The Opetchesaht, an Indian Band, and Danny Watts, suing on his own behalf and on behalf of all the members of the Opetchesaht *Appellants*

v.

Her Majesty The Queen in right of Canada and British Columbia Hydro and Power Authority *Respondents*

and

Union of British Columbia Indian Chiefs *Intervener*

and

B.C. Tel, B.C. Gas Utility Ltd. and the Greater Vancouver Sewerage and Drainage District *Interveners*

Indexed as: Opetchesaht Indian Band *v*. Canada

File No.: 24161.

1996: October 28; 1997: May 22.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

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on appeal from the court of appeal for british columbia

Indians -- Reserves -- Permits to use Indian reserve lands -- Right-of-way -- Validity of permit granting public utility right-of-way for electric power transmission lines across Indian reserve -- Right-of-way granted for such period of time as required for purpose of transmission line -- Nature and duration of rights granted under permit -- Whether rights granted within scope of s. 28(2) of Indian Act -- Whether permit valid -- Indian Act, R.S.C. 1952, c. 149, ss. 28(2), 37.

In 1959, the Crown, with the consent of the Opetchesaht band council, granted Hydro a right-of-way for an electric power transmission line across the band's reserve "for such period of time as the . . . right-of-way is required for the purpose of" a transmission line. The permit issued to Hydro, under s. 28(2) of the *Indian Act*, gave Hydro "the right to construct, operate and maintain an electric power transmission line", and the exclusive right to occupy the portions of the surface of the reserve where poles were erected, and that part of the air space where the wires were strung. The band retained the right to use and occupy the balance of the "right-of-way" area subject to specified restrictions. In 1992, the band applied to the Supreme Court of British Columbia under Rule 18A of the B.C. Rules of Court for a declaration that s. 28(2) did not authorize the grant of a right-of-way for electric power transmission lines over the reserve for an indefinite period of time. That section provides that "The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve." The court allowed the application but the Court of Appeal set aside the judgment, concluding that s. 28(2) allowed grants of interests for periods having no predetermined termination date.

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Held (Cory and McLachlin JJ. dissenting): The appeal should be dismissed.

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Iacobucci and Major JJ.: The permit granted to Hydro under s. 28(2) of the *Indian Act* is valid. The interests conveyed by the permit are analogous to an easement over the band's reserve lands, subject to termination when there is no longer a requirement for the power transmission right-of-way. Hydro's rights in the land are not exclusive. The band shares use of the right-of-way but they cannot erect buildings on it or interfere with Hydro's easement. While the statutory easement was granted for an indeterminate period, this is a period whose end is readily ascertainable. The easement will terminate when it is no longer required for a transmission line. Since the word "required" is used in the permit, the expiry of the permit is not solely dependant on Hydro's will. Whether the line is required is a justiciable issue.

In view of the overall context of s. 28(2), a period within the meaning of that section can be measured either by dates or by events. The end point of a permit thus need not be defined in terms of a specific calendar date as long as it is ascertainable and does not constitute a grant in perpetuity. Here, the end point of the permit arises when the easement is no longer required for power transmission. Because the duration of the easement is a bounded and ascertainable event, that duration is a period.

As a general rule under s. 37 of the *Indian Act*, surrenders are required not only when the Indian band is releasing all its interest in the reserve forever, but also whenever any interest is given up for any duration of time. Section 37 must be read subject to other provisions in the *Indian Act* relating to land, however, including s. 28. Not only do these provisions demonstrate that there is a certain overlap between them and s. 37, but they also overlap each other. The proper question in this case is thus not

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whether the permit could have been granted under s. 37, but rather whether it was properly granted under s. 28(2). While s. 28(2) cannot apply any time a portion of the Indian interest in any portion of reserve land is permanently disposed of, Hydro was accorded limited rights of occupation and use for an indeterminate but determinable and ascertainable period of time. There was no permanent disposition of any Indian interest. Furthermore, the band and Hydro were obligated to share the rights of use and occupation of the land, with the limited exceptions of the area of ground giving support to the poles and the air space occupied by the poles. Consequently, the surrender requirement of s. 37 does not apply to the present permit and more importantly, no rights exceeding those authorized by s. 28(2) were granted. The indeterminate easement granted on the face of this permit is a disposition of a limited interest in land that does not last forever. The grant of limited indeterminate rights in reserve land is permissible under s. 28(2) as a question of law.

It is important that the band's interest be protected but the autonomy of the band in decision making affecting its land must also be promoted and respected. Depending on the nature of the rights granted, different levels of autonomy and protection are accorded by ss. 37 and 28(2). Section 37 applies where significant rights are being transferred and demonstrates a high degree of protection, in that the approval of the Governor in Council and the vote of all of the members of the band are required. Under s. 28(2), lesser dispositions are contemplated and the interest transferred must be temporary. The permit in this case did not violate the balance between autonomy and protection struck by the *Indian Act*. This is not a case where surrender was required. The band council gave its consent to the permit following protracted negotiations. No claim of unfairness or an uneven bargain in this proceeding for summary judgment was advanced by the band.

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Per Cory and McLachlin JJ. (dissenting): Section 28(2) of the *Indian Act* cannot be used to convey a right-of-way on reserve land for "such period of time as [it] is required for the purpose of an electric power transmission line". The easement or right-of-way was granted for an indeterminate period and has the potential to continue in perpetuity. An interest in a band reserve land which possesses the potential to continue in perpetuity can only be removed from a band by surrender and alienation with the consent of the entire band membership under s. 37 of the *Indian Act* or by the formal process of expropriation under s. 35 of the Act.

A court should only be satisfied with the plain meaning of a statute where that meaning is clear and consistent with a purposive reading of the statute as a whole. In interpreting statutes relating to Indians, ambiguities and "doubtful expressions" should be resolved in favour of the Indians. This principle applies equally to cases in which third parties are involved. The phrase "any longer period" in s. 28(2) is ambiguous. Its meaning depends on its context. To resolve this ambiguity, the broader context within which s. 28(2) was enacted, a context which includes the history of the *Indian Act*, the principles it incorporates, the policy goals it was enacted to achieve, and its function in the overall scheme of the Act, must be considered.

A contextual interpretation of s. 28(2) indicates that the phrase "any longer period" was intended to deal with "things of a temporary nature", not indefinite alienations which had the potential to extend far into the unforseen future. Section 28 is concerned with the short-term, temporary use of the reserve by a person other than a band member. The phrase "any longer period" in s. 28(2), consistent with this interpretation, is best understood as a period defined in relatively short terms of months and years. This phrase relates to the earlier phrase "a period not exceeding one year", thus suggesting that what Parliament intended by "any longer period" was also a period

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capable of being expressed in finite calendar terms. An alienation which has the potential to go on as long as anyone can foresee falls outside the scope of s. 28(2). For purposes of guidance in other cases, commitments longer than the two-year mandate of band councils should not be transacted through s. 28(2).

This interpretation of s. 28(2) which confines it to short-term uses of Indian land fits perfectly with the other sections of the *Indian Act* relating to land and with the broader theme of inalienability of Indian reserve land that runs through the Act as a whole. It is also consistent with the policy of the *Royal Proclamation, 1763* and the principle that the long-term alienation of interests in Indian lands may only be effected through surrender to the Crown and consent of the band membership as a whole under s. 37 of the *Indian Act* or by expropriation under s. 35.

Since s. 28(2) does not permit long-term, indefinite alienation of interests in reserve land, a declaration that the permit is void should be granted, but the operation of that declaration should be suspended for a period of two years to permit the parties and others in similar situations to renegotiate or make new arrangements.

Cases Cited

By Major J.

Referred to: *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654; *Sevenoaks, Maidstone and Tunbridge Railway Co. v. London, Chatham and Dover Railway Co.* (1879), 11 Ch. D. 625; *Town of Lunenberg v. Municipality of Lunenberg*, [1932] 1 D.L.R. 386; *In re Ellenborough Park*, [1956] Ch. 131; *Canada (Attorney General) v. Canadian Pacific Ltd.*, [1986] 1 C.N.L.R. 1, aff'd [1986] B.C.J. No. 407

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(QL); *Canadian Pacific Railway Co. v. Town of Estevan*, [1957] S.C.R. 365; *The Queen v. Bolton*, [1975] F.C. 31; *Ouimet v. The Queen*, [1978] 1 F.C. 672, aff'd [1979] 1 F.C. 55; *Re Bower* (1967), 60 W.W.R. 445; *Cummins v. Keen* (1978), 82 D.L.R. (3d) 443; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *Smith v. The Queen*, [1983] 1 S.C.R. 554; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211; *The Queen v. Devereux*, [1965] S.C.R. 567.

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By McLachlin J. (dissenting)

R. v. Multiform Manufacturing Co., [1990] 2 S.C.R. 624; *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *Ouimet v. The Queen*, [1978] 1 F.C. 672, aff'd [1979] 1 F.C. 55; *Re Bower* (1967), 60 W.W.R. 445; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

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Act to amend the Indian Act, S.C. 1919, c. 56, s. 1.

British Columbia Rules of Court, Rule 18A.

Indian Act, R.S.C. 1906, c. 81, s. 48 [am. 1919, c. 56, s. 1; later partially rep. 1938, c. 31, s. 1].

Indian Act, R.S.C. 1952, c. 149, ss. 24, 28 [am. 1956, c. 40, s. 10], 35, 37, 38, 39(1) [*idem*, s. 11], 49, 50, 58 [rep. & sub. *idem*, s. 14].

Indian Act, R.S.C., 1985, c. I-5.

Indian Act, S.C. 1951, c. 29, s. 57(*c*).

Interpretation Act, R.S.C., 1985, c. I-21, s. 12.

Royal Proclamation, 1763, R.S.C., 1985, App. II, No. 1.

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APPEAL from a judgment of the British Columbia Court of Appeal (1994), 89 B.C.L.R. (2d) 145, 41 B.C.A.C. 241, 66 W.A.C. 241, [1994] 5 W.W.R. 594, [1994] 4 C.N.L.R. 68, allowing the federal Crown's appeal from a judgment of Lander J.,

[1994] 1 C.N.L.R. 109, declaring invalid a ministerial permit issued under the *Indian Act*. Appeal dismissed, Cory and McLachlin JJ. dissenting.

Jack Woodward, *Patricia Hutchings*, *Jane Woodward* and *Judith Sayers*, for the appellants.

Gerald Donegan, *Q.C.*, and *Robin S. Whittaker*, for the respondent Her Majesty the Queen in right of Canada.

J. Edward Gouge, *Q.C.*, *Peter D. Feldberg* and *Line Lacasse*, for the respondent British Columbia Hydro and Power Authority.

Louise Mandell and *Brenda Gaertner*, for the intervener the Union of British Columbia Indian Chiefs.

George K. MacIntosh, *Q.C.*, and *Robert P. Sloman*, for the interveners B.C. Tel et al.

//*Major J.*//

The judgment of Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Iacobucci and Major JJ. was delivered by

1 MAJOR J. -- This appeal is from an application by Danny Watts on his own behalf and on behalf of all members of the Opetchesaht (the "Band") for summary judgment under Rule 18A of the British Columbia Rules of Court. The appellants seek a declaration that s. 28(2) of the *Indian Act*, R.S.C. 1952, c. 149 (hereinafter "*Indian Act*"

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(now R.S.C., 1985, c. I-5)), did not authorize Her Majesty in right of Canada (the "Crown"), as represented by the Minister of Citizenship and Immigration, to grant in 1959 a right-of-way for power transmission lines over the Indian reserve known as Klehkoot I.R. No. 2 for an indefinite period of time to the British Columbia Power Commission ("Hydro").

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2 The chambers judge of the British Columbia Supreme Court found that s. 28(2) did not authorize the permit because it was for an indefinite period of time: [1994] 1 C.N.L.R. 109. Although the word "period" could denote a period of time defined in relation to events in certain contexts, in that of s. 28(2), it must take its content from the phrase "any longer period" which could only mean a specified period of years.

3 The British Columbia Court of Appeal allowed the appeal, concluding that s. 28(2) allowed grants of interests for periods having no predetermined termination date: (1994), 89 B.C.L.R. (2d) 145, 41 B.C.A.C. 241, 66 W.A.C. 241, [1994] 5 W.W.R. 594, [1994] 4 C.N.L.R. 68. Taylor J.A., for the court, considered and concluded that the 1956 amendments, including those to s. 28(2), significantly changed the pre-existing scheme by giving band councils increased authority to speak and act on behalf of their members. The Court of Appeal found that s. 28(2) created a third method of alienation, over and above the traditional surrender method (s. 37) and expropriation (s. 35). The Minister was authorized to grant rights of use and occupation under s. 28 that could also be granted under ss. 35 or 37 provided that grants under s. 28 did not amount to "transfer of title to, or ownership of, the land" (p. 155 B.C.L.R.).

4 This appeal raises two questions. What was the nature and the duration of the rights granted under the permit and were the rights granted by the permit capable of being granted under s. 28(2) of the *Indian Act*?

I. Facts

5 In 1958 Hydro finished construction of a hydro-electric generating facility at Sproat Falls, British Columbia. A transmission line was needed to convey electricity from the new generating facility to consumers in Port Alberni, British Columbia, and elsewhere.

6 Between February and July 1958, Hydro negotiated with the Crown and the Band to acquire a right-of-way for the transmission line across the appellant Band's land, the Klehkoot Indian Reserve No. 2, Alberni district, C.L.S.R. Plan 5074. The negotiations were protracted, with a variety of proposals from each side, including yearly rental payments for a term of 20 years, free electricity for members of the Band, various offers on a per acre value, as well as expropriation under s. 35 of the *Indian Act.*

7 An agreement was concluded between the Crown and Hydro, with the consent of the Band council, for a right-of-way 150 feet wide over 7.87 acres of the 290 acres of reserve land on July 8, 1959. Total consideration for the right-of-way was $983.75, or $125 per acre. This amount exceeded the $75 per acre paid to the Band's neighbour, R.B. McLean Lumber Co., whose land was comparable. Other lands on the right-of-way were not comparable for purposes of valuation. There was no evidence that the Band was paid less than fair market value.

8 The permit between Hydro and the Crown dated July 8, 1959 provides in part:

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NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the sum of Nine Hundred and Eighty-three Dollars and Seventy-five Cents ($983.75) paid to the Minister by the Permittee [Hydro] (receipt whereof is hereby acknowledged), the Minister under authority of Section 28(2) of the Indian Act, Chapter 149, Revised Statutes of Canada, 1952, as amended, doth hereby grant the Permittee, its successors and assigns, the right to construct, operate and maintain an electric power transmission line on the said lands being in the Klehkoot Indian Reserve number two, in the Province of British Columbia, and more particularly described as follows:

[description of the right-of-way covering 7.87 acres]

IT IS AGREED AND UNDERSTOOD that the aforesaid permission is subject to the following stipulations, provisos and conditions, that is to say:

1. That the rights hereby granted may be exercised by the Permittee for such period of time as the said right-of-way is required for the purpose of an electric power transmission line.

2. That the Permittee shall pay all charges, taxes, rates and assessments whatsoever which shall during the continuance of the rights hereby granted be due and payable or be expressed to be due and payable in respect of the said electric power transmission line or the use by the Permittee of the said lands.

3. That the Permittee shall not assign the right hereby granted without the written consent of the Minister.

4. That it shall be lawful for the Minister or any person thereunto authorized by him at all reasonable times to enter upon the said lands for the purpose of examining the condition thereof.

5. That the said lands shall be used for the purpose aforesaid and for no other purpose.

6. That the Permittee, its servants, employees, and workmen shall have and enjoy the right to unload and store material on the said lands for the erection, operation and maintenance of the said electric power transmission line and to roll and unroll wires thereon, and to do all such other acts and things as may be necessary or requisite for the purpose of properly erecting, operating, maintaining and patrolling the said electric power transmission line.

7. That the Permittee will not fence the said lands or any part thereof and Her Majesty is to be allowed free access to and use of the said lands except for building purposes and except insofar as it may be necessary for the Permittee to use the same for the purpose of constructing, operating, maintaining and patrolling the electric power transmission line.

8. That the Permittee will at all times hereafter indemnify and keep Her Majesty indemnified against all actions, claims and demands that may

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> be lawfully brought or made against Her Majesty by reason of any act or omission by the Permittee in the exercise or purported exercise of the rights hereby granted.
>
> 9. That the Permittee may cut down any trees standing outside the said lands which in its opinion might in falling or otherwise endanger the conductors, wires, structures, equipment or other plant of the Commission, paying to the Minister reasonable compensation for the value of any trees so cut down.
>
> IN WITNESS WHEREOF the Acting Director, Indian Affairs, on behalf of the Minister, has hereunto set his hand and the Permittee has caused these presents to be executed and its corporate seal to be affixed hereto by its proper officers duly authorized in that behalf.

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9 The permit gave Hydro "the right to construct, operate and maintain an electric power transmission line", and the exclusive right to occupy the portions of the surface of the reserve where poles were erected, and that part of the air space where the wires were strung. The Band retained the right to use and occupy the balance of the "right-of-way" area subject to specified restrictions related to the erection, operation, maintenance and patrol of the structures installed by Hydro. Hydro was allowed to use the lands as necessary for the purpose of constructing, operating, maintaining and patrolling the electric power transmission line. The right-of-way conferred by the permit was "for such period of time as the said right-of-way is required for the purpose of an electric power transmission line". The rights granted in the permit were not assignable without the written consent of the Crown.

10 The record discloses that rights-of-way such as the one constituted in the present permit are commonplace. The permit in this appeal is typical of over a thousand similar arrangements made between native bands and utility and commercial entities across the country.

11 Some time prior to 1990, the Band decided that development of the reserve was required. It planned to build a private Band road, a reservoir access road and

drainage ditch within the respondent Hydro's right-of-way. On March 6, 1990, the respondent Hydro, by letter, offered to consent to the construction provided, in part, that the Band agree to taking responsibility for any lost generation of power to third parties, that it submit to safety and construction concerns of the respondent Hydro and that the Band not interfere with the respondent Hydro's use of the right-of-way.

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12 The appellants commenced an action against the respondents on March 13, 1992, seeking a declaration that the permit was void and of no force and effect, an order for possession of the lands subject to the permit and damages for trespass.

13 On October 16 and 17, 1992, the appellants applied to the Supreme Court of British Columbia for summary judgment under Rule 18A of the British Columbia Rules of Court for a declaration that s. 28(2) of the *Indian Act* does not authorize the Minister to grant a right-of-way for power transmission lines over the reserve for an indefinite period of time. On January 27, 1993, Lander J. of the Supreme Court allowed the application, declaring that the permit purporting to grant a right-of-way to Hydro for as long as "said right-of-way is required for the purpose of an electric power transmission line" was not authorized by s. 28(2) of the *Indian Act*. On March 21, 1994, the Court of Appeal for British Columbia allowed the respondents' appeal.

II. Relevant Statutory Provisions

14 *Indian Act*, R.S.C. 1952, c. 149

> **28.** (1) Subject to subsection (2), a deed, lease, contract, instrument, document or agreement of any kind whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.

(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

37. Except where this Act otherwise provides, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the band for whose use and benefit in common the reserve was set apart.

38. (1) A band may surrender to Her Majesty any right or interest of the band and its members in a reserve.

(2) A surrender may be absolute or qualified, conditional or unconditional.

58. (1) Where land in a reserve is uncultivated or unused, the Minister may, with the consent of the council of the band,

. . .

(*b*) where the land is in the lawful possession of any individual, grant a lease of such land for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession,

. . .

(3) The Minister may lease for the benefit of any Indian upon his application for that purpose, the land of which he is lawfully in possession without the land being surrendered.

(4) Notwithstanding anything in this Act, the Minister may, without a surrender

(*a*) dispose of wild grass or dead or fallen timber, and

(*b*) with the consent of the council of the band, dispose of sand, gravel, clay and other non-metallic substances upon or under lands in a reserve, or, where such consent cannot be obtained without undue difficulty or delay, may issue temporary permits for the taking of sand, gravel, clay and other non-metallic substances upon or under lands in a reserve, renewable only with the consent of the council of the band,

and the proceeds of such transactions shall be credited to band funds or shall be divided between the band and the individual Indians in lawful possession of the lands in such shares as the Minister may determine.

III. Analysis

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15 Section 28(2) reads:

> **28.** . . .
>
> (2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

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16 The appellants' submission is that because Hydro might require the right-of-way forever the permit granting the right-of-way is not for a "period". I disagree. A period within the meaning of s. 28(2) can be measured either by dates or events. In this appeal the right-of-way is only for the period it is required by Hydro for that purpose alone. It is not certain how long that period will be. However, when Hydro's need for the right-of-way comes to an end, that fact will be ascertainable. Because the duration of the right-of-way is a bounded and ascertainable event, that duration is a period.

17 In determining whether s. 28(2) authorized the permit granted, three issues are raised. First, it is necessary to identify the nature and scope of the rights granted by the permit; second, whether the termination of the permit is defined by the happening of a reasonably ascertainable event; and finally, whether the permit constitutes a "sale, alienation, lease, or other disposition" under s. 37 of the *Indian Act* rather than a grant of rights under s. 28(2).

A. *Nature of Rights Granted by the Permit*

18 The respondent Hydro was granted "the right to construct, operate and maintain an electric power transmission line". This included the right of support by the land surrounding the base of the power poles, occupation of air space where the poles

and wires were found and permission to inspect, maintain or repair the pole line for as long as the requirement for the line existed.

19 Hydro characterizes the right-of-way as a right to cross the appellants' land for a specified purpose. Included in that right is the ability to erect towers and to prevent the Band from obstructing the right-of-way by any constructions on it.

20 The interests granted by the permit are analogous to an easement over the appellant Band's reserve lands, subject to termination when there is no longer a requirement for the power transmission right-of-way. See *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654.

21 The rights created by the permit are statutory in origin and as such, they may be unknown to the common law: see *Sevenoaks, Maidstone and Tunbridge Railway Co. v. London, Chatham and Dover Railway Co.* (1879), 11 Ch. D. 625, *per* Jessel, M.R., cited in *Town of Lunenberg v. Municipality of Lunenberg*, [1932] 1 D.L.R. 386 (N.S.S.C.), at p. 390.

22 In *Paul*, *supra*, the dispute was over a parcel of land in the Woodstock Indian Reserve used by Canadian Pacific Ltd. ("CP") under a 990-year lease. In 1975, the Indians who resided on the reserve disputed CP's claim to the use of the right-of-way and barricaded it to prevent the passage of trains. CP sought a permanent injunction to prevent future trespass. The band counterclaimed respecting title to the right-of-way. The trial judge granted the injunction on the basis that the railroad had acquired the "fee simple" to reserve land comprising a railway corridor. This Court upheld the injunction but found that CP did not have a fee simple title but a statutory right-of-way, i.e., an easement. See also P. Jackson, *The Law of Easements and Profits* (1978), at p. 189; *In*

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re Ellenborough Park, [1956] Ch. 131 (C.A.), at p. 163, *per* Lord Evershed, M.R., cited in *Paul*, *supra*, at p. 671.

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23 It is of interest that Hydro's rights in the land here are not exclusive. The permit allows Hydro a right of support by the earth surrounding the base of the power poles and their anchors but the language of the permit in two ways demonstrates that the grant is of non-exclusive rights. The respondent Hydro can only use the land for the power transmission line and related maintenance purposes and the appellant Band retains the right to use the right-of-way. The Band's ability to use the land is restricted only in that they cannot erect buildings on it or interfere with the respondent Hydro's easement. Both Hydro and the Band share use of the right-of-way.

B. *The Termination of the Interest Conveyed*

24 The respondent Hydro submits that the permit on its face sets its duration or temporal boundary as the happening of an event. That is the future date when the power easement is no longer required.

25 The appellants take a contrary position and claim that the rights granted to the respondent Hydro by the easement are indeterminate and potentially in perpetuity.

26 In my opinion, as previously stated, the statutory easement was granted for an indeterminate period. It was not known in 1959 nor is it now known exactly when the rights will terminate but clearly, the easement will terminate when it is no longer required for a transmission line. This is a period whose end is readily ascertainable.

27 The permit provides that the respondent Hydro is entitled to use the reserve lands in question for as long as it requires a transmission pole line to pass through the portion of the reserve over which it is currently constructed. It is not difficult to imagine a number of circumstances in which this requirement would expire. While all are speculative, there is the possibility that the generating station at Sproat Falls might be abandoned, that demographic changes in the area might affect the location, size and requirement of the transmission poles. More remote is the possibility of electricity being replaced by another energy source. It is obvious that technology has affected the way we live in ways that were earlier unimaginable. The example of the Canadian experience with the railways is apposite. Even 50 years ago, this country's railroads appeared to be a permanent fact of Canadian travel and transportation. Today, we have seen many railway lines abandoned in favour of airlines and highways.

28 Nor can the permit be characterized as perpetual because its duration is purely under the control of the respondent Hydro. In *Canada (Attorney General) v. Canadian Pacific Ltd.*, [1986] 1 C.N.L.R. 1 (B.C.S.C.), aff'd [1986] B.C.J. No. 407 (C.A.), it was held that a grant of an interest in reserve land for so long as required for railway purposes was not an interest determinable at the sole will of the railroad. The Court of Appeal found that the reserve land was no longer required for railway purposes, and that therefore, the transfer of the land from CP to its subsidiary, Marathon Realty Corporation, was void.

29 The duration of the easement in the instant case is similarly qualified. It endures only so long as the right-of-way is required for the purpose of an electric transmission line. The respondent Hydro has some discretion as to the decisions it makes with respect to the placement and utility of transmission lines. However, since the word "required" is used, it would be wrong to conclude that the expiry of the permit

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is solely dependant upon the will of the respondent Hydro. Whether the line is required is a justiciable issue: *Canadian Pacific Railway Co. v. Town of Estevan*, [1957] S.C.R. 365; *Canada (Attorney General) v. Canadian Pacific Ltd.*, *supra.* See also *The Queen v. Bolton*, [1975] F.C. 31 (T.D.), at p. 35.

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C. *Does a "Period" in Section 28(2) Include an Indeterminate Length of Time*?

30 Prior to the amendment under which the impugned permit was granted, s. 28 allowed the Minister to grant permits of no longer than one year:

> **28.** . . .
>
> (2) The Minister may by permit in writing authorize any person for a period not exceeding one year to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

31 It was noted in Parliamentary Committee, and I agree, that under the above wording

> . . . the minister, if he so desired or so chose, could grant permission for one year, and then at the end of that year, strictly in accordance with the wording of the subsection, he could grant permission for another year; because there is no statement in subsection (2) to the effect that at the end of the first year he would have to obtain permission before granting a permit for a further year.
>
> (House of Commons, *Minutes of Proceedings and Evidence*, Issue No. 3, of the Special Committee appointed to consider Bill No. 79, *An Act respecting Indians*, April 18, 1951, at p. 80.)

The amendment which was in force in 1959 (S.C. 1956, c. 40, s. 10), when the permit was issued, reads:

> **28.** . . .
>
> (2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

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This amendment limited the Minister's power to indefinitely renew permits beyond a period of one year and expanded the ability of the Band council to grant rights of occupation and use of reserve lands for periods longer than one year to third parties without a surrender.

32 The question is whether "any longer period" necessarily denotes a fixed number of years. There is nothing in s. 28(2) that limits it to granting only those rights that are expressed for a fixed period.

33 "Period" can be defined in a number of different ways depending on its context, as the case law aptly demonstrates. It could mean a fixed number of years or months: *Ouimet v. The Queen*, [1978] 1 F.C. 672 (T.D.), at p. 684, aff'd [1979] 1 F.C. 55 (C.A.); *Re Bower* (1967), 60 W.W.R. 445 (B.C.S.C.), at p. 447. However, "period" also denotes a length of time bounded by the happening of a certain event, capable of being ascertained: *Oxford English Dictionary* (2nd ed. 1989), vol. XI, at p. 558; *Webster's Third New International Dictionary* (1986), at p. 1680; *Dictionnaire alphabétique et analogique de la langue française* (1976), t. 5, at p. 122; *Cummins v. Keen* (1978), 82 D.L.R. (3d) 443 (Sask. Q.B.), at p. 445. As the end point of the permit is a justiciable issue, it is only necessary to decide whether a period can, in addition to a fixed period, encompass a length of time that endures until certain other circumstances occur. In my opinion and in view of the overall context of s. 28(2), a period can be measured either by dates or events.

34 The end point of a permit need not be defined in terms of a specific calendar date as long as it is ascertainable. The only requirement is that the end of the period be capable of ascertainment so that it does not constitute a grant in perpetuity. In the instant case, the end point of the permit arises when the easement is no longer required for power transmission.

35 It is possible that a grant for perpetual duration might be disguised under the appearance of a defined period. A right-of-way to last as long as the sun shall shine and the rivers flow would obviously be a suspicious attempt to create a perpetual period under the guise of an ascertainable event. There could be a grant where the terminable event is so remote and uncertain that the period is, in fact, perpetual. That would be a matter of fact in the particular case.

D. *Interaction of Section 37 and Section 28(2)*

36 The appellant Band submits that this right-of-way with its potentially lengthy duration should have been effected by way of surrender to the Crown pursuant to s. 37 of the *Indian Act* which states:

> **37.** Except where this Act otherwise provides, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the band for whose use and benefit in common the reserve was set apart.

37 This appeal concerns reserve lands as distinguished from lands in which "traditional" or aboriginal title is claimed. In *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344,

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McLachlin J. described Indian title in a reserve as being an incorporeal, personal right of perpetual usufruct. See also *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), at p. 54, *per* Lord Watson; *Smith v. The Queen*, [1983] 1 S.C.R. 554. It specifically does not include either the beneficial or legal fee simple:

> The Bands do not have the fee in the lands; their interest is a limited one. But it is an interest which cannot be derogated from or interfered with by the Crown's utilization of the land for purposes incompatible with the Indian title unless, of course, the Indians agree.
>
> (*Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 349, *per* Wilson J.)

Dickson J. (as he then was) described in *Guerin* (at p. 382) the Indians' interest as

> a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right.

38 Dickson J. then went on to state that the Indian interest in land is personal in the sense that the Indian band itself is prohibited from directly transferring its interest to a third party. The general inalienability of the Indians' interest is the most salient feature of the *sui generis* interest (at p. 365):

> Generally, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the Band for whose use and benefit in common the reserve was set apart.

39 Any sale or lease of land to a third party can only be carried out after a surrender has taken place, with the Crown then acting on the band's behalf to effectuate the transfer to third parties. The Crown prior to the surrender holds the fee simple to the land subject to the Indians' *sui generis* interest. When a band surrenders land, or more

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correctly, its *sui generis* interest in land, to the Crown, the band's interest is said to merge in the fee held by the Crown. The Crown then holds the land free of the Indian interest. The Crown has a broad discretion in dealing with surrendered land but it is subject to an equitable obligation to deal with the land for the benefit of the Indians and subject to the terms of the surrender from the band: *Guerin*, *supra*, at pp. 353-54, *per* Wilson J., and at p. 385, *per* Dickson J.

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40 Surrenders may be absolute or qualified, conditional or unconditional. *Smith, supra*, at p. 568, makes clear that upon unconditional and absolute surrender the Indians' rights in the land disappear. However, surrenders may also release only partially or temporarily the interest of the Indians. The point here is that surrenders are required as a general rule not only when the Indian band is releasing all its interest in the reserve forever, but whenever any interest is given up for any duration of time. Indeed, this has been recognized by the jurisprudence of this Court:

> That there can be a partial surrender of the "personal and usufructuary rights" which the Indians enjoy is confirmed by the *St. Catherine's Milling Company Limited* v. *The Queen* [(1888), 14 App. Cas. 46], in which there was retained the privilege of hunting and fishing; and I see no distinction in principle, certainly in view of the nature of the interest held by the Indians and the object of the legislation, between a surrender of a portion of rights for all time and a surrender of all rights for a limited time.
>
> (*St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211, at p. 219, *per* Rand J.)

41 That this is so is apparent from the face of s. 37. Section 37 is not restricted to sales or complete alienation of lands in a reserve from the Crown to third parties. Leases or other dispositions of "lands in a reserve" also require a surrender by the Indians of their interest to the Crown. Section 38 elaborates what exactly may be surrendered to the Crown:

> **38.** (1) A band may surrender to Her Majesty any right or interest of the band and its members in a reserve.
>
> (2) A surrender may be absolute or qualified, conditional or unconditional.

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42 Section 38 provides that "any right or interest of the band and its members" in a reserve may be surrendered, obviously in reference to s. 37. The bundle of rights which may be surrendered is "any right or interest" in a reserve. Section 35, the expropriation power, specifies that the right to expropriate may similarly be exercised "in relation to lands in a reserve or any interest therein".

43 Also apparent on the face of s. 37 from the qualification at the beginning of s. 37 is the legislative intention that it operate in conjunction with and subject to other provisions of the *Indian Act*. There is in this qualification an express recognition that other provisions of the *Indian Act* also deal with sales, alienations, leases or other dispositions of lands in a reserve.

44 For example, there are exceptions to the general rule against alienation in the provisions of s. 58. In the *Indian Act* as it stood in 1959, ss. 58(1)(*b*) and 58(4)(*b*), respectively, allow the Minister with the consent of band council to grant to non-band members leases for agricultural or grazing purposes or permits to dispose of sand, gravel, clay and other non-metallic substances on or under reserve land. In the case of sand, gravel, clay and other non-metallic substances, the Minister may issue temporary one-time permits without the consent of band council, but these are renewable only with the approval of band council. The granting of land for agricultural purposes must envisage the possibility of a use or occupation by a non-band member to the complete exclusion of use by a band member and the permanent taking of the *fructus*. Also, in the case of

taking of non-metallic substances, s. 58 contemplates a permanent disposition of what was part and parcel of reserve land.

45 Not only do the exceptions demonstrate that there is a certain overlap between them and the general rule in s. 37, but the exceptions also overlap each other. The overlap between s. 58 and s. 28(2) was recognised in *The Queen v. Devereux*, [1965] S.C.R. 567, at p. 572, where the lessor was an individual band member acting without consent of the band council. Judson J. held that there were two ways in which the defendant (non-Indian) in the case could have been in lawful possession of the land. It could have been either leased under s. 58(3) for the benefit of an Indian or occupied by permit under s. 28(2).

46 The practice of the Minister demonstrates that in his view, some sections of the *Indian Act* could be used interchangeably depending on the circumstances. The Agreed Statement of Facts dated May 16, 1996, illustrates that the practice which occurred in Canada after the 1956 amendments to the *Indian Act* was to grant power line rights-of-way across reserve lands both by way of surrender and conveyance (s. 37), expropriation (s. 35) and by permit (s. 28(2)).

47 The appellants argued that since the permit granted rights in perpetuity, this constituted a disposition of land made in violation of s. 37. Based on my earlier conclusion that the permit is not for perpetuity, s. 37 does not apply, at least not for the reason given by the appellants.

48 The question is whether the permit was properly granted under s. 28(2). Perhaps the easement in the permit could have been granted under s. 37, but that section must be read subject to other provisions in the *Indian Act*. The proper question is to

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decide the circumstances in which s. 28(2) could not apply, the default provision being the general rule in s. 37 against alienation without a surrender.

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49 In my view, s. 28(2) cannot apply any time a portion of the Indian interest in any portion of reserve land is permanently disposed of. For example, before permission to extract minerals in a reserve is granted by the Minister, surrender is required. I would note that this would be true whether the right to exploit and extract minerals were granted forever or for limited duration under a lease. For example, the mineral rights could well be disposed of under a document entitled a "lease". One must always look to the true nature of the rights granted. Even if the right to extract were granted only temporarily under the lease, in fact such a grant would forever deprive the band of a resource which formed part of the reserve. Surrender of mineral rights has been required under successive *Indian Acts* before disposition thereof to third parties. However, exception was made of this during some 30 years in the first half of this century when the Superintendent General of Indian Affairs was empowered to issue leases to third parties without any form of band consent: *An Act to amend the Indian Act*, S.C. 1919, c. 56, s. 1, amending *Indian Act*, R.S.C. 1906, c. 81, s. 48, partially repealed S.C. 1938, c. 31, s. 1, and replaced S.C. 1951, c. 29, s. 57(*c*). Exceptions for certain non-metallic minerals are provided for in s. 58, as discussed above.

50 In the instant case, the respondent Hydro was accorded limited rights of occupation and use for an indeterminate but determinable and ascertainable period of time. There was no permanent disposition of any Indian interest. Furthermore, the Band and Hydro were obligated to share the rights of use and occupation of the land, with the limited exceptions of the area of ground giving support to the poles and the air space occupied by the poles. Consequently, the surrender requirement of s. 37 does not apply to the present permit and more importantly, no rights exceeding those authorized by s.

28(2) were granted. The indeterminate easement granted on the face of this permit is a disposition of a limited interest in land that does not last forever.

51 Surely it was intended that the band council could at least have the right to grant that type of easement. Surrender involves a serious abdication of the Indian interest in land and gives rise to both a broad discretion and an equally onerous fiduciary obligation on the Crown to deal with the Indian lands thus surrendered. The case law establishes that in the case of an unconditional and absolute surrender the Indian interest in land actually disappears: *Smith*, *supra*, at p. 568. In the case of a conditional and partial surrender, such as a surrender to lease, *Smith*, at p. 568, left open the question of whether such amounts to another form of use or benefit to the Indians or whether the consequence in law is that the Indians' rights are terminated.

52 The remaining question is whether the grant of rights for an indeterminate period conflicts with the policy of prohibiting use of reserve land by third parties absent approval of the Minister and band. This leads to a consideration of the policy behind the rule of general inalienability. Both the common law and the *Indian Act* guard against the erosion of the native land base through conveyances by individual band members or by any group of members. Government approval, either by way of the Governor in Council (surrender) or that of the Minister, is required to guard against exploitation: *Blueberry River Indian Band*, *supra*, at p. 370, *per* McLachlin J.

53 On the other hand, the *Indian Act* also seeks to allow bands a degree of autonomy in managing band resources for commercial advantage in the general interest of the band. Collective consent of the Indians, either in the form of a vote by the band membership (surrender) or by a resolution of the band council, is required to ensure that those affected by the transfer assent to it. The extent to which individual band members

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participate in the approval process depends on the extent to which the proposed disposition affects individual or communal interests. In the case of sales, dispositions and long-term leases or alienations permanently disposing of any Indian interest in reserve land, surrender is required, involving the vote of all members of the band. On the other hand in the case of rights of use, occupation or residence for a period of longer than one year, only band council approval is required.

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54 It is important that the band's interest be protected but on the other hand the autonomy of the band in decision making affecting its land and resources must be promoted and respected. These sometimes conflicting values were identified by McLachlin J. in *Blueberry River Indian Band*, *supra*, at p. 370:

> My view is that the *Indian Act*'s provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection.

Gonthier J. at p. 358, speaking for the majority, accepted this principle:

> As McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured.

55 With the twin policies of autonomy and protection in mind, s. 37 and s. 28(2) reflect that, depending on the nature of the rights granted, different levels of autonomy and protection are accorded. Section 37 demonstrates a high degree of protection, in that the approval of the Governor in Council and the vote of all of the members of the band are required. This indicates that s. 37 applies where significant rights, usually permanent and/or total rights in reserve land are being transferred. On the other hand, under s. 28(2), lesser dispositions are contemplated and the interest transferred must be

temporary. It is evident from a review of this permit that it does not violate the balance between autonomy and protection struck by the *Indian Act*. This is not a case where surrender, with all of its administrative and legal impositions was required in terms of the overall policy of the *Indian Act*.

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56 This case was founded on a motion for summary judgment. It was common ground that the consent of the Band council had been given. The record confirms a protracted course of negotiations between the Band and the respondents. The appellants have advanced no claim of unfairness or an uneven bargain in this proceeding for summary judgment. Other legal and factual issues in the circumstances of granting this particular permit, such as the claims of undue influence and breach of fiduciary duty asserted in the appellants' amended statement of claim would require evidence and review at a trial and are not dealt with in this decision.

57 This appeal deals with the narrow issue of whether the permit was an indeterminate or perpetual grant of rights in reserve land and whether the provisions of s. 28(2) to grant indeterminate and limited rights violated the overall scheme of the *Indian Act*. I have concluded that the grant of limited indeterminate rights in reserve land is permissible under s. 28(2) as a question of law. There may be other legal and factual issues in the circumstances of granting this particular permit that require evidence and review at the trial and are not dealt with in this decision.

E. *Motion to Strike*

58 In addition to the issue of the validity of the permit, the appellants at the hearing brought a motion to strike certain portions of the factum of the interveners B.C. Tel et al. I would allow the motion in part, striking out the last sentence of paragraph

24 of the factum only. The balance of the unproven factual assertions made by these interveners in their factum are issues better left to the trial judge if the matter goes to trial.

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IV. Disposition

59 I would dismiss the appeal with costs.

//*McLachlin J.*//

The reasons of Cory and McLachlin JJ. were delivered by

MCLACHLIN J. (dissenting) --

I

60 The Opetchesaht people are an Indian band living on Vancouver Island in British Columbia. Like many of Canada's aboriginal peoples, they live on land which the government "reserved" for them many years ago. The reserve is the home of the Opetchesaht people, past, present and future. As such, it cannot be sold like private land. The *Indian Act*, R.S.C. 1952, c. 149 (now R.S.C., 1985, c. I-5), restricts the way reserve lands may be dealt with to the end of ensuring that they are preserved for the people and their descendants.

61 In 1959 the Crown and the band concluded an agreement with British Columbia Hydro giving Hydro the right to run an electrical transmission line across the Opetchesaht reserve. Pursuant to this agreement, the Crown with the agreement of the band council issued a permit to Hydro under s. 28(2) of the *Indian Act.* The permit gave Hydro "the right to construct, operate and maintain an electric power transmission line" and to occupy the portions of the surface of the reserve where poles were erected and the air space where wires were strung "for such period of time as the said right-of-way is required for the purpose of an electric power transmission line".

62 Almost four decades later, the Opetchesaht people find they need to use Hydro's right-of-way to provide a private band road, a reservoir access road and a drainage ditch for the benefit of the people now occupying the reserve. They can do none of these things because the permit prohibits them. This led the band to re-examine how the permit came to be issued. They came to the conclusion that it was wrongly issued; the required procedure, in their view, was surrender and alienation under s. 37 of the *Indian Act*, a process of formality and deliberation requiring the consent of the band membership. They brought this action, seeking a declaration that the permit was void and an order for possession of the right-of-way and damages for trespass. The matter proceeded summarily on a question of law. The trial judge ruled in favour of the Opetchesaht band. The British Columbia Court of Appeal ruled against them. The band appealed to this Court.

63 The issue is one of importance for the Opetchesaht people, who want to use the land bound by the permit for new needs. But its significance extends much further. At stake is an issue of importance to all bands with reserve lands: the conditions limiting how and when Indian peoples can sell, lease or otherwise dispose of their lands and interests in those lands in ways that bind future generations.

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64 My colleague Major J. concludes that Indian bands may dispose of interests in land for indefinite periods spanning many generations with only the consent of the Minister and the current band council. With great respect, I cannot agree. In my view, an interest in band lands such as the one here at issue, possessing as it does the potential to continue in perpetuity, can only be removed from the band by the formal process of expropriation under s. 35 or by surrender and alienation with the consent of the entire band membership under s. 37 of the *Indian Act.*

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II

65 The inquiry must begin with a review of the provisions of the *Indian Act* which govern the way Indian bands may deal with their lands. The general rule is set out in s. 37, which provides that reserve lands can only be disposed of by surrender to the Crown:

> **37.** Except where this Act otherwise provides, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the band for whose use and benefit in common the reserve was set apart.

The surrender must be by the band, not its council, and may be absolute, qualified, conditional or unconditional:

> **38.** (1) A band may surrender to Her Majesty any right or interest of the band and its members in a reserve.
>
> (2) A surrender may be absolute or qualified, conditional or unconditional.

Surrender is a formal process, accompanied by a formal vote by band members and other safeguards to ensure that the people understand and consent to the proposed alienation.

66 The *Indian Act* also provides for expropriation. This is also a formal process requiring the consent, not only of the Minister, but of the Governor in Council of Canada.

> **35.** (1) Where by an Act of the Parliament of Canada or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.
>
> (2) Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) shall be governed by the statute by which the powers are conferred.

67 The provisions for surrender and expropriation in the *Indian Act* may be contrasted with two provisions for dealing with reserve lands involving no formalities except the consent of the Minister and the band council. Section 58 permits the Minister with consent of the band council to enter into arrangement for exploitation of the land for agriculture, timber and non-mineral substances. Section 28, at the heart of this appeal, permits the Minister with the consent of the band council to authorize persons to "occupy", "use", "reside on" or "otherwise exercise rights on a reserve".

> **28.** (1) Subject to subsection (2), a deed, lease, contract, instrument, document or agreement of any kind whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.
>
> (2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the

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> band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

68 The issue on appeal is whether this section can be used to convey a right-of-way on reserve land for "such period of time as [it] is required for the purpose of an electric power transmission line". Can an alienation of reserve land as permanent as this be made simply by the Minister with the consent of the current band council? Or, absent expropriation, must the consent of the band membership as a whole be obtained through the formal process mandated by s. 37 of the *Indian Act*?

III

69 I turn first to the duration of the right granted by the permit. I agree with Major J. that the easement or right-of-way was granted for an indeterminate period. As he states, "[i]t was not known in 1959 nor is it now known exactly when the rights will terminate" (para. 26). I also agree that the easement will terminate when Hydro no longer requires it for a transmission line. Major J. goes on to argue that the term is not "perpetual" in the sense of being totally within Hydro's control. I am also prepared to agree with this assertion, if "perpetual" is intended in the sense of a span of time which we may predict with certainty will never end.

70 At the same time, however, it must be acknowledged that the easement has the potential to continue forever (or at least until the world ends and its continuance becomes academic). In terms relevant to the concerns of the Opetchesaht people, it shows every promise of binding not only the current generation which never agreed to it, but many generations to come. The permit may without exaggeration be characterized as an alienation of reserve lands for an indefinite period, a period which has the potential

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to extend to future generations of the Opetchesaht people for as far forward as we can see. Is this, we must ask, the type of disposition Parliament intended to allow under the summary procedures of s. 28(2) of the *Indian Act* upon agreement between the Minister and the current band council? Or is it the sort of alienation of interest in land which Parliament sought to safeguard by the surrender and transfer provisions of s. 37 of the Act?

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71 The fact that the band can still use the land in many ways cannot be determinative. The fact is, the band cannot use it in ways it deems important to the welfare of the current generation. It cannot build houses on the land and it cannot put roads or a reservoir on the land. And the problem transcends the needs of this generation. Doubtless future generations of band members will have their own needs and their own proposals for the use of the land. If the respondents are right, the future generations will be precluded from doing so by a decision made by a temporary band council and a minister decades, not inconceivably centuries, before.

IV

72 This case turns on the interpretation of the *Indian Act*. It therefore behoves us to review the principles of statutory interpretation that should guide us.

General Principles Governing the Construction of Statutes

73 This Court has recently affirmed that the process of statutory interpretation requires that the intention of Parliament be ascertained first by considering the plain meaning of the words used in the statute, and has determined that where "the words used in a statute are clear and unambiguous, no further step is needed to identify the intention

of Parliament" (*R. v. Multiform Manufacturing Co.*, [1990] 2 S.C.R. 624, at p. 630; *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385, at p. 399).

74 However, s. 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21, is equally clear that a legislative enactment "shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". Thus, it is apparent that a court should only be satisfied with the plain meaning of a statute where that meaning is clear and consistent with a purposive reading of the statute as a whole. Where the plain meaning is ambiguous, unclear or uncertain in scope, more is required.

75 *Driedger on the Construction of Statutes* (3rd ed. 1994), by R. Sullivan, at p. 131, surveys the terrain of statutory interpretation and condenses it into one "modern" rule: that courts must interpret legislation "in its total context, having regard to the purpose of the legislation, the consequences of its proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids", in order to further the achievement of the legislative purpose and to attain an outcome that is reasonable and just.

Construction of Statutes Relating to Indians

76 In interpreting statutes relating to Indians, ambiguities and "doubtful expressions" should be resolved in favour of the Indians: *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85. As La Forest J. stated in *Mitchell*, "in the interpretation of any statutory enactment dealing with Indians, and particularly the *Indian Act*, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them" (p. 143).

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77 It is also important to note that this *Nowegijick* principle applies equally to cases in which third parties are involved. In *Mitchell* at p. 99, Dickson C.J., in concurring reasons which were not contradicted on this point, rejected the suggestion that the principle should be limited to cases involving solely the Crown and native peoples, stating that "[i]t is Canadian society at large which bears the historical burden of the current situation of native peoples and, as a result, the liberal interpretative approach applies to any statute relating to Indians, even if the relationship thereby affected is a private one."

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V

78 This brings us to the issue at the heart of this case: does the phrase "any longer period" encompass an indefinite and potentially interminable conveyance of an interest in reserve lands?

79 The respondents' argument may be stated syllogistically. The word "period" denotes a length of time bounded by the happening of an event which is certain or capable of being ascertained. In this case, the permit is for a period bounded by the end of Hydro's need for the easement for a power line; an event which is capable of being ascertained, if and when it ever occurs. Therefore the permit in question defines a "period" falling within the phrase "any longer period" in s. 28(2). It follows that the permit was validly granted under s. 28(2). Major J. accepts this argument and uses it as the principal plank in his disposition of the case.

80 The defect of this argument, with respect, is that it fails to consider the context and purpose of the section of the *Indian Act* being construed. Its major premise is informed exclusively by abstract dictionary definitions. But, as the principles of

construction explored above suggest, dictionary or "plain" meanings suffice only where they are clear and consistent with a purposive reading of the statute as a whole. Every statute must be given such fair, large and liberal construction as best ensures the attainment of its objects. Nowhere is this more important than in statutes dealing with the rights of Indian peoples. When read in the context of the purpose of the Act, what seems at first blush to be a "plain meaning" may be revealed as not so plain after all. Ambiguities may appear, bringing into play subsidiary rules like the principle that in interpreting statutes relating to Indians, ambiguities and doubtful expressions should be resolved in favour of the Indians.

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81 This is the case here. As Major J. acknowledges, courts considering the meaning of "period" have defined it in a variety of different ways depending on the context. In particular, where the context so suggests, "period" has been held to designate a fixed number of years or months, an interpretation which would exclude the grant here at issue: *Ouimet v. The Queen*, [1978] 1 F.C. 672 (T.D.), at p. 684, aff 'd [1979] 1 F.C. 55 (C.A.); *Re Bower* (1967), 60 W.W.R. 445 (B.C.S.C.), at p. 447. It follows that at law, the phrase "any longer period" possesses no single "plain" meaning. Its meaning depends on its context. It is, in short, ambiguous. To resolve this ambiguity, we must consider the broader context within which s. 28(2) was enacted, a context which includes the history of the *Indian Act*, the principles it incorporates, the policy goals it was enacted to achieve, and its function in the overall scheme of the Act.

VI

82 The starting point in an assessment of the relationship between aboriginals and the Crown on the question of land is the *Royal Proclamation, 1763*, R.S.C., 1985, App. II, No. 1. That document, affirmed by Hall J. in *Calder v. Attorney-General of*

British Columbia, [1973] S.C.R. 313, at p. 395, as an "Indian Bill of Rights", established as governing principles in Canada (1) the reservation of certain lands to Indians for their exclusive use and possession, and (2) the creation of a strict process for the purchase of Indian land:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds. . . .
>
> . . .
>
> And whereas great Frauds and Abuses have been committed in the purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose. . . .

83 As a result of the *Royal Proclamation, 1763*, "lands could be surrendered only on a nation-to-nation basis, from the Indian nation to the British Crown, in a public process in which the assembled Indian population would be required to consent to the transaction" (*Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 1, at p. 261). The Report also notes that the "present *Indian Act* continues to reflect the land surrender procedure first set out in the Royal Proclamation" (p. 261).

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84 The 1952 *Indian Act*, as amended by S.C. 1956, c. 40, reflects the surrender requirements established by the Royal Proclamation. Section 37 of the Act affirms the presence of the Crown as a go-between in transactions involving reserve land, stating that "lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the band for whose use and benefit in common the reserve was set apart". Section 39(1) mandates that surrenders of reserve land must be made to the Crown, must be assented to by a majority of the electors of the band, and must be accepted by the Governor in Council. This requirement of band approval stands in contrast to the more limited requirements of ss. 28(2) and 58(1) for consent of the band council and Minister to the granting of a permit, or a lease for agricultural or grazing purposes.

85 The *Indian Act* provisions governing the surrender of reserve lands were created to strike "a balance between the two extremes of autonomy and protection. The band's consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender": *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, at p. 370. The protection of reserve lands for future generations may be seen as one of the fundamental purposes of the Act. Alienation was viewed as a grave matter, to be effected only in accordance with a highly scrutinized and strictly regulated procedure. The *Indian Act* confirms the general inalienability of Indian lands (s. 37) and safeguards the sanctity of reserve lands, by prohibiting their alienation except to the Crown, with the consent of the band membership as a whole.

86 The only other way Indian interests in reserve land can be permanently disposed of under the *Indian Act* is by expropriation. Where the greater public good

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so requires, interests in reserve land may be expropriated: s. 35. The procedure is strictly regulated and subject to consent of the Governor in Council, exercised by Cabinet, which owes the Indians a fiduciary duty to act in their best interests. The process is politically sensitive and open to public scrutiny.

87 Formal surrender and expropriation, however, are not the only way in which the *Indian Act* permits reserve land to be affected. The Act contains provisions allowing less significant dealings with reserve land by consent of the Minister and the band council. Section 58(3) permits Indians themselves to obtain leases: "The Minister may lease for the benefit of any Indian upon his application for that purpose, the land of which he is lawfully in possession without the land being surrendered." Again, s. 58(4) permits leases for such uses of the land as grazing and extraction of non-metallic substances without a surrender. Although, as Major J. points out, s. 58 permits materials to be permanently removed from a reserve, it does not permit permanent structures on the land nor permanent legal encumbrance of the land limiting how it can be used in the future.

88 A final exception to the general rule of inalienability established by s. 37 of the *Indian Act* is found in s. 28 of the Act. Section 28, like s. 58, is concerned with a limited situation. It is the situation where a person other than a band member wishes to "occupy", "use" or "otherwise exercise rights on" a reserve. It was intended, it appears, to address situations of non-Indians or Indians from other bands who have business on a reserve: survey parties, traders, hunting parties. Such people might wish to lease a house from the band on a temporary basis, or simply to be permitted to enter the reserve to conduct their business; s. 28 was intended to permit this: Special Joint Committee of the Senate and the House of Commons appointed to examine and consider the *Indian Act*, *Minutes of Proceedings and Evidence,* Issue No. 13, July 16,

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1946, at pp. 546-48. During the debates in Committee on Bill No. 79, after which s. 28(2) obtained its original 1951 form, and before the phrase "any longer period" was incorporated into the Act, the Minister responsible for Indian Affairs noted that the purpose of that section was for "rights of way, occupation by construction gangs for roads, hydro lines, and so on; things that are of a temporary nature" (*Minutes of Proceedings and Evidence*, Issue No. 3, of the Special Committee appointed to consider Bill No. 79, *An Act respecting Indians*, April 18, 1951, at p. 78 (emphasis added)). Provided the period was under one year, the Minister alone might authorize the use. Since 1956, where the permit is for "any longer period", the band council must consent. The point is, s. 28 was intended to deal with "things of a temporary nature", not indefinite alienations which had the potential to extend far into the unforseen future.

89 The Department of Indian Affairs and Northern Development has acknowledged that s. 28 should be confined to temporary uses of Indian land. In its *Land Management and Procedures Manual* (1988), the Department states that expropriations pursuant to s. 35 are the appropriate means for achieving such things as "major highways, railways, and long distance fuel and energy transmission systems" because "[s]uch uses require that the expropriating body gain the exclusive right to use and occupy reserve lands" (p. 4). The manual goes on to recognize that in the past s. 28 had been wrongly used for permanent structures (at p. 4):

> In the past, reliance was placed on the use of subsection 28(2) for the provision of rights of way for various utilities crossing through reserves to non-Indian lands. Since permanent installations or improvements such as roads, pipelines, electric and telephone cables and surface support structures are attached to the reserve land, it is inappropriate to grant a permit except in those circumstances where the sole purpose of the utility is to service reserve lands and the exclusive use of those lands is not required by the subject utility; [Emphasis in original.]

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90 R. A. Reiter, *The Fundamental Principles of Indian Law* (1990 (loose-leaf)), vol. II, c. XI, takes the same view. Without making claims to legal certitude, he suggests that s. 28, as opposed to the alienation and surrender process of s. 37, should be confined to grants of non-exclusive use of roads and right-of-ways, utility lines used exclusively to service the reserve, and non-exclusive grazing or agricultural purposes. He adds that s. 28(2) permits "by definition are for a short duration, . . . for 1-2 years" (p. 31).

91 Viewed thus, s. 28 not only makes good sense, but fits perfectly with the other sections of the Act relating to land and with the broader theme of inalienability of Indian reserve land that runs through the Act as a whole. Section 28 was never intended to deal with major long-term alienations of Indian interests in their reserve lands. It was aimed rather at the short-term, non-exclusive occupant -- the itinerant worker, service provider or agricultural lessee. The phrase "any longer period", consistent with this interpretation, is best understood as a period defined in relatively short terms of months and years. This makes sense in textual terms as well. The phrase "any longer period" relates to the earlier phrase "a period not exceeding one year". This suggests that what Parliament intended by "any longer period" was also a term capable of being expressed in finite calendar terms.

92 The question arises: how long is the short or temporary use contemplated by s. 28(2)? For the purposes of this case, it is unnecessary to decide this issue; certainly an alienation which has the potential to go on as long as anyone can foresee falls outside the scope of s. 28(2). However, for purposes of guidance in other cases, I would suggest that commitments longer than the two-year mandate of band councils should not be transacted through s. 28(2).

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93 This interpretation is consistent with the policy of the *Royal Proclamation, 1763*, and the principle that the long-term alienation of interests in Indian lands may only be effected through surrender to the Crown and consent of the band membership as a whole. To accept the views of the respondents in this case is to accept that parties seeking to obtain long-term or indefinite interests in reserve lands short of outright ownership could use the s. 28 permit provisions to circumvent the surrender requirements of the *Indian Act* and proceed to dispose of long-term interests in land with only the consent of the transitory band council. It would be to attribute to Parliament the intention to establish two alternative and inconsistent ways for alienation of major interests in reserve lands -- one strictly limited and regulated under s. 37, the other requiring only the approval of the Minister and the band council. Finally, it would attribute to Parliament the intention to accord the entire band membership the right to decide on alienation under s. 37, while depriving the membership of that power for transfers that may represent equally serious alienations under s. 28(2), and this despite the fact that s. 37 establishes consent of the band members as a condition of alienation not only of outright transfers of land, but of "leases" or other "dispositions". I cannot accept that these were Parliament's intentions.

94 If s. 28(2) is confined to leases and other arrangements for a finite calendar term not exceeding the usual mandate of the band council, long-term or perpetual interests in reserve land may be acquired only by alienation under the safeguards of s. 37 or by expropriation under s. 35. In either case, the interest of band members, present and future, finds significant protection. In the case of alienation, the band membership must be convinced of the appropriateness of the bargain. In the case of expropriation, the government must initiate, and the Cabinet approve, the drastic and

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politically sensitive process of expropriating reserve lands, constrained at every step by the Crown's duty to act in the best interests of the Indians.

95 A further consideration supporting limitation of s. 28(2) to temporary uses is the location of s. 28 within a portion of the *Indian Act* dealing with "Possession of Lands in Reserves", and setting out the unique concepts by which Indians may obtain, not ownership of band lands, but certificates of possession, or the even more transitory occupation of reserve land. Certificates of possession cannot be transferred to the band or another band member without ministerial approval (s. 24), nor can they be devised by will to persons not entitled to reside on a reserve (ss. 49-50). The strict conditions which are placed on possession and occupation of reserve lands reflect the *sui generis* nature of aboriginal rights in land, and in particular, the inability of Indians to hold and transfer fee simple estates. In this context, s. 28(2) allows a permit to be issued authorizing non-Indians to occupy or use a reserve, or to reside or otherwise exercise rights on a reserve. In contrast, s. 37 is placed under the heading "Surrenders", and contemplates the sale, alienation, lease, or other disposition of lands in a reserve.

96 I note finally that the construction of s. 28(2) which I suggest flows from a contextual reading of the Act is supported by the intervener, The Union of British Columbia Indian Chiefs. Despite the fact that this construction limits the power of Chiefs and councils, the Union argues that s. 28(2) should be construed to allow only short-term, temporary and non-permanent use of reserve land which is consented to by a band council, and can be reviewed by a subsequent band council at the conclusion of the permitted duration. Section 28(2) should not, it argues, allow long-term use of reserve lands without the consent of band members. The Union advocates an interpretation which confirms the authority of band members to collectively decide the

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long-term use of reserve lands, rather than one that grants to band councils the ability to enlarge or reduce the collective interest.

97 Applying contextual principles of statutory interpretation, I conclude that s. 28(2) of the *Indian Act* does not permit long-term, indefinite alienation of interests in reserve land. If one applies the principle that in cases of ambiguity, statutes should be interpreted in favour of Indians, this conclusion becomes inescapable in my view.

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VII

98 I conclude that s. 28(2) of the *Indian Act* does not authorize a permit for a right-of-way over reserve lands that has the potential to extend indefinitely into the future and bind future generations of band members. For such an alienation to take place, consent of the band membership as a whole is required in conformity with s. 37 of the Act.

99 I cannot accept the respondents' assertion that since thousands of such permits exist, this Court should not find them to be unauthorized because it would not be in the public interest. Public interest cannot defeat the legal right of the Opetchesaht people to have the illegal permit set aside and regain full use of the land that it purports to remove. Nor can I accept the argument that a declaration of invalidity would place Hydro in an untenable position. Hydro is not left without remedies. It is open to the parties to renegotiate a new arrangement. In the end, if negotiations fail, Hydro has the right to seek expropriation of the right-of-way. It is at this point that the public interest in the maintenance of the right-of-way would be fully evaluated.

100 While I would allow the appeal and grant a declaration that the permit is void, I would suspend the operation of that declaration for a period of two years to permit the parties and others in similar situations to renegotiate or make new arrangements: see *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721. I agree with Major J. that the final sentence of paragraph 24 of the factum of the interveners B.C. Tel et al. should be struck.

Appeal dismissed with costs, CORY *and* MCLACHLIN JJ. *dissenting.*

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