Osoyoos Indian Band v. Oliver (Town), 2001 SCC 85 (CanLII)

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Docket:	27408
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Osoyoos Indian Band *v.* Oliver (Town), [2001] 3 S.C.R. 746, 2001 SCC 85

Osoyoos Indian Band *Appellant*

v.

The Town of Oliver and Her Majesty The Queen in Right of the Province of British Columbia *Respondents*

and

The Attorney General of Canada and the Squamish Indian Band *Interveners*

Indexed as: Osoyoos Indian Band *v.* Oliver (Town)

Neutral citation: 2001 SCC 85.

File No.: 27408.

2001: June 12; 2001: December 7.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for british columbia

Indians -- Reserves -- Lands taken for public purposes -- Federal order in council granting province interest in lands occupied by irrigation canal crossing Indian reserve -- Whether lands taken by province are still "in the reserve" such that they are assessable and taxable pursuant to Band by-laws -- Indian Act, R.S.C. 1952, c. 149, s. 35 -- Indian Act, R.S.C. 1985, c. I-5, s. 83(1)(a) -- Water Act, R.S.B.C. 1948, c. 361, s. 21.

In 1925 an irrigation canal was constructed on a strip of land that bisects the appellant Indian Band's reserve. In 1957 a federal Order in Council was enacted pursuant to s. 35 of the *Indian Act* in which the Governor in Council consented "to the taking of the said lands" by the province. In 1961 the canal lands were registered by way of certificate of indefeasible title in the name of the province. The respondent Town currently operates and maintains the canal. In 1994, the Band Council enacted property assessment and property taxation by-laws pursuant to s. 83 of the *Indian Act* applicable to land in the reserve. In 1995, the Band Council passed a resolution directing the provincial Assessment Authority to assess the canal lands and include them on the Band's 1996

assessment roll. The Town objected to the assessment of the canal lands by the Band. The Band Board of Review stated a case for the British Columbia Supreme Court asking: (1) whether lands taken pursuant to s. 35 of the *Indian Act* are "land or interests in land" in a reserve within the meaning of s. 83(1)(*a*) such that those lands are assessable and taxable pursuant to Band by-laws; and (2) if s. 35 of the *Indian Act* authorizes the removal of lands from reserve status, whether the federal Order in Council removed the lands from reserve status so that they are not assessable and taxable by the Band. The chambers judge answered "No" to the first question and "Yes" to the second one, concluding that the land at issue was outside the reserve and the Band's jurisdiction to tax under s. 83(1)(*a*). The Court of Appeal upheld that judgment.

Held (L'Heureux-Dubé, Gonthier, Major and Bastarache JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Iacobucci, Binnie, Arbour and LeBel JJ. : As a general matter the Court should be cautious in taking away interests in land in the absence of a complete evidentiary record. This is especially true when the interest at stake is the aboriginal interest in reserve land. As this appeal comes by way of a stated case, however, the rights of the parties must be determined on the evidence at hand, even though the evidentiary record is demonstrably incomplete in this case.

Three implications follow from the *sui generis* nature of the aboriginal interest in reserve lands. First, it is clear that traditional principles of the common law relating to property may not be helpful in the context of aboriginal interests in land. Second, reserve land does not fit neatly within the traditional rationale that underlies the process of compulsory takings in exchange for compensation in the amount of the market value of the land plus expenses. Third, the aboriginal interest in land will generally have an important cultural component that reflects the relationship between an aboriginal community and the land and the inherent and unique value in the land itself which is enjoyed by the community. Because of these implications and the fact that the Crown owes a fiduciary duty to the band, it follows that a clear and plain intention must be present in order to conclude that land has been removed from a reserve.

Section 83(1)(*a*) of the *Indian Act* provides Indian bands with the jurisdiction to impose tax on a very broad range of interests in land, and should be given a broad reading. Band councils have the power to tax any interest or use of reserve lands in order to defray their costs as the government of that land. It follows that, unless the entire interest of a band is removed, land remains in the reserve for the purposes of s. 83(1)(*a*) and both easements and rights to use or occupy land held by non-band members are subject to the taxation jurisdiction.

The fiduciary duty of the Crown is not restricted to instances of surrender. Section 35 clearly permits the Governor in Council to allow the use of reserve land for public purposes. Once it has been determined that an expropriation of Indian lands is in the public interest, however, a fiduciary duty arises on the part of the Crown to expropriate or grant only the minimum interest required in order to fulfill that public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian lands by the band. This is consistent with the provisions of s. 35 which give the Governor in Council the absolute discretion to prescribe the terms to which the expropriation or transfer is to be subject. This two-step process minimizes any inconsistency between the Crown's public duty to expropriate lands and its fiduciary duty to Indians whose lands are affected by the expropriation. As the Crown's fiduciary duty is to protect the use and enjoyment of the Indian interest in expropriated lands to the greatest extent practicable, the duty includes the general obligation, wherever appropriate, to protect a sufficient Indian interest in expropriated land in order to preserve the taxation jurisdiction of the band over the land, thus ensuring a continued ability to earn income from the land. Although in this case the taxation jurisdiction given to bands came after the Order in Council of 1957, the principle is the same, namely that the Crown should not take more than is needed for the public purpose and subject to protecting the use and enjoyment of Indians where appropriate.

While in general s. 35 of the *Indian Act* authorizes the removal of land from the reserve, it did not authorize the removal of lands from the reserve for the purposes of s. 83(1)(*a*) in the circumstances of this case. Because the source of the power to expropriate here was the *Water Act*, the discretion to grant "land" pursuant to s. 35(3) was limited to the land or interest in land "reasonably required" for the canal. Since the canal was already built when the transfer was made, the interest in question is that which is reasonably required to operate and maintain the canal only. Moreover, it is obvious that the fee simple is not necessary to operate and maintain the canal since those activities are currently the responsibility of the Town, which appears to have some kind of

leasehold interest in the land. A canal is similar in nature to a railway in that both are permanent structures on the land involving operation and maintenance activities, and a grant of a statutory easement can be sufficient for the purposes of building and maintaining a railway.

The Order in Council does not evince a clear and plain intent to extinguish the Band's interest in the reserve land. It is ambiguous as to the nature of the interest conveyed. In light of such ambiguity, resort must be had to the interpretive principles applicable to questions dealing with Indian interests, and the interpretation which impairs the Indian interests as little as possible is to be preferred. In light of these principles, the Order in Council should be read as granting a statutory easement to the province, and therefore the canal land is still "in the reserve" for the purposes of s. 83(1)(*a*).

Per L'Heureux-Dubé, Gonthier, Major and Bastarache JJ. (dissenting): The provisions of s. 35 of the *Indian Act* can be interpreted so as to permit the removal of land from a reserve by the taking of full ownership. Such a taking, in effect, amounts to the non-consensual equivalent of absolute surrender (provided for in ss. 37 to 39 of the Act). Since the language of the third paragraph of the Order in Council closely mirrors that of s. 35(3), the subsection concerned in this case is s. 35(3), rather than s. 35(1). Once the government, having consented to a s. 35(1) expropriation, chooses to proceed under s. 35(3), it is free to transfer full ownership. It is for the government to decide, governed by its fiduciary obligations, the appropriate limits to the amount of land and the nature of the interest in land that it is transferring. In this case, the statute that would have governed in a parallel, non-aboriginal context is the *Water Act*. Section 21(2) of that Act authorized the taking of only that land that is "reasonably required". While s. 21 does not authorize taking a fee (simple or determinable) when a right of way over the surface will do, it is equally plain that s. 21 does authorize the taking of a fee simple when that is reasonably required.

The effect of expropriation of a fee under s. 35 is analogous to the effect of absolute surrender. In both cases the land so dealt with ceases to be within the reserve. The effect of an expropriation of a fee under s. 35(1) or (3) is not necessarily different because the fee is "determinable". In the absence of a term or condition specifying a reversionary interest in favour of the band, the expropriation under s. 35 for a public purpose does not contain the implicit condition that it be returned where it ceases to serve a public purpose. It would be entirely alien to the general law of expropriation to interpret the taking of a fee as inherently determinable on account of the possibility of its initial purpose being exhausted.

Interpreting s. 35 as authorizing the removal of land from the reserve is consistent with the purpose of the provision, as reflected in the Parliamentary debates. Practical considerations also support the conclusion that an expropriation of a freehold interest extinguishes the interest in the reserve. A major project like an irrigation canal, railway track, highway or airline landing strip generally requires outside investment. Were an aboriginal interest in land that is expropriated for such a purpose to continue to burden the land even after a taking of a fee, it would be difficult or impossible to grant potential investors security interest in the land.

Federal legislation passed before 1982 that sought to extinguish entirely an aboriginal right like aboriginal title must evince a clear and plain intention to do so. This "clear and plain intention" rule, derived from an understanding of aboriginal title, cannot be applied to aboriginal interest in reserve land, which is a statutory creature the existence of which is not premised on a relationship with the land. Aboriginal interest in reserve land is created under the *Indian Act*, which specifies, in the expropriation and the surrender provisions, how land loses its reserve status.

Through the adoption of the Order in Council by the federal government, the province obtained full ownership over the lands on which the irrigation canal is situated. The first part of the Order in Council unequivocally authorizes the taking of a fee in the lands on which the canal was built. The phrase "right-of-way" in the "Description" in the second part is used consistently as a descriptor of a physical area of land rather than as a reference to the nature of the interest involved. The last sentence of the Order in Council, which refers to the reservation of mines and minerals, is additional evidence that the Order in Council effected the transfer of the equivalent of a fee. This conclusion is supported by consideration of what would be reasonably and practically required for the construction and maintenance of an irrigation canal. The canal is lined with concrete and fully dominates the tract of land on which it is located to the exclusion of all other uses. A taking of full ownership for canal purposes is clearly reasonable.

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By Iacobucci J.

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By Gonthier J. (dissenting)

St. Mary's Indian Band v. Cranbrook (City), 1997 CanLII 364 (S.C.C.), [1997] 2 S.C.R. 657, aff'g 1995 CanLII 555 (BC C.A.), [1996] 2 C.N.L.R. 222; *Shelf Holdings Ltd. v. Husky Oil Operations Ltd.* reflex, (1989), 56 D.L.R. (4th) 193, leave to appeal denied, [1989] 1 S.C.R. xiv; *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (S.C.C.), [1995] 1 S.C.R. 3; *Mitchell v. Peguis Indian Band*, 1990 CanLII 117 (S.C.C.), [1990] 2 S.C.R. 85; *Opetchesaht Indian Band v. Canada*, 1997 CanLII 344 (S.C.C.), [1997] 2 S.C.R. 119; *Smith v. The Queen*, 1983 CanLII 134 (S.C.C.), [1983] 1 S.C.R. 554; *Musqueam Indian Band v. Glass*, 2000 SCC 52 (CanLII), [2000] 2 S.C.R. 633, 2000 SCC 52; *Rugby Joint Water Board v. Shaw-Fox*, [1973] A.C. 202; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, 1995 CanLII 50 (S.C.C.), [1995] 4 S.C.R. 344; *Guerin v. The Queen*, 1984 CanLII 25 (S.C.C.), [1984] 2 S.C.R. 335; *Delgamuukw v. British Columbia*, 1997 CanLII 302 (S.C.C.), [1997] 3 S.C.R. 1010; *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 A.C. 401; *R. v. Sparrow*, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075; *R. v. Van der Peet*, 1996 CanLII 216 (S.C.C.), [1996] 2 S.C.R. 507; *R. v. Adams*, 1996 CanLII 169 (S.C.C.), [1996] 3 S.C.R. 101; *R. v. Gladstone*, 1996 CanLII 160 (S.C.C.), [1996] 2 S.C.R. 723; *Canadian Pacific Ltd. v. Matsqui Indian Band* 1998 CanLII 8248 (F.C.A.), (1998), 162 D.L.R. (4th) 649; *BC Tel v. Seabird Island Indian Band*, 2000 CanLII 17134 (F.C.), [2000] 4 F.C. 350.

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Order in Council P.C. 1957-577.

Osoyoos Indian Band Property Assessment By-law P.R. 95-01, s. 80(1).

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APPEAL from a judgment of the British Columbia Court of Appeal 1999 BCCA 297 (CanLII), (1999), 172 D.L.R. (4th) 589, 122 B.C.A.C. 220, 200 W.A.C. 220, 68 B.C.L.R. (3d) 218, [1999] 4 C.N.L.R. 91, [1999] B.C.J. No. 997 (QL), 1999 BCCA 297, affirming a decision of the British Columbia Supreme Court 1997 CanLII 3720 (BC S.C.), (1997), 145 D.L.R. (4th) 552, [1998] 2 C.N.L.R. 66, [1997] B.C.J. No. 828 (QL). Appeal allowed, L'Heureux-Dubé, Gonthier, Major and Bastarache JJ. dissenting.

Louise Mandell, Q.C., *Leslie Pinder* and *Clarine Ostrove*, for the appellant.

Barry Williamson and *Gregg Cockrill*, for the respondent the Town of Oliver.

Timothy P. Leadem, Q.C., *Paul Yearwood* and *Hunter Gordon*, for the respondent Her Majesty The Queen in Right of the Province of British Columbia.

Gerald Donegan, Q.C., *Kathy Ring* and *Mary King*, for the intervener the Attorney General of Canada.

John R. Rich and *F. Matthew Kirchner*, for the intervener the Squamish Indian Band.

The judgment of McLachlin C.J. and Iacobucci, Binnie, Arbour and LeBel JJ. was delivered by

IACOBUCCI J. --

I. Introduction

1 In this appeal, the Court is asked to decide whether the Osoyoos Indian Band (the "Band") has the authority to assess and impose a tax on a strip of property that crosses Osoyoos Indian Reserve Number 1. The answer to this question depends on whether the land at issue is "in the reserve" within the meaning of s. 83(1)(*a*) of the *Indian Act*, R.S.C. 1985, c. I-5. The principal legal issue in this case is what interpretation should be given to a 1957 Order in Council made by the Governor in Council pursuant to s. 35 of the *Indian Act*, R.S.C. 1952, c. 149, granting an interest in the land at issue to the Province of British Columbia.

2 For the reasons that follow, I am of the view that the Band can tax the land in question and so I would allow the appeal.

II. Facts

3 Although my colleague, Gonthier J., has lucidly described the background in this appeal, I prefer to set out the relevant facts and background for purposes of discussion and analysis.

4 Osoyoos Indian Reserve Number 1 (the "reserve"), which is located near the Town of Oliver in the Okanagan Valley in southern British Columbia, is a reserve within the meaning of the *Indian Act*.

5 Sometime prior to March 25, 1925, a concrete-lined irrigation canal occupying a total area of 56.09 acres was constructed on a strip of land that bisects the reserve. The canal was constructed to aid in the agricultural development of the South Okanagan region of British Columbia. However, it was not until 1957 that an attempt was made to formalize the interests in the canal lands.

6 On April 25, 1957, the Governor in Council enacted Order in Council 1957-577 pursuant to the authority of s. 35 of the *Indian Act* in respect to the strip of land then occupied by the irrigation canal. The Order in Council provided as follows:

> WHEREAS the Minister of Agriculture for the Province of British Columbia has applied for the lands hereinafter described, being a portion of Osoyoos Indian Reserve number one, in the said Province for irrigation canal purposes;
>
> AND WHEREAS the sum of $7,700 has been received from the Province of British Columbia in full payment for the land required in accordance with a valuation approved by the Band Council of the Osoyoos Band of Indians on the 30th of March, 1955 and officials of the Indian Affairs Branch;
>
> THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Minister of Citizenship and Immigration, pursuant to the provisions of Section 35 of the Indian Act, is pleased hereby to consent to the taking of the said lands by the Province of British Columbia and to transfer the administration and control thereof to Her Majesty the Queen in right of the Province of British Columbia:
>
> DESCRIPTION
>
> The whole of those rights-of-way, in Osoyoos Indian Reserve number one, in the province of British Columbia, said rights-of-way containing together by admeasurement fifty-six acres and nine hundredths of an acre, more or less, as said rights-of-way are shown bordered red on a plan of record number Irr twenty-one hundred and thirty-four in the Indian Affairs survey records at Ottawa; saving and excepting thereout and therefrom all that portion lying within a right-of-way for a road, as the last aforesaid right of way is shown bordered red on a plan of record number Rd thirty-six hundred and eighty in said records, a copy of which is deposited in the Land Registry Office for the district of Kamloops at Kamloops under number A thirteen hundred and seventy-seven; also saving and excepting thereout and therefrom all roads reserved by the Province of British Columbia by provincial order-in-council number one thousand and thirty-six, also subject to a prior Grant of Easement for a Power Transmission Line granted to West Kootenay Power and Light Company Ltd. by Order-in-Council P.C. 143 dated January 25, 1937, for a term of thirty years, this right-of-way containing by

admeasurement 22 acres and two-tenths of an acre, more or less, and is shown on a plan of survey by R.P. Brown, B.C.L.S. dated November 16, 1936 and which is of record in the Indian Affairs Branch as Plan No. M. 2691.

Reserving thereout and therefrom all mines and minerals and the right to work the same.

7 The provincial Minister of Agriculture's powers of expropriation for irrigation were contained in s. 21 of the *Water Act*, R.S.B.C. 1948, c. 361. This power to expropriate was not formally invoked. Instead, the Governor in Council acted on the Minister's application by making a grant under s. 35(3) of the *Indian Act* without formal expropriation. The Order in Council was the only instrument authorizing the transfer of the land in question.

8 On September 12, 1961, the canal lands were registered by way of Certificate of Indefeasible Title in the name of Her Majesty the Queen in Right of the Province of British Columbia, in the Kamloops Registry of the British Columbia Land Title Office.

9 The Town of Oliver currently operates and maintains the canal. It is unclear under what authority the Town of Oliver occupies the canal lands. The Court of Appeal below was advised, and assumed, that the Town of Oliver was a party to a lease entered into with the Province. However, the parties now agree that there is no lease document as such.

10 In 1994, the Osoyoos Indian Band Council ("Band Council") enacted property assessment and property taxation by-laws pursuant to s. 83 of the *Indian Act* (the "Assessment By-laws") applicable to land in the reserve.

11 The Assessment By-laws provide for the appointment of an assessor for carrying out the purposes of the By-law. Pursuant to that power, the Band Council appointed the B.C. Assessment Authority as an assessor.

12 On August 28, 1995, the Band Council passed a resolution (1995−65) which directed the B.C. Assessment Authority to assess the canal lands and include them on the 1996 assessment roll of the Band. The Assessment Authority placed the canal lands on the folios of the Band. The canal lands have been assessed as follows:

	Land	Improvements	Total Assessed Value
Lot A	$ 37,100	$ 95,300	$132,400
Lot B	$ 36,200	$ 99,200	$135,400
Lot C	$ 63,800	$110,000	$173,800
Lot D	$ 26,400	$ 56,900	$ 83,300
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$163,500	$361,400	$524,900

13 The Town of Oliver objected to the assessment of the canal lands by the Band. The Town of Oliver and the Province were invited to make representations before the Osoyoos Indian Band Board of Review. The Board of Review resolved to suspend proceedings and state a case for the Supreme Court of British Columbia consisting of the following two questions:

1. Are lands, taken pursuant to s. 35 of the *Indian Act*, "land or interests in land" in a reserve of a Band within the meaning of s. 83(1)(*a*) of the *Indian Act* such that those lands are assessable and taxable pursuant to Band Assessment By-laws and taxable pursuant to Band Taxation By-laws?

2. If s. 35 of the *Indian Act* authorizes the removal of lands from reserve status, does federal Order in Council 1957−577, by which the Lands were transferred, remove the Lands from reserve status so that they are not assessable and taxable by the Osoyoos Indian Band?

14 The chambers judge answered "No" to Question 1 and "Yes" to Question 2. In the result, he held that the land at issue was outside the reserve and the Band's jurisdiction to tax under s. 83(1)(*a*).

15 On appeal, a majority of the British Columbia Court of Appeal affirmed the judgment of the chambers judge. Lambert J.A., in dissent, would have allowed the appeal.

III. Relevant Statutory Provisions

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

2. (1) In this Act,

. . .

(*o*) "reserve" means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band;

18. (1) Subject to the provisions of this Act, reserves shall be held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

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.

(3) Whenever the Governor in Council has consented to the exercise by a province, authority or corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without the consent of the owner, authorize a transfer or grant of such lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.

(4) Any amount that is agreed upon or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General of Canada for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).

Indian Act, R.S.C. 1985, c. I−5

83. (1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by−laws for any or all of the following purposes, namely,

(*a*) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve;

...

(2) An expenditure made out of moneys raised pursuant to subsection (1) must be so made under the authority of a by−law of the council of the band.

(3) A by−law made under paragraph (1)(*a*) must provide an appeal procedure in respect of assessments made for the purposes of taxation under that paragraph.

Water Act, R.S.B.C. 1948, c. 361

21. (1) In this and the following three sections "land" includes any estate or interest in or easement over land.

(2) Every licensee shall have the right to expropriate any land reasonably required for the construction, maintenance, improvement, or operation of any works authorized under his licence, and the holder of any licence that authorizes the diversion of water for domestic purpose or waterworks purpose shall have the right to expropriate, in addition, any land the control of which by the licensee would help to prevent pollution of the water authorized to be diverted, and, with the consent of the Lieutenant−Governor in Council, the holder of any licence that authorizes the construction of a dam shall have the right to expropriate, in addition, any land that would be flooded if the dam were constructed and utilized to the maximum height authorized. The owner of land so expropriated shall be compensated therefor by the licensee, and the procedure to be followed in expropriating land and the method of determining the compensation shall be as prescribed in the regulations.

IV. Judgments Below

A. *British Columbia Supreme Court* 1997 CanLII 3720 (BC S.C.), (1997), 145 D.L.R. (4th) 552

17 With respect to the first of the stated questions, Mackenzie J. reviewed the applicable jurisprudence of the British Columbia courts together with the language of the relevant statutory provisions. He found that the plain meaning of the words of s. 35(3) of the *Indian Act* lead irresistibly to the conclusion that the provision is

capable of authorizing the conveyance of a fee simple interest in lands from a reserve. Furthermore, the transfer of a fee simple absolute removes land from a reserve and therefore land taken pursuant to s. 35 is no longer reserve land and it is not assessable or taxable under s. 83(1)(*a*). Accordingly, he answered Question 1 "No".

18 With respect to the second of the stated questions, Mackenzie J. found that there are no words of limitation in the operative words of the Order in Council. In his view, the words "for irrigation canal purposes" did not create an easement or determinable fee with a reversion interest, nor were there any words that could be characterized as a condition. He concluded at para. 6:

> There are no restrictions on the extent of the transfer of administration and control which would limit it to the equivalent of an easement. In my view, the transfer here must be a transfer of administration and control unlimited in time, the equivalent of an absolute fee, or a transfer determinable on the lands ceasing to be used for irrigation purposes. The lands are still being used for irrigation purposes and no event which could terminate the transfer of administration and control has occurred.

19 Mackenzie J. rejected the argument that a determinable fee in reserve lands can be taxed. He concluded that a determinable fee in reserve lands removed the lands from the reserve for taxation purposes while the fee continued.

20 Finally, Mackenzie J. concluded that, assuming without deciding that the minerals remain in the reserve, the power to tax reserve lands does not reach the reservation for mines and minerals.

21 For the foregoing reasons, Mackenzie J. answered the second question "Yes".

B. *British Columbia Court of Appeal* 1999 BCCA 297 (CanLII), (1999), 172 D.L.R. (4th) 589

1. Newbury and Prouse JJ.A.

22 In writing for the majority, Newbury J.A. began her analysis by stating her view that it was inappropriate and unnecessary to enter into an analysis of aboriginal title in connection with the stated questions. For Newbury J.A., the real question on appeal was whether the "taking" effected by the Order in Council was such that the land no longer qualified as land "in the reserve".

23 Newbury J.A. then turned to the principles applicable to the interpretation of the statutes and documents at issue in this case. She held, at para. 90, that "[n]ative intentions, like the intentions of any owner whose land is expropriated, will usually be irrelevant in these circumstances, where the larger public good prevails over the interests and wishes of the owner". She noted, however, that special considerations apply in this case because Indian reserve lands are involved. In particular, she found that common law real property concepts do not apply to native lands, and that the fiduciary duty of the Crown requires that Indian rights and benefits be interpreted so as to impair such rights to the least extent possible. This principle of "minimal impairment" translates into a rule of construction whereby ambiguities in an instrument or enactment must be resolved in favour of the Indians as it is assumed the Crown would not breach its fiduciary duty. Newbury J.A. noted that this approach is consistent with and supplements the rule of construction in expropriation law that ambiguities are decided in favour of the owner whose land has been taken.

24 Nevertheless, Newbury J.A. went on to conclude, at para. 93, that the reason for this approach is the need to ensure that "native intentions" are not frustrated by the application of "formalistic and arguably alien rules". Here, in the case of an expropriation under s. 35, where the primary parties are the federal and provincial governments by whom common law concepts of real property are well understood, "formalistic" words of limitation will be the focus of the inquiry.

25 Newbury J.A. then turned to interpret the terms of the Order in Council. She noted, at para. 97, that the Order refers to the taking of "lands", and the payment for "the land", and the transfer of "administration and control". In her view, looking at the matter in non-technical terms, if the taking of an easement were intended, the Order in Council would refer to a right of way or a right to "use" of the land, but not to the "land" itself.

26 She then asked whether the use of the phrase "rights-of-way" under the heading "Description" altered the tenor of the document or created an ambiguity. Newbury J.A. found that the modern usage of the phrase does not always correspond with the common law concept. She was of the view that it is consistent with the authorities establishing the nature of rights of way outside the aboriginal context to read the use of the plural "rights-of-way" as the absence of any restrictions on the Province's ability to use the lands, and to read the reservation of mines and minerals as denoting an intention to grant absolute ownership of surface rights.

27 Newbury J.A. went on to explain, at para. 105, that the Order in Council did not grant only a right of way to the Province; it granted exclusive rights of enjoyment and possession that are inconsistent with the lands continuing to be held by Her Majesty in right of Canada "for the use and benefit of [the] Band". The Order referred to "the taking of the said lands", not simply the right to use or pass over the said lands; there was no indication the Province was acquiring anything other than exclusive rights (whether in fee simple or until the lands cease to be used for irrigation purposes); and the Order transferred "administration and control" of the lands to the Province -- wording that is inconsistent with the lands continuing to be held "for the benefit of" the Band.

28 Newbury J.A. agreed with the chambers judge that the Order in Council did not contemplate the expropriation of a mere right of way, but of "the lands" themselves, which were thereby removed from the reserve. She held that, based on a non−technical view of the wording used, there was no ambiguity in the Order in Council, and that the same conclusion is supported by the ordinary common law rules applicable to rights of way and easements. Accordingly, Newbury J.A. dismissed the appeal, Prowse J.A. concurring.

2. Lambert J.A. (Dissenting)

29 For Lambert J.A., aboriginal title was very much in issue in the case before him. He held that as a matter of law the Indian interest in reserve land is the same interest constituted by aboriginal title, and he took judicial notice of the fact that the Band have aboriginal title to the land in their reserve. Therefore, Lambert J.A. began his analysis of the first question by asking whether a compulsory taking extinguishes aboriginal title.

30 Put shortly, his answer was that s. 35 of the *Indian Act* is not sufficiently clear and plain to extinguish aboriginal title, with the result that aboriginal title remains a burden on any land or interest in land taken under s.

35, including an interest like or equivalent to a fee simple. Therefore, in his view, land that has not been absolutely surrendered but is taken under s. 35 from within the geographical boundaries of a reserve remains land "in the reserve" for the purposes of taxation under s. 83(1)(*a*) of the Act. Accordingly, Lambert J.A. would answer the first question "Yes".

31 With regard to the second question, Lambert J.A. set out the following principles that govern the interpretation of an Order in Council that affects the interests of Indians who are under the protection of the Crown. First, ambiguities in an enactment affecting Indian lands should be given the interpretation most favourable to the Indian interests if such an interpretation is one which the enactment will reasonably bear: see *Nowegijick v. The Queen*, 1983 CanLII 18 (S.C.C.), [1983] 1 S.C.R. 29, and *Mitchell v. Peguis Indian Band*, 1990 CanLII 117 (S.C.C.), [1990] 2 S.C.R. 85. Second, an enactment should be given an interpretation and application that results in a minimal impairment of the Indian interests if that interpretation and application are in accordance with the enactment, reasonably construed: see *Semiahmoo Indian Band v. Canada*, 1997 CanLII 6347 (F.C.A.), [1998] 1 F.C. 3 (C.A.), at p. 25; *R. v. Sparrow*, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075, at p. 1119. Third, technical conveyancing principles should not guide the resolution of questions involving the "*sui generis*" nature of Indian land where the interests of the Crown and the Indians in question can be reconciled and harmonized in a way consistent with the purposes of the legislation and the purposes of the transaction itself, and where such reconciliation and harmonization would be prevented by an adherence to strict conveyancing principles: see *Blueberry River Indian Band v. Canada* (*Department of Indian Affairs and Northern Development*), 1995 CanLII 50 (S.C.C.), [1995] 4 S.C.R. 344, and *St. Mary's Indian Band v. Cranbrook (City)*, 1997 CanLII 364 (S.C.C.), [1997] 2 S.C.R. 657.

32 Applying the foregoing principles, Lambert J.A. offered two alternative answers to Question 2. First, he held that the Order in Council transferred to the Province the administration and control of an interest in land akin to statutory easement, as opposed to a fee simple. Alternatively, he held that the Order in Council is ambiguous, and should be interpreted as transferring an interest sufficient to confer all the rights needed for the operation of the canal leaving the Band's interest in the land minimally impaired and sufficient to support their taxation powers.

33 Accordingly, Lambert J.A. answered the second question "No", and he would have allowed the appeal.

V. Issues and Submissions of the Parties

34 1. Can a taking pursuant to s. 35 of the *Indian Act* extinguish an Indian band's interest in reserve land such that the land is no longer "in the reserve" and falls outside the jurisdiction of the band?

2. Did Order in Council 1957-577 remove the land at issue in this case from the Osoyoos Indian Reserve Number 1?

35 The appellant submits that s. 35 does not evince a clear and plain intent to extinguish the aboriginal interest in reserve land. Therefore, land in which an interest is taken pursuant to s. 35 remains within the reserve and subject to the Band's jurisdiction to tax. Hence, the answer to the first question is "No". The appellant further submits that because Indian interests are at stake, fiduciary principles constrain the discretion of the Governor in Council to transfer land under s. 35. Consequently, a minimal impairment rule should be applied in the

interpretation of the Order in Council with the result that the Governor in Council could not have intended to, and did not in fact, remove the land at issue from the reserve. Hence, the answer to the second question is "No".

36 The Town of Oliver submits that s. 35 does authorize the expropriation of fee simple interests in reserve lands. Thus, because a fee simple interest in land is logically incompatible with an aboriginal interest in land, it is clear and plain that s. 35 is capable of extinguishing the aboriginal interest in reserve lands such that the lands are no longer within the legislative mandate of the *Indian Act*. The Province also argues that s. 35 clearly authorizes the expropriation of "any interest" in land, including an aboriginal interest in reserve land. Hence, the respondents' answer to the first question is "Yes". With respect to the interpretation of the Order in Council, the respondents submit that the Governor in Council is not under any fiduciary duty to the Band in the context of a taking of an interest in reserve land under s. 35. Therefore, a minimal impairment rule should not be applied in this case. The respondents further submit that Order in Council 1957-577 is not ambiguous and that its clear and plain effect was to transfer a fee simple interest in the land and not merely a statutory easement or some other lesser interest. Consequently, Order in Council 1957-577 did extinguish the aboriginal interest in the lands occupied by the irrigation canal and did remove the lands at issue from the reserve thus removing the taxing jurisdiction of the Band. Hence, the answer to the second question is "Yes".

VI. Analysis

A. *Preliminary Issues*

37 At the outset, I wish to address four preliminary issues that I believe have significant implications for the subsequent analysis and interpretation of the Order in Council.

1. Unsatisfactory Factual Basis

38 The determination of the rights and entitlements at issue in this case will significantly affect the interests of the parties. Yet, the factual basis upon which that determination must be made is somewhat unsatisfactory. I share the view of the Court of Appeal that the evidentiary record in this case is demonstrably incomplete. Important relevant evidence that could assist the Court in the interpretation and application of the Order in Council may be available but does not form part of the record of this case.

39 In particular, there is no evidence that explains under what authority, if any, the canal was initially constructed and operated prior to the enactment of the Order in Council. There is no evidence to indicate which interests in land were assessed or what methodology was used to calculate the value of the compensation received by the Band in 1955. The documentary evidence is thin: none of the correspondence, Band Council resolutions, minutes of meetings or other documents and reports that could offer external evidence of intention relating to the transfer effected by Order in Council 1957-577 was presented. Apart from the fact that the canal is "concrete lined", we do not know anything about how it was constructed. Similarly, apart from the fact that the canal lands cover an area of 56.09 acres, we do not know anything about its specific dimensions. There was no evidence that would explain what type of tenure is necessary to maintain and operate the canal or precisely what type of tenure is enjoyed by the Town of Oliver. There was no evidence of the activities carried on on the lands in question; whether it is fenced off or occupied exclusively by the Town of Oliver, or whether the Band members are permitted to cross the canal at certain points.

40 In my view, as a general matter the Court should be cautious in taking away interests in land in the absence of a complete evidentiary record. This is especially true when the interest at stake is the aboriginal interest

in reserve land. As discussed below, in order to extinguish an aboriginal interest in reserve land the Sovereign must evince a clear and plain intention to do so. In this case, we are faced with the difficult task of determining intention without supporting facts and evidence. Having said all this, as the appeal comes by way of a stated case, we must determine the rights of the parties as best we can using the evidence at hand.

2. *Sui Generis* Nature of Aboriginal Interest in Reserve Land

41 Canadian jurisprudence on the nature of the aboriginal interest in reserve land began with the decision of *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, in which Lord Watson, speaking for the Privy Council, stated at p. 54 that "the tenure of the Indians [is] a personal and usufructuary right". See also *Smith v. The Queen*, 1983 CanLII 134 (S.C.C.), [1983] 1 S.C.R. 554. Since then, our understanding of the nature of aboriginal interests in land has continued to develop. In this connection, when describing the features of the aboriginal interest in reserve land it is useful to refer to this Court's recent jurisprudence on the nature of aboriginal title. Although the two interests are not identical, they are fundamentally similar: see *Guerin v. The Queen*, 1984 CanLII 25 (S.C.C.), [1984] 2 S.C.R. 335, at p. 379, *per* Dickson J. (as he then was); *Delgamuukw v. British Columbia*, 1997 CanLII 302 (S.C.C.), [1997] 3 S.C.R. 1010, at paras. 116-21, *per* Lamer C.J.

42 The features common to both the aboriginal interest in reserve land and aboriginal title include the facts that both interests are inalienable except to the Crown, both are rights of use and occupation, and both are held communally. Thus, it is now firmly established that both types of native land rights are *sui generis* interests in the land that are distinct from "normal" proprietary interests: *St. Mary's Indian Band*, *supra*, at para. 14. Native land rights are in a category of their own. There are three implications that follow from the nature of the aboriginal interest in reserve lands that are important in the context of this case.

43 First, it is clear that traditional principles of the common law relating to property may not be helpful in the context of aboriginal interests in land: *St. Mary's Indian Band*, *supra*. Courts must "go beyond the usual restrictions imposed by the common law", in order to give effect to the true purpose of dealings relating to reserve land: see *Blueberry River Indian Band*, *supra*, at para. 7, *per* Gonthier J. This is as true of the Crown's purpose in making a grant of an interest in reserve land to a third party as it is of an Indian band's intentions in surrendering land to the Crown.

44 All members of the Court of Appeal acknowledged this Court's jurisprudence on the applicability of common law principles in the context of native land rights. Newbury J.A. wrote (at para. 93) that "a non-technical approach may be justified" even in the context of expropriation, and that form should generally not be permitted to "trump substance" wherever Indian interests may be affected. However, the majority went on to hold (at para. 94) that "in the case of an expropriation under s. 35, where the primary parties are the federal and provincial governments by whom common law concepts of real property are well understood, 'formalistic' words of limitation will . . . be the focus of the inquiry". This view is based on the mistaken assumption that the inapplicability of common law rules in relation to Indian lands has to do with the capacity of the parties to the transaction. However, the principle that it is inappropriate to apply common law real property rules to Indian lands was developed because of the *sui generis* nature of aboriginal interests in land. In the result, the transfer at issue in this case cannot be treated as a regular, commercial transaction.

45 Second, it follows from the *sui generis* nature of the aboriginal interest in reserve land and the definition of "reserve" in the *Indian Act* that an Indian band cannot unilaterally add to or replace reserve lands.

The intervention of the Crown is required. In this respect, reserve land does not fit neatly within the traditional rationale that underlies the process of compulsory takings in exchange for compensation in the amount of the market value of the land plus expenses. The assumption that the person from whom the land is taken can use the compensation received to purchase replacement property fails to take into account in this context the effect of reducing the size of the reserve and the potential failure to acquire reserve privileges with respect to any off-reserve land that may thereafter be acquired.

46 Third, it is clear that an aboriginal interest in land is more than just a fungible commodity. The aboriginal interest in land will generally have an important cultural component that reflects the relationship between an aboriginal community and the land and the inherent and unique value in the land itself which is enjoyed by the community. This view flows from the fact that the legal justification for the inalienability of aboriginal interests in land is partly a function of the common law principle that settlers in colonies must derive their title from Crown grant, and partly a function of the general policy "to ensure that Indians are not dispossessed of their entitlements": see *Delgamuukw*, *supra*, at paras. 129-31, *per* Lamer C.J.; *Mitchell*, *supra*, at p. 133.

47 Land may be removed from a reserve with the participation of the Crown, which owes a fiduciary duty to the band, as discussed below. Fiduciaries are held to a high standard of diligence. For this reason, as well as by reason of the foregoing principles, it follows that a clear and plain intention must be present in order to conclude that land has been removed from a reserve. In this regard, I respectfully disagree with my colleague, Gonthier J., when he states that no such intention is necessary in the context of a taking of an Indian interest in reserve land. In that connection, unlike my colleague, I agree with the approach taken by Décary J.A. in applying the clear and plain intention rule to reserve land: see *Canadian Pacific Ltd. v. Matsqui Indian Band* 1998 CanLII 8248 (F.C.A.), (1998), 162 D.L.R. (4th) 649 (F.C.A.), at para. 27; see also *Calder v. Attorney-General of British Columbia*, 1973 CanLII 4 (S.C.C.), [1973] S.C.R. 313, at p. 404 (*per* Hall J., dissenting); *BC Tel v. Seabird Island Indian Band*, 2000 CanLII 17134 (F.C.), [2000] 4 F.C. 350 (T.D.), at paras. 13-19 (*per* Muldoon J.).

3. Section 83: the Authority to Tax Property Interests "in the Reserve"

48 Section 83(1)(*a*) of the *Indian Act* provides Indian bands with the jurisdiction to impose tax on a very broad range of interests in land. This is clear from the plain meaning of the words in that section. In particular, it is notable that the section provides band councils with the authority to make by-laws for the taxation of "land" and "interests in land", including "rights to occupy, possess or use land". Indeed, the only limitation on the power to tax is that the land subject to taxation must be "in the reserve".

49 That s. 83(1)(*a*) should be given a broad reading is clear from an application of the principle in *Nowegijick*, *supra*, as explained by La Forest J. in *Mitchell*, *supra*, at p. 143:

> . . . it is clear that 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 . . . .
>
> At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation. It is also necessary to reconcile any given interpretation with the policies the Act seeks to promote. [Emphasis added.]

50 The cautionary note sounded by La Forest J. is of no import here. As acknowledged by this Court in *St. Mary's Indian Band*, *supra*, at para. 24, the position taken by Parliament in respect of s. 83(1)(*a*) is that "[o]ne of the most important by-law powers that bands need is their power to tax use of the land" and "band councils have the power to tax any interest or use of reserve lands in order to defray their costs as the government of that land". It follows that, unless the entire interest of a band is removed, land remains in the reserve for the purposes of s. 83 (1)(*a*) and both easements and rights to use or occupy land held by non-band members are subject to the taxation jurisdiction.

4. The Content of the Crown's Fiduciary Duty in the Context of Section 35

51 The intervener the Attorney General of Canada submits that when Canada's public law duty conflicts with its statutory obligation to hold reserve lands for the use and benefit of the band for which they were set apart, then a fiduciary duty does not arise. The Attorney General argues that the existence of a fiduciary duty to impair minimally the Indian interest in reserve lands is inconsistent with the legislative purpose of s. 35 which is to act in the greater public interest and that the opening phrase of s. 18(1) of the *Indian Act*, "Subject to the provisions of this Act . . .", effectively releases the Crown from its fiduciary duty in respect of s. 35 takings. In addition, the Attorney General contends that a fiduciary obligation to impair minimally the Indian interest in reserve lands is inconsistent with the principles of fiduciary law which impose a duty of utmost loyalty on the fiduciary to act only in the interests of the person to whom the duty is owed. Thus, the Attorney General submits that the holding in *Guerin*, *supra*, that the surrender of an Indian interest of land gives rise to a fiduciary duty on the part of the Crown to act in the best interests of the Indians does not extend to the context of expropriation, and that the duty of the Crown to the band in the case of an expropriation of reserve land is similar to its duty to any other land holder -- to compensate the band appropriately for the loss of the lands.

52 In my view, the fiduciary duty of the Crown is not restricted to instances of surrender. Section 35 clearly permits the Governor in Council to allow the use of reserve land for public purposes. However, once it has been determined that an expropriation of Indian lands is in the public interest, a fiduciary duty arises on the part of the Crown to expropriate or grant only the minimum interest required in order to fulfill that public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian lands by the band. This is consistent with the provisions of s. 35 which give the Governor in Council the absolute discretion to prescribe the terms to which the expropriation or transfer is to be subject. In this way, instead of having the public interest trump the Indian interests, the approach I advocate attempts to reconcile the two interests involved.

53 This two-step process minimizes any inconsistency between the Crown's public duty to expropriate lands and its fiduciary duty to Indians whose lands are affected by the expropriation. In the first stage, the Crown acts in the public interest in determining that an expropriation involving Indian lands is required in order to fulfill some public purpose. At this stage, no fiduciary duty exists. However, once the general decision to expropriate has been made, the fiduciary obligations of the Crown arise, requiring the Crown to expropriate an interest that will fulfill the public purpose while preserving the Indian interest in the land to the greatest extent practicable.

54 The duty to impair minimally Indian interests in reserve land not only serves to balance the public interest and the Indian interest, it is also consistent with the policy behind the rule of general inalienability in the *Indian Act* which is to prevent the erosion of the native land base: *Opetchesaht Indian Band v. Canada*, 1997 CanLII 344 (S.C.C.), [1997] 2 S.C.R. 119, at para. 52. The contention of the Attorney General that the duty of the Crown to the Band is restricted to appropriate compensation cannot be maintained in light of the special features of reserve land discussed above, in particular, the facts that the aboriginal interest in land has a unique cultural component, and that reserve lands cannot be unilaterally added to or replaced.

55 As the Crown's fiduciary duty is to protect the use and enjoyment of the Indian interest in expropriated lands to the greatest extent practicable, the duty includes the general obligation, wherever appropriate, to protect a sufficient Indian interest in expropriated land in order to preserve the taxation jurisdiction of the band over the land, thus ensuring a continued ability to earn income from the land. Although in this case the taxation jurisdiction given to bands came after the Order in Council of 1957, the principle is the same, namely that the Crown should not take more than is needed for the public purpose and subject to protecting the use and enjoyment of Indians where appropriate.

B. *Does Section 35 Authorize the Removal of Land Out of a Reserve?*

1. The Clear and Plain Intention Test and Its Application to Section 35

56 As discussed above, in order to extinguish the aboriginal interest in reserve land, the sovereign's intention must be clear and plain.

57 Section 35 of the *Indian Act* does not expressly authorize the extinguishment or taking of the aboriginal interest in land. However, in making its intention clear and plain, the Crown does not necessarily have to use language which refers expressly to its extinguishment of aboriginal rights: *R. v. Gladstone*, 1996 CanLII 160 (S.C.C.), [1996] 2 S.C.R. 723, at para. 34. Section 35(1) does authorize "a province, a municipal or local authority or a corporation" acting pursuant to a statutory authority "to take or to use lands or any interest therein". Section 35(3) authorizes the Governor in Council to make a "transfer or grant" of the same broad range of interests in reserve land "to the province, authority or corporation". Thus, s. 35 evinces a clear and plain intent to authorize the taking of "any interest" in reserve land, which, in the context of the *Indian Act*, necessarily includes the aboriginal interest in reserve land. On this basis, I conclude that, in general, s. 35 does authorize the removal of land from the reserve. I note that this conclusion is consistent with the *obiter dicta* in *Opetchesaht Indian Band*, *supra*, at para. 86, *per* McLachlin J. (as she then was), in dissent; and *Smith*, *supra*, at p. 577, *per* Estey J.

2. The Nature of the Interest Transferred Under Section 35 in this Case

58 Section 35 clearly permits the taking of reserve land for public purposes. Moreover, it is clear and plain that s. 35 authorizes the taking or use of a range of interests in land, up to and including a fee simple interest. This is obvious from an ordinary and grammatical reading of the words of the section. However, a more fundamental question is whether s. 35 of the *Indian Act* authorized the removal of lands from the reserve for the purposes of s. 83(1)(*a*) in the circumstances of this case.

59 In seeking to expropriate reserve land under s. 35(1) of the *Indian Act*, the Province was only able to take or use land that it was empowered to take under an Act of the provincial legislature. Section 35(1) reads:

> **35.** (1) Where by an Act of . . . a provincial legislature Her Majesty in right of a province . . . 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 . . . be exercised in relation to lands in a reserve or any interest therein. [Emphasis added.]

The words "the power" clearly refer to that power contained in the Act of the provincial legislature referred to in the opening lines of s. 35(1). Thus, the Province could only exercise "the power" given to it by the relevant Act of the legislature.

60 The parties concede that the Minister of Agriculture applied for the lands at issue under s. 21 of the *Water Act*, as inferred from the recitations of the Order in Council, i.e. "the Minister of Agriculture . . . applied for the lands . . . for irrigation canal purposes". Section 21 of the *Water Act* provides:

> **21.** (1) In this and the following three sections "land" includes any estate or interest in or easement over land.
>
> (2) Every licensee shall have the right to expropriate any land reasonably required for the construction, maintenance, improvement, or operation of any works authorized under his licence. . . . [Emphasis added.]

61 Thus, under s. 21 of the *Water Act*, the Minister of Agriculture was only empowered to expropriate the "estate or interest in or easement over land" that was "reasonably required" for the purposes of the canal, not more. The Province could not do an end run around the limitations on its powers inherent in the *Water Act* and expropriate a greater interest than was reasonably required for the canal by proceeding under s. 35(1) of the *Indian Act*.

62 In the same way, although s. 35(3) permitted the Governor in Council to short-cut the formal expropriation process, neither could the Governor in Council do an end run around the limitations on provincial powers of expropriation and grant an interest greater than the one the Province was authorized to take under its own legislation. Section 35(3) provides:

> (3) Whenever the Governor in Council has consented to the exercise by a province . . . of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province . . . taking or using the lands without the consent of the owner, authorize a transfer or grant of such lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council. [Emphasis added.]

63 By reference to "the powers referred to in subsection (1)", s. 35(3) authorizes the Governor in Council to grant or transfer only "such lands" as could have been taken by the Province under the relevant statutory authority, in this case, the *Water Act*. In other words, the Governor in Council could only grant the "estate or interest in or easement over land" that was "reasonably required" for the canal. This interpretation of s. 35 is not only consistent with its plain and ordinary meaning, but it is also supported by the principle of interpretation which favours a narrow reading of statutes which limit Indian rights (see para. 67 below).

64 In the result, in the circumstances of this case, because the source of the power to expropriate was the *Water Act*, the discretion to grant "land" pursuant to s. 35(3) was limited to the land or interest in land "reasonably required" for the canal.

65 This raises the question of what type of interest is reasonably required for the canal. The evidence before the Court is insufficient to provide a clear answer. The respondents argue that since the canal is a permanent structure, they therefore must have the exclusive right to use and occupy the land. However, while the canal seems to be a permanent structure on the land, this fact should not be overstated. There was no evidence to indicate what kind of structure the canal is. Stripped to its essence, it is a ditch lined with concrete. Furthermore, it may be inferred that the fee simple to the land was not necessary to construct the canal since no transfer of title was made at the time of its construction. As well, since the canal was already built when the transfer was made,

the interest in question is that which is reasonably required to operate and maintain the canal only. Moreover, it is obvious that the fee simple is not necessary to operate and maintain the canal since those activities are currently the responsibility of the Town of Oliver, which appears to have some kind of leasehold interest in the land. A canal is similar in nature to a railway in that both are permanent structures on the land involving operation and maintenance activities, and this Court has found that a grant of a statutory easement can be sufficient for the purposes of building and maintaining a railway (*Canadian Pacific Ltd. v. Paul*, 1988 CanLII 104 (S.C.C.), [1988] 2 S.C.R. 654, at p. 671). As noted above, as a general matter the Court should be reluctant to take away interests in land in the absence of conclusive evidence.

C. *Did the Order in Council Effect the Removal of Land From the Reserve?*

1. Applicable Principles of Interpretation

66 In my opinion, the Order in Council must be interpreted in light of the following four principles.

67 First, I have already discussed how, in order to extinguish the aboriginal interest in reserve land, the Sovereign's intention to do so must be clear and plain.

68 Second, I agree with Lambert J.A. that if two approaches to the interpretation and application of an enactment are reasonably sustainable as a matter of law, then the interpretation or application that impairs the Indian interests as little as possible should be preferred, so long as the ambiguity is a genuine one, and the construction that is favourable to the Indian interests is one that the enactment will reasonably bear, having regard to the legislative purposes of the enactment: see *Nowegijick*, *supra*; *Mitchell*, *supra*; *Semiahmoo Indian Band*, *supra*, *per* Isaac C.J., at p. 25; and *Sparrow*, *supra*, at p. 1119, *per* Dickson C.J.

69 Third, although the validity of the Order in Council was not challenged in this case, this Court is not required, on that basis, to give legal effect to an unauthorized act of the state. Therefore, it is appropriate in this case to apply a presumption that the Crown acted *intra vires* in making the transfer at issue in this case. Given that the scope of the statutory power to transfer interests in land is constrained by the terms of the *Water Act* in this case, the Governor in Council is presumed to have intended to transfer only that interest "reasonably required" for irrigation canal purposes. This approach is further support for the application of a minimal impairment rule in the context of this appeal.

70 Finally, as noted above, the *sui generis* nature of an aboriginal interest in reserve land justifies the departure from traditional common law property rules in relation to dealings with reserve land. Consequently, the transfer at issue in this case cannot be treated as a regular, commercial transaction. Rather, a non-technical approach to the interpretation of the Order in Council is preferable.

2. What Interest in Land Does the Order in Council Convey?

71 The Order in Council may be interpreted as expressly conveying either a fee simple or a more limited interest, or it may be ambiguous as to what interest has been conveyed.

72 Although I am of the view that the Order in Council is ambiguous as to the nature of the interests conveyed, I would like first to address the respondents' main arguments in support of their view that the Order in Council granted a fee simple interest in the reserve lands.

73 The respondents argue that if the canal lands are considered to be "in the reserve" for the purposes of taxation jurisdiction under s. 83 of the *Indian Act*, then the canal lands would also be subject to the other law-making powers of the Band, allowing the Band to enact by-laws which would interfere with the administration and control of the canal.

74 In response to this argument, I would like to point out that the right of the Band to enact by-laws is not an unfettered one. The general by-law provision of the *Indian Act*, s. 81(1), reads:

> **81.** (1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely, . . .

75 Since s. 35 of the *Indian Act* allows the Governor in Council to take interests in reserve land pursuant to a right of expropriation existing in a provincial or federal statute, if the Band were to enact a by-law incompatible with the interest created pursuant to s. 35, then the by-law would be inconsistent with s. 35 of the *Indian Act* and therefore prohibited by s. 81.

76 The Band's exercise of some of the regulatory powers under s. 81(1) would be compatible with the canal use authorized by the prior exercise of the s. 35 authority (e.g. "the regulation of the conduct and activities of hawkers, peddlers or others who enter the reserve to buy, sell or otherwise deal in wares or merchandise" (s. 81(1)(*n*)) while other provisions may not be (e.g. regulations to govern the maintenance of watercourses, ditches and other public works (s. 81(1)(*f*)).

77 There are numerous other powers in the Act exercisable by the Minister or the Band in relation to reserve lands that would similarly be limited by reason of incompatibility with the prior exercise of the s. 35 power to permit canal purposes on the 56.09 acres. Under s. 19 for example, the Minister may determine the location and direct the construction of roads in a reserve. Section 19 should not be interpreted to authorize a road that interfered with the prior grant of an interest in land sufficient for canal use. Given the paucity of the factual record mentioned above, it is neither possible nor desirable to define the precise limits of the powers of governance exercised by the Minister or the Band in relation to that portion of the reserve set aside for canal use, or other privileges or immunities related to reserve lands. It is sufficient to say that the governing limitation is incompatibility with (or derogation from) the prior exercise of the s. 35 power to permit canal purposes on the lands in question. The Band's power to tax the canal property does not, as such, demonstrate any such incompatibility. Nor does the Band's exercise of its taxation power as set out in the record before us disclose, in this instance, any such incompatibility.

78 I also find the reasoning of Duff J. in *Burrard Power Co. v. The King* (1910), 43 S.C.R. 27, to be apposite in this case. In that case, the Province of British Columbia granted lands to the Dominion for the purpose of building a railway. The Province then purported to issue a water grant to the defendant power company which would interfere with the interest of the Dominion in the railway lands. Duff J. held that since the carrying out of the plan of the power company would involve the dismemberment of the proprietary rights of the Dominion, the

water grant would *ipso jure* cease to apply to the railway lands (pp. 53-54). Similarly, if the Band enacted a by-law which interfered with the administration and control of the canal, such a by-law would interfere with the proprietary rights of the interest-holder, and would *ipso jure*, cease to apply to the canal lands.

79 The respondents argue further that the words "[r]eserving thereout and therefrom all mines and minerals and the right to work the same" in the Order in Council would not be necessary if the grant was merely an easement, and thus that these words indicate the grant of a fee simple interest. Although I acknowledge that this argument, taken by itself, is quite instructive, I agree with the finding of Lambert J.A. at the Court of Appeal that such a reservation had become a boiler plate provision in many Orders in Council under what is now s. 35 of the *Indian Act*, and thus that the reservation of mines and minerals is not conclusive with respect to the nature of the interest granted to the Province, and consequently, does not indicate a clear and plain intention to transfer a fee simple interest when one looks to other factors present in the case.

80 The respondents also point to the fact that the Province filed a Certificate of Indefeasible Title in 1961 to support their argument that the Province held a fee simple interest in the reserve lands. If the unilateral filing of a Certificate of Indefeasible Title four years after the occurrence of the transfer in question is indicative of anything, it indicates the intention of the Province in taking the interest. However, the only intention relevant to the inquiry is that of the grantor of the interest. Section 35 of the *Indian Act* gives the Governor in Council the absolute discretion to define the terms of the transfer, and thus the relevant inquiry is one of determining the intention of the Governor in Council, as evidenced by the Order in Council.

81 I conclude that the Order in Council is ambiguous. There are no clear words of exclusion or limitation that make plain the extent of the interest being transferred. Some phrases in the recitals suggest that a transfer of a fee simple is contemplated ("a portion of Osoyoos Indian Reserve number one"), while others suggest a more restricted interest ("for irrigation canal purposes"). Indeed, the phrase "a portion of Osoyoos Indian Reserve number one" is not necessarily indicative of a fee simple transfer. Given that the law views property as a bundle of rights, that the Order in Council grants "a portion" of the reserve is not inconsistent with the granting of an easement or a right to use the land "for irrigation canal purposes". A right to use the land for a restricted purpose is part of the bundle of rights that make up the property interest in the reserve and so may be referred to as "a portion" of the reserve.

82 In its traditional sense, a "right of way" is a type of easement, and at common law the acquisition of a right of way does not give the holder a fee simple interest or the right to exclusive possession: E. C. E. Todd, *The Law of Expropriation and Compensation in Canada* (2nd ed. 1992). However, as noted by Newbury J.A. in the Court of Appeal, in modern usage the term right of way does not always correspond to the common law concept and in some circumstances may refer to a right to the exclusive use and occupation of a corridor of land. I acknowledge that the term "rights-of-way" can have two meanings and that the degree of occupation will be governed by the document conceding the grant. However, it is not clear from the context in which it appears in the Order in Council whether the term "rights-of-way" necessarily refers to an easement as it is traditionally known, or some greater interest in a corridor of land.

83 The Description refers to three different rights of way: that occupied by the canal, that occupied by a road, and that occupied by a power transmission line. Only the power line right of way is clearly identified as a "prior Grant of Easement", but that does not, by comparison, necessarily render the other two rights of way something other than an easement. The Order in Council is ambiguous as there are no words which conclusively indicate either an exclusive interest, or a more limited interest when considering all the relevant factors. Indeed, if anything, the words "for irrigation canal purposes" in the recitals colour the description that follows and operate as

words of limitation.

84 In finding that the Order in Council removed the land from the reserve, the majority of the Court of Appeal relied in part on the fact that there was no indication that the Province was acquiring anything less than exclusive rights to the land. However, this approach is contrary to the clear and plain intention test for extinguishment. While express language is not strictly necessary, courts should not take away an aboriginal interest in land by implication unless clearly and plainly supported by context.

85 Turning to the operative words of transfer in this case, the Order in Council refers to the "taking" of the said lands and not merely the right to use the said lands. I agree with my colleague, Gonthier J., when he points out that the *Black's Law Dictionary* (6th ed. 1990), meaning of "take" can include ownership (see para. 129). But, as my colleague acknowledges, it can also include interests less than ownership. This highlights that the word "take", as used here, is ambiguous, in particular when one looks to all the other aspects of the Order in Council.

86 To elaborate further, the word "take" in relation to land does not necessarily refer to the acquisition of full title. Rather, *The Dictionary of Canadian Law* (2nd ed. 1995) defines "take lands" as including to "enter upon, take possession of, use and take lands for a limited time or otherwise or for a limited estate or interest". Similarly, several courts including this one have acknowledged that a "taking" of land includes the acquisition of possession and other interests less than full title: see *The Queen in right of British Columbia v. Tener*, 1985 CanLII 76 (S.C.C.), [1985] 1 S.C.R. 533, at p. 563; *Manitoba Fisheries Ltd. v. The Queen*, 1978 CanLII 22 (S.C.C.), [1979] 1 S.C.R. 101, at pp. 109-10, citing *Belfast Corp. v. O.D. Cars Ltd.*, [1960] A.C. 490 (H.L.), at p. 523; *Saskatchewan Land and Homestead Co. v. Calgary and Edmonton Railway Co.* (1913), 14 D.L.R. 193 (Alta. S.C.), at p. 197, affirmed (1915), 51 S.C.R. 1; *Canada (Attorney General) v. Canadian Pacific Ltd.* 2000 BCSC 933 (CanLII), (2000), 79 B.C.L.R. (3d) 62, 2000 BCSC 933.

87 The use of the term "land" is not determinative of the scope of the interest being conveyed because the legal definition of "land" includes "interests in land". This is true of the definition found in legal dictionaries and virtually every statutory definition, federal or provincial, of the term "land". Furthermore, the recitals state that the Minister "has applied for the lands hereinafter described" and that the Governor General in Council "is pleased hereby to consent to the taking of the said lands". Thus, the recitals clearly refer to the Description as containing the details of the interest in land being transferred. In this connection, it is most significant that the Description uses the term "rights-of-way", rather than referring to the metes and bounds of parcels of land.

88 Furthermore, the words "transfer the administration and control" in the Order in Council are not determinative of the nature of the interest acquired by the Province in this case. Administrative powers can be ancillary to an easement for irrigation purposes. This is not the language of a fee simple transfer. The transfer of administrative control from one emanation of the Crown to another is not an alienation: see *British Columbia (Attorney General) v. Mount Currie Indian Band* reflex, (1991), 54 B.C.L.R. (2d) 156 (C.A.), at p. 190; *Attorney General of Canada v. Western Higbie*, 1944 CanLII 29 (S.C.C.), [1945] S.C.R. 385, at pp. 402-3. Moreover, the transfer of administrative control over reserve land from the federal to the provincial Crown does not *per se* remove the land from a reserve. Reserve land can be, and is in many cases, held by a province for the benefit of an Indian band.

89 To summarize, the Order in Council is ambiguous as to the nature of the interest conveyed. It is consistent with the granting of either a fee simple, or a statutory easement for irrigation canal purposes. In light of such ambiguity, resort must be had to the interpretive principles applicable to questions dealing with Indian interests, and the interpretation which impairs the Indian interests as little as possible is to be preferred. Thus, the Order in Council should be read as granting a statutory easement to the Province.

VII. Conclusion

90 I conclude that the Order in Council is ambiguous as to the nature of the interest transferred. It does not evince a clear and plain intent to extinguish the Band's interest in the reserve land. An interpretation of the instrument as granting only an easement over or right to use the canal lands is both plausible and consistent with the policies of the *Indian Act* relating to taxation (s. 83(1)(*a*)) and expropriation (s. 35). This interpretation is consistent with the minimal impairment of the Band's interest in reserve land. Accordingly, I find that the Order in Council effected a grant of an easement over the land occupied by the canal and did not take away the whole of the Band's interest in the reserve. Therefore, the canal land is still "in the reserve" for the purposes of s. 83(1)(*a*).

91 I would allow the appeal, set aside the judgment of the British Columbia Court of Appeal, and substitute therefor an order declaring that the canal land is in the reserve for the purposes of s. 83(1)(*a*). Since the appellant did not seek costs, I refrain from making an order for costs.

The reasons of L'Heureux-Dubé, Gonthier, Major and Bastarache JJ. were delivered by

92 GONTHIER J. (dissenting) -- The present appeal is concerned with the authority of the Osoyoos Indian Band to tax land within the perimeter of its original reserve on which an irrigation canal was constructed and is now in operation. This land was the subject of an Order in Council which effected an expropriation of the land under the authority of s. 35 of the *Indian Act*, R.S.C. 1952, c. 149, in favour of the Province of British Columbia.

I. Facts

93 The Province of British Columbia built an irrigation canal in 1925 on the Osoyoos Indian Reserve Number 1, the reserve of the appellant Osoyoos Indian Band. In 1957, the Governor in Council adopted Order in Council P.C. 1957-577 pursuant to s. 35 of the *Indian Act* with respect to these lands. The Order in Council provided as follows:

> WHEREAS the Minister of Agriculture for the Province of British Columbia has applied for the lands hereinafter described, being a portion of Osoyoos Indian Reserve number one, in the said Province for irrigation canal purposes;
>
> AND WHEREAS the sum of $7,700 has been received from the Province of British Columbia in full payment for the land required in accordance with a valuation approved by the Band Council of the Osoyoos Band of Indians on the 30th of March, 1955 and officials of the Indian Affairs Branch;
>
> THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Minister of Citizenship and Immigration, pursuant to the provisions of Section 35 of the Indian Act, is pleased hereby to consent to the taking of the said lands by the Province of British Columbia and to transfer the administration and control thereof to Her Majesty the Queen in right of the Province of British Columbia:

DESCRIPTION

The whole of those rights-of-way, in Osoyoos Indian Reserve number one, in the province of British Columbia, said rights-of-way containing together by admeasurement fifty-six acres and nine hundredths of an acre, more or less, as said rights-of-way are shown bordered red on a plan of record number Irr twenty-one hundred and thirty-four in the Indian Affairs survey records at Ottawa; saving and excepting thereout and therefrom all that portion lying within a right-of-way for a road, as the last aforesaid right of way is shown bordered red on a plan of record number Rd thirty-six hundred and eighty in said records, a copy of which is deposited in the Land Registry Office for the district of Kamloops at Kamloops under number A thirteen hundred and seventy-seven; also saving and excepting thereout and therefrom all roads reserved by the Province of British Columbia by provincial order-in-council number one thousand and thirty-six, also subject to a prior Grant of Easement for a Power Transmission Line granted to West Kootenay Power and Light Company Ltd. by Order-in-Council P.C. 143 dated January 25, 1937, for a term of thirty years, this right-of-way containing by admeasurement 22 acres and two-tenths of an acre, more or less, and is shown on a plan of survey by R.P. Brown, B.C.L.S. dated November 16, 1936 and which is of record in the Indian Affairs Branch as Plan No. M. 2691.

Reserving thereout and therefrom all mines and minerals and the right to work the same.

94 In 1961, the Province of British Columbia registered the land by way of Certificate of Indefeasible Title. At the time of this appeal, the land is used for irrigation purposes and the fee is vested in the Province. The respondent Town of Oliver continues to operate and maintain the canal.

95 In 1994, the appellant passed property assessment and taxation by-laws pursuant to s. 83 of the *Indian Act*, R.S.C. 1985, c. I-5. In order to determine whether these apply to the lands in question, it brought this case, stated by the Osoyoos Indian Band Board of Review pursuant to s. 80(1) of the Osoyoos Indian Band Property Assessment By-law P.R. 95-01. The Board sought the opinion of the court on two questions:

1. Are lands, taken pursuant to s. 35 of the *Indian Act*, "land or interests in land" in a reserve of a Band within the meaning of s. 83(1)(*a*) of the *Indian Act* such that those lands are assessable and taxable pursuant to Band Assessment By-laws and taxable pursuant to Band Taxation By−laws?

2. If s. 35 of the *Indian Act* authorizes the removal of lands from reserve status, does federal Order in Council 1957-577, by which the Lands were transferred, remove the Lands from reserve status so that they are not assessable and taxable by the Osoyoos Indian Band?

96 The case, as stated, does not raise issues as to breaches of the Crown's fiduciary obligation, the validity and legitimacy of the Order in Council or the constitutionality of s. 35 of the *Indian Act*. There also is no evidence in this case of the existence of aboriginal title or treaty rights in the lands in question. Nor are any claimed. The case as stated -- and this decision -- do not therefore purport to address the effect of s. 35 of the *Indian Act* on reserve lands which are also subject to aboriginal title or treaty rights.

II. Relevant Statutory and Constitutional Provisions

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

2. (1) In this Act,

. . .

(*o*) "reserve" means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band;

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.

(3) Whenever the Governor in Council has consented to the exercise by a province, authority or corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without the consent of the owner, authorize a transfer or grant of such lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.

(4) Any amount that is agreed upon or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General of Canada for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).

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

83. (1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,

(*a*) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve;

Water Act, R.S.B.C. 1948, c. 361

21. (1) In this and the following three sections "land" includes any estate or interest in or easement over land.

(2) Every licensee shall have the right to expropriate any land reasonably required for the construction, maintenance, improvement, or operation of any works authorized under his licence, and the holder of any licence that authorizes the diversion of water for domestic purpose or waterworks purpose shall have the right to expropriate, in addition, any land the control of which by the licensee would help to prevent pollution of the water authorized to be diverted, and, with the consent of the Lieutenant-Governor in Council, the holder of any licence that authorizes the construction of a dam shall have the right to expropriate, in addition, any land that would be flooded if the dam were constructed and utilized to the maximum height authorized. The owner of land so expropriated shall be compensated therefor by the licensee, and the procedure to be followed in expropriating land and the method of determining the compensation shall be as prescribed in the regulations.

Constitution Act, 1982

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

III. Judgments

A. *British Columbia Supreme Court* 1997 CanLII 3720 (BC S.C.), (1997), 145 D.L.R. (4th) 552

98 Mackenzie J. noted that the Minister of Agriculture, who applied for the land for irrigation purposes, did not rely on s. 21 of the *Water Act* to expropriate formally. A formal expropriation would have been the first step that, together with the Governor in Council's consent, would have brought the expropriation under s. 35(1). Rather, the Governor in Council acted under s. 35(3) of the *Indian Act* in consenting to the Minister's application for the land.

99 Mackenzie J. concluded that s. 35(3) can remove lands from the reserve with the result that these are not taxable as land in the reserve under s. 83 of the *Indian Act*. He cited the Court of Appeal decision in *St. Mary's Indian Band v. Cranbrook (City)*, 1995 CanLII 555 (BC C.A.), [1996] 2 C.N.L.R. 222 (B.C.C.A.), as authority for the proposition that a fee simple is incompatible with lands remaining in the reserve.

100 Citing the principle of indivisibility of the Crown, he noted that the Order in Council need not be accompanied by a deed or other formal conveyance of title to the land. Mackenzie J. quoted, at para. 4, from Paul Lordon, Q.C., *Crown Law* (1991), at p. 283:

> Her Majesty is the owner of the property whether in right of Canada or the province and cannot grant to Herself. Only administrative control of the property passes. The transfer is, therefore, made by reciprocal Orders in Council and is confirmed by statute where third party rights are involved.

101 With respect to whether in fact the Order in Council did effect the transfer of a fee, Mackenzie J. put a great deal of weight on the fact that there were no words of limitation in the Order in Council. No conditions were included in the Order, nor were there restrictions on the extent of the transfer of administration and control. In his view, the transfer in question was a transfer of administration and control unlimited in time equivalent to an absolute fee or a fee determinable on the lands ceasing to be used for irrigation purposes (as the land was still being so used he did not have to decide which it was). He concluded that while administration and control of the lands remained with the Province, the lands were not part of the reserve, and the appellant had no jurisdiction to tax them.

102 Mackenzie J. further examined whether the reservation of the mines and minerals in the Order in Council left a taxable interest with the Band. He concluded that, regardless of the taxable interest in the mines and minerals themselves, such a reservation could not support a taxable interest in the surface.

B. *British Columbia Court of Appeal* 1999 BCCA 297 (CanLII), (1999), 172 D.L.R. (4th) 589

1. Newbury J.A. for the Majority (Prowse J.A. Concurring)

103 Newbury J.A. disposed of the case on principles of statutory and documentary construction. She refused to consider the effect of aboriginal title in her analysis on the grounds that there was no evidence to indicate that aboriginal title subsisted in the particular lands in question. In other words, counsel for the Band did not attempt to prove occupancy by the Band of the land in question.

104 In understanding the nature of the Band's jurisdiction to tax, Newbury J.A. rejected the drawing of an analogy from an aboriginal band to a municipality. A municipality's right to tax land is dependent on the geographical location of the land within the boundaries of the municipality, regardless of ownership or use. In contrast, the right to tax under the *Indian Act* is limited to land that meets the statutory definition of "reserve" land. Newbury J.A. concluded, at para. 87, that "reserve land that is expropriated and used for a *public* purpose is no longer land held for the benefit of a band but is land held for other purposes" (emphasis in original).

105 In interpreting s. 35 of the *Indian Act*, Newbury J.A. found that it did in fact incorporate statutory powers of expropriation of reserve land, which forced taking does not require the consent of the owner.

106 For the majority of the Court of Appeal, the critical issue to be resolved in this case was whether the "taking" effected by the Order in Council was such that the land was no longer land in the reserve. In deciding whether the Order in Council gave the Province only a right of way or something greater, Newbury J.A. recognized that special considerations apply where Indian reserve lands are concerned. She held, at para. 92, that as a rule of construction: "where ambiguous or unclear words are used in an instrument or enactment, the matter must be resolved in favour of the Indians as it is assumed the Crown would not breach its fiduciary duty". She noted that this is consistent with the rule of construction in expropriation law that ambiguities be decided in favour of the owner of the land. In addition, a technical or formalistic approach is inappropriate to the adjudication of disputes relating to native land.

107 In interpreting the Order in Council, she found that the evidence indicates that the provincial Crown took more than a right of way in 1957. In 1961, the Province took the steps necessary to register indefeasible title to the subject lands in its own name. Further, the lands were leased to the respondent Town of Oliver, implying exclusive possession and occupation of the lands. In her view, if a right of way had been intended, a right to the "use" of the land rather than to "the land" itself would have been specified.

108 Newbury J.A. acknowledged, at para. 97, that under the heading "Description" the Order in Council refers to "the whole of those *rights-of-way*" but went on to find that the term "right-of-way" did not create ambiguity in the Order.

109 Newbury J.A. reviewed both aboriginal and non-aboriginal case law regarding easements and stated the question to be determined as follows, at para. 104: "does the Order in Council . . . grant rights that are consistent with exclusive use by the Province or does it simply grant some rights or benefits that 'to some extent detract' from continuing rights of the Band?" (*Shelf Holdings Ltd. v. Husky Oil Operations Ltd.* reflex, (1989), 56 D.L.R. (4th) 193 (Alta. C.A.), leave to appeal denied, [1989] 1 S.C.R. xiv).

110 In answering this question, Newbury J.A. opined that the Order in Council granted "exclusive rights of enjoyment and possession that are inconsistent with the lands continuing to be held by Her Majesty in right of Canada 'for the use and benefit of [the] Band'" (para. 105). Newbury J.A., in support of this conclusion, noted that the Order in Council referred to "the taking of the said lands", not simply the right to use or pass over the lands; there was no indication that the Province acquired anything other than exclusive rights; and the Order in Council clearly stated that "administration and control" of the lands was to be transferred to the Province from the federal government.

111 In the result, Newbury J.A. stated, at para. 107:

> In summary, I agree with the Chambers judge that the Order in Council of 1957 did not contemplate the expropriation of a mere right of way, but of "the lands" themselves, which were thereby removed from the reserve. I say this on a non-technical view of the wording used, although the same conclusion is supported by the ordinary common law rules, reviewed above, applicable to rights of way and easements. In this case, there is no dichotomy, and the Order in Council is not ambiguous or ultimately unclear.

Newbury J.A. dismissed the appeal.

2. Lambert J.A., Dissenting

112 Lambert J.A. differed markedly from the majority in that he found that the case necessitated consideration of aboriginal title issues. He restated the first question, at para. 3:

> *The first question* asks whether, after a taking of land in a reserve under s. 35 of the *Indian Act*, the aboriginal title of the Indians, at the very least, still remains in the hands of the Indians and whether, if so, the land taken is still land or an interest in land *in the reserve* so as to be amenable to taxation of land and improvements under s. 83 of the *Indian Act*. This first question is a question about the nature of aboriginal title. [Emphasis in original.]

113 Lambert J.A. asserted, essentially, that the Indian interest in reserve land is the same as aboriginal title (and thus subject to the same principles for extinguishment). He also advanced an alternative; he held that as a matter of fact, aboriginal title exists in reserves in British Columbia. As there was no evidence of this, he relied on judicial notice, in para. 35:

> . . . it would be perverse in this case not to take judicial notice of the fact that Indian reserves in British Columbia were assigned in relation to intensive occupancy areas such as village sites and fishing grounds that had been occupied since before the assertion of British sovereignty. And, as a matter of law, Chief Justice Dickson said in *Guerin* that the Indian interest in reserve land is the interest constituted by aboriginal title.

114 In answering the first question, as he conceived of it, he applied to s. 35 the test for the extinguishment of aboriginal title and found that this section did not clearly and plainly extinguish title. In the result, he concluded that aboriginal title remains in the land or interest in land taken. As the land in question is within the geographical boundaries of the reserve and is subject, in his opinion, to aboriginal title, it is land in the reserve for the purpose of taxation under s. 83.

115 Lambert J.A. noted that the second stated question assumes that s. 35 of the *Indian Act* authorizes the removal of land from the reserve by expropriation. Proceeding on this assumption, Lambert J.A. held that the Order in Council transfers administration and control to the Province of the equivalent of a statutory easement and that it does not transfer an interest like a fee simple. Alternatively, he held that the Order in Council is ambiguous, and that the proper conclusion, based upon the principles of statutory interpretation relating to Indian land, the factual matrix in this case and the internal evidence from the Order in Council, was that the transfer of administration and control was sufficient only to confer all rights needed to operate and maintain the canal, yet

leave the Band with its interest in the reserve land minimally impaired. The remaining interest would be sufficient to support land taxation powers of the Band. Thus he would have allowed the appeal.

IV. Analysis

116 This case is focussed on whether s. 35 of the *Indian Act* can exact the removal of land from a reserve. The context within which this issue is considered is the application of s. 83(1)(*a*), which grants bands jurisdiction to tax land within their reserves.

117 Section 83(1)(*a*) provides:

> Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by−laws for any or all of the following purposes, namely,
>
> (*a*) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve;

118 The question that must ultimately be answered in this case is whether, for the purposes of s. 83(1)(*a*), the land on which the irrigation canal is located is within the reserve so that the Osoyoos Indian Band can tax the land.

119 It bears keeping in mind that the power to tax is important to the management of reserve territory. As Lamer C.J. put it in *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (S.C.C.), [1995] 1 S.C.R. 3, at para. 18:

> . . . it is important that we not lose sight of Parliament's objective in creating the new Indian taxation powers. The regime which came into force in 1988 is intended to facilitate the development of Aboriginal self-government by allowing bands to exercise the inherently governmental power of taxation on their reserves.

120 That said, the extent of an aboriginal band's power to tax cannot be understood by analogy to the taxation powers of other forms of government. A municipality, like an aboriginal band, has a statutory basis for its jurisdiction to tax. Under the *Municipal Act*, R.S.B.C. 1996, c. 323, however, jurisdiction to tax is a function of the geographical boundaries of the municipality as specified by statute and is not a function of the municipality's having an interest in the land through, for example, ownership or use.

121 In contrast, the *Indian Act* creates a power to tax reserve lands which is limited to such lands that are within the reserve. What constitutes land that is within the reserve is determined wholly by reference to those provisions within the Act that set out when the land loses its statutory status as "reserve" land.

122 This brings us to the first of the two stated questions in this case. Simply put, is a taking of a fee simple under s. 35, like an absolute surrender under ss. 38 and 39, one way in which the interest in reserve land is brought to an end?

A. *Issue #1: Does Section 35 Effect the Extinguishment of Aboriginal Interest in Reserve Land?*

1. Introduction

123 It is clear, as I conclude below, that s. 35 allows for the expropriation of a fee. In my view, the conveyance of full ownership, whether by way of absolute surrender or by way of non-consensual taking ("expropriation") under s. 35, strips the land in question of its statutory status as "reserve" land. It is less important to focus on the means (surrender or expropriation) by which full ownership to reserve land falls into the hands of a third party than to acknowledge the result. In an expropriation of a fee, as in a surrender for sale, the critical change is in how the land is held: a third party (neither the band nor the federal Crown for the band) has full ownership of the land.

2. Interpreting Section 35

(a) *Rules of Interpretation*

124 What rules and principles inform this Court's interpretation of s. 35 of the *Indian Act*, given that aboriginal interest in reserve land is affected? In *Mitchell v. Peguis Indian Band*, 1990 CanLII 117 (S.C.C.), [1990] 2 S.C.R. 85, at pp. 142-43, La Forest J. provides guidance for the proper interpretation of the *Indian Act*:

> I note at the outset that I do not take issue with the principle that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. . . .
>
> Whereas a treaty is the product of bargaining between two contracting parties, statutes relating to Indians are an expression of the will of Parliament. Given this fact, I do not find it particularly helpful to engage in speculation as to how Indians may be taken to understand a given provision. Rather, I think the approach must be to read the Act concerned with a view to elucidating what it was that Parliament wished to effect in enacting the particular section in question. [Emphasis added.]

125 While it is clear that the intent of Parliament in enacting a given provision is central to the interpretation of the *Indian Act*, Parliament's intent should be construed as generously as the Act allows. This too was acknowledged by La Forest J. in *Mitchell*, *supra*, at p. 143:

> This approach is not a jettisoning of the liberal interpretative method. As already stated, it is clear that 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.

(b) *Interpretation of Section 35*

126 With this in mind, can the provisions of s. 35 of the *Indian Act* be interpreted so as to permit the removal of land from a reserve by the taking of full ownership? The short answer is yes. Such a taking, in effect, amounts to the non-consensual equivalent of absolute surrender (provided for in ss. 37-39 of the *Indian Act*).

127 There are two ways of expropriating under s. 35: s. 35(1), which extends general powers of expropriation to an aboriginal context; and s. 35(3), which is in fact a transfer or a grant by the federal government to one of the eligible bodies seeking to expropriate rather than, strictly speaking, an expropriation.

128 Section 35(1) incorporates general expropriation legislation, such as the *Water Act*. In other words, where existing legislation authorizes the Province to "take or to use" land without the consent of the owner, reserve land too can be taken or used without the Band's consent. The salient difference between expropriation authorized under s. 35(1) of the *Indian Act* and expropriation of non-aboriginal lands under such legislation is that the Governor General's consent is required where reserve lands are taken.

129 The parties debated whether the word "taking" refers unambiguously to the acquisition of a fee simple interest. "Take" is defined in *Black's Law Dictionary* (6th ed. 1990) as follows:

> To lay hold of; to gain or receive into possession; to seize; to deprive one of the use or possession of; to assume ownership. Thus, constitutions generally provide that a person's property shall not be taken for public uses without just compensation. [Emphasis added.]

130 In my view, a restrictive interpretation of "take" as permitting the assumption of only a lesser interest in the land is contrary to the plain or ordinary meaning of the text of s. 35(1) of the *Indian Act*. Section 35(1) reads:

> 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.

131 On a plain and ordinary reading of s. 35(1), it imports the powers of expropriation that are granted in ordinary expropriation legislation; thus it allows the taking of no more than what the legislation permits in the non-Indian context. Thus, either a fee or a lesser interest may be "taken". In other words, s. 35(1) incorporates the limits in the provincial legislation as to the extent of the interest that can be acquired by the expropriating body. It is, of course, open to the Governor in Council to impose terms on the expropriation beyond the limitations found in the legislation, as it sees fit.

132 In this case, the document that draws upon s. 35 to effect the taking of land previously in the reserve is the Order in Council of 1957. The language of the third paragraph closely mirrors that of s. 35(3). Its opening line indicates the Governor in Council, having given its consent to an act of expropriation by the Province, has chosen to grant outright the required tract of land:

> THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Minister of Citizenship and Immigration, pursuant to the provisions of Section 35 of the Indian Act, is pleased hereby to consent to the taking of the said lands by the Province of British Columbia and to transfer the administration and control . . . .

Thus, the subsection with which we are concerned in this case is s. 35(3), as Mackenzie J. found at the Supreme Court of British Columbia, rather than s. 35(1).

133 Section 35(3) is an alternate route to the expropriation of reserve land. Where the body obtained the Governor in Council's consent to exercise a given power of expropriation under s. 35(1), it is open to the federal government to convey the land sought subject to any terms it seeks to impose. Consent to a proposed taking under s. 35(1) thus stands as a condition precedent to land's being transferred under s. 35(3).

134 There are a few, salient differences between s. 35(1) and (3) that merit mentioning. First, a taking under s. 35(1) is subject to all of the procedural limits that are contained in the expropriation legislation of general application but a transfer under s. 35(3) is not. That is, s. 35(2) ("procedure"), which declares that the general expropriation legislation governs all matters relating to the expropriation under s. 35(1), does not apply to s. 35(3). Also, the extent of the power to be exercised in a forced taking under s. 35(1) is subject at least to those substantive limits found in the expropriation legislation. Again, s. 35(3) operates somewhat differently. Once the government, having consented to a s. 35(1) expropriation, chooses to proceed under s. 35(3), it is free to transfer full ownership. It is for the government to decide, governed by its fiduciary obligations, the appropriate limits to the amount of land and the nature of the interest in land that it is transferring.

135 Without detailing the content of the Crown's fiduciary obligation, which will vary with the facts, it is fair to assume that the legislation that would guide a s. 35(1) expropriation might inform the extent of the interest and the tract of land that the government ought to transfer in keeping with its fiduciary obligation. In this respect, I agree with my colleague Iacobucci J.'s views expressed under the heading "The Content of the Crown's Fiduciary Duty in the Context of Section 35", though in this case, I cannot agree that the Crown's fiduciary obligation regarding its adoption of the Order in Council included a duty to protect an Indian interest in expropriated land sufficient to preserve the Band's taxation jurisdiction. The Band had no taxation jurisdiction to preserve in 1957, when the Order in Council was adopted. (The power to tax real property came into effect with the passage of what became s. 83 of the *Indian Act*, R.S.C. 1985, c. I-5, which allowed a band a limited power to tax contingent on a declaration by the Governor in Council that the "band has reached an advanced stage of development". It was not until the 1988 amendment to s. 83 (S.C. 1988, c. 23, s. 10) that all bands were given the broad jurisdiction to tax as exercized by the Band.)

136 In this case, the statute that would have governed in a parallel, non-aboriginal context is the *Water Act*. Section 21(2) of this Act authorized the taking of only that land that is "reasonably required". This limit on what could be expropriated does not apply just to how much land can be taken, but also to the nature of the interest in land that can be had. This is made abundantly clear by s. 21(1), which states that: "In this [s. 21] and the following three sections 'land' includes any estate or interest in or easement over land". Clearly, then, it is to be understood that s. 21 does not authorize taking a fee (simple or determinable) when a right of way over the surface will do. That said, it is equally plain that s. 21 does authorize the taking of a fee simple when that is reasonably required.

3. The Analogy Between Absolute Surrender and Expropriation

137 Given that s. 35 clearly authorizes the taking of a fee, what is the effect of such an expropriation on the Band's interest in the lands taken? The effect of expropriation of a fee under s. 35 is analogous to the effect of absolute surrender. This Court has stated unequivocally that, when a band surrenders reserve land absolutely, its interest in the reserve ceases to exist.

138 In my opinion, nothing turns on the distinction between absolute surrender by consensual sale and a non-consensual expropriation of a fee simple insofar as we are concerned with the continuation of the Band's

reserve interest in the land. This conclusion follows closely the reasoning of this Court in past cases where it has indicated that the effect of expropriation can be to remove the reserve land from the reserve. In *Opetchesaht Indian Band v. Canada*, 1997 CanLII 344 (S.C.C.), [1997] 2 S.C.R. 119, at para. 86, for example, McLachlin J. (as she then was), dissenting, stated:

> 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 so requires, interests in reserve land may be expropriated: s. 35.

139 Major J. for the majority in the same case, also observed that s. 35 has very much the same effect on aboriginal interest in reserve lands as the absolute surrender provisions (at para. 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". [Emphasis added.]

140

A similar understanding of the expropriation provision is found in *Smith v. The Queen*, 1983 CanLII 134 (S.C.C.), [1983] 1 S.C.R. 554, at p. 577, where Estey J., for the Court, stated:

> It is interesting to note that in s. 35 provision is made for the expropriation of the Indian interest by either level of government with the proceeds received therefrom being held by the Receiver General of Canada for the benefit of the Indians whose possessory title has been removed. [Emphasis added.]

141 According to the intervener the Attorney General of Canada, the fundamental difference between expropriation and surrender is that "a surrender requires the consent of the Indian band whose reserve land is being surrendered, while s. 35 has no statutory requirement for band consent to a disposition of the Indian interest in reserve lands" (factum, at para. 55). This distinction has led the appellant to conclude that surrender authorizes the removal of reserve status while expropriation does not.

142 I do not find this argument compelling. Given that Parliament has chosen to allow for the application of expropriation legislation to Indian reserves, it would simply be to undo this decision were the Band's consent required; expropriation, by definition, is the forced taking of land without the consent of the owner (or in this case the person for whose benefit the land is held). In the absence of some constitutional challenge to the terms of s. 35 of the *Indian Act* (and it bears emphasizing that no such challenge is made here), the absence of provision for the Band's consent to an expropriation does not speak to the effect of the expropriation on the Band's interest.

4. The Effect of Expropriation/Surrender

143 The effect of expropriation of a fee or of an absolute surrender is that the land so dealt with ceases to be within the reserve. As Lamer C.J. noted in *St. Mary's Indian Band v. Cranbrook (City)*, 1997 CanLII 364 (S.C.C.), [1997] 2 S.C.R. 657, at para. 28, the Kamloops Amendments (S.C. 1988, c. 23) were intended to ensure that "land surrendered for sale (or other means similar to sale) remain beyond the definition of

reserve" (first emphasis in original; second emphasis added). In *Musqueam Indian Band v. Glass*, 2000 SCC 52 (CanLII), [2000] 2 S.C.R. 633, 2000 SCC 52, at para. 16, McLachlin C.J. (dissenting but not on this point) stated that: "Once reserve land is surrendered to the Crown, it loses all the characteristics of reserve land". I stated, for the majority, at para. 35: "A freehold value for the Musqueam lands must be hypothetical because there is no such thing as freehold title on a reserve". In other words, the very notion that land that might initially have been on the reserve is now held in fee (other than by the federal Crown for the use and benefit of the Band) is incompatible with the land's being "in the reserve".

144 It ought to be noted that the effect of an expropriation of a fee under s. 35(1) or 35(3) is not necessarily different because the fee, in traditional common law parlance, is "determinable". In the absence of a term or condition specifying a reversionary interest in favour of the Band, it could be, and was in this case, argued that the expropriation under s. 35 for a public purpose contains the implicit condition that it be returned where it ceases to serve a public purpose. On considering both the analogy between surrender and expropriation and the general law of expropriation, I reject this argument.

145 In *St. Mary's Indian Band*, *supra*, the surrender of land for an airport specified as a condition that the land be returned when it is no longer being used for a public purpose. The Court refused to acknowledge that such a condition belied the absolute nature of the surrender, at pp. 669-70:

> I do not find that the "cease[d] to be used for public purposes" stipulation frustrates this conclusion. In other words, I am not persuaded by the appellants' position that the mere fact that the band included a rider in its surrender necessarily means that the surrender was other than absolute. "Absolute" and "conditional" are not mutually exclusive terms -- either conceptually or under the scheme of the *Indian Act*. Indeed a key element of both the 1952 and 1988 versions of the *Indian Act* is that they expressly provide that a surrender can be both absolute and conditional. Section 38(2) of the 1952 *Indian Act* provided:
>
> **38.** . . .
>
> (2) A surrender may be absolute or qualified, conditional or unconditional.
>
> Section 38(1) of the 1985 *Indian Act* similarly states:
>
> **38.** (1) A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.
>
> Not only does this show that my interpretation of the airport lands surrender has been long contemplated in the *Indian Act*, but it also suggests, with respect, that Spencer J. was wrong to resort to a dictionary in order to distinguish between an absolute and a qualified surrender. For Spencer J. to have concluded that an absolute surrender is one without limits is to deny the *Indian Act* reality that there can be conditions to an absolute surrender. [Emphasis added.]

146 Thus in *St. Mary's Indian Band* the Court found that the explicit inclusion of a "rider", namely that the land would revert on its no longer being used for public purposes, did not make the surrender less than absolute. The way in which the expropriation of a fee operates similarly to extinguish reserve interest encourages an analogous conclusion in the context of expropriation of a fee determinable. Given in this case that there are not any explicit conditions attached to the expropriation and that there is at best an implicit condition grounded in the possible impermanence of the public purpose motivating the expropriation, there is even less reason here to find that a reserve interest survives the expropriation.

147 In rejecting the "public purpose" limitation to a s. 35 expropriation, I think it is worth mentioning that it would be entirely alien to the general law of expropriation to interpret the taking of a fee as inherently determinable on account of the possibility of its initial purpose being exhausted. The intervener Squamish Indian Band appears to base its finding of such an implied condition on practical considerations. It argues that it would be unjust and wasteful were an expropriating body able to take land for a certain purpose, which land it then abandons on the completion of the purpose. That technological and social advances might render public works obsolete has been recognized by this Court before. For example in *Opetchesaht Indian Band*, *supra*, at para. 27, Major J. noted that:

> 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.

148 While this is all very true, it in no way follows that the land is wasted after its initial term of public use is up. It is open to the government to use the land for a different public purpose or for it to set aside the land once again for the use and benefit of the band from which it was taken. It is quite clear, however, that the *Indian Act*, as it stands now, does not impose an obligation to return the land or to take it only subject to a reversionary interest for the benefit of the band. Whether the Governor in Council is under a fiduciary obligation to set a condition of return as a term of its expropriation under s. 35 is simply not before the Court here.

149 The general law of expropriation is itself entirely a creature of statute: see *Rugby Joint Water Board v. Shaw-Fox*, [1973] A.C. 202 (H.L.), and E. C. E. Todd, *The Law of Expropriation and Compensation in Canada* (2nd ed. 1992), at p. 27. In Todd's book at p. 29, he notes that "a power of expropriation conferred for a particular purpose ceases to exist upon the completion of that purpose". This in no way lends support to the notion that a reversionary interest ought to accompany every expropriation for a public purpose where the public work is not guaranteed to last in perpetuity. Rather it means simply that the government's ability to first exercise a power to expropriate is coterminous with the need for the land for the public purpose. In other words, as a matter of common sense, if the purpose is exhausted before the power is exercised, then it really is too late to invoke the power to expropriate for that purpose. On the other hand, once the power to expropriate is exercised and the land taken, the completion of the initial purpose is irrelevant.

150 It would be foreign to the law of expropriation to introduce a condition of perpetual use that is external to the legislation. Where the statute itself does not contain such a limitation, it is enough for the land to be taken absolutely if, at the time of the taking, the public body requires the land absolutely for its legitimate purpose. In the absence of further circumscription of the ordinary law of expropriation in its application to Indians, there are no legal consequences flowing from the completion of a work's original purpose.

5. Support for This Interpretation of Section 35

151 Interpreting s. 35 as authorizing the removal of land from the reserve is consistent with the purpose of the provision, as reflected in the following parliamentary debate:

> Now, the basis for this section [now s. 35] is in the old Act and it continues the authority of the

> parliament of Canada, a provincial legislature, a municipal or legal authority or corporation, which by its authority has power to expropriate land. It may continue to have that right subject to the consent of the Governor in Council, subject to such terms as may be prescribed. This is a continuation of the previous discussion [relating to s. 28(2)] on the temporary use of land on the reserve. This is permanent expropriation of land on the reserve for public utilities and matters of that kind.
>
> As I say the conference did not object to it. They understood that Indian reserve lands should be subject to the same form of expropriation that other lands in Canada have by the body having that purpose. [Emphasis added.]
>
> (*Minutes of Proceedings and Evidence*, No. 3, of the Special Committee appointed to consider Bill No. 79, *An Act Respecting Indians*, April 18, 1951, at p. 92).

152 Practical considerations also support the conclusion that an expropriation of a freehold interest extinguishes the interest in the reserve. A major project like an irrigation canal, railway track, highway or airline landing strip generally requires outside investment. Were an aboriginal interest in land that is expropriated for such a purpose to continue to burden the land even after a taking of a fee, it would be difficult or impossible to grant potential investors security interest in the land.

153 Given that expropriation of full ownership under s. 35 of the *Indian Act* has the effect I conclude it does, the appellant's argument that s. 35 does not remove land from the reserve disintegrates. At best, it could be suggested that, given the necessary result of a taking of full ownership, the Governor in Council ought to withhold his or her consent, which s. 35 requires where a full expropriation, itself contemplated by the section, is proposed. This would be a perverse and untenable position. In my view, without getting into the content of fiduciary obligation, it cannot be found that consent must never be given to the very thing for which a statute requires it.

154 The *Indian Act* requires Crown consent for surrender of land for sale or lease as well as for expropriation. In *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, 1995 CanLII 50 (S.C.C.), [1995] 4 S.C.R. 344, at para. 35, and in *Guerin v. The Queen*, 1984 CanLII 25 (S.C.C.), [1984] 2 S.C.R. 335, at p. 383, the Court noted that the purpose of requiring Crown consent was not to substitute the Crown's decision for the band's decision but rather to prevent exploitation in the bargaining process. Thus as Dickson J. (as he then was) noted in *Guerin*: "The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited."

155 Once the analogy between surrender for sale and expropriation of fee simple is made, the role of the consent of the Crown to an expropriation becomes similarly clear. The Crown's consent pertains to the very fact of an expropriation in a particular case as well as to those elements of the expropriation that are subject of negotiation and with respect to which there is the possibility of exploitation, such as the rights taken in the expropriated land, the conditions attached to the taking of the land as well as the quantum of compensation.

156 In this case, there is no attack on the adequacy of the compensation offered or on the amount of the land taken. Indeed, the attack is not even directed at the fact that the government sought to expropriate land in this case (although the interpretation of the Order with respect to the extent of the interest granted is squarely at issue).

157 Once it is ascertained that s. 35 of the *Indian Act* allows the expropriation of a fee, the possibility of the removal of land from a reserve by expropriation can only be impeached by attacking the constitutionality of s. 35 of the *Indian Act*, or suggesting that somehow a particular instance of government consent, or indeed all consent to the expropriation of full ownership, is a breach of the Crown's fiduciary obligation. Of course it must be kept in mind that the parties have neither attacked the constitutionality of s. 35 of the *Indian Act*, nor claimed breach of fiduciary obligation.

6. Distinction Between Aboriginal Interest in Reserve Land and Aboriginal Title

158 For greater clarity, I emphasize that I have not considered the operation of s. 35 of the *Indian Act* where there is the added complication of aboriginal title or treaty rights in the reserve land. It is perhaps useful at this point to distinguish clearly aboriginal title from aboriginal interest in reserve land. In so doing, I hope also to clarify that common law principles of extinguishment do not bear on understanding how it is that aboriginal interest in a reserve comes to an end.

159 The appellant argued that, as a matter of law, aboriginal title subsists in a reserve created under the *Indian Act*. This is clearly incorrect. This Court in *Delgamuukw v. British Columbia*, 1997 CanLII 302 (S.C.C.), [1997] 3 S.C.R. 1010, at para. 143, set out the test for aboriginal title:

> In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre−sovereignty, there must be a continuity between present and pre−sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

A band's connection to the land that forms its reserve will not necessarily meet this test. For example, a reserve may consist of lands quite apart from the band's ancestral territory with respect to which there was no exclusive occupancy prior to sovereignty.

160 The appellant also reasoned that aboriginal interest in the reserve is itself a distinct aboriginal right that is essentially the same as aboriginal title (and thus subject to the same principles for extinguishment). The error in the appellant's conclusion apparently arises from the following comment in Dickson J.'s reasons in *Guerin*, *supra*, at p. 379:

> It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases. . . .

161 In *Guerin*, the issue before the Court was whether s. 18 of the *Indian Act* put the Crown in the position of a trustee of the reserve lands. Dickson J. for the majority concluded that the Crown stood only as a fiduciary to the Musqueam Indian Band with respect to the surrender of reserve lands that were also subject to aboriginal title. Section 18 of the *Indian Act* confirmed the fiduciary obligation already borne by the Crown in relation to lands subject to aboriginal title, but did not create a different property interest. The quotation above simply emphasizes that the fact that lands to which aboriginal title attaches are also reserve lands protected by the *Indian Act* does not change the aboriginal interest in the land insofar as the right to protection by the Crown as fiduciary is at issue.

162 In noting that the interest in reserve lands is the same as that in unrecognized aboriginal title in traditional lands, Dickson J. cites *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 A.C. 401 (P.C.), at p. 410. There, Lord Duff indicated that the equivalent of today's *Indian Act* existed to make "better provision for preventing encroachments upon the lands appropriated to the use of Indian tribes". He concluded that this language "does not point to an intention of enlarging or in any way altering the quality of the interest conferred upon the Indians by the instrument of appropriation or other source of title". In other words, where aboriginal title subsisted in lands that are then appropriated to the use of a band as reserve lands, the aboriginal interest in these lands is no different than that found in traditional lands in which there is an unrecognized aboriginal title -- at least for the purposes of understanding the existence and the content of a fiduciary obligation.

163 I agree with Dickson J. on this point and further would venture to find that an interest in reserve lands to which no aboriginal title attaches and an interest in non-reserve lands to which aboriginal title does attach are the same with respect to the generation of a fiduciary obligation on the part of the Crown. The content of the fiduciary obligation, of course, depends on the factual context: *R. v. Sparrow*, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075, at p. 1119.

164 In sum, this quotation from *Guerin* does not speak to identity of aboriginal title and an interest in reserve land with respect to the origin and termination of the respective interests. Dickson J. was merely comparing reserve lands subject to aboriginal title with non-reserve lands subject to aboriginal title, in context of understanding the existence of the Crown's fiduciary obligation in both cases.

165 In that there are rights created by the *Indian Act* in reserve lands, and in that these rights are held by aboriginal people, an interest in a reserve is literally an aboriginal right. However, the category of aboriginal right to which aboriginal title belongs and to which the appellant wishes to add an aboriginal interest in reserve lands has a special constitutional status -- affirmation and recognition under s. 35(1) of the *Constitution Act, 1982* -- which motivates the high level of protection.

166 This Court has defined "aboriginal rights" broadly, from activities with limited connection to the land on which the activity is performed on one end (see *R. v. Van der Peet*, 1996 CanLII 216 (S.C.C.), [1996] 2 S.C.R. 507, and *R. v. Adams*, 1996 CanLII 169 (S.C.C.), [1996] 3 S.C.R. 101) to interests in land that form aboriginal title on the other (see *Delgamuukw*, *supra*). The rights that are protected under s. 35(1) share a common characteristic that relates to its purpose. This purpose was articulated in *Van der Peet*, *supra*, at paras. 30-31:

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.
>
> More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown. [First emphasis in original; second emphasis added.]

167 Thus the shared characteristic of aboriginal rights, be they activities or interests in land, that are protected under s. 35 of the *Constitution Act, 1982* is the connection such rights have to an aboriginal society that preceded sovereignty. In *Delgamuukw*, at para. 151, the Court affirmed that a crucial part of the test for aboriginal rights continues to be that the interest is of "a central significance to their distinctive culture".

168 Aboriginal interest in reserve land is entirely created by modern legislation. Where the interest is not such that aboriginal title or rights as described above can be made out, I do not see how it could be said that the interest is connected to the distinct aboriginal society that preceded sovereignty.

169 In sum, aboriginal interest in reserve land is entirely distinct and independent from aboriginal title. Furthermore, it does not fall into the same category of "aboriginal right", subject to the same legal principles, as aboriginal title and the other aboriginal rights referred to above; in other words, a bare interest in reserve land which is not also the object of aboriginal title, treaty rights or such other aboriginal rights cannot be considered to be an "aboriginal right" that is protected under s. 35 of the *Constitution Act, 1982*.

170 Given that aboriginal interest in reserve land is not the same as or strictly speaking analogous to aboriginal title, the principles that inform the way in which it can be extinguished are also different. More specifically, it is the *Indian Act* that creates and also delineates the extent and the nature of the interest in reserve land.

171 In the context of aboriginal title, it is clear that holding a fee simple prevents occupancy and destroys the relationship of the band with the land such that aboriginal title is extinguished. As Lamer C.J. put it in *Delgamuukw*, *supra*, at paras. 128-29:

> . . . lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place. . . .
>
> It is for this reason also that lands held by virtue of aboriginal title may not be alienated. Alienation would bring to an end the entitlement of the aboriginal people to occupy the land and would terminate their relationship with it. . . .

172 Legislation that purports to allow for the infringement of aboriginal title must pass the test set out in *Sparrow*, *supra*. Federal legislation passed before 1982 that sought to extinguish entirely an aboriginal right like aboriginal title must evince a clear and plain intention to do so: *R. v. Gladstone*, 1996 CanLII 160 (S.C.C.), [1996] 2 S.C.R. 723, at para. 34; *Sparrow*, at p. 1099. In *Van der Peet*, *supra*, at para. 28, the Court noted that: "Subsequent to s. 35(1) aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by this Court in *Sparrow*".

173 I note that some Federal Court judgments have attempted to apply the "clear and plain intention" rule to reserve land. Décary J.A. in *Canadian Pacific Ltd. v. Matsqui Indian Band* 1998 CanLII 8248 (F.C.A.), (1998),

162 D.L.R. (4th) 649 (F.C.A.), stated at para. 27:

> Where a compulsory taking of part of a reserve is at issue, the Court must satisfy itself that the intention of the Crown to extinguish the Indian interest in the portion taken was "clear and plain" (see *R. v. Sparrow*, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075 at 1099 . . .).

The approach was adopted in the Federal Court (Trial Division) judgment for *BC Tel v. Seabird Island Indian Band*, 2000 CanLII 17134 (F.C.), [2000] 4 F.C. 350, at para. 19 (*per* Muldoon J.).

174 With respect, I do not agree that this principle, derived from an understanding of aboriginal title, can be applied to aboriginal interest in reserve land, which is a statutory creature the existence of which is not premised on a relationship with the land. Aboriginal interest in reserve land is created under the *Indian Act*, which specifies, in the expropriation and the surrender provisions, how land loses its reserve status.

B. *Issue #2: Does the Order in Council in Fact Authorize the Taking of a Full Ownership?*

175 Effect ought to be given to the plain and ordinary meaning of the document. At issue is essentially whether the Order in Council authorized the taking of an easement or, as the respondents submit, a full proprietary interest such that the land is no longer "reserve land" within the *Indian Act*. The point of contention is the meaning of the phrase "right-of-way" as it is used in the "Description". The appellant takes it to refer to the extent of the interest in the land, and the respondents, to describe a physical area of land that is taken in fee simple. In my view, a reading of the whole of the Order in Council supports the respondents' position.

176 The Order in Council is in two parts. The first two paragraphs, the recitals, state simply that an application has been made for a tract of land and that the quantum of compensation has been agreed on and has been paid:

> WHEREAS the Minister of Agriculture for the Province of British Columbia has applied for the lands hereinafter described, being a portion of Osoyoos Indian Reserve number one, in the said Province for irrigation canal purposes;
>
> AND WHEREAS the sum of $7,700 has been received from the Province of British Columbia in full payment for the land required in accordance with a valuation approved by the Band Council of the Osoyoos Band of Indians on the 30th of March, 1955 and officials of the Indian Affairs Branch;

177 In the identification of the legal interest in the first part, the document states that "the lands hereinafter described" are "a portion of Osoyoos Indian Reserve number one". This clearly indicates that what was transferred was "a portion of the reserve", not merely an easement.

178 The third paragraph of the first part contains the critical authorization:

> THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Minister of Citizenship and Immigration, pursuant to the provisions of Section 35 of the Indian Act, is pleased hereby to consent to the taking of the said lands by the Province of British Columbia and to transfer the administration and control thereof to Her Majesty the Queen in right of the Province of British Columbia:

179 This paragraph contains the whole of what it is the Order in Council purports to do. The language of this paragraph confirms that the Crown is authorizing the transfer of full ownership. However, the use of the word "taking" and the phrase "transfer the administration and control thereof" calls for comment.

180 I discussed above in context of s. 35 of the *Indian Act* the meaning of the word "take". Had the Crown here meant to use the word "taking" to mean that something less than a fee simple was authorized, one would expect that language more suited to such a lesser interest would have been adopted, such as the "right to use the lands". This sort of language is present in, for example, the Crown grant of the easement at issue in *Opetchesaht Indian Band*, *supra*, which stated, at para. 8: ". . . 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. . . ." (emphasis added).

181 The language "transfer the administration and control" is typically used instead of a conveyance of title between the federal and provincial Crowns. Professor G. V. La Forest in his text *Natural Resources and Public Property under the Canadian Constitution* (1969), at pp. 18-19, explained the theoretical underpinning for the use of such language:

> Still the special nature of public ownership must steadily be kept in mind. It is a power of the provincial (or Dominion) authorities to administer and control for the provincial (or Dominion) benefit property vested in the Queen. Consequently when it is desired to transfer public property from a province to the Dominion, or the contrary, the appropriate means of doing so is not by an ordinary conveyance but by an order in council; it is not a conveyance of property but the transfer of the administration of the Queen's property from one government to another. [Citations omitted.]

This passage supports the conclusion that a transfer of administration of land between the Dominion and provincial governments is the equivalent of the conveyance of title.

182 The first part of the Order in Council unequivocally authorizes the taking of a fee in the lands on which the irrigation canal was built. However, the second part at first read raises the spectre of ambiguity in the use of the phrase "right-of-way". By way of preface to my discussion of the meaning of "right-of-way" in the second part of the Order in Council, I urge that the second part of the Order in Council be understood to do what it purports to do, namely to describe which physical tract of land is the subject of the transfer.

183 The Description reads as follows:

> The whole of those rights-of-way, in Osoyoos Indian Reserve number one, in the province of British Columbia, said rights-of-way containing together by admeasurement fifty-six acres and nine hundredths of an acre, more or less, as said rights-of-way are shown bordered red on a plan of record number Irr twenty-one hundred and thirty-four in the Indian Affairs survey records at Ottawa; saving and excepting thereout and therefrom all that portion lying within a right-of-way for a road, as the last aforesaid right of way is shown bordered red on a plan of record number Rd thirty-six hundred and eighty in said records, a copy of which is deposited in the Land Registry Office for the district of Kamloops at Kamloops under number A thirteen hundred and seventy-seven; also saving and excepting thereout and therefrom all roads reserved by the Province of British Columbia by provincial order-in-council number one thousand and thirty-six, also subject to a prior Grant of Easement for a Power Transmission Line granted to West Kootenay Power and Light Company Ltd. by Order-in-Council P.C. 143 dated January 25, 1937, for a term of thirty years, this

> right-of-way containing by admeasurement 22 acres and two-tenths of an acre, more or less, and is shown on a plan of survey by R.P. Brown, B.C.L.S. dated November 16, 1936 and which is of record in the Indian Affairs Branch as Plan No. M. 2691.
>
> Reserving thereout and therefrom all mines and minerals and the right to work the same.

184 The use of the phrase "rights-of-way" can be understood as unambiguously referring to the strip of land on which the canal is situated. The same issue arose in *Seabird Island Indian Band*, *supra*. That case involved a taking under s. 35 of a highway by the Province of British Columbia, and the Order in Council there uses the same words, essentially, as here. In addressing the use of the term "right of way", the Court of Appeal stated, at para. 26:

> In addition, the expression of the term "right of way" is meant merely to point to the corridor rather than to describe the nature of any legal interest transferred; *CP*, *supra*, at paragraph 46 (pages 667-668) and *Canadian Pacific Ltd.*, *supra*, at paragraph 22 (pages 351-352). This is so despite the fact that the term "right of way" is used once in the order to describe the nature of a legal interest in land. The context for this use of the term was to describe the easement granted to the British Columbia Electric Company Limited and is irrelevant to the term's definition when the term is used in the context of the corridor lands; (Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. Toronto: Butterworths, 1994, at pages 163-168). The term "right of way" does not, therefore, give rise to any ambiguity.

185 In the Description, the phrase "right-of-way" is used consistently as a descriptor of a physical area of land rather than as a reference to the nature of the interest involved. Where "right-of-way" is used the last time, appositionally to Grant of Easement, the surrounding language clearly indicates that it is describing the actual tract of land to which the legal interest, described as a Grant of Easement, correlates.

186 The following language that accompanies the use of "right-of-way" as a descriptor of an area of land supports this conclusion:

-- In lines 8-9 of the Description, the following participle phrase modifies "rights-of-way" in line 1 (the critical reference to the canal): "saving and excepting thereout and therefrom all that portion . . .". Obviously, logic suggests that a subtraction of a portion is done from another such a portion. This indicates that the rights-of-way in line 1 is also a tract of land. The same language of subtraction is used in line 15.

-- In line 9 reference is made to "all that portion lying within a right-of-way for a road". The use of the preposition "within" rather than "subject to" combined with the fact that it is an area of land, a "portion" that is located therein, strongly suggests that "right-of-way for a road" is a description of a strip of land.

-- The phrase "right-of-way" as used to describe roads and the canal -- permanent surface structures both -- does not describe the interest in the land.

-- The words "containing together by admeasurement" in lines 3-4 refer to the strips of land on which the canal is situated. The words "containing by admeasurement" in line 22 refer likewise to the area of the land that is burdened by the Grant of Easement. The fact that the "rights-of-way" here are capable of being physically measured and can be spoken of as containing a certain number of acres strongly leads to the conclusion that physical tracts of land, rather than the nature of the interest, are being described.

187 The last sentence of the Order in Council, which refers to the reservation of mines and minerals, further supports this conclusion. A reservation of mines and minerals would only be meaningful where a transfer of title

is contemplated. There would be no reason to so reserve where there is a mere right of way or statutory easement. This reservation is additional evidence that the Order in Council effected the transfer of the equivalent of a fee. In sum, it is clear that, as the phrase "rights-of-way" is used in line 1 to refer to the canal, it is used as a reference to an area of land.

188 I conclude that, through the adoption of the Order in Council by the federal government, Her Majesty the Queen in right of the Province of British Columbia obtained full ownership over the lands on which the irrigation canal is situated. I think that this conclusion, derived from a plain reading of the terms of the Order in Council, is supported by consideration of what would be reasonably and practically required for the construction and maintenance of an irrigation canal. I would note, briefly, that the canal is lined with concrete and fully dominates the tract of land on which it is located to the exclusion of all other uses. A canal is like a highway or railway in this regard as opposed to a pipeline that is constructed underground or a utility line that for the most part takes up only air space. A taking of full ownership for canal purposes is clearly reasonable.

V. Conclusion

189 I would answer the first stated question -- Are lands, taken pursuant to s. 35 of the *Indian Act*, "land or interests in land" in a reserve of a Band within the meaning of s. 83(1)(*a*) of the *Indian Act* such that those lands are assessable and taxable pursuant to Band Assessment By-laws and taxable pursuant to Band Taxation By−laws -- in the negative, where full ownership is expropriated.

190 I would answer the second stated question -- If s. 35 of the *Indian Act* authorizes the removal of lands from reserve status, does federal Order in Council 1957-577, by which the Lands were transferred, remove the Lands from reserve status so that they are not assessable and taxable by the Osoyoos Indian Band? -- in the affirmative.

191 I would dismiss the appeal.

Appeal allowed, L'HEUREUX-DUBÉ, GONTHIER, MAJOR *and* BASTARACHE JJ. *dissenting.*

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