SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20120704
Docket: SCT-7002-11
Ottawa, Ontario

BETWEEN:

OSOYOOS INDIAN BAND

Claimant

AND:

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

Respondent

Before: The Hon. Harry Slade, Chairperson
Specific Claims Tribunal Canada

REASONS FOR DECISION

I. INTRODUCTION

[1] This Claim arises out of a taking, for railway purposes, of an interest in a 3.97 acre parcel of land in Osoyoos I.R. No. 1.

[2] The reserve was allotted by a minute of decision of the Joint Indian Reserve Commission in 1877. The Kettle Valley Railway Company acquired its interest under a federal Letters Patent issued on November 30, 1922. The Canadian Pacific Railway Company, KVR's parent company, later acquired the interest.

[3] On June 21, 1978, the federal Railway Transport Committee ordered the abandonment of the railway line, a portion of which was contained within the 3.97 acre parcel of land in the reserve (the Right of Way Land).

[4] On September 30, 1987, the Department of Indian Affairs (DIA) declined the request of the Osoyoos Band that it take action to restore its use and possession of the Right of Way Land, as an *Indian Act* reserve.

[5] On August 17, 2005, the Band submitted a Specific Claim to the Minister of Indian Affairs and Northern Development, pursuant to the provisions of the Federal Specific Claims Policy. The claim presented to the Minister asserted a breach of fiduciary obligations of the Crown by failing to ensure that the Right of Way Land, formerly held by KVR, reverted to the federal Crown upon abandonment of the line, for the benefit of the Band.

[6] On February 16, 2011 an official of the Crown formally advised the Band of the Government of Canada's position that there is no outstanding lawful obligation on the part of the Government of Canada.

[7] The Declaration of Claim was filed in the Registry of the Specific Claims Tribunal on July 29, 2011. The Response was filed on September 27, 2011.

[8] On December 7, 2011, Notices were delivered to the CPR and the AGBC pursuant to s. 22 of the *Specific Claims Tribunal Act*. Neither applied for intervenor standing.

[9] By agreement of the parties, this claim will proceed in two phases. The first phase will determine whether the Crown is in breach of a legal obligation to the Band. If it is determined that it did, a further hearing will take place on the issue of compensation.

[10] The liability phase was heard in Vancouver on May 30-31, 2012

II. HISTORY

A. Osoyoos Indian Reserve No. 1 allotted

[11] Under Article 13 of the Terms of Union by which British Columbia entered Confederation in 1871, tracts of land were to be conveyed by British Columbia to Canada "in trust for the use and benefit of the Indians", i.e., to become reserves.

[12] In 1876, Canada and British Columbia established the Joint Indian Reserve Commission. It was mandated to allot land, as reserve, for the use of the Aboriginal Nations. Pursuant to a Minute of Decision dated November 1877, the Commission allotted Osoyoos Indian Reserve No. 1 to the Osoyoos Indian Band.

[13] The lands allotted as Osoyoos I.R. No. 1 were surveyed at 32,097 acres in 1889. The 1902 and 1913 Schedules of Indian Reserves in the Dominion record the size of the Osoyoos I.R. No. 1 as encompassing that acreage.

[14] Due to an ongoing series of disputes between British Columbia and Canada, the lands for most of the reserves in British Columbia, including Osoyoos Indian Reserve No. 1, were not conveyed by British Columbia to Canada until 1938. The reserves, now described as "provisional reserves" were nevertheless administered by the federal Crown as if fully established as *Indian Act* reserves.

B. Kettle River Valley Railway Company

[15] The KVR was federally incorporated in 1901 and its "undertaking" was declared to be a work for the general advantage of Canada.

[16] In 1911, the KVR received authorization to construct a branch line of railway from Penticton to a point on the international border at or near the shoreline of Osoyoos Lake (the "Osoyoos Branch Line").

C. The Right of Way

[17] In 1921, the KVR applied to the DIA for a right of way through the reserve, as part of the Osoyoos Branch Line.

[18] In November 1921, Indian Agent Ball noted that the portion of the reserve around the right of way had never been used by the Osoyoos Indian Band, except to access fishing on the river bank. He also advised that there was no opposition to the right of way "… from the Indians of the Osoyoos Band as far as I can ascertain after interviewing a majority of the Band (the remainder being about hunting)".

[19] Several days later the DIA Secretary instructed Agent Ball to submit a valuation of the land required for the right of way. He added that "… this land may be taken under Sec. 46 of the *Indian Act*, but it is desired that if possible you obtain the Indians' approval of the valuations you recommend".

[20] In January 1922 Agent Ball reported that he valued the right of way at $880 ($780 for the land (3.9 acres at $200 per acre, plus $100 for severance). In addition he explained that:

> The valuation which I put upon No. 1 Reserve is the same as that paid to the owners of the same class of land on either side of the Reserve line, and as this is a small piece of the Reserve by the Okanagan River, it has never been used by the Indians except possibly when fishing, and their fishing rights will not be interfered with by the Right-of-way.

[21] Agent Ball advised his superior that the Osoyoos Indian Band approved the valuation of the Right of Way Land at a meeting on January 4, 1922.

[22] In September 1922, the DIA confirmed that the Right of Way Land was valued at $200 per acre plus $100 for severance, for a total of $894. The purchase price was paid by the KVR to the DIA, and held in trust by the federal Crown for the use and benefit of the Band.

[23] By Dominion Order-in-Council 2317, dated November 22, 1922, the federal Crown authorized "… the sale to the Kettle Valley Railway Company of the Indians' interest in the above described 12.968 acres of the Osoyoos Indian Reserves Nos. 1 and 2, for right of way purposes." The 12.968 acres referred to in Order-in-Council 2317 is comprised of the "all that parcel of land situated in Osoyoos Indian Reserve No. 1 … containing by admeasurement 3.97 acres more or less".

[24] The Letters Patent, issued on November 30, 1922, provides that in consideration of $894 paid by Kettle Valley, the federal Crown "granted, conveyed, and secured unto the said Kettle Valley Railway Company, their successors and Assigns forever" the right of way land.

D. Osoyoos Indian Reserve No. 1 created

[25] By Provincial Order-in-Council 1036, dated July 29, 1938, the Crown in right of British Columbia conveyed to the federal Crown "in trust for the use and benefit of the Indians of the Province of British Columbia" various lands, as described on a schedule. The schedule included Osoyoos I.R. No. 1 which is described as encompassing 32,097 acres.

[26] A DIA document entitled Schedule of Indian Reserves in the Dominion of Canada, "recompiled and corrected up to March 31, 1943" contains the following entries in relation to Osoyoos I.R. No. 1:

32073.710	Allotted by Joint Reserve Commission, 21st
32070.366	November, 1877.
32067.756	Original Survey 1889. Plan No. 232……..32097.00
32011.666	Resurvey south boundary 1927. Field Book 986. Title, Provincial Order in Council #1036, 29th July, 1938……..32097.00 To C.P. Ry., Right of Way, Kettle Valley Br. Plan R.R. 1979. Dominion Order in Council P. C. 2317, 7th November, 1922. Dominion Patent Reference 19940……..3.97

E. Abandonment and Disposition of the right of way

[27] In 1956, pursuant to the *Canadian Pacific Subsidiaries Act*, S.B.C. 1956, c. 54 and the *Canadian Pacific Railway Company (Subsidiaries) Act*, 1956, S.C. 1956, c. 55, the assets, railways and undertakings of KVR, including the Osoyoos Branch Line, were vested in the CPR.

[28] In 1977 the CPR applied to the Railway Transport Committee, pursuant to section 253 of the *Railway Act*, for an order abandoning operation of part of the Osoyoos Branch Line, including the Right of Way Land. In 1978, following a hearing

in Penticton, the Railway Transport Committee ordered the CPR to abandon the operation of the Osoyoos Branch Line and to advise the Railway Transport Committee when it had removed the tracks and other facilities along that portion of the line. The Order is silent as to the disposition of the Osoyoos Branch Line lands following abandonment.

[29] In June 1981, the Osoyoos Indian Band wrote to the DIA to request all data concerning the Right of Way. The Band also asked the DIA check into the recovery of the Right of Way Land. The DIA responded by providing a copy of the 1922 Letters Patent to the Band.

[30] In November 1986 the Osoyoos Indian Band wrote to the CPR to request that the land be “transferred back to the Osoyoos Indian Band”.

[31] By letter dated January 20, 1987, the CPR responded that title to the right of way shows that it purchased the land by way of Crown Grant at fair market value with no reversionary interest registered against it. The CPR advised that the disposition of the land was presently being negotiated with the Province of British Columbia.

[32] On January 29, 1987 the Osoyoos Indian Band notified the DIA that British Columbia was acquiring the land and requested that the DIA “proceed on the transfer of these lands back to reserve status”.

[33] Initially the DIA wrote that instructions were being issued to the Department of Justice to commence litigation. However, by letter dated September 30, 1987 the DIA notified the Osoyoos Indian Band that it would not commence litigation to acquire the land from the CPR and encouraged the Osoyoos Indian Band to seek legal advice and “to take whatever action might be appropriate.”

[34] On November 15, 1989, the CPR purported to transfer a fee simple interest in the abandoned branch line, including the Right of Way Land, to British Columbia. On February 5, 1990 the transfer was subsequently registered in the Provincial Land Title Office.

[35] In February 2005 the Province of British Columbia advised the Band that it was prepared to consider the sale of the Right of Way Land to the Band at fair market value.

III. POSITION OF THE PARTIES

A. The Claimant

[36] The essence of the Band's position is that the railway company acquired a limited interest over the Right of Way Land. It maintains that the interest of the federal Crown, as perfected by the 1938 transfer from British Columbia to Canada, was either undisturbed throughout or restored upon the 1978 abandonment of the railway line. This, in turn, established a Crown duty to the Band to assert the Crown's interest in the land and hold it for the use and benefit of the band as reserve.

[37] The Band claims four breaches of fiduciary duty on the part of the Crown:

1. If the KVR acquired an absolute interest in the Right of Way Land with no right of reversion, Canada breached its duty when it failed to ensure that the grant to the railway company made specific provision for a reversion for the use and benefit of the Band when the land was no longer required for railway purposes.

2. If it is determined that the Schedule of Indian Reserves in the Dominion of Canada reflects an adjustment to the 32,097 acres transferred by Order in Council 1036 of July 29, 1938, with the legal consequence that the Right of Way Land is not within the reserve, the Crown breached its duty to preserve and protect the interest of the Band.

3. Canada breached a legal obligation to the band in failing to attend the December 14, 1977 hearing of the Railway Transport Committee at which the application of the railway company to abandon the line of rail was considered, and subsequently took no action to protect the Band's interest.

4. The Crown breached its legal obligations by failing, in and after February 9, 2005, to acquire the Right of Way Land for the use and benefit of the Band on receipt of the expression by British Columbia of its willingness to sell it at fair market value.

B. The Crown

[38] The position of the Crown is as follows:

1. Any duties that Canada owed to the Band at the time the KVR acquired its interest were discharged when the federal Crown obtained for the benefit of the Band, and with its consent, the fair market value of the Right of Way Land calculated on the basis of the value of a fee-simple interest.

2. The Right of Way Land did not become part of Osoyoos Indian Reserve No. 1 upon the conveyance of land provisionally reserved from British Columbia to Canada by Order in Council 1036, 1938, as the 1922 sale to the railway company of a fee-simple interest reveals that the Crown did not, when the 1938 transfer from the Province took place, intend to include it in the reserve.

3. Although it is arguable that the effect of the Railway Transport Committee Order for the abandonment of the rail line was to vest the Right of Way Land in the federal Crown, litigation would be required to determine the matter. The question, in any event, is moot as any interest of the Band had been exchanged for good and valuable consideration.

4. The Claim based on the ability of the Crown to acquire the interest of the Province of the Right of Way Land in and after February, 2005, cannot be advanced before the Specific Claims Tribunal. Section 15(1)(a) of the *Specific Claims Tribunal Act* provides that no claim may be made before the Tribunal on the basis of events occurring within 15 years preceding the date of the filing of the claim with the Minister.

IV. ISSUES

[39] These are the central issues to be addressed in a determination whether the Crown has breached a legal obligation to the Band:

1. What interest, if any, did the KVR acquire in 1922?
2. Did the enactment of OIC 1036, 1938, fully establish Okanagan Indian Reserve No. 1 as an *Indian Act* reserve?
3. Did the transfer to Canada of title to the reserve include the Right of Way Land?
4. What was the legal consequence of the abandonment of the line of rail for the interest of the Crown and the Osoyoos Band?
5. Is litigation in the courts required to establish the interest of the Band?
6. Did the Crown fail in its duty to the Band?
7. Is the Osoyoos Band, in all the circumstances, entitled to an equitable remedy?

V. ANALYSIS AND FINDINGS

A. Preliminary Matters

1. Reliance on Indian Specific Claims Commission (ISCC) Reports

[40] The Band has introduced the following reports of the ISCC:

- Indian Claims Commission, *Inquiry Into the Claim of the Sumas Band* (Ottawa: February 1995). [excerpt only]
- Indian Claims Commission, *Lower Similkameen Indian Band: Vancouver, Victoria and Eastern Railway Right of Way Inquiry* (Ottawa: February 2008) [Summary and excerpt only]
- Indian Claims Commission, *Nadleh Whut'en First Nation: Lejac School Inquiry* (Ottawa: December 2008). [pages 1-38]

[41] The Band submits that the Tribunal should give considerable weight to these reports. The position of the Band with respect to the use of the reports was clarified in the course of the hearing. The Tribunal was urged to adopt the analysis of the ISCC on similar claims in its determination of issues in common with those that arise on this claim.

[42] I have not, in my analysis and conclusions that follow, relied on the contents of the ISCC reports.

2. Admissibility of Documentary Evidence

[43] The Band's submissions include references to documents that are not in the Common Book of Documents, and documents over which Canada would claim privilege. It is not necessary to rule on the question of privilege, as the documents of concern are not before the Tribunal. My findings are not referable to any document not in evidence or uncontroversial in the light of facts accepted as common ground in the party's respective Statements of Fact.

3. The Validity of the Grant to the KVR

[44] The claim of the Band does not rest on a theory that the 1922 grant to the KVR was invalid. However, counsel for the Band adverted to the question over the effect of grants made in the course of federal *de facto* administration of reserves prior to the 1938 transfer of title from the Province to Canada. Although the claim does not require the resolution of this question, it has been addressed in order that the decision rest on a full analysis of the legal effect of the 1922 grant.

B. What interest, if any, did the KVR acquire in 1922?

1. Could a federally incorporated railway company acquire an interest in Provincial Crown Land?

[45] At the time the KVR acquired its interest, the title to the (provisional) reserve was held by the Province. (*Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245)

[46] The KVR was incorporated in 1901 (*an Act incorporating the Kettle River Valley Railway Company*, 1 Edward VII Chapter 68)

[47] In *Canada (Attorney General) v. Canadian Pacific Ltd*. (2000), 79 B.C.L.R. (3d) 62 (S.C.) Saunders J. (now J. A.) noted the following:

> Historically, federally incorporated railways in Canada have been subject to various forms of the *Railway Act...* (para. 24)

[48] A central issue in *Canadian Pacific* was whether the *Railway Act, 1927* was the authority for the taking of land within a reserve. As in the present matter, the case was concerned with a taking of land allotted as reserve while title remained with the Province of British Columbia. Canadian Pacific ceased using the land for railway purposes after the transfer of title to Canada.

[49] Saunders J. rejected Canadian Pacific's claim that it acquired the land under the *CPR Act* or the Canadian Pacific Contract, and found that "any entitlement to CPR to the land must come from the *Railway Act*". (para. 150)

[50] At paras. 145-146, Saunders J. considered s. 189 of the *Railway Act, 1927*:

> No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council.

And found that:

> …The term "the Crown" has been interpreted to include the Provincial Crown: *British Columbia (Attorney General) v. Canadian Pacific Railway*, [1906] A.C. 204 (Canada P.C.); *Mitchell v. Sandy Bay Indian Band, supra*, at 105. Likewise, Her Majesty refers to both the federal and provincial Crown. (para. 146)

[51] *Canadian Pacific* is authority for the application of the *Railway Act, 1927*, s. 189, to land vested in a Province. The *Railway Act, 1919*, was in force when the KVR acquired an interest in Okanagan I.R. 1, then a provisional reserve.

[52] The above findings have direct application in the present matter. On November 22, 1922, the date of the federal Crown grant of an interest in the Right of Way Land to the KVR, proprietary title remained with the Provincial Crown. This much is clear from the decision in *Wewaykum Indian Band v. Canada*, *supra*. On the evidence in the present matter, the conveyance of the proprietary interest in

Okanagan Indian Reserve #1 was effected by the same instrument discussed in *Wewaykum*, namely Order in Council 1036 of July 29, 1938.

[53] In *Wewaykum*, Binnie J. discussed the pre-1938 role of the DIA in relation to land allotted as reserve:

> …While the Department of Indian Affairs treated the 'reserves" in British Columbia as being in existence prior to these formal enactments, there was a good deal of confusion in the early years regarding the precise nature of the federal interest under s. 91(24) of the *Constitution Act, 1867*. It was not until the Judicial Committee of the Privy Council decision in *St. Cathernie's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, that it was made clear that under s. 91(24) all the "Dominion had [was] a right to exercise legislative and administrative jurisdiction – while the territorial and proprietary ownership of the soil was vested in the Crown for the benefit of and subject to the legislative control of the Province…" (para. 51).

[54] If the federal Crown lacked the power to grant an interest in reserve land before 1938, any question over the validity of the 1922 grant to the KVR would have been resolved upon the 1938 transfer of title to Canada.

2. What interest did the KVR acquire in 1922?

[55] The Crown submits that the 1922 grant to the KVR manifests an intention on the part of the federal Crown that the Right of Way Land be excluded from the transfer of proprietary title to Osoyoos I.R. No. 1 by OIC 1036, 1938. This position is advanced on the ground that the KVR paid an amount based on a fee simple interest, and by reference to the 1943 schedule in which the following notations appear:

1) "To C.P. Ry., Right of Way, Kettle Valley Br. Plan R.R. 1979. Dominion Order in Council P.C. 2317, 7th November, 1922. Dominion Patent Reference 19940…….3.97"

2) the presence in the 1943 schedule, adjacent and to the left of the description by acreage of the reserve as surveyed in November 1877, and as resurveyed with reference to OIC 1036, 29 July 1938 (both being 32,097 acres), of what appears to be a different acreage, that being 32,073.710 acres.

[56] The Crown relies primarily on the express terms of the 1922 grant to the KVR, and the value placed on the land by Agent Ball. The grant is said to be "absolute" and "forever".

[57] The federal Order in Council that authorized the grant of an interest to the KVR, P.C. 2317, provides for the "sale" of the "Indians' interest".

> The Committee of the Privy Council have had before them a report, dated 27th October, 1922, from the Superintendent General of Indian Affairs, submitting that the Kettle Valley Railway Company has applied to the Department of Indian Affairs for right of way, to comprise all that parcel of land situated in the Osoyoos Indian Reserve No. 1 in the Smilkaneen Division of Yale District, in the Province of British Columbia and Dominion of Canada, containing by admeasurement 3.97 acres more of less, the said right of way being shown on a plan of survey...
>
> The Minister therefore recommends that under the provisions of Section 46 of the *Indian Act* as amended by section I of Chapter 14, 1-2 George V, authority be given for the sale to the Kettle Valley Railway Company of the Indians' interest in the above described 12.968 acres of the Osoyoos Indian Reserves Nos. 1 and 2, for right of way purposes.
>
> (Emphasis added)

[58] The reference in the concluding paragraph to 12.968 acres includes the 3.97 acres comprising the Right of Way Land.

[59] The Letters Patent dated November 30, 1922 contains the words "…the absolute purchase at and for the price and sum of $894… to have and hold the said parcel… unto the said Kettle Valley Railway Company, their successors and assigns forever…"

[60] As for the price paid, Agent Ball was charged by his superiors with the responsibility of obtaining a valuation of the right of way parcel. In his November 1, 1921 letter to the Assistant Deputy and Secretary, Department of Indian Affairs, Ottawa, Agent Ball described the Right of Way Land and, with reference to its value, said "this is probably worth $200 per acres (sic) as land adjoining it has already been purchased at this figure I am told. I have made no valuation of the No. 2 reserve so far. This railway line is to be completed in time for next year's farming operations…"

[61] In Agent Ball's January 19, 1922 letter to the Assistant Deputy and Secretary, the $200 per acre figure is repeated: "the valuation which I placed upon No. 1 reserve is the same as that paid to owners of the same class of a small piece of the reserve separated from the main reserve by the Okanagan River, …"

[62] I again refer to the decision of Saunders J. in *Canadian Pacific*. There, the Letters Patent granted to the CPR was on terms that are, in all material respects, identical to the Letters Patent of the Right of Way Land to the KVR:

> Canada sent the proposed description of the lands granted to the CPR for approval by letter dated April 18, 1928. On May 22, 1928, Letters Patent were issued by Canada transferring the 3.62 acres now known as Lot J to the CPR. The terms of the Letters Patent provided:
>
> > WHEREAS the lands hereinafter described are part and parcel of those set apart for the use of False Creek Indians AND WHEREAS WE have thought fit to authorize the sale and disposal of the Lands hereinafter mentioned, in order that the proceeds may be applied to the benefit, support and advantage of the said Indians, ... AND WHEREAS the Canadian Pacific Railway Company have contracted and agreed to and with Our Superintendent General of Indian Affairs, duly authorized by Us in this behalf, for the <u>absolute purchase</u> at and for the price and sum of Seven Hundred and Twenty-four Dollars ... We by these Presents, do grant, sell, alien, convey and assure <u>unto the said Canadian Pacific Railway Company, its successors and assigns forever</u>; all that Parcel or Tract of Land, ...

[63] There was in *Canadian Pacific* no evidence on which the price paid could be related to the fee or a lesser interest (*Canadian Pacific*, paras. 131-132). As for the price paid by the KVR, it is apparent from Agent Ball's correspondence that he applied a per acre value equal to that paid for adjacent farm land taken up for the KVR right of way. Counsel for the Crown properly acknowledged that this is a reasonable inference from the documentary evidence. It is, in my respectful view, a strong inference and I find as fact that the amount paid by the KVR reflected the value of per acre of adjacent farm land taken for railway purposes.

[64] In the present matter, the Order in Council (PC 2317), made under the authority of s. 46 of the *Indian Act*, purported to permit the "...sale...of the Indians' interest...".

[65] Section 46 of The *Indian Act*, S.C. 1906, as amended by S.C. 1911, c. 14, provides as follows:

> His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:-
>
> > Subjection 1 of section 46 of *The Indian Act*, chapter 81 of the Revised Statutes, 1906, is repealed, and the following is substituted therfor:-
> >
> > **"46.** No portion of any reserve shall be taken for the purpose of any railway, road, public work, or work designed for any public utility without the consent of the Governor in Council, but any company or municipal or local authority having statutory power, either Dominion or provincial, for taking or using lands or any interest in lands without the consent of the owner may, with the consent of the Governor in Council as aforesaid, and subject to the terms and conditions imposed by such consent, exercise such statutory power with respect to any reserve or portion of a reserve; and in any such case compensation shall be made therefor to the Indians of the band, and the exercise of such power, and the taking of the lands or interest therein and the determination and payment of the compensation shall, unless otherwise provided by the order in council evidencing the consent of the Governor in Council, be governed by the requirements applicable to the like proceedings by such company, municipal or local authority in ordinary cases." (emphasis added)

[66] This provision of the *Indian Act* must be considered together with the statutory power of the entity that seeks to take or use reserve lands.

[67] The *Railway Act, 1919* provides, in s. 189:

> (1) No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council.
>
> ...
>
> (3) The company may not alienate any such lands...

[68] In *Canadian Pacific*, Saunders J. went on to find :

> There is, in my view, no basis on which to conclude other than that Lot J was acquired under s. 189 of the 1927 *Railway Act*. That provision contains a restriction on alienation. Accordingly, I find that the acquisition of Lot J carried with it a restriction on alienability. (para. 153)
>
> Alienation means conveyance of title, that is, conveyance of an indefeasible fee simple: *Kruger, supra,* citing *Masters v. Madison County Mutuals Inc. Co*., 11 Barb. 624 (U.S. N.Y. 1852). An interest that prohibits alienation is not

> a fee simple absolute: R.E. Megarry and H.W.R. Wade, *The Law of Real Property*, 3rd ed. (London: Stevens & Sons Ltd., 1966) p. 79 (emphasis added) (para. 154)

[69] The trial decision in *Canadian Pacific* was upheld on appeal, 2002 BCCA 478. Esson J. A., for the court, said this at para. 99:

> I agree with the trial judge that the mistake and the documents which resulted from it cannot assist CPR. Its statutory power to take arose under a statute which precluded a grant of title which would authorize alienation. It follows that the grant of title, to the extent the grant exceeded the restriction, was *ultra vires* the Governor-in-Council. From that it follows that the finding of the trial judge that CPR took Lot J subject to the restraint on alienation is right… (emphasis added)

[70] Esson J. A. concluded, at para. 120:

> …that Meredith J, and this court were right in *Kettle Valley* in holding that the restriction on alienation necessarily implies that the land expropriated from the Crown would revert to the Crown upon ceasing to be used for railway purposes, I recognize that the legislation and policies in other countries are of limited value. But, having regard to the extent to which the law and policy of this country were influenced by the precedent created in the United Kingdom and the United States, they have value, particularly in the field of railway construction. I would hold that *Kettle Valley*, in finding a necessary implication that cessation of use for railway purposes would cause the land to revert to the Crown, was rightly decided.

[71] No statutory authority existed for a sale of the Indian's interest in the context of a taking for railway purposes. As in *Canadian Pacific*, this reference is a mistake.

3. Reserve Creation, and the *Indian Act*

a) Introduction

[72] In *Wewaykum*, Binnie J. held that the surrender provisions of the *Indian Act* did not apply to the provisional reserves at issue in that case. The several bases for that finding are set out at para. 40:

> Counsel for Cape Mudge argues that the *1907 Resolution* is invalid for noncompliance with the surrender provisions of the *Indian Act* but (i) I do not think resolution of a "difference of opinion" between sister bands of the same First Nation to which the land had been allocated in the first instance should be characterized as a surrender, (ii) the land designated as Reserve No. 11 was not an Indian Reserve within the meaning of the *Indian Act* in 1907; it was still provincial Crown property, and (iii) in any event the operation of the

> surrender provisions of the *Indian Act* had been suspended (to the extent they were capable of application) by Proclamation of the Privy Council made December 15, 1876 (*The Canada Gazette*, December 30, 1876, vol. X, No.27). (emphasis added)

[73] Counsel for the Band aptly described the legal consequence of the grant to the KVR as "murky". The grant was authorized under s. 46 of the *Indian Act, 1911*. However, as the reserve was "provisional" it was not an Indian Reserve within the meaning of the *Indian Act*. The question, therefore, is whether the Crown's reliance on s. 46 of the *Indian Act* to permit the 1922 taking under the *Railway Act*, in 1919, has any significance for the issues before the Tribunal.

[74] In *Canadian Pacific* it was assumed that the *Indian Act* did apply while the title remained with the Province. This may be contended to raise a question over the applicability of the law as found in *Canadian Pacific* to the facts in the present matter.

b) Analysis and findings

[75] In *Canadian Pacific*, Saunders J. adopted the following approach to the determination of the nature of the interest of the railway in the land in question in that litigation.

> The third approach is described in *Canada Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654 (S.C.C.) at 665 in which the Court said that to define the nature of the railway's interest, one should consider the language of the statutes, any agreements between the original parties, and the subsequent actions and declarations of the parties. (para. 136)

[76] Referring to the matter before her, Saunders J. said:

> In this case, involving consideration of two properties, two corporate entities each with its own Special Act, the *Indian Acts*, the *Railway Acts*, and the *CPR Act*, this latter approach is the one I have used. The discussion necessarily breaks into sub-topics. (para. 137)

[77] In the present matter, the statutes to be considered are the *Railway Act, 1919*, and the *Indian Act, 1906* (as amended in 1911).

[78] Saunders J. considered the effect of section 48 of the *Indian Act*, *1927*, which provided as follows:

> 48. No portion of any reserve shall be taken for the purpose of any railway…without the consent of the Governor in Council, but any company… having statutory power… for taking or using lands or any interest in lands without the consent of the owner may, with the consent of the Governor in Council… exercise such statutory power with respect to any reserve… (para. 184)

[79] Section 48 of the 1927 *Indian Act* is on the same terms as section 46 of the *Indian Act, 1906*, as amended in 1911, which established the authority for the 1922 grant of the Right of Way Lands to the KVR.

[80] Saunders J. also referred to s. 35 of the 1886 *Indian Act*, which generally prohibited the alienation of reserve land without a "surrender".

[81] Saunders J. concluded that the purported "taking" of an absolute interest was ineffective, on these bases:

> While s. 35 of the 1886 *Indian Act* and s. 48 of the 1927 *Indian Act* contemplating a "taking" of land by a railway, with consent of the Crown, nothing in those sections required that the interest "taken" by a railway be an absolute interest, leaving no residual interest for either the Crown or the Indian peoples. I rest this conclusion on two legs. First, the statutory power of the railway referred to in all versions of the *Indian Act* is limited by the restraint on alienation found in the *Railway Act* empowering the taking. (para. 186)
>
> Second, in relation to the meaning of the word "taken", I refer to s. 35 of the 1886 *Indian Act* and make the following observations. If "taken" in s. 35 means sold or alienated, it stands in contradiction to s. 38, or at least is an unrecognized exception to the clear ban on alienation of reserve land without surrender found exception to the clear ban on alienation of reserve land without surrender found in s. 38. Further, the word "taken" does not always mean fully acquired. For example, the *Dictionary of Canadian Law*, 2d. ed. (Scarborough: Carswell, 1995) at 1234 defines "take lands" as:
>
> > Enter upon, take possession of, use and take lands for a limited time or otherwise or for a limited estate or interest.
>
> (para. 187).

[82] I note once again that the provincial interest in the land at issue in *Canadian Pacific* was not transferred to Canada until 1947 (para.189). Here, it was not

transferred until 1938. In *Canadian Pacific* the analysis of the trial judge assumes that the *Indian Act* applied.

[83] If the consequence of the decision of the Supreme Court in *Wewaykum*, *supra*, is that the *Indian Act* did not, at the date of the grant for railway purposes, apply to the land at issue in *Canadian Pacific*, or to Osoyoos I.R. No. 1 in 1922, there is a question whether the precedent of *Canadian Pacific* applies in the analysis of the issues in the present matter. I conclude that it does. It is clear on the face of the provisions of the 1919 *Railway Act* that any interest taken by a railway company in Crown lands is subject to a restraint on alienation. Saunders J. concluded that the legislative basis for the taking was the *Railway Act*:

> However, as I have earlier found, the grants were made under the *Railway Act*, title lay with British Columbia and the Indians did not surrender the lands. The result is that the statute trumps the terms of the Letters Patent, and the Letters Patent must be read as subject to the restraint on alienation found in the *Railway Act*. (para. 194) (emphasis added).

[84] While the reference in the above paragraph to "surrender" must be considered in light of the decision of the Supreme Court in *Wewaykum*, *supra*, Saunders J.'s analysis of the consequence of the grant having been made under the *Railway Act* remains. In short, in the present matter, as in *Canadian Pacific* "…the statute trumps the terms of the Letters Patent, and the Letters Patent must be read as subject to the restraint on alienation found in the *Railway Act*." This conclusion is fully supported by the decision, on appeal, of the decision at trial in *Canadian Pacific*. There, the Court concluded, at para. 99, that the CP took its interest subject to the restraint on alienation in the *Railway Act*. The Court of Appeal did not, in reaching its conclusion, rely on provisions of the *Indian Act*.

[85] I conclude that the KVR acquired its interest in the Right of Way Lands subject to the restraint on alienation provided in the *Railway Act*.

C. Did the Enactment of Order in Council 1036, 1938 fully establish Okanagan Indian Reserve No. 1 as an *Indian Act* reserve?

[86] In the course of the hearing, counsel for the Crown posed the question whether the federal Crown's acceptance of the conveyance have the legal effect of

creating a reserve. Reference was made to the apparent absence of any action on the part of a duly authorized representative of the federal Crown to set apart, as reserve under the *Indian Act*, the lands conveyed by OIC 1036.

[87] In *Ross River Dena Council Band v. Canada*, 2002 SCC 54, LeBel J., at paras. 48-51, discussed the creation of reserves within the meaning of that term in the *Indian Act*. He said, at para.50:

> Under the *Indian Act*, the setting apart of a tract of land as a reserve implies both an action and an intention. In other words, the Crown must do certain things to set apart the land, but it must also have an intention in doing those acts to accomplish the end of creating a reserve. It may be that, in some cases, certain political or legal acts performed by the Crown are so definitive or conclusive that it is unnecessary to prove a subjective intent on the part of the Crown to effect a setting apart to create a reserve. For example, the signing of a treaty or the issuing of an Order-in-Council are of such an authoritative nature that the mental requirement or intention would be implicit or presumptive.

[88] In *Wewaykum*, *supra* Binnie J. refers, at para 51, to "… the critical role of 'intention' in the creation of reserves…". He said, with reference to reserve creation in British Columbia, that "… it was clear that at the highest levels of both governments the intention was to proceed by way of mutual agreement". That agreement is found in the actions of the federal and provincial governments in enacting "… mirror legislation establishing the Ditchburn Clark Commission to attempt to bring closure for a federal provincial wrangle that at that stage had dragged on for almost 50 years…" (at para. 50).

[89] The following excerpts from *Wewaykum* reveal that the federal-provincial wrangling over reserve creation was fully resolved on the enactment by the province of OIC 1036, 1938:

> The content of the fiduciary duty changes somewhat after reserve creation, at which the time the band has acquired a "legal interest" in its reserve, …" (emphasis added) (at para. 98).
>
> "While the reserves were not constituted, as a matter of law, until 1938…" (para. 102).
>
> "Reserves Nos. 11 and 12 were formally created when the federal Crown obtained administration and control of the subject lands in 1938." (emphasis added) (para. 106).

[90] As Okanagan I.R. No. 1 was, like Reserves Nos. 11 and 12 which were the subject of the dispute in *Wewaykum*, "conveyed" by OIC 1036, the reserve was "created" in 1938.

D. Did the transfer to Canada of title to the reserve include the Right of Way land?

1. Transfer of the reserve by reference to acreage

[91] In November 1877, the Joint Indian Reserve Commission allotted I.R. No. 1 to the Osoyoos Indian Band. The area of the reserve, established by a survey in 1889, was 32,097 acres. Later Schedules of Indian reserves published by the DIA in 1902 and 1913 recorded the area of the reserve at the same acreage. The Schedule to OIC 1036, 1938, by which title was transferred from the Province to Canada specifies 32,097 acres.

2. Adjustments

[92] The Crown submits that the reference in 1943 schedule to a right of way comprising 3.97 acres in favour of the KVR, considered alone or together with the lower acreage figure in the adjacent left column, reveals that the Crown did not accept the transfer of all the land described by acreage in the schedule attached to OIC 1036, 1938.

[93] I reject the Crown's argument for the following reasons :

1. The 1943 schedule does not, on the face of it, indicate that the Right of Way Land, comprising 3.97 acres, is excluded from the land area of the reserve as described by acreage in the schedule to OIC 1036, 1938. To the contrary, it notes the acreage at 32,097, as does the 1889 survey of the original allotment.

2. The evidence offers no explanation for the figure "32073.710" in the column to the left of the entry setting out the acreage at 32,097.

3. The Crown proffered no authority for making an adjustment to the area encompassed within *Indian Act* reserves as previously surveyed and conveyed from the province to Canada.

E. What was the legal consequence of the 1978 abandonment of the line of rail for the interest of the Crown and the Osoyoos Band?

[94] The conclusion at trial and on appeal in *Canadian Pacific* applies fully in the present matter, "…the restriction on alienation necessarily implies that the land expropriated from the Crown would revert to the Crown upon ceasing to be used for railway purposes, …" (*Canadian Pacific*, BCCA, *supra*, para. 120).

[95] The Court of Appeal upheld the result at trial and ordered, in supplementary reasons, that the lands in issue be "…vested in Her Majesty the Queen in Right of Canada… and are revived as reserve lands within the meaning of the *Indian Act*…". (*Squamish Indian Band v. Canadian Pacific Ltd., Squamish Indian Band v. Canada (A.G.)*, 2003 BCCA 283 (at para. 5). Hence, upon the reversion of the land the interest of the Band was, by operation of law, "revived".

[96] The abandonment of the KVR line of rail occurred in 1978. For the purposes of the following analysis, I find that upon the abandonment of the line of rail the Crown interest in the Right of Way would revert to the Crown with the consequence of the revival of the interest of the Band.

F. Is litigation in the courts required to establish the interest of the Band?

1. *The Specific Claims Tribunal Act*

[97] The Crown says that litigation would have been necessary to determine the interest of the Band in the Right of Way Land.

[98] The position of the Crown is based on a misapprehension of the role and jurisdiction of the Tribunal.

[99] The Tribunal is an alternative to proceedings in courts.

[100] As many historical claims over which it has jurisdiction may be statute barred if brought in court, delay in bringing a claim before the Tribunal may not be taken into account (*Act*, s. 19).

[101] A decision of the Tribunal is final and conclusive between the parties, subject only to judicial review. (*Act*, s. 34)

[102] The Tribunal is limited to claims and awards of monetary compensation (*Act*, s. 15(4)(b), s. 20(1)(a)).

[103] A claimant must forgo court proceedings if proceeding before the Tribunal (*Act*, s. 15(3), s. 37).

[104] In claims based on the unlawful disposition of land, a decision of the Tribunal releases the claimant's interests or rights to the land. (*Act* s. 21(c)).

[105] The Tribunal may determine the legal obligations of the Crown. A determination of a legal obligation may relate to interests in reserve land. (*Act*, s. 14(1)(a)-(c)).

[106] The Tribunal may determine any question of law or fact in relation to any matter within its jurisdiction. (*Act*, s. 13(1)(a)). As claims arise out of administration of reserve lands, the Tribunal may reach conclusions that define First Nations' interests in land. The Tribunal's findings are binding on the parties.

[107] In light of the jurisdiction and powers of the Tribunal, proceedings before it stand in the staid of proceedings before the courts. It may determine what interest a First Nation has in land, and any related Crown duties.

2. Alternative finding

[108] If I am incorrect in my analysis under the heading "Is litigation in the courts required to establish the interest of the Band?" the following analysis and conclusions apply.

[109] The Crown says that litigation would have been required to determine the interest of the federal Crown, provincial Crown, CPR, and the Band. This, however, is speculative as the fact is that the Crown did nothing to advance, protect or preserve the Band's right to use and occupy the Right of Way Land upon reversion to the Crown and revival of the Band's interest.

[110] If the proposition that the Band's possession of the Right of Way Land would have been restored had the Crown intervened is also speculative, there can be little doubt of the outcome had the Crown asserted the Band's interest. It may be assumed that the Crown, both provincial and federal, would be guided in their actions by the history of the taking and creation of the reserve, and the law. In particular:

(1) The original allotment of 32,097 acres.

(2) The taking of the Right of Way Land subject to a statutory restraint on alienation.

(3) The ultimate creation of the reserve in 1938, comprised of 32,097 acres.

(4) The fact that the concept of the reversion of land taken for Railway purposes upon the cessation of railway use, was of long standing in both English and American law. As noted by Saunders J. :

> Even though the *Railway Act* does not discuss the possibility of the reversion, it is, I consider, a reasonable inference. Such a concept is found in both English and American law: *Metropolitan Railway v. Fowler, supra; Rio Grande Western Co. v. Stringham (1915)*, 239 U.S. 44 (U.S.S.C.). (*Canada v. CP*, supra, para. 252).

(5) Presumptions derived from the obligation of the Crown to act honourably in the exercise of discretionary power in relation to aboriginal interests. The Common law of Canada has recognized that the relationship between the Crown and indigenous peoples grounds a Crown duty to act honourably in its exercise of administration and control of aboriginal interests from as early as 1895 (*R. v. Marshall* [1999] 3 S.C.R. 456, para. 50).

In *Haïda Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, McLachlin C. J., for the Court, said:

> The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*.
>
> In *Haïda Nation*, the honour of the Crown was found to give rise to a duty to consult and accommodate the Aboriginal Nations when Crown actions may infringe on their interests. These duties apply notwithstanding that such interests may not have yet been conclusively proven or defined.
>
> This duty, grounded in the honour of the Crown, was held to apply in relation to the provinces as well as Canada, as the provincial interest in land is subject, under s. 109 of the *Constitution Act, 1867*, to "any interest other than that of the province" in provincial Crown land. (*Haïda Nation*, *supra*, paras. 58-59).
>
> In the present matter, the Province came into possession of the Right of Way Land on the basis of the "purchase" from the CPR. It did so despite the Band's obvious interest.
>
> The fair dealing required by the honour of the Crown would mandate that the DIA act on the 1981 request of the Band. As the Province had acquired the Right of Way Land from the CPR it too would be honour bound to take account of the interest of the Band.

[111] In *Canada (AG) v. Canadian Pacific Ltd. and Marathon Realty (B.C.C.A.)*, [1986] B.C.J. No. 407, the court upheld the decision at trial, in which Meredith J. found that a conveyance of land acquired through a reserve under s. 189 of the *Railway Act* to Marathon Realty was unlawful as prohibited by the restraint on alienation in s. 189 (3). Meredith J. found that the lands must be restored to the Crown.

[112] In September 1987 the DIA refused to act on the request of the Band that it restore the Crown title for the use and benefit of the Band. Hence, the Crown persisted in its breach of duty despite the outcome in *Marathon Realty*.

[113] The decision in *Marathon Realty* was affirmed by a five member panel of the British Columbia Court of Appeal in *Canadian Pacific* (supra).

[114] The Crown's failure to take action to establish the interest of the Band in the Right of Way Land constituted a failure to protect its legal interest. Had it done so the outcome would, on the basis of these authorities, be certain.

G. Did the Crown fail in its duty to the Band?

[115] In *Guerin v. Canada*, [1984] 2 S.C.R. 335 Dickson J., for the majority, said :

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect. (p. 376.) (Emphasis added)

[116] In *Wewaykum*, Binnie J. said the following with respect to the application of fiduciary principles to Indian lands:

> 1. The content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity.
>
> 2. Prior to reserve creation, the Crown exercises a public law function under the *Indian Act* — which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown's duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.
>
> 3. Once a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation. (Para. 86) (emphasis added).

[117] Order In Council PC 2317 purports to authorize "... the sale...of the Indian's interest...". However, the statutory authority for the taking does not provide for the

absolute sale of any interest in Crown land. Any interest in Crown land granted under the *Railway Act* is subject to a restraint on alienation. The Indian interest is a burden on Crown title. The Crown has provided no authority for the severance of the Indian interest from the Crown title.

[118] In the present matter, the Band had a cognizable interest in the Right of Way Land. This interest existed between the date of the KVR grant in 1922, and the date of abandonment of the line of rail. The interest of the Band was perfected in 1938. The interest was then reversionary. After the line of rail was abandoned, the Band's interest was in the Right of Way Land as reserve.

[119] In *Wewaykum,* Binnie J. stated that "expropriation of an existing reserve (equally) gives rise to a fiduciary duty". (Para. 98).

[120] The 1922 taking of the Right of Way Land was an expropriation. Any interest the Band had in the Right of Way Land within its provisional reserve was protected by the statutory restraint on alienation. In 1938, I.R. No. 1 became an *Indian Act* Reserve. This included the reversionary Crown title and the revived interest of the Band upon the cessation of railway use of the Right of Way Land. The Crown's duty, once a reserve is created, "expands to include the protection and preservation of the Band's quasi-proprietary interest in reserve from exploitation." (*Wewaykum*, *supra*, para. 86).

[121] The actions of the CPR, in transferring its purported interest in the Right of Way Land to British Columbia, was done with knowledge that the abandoned line of rail crossed a reserve of the Okanagan Indian Band. The CPR knew that the Right of Way Land was acquired by way of a federal Crown grant, and was held subject to a restraint on alienation. The actions of the CPR were unlawful, and to the detriment of the Band.

[122] Officers of the federal Crown would have been aware of the 1977 application of the CPR to the Railway Transport Committee, made pursuant to the *Railway Act*. The committee is a federal institution. The Crown had actual or constructive notice that the interest of the Band was engaged upon abandonment of the line of rail.

[123] In June, 1981, the Osoyoos Indian Band asked the DIA for all data concerning the Right of Way Land asked DIA to check into its recovery. In 1987, the Band asked the DIA to restore its interest in the Right of Way Land. Despite being on notice, the Crown did nothing. This enabled the unlawful sale of the land by the CPR in November 1989.

[124] The Crown was under a positive obligation to preserve and protect the Band's legal interest in reserve. (*Wewaykum*, para. 104). In fact, the Crown did nothing to advance or assert the legal interest of the Crown and the resulting interest of the Band. The claim of the Band rests on the events of 1978 and 1981, and its ongoing failure to protect the legal interest of the Band in the reserve. The claim of the Band does not rest on the 2005 expression of the Province's willingness to sell the Right of Way Land to the Band.

H. Is the Osoyoos Band, in all the circumstances, entitled to an equitable remedy?

1. Introduction

[125] In *Wewaykum*, *supra*, Binnie J. said :

> One of the features of equitable remedies is that they not only operate 'on the conscience' of the wrongdoer, but require equitable conduct on the part of the claimant. They are not available as of right. Equitable remedies are always subject to the discretion of the Court. (para. 107).

[126] The Crown raises two grounds for the denial of equitable relief:

1. the Band can bring an action to recover the land on completion;

2. the Band was fully compensated for the taking of the land.

2. Action by the Band

[127] The Osoyoos Band asserts various breaches of fiduciary duty. The Crown, in oral submissions, argued that no fiduciary duty could exist because the Band could have taken proceedings in court to assert its interest in the Right of Way Land upon abandonment of the line of rail. In short, there could be no duty on the Crown to do what the Band could have done itself.

[128] As is noted above, it is the duty of the Crown as a fiduciary to protect and preserve the Indian interest in reserve lands. The Band seeks an equitable remedy. The Crown's contention that an equitable remedy is not available to the Osoyoos Band must therefore be advanced on the basis that the Band has not engaged in equitable conduct.

[129] I do not accede to the position advanced by the Crown.

[130] The premise of the Crown's position is that the Band could have sued the CPR seeking recovery of its use of the Right of Way Land. The federal Crown would be a necessary party to an action seeking recovery of the land, as the Band would have to assert the proprietary title of the federal Crown.

[131] To deprive the Band of an equitable remedy in the face of a clear breach of the Crown's duty to protect the Band's interest on the basis that the Band could have taken action itself would have the effect of shifting the burden of enforcement of the Crown's duty to the Band and seeking relief against its fiduciary. This cannot be reconciled with the honour of the Crown in its administration of the Indian interest in reserve land. The Band did not engage in inequitable conduct by failing to take legal proceedings.

3. The Receipt of Compensation at the Time of the Taking

[132] Agent Ball was directed to obtain a valuation. There is no evidence that he sought advice from an appraiser. His informal valuation reflects the price paid by the KVR for the right of way acquired over adjacent farmland. There is no direct evidence of the legal nature of the interest acquired from the neighbouring farmers.

[133] The evidence is not clear on whether the price paid reflects the value of the fee or an interest subject to a restraint on alienation. It may be assumed that the KVR would pay no more than the value of an interest subject to a restraint on alienation. On this basis I find that the KVR paid a sum that reflects a limited interest.

[134] It is, in any event, of no consequence for the interests of the Band whether the price paid was based on the value of the fee or a lesser interest. The Band is entitled to the reversion. This is a legal right. The subject matter of this specific claim is the failure of the Crown to secure the reversion, not the adequacy of the compensation paid at the time of the taking.

[135] The remedy under the *Specific Claims Tribunal Act*, s. 20(1)(a), is limited to monetary compensation. As the breach deprived the Band of its land, compensation is due.

[136] The fact that money was received for the benefit of the Band at the time of the taking, November 30, 1922, does not produce inequity. Whatever the basis for the price paid, the payment was for an interest that was at all times subject to a restraint from alienation.

VI. CONCLUSION

[137] The Osoyoos Band has established a breach of legal obligation arising from the Crown's administration of reserve lands by failing to act on its duty to exercise its title on the abandonment of the line of rail over the Right of Way Land, for the use and benefit of the Band as reserve.

HARRY SLADE
Chairperson, Specific Claims Tribunal Canada