TITLE TO INDIAN RESERVES IN BRITISH COLUMBIA: A CRITICAL ANALYSIS OF ORDER IN COUNCIL 1036

by

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ABSTRACT

Indian reserves in British Columbia have a unique history. When British Columbia joined Confederation, the Terms of Union required the province to convey reserve lands to Canada in trust, for the use and benefit of the Indians. That constitutional obligation, imposed by the Terms of Union, was not fulfilled until many years after the date of union. It was not until 1929 that a "form of tenure and mode of administration" for all reserves in the province was agreed upon by the two governments. Nine years later, the provincial government passed Order in Council 1036, which conveyed most reserves outside the old Railway Belt to Canada. Pursuant to the 1929 agreement, the reserves which had been established inside the Railway Belt, (a strip of land that had been transferred to Canada in 1884), were to be governed by the same terms and conditions found in Order in Council 1036. Other reserves, which had been established pursuant to treaty Number 8, were not formally transferred until 1961.

The purpose of this thesis is to examine the history leading up to the transfer of reserve lands in British Columbia, and to critically analyze the title which passed pursuant to Order in Council 1036. The examination of Order in Council 1036 includes an analysis of the proprietary rights transferred, such as water and mineral rights. The transfer instrument is analysed in detail in order to determine what rights and interests were passed to the

Dominion and what was reserved to the province. Because the reserves in the old Railway Belt share the same terms and conditions, pursuant to Privy Council Order 208, they will also be included in this study. The establishment and transfer of Treaty Eight reserves will not be dealt with here. However, due to the similarities in the transfer instruments, some of the comments and analysis with respect to the other reserves will be applicable to the Treaty Eight reserves.

The Constitution required the province to convey reserve lands to the Dominion. The term "conveyance" is not strictly appropriate to describe a transfer of property rights between levels of Her Majesty's governments. Therefore, certain aspects of Crown title and the transfer of property interests between levels of governemnt are examined herein. It is submitted that, because the Terms of Union required the "conveyance" of Indian reserves, the transaction must be analyzed from a constitutional law perspective.

One of the features of Order in Council 1036 is a reservation by the province of a right to resume up to one-twentieth of any reserve lands. That is a term of the conveyance that continues to concern Indian bands in British Columbia. It is submitted that this condition of the transfer is invalid because it is contrary to the requirements of the Terms of Union. The conveyance should not be construed as a grant of real estate, but rather as a

transfer of proprietary interests pursuant to legislation. Order in Council 1036, (and the Federal counterpart, Privy Council Order 208), should be viewed as delegated legislation. It is further submitted that this delegated legislation is ultra vires to the extent that it purports to give the provincial government a power of resumption over Indian reserve lands.

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INTRODUCTION

Indian reserves in British Columbia have a unique and interesting history. Most of the reserves in the province were not established pursuant to treaties, by which the original inhabitants ceded their right to a larger territory in exchange for a small area. The absence of treaties in much of British Columbia is responsible for the current legal claims put forward by most bands concerning their unsurrendered interest in their traditional lands. While the aboriginal land claims have generated much interest and scholarly works, relatively little has been written about the established reserve lands in British Columbia. The purpose of this work is to examine the establishment of Indian reserves in British Columbia, and to analyze the conveyance of reserve lands from the province to the Dominion, in trust for the use and benefit of the Indians.

When British Columbia joined Confederation in 1871 it agreed to convey lands to the Dominion to be used as Indian reserves in the province. This agreement was noted in the Terms of Union and consequently became part of the Canadian Consitution.[1] The constitutional obligation was not settled until 1938, when B.C.

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[1] British Columbia "Terms of Union", being a schedule to an Order of Her Majesty in Council admitting British Columbia into the union (16 May, 1871), R.S.C. 1970 Appendix II, 279. Hereinafter referred to as the "Terms of Union".

finally transferred most of the reserves by Order in Council.[2] Many other reserves were within the boundaries of the Railway Belt, a strip of land on either side of the Canadian Pacific Railway, which had been previously transferred to the Dominion pursuant to the Terms of Union. By an agreement reached in 1929, the Railway Belt reserves were to be subjected to the same "form of tenure and mode of administration"[3] as reserves outside the Belt.

It is this "form of tenure and mode of administration" that is the subject of analysis here. The Indian reserves that are governed by the agreed form of tenure expressed in O/C 1036 and Privy Council Order 208 comprise most of the reserves in British Columbia. These Orders are roughly analagous to title deeds, in that they purport to convey lands subject to certain conditions and reservations. Indeed, the agreed form of conveyance is very close to the standard Crown grant of the day. However, an analysis of the transfer can not be achieved simply by reference to concepts of property or conveyancing law. The transaction was not, strictly speaking, a conveyance at all, but rather a transfer

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[2] British Columbia Order in Council No. 1036, July 29, 1938, see appendix. The Order is sometimes hereinafter referred to as O/C 1036.

[3] The Scott-Cathcart Agreement was embodied in federal Privy Council Order No. 208, February 3, 1930, see appendix (sometimes hereinafter referred to as P.C. 208). It contains the draft form of conveyance which ultimately became O/C 1036. These documents will be discussed in the following chapters.

of administration and control over certain lands from the Crown in right of British Columbia to the Crown in right of Canada.[4] Accordingly the transaction will be examined in this light, with particular reference to constitutional issues involved.

Following a review of the history leading up to the transfer, the nature of title to Crown lands will be distinguished from individual forms of land tenure. The transfer of Crown lands between levels of government will be generally reviewed before the particular transaction effected by O/C 1036 is analyzed in detail. The analysis of the transfer instrument will attempt to describe the nature of title to Indian reserves including water and mineral rights, in view of the reservations contained in O/C 1036. Finally, the form of tenure and mode of administration governing Indian reserves will be scrutinized against the dictates of the Constitution. Based on this analysis I will argue that the "form of tenure", expressed in O/C 1036 and P.C. 208 is constitutionally flawed. In particular, I will attempt to establish that the right of the province to resume a portion of reserve lands for public purposes is invalid.

Before proceeding, a word of caution is in order. The analysis will be relevant to those reserves which were transferred pursuant to Order in Council 1036, and to those reserves which are situate

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[4] This aspect of the transfer is discussed more fully in Chapters II and III.

within the old Railway Belt. Other reserves, in North Eastern B.C., were established pursuant to treaty, and were transferred under separate instrument, in 1961.[5] These reserves have not been included here because of the difference in the way they were established and because of the difference in the wording of the transfer instrument. It should also be noted that there are a variety of ways in which reserve lands were set apart. For example, some reserves were purchased by the federal government from individual land owners, and consequently the nature of title might be affected by the original Crown grant. The history of any particular reserve might well affect the general remarks and analysis offered here. However, the issues discussed in the following chapters will have some relevance to all Indian reserves in British Columbia.

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[5] British Columbia Order in Council No. 2995, November 28, 1961. These reserves were established pursuant to Treaty No. 8.

CHAPTER I

HISTORICAL BACKGROUND

Pre-Confederation - Colonial Indian Policy

According to the Terms of Union, the federal government was to assume the charge of the Indians and the management of Indian lands under a policy "as liberal as that hitherto pursued by the British Columbia Government."[1] The choice of words was ambiguous, if not misleading, in view of the past policy of the colonial government. During the early years of the colony under the Governorship of James Douglas the word "liberal" seems almost an appropriate description of Indian policy. However, in the seven years immediately preceding Union the policy might be described as anything but "liberal".

During his tenure as Governor of the colony of Vancouver Island (and later of mainland British Columbia), Douglas followed the traditional British policy of dealing with native populations in North America. That policy, which was reflected in the Royal Proclamation of 1763, recognized the native "interest" in the land and demanded that it be respected. Before the Crown could open any land for purchase and settlement, the native interest had to

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[1] British Columbia "Terms of Union", being a schedule to an Her Majesty in Council admitting British Columbia into the May, 1871), R.S.C. 1970 Appendix II, 279. Hereinafter refer the "Terms of Union".

be formally purchased, or "surrendered", and other suitable provisions made for the future welfare of the natives.

Between 1850 and 1857, Governor Douglas made a number of treaties with the Indians of Vancouver Island, whereby their interest in certain lands were relinquished to the Crown in exchange for money (actually the cash was converted to blankets) and the promise that their villages and garden sites would remain undisturbed forever.[2] In response to Imperial instructions to deal humanely with the natives and supply them with an alternate means of subsistence, Douglas began to formulate a policy not unlike the present reserve system. The Indians were to be settled on reserves, with any unused portions of reserve land to be leased to the highest bidder. Any proceeds from leasing would be credited to the band to help defray the cost of administering the charge of the Indians.[3]

Although the formal surrender process begun on Vancouver Island was never completed due to lack of funds, Douglas proceeded to implement his reserve policy. He stipulated that reserves were to

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[2] See copies of treaties in, "Papers Connected with the Indian Land Question", British Columbia Legislative Assembly. Sessional Papers, 2nd Parl., 1st Sess., 1876. The "Papers" have been published separately as, Papers Connected with the Indian Land Question: 1850-1875 (Victoria: Wolfenden, 1875). The treaties are reproduced at pages 5-10 of the Wolfenden publication.

[3] Robert Cail, Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871 - 1913 (Vancouver: University of British Columbia Press, 1974), 174.

be set aside in all areas of the province inhabited by Indians, and that reserves should be defined according to the desires of each particular Band.[4] Instructions from Douglas to Colonel Moody (Chief Commissioner of Lands and Works) in 1863 illustrate the liberality of his policy regarding the size of reserves. The Indians of the Coquitlam River reserve had expressed dissatisfaction with the size of the reserve which had been established for them. Douglas wrote to Moody:

> I beg that you will therefore, immediately cause the existing reserve to be extended in conformity with the wishes of the Natives, and to include therein an area so large as to remove from their minds all causes of dissatisfaction.
>
> Notwithstanding my particular instructions to you, that in laying out Indian reserves the wishes of the Natives themselves, with respect to boundaries, should in all cases be complied with, I hear very general complaints of the smallness of the areas set apart for their use.
>
> I beg that you will take instant measures to inquire into such complaints, and to enlarge all the Indian reserves between New Westminster and the mouth of the Harrison River, before the contiguous lands are occupied by other persons.[5]

Unfortunately, when Douglas finally retired in 1864 he left no definite, codified system for allotting and registering Indian reserves. White settlers were by that time exerting more pressure for land grants and the colony's new leaders were all too eager to accommodate presumably productive farmers at the expense of the native population. As the colony moved away from a fur trade

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[4] Ibid., 175.

[5] Ibid., 179.

economy to an agricultural base, the Indians were viewed less as an asset and more as a liability. Viewed as both "uncivilized" and "unproductive" they were seen as an impediment to the prosperity that would undoubtedly follow the white settlers. Accordingly, the Indian policy began to change. Although the general policy followed by Douglas remained in its essential element (reserves were still set aside for the benefit of the Indians) any liberal implementation of that policy ceased.

In 1864 Joseph Trutch became Chief Commissioner of Lands for British Columbia. The new administration in the colony adopted a policy limiting reserves to ten acres per family, which was ostensibly based on past practice.[6] As a result of pressure from settlers some of the larger reserves allotted pursuant to Douglas's general instructions were reduced, and new reserves were restricted in accordance with the new policy.[7] Any notion of aboriginal title was dismissed by the new administration and reserves were to be allotted according to the present needs of the Indians only. The then Colonial Secretary, W.A.G. Young, apparently agreed that reserves should not be too large. In his instructions to Trutch he stated that the allotted reserves should

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6 Ibid., 175 and 202.

7 For a good review of this policy and examples of Reserve reductions, see Cail, 180 and Robin Fisher, Contact and Conflict: Indian - European Relations in British Columbia, 1774 - 1890 (Vancouver: University of British Columbia Press, 1977), 163-164.

in no case "be of such an extent as to engender the feeling in the mind of the Indian that the land is of no use to him, and that it will be to his benefit to part with it."[8]

The Colonial Secretary may have only intended to discourage Indian bands from selling their land heritage. On another view, his remarks could be seen to support a policy of limiting reserves to a size that would be adequate only for a band's subsistence.

By limiting the size of reserves another feature of Douglas's policy was disregarded. If the reserves were kept small enough there could be no thought of leasing unused portions to derive an income for the maintenance of the band. One of the few common threads in the colonial Indian reserve policy was that the existing village sites and gardens were included in all reserves, and to this limited extent it may be said that colonial policy respected the Indians' prior interest in the land. A further common element in the policy was that the Indians were prevented from alienating their reserve lands, and thereby, presumably, their future subsistence was also protected.

There had also been some progress in the systematic recording of reserves in the latter years of the colony's existence. In 1867 the first list of Indian reserves appeared in the B.C.

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[8] Young to Trutch, letter dated November 6, 1867, in "Papers Connected with the Indian Land Question", 205.

Gazette. Shortly after Union, in 1872, B.W. Pearse (the Province's first Chief Commissioner of Land and Works) prepared a "Return of All Indian reserves (surveyed) in the Province of British Columbia". This was presented as a "Return to the Legislature",[9] and reported a total of 74 reserves situated in the Districts of Vancouver Island, New Westminster and Yale.

Confederation - Terms of Union, 1871

In 1871 British Columbia joined Confederation pursuant to the "Terms of Union", passed that same year as an Imperial Privy Council Order (May 16, 1871).[10] The jurisdiction over Indian Affairs in the new union was governed by Article 13 of the Constitutional document:

> "13. The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.
>
> To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians,

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9 "Return of Indian Reserves", British Columbia, Journals, 1st Parl., 2nd Sess. 1872-3, Appendix Sessional Papers.

10 See Note 1, supra.

> on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies".

Thus the Dominion Government assumed legislative jurisdiction over Indians and "lands reserved for their use and benefit". This was a confirmation of the Dominion's jurisdiction contained in Section 91(24) of the Constitution Act, 1867. The Article's main purpose was to address the issue of reserve lands. It did this rather unsatisfactorily, to say the least, due to its ambiguous and misleading wording. However, it did provide that reserve lands were to be "conveyed" by the Province to the Dominion, in trust for the use and benefit of the Indians. In case of disagreement respecting quantity of land, a remedy was provided. The "arbitration" procedure set out in Article 13 was never used because the federal and provincial governments eventually reached a negotiated settlement. However, it would be over 65 years before any "conveyance" as required by Article 13 was effected.

The reason that negotiations took so long are many and varied. However, it may be generally explained as follows. Having agreed to convey lands for the use of the Indians, and give the federal government jurisdiction over those lands, the Province was determined to give up as little land as possible. Crown land was valued as the key to prosperity, and jealously guarded by the new province. The federal government on the other hand, was shocked when it realized just how greatly past colonial policy differed

from Indian reserve policy in the rest of the country. The "ten acre per family" rule of allotment relied upon by the Province was far below what the federal government considered to be a reasonable and just allotment. As negotiations began, the two parties were poles apart.

It seems obvious that the Dominion Government, at least, was unaware of the gulf that separated the two Indian policies when Article 13 was written. It has been suggested by one historian that Joseph Trutch was personally responsible for the deliberately contentious and ambiguous language of the Article.[11]

Indian Reserve Commission 1875-1910

If it was not clear prior to 1871 that past British Columbia Indian land policy was quite different from Dominion policy, it quickly became apparent. The years immediately following Union were marked by a kind of "bidding" war between the province and the Dominion. The Dominion took the position that reserves should be allotted on the basis of eighty acres per family, while the province stuck to the "ten acre rule", eventually moving to twenty (for new reserves only).[12]

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[11] Cail, 186.

[12] Ibid., 195.

Finally, another approach was suggested by Mr. William Duncan, a lay missionary, with much experience in Indian matters in British Columbia. Duncan proposed that no fixed acreage be used when allotting reserves, but that each Indian nation should be dealt with separately according to its own particular needs. An Indian agent should be appointed to live among each nation and gather the required information. Duncan's suggestions also included the reduction of reserves where the acreage was found to be more than necessary. The Provincial Government adopted Duncan's views and passed them to Ottawa for consideration.[13]

Duncan's suggestions ultimately formed the basis of agreement for the appointment of the first Indian Reserve Commission for British Columbia. It was hoped that through the work of the Commission the Indian land question would be finally settled. The federal government passed an Order in council setting out the terms of the agreement, and the province accepted the proposal in a reciprocal Order in council on January 6, 1876.[14]

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13 "Report of the Government of British Columbia on the subject of Indian Reserves (Aug. 17, 1875)." British Columbia. Legislative Assembly. Sessional Papers, 2nd Parl., 1st Sess. 1876.

14 Privy Council Order, Nov. 10, 1875, and British Columbia Order in Council 1138, passed Jan. 6, 1876. The British Columbia Order is reproduced in "Papers Connected with the Indian Land Question", 160-163.

Under the terms of the agreement the Commissioners were to do the work of gathering information, rather than using Indian Agents, as suggested by Duncan. The notable features of the agreement were:

1) no fixed acreage was to be used by the Commissioners when determining reserve size;
2) a "liberal policy" was to be pursued in reserving lands, and the amount of land should reflect the needs of each Nation based on their particular circumstances and economy.
3) reserves were to be proportionate in size to the population of each Nation, being increased or decreased periodically. The extra land required would be taken from Crown lands and the excess would revert to the province.
4) Portions of existing reserves that were not included in the official reserve as determined by the Commissioners were to be returned to Provincial control, upon payment of compensation for any improvements.

The requirement that any land, from time to time deleted from a reserve should revert to the province, was later viewed as supporting the province's claim to a "reversionary interest". The province steadfastly maintained, by its interpretation of the Terms of Union, that any lands conveyed to the Dominion for the

use and benefit of the Indians would revert to the province should they not be actually required by the Indians. The federal government's proposals of November 10, 1875 have been interpreted by some writers to be a recognition of the province's reversionary interest.[15] Although it is doubtful that the federal government viewed this part of the agreement in the same way as the Province, the wording of the agreement encouraged the province to continue its claim. The "reversionary interest" and the problems it caused will be discussed later, in more detail.

The Indian Reserve Commission began its work in 1876 as a joint commission with three members, and continued until 1910. The Dominion government appointed Alexander Anderson as their representative to the Commission, while British Columbia appointed Archibald McKinlay. Gilbert Malcolm Sproat was chosen to be the chairman of the Joint Commission. The tripartite Commission was short lived because the provincial government considered its operations to be too costly. It was dissolved at the end of 1877, but Gilbert Sproat continued as sole Commissioner until March, 1880. Sproat resigned amidst controversy and was succeeded by

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[15] David Borthwick "The Provincial Reversionary Interest in Indian Reserves - A Unique Proposition," (unpublished, 1975), Department of Indian Affairs and Northern Development Library Services, Ottawa.

Peter O'Reilly, who served from 1880 to 1898. A.W. Vowell, the federal Indian Superintendant for British Columbia, served as reserve Commissioner from 1898 to 1910.

The work of the first Commission was very controversial, to say the least. The commissioners were subject to a great deal of conflicting pressures from the Province, the Dominion and the Indians. The Commission was to meet with the various Indian Nations in the Province and ascertain the appropriate reserve sizes according to the terms of reference in the agreement of 1875. Notification of the exact size and location of allotted reserves was forwarded to Victoria, where it was to be confirmed by publication in the Gazette.[16] It was at this final stage where the commission's work bogged down. In fact, none of the reserves allotted by either the joint commissioners, or Gilbert Sproat (as sole commissioner) were approved and gazetted. The province complained about the extravagance of the early commissioners and used various excuses to withhold official approval.[17]

It is still a matter of some doubt as to whether the reserves allotted by the first Joint Commission needed to be formally approved by the provincial government. Certainly, publication in the Gazette would provide useful notice that the described lands were reserved from settlement, but it was not a prerequisite to

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[16] Cail, 213.

[17] Cail, 224, and also Fisher, 197.

the establishment of a reserve by the Joint Commission. According to the agreement between the two governments, the Commissioners were to "fix and determine" the "extent and locality" of each reserve "after full enquiry on the spot" [18] There was no mention of any further approval or ratification that was necessary by either level of government. Later, when the Joint Commission was dissolved and replaced by a single Commissioner, a ratification procedure was agreed upon.

Just prior to the dissolution of the Joint Commission the provincial government made a proposal designed to reduce the cost of the allotment procedure. It was suggested that the Commission confine its work to the more settled areas of the province where the settlement of the Indian reserve issue was most urgent. Once work had been done in these areas, and the Commission dissolved, the Superintendent of Indian Affairs would allot lands to tribes in remote areas. Those allotments would be subject to the approval of the Chief Commissioner of Lands and Works, and in case of disagreement the final arbiter would be the British Columbia Supreme Court.[19]

The Joint Commission was dissolved in 1877 but the idea of allotments by the Superintendent of Indian Affairs was never

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[18] British Columbia Order in Council No. 1138, January 6, 1876.

[19] British Columbia Order in Council 279, January 30, 1877; Dominion Order in Council, February 23, 1877.

realized. Instead, Gilbert Sproat carried on the work of allotting reserves as sole Commissioner. His allotments were subject to the approval of the Commissioner of Lands and Works with a right of appeal to the Supreme Court of British Columbia. As previously noted, none of the reserves allotted by Sproat or the Joint Commission were approved or gazetted by the province. Neither was there any appeal taken to the Supreme Court over any of Sproat's allotments. Perhaps the lack of protest by the federal government may be explained by a desire to negotiate a settlement of the reserve issue. Instead of resorting to the agreed route of appeal it was just as expedient to carry on with another Commissioner.

After Sproat resigned, under pressure, in 1880, he was replaced by Peter O'Reilly. Commissioner O'Reilly was the brother-in-law of Joseph Trutch. With this appointment, a new policy, more suited to provincial views was established. The decisions of the new reserve commissioner were to be subject to the approval of the Indian Superintendent and the Chief Commissioner of Lands and Works. Any disputes were to be settled by the Lieutenant Governor.[20] O'Reilly was the perfect man from the provincial point of view, and consequently in spite of the new approval requirements, the work of the Indian Reserve Commission moved along comparatively quickly. Much of his time was spent revising

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[20] Fisher, 199, and see Privy Council Order No. 1334, July 19, 1880.

(reducing) reserves allotted by Sproat.[21] By 1885, 621 reserves had been allotted, 239 had been approved by the Province (all of these were "O'Reilly reserves") and 477 had been surveyed.[22] However, by 1894 federal funds for surveys were exhausted, and O'Reilly had to discharge the survey crews.[23]

Apparently the disagreements over earlier reserve allotments were overcome by the subsequent work of Commissioner O'Reilly. However the earlier allotments may have some significance when determining the issue of when a particular reserve became "lands reserved for the Indians", within the meaning of the Consititution. Although a reserve allotted by the Joint Commission may not have been formally approved until O'Reilly's time, it might still be considered to have been an Indian reserve from the date of the earlier allotment. The precise time when a reserve became "lands reserved for the Indians" is relevant to the claim of federal legislative jurisdiction over the land. Since lands reserved for the Indians fall under exclusive federal jurisdiction, provincial laws which would otherwise affect those lands do not apply. This issue will be discussed further in another part of this paper.

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[21] Fisher, 200-201.

[22] Cail, 224.

[23] Ibid., 225.

O'Reilly was succeeded in 1898 by A.W. Vowell. The Laurier government was in power in Ottawa and relations between the federal and provincial governments became strained again. In addition to the usual contentious issue of reserve size, the Province re-affirmed its "reversionary interest" in all reserve lands. The Indians were pressing the issue of aboriginal title and the federal government was prepared to take all issues to the courts for settlement.

On February 26, 1907 the provincial government passed an Order in council proclaiming its reversionary interest, and recommending action to re-claim any portions of reserve land that had been alienated pursuant to the Indian Act.[24] The Federal Government replied with its own Order which rejected the provincial position and proposed to have the issue settled by the courts.[25] The Province had also suggested that a conference was necessary to re-adjust the reserves which had been allotted to expedite the return of any "surplus" land to provincial control. The Dominion declined this offer, preferring to wait until the contentious issues - aboriginal title, reversionary interest, reserve size- could be settled by the courts.[26]

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[24] British Columbia Order in Council No. 125, Feb. 26, 1907.

[25] Privy Council Order No. 2739, Dec. 19, 1907.

[26] Ibid.

The McKenna-McBride Agreement and Royal Commission 1913-1916

The differences between the two governments were not resolved until the defeat of the Laurier government in 1911, and the return of a Conservative government, which adopted a more conciliatory attitude toward British Columbia. The actual work of the Indian Reserve Commission had come to a halt in 1908 due to the strained relations between Victoria and Ottawa, and when Vowell retired in 1910 the position was abandoned. The new government in Ottawa appointed Dr. J.A.S. McKenna as Special Commissioner, in May, 1912, to investigate the issues and negotiate a settlement of the Indian land question in British Columbia. The three outstanding matters to be resolved were: (1) aboriginal title, (2) reversionary interest, (3) reserve size. McKenna agreed to defer resolution of the aboriginal title issue, thus paving the way to agreement on the other matters.

As a result of negotiations between McKenna and Premier McBride, the "McKenna-McBride Agreement" was signed on September 24, 1912.[27] It provided for the appointment of a Royal Commission to adjust the acreage of allotted reserves and create new reserves where necessary. In turn, the province agreed to legally reserve any additional lands and convey all reserve lands as finally fixed

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[27] The text of this agreement may be found in the Report of the Royal Commission on Indian Affairs for the Province of British Columbia (Victoria: Acme Press, 1916) Vol. I, 10-11.

by the Commission. The province agreed to convey their reversionary interest, except in the case of any Band which might become extinct. Otherwise, the Dominion was free to deal with reserve lands as they saw fit, for the benefit of the Indians. The McKenna-McBride Agreement was accepted by both governments, subject to the right of each to approve any report submitted by the Royal Commission.[28]

The Royal Commission began its work in 1913 and completed its report in 1916. During the course of the Commission's work, 1,000 existing reserves (allotted by the various Indian Reserve Commissions, 1876 - 1910) were reviewed and adjusted, and new reserves were recommended.[29]

The Indian Affairs Settlement Acts and the Ditchburn-Clark Agreement

In order to implement the Commission's Report, both governments passed legislation (virtually identical in their terms) empowering the Executive to do all acts necessary to carry out the recommendations of the Royal Commission, and if necessary, to

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[28] Dominion Privy Council Order No. 3277, November 27, 1912; British Columbia Order in Council 1341, December 18, 1912.

[29] Cail, 237.

enter into further negotiations on the Indian land question.[30] The Commission's Report was ultimately reviewed and amended by W.E. Ditchburn (Dominion) and Major J.W. Clark (B.C.) between the years 1920 and 1923. The amendments were not extensive. Several inaccuracies were discovered in the original report, and these were rectified. The Report of the Royal Commission, as amended by Ditchburn and Clark was finally confirmed by reciprocal Orders-in-Council.[31] The Dominion Order confirmed the Report with the exception of cut-offs recommended in the Railway Belt. [32] It was mutually agreed that the issue of Indian lands in B.C. covered by Treaty No. 8 (which lands were dealt with in a separate Interim Report (No. 91) of the Commission) would be settled at a later date. Finally, it was agreed that upon all lands being duly surveyed, conveyance would be effected in accordance with clause 7 of the McKenna-McBride Agreement.

Scott-Cathcart Agreement

The legal surveys for the reserves allotted or confirmed by the Royal Commission would take several years to complete. In the

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30 British Columbia Indian Land Settlement Act, S.C. 1920, c.51, and Indian Affairs Settlement Act, S.B.C. 1919, c.32, sometimes hereinafter referred to as the "Settlement Acts".

31 Privy Council Order No. 1265, July 19, 1924; British Columbia Order in Council No. 911, July 26, 1923.

32 Privy Council Order No. 1265, July 19, 1924.

meantime the province and Dominion continued negotiations on another issue which had plagued the two governments since Confederation - the problem of the Railway Belt and Peace River Block lands. Following a 1927 Royal Commission investigation into the problems caused by these federally administered areas in British Columbia, it was agreed that all unalienated lands in these areas would be returned to the province. This was eventually done in 1930.[33] However, before the lands in the Railway Belt and Peace River Block could be re-conveyed to the province, arrangements had to be made regarding the Indian reserves contained within those areas. The Scott-Cathcart Agreement, of March 22, 1929 settled all Indian land issues that would be affected by the transfer, and also addressed the issue of conveyance of all other reserve lands.

The Scott-Cathcart Agreement is a document of great importance in the history of Indian reserves in British Columbia. Together with the reciprocal Orders-in-Council which approved it, the agreement dealt with the "tenure and mode of administration" of Indian reserves both inside and outside the Railway Belt and Peace River Block, and thereby created a certain uniformity for most of the reserves in the province.

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[33] The Constitution Act, 1930, 20 - 21 Geo. V, c.26 (U.K.), reprinted in R.S.C. 1970, Appendix II, at 365. The memorandum of agreement between the Dominion and British Columbia which pertains to the re-transfer of federally held lands in B.C. is embodied in the Act, at p. 392.

The main provisions of the Agreement are as follows:

1) The form of the conveyance for lands outside the Railway Belt and Peace River Block areas was agreed upon and detailed in Schedule A, annexed to the Agreement. This form eventually became the form of conveyance used in O/C 1036.
2) The Indian reserves inside the Railway Belt and Peace River Block were to be governed by the terms of the conveyance of land outside those areas. That is, the "tenure and mode of administration" of Railway Belt reserves was to be governed by the terms set out in Schedule A.

3) The terms of the McKenna-McBride Agreement regarding the disposition of "cut-off" lands were amended, allowing the lands to be either subdivided or sold "en bloc".

4) Any additional lands required for the Indians, not provided for by the McKenna-McBride Commission were to be granted by the province "at a reduced or nominal price" and would be subject to revert to the province if the Band should become extinct.

5) Indian claims to the foreshore of their reserves were left to the "invariable policy of the Province to consider the rights

5) of the upland owners," which "fully protected the rights of the Indians in the same way as other upland owners or occupiers of land."

6) It was recommended that the Province repeal that section of the Land Registry Act (R.S.B.C. 1924, s.47) which prohibited registration of any interest in land derived from a Dominion patent to Indian reserve lands, without the consent of the provincial Executive.

Perhaps the most important feature of the Scott-Cathcart Agreement was the agreement on the form of conveyance of reserve lands outside the Railway Belt. The reserves inside the Railway Belt did not have to be conveyed by the province, since the railway lands had already passed to the Dominion under the Terms of Union (article 11) and a formal grant by statute in 1883.[34]

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[34] An Act Relating to the Island Railway, the Graving Dock and Railway Lands of the Province, S.B.C. 1884, c.14. There has been some dispute and uncertainty in the case law as to the exact date that the Railway Belt was actually transferred, or taken out of the control of the B.C. Government. The legislation was based on a Dominion/Provincial agreement which was to be ratified by both the B.C. legislature and the federal Parliament. The Provincial Statute (Dec. 19, 1883) provided the provincial ratification and the Dominion passed a similar Act to ratify the agreement on April 19, 1884 (See S.C. 1884 c.6). Without deciding the point, the Supreme Court of Canada indicated that the transfer was not complete until the passage of the Dominion legislation. However there was no unanimity among the judges on this point - see for example The Queen v. Farwell (1887), 14 S.C.R. 392 at 417 and 420. In George v. Mitchell (1912), 3 W.W.R. 162, the B.C. Court of Appeal held that the date of the Federal Act was

Nevertheless, the Dominion, by this agreement imposed the terms of the provincial "conveyance" of Indian reserves upon reserve lands which they already owned. This was unfortunate for the bands who had reserves in the Belt, because the Dominion already owned the lands comprising the "Railway Belt Indian reserves" under a virtually unrestricted transfer from the province. In 1929 the Dominion agreed to give the province certain rights over these lands such as are contained in the provisos of O/C 1036. Perhaps the parties had only uniformity in mind, but it is likely that the Dominion made concessions on the Railway Belt reserves in order to get concessions from the province on other reserves and, simply, to get on with the transfer.

The Scott-Cathcart Agreement was formally approved by Privy Council Order No. 208,[35] in 1930. In the following year, the agreement concerning the re-transfer of the Railway Belt and Peace River Block was signed, and became part of the Constitution Act, 1930.[36] By article 13 of the re-transfer agreement, all Indian reserves in the subject areas were excluded from the re-transfer,

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conclusive of the transfer.

[35] Privy Council Order No. 208, February 3, 1930, see appendix.

[36] 20-21 George V, C.26 (U.K.), in R.S.C. 1970, Appendix II, 365.

but the terms and conditions in the Scott-Cathcart draft form of conveyance (as set out in P.C. 208) were made applicable to them. The Article reads as follows:

> 13. Nothing in this agreement shall extend to the lands included within Indian reserves in the Railway Belt and the Peace River Block, but the said reserves shall continue to be vested in Canada in trust for the Indians on the terms and conditions set out in a certain order of the Governor General of Canada in Council approved on the 3rd day of February, 1930 (P.C. 208).[37]

Thus, the "tenure and mode of administration" of Indian reserves in the Railway Belt, as set out in P.C. 208 (and in terms identical to O/C 1036) became "constitutionalized", in the Constitution Act, 1930. The significance of this will be discussed later. For now it is important to remember that the Railway Belt reserves were different from other reserves in that they were not "conveyed" by the province. The Dominion had previously acquired the rights of ownership over these lands due to the agreement in Article 11 of the Terms of Union and the subsequent grant of the Railway Belt and Peace River Block by statute in 1883. Therefore, the rights that the province regained over these lands, by virtue of the terms and conditions in the "form of conveyance" set out in P.C. 208, were acquired by agreement between the parties, and can not be viewed as rights held back by the province as a "grantor" of lands.[38] Because of

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[37] Ibid., 395.

[38] The significance of this will be noted in later chapters.

this, and due to the inclusion of P.C. 208, by reference, in the Constitution, the "Railway Belt reserves" continue to be in a different legal position than other Indian reserves in the province.

The Settlement of the Form of Conveyance - O/C 1036

It took a long time for the provincial and the federal governments to agree upon the form of conveyance of Indian reserves. The McKenna-McBride Report, as amended by Ditchburn and Clark, had been approved (subject to the completion of surveys) by both governments by 1924.[39] It was not until 1929 that the Scott-Cathcart form was agreed upon, and subsequent to that, further provincial wrangling over form delayed the transfer of reserves outside the Railway Belt until July 29, 1938. David Borthwick has written a brief, but well documented history of the negotiations leading up to the passage of O/C 1036. Borthwick's history refers to various correspondence between federal and provincial authorities in the years leading up to the Scott-Cathcart Agreement.[40]

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[39] Privy Council Order No. 1265, July 19, 1924: British Columbia Order in Council 911, July 26, 1923.

[40] David Borthwick, "The Birth of B.C. Order in Council 1036" (unpublished, 1975), Department of Indian Affairs and Northern Development Library Services, Ottawa. The correspondence referred to in Borthwick's paper are attached to it as "exhibits".

In 1926, T.D. Patullo, then Minister of lands for British Columbia, provided Duncan Scott (Deputy Superintendent of Indian Affairs) with a copy of the standard provincial Crown grant form, which, the province proposed, would govern the transfer of Indian reserves.[41] This was rejected by Scott, who requested a straight, unrestricted transfer.[42] This counter-proposal was rejected in turn by Patullo, who insisted on the reservations contained in the standard grant.[43] He felt that such reservations were necessary in the public interest. Scott stood his ground on the issue and refused to waive any rights to which the Indians were entitled by virtue of the McKenna-McBride Agreement and the Terms of Union.[44] Later, Scott specifically noted that certain reservations in the standard Crown grant would give the province a voice in the control and management of Indian reserves which would be unconstitutional.[45] This is an important point, and one which will be developed further in another chapter. It is interesting to note that, early in the negotiations, the Dominion foresaw the potential for conflict between the form of conveyance and the division of legislative powers under the Constitution.

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41 Borthwick, "Order in Council 1036", exhibits A, B.

42 Ibid., exhibit C.

43 Ibid., exhibit D.

44 Ibid., exhibit E.

45 Ibid., exhibit L.

There was a break in the correspondence while Patullo sought legal advice from the Office of the Attorney General. Patullo's memos to the Attorney General are of some interest because in them he confided that the province may be willing to pay compensation for some of the rights reserved in the standard grant.[46] What is more interesting is the return memorandum from the Attorney-General's Department. The legal advisers felt that the province was on shaky ground in demanding the reservations from the grant, since that was contrary to previous negotiations. In particular, the reservations were seen to be contrary to the Terms of Union and the McKenna-McBride Agreement. Nevertheless, an argument was put forward to support the provincial position. It was suggested that because the Province had been asked to convey its "reversionary interest", something which the Terms of Union did not require, it could properly demand concessions from the Dominion.[47] This was an ingenious argument considering that the Terms of Union did not mention any "reversionary interest". Indeed, Article 13 required a "conveyance" of land, a term which is indicative of a complete transfer of the provincial interest.

The two parties continued to bicker over the form of conveyance until the Scott-Cathcart Agreement was ultimately signed on March 22, 1929. The form of conveyance was included as Schedule A of the agreement, and it was approved by P.C. 208 (Feb. 3, 1930) and

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[46] Ibid., exhibit M.

[47] Ibid., exhibit O.

B.C. O/C 1151 (September 24, 1930).[48] The Scott-Cathcart form of tenure eventually became O/C 1036.

Order in Council 1036 was very similar to the standard Crown Grant of the day. However there were important differences. There is provision for the Department of Indian Affairs to be notified of any proposed works referred to in the provisos. Perhaps this was inserted to allay the Dominion's concerns over the constitutionality of unilateral provincial interference in the administration of Indian reserves. The usual provisions in the standard grant reserving minerals, petroleum and natural gas were omitted, along with the provisions calling for a re-conveyance of one quarter of any sub-divided lands. Compensation was also specifically provided for road building materials taken from reserves for use outside the reserves.[49]

It is not certain how the exact form of conveyance was finally agreed upon. Perhaps, the parties were under pressure to expedite an agreement on this matter due to its relationship with the Railway Belt re-transfer agreement. It would also appear that the "nitty-gritty" negotiations immediately prior to the signing of the agreement were conducted in a confidential manner that has left few details recorded. However, the correspondence provides a

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[48] The Scott-Cathcart Agreement was attached as Schedule 4 to Privy Council Order No. 208.

[49] The terms of the Order in Council will be analyzed in Chapter 4.

pretty good picture of the process of negotiation. The Scott-Cathcart form of conveyance was a compromise of the former extreme positions, but one which highly favoured provincial interests.

Even though the form of conveyance for Indian reserves outside the Railway Belt had been agreed upon, the provincial government continued to drag its heels on the formal transfer of reserves. This stalling by the province was made possible by continued bickering over the official surveys of reserves, and the old issue of reserve size. At one point the province re-opened the issues of "cut-offs" in the Railway Belt and the provincial "reversionary interest".[50] In conjunction with these claims, the province attempted to re-negotiate the form of conveyance, in order to strengthen their water rights and mineral rights in reserve lands. The newly proposed form of conveyance was rejected by the Dominion, and the Indian reserves outside the Railway Belt and Peace River Block were finally conveyed by O/C 1036, on July 29 1938. The form of this "conveyance" is identical to the draft form agreed upon by Messrs. Scott and Cathcart, in 1929.

The Provincial Claim to a "Reversionary Interest"

As previously noted, the provincial government was of the view that the Terms of Union did not require them to "convey" a

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[50] Borthwick, "Order in Council 1036", 5.

complete interest (fee simple) in the Indian reserve lands.[51] According to their interpretation, they were only obliged to transfer an interest of "use and benefit" over the lands while retaining the underlying title. In the event that the Indians no longer required the land for their "use and benefit" - for example, in the case of a surrender for sale - the land would "revert" to provincial control. The Province found support for their position in the orders-in-council which established the original Joint Commission on Indian reserves. According to provincial O/C 1138, where Indian reserves were found to be in excess of the Band's needs, that excess would "revert" to the province. It might be argued that the Dominion approval of this reserve settlement process amounted to an acceptance of the provincial claim to a reversionary interest. However, the reference to a reversion in favour of the Province must be viewed in the context of the entire agreement. The Joint Commission was established to settle the size of Indian reserves. Some reserves had been established prior to 1871 but none had been conveyed to the federal government pursuant to the Terms of Union. It is logical that any lands which were not included in a reserve, as approved by the Joint Commission, would not need to be "conveyed" by the Province. The reference to a reversion in favour of the Province may be seen as an agreement by the federal government not

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[51] Borthwick, "Reversionary Interest", 3.

to claim any interest in provincial land (under Article 13 of the Terms of the Union) that was not ultimately set apart as an Indian reserve.

The original agreement regarding the establishment of Indian reserves also contemplated a continuous adjustment of reserve size based on population. Any land in excess of a band's need was to revert to the province, from time to time depending on updated data. This feature of the agreement was perhaps the strongest indication of a continuing interest held by the Crown in right of the province. However, the corollary to that provision was that any extra land required in the future would be taken from provincial Crown lands. If the Province planned to rely on the reversionary aspect of the agreement they would also be bound to give up more land if and when it was necessary. It is doubtful that provincial authorities seriously considered giving effect to the "giving" side of the agreement, ad infinitum. Their focus on the "taking" side of the agreement may be more easily understood, especially since the native population was in drastic decline due to disease and other sociological factors, at the time the agreement was negotiated.

In support of its reversionary claim, the province could argue that the interests that were to be conveyed pursuant to Article 13 were only those interests in the land that were necessary for the use and benefit of the Indians - a limited usufructuary interest.

Such a limited interest might not include mineral rights nor the right to sell reserve lands for development purposes. A limited interest could restrict the ways in which Indian Bands might develop their lands. For example, if a band sought to surrender land, mineral or timber rights in exchange for compensation the usufructuary interest would cease to exist immediately upon surrender. The underlying provincial interest would become unburdened, and hence the province would acquire all of the interest in the surrendered lands. The federal government could not dispose of any interest for the benefit of the band. This was in essence the situation in Ontario, as held by the Privy Council in St. Catherine's Milling and Lumber Co. v. The Queen. [52]

In order to fully develop and manage lands for the benefit of Indian bands, the federal government would require a proprietary interest equivalent to a fee simple. The early position taken by the Province was that such an interest was never intended to be transferred. However, this position may be challenged by the Provincial Government's own statements written in defence of their Indian policy.

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[52] (1888) 14 App. Cas. 46.

In his 1875 Report on Indian reserves,[53] Attorney General Walkem explained and defended the colony's past policy regarding Indians and reserves. Walkem noted that past colonial policy was aimed at treating the Indians as fellow subjects.[54] In the report, Walkem stated the real issue between the province and the Dominion as, "what assistance in land shall British Columbia now give to enable the Dominion to carry out her Indian policy?"[55] In answering this question, the Attorney General noted the different pursuits of the Indians of British Columbia and suggested that the land to be provided ought to enhance those pursuits.[56] He divided the Indians into three general categories: (1) fishermen and hunters; (2) stock breeders and farmers; and (3) labourers. He then considered what land was necessary for each group. It is interesting to note his comments with respect to fishermen:

> No good reason exists why "fisheries," such as those established by our merchants...should not be erected in suitable places for the benefit of the Indians, and be in time profitably controlled and conducted by themselves...The establishment of lumber mills and other industries would unquestionably follow success in this direction.[57]

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53 "Report of the Government of British Columbia on the Subject of Indian Reserves", British Columbia, Legislative Assembly, Sessional Papers, 2d Parl., 1st sess., 1876, 57.

54 Ibid., 60.

55 Ibid., 58.

56 Ibid., 63.

57 Ibid., 63-64.

In the preceding comments, there is evidence that part of British Columbia's Indian policy was to integrate the Indians into white society by developing their traditional skills and pursuits. Such land as was necessary for this goal would be allotted to the Indians. It should also be remembered that early on, Governor Douglas foresaw a system whereby unused Indian lands might be leased, with the proceeds directed to the maintenance of the Band. Early British Columbia Indian policy was perhaps not based on principles of equality. It may be more properly viewed as a policy of integration and assimilation. On either view of the basis for the policy as espoused by Walkem, the Indians, or their "trustee", would need at least as full an interest in their land as white settlers enjoyed - a fee simple interest. The reference to Indians eventually founding successful industries out of their traditional skills and land base is consistent with an intention to grant fisheries, timber, water, and mineral rights. Indeed, successive reserve Commissions routinely reserved water rights, fisheries and specific lands for timber and fishing stations.

Walkem's report was probably written with a view to show the past policy as enlightened and commendable. But even if one disregards the puffery, the description of policy that remains shows the necessity of bestowing a broad interest in land in trust for the use and benefit of the Indians in order to effect its purpose.

Prior to the resolution of the reversion issue, the province enacted legislation to support their claim. In 1899 the province amended the section of the Land Act, which provided for the reservation of lands for the purpose of conveying them to the Dominion for the use and benefit of the Indians, by adding the words,

> and in trust to re-convey the same to the Provincial Government in case such lands ceased to be used by such Indians;[58]

The 1908 Land Act provided that:

> It shall be lawful for the Lieutenant-Governor in Council to, at any time, grant, convey, quit-claim, sell or dispose of, on such terms as may be deemed advisable the interest of the Province, reversionary or otherwise in any Indian reserve, or any portion thereof...[59]

This section was carried forward in subsequent editions of the Revised Statutes of British Columbia, until it was repealed in 1970.

In conjunction with these enactments, the province amended the Land Registry Act, in 1910, to prohibit the registration (without the consent of the Lieutenant-Governor) of any title deriving from the Dominion which formed part of an Indian reserve.[60] As noted

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[58] S.B.C. 1899, c. 38, s. 9.

[59] S.B.C. 1908, c.30, s.80.

[60] S.B.C. 1910, c.27, s.2.

earlier, this section was repealed, following the recommendations in the Scott-Cathcart Agreement of 1929.[61] The province did, on occasion, sell its reversionary interest, and did sanction the registration of Dominion patents to reserve lands, sometimes using a Crown grant, and sometimes using an Order in council.[62]

The legislative activity had both rhetorical and practical purposes. The province could not, by unilateral legislation bind the Dominion to re-convey land that it held. However, the practical effect of the legislation was that a holder of a Dominion patent to reserve lands would be unable to register his interest without the sanction of the provincial Executive. As well, the sale of the reversionary interest would quiet any provincial claim against a Dominion patentee. Whether or not the provincial claim to a reversionary interest was valid, the legislation served the practical purpose of forcing purchasers of surrendered Indian lands to also pay for the provincial interest.

The province persisted in their claim until, by the terms of the McKenna-McBride Agreement, it was virtually abandoned. The only remnant of the reversionary interest left in this agreement was the stipulation that the Dominion would "re-convey" any unalienated Indian lands in the event of the Band becoming extinct. This condition continued through to become part of the

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[61] See S.B.C. 1931, c.32, s.2.

[62] Borthwick, "Reversionary Interest", at 10.

"conveyance" of Indian reserves in O/C 1036. The reversionary claim was finally dropped in 1969 by Provincial Order in Council.[63]

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[63] British Columbia Order in Council No. 1555, May 13, 1969.

CHAPTER II

NATURE OF TITLE TO CROWN LANDS

Eventually, British Columbia conveyed reserve lands to the Dominion, in trust for the use and benefit of the Indians, by Order in Council 1036. Prima facie, the terms and conditions under which the transferred lands are held by Canada (found in Order in Council 1036) apply to most of the reserves outside the Railway Belt and Peace River Block,[1] as well as to those reserves within the Railway Belt. Recall that Privy Council Order No. 208 concerning reserves in the Railway Belt, approved the draft form of conveyance in the Scott-Cathcart Agreement of 1929, which is identical in its terms to Order in Council 1036. The combined effect of Privy Council Order No. 208 and British Columbia Order in Council 1036 was to give a common title to virtually all of the Indian reserves in British Columbia, under the administration and control of the federal government.

This was not, strictly speaking, a "conveyance", as that term is normally used to describe a transfer of property from one individual to another. Rather it was a transfer of certain lands from the Crown in right of the province to the Crown in right of Canada. Any analysis of the transaction must proceed from the understanding that the "conveyance" of reserve lands was actually

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[1] The Treaty Reserves in the North Eastern B.C. were transferred under separate instrument (British Columbia Order in Council No. 2995, Nov. 28, 1961).

a transfer of the Crown's proprietary interest from one branch of government to another. The transfer instrument cannot simply be interpreted by reference to the law relating to conveyances. Regard must be had for the nature of the Crown's interest in its lands, and the management and control of that interest by Parliament or the provincial legislature.

Because of the division of legislative powers some of the terms of the conveyance may raise constitutional problems. These issues will be explored later. Even if the validity of the form of conveyance is accepted, there is still some uncertainty as to the effect of some of the conditions expressed therein. Before these and other matters can be addressed, however, it will be useful to examine the nature of the Crown's interest in its land generally. It has often been expressed by the highest judicial authority that the underlying or ultimate title to Indian reserve lands is in the Crown. Leaving aside, for the moment, the notion of "Provincial Crown" and "Federal Crown", let us examine what the title consists of.

Background - "Interests" in Land

Canadian law regarding ownership of land has its origins in the common law. Land itself is not strictly "owned" by the landholder. Rather, a person may hold certain rights in connection with a piece of land, or to put it another way, he has

a certain "estate" or "interest" in a piece of land. Only the Crown's title may be described as "allodial", or one of absolute ownership. All other interests in land are "tenurial", being interests held of the Crown.[2] The closest one may come to "ownership" of land, in the traditional sense of that term, is to own a "fee simple estate" in the land. When one purchases a house or lot, for example, he is described as the owner of the "fee simple" of the described parcel of land. Generally speaking, this is the highest interest in land that an individual can hold. The holder of a fee simple holds a number of rights with respect to a certain described piece of land.

Instead of owning the land itself, consider the land holder in fee simple to possess a bundle of rights connected with the land. For example, he has the right to exclusively use the land for whatever purpose he may please (subject to any statutes regulating use), the right to sell or lease it to someone else, the right to make use of the surface of the land, and any minerals (except gold and silver) he may find under the surface. He has the right to use any trees growing on the land, and a more qualified right to use water flowing over the land, He can take some of his rights and sell or lease them to others. For example, he may sell to another the right to any sand, gravel or other minerals on his land. Similarly, one could sell virtually all of the rights in

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[2] A.H. Oosterhoff and W. B. Rayner, Anger and Hornsberger Law of Real Property, 2d ed., vol. 1 (Aurora, Ont.: Canada Law Book, 1985), 80.

the "bundle" but reserve or hold back one or more. A common example would be the reservation of mineral rights from the sale of the land. The buyer would then have bought a smaller bundle of rights than the purchaser had to start with. He may pass on that bundle intact or he may hold some rights back, or dispose of them separately. When we inquire into the "nature of title" or the nature of an "interest" in land, we are seeking to determine the size of the "bundle of rights" and the kind of rights included in the bundle.

Crown's Proprietary Interest in Land

Ever since the reign of William the Conqueror (1066 A.D.) the Crown has been deemed to be the owner of all unappropriated lands of the realm, including its colonial possessions. Therefore, in all Crown lands, the Crown has all of the interests that make up the fee simple estate. From the prerogative powers of the Crown flow numerous additional rights over Crown land and all other lands.

The Crown's proprietary interests flowing from the Royal prerogative include the ownership of all mines of gold and silver ("Royal Mines") wherever situate within the realm, the right to "bona vacantia", being certain kinds of abandoned property (personal property rather than land), certain fish and royal

swans.[3] Also, the Crown is entitled to all previously granted land which has become ownerless due to a lack of heirs (the land is said to "escheat" to the Crown). Perhaps the most significant of these rights is the right to "Royal Mines".

The Crown also owns, by virtue of its prerogative rights, the foreshore (all lands between high and low tidal water mark), the seabed (including all minerals thereunder) within its territorial limits, and the bed of all tidal, navigable rivers (including minerals).[4]

Crown Lands and Public Lands

Until approximately 1700, the King could deal with his lands and interests in lands as he pleased. The revenue generated therefrom was known as the Crown's ordinary and hereditary revenues. The revenue from these sources was at one time sufficient to cover all the expenses of running the government, but increasingly the King had to call upon Parliament to supply additional funds. Parliament eventually placed certain controls on the disposition of Crown lands, and finally an arrangement was made whereby the King surrendered the major portion of his

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3 H.S. Theobald, The Law of the Land (London: W. Clowes, 1929), 1-5.

4 Ibid., 1-4.

hereditary revenues to Parliament in return for an annual sum known as the Civil List.[5] In England, this system continues so that each reigning Monarch, upon accession, agrees that all ordinary and hereditary revenues shall be paid into the consolidated revenue fund in return for a fixed annual sum.

In earlier times there was no distinction drawn between property held by the Crown in a personal capacity and that held in a political capacity. Under the Civil List or consolidated fund arrangement, title to the revenues is in the Crown but the revenues are paid into a fund, to be appropriated by Parliament. The Queen still has private property ("privy purse") to use as She pleases, but the remainder of Her ordinary and hereditary revenues are under the control and management of Parliament. In other words, the public, through Parliament, now has the beneficial use, control and management of the revenues derived from Crown lands and the other sources of hereditary revenue.[6] However, in constitutional theory all public lands and revenue are said to be vested in the Crown.[7]

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5 Gerard LaForest, Natural Resources and Public Property Under the Canadian Constitution, (Toronto: University of Toronto Press, 1969), 5.

6 Ibid., 6.

7 See Atty. - Gen. B.C. v. Atty. - Gen. Canada (1889), 14 App. Cas. 295, at 301 (Sometimes hereinafter referred to as the "Precious Metals" case).

Crown Lands in Canada

In British colonial Canada, the sovereign owned all ungranted lands and had prerogative rights and privileges similar to those enjoyed in the United Kingdom. In practice the Crown held and disposed of all revenues generated from colonial lands for the benefit of the colonies in which they were situate.[8] However, the local assemblies lacked control over their revenues. Eventually, each local assembly was granted the power to control its revenues by legislation similar to that passed in England.

In his work on natural resources and public property in Canada, Gerard LaForest (now Mr. Justice LaForest, of the Supreme Court of Canada) reviews the legislation granting each of the original four provinces control over their resources. He provides this summary of the situation at Confederation.

> This, then, was the situation at Confederation in the provinces originally uniting to form the Dominion of Canada. The entire control, management, and disposition of the Crown lands, and the proceeds of the provincial public domain and casual revenues arising in these provinces were confided to the executive administration of the provincial governments and to the legislative action of the provincial legislatures so that Crown lands, though standing in the name of the Queen, were, with their accessories and incidents, to all intents and purposes the public property of the respective provinces in which they were situate.[9]

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[8] LaForest, Natural Resources, 11.

[9] Ibid., 14.

It is not certain whether British Columbia had acquired control of all hereditary revenues by Imperial statute before it entered Confederation in 1871.[10] However, article 10 of the Terms of Union had the effect of achieving this by making the division of property sections in the Constitution Act, 1867 applicable to the new province.[11]

Distribution of Property - Constitution Act, 1867

In constitutional theory and in law the Crown is said to be "indivisible".[12] However, because Canada has a federal constitution which divides legislative powers between the several provinces and the Dominion, reference is often made to the Crown "in right of Canada", or "in right of" a particular province. When the resources of Canada were distributed between the provinces and the Dominion, the "ownership", or title to the property remained vested in the Crown indivisible. What, in law was distributed was the control, benefit and management of the resources, or more simply, the right to the beneficial use of the resources.[13] Therefore any transfer of property between levels of

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10 Ibid., 31, footnote 26.

11 Ibid.

12 See Her Majesty in Right of the Province of Alberta v. Canadian Transport Commission, [1978] 1 S.C.R. 61, at 10-11; [1977] 2 Alta. L.R. (2d) 72, at 79-80 (subnom. In re Pacific Western Airlines Ltd.)

13 LaForest, Natural Resources, 17-18.

government in Canada is not a transfer of title, but rather a transfer of the right to the beneficial use of the property.

The distribution of resources at Confederation is governed mainly by Part VIII of the Constitution Act, 1867. [14] The effect of the sections contained therein is similar to the old Civil Lists Acts in that they distribute Crown property while imposing certain charges on the federal consolidated fund, including the salary of the Governor General.[15] Property is distributed between the provinces and the Dominion by sections 102, 107, 108, 109, 110, 113, and 117. The most important of these sections for the purpose of this study are sections 109, and 117:

> 109 All Lands, Mines, Minerals and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.
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> 117 The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country.

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[14] Constitution Act, 1867, 30-31 Vict. c.3 (U.K.), in R.S.C. 1970, Appendix II. 191.

[15] LaForest, Natural Resources, 105.

Because British Columbia entered Confederation later, with its own distinct terms, these must also be examined. In particular, Article 13 of the Terms of Union concerns the distribution of property relative to Indian reserves. It should be noted that the Dominion is allotted property in two sections (section 107 [stocks, bonds, etc.] and 108) with the possibility of assuming more pursuant to Section 117 (property required for defence purposes). Bear in mind that the entity, the Dominion, had no property of its own prior to Confederation. Therefore, any property it acquired came from the provinces - the old colonies. The provinces retained virtually all of their property via sections 109 and 117.

It should be noted, however, that although the sections refer to property "belonging to" the provinces or, the "public property" of the provinces, these terms actually mean beneficial use and control. This is due to the nature of "public property", discussed earlier. The Privy Council has commented on the distribution of property in the Constitution Act, 1867:

> In construing these enactments, it must always be kept in view that, wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a Province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.[16]

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[16] St. Catherines Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46 at 56, per Lord Watson.

Sections 109 and 117 of the Constitution Act, 1867 have been interpreted as residuary clauses, giving the provinces control of all public property and prerogative revenues not otherwise assigned to the Dominion. Although section 109 does not specifically refer to "public property" judicial construction has so limited it.[17] In St. Catherine's Milling, section 117 was considered to be simply a restatement of what was expressed in section 109.[18]

The wording of section 109 has been the subject of much judicial consideration. The section deals with "All Lands, Mines, Minerals and Royalties belonging to the several Provinces ..." . However, it can be broken down into two subjects: (1) public lands, and (2) royalties. This is so because the courts have held that the expression "lands" in section 109 includes mines and minerals but "royalties" has separate legal significance. In the Precious Metals case, Lord Watson stated:

> The expression "lands" in that article [article 11 of the Terms of Union] admittedly carries with it the baser metals, that is to say, "mines" and "minerals" in the sense of section 109. Mines and minerals, in that sense, are incidents of land...[19]

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17 Atty. - Gen. Ontario v. Mercer (1883), 8 App. Cas. 767, at 775-76 (P.C.).

18 14 App. Cas. 46, at 57 (P.C.).

19 14 App. Cas. 295, at 305.

Lord Watson went on to hold that "royalties", including precious metals (gold and silver) were not "incidents of land". The term "royalties" refers to those proprietary rights of the Crown stemming from the royal prerogative. Although the term "royalties" in section 109 has not received an exhaustive legal definition, it has been held to include such prerogative rights as royal mines (gold and silver),[20] and escheats.[21]

Crown Lands in British Columbia - Terms of Union

As a result of article 10 of the Terms of Union the provisions of the Constitution Act, 1867 applied to British Columbia, except those which obviously only concerned the original four provinces, and except to the extent where the general provisions were modified by the specific Terms of Union. Article 10 reads as follows:

> 10. The provisions of the "British North America Act, 1867," shall (except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to and only affect one and not the whole of the Provinces now comprising the Dominion, and except so far as the same may be varied by this Minute) be applicable to British Columbia in the same way and to the like extent as they apply to the other Provinces of the Dominion, and as if the colony of British Columbia had been one of the Provinces originally united by the said Act.

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20 Ibid.

21 Atty. - Gen. Ont. v. Mercer, supra f.n. 17.

La Forest has noted that one of the effects of article 10 was to apply the property sections (including 109 and 117) of the Constitution Act, 1867 to British Columbia, whether or not the colony had, prior to Confederation, gained control of the Crown's hereditary revenues.[22] In this regard La Forest points out:

> Though it does not appear that the sovereign ever formally surrendered the territorial and casual revenues to British Columbia before Confederation as occurred in the older provinces, it has been assumed by the highest authority that this was the case.[23]

The author cites, among other authorities, the Precious Metals case. It appears that in all of the authorities cited the fact that British Columbia entered Confederation in control of the Crown's hereditary revenues is truly assumed, as opposed to being actually proved. However, the issue is likely of little significance anymore because of article 10 and the Privy Council's decision in Atty.- Gen. Alberta v. Atty.- Gen. Canada.[24] In that

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22 LaForest, Natural Resources, 31.

23 Ibid., 32, footnote 26.

24 [1928] A.C. 475.

case, the court considered section 3 of The Alberta Act, 1905.[25] Section 3 was very similar in its wording to article 10 of the Terms of Union and the court held that:

> ...the effect of this section...(places) the Province of Alberta in the same position as the other Provinces in regard to property, except as varied by the statute, either by express terms or reasonable implication.[26]

It seems reasonably clear then that British Columbia was placed in the same position as the other provinces with respect to the distribution of property under the Constitution Act, 1867. It is also clear from the case law that the Terms of Union have Constitutional status[27] and are capable of modifying or varying the sections of general application in the Constitution Act, 1867 (including the property sections, 109 and 117).[28]

There are two articles in the Terms of Union which appear on their face to vary the general scheme of property distribution found in sections 109 and 117. These are Article 11 - dealing with the transfer of railway belt lands - and Article 13 - dealing with the transfer of lands for Indian reserves. In fact, Article

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25 4-5 Edw. VII c.3 (Canada), in R.S.C. 1970, Appendix II, 317.

26 [1928] A.C. 475 at 485-6. See also the "Precious Metals Case", 14 App. Cas. 295 at 304.

27 Jack v. The Queen, [1980] 1 S.C.R. 294, at 299-300, and 301-302; [1979] 2 C.N.L.R. 24 (S.C.C.) at 27-29.

28 See Precious Metals case, 14 App. Cas. 295, 303-4.

11 has been described as an exception from section 109.[29] The writer is unaware of any similar judicial interpretation of Article 13.[30]

In the Precious Metals case the Privy Council considered the relationship between Article 11 and section 109:

> The 11th Article ... is a part of a general statutory arrangement, of which the leading enactment is, that, on its admission to the Federal Union, British Columbia shall retain all the rights and interest assigned to it by the provisions of the British North America Act, 1867, which govern the distribution of property and revenues between the Province and the Dominion; the 11th Article being nothing more than an exception from these provisions.[31]

If Article 11 can be viewed as an exception from the general property provisions perhaps Article 13 could also be so viewed. One possible effect of this would be that, instead of British Columbia retaining "all lands", etc. pursuant to section 109, they retain all lands except those lands which are to be reserved for the Indians pursuant to article 13. The possible legal implications of this "constitutional exception" will be examined in chapter five.

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29 Ibid., 304.

30 However, in Jack v. The Queen, [1979] 2 C.N.L.R. 24, the Supreme Court of Canada seemed to accept the proposition that Article 13 could vary another Section of general application in the Constitution Act, 1867, s. 91(24) (Indians and lands reserved for the Indians).

31 14 App. Cas. 295, 303-304.

In summary it is noted that British Columbia is generally in the same position as all the other provinces with respect to the "ownership" of public property and revenues. The special terms under which the province entered Confederation have constitutional status and are capable of varying the provisions of general application in the Constitution Act, 1867. Article 13, which requires the province to convey lands for Indian reserves, may be viewed as an exception or variation of those general terms, particularly sections 109 and 117.

CHAPTER III

TRANSFER OF CROWN LANDS FROM PROVINCE TO DOMINION

Transfer of Crown Lands Generally

There are significant legal differences between a Crown grant to an individual and a transfer of land between levels of government. A normal Crown grant to an individual would convey the fee simple in the land less whatever reservations were included in the grant (usually the Crown reserves mineral rights and other various rights of way). Once the land is granted to an individual, it ceases to become public or Crown land. That is, the fee simple is no longer vested in the Crown. It follows that the Crown (and the government) ceases to have any beneficial interest, management, or control in or over the land. The provincial government may, pursuant to legislation, have a certain regulatory influence over land held by individuals in fee, but it no longer enjoys benefits related to "ownership". The provincial Crown would also retain its interest flowing from the Royal prerogative (foreshore, Royal Mines, etc.) unless specifically granted with the fee simple.

When land is transferred from the Crown in right of a province to the Crown in right of the Dominion, the fee simple is not conveyed, since it remains vested in the Crown "indivisible". What is accomplished is not a "conveyance" in law, but rather a

transfer of beneficial use and control.[1] But since beneficial use and control is all any government has with respect to Crown lands, when this is transferred it leaves virtually no interest in the land.[2]

The government that has the beneficial use of the land is the only government that can dispose of title to the land.[3] It is not clear whether there is any preferred method for transferring public land from a province to the Dominion, or vice versa.

Transfer from Province to Dominion

The Supreme Court has commented on a transfer of land between governments on various occasions. In the Saskatchewan Natural Resource Reference,[4] the Court considered the effect of the transfer of Rupert's Land from the Imperial Crown to the Crown in right of Canada:

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1 See Precious Metals case, 14 App. Cas. 295. Other cases on this point will be referred to later.

2 The Crown may, depending on the circumstances of the transfer, retain certain prerogative rights, or "royalties", in the land. See Precious Metals case, generally.

3 Ontario Mining Co. v. Seybold, [1903] A.C 73.

4 Reference Re Saskatchewan Natural Resources, [1931] S.C.R. 263.

> It is objected that, although the Territories were made part of the Dominion and became subject to its legislative control, there was no grant or conveyance of the lands by the Imperial Crown to the Dominion; but that was not requisite, nor was it the proper method of effecting the transaction. It is not by grant inter partes that Crown lands are passed from one branch to another of the King's government; the transfer takes effect, in the absence of special provision, sometimes by Order in Council, sometimes by despatch. There is only one Crown, and the lands belonging to the Crown are and remain vested in it, notwithstanding that the administration of them and the exercise of their beneficial use may, from time to time, as competently authorized, be regulated upon the advice of different Ministers charged with the appropriate service.[5]

Later in A.G. Canada v. Higbie et al.,[6] the Supreme Court considered the validity of a transfer of land from British Columbia to the Dominion. The Dominion claimed that it owned the foreshore of Coal Harbour, as a result of a provincial order in council which purported to transfer the property. There was some doubt as to whether the order in council was passed with sufficient, or any, legislative authority. The Court was divided on the legal effect of the order.[7] Two members of the Court held

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5 Ibid., at 275.

6 [1945] S.C.R. 385.

7 However, it was unanimously held that the provincial order-in-council was an "admission of fact" that Coal Harbour was a "public harbour" prior to 1871. It followed then, as a matter of law, that the property passed to the Dominion via section 108 and Schedule 3 of the Constitution Act, 1867. See the judjments of Kerwin, J. at 426-7, and Rand, J. at 435.

the order in council valid as a "conveyance" noting, however, that it was not a conveyance in the strict legal sense. The Chief Justice stated:

> The orders in council may be upheld as valid, because both Governments, in acting as they did, were exercising powers which are part of the residual prerogative of the Crown, or because the transfer from one Government to another is not appropriately effected by ordinary conveyance. The King does not convey to himself ...[8]

Rinfret, C.J. then quoted at length from the Saskatchewan Natural Resources Reference, the same passage that has been referred to herein.

Transfer of Crown Land Pursuant to Terms of Union

Under the Terms of Union, British Columbia was obliged to "convey" land to the Dominion in two instances - for Indian reserves (article 13) and for the Railway Belt (article 11). The transfer of the Railway Belt lands has been the subject of litigation and judicial consideration. Since the wording of articles 11 and 13 of the Terms of Union are substantially the same regarding the obligation to convey, it is useful to examine the leading cases concerning the Railway Belt transfer.

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[8] [1945] S.C.R. 385, at 402.

The Railway Belt Transfer - Precious Metals

In the first case, which concerned the ownership of precious metals in the Railway Belt lands,[9] the Privy Council had to construe the "conveyance" of those lands pursuant to Article 11. By Article 11, the British Columbia government was obliged to "convey to the Dominion Government, in trust ...public lands along the line of railway..." The 40-mile wide strip of land was actually granted by an Act of the legislature in 1883.[10] It is interesting to compare the wording of article 13 which states:

> "to carry out such policy [Indian policy] tracts of land...shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians..."

In both cases, the obligation is to convey land in trust for a specified purpose. Note however, that article 11 refers to "public lands" a term which the Privy Council focussed on in their judgment.

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9 Precious Metals case, 14 App. Cas. 295.

10 An Act Relating to the Island Railway, the Graving Dock, and Railway Lands of the Province, S.B.C. 1884, c.14. (enacted Dec. 19, 1883).

The following passage from the Privy Council decision illustrates the approach taken in construing the land transfer:

> Whether the precious metals are or are not to be held as included in the grant to the Dominion Government, must depend upon the meaning to be attributed to the words "public lands" in the 11th Article of Union. The Act 47 Vict. c. 14, s. 2, which was passed in fulfillment of the obligation imposed upon the Province by that article and the agreement of 1883, defines the area of the lands but it throws no additional light upon the nature and extent of the interest which was intended to pass to the Dominion. The obligation is to "convey" the lands, and the Act purports to "grant" them, neither expression being strictly appropriate, though sufficiently intelligible for all practical purposes. The title to the public lands of British Columbia has all along been, and still is, vested in the Crown; but the right to administer and to dispose of these lands to settlers, together with all royal and territorial revenues arising therefrom, had been transferred to the Province, before its admission into the federal union. Leaving the precious metals out of view for the present, it seems clear that the only "conveyance" contemplated was a transfer to the Dominion of the provincial right to manage and settle the lands, and to appropriate their revenues. It was neither intended that the lands should be taken out of the Province, nor that the Dominion Government should occupy the position of a freeholder within the Province. The object of the Dominion Government was to recoup the cost of constructing the railway by selling the land to settlers. Whenever land is so disposed of, the interest of the Dominion comes to an end. The land then ceases to be public land, and reverts to the same position as if it had been settled by the Provincial Government in the ordinary course of its administration. That was apparently the consideration which led to the insertion, in the agreement of 1883, of the condition that the Government of Canada should offer the land for sale, on liberal terms, with all convenient speed.[11]

It is important to note the Privy Council's consideration of the words "convey" (in article 11) and "grant" (in the statute which transferred the lands). It is said that neither term is

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[11] 14 App. Cas. 295, at 301-302.

"strictly appropriate" since the only "conveyance" contemplated was a transfer to the Dominion of the province's right to manage and settle the lands. The Court also noted that the statute did not throw any "additional light upon the nature and extent of the interest which was intended to be passed to the Dominion." The Privy Council looked to the Terms of Union and the 1883 agreement, based on the obligation in article 11, in order to resolve the "nature and extent of the interest" of the Dominion in the Railway Belt.

Based on the above interpretation of the transfer, the Privy Council reached the following conclusion:

> It therefore appears to their Lordships that a conveyance by the Province of "public lands", which is an assignment of its right to appropriate the territorial revenues arising from such lands, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown [e.g. revenues from precious metals].[12]

Waters in the Railway Belt

The Privy Council had another opportunity to consider the transfer of the railway lands pursuant to article 11 of the Terms of Union, in Burrard Power Company v. The King.[13] Certain water rights in Railway Belt lands had been granted to the appellant

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[12] Ibid., 303.

[13] [1911] A.C. 87.

company by the British Columbia Water Commissioner, who purported to act under the British Columbia Water Clauses Consolidation Act, 1897.[14] The Court held that, as a result of the transfer of the lands, the proprietary rights therein belonged to the Crown in right of the Dominion. The lands were public lands within the meaning of section 91 of the Constitution Act, 1867 and were therefore under exclusive federal jurisdiction. The provincial statute could not affect the waters of those lands, because the water rights were incidental to those lands.[15]

In the British Columbia Fisheries Reference, their Lordships had a number of questions referred to them concerning the ownership of fisheries in tidal waters and non-tidal waters within the Railway Belt.[16] The Province sought to determine which level of government had authority to legislate with respect to exclusive fishing rights in the waters. It was held that, as regards tidal waters, the Province had no jurisdiction to legislate. Nor could the Province issue exclusive licences for tidal waters since the right to the fish in tidal waters was a public right. With respect to the non-tidal waters, their Lordships applied the general principle that title to a fishery derives from title to the soil, and that since the Dominion owned the "whole solum",

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14 S.B.C. 1897, c.45.

15 [1911] A.C. 87, at 94.

16 Atty.-Gen. B.C. v. Atty.-Gen. Canada, [1914] A.C. 153.

they owned the fishery.[17] In reaching this decision the Court again construed the transfer of the Railway Belt from the Province to the Dominion. Referring to the earlier Precious Metals decision, the Court stated:

> Their Lordships can see nothing in the judgment above referred to which casts the slightest doubt upon the conclusion to which they have come from a direct consideration of the terms of the grant itself, namely, that the entire beneficial interest in everything that was transferred passed from the Province to the Dominion. There is no reservation of anything to the grantors. The whole solum of the belt lying between its extreme boundaries passed to the Dominion, and this must include the beds of the rivers and lakes which lie within the belt. Nor can there be any doubt that every right springing from the ownership of the solum would also pass to the grantee, and this would include such rights in or over the waters of the rivers and lakes as would legally flow from the ownership of the solum.[18]

The Court had again looked to the terms of the grant to determine the "interests" which passed with the lands. Specifically, they noted that there was no reservation of anything to the grantors (the Province). This indicates that if anything had been reserved or excepted in the grant - as was done in Order in council 1036 - such reservation might have reduced or qualified the interest of the Federal Crown.

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17 Ibid., at 166.

18 Ibid.

CHAPTER IV

THE FORM OF CONVEYANCE - ORDER IN COUNCIL 1036

Order in Council 1036 was the instrument of transfer for most of the Indian reserves in British Columbia. By agreement between the provincial and federal governments, and pursuant to Privy Council Order No. 208 the reserves in the Railway Belt were subject to identical terms and conditions to those expressed in O/C 1036. Although the form of the Order was very similar to the statutory form of a Crown grant, we have seen that the transfer of Indian reserves was not strictly speaking, a "conveyance" or "grant". In this chapter the transfer instrument will be analyzed in order to determine just what interest in the subject lands passed to the federal government, and what was held back by the province.

It has been noted previously that the wording of the conveyance in O/C 1036 is virtually identical to the wording of Section 7 of the McKenna - McBride agreement. The operative words of the transfer are as follows:

> TO HIS HONOUR
> THE LIEUTENANT - GOVERNOR IN COUNCIL:
>
> The undersigned has the honour to RECOMMEND: -
>
> THAT under authority of Section 93 of the "Land Act", being Chapter 144, "Revised Statutes of British Columbia, 1936", and Section 2 of Chapter 32, "British Columbia Statutes 1919", being the "Indian Affairs Settlement Act", the lands set out in schedule attached hereto be conveyed

> to His Majesty the King in the right of the Dominion of Canada in trust for the use and benefit of the Indians of the Province of British Columbia, subject however to the right of the Dominion Government to deal with the said lands in such manner as they may deem best suited for the purpose of the Indians including a right to sell the said lands and fund or use the proceed for the benefit of the Indians subject to the condition that in the event of any Indian tribe or band in British Columbia at some future time becoming extinct that any lands hereby conveyed for such tribe or band, and not sold or disposed of as heretofore provided, or any unexpended fund being the proceeds of any such sale, shall be conveyed or repaid to the grantor, and that such conveyance shall also be subject to the following provisions:[1]

The Order in council purports to convey the land to the King in right of Canada "in trust" for the use and benefit of the Indians.

The Conveyance "In Trust"

In Guerin v. The Queen,[2] the Supreme Court of Canada considered the effect of the transfer of Indian reserves in British Columbia. The Court distinguished the reserve situation in British Columbia from the situation in St. Catherine's Milling,[3] noting that the province had transferred title to the reserves to the Crown in

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1 British Columbia Order in Council 1036, July 29, 1938. See Appendix.

2 [1984] 2 S.C.R. 335; 55 N.R. 161.

3 14 App. Cas 46 (P.C.).

right of Canada.[4] Of course the title was both before and after the transfer vested in the Crown, but the Crown in right of Canada had acquired the right to the beneficial use and management of the lands. One important aspect of that right is the right to dispose of the property. The operative words of the transfer clearly stipulated that Canada had the right to sell the lands. The reason that such express language was used probably relates to the old dispute over the claimed "reversionary interest". The language is inconsistent with a provincial interest, reversionary or otherwise, that would underlie the federal interest. It is consistent with the McKenna-McBride Agreement, wherein the provincial government conceded to abandon the claimed reversionary interest, except in the event that a band became extinct.

The order also makes it clear that the transfer of the lands to Canada is in trust for the use and benefit of the Indians. This does not limit the nature of the interest granted, for example, by restricting it to a usufruct. It is simply a statement of the purpose underlying the transaction.[5] In order for the federal government to carry out the terms of the "trust", (that is, the management, including the sale of reserve lands), it would be

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[4] Guerin v. The Queen, [1984] 2 S.C.R. 335, at 380-381; 55 N.R 173.

[5] See the discussion of this point by the Federal Court of A Guerin v. The Queen (1982), 45 N.R. 181 at 250. Although th Court of Canada reversed the decision of the Federal Court o the latter court's discussion of the meaning of the words " was not contradicted.

necessary to at least have the fee simple interest in the lands.[6] Neither does the condition requiring re-conveyance when a band becomes extinct restrict the scope of the interest transferred. It might be viewed as a condition subsequent that does not affect the absolute interest granted until such time as the triggering event may occur.[7] In any event the condition is no longer of any practical effect since its repeal by order in council in 1969.[8]

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6 An analogous case on this point is Re Taxation of University of Manitoba Lands, [1940] 1 D.L.R. 579 (Man. C.A.). The Manitoba Court of Appeal considered the effect of a conveyance of land from Canada to the University. The deed recited certain trusts and conditions under which the lands were to be held by the University. The lands were to be used for the purpose of operating the university, and in the event of the university ceasing its operations, the land was to revert to the federal Crown. The University claimed that under the terms of the conveyance they did not hold the fee simple estate, but only a power of management and sale over the lands, which were still vested in the Crown. The Court rejected this argument, and stated:

> the expression in the first proviso, "subject to the following trusts and purposes" does not restrict the scope of the grant - all the trusts and purposes stated are merely the aims of the University which the University would naturally discharge and accomplish in its own normal operations. (at 592).

7 Re Taxation of University of Manitoba Lands, [1940] 1 D.L.R. 579, at 592.

8 British Columbia Order in Council No. 1555, May 13, 1969.

The stated authority under which the order is made is the Land Act, section 93, chapter 144, R.S.B.C. 1936. That legislation empowered the provincial executive to reserve Crown lands for the purpose of conveying them to the federal government in trust, for the use and benefit of the Indians. The other noted statutory authority is the Indian Affairs Settlement Act. That Act authorized, in broad and general terms, the Lieutenant-Governor in Council to do anything necessary to carry out the McKenna-McBride Agreement, including such further negotiations as might be required for the final settlement of all differences between the provincial and federal governments.[9] If the latter statute had simply authorized the executive branch to carry out the terms of the McKenna-McBride Agreement, it would be arguable that the many provisoes included with the transfer were not authorized by the Statute. The earlier agreement had simply called for a conveyance of the lands in trust, with a reconveyance in case any band should become extinct. However, the third section of the Indian Affairs Settlement Act gives the provincial executive the flexibility to conduct further negotiations and enter into further agreements.

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[9] S.B.C. 1919, c.32.

The Provincial Interest by Way of the Provisions in O/C 1036

The order in council contained several "provisoes" to which the transfer was subject. Some of these provisions may be characterized as exceptions or reservations from the grant. A thing which is "excepted" out of a grant does not form part of the thing granted. That which is excepted must be something that is in being at the time of the grant so that it can be defined and excluded. A reservation is some benefit - usually a right or intangible thing - to be newly created which the grantor desires to be retained for his benefit over the thing granted (for example, a right of way).[10] It has also been said that a reservation operates as if the grantor had granted the whole property to the grantee and the grantee had then granted back to the grantor the particular right which the grantor had bargained for.[11] Sometimes a thing which is said to be "reserved out of the grant" may be interpreted as an exception, in that it does not become part of the thing granted at any time, or it does not "run with the land".[12] It would appear that the only true exception in O/C 1036 is the final provision which excepts all travelled streets, roads, etc. Therefore, all streets, roads, etc. which

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[10] Rayfuse v. Mugleston, [1954] 3 D.L.R. 360 (B.C.C.A.), at p.3

[11] G. Battersby, ed., Williams on Title, 4th ed. (London: Butterworths, 1975), 548.

[12] Rayfuse v. Mugleston, supra, at 368.

come within the language of the exception were not transferred to the Dominion for the use and benefit of the Indians, but remain under the administration and control of the province.

The Exception of Streets and Roads

The exception in O/C 1036 reads as follows:

> PROVIDED also that all travelled streets, roads, trails, and other highways existing over or through said lands at the date hereof shall be excepted from this grant.

It should first be noted that only those streets, etc. "existing" at the date of O/C 1036 - July 29, 1938 - are excluded from the grant. The exception does not reach any roads which have come into being after July 29, 1938. In the case of reserve lands in the Railway Belt the date is that of the Scott-Cathcart Agreement as approved by P.C. 208 - February 3, 1930.

Any land which falls within the exception (or any reservation out of the grant which operates as an exception) is under provincial legislative control. In Prudential Trust Co. v. The

Registrar,[13] the Supreme Court of Canada commented upon the effect of reservations and exceptions in a grant from the Crown Dominion:

> The interests retained by the Dominion, whether in the form of reservations or exceptions in the grant... were beyond the operation of provincial law; they were property of Canada and under s. 91 of the BNA Act, within the exclusive legislative jurisdiction of Parliament.[14]

By analogy, any interests retained by British Columbia via exception or reservations in O/C 1036 are beyond federal legislative control and are property within the exclusive jurisdiction of the provincial legislature.

The main issue with respect to this exception is what in fact was a "travelled street, road, trail or other highway" as of July 29, 1938. The provincial interpretation of this proviso is, that all roads within the meaning of the British Columbia Highway Act[15] are covered by the exception. That is, all public roads that were

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[13] [1957] S.C.R. 658; 9 D.L.R. (2d) 561.

[14] Ibid., (S.C.R.) at 660; (D.L.R.) at 562.

[15] R.S.B.C. 1979, c.167.

in existence were excluded from the conveyance.[16] It would be a question of fact in any given case as to which streets and roads were "public roads" in 1938.

The "travelled roads exception" was argued before the British Columbia Supreme Court in Moses v. The Queen[17] but the Court did not consider the arguments. The federal government argued that the word "travelled" meant "in use" by the public while the province insisted that the exception could include a road which was not in use as a public road.[18] The province also took the position that as a result of a 1911 provincial declaration all roads and rights of way through Indian reserves were 66 feet in width.[19] The Dominion challenged this contention on the ground that provincial legislation could not affect "lands reserved for the Indians", as such were under exclusive federal jurisdiction. Since the reserve in question had been set apart as a reserve (allotted) prior to 1911 the provincial declaration could not apply to roads within it.[20] The Court did not address either the federal or the provincial position on this issue. The judgment

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16 Don MacSween, "Order in Council 1036: The Remnants of Colonial Rule", in Indians and the Law (Vancouver: Continuing Legal Education Society of British Columbia, 1985), at 3.1.06.

17 [1977] 4 W.W.R. 474 (B.C.S.C.).

18 See "written argument" of Federal Department of Justice in Moses Supreme Court file, Vancouver Registry No. 43319/75.

19 Moses, [1977] 4 W.W.R. 474, at 476-477.

20 Ibid.

was confined to the issue of whether provincial authorities were trespassing on the reserves, or whether they had a right to enter upon reserve lands based on the resumption power. Although the interpretation of the roads exception remains unresolved, it may be said that the question of whether a road is included in the exception is largely a question of fact. Furthermore, the actual width of the road may depend on the date when any particular reserve was established.

Use of Sand and Gravel, on Reserves

Another provision of O/C 1036 reserves a right to use sand and gravel and other road building materials. It reads as follows:

> PROVIDED also that it shall be at all times lawful for any person duly authorized in that behalf by Us, Our heirs and successors, to take from or upon any part of the hereditaments hereby granted, any gravel sand, stone, lime, timber or other material which may be required in the construction, maintenance, or repair of any roads, ferries, bridges, or other public works. But nevertheless paying therefore reasonable compensation for such materials as may be taken for use outside the boundaries of the hereditaments hereby granted:

The clause reserves a right of the Crown (or their authorized agents) to take the described materials, but only those which are required for the specified public works. The specified works are defined quite broadly but they must be "public works". There is a provision for compensation to be paid, but only for those

materials taken and used outside the boundaries of the reserve.

In a normal Crown grant this reservation might be construed as a non-exclusive "profit a prendre", that is, "a right vested in one man of entering upon the land of another and taking therefrom a profit of the soil."[21] The "profit" must be something out of the land itself, as distinguished from making a profit by using the land. Such things as sand, gravel stone, timber, etc., are "profits of the soil". The right is non-exclusive because it does not give the person exclusive possession or property in the "profits of the soil". The owner of the land is not precluded from dealing with the same materials as he pleases, including the granting of similar rights to others. In effect, the holder of the reserved right (the Crown) has no "ownership" of the materials but only a right to use what still might remain.[22]

In the standard Crown grant (which was first proposed by the province to govern the conveyance of Indian reserves) the right to take such materials was expressly stated to be without compensation. This is more like a true "profit a prendre". However, in O/C 1036 the clause expressly provides for compensation, at least for such materials as may be used outside the boundaries of the reserve. This obviously qualifies the right

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21 John S. James, Stroud's Judicial Dictionary, vol. 4, (London: Sweet and Maxwell, 1974) at 2141.

22 Bayview Properties Ltd. v. Atty.-Gen. Victoria, [1960] V.R. 214 (Supreme Court of Victoria, Aus.) at 216.

of the province to take the specified "profits of the soil".

The reservation of sand and gravel is used rarely today. It was inserted in early Crown grants, when a few wagon loads of gravel sufficed to maintain a wagon road.[23] Presumably the province does not rely on this outdated reservation to obtain the large quantities of materials used in modern major construction works. However, the compensation issue might be considered with a view to minimizing the impact of the use (even if rare) of this reservation.

If a portion of an Indian reserve was covered by a provincial, public road (whether that road was originally excepted from O/C 1036, or resumed later) should the Band have to provide gravel from other portions of the reserve free of charge to build or maintain public roads "within the boundaries of the reserve"? Even though public roads may be of some benefit to the band, they may also fragment reserves, and subtract from the total area of band land. Early road building was often aided by the resumption power, without compensation being paid. This reservation, on one reading at least, could have the effect of causing the Band to further supplement the general public by supplying road materials free of charge.

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[23] MacSween, at 3.I.06

Perhaps one way to avoid such a result would be to interpret the "boundaries" of the reserve to not include roads which have passed to provincial administration and control. This would include all roads excepted, resumed, or taken pursuant to section 35 (and its predecessors) of the Indian Act.[24] Therefore, if road materials were needed for the construction or maintenance of roads in those areas, compensation would be required because the areas no longer form part of the reserve.

Water Rights

Order in Council 1036 reserves certain water privileges to the Crown or persons acting under its authority, in the following terms:

> PROVIDED also that it shall be lawful for any person duly authorized in that behalf by Us, Our heirs and successors, to take and occupy such water privileges, and to have and enjoy such rights of carrying water over, through or under any parts of the hereditaments hereby granted, as may be reasonably required for mining or agricultural purposes in the vicinity of the said hereditaments, paying therefore a reasonable compensation:

The following points are noted regarding this provision:

1. The provision is limited to water privileges for the specified purpose of mining and agricultural operations in the vicinity of an Indian reserve.

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[24] Indian Act, R.S.C. 1970, c.I-6, s.35.

2. It allows the Crown to have the privilege of using water on the reserve or of carrying water over the reserve as may be reasonably required for the specified purposes.

3. Compensation must be paid for the use of such privileges.

Apparently this reservation is not widely used today, as the carriage of water by flumes or open ditches for mining or agricultural purposes is falling into disuse.[25] The reservation does not restrict the Indians' use and enjoyment of such water rights as are attached to the reserve lands, but merely allows the Crown the privilege of using or carrying water on or over a reserve for the specified purposes. It does not purport to be an exclusive right to water on the reserve.

Perhaps this clause could be used to justify the granting of a provincial water licence (or easement for the purpose of diverting water) for waters on Indian reserves. Under the present water legislation the provincial authorities may grant water licences and grant permission to the licensee to cross another person's land with a water line, when diverting water from a distant source.[26] The legislation also provides an expropriation procedure if the parties can not agree on compensation for the water works easement.[27] Although the province would not normally be competent to apply these legislative provisions so as to

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25 MacSween, p. 3.1.06.

26 Water Act, R.S.B.C. 1979, c.429, ss.24, 27.

27 Water Act, R.S.B.C. 1979, c.429, s.24.

interfere with Indian reserve land, this proviso may allow that result to a certain extent. It is doubtful, however that the expropriation procedure in the Water Act could unilaterally affect reserve lands. In any event, compensation is necessary, and an easement could only be authorized in connection with mining or agricultural activities in the vicinity of the reserve.

It is not clear whether Indian reserves in British Columbia enjoy the full range of common law riparian rights. This is because provincial legislation superseded the common law in this area many years ago. Since 1865[28] there has been some system of water licensing in force in British Columbia, which system is currently governed by the Water Act.[29] Normally provincial legislation cannot affect lands which are under the exclusive legislative jurisdiction of Parliament. However, many of the water licences that were issued pursuant to provincial legislation ante-dated the establishment of Indian reserves. The issue of riparian rights on reserve lands is further complicated by the fact that flowing water does not respect jurisdictional boundaries. It is perhaps because of such difficulties that the federal government has chosen to work within the system provided by the Water Act. A good system of water management can help to ensure that more people benefit from a scarce resource. The

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28 Land Ordinance, Ordinances of the Legislative Council of British Columbia, 1865, No. 27 ss.44-50.

29 R.S.B.C. 1979 c.429.

statutory scheme can also allow for uses of water, such as spray irrigation, that are necessary in a modern economy, but would not be permitted under the common law.[30]

However there are some problems with the provincial system of recorded water rights when that system is applied to the Indian reserve situation. The system operates on a first in time, first in right basis, and there is a finite amount of water which can be recorded for use from any given source. The holder of the right to use water may lose his entitlement to some or all of the allotment if he is not making satisfactory use of it. Because the provincial legislation did not permit Indians to file a claim for water rights until 1888, reserve lands were twenty years behind other claimants in the same area. The statutory scheme does not now, and never did recognize any right to water based on length of use or aboriginal title. Although various reserve Commissioners had included a reservation of water rights when establishing reserves, the legislation did not recognize those records as valid. It was not until 1921 that claims were recognized based on the allotment by reserve Commissioners, and even then, the effective date was deemed to be the date on which the record was filed.[31] Since no claims were filed on behalf of Indian bands until after 1888, the Indian Water Claims Act did not go very far

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30 See Rugby Joint Water Board v. Walters, [1966] 3 All E.R. 497 (Ch.D.), at 508.

31 Indian Water Claims Act, S.B.C. 1921, 2nd Sess., c.19, ss.2, 3.

to remedy the late start of Indian bands in recording water rights.

The "use it or lose it" feature, which qualifies water rights under the legislation, may be generally viewed as a reasonable one to apply in a system of water licencing. However it may cause problems when applied to an Indian reserve. Reserve lands are set apart for the benefit of an entire band, as a land base and heritage for future generations. The on-reserve population, as well as the uses to which the land is put, may be subject to dramatic change over the years. In this respect a reserve is more like a municipality, as opposed to a large ranching operation, or other individual enterprise. The need for water in 1888 may not compare to the need in 1988. One example of dramatic change is the recent amendments to the Indian Act, regarding membership.[32] As a result of these legislative changes most bands will see a substantial increase in membership, and perhaps a corresponding increase in on-reserve population. The federal and provincial governments should continue to cooperate in the management of water resources, and in a way that will address the unique needs of Indian reserve lands.

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[32] An Act to Amend the Indian Act, S.C. 1985, c.27.

In the absence of cooperation between the two levels of government the jurisdiction over water would be split in an unmanageable way. Indian bands would enjoy certain riparian rights over waters actually on or adjacent to their reserves. Theoretically these would include the right to use water for ordinary domestic purposes, the right to an undiminished flow of water, both in quantity and quality, rights of access to all waters touching the reserve, and the right to use ground and surface waters.[33] While the right of access, and rights to use of ground and surface waters have not really been affected by the Water Act, the important rights, relating to use and flow would conflict with provincial licenses.

It is difficult to predict how a court might resolve a conflict between an Indian band, claiming use pursuant to riparian right, and a provincial water licensee. Because of the federal legislative jurisdiction in section 91(24) of the Consitution Act, 1867, any provincial interference with water or water rights associated with reserve lands requires federal cooperation.[34] However since the provincial legislation ante-dates the establishment of many reserves in British Columbia, it may be

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[33] See Gerard La Forest, Water Law in Canada: The Atlantic Provinces (Ottawa: Information Canada, 1973). Chapter 9 provides a good review of the Canadian law regarding riparian rights.

[34] LaForest, Water Law, 44.

that, despite the exclusive federal jurisdiction, water rights associated with reserve lands are subject to the prior rights of others, obtained pursuant to provincial law.

Judicial decisions regarding waters in the Railway Belt may provide some insight into the resolution of jurisdictional conflict over water situate on federally administered lands within the province.

The first major case to deal with the transfer of the Railway Belt was The Queen v. Farwell.[35] The plaintiff, Farwell, claimed ownership of a tract of land inside the Belt based on a provincial grant made in 1885. The Supreme Court of Canada held that, after the date of transfer the province ceased to have any control over the lands within the Belt, and therefore the plaintiff's title was invalid.

Following the principle stated in Farwell, and other subsequent decisions of the Privy Council, the British Columbia Court of Appeal later ruled that provincial water records issued to landholders in the Belt prior to the transfer (1884) were valid.[36] The Privy Council had just earlier held that the province could

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35 The Queen v. Farwell (1887), 14 S.C.R. 492.

36 George v. Mitchell (1912), 3 W.W.R. 162 (B.C.C.A.)

not issue water licences over water included in the Belt after the transfer, since the land and the water rights were under the exclusive jurisdiction of the Dominion.[37]

In the Burrard Power case, the Court held that the effect of the transfer of "public lands" by the province to the Dominion was to give the Dominion exclusive legislative and executive jurisdiction over the lands under what is now s. 91(1A) of the Constitution Act, 1867 (public property).[38] The province had argued that even if the proprietary rights to the land and water had passed to the Dominion, the province maintained legislative jurisdiction. The reasoning used by the Court in rejecting this argument has great significance to the issue of jurisdiction over waters on Indian reserves in B.C. After referring to the "agreement" embodied in article 11 of the Terms of Union, Lord Mersey stated:

> To hold that the Province after the making of such an agreement remained at liberty to legislate in the sense contended for would be to defeat the whole object of the agreement, for if the Province could by legislation take away the water from the land it could also by legislation resume possession of the land itself, and thereby so derogate from its own grant as to utterly destroy it.[39]

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37 Burrard Power Co. v. The King, [1911] A.C. 87 (P.C.).

38 Ibid., 94.

39 Ibid.

If the reasoning in the above noted cases is applied to Indian reserves it would appear that the riparian rights of use and flow will be subject to rights of licensees who acquired their right prior to the establishment of the reserve. Any licences which affect the supply or quality of waters on reserve lands, and which were issued subsequent to the establishment of the reserve may be regarded as unlawful interference with federally administered waters.

An alternative argument might be that the provincial legislation had abolished certain riparian rights by declaring ownership of all waters to be in the Crown in right of the province. Hence the only way in which water rights can be obtained is through the Crown, pursuant to the statutory scheme. That seems to be the effect of the current water legislation. By the time that the reserves were conveyed to Canada, the common law water rights normally associated with land ownership had been superseded by legislation, and therefore could not be passed along as part of the land transfer. However, the provincial legislation respecting water rights did not purport to apply to waters under federal jurisdiction.[40] When in 1939 the water legislation was re-enacted in its modern form, there was no express exclusion of

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[40] See, for example, the Water Privilges Act, 1892, S.B.C. 1892 c.47, s.2.

waters under federal jurisdiction.[41] The Act simply vested the property in all waters in the Crown provincial. However the conveyance of most of the reserves in British Columbia was effected in 1938. If a court was to look to the terms of the conveyance, as in the Railway Belt cases, in order to determine whether water rights passed, there is nothing in O/C 1036 to suggest that waters were not included with the transferred land. The only reference to water rights is the proviso, noted above, which reserves certain "privileges" to the province.

The negotiations preceding the passage of O/C 1036 indicate that the proviso does not give the province exclusive rights to, or ownership of water on reserves. Just before O/C 1036 was passed, in July 1938, the provincial negotiators attempted to change the form of conveyance that had been agreed upon in the Scott-Cathcart Agreement of 1929. The province attempted to strengthen their water rights in reserve lands by replacing the second proviso with the following clause:

> 2. That all water rising, being or flowing in, on, under or through the said lands be exempted from this conveyance and that it shall be lawful for the Province or for any person authorized in that behalf by the Province to take and use so much of the said lands as

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41 Water Act, 1939, S.B.C. 1939, c.63, s.3. This was the first time that the vesting provision did not expressly exclude federal waters. The 1892 Act, noted above, was the first Act which specifically vested all waters, except those under federal jurisdiction, in the Crown provincial.

> may be required for the construction, maintenance and operation of works for storing, diverting and conveying water, paying therefore a reasonable compensation.[42]

The province attempted, unsuccessfully to exempt all water rights from the conveyance. The rejection of the above noted clause is evidence that the common law water rights in reserve lands were preserved for the benefit of the Indians, subject only to the privilege of the Crown to use and carry water over the lands on payment of reasonable compensation. Also, as previously noted, the rights of a band may be subject to rights acquired by others prior to the establishment of the reserve.

It should finally be noted that since the federal government is competent to legislate with respect to waters on reserve land, it would be theoretically possible to have a federal statutory scheme that would operate exclusively on reserve lands. The Indian Act currently empowers band councils to enact by-laws concerning waters on reserves, and so the potential for conflict between the federal and provincial jurisdictions is apparent.[43] In view of all the circumstances it appears that the only practicable way of properly and effectively managing water resources is the cooperative approach which is currently being pursued.

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[42] Borthwick, "Order in Council 1036", exhibit F-1.

[43] Indian Act, R.S.C. 1970, c.I-6, s.81(1)(f), (1), (o).

Waters in the Railway Belt

Before leaving the subject of water rights on reserve lands, the unique position of reserves within the old Railway Belt must be addressed. The federal government moved to remedy the practical problems caused by their exclusive jurisdiction over waters in the Belt by adopting the provincial water legislation as their own. The Railway Belt Water Act[44] was first enacted in 1912 in response to the decision in the Burrard Power case.

The Dominion moved swiftly after the Burrard Power decision, passing an order in council (December 20, 1911) which purported to transfer the administration of water rights in the Belt to the province.[45] The legality of this delegation of power was strengthened with the passage of the Railway Belt Water Act, in 1912. The Act vested all ungranted water rights in the Crown, prohibited further acquisition of riparian rights and provided that the waters in the Belt were to be administered under the British Columbia Water Act, 1909.

The act of 1912 contained some serious drafting mistakes, since the provincial statute of 1909 had been repealed. The Railway Belt Water Act was therefore amended in 1913[46] to allow for

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44 R.S.C. 1927, c.211, originally enacted by S.C. 1912, c.47.

45 Cail, 122.

46 Railway Belt Water Act, 1913, S.C. 1913, c.45.

provincial administration pursuant to any provincial water legislation in force from time to time. The Act was amended again in 1926[47] and consolidated in the Revised Statutes of Canada, 1927.[48] It was not included in subsequent consolidations, but neither was it repealed.[49] It remains in force and still applies to Indian reserves in the old Railway Belt.[50]

The most important effect of the Act was to put all land and water in the Railway Belt under the same system of water rights administration as all other lands in British Columbia. That is, the Water Act of 1913, and its successors applied to the waters of the Railway Belt, including waters on Indian reserves.

The Right to Resume Land

Perhaps the most controversial of the provisions in O/C 1036 is the first one, which gives the province the right to resume up to 1/20th of reserve lands. The provincial government claims the right to take land from Indian reserves pursuant to this clause

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47 Railway Belt Water Act, 1926, S.C. 1926, c.15.

48 Railway Belt Water Act, R.S.C. 1927, c.211.

49 However there were some minor amendments created by the Railway Belt Water Act, 1928, S.C. 1928, c.6.

50 The Act still applies to Indian Reserves in the Railway Belt because they were excepted from the general re-transfer of the Belt.

without payment of compensation. It is a very troublesome provision for Indian bands in British Columbia and it will be examined here in detail in an effort to determine its legal effect, including whether compensation is required. The proviso is as follows:

> PROVIDED NEVERTHELESS that it shall at all times be lawful for Us, Our heirs and successors, or for any person or persons acting in that behalf by Our or their authority, to resume any part of the said lands which it may be deemed necessary to resume for making roads, canals, bridges, towing paths, or other works of public utility or convenience; so, nevertheless that the lands so to be resumed shall not exceed one-twentieth part of the whole of the lands aforesaid, and that no such resumption shall be made of any lands on which any buildings may have been erected, or which may be in use as gardens or otherwise for the more convenient occupation of any such buildings:

It can be seen that the proviso allows the province to resume any part of the "said lands", but only up to 1/20th of the whole. There is a further exception to the resumption power, that any land upon which any building has been erected or that is in use as garden or "otherwise for the more convenient occupation of any such building" may not be resumed. There is no mention of compensation being paid, nor is it expressly stated that no compensation is necessary. It is also unclear whether the 1/20th limit is to be calculated in relation to each reserve, or to the total area of all reserves in the Schedule to O/C 1036.

This provision, like most of the others, was reproduced verbatim from the standard form Crown grants of the time.[51] It has received minimal judicial consideration in relation to Indian lands, and there are very few cases where the clause has been considered in private grants. In the Moses case the British Columbia Supreme Court held that the resumption power was valid and the province had a right to enter upon Indian lands for the purpose of making surveys in furtherance of exercising the right to resume.[52] It was held that the Orders in Council (British Columbia O/C 1036 and P.C. 208) were validly passed pursuant to the authority of the provincial Indian Affairs Settlement Act and the federal British Columbia Indian Lands Settlement Act.[53] Although the Court did not give any detailed reasoning, it further construed the provision as being a "reservation to the province of a right to resume possession of a portion of each reserve for purposes of public works", and that such reservation did not constitute a taking of lands or an alienation of lands as provided for in the Indian Act.[54]

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51 See for example the Land Act, R.S.B.C. 1924, c.131, Schedule, Forms 9 and 11.

52 Moses v. The Queen, [1977] 4 W.W.R. 474, at 485, and 490-91.

53 Ibid., 490.

54 Ibid.

What is a Resumption?

The Court in Moses described the right to resume as a "reservation" in the grant. It could not have been an "exception", as the thing to be excepted was not identified at the time of the grant. The reservation was of a right to take back any part of the land up to a specified amount. On the basis of the holding in Moses and on the plain reading of the provision this is a reservation of a right to claim a certain interest in the land at some future date. The Moses case does not provide any details on what a resumption is and how it operates in law. Similar resumption provisions were used in Australia in the last century and there is a larger body of case law from that jurisdiction.

Before reviewing the jurisprudence from Canada and Australia regarding the resumption power of the Crown, some legal definitions should be noted. A resumption has been defined as follows:

> 1) Resumption is a word used in the statute of 31 Hen. 6., c.7, and is there taken for the taking again into the King's hands such lands or tenements as upon false suggestion or other error he had made livery of to an heir, or granted by patent unto any man".[55]

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[55] John S. James, Stroud's Judicial Dictionary, 4th ed., vol. 4, 2387.

2) The action on the part of the Crown or other authority, of reassuming possession of lands, rights, etc., which have been bestowed on others.[56]

In Australia the term "resumption" is today used in the same context as we use the term "expropriation".[57] However, it seems that in the old Crown grants of that colony the reservation of a right to resume lands was used in the same way as it was in British Columbia. There were no expropriation statutes in effect, and the Crown preferred to use the reservation to provide for future contingencies rather than having to bargain for the land back at a time when the value had greatly increased.

The purpose of the reservation has been noted in the case law. In a dissenting opinion in Caine v. Corporation of Surrey[58] McPhillips, J.A. commented upon the need for municipalities to realize upon the right of resumption in Crown grants:

> Roads are essential in the development of any country and the Legislature in its wisdom and with proper regard to economy and future administration provided for eventualities and safeguarded the municipal authority from undue exactions upon the part of the owners of land for compensation for rights-of-ways for roads. Were this not foreseen the retarding of settlement would be greater than it now is and

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[56] Sir James A.H. Murray, ed. A New English Dictionary on Historical Principles, Vol. 8 (Oxford: Clarendon Press, 1914), 559.

[57] Douglas Brown, Land Acquisition (Sydney: Butterworths, 1972), see Chapter 4, generally, 12-19.

[58] [1920] 2 W.W.R. 681.

> would leave settlers without roads of necessity owing to the extensive outlay consequent upon expropriation proceedings and purchase of land for road purposes. It may be assumed, that roads will not be unduly established and, if established, it reasonably may be assumed as well that they are roads of benefit and advantage to the adjoining lands. The allowance of capricious objection to resumption would be destructive of the declared public policy of the Legislature and the present action is an objection of that character and is wholly without merit.[59]

In Cooper v. Stuart[60] the Privy Council considered the validity of a resumption power in an Australian Crown grant. The appellant had, amongst other points, argued that the reservation was void for being contrary to the rule against perpetuities. The court rejected that argument with the following reasoning:

> Assuming next (but for the purposes of this argument only) that the rule has, in England, been extended to the Crown, its suitability, when so applied, to the necessities of a young Colony raises a very different question. The object of the Government, in giving off public lands to settlers, is not so much to dispose of the land to pecuniary profit as to attract other colonists. It is simply impossible to foresee what land will be required for public uses before the immigrants arrive who are to constitute the public. Their prospective wants can only be provided for in two ways, either by reserving from settlement portions of land, which may prove to be useless for the purpose for which they are reserved, or by making grants of land in settlement, retaining the right to resume such parts as may be found necessary for the uses of an increased population. To adopt the first of these methods might tend to defeat the very objects which it is the duty of a colonial governor to

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[59] Ibid., 688.

[60] (1889), 14 App. Cas. 286 (P.C.).

> promote; and a rule which rests on considerations of public policy cannot be said to be reasonably applied when its application may probably lead to that result.
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> Their Lordships have, accordingly, come to the conclusion that, assuming the Crown to be affected by the rule against perpetuities in England, it was nevertheless inapplicable in the year 1823, to Crown grants of land in the Colony of New South Wales, or to reservations or defeasances in such grants to take effect on some contingency more or less remote, and only when necessary for the public good.[61]

The case of Cooper v. Stuart appears to be the leading case on the validity of a reservation in a Crown grant of a right to resume. The appellant in Cooper challenged the validity of the following reservation in a Crown grant:

> reserving to His Majesty, his heirs and successors... such parts of the said land as are now or shall hereafter be required ... for a highway or highways; and, further, any quantity of land, not exceeding ten acres, in any part of the said grant, as may be required for public purposes...[62]

He sought a declaration that the reservation to the Crown to resume any quantity of land not exceeding ten acres was invalid because it was, (a) void for repugnancy to the grant, and (b) that it violated the rule against perpetuities. Several "private law" conveyancing cases were cited in support of the appellant's first argument but the Court rejected their applicability with the following reasoning:

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[61] Ibid., 293-94.

[62] Ibid., 288.

> Assuming these authorities, and the very technical rule which they establish, to be applicable to a Crown grant of public property in a Young Colony, it appears to their Lordships that the reservation in the grant of 1823 does not constitute an exception within the meaning of the rule.
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> An exception is that by which the grantor excludes some part of that which he has already given, in order that it may not pass by the grant, but may be taken out of it and remain with himself. A valid exception operates immediately, and the subject of it does not pass to the grantee. Their Lordships are of opinion that the grant to Hutchinson carried to him the whole 1400 acres, but subject to a defeasance as to 10 acres. The whole and every part of the lands granted vested, and have, from the 27th of May, 1823, to November, 1882, been in the ownership and possession of the grantee or his representatives, subject to that provision, which the plaintiff describes in his statement of claim as a "reservation of a right to resume any quantity of land, not exceeding ten acres, in any part of the said grant". It is obvious that such a provision does not take effect immediately, it looks to the future, and possibly to a remote future. It might never come into operation, and when put in force it takes effect in defeasance of the estate previously granted, but not as an exception.[63]

According to the Privy Council then, the reservation of a right to resume a certain amount of land out of a grant operates as a "defeasance" of that part of the grant. It is not an "exception" from the grant because it does not operate immediately. It operates in the future, if at all. The insertion of such a provision in a grant does not take anything away from the estate granted, as the whole part of the lands passes into the ownership and possession of the grantee from the date of the grant, but subject to a "defeasance" of the specified amount.

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[63] Ibid., 289-90.

A defeasance has been defined as some thing which defeats the operation of a deed or document, and if contained in the same deed it is called a condition.[64]

It has also been noted that before a defeasance can be consummated any conditions must be strictly performed.[65] Relating this to O/C 1036, it could be argued that all conditions contained in the third proviso (notice to the Department of Indian Affairs) are conditions precedent to the operation of the right to resume. As well, it could be argued that the province would have to show that their planned resumption did not exceed 1/20th of the reserve lands, and did not fall into any of the other exceptions. Until this is done, there is no obligation on the federal government nor on the Indians to yield up possession of the resumed land.[66]

Support for the above proposition is found in Power v. The King,[67] a decision of the Supreme Court of Canada. In that case the Court construed a right of resumption contained in the grant of a water lot. The Crown patent contained a provision which

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[64] Re Storey; ex p. Popplewell (1882) 21 Ch.D. 23, at 81, (Eng.C.A.).

[65] John Blake, ed., Jewitt's Dictionary of English Law, 2nd ed. vol. 1 (London: Sweet & Maxwell, 1977), 579.

[66] Note, however, the decision in Moses, supra, wherein the Court held that the provincial authorities could not be charged with trespass, due to the necessity of making surveys prior to complying with the notice provisions in O/C 1036.

[67] (1918), 56 S.C.R. 499; 42 D.L.R. 387

reserved the right to resume all or part of the lot upon giving twelve months notice and upon payment of compensation for any improvements.[68] The court referred to this provision as a "condition in the grant".[69] The appellant tried to argue that according to the law of Quebec (Civil Code) the Crown's right to resume had been prescribed (barred by passage of time). In rejecting this argument the Court described the operation of the right to resume:

> Had the condition entailed an obligation on the part of the grantee, that obligation would, perhaps, have been susceptible of negative prescription under art. 2210 C.C. by nonfulfillment of it during a period of 30 years, or during a shorter period under some other prescription provision. But I incline to think that the Crown's right of resumption did not impose any obligation upon the holder of the land. If there was anything that could properly be called an obligation contracted by the grantee and binding his successors in title it was to surrender or deliver up possession of the property. That obligation would arise, however, only when 12 months had elapsed after notice had been duly given of intention to exercise the right of resumption and the other terms of the condition, if applicable, had been complied with.[70]

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[68] The Crown Patent is set out in the decision of the Exchequer Court, at (1916), 16 Ex.C.R. 104, at 114.

[69] See Supreme Court of Canada decision, 42 D.L.R. 387, at 388.

[70] Ibid., 390.

Note the comments with respect to the grantee's obligation to surrender possession of the property. That obligation would arise only when all applicable terms of the "condition" - i.e. the right to resume - had been complied with by the Crown.

Limits on the Resumption Power

As noted above, some of the limitations on the power to resume are included in the proviso - the 1/20th limitation, non-resumability of gardens and land upon which any buildings have been erected. The case law on resumptions is scarce, but the exceptions to the right have been considered by the British Columbia Court of Appeal in one old case. In Caine v. Corporation of Surrey[71] the municipality had attempted to exercise the right to resume up to 1/20th of the plaintiff's land (the Municipal Act, allowed municipalities to exercise this right which was reserved out of Crown grants to individuals). The plaintiff (Respondent in the Court of Appeal) claimed that the required land could not be resumed once it fell within the exception "gardens or otherwise for the more convenient occupation of any such buildings". The evidence as to what actual use the land was put does not appear in the report, however, it is clear that there was no building that was affected by the resumption. The trial judge gave a broad

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[71] [1920] 2 W.W.R. 681.

interpretation to the exception and concluded that, on the evidence, the proposed road actually encroached upon "garden land". The brief judgment on this point is as follows:

> Strictly speaking, it may seem erroneous to speak of any land outside of the four walls of a building as being in use for the more convenient occupation of the building, but to my mind the word "occupation" has here a much wider meaning. I would say that regard must be had to the uses to which the building is put and so having regard I would say that a driveway to a house is in use for the more convenient occupation of the house and the ordinary farm barnyard is in use for the more convenient occupation of stable and barn. In my view, it is not a question as to the extent of the ground so used, whether a restricted or a generous area the question is one of fact. Was it so used? One guide to a decision on this question of fact or, perhaps I should say, one element which should enter into the calculation, is this: Is the land withdrawn from the larger purposes of the farm, the growing of grain, the depasturing of cattle, and the like, and kept for use in connection with the house and farm building? Looking at the matter in this light, I have no hesitation in holding that all the land to the south of the plaintiff's house, of his stable, and of his barn, right up to the south boundary of his land was land in use for the more convenient occupation of these buildings. I need not, therefore, go into details, but I should add that, in my opinion, the evidence shows that the proposed road actually encroaches in detail upon garden land.[72]

The municipality appealed, but the Court of Appeal agreed with the trial judge. The Court of Appeal judgment is also brief but nevertheless deals exclusively with the interpretation of the exception to resumption. One of the Justices on appeal simply agreed with the trial judge and another dissented. In the

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[72] Ibid., 682-83.

deciding opinion Mr. Justice Martin elaborated on the issue of what might be included as garden land in association with a building:

> I am of the opinion that the important word "gardens" should not be held to mean in this country, as was strongly urged upon us, supported by English authorities, only areas inclosed by walls, fences, etc., for it is an open and notorious fact even in our own cities there are innumerable gardens fronting on the streets which have no inclosure towards the highway, but simply a boundary curb (and often not even that between the grass and the pavement) as is indeed the case in the spacious garden which on all sides surrounds the Parliament buildings in Victoria. There are, of course, various kinds of gardens, such as kitchen or flower, or tree, etc. or nursery, which vary in size and kind in urban or suburban residences, or farms or cattle or chicken ranches, etc.
>
> "Garden" is a wide and historically popular word, and the first one which we have authentic information from holy writ, was "planted" by the Almighty, "Eastward in Eden" (ii Gen. 8), and He "took the man and put him into the Garden of Eden to dress it and keep it" (15); it was a tree garden, for in it:
>
> grew every tree that is pleasant to the sight and good for food; the tree of life also in the middle of the garden, and the tree of knowledge of good and evil;
>
> Nothing else is mentioned as growing in it, and though it was watered by four rivers and guarded by cherubim and a flaming sword, after Adam and Eve were ejected there is no word of any wall or other inclosure surrounding it.
>
> Second, a difficult question arose under said sec. 325 of the Municipal Act, 1914, ch. 52, regarding the exception against the resumption of lands "which may be in use as gardens or otherwise for the more convenient occupation of any such buildings". The language is open doubtless to extremes of construction in either direction, as illustrated by counsel at the Bar, but broadly and simply it means, I think, that if there are buildings upon "the whole (area) of the lands granted as aforesaid" (here originally 160 acres) which are subjected to the power of resumption, then any part of that land which is "in use as gardens or other wise for the more convenient occupation of *** such buildings" is excluded from resumption.

> As to whether or not the use of a piece of land as "a garden or otherwise" is a "convenient occupation" in connection with any "building", or the many buildings of a farmstead or otherwise, that is a matter of fact dependent upon the circumstances of each case.[73]

One final point should be noted about the Caine case. At trial, the plaintiff had successfully sought a permanent injunction forbidding the municipality from exercising the right of resumption. The British Columbia Court of Appeal simply dismissed the appeal by the municipality. On further appeal to the Supreme Court of Canada Surrey's appeal was dismissed without additional reasons, but the Supreme Court varied the original ruling. It was held that the plaintiff was not entitled to a permanent injunction covering all of his lands. Rather, the municipality was free to attempt resumption of some other part of the plaintiff's land, or to obtain the required parcel by regular expropriation proceedings.[74]

In the Caine case the validity of the reserved right to resume in the Crown grant was not challenged and all courts seemed to assume its validity. However, that case provides the basis for some interesting practical strategies to be employed against resumption proceedings. If a Band wanted to defeat the unilateral action of the province, it appears that this could be done by

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[73] Ibid., 683-84.

[74] Corporation of Surrey v. Caine (1920), 60 S.C.R. 654.

erecting a building (apparently any building would do) and perhaps planting a garden on the required land. The province cannot resume until it has provided notice and plans of the proposed work to the Department. It would likely be fairly easy to anticipate which lands were required before the requisite pre-conditions to resumption had been met. If a Band wanted to "play hardball" with the province over the issue of compensation, some advantage could be gained by employing such a strategy, and thereby neutralizing the threat of resumption.

Calculation of Resumable Portion

Due to the wording of O/C 1036 it might be possible for the province to argue that the right to resume relates to the total acreage of all reserves scheduled to O/C 1036.

The resumption provision refers to the "said lands" and the only description of the "said lands" is found in the preceding description of the lands to be conveyed: "the lands set out in Schedule A attached hereto..." . The province contends that they are entitled to resume up 1/20th of the total acreage of all reserves conveyed by O/C 1036.[75] Therefore, if they have reached the 1/20th limit in any one particular reserve they could legally

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[75] This interpretation has been noted by provincial authorities, see, MacSween, 3.1.07.

exceed that limit in that reserve so long as the total of their resumptions pursuant to O/C 1036 does not exceed 1/20th of the total area of reserves included in the schedule.

This is an extreme argument indeed, and one which would not likely find favour in a court of law. On this interpretation the province could take back an entire reserve or more via the resumption power and thereby totally defeat the interest of the particular Band for whose use and benefit the reserve was set apart and conveyed. Undoubtedly, the province must know this is not a strong argument, but due to the wording of the Order in council it could be raised as a legal issue.

In the Moses case, neither the Supreme Court of British Columbia nor the Court of Appeal ruled on the issue, but both courts indicated that the resumption was limited to 1/20th of each reserve. In the Supreme Court, Mr. Justice Andrews referred to the provision as a "reservation to the province of a right to resume possession of a portion of each reserve for purposes of public works".[76] (my emphasis). By the time the case reached the Court of Appeal the issue of trespass was moot, since the roadwork had been completed. The Court of Appeal decision was brief, but there was an interesting qualification whereby the province agreed not to raise the decision of the Court in any future proceedings instituted to determine whether the province had resumed more land

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[76] Moses v. The Queen, [1977] 4 W.W.R. 474, at 490.

than it should have, in the event that the Court decided that the province had the right to resume some land.[77] Speaking for the Court, Mr. Justice Craig went on to dismiss the appeal saying, "... I am of the opinion that the trial judge was right in concluding that the province has the right to resume up to 1/20th of the lands in each reserve".[78] (my emphasis).

The present policy of the provincial government is to take land pursuant to section 35 of the Indian Act when it requires land for public purposes.[79] The present policy regarding resumptions has been described as follows:

> Where a resumable allowance remains using Order in council 1036/208 or other and an agreement can be consummated, the Province will accept the section 35 Indian Act transfer: "For highway purposes and other works of public utility or convenience." Where the resumable allowance has already been expended, a section 35 Indian Act transfer is desirable but a section 37 Indian Act surrender may prove necessary.
>
> A change in current policy with respect to the current interpretation that only one-twentieth of any one reserve is resumable, may be necessary should the resumable allowance in respect of the individual reserve have been "spent", the Band not wish to consummate an amicable agreement and a determination made by the province that the project must proceed.[80]

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77 Moses v. The Queen, [1979] 5 W.W.R. 100 (B.C.C.A.), at 101.

78 Ibid., 102.

79 MacSween, 3.1.07.

80 Ibid.

The policy statement reveals that even though a resumable allowance remains, the province will accept a s.35 transfer as opposed to the unilateral exercise of the resumption power. Supposedly this is a sign of good faith on the part of the province, not to take land without some compensation. But can the province retain its right to resume a full 1/20th part of a reserve while accepting a transfer of reserve lands pursuant to section 35 of the Indian Act? Even though a section 35 transfer is used to provide the province with the lands it needs, such lands should be included in the computation of the 1/20th limit. It is suggested that all lands taken by any provincial authority, whether via section 35 or O/C 1036, should be included in the calculation of the 1/20th limit.

Support for the foregoing proposition is found in the British Columbia Highway Act[81] and the case law dealing with compensation for any taking of land pursuant to the Act. The issue of compensation for lands taken under the Highway Act, partly under the power of resumption, was considered by a Board of Arbitration in the case of British Pacific Properties Ltd. v. Minister of Highways and Public Works.[82] The arbitrators considered the effect of the then section 16(1)(b) of the Highway Act (now section 14(1)(b)) which reads as follows:

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[81] Highway Act, R.S.B.C. 1979, c.167. See ss. 6 and 14.

[82] (1978), 14 L.C.R. 299.

16.(1) Compensation shall be paid in respect of lands entered upon and taken possession of under this Part for the following matters only:

(b) Lands which were originally granted to some person by the Crown, either in right of the Province or Canada, and by the taking of which the total area taken for the purpose of highways from the lands comprised in the original Crown grant is found to exceed one-twentieth of the total area of the lands comprised in the Crown grant, and then only for the area in excess of one-twentieth of that total area; but, where the lands comprised in the Crown grant have been sub-divided into parcels by any registered conveyance or plan of subdivision the area of land which may be so taken from any parcel without the payment of compensation shall not exceed one-twentieth of the area of that parcel, and where lands are being taken from two or more of the parcels at the same time the total area to be so taken without the payment of compensation shall be appointed among those parcels on the basis of their respective areas.[83]

The claimant (British Pacific Properties) sought credit for past dedications of roads, to be included in the calculation of the non-compensable 1/20th area. The claim was expressed as follows:

> In computing the value of those portions of the said lands which may be taken by the Minister without compensation by virtue of the provisions of s. 16(1) of the Highway Act, the Claimant has included the area of road dedications to the Crown of land parcels which have been subdivided by the Claimant, and it is the position of the Minister that the Claimant is not entitled to claim such road dedications as part of the statutory non-compensable resumption.[84]

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[83] Ibid., 302.

[84] Ibid., 303.

It was argued that by "dedication" such lands had been "taken" under Part I of the Act and, therefore, pursuant to section 16(1)(b), they should be credited to the non-compensable 1/20th portion.[85] The Board agreed with this interpretation stating:

> It would seem therefore that "dedication" may be one of the means of taking encompassed by the language of s.16.
>
> The Arbitrators are of the view, that at the very least, there is ambiguity as to whether use of the word "taken" is to be limited simply to "expropriated" in the context of this section, or whether it must be given some broader meaning.
>
> It seems well settled in law that any ambiguity in legislation which authorized expropriation must be resolved in favour of those whose property, or rights, are being encroached upon:...[86]

Section 107(1) of the Land Titles Act, R.S.B.C., c.219, provides that upon registration of a subdivision plan any portion of the land shown as a highway or for public use is automatically dedicated to public use for the purposes shown. Sub-section (2) provides for a qualification of the operation of some of the provisions in sub-section (1), where the Crown in right of Canada, in trust for an Indian Band, is the owner of the subdivision. In view of the British Pacific Properties case it appears that if an Indian Band decides to sub-divide and dedicate certain portions of the land for public use, then such lands should be included in the calculation of the 1/20th resumption power in O/C 1036.

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[85] Ibid., 303-304.

[86] Ibid., 304.

Procedural Requirements for Resumption

Apart from the notice requirement contained in O/C 1036 there are no procedures stipulated to govern the exercise of the province's right to resume. The notice provision in O/C 1036 reads as follows:

> PROVIDED also that the Department of Indian Affairs shall through its proper officers be advised of any work contemplated under the preceding provisoes that plans of the location of such work shall be furnished for the information of the Department of Indian Affairs, and that a reasonable time shall be allowed for consideration of the said plans and for any necessary adjustments or arrangements in connection with the proposed work.

In accordance with this provision, and pursuant to its own procedures the province currently observes the following requirements:

1. The initial notification to Canada of the intention to carry out such surveys as are necessary to define the project.

2. The official notification to Canada of the project accompanied by complete plans and the intention to resume pursuant to the permitting document giving Canada a reasonable time to consider the plans and suggest changes.

3. To make such changes to plans as may prove necessary to proceed with the resumption of the land pursuant to the permitting document and it is now Provincial practice to give the fullest Provincial support possible, (i.e.

> by order in council) to notify Canada by a copy of the resuming document, after which entry can be made for the purposes of construction.[87]

In the past the resumption has been effected by provincial order in council, and that appears to be the present practice.[88] Also, in the past, the Dominion has passed an order in council acknowledging the province's right to resume and "conveyed" the subject lands to the province.[89] Band Council Resolutions have also been obtained to give up possession of the land to the province in recognition of the right to resume.[90] To summarize, the procedures followed in the past have been inconsistent. According to the Moses case the province does not require a federal order in council, or a surrender in order to resume land pursuant to O/C 1036 (the situation may be different in the old Railway Belt where Dominion P.C. 208 is relied upon, but this will be dealt with later).

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87 MacSween, 3.1.08.

88 This was the procedure followed in the Moses case.

89 See, for example, Privy Council Order No. 1399, March 25, 1949, Department of Indian Affairs Reserve General Regsitry No. 12412.

90 See, for example, Band Council Resolution of the Lower Nicola Band, August 29, 1962, Department of Indian Affairs Reserve General Registry No. X13790.

In a ruling of the British Columbia Supreme Court it was held that the exercise of the right to resume land is subject to the review of the Court under the Judicial Review Procedure Act[91] and that the resuming authority must comply with the administrative law doctrine of fairness.[92] In the case of Moser v. The Queen, Mr. Justice Hinds dealt with a preliminary objection to his jurisdiction. The province argued that because they were exercising the right of resumption found in the Crown grant, they were not acting pursuant to a "statutory power", so as to bring the case within the jurisdiction of the Court under the Judicial Review Procedure Act. The Court noted that neither the Crown grant nor the Land Act (R.S.B.C. 1936, c.144, and its successors) stipulated how a decision to resume land pursuant to a reservation in a Crown grant should be effected. It was noted further, that the Minister of Highways, in this case, obtained his authority to resume land, based on the reservation in the grant, from Section 8 (now s.6) of the Highway Act.[93] Mr. Justice Hinds dismissed the preliminary objection with the following reasoning:

> In any event, the decision of the Minister to resume a portion of the subject property, while founded on the reservation contained in the Crown grant, was exercised or made under the powers or rights conferred by s.8(1) of the Highway Act.

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91 R.S.B.C. 1979, c.209

92 Moser v. The Queen (1981), 24 L.C.R. 226.

93 Moser v. The Queen (1981), 24 L.C.R. 226, at 232.

> ...it therefore follows that the Minister's decision was- to paraphrase s.2(2)(b) of the Judicial Review Procedure Act - in relation to the exercise, or refusal to exercise of a statutory power.[94]

The Plaintiff in the case had complained about the arbitrary manner in which the resumption power was exercised. It was held that the Minister's exercise of his discretion to resume the land violated the doctrine of fairness because, in the circumstances, it amounted to an abuse of discretion.[95] In this regard, it was also noted that the Ministry's methods of negotiation regarding the location of the land to be resumed deprived Mr. Moser of an opportunity to suggest alternative locations.[96] With respect to Indian reserve land, such an opportunity appears to be safeguarded by the third proviso in O/C 1036. The Moser case is nonetheless an interesting example of how a Court might deal with a "high-handed" approach on the part of the province, when exercising a right to resume.

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[94] Ibid., 233.

[95] Ibid., 234-235.

[96] Ibid., 235.

Compensation for Lands Resumed

The issue of whether compensation must be paid for lands resumed pursuant to O/C 1036 or P.C. 208 has never been decided by the Courts. The issue was raised and argued in the Moses case but was never adjudicated nor commented upon by the Supreme Court or Court of Appeal of British Columbia. Arguably the situation is unique when the right to resume is reserved in a document transferring administration and control between levels of Her Majesty's government, as compared to a Crown grant to an individual. However, before this situation is analyzed, reference will be made to the case law regarding compensation for lands resumed, and the general common law principles regarding compensation for lands compulsorily acquired.

It would appear from the case law that no compensation is necessary when a right to resume reserved in a Crown grant, is exercised. Although this exact point was not in issue in Power v. The King,[97] the decision necessarily implies this. In that case the Crown elected to institute expropriation proceedings in order to acquire land, instead of exercising its right to resume, which it had reserved in the original Crown patent. The Crown nevertheless contended that the value of the subject land for

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[97] (1918), 42 D.L.R. 387 (S.C.C.).

compensation purposes, was greatly reduced because the whole parcel was resumable. The Court agreed with this argument, stating:

> It is incontestable that it is the value of the owner's interest immediately before the expropriation for which he is entitled to compensation. Upon all the evidence I should incline to the view that the interest, if subject to this condition of resumption, had no substantial value.[98]

It should be noted, however, that the wording of the resumption in Power specifically allowed for compensation for improvements to the land. This is different from the resumption power in O/C 1036 which is silent on compensation altogether. The Court in Power did not go into detail why the land, subject to resumption, had "no substantial value", but perhaps the reasoning was based on a reading of the grant, that because compensation was expressly referred to in one instance it is necessarily excluded in all others.

In the Moser case,[99] although the point was not in issue, the Court made the following comments regarding compensation:

> It is noted with interest that s. 16(1)(b) of the Highway Act, R.S.B.C. 1960 (now s. 14(1)(b) of the Highway Act, R.S.B.C. 1979), deals with the matter of compensation to be paid for lands taken under Part I of the Act - which included s.8. As the portion of the subject property

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[98] Ibid., 389.

[99] Moser v. The Queen (1981), 24 L.C.R. 226.

> resumed did not exceed one-twentieth of the total area contained in the Crown grant, no compensation is payable to the petitioner.[100]

This case cannot be said to stand for the proposition that no compensation is ever payable in the case of a resumption. The Court's view was based on the Highway Act which limits compensation, not the reservation in the Crown grant.

The case law, as well as the Highway Act indicates that a resumption is treated differently than an expropriation, in that no compensation is paid for resumed lands. According to the Privy Council in Cooper v. Stuart[101] and the British Columbia Supreme Court in Moses[102] a resumption is something reserved out of a grant. In Cooper it was said to operate as a defeasance, while in Moses the Court did not specify how the reservation took effect.[103] If such a right is reserved out of the grant- notwithstanding that it actually takes effect, if at all, in the future - it may be that compensation for such reservation is

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100 Ibid., 232-33.

101 (1889), 14 App. Cas. 286.

102 [1977] 4 W.W.R. 474.

103 However, the Court in Moses perhaps implicitly rejected the reasoning in Cooper v. Stuart, that the resumption operates as a defeasance. The Dominion had argued that the resumption took effect as a defeasance, while the province argued that it was a reservation from the grant. Without commenting upon how the resumption worked, the Court characterized the right to resume as a reservation from the grant.

reflected in the price paid for the land. That is, the parties have already bargained for their respective interests and rights over the land at the time of the grant. Normally, in a sale to an individual, the reservation of such a right would reduce the purchase price. An original grantee, undoubtedly acquired land at a bargain rate, as the early land policy was aimed at attracting settlers who would improve the land and, eventually the economy. But in order to purchase the land at such a low, or nominal price, the grantee agreed to take the property subject to the condition that the Crown might in the future take back up to 5 percent (1/20th) of the land.

To successors in title, the exercise of the right to resume, without compensation, may not seem as reasonable. However, they would have been aware of the condition when they purchased, and no doubt would have bargained accordingly. Of course, there was no analogous bargaining with respect to O/C 1036. At least the Indian Bands did not bargain with the province. To some extent the Federal Government did, but there was no purchase price, nor any real <u>quid pro quo</u> involved. The federal government negotiated with the province over the form of the conveyance, ultimately agreeing to the condition. Since the federal government agreed to the condition, perhaps it should be ultimately responsible for payment of compensation, if the province is not legally required to pay.

There are two cases from Australia, which are included here for reference, on the issue of compensation.[104] In both cases the Courts decided that pursuant to the reservation of the right to resume in the Crown grant no compensation was necessary. It is interesting to note, however, that in each case the Crown grant expressly stated the right to resume without compensation.

Finally, it has been said to be the law in Australia that since the power to resume under a Crown grant is contractual in nature, that power is to be determined according to the express or implied terms of the grant.[105] This makes much sense, especially in light of the preceding comments regarding the resumption as one of the things included in the "bargain" for the land. It might be argued that since O/C 1036 does not expressly state that no compensation will be paid, the reverse should be implied. Such an implied term - for reasonable compensation - would be reasonable in view of the common law presumption in favour of compensation for lands compulsorily acquired by the state for public purposes.

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104 Thomas v. Sherwood (1893), 9 App. Cas. 142 (P.C.), see pp. 143 and 149; Worsely Timber Co. Ltd. v. Minister for Works (1933), 36 W.A.L.R. 52 (Aus).

105 Brown, 29.

Implied Compensation

There is a common law presumption against the taking of private property without compensation.[106] However, the common law is subject to be superseded by an Act of the legislature, and there are now statutes in operation in all jurisdictions in Canada which allow for various expropriations. Any right to expropriate must be based upon a statute and, in common law jurisdictions any right to compensation must also be based upon the statute which authorizes the taking. However, due to the common law rules of statutory interpretation, the Courts will invariably imply a right to compensation in the statute that authorizes the taking unless the contrary intention is expressed in unequivocal terms. This rule applies most strongly to the construction of a statute delegating legislative powers.[107]

However, these common law presumptions may have no application to the exercise of a right to resume contained in a Crown grant. The courts have recognized a distinction between a power of resumption and a power of expropriation, although there does not appear to be any case where this distinction is expressly

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106 George S. Challies, The Law of Expropriation, 2d ed. (Montreal: Wilson & Lafleur, 1963), at 3.

107 Ibid., 82-83. See also 44 Halsbury's Laws, (4th), para. 906, at 557. See also Newcastle Breweries Ltd. v. The King, [1920] 1 K.B. 854, at 866.

considered.[108] There does seem to be good reason for treating the two powers differently in law, if the resumption power is viewed as a result of the parties contractually bargaining for their respective rights.

Perhaps the right to resume land in O/C 1036 and in P.C. 208 could be construed as a compulsory taking of land authorized by statute, as opposed to a reservation or condition contractually bargained for in a Crown grant. Certainly the lands in the Railway belt (governed by P.C. 208) are not the subject of a "conveyance" which reserves a right of resumption. Rather, the right of resumption in the provincial government stems from a federal-provincial agreement - The Scott-Cathcart Agreement of 1929. The province could not reserve this right out of a conveyance of lands since the province was not the grantor of the Indian reserves in the Railway Belt. According to the re-transfer agreement, which was embodied in the Constitution Act, 1930, the Indian reserves were not included in the re-transfer of the lands by the Dominion to the province. That agreement further stipulated that the Indian lands would continue to be vested in the Dominion on the conditions expressed in the Scott-Cathcart Agreement and embodied in P.C. 208. Privy Council Order 208 was enacted pursuant to the British Columbia Indian Lands Settlement

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[108] But see, for example, Power v. The King, supra, and Thomas v. Sherwood, supra.

Act.[109] Therefore, the right to resume - and all the other conditions - is based upon the agreement of 1929 and the "Settlement Act". It is also embodied in the Constitution Act, 1930.

It is apparent that the resumption power over the "Railway Belt reserves" is based on a statute and not upon the terms of a grant. The same could be said of the resumption power in O/C 1036. It has been noted that a transfer of property between levels of Her Majesty's Government is not, strictly speaking, a conveyance in law. Although the Terms of Union call for a "conveyance" of lands, the Courts have held that this term is not really appropriate for such a transfer. The transfer of Indian reserves has always been based upon a statute - beginning with the Terms of Union.

In Moses, the British Columbia Supreme Court held that the authority of the Executive to pass O/C 1036 was based upon a Provincial Statute - the Indian Affairs Settlement Act - and was therefore validly made. The Court also held that P.C. 208 was authorized by federal statute, The British Columbia Indian Lands Settlement Act (1920).[110] The Orders in Council should be characterized as delegated legislative enactments. As such they are subject to the common law rules of statutory interpretation.

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109 S.C. 1920, c.51.

110 Moses v. The Queen, [1977] 4 W.W.R. 474, at 490.

Among these rules is the presumption that compensation must be paid for land compulsorily acquired unless the statute expressly provides otherwise. There is nothing in the two statutes referred to above that authorizes a taking of land without payment of compensation. The Orders in Council are silent on the issue of compensation relative to the exercise of the resumption power. Even if O/C 1036 and P.C. 208 expressly excluded compensation they might be attacked as ultra vires, since the enabling statutes- the "Settlement Acts" - do not so expressly provide.[111]

Since the Orders in Council are really legislative enactments, and not Crown grants the reference to resumption should not be viewed in a strict property law sense, but rather in its ordinary sense, as a "taking back" of something which had previously been given. In this sense the right to resume may be viewed as a right to "expropriate", or "take" pursuant to statutory authority. Hence the presumption against the taking of property rights without compensation should apply. It should finally be noted that the right to compensation has been held to apply to any person with any "interest" in the land, including a usufructuary interest.[112]

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111 See footnote 107, supra, and particularly, Newcastle Breweries Ltd. v. The King, [1920] 1 K.B. 854, at 866.

112 See Challies, 73, and Commissaries d'Ecoles de Ste Rose v. Charbonneau, [1953] S.C. 477 (Que.S.C.).

Past Policy Regarding Compensation

The policy of both the provincial and Dominion governments regarding compensation for lands resumed has been somewhat inconsistent, although for the most part there appears to be agreement that no compensation is required. Before the form of conveyance was agreed upon in 1929 the Dominion opposed any reservation or restrictions in the transfer. The correspondence which preceded the agreement sheds some light on the issue of compensation, but is inconclusive.

In a letter dated June 18, 1926[113], Duncan Scott, Deputy Superintendent of Indian Affairs rejected the draft form of conveyance offered by T.D. Patullo (then Minister of Lands for British Columbia). He advised that section 46 of the Indian Act (now s.35) provided for the taking of land from reserves for public purposes. In his reply,[114] Patullo insisted that certain reservations contained in the standard grant must be kept, in the public interest. He expressed doubts regarding the sufficiency of section 46 (now section 35) of the Indian Act to protect that public interest.

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113 Borthwick, "Order in Council 1036", Exhibit C. David Borthwick has appended copies of correspondence between provincial and federal officials to his paper, and referred to them as "exhibits".

114 Borthwick, "Order in Council 1036", Exhibit D.

Clearly, the provincial government did not want to be dependent upon the Dominion Executive for its consent to construct roads through reserves. They saw the right to resume as a necessary independent power to take lands as required for the public interest. Apparently Patullo was concerned that pursuant to section 46 of the Indian Act, compensation would have to be paid, but his main concern seemed to be the lack of an independent authority to expropriate lands when needed for public purposes.

There followed a number of exchanges between these two men. Patullo sought the advice of his Attorney-General in a memorandum dated 13 January 1928.[115] In the memo Patullo explained that he did not want to give up the right to resume but suggested that the province might well agree to give compensation. The legal opinion which followed[116] did not specifically address the compensation issue. The suggestion made by Patullo in the above-noted memo is the only indication that the province would be willing to pay compensation for resumptions in the case of Indian reserve lands. The suggestion was apparently never raised in correspondence between the two governments.

The draft form of conveyance, agreed upon in the Scott-Cathcart Agreement, eventually became O/C 1036. As previously noted, the document is silent on the issue of compensation. There

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115 Ibid., Exhibit M.

116 Ibid., Exhibit O.

was inserted in the order the provision for notice and consultation with the Department of Indian Affairs. This would appear to be a compromise to settle the concerns of the Dominion regarding the ability of the province to unilaterally deal with Indian lands via the reservations in the conveyance. Perhaps the silence of the document regarding compensation for land resumed was also a compromise. However, there was no change in this provision from the original proposal, which came straight from the standard forms of the provincial Land Act (1924).[117]

Ever since the "conveyance" in 1938 the province has taken the position that no compensation is required for lands resumed, and the Dominion has, for the most part, agreed with that view. However, in the Moses case the federal government argued that compensation was necessary for resumed lands, although that issue was not really before the Court. The issue of compensation was not dealt with by either the Supreme Court or the Court of Appeal for British Columbia.

It is curious that the federal government agreed to allow the province to resume land for public purposes without payment of any compensation, for that was a major departure from past policy. The Indian Act required compensation to be paid for lands taken for public purposes.[118] As well, in most of the numbered treaties

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[117] R.S.B.C. 1924, c.131, schedule, Form No. 9.

[118] Indian Act, R.S.C. 1927, c. 98, s.48.

made between Canada and various Indian tribes, compensation was required for lands resumed by Canada for public purposes.[119] Some treaties only required payment for improvements on appropriated reserve lands, while others stipulated that either compensation would be paid for the value of the area lost, or an equivalent area would be added to the reserve.[120] The issue of compensation will be examined again in the next chapter.

Mineral Rights

The Scott Cathcart Agreement and subsequent Orders in Council were silent on the issue of mineral rights. In the Precious Metals case, the Privy Council applied the usual rules of construction governing conveyances to the transfer of the Railway Belt and Peace River Block lands. It was held that since the transfer instrument was silent on the issue of mineral rights, the base metals passed to the grantee (Dominion) as incidents of "land", while the precious metals remained with the province. As

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119 Alexander Morris, The Treaties of Canada with the Indians (Toronto: Belfords, Clarke & Co., 1880; Coles, 1979), 313-370. Treaties No. 3 through 9 all reserved a right to Canada to appropriate lands from reserves for public purposes, paying due compensation for any improvements.

120 See Treaty No. 4 (1874), in Morris, 333, and Treaty No. 9 (1905) for examples requiring compensation for land and improvements. The clause in treaty No. 9 is reprinted in, Bradford W. Morse, ed., Aboriginal Peoples and the Law (Ottawa: Carleton University Press, 1985), 293-4.

noted previously, the Privy Council's decision was influenced by what they termed a "commercial arrangement" expressed in Article 11, and the obligation of the province to convey "public lands".[121] The transaction was described as a transfer of the right to manage and settle the lands and to appropriate the territorial revenues. The rights to precious metals, which derive from the royal prerogative were said to differ in legal quality from the ordinary territorial rights. In the absence of language indicating that the precious metals were also to be conveyed, they did not pass with the transfer of the land.[122]

Based on the decision in the Precious Metals case it is likely that the lack of specific reference to minerals in O/C 1036 has the effect of transferring the base minerals with the land. This would include oil and gas, but would exclude gold and silver. It is arguable that because the transfer of Indian reserves pursuant to Article 13 is different from the "commercial agreement" embodied in Article 11, the decision in the Precious Metals case should not be applied to mineral rights on Indian reserves. The reserve lands were to be transferred for the use and benefit of the Indians. Unlike the Railway Belt lands it is clear that Indian reserves were intended to be permanently removed from provincial territorial jurisdiction. They were not "public lands" placed at the disposal of the federal government for the

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121 (1889), 14 App. Cas. 295, at 301-302.

122 Ibid., 303.

purpose of raising revenue. Any revenue that might be generated from the management of Indian reserves is to enure to the benefit of the band for whose use and benefit the lands were set apart. If the Indian bands are to benefit from their reserve lands why should they not also benefit from any minerals that may exist on those lands?

Article 13 expressed the intention that the Dominion would carry on a policy as liberal as that previously followed in the province, and to assist in that purpose, reserve lands were to be conveyed to the Dominion. The past policy of the colonial government does not provide much insight into the issue of whether Indian bands were to benefit from any minerals on their reserves. However, because lands were reserved out of the public domain, for the exclusive use and benefit of the Indians, it might be reasonable to assume that any minerals would have also been managed for the benefit of the Indians. It was only after British Columbia joined confederation that the provincial government became concerned with separate property rights that may have been connected with reserve lands, such as mineral rights. The underlying title was always viewed as being in the Crown, but because the lands were reserved from the public domain, the beneficial use of the lands was reserved for the Indians. A truly liberal policy would have included the beneficial use of all minerals including "royalties" which might be found on Indian reserves. According to the summary of colonial policy made by the

provincial Attorney General in 1875, (referred to in Chapter 1) it was envisioned that bands might become self-sufficient through the exploitation of resources connected with their reserves. If that was the policy, it should not matter whether the particular resources available were timber, fish, copper, oil or gold. The legal distinction between base metals and precious metals should not affect a general policy that Indian reserves should be developed for the benefit of the band.

The Indian Reserves Mineral Resources Act

Shortly after the conveyance of reserve lands by Order in Council 1036, the federal and provincial governments reached an agreement concerning the management of minerals on reserve lands.[123] The agreement was embodied in reciprocal statutes passed in 1943.[124] The parties apparently proceeded from the understanding that the base metals had been transferred to the Dominion but the precious metals had not. This view was probably a result of the Precious Metals decision. The preamble to the agreement is as follows:

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123 "Crerar-Carson Agreement" The agreement is reproduced in the reciprocal legislation, noted below.

124 Indian Reserves Mineral Resources Act, S.B.C. 1943, c.40, and The British Columbia Indian Reserve Mineral Resources Act, S.C. 1943-44, c.19.

> Whereas from time to time treaties have been made with the Indians for the surrender for various considerations of their personal and usufructuary rights to territories now included in the Province of British Columbia, such considerations including the setting apart for the exclusive use of the Indians of certain definite areas of land known as Indian reserves;
>
> And whereas the said Indian reserves were conveyed to the Dominion Government as trustee for the Indians under the terms and conditions set forth in an agreement dated the 24th day of September, 1912, between the Dominion Government and the Province of British Columbia;
>
> And whereas the precious metals in, upon or under the lands comprising such reserves are not incidents of such lands but belong beneficially to the Crown in the right of the Province of British Columbia with the result that the development of all the minerals in, upon or under such lands is at present impractical since the precious and base metals are closely associated and cannot be mined separately;
>
> And whereas it has been agreed between the Governments of the Dominion of Canada and the Province of British Columbia, that as a matter of policy and convenience and for the development of such minerals and without thereby affecting the constitutional or legal rights of either of the said Governments, the Province of British Columbia should have charge of the development of all minerals and mineral claims both precious and base, in, upon or under the said Indian reserves.

The Agreement provides the procedure by which claims are to be staked, the method for calculating, distributing, and collecting royalties and other fees, and generally allows for the province to administer those details. In paragraph 3, the term "mineral" is defined to include gold and silver but exclude coal, petroleum and natural gas, etc. Therefore, the related legislation does not affect any rights to oil and gas that the Indians could otherwise claim. The main point of the Agreement was to provide some way of administering mineral rights on Indian reserves based upon the

assumption that ownership of the minerals was split between the province, owning the precious metals, and the Dominion, owning the base metals. The legislation attempted to simplify the administration of mineral claims by allowing the province to collect all revenue from any mineral rights. The proceeds were to be divided equally between the two governments (the Dominion share to be held for the benefit of the Indians). The legislation is still in effect and governs the management of minerals on Indian reserves.

CHAPTER V

CONSITUTIONAL PROBLEMS WITH THE TRANSFER

If the transfer of reserve lands is viewed strictly as a conveyance, and construed as any other grant of land, then the reservations contained in Order in Council 1036 might not be subject to challenge on constitutional grounds. The many terms and conditions might be construed as providing a special definition of Indian reserves for the province of British Columbia. On this view, the exercise of the resumption power would have the effect of changing the character of the resumed lands from reserve lands to provincial lands. Because the resumed lands would no longer be defined as "lands reserved for the Indians," the requirement of surrender, imposed by the Indian Act, would not apply. However, the ability of the two governments to reach such an agreement regarding reserves in British Columbia may have been restricted by the dictates of the Terms of Union and the Constitution Act, 1867. Particularly, if the transaction is viewed as a price of delegated legislation, the powers of the respective governments are restricted by any enabling legislation and the division of powers set out in the Constitution. These constitutional aspects of the transfer will now be examined.

Prior to Union the colony of British Columbia had reserved some land for Indians but many bands were without reserves. Except for the early Douglas treaties there had been no attempt by the

colonial government to obtain surrenders of Indian title. There was apparently no clear colonial Indian policy. Part of the deal which was struck between British Columbia and the Dominion was that the Dominion would take over the "charge of the Indians". On its part, the province agreed to convey certain lands to the Dominion to be used as Indian Reserves. Had the Dominion officials been fully aware of the unsettled state of Indian Affairs in the province, it is likely that more thought and detail would have gone into the expression of this agreement in the Terms of Union. As it was, the agreement was expressed in the ambiguous language of Article 13.

The first paragraph of Article 13 is an assumption by the Dominion of the "charge" of the Indians and the trusteeship and management of their reserved lands. The article must be viewed as having more significance than simply restating the federal government's constitutional responsibility for Indians and lands reserved for the Indians. Article 10 of the Terms of Union already stipulated that the provisions of the British North America Act, 1867 would govern the union. This, of course, would have made section 91(24) applicable. Without the obligation to convey lands to the Dominion, British Columbia would have been in the same position as the original four provinces with respect to

the underlying interest in reserve lands, and the principles in St. Catherine's Milling[1] would be applicable to Indian lands in British Columbia today.

One must assume then that Article 13 was intended to do more than simply confirm the applicability of section 91(24) of the Constitution Act, 1867. Indeed the second paragraph of Article 13 requires a conveyance of lands reserved for the Indians from British Columbia to the Dominion.

The expressed reason that the province was to convey reserve lands was so that the Dominion could carry out "a policy as liberal as that hitherto pursued by the British Columbia Government". A dispute soon arose over the "liberality" of the colonial government's past policy, but that early dispute was focused on the quantity of lands to be reserved, rather than the quality of the proprietary interest that was to be conveyed. As noted in Chapter one, the colonial policy in British Columbia apparently would require a full proprietary interest to be held by the government in trust for the Indians.

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1 St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46, held that the Crown in right of the Province of Ontario held the beneficial title to Indian Reserve Lands, subject to the "usufructuary interest" of the Indians. When the Indian interest was surrendered, the provincial title became unburdened and complete, leaving the federal government with no right to dispose of the lands.

Out of the early negotiations concerning the size of reserves there emerged the novel claim by the provincial government of a reversionary interest in all Indian reserves. The notion of a continuing provincial interest in reserve lands runs contrary to the language of Article 13, which apparently requires the province to relinquish its proprietary interest in favour of the Dominion, in order that the federal government may assume the "trusteeship and management" of Indian lands. The federal government's later experience with lands reserved for the Indians in central and eastern Canada illustrated how unmanageable these lands were when provincial governments held an underlying proprietary interest.[2] By requiring a conveyance of Indian reserves from British Columbia to the Dominion, the Terms of Union apparently addressed this problem. On its face, Article 13 requires a transfer of the province's proprietary interest in reserve lands upon the application of the federal government. Although the Article allowed for a dispute settling mechanism regarding the issue of reserve size, there is nothing in its terms to suggest that the province should retain any proprietary interest in reserve lands.

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[2] See, St.Catherines Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46 (P.C.) - Dominion could not dispose of timber rights on surrendered land; also, Ontario Mining Co. v. Seybold, [1903] A.C. 73 (P.C.) - The Dominion could not appropriate a portion of lands for making reserves out of a larger area surrendered by treaty; also, Atty.-Gen. Quebec v. Atty.-Gen. Canada, [1912] 1 A.C. 401 (P.C.) - Dominion could not dispose of minerals following a surrender.

The provincial government later gave up their claim to an underlying interest in reserve lands, but their "generosity" on this issue was used as a bargaining chip during the negotiations over the form of conveyance. The transfer, with conditions attached, was the quid pro quo for the province giving up its reversionary interest. Although the "reversionary interest" may have served the purpose of extracting certain concessions out of the federal government, the surrender of this claim can not justify the terms of the ultimate conveyance if those terms are in conflict with the requirements of the constitution.

Article 13 of the Terms of Union

If Article 13 requires a transfer of the entire proprietary interest in reserve lands, the most objectionable feature of O/C 1036, is the reservation of a right to resume land and other incidents of land, such as sand, gravel and timber. Through these reservations the Crown in right of the province has retained a certain control over the lands. By exercising the power the province regains a beneficial interest in Indian reserve lands. Does Article 13 preclude such a continuing power of management and control in the province?

No court has passed judgment on the nature of the "conveyance" which is required by Article 13. However, Article 11 of the Terms of Union, which is similar in its wording to Article 13 has been judicially considered. The leading cases regarding the transfer of the Railway Belt lands have been noted in Chapter III. In the Precious Metals case the Privy Council described Article 11 as an obligation to convey certain lands. Presumably Article 13 may also be viewed as an obligation on the part of the province to convey reserve lands. In the British Columbia Fisheries Reference[3] the Privy Council again referred to the conveyance in Article 11 as a constitutional obligation, and one which could not be altered by either the provincial or federal government. It was there stated:

> By the second clause of paragraph 11 the Government of British Columbia became bound to convey to the Dominion Government, or rather to the Crown in right of the Dominion, in trust, to be appropriated in such manner as the Dominion Government should deem advisable in furtherance of the construction of this railway, a certain extent of public lands,...Neither the Legislature of the Province of British Columbia nor that of the Dominion has power by legislation to alter the terms of this Order in Council (which is in effect an Imperial statute), or to relieve themselves from the obligations it imposes upon them.[4] (emphasis added).

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[3] Atty.-Gen. British Columbia v. Atty.-Gen. Canada, [1914] App. Cas. 153 (P.C.)

[4] Ibid., 164.

In the Precious Metals case, Article 11 was described as an "exception" to section 109 of the Constitution Act, 1867.[5] Section 109 declares the general rule that the provinces own all of the lands within their geographic boundaries. It is the primary section of the Constitution which governs the distribution of property. However, because the Railway Belt and most Indian reserves were undetermined at the date of union, they could not be excepted out of the general lands which remained vested in the province pursuant to section 109. If the lands had been determined at the date of union it is quite possible that the Terms of Union would have simply excepted them out of provincial Crown lands. There would have been no need for a conveyance by the province. Because the extent and location of the lands were not settled, a conveyance at some future date was necessary. If Article 13 operates as an exception to section 109, then its effect should be to adjust the distribution of property under the constitution. Based on the reasoning in the Railway Belt cases, the combined effect of Article 13 and section 109 would be as follows: all lands which belonged to British Columbia before the union continued to belong to British Columbia after the date of union, except Indian reserves, which were to be transferred to the Crown in right of the Dominion, upon application by the Dominion.

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[5] Atty.-Gen. British Columbia v. Atty.-Gen. Canada (1889), 14 App. Cas. 295, at 304.

Once the quantity and location of the lands was settled, Article 13 imposed an obligation on the province to transfer its entire proprietary interest in the lands to the Dominion.

By reserving certain interests, such as the right to resume a portion of the lands, British Columbia has not fulfilled its constitutional obligation. It was noted earlier that a right to resume operates, when exercised, as a defeasance.[6] It is doubtful that Article 13, on any interpretation, contemplates a reversal of the conveyance in whole or in part. Yet this is the practical effect of a resumption.

In the Burrard Power[7] case it was held that the obligation, in Article 11, to convey land normally implied an obligation to convey waters associated with the land. The Attorney General for British Columbia had argued that the waters were not included with the Railway Belt lands and were therefore subject to the provincial water legislation. In rejecting this argument the Board commented:

> To hold that the Province after the making of such an agreement remained at liberty to legislate in the sense contended for would be to defeat the whole object of the agreement, for if the Province could by legislation take away the water from the land it could also by

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[6] Cooper v. Stuart (1889), 14 App. Cas. 286 (P.C.), at 289-90.

[7] Burrard Power Co. v. The King, [1911] App. Cas. 87

> legislation resume possession of the land itself, and thereby so degrogate from its own grant as to utterly destroy it.[8]

Pursuant to the resumption reservation in O/C 1036, the provincial government has, by legislation, resumed possession of some of the lands that it previously transferred. The power of resumption was purportedly reserved out of the "grant" and so it may not be considered to be legislation in derogation of the grant. However the terms of the "grant" itself may be viewed as a derogation of the obligation imposed on the province by Article 13.

The fact that the federal government agreed to the terms and conditions in Order in Council 1036 cannot cure a constitutional invalidity in the transfer. It is not open to governments in a federal state to amend the constitution by simple agreement. The federal government had originally insisted upon a straightforward transfer without conditions. Perhaps the federal negotiators were persuaded that the conditions attached to O/C 1036 were not contrary to the dictates of Article 13. It is quite possible that after 65 years of wrangling with intransigent provincial governments the compromise was struck simply to get on with the transfer. Whatever the reason was for the agreement, the Indian beneficiaries ought not to be bound by it, if it is unconstitutional in some of its aspects.

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[8] Ibid., 94.

Conflict with Section 91(24), Constitution Act, 1867

If the form of transfer is not contrary to Article 13 and the distribution of property under the constitution, the resumption power is certainly in conflict with the Indian Act and the exclusive legislative jurisdiction of Parliament over lands reserved for the Indians. The power of resumption which the province holds over all Indian reserves in British Columbia allows the provincial government to have a continuing legislative and administrative power over "lands reserved for the Indians". The power may apparently be exercised by the unilateral action of the provincial government over the objections of both the Indian band and the federal government. The provincial authorities are of the view that no compensation is required when lands are resumed, and it appears that that view is consistent, at least, with the law concerning resumptions in grants to individuals. If the resumption power is valid, it is apparently separate from and paramount to the provisions in the Indian Act which otherwise govern the taking or other disposition of reserve lands for public and other purposes.[9] While there is some indication that the federal negotiators were aware of the constitutional, or jurisdictional problems that the resumption power posed, they nevertheless acceded to the provincial demands.[10] Perhaps the

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[9] See, for example, R.S.C. 1970 c.I-6, s.35 (expropriation), and s.37. (surrenders).

[10] See discussion of negotiations in Chapter I.

notice provision in O/C 1036 was seen as a compromise which would allow the federal authorities some voice in the exercise of the resumption power. However the notice clause does not give the Dominion a veto over the province's right to resume, and consequently the unilateral nature of the provincial power remains open to objection on constitutional grounds.

As previously noted, the validity of the right to resume was upheld in the Moses case.[11] However it is not clear whether the British Columbia courts considered the constitutional issues which are raised here. If similar issues were raised they were not dealt with in any satisfactory manner in either the Supreme Court, or the Court of Appeal. The Judgment of Mr. Justice Andrews in the Supreme Court is remarkable for its lack of explanation of the conclusions reached. After setting out the historical background to the passage of both O/C 1036 and P.C. 208, Andrews, J. concluded:

> The British Columbia Indian Lands Settlement Act (Canada) and the Indian Affairs Settlement Act (British Columbia) gave the Governor in Council and the Lieutenant-Governor of British Columbia in Council, respectively, broad powers for the purpose of settling all differences between the governments of the Dominion and the province. Privy Council O. 208 and order in council 1036 were validly made pursuant to the authority established by these two statutes.
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> In my view, the sections of the Indian Act then if force regarding taking lands for public purposes and alienating land had no application to the provisions of Privy Council O. 208. The draft form of conveyance approved by Privy

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[11] Moses v. The Queen, [1977] 4 W.W.R. 474, affd, [1979] 5 W.W.R. 100 (B.C.C.A.)

> Council O. 208 established the terms on which Indian lands in the province were to be held by the Dominion and in this regard provided for a reservation to the province of a right to resume possession of a portion of each reserve for purposes of public works. The reservation of such a right to the province did not constitute a taking of lands or an alienation of lands, as provided for in the Indian Act (R.S.C. 1927, c.98, ss.48 and 50).
>
> Neither does the present exercise of this right come within s.35(1) of the Indian Act now in force, regarding the taking of land for public purposes pursuant to statutory powers, or s.37 of the Act, requiring a surrender of lands before they may be alienated or otherwise disposed of.[12]

By the time the case reached the Court of Appeal it was virtually moot, since the case had been based on a trespass which had already occurred. The Court of Appeal affirmed the judgment of Andrews J., that the province has the right to resume, without further reasons. The Court did not deal with all of the issues which had been raised, as the parties had apparently agreed to settle collateral issues.[13] It is unfortunate that the Moses case stands as a Court of Appeal precedent, for the proposition that the provincial right to resume is valid. The constitutional issues do not appear to have been before either court, or if they were they were not addressed.

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12 [1977] 4 W.W.R. 474, at 490.

13 See Moses v. The Queen, [1979] 5 W.W.R. 100, at 101 (B.C.C.A.).

Mr. Justice Andrews held that the executive orders (P.C. 208 and O/C 1036) were validly made pursuant to the British Columbia Indian Lands Settlement Act (Canada), and the Indian Affairs Settlement Act (B.C.). He noted that these two statutes bestowed broad powers on the executive branches of government to settle all differences concerning Indian Affairs in the Province. That is evident from the language of the statutes. However, the legislation, expressed in very general terms, purports to delegate decision making powers. The exercise of the delegated power must be scrutinized according to the rules which apply to delegated legislation. Just because a statute of Canada authorizes the executive to do whatever is necessary to achieve a certain result, that does not bestow unfettered powers. Their broadly expressed powers must be subject to the enabling statute, other specific acts of Parliament, and the Constitution.

In Moses, Andrews J., held that the sections of the Indian Act regarding the taking or alienation of reserve lands "had no application to the provisions of Privy Council Order 208",[14] which established the terms on which Indian lands in B.C. would be held by the Dominion. The reservation of the right to resume did not constitute a taking or alienation of lands as provided for in the Indian Act. Neither did the exercise of the power come within section 35 or 37 of the Act.[15] According to the judgment the

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[14] [1977] 4 W.W.R. 474, at 490.

[15] Ibid.

resumption power apparently arises independantly from the agreed form of conveyance established by the Scott-Cathcart Agreement, and confirmed by P.C. 208. While that may be so, it should not resolve the issue of the validity of the resumption reservation. It is the agreed form of conveyance and supporting executive orders that are arguably ultra vires. In fact the reasoning in Moses highlights the constitutional conflict.

Regardless of whether the reservation of the right to resume is a "taking" within the meaning of the Indian Act, the exercise of that right does in fact result in a taking of reserve lands. Privy Council Order 208 has established an alternate method for taking reserve lands for public purposes. It is in direct conflict with the Indian Act, a statute of Parliament which provides specific procedures for any disposition of reserve lands, including the taking of lands for public purposes. Is it possible that an executive order, issued pursuant to the most generally phrased enabling legislation can overrule a specific Act of Parliament? Surely Parliament could not have intended to grant such a power to the executive branch by the general language of the British Columbia Indian Lands Settlement Act.

Even if Parliament had passed specific legislation granting the province the resumption power, that could still be subject to challenge on constitutional grounds. Because the effect of the power is to give the province a limited but exclusive jurisdiction

over lands reserved for the Indians, it is apparently in conflict with the division of legislative powers in the Constitution Act, 1867. Of course methods have been found to avoid the strictures imposed by sections 91 and 92 of the Constitution. In a spirit of "cooperative federalism", the federal and provincial governments have managed to enact complementary legislation to govern such cross-jurisdictional fields as, inter-provincial trade and transport.[16] The Railway Belt Water Act[17], noted earlier, is a specific example of federal legislation which adopts provincial law in order to overcome jurisdictional problems. The B.C. Indian Lands Settlement Act did not purport to adopt provincial law regarding the taking of lands for public purposes.

The "Settlement Act" did specifically refer to the McKenna-McBride Agreement, and authorized the executive to do anything necessary to carry out that agreement. There is no reference to a right of resumption in the McKenna-McBride Agreement. That agreement addressed the issue of the conveyance in terms that are inconsistent with any reservations from the conveyance. In clause 7 it is declared that Indian reserves shall be conveyed by the province to the Dominion:

> ... subject only to a condition that in the event of any Indian tribe or band in British Columbia at some future time becoming extinct, then any lands within the territorial

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16 See, generally, Peter Hogg, Constitutional Law of Canada, 2d ed., (Toronto: Carswell, 1985), 295-303.

17 R.S.C. 1927, c.211

> boundaries of the Province which have been conveyed to the Dominion as aforesaid for such tribe or band, and not sold or disposed of as herinbefore mentioned, or any unexpended funds being the proceeds of any Indian Reserve in the Province of British Columbia, shall be conveyed or repaid to the Province. (my emphasis)[18]

Clause 8 of the Agreement specifically dealt with the issue of taking reserve lands for public purposes while the Royal Commission was sitting. The commissioners were to hear any applications for such takings and file an interim report setting out their recommendations. The respective governments were obliged to "do everything necessary to carry the recommendations of the Commissioners into effect".[19] This part of the agreement was consistent with the provisions of the Indian Act which permitted the taking of reserve lands for public purposes, upon payment of compensation. Although the "Settlement Acts" did not bind the executive branches to follow the letter of the McKenna-McBride Agreement, is clear that they were to be guided by the agreement in exercising their broad delegated powers.

It is worth noting that the federal statute specifically empowered the executive to carry out the recommendations of the Commissioners concerning cut-offs, without obtaining surrenders from the affected bands "notwithstanding any provisions of the Indian Act to the contrary". The Act did not similarly specify

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18 "McKenna - McBride Agreement", supra, Chapter I, footnote 27.

19 Ibid.

that the Governor in Council could, by order, create an alternate method of taking lands for public purposes, notwithstanding provisions of the Indian Act to the contrary. The inclusion of the specific clause regarding cut-offs illustrates that Parliament had considered the potential conflict between the settlement of the Indian land question in B.C. and certain provisions of the Indian Act. It was foreseen that most bands would not consent to the cut-offs, which the provincial government insisted the Commissioners be empowered to recommend. The Indian Act prohibited any sale or alienation of reserve lands until the land had been surrendered in accordance with the procedures set out in the Act.[20] The Act also provided a specific procedure for taking reserve lands for public purposes. "Expropriation" of reserve lands is permitted subject to the consent of the Governor in Council, and compensation must be paid to the band.[21] The expropriation provisions of the Act were apparently not viewed, at that time, as an impediment to settlement of the Indian lands question. Once it became apparent that the province insisted on a separate method of taking lands for public purposes, the federal "Settlement Act" ought to have been amended to allow the right of resumption, notwithstanding the Indian Act. This would have been the only way in which the Governor in Council could conceivably

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[20] Indian Act, R.S.C. 1927 c.98 s. 50.

[21] Indian Act, R.S.C. 1970, c.I-6, s.35 is the relevant section governing "expropriation" of reserve lands. At the time that the Scott-Cathcart Agreement was reached, the relevant provision was found in R.S.C. 1927, c.98, s.48.

have the power to override a statute of Parliament. That is because the exercise of the power resides with the provincial government, and therefore is contrary to the division of powers under the constitution.

The Railway Belt Reserves

The foregoing discussion regarding the constitutional infirmity of the transfer agreement may not be applicable to Indian Reserves within the Railway Belt and Peace River Block. The Railway Belt and Peace River Block, which had been transferred unconditionally to the Dominion were re-transferred in 1930 to the province. The re-transfer took the form of a constitutional amendment, in the Constitution Act, 1930.[22]

Section 1 of this Imperial Statute states:

> 1. The agreements set out in the schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the British North America Act, 1867, or any Act amending the same, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.[23]

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[22] 20-21 George V c. 26 (U.K.), in R.S.C. 1970, Appendix II, p. 365 and pp. 392 et seq.

[23] Ibid., 366.

In other words, the 1930 agreement concerning the re-transfer of the Railway and Peace River lands superseded the Terms of Union and the Constitution Act, 1867. Section 13 of that agreement reads as follows:

> 13. Nothing in this agreement shall extend to the lands included within Indian reserves in the Railway Belt and the Peace River Block, but the said reserves shall continue to be vested in Canada in trust for the Indians on the terms and conditions set out in a certain order of the Governor General of Canada in Council approved on the 3rd day of February, 1930 (P.C. 208).[24] (emphasis added)

This means that the terms and conditions under which the Dominion holds Indian Reserves in the Railway Belt and Peace River Block have been entrenched in the Constitution. The terms and conditions in P.C. 208 are the same as those found in Order in Council 1036. In the result, although it may be possible to challenge the constitutional validity of the reservations and conditions in Order in Council 1036 lands, those identical provisions may be immune from challenge with respect to Railway Belt and Peace River Block reserves.

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[24] Ibid., 395.

Native Rights and the Constitution Act, 1982

Section 35 of the Constitution Act, 1982[25] recognizes and affirms existing aboriginal rights. It may be open to argument, that the Indian interest in reserve lands is protected by Section 35. The Supreme Court of Canada held, in the Guerin case, that aboriginal title was a recognized legal right in Canada, and that the Indian interest in reserve land was the same as aboriginal title in traditional tribal lands.[26] The Court further described the Indian interest as a unique interest in land, which is at least a right of occupation and possession similar to beneficial ownership.[27] It has been suggested that because aboriginal title is a recognized "interest" in land, it benefits from the common law presumption in favouring the payment of compensation upon a compulsory taking.[28] The notion that aboriginal title is a compensable right is deeply rooted in the past practice of the Crown in extinguishing aboriginal title. Brian Slattery suggests that traditional Crown practice has required a surrender of aboriginal title prior to the purchase of that interest by the Crown. This practice may be described as part of the "common law

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25 Constitution Act, 1982, as enacted by Canada Act, 1982, (U.K.), 1982 c.11.

26 Guerin v. The Queen, [1984] 2 S.C.R. 335; 55 N.R. 161, at 171-172.

27 Guerin, 55 N.R. 161, at 174.

28 Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 Canadian Bar Review 727, at 751.

of aboriginal rights".[29] Because Parliament has legislative jurisdiction over Indians and lands reserved for the Indians, it has been competent to pass legislation which varies the common law of aboriginal rights. The provision in the Indian Act which permits the taking of reserve lands for public purposes without surrender is an example of specific legislation which overrides the common law. But the common law of aboriginal rights can only be amended by specific federal legislation. The Indian Affairs Settlement Act which is the purported enabling legislation for O/C 1036 is a provincial statute, and therefore could not authorize the compulsory taking of reserve lands without compensation. The reciprocal federal legislation is not specific enough to override the common law requiring compensation for aboriginal title. Nor does it provide for the amendment of the Indian Act provisions concerning compulsory acquisition of reserve lands. This latter point has been addressed above. Slattery argues that the effect of s. 35 of the Constitution Act, 1982 is to make even the federal expropriation power inapplicable to aboriginal lands.[30] Whether or not the provision goes that far, it might very well protect reserve lands from the exercise of the resumption power. At the very least, the power of resumption ought to be construed as requiring compensation to be paid for the aboriginal interest taken, because of the common law presumption in favour of compensation.

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[29] Ibid., 751-2.

[30] Ibid., 766.

The British Columbia Court of Appeal has recently interpreted section 35 of the Constitution Act, 1982 as being a limitation on the legislative powers of Parliament in so far as legislation may interfere with existing aboriginal rights.[31] In the Sparrow case it was held that federal fisheries regulations which allocate the right to take fish must be subject to the aboriginal right to fish for food. In allocating rights to take fish among various persons or groups, priority must be given to the Indian food fishery.[32] Although not specifically relevant to the issues addressed here, the case is significant because it found aboriginal rights to be paramount to federal legislation due to the affirmation of aboriginal rights in the constitution. That general principle might be used to protect the Indian interest in reserve lands from the executive action of the provincial government in case of an attempted resumption of reserve lands.

The Scott-Cathcart Agreement, and the ensuing transfer of reserve lands might be viewed as a binding agreement between the two levels of government with respect to the underlying interest of the Crown in reserve lands. However, since most of the Indian bands in British Columbia have never surrendered their aboriginal interest in their reserve lands, that interest should be protected by section 35 of the Constitution Act, 1982. If it was permissible for the federal government to agree to a resumption of

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[31] Sparrow v. The Queen, [1987] 2 W.W.R. 577 (B.C.C.A.)

[32] Ibid., 607-608.

the Crown's underlying interest in reserve lands, the power to resume lands may not be applicable to the Indian interest in those lands. That interest, which is the same as an aboriginal interest, may well be protected by the Constitution Act, 1982. That does not mean that it would be impossible for the province to obtain lands for public purposes from Indian reserves in B.C. The Indian Act has, for many years, provided a method for appropriating reserve lands for public purposes, without a surrender of the Indian interest.[33] Presumably this method would still be open to provincial authorities, since the "existing" aboriginal interest in reserve lands had been qualified by the expropriation provisions of the Indian Act prior to the enactment of the Constitution Act, 1982.

Conclusions

The agreement concerning the "form of tenure and mode of administration" for Indian reserves in B.C., and the eventual transfer of reserves by Order in Council 1036, may well suffer from constitutional infirmities. This does not mean that the transfer is void or voidable, but rather certain terms and conditions of the transfer may be ultra vires. In particular, the reservation by the province of a right to resume one-twentieth of

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[33] Indian Act, R.S.C. 1970, c.I-6, s.35. The subject was first dealt with in the 1886 Indian Act, R.S.C. 1886, c.43, s.35

each reserve apparently interferes with the distribution of legislative powers under the Constitution Act, 1867. The agreement reached by Messrs. Scott and Cathcart may have resolved an impasse in negotiations, but the compromise of 1929 has resulted in a continuing unsettled state of affairs. Indian bands in British Columbia resent the resumption power claimed by provincial authorities. They have good reason to object. Not only were they never treated with regarding their traditional territories, but the paltry reserves that were established for their benefit are in danger of being reduced by the unilateral action of the provincial government, without compensation.

As noted above, the agreement regarding tenure and administration may be viewed as an attempt to create a kind of joint administration of Indian reserves in B.C. Surely this attempt, which was born of compromise between the two governments, can not succeed in altering the division of powers in the Constitution Act, 1867.

The transfer of reserve lands pursuant to O/C 1036 can not be viewed as a normal conveyance. The terms and conditions found in the Order cannot be interpreted in the same way as identical terms in Crown grants. The transfer was required by the Terms of Union and ought to be considered as part of the distribution of property under the Consititution. The resumption power should not be viewed as a reservation from a grant, but rather a condition of a

transfer which was effected pursuant to legislation. Indeed, all of Order in Council 1036 can be scrutinized as a piece of delegated legislation.

Privy Council Order 208, which subjected the Railway Belt reserves to the same conditions as the other reserves, is certainly a piece of delegated legislation. The Railway Belt reserves were already owned unconditionally by the Dominion before the Scott-Cathcart agreement was reached. The provisos in the form of conveyance can not be viewed as reservations from a grant by the province. However, the Railway Belt reserves are affected by the Constitution Act, 1930, and the adoption therein of the Scott-Cathcart "form of tenure and mode of administration".

In many respects it was fortunate that Indian reserve lands were transferred by the province to the Dominion, in trust for the Indians. The transfer makes it clear that there is no underlying interest which is in conflict with the Indian interest. The transfer instrument allows a relatively certain analysis of the nature of title to Indian reserves, or the kinds of property rights that are associated with reserve lands. Although the problems created by the St. Catherines Milling case were not apparent at the time that the Terms of Union were struck, the required "conveyance" of reserve lands ensured that those problems would not plague the administration of Indian affairs in British Columbia. However, the "form of tenure" that was ultimately

chosen created some different problems for Indian bands in the province. They are faced with the prospect of losing a portion of their reserve lands without surrender and without compensation. This situation, which is unique in Canada, ought to be rectified.

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APPENDIX A

Reproduction of Order in Council

1036.

I hereby certify that the following is a true copy of a Minute of the Honourable the Executive Council of the Province of British Columbia, approved by His Honour the Lieutenant-Governor on the 29th day of July, A.D. 1938.

To His Honour

The Lieutenant-Governor in Council:

The undersigned has the honour to

RECOMMEND:--

THAT under authority of Section 93 of the "Land Act", being Chapter 144, "Revised Statutes of British Columbia, 1936", and Section 2 of Chapter 32, "British Columbia Statutes 1919", being the "Indian Affairs Settlement Act", the lands set out in schedule attached hereto be conveyed to His Majesty the King in the right of the Dominion of Canada in trust for the use and benefit of the Indians of the Province of British Columbia, subject however to the right of the Dominion Government to deal with the said lands in such manner as they may deem best suited for the purpose of the Indians including a right to sell the said lands and fund or use

(ORDER IN COUNCIL No. 1036...Continued)

the proceeds for the benefit of the Indians subject to the condition that in the event of any Indian tribe or band in British Columbia at some future time becoming extinct that any lands hereby conveyed for such tribe or band, and not sold or disposed of as heretofore provided, or any unexpended fund being the proceeds of any such sale, shall be conveyed or repaid to the grantor, and that such conveyance shall also be subject to the following provisions:-

> PROVIDED NEVERTHELESS that it shall at all times be lawful for Us, Our heirs and successors, or for any person or persons acting in that behalf by Our or their authority, to resume any part of the said lands which it may be deemed necessary to resume for making roads, canals, bridges, towing paths, or other works of public utility or convenience; so, nevertheless that the lands so to be resumed shall not exceed one-twentieth part of the whole of the lands aforesaid, and that no such resumption shall be made of any lands on which any buildings may have been erected, or which may be in use as gardens or otherwise for the more convenient occupation of any such buildings:
>
> PROVIDED also that it shall be lawful for any person duly authorized in that behalf by Us, Our heirs and successors, to take and occupy such water privileges, and to have and enjoy such rights of carrying water over, through or under any parts of the hereditaments hereby granted, as may be reasonable required for mining or agricultural purposes in the vicinity of the said hereditaments, paying therefor a reasonable compensation.
>
> PROVIDED also that the Department of Indian Affairs shall through its proper officers be advised of any work contemplated under the preceding provisoes that plans of the location of such work shall be furnished for the information of the Department of Indian Affairs, and that a reasonable time shall be

(ORDER IN COUNCIL No. 1036...Continued)

allowed for consideration of the said plans and for any necessary adjustments or arrangements in connection with the proposed work:

PROVIDED also that it shall be at all times lawful for any person duly authorized in that behalf by Us, Our heirs and successors, to take from or upon any part of the hereditaments hereby granted, any gravel, sand, stone, lime, timber or other material which may be required in the construction, maintenance, or repair of any roads, ferries, bridges, or other public works. But nevertheless paying therefor reasonable compensation for such material as may be taken for use outside the boundaries of the hereditaments hereby granted:

PROVIDED also that all travelled streets, roads, trails, and other highways existing over or through said lands at the date hereof shall be excepted from this grant.

AND TO FURTHER RECOMMEND THAT a certified copy of this minute, if approved, be transmitted to the Registrar in each Land Registry Office in the Province of British Columbia to the intent that such certified copy be accepted by him as a conveyance of the said land to His Majesty the King in the right of the Dominion of Canada as represented by the Department of Indian Affairs of Canada, without further formal instrument of transfer subject to the said provisoes and conditions.

AND TO FURTHER RECOMMEND THAT a certified copy of this minute, if approved, be forwarded to the Superintendent General of Indian Affairs at Ottawa.

DATED this 29th day of July A.D. 1938.

APPENDIX B

Reproduction of Privy Council Order 208 and the Scott-Cathcart Agreement, being Schedule Two of P.C. 208.

P.C. 208

Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 3rd FEBRUARY 1930

The Committee of the Privy Council have had before them a Report, dated 24th January, 1930, from the Superintendent General of Indian Affairs, submitting that, pursuant to certain Statutes of Canada and of the Province of British Columbia (Ca. 1920, Chapter 51, B.C. 1919, Ch. 32) Your Excellency in Council and His Honour the Lieutenant-Governor of British Columbia in Council were respectively authorized to take such action as might be necessary to carry out a certain agreement made on the 24th day of September, 1912, with respect to the administration of Indian lands in the said Province, a copy of which said agreement is attached as schedule One hereto.

The Minister states that in pursuance of the said agreement a Royal Commission was constituted to report on the matters aforesaid, and duly reported on the 30th of June, 1916, whereupon the Lieutenant-Governor in Council, on the 26th day of July, 1923, made an Order (No. 911) approving of the said report, and Your Excellency in Council, on the 19th day of July, 1924, (P.C. 1265) made an Order approving thereof except as to cut-offs in the Railway Belt.

The Minister further states that on the 22nd day of March, 1929, a further agreement with respect to Indian lands in the Province of British Columbia was entered into between representatives of the Governments of Canada and of the Province of British Columbia respectively, a copy of which said agreement with schedules containing a list of the reserves in the Railway

Belt and Peace River Block and a draft of the form of conveyance in the said agreement referred to are hereto attached as schedules Two, Three and Four.

The Minister accordingly recommends that the said last mentioned agreement and the schedules aforesaid be approved and the agreement directed to be carried out according to its terms upon the approval thereof by the Lieutenant-Governor of British Columbia in Council.

The Minister further recommends that the Superintendent General of Indian Affairs be authorized, pursuant to Section 48 of the Indian Act (R.S.C. 1927, Ch. 98), to agree to the taking for any such public work as is mentioned in the draft form of conveyance attached hereto as schedule Four an area in excess of the one-twentieth therein provided for on payment of the Province of British Columbia for the benefit of the Indians of such sum by way of compensation for the land so taken as the Superintendent General of Indian Affairs my determine.

The Committee concur in the foregoing recommendations and submit the same for Your Excellency's approval.

Schedule 2

MEMORANDUM OF AGREEMENT
ARRIVED AT BETWEEN DR. DUNCAN C. SCOTT
AND MR. W. E. DITCHBURN ON BEHALF OF THE
DOMINION GOVERNMENT, AND MR. HENRY CATH-
CART AND MR. O. C. BASS ON BEHALF OF THE
PROVINCIAL GOVERNMENT.

The undersigned having been designated by their respective Governments to consider the interest of the Indians of British Columbia, the Department of Indian Affairs and the Province of British Columbia, arising out of the proposed transfer to the Province of the lands in the Railway Belt and the Peace River Block; and to recommend conditions under which the transfer may be made with due regard to the interests affected beg to report as follows:-

As the tenure and mode of administration of the Indian Reserves in the Railway Belt and the Peace River Block would, we thought, be governed by the terms of the conveyance by the Province to the Dominion of the Indian Reserves outside those areas it was thought advisable to agree if possible upon a form of conveyance particularly as that question had been before the Governments for some time and remained undecided and furthermore to consider a few important matters germane to Indian affairs in the Province with the hope of making recommendations which would promote the ease and harmony of future administration.

1. We have agreed to recommend the form of conveyance from the Province to the Dominion of the Indian reserves outside the Railway Belt and the Peace River Block hereunto annexed marked "A".

2. We have agreed that, the provisions of section 47 of the "Land Registry Act" (R.S.B.C 1924, chapter 127) being no longer necessary in view of the settlement now arrived at, the said section should be repealed, and the representatives of the Province undertake to so advise and recommend, and, pending such repeal, will recommend that in proper cases arising, registration may be permitted by Order in Council as provided in said section 47.

3. We have considered clause 4 of the document known as the McKenna-McBride agreement, which reads as follows:-

> "4. The lands which the Commissioners shall determine are not necessary for the use of the Indians shall be subdivided and sold by the Province at public auction."

It is considered that this provision might beneficially be varied so that it be provided that on agreement between the Governments, through their respective Departments, the lands may be either subdivided for sale, or disposed of en bloc, as may appear most advantageous in the circumstances of each particular case, but that such sale and disposal shall be by public auction; and as to disposal of timber, mineral and similar rights, the same

should be dealt with by agreement between the respective Governments through their proper Departments, and we shall recommend accordingly to our respective Governments.

4. It was brought up by the Dominion representatives that a necessity existed for additional lands for Indians in various portions of the Province, not provided for by the Royal Commission on Indian Affairs, and it was suggested that such lands be granted by the Province at a reduced or nominal price, apart from the prices fixed by the Land Act, the Province to have its reversionary interest in such lands, or the proceeds of sale or disposal thereof, as in Indian Reserves proper, on the extinction of the Indian interest. In such event, the Province to reimburse the Dominion the purchase price paid by it for said lands.

It is, with great respect, considered good policy to have this question of Indian lands finally settled, and that some consideration be given by the Provincial Government to a reduction in price.

5. It was urged by the Dominion representatives that the Indian claims to the foreshore of their reserves be recognized by the Province, but the Provincial representatives pointed out that it has been and is the invariable policy of the Province to consider the rights of the upland owners, and that this policy fully protected the rights of the Indians in the same way as other upland owners or occupiers of land.

In this connection the following letter from the late Premier Oliver, dated the 23rd. of April, 1924, was before the representatives:-

"Ottawa, April 23, 1924.

The Honourable,
The Superintendent General of Indian Affairs,
Ottawa.

Dear Sir:-

Re: Indian Reserves in British Columbia.

Referring to our conversation of yesterday and having reference to the fears expressed by the Indians that where their reserves fronted on the water, access to their lands might be interfered with by construction of wharfs, docks, booms or other obstructions erected or placed along any foreshore being in the Province, as I expressed myself yesterday, I would favour a policy treating the Indians on exactly the same footing as I would treat the whites, and would if necessary advise the Government of the Province to give the Indian Department a written assurance to that effect. I am, however, of the opinion that no such assurance is necessary, as I think the principle of Riparian Rights would apply to any Indian reserves having water frontage to the same extent as Riparian Rights would apply to the same lands were such lands subject to the private ownership of any person other than an Indian. In other words, Riparian Rights would accrue to the Indians (through the Indian Department) to the same extent as they would apply to a white owner. I should be pleased if you would obtain the advice of your legal Department on this phase of the situation.

I am,
Yours faithfully,
John Oliver".

It was considered by the representatives of the Province that this letter expressed the policy which in the past has been followed, and will be followed by the Province in the future.

6. Regarding Indian Reserves in the Railway Belt and Peace River Block, we have agreed that the Indian Reserves set apart by the Dominion Government in the Railway Belt and in the Peace River Block (as shown in Schedule hereto annexed), and also the Indian Reserves set apart before the transfer of the Railway Belt and the Peace River Block by the Province to the Dominion shall be excepted from the reconveyance of the Railway Belt and the Peace River Block, and shall be held in trust and administered by the Dominion under the terms and conditions set forth in the Agreement dated 24th, September, 1912, between Mr. J.A. McKenna and the Hon. Sir Richard McBride, (as confirmed by Dominion Statute, Chapter 32 of the Statutes of 1919) in the Dominion Order in Council Number 1265, approved 19th. July, 1924, and Provincial Order in Council Number 911, approved 26th. of July, 1923, and in the form of conveyance marked "A" of the Indian Reserves outside the Railway Belt and the Peace River Block.

Respectfully submitted.

DATED at Victoria, British Columbia, this 22nd. day of March, 1929.