# GOVERNING LANDS AND WATERS: LIMITS TO RESERVE TITLE AND *INDIAN ACT* POWERS IN BRITISH COLUMBIA, AND PROPOSALS FOR REFORM*

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*Definitions of reserve land arrived at by the case law are often complicated, in part because of the particular facts and the various legal instruments which created reserves.*

*Recent case law has defined reserve lands in British Columbia narrowly, while giving a broad scope to property rights created out of reserve lands for other governments, utilities, and railways. The effect is to place serious limits on the jurisdiction of Indian Act band councils and their ability to exercise meaningful powers of self-government.*

*The narrow construction of "reserve lands" under the Indian Act should serve as a warning that Aboriginal self-government can be stymied where judicial interpretation remains tied to notions of Aboriginal lands as mere property to be measured and bounded, rather than a key element in determining the scope of Aboriginal sovereignty.*

*The Supreme Court of Canada has also held that adjoining rivers do not form part of most British Columbia reserves and band council by-laws do not apply in those waters. Yet the Supreme Court has also held that members of a band can have a constitutionally protected Aboriginal right to fish in rivers adjoining their reserves. Since Aboriginal rights are by definition collective, a good argument can be made that as a First Nation, the band's members therefore have a collective right of self-government in order to determine the time and manner in which they carry out an activity related to lands or waters that is an integral part of their distinctive culture.*

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*In the current state of the law, First Nations may find that they can gain the greatest latitude for self-government by asserting their Aboriginal rights as protected by the Constitution Act, 1982, section 35(1). The limits of Indian Act statutory powers may already have been reached.*

*Unfortunately, when Aboriginal rights were the subject of negotiations to produce British Columbia's first modern treaty, the Nisga'a Final Agreement Act, the result was at best a partial shift from the limitations of Indian Act jurisdiction. Nevertheless, an important innovation in the Nisga'a Final Agreement Act is that it provides for the creation of a category of core Nisga'a Lands that remain under Nisga'a jurisdiction even if the title to them is sold.*

*It is time similarly to address the loss of jurisdiction over lands that has accompanied the confused history of the creation of British Columbia Indian reserves, as well as their lease, surrender, or expropriation. Amendments to the Indian Act and, if necessary, expropriation by the federal government are needed to keep British Columbia's Indian reserves from becoming jurisdictional checkerboards.*

> The boundaries of Indian land and the scope of Indian sovereignty often are disputed by those seeking for themselves the benefits of resources within Indian dominion.
>
> Justice Thurgood Marshall[1]

## I. INTRODUCTION: TITLE TO RESERVES AND ABORIGINAL TITLE

The Supreme Court of Canada has repeatedly referred to the Aboriginal interest in reserve lands as *sui generis*.[2] This characterization is based in large part on the analysis of Aboriginal title found in *St. Catherine's Milling and Lumber Co.* v. *R.*,[3] but as Richard Bartlett has pointed out, the

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1 Library of Congress, Thurgood Marshall Papers, Memorandum of Justice Marshall, 25 June 1981, as cited in N.B. Duthu, "The Thurgood Marshall Papers and the Quest for a Principled Theory of Tribal Sovereignty: Fueling the Fires of Tribal/State Conflict" (1996) 21 Vermont L.R. 47 at 82. This document is a memorandum of a draft opinion which preceded the final judgment in *Merrion* v. *Jicarrilla Apache Tribe*, 455 U.S. 130 (1982) [hereinafter *Merrion*].

2 *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335 at 352; *Apsassin* v. *Canada*, [1995] 4 S.C.R. 344 at para. 6 [hereinafter *Apsassin*].

3 *St. Catherine's Milling and Lumber Co.* v. *R.* (1888), 14 A.C. 46, 2 C.N.L.C. 541(P.C.).

property interest at issue in that case was the Aboriginal title to lands surrendered to the Crown by treaty, not the reserves created later.[4]

Chief Justice Lamer held in *Delgamuukw* v. *British Columbia* that Aboriginal title to traditional lands, as protected by the *Constitution Act, 1982*, section 35(1), includes the right to use those lands for non-traditional purposes. He came to the conclusion in part by analogy with an Indian band's mineral rights in reserve lands pursuant to the *Indian Oil and Gas Act*.[5] In that instance, the analogy bestowed some of the precision of reserve land's legal definition on the emerging concept of Aboriginal title.[6]

However, that precision can also pose problems. The definition afforded to reserve land pursuant to the *Indian Act* is not always large, liberal, or generous. A number of recent judicial decisions, reviewed in this paper, have interpreted instruments that created and diminished British Columbia reserves as well as the statutory framework of the *Indian Act*, only to produce unfortunate results. Frequently the cases have arisen where Indian band councils have sought to exercise one of the most basic powers of modern government: taxation. In the words of Justice Thurgood Marshall: "The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."[7]

The tax cases turn on whether the land assessed for property taxes is "in the reserve."[8] Unfortunately, several decisions have defined reserve lands in British Columbia narrowly, while giving a broad scope to property rights created out of reserve lands for other governments, utilities, and railways. The effect is to place serious limits on the jurisdiction of *Indian Act* band councils and their ability to exercise meaningful powers of self-government.

For the Gitksan and We'suwet'en hereditary chiefs who brought the action in *Delgamuukw*, their unextinguished Aboriginal title also forms the basis for their claim to an inherent right to self-government with respect to all their lands. Except for the Nisga'a, comprehensive claims to

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4 R. H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland; A Study in Law and History* (Saskatoon: University of Saskatchewan Native Law Centre, 1990) at 65-71.

5 *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 at para. 118 [hereinafter *Delgamuukw*].

6 On this point see: B. Slattery, "The Definition and Proof of Aboriginal Title," paper prepared for the Pacific Business & Law Institute conference, "The Supreme Court of Canada Decision in *Delgamuukw*," Vancouver, 12 February 1998 at 3.7.

7 *Merrion, supra* note 1 at 137.

8 *Indian Act*, R.S.C. 1985, c. I-5, s. 83(1).

Aboriginal title are outstanding in most of British Columbia west of the Rocky Mountains and these rights of governance are still at issue in the negotiations currently underway as part of the treaty process.

In anticipation of land claims settlements, reserve lands remain the lands over which First Nations can most readily establish their powers at law. For instance, recent initiatives widely publicized by the Government of Canada as extending Aboriginal powers of self-government are restricted to reserve lands.[9]

Definitions of reserve land arrived at by the case law are often complicated, in part because of the particular facts and the various legal instruments which created reserves. The situation is particularly complex in British Columbia, where the Province refused to recognize Aboriginal rights or title from the time it joined Confederation in 1871 until the *Delgamuukw* judgment was rendered in 1998. Reserves have been created under Imperial treaty on Vancouver Island, under Treaty 8 with the federal government east of the Rocky Mountains (in the Peace River country), and in most of the Province by executive acts unrelated to treaties, both before and after Confederation. Since Confederation, the creation of Indian reserves has been the subject of fierce controversy between the federal and provincial governments.[10]

The narrow construction of "reserve lands" under the *Indian Act* should serve as a warning that Aboriginal self-government can be stymied where judicial interpretation remains tied to notions of Aboriginal lands as mere property to be measured and bounded, rather than a key element in determining the scope of Aboriginal sovereignty.

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[9] See in particular "Framework Agreement on First Nation Land Management" between Westbank, Musqueam, Lheit-Lit'en, N'Quatqua Squamish, Siksika, Muskoday, Cowessess, Opaskwayak Cree, Nipissing, Mississauguas of Scugog Island, Chippewas of Mnjikaning, Chippewas of Georgina Island and the Government of Canada, signed on 12 February 1996; ratified and brought into effect by the *First Nation Land Management Act*, S.C. 1999, c. 24.

[10] Bartlett, *supra* note 4 at 16-17, 35-39, 94-99. The cases reviewed in this paper do not concern reserves created either pursuant to the Douglas Treaties on Vancouver Island or under Treaty 8, such as the reserve at issue in *Apsassin, supra* note 2. We believe a good case can be made that such reserves have acquired a distinct legal status based on the protection of treaty rights in s. 35(1) of the *Constitution Act, 1982*: see on this point *Chippewa of Sarnia* v. *Canada* (1999), 101 O.T.C. 1 at para. 802, aff'd on this point (2000), [2001] 2 C.N.L.R. 56 (Ont. C.A.) at para. 238.

## II. RESERVES THAT DO NOT INCLUDE THE RAILWAYS THAT CROSS THEM: *CANADIAN PACIFIC LTD.* v. *MATSQUI INDIAN BAND*

The Matsqui Indian Band in British Columbia learned a hard lesson in the difference between the theory and practice of "self-government" where control of its reserve lands is concerned. In particular, the courts have held that some railways crossing the reserve are not "in the reserve" and not subject to taxation by the Band.

Before the Supreme Court of Canada, the case of *Matsqui Indian Band* v. *Canadian Pacific Ltd.*[11] dealt with a challenge to the way property tax assessments were made pursuant to section 83(1)(a) of the *Indian Act*. The decision addressed the standard for judicial review, not the assessments made by the Band with respect to a strip of land running through the reserves over which Canadian Pacific had laid railway tracks.

Nevertheless, both Chief Justice Lamer and Justice Sopinka held that when reviewing the respondent Bands' exercise of their power to issue tax assessments, the court must respect the goal of Aboriginal self-government. Chief Justice Lamer wrote:

> It is important that we not lose sight of Parliament's objective in creating the new Indian taxation powers. The regime which came into force in 1988 is intended to facilitate the development of Aboriginal self-government by allowing bands to exercise the inherently governmental power of taxation on their reserves. Though this Court is not faced with the issue of Aboriginal self-government directly, the underlying purpose and functions of the Indian tax assessment scheme provide considerable guidance in applying the principles of administrative law to the statutory provisions at issue here. I will therefore employ a purposive and functional approach where appropriate in this ruling.[12]

Similarly, Justice Sopinka held, "In this appeal, a very significant factor is that the Band taxation scheme, under the *Indian Act*, R.S.C. 1985, c. I-5, as amended, is part of a nascent attempt to foster Aboriginal self-government."[13] The jurisdictional question of whether the land on which Canadian Pacific had laid its track was "in the reserve" within the meaning of section 83(1) of the *Indian Act* ultimately returned to the Federal Court, Trial Division for a decision on the merits.[14]

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[11] [1995] 1 S.C.R. 3, 177 [hereinafter *Matsqui*].

[12] *Ibid.* at para. 18 [emphasis added].

[13] *Ibid.* at para. 114.

[14] *Canadian Pacific Ltd.* v. *Matsqui Indian Band* (1996), [1997] 2 C.N.L.R. 16 (F.C.T.D.), [hereinafter *Canadian Pacific (T.D.)*]. This decision was affirmed with respect to the

Unfortunately for five British Columbia Bands, including the Matsqui Indian Band, all of which have Canadian National Railway track running through their reserves, the position of the Federal Court was that there is no property for them to tax. The track was held not to be "in the reserve." (A different result was arrived at for Canadian Pacific track, as discussed below.) Neither the legality of the surrenders nor the fulfilment by the Crown of its fiduciary obligations was decided by the case, though some surrenders were alleged to have been irregular under the terms of the *Indian Act* and compensation was as low as one dollar for 160 acres.[15]

At trial, Justice Teitelbaum held that with each right-of-way, both railways received a grant of land under a determinable fee, that is, "a fee-simple which will automatically determine on the occurrence of some specified event which may never occur."[16]

> Phrases such as 'for the purposes of a railway' used by the Letters Patent and contained in the [railway] legislation are more in the line of the magic words that create a determinable fee than they are in line with creating a conditional interest.[17]

The terminating event would arrive if the lands ceased to be used for railway purposes, but in the mean time, "title vests with the applicants and the Lands do not fall within the Indian Bands' taxing authority."[18]

The appeals from the trial judgment were heard by two different panels of the Federal Court of Appeal: one concerned the interests of the Canadian National Railway, while the other concerned those of Canadian Pacific Limited. Writing for the majority on the issue of title in Canadian Pacific's appeal,[19] Justice Robertson held that "the conveyancing

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interests of the Canadian National Railway in (1998), [1999] 1 C.N.L.R. 42 (F.C.A.) [hereinafter cited as *Canadian National*]. Application for leave to appeal to the Supreme Court of Canada was dismissed in *Bulletin of Proceedings*, 26 March 1999. The decision as it concerned Canadian Pacific Ltd. alone was subsequently confirmed in *Canadian Pacific Ltd.* v. *Matsqui Indian Band* (1999), [2000] 1 C.N.L.R. 21 (F.C.A.), [hereinafter *Canadian Pacific (F.C.A.)*. Deadline for application for leave to appeal to the Supreme Court of Canada extended to February 28, 2001: *Bulletin of Proceedings*, 6 October 2000, Docket No. 27483.

15 *Canadian Pacific (T.D.)*, *ibid.* at paras. 76, 96, 12; *Canadian National*, *ibid.* at para. 14.

16 Megarry & Thompson, *Megarry's Manual of the Law of Real Property* (London: Sweet & Maxwell, 1993) at 35, as cited in *Canadian Pacific (T.D.)*, *ibid.*, at para. 88.

17 *Canadian Pacific, ibid.* at para. 94.

18 *Ibid.* at para. 87.

19 The decision with respect to the assessments against Canadian Pacific has no clear majority: Desjardins J.A. agreed with Robertson J.A. that the lands were in the reserve, but held the tax illegal for being discriminatory; Marceau J.A. agreed with Robertson J.A. that the tax was permissibly discriminatory but held the land was not in the reserve.

documents received by Canadian Pacific and presented to this Court purport to convey fee-simple title to each right-of-way, not a determinable fee." However no such title could pass, he held, because at all relevant times the *Railway Act* provided that after lands were acquired from the Crown for railway purposes, they could not be alienated, which was "antithetical to the notion of title in fee-simple." Therefore, "at best" the railway "obtained statutory easements to the rights-of-ways or licences to use or occupy reserve lands required for railway purposes."[20]

In both decisions, the Federal Court of Appeal rejected Justice Teitelbaum's approach and his definition of the property interest as a determinable fee. The panel hearing the appeal concerning the Canadian National Railway explicitly followed the instruction of the Supreme Court of Canada in *St. Mary's Indian Band* "not to resort to traditional real property concepts in adjudicating such a dispute" but instead to rely upon "the true intentions of the parties and the context of the transaction."[21] Unfortunately, Justice Teitelbaum had held on the facts that the band council resolutions showed a clear intention to surrender the land.[22]

Writing in the appeal of the Canadian National Railway's case, Justice Décary agreed with the trial judge that the Matsqui Band's intention was "clearly to surrender lands to the Crown for purposes of sale to CN" and "to part with the railway lands on an absolute basis." He reached this conclusion based on the language of the surrender and the Letters Patent, the price paid, and "the permanent nature of the railway for the construction of which the surrender was made."[23] Moreover, Justice Décary held that when the Band negotiated for surrender provisions such as "crossings with the necessary gates where most convenient for us," it understood the railway was acquiring "the exclusive use of the lands."[24]

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As a result, Marceau and Desjardins JJ.A. agreed only to the extent of dismissing the appeal, while each supported Robertson J.A. on different issues.

20 *Canadian Pacific (F.C.A.)*, *supra* note 14 at paras. 47, 89. This issue was not addressed in the reasons rendered by Décary J.A. for the panel of the Federal Court of Appeal that ruled on the assessments against Canadian National.

21 *St. Mary's Indian Band* v. *Cranbrook (City)*, [1997] 2 S.C.R. 657 [hereinafter *St. Mary's (S.C.C.)*] at para. 30. In particular, Lamer C.J.C. rejected (at para. 16) the idea of relying on complex property law notions such as "traditional distinctions between a determinable fee and a fee subject to a condition subsequent".

22 *Canadian Pacific (T.D.)*, *supra* note 14 at para. 96.

23 *Canadian National*, *supra* note 14 at para. 45. Nevertheless, three of the five parcels from the Matsqui Reserve at issue were not surrendered but acquired by Canadian National following compulsory takings (at para. 7).

24 *Ibid.* at paras. 47, 51.

He reached a similar conclusion with respect to lines crossing the Kamloops reserve.[25]

The result for these British Columbia Indian bands is that one of Canada's largest corporations owns valuable infrastructure that crosses and divides their reserves but is not "in" their reserves so as to allow the corporation actually to be taxed on the value of its property interest.

A similar case heard in the British Columbia Court of Appeal concerned the question of whether lands taken from the Osoyoos Band's reserve without its consent and used by the municipality as an irrigation canal remained "in the reserve" and taxable. In a dissenting judgment, Justice Lambert noted that the canal both cut the reserve into two parts and itself crossed a right-of-way (belonging to the West Kootenay Power Company) in three places.

> The result is to produce six separate parcels of land bounded in whole or in part by the irrigation canal right-of-way or the power line right-of-way. I understand that a similar argument to the argument in this case is being made in a different case in relation to the West Kootenay Power Company right-of-way. But *whether the Indian reserve is to be regarded as divided into two separate parts or six separate parts by the rights-of-way, the fact remains that if the effect of the taking of a right-of-way is to take the land over which the right-of-way passes out of the reserve, then the Indians on the reserve would have no right of access from one part of their reserve to another part of their reserve* without going off the reserve and travelling round the end of the works and then on to the other part of their land from outside of the reserve; and for the two parts of this reserve that are entirely bounded by the irrigation canal and the power line right-of-way, the Indians would have no access to those parts of their reserve at all. If the Indians have no right to cross the canal, or to build a bridge over the canal, or a passage for cattle over the canal, then they cannot change the grazing of cattle from one part of their reserve to another.[26]

The result is the same where Canadian National's track is held to be outside a reserve: the reserve is cut into pieces by a strip of land over which band members have no rights.

Justice Décary's judgment in the Canadian National Railway's appeal appears to express regret at this result:

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[25] *Ibid.* at paras. 56-57. However, while Décary J.A. was "impressed by the lengthy negotiations that preceded every taking" (at para. 57), the fact remains that none of the land from the Kamloops Reserve at issue was surrendered—it was all the subject of compulsory takings by the Crown (at para. 8).

[26] *Osoyoos Indian Band* v. *Town of Oliver*, [1999] 4 C.N.L.R. 91 (B.C.C.A.) [hereinafter *Osoyoos (C.A.)*] at para. 68C [emphasis added]; leave to appeal to the Supreme Court of Canada granted, appeal inscribed for hearing in the session commencing April 17, 2001: *Bulletin of Proceedings*, 20 April 2000 and 2 March 2001, Docket No. 27408.

> These cases have been argued by all parties on the basis that the words "in the reserve," in paragraph 83(1)(a) of the *Indian Act*, mean that only land that satisfies the requirements of the narrow definition of "reserve" in the *Indian Act* could be taxed by a band. It was not suggested that the words "in the reserve" ("les immeubles situés dans la réserve") might, for the limited purposes of paragraph 83(1)(a), be understood in a geographical rather than legal sense and include all lands that happen to be situated within the geographical boundaries of the reserve, whether or not they are legally "reserve lands". *It could make sense, for taxation purposes, to look at the "reserve" as a physical, global entity—indeed, it is a "tract of land"—rather than as a legal puzzle missing a few pieces.*[27]

But if Justice Décary correctly views the definition of a reserve for taxing purposes as a legal puzzle, then the missing piece is the political definition of its boundaries. The real problem is that an Indian reserve is not defined as a jurisdiction but as a land-holding: when the courts accord taxation power over lands within an Indian reserve's nominal boundaries based on whether the lands are beneficially owned by the band or have been surrendered absolutely to others, they treat the band as a property-owner rather than as a government.

Even where reserve title is not at issue, the band's power to tax property interests is not exclusive. The British Columbia Court of Appeal has held in a line of cases that the Province and the municipalities it creates may tax all property interests on reserves other than those owned by Indians and band councils (since they are protected by the tax exemption in section 87 of the *Indian Act*).[28] Municipalities have taken the position that this principle allows double taxation on their part with the band.[29] Some relief is granted by a recent British Columbia statute which allows Indian bands to eliminate concurrent municipal property

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[27] *Ibid.* at para. 10 [emphasis added].

[28] *Tsawwassen Indian Band* v. *Delta (City)* (1997), [1998] 1 C.N.L.R. 290 (B.C.C.A.) [hereinafter *Tsawwassen*] at para. 85; leave to appeal to the Supreme Court of Canada refused, *Bulletin of Proceedings*, 27 February 1998, Docket No. 26273. See also: *Assessor of Area #05 - Port Alberni* v. *Tin Wis Resort Ltd.* (1997), 45 B.C.L.R. (3d) 241 (S.C.) at para. 35; application for leave to appeal and application to revise judgment dismissed by the B.C. Court of Appeal, (1998) 108 B.C.A.C. 174 and 116 B.C.A.C. 150; application for leave to appeal dismissed by the Supreme Court of Canada, *Bulletin of Proceedings*, 14 May 1999, Docket No. 27015. The same principle has been applied in other provinces: *Grammont Motel Ltée* c. *Corporation de la municipalité du Canton de Mann*, [1977] C.A. 399 (Que.); *Re Provincial Municipal Assessor and Rural Municipality of Harrison* (1971), 20 D.L.R. (3d) 208, 7 C.N.L.C. 291 (Man. Q.B.). This line of cases is consistent with *Smith* v. *Vermillion Hills Rural Council*, [1916] 2 A.C. 569 (P.C.).

[29] T.M. Dust, "The Impact of Aboriginal Land Claims and Self-government in Canadian Municipalities" (1997), 40 Cdn. Public Admin. 481 at 494, n. 3.

taxation and occupy the field alone, but this depends on the band's obtaining provincial consent.[30]

When courts hold that property interests such as those of the railway lines crossing the reserves at issue in *Canadian Pacific* v. *Matsqui* are not even "in the reserve," as the Federal Court did at trial and on appeal, they have deprived bands of the "inherently governmental power of taxation"[31] over major facilities intersecting their reserves. Their taxing authority is limited by notions of property rather than jurisdiction. Combined with the case law holding that municipalities are empowered to tax non-Indian property interests on reserve, the Federal Court of Appeal's decision in *Canadian Pacific* v. *Matsqui* leaves bands with precious little on which to exercise exclusive powers of taxation.

## III. RESERVE LANDS THAT BECOME MUNICIPAL PROPERTY: ST. MARY'S INDIAN *BAND* v. *CRANBROOK AND OSOYOOS INDIAN BAND v. TOWN OF OLIVER*

Bands learned in *St. Mary's Indian Band* v. *Cranbrook (City)*[32] that they can lose jurisdiction over surrendered reserve lands, even when the band took care to provide in the surrender for a reversionary interest. Unlike a lease, a band's decision to surrender land for sale conditionally gives it no more jurisdiction than if the land had been expropriated, until and unless the condition comes to pass.

In 1966, at the request by the City of Cranbrook, the St. Mary's Indian Band surrendered 598 acres for an airport site to the Crown in return for $35,880 and on the condition that it would revert to the Band for consideration of one dollar "upon such land being no longer required as an airport site." In addition, their terms of surrender provided that "should [at] any time the said lands cease to be used for public purposes they will revert to the St. Mary's Indian Band free of charge."[33]

The Band argued that the airport occupied "designated lands" on the reserve within the meaning of sections 2(1) and 38(2) of the *Indian Act* because the site had been surrendered "otherwise than absolutely," as required by those provisions. Accordingly the Band assessed the city, which leased the land from the Crown, for property taxes on its leasehold interest.

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30 *Indian Self-Government Enabling Act*, R.S.B.C. 1996, c. 219.

31 *Matsqui*, *supra* note 11 at para. 18, Lamer C.J.C.

32 *St. Mary's (S.C.C.)*, *supra* note 21, aff'g *St. Mary's Indian Band* v. *Cranbrook (City)* (1995), 10 B.C.L.R. (3d) 249 (C.A.) [hereinafter *St. Mary's (C.A.)*].

33 *St. Mary's (C.A.)*, *ibid,* at para. 227; only the second condition is noted in the description of the facts in *St. Mary's (S.C.C.)*, *supra* note 21 at para. 3.

However, the Supreme Court of Canada disallowed the assessment. Writing for the Court, Chief Justice Lamer held "that the appellants [the Band] intended to part with the airport lands on an absolute basis." He noted the Band had considered a long-term lease, "but ultimately preferred the option whereby the Crown would sell the surrendered land to a third party," and the Band had received full market value in compensation.[34]

The Supreme Court held that 1988 amendments to the *Indian Act* creating the category of "designated lands" within reserves had the following purpose:

> Parliament wanted to draw land surrendered for lease (or other means short of lease) within the legal definition of 'reserve.' At the same time, Parliament sought to confirm that land surrendered for sale (or other means similar to sale) remain beyond the definition of reserve.[35]

Since the airport was on "lands surrendered for sale, be it conditionally," it was no longer on reserve land. As one commentary has noted, the *ratio decidendi* of the decision appears to be "that a right of reversion does not take away from the absolute character of a surrender [of reserve land] for sale." Moreover, "[t]he amended provisions of the *Indian Act* apply only to surrenders for lease."[36]

One problem with the Supreme Court of Canada's decision is that, while it settles the question of the City of Cranbrook's liability to the St. Mary's Band for property taxes, it leaves unsettled the nature of the Band's continuing interest in the land held by the Crown and leased by the city for the airport.

The trial judge had concluded there was "a continuing underlying Indian interest in the land" based on the Crown's fiduciary duty to the Band.[37] The British Columbia Court of Appeal, on the other hand, applied common-law property principles to hold that the airport was no longer part of the reserve, but held by the Crown under a "fee-simple defeasible by condition subsequent."[38] The Band therefore had only a right of entry, not a property interest.

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[34] *St. Mary's (S.C.C.), supra* note 21 at para. 18.

[35] *Ibid.* at para. 28.

[36] E. Meehan & E. Stewart, "Developments in Aboriginal Law: The 1996-97 Term" (1998), 9 Supreme Court L.R. (2d) 1 at 7.

[37] *St. Mary's Indian Band* v. *Cranbrook (City)* (1994), 114 D.L.R. (4th) 752 at 759 (B.C.S.C.) [hereinafter *St. Mary's (B.C.S.C.)*].

[38] *St. Mary's (C.A.), supra* note 32 at para. 23.

The Supreme Court of Canada's judgment reiterated the rule in *Apsassin* that transactions involving Indian reserve lands should be interpreted according to the true intentions of the parties, and that common-law property rules should not be strictly applied.[39] In fact, Chief Justice Lamer stated that while he agreed with the result reached by the British Columbia Court of Appeal, he disagreed "with the manner in which Hutcheon J.A. arrived at it."[40]

The Supreme Court of Canada's emphasis on the intention of the parties makes clear that the airport land retains the potential to become a part of the reserve again, should the reversionary conditions set out in the surrender be fulfilled. More recently the British Columbia Supreme Court has confirmed that Canada's absolute title includes the right to transfer the title in fee-simple to the City of Cranbrook,

> albeit one that requires a notation as reflected in the documents tendered for registration which acknowledge the Band's potential future interest should the Land no longer be used for airport purposes.[41]

The proper characterization for the St. Mary's Band's subsisting interest in the airport lands is suggested by the unanimous decision of the Federal Court of Appeal in *Semiahmoo Indian Band* v. *Canada*.[42] The Semiahmoo Band had surrendered land under threat of expropriation for use as a border-crossing, but the lands were not actually needed by the Crown. The Federal Court of Appeal held that where reserve lands were surrendered for a particular purpose for which they proved unnecessary, the Crown holds the land on a constructive trust for the Band and an order will issue that the land be restored to the reserve.[43]

If the lands conditionally surrendered by the St. Mary's Band and used for the airport at Cranbrook should ever "cease to be used for public purposes," the provision in the surrender for their reversion to the Band would (applying the principles set out in *Semiahmoo Indian Band* v. *Canada*) transform the Crown's current interest into a constructive trust for the benefit of the Band, until such time as the lands could be restored to the reserve. Yet it is not clear whether the Band holds a current interest in the lands which is any better than the right of entry recognized by the

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39 *Apsassin*, *supra* note 2 at 31.

40 *St. Mary's (S.C.C.)*, *supra* note 21 at para. 16.

41 *Cranbrook (City)* v. *British Columbia (Registrar of Titles)*, [1999] B.C.J. No. 230 at para. 15 (S.C.), online: QL (BCJ).

42 (1997), [1998] 1 C.N.L.R. 250 (F.C.A.) [hereinafter *Semiahmoo*].

43 *Ibid.* at 281-83, 289, corresponding to paras. 94-99, 119.

Court of Appeal. The result of the Supreme Court of Canada's decision is therefore that the Crown was held to have "absolute" title to land over which the Band apparently had no control but which might nevertheless be restored to the beneficial ownership of the Band and form part of its reserve again one day.

Another effect of the Supreme Court of Canada's decision is that the conscious decision of a band to maintain a right of reversion over surrendered land nevertheless leaves it with no jurisdiction, merely a contingent future interest. The St. Mary's Band's voluntary surrender to which it intentionally attached conditions has left it with no more control over the land in the present than if it had been expropriated.

The effect of such an expropriation was at issue in the more recent case of *Osoyoos Indian Band* v. *Town of Oliver*, which held the Band has no power to tax the town's irrigation canal, built on reserve land. In 1957, the federal government had exercised a compulsory taking on the Province's behalf so the reserve lands at issue could be occupied by the town's canal. The statutory power is found in section 35 of the *Indian Act*, which allows the Governor in Council to grant consent to a compulsory taking that operates in the place of provincial or municipal expropriation powers on reserve. The Osoyoos Band consented to the valuation which determined the amount of the payment, but it had no choice over giving up the land.[44]

The British Columbia Supreme Court held that the resulting transfer of administration and control over the land from Canada to the Province was absolute; since the land taken "is no longer reserve land it is not assessable or taxable under section 83(1)(a)" of the *Indian Act*.[45] The British Columbia Court of Appeal upheld this judgment, relying as the trial judge did on the 1957 federal Order-in-Council which consented "to the taking of the said lands by the Province of British Columbia and to [the] transfer [of] the administration and control thereof to Her Majesty the Queen in right of the Province of British Columbia"[46] In fact, neither court could rely on much else in the way of evidence because the matter was a stated case concerning the interpretation of band assessment by-laws, referred by the Osoyoos Indian Band Board of Review.[47]

Justice Lambert in dissent took a narrow view of the Order-in-Council. In particular, he held that the canons of interpretation with

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[44] *Osoyoos Indian Band* v. *Oliver (Town* (1997), [1998] 2 C.N.L.R. 66 (B.C.S.C.) [hereinafter *Osoyoos (B.C.S.C.)*] at paras. 2-3; aff'd *Osoyoos (C.A.), supra* note 26.

[45] *Osoyoos (B.C.S.C.), ibid.* at paras. 5, 6.

[46] *Osoyoos (C.A.), supra* note 26 at para. 72.

[47] *Ibid.* at paras. 2, 95.

respect to legislation respecting Indians "would regard the Order-in-Council as taking an interest in the nature of a statutory easement containing sufficient power to build, maintain and operate the irrigation canal" and nothing more. To the extent the instrument was, "at the very least, ambiguous in relation to whether it constitutes a taking of an interest like absolute title," it should be interpreted as "leaving the Indians' fundamental interest in the strip of land unimpaired, and continuing that strip of land as a part of the reserve."[48]

For the majority, Justice Newbury held that the Order-in-Council granted "rights that are consistent with exclusive use by the Province" and did not "simply grant some rights or benefits that 'to some extent detract' from continuing rights of the Band."[49]

> The Order referred to the "taking of the said lands," not simply the right to use or pass over the said lands; there was no indication the Province was acquiring anything other than exclusive rights (whether in fee-simple or until the lands cease to be used for irrigation purposes need not be decided); and the Order transferred "administration and control" of the lands to the Province—a wording that is surely not consistent with the lands continuing to be held "for the benefit of" the Band.
>
> In summary, I agree with the Chambers judge that the Order-in-Council of 1957 did not contemplate the expropriation of a mere right-of-way, but of "the lands" themselves, which were thereby removed from the reserve. I say this on a non-technical view of the wording used, although the same conclusion is supported by the ordinary common-law rules, reviewed above, applicable to rights of way and easements. In this case, there is no dichotomy, and the Order-in-Council is not ambiguous or ultimately unclear.[50]

The emphasis on original intent first signaled by the Supreme Court of Canada in *St. Mary's* has now taken a sharp turn: since the Osoyoos Band had not even consented to the loss of the lands, the British Columbia Court of Appeal searched for an intent on the part of the federal Crown to preserve some Indian interest upon a compulsory taking of reserve lands, and found none. On that basis, the court concluded the land had passed out of the reserve and out of the Band's control.

Yet the Federal Court of Appeal refused to ascribe such drastic consequences to the federal Crown's intentions when it effectively expropriated reserve lands for railways. The Canadian Pacific Railway argued that it had acquired absolute title to lines crossing the Matsqui reserve (among others) because Canada had the obligation—under a

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48 *Ibid.* at paras. 74, 75, 76.

49 *Ibid.* at para. 104.

50 *Ibid.* at paras. 105, 107.

contract incorporated into the *Canadian Pacific Railway Act* by reference—to "extinguish the Indian title affecting the lands herein appropriated, and to be hereafter granted in aid of the railway." Justice Robertson, in the majority on this point, held,

> [T]he obligation of the Dominion government to convey "absolute title" to the railway to Canadian Pacific cannot be construed as an obligation to convey fee-simple title to the right-of-ways. The title obligation simply reflects the understanding that, as between those two parties, the Dominion government was to relinquish all of its rights in the railway to Canadian Pacific. *It does not mean that the government intended to abrogate Indian rights guaranteed under the Indian Act.*[51]

Surely the Crown's fiduciary duty to Aboriginal peoples could just as well support the argument that it cannot be taken to intend the extinguishment of reserve title without informed consent, even if breach of fiduciary duty was not at issue in the *Osoyoos* case.[52] The alternative is an interpretation which countenances not just the Crown's unilateral creation of a right to construct a facility crossing a reserve, but also the expropriation of the land beneath it and with that the loss of all the Band's powers, including taxation.

## IV. RESERVES CROSSED BY TEMPORARY TAX-FREE HYDRO LINES: THE COMBINED EFFECT OF *OPETCHESAHT* AND *WESTBANK*

Around 1958, the British Columbia Hydro and Power Authority saw the need to run a transmission line from a new generating facility to the major consumers on Vancouver Island and chose a route which crossed the Opetchesaht Band's reserve. After more than a year's negotiations with the Crown and the band council, B.C. Hydro obtained a right-of-way on terms that appeared to reflect fair market value.[53] The authorization took the form of a permit under the *Indian Act*, which provided for the minister "by permit in writing [to] authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve."[54]

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51 *Canadian Pacific (F.C.A.), supra* note 14 at para. 89, Robertson J.A. [emphasis added].

52 *Osoyoos (C.A.), supra* note 26 at para. 107.

53 *Opetchesaht Indian Band* v. *Canada*, [1997] 2 S.C.R. 119 at paras. 6-7 [hereinafter *Opetchesaht*].

54 R.S.C. 1952, c. 149, s. 28(2).

Decades later, when the Band wanted to use B.C. Hydro's right-of-way to build roads and a drainage ditch, the council discovered it would need B.C. Hydro's permission. The utility offered its consent but only on certain conditions, including that the Band take responsibility for any resulting loss of power by third parties.[55] As Justice McLachlin explained in her dissenting judgment, the disagreement with B.C. Hydro led to the Band's action:

> This led the band to re-examine how the permit came to be issued. They came to the conclusion that it was wrongly issued; the required procedure, in their view, was surrender and alienation under s. 37 of the *Indian Act*, a process of formality and deliberation requiring the consent of the band membership. They brought this action, seeking a declaration that the permit was void and an order for possession of the right-of-way and damages for trespass. The matter proceeded summarily as a question of law. The trial judge ruled in favour of the Opetchesaht band. The British Columbia Court of Appeal ruled against them.[56]

Justice McLachlin dissented from the majority's judgment at the Supreme Court of Canada, agreeing with the Band that a formal surrender was required in order to grant B.C. Hydro its right-of-way, while the majority held that a permit was sufficient. In Justice McLachlin's view a fundamental principle of the *Indian Act* was "that the long-term alienation of interests in Indian lands may only be effected through surrender to the Crown and consent of the band membership as a whole," including, "long-term or definite interests in reserve lands short of outright ownership."[57]

The crucial question, identified in Justice Major's judgment for the majority, was "whether the grant of rights for an indeterminate period conflicts with the policy of prohibition of use of reserve land by third parties absent approval of the Minister and the band."[58] He concluded that a surrender, including a vote by all band members and approval by the governor in council, was only required "where significant rights, usually permanent and/or total rights in reserve land are being transferred." A permit issued by the minister with the approval of the band council was sufficient where "lesser dispositions are contemplated and the interest

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55 *Supra* note 53 at para. 11.

56 *Ibid.* at para. 62.

57 *Ibid.* at para. 93.

58 *Ibid.* at para. 52.

transferred must be temporary," including "the grant of limited indeterminate rights in reserve land."[59]

It is worth noting that although the permit was "for such a period of time as the said right-of-way is required for the purpose of an electric power transmission line,"[60] Justice Major held that B.C. Hydro's rights were not "indeterminate and potentially in perpetuity." A number of economic and technological factors could still bring an end to the need for the line, he explained, and, in particular, he pointed out that while "50 years ago, this country's railroads appeared to be a permanent fact of Canadian travel and transportation," many were now being abandoned.[61] Yet the Federal Court of Appeal concluded in *Canadian National Railway Co.* v. *Matsqui Indian Band* that the Band intended "to part with the railway lands on an absolute basis" partly because of "the permanent nature of the railway for the construction of which the surrender was made."[62]

When it comes to control of reserve land, then, the Federal Court of Appeal holds Indian bands intend to give up lands permanently when they are surrendered for railroad use because that use is by nature permanent—but the Supreme Court of Canada holds that an easement over reserve lands for a hydro-electric transmission line is by definition not in perpetuity since it is no more permanent than railway lines, which are now frequently being abandoned. The only consistency in these authorities is that both uphold the transfer of reserve lands or interests in reserve lands to third parties.

The striking difference between the majority decision and Justice McLachlin's dissent are the two different analyses of the relation between the Band's powers and B.C. Hydro's easement. Justice McLachlin wrote:

> The fact that the band can still use the land in many ways cannot be determinative. The fact is, the band cannot use it in ways it deems important to the welfare of the current generation. It cannot build houses on the land, it cannot put roads or a reservoir on the land. And the problem transcends the needs of this generation. Doubtless future generations of band members will have their own needs and their own proposals for the use of the land. If the respondents are right, the future generations will be precluded from doing so by a decision made by a temporary band council and a minister decades, not inconceivably centuries, before.[63]

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59 *Ibid.* at paras. 55, 57.

60 *Ibid.* at para. 9.

61 *Ibid.* at para. 27.

62 *Canadian National*, *supra* note 14 at para. 45.

63 *Opetchesaht, supra* note 53 at para. 71 [emphasis added].

For the majority, Justice Major held that the fact the band council consented after protracted negotiations demonstrated sufficient autonomy of decision-making to balance against any need to protect the Band's interests.[64] As commentators have pointed out,

> the majority view appears to favour a restrictive interpretation of the statute requiring the present Band Council to be bound by an arrangement reached almost 40 years ago, in seeming support of its autonomy in decision-making, but in fact fail[s] to support its autonomy to develop its reserve lands as it wishes.[65]

Shortly after the Supreme Court of Canada rendered its judgment in *Opetchesaht*, the British Columbia Court of Appeal had to consider similar permits and easements held by B.C. Hydro on the Westbank First Nation's two reserves.[66] Westbank had sued the utility for unpaid taxes which it had levied under a taxation by-law adopted pursuant to section 83(1)(a) of the *Indian Act*. However B.C. Hydro obtained summary judgment dismissing the Band's claim on the basis of its status under statute as an agent of the provincial Crown.

The Court of Appeal agreed with the motions judge that the exemption from taxation of lands and property belonging to the federal and provincial Crown under section 125 of the *Constitution Act, 1867* applied to B.C. Hydro so as to exempt it from Westbank's taxation by-law.[67] Before the Supreme Court of Canada, the Band conceded that the Province has the power to constitute B.C. Hydro as an agent of the Crown for the purpose of holding an interest in reserve lands. Since the amounts assessed by the Band under its by-laws were in pith and substance taxes which it sought to impose, the Supreme Court of Canada concluded the by-laws were constitutionally inapplicable to B.C. Hydro.[68]

The record in *Opetchesaht* disclosed that easements such as B.C. Hydro's across the reserve were "commonplace" for utilities and other commercial entities.[69] Where, as in most of British Columbia, the utility is

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64 *Ibid.* at para. 54, 55.

65 Meehan & Stewart, *supra* note 36 at 7-8.

66 *Westbank First Nation* v. *British Columbia Hydro and Power Authority* (1997), [1998] 2 C.N.L.R. 284 (B.C.C.A.), aff'g (1996), [1997] 2 C.N.L.R. 229 (B.C.S.C.) [hereinafter *Westbank (C.A.)* and *Westbank (B.C.S.C.)*].

67 *Westbank (C.A.), ibid.* at paras. 1-2, 7, 26-27, 31.

68 *Westbank First Nation* v. *British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134 at paras. 14, 45, 46 [hereinafter *Westbank (S.C.C.)*].

69 *Opetchesaht*, *supra* note 53 at para. 10.

owned by the Crown, the bands affected will not only have to put up with its transmission lines on their reserves as long as the utility considers that the easement is required, but the utility will occupy reserve land without the tax liability that any private company would incur.[70]

## V. RESERVES THAT DO NOT INCLUDE ADJOINING RIVERS: RIPARIAN RIGHTS AND TITLE AFTER *R.* v. *LEWIS* AND *R.* v. *NIKAL*

The Supreme Court of Canada decided in *R.* v. *Lewis*[71] and *R.* v. *Nikal*[72] that adjoining rivers did not form a part of two British Columbia reserves, neither by virtue of common-law rules of property nor through a purposive application of the *Indian Act*'s grant of jurisdiction to band councils.

In both cases, the accused's defence to charges of fishing in contravention of federal regulations was that band council by-laws permitted the activity. In both cases, the judge at first instance held that the part of the river where at least one of the alleged offences occurred formed part of the reserve and the by-laws were therefore *intra vires* the band council, forming a complete defence. However, the accused were unsuccessful on those grounds both before the British Columbia Court of Appeal and the Supreme Court of Canada.

The appellate courts declined to apply the common-law presumption of *ad medium filum aqua*—that proprietors of riparian lands own the bed of adjoining non-tidal rivers and streams up to the centre—in the case of rivers adjoining the reserves, both of which rivers were held to be navigable.[73] The Supreme Court held that the presumption is inapplicable in British Columbia as a general rule because in all western provinces the public right of navigation and of fishing vested in the Crown and preceded all grants of riparian land.[74]

The Supreme Court paid close attention to the historical record as to federal government policy in the administration of the fisheries and concluded the Crown in right of Canada had no intention of granting any exclusive fishery to Indian nations, although the Indian reserve commissioners did receive instructions to reserve "fishing stations" for

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[70] The immunity of the provincial Crown from other band council by-laws remains an open question: *Westbank (B.C.S.C.)*, *supra* note 66 at paras. 37-45.

[71] [1996] 1 S.C.R. 921 [hereinafter *Lewis*].

[72] [1996] 1 S.C.R. 1013 [hereinafter *Nikal*].

[73] *Lewis*, *supra* note 71 at para. 58; *Nikal*, *ibid.* at para. 64.

[74] *Nikal*, *ibid.* at para. 67.

the Indians.[75] In addition, the Supreme Court considered the particular mandates received by the Commissioners in the nineteenth century when they drew the boundaries for the two reserves at issue and concluded the Crown had no intention to grant title to adjoining rivers, in addition to the lands surveyed as reserves.[76]

In *Lewis*, the Supreme Court found no implicit intention by the Crown to include the adjacent waters in the creation of reserves, even where the use of adjacent fishing grounds was intended.[77] Nor did the band council's power under the *Indian Act*, to regulate fish "on the reserve,"[78] imply a power to regulate fish in immediately adjacent waters, since such an interpretation would contradict the plain and ordinary meaning of "on the reserve."[79]

Yet while in *Lewis* the defendant was convicted, the acquittal on charges of fishing without a licence was restored in *Nikal*. The Supreme Court was satisfied that Jerry Nikal had "successfully demonstrated an Aboriginal right to fish for food and ceremonial purposes," protected by section 35(1) of the *Constitution Act, 1982*.[80] The requirement of a licence was held by itself not to constitute a *prima facie* infringement of his Aboriginal rights, but the conditions imposed by the licence were infringements and were not justified by the Crown.[81]

An important part of Justice Cory's analysis of the Aboriginal right in *Nikal* is the following: "It must also be remembered that Aboriginal rights, by definition, can only be exercised by Aboriginal peoples. Moreover, the nature and scope of Aboriginal rights will frequently be dependant upon membership in particular bands who have established particular rights in specific localities."[82] This raises a question as to what it might mean for the members of a band to have Aboriginal rights in relation to a specific site where the band council has no powers by virtue of the *Indian Act*.

Unless each individual is free to exercise this collective right however he sees fit and with supervision only by the Crown, the natural conclusion to be drawn from *Nikal* is that section 35 of the *Constitution Act, 1982*

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75 *Lewis*, *supra* note 71 at paras. 34-41; *Nikal*, *ibid.* at para. 50.

76 *Lewis*, *ibid.* at para. 48; *Nikal*, *ibid.* at para. 44.

77 *Lewis*, *ibid.* at para. 54.

78 *Indian Act*, *supra* note 8, s. 81(1)(o).

79 *Lewis*, *supra* note 71 at para. 66.

80 *Nikal*, *supra* note 72 at para 88.

81 *Ibid.* at paras. 88-89.

82 *Ibid* at para. 95.

also protects the collective determination of how the right is exercised. This was the conclusion of one commentator on the decision of the British Columbia Court of Appeal:

> It may be said that one interpretation of *Nikal* is that members of the Morricetown Band have a right of self-government to determine the time and manner of their fishing, subject only to conservation concerns, as set out in the justification test in *Sparrow*, provided that those powers are connected to aboriginal rights which were an integral part of their distinctive culture.
>
> Contrary to the decision of Chief Justice McEachern [in *Delgamuukw* (1991), 5 C.N.L.R. 1 (B.C.S.C.)], and to the majority in the Court of Appeal [in *Delgamuukw* (1993), 5 C.N.L.R. 1 (B.C.C.A.)], at least in this sphere, there is "space for aboriginal rights of self-government" which are now protected in the constitution. These more limited rights do not require legislative recognition or delegation for their existence.
>
> If the fishing rights at stake in *Nikal* are connected to rights "to occupy and control" places of economic importance, then a large right of self-government may exist.[83]

There is no contradiction between such an assertion of jurisdiction and the Crown's title to the river bed referred to in *Lewis* and *Nikal*: the Crown's radical title to riverbeds is simply burdened by pre-existing Aboriginal interests in the same way as its radical title to land generally is burdened by Aboriginal title.[84] Moreover, at common law, fishing rights can in any case exist independently of ownership of the river bed and the Supreme Court of Canada has held that an Aboriginal right to fish can exist without proof of Aboriginal title to the fishing grounds.[85]

## VI. RESERVES FROM WHICH THE PROVINCE MAY REMOVE 1/20 OF THE LAND? THE CONTRADICTORY CASE LAW ON ORDER-IN-COUNCIL 1036

Unlike the other cases discussed in this paper, the most recent judgments to trace the complex history of reserve creation in British Columbia did not involve a challenge to Indian band jurisdiction by non-Aboriginals.[86]

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[83] B. Freedman, "The Space for Aboriginal Self-Government in British Columbia: The Effect of the Decision of the British Columbia Court of Appeal in *Delgamuukw* v. *British Columbia*" (1994) 28 U.B.C. L. Rev. 1 at 86-87.

[84] See on this point D. Sweeney, "Fishing, Hunting and Gathering Rights of Aboriginal Peoples in Australia" (1993) 16 U.N.S.W. Law J. 97 at 130-31.

[85] *R.* v. *Adams*, [1996] 3 S.C.R. 101 at paras. 26-30.

[86] *Wewaykum Indian Band* v. *Wewayakai Indian Band* (1995), 99 F.T.R. 1 [hereinafter, *Wewaykum (T.D.)*], aff'd in *Wewaykum Band* v. *Wewayakai Band* (1999), 247 N.R. 350 (F.C.A.) [hereinafter, *Wewaykum (F.C.A.)*], leave to appeal to the Supreme Court of

The actions instead arose when different Indian band litigants argued they were entitled to the same reserve.

At least 76 reserves were created in British Columbia before Confederation, including not just those created by the Douglas Treaties of the 1850s on Vancouver Island, but also dozens more created pursuant to surveys by colonial officials.[87] Lieutenant-Governor Joseph Trutch reported in 1870 that "these Indian Reserves are held by Government, in trust, for the exclusive use and benefit of the Indians resident thereon."[88] There would therefore seem to be little doubt that the lands were definitively set aside as reserves during the colonial period under Imperial law.[89] As a result, legal jurisdiction over colonial reserves and at least title as well passed to the Crown in right of Canada by operation of British Columbia's entry into Confederation in 1871.[90]

Unfortunately, however, many more Indian reserves in British Columbia were created after Confederation as a result of a complicated and conflict-ridden series of negotiations between the federal and provincial governments. The trial judge in *Wewaykum* gave considerable

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Canada granted, *Bulletin of Proceedings*, October 13, 2000, Docket No. 27641. Note that the same action was heard by the Supreme Court of Canada on a jurisdictional question under the style of cause *Roberts* v. *Canada*, [1989] 1 S.C.R. 322. The two other recent judgments are: *Canada (Attorney General)* v. *Canadian Pacific Ltd.*, [2000] 4 C.N.L.R. 39 (B.C.S.C.) [hereinafter *Canada* v. *Canadian Pacific*]; *Squamish Indian Band* v. *Canada*, [2000] F.C.J. No. 1568 (T.D.), online: QL (BCJ) [hereinafter *Squamish*].

87 R.E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver: University of British Columbia Press, 1974) at 170-82, 189-90, 294-96.

88 *Ibid.* at 183, citing British Columbia, Legislative Assembly, "Report on Indian Reserves (Papers Connected with the Indian Land Question)", Trutch to Musgrave, 28 January 1870, in *Sessional Papers* (1876) at 68.

89 *Jules* v. *Harper Ranch Ltd.*, [1989] 3 C.N.L.R. 67 (B.C.S.C.) at 91-94, leave to appeal refused (1990), [1991] 1 C.N.L.R. vi (B.C.C.A.), aff'd on other grounds (1991), 81 D.L.R. (4th) 323 (B.C.C.A.).

90 *British Columbia Terms of Union*, Article 13, R.S.C. 1985, App. II, Terms No. 10 and 13. Note that the Provincial Secretary reported to the Superintendent for Indian Affairs that the lease fund of the pre-Confederation Songhees Indian Reserve had become a federal asset as of 1871: Cail, *supra* note 87 at 193-94. On the other hand, the trial judge in *Canada* v. *Canadian Pacific*, *supra* note 86, assumed without further explanation (for example, at para. 72) that for pre-Confederation reserves as much as for those created after 1871, title did not vest in the federal Crown until a formal transfer by the provincial government, but did not explain her reasons. The trial judge in *Squamish*, *supra* note 86, reached this conclusion explicitly at para. 337, describing colonial reserves after 1871 as lands over which "federal legislative authority over lands reserved for Indians was validly exercised...even though they were provincial public lands which had not yet been conveyed to the Federal Government."

attention to the question of when the reserves at issue were created "in law" so that "federal legislative jurisdiction attached to the lands."[91] Not only were the results unfortunate, but the grounds for addressing the issue seem unclear: the question before the court was which band was entitled to which reserve and not when the lands in each reserve had gained that legal status.

On appeal, the Federal Court of Appeal decided that it "should refrain from deciding those issues since the requisite evidentiary foundation is incomplete, and the facts alleged by the appellant, Campbell River Band and by the Crown do not require us to do so."[92] As a result, Justice Teitelbaum's reasoning on this issue is pure *obiter*, but it remains the most recent judicial consideration of the complex history of reserve creation in British Columbia, a question which is before the courts in other matters.

To argue the respective entitlements of the Wewaykum and Wewayakai Bands, the parties were forced to rely among other things on a survey carried out in 1888 under the instructions of the Indian reserve commissioner and approved the following year by the provincial chief commissioner of Lands and Works and the federal Superintendent of Indian Affairs.[93] The so-called Joint Indian Reserve Commission, and the single commissioner who succeeded it after 1877, allotted reserves across the Province between 1876 and 1908 on the authority of federal Order-in-Council 1088 of 1875 and the subsequent acceptance of its terms by a provincial Minute in Council of 1876.[94]

Disputes subsequently arose between the federal and provincial governments, principally over the nature of the Province's reversionary interest in reserve lands once they were surrendered or ceased to be used. The McKenna-McBride Commission appointed in 1912 to resolve the dispute did so in part by addressing the size and number of Indian reserves, creating some new reserves but reducing or disposing of others.[95] The Wewaykum and Wewayakai Bands therefore also relied on the commission's report concerning the disputed reserves' boundaries.[96]

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91 *Wewaykum (T.D.), supra* note 86 at para. 260.

92 *Wewaykum (F.C.A.), supra* note 86 at para. 33, Issac C.J. for the majority.

93 *Wewaykum (T.D.), supra* note 86.

94 Cail, *supra* note 87 at 203-08, 215-18, 228-29.

95 *Ibid.* at 227-31, 233-37.

96 *Wewaykum (T.D.), supra* note 86 at paras. 30-37, 48-79.

Canada and British Columbia gave themselves statutory power to implement the McKenna-McBride Commission report,[97] but its schedule of reserves was subject to further reductions, cut-offs, and additions before being confirmed by the federal-provincial Ditchburn-Clark Commission in 1923.[98] By Order-in-Council 911 the same year, British Columbia "approved and confirmed" the McKenna-McBride schedule of reserves as modified by Ditchburn-Clark, as did Canada in 1924 under Order-in-Council 1265.[99]

The lack of judicial deference Justice Teitelbaum showed to Indian reserves as separate political jurisdictions is evident, firstly, by the importance he attached to determining the date when the Province definitively transferred the lands to Canada so as to create the reserves. It also appears in his surprising decision that reserve creation occurred some 60 years after the litigant bands had been told the lands were assigned to them.

For Justice Teitelbaum even the *consensus ad idem* between British Columbia and Canada exhibited by Orders-in-Council 911 and 1265 in 1923 and 1924 respectively had not been enough to complete the transfer of reserve lands. He accepted the position traditionally taken by the Province, namely, that the "formality" of a "conveyance of administration and control of the lands to the federal government" was still required[100] and did not take place until British Columbia purported to convey the lands formally to Canada through Order-in-Council 1036 in 1938.

This view stands in striking contrast to the decision of the British Columbia Court of Appeal in *Osoyoos (C.A.)*, which concluded that reserve land had been irrevocably lost by the Band to the Province by virtue of a federal order-in-council which the Province did not reciprocate. For the compulsory taking of reserve land benefiting the Province, the court held that the principle of indivisibility of the Crown eliminated the need for a formal conveyance of title by the federal government.[101] It is difficult to see why more was needed when the Province ceded land for reserves.

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97 *British Columbia Indian Lands Settlement Act*, S.C. 1920, c. 51; *Indian Affairs Settlement Act*, S.B.C. 1919, c. 32.

98 *Wewaykum (T.D.)*, *supra* note 86 at paras. 107-11.

99 *Ibid.* at paras. 114-15, 243-47.

100 *Ibid.* at para. 264.

101 *Osoyoos (C.A.)*, *supra* note 26 at para. 105, aff'g on this point *Osoyoos (B.C.S.C.)*, *supra* note 44 at para 4. See also *Comiagas Farms Ltd.* v. *British Columbia* (1993), 77 B.C.L.R. (2d) 165 (C.A.) at para. 9: even in the case of a federal-provincial transfer, the Crown does not convey land to itself.

The issue is important because British Columbia's Order-in-Council 1036 in 1938 imposed significant qualifications on its purported conveyance of reserve lands, which had not appeared in earlier provincial enactments. British Columbia excepted from its grant of lands "all travelled streets, roads, trails, and other highways existing over or through said lands"; it also included in the Order-in-Council a right for the Province to "resume" up to 1/20 of each reserve "for making roads, canals, bridges, towing paths, or other works of public utility or convenience."[102] As a result, the Province argues that Order-in-Council 1036 gives it title to most of the highways crossing Indian reserves, while the bands affected view provincial roads as a form of trespass.

No definitive judgment has been rendered on this question. The British Columbia Court of Appeal confirmed the right of resumption in 1979,[103] but in 1991 the Court of Appeal held its earlier judgment was *per incuriam*. The majority in *A.G.B.C.* v. *Andrew* upheld an injunction against members of the Mount Currie Band who had blockaded a road on their reserve, but explicitly declined to rule on the Province's right of resumption without a full trial on the facts.[104] More recently, the Court of Appeal has held, "The interesting question of whether the Crown Provincial has a right of resumption in reserve land arising out of the Order-in-Council of 1938 has never in this Province been authoritatively determined."[105]

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[102] Reproduced in *A.G.B.C.* v. *Andrew and Mount Currie Indian Band*, [1991] 4 C.N.L.R. 3 (B.C.C.A.) at 26-27 [hereinafter *Andrew*]. The situation is somewhat different for reserves in the Railway Belt and the Peace River Block: for those regions, by Order-in-Council P.C. 1265, Canada explicitly declined to adopt the list of Indian reserves contained in provincial O.C. 911 on the grounds it already had full title to them. In 1929, the federal and provincial governments reached the so-called Scott-Cathcart Agreement on the specific issue of Indian reserves in the Railway Belt and the Peace River Block, which was approved by Order-in-Council P.C. 208 in 1930 (reproduced without its schedules in *Andrew* at 72-74). The Order-in-Council is cited in the Railway Belt and Peace River Block Re-transfer Agreement, *Constitution Act, 1930*, Schedule 4, para. 13, R.S.C. 1985, App. II, No. 26. The Scott-Cathcart Agreement (Schedule 2 to P.C. 208) attaches a draft form of conveyance (Sched. 4) for all reserves in the province—purporting to create a provincial power of resumption similar to that later asserted in Order-in-Council 1036—but states that the signatories were only "designated by their respective Governments" to deal with the effect on Indian reserves of the proposed Railway Belt and Peace River Block retransfer. We believe that the draft form of conveyance was clearly *ultra vires* with respect to other Indian reserves in British Columbia on both statutory and constitutional grounds and probably *ultra vires* with respect to Railway Belt and Peace River Block reserves.

[103] *Moses* v. *The Queen*, [1979] 4 C.N.L.R. 61 (B.C.C.A.).

[104] *Andrew*, *supra* note 102 at 23, Anderson J.A.

[105] *Stoney Creek Indian Band* v. *Alcan Aluminum Ltd.* (1999), [2000] 2 C.N.L.R. 345 at para. 14 (B.C.C.A.), Southin J.A. [hereinafter *Stoney Creek*], rev'g (1998), [1999] 1

Madame Justice Southin held in a dissenting judgment in *Andrew* that the fiduciary duty of the Crown to Aboriginal peoples required Order-in-Council 911 of 1923 to be considered a final disposition of land for their benefit. As a result, no right of resumption remained to be withheld by the Province in 1938 and Justice Southin held no injunction could be issued against those blockading the road.[106] Since that decision was rendered, a legal scholar has pointed out that in an unreported judgment of 1912, the Chief Justice of the British Columbia Supreme Court ruled that reserves in the Province had been legally created by the decisions of the Joint Indian Reserve Commission since 1875.[107]

The prior existence of reserves that were merely modified or confirmed is also implicit in the McKenna-McBride Agreement itself, which provides at section 2(a) that the reserves could "with the consent of the Indians, as required by the Indian Act, be reduced to such acreage as the Commissioners think reasonably sufficient for the purposes of such Indians."[108] If the lands were not yet reserves in 1912, then the *Indian Act*'s surrender requirements would not have had to apply to cut-offs. The same premise was taken up again much more recently by Parliament in the *British Columbia Indian Cut-off Lands Act*,[109] which defines "cut-off lands" as those "referred to in section 2(a) of the McKenna-McBride Agreement that had before 1916 been set aside for the use and benefit of Indians," tracking the definition of reserve in the *Indian Act*.[110]

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C.N.L.R. 192, application for leave to appeal to the Supreme Court of Canada dismissed in *Bulletin of Proceedings*, August 25, 2000, Docket No. 27583.

106 *Andrew*, *supra* note 102 at 54-55.

107 H. Foster, "Roadblocks and Legal History, Part I: Do Forgotten Cases Make Good Law?" (1996) 54 Advocate 355 at 358-60 (appeals of the decision to the British Columbia Court of Appeal and the Supreme Court of Canada were dismissed for want of jurisdiction). The early legal existence of the reserves is also supported by the frequent use of the forced-taking provision of the *Indian Act* to create roads on the reserves at provincial request before 1930. See, for example, P.C. 663, 17 April 1929, which removed part of the Kispiox Reserve for use as a provincial highway.

108 Reproduced in P.C. 208, 1930, as Sched. 1 and in Cail, *Land, Man, and the Law*, *supra* note 87, as Appendix, Item 5, Part I.

109 S.C. 1984, c. 2.

110 R.S.C. 1906, c. 81, s. 2. The mirror provincial statute is less definite, probably deliberately: the *Indian Cut-off Lands Disputes Act*, R.S.B.C. 1996, c.218, defines "cut-off lands" as "lands that had before 1916 been appropriated by the government for the use and benefit of Indians." If the legislature used the word "appropriated" to avoid the words "set aside" used in the *Indian Act*, the two are nonetheless synonymous: the only other use of the word in the context of land in a provincial statute is in the *Highway Act*, R.S.B.C. 1996, c. 188, s. 67(o), which provides that "every highway, park or public square *appropriated or set apart for public use* must be shown as such" on a surveyor's plan [emphasis added]. However, the legislature also suggested that only the province

Moreover, applying Justice Southin's fiduciary analysis to the facts also suggests an earlier date for reserve creation, since the First Nations themselves understood their reserves to have been created by the Joint Indian Reserve Commission. In 1912, Chief John Chilahitsa, an Okanagan chief and member of the executive committee of Indian Rights Association of British Columbia, gave the following account to the prime minister of Canada concerning his father's understanding of the reserve commissioners' work:

> They [the reserve commissioners] said they proposed to give the Indian tribes reserves, large pieces of land, and that they would be set apart and posts set in the ground and these posts would be the same as a high fence around them. And they said that the chiefs would be set down there as heads of these places and *everything upon these lands which would be posted would be the real property of the Indians*—the gold and silver and everything. They explained to the Indians that it would all be done for the safety of the Indians, as many whites would come to that country and wish lands, and *they wanted the Indians to have a certain amount of their own country kept for them and saved from settlement by these whites*. My father and the other Chiefs asked them what about these lands outside of the reserves, and the Commissioners said, "We will discuss these lands later."[111]

It is therefore clear that Aboriginal peoples understood their reserves to have been set aside once the Joint Indian Reserve Commission completed its work and that they had received all rights to the land.

What took place between 1923 and 1924 was the conclusion of a process meant by Parliament and the provincial legislature to provide "a full and final adjustment of the differences" between Canada and British Columbia over reserve boundaries through a negotiated agreement with the Province.[112] Both governments approved the modified list of reserves "as constituting full and final adjustment and settlement of all differences in respect thereto between the Governments of the Dominion and the Province, in fulfillment of the said [McKenna-McBride] Agreement of the

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had given the lands their status, since under the *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29, in an enactment "government" means the Crown in right of British Columbia.

[111] British Columbia Archives and Records Services, "Deputation from the Indian Rights Association of British Columbia upon the Prime Minister of Canada" (8 January 1912), as cited in W. Wickwire, "'We Shall Drink from the Stream and So Shall You': James A. Teit and Native Resistance in British Columbia, 1908-22" (1998) 79 Cdn. Historical Rev. 199 at 232-33 [emphasis added].

[112] *British Columbia Indian Lands Settlement Act*, *supra* note 97, s. 3; see also *Indian Affairs Settlement Act*, *supra* note 97, s. 2.

24th day of September, 1912, and also of section 13 of the Terms of Union."[113]

The Supreme Court of Canada approved a "purposive interpretation" of the 1930 Natural Resources Transfer Agreement between Canada and Alberta that settled the question of provincial control in the Province's favour.[114] The Court construed the agreement's own exceptions narrowly.[115] Similarly, an agreement between Canada and British Columbia meant to create Indian reserves from provincial Crown lands should be interpreted broadly and it is difficult to see why any legal effect should be given to exceptions and reservations set out by the Province several years after the fact.

Justice Teitelbaum seems to have been entirely aware that his decision would reinforce provincial claims under Order-in-Council 1036 to all roads crossing reserves and the right to resume as much as an additional 1/20 of reserve lands:

> If I accept, as [the] Cape Mudge [Band] urged me to do, that administration and control had passed prior to 1938, the province would have been unable to preserve a right of resumption and the various other administrative reservations set out in the conveyance. These reservations are at the heart of administration and control, and legislative jurisdiction.[116]

Without establishing any convincing legal basis for preferring such a conclusion, Justice Teitelbaum therefore sought to uphold the "administration and control, and legislative jurisdiction" over portions of Indian reserves by the Province, in preference to jurisdiction by the bands.

Combined with the result on appeal of his judgment in *Canadian Pacific (T.D.)*, the effect of Justice Teitelbaum's decision at trial in *Wewaykum (T.D.)* would have been to reduce most British Columbia Indian reserves to checkerboards. Not only would most railway tracks and highways crossing them be subtracted from the band's title and control, but another 1/20 of every reserve would always stand at risk of "resumption" by the Province for public purposes, removing those lands from the band's ownership and control as well.

However, as noted above, the Federal Court of Appeal affirmed the trial judgment while explicitly declining to rule on this particular issue.[117]

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[113] P.C. 1265; *Andrew*, *supra* note 102 at 54 (O.C. 911).

[114] *Constitution Act, 1930*, Schedule 2, R.S.C. 1985, App. II, No. 26.

[115] *Canada (Director of Soldier Settlement)* v. *Snider*, [1991] 2 S.C.R. 481 at para. 47.

[116] *Wewaykum (T.D.)*, *supra* note 86 at para. 253.

[117] *Wewaykum (F.C.A)*, *supra* note 86 at para. 33.

It is significant that two related recent judgments on the extent of reserve title in British Columbia have proceeded either on the assumption that the *Indian Act* has applied to reserves since the nineteenth century or on the basis of an explicit conclusion of law to that effect. This issue was considered independently of the question of when title to the reserve in question vested in the federal Crown, which both judgments ultimately concluded did not occur until a formal transfer by the provincial government in 1947.[118] The long-standing debate over the date of "reserve creation" in the sense of the federal Crown's legal title to land may therefore no longer be relevant, and the crucial issue would now appear to be when federal jurisdiction in the form of the *Indian Act* attached to the land.

Moreover, the Supreme Court of Canada's decisions in *R.* v. *Lewis* and *R.* v. *Nikal* together suggest that, unless the high court considered clearly irrelevant evidence in reaching its conclusions, Justice Teitelbaum's analysis of the creation of Indian reserves in British Columbia is incorrect.

Firstly, the Supreme Court of Canada decided the rivers adjacent to two British Columbia reserves are not now included in the reserves. They relied on the same surveys and decisions by the Indian Reserve Commissioners that Justice Teitelbaum held in *Wewaykum Indian (T.D.)* did not create any property interest at all, and which he held preceded the legal creation of the reserves by several decades.

Secondly, the Supreme Court of Canada ruled the intent of the Crown in right of Canada was relevant in determining the grants of fisheries and the grants of land made to create those reserves in the late nineteenth century. This stands in apparent contradiction to Justice Teitelbaum's view that the federal government had neither legislative jurisdiction nor proprietary interest in the lands before the appropriation and conveyance of lands by the Province to Canada, decades later.[119]

The Supreme Court's use of the evidence in *Lewis* and *Nikal* provides strong support for the proposition that both the Crown in right of Canada's interest and that of the bands were at least partly determined in

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[118] *Canada* v. *Canadian Pacific*, *supra* note 86 at paras. 181, 189; *Squamish*, *supra* note 86 at paras. 372, 439-44. This approach is in accord with the view of the Supreme Court of Canada in *Smith* v. *The Queen*, [1983] 1 S.C.R. 554 at 564, 580, that the province retained the bare legal title to a pre-Confederation reserve barring a transfer of title to Canada, but the federal government nevertheless had exclusive jurisdiction over the land so long as it remained a reserve.

[119] *Wewaykum (T.D.)*, *supra* note 86 at paras. 220-29. Nevertheless, Teitelbaum J. rendered judgment in an unrelated case concerning a British Columbia Indian reserve on the basis that the *Indian Act*, R.S.C. 1906, c. 81 applied to a surrender of land which had occurred in 1911: *Canadian Pacific Ltd. (T.D.)*, *supra* note 14 at para. 24.

the nineteenth century, when boundaries of reserves in British Columbia were first established.

The question of whether title to roads was excluded from reserves by Order-in-Council 1036 is among those to be addressed by the British Columbia Supreme Court in *Stoney Creek Indian Band* v. *Alcan Aluminum Ltd.*,[120] a case concerning a claim for trespass on Stoney Creek Indian Reserve No. 1, where Alcan defends its construction of a road on the reserve in part by relying on a claim by the Province to a pre-existing right-of-way. The Court of Appeal set aside a decision on summary judgment that provincial limitation law could be of no application to trespass on reserve lands, and remitted the matter for a full hearing on the facts. In particular, the Court of Appeal suggested the trial judge will have to determine the effect of Order-in-Council 1036 on the issue of whether the lands formed part of the reserve.

The power alleged by the Province to "resume" up to 1/20 of reserve lands must ultimately be ruled *ultra vires* for it not only trenches upon Parliament's exclusive jurisdiction over "Lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*, but would oblige the federal government to stand by impotently while Indian lands are permanently diminished. Provincial statute provides that, once exercised, the alleged right of resumption "shall operate as a complete extinguishment of every title and claim to any lands so entered upon or taking possession of."[121] Such diminishment by the Province is impossible because the Supreme Court of Canada has been extremely clear that where the "title and claim to any lands" belong to Indians, a Province cannot extinguish those rights because they are within the exclusive jurisdiction of the federal government.[122]

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[120] *Stoney Creek*, *supra* note 105, at paras. 34, 38-39.

[121] *Highways Act*, R.S.B.C. 1924, c. 103, s. 8. See on this point: *BC Tel* v. *Seabird Island Indian Band*, [2000] 3 C.N.L.R 16 (F.C.T.D.) at paras. 21-24.

[122] See *Delgamuukw*, *supra* note 5 at 173, 176. The provincial legislature may not "override, interfere with or control or affect" a use of land which "is exclusively vested in the Dominion Parliament, and being so vested by virtue of one of the enumerated classes of subjects of section 91, is explicitly withdrawn from the jurisdiction of the local legislature": *In Re Alberta Railway Act* (1913), 48 S.C.R. 9 at 22, aff'd *Attorney-General for Alberta* v. *Attorney-General for Canada*, [1915] A.C. 363 (P.C.)

## VII. THE EXTENT OF NISGA'A LANDS UNDER THE NISGA'A AGREEMENT

### A. INTRODUCTION

Since British Columbia has ratified a modern treaty between the Nisga'a Tribal Council, Canada, and the Province,[123] it is worth asking how that agreement[124] addresses the issues at stake in the cases reviewed above. Unfortunately, the text of the Final Agreement contains few provisions to resolve the difficulties created by that case law.

### B. TITLE AND JURISDICTION OVER THE LANDS

It is important to note that none of the Nisga'a lands are "lands reserved for the Indians" within the meaning of section 91(24) of the *Constitution Act, 1867*,[125] so they are not under exclusive federal jurisdiction. Unlike Indian reserves, therefore, they are shielded from provincial regulation only by the terms of the treaty itself. The lands the Nisga'a receive under their treaty take three forms: the first, somewhat confusingly called "Nisga'a Lands," consists of 1,930 square kilometres made up of both new lands and some existing reserves. The Nisga'a hold these lands in fee-simple and will have full jurisdiction over them.[126] Secondly, the Nisga'a hold some other former reserves in fee-simple along with the addition of specified adjacent properties, lands henceforth referred to as Category A of Nisga'a Fee-Simple Lands.[127] Finally, they acquire a further 250 hectares adjacent to various bodies of water, which they also hold in fee-simple, and which form Category B of the Nisga'a Fee-Simple Lands.[128]

Jurisdiction is the essence of the difference between the two forms. Parcels of the Nisga'a Lands retain their status and therefore remain under

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[123] Peter Grant is counsel for the plaintiffs in *Gitanyow First Nation* v. *Canada*, [1998] 4 C.N.L.R. 47, [1999] 1 C.N.L.R. 66 (B.C.S.C.), an action for declaratory relief which argues, among other things, that certain provisions of the Nisga'a Final Agreement constitute a breach of the federal and provincial governments' obligation to conduct treaty negotiations with the Gitanyow in good faith because of its effect on lands and resources claimed by the Gitanyow Hereditary Chiefs.

[124] Schedule to *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2; see also *Nisga'a Final Agreement Act*, S.C. 2000, c. 7.

[125] *Nisga'a Final Agreement Act*, *ibid.* Ch. 2, para. 10.

[126] *Ibid.* Ch. 3, paras. 1 to 3; Ch. 10, paras. 47 to 52.

[127] *Ibid.* Ch. 3, para. 46.

[128] *Ibid.* paras. 61 to 62.

Nisga'a jurisdiction even after a change in ownership.[129] On the other hand, Nisga'a Fee-Simple Lands of both categories lose their status if "no estate or interest in that parcel is owned by the Nisga'a Nation, a Nisga'a Village, a Nisga'a Corporation or a Nisga'a citizen."[130] Jurisdiction over this second form of land-holding is therefore dependent on Nisga'a ownership, not boundaries.

The Nisga'a hold all their treaty territory subject to interests existing at the time the treaty takes effect. Isolated parcels held in fee-simple by others remain, surrounded by Nisga'a Lands.[131] On the core Nisga'a Lands themselves, existing interests continue, but they are exhaustively set out[132] and the licences, permits, or leases to be issued all identify the Nisga'a Nation as the lands' owner.[133]

The treaty provides that "the estate in fee-simple to Category A Lands is free and clear of all estates, charges, mineral claims, encumbrances, licences, and permits, except those set out in Appendix D-4."[134] But since Category A of the Nisga'a Fee-simple Lands consists of certain former reserves along with designated adjacent lands,[135] the Nisga'a cannot acquire any greater title than the bands previously held to their reserves.

For Category A Fee-simple Lands, therefore, the treaty solves none of the problems created by previous events such as the surrenders or expropriations at issue in cases like *Canadian National* before the Federal Court of Appeal or *St. Mary's* before the Supreme Court of Canada. Anyone occupying former Nisga'a reserve lands ceded by virtue of compulsory takings or surrenders could still argue that the title in fee-simple had been given up and that the lands were not "in the reserve" so as to be transformed by the treaty into Category A Fee-simple Lands.

Anyone wishing to make a similar argument with respect to the former reserves subsumed into the core Nisga'a Lands (for instance, someone in a similar position to the Canadian National Railway in relation to the Matsqui Band) will raise the question of the actual effect of the treaty's cession of title. Does it expropriate the underlying fee to any lands within the Nisga'a Lands boundaries that are not specifically excepted, leaving only implied easements for any interest omitted from the treaty's lists? Or

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[129] *Ibid.* para. 5.

[130] *Ibid.* paras. 53, 67.

[131] *Ibid.* Appendix B-2.

[132] *Ibid.* Ch. 3, para. 29.

[133] *Ibid.* Appendix C-2.

[134] *Ibid.* Ch. 3, para. 50.

[135] *Ibid.* para. 46.

is such an effect not to be presumed,[136] leaving further unenumerated fee-simple exceptions to the Nisga'a title to Nisga'a Lands?

The question of lands removed from the scope of the pre-existing reserves which are to be incorporated into Nisga'a Lands raises not just the issue of ownership but also of jurisdiction. Under the treaty, parcels of the Nisga'a Lands retain their status even after a change in ownership,[137] but without clear language the treaty cannot grant jurisdiction over parcels which were not in reserves at the effective date and have therefore never become Nisga'a Lands.

## C. ORDER-IN-COUNCIL 1036

The effects of the Province's purported power to take up reserve land under Order-in-Council 1036—which would exclude lands taken from the Bands' title—are also not undone, if such occupation took place on reserves included in either Nisga'a Lands or Category A of Nisga'a Fee-simple Lands.[138] For the reserves included in Category A, however, the Province will no longer need to use Order-in-Council 1036 to claim such a power because it has an explicit power to expropriate Nisga'a Fee-simple Lands.[139] (Only the federal government may expropriate Nisga'a Lands.)[140] For the Fee-simple Lands generally and especially for the 250 new hectares that will make up Category B, the broader but more demanding expropriation power seems designed to replace the Province's ordinary power under statute to resume up to 1/20 of Crown land after disposition for use in "roads, canals, bridges or other public works."[141] On Nisga'a Lands it is clear the Province will not be able to assert rights to resume for the purpose of public works in the future.[142] It would also

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136 An important presumption of statutory interpretation is that "unless it is clearly and unambiguously intended to do so, a statute should not be construed so as to interfere with or prejudice established private rights under contracts or the title to property, or so as to deprive a man of his property without being heard": *Halsbury's Laws of England*, vol. 44, 4th ed. (London: Butterworths, 1980) at para. 906.

137 *Nisga'a Final Agreement Act*, *supra* note 124 at para. 5.

138 The authors acknowledge they have not undertaken detailed research as to whether the province claims title in any of the affected reserves by virtue of Order-in-Council 1036.

139 *Supra* note 124, Ch. 3, paras. 55 to 60, 68 to 72.

140 *Ibid.* Ch. 3, para. 74.

141 *Ibid.* para. 63, applies the exceptions and reservations in relation to roads and other forms of access from the *Land Act*, R.S.B.C. 1996, c. 245, s. 50(1)(a), but not the right in s. 50(1)(a)(i) to resume 1/20 of land granted.

142 *Ibid.* para. 3 states that the "estate is not subject to any condition, proviso, restriction, exception, or reservation set out in the *Land Act*."

seem that the Province has implicitly conceded it has no existing title on those former reserves by virtue of Order-in-Council 1036, since Nisga'a Lands are defined as "free and clear of all interests" other than those explicitly set out,[143] while a number of secondary provincial roads which pass through Nisga'a Indian reserves will become "rights of way granted to British Columbia."[144]

### D. TAXATION

The taxation powers of the Nisga'a government which receive constitutional protection under the treaty are actually narrower than those currently enjoyed by band councils under section 83(1) of the *Indian Act*. The Nisga'a Lisims Government, which represents the whole Nisga'a Nation, is only guaranteed the power to impose direct taxes "on Nisga'a citizens on Nisga'a Lands."[145] Nisga'a village governments are guaranteed no taxation powers at all, though the Nisga'a Lisims Government may delegate powers to them.[146] The issue of taxation on Nisga'a Fee-simple Lands is simply not addressed.

A great deal of property and activity has been left out of the purview of the treaty-protected taxation powers. For instance, they do not even include Nisga'a corporations, which are those entirely owned (either legally or beneficially) by the Nisga'a Nation, a Nisga'a village or a Nisga'a settlement trust.[147] Since these corporations are not included in the treaty's property tax exemptions either,[148] and Nisga'a Lands remain part of the Regional District of Kitimat-Stikine,[149] the strange result is that municipalities but not Nisga'a governments have a legal right to tax the property of a Nisga'a corporation.[150] More importantly, the Nisga'a governments have no protected right to tax the property interests of any non-Nisga'a situated on Nisga'a Lands. Under the treaty they have less power than band councils to whom the *Indian Act* gives a power of "taxation for local purposes of land, or interest in land, in the reserve,

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143 *Ibid.* paras. 29 and 30.

144 *Ibid.* Appendix C-1, Part 3, "Roads."

145 *Ibid.* Ch. 16, para. 1.

146 *Ibid.* Ch. 11, paras. 34(d) and 37(a).

147 *Ibid.* Ch. 1.

148 *Ibid.* Ch. 16, paras. 13 and 16.

149 *Ibid.* Ch. 18.

150 Moreover, the municipality's delegated power springs from the province's entrenched right to tax the lands under the *Constitution Act, 1867*, s. 91(2).

including rights to occupy, possess or use land in the reserve."[151] A band council can therefore tax any property interest owned by anyone other than the Crown[152] provided it can show the land in question remains "in the reserve."

The treaty does envision negotiations with the provincial and federal governments on agreements which would give Nisga'a governments "direct taxation authority over persons other than Nisga'a citizens, on Nisga'a Lands."[153] However this provision provides only a right to negotiate toward such an agreement, not a right to exercise the authority. Moreover, provincial statute[154] already grants band councils the right to negotiate with the Province so as to exclude concurrent municipal taxation of non-Indian property interests on reserve.

## E. HIGHWAYS AND UTILITIES

Where highways and utility rights of way exist on Nisga'a Lands, the treaty preserves them.[155] Thus on the former reserves included in Nisga'a Lands, rights such as those recognized as belonging to B.C. Hydro in *Opetchesaht* continue unchanged.[156] The Nisga'a will be obliged to grant new rights-of-way for secondary roads or public utilities up to a maximum aggregate total area of 800 hectares on Nisga'a Lands.[157] On Nisga'a Fee-simple Lands, the Province will be able simply to exercise its expropriation powers.[158]

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[151] *Indian Act*, *supra* note 8, s. 83(1)(a). Also, unlike a band council, the Nisga'a Lisims Government is not listed as a "taxing authority" in s. 2(1) of the *Municipal Grants Act*, R.S.C. 1985, c. M-13, as am. S.C. 2000, c. 8. It therefore appears the Nisga'a government is not eligible for federal government payments in lieu of property tax.

[152] The federal and provincial Crown are both exempted by virtue of the *Constitution Act, 1867*, s. 125. See *Westbank (S.C.C.)*, *supra* note 68 at paras. 14, 45, 46.

[153] *Nisga'a Final Agreement Act*, *supra* note 124 Ch. 16, para. 3(a). Federal officials have reportedly said this provision is "unlikely ever to be used": John Geddes, "Turmoil in Native Affairs" *Maclean's* (1 November 1999) 24 at 25.

[154] *Indian Self-Government Enabling Act*, R.S.B.C. 1996, c. 219.

[155] *Nisga'a Final Agreement Act*, *supra* note 124 Ch. 3, paras. 29(a), 30.

[156] For Nisga'a Fee-simple Lands, highways and rights of ways do not seem to be an issue since the Nisga'a acquire the lands "free and clear" of any interests other than one right-of-way and a few mineral claims set out in an appendix for Category A, and a few statutory covenants and a navigation light in Category B. See *ibid.* Ch. 3, paras. 50, 64; Appendices D-4, D-8.

[157] *Ibid.* Ch. 7, para. 2.

[158] *Ibid.* Ch. 3, paras. 55 to 60, 68 to 72.

Not only are highways and rights of way preserved and their extension foreseen, but limitations are placed on Nisga'a jurisdiction over them. On Nisga'a Fee-simple Lands, if the underlying fee-simple is expropriated, the lands will simply cease to be lands subject to the treaty.[159] On Nisga'a Lands, Nisga'a laws apply to secondary provincial roads and public utilities only to the extent that those laws do not impair the ability to use the right-of-way "for the purposes for which the right-of-way was granted" and to the extent they do not specify a more stringent standard of design or operation than federal or provincial law.[160]

The Province's or utility's ability to operate their rights of way is made fundamental because Nisga'a law is without effect if it diminishes them. Moreover, the Nisga'a may not be more demanding in terms of safety or environmental standards than would other governments. This is an express limitation on the powers of government recognized in the treaty, particularly the powers over structures and public works on Nisga'a lands.[161] While Nisga'a powers to regulate provincial secondary roads are limited, the Province preserves the title to a Nisga'a Highway corridor through Nisga'a Lands and also has the right to regulate adjoining Nisga'a Lands for the purposes of ensuring access and safety on the highway.[162]

## F. WATERS

The treaty gives Nisga'a Lands no greater extent than reserve lands in British Columbia, since *Nikal* and *Lewis* held reserves do not include adjacent rivers. The Province owns all submerged lands within the boundaries of Nisga'a Lands[163] and within Category A of Nisga'a Fee-simple Lands (except in three of the 16 former reserves they include)[164] as well as within all Category B lands.[165]

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159 *Ibid.* Ch. 3, paras. 53, 67.

160 *Ibid.* Ch. 7, para. 6.

161 *Ibid.* Ch. 11, paras. 69 to 71.

162 *Ibid.* Ch. 7, paras. 8, 43.

163 *Ibid.* Ch. 3, para. 22.

164 *Ibid.* para. 52.

165 *Ibid.* para. 65. Note that by virtue of para. 63, the province also has the right to take and occupy water privileges in Category B lands if they are required "for mining or agricultural purposes in the vicinity of the land," though it must pay "reasonable compensation." See *Land Act*, *supra* note 141, s. 50(1)(a)(iii).

Being without ownership of the submerged lands and without any property interest in the fish to be found there,[166] the Nisga'a have only the fishing rights provided by the treaty. The treaty defines the full extent of Nisga'a Aboriginal rights, since all other rights are expressly released[167] and nothing else enjoys the protection of the *Constitution Act, 1867*, section 35(1).

The treaty provides for a collective Nisga'a fish entitlement,[168] as determined in a Harvest Agreement that sets Nisga'a allocations. However the Harvest Agreement to be negotiated by the parties to the treaty will not itself constitute a treaty protected by section 35(1) of the *Constitution Act, 1982*.[169] Once the Harvest Agreement is in place, the Nisga'a will propose annual fishing plans to determine the method, timing and location of the harvest and the terms and conditions for sale of fish.[170] The annual plan has considerable force since it prevails over inconsistent provincial and federal legislation, but the minister of Fisheries has the power to approve, reject or vary the plan as proposed by the Nisga'a.[171] Once the total Nisga'a allocation has been negotiated in the Harvest Agreement and the minister has approved the method for harvesting as set out in the annual plan, exclusive Nisga'a jurisdiction over fisheries is limited to the distribution of the collective harvest entitlement among the members.[172] Even Nisga'a laws on the sale of fish harvested from that entitlement cannot conflict with federal or provincial law.[173]

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166 *Nisga'a Final Agreement Act, ibid.* Ch. 8, para. 3.

167 *Ibid.* Ch. 2, paras. 23, 26.

168 *Ibid.* Ch. 8, paras. 1, 2, 4, and 5.

169 *Ibid.* paras. 22, 24.

170 *Ibid.* paras. 84, 86.

171 *Ibid.* paras. 92, 90.

172 *Ibid.* paras. 69, 71.

173 *Ibid.* paras. 72, 73.

## VIII. CONCLUSION: THE STATE OF THE LAW AND THE WAY FORWARD

### A. THE CASE LAW

The extent of the lands held as reserves in British Columbia has received a narrow and restrictive interpretation in a number of recent cases. The result is to limit the powers band councils can exercise pursuant to the *Indian Act*.

The Supreme Court of Canada held in *St. Mary's* that where a band surrendered reserve land for sale and not for lease, the land ceases to be "in the reserve" within the meaning of section 83(1) of the *Indian Act*. This principle applies even if the surrender was conditional, so long as the condition has not come to pass. More recently, the British Columbia Court of Appeal has held in *Osoyoos (C.A.)* that land was no longer "in the reserve" after what amounted to an expropriation on behalf of the Province, since it found no intention by the federal Crown to retain the land. On this basis, the courts have held that even land under infrastructure, such as railway tracks and irrigation canals which bisect reserves are not "in the reserve." Lands which are not "in the reserve" are not subject to taxation by the band and it remains an open question whether they are subject to the band's other powers of zoning and regulation.

At the same time, the Supreme Court of Canada held in *Opetchesaht* that a simple permit was enough to give public utilities a right-of-way across reserves of indefinite duration, even in the absence of a formal surrender. Bands will therefore continue to have to deal with the limits these rights-of-way place on the use of reserve lands, pursuant to permits granted by band councils decades ago. Moreover, in *Westbank*, the Supreme Court of Canada also held that where a utility is designated a Crown agent under statute, it enjoys the provincial Crown's immunity from taxation under section 125 of the *Constitution Act, 1867*. As a result, bands will not be able to tax public utilities that are Crown corporations and occupy lands on their reserves. On the other hand, the immunity of the provincial Crown from other band council by-laws remains an open question. Finally, the Supreme Court of Canada held in *Lewis* and *Nikal* that adjoining rivers do not form part of most British Columbia reserves. As a result, band council by-laws concerning fishing do not apply on the rivers which form reserve boundaries.

Yet the Supreme Court's decision in *Nikal* also holds that members of a band can nonetheless have a constitutionally-protected Aboriginal right to fish in those rivers. Since Aboriginal rights are by definition collective,

a good argument can be made that as a First Nation, the band's members therefore have a collective right of self-government in order to determine the time and manner in which they carry out an activity related to lands or waters that is an integral part of their distinctive culture.[174] In the current state of the law, First Nations may find that they can gain the greatest latitude for self-government by asserting their Aboriginal rights as protected by the *Constitution Act, 1982*, section 35(1). The limits of *Indian Act* statutory powers may already have been reached.

### B. THE NISGA'A FINAL AGREEMENT

Unfortunately, when Aboriginal rights were the subject of negotiations to produce British Columbia's first modern treaty, the *Nisga'a Final Agreement Act*, the result was at best a partial shift from the limitations of *Indian Act* jurisdiction.

On the core Nisga'a Lands, the Nisga'a government retains jurisdiction even when lands are sold, but on the Nisga'a Fee-simple Lands (slightly less than half the total) title defines the land's treaty status. In addition, the vagaries of the reserve title have not been resolved before including existing reserves in the new treaty lands: owners of certain existing interests may still claim they held a fee-simple estate which removed their land from the reserve and are thus not part of treaty lands. The same problem arises for lands the Province may claim on the basis of having exercised in the past its purported right to build roads or to resume up to 1/20 of reserves for public works. However, for reserves included in the core Nisga'a Lands, the Province appears to have admitted it has no such title.

On Nisga'a Fee-simple Lands the Province has expropriation powers that could in any case remove lands from treaty status. On the core Nisga'a Lands the Province has the right to use up to 800 hectares for highways or public utility rights-of-way and the Nisga'a government may not legislate to impair their functioning nor hold them to higher regulatory standards than federal or provincial law.

The Nisga'a government's taxation powers under the treaty are actually narrower than those of a band council under the *Indian Act*, since it will only be able to tax Nisga'a interests on Nisga'a Lands. The negotiation of agreements to enlarge Nisga'a taxation powers is foreseeable, but such an agreement would only give Nisga'a government

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[174] The British Columbia Court of Appeal has already held that personal status may be determined by Aboriginal custom, thus recognizing self-government *in personam* if not *in rem*: *Casimel* v. *Insurance Corporation of British Columbia* (1993), [1994] 2 C.N.L.R. 22 (B.C.C.A.) at 30; see also, *Campbell* v. *British Columbia (Attorney General)*, [2000] 4 C.N.L.R. 1 (B.C.S.C.).

the tax base already available to band councils that enter into similar negotiations allowed for by provincial statute. The Nisga'a have conceded they have no title to submerged lands (with a very few exceptions), no property interest in the fish, and no harvesting rights except those to be negotiated. The agreement arising from those negotiations will not enjoy treaty status, and Nisga'a government will be left with exclusive jurisdiction only over the way in which the eventual Nisga'a entitlement is harvested.

However, an important innovation in the *Nisga'a Final Agreement Act* is that it provides for the creation of a category of core Nisga'a Lands that remain under Nisga'a jurisdiction even if the title to them is sold. It is time also to address the loss of jurisdiction over lands that has accompanied the confused history of the creation of British Columbia Indian reserves, as well as their lease, surrender, or expropriation.

### C. SOLUTIONS

Two categories of land are affected by the case law on the definition of the phrase "in the reserve" for the purposes of the *Indian Act*. The first is large parcels of former reserve land such as the 598 acres surrendered by the St. Mary's Band to Canada for use by Cranbrook as an airport. Decades later, the courts have ruled that the fact they were sold rather than leased removes them from the reserve and therefore from the Band's jurisdiction. The ideal solution would be to retroactively expand the definition of "designated lands" in sections 2(1) and 38(2) of the *Indian Act* to recognize a band's continuing underlying interest in lands surrendered with a reversionary interest. At the very least, the federal government should maintain legal title to these lands to ensure that when they are no longer needed for their current use, the lands can easily be returned to reserve status. Concretely, this means refraining from practices such as those under its airport privatization policy that has seen former reserve lands transferred outright to local municipalities. In addition, lands that were subject to compulsory taking, rather than surrendered, should receive at least equivalent protection.[175]

The situation is different with respect to narrow strips of land which, as in the case of railways, the courts have held are no longer part of the reserve. The best solution would be a simple expropriation of the underlying fee-simple and its addition to the reserve, leaving the railways

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[175] Also in British Columbia, the Penticton Band lost reserve land to airport use as a result of a federal expropriation during World War II. It has been obliged to request that a reversionary clause be inserted into the federal government's proposed sale of the land to the municipality: P. Barnsley, "Chief predicts big trouble" (May 1999) *Windspeaker* 8.

and other utilities with true easements or rights-of-way.[176] The cost incurred (if any, as the practical use of the property interest held by the railways would barely change) should be borne by the federal government, since it was the deficient fulfillment of its fiduciary duties that has left band councils in charge of jurisdictional patchworks.

Similarly, expropriation would be a way to restrict the rights of utilities to occupy reserve lands for rights-of-ways and easements under decades-old permits. In particular, the rights of utilities to dictate the use of lands adjoining their infrastructure could be reduced. The fact that many of them belong to provincial Crown corporations might make the federal government reluctant to exercise this power, though there is no good reason in law or policy why Crown agents operating in the commercial realm should be treated differently from railways.

Another difficulty is that as Crown agents, these provincially-owned utilities also enjoy a constitutional exemption from band taxation, which Parliament appears powerless to change. At the very least, Parliament should exercise its paramount legislative powers and make it clear that the provincial Crown is subject to band council by-laws when the Province or its agents are on reserve lands. In this way, band councils would have the power to make Crown-owned utilities conform to community standards, even if it seems they cannot be forced to contribute to the community through taxes.

An additional flaw in property taxation by bands operates even when the land in question is held to be within the reserve: a line of cases holds that the taxation power is not exclusive and that the Province and the municipalities it creates may tax property interests on reserves if they belong to anyone other than an Indian or band council.[177] Parliament should exercise its exclusive jurisdiction under section 91(24) of the *Constitution Act, 1867* and amend the *Indian Act* to ensure the taxation of property interests on reserve is within the exclusive jurisdiction of the bands so as to displace any provincial or municipal property-tax regimes with respect to non-Indian property-owners on reserve.

Finally, it is time that Canada, British Columbia, and First Nations address the lingering effects of the confusion over reserve creation in British Columbia. In most of the province, the boundaries for post-Confederation reserves were set by the late nineteenth century or the early years of the twentieth. It is at least surprising that the Province claims the

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[176] Writing before his appointment to the bench, Justice La Forest expressed the view that such an expropriation would be constitutional, despite some controversy in the older case law: G.V. La Forest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto Press, 1969) at 152.

[177] *Tsawwassen*, *supra* note 28.

process nevertheless did not actually end until decades later, in 1938, when a formal transfer of the underlying title to the federal government purportedly took place. More importantly, there is a fundamental injustice in the Province's argument that it delayed some essential part of the reserve creation process and, by its Order-in-Council 1036, could therefore leave the bands with reserves both smaller than those promised to them decades earlier and subject to the Province's right to subtract more land at any time.

The Province could demonstrate its goodwill by at least renouncing its claim that under Order-in-Council 1036 it may still "resume" up to 1/20 of reserve lands for public works in the future.[178] Of course, that power can in any case no longer exist: once jurisdiction over Indian reserves vested in the federal Crown, the provincial Crown lost the power to remove that status, absent federal consent. British Columbia cannot argue that its right to resume reserve land in the future was part of the title acquired by Canada, for no such right had crystallized at the time of the transfer and, if it exists, the right was subordinated to federal law when the land came under federal jurisdiction.[179]

If British Columbia maintains its position that the reserves did not vest in the Crown in right of Canada for the benefit of the bands until provincial Order-in-Council 1036 in 1938, it will continue to claim that it holds the fee-simple to reserve lands used for public works (such as highways) as of that date. The best way to end the debate would be for the Province to renounce any underlying fee-simple interests it might have, and see that they are added to the surrounding reserves, keeping only the easement or right-of-way needed for its public works.

If the Province refuses to clarify reserve title for the benefit of the bands, then the federal Crown should remove any doubt by using its expropriation powers as suggested above with respect to railways.[180]

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[178] *Land Act*, *supra* note 141, ss. 15(1)(b), 52(1). Two separate legal issues are raised by Order-in-Council 1036: first, the province alleges it excepted certain lands from its grant for the reserves; second, it alleges a right to "resume" part of the lands it admits it did grant. The first constitutes an exception and the province argues title to that land did not pass so as to form part of the Indian reserves; the second is a reservation and the province argues it created the right to take certain Indian reserve lands after 1938. See on this point *Re Monashee* v. *British Columbia* (1981), 28 B.C.L.R. 260 at 264-65 (B.C.C.A); *Gibbs* v. *Village of Grand Bend* (1995), 26 O.R. (3d) 644 at 653-55.

[179] *Attorney-General for Alberta* v. *Attorney-General for Canada*, *supra* note 122 at 367-68; *Canadian Pacific Railway Company* v. *Department of Lands and Forests*, [1923] S.C.R. 155 at 167. See also the *Federal Real Property Act*, R.S.C. 1985, c. F-8.4, s. 13: "Except as expressly authorized by or under an Act of Parliament, no person acquires any federal real property by virtue of a provincial Act."

[180] Canada has generally tried to have it both ways on this issue: the federal government has agreed with First Nations that the reserves existed before 1938, but it has agreed

Recently, the federal government has been willing to take the extraordinary step of expropriating provincial Crown lands in British Columbia at Nanoose Bay in order to preserve them as a naval base.[181] The federal government should be willing to do no less in order to keep British Columbia's Indian reserves from becoming jurisdictional checkerboards.

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with British Columbia that the province could exercise powers of resumption by virtue of Order-in-Council 1036. See *e.g.* the Statement of Defence of the Defendant Attorney General of Canada filed June 15, 1994 in *Williams* v. *H.M.T.Q. in right of British Columbia*, B.C.S.C., Smithers Registry No. 2236, at paras. 22 and 26.

[181] See *Human Rights Institute of Canada et al.* v. *Canada*, [1999] B.C.J. No. 2096 (S.C.), online: QL (BCJ) and *Human Rights Institute of Canada et al.* v. *Canada* (1999), [2000] 1 F.C. 475 (T.D.).