INDIAN CLAIMS COMMISSION

LOWER SIMILKAMEEN INDIAN BAND
VANCOUVER, VICTORIA AND EASTERN RAILWAY
RIGHT OF WAY INQUIRY

PANEL

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SUMMARY

LOWER SIMILKAMEEN INDIAN BAND
VANCOUVER, VICTORIA AND EASTERN RAILWAY RIGHT OF WAY INQUIRY
British Columbia

The report may be cited as Indian Claims Commission, *Lower Similkameen Indian Band: Vancouver, Victoria and Eastern Railway Right of Way Inquiry* (Ottawa, February 2008).

This summary is intended for research purposes only.
For a complete account of the inquiry, the reader should refer to the published report.

Panel: Commissioner D.J. Bellegarde (Chair),Commissioner J. Dickson-Gilmore, Commissioner S.G. Purdy

British Columbia – Indian Reserve Commission – McKenna-McBride Commission – Reserve Creation – Terms of Union, 1871; **Constitution** – *Constitution Act, 1867*; **Right of Way** – Expropriation – Railway – Reversionary Interest; **Compensation** – Criteria – Damages – Injurious Affection; **Fiduciary Duty** – Reserve Creation – Right of Way; **Indian Act** – Expropriation; **Reserve** – Compensation – Reserve Creation

THE SPECIFIC CLAIM

In 1995, the Lower Similkameen Indian Band submitted a specific claim alleging inadequate compensation for the taking of a right of way in 1905 through what are now its Indian Reserves 2, 7, and 8 for the use of the Vancouver, Victoria and Eastern Railway and Navigation Company (VV&E). The claim also asserted that because the VV&E has abandoned the line, the right of way has reverted to reserve status.

The claim was rejected in 1996. In April 2003, the Indian Claims Commission agreed to the Band's request to hold an inquiry into the rejected claim. The community session, including a site visit, was held at Keremeos on April 19–20, 2004. Thirty-seven community members testified. Counsel for the parties presented legal arguments at Penticton on January 26, 2005, based on previously filed briefs.

BACKGROUND

In 1878, Indian Reserve Commissioner Gilbert Sproat set aside certain lands in the Similkameen River valley for the Lower Similkameen Indian Band, from northwest of what is now Keremeos to the U.S. border. In 1884 and 1888, his successor Peter O'Reilly set aside further lands for the Band. The reserves were surveyed in 1889, and listed in 1902 in the Schedule of Indian Reserves in the Dominion.

In 1905, the VV&E requested, and was granted by order in council, a right of way through the Lower Similkameen reserves for its rail line, which was intended to convey ore from mines at Hedley and Princeton, upstream from Keremeos, to the United States, to link with its parent, the Great Northern Railway. A total of 116.84 acres was taken for the purpose.

Although the railway offered compensation of $25 per acre, the Indian Agent set the value of land at $5 per acre. An additional $2,370 was included in the compensation package for improvements made by individual band members and removal of buildings. The railway paid a total of $2,954.25, giving it possession.

The next year, Chief Newhumpsion complained that compensation for the reserve lands compared unfavourably to that paid to settlers in the area. Local Justice of the Peace R.C. Armstrong supported this complaint, writing that he had received $100 per acre for equivalent land. Superintendent A.W. Vowell in Victoria thereupon dispatched surveyor Ashdown Green to investigate the apparent discrepancy in values. Green reported that there were no grounds for disturbing the original compensation, and this view was accepted by the department.

The *Indian Act* made reference to arbitration respecting compensation for the compulsory taking of reserve lands. No arbitration ensued in this case.

The railway had significant impact on the reserves and its community. It displaced one village, divided individual holdings, caused injury and death to livestock, and generally disrupted life on the reserves.

In 1913, the McKenna-McBride Commission "confirmed" the reserves as shown in the Schedule of Indian Reserves of that year. The acreages so shown were not reduced for the right of way.

In 1938, the provincial government, in discharge of its obligation under the Terms of Union, 1871, conveyed the reserve lands, including the right of way, to Canada "in trust for the use and benefit of the Indians."

Rail traffic south of Keremeos ceased in 1972 with the wash-out of the bridge over the Similkameen River. The line above Keremeos had been abandoned in 1954. In 1985, the railway, by then the Burlington Northern, applied for and was granted permission by the Canadian Transport Commission to abandon the remainder of the line, from Keremeos to the U.S. border. The Band advised the Commission at the time that it did not object so long as the right of way was returned to it.

The status of the right of way is disputed not only by Canada and the Band but also by the Burlington Northern and Sante Fe Railway, as it now is, which lays claim to it.

ISSUES

Did Canada, at the time of the expropriation owe a statutory and/or fiduciary duty to the Lower Similkameen Indian Band to obtain adequate compensation based on fair market value and/or compensation as was provided to other land owners in the area for the lands taken by the VV&E Railway for railway purposes?

Did Canada breach a statutory and/or fiduciary duty to the Band to obtain adequate compensation based on fair market value and/or compensation as was provided to other land owners in the area for the lands taken by the VV&E Railway for railway purposes?

Did Canada owe a statutory and/or fiduciary duty to the Band to name an arbitrator pursuant to the *Indian Act* regarding the taking of the lands in this claim?

Did Canada breach a statutory and/or fiduciary duty to the Band with respect to the 1906 investigation conducted by Ashdown Green regarding the value of the lands taken by the VV&E Railway for railway purposes?

Did Canada breach a statutory and/or fiduciary duty to the Band to ensure that the lands taken by the VV&E Railway for railway purposes reverted back to Her Majesty the Queen and, particularly, to Her Majesty the Queen in Right of Canada and then to reserve status for the benefit of the Band once those lands were no longer required for railway purposes?

FINDINGS

Canada acknowledged from the outset that it owed a fiduciary duty to obtain adequate compensation for the Band. The level of such duty was in issue. As the Supreme Court of Canada has held, lands set aside for reserve in British Columbia did not fully become Indian reserves until conveyed by the province to Canada in 1938. Before that date, the fiduciary duty owed by Canada respecting the lands was a somewhat lesser duty than after the *Indian Act* reserves were created in 1938. There is nevertheless a substantial fiduciary duty in the pre–reserve creation state. In the Lower Similkameen case, band members, Canada, the province, and the surrounding community all believed in 1905 that reserves had been created. In this circumstance, Canada owed the highest pre–reserve creation fiduciary duty.

There was also a statutory duty arising from the *Railway Act, 1903* to ensure compensation to the Band as in the case of non-reserve lands. Compensation under the statute was to take injurious affection into account. There is also a common law duty to compensate where enjoyment of possession is reduced by Crown action.

The amount paid the Band, $5 per acre, was grossly disproportionate to that paid for non-reserve lands, the average of which was $104.91 per acre. The statutory requirement that compensation to the Band should be based on the value of equivalent non-reserve lands was therefore breached. Acceptance of such a low value fell seriously short of the standard of prudence required of a fiduciary. Canada thus breached its fiduciary duty to the Band. This breach was exacerbated by Canada's failure to consider the serious adverse effects on the reserves and community life, thus failing to account for injurious affection.

The *Indian Act* makes reference to arbitration. There was no statutory or fiduciary duty to initiate an arbitration, but the pre-reserve fiduciary duty required Canada to address seriously and conscientiously the valuation problem. This it did not do.

While there is basis for criticism of surveyor Ashdown Green's report, it is not possible to make a finding of breach of either statutory or fiduciary duty in respect of his investigation.

The right of way was taken under the *Railway Act, 1903*, which permitted the taking of provincial lands for railway purposes. What was taken was a mere easement, which ceased no later than 1985, when abandonment of the line was formally approved. The right of way, together with the other reserve lands, had been conveyed to Canada in trust for the Band in 1938. With the cessation of the easement, the full reserve interest in the right of way revived. This finding is supportable on both legal and equitable grounds.

RECOMMENDATIONS

That the Lower Similkameen Indian Band's claim for compensation be accepted for negotiation under Canada's Specific Claims Policy.

That Canada take the necessary steps, by litigation or otherwise, to ensure that the legal status of the former VV&E right of way lands is in every respect that of Indian reserve land set apart for the use and benefit of the Lower Similkameen Indian Band.

REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

Cases Referred To

Wewaykum Indian Band v. Canada, [2002] 4 SCR 245; *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816; *Kruger et al. v. The Queen*, [1986] 1 FC 3; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*); *Manitoba Fisheries Ltd. v. Canada*, [1979] 1 SCR 101; *Belfast Corporation v. O.D. Cars Ltd.* [1960] AC 490; *Fales v. Canada Permanent Trust Co.*, [1977] 2 SCR 302; *Minister of Highways (B.C.), v. British Pacific Properties*, [1960] SCR 561; *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746; *Canada (Attorney General) v. Canadian Pacific Ltd.*, [1986] 1 CNLR, affirmed [1986] BCJ No. 407 (QL), reaffirmed 2002 BCCA 478; *Canada (Attorney General) v. Canadian Pacific Ltd.*, 2000 BCSC 933, affirmed in part 2002 BCCA 478; *Reference re: British North America Act, 1867, s. 108 (B.C.)*, [1906] AC 204; *Reference re: Railway Act, s. 189 (Canada)*, [1926] SCR 163; *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85; *British Columbia (Milk Board) v. Grisnich (c.o.b. Mountainview Acres)*, [1995] 2 SCR 895; *A.G. v. DeKeyser's Royal Hotel Ltd.*, [1920] AC 508; *Canadian Pacific Limited v. Paul*, [1988] 2 SCR 654; *Canadian Pacific Limited v. Matsqui Indian Band*, [2000] 1 FC 325; *Squamish Indian Band v. Canada*, 2001 FCT 480; *Peter v. Beblow*, [1993] 1 SCR 980.

ICC Reports Referred To

Indian Claims Commission, *Sumas Band: Indian Reserve 6 Railway Right of Way Inquiry* (Ottawa, February 1995), reported (1996) 4 ICCP 3.

Treaties and Statutes Referred To

Indian Act, RSC 1886; *Railway Act, 1903*, SC 1903; *An Act Respecting the Vancouver, Victoria and Eastern Railway and Navigation Company*, SC 1898; *Railway Act*, RSC 1927; *An Act to grant public lands on the Mainland to the Dominion in aid of the Canadian Pacific Railway*, 1880, SBC 1880.

Other Sources Referred To

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982); John Mark Keyes, *Executive Legislation: Delegated Law Making by the Executive Branch* (Toronto: Butterworths, 1992); P.W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007); Donovan W.M. Waters, *Waters Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Carswell, 2005); A.H. Oosterhoff et al., *Oosterhoff on Trusts: Text, Commentary and Materials*, 6th ed. (Toronto: Thomson Carswell, 2004).

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PART I
INTRODUCTION

The Similkameen River flows southeasterly from its origins in British Columbia's Cascade Mountains, entering the state of Washington and emptying into the Okonagan River (Okanagan in Canada). From 1878 on, lands were set aside in the Similkameen Valley from above Cariamas (now Keremeos) south to the United States border in order to establish Indian reserves for the Lower Similkameen Indian Band.

In 1897 the Vancouver, Victoria and Eastern Railway and Navigation Company (VV&E), a subsidiary of the Great Northern Railway (now a part of the Burlington Northern and Santa Fe Railway), was incorporated.[1] In 1905 it asked the federal government for a right of way through some of the Lower Similkameen Band's reserve lands – specifically, Indian Reserves (IR) 3, 5, 7, 8, 10, and 10B. The request was granted. The right of way, for the most part 99 feet wide except for an expanded section at the international boundary, was constructed to connect the mine at Hedley, in the Similkameen River valley northwest of the reserves of the Lower Similkameen Band, to the Great Northern line in Washington state. As such, the right of way passed through the heart of the reserves, with no regard for the reserve communities, structures, and other improvements along the way. The railway operated until 1972 and was formally abandoned in 1985.

In this inquiry, the panel is required to consider issues related to the compensation made for the 116.84 acres taken from the reserves then known as IR 3, 5, 7, and 8,[2] as well as the nature of the reversionary interest in those lands following abandonment. These issues, as agreed to by the parties, are set out in Part III of this report.

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[1] The company was incorporated "for the purpose of constructing, equipping, maintaining and operating a line of railway from some point on Burrard Inlet or English Bay, at or near the City of Vancouver, in the Province of British Columbia, to the City of Westminister; thence eastward through the valley of the Fraser River and the southern part of British Columbia by the most feasible route to the City of Rossland," though that objective was never achieved. *An Act to Incorporate the Vancouver, Victoria and Eastern Railway and Navigation Company*, SBC 1897, c. 75, Preamble.

[2] These are the reserves put in issue by the Band in its claim. Because IR 2, 3, and 5 were amalgamated as IR 2 in 1959, the Band's claim is in respect to the current IR 2, 7, and 8. IR 10 and 10B are not included in the Band's claim, and we have not been asked to make any findings with respect to them.

With respect to compensation, the panel must consider whether Canada owed the Lower Similkameen people a statutory or fiduciary obligation, or both, to obtain adequate compensation for the lands taken, and, if so, whether Canada breached such obligation. A further issue is whether Canada was required to name an arbitrator to determine the adequacy of the compensation once it was questioned shortly after the taking.[3] The final issue respecting compensation concerns an investigation conducted in 1906 by the surveyor Ashdown Green regarding the value of the lands taken. The panel is required to determine whether Canada breached a duty by relying on this investigation.

MANDATE OF THE COMMISSION

The mandate of the Indian Claims Commission (ICC) is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister."[4] This Policy, outlined in the 1982 booklet published by the Department of Indian Affairs and Northern Development (DIAND) entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government.[5] The term "lawful obligation" is defined in *Outstanding Business*:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation", i.e., an obligation derived from the law on the part of the federal government.

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[3] In this report, we use the terms "take" and "taking" rather than "expropriate" and "expropriation" in order to be consistent with the terminology of the *Indian Act* and the *Railway Act, 1903*.

[4] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

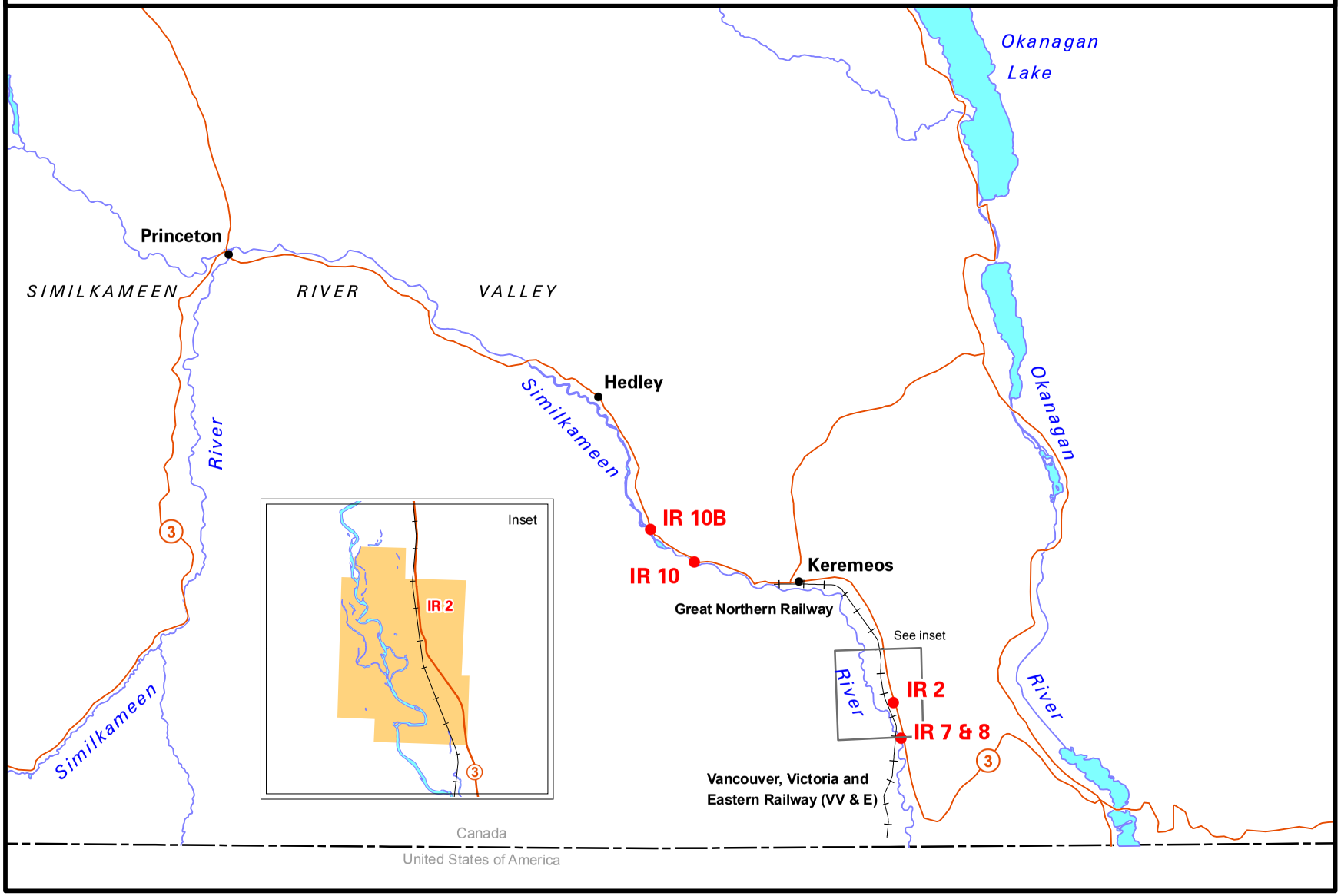
[5] Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted (1994) 1 ICCP 171–85 (hereafter *Outstanding Business*).

A lawful obligation may arise in any of the following circumstances:

i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
iv) An illegal disposition of Indian land.[6]

[6] *Outstanding Business,* 20, reprinted (1994) 1 ICCP 179.

Map 1 **Claim Area Map**



PART II

THE FACTS

In April 1878 the province of British Columbia appointed Gilbert Malcolm Sproat as Indian Reserve Commissioner. Later that year, in October, Sproat visited the Similkameen Valley, which he described as being narrow and gravelly, but valuable for winter grazing and for producing hay. He also found that most of the best land had already been pre-empted by settlers. He set aside lands which would eventually become IR 5, 7, 8, and 10, as well as some smaller pieces of land already occupied by Lower Similkameen band members. Because there was a great deal of uncertainty about what lands had not yet been taken by settlers and were still available for use by the Band, Sproat also temporarily reserved a larger tract of land.

Following his initial attempts to set down reserves for the Lower Similkameen people, Sproat resigned his position as Indian Reserve Commissioner and did not return to the Lower Similkameen Valley. In 1880 Peter O'Reilly became Indian Reserve Commissioner, but he did not go to the Similkameen Valley until 1884, six years after Sproat's visit. By this time, the provincial government had sold off most of the land temporarily reserved by Sproat, though O'Reilly was able to set aside IR 3 that autumn, and in 1888 he set aside IR 5.

In 1889 W.S. Jemmett surveyed the Similkameen Indian Reserves 3, 5, 7, 8, and 10. O'Reilly returned in 1893 and enlarged IR 10 by adding IR 10B. In 1902 the Schedule of Indian Reserves in the Dominion listed the lands surveyed as being set aside for the Lower Similkameen Band.

The Vancouver, Victoria and Eastern Railway and Navigation Company was incorporated in British Columbia in 1897 and brought under federal jurisdiction the following year. In October 1905 the railway's solicitors, McGiverin & Haydon, informed the Deputy Superintendent General that the company planned to build a railway line from the border with the United States to Keremeos, and that this project would require a right of way over IR 7 and 8. In November the company made a request for a right of way over IR 3, 5, 10, and 10B. McGiverin & Haydon stated that its client was anxious to start construction of the railway and had already begun the work in some areas. The law firm told the department that as far as it was concerned, a fair price for the reserve lands would be $25 per acre.

The department instructed the Indian Agent for the Kamloops-Okanagan Agency, Archibald Irwin, to provide a valuation of the lands required for the rights of way through the reserves. Agent Irwin valued the lands to be taken for the right of way at $5 per acre and made separate valuations for improvements, clearing, and cultivation, which would be paid directly to individual band members. The total valuation amounted to $2,954.25, with $584.25 allocated for the land, $2,070 allocated for improvements, and $300 for removing buildings.

A.W. Vowell, the Indian Superintendent located in Victoria, forwarded Agent Irwin's valuations to the Secretary of the Department of Indian Affairs on November 15, 1905, noting that Irwin had paid considerable attention to the valuations, that the agent for the VV&E concurred with them, and that the VV&E was anxious for a speedy settlement. Surveyor J.K. McLean reviewed Irwin's figures and concluded they were fair. Less than two weeks after Vowell had forwarded the valuations to Ottawa, Secretary J.D. McLean wrote to the railway company's solicitors, informing them that they could have immediate possession of the rights of way on payment of $2,954.25. On behalf of the railway, McGiverin & Haydon completed payment on December 10, 1905.

On December 23, 1905, through order in council, the Minister recommended that under the authority of the *Indian Act*, the land should be sold to the company. This order in council was amended a month later, in January 1906, because the first order had misnamed the railway company. On March 20, 1906, two letters patent were issued for the rights of way, one for the line running through IR 3, 5, 7, and 8, and the other for the right of way through IR 10 and 10B. Each patent states it is for the absolute purchase of the right of way lands.

Six weeks later, on May 1, 1906, Chief Johnie Newhumpsion of the Lower Similkameen Band wrote the first of a number of letters to the Department of Indian Affairs, protesting the valuations and stating that the Band had not received any money. On May 21 the Secretary of the department credited the Band with the amount owed for the land and forwarded a cheque for $2,070 to Vowell to be paid to the band members for improvements. The Secretary also responded to Chief Newhumpsion's letter, stating that the valuations were very liberal. Agent Irwin also replied, defending his actions and pointing out that the Band had been allowed almost $100 per acre for good cultivated land.

A local justice of the peace, R.C. Armstrong, wrote to the Department of Indian Affairs on behalf of the Band, saying that he had received $100 per acre for uncleared bush land, whether cultivated or not, which was adjacent to that belonging to the Band. The Band wanted arbitration, he stated, and also wanted Armstrong to act for it.

Although Irwin claimed that the Band had received $100 per acre, he was in fact allocating only $5 per acre for the land. The difference between the valuations for the Band's land and Armstrong's land was not lost on the Secretary of the department, who contacted Indian Superintendent Vowell and expressed concern about the disparity between the land valuations for the Lower Similkameen Band and for R.C. Armstrong. Vowell observed that Indian lands should be valued at the same rate as lands outside the reserves, something that Irwin had apparently not done. The Secretary noted that because the matter with the railway was closed, it would be difficult, if not impossible, to reopen it. Nevertheless, the Superintendent instructed Vowell to investigate the disparity in the valuations.

Vowell responded that he would review the matter and commented that he could not understand how the Agent could value land at $5 per acre if adjoining land was valued at $100 per acre. The prices paid to settlers for the rights of way through non-reserve land ranged from $50 to $124.92 per acre, the average being $104.91 per acre.

In August 1906 Vowell assigned surveyor Ashdown Green to investigate Irwin's valuations. Later that month Green visited the reserves, in the company of Agent Irwin, and reported on August 27, 1906. The next summer Ashdown Green learned that Irwin had been instructed to value each parcel of land irrespective of any arrangements made with adjacent settlers. Green reviewed the prices paid for each parcel of land as well as payments made for the improvements and concluded that the average price for the land taken from IR 3, 5, 7, and 8 was $24.85 per acre. He also reviewed the value of lands surrounding the reserve and the Provincial Government Assessment Roll for 1906. These rolls show that wild land in the Similkameen Valley had an assessed value for tax purposes of between $1.25 to $5.00 per acre. He examined the prices that had been paid for non-reserve lands and acknowledged that they were generally between $50 and $100 per acre. Green looked specifically at R.C. Armstrong's land and reported that the justice of the peace had indeed been paid

$100 per acre, though he himself would have valued it much lower. He assumed that the railway company had been willing to pay the higher figure to avoid the risk of arbitration.

Green concluded that the general value of lands in the Similkameen Valley was low, because of the lack of water, and that Agent Irwin's valuation of $5 per acre was very liberal, with the amounts paid for improvements far in excess of their worth. He acknowledged that land values were rising in other nearby areas, but thought that the prices were inflated and would return to a real level once the railway was finished.

During his trip to the valley, Ashdown Green had visited Armstrong. He explained in his report that he told Armstrong he did not agree with the values put on his land at the time of sale. In Armstrong's account of the meeting, however, Green made such outrageous statements that Armstrong could only conclude that someone had been paid to lie about the land. As an example, he pointed to Green's statement that the land was mostly stony. He agreed that a little of the land was stony, but most, he stated, was good fruit land as long as there was water for irrigation. Green, he wrote, was a "coast man," the wrong type of person to value land in the interior.

The money for improvements was paid to the band members at a meeting arranged by Agent Irwin and attended by Green. Later, the fact that the band members accepted the payment was cited by Indian Superintendent Vowell as proof that they accepted Green's valuation and the amount paid to them. When Indian Superintendent Vowell forwarded Ashdown Green's report to the Secretary of the Department of Indian Affairs in Ottawa on August 29, 1906, he observed that the Indians had apparently been dealt with liberally and had no reasonable cause for complaint.

Chief Newhumpsion and the band members continued to complain, however, and in 1911 Armstrong raised the issue again. The department responded that the matter had been thoroughly investigated in 1906.

In 1913 the Department of Indian Affairs compiled another Schedule of Indian Reserves. It lists IR 7 and 8 as confirmed and IR 3 and 5 as approved. The acreage listed for the reserves was the same as that for 1902, with no adjustment, it seems, for the rights of way.

Indian Agent Fred Ball reported in 1927 that band members were still asking him questions about the right of way. For them, he stated, it remained a live question.

In 1938 the provincial BC government dealt with the legal status of the lands occupied by the Lower Similkameen people, as well as the lands occupied by most of the First Nations in British Columbia. Although some of the lands in the Similkameen Valley had been surveyed and set aside as early as 1878, the formal requirements of the Terms of Union of 1871, when British Columbia entered Confederation, had not yet been met. When the McKenna-McBride Commission (formally the Royal Commission on Indian Affairs for the Province of British Columbia) examined the reserved lands in the Similkameen Valley in the years 1913–15, the Commissioners issued minutes of decision confirming the reserves. Finally, in 1938, the provincial government passed Order in Council 1036, which transferred title to the reserved lands to Canada, to be held in trust for the use and benefit of the Indians. The acreage transferred from the province to the federal government, as listed in the schedules attached to the order in council, was the same as that listed in the Schedule of Indian Reserves in 1902.

In 1944 Canada approved the lease of the VV&E's railway to the Great Northern Railway Company of Minnesota, which used the lines for 10 years, until 1954. At that time the company applied to the Board of Transport Commissioners to abandon that portion of the rail line that ran through IR 10. In 1956, the government of British Columbia authorized the acquisition of the abandoned rights of way for the use of the Department of Highways. The province purchased the land from the Great Northern Railway for $1 and acquired the certificates of title to the land.

In 1970, Burlington Northern Inc., the successor to the Great Northern Railway, informed the federal government that it was studying further abandonment of the line but had not yet made a final decision. Two years later, when a flood washed away the railway bridge, the line became impassable. In response, the railway developed a truck route over the affected part of the right of way, and the bridge was never rebuilt.

In 1977 the Lower Similkameen Indian Band contacted Burlington Northern to find out how it could reacquire the rights of way through IR 2, 7, and 8, IR 2 being the amalgamation of what had previously been IR 3 and 5. The company responded that no decision had been made about abandoning the line, but it noted the Band's interest in possibly purchasing the land.

After several years of correspondence among the Band, the company, and the governments of both the United States and Canada, the Burlington Northern Railway officially applied to the

Railway Transport Committee (RTC) in 1985 for permission to abandon the railway between Keremeos and the international boundary. After an investigation in which the RTC reported that the line was impassable and invited comment from the public, the committee concluded that abandonment was in the public interest. Among the comments received was one from the Lower Similkameen Band, stating that the Band had no objection to the abandonment of the line as long as the rights of way were returned to the Indians.

PART III

ISSUES

The Indian Claims Commission is inquiring into the following five issues.

Compensation

1 Did Canada, at the time of the expropriation of the lands referred to in the Claim Submission of the Lower Similkameen Indian Band, owe a statutory and/or fiduciary duty to the Lower Similkameen Indian Band to obtain adequate compensation based on fair market value and/or compensation as was provided to other land owners in the area for the lands taken by the Victoria, Vancouver and Eastern Railway for railway purposes?

2 Did Canada breach a statutory and/or fiduciary duty to the Lower Similkameen Indian Band to obtain adequate compensation based on fair market value and/or compensation as was provided to other land owners in the area for the lands taken by the Victoria, Vancouver and Eastern Railway for railway purposes?

3 Did Canada owe a statutory and/or fiduciary duty to the Lower Similkameen Indian Band to name an arbitrator pursuant to section 35 of the 1886 *Indian Act* (as amended in 1887 and later became section 46 of the 1906 *Indian Act*) regarding the taking of the lands in this claim? If yes, was this obligation(s) breached?

4 Did Canada breach a statutory and/or fiduciary duty to the Lower Similkameen Indian Band with respect to the 1906 investigation conducted by Ashdown Green regarding the value of the lands taken by the Victoria, Vancouver and Eastern Railway for railway purposes?

Reversionary Interest in Land

5 Did Canada breach a statutory and/or fiduciary duty to the Lower Similkameen Indian Band to ensure that the lands taken by the Victoria, Vancouver and Eastern Railway for railway purposes reverted back to Her Majesty the Queen and, particularly, to Her Majesty the Queen in Right of Canada and then to reserve status for the benefit of the Lower Similkameen Indian Band once those lands were no longer required for railway purposes?

PART IV

ANALYSIS

ISSUE 1 DUTY TO OBTAIN COMPENSATION

1 Did Canada, at the time of the expropriation of the lands referred to in the Claim Submission of the Lower Similkameen Indian Band, owe a statutory and/or fiduciary duty to the Lower Similkameen Indian Band to obtain adequate compensation based on fair market value and/or compensation as was provided to other land owners in the area for the lands taken by the Victoria, Vancouver and Eastern Railway for railway purposes?

This issue requires the panel to consider the following questions:

1 Did Canada owe either a statutory or a fiduciary duty, or both, to the Lower Similkameen Band with respect to compensation for the taking[7] of the lands for the right of way of the Victoria, Vancouver and Eastern Railway and Navigation Company ("VV&E")?

2 If Canada did owe such a duty or duties, how is the compensation determined?[8]

Reserve Land Selection and Surveys

The creation of reserves for the Lower Similkameen Indian Band began in 1878 with the somewhat imprecise setting aside of lands by Indian Reserve Commissioner Gilbert Malcolm Sproat, and it was not completed until 50 years later with British Columbia's Order in Council 1036.[9]

In April 1878 Mr Sproat was appointed Indian Reserve Commissioner by the BC provincial government, with authority to make "decisions regarding Indian land questions in the Electoral District of Yale."[10] In October of that year, Sproat visited the Similkameen Valley to set aside

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[7] "Expropriation" does not appear in either of the statutes purportedly authorizing the taking of lands: *Indian Act*, RSC 1886, c. 43, as amended, or *Railway Act, 1903*, SC 1903, c. 58. Following statutory usage, we have employed the word *take* and its cognates throughout in preference to *expropriate*.

[8] The factual issue of the adequacy of compensation, assuming it was required, is to be addressed under Issue 2. Issue 1 requires only the determinations of law.

[9] British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 381).

[10] British Columbia Order in Council 615-1878, April 26, 1878, BC Archives (BCARS), GR0113 (ICC Exhibit 1c).

reserves for the "the Cariamas Indians."[11] The lands he reserved would later form IR 5, 7, 8, and 10, but at the time an impending winter and settlers' pre-emptions made any determination of available lands almost impossible.[12] Sproat therefore "temporarily reserved" those portions of the valley "where cultivation was progressing or seemed possible."[13] These temporary reserves, stretching the length of the valley from the Ashnola River west of Keremeos to the United States border, were intended to protect the interests of the Band until Sproat could return to finalize these and additional reserves for the people of the Lower Similkameen.[14]

Sproat resigned in 1880[15] and was replaced by Peter O'Reilly.[16] When O'Reilly returned to the valley four years later, he discovered that the provincial government had sold most of the temporary reserves to settlers.[17] He moved with relative speed to secure the remaining lands and, in September 1884, issued a minute of decision setting aside 1,920 acres of land bordering the Similkameen River and within Sproat's original temporary reserve.[18] These lands would later become IR 3. In 1888 he set aside a further 960 acres adjoining IR 3, which became IR 5.[19]

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[11] G.M. Sproat, Indian Reserve Commissioner, to Chief Commissioner of Lands and Works, February 13, 1879, no file reference available (ICC Exhibit 1a, p.13). "Cariamas" is the older spelling of Keremeos.

[12] G.M. Sproat, undated memorandum, no file reference available (ICC Exhibit 1a, pp. 19–20).

[13] G.M. Sproat, Minute of Decision, October 12, 1878, no file reference available (ICC Exhibit 1a, pp. 7–9).

[14] G.M. Sproat, undated memorandum, no file reference available (ICC Exhibit 1a, pp. 7–9).

[15] Order in Council PC 1880-1334, July 19, 1880, Library and Archives Canada (LAC), RG 2, vol. 2762 (ICC Exhibit 1d, p. 1).

[16] Order in Council PC 1880-1334, July 19, 1880, LAC, RG 2, vol. 2762 (ICC Exhibit 1d, pp. 2–3); Order in Council PC 1881-532, April 5, 1881, LAC, RG 2, vol. 2763 (ICC Exhibit 1e, pp. 1–3).

[17] P. O'Reilly, Indian Commissioner, to Chief Commissioner of Lands and Works, November 29, 1884, no file reference available (ICC Exhibit 1a, p. 26).

[18] Minute of Decision, author unidentified, September 22, 1884, no file reference available (ICC Exhibit 1a, p. 24).

[19] Minute of Decision, P. O'Reilly, Indian Reserve Commissioner, October 30, 1888, no file reference (ICC Exhibit 1a, p. 28).

In 1889 Dominion Land Surveyor W.S. Jemmett surveyed Lower Similkameen Indian Reserves 3, 5, 7, 8, and 10. IR 7 and 8, located south of Keremeos near the United States border, were said to contain 3,800 acres, while IR 10, west of Keremeos, comprised 4,153 acres.[20] The plans of these three reserves were approved by the Chief Commissioner of Lands and Works in1891.[21] Jemmett found IR 3 and 5, lying along the river between Keremeos and IR 7 and 8, to contain 1,750 and 1,278 acres, respectively, and the Chief Commissioner of Lands and Works approved the plan of these reserves in1895.[22]

In its Schedule of Indian Reserves in the Dominion for 1902, the Department of Indian Affairs listed reserves that had been set aside for the Lower Similkameen Band. IR 3, 5, 7, and 8 were recorded as "confirmed,"[23] with acreages as shown on the approved survey plans: IR 3 as 1,750 acres; IR 5 as1,278 acres, and IR 7 and 8, together referred to as "Skemeoskuankin," with a combined area of 3,800 acres.[24] The reserve sizes appearing on the 1902 Schedule match the acreages that appear on the approved plans for each reserve.[25] Errors in the 1899 survey of IR 7 and 8 led to a 1902 re-survey of those reserves, resulting in their being found to have a combined acreage

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[20] Natural Resources Canada, Plan BC 25, Canada Lands Surveys Records (CLSR), "Plan No. III of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia, surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7f).

[21] F.G. Vernon, Chief Commissioner of Lands and Works, to P. O'Reilly, Indian Commissioner, April 28, 1891, no file reference available (ICC Exhibit 1a, pp. 34–35).

[22] Natural Resources Canada, Plan BC 23, CLSR, "Plan No. 2 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia," surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7a).

[23] Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 61 (ICC Exhibit 1a, p. 46).

[24] Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 61 (ICC Exhibit 1a, p. 46).

[25] Natural Resources Canada, Plan BC 24, CLSR, "Plan No. 1 of the Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia," surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7d); Natural Resources Canada, Plan BC 23, CLSR, "Plan No. 2 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia," surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7a).

of 4,075 acres.[26] This amendment was approved in December 1902, after compilation of the dominion schedule.

The VV&E Right of Way

The VV&E had been incorporated under provincial law in 1897 and brought within federal jurisdiction the following year.[27] As a railway company, it was able in due course to take advantage of the provisions of the *Railway Act*, *1903* that provided for the taking of Crown lands by railways with the consent of the Governor in Council:

> 134. No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council; but with such consent, any such company may, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, but not alienate, so much of the lands of the Crown lying on the route of the railway as have not been granted or sold, and as is necessary for such railway ... and whenever any such lands are vested in the Crown for any special purpose, or subject to any trust, the compensation money which the Company pays therefor shall be held or applied by the Governor in Council for the like purpose or trust.[28]

The Act also provided for the taking of reserve lands:

> 136. No company shall take possession of, or occupy, any portion of any Indian reserve or lands, without the consent of the Governor in Council; and when, with such consent, any portion of any such reserve or lands is taken possession of, used or occupied by any company, or when the same is injuriously affected by the construction of any railway, compensation shall be made therefor as in the case of lands taken without consent of the owner.[29]

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[26] A.W. Vowell, Indian Reserve Commissioner, to Deputy Commissioner of Lands and Works, December 3, 1902, no file reference available (ICC Exhibit 1a, p. 48); Natural Resources Canada, Plan BC 1028, CLSR, "Amended Plan Nos. 7, 8, 12 & 12A, Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia," surveyed by F.A. Devereaux, PLS, 1900 and 1902 (ICC Exhibit 7k).

[27] *An Act Respecting the Vancouver, Victoria and Eastern Railway and Navigation Company*, SC 1898, c. 89, s. 1 (ICC Exhibit 6i, p. 1).

[28] *Railway Act, 1903*, SC 1903, c. 58, s. 134 (ICC Exhibit 6c, p. 40).

[29] *Railway Act, 1903*, SC 1903, c. 58, s. 136 (ICC Exhibit 6c, p. 40).

Relying, presumably, on these provisions, the railway's Ottawa solicitors, McGiverin & Haydon, wrote on October 17, 1905, to the Deputy Superintendent General of Indian Affairs as follows:

> We are acting on behalf of the Vancouver Victoria and Eastern Railway and Navigation Company.
>
> Plans for the construction of the section of this Company's railway between the United States line and Cariamas, B.C. have been approved by the Railway Commission and this portion of the line crosses Indian Reserves Nos. 7 and 8.
>
> We beg to offer herewith plans of the Company's right of way across these Reserves over the location in question and these plans have been certified in the usual way by the Chief Engineer of the Railway Commission.
>
> We are asking if you can give your immediate consideration to the right of way asked for as our clients are most anxious to get on with construction work having the contractors in the field.[30]

On November 3, 1905, the solicitors made a further request for a right of way through IR 3, 5, 10, and 10B.[31] Plans for this extension, signed by the Deputy Minister of Railways and Canals in October 1905, accompanied the letters.[32]

The Department of Indian Affairs then conducted the valuations discussed under Issue 2 of this report, and, on November 28, 1905, the Secretary of the department wrote to McGiverin &

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[30] McGiverin & Haydon, Barristers, Solicitors & Notaries, to Deputy Superintendent General of Indian Affairs, October 17, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 53).

[31] McGiverin & Haydon, Barristers, Solicitors & Notaries, to Deputy Superintendent General of Indian Affairs, November 3, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 54).

[32] Natural Resources Canada, Plan 695, CLSR, "Vancouver, Victoria and Eastern Rwy. and Navigation Company through Reserve No. 8, Similkameen Group B.C.," surveyed by Jas. Hislop, PLS, no date (Exhibit 7o); Natural Resources Canada, Plan 696, CLSR, "Vancouver, Victoria and Eastern Rwy. and Navigation Company, R. of Way Plan through Indian Reserve No. 7, Similkameen Group B.C.," surveyed by Jas. Hislop, PLS, undated (ICC Exhibit 7p); Natural Resources Canada, Plan 698, CLSR, "V.V. & E. Ry., Osoyoos Division – Yale District B.C., Right of Way Required Across Indian Reserve No. 3," June 2, 1905 (ICC Exhibit 7r); Natural Resources Canada, Plan 699, CLSR, "V.V. & E. Ry., Osoyoos Division – Yale District B.C., Right of Way Required Across Indian Reserve No. 5," June 3, 1905 (ICC Exhibit 7s).

Haydon notifying them that VV&E could have "possession of the right of way upon payment to this Department of $2954.25."[33] Two payments were made, the second on December 10, 1905.[34]

An order in council authorizing the taking of the requested right of way, purportedly under section 35 of the *Indian Act* of 1886 as amended in 1887, was made on December 23, 1905:

> On a Memorandum dated 15th December, 1905, from the Superintendent General of Indian Affairs, stating that the Victoria, Vancouver and Eastern Railway Company has applied to the Department of Indian Affairs for right of way through reserves Nos. 3, 5, 7, 8, 10 and 10B of the Lower Similkameen Band of Indians, in the Osoyoos Division of Yale District, in the Province of British Columbia, and has deposited with the Department of Indian Affairs a plan of the land required, with a certificate endorsed thereon of the Chief Engineer of the Department of Railways and Canals that the Land applied for is actually required for railway purposes and is such as the company should be allowed to acquire.
>
> The Minister, knowing of no objection to the railway company being allowed to acquire the land above referred to, recommends that, under the provisions of Section 35 of the Indian Act, as amended by Section 5 of Chapter 33, 50–51 Victoria, authority be given for the sale of the land to the said Company upon such terms as may be agreed upon.
>
> The committee submits the same for approval.[35]

As the railway was misnamed in this order in council, another one was made on January 22,1906, correcting the name to "Vancouver, Victoria and Eastern Railway and Navigation Company."[36]

Section 35 of the *Indian Act*, RSC 1886, c. 43, as amended by SC 1887, c. 33, s. 5, provided in relevant part as follows:

> No portion of any reserve shall be taken for the purposes of any railway, road or public work without the consent of the Governor in Council.

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[33] J.D. McLean, Secretary, Department of Indian Affairs, to McGiverin & Haydon, Barristers, Solicitors & Notaries, November 28, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 66).

[34] McGiverin & Haydon, Barristers, Solicitors & Notaries, to Secretary, Department of Indian Affairs, December [10], 1905, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 76–77).

[35] Order in Council, December 23, 1905, no file reference available (ICC Exhibit 1a, p. 80).

[36] Order in Council, January 22, 1906, no file reference available (ICC Exhibit 1a, p. 81).

On March 20, 1906, letters patent were issued for the "absolute purchase"of IR 3, 5, 7, and 8, the conveying term of which was as follows:

> We by these Presents, do grant, sell, alien, convey and assure unto the said The Vancouver Victoria and Eastern Railway and Navigation Company, their successors and assigns forever: all these parcels or tracts of land ... composed of the Right of Way of the said Company through Indian Reserves numbers seven, eight, three and five of the Lower Similkameen Indians.[37]

Events Confirming the Reserves

In 1913 a further Schedule of Indian Reserves in the Dominion, compiled by the Department of Indian Affairs, was released. This schedule lists IR 7 and 8 as "confirmed" and IR 3 and 5 as "approved" for the Lower Similkameen Band.[38] The reserves have the same numbers and acreages as those listed in the 1902 Schedule: IR 3 being 1,750 acres, IR 5 being 1,278 acres, and IR 7 and 8 together containing 3,800 acres (instead of 4,075 acres as re-surveyed in 1902).[39] An additional notation appears for each of these reserves: "Right of way of the V.V. & E. Ry. and Nav. Co. through this reserve." However, no specific acreage for the rights of way were listed, and the reserve acreage was not reduced to account for the rights of way.[40]

Later in 1913, the Royal Commission on Indian Affairs for the Province of British Columbia, known as the McKenna-McBride Commission, examined the Lower Similkameen reserves and interviewed the occupants about land use and some of the characteristics of the land. After their inspection, the Commissioners issued minutes of decision confirming the Lower Similkameen reserves. The first minute, dated November 22, 1913, ordered that IR 3 and 5 "BE CONFIRMED as now

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[37] Letters Patent No. 14388, March 20, 1906, no file reference available (ICC Exhibit 1a, pp. 84–85).

[38] Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913*, 105 (ICC Exhibit 1a, p. 252). Given that IR 3, 5, 7, and 8 had all been listed in the 1902 Schedule as "confirmed," it is not clear why different terminology was employed in the 1913 Schedule.

[39] Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913*, 105 (ICC Exhibit 1a, p. 252).

[40] Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913*, 105 (ICC Exhibit 1a, p. 252).

fixed and determined and shewn in the Official Schedule of Indians Reserves, 1913."[41] IR 3 contained 1,750 acres in total,[42] while IR 5 contained 1,278 acres.[43] The Commissioners valued 150 acres at $100 per acre, 450 acres at $60 per acre, and the balance as "benchland worthless without irrigation facilities."[44] Another minute of decision, dated November 22, 1913, ordered that "Skemeoskuankin Reserves Nos. 7 and 8, Similkameen District of the Lower Similkameen Tribe, BE CONFIRMED as now fixed and determined and shewn in the Official Schedule of Indian Reserves, 1913."[45] These reserves, containing 3,800 acres in total, are described as "range with cultivable bottomland," including 500 acres of "choice cleared meadow" and 1,000 acres of uncleared bottomland. Most of the land was said to contain "fairly good soil" that supported the production of grain, fruit, and hay; good timber was also available. The Commissioners valued 500 acres at $100 per acre, 1,000 acres at $60 per acre, 1,000 acres at $30 per acre, and 1,300 acres at $20 per acre.[46]

On July 29, 1938, the British Columbia government passed Order in Council 1036. This order read as follows:

> THAT under authority of Section 93 of the "Land Act," being Chapter 144, "Revised Statutes of British Columbia, 1936," and Section 2 of Chapter 32, "British Columbia Statutes 1919," being the "Indian Affairs Settlement Act," the lands set out in schedule attached hereto be conveyed to His Majesty the King in the right of the Dominion of Canada in trust for the use and benefit of the Indians of the Province of British Columbia, subject however to the right of the Dominion Government to deal

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41 Minute of Decision, November 22, 1913, in Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, pp. 718–19 (ICC Exhibit 1a, pp. 361–62).

42 Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, 701, 704 (ICC Exhibit 1a, pp. 344, 347).

43 Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, 701, 704 (ICC Exhibit 1a, pp. 344, 347).

44 Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, 701, 704 (ICC Exhibit 1a, pp. 344, 347).

45 Minute of Decision, November 22, 1913, in Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, 719 (ICC Exhibit 1a, p. 362).

46 Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, 702, 704 (ICC Exhibit 1a, pp. 345, 347).

> with the said lands to such manner as they may deem best suited for the purpose of the Indians.[47]

Reserves 2–13 of the Lower Similkameen Band were listed in the schedule to this order. The acreages given in the schedule were identical to those listed in the 1902 and 1913 Dominion Schedules,[48] except that the combined area of IR 7 and 8 is corrected for the 1902 re-survey. Thus, IR 3 was listed at 1,750 acres, "Joe Nahumpcheen" IR 5 at 1,278 acres, and "Skemeoskuankin" IR 7 and 8 at 4,075 acres.[49] The acreages of IR 3, 5, 7, and 8 were not adjusted on account of the right of way.[50] Nor was a reduction made for the railway right of way through IR 10, though the acreage of that reserve was reduced by 2.6 acres, apparently for an irrigation ditch right of way.[51]

Indian Reserve Creation in British Columbia*: Wewaykum*

The Band's claim that is the subject of this inquiry was rejected by the Department of Indian Affairs by letter of September 9, 1996, and accepted for inquiry by the Indian Claims Commission on April 10, 2003. During that interval, on December 6, 2002, the landmark decision of the Supreme Court of Canada in *Wewaykum Indian Band v. Canada*[52] was released, dealing with the issue of reserve creation in British Columbia and the application of fiduciary principles to Indian lands. This

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[47] British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 381).

[48] Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 61 (ICC Exhibit 1a, p. 46); Schedule of Indian Reserves in the Dominion, Supplement to *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913*, 105 (ICC Exhibit 1a, p. 252).

[49] British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 384).

[50] British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 384).

[51] British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 385); see also Department of Mines and Resources, Indian Affairs Branch, *Schedule of Indian Reserves in the Dominion of Canada, Part 2: Reserves in the Province of British Columbia*, March 31, 1943, 111–13 (ICC Exhibit 1a, pp. 394–96).

[52] *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245.

decision therefore played no part in Canada's rejection of the Band's claim, but it assumed significant proportions in the inquiry. It is appropriate here to explain that decision briefly.

In the context of a dispute between the Wewaykum and Wewaikai Indian Bands and between the bands and Canada, Mr Justice Binnie explained for a unanimous court how reserves were created in British Columbia: "Federal-provincial cooperation was required in the reserve creation process,"[53] he wrote, because neither level of government had the constitutional ability to create reserves on its own. The federal government had jurisdiction over Indians and Indian lands, but no land in British Columbia to set apart;[54] the provincial government, in contrast, as the holder of title to Crown lands, had no power to create reserves. "At the highest levels of both governments," Binnie J stated, "the *intention* was to proceed by mutual agreement."[55]

The Court concluded that the mutual intention to create Indian reserves in British Columbia was accomplished by British Columbia Order in Council 1036 of July 29, 1938, which, as already noted, conveyed "the lands set out in schedule attached hereto [listing Indian Reserves 2–13 of the Lower Similkameen Band] ... to His Majesty the King in the right of the Dominion of Canada in trust for the use and benefit of the Indians of the Province of British Columbia."[56]

It follows from this finding of the Supreme Court that, before 1938, what had been thought to be reserves set apart pursuant to the *Indian Act* were not. Provincial surveys, federal treatment of the lands as reserved, and acceptance by a band may have indicated intention but did not constitute the reserve-creating act. Before Order in Council 1036, reserves were in a pre–reserve creation state. Speaking of the degree of protection to which the pre–*Indian Act* lands were entitled in the case before the Court, Binnie J wrote:

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[53] *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 15.

[54] The exception being the Railway Belt and Peace River Block, which were federal lands from 1880 until 1930 as a result of the grant by British Columbia in aid of construction of the Canadian Pacific Railway. These lands were not discussed in *Wewaykum*.

[55] *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 51. Emphasis in original.

[56] British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 381); see *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at paras. 18–19.

> [The] survey of a proposed reserve was not enough to create a reserve within the meaning of the *Indian Act* but, if approved by the provincial government, the effect was to withdraw the subject lands from other inconsistent uses, such as preemption by settlers. *It thus created a measure of what might be termed administrative protection*, but this fell well short of the various statutory protections under the federal *Indian Act*.[57]

A fiduciary duty may apply in this context, but it is a lesser duty than obtains when an *Indian Act* reserve has been created. Mr Justice Binnie went on to discuss the content of the Crown's fiduciary duty both before and after reserve creation, finding the duty expanded in the latter case "to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation."[58] The application of *Wewaykum* to the facts of this inquiry is explored more fully in our analysis below.

Issue 1 involves the nature of the fiduciary obligation, if any, of Canada to the Band in 1905–6. The question of whether the purported reserves were in fact *Indian Act* reserves therefore became the subject of substantial submissions by both the Band and Canada.

Positions of the Parties

The parties agree that the question posed in Issue 1, whether Canada owed a duty to the Lower Similkameen Band for compensation for taking lands for the right of way for the VV&E, should be answered in the affirmative so far as fiduciary duty is concerned, though Canada's answer is somewhat qualified. Without addressing the question of statutory obligation, Canada acknowledges, in response to the question:

> Yes, Canada owed a fiduciary duty to obtain adequate compensation for the band, which duty was limited by the fact that the lands occupied by the Band at the time of the taking were not reserve lands.[59]

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[57] *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 22. Emphasis added.

[58] *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 86.

[59] Written Submission on Behalf of the Government of Canada, December 17, 2004, para. I.1.

The Band does not press the case for any statutory duty, relying rather on its claim to a fiduciary duty. On that question, the Band submits that the Lower Similkameen "reserves" were *Indian Act* reserves in 1905 and that the full scope of reserve-based fiduciary duty was engaged at that time. Though acknowledging *Wewaykum*, the Band nevertheless relies on the reserve creation criteria set out in the earlier decision of the Supreme Court on the subject of reserve establishment in the Yukon, *Ross River Dena Council Band v. Canada*,[60] to support this submission. It points to the senior officials involved in purporting to set the reserves apart, and it notes that both levels of government and the Lower Similkameen people themselves were all of the view that true *Indian Act* reserves had been created. From all of this, the Band submits that the proper conclusion to be drawn is that the land that was considered Indian reserve land in 1905 should now be held to have been reserves under the *Indian Act* at that time, notwithstanding *Wewaykum*. However, in oral submissions, counsel for the Band, noting Canada's position that the reserves in question were not Indian reserves in 1905, stated, "We say in the alternative, if you find that they aren't Indian reserves, we say that doesn't matter at all."[61] He went on to explain, "The same standards of fiduciary duty should apply ... even if the lands had not met the formal requirements of being an Indian reserve."[62]

With respect to the issue of compensation, in particular, the Band submits, without further elaboration, that "adequate" compensation means that compensation is to be paid with regard to "current land values."[63]

Canada relies entirely on *Wewaykum*, concluding "that the Lower Similkameen Indian Band reserves at issue in this inquiry, were not finally and formally created until 29 July 1938."[64] Canada distinguishes *Ross River* on the ground that it contains an express caution against its application beyond the Yukon.[65] However, as noted above, Canada accepts that it "owed a fiduciary duty to

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60 *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816.

61 ICC Transcript, January 26, 2005 (Rory Morahan, pp. 10, ll, 2–4).

62 ICC Transcript, January 26, 2005 (Rory Morahan, p. 10, l. 23–p. 11, l. 1).

63 Written Submission on Behalf of the Lower Similkameen Indian Band, October 26, 2004, para. 111.

64 Written Submission on Behalf of the Government of Canada, December 17, 2004, para. 56.

65 *Ross River Dena Council Band v. Canada,* [2002] 2 SCR 816 at para. 41.

obtain adequate compensation for the band," though maintaining that the "duty was limited by the fact that the lands occupied by the Band at the time of the taking were not reserve lands."[66] Canada does not explain the effect of this limitation, but, since there is either a duty to obtain adequate compensation or there is not, we have difficulty comprehending how this duty might be limited. In any case, the fiduciary duty pertinent to the circumstances, Canada acknowledges, required that adequate compensation be obtained.

Canada elaborates on this duty by reference to *Kruger et al. v. The Queen*:

> When the Crown expropriated reserve lands ... there would appear to have been created the same kind of fiduciary obligation, vis-à-vis the Indians, as would have been created if their lands had been surrendered. The precise obligation in this case was to ensure that the Indians were properly compensated for the loss of their lands as part of the obligation to deal with the land for the benefit of the Indians, just as in the *Guerin* case, the obligation was to ensure that the terms of the lease were those agreed to by the Indians as part of the general obligation to them to ensure that the surrendered lands be dealt with for their use and benefit. How they ensured that lies within the Crown's discretion as a fiduciary and so long as the discretion is exercised honestly, prudently and for the benefit of the Indians there can be no breach of duty.[67]

Noting that, in *Kruger*, it was the taking of *reserve* lands that was at issue, Canada nevertheless does not submit that any lesser duty applies in this case; to the contrary, Canada argues that "the duty, if any, in the present matter does not exceed the duty set out above."[68] The odd qualification, "if any," disappears when one refers to the closing words of the same paragraph of Canada's submission: "It is submitted that the process followed by the Crown both in granting the right of way and obtaining appropriate compensation completely fulfilled the Crown's pre–reserve creation fiduciary duty as specifically set out in *Wewaykum*."[69] While the "appropriateness," or adequacy, of the compensation is a question of fact to be addressed under Issue 2, this statement, taken together with Canada's

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[66] Written Submission on Behalf of the Government of Canada, December 17, 2004, para. I.1.

[67] *Kruger et al. v. The Queen*, [1986] 1 FC 3 at 48, Urie JA, quoted in part in Written Submissionon Behalf of the Government of Canada, December 17, 2004, para.76.

[68] Written Submission on Behalf of the Government of Canada, December 17, 2004, para. 77.

[69] Written Submission on Behalf of the Government of Canada, December 17, 2004, para. 77.

statement that it "owed a fiduciary duty to obtain adequate compensation for the band," clearly acknowledges, in our view, a degree of fiduciary duty requiring adequate compensation for the taking of the right of way.

Canada's submission with respect to the meaning of "adequate" compensation relies on *Kruger*[70] and on the Supreme Court decision generally known as *Apsassin*.[71] Canada submits that it has "an obligation to ensure that the Indians are 'properly[']or 'fairly' compensated," that how this is ensured "lies within the Crown's discretion," and that "it is sufficient if the price falls within the range of appraised values."[72]

Panel's Reasons

Since the parties are in agreement that Canada owed a fiduciary obligation in 1905–6 to obtain adequate compensation, we might take the view that there is no issue between them and move on to Issue 2. However, we consider that it is important for us to address this issue independently of the parties' positions.

Duty Owed by Canada

1 Did Canada owe either a Statutory or a Fiduciary Duty, or both, to the Lower Similkameen Band with respect to compensation for the taking of the lands for the right of way of the VV&E?

In order to answer this question, we must consider the status of the lands regarded as reserve lands in 1905–6, at the time of the taking and subsequent valuation of the right of way.

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[70] *Kruger et al. v. The Queen*, [1986] 1 FC 3 at 48, Urie JA.

[71] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 55 (sub nom. *Apsassin*).

[72] Written Submission on Behalf of the Government of Canada, December 17, 2004, para. 76.

Statutory Duty

Applying the *Wewaykum* decision to the situation of the Lower Similkameen reserves, there can be no doubt that these lands were not *Indian Act* reserves in 1905, nor were they until 1938. But this status by no means vitiates the duty owed to the Band by Canada. Although it eliminates any duty owed under the *Indian Act*, as that Act did not apply to these lands, the duty under the *Railway Act, 1903* encompasses more than Indian reserves:

> Indian Lands
> 136. No company shall take possession of, or occupy, any portion of any Indian reserve or lands, without the consent of the Governor in Council; and when, with such consent, any portion of any such reserve *or lands* is taken possession of, used or occupied by any company, or when the same is injuriously affected by the construction of any railway, compensation shall be made therefor as in the case of lands taken without the consent of the owner.[73]

By employing the phrase "Indian reserves or lands," the legislator intended a broad compass for the obligation to compensate. The obligation arose for the taking of not only reserves but also Indian lands, clearly a broader term, with compensation to be made "as in the case of lands taken without the consent of the owner." It is not necessary to consider the limits of what may have been intended by "Indian lands"; lands that were thought by all concerned at the time to be Indian reserves were at the least "Indian lands." These lands had been "temporarily reserved" by Commissioner Sproat; more precisely secured by his successor, Commissioner O'Reilly; and surveyed in 1889 and approved in 1895 in the configurations and areas (as corrected in1902 for IR 7 and 8) that were finally confirmed by British Columbia Order in Council 1036 in 1938. If the phrase "Indian lands," as distinct from reserves, is to be given meaning, there can be no question that the Lower Similkameen lands, intended for no use other than for the Lower Similkameen Indians, were "Indian lands" in 1905. The *Railway Act, 1903* therefore required that "compensation shall be made ... as in the case of lands taken without the consent of the owner." The implication that "Indian lands" are not lands taken from an "owner" makes it clear that it is the Indians, not the Crown, who are to receive the compensation, as title to Indian reserves or lands rests with the Crown, not the Indians.

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[73] *Railway Act, 1903*, SC 1903, c. 58, s. 136. Emphasis added.

Compensation is to be made when, with the Governor in Council's consent, "any portion of any such reserve or lands is taken possession of, used or occupied by any [railway] company, or when the same is injuriously affected by the construction of any railway." We do not read these conditions as being mutually exclusive; where the taking of a portion of a reserve also incurs injurious affection,[74] both conditions are compensable.

Though the obligation to produce funds for the payment was the company's, there was a concomitant public law duty on the Crown to ensure that the obligation was met. This duty arose from statute, triggered by the giving of the Governor in Council's consent, and the concept of fiduciary duty need not be invoked for this purpose.

Common Law Duty

While not raised by the parties, the Crown has a common law duty to compensate not only in cases of taking of title but also in cases where "enjoyment of possession" is eliminated or depreciated by actions of the Crown:

> [T]here would be the general principle, accepted by the legislature and scrupulously defended by the courts, that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in its place. Acquisition of title or possession was "taking."[75]

The Crown, and not the Lower Similkameen Band or its members, had title to the right of way taken, so that taking of title is not at issue. However, the Band, or its members, did have the right to "enjoyment of its possession," which was taken from them. This loss provides another basis on which compensation was due. The compensation is to be "full."

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[74] Injurious affection refers to the harmful effect of a "taking," or other appropriation on land not taken – that is, on the remaining land of the same owner or on neighbouring lands. It is usually measured by reduction in value of the land not taken.

[75] *Manitoba Fisheries Ltd. v. Canada*, [1979] 1 SCR 101 at 110, Ritchie J, quoting Lord Radcliffe in *Belfast Corporation v. O.D. Cars Ltd.,* 1960 AC 49 at 523 (HL(NI)).

Fiduciary Duty

For the reasons already explained, the Lower Similkameen reserves were in a pre–reserve creation situation in 1905. We must look to *Wewaykum* to determine the fiduciary duty owed to the Band at that time. The Court has clearly delineated the contrast between the pre–reserve creation and post–reserve creation duties:

> Prior to reserve creation, the Crown exercises a public law function under the *Indian Act* – which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown's duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.
>
> Once a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation.[76]

The Court goes on to explain that, at the reserve creation stage, "the imposition of a fiduciary duty attaches to the Crown's intervention the additional obligations of loyalty, good faith, full disclosure appropriate to the matter at hand and acting in what it reasonably and with diligence regards as the best interest of the beneficiary."[77]

There can be no question that, if the actual creation of the reserves had not crystallized in 1905, the lands were nevertheless at the highest pre–reserve creation state at least from 1895 onward, for the reasons already mentioned – the roles of Commissioners Sproat and O'Reilly, the 1889 survey, and the 1891 and 1895 approvals. This status was confirmed by the listings in the 1902 and 1913 Dominion Schedules, which corresponded, with one correction, to the actual reserve confirmation by the 1938 provincial transfer of control, or conveyance. It is not possible to conceive of a more certain state of pre–reserve creation in 1905.

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[76] *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 86.

[77] *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 94.

The conditions for creation of an Indian reserve are examined in *Ross River Dena Council Band v. Canada.*[78] The Ross River Dena Council Band is located on lands in the Yukon which, were they an *Indian Act* reserve, would have exempted them from tobacco tax. The Court set out the conditions for the creation of a reserve:

> Whatever method is employed, the Crown must have had an intention to create a reserve. This intention must be possessed by Crown agents holding sufficient authority to bind the Crown. ... Steps must be taken in order to set apart land. The setting apart must occur for the benefit of Indians. And, finally, the band concerned must have accepted the setting apart and must have started to make use of the lands so set apart.[79]

In the case of the Ross River Band, the Court found that the requisite intention to create the reserve was lacking.

The Court cautions against the universal application of the *ratio* of this case:

> A word of caution is appropriate at the start of this review of the process of reserve creation. Some of the parties or interveners have attempted to broaden the scope of this case. They submit that it offers the opportunity for a definitive and exhaustive pronouncement by this Court on the legal requirements for creating a reserve under the *Indian Act*. Such an attempt, however interesting and challenging it may appear, would be both premature and detrimental to the proper development of the law in this area. Despite its significance, this appeal involves a discussion of the legal position and historical experience of the Yukon, not of historical and legal developments spanning almost four centuries and concerning every region of Canada.[80]

The Yukon**,** as a territory, is a single-jurisdiction entity, in that the title to Crown lands remains with the federal Crown. The federal-provincial constitutional context of British Columbia is more complex, leading to the finding in *Wewaykum* that reserve creation was deferred to 1938. It is nevertheless instructive to consider how the conditions set out in *Ross River* apply to the Lower Similkameen facts:

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78 *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816.

79 *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816 at para. 67.

80 *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816 at para. 41.

- the Crown must have intended to create a reserve, given that Crown agents possessed sufficient authority to bind the Crown to this intention;
- steps must have been taken to set the lands apart for the benefit of Indians; and
- the Indians must in turn have accepted the setting apart of the lands and started to make use of them.[81]

All these conditions existed in the case of Lower Similkameen in 1905. The historical record demonstrates the requisite intention, and clearly the Band had accepted the lands (which they understood as "set apart") and had started to make use of them. However, the difficulty is that, for constitutional reasons, all these steps were without legal effect. The final step was taken only in 1938. As *Wewaykum* points out:

> Any unilateral attempt by the federal government to establish a reserve on the public lands of the province would be invalid ... . Equally, the province had no jurisdiction to establish an Indian reserve within the meaning of the *Indian Act*, as to do so would invade exclusive federal jurisdiction over "Indians, and Lands reserved for the Indians."[82]

As the judgment goes on to explain, the required crystalizing act of federal-provincial cooperation was provincial Order in Council 1036.[83]

Not to be overlooked, however, are the words by which *Ross River* enjoins the Crown respecting its fiduciary duty even where no reserve has been created (as the Court found in that case):

> It must be kept in mind that the process of reserve creation, like other aspects of its relationship with First Nations, requires that the Crown remain mindful of its fiduciary duties and of their impact on this procedure, and taking into consideration the sui generis nature of native land rights.[84]

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81 *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816 at para. 67; see also para. 60.

82 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 15.

83 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at paras. 18 and 51.

84 *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816 at para. 68.

Taking into account the belief of all concerned – both governments and the Band – that reserves had been created for the Lower Similkameen people, the fact that the intention to do so existed and the lands had been set apart, and mindful of the exhortation from *Ross River* just quoted, it is our view that the highest level of fiduciary duty obtained in this case short of the duty owed once a reserve is established. This duty was to fulfill "the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries."[85] There can be no question that this description translates in this case into a manifest duty to ensure that the Band was adequately and fully compensated for the taking of the right of way.

To summarize, in the case of the taking of the VV&E right of way over IR 3, 5, 7, and 8:

- There was a statutory duty under the *Railway Act, 1903* to ensure that the Band was compensated for the taking of the right of way "as in the case of lands taken without the consent of the owner." This obligation was a public law duty.

- There was a common law duty to provide or ensure "full compensation" for loss of "enjoyment of possession," including an obligation to compensate for injurious affection. This duty was also a public law duty.

- There was also a fiduciary duty on the Crown of the highest nature available in the pre–reserve creation context to ensure that the Band obtained compensation for the lands taken. We have reached this conclusion because of the certainty at the time that the Lower Similkameen lands were indeed Indian reserves, an understanding shared by both levels of government and the Lower Similkameen people.

There were therefore three parallel and consistent sources of Crown duty to ensure that the Lower Similkameen Band obtained compensation for the taking of the VV&E right of way, including any compensation arising from injurious affection. As already noted, Canada does not dispute that it "owed a fiduciary duty to obtain adequate compensation for the band."

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[85] *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 86.

Determination of Compensation

2 If Canada did owe such a duty or duties, how is the compensation determined?

Before addressing this second question posed at the beginning of this section, we reiterate that Issue 1 does not require us to consider whether the compensation was in fact adequate. That question is dealt with in Issue 2.

The issue as agreed by the parties refers to "adequate compensation," though the adjective is probably redundant; if the question is turned on its head to ask whether inadequate compensation would suffice, the answer is obviously no. One is compensated only if the compensation is in some sense adequate. However, the issue as stated qualifies "adequate compensation" as compensation "based on fair market value and/or compensation as was provided to other land owners in the area." Compensation "provided to other land owners in the area" is strong evidence of "fair market value," and in the Lower Similkameen case probably the best evidence.

The statutory standard for compensation in the *Railway Act, 1903* was that "compensation shall be made ... as in the case of lands taken without the consent of the owner." Where compensation is to be made "as in the case of lands taken without the consent of the owner," the same level of compensation is to be provided as if the land were held in fee simple by non-Indians. Thus, the starting point for compensation would be fair market value of the land if it were not reserve land, determined by reference to compensation paid to other land owners in the area, if such compensation was paid, or other evidence of fair market value.

The common law duty applied by the Supreme Court in *Manitoba Fisheries*, to ensure "full compensation" for loss of "enjoyment of possession," is a "general principle" of compensation.[86] In fact, compensation in that case was for the loss of a business as a result of passage of an Act of Parliament that created a Crown corporation which displaced the business. The judgment declared "that the appellant is entitled to compensation in an amount equal to the fair market value of its

[86] *Manitoba Fisheries Ltd. v. Canada*, [1979] 1 SCR 101 at 110.

business as a going concern ... minus the residual value of its remaining assets."[87] Again, compensation is to be determined by reference to fair market value.

It might be argued that in the case of a railway right of way, where the railway's right to use the land concludes on cessation of use (see Issue 5), the compensation should be discounted on account of the possibility that the land might revert to reserve use at some unspecified future date. The panel does not agree. The Commission has dealt with this argument previously, in *Sumas Band: Indian Reserve 6 Railway Right of Way Inquiry*, an inquiry also having to do with a Band's interest in another abandoned VV&E right of way. Having held that the railway's interest was determinable, the Commission stated:

> A fee simple determinable ... may in theory be valued as a fee simple, depending on the uncertainty of when and if the terminating event will occur. It is likely that in 1910 most thought the railway would continue operating in perpetuity. Under that assumption, a fee simple determinable is equivalent in value to a fee simple absolute.[88]

We conclude that compensation to the Lower Similkameen Indian Band for the taking of the VV&E right of way will be adequate if it is based on fair market value as evidenced by compensation paid to other land owners in the area whose land was also taken for the VV&E. Factual questions of land quality will of course be relevant to valuations, as will the issue of injurious affection.

So far as compensation is concerned, the central question in this inquiry is not whether adequate compensation should be obtained (Issue 1) but whether in fact it was obtained (Issue 2). We shall therefore proceed to address that issue.

ISSUE 2 DID THE BAND RECEIVE ADEQUATE COMPENSATION?

2 Did Canada breach a statutory and/or fiduciary duty to the Lower Similkameen Indian Band to obtain adequate compensation based on fair market value and/or

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87 *Manitoba Fisheries Ltd. v. Canada*, [1979] 1 SCR 101 at 118.

88 ICC, *Sumas Band: Indian Reserve 6 Railway Right of Way Inquiry* (Ottawa, February 1995), reported (1996) 4 ICCP 3 at 3–31.

compensation as was provided to other land owners in the area for the lands taken by the Victoria, Vancouver and Eastern Railway for railway purposes?

We have already determined that the Crown owes fiduciary, statutory, and common law duties to the Band with regard to ensuring that the VV&E Railway paid adequate compensation for the lands taken up for railway purposes. We must now decide whether the Crown discharged these duties. The parties have agreed that this issue must take into account both fair market value and the level of compensation paid to other land owners in the area.

Factual Background

In the fall of 1905, when the VV&E Railway Company approached the Department of Indian Affairs for a right of way over the Lower Similkameen Reserves, the company offered to pay $25 per acre for the land – a sum that, in their view, was a "fair average price for Indian lands."[89]

In response, the department asked Archibald Irwin, the Indian Agent for the Kamloops-Okanagan Agency, to provide a valuation for the lands requested by the railway. Agent Irwin was asked to value the land itself, and then to value improvements made by band members, such as seeding or tilling previously uncultivated land and the cost of removing and relocating structures. The purpose of breaking down the payment was to allow the government to compensate individuals for the effort they had put into improving their lands while, at the same time, to pay the Band for the land itself. Since the land set aside for the Band was held in trust by the Crown, payment for the land was also to be held in trust by the Crown for the Band. Payments for the improvements and the costs of buildings were made to individual band members.

The department instructed Superintendent A.W. Vowell in Victoria "to be guided in the valuation of land and damages taken for the Right of Way of the C.P.R. through the Indian reserves" to the northwest, near Spence's Bridge and Nicola Lake.[90] Compensation for the lands in these areas

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[89] McGivern & Haydon, Barristers, Solicitors & Notaries, to Deputy Superintendent General of Indian Affairs, October 17, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 53).

[90] Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, July 27, 1905, LAC, RG 10, vol. 7676, file 22169-13 CP (ICC Exhibit 1a, pp. 51–52).

was set at $100 per acre for land under cultivation and for meadows; compensation for lands capable of cultivation and for waste land was set at $25 and $2, respectively.[91]

In November 1905 Agent Irwin set the "actual net value on all the lands of $5.00 per acre, for a total possible compensation of $584.25."[92] Vowell passed on Irwin's recommendations within the week, and, in his letter to the Secretary of the Department of Indian Affairs in Ottawa, he stated that the railway company was "desirous of a speedy settlement."[93] These letters found their way to the Deputy Superintendent General via the offices of the department's Chief Surveyor, who implicitly acknowledged the difference between the Company's and the Agent's valuations:

> As these gentlemen have been pressing for immediate action so that construction can proceed, I beg to recommend that the valuation by Mr. Agent Irwin be approved and that Messrs. McGivern & Haydon be informed that their Company can have possession upon payment of $2954.25.[94]

This total was the sum of three different amounts: $584.25 paid to the Band's trust account for the land, plus two amounts paid to individuals – $2,070 for improvements and $300 for moving buildings. Nothing appears in the documentary evidence from that time that would suggest that the department considered paying the $25 per acre suggested by the railway as a fair price for the land. Equally absent is any consideration of whether Agent Irwin's valuations reflected the fair-market value of the lands or of whether his valuations were related to the prices paid by the railway for similar non-Indian land abutting the reserves.

Notwithstanding these apparent omissions, the Secretary of the Department of Indian Affairs wrote from Ottawa to Indian Superintendent Vowell in British Columbia on November 28, 1905,

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[91] Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, July 27, 1905, LAC, RG 10, vol. 7676, file 22169-13 CP (ICC Exhibit 1a, pp. 51–52).

[92] Archibald Irwin, Indian Agent, to A.W. Vowell, Indian Superintendent for British Columbia, November 10, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 56).

[93] A.W. Vowell, Superintendent of Indian Affairs, BC, to Secretary, Department of Indian Affairs, November 15, 1905, DIAND file E3667-07399 (ICC Exhibit 1a, pp. 61–62).

[94] J.K. McLean for Chief Surveyor, Department of Indian Affairs, to Deputy Superintendent General, Department of Indian Affairs, Ottawa, November 22, 1905, DIAND file E3667-07399 (ICC Exhibit 1a, p. 65).

to confirm that the "valuation has been approved"[95] for IR 3, 5, 7, and 8. Identical valuations for lands and improvements on IR 10 and 10B were forwarded to the department by November 30[96] and were also quickly processed and accepted. On December 23, 1905, the Governor General in Council passed an order in council consenting to and confirming the takings from IR 3, 5, 7, 8, 10, and 10B.[97]

Almost a year later, Chief Johnie Newhumpsion raised concerns with the department regarding the fairness and accuracy of the valuations of the lands taken from the Band:

> We the undersigned are appealing to your Department for Justice. We inclose Names and Stations of the Line of Rail now Building By the Great Northern RR and as yet we have not got anything for same and am Led to believe by Gov. agt in Kamloops Mr. Irwin That we are to get [illegible] average of $10.00 pr. acre or thereabouts; all Right of way In this Parts is Valued by Great Northern $100 and [as] high as $200. Such Land as we [have] would average from $100 to $200 and we have not got any satisfaction so far.
>
> However we intent getting our Money and what is Just and Right [before] allowing the Great Northern [to] Lay Track on our Land untill [illegible] Just Settlement.
>
> We are notifying the RR of [our] actions.
>
> Kindly advise us as what [to do.] All we want is near what [the white Men] gets. [Advise us] if it would be just & [illegible] to Demand our money Before Laying Track.[98]

The department's response was to instruct Superintendent Vowell to pay out as much of the remaining balance owed to the Band as soon as possible.[99] In the responding letter to Chief

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[95] J.D. McLean, Secretary, Department of Indian Affairs, to [A.W. Vowell], Indian Superintendent, November 28,1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 67).

[96] A.W. Vowell, Indian Superintendent, BC, to Secretary, Department of Indian Affairs, November 30, 1905, no file reference available (ICC Exhibit 1a, pp. 73–74).

[97] Order in Council, December 23, 1905, no file reference available (ICC Exhibit 1a, p. 80).

[98] Johnie Newhumpsion to Department of Indian Affairs, May 1, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 95–97).

[99] Sam Bray, Chief Surveyor, Department of Indian Affairs, to Deputy Superintendent General of Indian Affairs, May 14, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 100); Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, BC, May 21, 1906, DIAND file E 5667-07399 (ICC Exhibit 1a, p. 102).

Newhumpsion, the Secretary of the Department of Indian Affairs stated that the valuations appeared to be "very liberal."[100]

Chief Newhumpsion continued to protest against the valuations. Superintendent Vowell in Victoria asserted that "the question was fully gone into by our Indian Agent, Mr. Irwin, of Kamloops, B.C., who decided as to the valuations" that were later accepted by the department.[101] The Superintendent passed the letters on to Agent Irwin, who wrote directly to Chief Newhumpsion. Agent Irwin stated:

> I told you when last down the amount each of you would receive besides $5.00 per acre which would go to the credit of the whole band. The Department at Ottawa in commenting on your letters, and in fact at the time I made the valuation considered I made you a liberal allowance for improvements, &c. And I may as well tell you that you will be bound by my award in the matter. You state what is not true to the Department when you say that most of right of way through reserves was garden, but it is a matter of little concern to me. You have been allowed nearly $100.00 per acre for good cultivated land and that should satisfy you. If white men have made land in the section valuable they should profit accordingly.[102]

What Irwin did not say is that $100 per acre for cultivated land represented only $5 per acre for the land itself. Chief Newhumpsion and those his letters represented were not the only people residing in and around the Lower Similkameen Valley who had concerns about the fairness and accuracy of the valuations. R.C. Armstrong, a local Justice of the Peace, had, for the past 21 years, resided on lands directly abutting the Lower Similkameen lands. In June 1906 he wrote to the department in support of Chief Newhumpsion and his Band:

> As the Indians have come to me to ask me to state the price of the RR Co. paid me for right of way across my land and, as their reserve joins my land, they think they

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[100] Secretary, Department of Indian Affairs, to Johnie Newhumpsion, May 21, 1906, DIAND, file E5667-07399 (ICC Exhibit 1a, p. 101).

[101] A.W. Vowell, Indian Superintendent, BC, Indian Office, to Johnie Newhumpsion, June 11, 1906, DIAND file E5667-07899 (ICC Exhibit 1a, p. 107).

[102] A. Irwin, Indian Agent, to Johnie Newhumpsion, June 17, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 108–9).

> should receive the same price for their land as I did. I may say that I have lived joining the reserve for 21 years. I ought to know something about it. *I was paid one hundred ($100.00) dollars an acre for bush land (none cleared) and I may say their land is (most of it) as good as mine. It seems strange that their land was valued to only five dollars an acre and mine beside it at one hundred. Now most of their land is worth one hundred dollars an acre, if mine is, and their improvements extra.* Some of the land in reserve is stony, perhaps ten acres in all or about that much, but as they have water all their bench land, even that is good for orchards. Very poor land in the valley is selling at two hundred dollars an acre, where there is water for it. One hundred dollars an acre and five dollars for the same kind of land is rather too much of a difference. *The Indians wish to have the price of the land left to arbitration and wish me to act as their man.* I should like to see them get fair treatment and shall act for them if I am authorized to do so, if so left for settlement. The Indians a man, the RR Co. a man, and them two to choose a third. I may say the Indians says [sic] they have lost all confidence in the local agent. They are intending to write themselves, but wished me to make these statements as I have lived so long near them.[103]

As far as Armstrong was concerned, the difference between $5 per acre and $100 per acre was too great to be fair. He also stated that the Band wished not only to have arbitration but also to have him represent them.

The department did not respond directly to the request for arbitration but stated that it had little choice but to "rely upon the judgment of its Agents for valuations of this and in fact of any nature."[104] It thereupon directed Indian Superintendent Vowell to look into the Lower Similkameen valuations:

> The matter appears to require special investigation, as the difference between the value placed on the land by Mr. Irwin and as valued by Mr. Armstrong and the Indians is absurdly great. *Also the lands in Indian reserves should be valued exactly the same as similar lands outside the reserves. It would appear from a passage in Mr. Irwin's letter that he has not done this.*
>
> The Department has necessarily to rely on the judgment of its Agent for valuations of this and in fact of any nature. It would appear in this case that the Agent did not consult the Indians as to the value of their improvements. This should have

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[103] R.C. Armstrong, Justice of the Peace, to Department of Indian Affairs, June 23, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 110–11). Emphasis added.

[104] Secretary, Department of Indian Affairs to A.W. Vowell, Indian Superintendent, July 10, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 118).

> been done very carefully, in order to avoid discontent. *It is to be regretted that the matter is closed with the Railway Company, and very difficult, if not impossible to re-open it.* I have to request you to be good enough to make a strict investigation as early as may be convenient.[105]

Three aspects of the letter of direction are important: first, it is clear the department recognized there was a problem with the valuations of the lands; second, the department states that Indian lands should be valued in the same way as similar non-Indian lands; and third, regardless of any apparent unfairness, it was too late to demand a higher price from the railway company.

Superintendent Vowell of Victoria agreed to conduct the investigation, remarking that he "cannot understand how the Agent could value land at $5.00 an acre and if that adjoining it had been paid for at the rate of $100.00 per acre."[106] He arranged to have Ashdown Green, a surveyor with the department in Victoria, travel into the interior with Agent Irwin to conduct new valuations.

Ashdown Green's report of August 1906 reviewed each parcel of land in the reserves separately, including amounts paid to individual band members as compensation for improvements. Green gave his opinion that the reason R.C. Armstrong had been paid $100 per acre for his land was "doubtless it paid the Company to give him his price rather than go to arbitration, with the loss of time such action would entail."[107] Green also stated that the area was dry, waterless, sage brush country and that the "greater part of the land taken from the reserves is absolutely worthless."[108] The amounts paid for improvements were, in his opinion, "far in excess of their actual worth."[109]

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[105] Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, July 10, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 118). Emphasis added

[106] A.W. Vowell, Indian Superintendent, Indian Office, to Secretary, Department of Indian Affairs, July 18, [1906], DIAND file E5667-07399 (ICC Exhibit 1a, p. 122).

[107] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).

[108] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 136).

[109] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 136).

In September 1906 the Secretary of the department wrote to Superintendent Vowell in Victoria and advised that Ashdown Green had gone "very thoroughly into the matter"[110] and that the Indians had accepted the awards. Five years later R.C. Armstrong wrote again on behalf of the band members, restating that he was paid $100 per acre for land while the Band received only $5 per acre and that Green had "lied about the quality of the land."[111]

Band's Position

The Band takes the position that Canada has breached both fiduciary and statutory duties with regard to the compensation that was paid to the Band more than a century ago. According to the Band, the $5 per acre payment to the Band when the fair market value of the land was $100 demonstrates that the "compensation package being imposed was not in the best interest of the Indian people and was not to the standard of a prudent man managing his own affairs."[112] The Band also argued that the settlement amount was exploitative[113] and was forced upon the Lower Similkameen people. Such a forced settlement, the Band argues, is a breach of fiduciary duty.[114]

Canada's Position

Canada acknowledged that the Crown has a fiduciary duty to ensure that proper or fair compensation is paid when land is taken, but it argued that in this particular case the Crown's conduct did not result in a breach of fiduciary duty. Canada put forward the following as rules for determining whether the compensation paid for reserve land was adequate:

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[110] Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, September 18,1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 139).

[111] R.C. Armstrong, [J.P.] to Department of Indian Affairs, October 15, 1911, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, pt. 1 (ICC Exhibit 1a, p. 238).

[112] Written Submission on Behalf of the Lower Similkameen Indian Band, October 25, 2004, para. 196.

[113] Written Submission on Behalf of the Lower Similkameen Indian Band, October 25, 2004, para. 198.

[114] Written Submission on Behalf of the Lower Similkameen Indian Band, October 25, 2004, para. 216.

1. The Crown has an obligation to ensure that the Indians are "properly" or "fairly" compensated for the lands taken;
2. Exactly how fair compensation is ensured lies within the Crown's discretion, and as long as that discretion is exercised honestly, prudently, and for the benefit of the Indians, there can be no breach of duty;
3. It is not necessary for the Crown to obtain the highest appraised value for the lands, but absent evidence that the compensation was unreasonable, it is sufficient if the price falls with the range of appraised values.[115]

Canada cited the process as evidence that there was no breach of duty: "When the initial valuation was questioned, the DIA [Department of Indian Affairs] treated those questions with respect and moved quickly to retain a highly regarded individual to enquire into the matters. Once his report was received, it was disclosed to and discussed with the Indians at a public meeting and the Indians, when so informed, agreed that the evaluations had been fair."[116]

Canada concluded that the conduct of the department showed the "proper loyalty, good faith, appropriate disclosure and ordinary prudence for the best interests of the Indians as required by the rules of pre-reserve creation fiduciary obligations of the Crown to First Nations."[117]

With regard to a statutory duty, Canada argued that because the lands were not reserves, section 35 of the *Indian Act,* requiring compensation to be made "in the same manner as is provided with respect to the lands or rights of other persons,"[118] did not apply.

Test for Breach of Duty

The courts do not provide us with much guidance to determine what would constitute a breach of fiduciary duty with regard to compensation paid to a First Nation for expropriated land. Most of the case law has focused on whether the expropriation itself was a breach of fiduciary duty, not whether the money paid for the land was sufficient. As we discussed earlier in this report, we are guided by *Kruger v. Canada*, which imposes a fiduciary duty on the Crown when it expropriates Indian lands

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115 Written Submission on Behalf of the Government of Canada, December 17, 2004, para. 76.

116 Written Submission on Behalf of the Government of Canada, December 17, 2004, para. 77.

117 Written Submission on Behalf of the Government of Canada, December 17, 2004, para. 77.

118 *Indian Act*, RSC 1886, s. 35.

and requires the Crown to pay proper compensation. *Kruger* also requires the Crown to act honestly, prudently, and for the benefit of the Indians when it exercises discretion over Indian lands.

The question of the relationship between the fiduciary duty and compensation was also explored in *Apsassin*.[119] In this case, the Band had surrendered lands to the Crown for sale, and one of the issues was whether the Crown had breached its fiduciary duty in selling the lands for less than the highest appraised value, but more than the lowest appraised value. In stating that the Crown did not breach its duty, Madam Justice McLachlin stated that the "duty on the Crown as fiduciary" was "that of a man of ordinary prudence in managing his own affairs."[120] The Crown therefore must do no less for the Band than it would in managing its own affairs, keeping in mind that the Band had no ability to deal directly with the railway and was completely dependent on the Department of Indian Affairs to negotiate with the VV&E Railway.

We must also be guided by the statutes: section 136 of the *Railway Act* required that compensation be paid for "any portion of any Indian reserve or lands ... compensation shall be made therefor as in the case of lands taken without the consent of the owner."[121] The Act sets out the requirement for compensation and also directs what would be considered to be sufficient compensation. Section 35 of the *Indian Act* referred specifically to "reserves," but in these circumstances we are mindful that the officials of the days referred to the lands as reserves and acted as if they were reserves. They could not have known at the time that many years later the Supreme Court would rule that these lands set aside for the Lower Similkameen people had not attained the legal status of reserves. Accordingly, the officials ought to have respected and enforced the laws that would have protected the Lower Similkameen Band.

We find that there was a statutory requirement for the Crown to ensure that the Lower Similkameen Indian Band was adequately and fully compensated for the lands that were taken for

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[119] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*).

[120] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*), McLachlin J, at para. 104, citing *Fales v. Canada Permanent Trust Co.*, [1977] 2 SCR 302 at 315.

[121] *Railway Act, 1903,* SC 1903, c. 58, s. 136 (ICC Exhibit 6c, p. 40).

railway purposes. We also find that the level of compensation was required by statute to be equal to the amounts paid by the railway to the neighbouring non-Aboriginal land owners.

Breach of Statutory Duty

The historical evidence shows that the Lower Similkameen Indian Band was paid less for its land than the neighbouring non-Aboriginal land owners were paid. The record also shows that, from the outset, the department did not follow the statutory requirements.

Agent Irwin had been specifically instructed in July 1905 to place a fair value on the land taken and to value lands and improvements separately. These instructions directly contradicted the statutes that governed this and similar situations. Indian Superintendent Vowell was told by departmental officials in Ottawa: "It does not appear advisable that the Agent should be governed by any general arrangement made with the adjacent white land owners."[122]

From the beginning, the correspondence among the department, the railway company, and its solicitors shows that the department was more eager to please the company than it was to ensure that the Lower Similkameen Indian Band received fair compensation. The railway company had suggested that a fair price would be $25 per acre. The department approved Agent Irwin's valuation of $5 per acre and moved immediately to invoice the company for a total based on that amount for the land plus the value allowed for improvements.

Certainly departmental officials were aware that the band members were unhappy. Chief Newhumpsion stated specifically that his people thought their land had been undervalued. There is no explanation for Agent Irwin's statement in response to Chief Newhumpsion that they had been "allowed nearly $100.00 per acre for good cultivated land"[123] and no evidence to show that anything near that amount was paid. There is also no reference to the instructions to Agent Irwin in which he was told to separate the value of improvements from the value for the land itself.

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[122] Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, July 27, 1905, LAC, RG 10, vol. 7676, file 22169-13 CP (ICC Exhibit 1a, p. 51).

[123] A. Irwin, Indian Agent, to Johnie Newhumpsion, Chief, Lower Similkameen Indian Band, June 17, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 108–9).

The neighbouring Justice of the Peace, R.C. Armstrong, was clear that he was paid $100 per acre for his land and that it was of the same quality as the Band's land. There is no evidence to support surveyor Ashdown Green's supposition that the railway paid Armstrong so it would not need to face an arbitration. Armstrong allowed that some of the Band's land was stony, but he also stated that there was water for all the Band's land and that the presence of water for irrigation was the key to valuing land. Armstrong's letter also stated that very poor land with water was selling in the valley for $200 an acre.

Other than Armstrong's letters and some valuations provided by Ashdown Green in his 1906 report, there is little direct evidence in the record about how much the non-Aboriginal settlers were paid for their land. As a result, subsequent to the oral hearing in this inquiry, on agreement of the parties, the ICC undertook independent research and examined the transfer documents for non-reserve lands held in the provincial land titles office. These documents indicated that the average price paid for the non-reserve lands was $104.91 per acre.[124] Because the transfer documents do not break down the price paid for bare land and improvements, we must assume that the amounts paid for non-reserve lands included improvements that may have been on those lands.

It appears to us that the transfer documents validate Armstrong's observations that the Band and its members were underpaid relative to the nearby settlers. We make no comment on the magnitude of the difference, except that we cannot find anything in the evidence presented to us that would justify any difference between the values placed on and the prices paid for Aboriginal and non-Aboriginal lands. We must conclude that there has been a breach of the Crown's statutory duty to the Band and its members to compensate them fully and equally for the land taken for railway purposes.

Breach of Fiduciary Duty

We have reviewed Canada's statement of the law on breach of fiduciary duty with regard to compensation, and we approve of this formulation of appropriate Crown conduct. We find that the standard of conduct is that of an honest, prudent person acting for the benefit of the beneficiary,

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[124] K. Faulkner, ICC Research Officer, "Further Research on Sales of Non-reserve Lands to VV & E," May 26, 2005 (ICC Exhibit 9a).

which in this case is the Lower Similkameen Indian Band. We accept Canada's argument that the price paid to the Band need be only within the range of acceptable valuations, not necessarily equal to the highest price paid for similar or identical land. We would add, however, that, given the very high nature of the fiduciary duty on the Crown, even in the pre–reserve creation phase, particularly where land was being taken for a railway, the prudent fiduciary would surely accept a price only at the high end of a potential range of values.

Having said that, in turning to the question of whether Canada breached its fiduciary duty to the Lower Similkameen Indian Band, we can only conclude that it has. The values placed on the Band's lands by the Crown itself are clearly not within a range of acceptable values, and certainly nowhere near the top of the range. We have not been presented with any evidence or argument that would justify why a prudent fiduciary would accept 22 per cent of the land's fair market value, nor can we find an explanation that would show how accepting this low valuation was to the benefit of the Band.

We have also considered whether the historical record shows that the department did its best to negotiate with the VV&E Railway in such a way that the price paid was the best that could be bargained, given the circumstances. Again, we do not find any evidence to support that view. Instead, we find that the department was eager to provide land for the company and that it did not appear to have questioned the valuations from Indian Agent Irwin that ran contrary to both the statutes and the instructions sent to Superintendent Vowell in Victoria. When Chief Newhumpsion questioned the valuations, the department's immediate response was that they were "very liberal." Agent Irwin responded that the band members "were bound by my award." Only when the Secretary responded to R.C. Armstrong and instructed Superintendent Vowell to investigate was there any suggestion that someone in the department was concerned: "[T]he difference between the value placed on the land by Mr. Irwin and as valued by Mr. Armstrong is absurdly great," he wrote. The Secretary reiterated that the "lands in Indian reserves should be valued exactly the same as similar lands outside the reserves."[125] Vowell's response, that he could not understand the difference in valuation, indicated that he too was concerned.

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[125] Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, July 10, 1906, DIAND, file E5667-07399 (ICC Exhibit 1a, p. 118).

Regardless of those concerns, the department did not seek further payment from the railway company but merely asked Ashdown Green to investigate.

There is little question that the Crown could have required the railway company to pay more in compensation for the lands that were taken from the Band. To focus on the government's public policy agenda in using the railways as a method of opening up the country in these years and bringing economic growth to remote areas is too easy an explanation. The fact that the VV&E paid the non-Aboriginal settlers more than $100 per acre for their land is evidence that the company knew the cost of putting the railway through the Lower Similkameen Valley. We cannot conceive that the railway would have abandoned the project if the Government of Canada had wanted more money for the Indian lands.

We find that there was no point at which the Crown tried to balance any competing interests and that quite the opposite is true: the Crown appeared to be concerned only with the need for the railway company to build its line quickly and most economically. The Crown's attitude, which seems to us to be that the deal was a closed matter, cannot be said to reach the standard of the highest order of pre-reserve fiduciary duty.

Compensation for Injurious Affection

It is clear from a review of the historical documents that at no time did the Crown consider whether the Band and its members should be compensated for "injurious affection." Injurious affection is the damage caused to other lands as a consequence of expropriation. With regard to compensation for injurious affection, the Supreme Court has stated:

> [W]here a statute requires compensation to be paid for lands compulsorily taken, one element to be included, in determining the compensation for the lands taken, is in respect of damage sustained by the owner, by reason of injurious affection to his adjoining lands because of the severance.[126]

The maps are clear that, in many places, the rail lines laid down by the VV&E bisected each reserve it crossed. At the community session held during this inquiry, several Elders spoke to the experiences

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[126] *Minister of Highways (B.C.) v. British Pacific Properties*, [1960] SCR 561 at 567.

of their grandparents. John Terbasket, for instance, recalled that his grandfather, William Terbasket, who had a home on IR 3, found, after the railway was built, that "his house was on one side and his barns were on the other side of the track."[127] The construction of the rail line cut off access to irrigation water; one Elder noted that parts of the reserves are no longer used because of lack of access to water. Many community members recalled that the fences along the rail bed were poorly maintained by the company within the reserve, although they were well maintained elsewhere. As a result, many of the band members' cattle and horses were injured or killed, either from being hit by the train or being tangled in barbed wire.

The railway also had an impact on wildlife migration patterns because the noise from trains frightened deer and other small game animals away from the reserves. The loss of this ready supply of food led to shifts in traditional subsistence patterns and required band members to travel further to hunt. The Elders testified that the railway right of way followed an old trail used by the Similkameen people and that a number of spiritual sites and traditional markers were destroyed or disturbed, including a gravesite on IR 7.

We do not find anything in either the historical record or the evidence put before us to indicate that Canada considered the impact of the railway on the way of life of the Similkameen people. There is no evidence that the compensation paid was to include this kind of damage, and we find no indication that Canada either forced or encouraged the railway company to take the lives of the Similkameen people into account. We note the words of Justice Iacobucci in *Osoyoos*, in which he stated some of the unique characteristics of reserve lands:

> ... an Indian band cannot unilaterally add to or replace reserve lands,
>
> and,
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> ... it is clear that an aboriginal interest in land is more than just a fungible commodity. The aboriginal interest in land will generally have an important cultural component that reflects the relationship between an aboriginal community and the land and the inherent and unique value in the land itself which is enjoyed by the community.[128]

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127 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 13, John Terbasket).

128 *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746 at paras. 45 and 46.

We have already stated that the lands taken were not fully constituted legal reserves. However, regardless of their status in 1905, they had been set apart, and the Lower Similkameen people had been located there permanently. The Band had no opportunity whatsoever to select another land base. As we have said before, everyone acted as if the *Indian Act* and its restrictions governed the lives of the people of Lower Similkameen. We think Justice Iacobucci's comments are as applicable to the Lower Similkameen Band in 1905 as they were to the Osoyoos Band almost a century later.

We also note that even though the rail line has been abandoned, the rail bed continues to exist and continues to run through the heart of this community. We find that for the Crown to have fully compensated the Band at the time the lands were taken, it should have turned its mind to the impact that taking these lands would have on people who had no choice in the matter and nowhere else to go.

ISSUE 3 DUTY TO NAME AN ARBITRATOR

3 Did Canada owe a statutory and/or fiduciary duty to the Lower Similkameen Indian Band to name an arbitrator pursuant to section 35 of the 1886 *Indian Act* (as amended in 1887 and later became section 46 of the 1906 *Indian Act*) regarding the taking of the lands in this claim? If yes, was this obligation(s) breached?

Section 35 of the 1886 *Indian Act* provided for compensation to a band of Indians for any railway, road, or public work that passed through or caused injury to a reserve, or any act authorized by an Act of Parliament or of the Legislature that caused damage to a reserve. The section also spelled out the rules for determining the compensation to the Indians:

> compensation shall be made to them therefor in the same manner as is provided with respect to the lands or rights of other persons; *and the Superintendent General shall, in any case where an arbitration is had, name an arbitrator on behalf of the Indians and shall act for them on any manner in any manner relating to the settlement of such compensation*; and the amount awarded in any case shall be paid to the Minister of Finance and Receiver General ...[129]

[129] *Indian Act*, RSC 1886, s. 35. Emphasis added.

The question is whether the Crown had a duty under this section of the statute, or a fiduciary duty, to name an arbitrator. The underlying question is whether the Crown had a statutory or fiduciary duty to initiate the arbitration in the first place.

Band's Position

The First Nation argues that because arbitration was foreseen under the Act, the Crown had a fiduciary duty to use arbitration where there was a dispute over compensation. The only way to alter the agreement made with the railway, it states, was to use arbitration to force a new compensation package.

The Band also argues that, once it had notified the Crown that it was not happy with the compensation paid, a prudent fiduciary would have sought arbitration because of its duty of loyalty and as a way to act in the best interests of the beneficiary – the Band. According to the First Nation, the Crown breached its duty of loyalty by imposing an exploitative bargain and by not fulfilling the request for arbitration.

Canada's Position

Canada takes the position that the wording of section 35 of the Act leaves the decision about whether to conduct an arbitration to the discretion of the Superintendent General of Indian Affairs – that it is permissive, not obligatory. As a result, the Superintendent General was not under a fiduciary obligation to hold an arbitration. Canada also argues that the department met its obligations when it appointed surveyor Ashdown Green to review the valuations of the lands that had been taken for the railway.

Panel's Reasons

We have already stated that, in 1906, only one final step remained before the lands set aside by Canada and British Columbia, and occupied by the Lower Similkameen people, would become reserves. Everything that was required up to that final step had clearly been done, and for all intents and purposes Canada, British Columbia, the Band, and the surrounding settlers treated the lands as a reserve. We have concluded that, with respect to the lands occupied by the Lower Similkameen

people, the Crown owed pre-reserve fiduciary duties of the highest order to the Band. These pre-reserve fiduciary duties required the Crown to act with loyalty, good faith, appropriate disclosure, and ordinary prudence in the best interests of the Band.[130]

From our perspective, it is not conclusive that, because the lands were not fully constituted reserves, the *Indian Act*, which applies to reserve lands, can be disregarded. Clearly, all the parties involved at the time not only thought that the Band's lands were reserve lands but acted as though they were. The Crown had a fiduciary duty to act with loyalty towards the Lower Similkameen people with regard to their lands, and we think that this requirement can have been met only with a carefully considered response.

The section 35 reference to arbitration is poorly worded. The section is silent on the role of the Crown, if any, in demanding or encouraging the parties, in this case the VV&E and the Lower Similkameen Band, to settle the compensation issue by arbitration. One wonders how this or any Band, whose lands were being taken for a right of way, would have had the knowledge or capacity in those days to initiate an arbitration on its own. Further, the section does not address the situation that the Lower Similkameen Band faced. This Band was pitted against both the Crown and the railway in trying to obtain adequate compensation. Yet, if an arbitration had been initiated, section 35 of the Act would have required the Crown to take charge of the Indians' case, including naming the arbitrator on behalf of the Indians and acting for them throughout the process. The conflict of interest could not be more pronounced.

Unfortunately, our hands are tied by the wording of the section. On a plain reading, it appears that, in the case of a disagreement over compensation, arbitration was not a mandatory process. The section only stipulated that, once the parties were in an arbitration process, the Crown would have a statutory duty to name the arbitrator for the Indians and represent their interests. There was no arbitration in this case, and therefore no statutory breach.

Still, we are left with the question of whether the Crown had a fiduciary duty in these circumstances to initiate the arbitration itself. The department knew that the band members were not satisfied with the compensation paid, and a respected non-band member, R.C. Armstrong, had told

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130 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 94.

the department that he and others were paid much more for the same quality of land than was the Band. Further, two officials remarked on the low valuations put on the land by Agent Irwin: Secretary J.D. McLean and Indian Superintendent A.W. Vowell exchanged correspondence indicating that they were both disturbed at the disparity between the $5 an acre received by the Band and $100 an acre for similar land near the reserves.[131] Although the department knew full well that there was a serious problem with the compensation, it appears that officials concluded that it was too late to take any remedial action, as the railway had already paid the compensation agreed to by the department and, reluctantly, by the Band.

Given the permissive language of the statute, however, we are unable to find that the Crown was under a fiduciary or any duty to order the parties to appear before a board of arbitration; hence, there was no duty to name an arbitrator for the Band. The Crown, in its discretion, may have opted for arbitration but there is no basis for finding a fiduciary duty to do so. Moreover, as we have mentioned, this was not a case in which the Crown could fairly represent the interests of the Band. The fact that the Crown had already agreed to a deal based on the valuation of its own official, Agent Irwin, put the Crown in an adverse position to that of the Band.

In conclusion, the Crown was not in breach of a statutory or fiduciary duty when it failed to name an arbitrator under the *Indian Act* or make any attempts to have the compensation dispute placed before a board of arbitration. This is not to say, however, that the Crown met its fiduciary duty to take other steps to rectify the situation once senior officials became apprised of the problem. Apart from sending out Ashdown Green to investigate, the Crown did nothing to resolve the matter. As we have already discussed, this failure was one aspect of the Crown's breach of fiduciary duty to obtain adequate compensation for the Band.

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[131] A.W. Vowell, Indian Superintendent, to Secretary, Department of Indian Affairs, July 18, [1906], DIAND file E5667-07399 (ICC Exhibit 1a, p. 122).

ISSUE 4 ASHDOWN GREEN'S INVESTIGATION

4 Did Canada breach a statutory and/or fiduciary duty to the Lower Similkameen Indian Band with respect to the 1906 investigation conducted by Ashdown Green regarding the value of the lands taken by the Victoria, Vancouver and Eastern Railway for railway purposes?

After both the Lower Similkameen Band and R.C. Armstrong had complained, departmental officials in Ottawa instructed the Superintendent, A.W. Vowell, "to make a strict investigation."[132] Vowell appointed surveyor Ashdown Green to investigate the matter a month later. Green visited the reserves with Agent Irwin and reported on August 27, 1906.

Green's report is fairly detailed, and it is apparent that he visited most, if not all, of the band members' farms from which land was taken for the railway. It is also clear that he did not separate bare land values from the values for improvements, as was necessary to properly value Indian lands, and that he did not think that Armstrong's statements about his own lands were persuasive. He acknowledged that the railway had paid Mr Armstrong $100 per acre but stated: "I should not have valued it at more than $10 per acre."[133] He concluded that the railway had paid Armstrong to avoid the time and cost of an arbitration.

Green compared the price paid for the Indian lands to the assessed value for tax purposes of non-Indian lands, rather than comparing the price paid for the Lower Similkameen lands to the market prices paid. He used prices paid for land two years earlier, before the railway came through the valley. What is entirely lacking is an explanation by Green of the significant difference between the prices paid to the settlers and to the band members; instead, he describes the land the Band had, much of which he thought was worthless. The tone of Green's report is very much one of an after-the-fact rationalization of the department's valuations and actions. In valuing the Band's lands, he collapsed values of bare land, improvements, and compensation for moving buildings into a single value, in spite of long-standing instructions to separate out those values for Indian lands. He

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[132] Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, July 10, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 118).

[133] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).

concluded that the average price paid for 116.85 acres of land in IR 3, 5, 7, and 8 was $24.85 per acre, a sum that included improvements and payments made for buildings.

We cannot consider his report without noting the fact that Agent Irwin accompanied Green on his travels and acted as his guide. Irwin was present at Green's meetings with both band members and non-reserve residents. This is the same Agent Irwin that Green was supposed to be investigating. We do not see how he could have conducted an independent assessment in the company of the person whose values he was investigating, and we do not find it surprising that his conclusion about this "arid and water-less country covered with sage brush"[134] was that "the greater part of the land taken from the reserves is absolutely worthless for any purpose."[135] Nor is it surprising that he concluded that Agent Irwin's $5 valuation was "a very liberal one."[136] We note that he states that "Mr. Irwin's instructions were that he should value each parcel of land irrespective of any arrangement made with adjacent white settlers."[137] The historical record is clear that the department's instructions were inconsistent and contradictory. Irwin's instructions were the opposite. Superintendent Vowell, for instance, stated that Irwin had been "fully instructed as to the requirements of the department touching such valuations."[138] Later in 1906, when the Secretary was writing from departmental headquarters in Ottawa to Vowell, after both Chief Newhumpsion and R.C. Armstrong had written in protest, he stated that "the lands in Indian reserves should be valued exactly the same as similar lands outside reserves"[139] – the requirement that is set out by the statute.

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[134] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).

[135] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).

[136] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).

[137] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).

[138] A.W. Vowell, Superintendent of Indian Affairs, BC, to Secretary, Department of Indian Affairs, November 15, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 61–62).

[139] Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, July 10, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 118).

We note that R.C. Armstrong was similarly unimpressed. The day after Ashdown Green and Agent Irwin visited him, he wrote a strongly worded letter to the department:

> As Mr. Green called on me yesterday as he was returning from the Ind[ian] reserve with Irwin, he made such outrageous statements re the Indian land I wish to say I think some one has been paid to lie about the land. I felt sure when I saw him with Irwin. I felt sure the Indians would be done for and you made to believe a wrong value. [T]he first false statement he mad[e] was the land was mostly stony[. N]ow the fact is there is not ten acres of the right of way stony. Of course, if there is a cut made on any of these benches there will be stones struck, as all the benches is made from the mountains ages ago. Then as to sand he said a lot of it was sandy a straight lie. Now the weather has been so dry for months that the land is dry in spots and dusty. A coast man was the worst kind of a man to send to value land in the upper country as it looks so different from the wet coast land but as I wrote before the stony land in this valley and all these valleys is good fruit land if there is water to irrigate them and there is plenty of water to irrigate all this reserve[.] At Keremeos there has been 1600 acres sold for $35.00 on an acre, more than half of which is high gravelly and stony land and is now selling in small lots of 5 and ten acres for from one to two hundred dollars an acr[e]. There was another ranch of 800 acres sold for about the same per acre more than half of which is bench land and no way to irrigate it either. I will give $20.00 twenty dollars an acre for any amount of the Indian land measured from the river to the mountain and I have offered $20 an acre for a very stony piece of reserve (ten acres) but it can be irrigated (for fruit purposes). I think some one has been squared in this deal. ... I enclose on the back a list of names and prices paid by the R.R. here.[140]

Positions of the Parties

The Band has argued that Canada breached a fiduciary duty with regard to Ashdown Green's investigation. Conversely, Canada has argued that it did not.

We do not find the issue clear. Green was a surveyor employed by the Department of Indian Affairs. He was asked by his superiors to investigate and report, and he did so, albeit, we think, not very well. R.C. Armstrong may have thought he "was the wrong kind of man" to do this report, but we have not been presented with any evidence that Green was unskilled or unable. There is nothing on the record about whether the department had any concerns.

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[140] R.C. Armstrong, to Secretary, Department of Indian Affairs, August 14, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 128–30).

Panel's Reasons

Accordingly, we are unable to make a finding that Canada breached either a statutory or a fiduciary duty to the Band with regard to Ashdown Green's investigation.

ISSUE 5 REVERSIONARY INTEREST IN THE LANDS

5 Did Canada breach a statutory and/or fiduciary duty to the Lower Similkameen Indian Band to ensure that the lands taken by the Victoria, Vancouver and Eastern Railway for railway purposes reverted back to Her Majesty the Queen and, particularly, to Her Majesty the Queen in Right of Canada and then to reserve status for the benefit of the Lower Similkameen Indian Band once those lands were no longer required for railway purposes?

Though framed in the past tense, this issue requires the panel to determine whether there has been and continues to be a duty to ensure that the right of way over IR 3, 5, 7, and 8 reverts to Indian reserve status with the abandonment of its use for railway purposes, and whether that duty has been breached. For the reasons that follow, the panel has concluded that the lands in question have been reserve lands since conveyance by British Columbia to Canada for that purpose, and that the interest of the railway has reverted to the Crown for the use and benefit of the Lower Similkameen Indian Band. Canada had and continues to have a fiduciary duty to ensure that this result occurs.

Background

In response to requests in October and November 1905 from the Ottawa solicitors for the VV&E, and subsequent payment, an order in council issued December 23, 1905, recommending that, "under the provisions of Section 35 of the Indian Act, as amended by Section 5 of Chapter 33, 50–51 Victoria, authority be given for the sale of the land to the said Company upon such terms as may be agreed upon."[141]

Section 35 of the *Indian Act*, RSC 1886, c. 43, as amended by SC 1887, c. 33, s. 5, provided in relevant part as follows:

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[141] Order in Council, December 23, 1905, no file reference available (ICC Exhibit 1a, p. 80).

> No portion of any reserve shall be taken for the purposes of any railway, road or public work without the consent of the Governor in Council.

On March 20, 1906, letters patent were issued for the "absolute purchase"of the right of way over IR 3, 5, 7, and 8, the conveying term of which was as follows:

> We by these Presents, do grant, sell, alien, convey and assure unto the said The Vancouver Victoria and Eastern Railway and Navigation Company, their successors and assigns forever: all these parcels or tracts of land ... composed of the Right of Way of the said Company through Indian Reserves numbers seven, eight, three and five of the Lower Similkameen Indians.[142]

As discussed under Issue 1, British Columbia Order in Council 1036 of July 29, 1938, provided:

> THAT under authority of Section 93 of the "Land Act," being Chapter 144, "Revised Statutes of British Columbia, 1936," and Section 2 of Chapter 32, "British Columbia Statutes 1919," being the "Indian Affairs Settlement Act," the lands set out in schedule attached hereto be conveyed to His Majesty the King in the right of the Dominion of Canada in trust for the use and benefit of the Indians of the Province of British Columbia, subject however to the right of the Dominion Government to deal with the said lands to such manner as they may deem best suited for the purpose of the Indians.[143]

Among the lands listed in the schedule were Reserves 2–13 of the Lower Similkameen Band. For the reserves in question, the acreages listed in the schedule as conveyed were not reduced by an amount corresponding to the area occupied by the right of way. The acreages that in 1902 made up IR 3, 5, and 7 and 8 combined – 1,750 acres, 1,278 acres, and 4,075 acres, respectively – were the same identical acreages that were conveyed to the federal Crown by the provincial order in council.

At the community session in this inquiry, held April 19–20, 2004, Elders of the Lower Similkameen Band gave their evidence about the oral history of the Band with respect to events

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[142] Letters Patent No. 14388, March 20, 1906, no file reference available (ICC Exhibit 1a, pp. 84–85).

[143] British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 381).

surrounding the taking of the right of way in 1905–6. A century having passed, these Elders were testifying as to the understanding of their parents and the community generally, as conveyed to them in their younger years. A consistent theme in the evidence was that the land was to return to the reserve whenever the trains stopped running. The evidence of Mrs Margaret Kruger, born in 1914, is typical. Speaking of conversations of Elders she listened to when she was about 20 years old, she said:

> Well, they just said that the railway took over the land and they felt that they were going to get it back, whenever the trains (indiscernible). ... whenever they quit using it, the land would go back to the Indians. That's been the number one thoughts of all the native people. When the white man uses the land and when they're finished with it, it automatically goes back to the band.[144]

Several Elders, speaking of the right of way in the Okanagan language, employed the term *kwúlen*, which the interpreter explained means "loan."[145]

Use of the trackage ceased with the wash-out of the Similkameen River railway bridge in 1972. When, in1985, the VV&E's successor, the Burlington Northern, applied to abandon the line from Keremeos to the international boundary (the upstream portion having been abandoned in 1954), the Railway Transport Committee of the Canadian Transport Commission approved the abandonment on October 4, 1985.

In the course of the committee's investigation into the abandonment application, Band Administrator Delphine Terbasket notified the Canadian Transport Commission: "The Upper and Lower Similkameen Indian Band advise that [there] is no objection [to] the abandonment as long as the crossing right of ways are returned to the Upper and Lower Similkameen Indian Reserves."[146] In its decision, the Railway Transport Committee noted that "the determination of Native land claims

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144 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, Margaret Kruger, p. 140).

145 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, Interpreter, p. 128). Several witnesses also offered "to lend" or "to borrow" as the meaning of *kwúlen*.

146 Delphine Terbasket, Administrator, to R.W. Lebell, Canadian Transport Commission, Western Division, September 18, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 449).

is a matter outside the scope of the jurisdiction of the Commission."[147] Responding to the decision, Hubert J. Ryan, then Acting Director of the Department of Indian Affairs' Land Directorate, informed the British Columbia Region Reserves and Trusts office of the commission's order, noting: "As the rail line in question passes through a number of reserves belonging to the Similkameen Band you may wish to approach the company in question with the view of re-acquiring these lands for the use and benefit of the Band."[148] While this letter appears to have led to some internal discussion, no action was taken. The Band subsequently commenced litigation, though our most recent information is that it is in abeyance.[149]

Positions of the Parties

The Band makes alternative submissions: If what were known as "reserves" in 1905 were in fact true Indian reserves, the alienation created by the 1905 orders in council was merely an easement, notwithstanding the language of the letters patent. Alternatively, if no reserve was created until 1938, the Band takes the position that the federal Crown lacked jurisdiction to take the lands in question under the *Indian Act*, with the result that the orders in council were void *ab initio* (from the beginning). The Band relies on *Osoyoos Indian Band v. Oliver (Town)*[150] for the position that, in case of ambiguity about a taking from a reserve, an interpretation that minimally impairs the reserve interest is to be preferred. The Band did not, however, point to any ambiguity in the orders or letters patent on which it relied.

The Band also traced the history of the restraint on alienation contained in the *Railway Act*, *1903* and its successors, pointing out that a railway was authorized to "take and appropriate" Crown

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147 Decision No. WDR1985-07, Railway Transport Committee, Canadian Transport Commission, Western Division, October 4, 1985 (ICC Exhibit 1a, p. 453).

148 Hubert J. Ryan, Acting Director, Land Directorate, Reserves and Trusts, to Director, Reserves and Trusts, BC Region, October 15, 1985, DIAND file E5667-07399 (ICC Exhibit 1a, p. 457).

149 In its written submissions, Canada states: "The Lower Similkameen Indian Band did in fact commence litigation pursuing both Canada and the railway company that has moved parallel to this claim" (para. 45). By letter of January 4, 2005, counsel for the Band advised counsel for the Commission as follows: "In the past, there was a formal abeyance agreement for the litigation, however it has expired. Though the abeyance agreement has expired, neither the Lower Similkameen Indian Band nor the Federal Crown has proceeded with litigation."

150 *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746.

lands (including provincial Crown lands) for railway purposes, but prohibited from alienating such lands. In this regard, the Band relies on case law dealing with the reversionary interest in railway right of way lands when the railway use has been abandoned: *Canada (Attorney General) v. Canadian Pacific Ltd.*[151] (the "Kettle Valley case") and *Canada (Attorney General) v. Canadian Pacific Ltd.*[152] (the "False Creek case"). In the Band's view, the ultimate result of the reversionary interest logic is a constructive trust in favour of the Band.

Canada takes the position, relying on *Wewaykum*,[153] that the federal authority over the lands in 1905 was limited to "legislative and administrative jurisdiction" such that the federal Crown was unable to grant fee simple rights, saying what was conveyed is best characterized as an easement. Canada agrees with the Band that the *Railway Act, 1903* and the case law cited by the Band preclude the railway alienating the right of way lands once they are no longer used as trackage, but it says that the reversionary interest accrues only to the federal Crown, not to the benefit of the Band. In support of this position, Canada argues that, despite the inclusion of the right of way lands in provincial Order in Council 1036 of 1938, and their consequent apparent conveyance to Canada "in trust for the use and benefit of the Indians," these lands could not have acquired reserve status because they were already subject to an easement in favour of the railway.

No one has argued before the panel that the railway has title to the lands. The parties agree that the reversionary interest in the right of way lands accrues to the federal Crown, differing only on the central question – whether that interest is ultimately for the use and benefit of the Band.

Panel's Reasons

Were the1905 Orders in Council Effective?

We must first consider what the federal Crown effected in 1905 by its orders in council. The Governor in Council, invoking as authority section 35 of the *Indian Act* of 1886 as it then stood,

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[151] *Canada (Attorney General) v. Canadian Pacific Ltd.*, [1986] 1 CNLR, affirmed [1986] BCJ No. 407 (QL).

[152] *Canada (Attorney General) v. Canadian Pacific Ltd.,* 2000 BCSC 933, affirmed without pronouncement as to reversion to reserve status, 2002 BCCA 478; [2002] 4 CNLR 32.

[153] *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 51.

purported to give, by order, "authority ... for the sale of the [right of way] land" to the VV&E. Had the lands in question been Indian reserves, as all parties at the time believed them to be, the *Indian Act* would have applied. However, as *Wewaykum* tells us, they were not reserves, and the statute did not apply. Moreover, section 35 prohibited a "portion of any reserve" from being taken without Governor in Council consent, but arguably it did not in itself give the power to take reserve lands.[154] For Crown lands and reserve lands, that power lay in the *Railway Act, 1903*, the relevant provisions of which were as follows:

> 134. No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council; but with such consent, any such company may, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, but not alienate, so much of the lands of the Crown lying on the route of the railway as have not been granted or sold, and as is necessary for such railway ... .
>
> 136. No company shall take possession of, or occupy, any portion of any Indian reserve or lands, without the consent of the Governor in Council; and when, with such consent, any portion of any such reserve or lands is taken possession of, used or occupied by any company, or when the same is injuriously affected by the construction of any railway, compensation shall be made therefor as in the case of lands taken without consent of the owner.[155]

The terms "Lands vested in the Crown" and "Lands of the Crown" in the various *Railway Acts* include provincial Crown lands: *Reference re: British North America Act, 1867, s. 108 (B.C.)*;[156] *Reference re: Railway Act, s. 189 (Canada)*.[157] The federal Crown was therefore able to give valid

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[154] The prohibitory language of s. 35 of the *Indian Act* of 1886 as amended in 1887 – "No portion of any reserve shall be taken for the purposes of any railway, road or public work without the consent of the Governor in Council" – stands in contrast to the corresponding section of the 1906 *Indian Act*, s. 46, amended in 1911 to give express power to specified entities to take reserve lands with Governor in Council consent. "[T]he right to expropriate ... must be found in the express words of a statute for the right is never implied." See G.S. Challies, *The Law of Expropriation* (2nd ed., 1963), p. 12, quoted with approval by L'Heureux-Dubé J in *Leiriao v. Val-Bélair (Town)*, [1991] 3 SCR 349 at para. 12.

[155] *Railway Act, 1903*, SC 1903, c. 58, s. 136 (ICC Exhibit 6c, p. 40).

[156] [1906] AC 204.

[157] [1926] SCR 163. See also *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85 at 101–10.

consent to the taking by a railway of an interest in provincial Crown lands to the extent provided by the *Railway Act, 1903*.

Any legal difficulties that might be thought in this case to arise from the questionable reliance by the federal Crown exclusively on the *Indian Act* dissipate in the face of the doctrine that "executive legislation need not indicate the source of its authority."[158] As Mr Justice La Forest has stated: "All that is constitutionally required of subordinate bodies – as of federal and provincial governments – is that they act within their jurisdiction, not that they state the source of this jurisdiction."[159] Thus, given that it is not disputed that the lands in question were Crown lands, their taking was effective. The *Railway Act, 1903* had that effect, despite its not being mentioned in the order. This fact disposes of the argument that the taking, purportedly under the *Indian Act*, was void *ab initio*. In fact, it was effective.

What Interest Was Taken?

The next question to be considered is, "What was taken?" The language employed in the order in council, "authority be given for the sale of the land to the said Company," and in the letters patent, "We ... do grant, sell, alien, convey and assure unto the said ... Company, their successors and assigns forever," is the language of conveyance of fee simple title (though it is the language of the order that governs, the letters patent being unable to exceed what was in the order). However, the power to take under the *Railway Act, 1903* was constrained by the prohibition against alienation contained in section 134:

> [W]ith such consent [of the Governor in Council], any such company may, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, *but not alienate*, so much of the lands of the Crown ... as is necessary for such railway.[160]

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158 John Mark Keyes, *Executive Legislation: Delegated Law Making by the Executive Branch* (Toronto: Butterworths, 1992), 138 (footnote omitted), mentioned with approval in *British Columbia (Milk Board) v. Grisnich (c.o.b. Mountainview Acres)*, [1995] 2 SCR 895 at paras. 6 and 20.

159 *British Columbia (Milk Board) v. Grisnich (c.o.b. Mountainview Acres)*, [1995] 2 SCR 895 at para. 30.

160 *Railway Act, 1903*, SC 1903, c. 58, s. 134 (ICC Exhibit 6c, p. 40). Emphasis added.

Since the granting of fee simple title is equivalent to alienation,[161] we conclude that any intention on the part of the federal Crown to grant title is overridden by the statutory prohibition against alienation, executive action being unable to exceed the power given by statute.[162] A lesser interest was granted.

Meredith J of the British Columbia Supreme Court dealt with similar circumstances in *Canada (Attorney General) v. Canadian Pacific Limited et al.*,[163] where the order in council in question spoke of the "sale ... without any terms or conditions" of the reserve lands, in this case of the Penticton Indian Band, to the Canadian Pacific Railway (CPR). Meredith J held that notwithstanding the language of the order, "the purported alienation of the lands ... is illegal as contrary to the *Railway Act*. And further because the lands are no longer necessary, and are thus no longer used, for purposes of the railway they must be restored to the Crown."[164] On examining the restraint against alienation in the *Railway Act*, RSC 1927, c. 170, s. 189, "The company may not alienate any such lands so taken, used or occupied," he commented: "The restraint against alienation is clear."[165] In our view, the phrase "such company may ... take and appropriate, for the use of its railway and works, but not alienate" in s. 134 of the *Railway Act, 1903* makes the restraint against alienation in that Act equally clear. The decision of Meredith J was upheld on appeal,[166] and

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161 See *Kruger et al. v. The Queen*, [1986] 1 FC 3 at 41, Urie JA.

162 "[I]t would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions." *A.G. v. DeKeyser's Royal Hotel Ltd.*, [1920] AC 508 at 542 (HL). See P.W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007), para. 29.3, n.10.

163 Known as the "Kettle Valley case": [1986] 1 CNLR 1 (BCSC), affirmed [1986] BCJ No. 407 (BCCA); reaffirmed by a five-judge panel in the "False Creek case": 2002 BCCA 478, [2002] 4 CNLR 32.

164 *Canada (Attorney General) v. Canadian Pacific Limited et al.*, [1986] 1 CNLR 1at 2 (BCSC). The Penticton Indian Band was not a party to the proceeding, and the decision did not address their possible interest in the reversion.

165 *Canada (Attorney General) v. Canadian Pacific Limited et al.*, [1986] 1 CNLR 1 at 4 (BCSC).

166 [1986] BCJ No. 407 (BCCA).

subsequently reaffirmed by a five-judge panel of the British Columbia Court of Appeal in *Canada (Attorney General) v. Canadian Pacific Ltd.* (the "False Creek case").[167]

This reasoning is supported by that of another case in the same court involving the same main parties, *Canada (Attorney General) v. Canadian Pacific Ltd.*,[168] in which Saunders J (as she then was) also considered the effect of section 189 of the *Railway Act*, RSC 1927. Acknowledging in that case that the intention was to give the Canadian Pacific Railway a fee simple title, she nevertheless held that the statutory authority overrode any intention of the parties:

> I am satisfied on the evidence that CPR and the government officials acting for Canada intended that the entire title, not a lesser estate, was to be conveyed to CPR. However, at the time of the Grant, Canada still lacked title. This transaction, therefore, cannot be forced away from the language of the *Railway Act* into the language of the CPR Contract. This mistake, while mutual, does not, in my view, alter the statutory authority which must be taken to have applied to this transaction.[169]

The further point needs to be made that the interest granted was in provincial Crown land; if the Governor in Council's powers were limited under the *Railway Act* to consenting to a taking without alienation, he could not have consented to more, as the federal Crown had no fee simple to grant. This is an instance of the general rule that one cannot give what one does not possess, sometimes expressed by the Latin maxim *nemo dat qui non habet*.

There can be no doubt, therefore, that the result of the 1905 orders in council, whatever the intention (of which we have no evidence other than the words of the order itself), was to grant the VV&E a lesser interest than fee simple. What was taken is best described by the term employed by the Supreme Court in *Canadian Pacific Limited v. Paul* as "a statutory right of way, i.e., an easement,"[170] or by that Court in *Osoyoos Indian Band v. Oliver (Town)* as a "statutory easement."[171]

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167 *Canada (Attorney General) v. Canadian Pacific Ltd.,* 2002 BCCA 478.

168 The "False Creek case": 2000 BCSC 933.

169 2000 BCSC 933, [2000] 4 CNLR 39 at para. 157.

170 *Canadian Pacific Limited v. Paul*, [1988] 2 SCR 654 at 670. See also *Canadian Pacific Limited v. Matsqui Indian Band*, [2000] 1 FC 325 at para. 87, Robertson JA, who (in dissent, but terminology was not at issue) employs the term "statutory easement or licence."

171 *Osoyoos Indian Band v. Oliver (Town),* [2001] 3 SCR 746 at para. 89.

We note parenthetically that we find no ambiguity of the type central to *Osoyoos* that would require us to decide between alternative degrees of interest obtained by the VV&E. In that case, the federal order in council was ambiguous, and the majority of the Court preferred the interpretation that "impairs the Indian interest as little as possible."[172] In our case, however, whatever the intention of the order in council, it was effective only to grant an easement, because of the restriction against alienation contained in the applicable *Railway Act* (not at issue in *Osoyoos*). It is sufficient, therefore, to regard what was taken as an easement.

What Is the Disposition of the Easement?

The easement was "for the *use* of [the VV&E's] railway and works."[173] Such use ceased at the latest on October 4, 1985, when the Canadian Transport Commission approved the abandonment of the line, if not with the actual cessation of use in 1972. Given the purpose for which it was granted, the easement ceased not later than the second of these dates.

Was There a Reversionary Interest in the Easement? If So, to Whom?

On this question of reversion, we again adopt the reasoning of Saunders J in *Canada (Attorney General) v. Canadian Pacific*: "I have found that CPR's interest ... is not an absolute fee simple. The corollary is that there is a reversionary interest of some nature held by another party. That party must be Canada because British Columbia's entire remaining interest in the land was passed to Canada."[174] Later, she says: "Even though the *Railway Act* does not discuss the possibility of the reversion, it is, I consider, a reasonable inference."[175]

When this decision was appealed to the British Columbia Court of Appeal, the appeal was heard by a five-judge panel, convened because the correctness of the 1986 decision of that court in the Kettle Valley case had been put in issue. Commenting on the latter decision, and by implication

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172 *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746 at para. 89.

173 *Railway Act, 1903*, SC 1903, c. 58, s. 134 (ICC Exhibit 6c, p. 40). Emphasis added.

174 *Canada (Attorney General) v. Canadian Pacific*, 2000 BCSC 933, [2000] 4 CNLR 39 at para. 202.

175 *Canada (Attorney General) v. Canadian Pacific*, 2000 BCSC 933, [2000] 4 CNLR 39 at para. 252.

affirming the finding of Saunders J that the CPR's interest had reverted to the federal Crown, Esson JA wrote for the court: "I would hold that *Kettle Valley*, in finding a necessary implication that cessation of use for railway purposes would cause the land to revert to the Crown, was rightly decided."[176]

In our case also, British Columbia's "entire remaining interest in the land," in the words of Saunders J, was passed to Canada; the lands conveyed to Canada by British Columbia by Order in Council 1036 of July 29, 1938, were identically the lands occupied by the reserve in 1902, before the taking of the right of way. This interest was subject to the easement granted in 1905 to the VV&E. It follows that, as a matter of law, the interest of the VV&E, or its then-successor, the Burlington Northern, in its former right of way reverted to Canada not later than October 4, 1985.[177]

The parties do not disagree that the reversionary interest in the right of way lands accrued to the federal Crown. That position is supported by the foregoing reasoning. The parties differ, however, on whether that interest is ultimately held for the use and benefit of the Band. We will address this question in the next section.

Is the Reversionary Interest for the Use and Benefit of the Lower Similkameen Indian Band?

There are both legal and equitable grounds on which to conclude that the VV&E right of way has reverted to the federal Crown for the use and benefit of the Lower Similkameen Indian Band. Both grounds rest on the effect of British Columbia Order in Council 1036.

Legal Ground

Article 13 of the British Columbia Terms of Union imposed the following obligation on the province:

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[176] 2002 BCCA 478, [2002] 4 CNLR 32 at para. 120.

[177] This finding expresses our view of the correct legal position. We have not concerned ourselves with real property records, positions taken by parties in any litigation, or any court decisions that may have been made, none of which is on the record.

> [T]racts of land ... shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians.[178]

As Binnie J explains in *Wewaykum*:

> Federal-provincial cooperation was required in the reserve-creation process because, while the federal government had jurisdiction over "Indians, and Lands reserved for the Indians" under s. 91(24) of the Constitution Act, 1867, Crown lands in British Columbia, on which any reserve would have to be established, were retained as provincial property.[179]

In the course of discharge of its obligation, the province conveyed its interest in Reserves 2–13 of the Lower Similkameen Band by Order in Council 1036 of July 29, 1938. The condition for the conveyance tracked the language of Article 13, approving,

> THAT ... the lands ... be conveyed ... *in trust for the use and benefit of the Indians* of the Province of British Columbia, subject however to the right of the Dominion Government to deal with the said lands to such manner as they may deem best suited for the purpose of the Indians ... .[180]

So far as the reserves at issue here are concerned, the lands so conveyed to Canada were identically the lands occupied by the reserve in 1902, before the taking of the right of way. On conveyance, the lands, including the right of way, became Indian reserve lands, subject to any administrative steps Canada may have had to take in order to set the lands apart as such.[181]

In *Kruger et al. v. The Queen*, Urie JA discusses the direct effect of Order in Council 1036. Following a recital of the order, he says: "The Penticton Indian Band, as one of the Indian bands in

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178 Imperial Order in Council, May 16, 1871, reproduced in RSC 1985, Appendix II, No. 10.

179 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 15.

180 British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 381). Emphasis added.

181 See *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 16. If this final step was not taken post–Order in Council 1036, this would again be a failure of fiduciary duty for which the Crown, not the Band, should bear the burden.

the province, *thereby* became entitled to the use and benefit of the lands described [for them] in the Schedule."[182]

It is trite law that a conveyance of land is subject to any pre-existing interest in that land, and it follows that the interest granted to Canada in 1938 in those lands "in trust for the use and benefit of the Indians" was subject to the easement granted in 1905 to the VV&E. Canada has submitted that "the right to use and occupy those railway lands did not form part of the reserve created in 1938 as the Province had no authority to convey that interest."[183] In the face of the language of the 1938 order, this proposition does not withstand scrutiny. While it is true that "that interest" – the easement – was already conveyed and so subtracted from the province's interest, the province's residual interest – namely, the fee simple subject to the easement, or what Canada in the same paragraph acknowledges as "the underlying title" – was transferred to Canada in 1938, becoming reserve lands by virtue of the terms of the provincial order. The reserve lands so created were thus subject to the easement. As we have already explained, the reserve lands were freed of this burden not later than 1985, with the result that the former right of way, in our view, now has full reserve status.

In any case, if, as Canada maintains, the province has not transferred title of the right of way to the federal Crown, it remains to this day provincial Crown land. In that case, any reversionary right would accrue to the provincial Crown, the federal Crown having no interest whatever on cessation of use by the railway.

We find support for the view that the reversionary interest accrues to the Band's benefit in the conclusion of Saunders J in *Canada (Attorney General) v. Canadian Pacific* (the "False Creek case") respecting whether the Crown's reversionary interest in that case was held for the use and benefit of certain Indian bands.[184] She was bound in her findings by the decision of the British Columbia Court of Appeal in *Osoyoos*[185] (the Supreme Court decision not yet having issued), where

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182 *Kruger et al. v. The Queen,* [1985] 3 CNLR 15 at 17 (FCA). Emphasis added.

183 Written Submission on Behalf of the Government of Canada, December 17, 2004, para. 6.

184 The question of which band or bands were entitled to the use and benefit was the subject of a separate proceeding in the Federal Court: *Squamish Indian Band v. Canada*, 2001 FCT 480. See *Canada (Attorney General) v. Canadian Pacific Ltd.,* 2000 BCSC 933, [2000] 4 CNLR 39 at para. 15.

185 *Osoyoos Indian Band v. Oliver (Town)*, 1999 BCCA 297.

the majority held that the taking of the irrigation canal right of way at issue, done under section 35 of the 1952 *Indian Act*, removed the right of way from the reserve. Thus, in order to determine the ultimate disposition of the reversionary interest in the right of way at issue before her, Saunders J had to consider whether the reserve interest that had existed before the taking had "revived." Her finding on that point is as follows:

> [T]he title [the CPR] acquired was not absolute because the statutory powers exercised were limited by a prohibition on alienation. I conclude that the taking in s. 48 included a taking under s. 189 of the 1927 *Railway Act* which did not extinguish the reserve status, but rather suspended it.[186]

On appeal, the British Columbia Court of Appeal declined either to agree with or reverse this part of Madam Justice Saunders' decision:

> The issue of revival is complex and potentially of very substantial general importance. We are told that this is the first case in which the concept of revival has been squarely raised. The fact pattern in this case is highly unusual and in many respects unique. The issue, therefore, is one which it may be preferable not to decide if it need not be decided. ...
>
> In short, while I do not say that the trial judge's interpretation of the statutes and the concept of revival of reserve status is in error, I cannot say that it is right.[187]

Given, however, the majority decision of the Supreme Court in *Osoyoos*, that the taking of the right of way in that case did not remove the land from the reserve, reversing the Court of Appeal, the question of "revival" of the Indian interest is moot. Thus, the ultimate finding of Saunders J, that the reversionary interest was indeed for the use and benefit of a band or bands, would appear to have been buttressed, if anything, by the Supreme Court's decision. However, the Court of Appeal did not find it necessary to consider how the "revival" question might have been affected by the Supreme Court decision or to deal with the constructive trust issue. The Court did, however, affirm Saunders J's conclusion that the interest did in fact accrue to the band or bands, resting its decision on the "resulting trust" finding preferred by Saunders J.

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186 2000 BCSC 933, [2000] 4 CNLR 39 at para. 224.

187 *Canada (Attorney General) v. Canadian Pacific Ltd.*, 2002 BCCA 478.

Since the facts in this inquiry do not support a finding of "resulting trust,"[188] it is necessary to consider whether the alternatives proposed by Saunders J apply to our situation. While in our view, in the light of the decision of the Supreme Court in *Osoyoos*,[189] the "revival" argument is no longer required, we do regard the "constructive trust" argument as applicable, and that approach is analyzed below.

The legal reasoning on which we rest our conclusion that the interest in the VV&E right of way is held by Canada for the use and benefit of the Lower Similkameen Indian Band is quite straightforward:

1 When the right of way was taken in 1905, the "reserve" lands were in fact provincial Crown lands.

2 As we have already held, the taking created an easement in favour of the VV&E over the provincial lands.

3 In 1938 British Columbia conveyed lands that included the right of way lands to Canada "in trust for the use and benefit of the Indians."

4 On that conveyance, the right of way became part of the reserve, subject to the easement to VV&E or, by then, its parent/successor.

5 That easement terminated not later than 1985.

6 It follows that the lands are now fully reserve lands.

We have described this result as legal because it turns on the fact that the 1938 conveyance included the right of way. The alternative ground on which we would reach the same conclusion is an equitable ground.

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[188] For a resulting trust to have arisen, the claimant had either to transfer the property in question to the alleged trustee, or supply all or part of the money to purchase it. See Donovan W.M. Waters, *Waters Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Carswell, 2005), p. 365. In the False Creek case, the Squamish Band had advanced $350,000 to purchase the provincial interest in the lands in question.

[189] *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746.

Equitable Ground

In order to argue that the right of way reverts to it, Canada must rely on the fact that the right of way was conveyed to it by provincial Order in Council 1036. Were that not so – had the right of way been excepted from the provincial order – the right of way would have remained provincial Crown land subject to an easement; on cessation of that easement, the burden on the provincial title would be lifted and the full title of the province would revive, as mentioned above. The federal Crown would have no claim. The case for a reversionary interest in favour of Canada rests, therefore, on the content of Order in Council 1036, by which the right of way was conveyed to Canada "in trust for the use and benefit of the Indians." It was accepted by Canada on that basis. We can only conclude that it would be a most serious breach of that express trust for Canada to obtain title to the right of way, yet refuse to accept that it is for the use and benefit of the Lower Similkameen Indian Band.

There can be no doubt of the fiduciary obligation on Canada in these circumstances, given the language of the provincial conveyance, made to satisfy a constitutional imperative. The right of way having, in 1938, been created reserve land, the highest fiduciary obligation arises. Specifically, the obligation is to ensure that the lands have, or acquire, so far as title is concerned, full reserve status:

> Once a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation.[190]

Should Canada now have, or obtain, title to the right of way lands,[191] but treat the lands otherwise than held in trust for the Band, Canada would be unjustly enriched.[192] This point leads us to observe

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[190] *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 86.

[191] The current legal status of the lands is not known to us. The Band's 1995 claim submission states, "To this day, Burlington Northern Railway remains the holder of title of the lands which formed the right of way" (para. 69), while Canada states, "[P]resently the Burlington Northern Railway Company claims to own the fee simple [but] in fact, the railway company's interest in the lands has reverted or must revert to the Federal Crown" (paras. 2–3). As noted above, the legal status of the lands has been the subject of litigation, which we are told has been placed in abeyance.

[192] See *Semiahmoo Indian Band v. Canada*, [1998] 1 FC 3 at paras. 93–97.

that, in addition to our finding above of an express trust, the equitable concept of constructive trust applies to such circumstances:

> An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment; (2) a corresponding deprivation; and (3) the absence of a juristic reason for the enrichment. These proven, the action is established and the right to claim relief made out. At this point, a second doctrinal concern arises: the nature of the remedy. "Unjust enrichment" in equity permitted a number of remedies, depending on the circumstances. ... [An] equitable remedy, available traditionally where one person was possessed of legal title to property in which another had an interest, was the constructive trust.[193]

Canada has submitted that it is entitled to the reversionary interest in the right of way. By retaining the right of way other than in trust for the Band, Canada would clearly be enriched, the Band correspondingly deprived, and no juristic reason for the enrichment has been suggested. While invocation of a constructive trust may be superfluous in the circumstances, given the clear words of the provincial conveyance, the concept nevertheless buttresses our view. As one authority describes the constructive trust, "Someone who acquired property in breach of trust, or otherwise by taking advantage of a fiduciary position, could not benefit from the property; he was deemed to hold the property in trust instead."[194]

In the False Creek case, one of the three grounds on which Saunders J held the reversionary interest to accrue to bands was that a constructive trust existed. It is pertinent to repeat what she said on this point:

> [I]n a case such as this in which Canada only acquired the province's title as administrator of Indian affairs, and had no interest in the land independent of the Indian interest, at any time, there is little merit to the suggestion that it now has an exclusive interest in those very parcels with the result that use and benefit would flow

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[193] *Peter v. Beblow*, [1993] 1 SCR 980, McLachlin J (as she then was) at para. 3.

[194] A.H. Oosterhoff et al., *Oosterhoff on Trusts: Text, Commentary and Materials*, 6th ed. (Toronto: Thomson Carswell, 2004), 627.

> not to the Indians for whose benefit it was reserved, or to the province that held proprietary title before it was reserved for Indian use, but to Canada.[195]

While we have not inquired in detail into the current legal situation respecting the right of way lands, we have been told that litigation has been commenced (though now in abeyance) to establish title to these lands. In our view, the fiduciary duty that infuses the taking of reserve lands for public purposes, demands that a compulsory taking "impairs the Indian interest as little as possible"[196] and obliges Canada to pursue vigorously whatever steps are required to ensure that the title to the right of way lands is held in the federal Crown for the use and benefit of the Lower Similkameen Indian Band.

Precedent

The Indian Claims Commission has previously considered the question of reversionary interest in reserve lands on abandonment by a railway – in fact, the VV&E – in *Sumas Band: Indian Reserve 6 Railway Right of Way Inquiry*.[197] In that inquiry, too, the Commission found that the interest in the right of way reverted to Canada for the Band, rejecting the proposition that "the Indian interest in reserve lands may be taken absolutely while the Crown's interest ... is preserved."[198] In the result, the Commission recommended in February 1995 that the claim of the Sumas Band be accepted for negotiation under Canada's Specific Claims Policy.

In response, the Minister of Indian Affairs of the day, Minister Irwin, informed the Commission that, in view of litigation then under way, "judicial guidance is appropriate prior to

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[195] *Canada (Attorney General) v. Canadian Pacific Ltd.,* 2000 BCSC 933, [2000] 4 CNLR 39 at para. 220.

[196] *Osoyoos Indian Band v. Oliver (Town),* [2001] 3 SCR 746 at para. 89.

[197] Indian Claims Commission, *Sumas Band: Indian Reserve 6 Railway Right of Way Inquiry* (Ottawa, February 1995), reported (1996) 4 ICCP 3.

[198] Indian Claims Commission, *Sumas Band: Indian Reserve 6 Railway Right of Way Inquiry* (Ottawa, February 1995), reported (1996) 4 ICCP 3 at 43. Since our report on that inquiry was released in February 1995, we have had the benefit of significant developments in the case law; to the extent that these developments have clarified certain matters, our reasoning in this report differs somewhat from that of *Sumas*.

substantively responding to [the Commission's] recommendations."[199] In June 2005 his successor, Minister Scott, advised the Chief Commissioner as follows: "I am pleased to inform you that, after a careful review of the Sumas First Nation's claim and in light of the current case law, Canada has chosen to accept the Sumas First Nation's Railway Right-of-Way claim for negotiation."[200]

While the Minister did not provide further detail, we regard his decision as endorsement of the general proposition that, in the circumstance of a railway's cessation of use of its right of way over reserve land, the land reverts to the federal Crown for the use and benefit of the band whose reserve it is. From the following brief analysis, we conclude that the taking of the VV&E right of way over the Sumas Band's IR 6 is strongly analogous to the taking of the Lower Similkameen right of way into which we are asked to inquire. Acceptance for negotiation of the Sumas Band claim would appear to be an acknowledgment by Canada that the reversionary interest in analogous rights of way is in each case an interest in trust for the First Nation.

The Sumas Band's IR 6, together with other reserves for the Band, was purportedly set apart by Indian Reserve Commissioner Sproat on May 15, 1879.[201] However, as *Wewaykum* reminds us, nether the federal nor the provincial government could unilaterally create reserves on provincial Crown land.[202] In 1879 Crown land in British Columbia was provincial; it was not until the following year that lands on which the Sumas "reserves" stood were conveyed to Canada as part of the Railway Belt.[203] Thus, what were thought in 1879 to be Sumas *Indian Act* reserves, including IR 6, were, like the Lower Similkameen "reserves" from 1895, in a pre–reserve creation state. By the time the right

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[199] Letter of December 20, 1995, to Co-chairs Commissioners Bellegarde and Prentice, reproduced at 4 ICCP 205.

[200] Letter from the Honourable Andy Scott, Minister of Indian Affairs and Northern Development, to Chief Commissioner Renée Dupuis, June 16, 2005.

[201] Indian Claims Commission, *Sumas Band: Indian Reserve 6 Railway Right of Way Inquiry* (Ottawa, February 1995), reported (1996) 4 ICCP 3 at 9.

[202] *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at paras. 15–16.

[203] *An Act to grant public lands on the Mainland to the Dominion in aid of the Canadian Pacific Railway*, 1880, SBC 1880, c. 11. The Sumas Band's lands fell within the Railway Belt; those of the Lower Similkameen Band did not.

of way over IR 6 was taken, in 1910, purportedly under section 46 of the *Indian Act*,[204] the lands had become federal Crown lands within the Railway Belt. As no step had been taken after 1880 to set the reserves apart, they remained in their pre–reserve creation state at that time. It is difficult to conceive of a closer analogy than this one to the Lower Similkameen situation.

Conclusion

The question the panel was required to answer was as follows:

> Did Canada breach a ... duty to the Lower Similkameen Indian Band to ensure that the lands taken ... reverted ... to reserve status ... once those lands were no longer required for railway purposes?

As noted at the outset, the panel has interpreted this question as requiring it to determine not only whether there was such a duty in the past but whether there is a continuing duty to ensure that the legal status of the lands is that of reserve land for the benefit of the Band, and whether that duty has been breached to date. In failing to make best efforts to fulfill that duty since 1985, Canada has been in breach of its fiduciary duty. It is not too late, however, for Canada to carry out that duty as the fiduciary duty is ongoing. We encourage Canada to execute its obligation in this case in the immediate future by whatever legal steps may be required.

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[204] RSC 1906, c. 81. Section 46 is the successor to section 35 of the *Indian Act* of 1886.

PART V

CONCLUSIONS AND RECOMMENDATIONS

This inquiry has required us to address both historical and contemporary questions. These are, first, the compensation issues arising from the events of 1905–6, and, second, the nature of the current reversionary interest in the lands taken for railway purposes at that time.

With respect to compensation, we find that both public law and fiduciary duties in 1905–6 combined so as to have required that adequate compensation be paid for the taking of the railway lands. The public law duties are both statutory and those of common law. All these duties require that compensation should be paid based on fair market value; anything less is not "adequate." Acting as a prudent fiduciary, the Crown should have accepted a value only at the high end of the potential range. We have also concluded that compensation, to be adequate, must also provide for injurious affection to the lands adjacent to the right of way.

As to whether the compensation paid was in fact adequate, we have compared the compensation paid for band lands to that paid for other lands in the vicinity and concluded that the compensation for the band lands was far from adequate, being as little as 22 per cent of the land's value. Not only is the value that was accepted by Canada not at the high end of the range but it was not even within an acceptable range.

This inadequate valuation and compensation does not account for the injury to the band lands as a whole, bisected as they were by the railway. Compensation was also due for the serious disruption of band life and culture, damage to livestock, and impact on band members resulting from changes in wildlife behaviour, all of which were caused by the construction and operation of the line.

We find the arbitration provisions of the *Indian Act* to have had no application to the circumstances presented.

The evidence respecting the investigation by surveyor Ashdown Green is at best equivocal and at worst inadequate. We are unable to reach a conclusion as to whether this investigation constituted a breach of Canada's duty to the Band.

With respect to the reversionary interest, we have found that the 1905 taking of the right of way over provincial Crown lands created an easement in favour of VV&E. In 1938, when British Columbia conveyed lands, including the right of way, to Canada "in trust for the use and benefit of

the Indians," the right of way became part of the reserve, subject to the easement then belonging to the VV&E's parent/successor (now the Burlington Northern and Santa Fe Railway). That easement terminated no later than 1985, and it follows that the lands are now federal Crown lands held in trust for the Lower Similkameen Band – that is to say, reserve lands. Moreover, given that Canada obtained the lands in its trust capacity (without which they would have returned to the province), the only equitable result is that Canada should make every effort to secure the lands for the Band's use and benefit.

We therefore recommend to the parties:

RECOMMENDATION 1

That the Lower Similkameen Indian Band's claim for compensation be accepted for negotiation under Canada's Specific Claims Policy.

RECOMMENDATION 2

That Canada take the necessary steps, by litigation or otherwise, to ensure that the legal status of the former VV&E right of way lands is in every respect that of Indian reserve land set apart for the use and benefit of the Lower Similkameen Indian Band.

FOR THE INDIAN CLAIMS COMMISSION

Daniel J. Bellegarde (Chair)
Commissioner

Jane Dickson-Gilmore
Commissioner

Sheila G. Purdy
Commissioner

Dated this 26th day of February 2008.

APPENDIX A

HISTORICAL BACKGROUND

LOWER SIMILKAMEEN INDIAN BAND

VANCOUVER, VICTORIA AND EASTERN RAILWAY RIGHT OF WAY INQUIRY

Indian Claims Commission

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INTRODUCTION

In 1995 the Lower Similkameen Indian Band submitted a specific claim to the Department of Indian Affairs and Northern Development regarding the taking of a right of way by the Vancouver, Victoria and Eastern Railway Company (VV&E, a subsidiary of the Great Northern Railway, now part of the Burlington Northern and Santa Fe Railway) through Indian Reserves (IR) 2, 7, and 8 in 1905.[1] IR10 and 10B are not included in this claim. These reserves are located in the Similkameen River valley in southern British Columbia between the village of Keremeos and the international boundary. According to their oral history, the Similkameen people, also known as Smalq'mixw, are part of the Okanagan Nation, having occupied the Similkameen Valley since time immemorial.[2]

RESERVE ALLOCATION AND CONFIRMATION, 1878–1902

Indian Reserve Commission: G.M. Sproat, 1878

In April 1878 Gilbert Malcolm Sproat was appointed Indian Reserve Commissioner by the provincial government, with authority to make "decisions regarding Indian land questions in the Electoral District of Yale"[3] – the district that included the Similkameen Valley. In October 1878 he visited the area to set aside reserves for "the Keremeus Indians."[4] He described the valley itself as "narrow and gravelly," but valuable for winter grazing and producing hay for stock.[5] Sproat also reported that he "found the Indians in a state of discontent and dejection" because most of the best land in the area had already been pre-empted by white settlers, while the Similkameen people had

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[1] In 1905 the reserve we know today as IR 2 existed as three separate reserves: IR 2, 3, and 5. (They were amalgamated in 1959. See Exhibit 1a, p. 405.) The right of way passed through IR 3 and 5 as they existed at the time. For ease of reference, the old Indian Reserve numbers will be used in this history before 1959. The VV&E also expropriated a right of way through Lower Similkameen IR 10 and 10B (also amalgamated in 1959, along with IR 10A, to form one reserve known as IR 10), but these lands are not included within the claim submitted to the ICC for inquiry. However, the allocation and survey of IR 10 and 10B are included within this history for completeness.

[2] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 159–60, Lillian Allison; pp. 226–28, Leon Louis).

[3] British Columbia OC 615-1878, April 26, 1878, BC Archives (BCARS), GR0113 (ICC Exhibit 1c).

[4] G.M. Sproat, Indian Reserve Commissioner, to Chief Commissioner of Lands and Works, February 13, 1879, no file reference available (ICC Exhibit 1a, p. 13).

[5] G.M. Sproat, Indian Reserve Commissioner, to Chief Commissioner of Lands and Works, February 13, 1879, no file reference available (ICC Exhibit 1a, pp. 15–17).

not been granted any land of their own.[6] Sproat set to work allotting reserves in the Similkameen Valley from the remaining available land.

Sproat reserved lands for the "Okanagan Indians – Keremeus Group" which would eventually form IR 5, 7, 8, and 10. Part of IR 7 was located on the west bank of the Similkameen River "opposite the old Custom House" and was to "include the cultivable land."[7] For the "Keremeus Group – Ashnola Subgroup," he set aside a reserve at the confluence of the Similkameen and Ashnola Rivers which later formed part of IR 10.[8]

In addition, Sproat "reserved absolutely" other small parcels of arable land in the valley occupied by Lower Similkameen band members.[9] He noted that the exact locations could not be confirmed without survey, but that "the fact of occupation will enable the places to be easily found."[10] Included among these parcels were two 40-acre farms belonging to "John (son of Nah-hum-cheen)" and "Bauley." Both parcels were later included within IR 5 and 8, respectively.[11]

While Sproat was engaged in setting aside reserves, settlers were pre-empting land and water rights, making it "impossible for the Commissioner to know what arable land was really available without disturbing white settlers."[12] Because winter was approaching and considerable uncertainty existed with respect to what lands were available for reserve purposes, Sproat did not set aside any additional "definite reserves" at this time. Instead, he "temporarily reserved" a large tract of land in the Similkameen Valley, after "having made certain definite reserves where cultivation was progressing or seemed possible."[13] This temporary reserve stretched the length of the valley between

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6 G.M. Sproat, Indian Reserve Commissioner, to Chief Commissioner of Lands and Works, February 13, 1879, no file reference available (ICC Exhibit 1a, pp. 14–18).

7 G.M. Sproat, Minute of Decision, October 12, 1878, no file reference available (ICC Exhibit 1a, p. 3).

8 G.M. Sproat, Minute of Decision, October 12, 1878, no file reference available (ICC Exhibit 1a, p. 4).

9 G.M. Sproat, Minute of Decision, October 12, 1878, no file reference available (ICC Exhibit 1a, p. 8).

10 G.M. Sproat, Minute of Decision, October 12, 1878, no file reference available (ICC Exhibit 1a, p. 8).

11 G.M. Sproat, Minute of Decision, October 12, 1878, no file reference available (ICC Exhibit 1a, p. 9).

12 G.M. Sproat, undated memorandum, no file reference available (ICC Exhibit 1a, p. 20).

13 G.M. Sproat, undated memorandum, no file reference available (ICC Exhibit 1a, pp. 19–20).

the Custom House (opposite IR 7) and the Ashnola River west of Keremeos (near IR 10), and it was intended to protect the interests of band members until he could return to finalize additional reserves for them.[14] Sproat explained that the lands in the temporary reserve were suitable chiefly for winter grazing, especially on the east bank (IR 3 and 5) of the Similkameen River. He also noted that "arable patches" of land could be found along the west bank (IR 7 and 8).[15]

In March 1880 Sproat resigned his position as Indian Reserve Commissioner.[16] He was succeeded by Peter O'Reilly in the summer of 1880.[17]

Indian Reserve Commission: Peter O'Reilly, 1884–95

Indian Reserve Commissioner Peter O'Reilly returned to the Similkameen Valley in 1884, by which time the provincial government had sold most of the land temporarily reserved by Sproat.[18] On September 22, 1884, O'Reilly issued a minute of decision setting aside a tract of land consisting of 1,920 acres "situated on the banks of the Similkameen river" within Sproat's temporary reserve, later known as IR 3.[19] In his covering letter to the Chief Commissioner of Lands and Works, O'Reilly explained that "much the larger portion of this reserve is of little value, being a mountain slide [sic]," but that "about 200 acres on the banks of the river, though poor gravelly soil, may when cleared, be converted into hay land."[20]

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[14] G.M. Sproat, Minute of Decision, October 12, 1878, no file reference available (ICC Exhibit 1a, pp. 7–9).

[15] G.M. Sproat, undated memorandum, no file reference available (ICC Exhibit 1a, p. 23).

[16] Order in Council PC 1880-1334, July 19, 1880, Library and Archives Canada (LAC), RG 2, vol. 2762 (ICC Exhibit 1d, p. 1).

[17] Order in Council PC 1880-1334, July 19, 1880, LAC, RG 2, vol. 2762 (ICC Exhibit 1d, pp. 2–3); Order in Council PC 1881-532, April 5, 1881, LAC, RG 2, vol. 2763 (ICC Exhibit 1e, pp. 1–3).

[18] P. O'Reilly, Indian Reserve Commissioner, to Chief Commissioner of Lands and Works, November 29, 1884, no file reference available (ICC Exhibit 1a, p. 26).

[19] Minute of Decision, author unidentified, September 22, 1884, no file reference available (ICC Exhibit1a, p. 24).

[20] P. O'Reilly, Indian Reserve Commissioner, to Chief Commissioner of Lands and Works, November 29, 1884, no file reference available (ICC Exhibit 1a, p. 26).

O'Reilly visited again in 1888 and set aside IR 5. The minute of decision describes this allotment as "a Reserve of nine hundred and sixty (960) acres ... south of, and adjoining Reserve No. 3."[21] It included the 40 acres reserved by Sproat in 1878 for John "Nah-hum-cheen's" farm.[22]

Survey of IR 3, 5, 7, 8, and 10

W.S. Jemmett surveyed the Similkameen IR 3, 5, 7, 8, and 10 in 1889. IR 7 and 8, located south of Keremeos near the international boundary, contained 3,800 acres, according to "Plan No. 1 of Similkameen Indian Reserves."[23] IR 10, located west of Keremeos, contained 4,153 acres, according to "Plan No. 3 of Similkameen Indian Reserves."[24] Plans 1 and 3, containing IR 7, 8, and 10, were approved by F.G. Verson, the Chief Commissioner of Lands and Works, on April 28, 1891.[25]

IR 3 and 5 were located along the Similkameen River between Keremeos and the international boundary. According to "Plan No. 2 of Similkameen Indian Reserves," IR 3 and 5 contained 1,750 and 1,278 acres, respectively.[26] Plan No. 2, containing IR 2 through 5, was approved by the Chief Commissioner of Lands and Works on June 8, 1895, after delays caused by settler objections to IR 1 led to the cancellation of that reserve.[27]

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[21] Minutes of Decision, P. O'Reilly, Indian Reserve Commissioner, October 30, 1888, no file reference available (ICC Exhibit 1a, p. 28).

[22] G.M. Sproat, Minute of Decision, October 12, 1878, no file reference available (ICC Exhibit 1a, p. 9).

[23] Natural Resources Canada, Plan BC 24, CLSR, "Plan No. 1 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia," surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7d).

[24] Natural Resources Canada, Plan BC 25, CLSR, "Plan No. III of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia," surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7f).

[25] F.G. Vernon, Chief Commissioner of Lands and Works, to P. O'Reilly, Indian Reserve Commissioner, April 28, 1891, no file reference available (ICC Exhibit 1a, pp. 34–35).

[26] Natural Resources Canada, Plan BC 23, CLSR, "Plan No. 2 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia," surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7a).

[27] Natural Resources Canada, Plan BC 23, CLSR, "Plan No. 2 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia," surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7a); F.G. Vernon, Chief Commissioner of Lands and Works, to P. O'Reilly, Indian Reserve Commissioner, April 28, 1891, no file reference available (ICC Exhibit 1a, pp. 34–35); Minutes of Decision, P. O'Reilly, Indian Reserve Commissioner, August 9, 1893, no file reference available (ICC Exhibit 1a, p. 39).

O'Reilly again visited the Similkameen Valley in the summer of 1893. He reported that, "having made a careful examination of the neighbourhood of IR 10, I came to the conclusion that it could be increased with advantage to the Indians by additions both in the eastern and western boundaries."[28] A minute of decision set aside 350 acres for IR 10B, located to the east of and adjoining IR 10.[29] O'Reilly reported that the greater portion of this allotment was "on a steep rocky mountain side with little pasturage," although it also included 80 acres "already fenced in by the Indians who farm several small fields."[30] Provincial Land Surveyor E.M. Skinner surveyed IR 10B the next year, and "Plan No. 4 of the Similkameen Indian Reserves" shows that the final reserve was enlarged somewhat to 411 acres.[31] This plan was approved by George Martin, the Chief Commissioner of Lands and Works, on June 8, 1895.[32]

Schedule of Indian Reserves, 1902

The 1902 Schedule of Indian Reserves in the Dominion, compiled by the Department of Indian Affairs, listed reserves set aside for the Lower Similkameen Band. IR 3, 5, 7, and 8 are noted as "confirmed."[33] The acreage of IR 3 was listed as 1,750 acres, and IR 5 was said to contain 1,278 acres. IR 7 and 8 are referred to together as "Skemeoskuankin" reserve, with a combined acreage of

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[28] P. O'Reilly, Indian Reserve Commissioner, to Deputy Superintendent General of Indian Affairs, November 3, 1893, LAC, RG 10, vol. 1278 (ICC Exhibit 1a, p. 43).

[29] Minutes of Decision, author unidentified, August 9, 1893, no file reference available (ICC Exhibit 1a, p. 40).

[30] P. O'Reilly, Indian Reserve Commissioner, to Deputy Superintendent General of Indian Affairs, November 3, 1893, LAC, RG 10, vol. 1278 (ICC Exhibit 1a, p. 44).

[31] Natural Resources Canada, Plan BC 26, CLSR, "Plan No. IV of the Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia," surveyed by E.M. Skinner, P.L.S., 1894 (ICC Exhibit 7i); Natural Resources Canada, Field book, FBBC182, CLSR BC, E.M. Skinner, "Keremeos Forks IR 12A, Ashnola IR No. 10B, Ashnola IR No. 10A," May 22–June 8, 1894 (ICC Exhibit 7j).

[32] Natural Resources Canada, Plan BC 26, CLSR, "Plan No. IV of the Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia," surveyed by "E.M. Skinner, P.L.S.," 1894 (ICC Exhibit 7i).

[33] Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 61 (ICC Exhibit 1a, p. 46).

3,800 acres.[34] The reserve sizes appearing on the 1902 schedule match the acreages that appear on the approved plans for each reserve.[35]

Re-survey of IR 7 and 8, 1902

In the fall of 1902, Provincial Land Surveyor F.A. Devereux re-surveyed IR 7 and 8 after errors were discovered in the original survey. CLSR Plan BC1028, "showing the boundary lines as they actually are on the ground and as re-surveyed by Mr. F.A. Devereux," displays a combined area for IR 7 and 8 of 4,075 acres.[36] This amended plan was approved in December 1902.[37]

Railway Right of Way Through Lower Similkameen Reserves

Legislative Provisions relating to Lands Taken for Public Purposes

With respect to Crown lands, the *Railway Act, 1903,* stated:

> 134. No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council; but with such consent, any such company may, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, but not alienate, so much of the lands of the Crown lying on the route of the railway as have not been granted or sold, and as is necessary for such railway ... and whenever any such lands are vested in the Crown for any special purpose, or subject to any trust, the compensation money

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[34] Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 61 (ICC Exhibit 1a, p. 46).

[35] Natural Resources Canada, Plan BC 24, CLSR, "Plan No. 1 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia," surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7d); Natural Resources Canada, Plan BC 23, CLSR, "Plan No. 2 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia," surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7a).

[36] A.W. Vowell, Indian Reserve Commissioner, to Deputy Commissioner of Lands and Works, December 3, 1902, no file reference available (ICC Exhibit 1a, p. 48); Natural Resources Canada, Plan BC 1028, CLSR, "Amended Plan Nos. 7, 8, 12 & 12A, Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia," surveyed by F.A. Devereux, PLS, 1900 and 1902 (ICC Exhibit 7k).

[37] A.W. Vowell, Indian Reserve Commissioner, to Deputy Commissioner of Lands and Works, March 17, 1903, no file reference available (ICC Exhibit 1a, p. 49).

> which the Company pays therefor shall be held or applied by the Governor in Council for the like purpose or trust.[38]

The provisions for the taking of Indian reserve lands were as follows:

> 136. No company shall take possession of, or occupy, any portion of any Indian reserve or lands, without the consent of the Governor in Council; and when, with such consent, any portion of any such reserve or lands is taken possession of, used or occupied by any company, or when the same is injuriously affected by the construction of any railway, compensation shall be made therefor as in the case of lands taken without consent of the owner.[39]

The provisions of the *Indian Act*, 1886, as amended, also required the consent of the Governor in Council for the taking of reserve lands. It also required compensation to be made "in the same manner as is provided with respect to the lands or rights of other persons" and provided a mechanism for arbitration. Section 35 states:

> 35. No portion of any reserve shall be taken for the purposes of any railway, road or public work without the consent of the Governor in Council, and if any railway, road or public work passes through or causes injury to any reserve belonging to or in possession of any band of Indians, or if any act occasioning damage to any reserve is done under the authority of an Act of Parliament, or of the Legislature of any Province, compensation shall be made to them therefor in the same manner as is provided with respect to the lands or rights of other persons; and the Superintendent General shall, in any case in which an arbitration is had, name the arbitrator on behalf of the Indians, and shall act for them in any matter relating to the settlement of such compensation; and the amount awarded in any case shall be paid to the Minister of Finance and Receiver General for the use of the band of Indians for whose benefit the reserve is held, and for the benefit of any Indian who has improvements thereon.[40]

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[38] *Railway Act*, 1903, c. 58, s. 134 (ICC Exhibit 6c, p. 40).

[39] *Railway Act*, 1903, c. 58, s. 136 (ICC Exhibit 6c, p. 40).

[40] *Indian Act*, RSC 1886, c. 43, s. 35, as amended by SC 1887, c. 33, s. 5 (ICC Exhibit 6a, pp. 18–19).

Incorporation of the VV&E Railway and Navigation Company

The VV&E was incorporated by British Columbia statute in 1897, with the powers conferred under the *British Columbia Railway Act*, including the right to "purchase, hold, receive or take land or other property, and also to alienate, sell or otherwise dispose of the same."[41] The following year a dominion statute brought the VV&E under federal jurisdiction, declaring, "the works which the Company by its said Act of incorporation is empowered to undertake and operate ... to be works for the general advantage of Canada."[42]

Request by the VV&E for a Right of Way

On October 17, 1905, McGiverin & Haydon, solicitors for the VV&E, informed the Deputy Superintendent General of Indian Affairs that the company planned to build a railway line from the U.S. border to the town of Keremeos, and that a right of way over Lower Similkameen IR 7 and 8 would be required.[43] McGiverin & Haydon requested the department to give its "immediate consideration to the right of way asked for" because their client was "most anxious to get with construction work having the contractors in the field."[44] An additional request for a right of way through IR 3, 5, 10, and 10B was made on November 3, 1905, by McGiverin & Haydon on behalf of the VV&E.[45] Plans of each right of way, signed by the Deputy Minister of Railways and Canals in October 1905, accompanied the letters from McGiverin & Haydon.[46]

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41 *An Act Respecting the Vancouver, Victoria and Eastern Railway and Navigation Company*, SBC 1897, c. 75, s. 11(d) (ICC Exhibit 6h, p. 2).

42 *An Act Respecting the Vancouver, Victoria and Eastern Railway and Navigation Company*, SC 1898, c. 89, s. 1 (ICC Exhibit 6i, p. 1).

43 McGiverin & Haydon, Barristers, Solicitors & Notaries, to Deputy Superintendent General of Indian Affairs, October 17, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 53).

44 McGiverin & Haydon, Barristers, Solicitors & Notaries, to Deputy Superintendent General of Indian Affairs, October 17, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 53).

45 McGiverin & Haydon, Barristers, Solicitors & Notaries, to Deputy Superintendent General of Indian Affairs, November 3, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 54).

46 Natural Resources Canada, Plan 695, CLSR, "Vancouver, Victoria and Eastern Rwy. and Navigation Company through Reserve No. 8, Similkameen Group B.C.," surveyed by Jas. Hislop, PLS, no date (Exhibit 7o); Natural Resources Canada, Plan 696, CLSR, "Vancouver, Victoria and Eastern Rwy. and Navigation Company, R. of Way Plan

A.W. Vowell, the British Columbia Indian Superintendent, reported on November 15, 1905, that, in accordance with previous instructions received from the department, arrangements for "the amount to be paid" for lands and improvements in the Lower Similkameen reserves had been made with the company's Right of Way Agent.[47] In regard to the matter of compensation, McGiverin & Haydon wrote to the department on November 3, 1905, and stated:

> In pursuance of your request as to what price we should propose for payment of these lands, we have to say that we telegraphed Mr. A.H. McNeil, K.C., the Solicitor for this Company at Rossland, and who, we think, has a good reliable knowledge of the country generally, and in answer to our telegram, he replied as follows: "Fair average price per acre for Indian lands is $25."[48]

They again requested that the department grant permission "as soon as possible," explaining that "the Company is building through the open parts of this section of their location and are very desirous of having the Department's direction in the matter."[49]

Valuation of Rights of Way through IR 3, 5, 7, and 8

The department instructed Archibald Irwin, the Indian Agent for the Kamloops-Okanagan Agency, to provide a valuation of the lands required for the rights of way through IR 3, 5, 7, and 8. According to Indian Superintendent A.W. Vowell, Irwin had been "fully instructed as to the requirements of

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through Indian Reserve No. 7, Similkameen Group B.C.," surveyed by Jas. Hislop, PLS, undated (ICC Exhibit 7p); Natural Resources Canada, Plan 698, CLSR, "V.V. & E. Ry., Osoyoos Division – Yale District B.C., Right of Way Required Across Indian Reserve No. 3," June 2, 1905 (ICC Exhibit 7r); Natural Resources Canada, Plan 699, CLSR, "V.V. & E. Ry., Osoyoos Division – Yale District B.C., Right of Way Required Across Indian Reserve No. 5," June 3, 1905 (ICC Exhibit 7s).

[47] A.W. Vowell, Superintendent of Indian Affairs, BC, to Secretary, Department of Indian Affairs, November 15, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 61–62).

[48] McGiverin & Haydon, Barristers, Solicitors & Notaries, to Deputy Superintendent General of Indian Affairs, November 3, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 55).

[49] McGiverin & Haydon, Barristers, Solicitors & Notaries, to Deputy Superintendent General of Indian Affairs, November 3, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 55).

the department touching such valuations."[50] Ashdown Green, a representative of the Indian Office, later reported that "Mr. Irwin's instructions were that he should value each parcel of land irrespective of any arrangement made with adjacent white settlers."[51]

Indian Agent Irwin carried out his inspection of the Lower Similkameen rights of way and provided his valuations to the department on November 10, 1905. He reported that the total acreage desired for the right of way was 116.85 acres, on which he placed "a net actual value" of $5.00 per acre, or $584.25 in total, to be credited to the Band as a whole. In addition, he made separate valuations for the improvements, clearing, and cultivation for a number of individuals whose holdings were directly affected by the right of way.[52]

According to CLSR Plan 698, the right of way through IR 3 required 24.51 acres.[53] In addition to $5 per acre for the land, Agent Irwin awarded "William Terrabasket" and "Charles Yackemticken" $200 each for their improvements. Charles Yackemticken's allotment had a 300-foot-wide strip taken for station grounds, while the strip taken through the rest of the reserve was 99 feet wide and passed through at least one cabin and three fences.[54] The 1889 reserve survey plan of IR 3 described the land in the vicinity of the right of way as "grassland" and "low bottomland."[55]

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[50] A.W. Vowell, Superintendent of Indian Affairs, BC, to Secretary, Department of Indian Affairs, November 15, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 61–62).

[51] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 136).

[52] A. Irwin, Indian Agent, to A.W. Vowell, Indian Superintendent, November 10, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 56).

[53] Natural Resources Canada, Plan 698, CLSR, "V.V. & E. Ry., Osoyoos Division – Yale District BC, Right of Way Required Across Indian Reserve No. 3," June 2, 1905 (ICC Exhibit 7r).

[54] A. Irwin, Indian Agent, to A.W. Vowell, Indian Superintendent, November 10, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 56); Natural Resources Canada, Plan 698, CLSR, "V.V. & E. Ry., Osoyoos Division – Yale District B.C., Right of Way Required Across Indian Reserve No. 3," June 2, 1905 (ICC Exhibit 7r).

[55] Natural Resources Canada, Plan BC 23, CLSR, "Plan No. 2 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia," surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7a).

CLSR Plan 699 shows a 99-foot-wide right of way passing through IR 5, taking 14.76 acres in total and passing through three "old barns," three fences, and a small corner of swamp.[56] Those improvements, owned by "Johny Nhumcheen's," were valued by Irwin at $200.[57] The 1889 reserve survey plan of IR 5 described the land in the vicinity of the right of way as "low bottomland."[58]

With regard to IR 8, Irwin awarded "Andrew," "Nwhimkin," and "Pierre" the sum of $360, $100, and $225, respectively, for theIR improvements.[59] CLSR Plan 695 shows a 99-foot-wide right of way, comprising a total area of 18.26 acres, through this reserve.[60] The 1889 survey plan and field notes described the land along the right of way as "grassland" and "lowland" and indicated several fields in the area.[61] During the community session site tour, Lower Similkameen Elder John Terbasket identified a small village site on the IR 8 right of way which had not been reported by Irwin.[62] The farm of R.C. Armstrong adjoined the northern end of this reserve and will be discussed more below.

Finally, 59.31 acres were taken for the right of way through IR 7, as shown on CLSR Plan 696.[63] The plan shows that the right of way passed directly through or immediately beside two villages, two cemeteries, a church, a corral, and various cabins, barns, fences, and fields. Except for

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[56] Natural Resources Canada, Plan 699, CLSR, "V.V. & E. Ry., Osoyoos Division – Yale District B.C., Right of Way Required Across Indian Reserve No. 5," June 3, 1905 (ICC Exhibit 7s).

[57] A. Irwin, Indian Agent, to A.W. Vowell, Indian Superintendent, November 10, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 56).

[58] Natural Resources Canada, Plan BC 23, CLSR, "Plan No. 2 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia," surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7a).

[59] A. Irwin, Indian Agent, to A.W. Vowell, Indian Superintendent, November 10, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 56).

[60] Natural Resources Canada, Plan 695, CLSR, "Vancouver, Victoria and Eastern Rwy. and Navigation Company through Reserve No. 8, Similkameen Group B.C.," surveyed by Jas. Hislop, PLS, no date (Exhibit 7o).

[61] Natural Resources Canada, Plan BC 24, CLSR, "Plan No. 1 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia," surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7d).

[62] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 20–21, John Terbasket).

[63] Natural Resources Canada, Plan 696, CLSR, "Vancouver, Victoria and Eastern Rwy. and Navigation Company, R. of Way Plan through Indian Reserve No. 7, Similkameen Group B.C.," surveyed by Jas. Hislop, PLS, undated (ICC Exhibit 7p). See also, Natural Resources Canada, Plan BC 24, CLSR, "Plan No. 1 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia," surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7d).

a large station ground at the international boundary (2,000 feet long and 300 feet wide), the right of way was 99 feet wide. Indian Agent Irwin assessed a value of $785 for the improvements of seven individuals, in addition to $135 paid directly by the company for the removal of buildings.[64] Lower Similkameen Elders recall the existence of at least three main villages along the IR 7 right of way, containing between 20 and 30 homes each.[65] Elder Henry Dennis explained what a village site would have looked like at the time the railway went through:

> Their village is more like a little subdivision, but a little different them days, because they had their barnyards and fences and corrals and garden grounds and everything around amongst every little lot that they had. I mean, they disturbed that by going through it and getting rid of all of their belongings and their chicken coops and all this. I mean, there's a lot of them never got a chance to move them. They were just burned and moved on.[66]

In addition, all the village sites contained one- and two-storey log houses, and at least one site contained pit houses (structures that were built into the ground and could not be moved).[67] John Terbasket stated at the community session that no one living in any of the villages received compensation, either for damages or for moving homes or buildings, or for their improvements.[68]

According to the community, the large gravesite near the southernmost village site on IR 7 was disturbed by the railway, which was constructed directly through the middle of the site despite band protests. The company apparently relocated some of the graves, but not all of them.[69] The company also moved the large church in this southernmost village site, which appears on the right

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[64] A. Irwin, Indian Agent, to A.W. Vowell, Indian Superintendent, November 10, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 56).

[65] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 382–85, Henry Dennis).

[66] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 382–83, Henry Dennis).

[67] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 382–84, Henry Dennis).

[68] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 30, 32, 303–4, John Terbasket; p. 177, Henry Allison).

[69] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 168, Lillian Allison; p. 173, Barbara Allison; pp. 175, 209, Henry Allison; p. 303, John Terbasket; p. 340, Mary Louie; p. 395, Henry Dennis).

of way plan.[70] Indian Agent Irwin did not mention any of these village or grave sites within his valuation reports to the department.

In summary, Agent Irwin valued the total improvements on IR 3, 5, 7, and 8 at $2,070.00, not including an additional $300.00 already paid directly by the company for "removing buildings."[71] The total valuation came to $2,954.25, including $584.25 for the land, $2,070.00 for improvements, and $300.00 for removing buildings.[72]

Approval of Valuations for the VV&E Rights of Way

Indian Superintendent A.W. Vowell forwarded Irwin's valuations for the rights of way to the Secretary of the Department of Indian Affairs on November 15, 1905, commenting that the Agent had "bestowed considerable attention" to the matter of the valuations.[73] Furthermore, he reported:

> The Right of way Agent of the Victoria, Vancouver and Eastern Railway Company called at the office some time ago, and informed me that the Agent went very carefully over the ground with him and that every care was taken to have fair and equitable estimates made of the land and improvements &c.
>
> At the same time he expressed himself on behalf of the Company as being particularly desirous of a speedy settlement so that the construction of the Railway might proceed without let or hindrance.[74]

J.K. McLean, on behalf of the Chief Surveyor, wrote a memo to the Deputy Superintendent General of Indian Affairs summarizing the matter of valuations for the right of way through IR 3, 5, 7, and 8. He noted that Superintendent Vowell considered Irwin's valuation "fair and equitable"

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[70] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 168, Lillian Allison; p. 303, John Terbasket).

[71] A. Irwin, Indian Agent, to A.W. Vowell, Indian Superintendent, November 10, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 56).

[72] A. Irwin, Indian Agent, to A.W. Vowell, Indian Superintendent, November 10, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 56).

[73] A.W. Vowell, Superintendent of Indian Affairs, BC, to Secretary, Department of Indian Affairs, November 15, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 61).

[74] A.W. Vowell, Superintendent of Indian Affairs, BC, to Secretary, Department of Indian Affairs, November 15, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 61–62).

and only slightly higher than the railway company's offer of $25 per acre, or $2,921.25 for 116.85 acres,[75] although it is unclear whether the $25 per acre offered by the company was inclusive of improvements or reflected only the value of the land. McLean concluded:

> As these gentlemen have been pressing for immediate action so that construction can proceed, I beg to recommend that the valuation by Mr. Agent Irwin be approved and that Messrs. McGiverin & Haydon be informed that their Company can have possession upon payment of $2954.25.[76]

Secretary J.D. McLean wrote to McGiverin & Haydon on November 28, 1905, to inform them "that the Railway Company can have possession of the right of way upon payment to this Department of $2954.25," specifically noting that "this sum includes payment for Indian improvements."[77] McLean notified Superintendent Vowell on November 28 that Irwin's valuation had been approved by the department[78] and, on the next day, advised McGiverin and Haydon that "$300 included in the sum of $2954.25 has already been paid by the Company to the Indians," leaving $2,654.25 outstanding.[79]

On December 10, 1905, McGiverin and Haydon forwarded a cheque for $2,654.25 to the department, "being the amount of purchase price for right of way" through Lower Similkameen IR 3, 5, 7, and 8.[80]

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[75] J.K. McLean, for Chief Surveyor, Department of Indian Affairs, to Deputy Superintendent General of Indian Affairs, November 22, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 65).

[76] J.K. McLean, for Chief Surveyor, Department of Indian Affairs, to Deputy Superintendent General of Indian Affairs, November 22, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 65).

[77] J.D. McLean, Secretary, Department of Indian Affairs, to McGiverin & Haydon, Barristers, November 28, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 66).

[78] J.D. McLean, Secretary, Department of Indian Affairs, to Indian Superintendent, November 28, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 67).

[79] Secretary, Department of Indian Affairs, to McGiverin & Haydon, Barristers, November 29, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 71).

[80] McGiverin & Haydon, Barristers, Solicitors & Notaries, to Secretary, Department of Indian Affairs, December [10], 1905, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 76–77).

Community Understanding of Agreements Made with the Railway

There is no written record of whether Indian Agent Irwin consulted the Lower Similkameen Band regarding his valuation of their lands or improvements, or whether he discussed any terms or made any agreements with the Band as a whole regarding the rights of way. Neither the historical record nor the Elders' oral evidence indicates that a band council meeting or a general meeting of Lower Similkameen band members was held to discuss the railway right of way collectively.

According to Lower Similkameen Elder John Terbasket, the concept of selling or leasing land was foreign to them:

> I think this is probably the first ever negotiations on – any kind of negotiation concerning lease or rent or buy. And in our culture, there was no such thing as buying land or selling land to others. This was our territory when the railway come in, that our people understood that the lands were to be borrowed for a time of the use of the railway.[81]

Elder John Terbasket recounted that the Indian Agent approached a few landowners individually, to offer compensation for improvements.[82] He explained that "the Indian agent came in, as we understood, and dealt with individuals. The train's going to come through here, we'll give you money for this, this, this. And there was not time to really call meetings."[83] Mr Terbasket explained that agreements respecting the right of way were made with a handshake:

> And in our culture, that the handshake, word, was law. And so a lot of the deals that were made with these railway people were handshake, eh. They explained what they were going to do and they shook hands, and our people took that for law. But we found out later that whatever was written was what they used to – it was a different version of what was said.[84]

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[81] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 262, John Terbasket). See also ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 262, John Terbasket).

[82] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 31, 269, 284–85, John Terbasket).

[83] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 269–70, John Terbasket).

[84] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 262, John Terbasket); see also, ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 59–60, Henry Allison; p. 351, Moses Louie).

Violet Barber explained that the people "had nothing to say ... I doubt if they gave consent to have the railroad going through their property. That's what I mean. They had nothing to say. They were going to put the railroad through, and it went."[85] Hazel Squakin stated that

> all of the meetings were held after the fact, after the railroads were going through and everything else like that, because ... in the beginning it was basically decided that it was going to go through. And even they said no and they were opposed to it, and they were told that it was going to go through anyway. And it still went through. So they gathered mostly after the fact at these places to complain more about it as a group.[86]

Elder Barbara Allison stated "our people fully expected that the right of way would be returned to them, because that was the promise."[87]

Oral evidence was also presented at the community session concerning the existence of a written agreement made with the railway, stating that the right of way lands would be returned to the reserves. Elder Henry Dennis attested that a written agreement stating that the railway land would revert back to the Band once existed between the railway company and the Band:

> [T]here was supposed to have been papers made out. I don't know whether it was – I think myself it has something to do with the Indian agent at the time. It was supposed to have been written in a paper that they called, in the government office, the black and white. And Pierre John, I think, and Johnny Holmes and Bobby Allison, that said they've seen this black and white paper in their younger days. They said that they seen this written in there, that when the railroad was discontinued, it would automatically revert back to reserve.[88]

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[85] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 349, Violet Barber).

[86] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 115–16, Interpreter for Hazel Squakin). See also, ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 140, Margaret Kruger).

[87] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 213, Barbara Allison). See also, ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 103–4, Mike Allison; p. 116, 126 Hazel Squakin; p. 130, Carol Allison; p. 140 Margaret Kruger; p. 389, Henry Dennis; p. 407 Robert Dennis; and pp. 421–22, Ralph Bent.)

[88] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 392, Henry Dennis).

During the community session, Elders shared the Okanagan words they heard used to describe the railway agreement: *kwúlen*, meaning "to lend," and *kwelnúla?xw*, meaning "to borrow."[89] Elder Maggie Kruger remembers hearing her Elders talking about the railway and about meetings in which the railway was discussed:

> Whenever the Great Northern, whenever it – whenever they quit using it, the land would go back to the Indians. That's been the number one thoughts of all the native people. When the white man uses the land and when they're finished with it, it automatically goes back to the band.[90]

At least two of the Elders from whom Ms. Kruger heard this information, Bertie Allison and Crooked Mouth Pierre, were alive at the time the railway was built, and their names are listed among those compensated for improvements in IR 7 and 8.[91] Henry Dennis further explained:

> They said when the railroad was going to be discontinued, they said it wouldn't – they told the people it wouldn't be in there that many years. That these mines would all run out. But they told them when it was discontinued that it would be going back to – well, back to reserve and back to each locatee that owned property along the line. They said that if a man owned that property right across the line, he'd get all that land back, and if there's two different people on each side, they would fence it right down the middle, which never really happened.[92]

In addition, the community understood that before the land was returned, it would be cleaned up "as it was back then."[93]

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[89] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 130, Carol Allison; p. 167, Lillian Allison; p. 172, Barbara Allison; p. 187, Antoine Qualtier; p. 307, John Terbasket; pp. 225, 239, Leonard Louis; pp. 345–46, Interpreter for Moses Louie; p. 346, Kenneth Richter).

[90] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 140, Margaret Kruger).

[91] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 141, Margaret Kruger); and, A. Irwin, Indian Agent, to A.W. Vowell, Indian Superintendent, November 10, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 56).

[92] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 388–89, Henry Dennis).

[93] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 346, Kenneth Richter); see also ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 60, 178, Henry Allison; pp. 166–67, Lillian Allison).

Aside from promises regarding the return of the land, there was also an understanding that once the train was operating, the Similkameen people would have access to conveniences such as stores on the station grounds in IR 3 and IR 7, and free rides on the train.[94] During the site tour Henry Dennis recalled that

> they more or less gave the people the idea of the convenience they were going to have of this railroad going through, that they'd have a store and a station. People that catch the train, there was supposed to be free trips to town, whichever way they wanted to go.[95]

Later on at the community session, Henry Dennis reiterated this fact when he stated that the lack of free train rides "made them complain because they were supposed to get all that free because they weren't getting compensation for land. They were getting all these conveniences."[96] Some Elders understood that these free rides were being offered in lieu of monetary compensation.[97] Finally, there was an understanding that band members would be offered jobs working on the railway and packing supplies up to the mines in Hedley.[98]

Order in Council and Letters Patent for the VV&E Rights of Way

The Order in Council which purportedly authorized the expropriation under section 35 of the *Indian Act*, dated December 23, 1905, reads as follows:

> On a Memorandum ... from the Superintendent General of Indian Affairs, stating that the Victoria, Vancouver and Eastern Railway Company has applied to the Department of Indian Affairs for right of way through reserves Nos. 3, 5, 7, 8, 10 and

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[94] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 7–8, 33, Henry Dennis; p. 33, John Terbasket; p. 132, Nancy Allison; pp. 174–75, Henry Allison).

[95] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 7–8, Henry Dennis).

[96] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 388, Henry Dennis); see also, ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 380, Henry Dennis).

[97] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 33, John Terbasket; p. 393, Henry Dennis).

[98] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 35–36, 265, John Terbasket; pp. 36, 393, Henry Dennis; p. 187, Antoine Qualtier).

> 10B of the Lower Similkameen Band of Indians, in the Osoyoos Division of Yale District, in the Province of British Columbia, and has deposited with the Department of Indian Affairs a plan of the land required, with a certificate endorsed thereon of the Chief Engineer of the Department of Railways and Canals that the Land applied for is actually required for railway purposes and is such as the company should be allowed to acquire.
>
> The Minister, knowing of no objection to the railway company being allowed to acquire the land above referred to, recommends that, under the provisions of Section 35 of the Indian Act, as amended by Section 5 of Chapter 35, 50–51 Victoria, authority be given for the sale of the land to the said Company upon such terms as may be agreed upon.[99]

A subsequent Order in Council issued on January 22, 1906, recommended that the December 23, 1906, Order in Council be amended "by substituting for the title of the railway company therein mentioned the following – 'Vancouver, Victoria and Eastern Railway and Navigation Company.'"[100]

On March 20, 1906, two letters patent were issued for the rights of way: one for the rights of way through IR 3, 5, 7, and 8 (sale 1), and another for the right of way through IR 10 and 10B (sale 2). Each patent states that the terms are for "absolute purchase" of the right of way lands.[101] The letters patent for sale 1 are for 59.31 acres from "Indian Reserve Number Seven," 18.26 acres from "Indian Reserve Number Eight," 14.76 acres from "Indian Reserve Number Five," and 24.51 acres from "Indian Reserve Number Three."[102] The letters patent for sale 2 describe an area of 20.85 acres within "Indian Reserve Number Ten B," and an area of 44.9 acres within "Indian Reserve Number Ten." The total area of the rights of way described in the two letters patent was 182.59 acres, 116.84 acres of which was conveyed in sale 1 and the remaining 65.75 acres in sale 2.[103]

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[99] Order in Council, December 23, 1905, no file reference available (ICC Exhibit 1a, p. 80).

[100] Order in Council, January 22, 1906, no file reference available (ICC Exhibit 1a, p. 81).

[101] Letters Patent No. 14388 (sale 1), March 20, 1906, no file reference available (ICC Exhibit 1a, p. 83); Letters Patent No. 14389 (sale 2), March 20, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 88).

[102] Letters Patent No. 14388 (sale 1), March 20, 1906, no file reference available (ICC Exhibit 1a, pp. 84–85).

[103] Letters Patent No. 14389 (sale 2), March 20, 1906, no file reference available (ICC Exhibit 1a, pp. 89–90).

Protests regarding Valuations, 1906

On May 1, 1906, only six weeks after the letters patent were issued, the Chief of the Lower Similkameen Band, "Johnie Newhumpsion,"[104] sent a letter protesting the valuations made by Agent Irwin and informing the department that compensation for the right of way had not yet been received:

> We the undersigned are appealing to your Department for Justice. We inclose Names and Stations of the Line of Rail now Building By the Great Northern RR and as yet we have not got anything for same and am Led to believe by Gov. agt in Kamloops Mr. Irwin That we are to get [illegible] average of $10.00 pr. acre or thereabouts; all Right of way In this Parts is Valued by Great Northern $100 and [as] high as $200. Such Land as we [have] would average from $100 to $200 and we have not got any satisfaction so far.
>
> However we intent getting our Money and what is Just and Right [before] allowing the Great Northern [to] Lay Track on our Land untill [illegible] Just Settlement.
>
> We are notifying the RR of [our] actions.
>
> Kindly advise us as what [to do.] All we want is near what [the white Men] gets. [Advise us] if it would be just & [illegible] to Demand our money Before Laying Track.[105]

Enclosed with this letter was a list of individuals holding allotments, and their respective locations along the right of way through IR 7 and 8. Chief Newhumpsion's list included the same individuals identified by Irwin with the addition of a large holding belonging to "Marcell & Boy," who Irwin did not identify. Also included on the list are gardens and two townsites not mentioned in Indian Agent Irwin's report.[106]

Following receipt of Chief Newhumpsion's letter, Chief Surveyor Samuel Bray recommended that, since payment in full had already been received from the railway company, an amount of $584.25 should be credited to the Band's capital account, and the balance of $2,070

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[104] Several variant spellings of Chief Nahumcheen's last name appear in the documentary record: Newhumpsion, Nah-hum-cheen, Nah-hump-cheen, Nhumcheen, Nahumcheen, and N'Humcheen.

[105] Johnie Newhumpsion to Department of Indian Affairs, May 1, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 95–97).

[106] Johnie Newhumpsion to Department of Indian Affairs, May 1, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 97).

forwarded to Superintendent Vowell "with instructions to pay the same with as little loss of time as possible to the Indians entitled to receive it, in accordance with letter from Mr. Agent Irwin dated the 10th November, 1905."[107] The Secretary forwarded a cheque in the amount of $2,070 (the amount Irwin awarded for improvements) to Vowell, with instructions that the money should be "paid out as suggested by Agent Irwin" in his letter of November 10, 1905.[108] Vowell reported to the Secretary on May 28, 1906, that the cheque had been received and that arrangements would be made "without delay for the payment of same to the Indians."[109]

The Secretary of the Department of Indian Affairs responded to Chief Newhumpsion's letter on May 21,1906:

> [A] sum of money has been this day forwarded to Mr. Indian Superintendent Vowell, Victoria, with instructions to pay with as little delay as possible the Indian occupants to whom the same is due. I think that you will all be satisfied with the sums you will receive. The valuations were made by Mr. Agent Irwin, and appear to be very liberal.[110]

In response to another letter from Chief Newhumpsion, Indian Superintendent Vowell wrote to the Chief, on June 11,1906, explaining that Indian Agent Irwin's valuations were approved by the department and enclosing a copy of Irwin's report in order for the Chief to "better understand exactly the awards made."[111] A copy of Chief Newhumpsion's letter was also forwarded to Indian Agent Irwin, who responded to Newhumpsion shortly thereafter:

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[107] Sam Bray, Chief Surveyor, Department of Indian Affairs, to Deputy Superintendent General of Indian Affairs, May 14, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 100).

[108] Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, May 21, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 102–3).

[109] A.W. Vowell, Indian Superintendent, to Secretary, Department of Indian Affairs, May 28, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 104).

[110] Secretary, Department of Indian Affairs, to Johnie Newhumsion, May 21, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 101).

[111] A.W. Vowell, Indian Superintendent BC, to Johnie Newhumpsion, June 11, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 107).

> I told you when last down the amount each of you would receive besides $5.00 per acre which would go to the credit of the whole band. The Department at Ottawa in commenting on your letters, and in fact at the time I made the valuation considered I made you a liberal allowance for improvements, &c. And I may as well tell you that you will be bound by my award in the matter. You state what is not true to the Department when you say that most of right of way through reserves was garden, but it is a matter of little concern to me. You have been allowed nearly $100.00 per acre for good cultivated land and that should satisfy you. If white men have made land in the section valuable they should profit accordingly.
>
> I have received the money for Indian's improvements, as you have been told from Ottawa and I shall be down to pay same as soon as I can. It will probably be a month or more before I can come as I have much to do. I shall let you know when I have decided to come.[112]

On June 23, 1906, R.C. Armstrong wrote his own appeal to the department regarding the valuations made by Irwin. Armstrong, a local landowner and Justice of the Peace, stated that he had received $100 per acre for the right of way through his own land, which was adjacent to the northern portion of IR 8. He wrote:

> As the Indians have come to me to ask me to state the price of the RR Co. paid me for right of way across my land and, as their reserve joins my land, they think they should receive the same price for their land as I did. I may say that I have lived joining the reserve for 21 years. I ought to know something about it. I was paid one hundred ($100.00) dollars an acre for bush land (none cleared) and I may say their land is (most of it) as good as mine. It seems strange that their land was valued to only five dollars an acre and mine beside it at one hundred. Now most of their land is worth one hundred dollars an acre, if mine is, and their improvements extra. Some of the land in reserve is stony, perhaps ten acres in all or about that much, but as they have water all their bench land, even that is good for orchards. Very poor land in the valley is selling at two hundred dollars an acre, where there is water for it. One hundred dollars an acre and five dollars for the same kind of land is rather too much of a difference. The Indians wish to have the price of the land left to arbitration and wish me to act as their man. I should like to see them get fair treatment and shall act for them if I am authorized to do so, if so left for settlement. The Indians a man, the RR Co. a man, and them two to choose a third. I may say the Indians says [sic] they

[112] A. Irwin, Indian Agent, to Johny Nhumcheen, June 17, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 108–9).

> have lost all confidence in the local agent. They are intending to write themselves, but wished me to make these statements as I have lived so long near them.[113]

Around the same time, Chief Newhumpsion wrote another undated letter to the department in which he again asserted that "all lands of our Class [have] sold from one to two hundred Dollars an acre. What we are Fighting For or asking Peacibly for is [illegible] less not ten dollars an acre."[114] The letter concludes with a request for arbitration regarding the right of way valuations: "We again appeal to you to give us a hearing and [do] justis to our Indians. We ask you or government to appoint one Man, we appoint one man RR to appoint one man to value our land we pay our man and government. We all are willing to abide by their decision."[115]

Following these requests for reconsideration of the valuations, the department finally decided to consider the matter. The Secretary wrote to Indian Superintendent Vowell on July 10, 1906:

> The matter appears to require special investigation, as the difference between the value placed on the land by Mr. Irwin and as valued by Mr. Armstrong and the Indians is absurdly great. Also the lands in Indian reserves should be valued exactly the same as similar lands outside the reserves. It would appear from a passage in Mr. Irwin's letter that he has not done this.
>
> The Department has necessarily to rely on the judgment of its Agent for valuations of this and in fact of any nature. It would appear in this case that the Agent did not consult the Indians as to the value of their improvements. This should have been done very carefully, in order to avoid discontent. It is to be regretted that the matter is closed with the Railway Company, and very difficult, if not impossible to re-open it. I have to request you to be good enough to make a strict investigation as early as may be convenient.[116]

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[113] R.C. Armstrong, Justice of the Peace, to Department of Indian Affairs, June 23, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 110–11).

[114] Johnie Newhumpsion, Chief, to J.D. McLean, Secretary, Department of Indian Affairs, no date, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 112–13).

[115] Johnie Newhumpsion, Chief, to J.D. McLean, Secretary, Department of Indian Affairs, no date, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 112–13).

[116] Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, July 10, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 118).

Vowell replied on July 18, 1906, saying he would review the matter. He commented: "[I] cannot understand how the Agent could value land at $5 an acre if that adjoining it had been paid for at the rate of $100 an acre."[117] In addition, Vowell noted that he had advised Irwin that land values in the area were increasing rapidly "with a view towards having him pay particular attention to the matter."[118]

On July 11, 1906, the Secretary acknowledged Chief Newhumpsion's request that "the land and improvements taken in the right of way ... shall be revalued as the valuation made by Mr. A. Irwin, the Indian Agent is in your opinion altogether too low." He explained that "[a] few years ago these lands were of very little value; it was not known here that they had increased so rapidly in value, as you state,"[119] and informed the Chief that "[t]he Railway Company has paid all the money demanded, and it will be practically impossible to again open the matter."[120]

The Secretary also wrote to R.C. Armstrong on the same date, saying that "[t]he wide discrepancy between the values of the land within the Indian Reserves and the amounts which you state have been paid for the lands of adjacent White men has been noted and the matter will be duly investigated."[121]

Report of Ashdown Green regarding IR 3, 5, 7, and 8, 1906

Unable to make a personal investigation of Irwin's valuations, Vowell assigned surveyor Ashdown Green to investigate the matter in August 1906. Green's report stated that his instructions were "to investigate the statement made by Mr. R.C. Armstrong of Keremeos to the effect that Indian land

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[117] A.W. Vowell, Indian Superintendent, to Secretary, Department of Indian Affairs, July 18, [1906], DIAND file E5667-07399 (ICC Exhibit 1a, p. 122).

[118] A.W. Vowell, Indian Superintendent, to Secretary, Department of Indian Affairs, July 18, [1906], DIAND file E5667-07399 (ICC Exhibit 1a, p. 122).

[119] Secretary, Department of Indian Affairs, to John Newhumpsion, July 11, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 119).

[120] Secretary, Department of Indian Affairs, to John Newhumpsion, July 11, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 119).

[121] Secretary, Department of Indian Affairs, to R.C. Armstrong, Justice of the Peace, July 11, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 120).

valued by Mr. Agent Irwin was sold to the V.V.& E. Railway Company at $5 an acre, while for similar land $100 was obtained from the Company by Mr. Armstrong." Green visited the reserves with Indian Agent Irwin and reported on his findings on August 27, 1906.[122]

Green remarked that the valley in the vicinity of IR 3 and 5 was about one mile wide and surrounded by steep mountains. The railway line itself followed "the base of the foothills on a give and take line between the high land and the swamp, the cuttings being through loose rock and gravel and the fillings on low land." He also noted the presence of "borrowing pits on the right of way" and said that "a slough of the river at the base of the foothills has in many places been filled up."[123] The evidence from the community session suggested that the railway company used gravel and other resources from the reserves to build up the railway grade, and that the "borrowing pits" described by Green, from which gravel and dirt were extracted, are still visible in some places.[124] There is no historical record of any compensation being paid for the use of these resources.

Green's report also discussed each of the allotments on the reserves along the right of way. On IR 3, he found that 8.59 acres of

> Charley Yackemticken's allotment has been appropriated by the Railway Co. and that, in addition to the $5 an acre to the band, $200 has been paid him as compensation. No cultivation or improvements had been made, and the land was principally the bed of a slough or low swamp with willow and rough grass valueless for any purpose.[125]

In regard to "William Terrabasket's" holding, located between stations 426 and 496, he found that

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[122] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 131).

[123] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 131).

[124] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 50, unidentified speaker [Ed Louie]; pp. 52, 266, 306, John Terbasket; p. 186, Henry Allison; p. 339, Mary Louie; p. 406, Robert Dennis; pp. 416–17, Ralph Bent).

[125] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 131–32).

> [a]lmost the whole of the 15-3/4 acres taken is practically valueless, being either dry gravel bench covered with sagebrush, or the bed of the slough before mentioned. The improvements, for which he received $200, consist of about an acre of light slashing on the banks of the slough, the real value of which is about $8.00.
>
> Subsequent to Mr. Irwin's award a slight change in the line cut off about 1/20 of an acre of Terrabasket's garden with six fruit trees, and necessitated the removal of a log stable at a cost of say $10. For this the Company paid Terrabasket an additional $115.[126]

In summary, Green calculated that a total of $637 was paid by the company for 24.4 acres of land and improvements on IR 3, or an average of $26.00 per acre.[127]

Surveyor Green then examined IR 5, which was occupied by Chief Newhumpsion. Green found that "10 acres of the land taken by the Railway is gravel foothill through which there is a deep cutting, the remaining 5 acres is unimproved swamp now covered with an embankment."[128] Chief Newhumpsion was paid $200 in compensation. Green calculated that the company paid a total of $274.00 for land and improvements on IR 5, or approximately $18.50 per acre.[129]

On IR 8, three occupants (Andrew, Nwhimkin, and Pierre) received compensation for severance and improvements. Andrew was paid $360 for 4 acres of "clayey soil" cultivated with timothy grass.[130] Nwkimkin was paid $100 as severance for 2 acres of "sandy soil capable of easy cultivation," although "no use had been made of it."[131] Pierre received $225 for his improvements. Green described Pierre's holding as "Light soil about 4 inches deep," on which "about 1-1/2 acre had

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126 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 132).

127 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 132).

128 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 132).

129 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 132).

130 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 132).

131 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 133).

been cultivated, and on another 1-1/2 acre the natural grass and weeds had been cut for hay."[132] Another locatee, Louis, did not receive any allowance for severance or improvements on his allotment at the northern end of the reserve.[133] Green reported that "the land is level and the soil alluvial of fair quality, heavily covered with brush, and cottonwood trees. Nothing whatever had been done on this part of 'Louis' claim, and no allowance for improvements or severance has been made to him."[134] However, he also noted that "to the north of this allotment lie the two acres belonging to Mr. Armstrong for which he received $100 an acre."[135] In total, $776.25 was paid for 18.26 acres of right of way through IR 8, including payments made thereon, or about $42.50 per acre.[136]

On IR 7, Green reported that "Station 0 to 30 embraced about 7-1/2 acres of sour swampy land" on which occupant Seymour used to cut "rough wild grass," and that he had received $150 as compensation.[137] The right of way plan shows that two-thirds of this portion (station 1-20) consists of a 300-foot-wide strip taken for station grounds.[138] Indian Agent Fred Ball later commented in 1925:

> I see absolutely no reason why they should have been allowed to take a width of three hundred feet for a distance of two thousand feet north from the International

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[132] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 133).

[133] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 132–33).

[134] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 133).

[135] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 133).

[136] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 133).

[137] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 133).

[138] Natural Resources Canada, Plan 696, CLSR, "Vancouver, Victoria and Eastern Rwy. and Navigation Company, R. of Way Plan through Indian Reserve No. 7, Similkameen Group BC," surveyed by Jas. Hislop, PLS, undated (ICC Exhibit 7p).

> Boundary, as this width is not at all necessary for a single track line and it takes some really valuable land from the Reserve for the apparent purpose of using it as a site for a house for the section man, and to give him about fourteen acres of good land for a farm.[139]

John Terbasket recalls that the station grounds at the border were intended for side tracks for storage of empty rail cars, although they were rarely or never used for this purpose.[140]

North of Seymour's allotment, the line took 4 acres from an improved meadow claimed by Narcisse, who received $360 as compensation.[141] Joe, whose allotment was described by Green as "very poor sandy soil," received $90 as compensation for 1 1/2 acres of ploughed land.[142] Between stations 59 and 69, Green reported that the railway passed "near the garden of an old woman named 'Cecille,'" and also took "less than ½ acre" from Lammea's garden.[143] Cecille was paid $30, and Lammea received $50 in compensation.[144] "B. Allison" received $75 for "a small strip" taken from his garden and the removal of four peach trees, as well as an additional $35 paid "by the Company for the removal of a corral."[145] Finally, William Quartelle received $30 as severance for the right of way through his holding, which Green described as "worthless rocky soil" with "no cultivation," as well as $100 "paid by the Company for the removal of a small cabin."[146] For the entire right of way

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139 Fred Ball, Indian Agent, Okanagan Agency, to Assistant Deputy and Secretary, Department of Indian Affairs, July 30, 1925, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 373).

140 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 55–56, John Terbasket).

141 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 133).

142 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 133).

143 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 133–34).

144 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 133–34).

145 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 134).

146 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 134).

through IR 7, the VV&E paid $296.60 for 59.31 acres, in addition to $785 for improvements and $135 for removing buildings, for a total of $1,216.60. According to Green, this amount worked out to an average of $20.50 per acre.[147]

In his conclusion, Green reported that a total of $2,904.25 was paid for 116.85 acres by the VV&E for the right of way through IR 3, 5, 7, and 8.[148] Included in this total is $250 of "additional payments by the Company," consisting of $145 for buildings and $105 for William Terbasket's garden.[149] This total is less than the amount reported by Irwin in his report, which stated that band members were paid $300 for the removal of buildings.[150] Overall, Green calculated that "an average of $24.85 per acre had been paid for 116.85 acres in Reserves Nos. 3, 5, 7, and 8."[151]

Sales of Non-reserve Lands to VV&E, 1906

After outlining the holdings within the reserves, Green proceeded to discuss the value of lands surrounding the reserves, a matter he felt was subject to "a wide difference of opinion." He explained that "Mr. Irwin's valuation was made about a year ago, and the only basis he could go on was the Provincial Government Assessment roll for 1906 which was made about that time, and which is generally very reliable."[152] Green reported that the average assessment of "improved farms in the immediate neighbourhood" was $14.30 per acre, and that Armstrong's farm was valued at $15.50

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147 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 134).

148 His calculation includes payment for the lands (116.85 acres at $5 per acre = $584.25), improvements ($2,070.00), and additional payments by the railway company ($250.00).

149 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 134).

150 A. Irwin, Indian Agent, to A.W. Vowell, Indian Superintendent, November 10, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 56).

151 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 134).

152 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 134).

per acre.[153] He also noted that the Hudson's Bay Company property near Keremeos had been sold two years previously for approximately $21 per acre, and was "far more valuable than the land now under consideration," being in a central location, with good water, an orchard, and "extensive improvements."[154] Green noted, however, that the same property had been subdivided into 10-acre lots and was "advertising at from $100 to $200 an acre."[155]

The 1905–7 Property Tax Assessment Rolls for land in the Princeton District show that "wild land" in the Similkameen Valley had an assessed value between $1.25 and $5.00 per acre. At the same time, it appears that improved properties were rarely valued any higher. The assessed property values in the Similkameen Valley in 1906 ranged from $0.83 to $10 per acre, with an average slightly below $5 per acre. No assessments for properties adjacent to the Lower Similkameen IR 3, 5, 7, and 8, including R.C Armstrong's land, could be found on these assessment rolls.[156]

Regarding the amounts paid by the railway, Green reported that adjacent landowners received between $50 and $100 per acre, while settlers closer to Keremeos had received as much as $200 per acre.[157] Green commented that, although Armstrong had received $100 per acre for unimproved land, "I should not have valued it at more than $10 an acre, but doubtless it paid the Company to give him his price rather than go to arbitration, with the loss of time such action would entail."[158]

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153 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 134).

154 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).

155 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).

156 Property Tax Assessment Rolls for the Princeton Assessment District, 1905–7, BCARS, GR 1999, B487, vols. 2–4 (ICC Exhibit 1b). These figures are rough averages only.

157 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).

158 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).

As to the general value of lands in the Similkameen Valley, Green felt that the "intrinsic value" was very small. He reported that most of the valley was "an arid and waterless country covered with sage brush," suited mainly for grazing.[159]

In general, Green concurred with Irwin's valuations, stating:

> Mr. Irwin's instructions were that he should value each parcel of land irrespective of any arrangement made with adjacent white settlers. The greater part of the land taken from the reserves is absolutely worthless for any purpose, and as the improved land is only second class I consider his valuation of $5.00 an acre a very liberal one.
>
> The award for improvements I believe in most cases to be far in excess of their actual worth, for it must be noted that the land taken from the Indians did not require clearing or other work before ploughing, etc., and that there is much more similar land in the possession of the Indians that they can use.[160]

He admitted, however, that land prices were rising dramatically:

> At the present time there is at the Okanagan Lake, from Vernon to Penticton, a boom in land values, caused by Land Companies who buy land and subdivide it into ten acre lots, each one of which is supposed to support a family when planted with peach trees.
>
> The boom has spread to the Similkameen though there the conditions for transport of fruit are not so favourable. There are now three rival townsites at Keremeos and no doubt inflated prices will prevail until the railway is finished when the value of land will find its real level and return to normal conditions.[161]

During Surveyor Green's visit, Indian Agent Irwin called a meeting of the Band "for the purpose of paying them the several amounts awarded for improvements."[162] Green informed the band members at this meeting about his own views:

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[159] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).

[160] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 136).

[161] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 137).

[162] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 136).

> I considered they had been very liberally dealt with, that they were quite mistaken in supposing that land was as valuable in the Similkameen as they had been told, that Indians in the Nicola country for similar land had only been paid at half the rate, and that as a railway would benefit the valley it would be unfair to hold up the Company for twenty times what the land was worth before the railway was thought of.
>
> Subsequently the Indians agreed to receive the amounts and were paid by Mr. Irwin in my presence.[163]

In regard to the receipt of payments for the right of way, community knowledge is mixed. Elder John Terbasket stated that a few people received payments for it from the Indian Agent, although not everyone who was affected received compensation:

> Certain landowners, they had to make sure that they gave some, eh, to show that they bought here and there, that this was bought, this was bought, this was bought. But the ones that lived in the villages, a lot of them didn't get a penny.[164]

Elder John Terbasket explained that those with "maybe horses and cows" were dealt with, while others were seen as "not important."[165] He said that the people were told their land was "worth nothing."[166] However, most community members never heard anything about people receiving payment for the right of way, although compensation was promised.[167] Henry Dennis recalls that he often heard Elders complain about not being paid.[168]

Following the completion of his investigation, surveyor Ashdown Green paid a visit to R.C. Armstrong on August 13, 1906, and informed him

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[163] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 136–37).

[164] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 32 John Terbasket).

[165] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 30, John Terbasket).

[166] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 264, John Terbasket).

[167] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 168, Lillian Allison; p. 143, Margaret Kruger; p. 144, Carol Allison; pp. 30–32, 381, Henry Dennis; pp. 32, 185, Henry Allison; p. 187, Antoine Qualtier).

[168] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 381, 392–93, Henry Dennis).

> that I could not agree with the valuation he placed upon property in the neighbourhood; that I did not consider the sum paid him by the Railway any criterion; that the prices he quoted were speculative, and out of all proportion to the real value. Mr. Armstrong did not appear to attach much importance to his own letter. He said that the Indians had asked him to tell the Department that he had received for his land, and that he merely did so.[169]

Green noted that, at this meeting, Armstrong "valued his own farm at $50 an acre all round, and that the sage brush in front of his house was worth at least $20 an acre."[170]

On August 14, 1906, Armstrong described his meeting with Green in a letter written to the department:

> As Mr. Green called on me yesterday as he was returning from the Ind[ian] reserve with Irwin, he made such outrageous statements re the Indian land I wish to say I think some one has been paid to lie about the land. I felt sure when I saw him with Irwin. I felt sure the Indians would be done for and you made to believe a wrong value. [T]he first false statement he mad[e] was the land was mostly stony[. N]ow the fact is there is not ten acres of the right of way stony. Of course, if there is a cut made on any of these benches there will be stones struck, as all the benches is made from the mountains ages ago. Then as to sand he said a lot of it was sandy a straight lie. Now the weather has been so dry for months that the land is dry in spots and dusty. A coast man was the worst kind of a man to send to value land in the upper country as it looks so different from the wet coast land but as I wrote before the stony land in this valley and all these valleys is good fruit land if there is water to irrigate them and there is plenty of water to irrigate all this reserve[.] At Keremeos there has been 1600 acres sold for $35.00 on an acre, more than half of which is high gravelly and stony land and is now selling in small lots of 5 and ten acres for from one to two hundred dollars an acr[e]. There was another ranch of 800 acres sold for about the same per acre more than half of which is bench land and no way to irrigate it either. I will give $20.00 twenty dollars an acre for any amount of the Indian land measured from the river to the mountain and I have offered $20 an acre for a very stony piece of reserve (ten acres) but it can be irrigated (for fruit purposes). I think some one has

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[169] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 136).

[170] Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 136).

> been squared in this deal. ... I enclose on the back a list of names and prices paid by the R.R. here.[171]

Attached with the letter was a sketch of the land surrounding Armstrong's land property, with the following amounts paid to each land holder: R.C. Armstrong received $100, Manery received $92 for "half bench, no water," McCurdy received $95, another Armstrong received $100 for "good land," Mrs Lowe received $200, and Mrs Daly received $50 for "stone and gravel."[172]

Superintendent Vowell forwarded Ashdown Green's report to the Secretary on August 29,1906, offering his view that "[f]rom the report it seems that the Indians have been most liberally dealt with, leaving them no reasonable cause for complaint on the whole." However, he also noted:

> [I]n some cases what might have reasonably been allowed as the value of the land has, on the contrary, been devoted to pay for improvements of Indians and as compensation for severance, &c. Under the circumstances especially as the Indians have accepted the different amounts allotted them, I do not think that any re-opening of the case, if such were possible, would lead to any good results.[173]

The Secretary informed Vowell that, in light of Green's report, and "the fact that the Indians have accepted the several awards, there appears to be no necessity for further action."[174]

In the course of this inquiry, we carried out a comparative land titles search. To summarize our findings, we found that prices paid to settlers for non-reserve lands ranged from $50.00 to

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171 R.C. Armstrong, to Secretary, Department of Indian Affairs, August 14, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 128–30).

172 R.C. Armstrong, to Secretary, Department of Indian Affairs, August 14, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 130).

173 A.W. Vowell, Superintendent of Indian Affairs, BC, to Secretary, Department of Indian Affairs, August 29, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 138).

174 Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, BC, September 18, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 139).

$124.92, with the average price for non-reserve lands being $104.91 per acre.[175] It is noteworthy that the settlers were paid a lump sum for the right of way through each lot, although is not certain whether additional amounts were paid for improvements or for the removal of buildings.[176] The sales agreements do not make reference to any separate payments of that nature.[177]

By the summer of 1907 the construction of the railway had progressed through the Lower Similkameen reserves to the town of Keremeos.[178]

Impact of the Railway on the Lower Similkameen Community

According to the Elders at the community session, the construction of the railway line through the Lower Similkameen reserves had a dramatic impact on the community. The railway right of way survey plans indicate that the rights of way bisected each one of the reserves they crossed.[179] During the community session site tour, John Terbasket pointed to the location of individual holdings along the right of way and said that "all these lands were cut in half as a result of the railway."[180] He recalled that his grandfather, William Terbasket, had a home on IR 3, and, after the railway was

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[175] K. Faulkner, "Further Research on Sales of Non-reserve Lands to VV& E," May 26, 2005 (ICC Exhibit 9a, p. 2). This report is additional research that was requested by the panel following the oral session in January 2005. Kristen Faulkner, ICC Research Officer, supervised the research and produced the report.

[176] K. Faulkner, " Further Research on Sales of Non-reserve Lands to VV& E," May 26, 2005 (ICC Exhibit 9a, p. 2).

[177] K. Faulkner, "Further Research on Sales of Non-reserve Lands to VV& E," May 26, 2005 (ICC Exhibit 9a, p. 2).

[178] A. McGraw, Inspector of Indian Agencies, Southeastern Inspectorate, to J. Robert Brown, Indian Agent, May 5, 1916, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 335).

[179] Natural Resources Canada, Plan 695, CLSR,"Vancouver, Victoria and Eastern Rwy. and Navigation Company through Reserve No. 8, Similkameen Group B.C.," surveyed by Jas. Hislop, PLS,no date (Exhibit 7o); Natural Resources Canada, Plan 696, CLSR,"Vancouver, Victoria and Eastern Rwy. and Navigation Company, R. of Way Plan through Indian Reserve No. 7, Similkameen Group B.C.," surveyed by Jas. Hislop, PLS,undated (ICC Exhibit 7p); Natural Resources Canada, Plan 698, CLSR,"V.V. & E. Ry., Osoyoos Division – Yale District B.C., Right of Way Required Across Indian Reserve No. 3," June 2, 1905 (ICC Exhibit 7r); Natural Resources Canada, Plan 699, CLSR,"V.V. & E. Ry., Osoyoos Division – Yale District B.C., Right of Way Required Across Indian Reserve No. 5," June 3, 1905 (ICC Exhibit 7s).

[180] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 13). See also ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 19–21, 303–4, 310–11, John Terbasket).

built, "his house was on one side and his barns were on the other side of the track."[181] Henry Dennis explained that in each of the villages, "they had to move their quite a few buildings and sheds, barns, corrals. And if they didn't move them, they destroyed them for them."[182] Carol Allison heard from her father, former Chief Barnett Allison, that it took weeks to tear down and relocate homes and buildings, and that this work took away from the regular work, such as haying, that needed to be done.[183] Some buildings took as long as two to five years to rebuild.[184] It is unclear how long the band members were given to move their homes off the right of way before the railway came through. Henry Dennis explained:

> They never really said how much time, but they didn't give them very much time because a lot of them never got a chance to finish moving their belongings out, like tearing their buildings down, because that was a lot of work. You had to tear log buildings down and move them off the property before you get it all off before they could – before they went through.[185]

Elders during the community session spoke of pit houses being destroyed when the railway came through because they could not be moved. Elder Moses Louie recounted:

> Back then, the village sites were in the ground. Our people called them ptsie (phonetic). I guess they were – parts of it was covered with the ground and they mostly lived in the ground. The graveyards were right there too. The train track went right through the middle of all of those ptsie sites. I'm not sure what the English call the ptsie. I think they call it kikwilie or pit houses – pit houses, yeah. And that's where the original people lived, and that's what was ruined and lost by the railroad.
>
> He [Moses Louie] was saying after the destruction of the pit houses, teepees were put up, and during then, that they lived in teepees also, back then too. But teepees were easy to move. The pit houses, you couldn't move them, so they were

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181 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 13, John Terbasket).

182 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 384–85, Henry Dennis).

183 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 121–23, Carol Allison).

184 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 184, Henry Allison).

185 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 385, Henry Dennis).

> just totally lost and destroyed, along with everything that they owned, their belongings.[186]

The construction of the railway line not only cut off access to water for irrigation and the personal needs of band members or their livestock but also displaced at least one village.[187] During the community session site tour, John Terbasket identified the former location of a small village on IR 8 which was vacated because access to water had been cut off.[188] Nancy Allison noted that parts of the reserves are no longer used because of the lack of water.[189]

Raising cattle and horses was important in the local economy. Many community members recall that the railway fences within the reserves were poorly maintained, while those off reserve were kept in good repair.[190] This neglect resulted in injury or death to many livestock and horses, which were either hit by the train or tangled up in barbed wire. There is no record of compensation paid for injured or killed animals, and community members do not recall being compensated for such injuries.[191]

The noise level from the train and the high right of way fences affected migration patterns for wildlife.[192] Deer were very important to the economic welfare of the community, as many people hunted them for food and for clothing. Elders Carrie Allison, Maggie Kruger, and Hazel Squakin explained that the communities "depended on game not only as a food, but they used the buckskin

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[186] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 344–45, interpreter for Moses Louie). See also ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 30, John Terbasket; pp. 382–85, 387–88, Henry Dennis).

[187] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 21, 304, John Terbasket; p. 44, unidentified speaker; p. 103, Nancy Allison; p. 220, Lillian Allison; p. 222, Henry Allison; p. 391, Henry Dennis); also ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 220, Lillian Allison; p. 328, Mary Louie).

[188] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 21–22, John Terbasket).

[189] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 103, Nancy Allison).

[190] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 17, 305, John Terbasket; p. 28, Henry Allison; p. 206, Bernie Allison; p. 401, Henry Dennis).

[191] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 17, John Terbasket; p. 104, Mike Allison; pp. 28, 177–78, Henry Allison; pp. 189–91, Bernie Allison; p. 204, Antoine Qualtier; p. 243, Leonard Louis; p. 328, Mary Louie; p. 28, 400–3, Henry Dennis).

[192] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 188–89, Antoine Qualtier).

for gloves and for everything that they needed."[193] John Terbasket's mother used to trade buckskin gloves for groceries and other necessities, and he recalled that this was an important part of many families' incomes.[194] Once the railway came, the deer and other wildlife were scared away, forcing people to travel farther to hunt. Carrie Allison and others explained: "When the railroads came through they didn't – all the game was scared away. It was hard to get. They had to go higher in the mountains."[195]

People also complained about how the railway had "spoiled everything," including food, game, berry picking, medicine areas, and the water in the valley.[196] Specifically, Elders complained that the water was polluted by tar and creosote from the railway ties as well as chemicals sprayed along the track to keep down weeds.[197] Ore and other material from the mines at Hedley also dropped from open box cars along the right of way.[198]

The right of way through the valley followed an old trail used by the Similkameen people, and a number of spiritual sites and traditional markers were destroyed or disturbed by the right of way.[199] As well, the disturbance of the gravesite on IR 7 was extremely upsetting to the community. Henry Allison said that many meetings were held to try to get the railway to go around the cemetery,

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193 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 112, interpreter for Carrie Allison, Maggie Kruger, and Hazel Squakin).

194 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 265, 312–13, John Terbasket).

195 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 111, Carrie Allison; p. 112, interpreter for Carrie Allison, Maggie Kruger, and Hazel Squakin).

196 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 107, Hazel Squakin; pp. 329, 339, Mary Louie; p. 331, Ed Louie; p. 344, Moses Louie; p. 348, Violet Barber).

197 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 120, Hazel Squakin; p. 166, Lillian Allison; pp. 179– 80, Henry Allison; pp. 331, 334–35, Ed Louie; pp. 329–30, Mary Louie; p. 347, Kenneth Richter; p. 353, Moses Louie; pp. 394–95, Henry Dennis; p. 437, Herman Edward; p. 442, Robert Edward).

198 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 413, Henry Dennis).

199 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 138, Carol Allison; p. 280, Jeanine Terbasket; pp. 273–74, John Terbasket; pp. 327, 341, Mary Louie; p. 355, Moses Louie; pp. 411, 415–16, Theresa Dennis).

but the company refused.[200] Burial sites are still visible on both sides of the railway bed at the location of this gravesite.[201]

The Reverend John McDougall's "Report on British Columbia Indians," 1909

In 1909 the Reverend John McDougall investigated the Indian reserves in British Columbia to determine "if in the interests of the Indian in the first place, and then the general settlement in the second place, there were any of these reserves or portions of these reserves which might be surrendered by the Indians and sold for their benefit."[202] McDougall reported that lands in the Similkameen and Okanagan valleys had become valuable and coveted by the white settlers since the beginning of the fruit and vegetable industry there:

> Considering demands for Indian Reserves these are mostly to be found in the Okanagan and Similkineen [sic] valleys where of late a considerable number of settlers and fruit growers have gone in and at the present there are large enterprises undertaken in the bringing in of water onto lands which hitherto were considered wild or at best only fit for pasturing during certain periods of the year, but it has been found that given water, here are both soil and climate fitted for fruit and vegetables of the very best quality. These climatic and soil conditions in connection with the large and growing markets of the Middle West have made all land values in these valleys jump up into high price, therefore, Indian Reserves situate all up and down in these areas are much coveted by the speculator and also the bonafide settler.[203]

McDougall's report identified a number of reserves within British Columbia "as being possible of surrender without prejudice to the interest and well being of the Indians."[204] The locations included

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200 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 175, Henry Allison).

201 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 48–50, unidentified speakers).

202 Rev. John McDougall, "Report on British Columbia Indians," 1909, LAC, RG 10, vol. 4020, file 280470-3 (ICC Exhibit 1a, p. 219). His full name was "John C. (for Chantler) McDougall," although he almost never used his middle initial in correspondence.

203 Rev. John McDougall, "Report on British Columbia Indians," 1909, LAC, RG 10, vol. 4020, file 280470-3 (ICC Exhibit 1a, p. 218).

204 Rev. John McDougall, "Report on British Columbia Indians," 1909, LAC, RG 10, vol. 4020, file 280470-3 (ICC Exhibit 1a, p. 219).

lands adjacent to the towns of "Keremeos and Hedley, and Princeton in the Similkineen [sic]."[205] The report also drew attention to the "quality and fitness" of the Indian agents he dealt with in his travels across the province:

> In the case of the Kamloops and Okanagan Districts, I reluctantly have come to the conclusion that the present agent is altogether unfit for the work which is necessary in the management of this large district. In the first place, Wm. [sic] Irwin (in my judgement) is physically incapable of accomplishing the necessary amount of travel required to give the oversight and protection, and instruction these Indian Bands require. The consequence has been that, from the testimony of the Indians and adjacent settlers, many of these bands have not seen him for years, possibly some of them never in all the time since he was made agent. In the second place, I found a deplorable lack of respect for or confidence in your agent, both by the Indians generally and also to a large extent by the older settlements of white people. In this connection, I found that there was no bond of sympathy between the Indians and their agent, many times it was said to me "The agent good for white man, but very bad for Indian." From casual remarks, which fell from the Indians, as I travelled with them over these Reserves, I was sorry to find that they did not have any faith in the agents moral character, one chief charges the agent with being "a regular gambler" and laughed at the idea of such a man working for the Indians' good. All this and much more I came up against, and was to that degree made ashamed of, as I travelled over this large district, and, right here I may be pardoned, if I presume to suggest that this district be divided and two agencies created and two of the best men possible fo [sic] this work be placed in charge of these Indians and their Reserves. Surely, sympathetic and fair minded honest men can be found for these responsible positions.[206]

In 1910 the Agency was divided in accordance with McDougall's recommendations, and J. Robert Brown was appointed Indian Agent for the newly created Okanagan Agency.[207] Irwin was

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[205] Rev. John McDougall, "Report on British Columbia Indians," 1909, LAC, RG 10, vol. 4020, file 280470-3 (ICC Exhibit 1a, p. 219).

[206] Rev. John McDougall, "Report on British Columbia Indians," 1909, LAC, RG 10, vol. 4020, file 280470-3 (ICC Exhibit 1a, pp. 223–25).

[207] Record of Employment for Archibald Irwin, Department of Indian Affairs Establishment Books, Outside Service, c. 1870–1920, LAC, RG10, vol. 9180, p. 165 (ICC Exhibit 1a, p. 234).

dismissed from his post as Indian Agent on February 8, 1911, on grounds of "mismanagement," although the specific events leading to his dismissal are not certain.[208]

Lower Similkameen Band Protests Regarding Compensation, 1908–12

On October 10, 1908, Chief Ashnola, a minor chief of the Ashnola reserves (IR 10, 10A, and 10B) located west of Keremeos, wrote to the department concerning compensation for an irrigation ditch built within the limits of those reserves.[209] In the same letter, he also inquired whether the "Great Northern Railroad" had paid compensation for the railway right of way and requested that the department to inform him of the rate of compensation on a per acre basis.[210] The historical record does not reveal any subsequent correspondence regarding communication between the department and Chief Ashnola in response to his queries about the railway right of way compensation.

Elder Henry Dennis recalls that in the early years, Bertie Allison and Chief Newhumpsion complained the most about the railway, especially concerning compensation for themselves and others.[211]

R.C. Armstrong raised the issue of compensation next in 1911, again complaining about the rate of compensation given by the VV&E to the band members and saying that some of them had not yet been remunerated for the right of way:

> You will perhaps remember of me writing to you re the value put on the Indian land for right of way of the GNR.
>
> Although a man was sent with Irwin to look at the land, both Irwin and Green lied about the quality of the land they represented it was mostly stony bench. The fact is it was almost all first class bottom land from my place to the Wash[ington] line, about six miles. The Indians only got five dollars an acre while I was paid one hundred dollars an acre along side theirs exactly the same kind of land. I suppose

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[208] Record of Employment for Archibald Irwin, Department of Indian Affairs Establishment Books, Outside Service, c. 1870–1920, LAC, RG10, vol. 9180, p. 165 (ICC Exhibit 1a, p. 234).

[209] John Ashnola, Chief, to Superintendent General of Indian Affairs, October 10, 1906, LAC, RG 10, vol. 7660, file 21164-17 (ICC Exhibit 1a, p. 207).

[210] John Ashnola, Chief, to Superintendent General of Indian Affairs, October 10, 1906, LAC, RG 10, vol. 7660, file 21164-17 (ICC Exhibit 1a, p. 207).

[211] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 380–81, 397–98, Henry Dennis).

> Irwin was fixed by the RR Co. Even now some of the Indians tell me they never recieved [sic] even the five an acre from Irwin. It is a shame if they are kept out of their money.[212]

The department replied to Armstrong, saying that the matter "was thoroughly investigated in 1906 by Mr. Ashdown H. Green" and that "the Department does not see why the question should be re-opened."[213] Only a few months later, Indian Agent J.R. Brown reported: "At a recent meeting of the Skemeosquamkin Band of Indians of the South Similkameen, I was instructed to ask the Department, that the sum of money paid by the Great Northern Railway [Company], for Right of Way, through Indian Reserve, be distributed among the Indians of that Reserve."[214] The department replied that the proceeds "cannot be distributed as suggested," since "[t]his money represents capital and can only be expended in improvements of a permanent character."[215]

Schedule of Indian Reserves, 1913

The 1913 Schedule of Indian Reserves in the Dominion, compiled by the Department of Indian Affairs, lists IR 7 and 8 as "confirmed" and IR 3 and 5 as "approved" for the Lower Similkameen Band.[216] The reserves have the same names and acreages as those listed in the 1902 Schedule: IR 3 being 1,750 acres, IR 5 being 1,278 acres, and IR 7 and 8 together containing 3,800 acres (instead of 4,075 acres as re-surveyed in 1902).[217] An additional notation appears for each of these reserves:

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[212] R.C. Armstrong, Justice of the Peace, to the Department of Indian Affairs, October 15, 1911, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, pp. 238–39).

[213] S. Stewart, Assistant Secretary, Department of Indian Affairs, to R.C.A. Armstrong, October 26, 1911, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 240).

[214] Indian Agent to Secretary, Department of Indian Affairs, March 11, 1912, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 248).

[215] Assistant Deputy and Secretary, Department of Indian Affairs, to J.R. Brown, Indian Agent, March 25, 1912, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 249).

[216] Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913*, p. 105 (ICC Exhibit 1a, p. 252).

[217] Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913*, p. 105 (ICC Exhibit 1a, p. 252).

"Right of way of the V.V. & E. Ry. and Nav. Co. through this reserve." However, no specific acreage for the rights of way were listed, and the reserve acreage was not reduced to account for them.[218]

Royal Commission on Indian Affairs for the Province of British Columbia

During the fall of 1913, the Royal Commission on Indian Affairs for the Province of British Columbia (also known as the McKenna-McBride Commission) examined the Lower Similkameen reserves and interviewed the occupants about land use and some of the characteristics of the land. Following their inspections, the Commissioners issued minutes of decision confirming the Lower Similkameen reserves. These decisions were published in the Royal Commission's *Report* in 1916, along with information regarding the character and valuations of reserve lands.

The first minute of decision, dated November 22, 1913, regarding the "Lower Similkameen Tribe," ordered that IR 3 and 5 "BE CONFIRMED as now fixed and determined and shewn in the Official Schedule of Indians Reserves, 1913."[219] IR 3, containing 1,750 acres in total, was described in the report as "dry farm land and rocky bluffs," with 600 acres of good soil that produced hay, oats, vegetables, and fruit. The Commissioners valued 300 acres at $100 per acre, 700 acres at $60 per acre, and the balance as "bench and rocky bluffs, valueless unless irrigated."[220] IR 5, containing 1,278 acres in total, was described therein as "cultivable bottomlands and dry bench" that produced hay, oats, vegetables, and fruit, and supported horses and cattle. The Commissioners valued 150 acres at $100 per acre, 450 acres at $60 per acre, and the balance as "benchland worthless without irrigation facilities."[221]

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[218] Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913*, p. 105 (ICC Exhibit 1a, p. 252).

[219] Minute of Decision, November 22, 1913, in Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, pp. 718–19 (ICC Exhibit 1a, pp. 361–62).

[220] Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, pp. 701, 704 (ICC Exhibit 1a, pp. 344, 347).

[221] Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, pp. 701, 704 (ICC Exhibit 1a, pp. 344, 347).

Another minute of decision, also dated November 22, 1913, ordered that "Skemeoskuankin Reserves Nos. 7 and 8, Similkameen District of the Lower Similkameen Tribe, BE CONFIRMED as now fixed and determined and shewn in the Official Schedule of Indian Reserves, 1913."[222] These reserves, said to contain 3,800 acres in total, are described as "range with cultivable bottomland," including 500 acres of "choice cleared meadow" and 1,000 acres of uncleared bottomland. Most of the land was said to contain "fairly good soil" that supported the production of grain, fruit, and hay; good timber was also available. The Commissioners valued 500 acres at $100 per acre, 1,000 acres at $60 per acre, 1,000 acres at $30 per acre, and 1,300 acres at $20 per acre.[223]

The report also included information regarding the economic and agricultural activities engaged in by reserve residents. It was reported that all the residents of IR 3, 5, 7, and 8 were "generally comfortably situated" and engaged in farming and stock raising.[224]

Flooding Damage to Skemeoskuankin Reserves, IR 7 and 8

In 1915 Indian Agent J.R. Brown informed the department that Bertie Allison had made a claim against the Great Northern Railway for damage to his meadow allegedly caused by the flooding of a creek that was diverted during construction of the railway. Although the company held that it was "in no way responsible for the trouble complained of,"[225] the Agent argued that the railway's diversion of the creek was the cause of the damage and urged the department to seek compensation from the company.[226] There is no record of how this issue was resolved.

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[222] Minute of Decision, November 22, 1913, in Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, p. 719 (ICC Exhibit 1a, p. 362).

[223] Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, pp. 702, 704 (ICC Exhibit 1a, pp. 345, 347).

[224] Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, p. 707 (ICC Exhibit 1a, p. 350).

[225] F.D. Belaney, Division Superintendent, Great Northern Railway Company, to J. Robert Brown, Indian Agent, March 15, 1915, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, pp. 322–23).

[226] J. Robert Brown, Indian Agent, to Secretary, Department of Indian Affairs, June 21, 1915, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 326); J. Robert Brown, Indian Agent, to Secretary, Department of Indian Affairs, March 6, 1916, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 331); J. Robert Brown, Indian Agent, to Secretary, Department of Indian Affairs, August 9, 1916, LAC, RG 10,

Further Inquiries Regarding Compensation, 1925–36

In response to questions as to whether the right of way in IR 7 and 8 was "correctly fenced," Indian Agent Fred Ball noted in July 1925 that more land than necessary had been taken for the right of way and used as a farm by the railway's "section man."[227]

In July 1927 Agent Ball reported that, during a recent visit with the Lower Similkameen Band, he was asked "a number of questions" about the right of way. He commented that "it seems a late date to be making inquiries regarding it, but apparently it is still a live question with the Indians."[228] Furthermore, he reported:

> I noticed a letter in one of the small local papers recently – a letter written by the wife of a liquor supplier and about as badly misinformed as could be – in which it was stated that "the Indians never received compensation for their land taken by the Railway Company and that they were offered a threshing machine in payment, which was refused." I know this statement is not correct, because one Indian, Pierre Alec, admits receiving $250 and was promised $600 altogether, but the balance was never paid to him.
> ...
> While this may seem an ancient matter to deal with, the Indians do not consider it a closed incident by any means. For instance, Pierre Alec showed me a packet of papers which proved to be consecutive pages torn from calendars for the past twenty years with marks on various dates which gave him sundry information, the whole forming rather a complete diary so far as he is concerned. It showed the visits of Mr. Irwin, the Indian Agent at that time, and the payments made to Pierre Alec and the amounts promised later etc., but none of the other Indians had any documents of this kind.[229]

Indian Agent Ball requested information on the original settlement and remarked: "I believe they will be quite satisfied if I can go in[to] this matter in detail with them and show them they have been

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vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, pp. 336–37).

[227] Fred Ball, Indian Agent, Okanagan Agency, to Assistant Deputy and Secretary, Department of Indian Affairs, July 30, 1925, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 373).

[228] Fred Ball, Indian Agent, Okanagan Agency, to Assistant Deputy & Secretary, Department of Indian Affairs, July 29, 1927, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 374).

[229] Fred Ball, Indian Agent, Okanagan Agency, to Assistant Deputy & Secretary, Department of Indian Affairs, July 29, 1927, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 374).

properly compensated."[230] The information was provided to the agent as requested, but it did not quiet the concerns expressed by band members.

In 1936 Indian Agent James Coleman reported:

> From time to time some Indian or the other brings up the question of payment for the right of way of the Great Northern railroad through their Reserves and as there is absolutely no information or plans regarding the transaction in this office, I am unable to give them any information. A few days ago a Pierre Alex, of the Lower Similkameen Band, stated that the railroad took six acres of his land at the rate of $100.00 per acre, a total of $600.00, of which he was paid $225.00 by Mr. Indian Agent Irwin, who informed him that the balance was left to his credit with the Department. Whether such was the case or not I have no information.[231]

A.F. McKenzie, the Acting Assistant Deputy and Secretary, provided a statement showing the valuations and allowances for improvements for the right of way. He pointed out that "Pierre appears in each statement with $225.00 paid each time. However, it may not be the same man."[232] He further remarked: "The land was not sold at $100.00 per acre. It was valued at varying prices. The band lands brought $5.00 per acre. The individuals received the enhanced value of the better land they had cultivated by Indian Improvements."[233]

The community evidence suggests that there were two separate men with names similar to the "Alex Pierre" mentioned in the correspondence. Theresa Dennis noted that a "Pierre Alexees" (phonetic) lived in the Ashnola area and that the railway went through his property.[234] John Terbasket

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[230] Fred Ball, Indian Agent, Okanagan Agency, to Assistant Deputy & Secretary, Department of Indian Affairs, July 29, 1927, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 374).

[231] James Coleman, Indian Agent, to Secretary, Department of Indian Affairs, June 8, 1936, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 376).

[232] A.F. MacKenzie, Acting Assistant Deputy and Secretary, Department of Indian Affairs, to James Coleman, Indian Agent, June 16, 1936, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 378).

[233] A.F. MacKenzie, Acting Assistant Deputy and Secretary, Department of Indian Affairs, to James Coleman, Indian Agent, June 16, 1936, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 378).

[234] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 398–99, Theresa Dennis).

clarified that another man named Alex Pierre, or Crooked Mouth Pierre, lived at IR 8, and his lands were also affected by the railway.[235]

Abandonment of Railway Line between Hedley and Princeton, 1937

On September 30, 1937, the Board of Railway Commissioners granted authorization to the VV&E Railway and Navigation Company for "the abandonment of its line of railway between Hedley and Princeton."[236] However, the line between Hedley and Chopaka, Washington, continued to operate, including use of the right of way through the Lower Similkameen Reserves.

Provincial Order in Council 1036, 1938

On July 29, 1938, the provincial government passed Order in Council 1036. It read:

> That under authority of Section 93 of the "Land Act," being Chapter 144, "Revised Statutes of British Columbia, 1936," and Section 2 of Chapter 32, "British Columbia Statutes 1919," being the "Indian Affairs Settlement Act," the lands set out in schedule attached hereto be conveyed to His Majesty the King in the right of the Dominion of Canada in trust for the use and benefit of the Indians of the Province of British Columbia, subject however to the right of the Dominion Government to deal with the said lands in such manner as they may deem best suited for the purpose of the Indians including a right to sell the said lands and fund or use the proceeds for the benefit of the Indians subject to the condition that in the event of any Indian tribe or band in British Columbia at some future time becoming extinct that any lands hereby conveyed for such tribe or band, and not sold or disposed of as heretofore provided, or any unexpended fund being the proceeds of any such sale, shall be conveyed or repaid to the grantor, and that such conveyance shall also be subject to the following provisions:–
>
> PROVIDED NEVERTHELESS that it shall at all times be lawful for Us, Our heirs and successors, or for any person or persons acting in that behalf by Our or their authority, to resume any part of the said lands which it may be deemed necessary to resume for making roads, canals, bridges, towing paths, or other works of public utility or convenience; so, nevertheless that the lands so to be resumed shall not exceed one-twentieth part of the whole of the lands aforesaid, and that no such

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235 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 399, John Terbasket).

236 Order No. 54909, Board of Railway Commissioners for Canada, September 30, 1937, no file reference available (Exhibit 1a, p. 379).

> resumption shall be made of any lands of which any buildings may have been erected, or which may be in use as gardens or otherwise for the more convenient occupation of any such buildings:
>
> PROVIDED also that it shall be lawful for any person duly authorized in that behalf by Us, our heirs and successors, to take and occupy such water privileges, and to have and enjoy such rights of carrying water over, through or under any parts of the hereditaments hereby granted, as may be reasonably required for mining or agricultural purposes in the vicinity of the said hereditaments, paying therefor a reasonable compensation:
>
> PROVIDED also that the Department of Indian Affairs shall through its proper officers be advised of any work contemplated under the preceding provisoes that plans of the location of such work shall be furnished for the information of the Department of Indian Affairs, and that a reasonable time shall be allowed for consideration of the said plans and for any necessary adjustments or arrangements in connection with the proposed work:
>
> PROVIDED also that it shall be at all times lawful for any person duly authorized in that behalf by Us, our heirs and successors, to take from or upon any part of the hereditaments hereby granted, any gravel, sand, stone, lime, timber or other material which may be required in the construction, maintenance, or repair of any roads, ferries, bridges, or other public works. But nevertheless paying therefor reasonable compensation for such material as may be taken for use outside the boundaries of the hereditaments hereby granted:
>
> PROVIDED also that all travelled streets, roads, trails, and other highways existing over or through said lands at the date hereof shall be excepted from this grant.[237]

The Lower Similkameen reserves, including IR 3 (1,750 acres), "Joe Nahumpcheen" IR 5 (1,278 acres), and "Skemeoskuankin" IR 7 and 8 (4,075 acres), were covered by Order in Council 1036.[238] It should be noted that the schedule to this Order shows the correct acreage of 4,075 acres for IR 7

[237] British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 384).

[238] British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 384).

and 8, in contrast with previous schedules produced by the Department of Indian Affairs.[239] This Order in Council did not reduce the acreage of Lower Similkameen reserves 3, 5, 7, and 8. In comparison, the acreage of IR 10 was reduced by 2.6 acres, apparently on account of an irrigation ditch right of way, although no extra reduction was made for the railway right of way through the same reserve.[240]

Petition and Band Council Resolution, 1940

In January 1940, 16 band members[241] signed a petition stating: "[T]his is all our neams [sic] signed for Perrie Alex's railway mony [sic] he received 225.00 and 375.00 come to him."[242] A Band Council Resolution dated March 30, 1940, followed the petition and requested

> that a sum not exceeding Three Hundred seventy five Dollars, be paid out of money standing to the credit of this Band, for the purpose of reimbursing Pierre Alex for land taken for Railway (G.N.) purposes in 1905 for which he was never paid, receiving $225.00 instead of the $600.00 which he should have received.[243]

When forwarding the Band Council Resolution to the department, Indian Agent Adrian Barber explained in his covering letter:

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239 Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, p. 61 (ICC Exhibit 1a, p. 46); Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913*, p. 105 (ICC Exhibit 1a, p. 252).

240 British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 385); see also Department of Mines and Resources, Indian Affairs Branch, "Schedule of Indian Reserves in the Dominion of Canada, Part 2: Reserves in the Province of British Columbia," March 31, 1943, pp. 111–13 (ICC Exhibit 1a, pp. 394–96).

241 The 16 signatures on the petition are [Chief] Joseph Louie, Johnny [Jasket], Harry [McKanzz], George [McKanzz], Michel, Abraham Louie, Willie Terbasket, Gabriel Terbasket, Alex [Squise], Frank Terbasket, Eneas Nehumchin, Charlie Joe, Johanny Edward, Billy Francis, Eneas Squakin, and "Perrie" Alex.

242 Joseph Louie and others to A.H. Barber, January 26, 1940, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, pp. 386–87).

243 Band Council Resolution, March 30, 1940, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 388). It is signed by [Chief] Joseph Louie, Charlie Joe, Niel Bent, Billie Terbasket, and Joe Dennis.

> On each of my visits to the Lower Similkameen Band of Indians an old Indian, Pierre Alex, brings up an old claim for compensation for six acres of improved land which he alleges were taken for right of way purposes by the V.V. and E. Railway, now the Great Northern, in 1905, the money having been paid to the Department and he only having received $225.00 instead of $600.00 for six acres at $100 per acre.
>
> ...
>
> ... in January I received the attached letter from the Chief of the Band and further on March 30th last, when I presided at a meeting of the Band the matter was again brought up and the meeting insisted I have the money paid to this man out of the Band Account and passed a resolution requesting this be done, which I also forward hereto attached.
>
> Whilst this claim has the support of the old members of the Band, it is very old and has apparently been taken up by a number of Agents previous to this time without satisfaction to the old fellow. I am submitting the resolution as requested by the Band for consideration by the Department, but would be pleased if the Department could let me have a statement giving the acreage and price per acre received for improved and cultivated land and it may be possible that I could explain the matter to the Band but do not expect to be able to satisfy Pierre Alex without payment of the amount he claims is due to him.[244]

The Secretary replied to Agent Barber on April 24, 1940, with an explanation of the original valuations and amounts paid to the Band and to individuals.[245] It is not known whether the money requested in the Band Council Resolution was paid to Pierre.[246]

Schedule of Indian Reserves, 1943

In 1943 the Indian Affairs Branch of the Department of Mines and Resources published a "Schedule of Indian Reserves in the Dominion of Canada," intended to be "a ready reference to pertinent information necessary for administrative purposes both for office and the field."[247] This Schedule

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[244] Adrian Barber, Indian Agent, to Secretary, Department of Indian Affairs, April 17, 1940 (ICC Exhibit 1a, p. 389).

[245] T.R.L. MacInnes, Secretary, Indian Affairs Branch, Department of Mines and Resources, to A.E. Barber, Indian Agent, April 24, 1940, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 390).

[246] Henry Dennis, whose father owned Pierre Alexees' land in later years, recalls that Pierre never received compensation. See ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 400, Henry Dennis).

[247] Department of Mines and Resources, Indian Affairs Branch, "Schedule of Indian Reserves in the Dominion of Canada, Part 2: Reserves in the Province of British Columbia," March 31, 1943 (ICC Exhibit 1a, p. 392).

differs from all previous similar Schedules of Indian Reserves in that the lands taken for any rights of way, including the VV&E Right of Way, are excluded from the total acreage listed for each reserve:

- IR 3 was said to contain 1,714.29 acres
  1,750.00 (surveyed in 1889) – 25.21 (VV&E right of way) – 11.20 (Road right of way)
- IR 5 was said to contain 1,251.99 acres
  1,278.00 (surveyed in 1887) – 14.76 (VV&E right of way) – 11.25 (Road right of way)
- IR 7 and 8 (combined) were said to contain 3,957.69 acres
  4,075.00 (re-surveyed in 1902) – 59.31 (VV&E right of way) – 58.00 (Road right of way[248]

It is noteworthy that the 59.31 acres shown on the Schedule as the area of the VV&E right of way through IR 7 and 8 was, in fact, the area within IR 7. The Schedule omitted the area of 18.26 acres required for the right of way through IR 8.

ABANDONMENT OF THE VV&E RIGHT OF WAY

Status of the VV&E Princeton Line, 1944–85

In 1944 a dominion statute approved the lease of "the railway and all undertakings of the Vancouver, Victoria and Eastern Railway and Navigation Company" to the Great Northern Railway Company, based in Minnesota. The agreement included VV&E's "main line of railway extending from Hedley, British Columbia, to the international boundary line north of Chopaka, Washington."[249]

On December 14, 1954, the Board of Transport Commissioners approved the abandonment of the portion of railway between Hedley and Keremeos which passes through IR 10.[250] On January 10, 1956, a provincial order in council authorized the acquisition of the abandoned rights

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[248] Department of Mines and Resources, "Schedule of Indian Reserves in the Dominion of Canada, Part 2: Reserves in the Province of British Columbia," March 31, 1943 (ICC Exhibit 1a, pp. 394–95).

[249] *An Act respecting Vancouver, Victoria and Eastern Railway and Navigation Company, the Nelson and Fort Sheppard Railway Company and Great Northern Railway Company*, SC 1944, c. 55 (ICC Exhibit 6g, pp. 2 and 5).

[250] Order No. 54909, Board of Transport Commissioners for Canada, December 14, 1954, National Transportation Agency, [file 33882, vol. 5] (Exhibit 1a, p. 398).

of way "for the use of the Department of Highways."[251] The land was purchased from the Great Northern Railway for $1, and the province acquired the certificates of title to the land.[252]

Henry Dennis owned land adjacent to the IR 10 right of way at this time. He recalls that sometime after the railway ceased to operate in that area, four men from the Highways Department came to ask his permission to "borrow" Mr Dennis' right of way property for three years, so they could use it as a temporary road while building a new bridge over the Ashnola River.[253] They acknowledged in their conversation that "we know this goes back to you, it's your property, so we have to borrow it off you."[254] Later, after the highway was built on the right of way through IR10, Mr Dennis made numerous attempts to get the Highways Department to erect a fence along the highway, because a number of his animals were being killed. He was informed that the land "belongs to the Indians," and that "they couldn't fence that property because it belonged to the reserve."[255]

It appears that the possibility of abandoning the remaining portion of the railway between Keremeos and the international boundary at Chopaka (passing through IR 2, 7, and 8) was discussed as early as 1970. The present day IR 2 was once made up of three reserves, IR 2, 3, and 5. They were amalgamated in 1959 to form one reserve, designated as IR 2.[256] At the time, the attorney for the Burlington Northern Inc.[257] informed the Secretary of the Railway Transport Committee that "the matter of abandonment of line is being given further study," but that no formal decision regarding

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[251] Provincial Order in Council, January 10, 1956 (Exhibit 1a, pp. 399–400).

[252] J.E. Moore, Departmental Comptroller, Department of Highways, to Superintendent of Lands, Department of Lands and Forests, May 22, 1957 (ICC Exhibit 1a, p. 401).

[253] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 389, Henry Dennis).

[254] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 389–90, Henry Dennis).

[255] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 390, Henry Dennis). See also ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 60–61, Henry Dennis).

[256] D.M. Hett, Superintendent, Okanagan Indian Agency, to A.F. Paget, Comptroller of Water Rights, Department of Lands and Forests, December 23, 1959 (ICC Exhibit 1a, p. 405).

[257] In 1965 the Great Northern Railway Company in Canada was authorized to amalgamate with Great Northern Pacific& Burlington Lines, and other railway companies. The merger became effective in 1970, and the Company was first known as Burlington Northern Inc., and later as the Burlington Northern Railroad Company. See Burlington Northern Railroad Company, Submission to the Railway Transport Committee, March 28, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 434).

abandonment had yet been made.[258] However, flooding damage to the tracks in 1972 halted railway service along the line and obliged the company to provide "substituted motor carrier service," which continued until 1982.[259] The 1972 flood washed out the railway bridge across the Similkameen River at the northern end of IR 8. There is no indication that the railway company made any efforts to repair the bridge or clean up the debris from the washout. An attempted cleanup carried out by the Lower Similkameen Band resulted in the death of one community member when part of the bridge collapsed.[260]

The Village of Keremeos made inquiries to the Railway Transport Committee in 1974 about how it might acquire a portion of the apparently unused right of way. It was informed that no application to abandon the right of way had been made:

> Under these circumstances, there is nothing you can do to acquire a portion or portions of the Railway right of way. In the event, the Railway was to apply for authority to abandon this trackage and their request was subsequently approved, the Railway could then dispose of the right of way in any manner they chose.[261]

In June 1974 the attorney for Burlington Northern, F.D. Pratt, informed the Railway Transport Committee: "[I]t is [Burlington Northern's] present intention not to apply to abandon this line but to continue the present trucking service ... until such time as additional freight warrants restoration of train service."[262]

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[258] F.D. Pratt, Attorney for British Columbia, Burlington Northern Inc., to C.W. Rump, Secretary, Railway Transport Committee, September 17, 1970, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 406).

[259] Burlington Northern Railroad Company, Submission to the Railway Transport Committee, March 28, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 435).

[260] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 17, 71, John Terbasket; p. 426, Gloria Bent; pp. 435–36, Delphine Terbasket).

[261] J.D. Beaton, Secretary, Railway Transport Committee, to Viola Sales, Municipal Clerk, Corporation of the Village of Keremeos, April 2, 1974, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 407).

[262] F.D. Pratt, Attorney for British Columbia, Burlington Northern Inc., to the Secretary, Railway Transport Committee, Canadian Transport Commission, June 12, 1974, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 408).

In February 1977 the Lower Similkameen Band apparently contacted the Burlington Northern to find out how the rights of way through IR 2, 7, and 8 could be reacquired.[263] A company representative replied on February 24, informing them that a decision had not yet been made to abandon the right of way but that "once a line is discontinued, our policy is to deal with the adjoining owners for sale of our ownership unless government edict directs otherwise. I note your interest in possible purchase of the right of way on behalf of the Band."[264]

Over four years later, on June 29, 1981, the Burlington Northern notified the Interstate Commerce Commission (in the United States) that it anticipated abandoning its line between Oroville, Washington, and Keremeos, British Columbia, within three years.[265] Chief Barnett Allison immediately forwarded the notice to the Department of Indian Affairs and advised:

> Our people and Council resolved that three sections of the line through our reserve No 2, No 7 & 8 and Ashnola [No.] 10 & 10B be returned to the Band immediately. We urge the Department to act on behalf of the Government of Canada to demand the said right of way to be transferred to Reserve land status as it was before.
>
> Your immediate action is required and please keep us informed of your progress in this matter.[266]

On July 31, 1981, Peter Clark, the Director of Reserves and Trusts for the BC Region, wrote to the Director of the Lands Branch in Ottawa to ask for information "so that I might provide the Band with advice as to the proper means of obtaining the return of the lands."[267] He also commented: "It would

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263 J.C. Kenady, Vice President, Industrial Development and Property Management, Burlington Northern, to Joe Terbasket, Land Claims Worker, Lower Similkameen Band Office, February 24, 1977, DIAND file E5667-07399 (ICC Exhibit 1a, p. 409).

264 J.C. Kenady, Vice President, Industrial Development and Property Management, Burlington Northern, to Joe Terbasket, Land Claims Worker, Lower Similkameen Band Office, February 24, 1977, DIAND file E5667-07399 (ICC Exhibit 1a, p. 409).

265 Notice, Burlington Northern Railroad Company, June 29, 1981, DIAND file E5667-07399 (ICC Exhibit 1a, p. 411).

266 Chief Barnett Allison, Lower Similkameen Indian Band, to Peter Clark, Director, Reserves and Trusts, BC Region, July 14, 1981, DIAND file E5667-07399 (ICC Exhibit 1a, p. 410).

267 Peter Clark, Acting Director, Reserves and Trusts, BC Region, Indian and Northern Affairs, to F.J. Singleton, Acting Director, Lands Branch, Reserves and Trusts, Departmental Headquarters, July 31, 1981, DIAND file E5667-07399 (ICC Exhibit 1a, p. 412).

appear that Burlington Northern understand that the land should be purchased by the Band/Crown whilst the Band understand that the lands revert when no longer required."[268] The Band was informed in November 1981 that "the Department was proceeding through the Courts to obtain a (legal) decision as to the ownership of the land."[269]

In 1983 Vic Hulley of the Similkameen Indian Administration wrote to Peter Clark, asking for an update on the department's legal action. Hulley informed Clark that the Band was simultaneously continuing its "direct and persistent representation to Burlington Northern to make the old RR-R/W available to the Lower Similkameen Band on a first refusal basis."[270] In the same letter, he stated: "The old documents wherein title to the subject lands was vested in Burlington Northern as near as I can determine did not provide for the reversion of the lands to Crown Canada."[271]

Official Abandonment of Right of Way, 1985

On March 28, 1985, the Burlington Northern Railway officially applied to the Railway Transport Committee for permission to abandon the railway line between Keremeos and the international boundary.[272] The application stated that, due to the 1972 washout and a lack of maintenance work since that time, "the Keremeos Line is in a state of bad disrepair and over a large part thereof the

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[268] Peter Clark, Acting Director, Reserves and Trusts, BC Region, Indian and Northern Affairs, to F.J. Singleton, Acting Director, Lands Branch, Reserves and Trusts, Departmental Headquarters, July 31, 1981, DIAND file E5667-07399 (ICC Exhibit 1a, p. 412).

[269] Vic Hulley, Lands and Estates, Similkameen Indian Administration, to Peter Clark, Acting Director, Reserves and Trusts, BC Region, February 28, 1983, DIAND file E5667-07399 (ICC Exhibit 1a, p. 430).

[270] Vic Hulley, Lands and Estates, Similkameen Indian Administration, to Peter Clark, Acting Director, Reserves and Trusts, BC Region, February 28, 1983, DIAND file E5667-07399 (ICC Exhibit 1a, p. 430).

[271] Vic Hulley, Lands and Estates, Similkameen Indian Administration, to Peter Clark, Acting Director, Reserves and Trusts, BC Region, February 28, 1983, DIAND file E5667-07399 (ICC Exhibit 1a, p. 430).

[272] Malcolm G. King, Barrister and Solicitor, Douglas, Symes & Brissenden, to J. O'Hara, Secretary, Railway Transport Committee, Canadian Transport Commission, March 28, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 431); and Burlington Northern Railroad Company, Submission to the Railway Transport Committee, March 28, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, pp. 432–41).

tracks have been removed by persons unknown."[273] Furthermore, an earlier order by the Interstate Commerce Commission in the United States had effectively isolated the portion of the railway between Keremeos and the border by authorizing the abandonment of the portion within Washington between Chopaka and Oroville.[274]

The Railway Transport Committee conducted a field investigation regarding the impact of the proposed abandonment. On July 22, 1985, it was reported that the rail line between Keremeos and Chopaka was "impassable and in poor state of repairs" and that "[t]here is no opposition to the abandonment."[275] A public notice of the proposed abandonment was issued accordingly on August 27, 1985, including a statement that "any person who is of the opinion that a Public Hearing is required on this matter should make his or her views known by writing on or before September 17, 1985."[276]

On September 18, 1985, Band Administrator Delphine Terbasket notified the Canadian Transport Commission that "[t]he Upper and Lower Similkameen Indian Band advise that [there] is no objection [to] the abandonment as long as the crossing right of ways are returned to the Upper and Lower Similkameen Indian Reserves."[277] On the same date the Okanagan Nations Research Institute notified the Commission that their research indicated a "prior claim on proposed abandonment of Burlington Northern Railway by Lower and Upper Similkameen Indian Band on those portions of this right of way which transgres [sic] reserve land."[278] R.W. Lebell, Secretary of

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[273] Burlington Northern Railroad Company, Submission to the Railway Transport Committee, March 28, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, pp. 437, 440).

[274] Burlington Northern Railroad Company, Submission to the Railway Transport Committee, March 28, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 438).

[275] L.P. Trainor for J.J. Eisler, Regional Director, Railway Transport Committee, to J. Kimpinski, Executive Director, Western Division, [Railway Transport Committee], July 22, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, pp. 443–45).

[276] Notice, Railway Transport Committee, Canadian Transport Commission – Western Division, August 27, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, pp. 446–47); also located in DIAND file E5667-07399 (ICC Exhibit 1a, p. 448).

[277] Delphine Terbasket, Administrator, to R.W. Lebell, Canadian Transport Commission, Western Division, September 18, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 449).

[278] Okanagan Nations Research Institute, to R.W. Lebell, Canadian Transport Commission, September 18, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 450).

the Canadian Transport Commission, Western Division, acknowledged the submission of the Okanagan Nations Research Institute and stated:

> The nature of your claim is not clear in your telex, but it appears that you are not contemplating shipments by rail on this line. Instead, it appears that you are asserting a land claim with respect to a portion of the railway right of way. In deciding an abandonment case, the Commission is restricted by law to matters involving train service and the Commission does not have any power to decide the title to lands or to make orders for the disposition of the right of way. If the line is ordered abandoned, the title to the right of way will be held by Burlington Northern in the same manner as any other landowner within the Province. Any claim of prior title to those lands may be determined in a Court within the Province of British Columbia because, as I have indicated, the Commission has no jurisdiction to decide land titles.[279]

On October 4 the Railway Transport Committee issued a decision stating that "no objections were received respecting the proposed abandonment." However, it noted:

> The Okanagan Nations Research Institute and the Upper and Lower Similkameen Indian Bands asserted land claims against the right of way of the railway, but the determination of Native land claims is a matter outside the scope of the jurisdiction of the Commission.[280]

The decision concluded that abandonment of the Burlington Northern line between Keremeos and the international boundary would be "in the public interest."[281] An order issued on the same date approved "abandonment of the operation of the said trackage."[282]

Hubert J. Ryan, Acting Director for the Land Directorate at Department of Indian Affairs headquarters, informed the BC Region Reserves and Trusts Office of the order for abandonment of

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[279] R.W. Lebell, Secretary, Canadian Transport Commission, Western Division, to Okanagan Nations Research Institute, September 20, 1985, DIAND file E5667-07399 (ICC Exhibit 1a, p. 451).

[280] Decision No. WDR1985-07, Railway Transport Committee, Canadian Transport Commission, Western Division, October 4, 1985 (ICC Exhibit 1a, p. 453).

[281] Decision No. WDR1985-07, Railway Transport Committee, Canadian Transport Commission, Western Division, October 4, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, pp. 453, 455).

[282] Order No. WDR1985-00198, Railway Transport Committee, Canadian Transport Commission, Western Division, October 4, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 456).

the railway line. He stated that "[a]s the rail line in question passes through a number of reserves belonging to the Similkameen Band you may wish to approach the company in question with the view of re-acquiring these lands for the use and benefit of the Band."[283]

On November 7, 1985, A.J. Broughton, the Manager of Indian Lands for Reserves and Trusts, BC Region, wrote to DIAND Regional Legal Services, informing them that "[t]he Band wishes to reacquire the right of way through its reserves."[284] Broughton asked to be advised whether "the Crown and/or the Band have any right to reacquire the right of way without compensating the railway."[285] On the same date, Broughton wrote to Peter Keltie, the DIAND Central District Manager, instructing him to "notify the Band, and take part in any discussions on the reacquisition of the right of way as you think appropriate. It appears that the Band has been interested in this reacquisition for some time."[286]

On April 17, 1986, Councillor John Terbasket wrote to Peter Keltie at the Department of Indian Affairs in Vancouver to request assistance. The letter stated:

> The Burlington Northern Railway has been abandoned and the land is no longer required by Burlington Northern for railway purposes.
>
> We have submitted a claim with the Railway to have the right of way land returned to the band.
>
> We solicit the support of the Department of Indian Affairs towards this effort, and request a letter from the Department supporting the return of the land.[287]

There is no further record of what action followed this request, but it appears that the Lower Similkameen Band reached an agreement of some kind with the railway company by the end of 1986

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[283] Hubert J. Ryan, Acting Director, Land Directorate, Reserves and Trusts, to Director, Reserves and Trusts, BC Region, October 15, 1985, DIAND file E5667-07399 (ICC Exhibit 1a, p. 457).

[284] A.J. Broughton, Manager, Indian Lands, Reserves and Trusts, BC Region, to F.L. Morris, Regional Legal Services, November 7, 1985, DIAND file E5667-07399 (ICC Exhibit 1a, p. 458).

[285] A.J. Broughton, Manager, Indian Lands, Reserves and Trusts, BC Region, to F.L. Morris, Regional Legal Services, November 7, 1985, DIAND file E5667-07399 (ICC Exhibit 1a, p. 458).

[286] Allan J. Broughton, Manager, Indian Lands, Reserves and Trusts, BC Region, to Peter D. Keltie, District Manager, Central District, November 7, 1985, DIAND file E5667-07399 (ICC Exhibit 1a, p. 459).

[287] John Terbasket, Councillor, Lower Similkameen Indian Band, to Peter Keltie, Department of Indian Affairs, April 17, 1986, DIAND file E5667-07399 (ICC Exhibit 1a, p. 465).

for the return of the right of way lands. Internal correspondence of the BC Ministry of Transportation and Highways, dated December 16, 1986, stated:

> [The] Lower Similkameen Indian Band confirmed they have made an agreement with Burlington Northern for the right of way through the Similkameen I.R. #2 and through Skemeoskuankin I.R. #7.
>
> All portions of the old railway right of way, through these reserves, are to be transferred back to the Band.[288]

Further details of this agreement are unknown.

At this time, the BC Ministry of Transportation was interested in obtaining the right of way and establishing it as a "public highway." However, the Band "would not consider" the proposal.[289] Nothing in the historical record of this inquiry indicates that either of these proposals was ever carried out.

In the mid-1990s a developer had apparently expressed an interest in obtaining the remaining Lower Similkameen right of way lands. Nothing further is known of this proposal, although it was apparently the impetus for filing the Specific Claim respecting those lands.[290] At the time of the submission of its Specific Claim to the Department of Indian Affairs in 1995, the Lower Similkameen Indian Band had an option to purchase the land from the railway company for US$233,680. The option expired on December 25, 1995.[291]

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[288] G.A. Ward, Regional Property Agent, Kamloops Region, to D.I.F. MacSween, Manager of Operations, Property Services, Ministry of Transportation and Highways, December 16, 1986, no file reference available (ICC Exhibit 1a, p. 467).

[289] G.A. Ward, Regional Property Agent, Kamloops Region, to D.I.F. MacSween, Manager of Operations, Property Services, Ministry of Transportation and Highways, December 16, 1986, no file reference available (ICC Exhibit 1a, p. 467).

[290] ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 58, Henry Allison; pp. 58–59, Barbara Allison).

[291] "Lower Similkameen Burlington Railway Specific Claim," November 20, 1995 (ICC Exhibit 2a, p. 4).

APPENDIX B

Lower Similkameen Indian Band:Vancouver, Victoria and Eastern Railway Right of Way Inquiry

1 Planning conference — Vancouver, September 26, 2003

2 Community session — Keremeos, April 19–20, 2004

The Commission heard from Carol Allison, Nancy Allison, Mike Allison, Carrie Allison, Margaret Kruger, Hazel Squakin, Bernie Allison, Ramona Allison-Heinrich, Antoine Qualtier, Lillian Allison, Casey Sanders, Henry Allison, Barbara Allison, Leonard Louis, Les Louis, Leon Louis, Lauren Terbasket, John Terbasket, Jeanine Terbasket, A.J. Terbasket, Raymond Terbasket, Lyle Terbasket, Mary Louie, Edward Louie, Kenneth Richter, Violet Barker, Richard Dixon Terbasket, Theresa Terbasket, Moses Louie, Robert Dennis, Teresa Dennis, Gloria Bent, Ralph Bent, Henry Dennis, Herman Edwards, Delphine Terbasket, Robert Edward.

3 Written legal submissions

- Submission on Behalf of the Lower Similkameen Indian Band, October 26, 2004
- Submission on Behalf of the Government of Canada, December 17, 2004
- Reply Submission on Behalf of the Lower Similkameen Indian Band, December 30, 2004

4 Oral legal submissions — Penticton, January 26, 2005

5 Content of formal record

The formal record of the Lower Similkameen Indian Band: Vancouver, Victoria and Eastern Railway Right of Way Inquiry consists of the following materials:

- Exhibits 1a–9a tendered during the inquiry
- transcripts of community session (1 volume) (Exhibit 5a)
- transcript of oral session (1 volume)

The report of the Commission and letter of transmittal to the parties will complete the formal record of this inquiry.