FILE NO.: SCT-5003-11
CITATION: 2019 SCTC 5
DATE: 20191213

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
MAKWA SAHGAIEHCAN FIRST NATION Claimant	Steven W. Carey and Amy Barrington, for the Claimant
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Crown-Indigenous Relations Respondent	Lauri Miller and David Culleton, for the Respondent
	HEARD: December 4–6, 2018

REASONS FOR DECISION

Honourable Harry Slade, Chairperson

NOTE: This document is subject to editorial revision before its reproduction in final form.

Cases Cited:

Guerin v R, [1984] 2 SCR 335, 1984 CarswellNat 813; *Cardinal v R*, [1982] 1 SCR 508, 1982 CarswellNat 139*; Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, 1995 CarswellNat 1278; *Semiahmoo Indian Band v Canada* (1997), [1998] 1 FC 3, 1997 CarswellNat 1316; *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746; *Canadian Pacific Ltd. v Matsqui Indian Band*, [2000] 1 FC 325, 1999 CarswellNat 1267; *Reference re: Railway Act (Canada)*, [1926] SCR 239 (QL); C*anada (AG) v Canadian Pacific Railway Co (Re Railway Act 1952 (Canada))*, [1958] SCR 285 (QL); *Canadian Pacific Ltd. v Paul*, [1988] 2 SCR 654 ; *Squamish Indian Band v Canadian Pacific Ltd*, *2*000 BCSC 933, [2000] 4 CNLR 39 (QL); *Squamish Indian Band v Canadian Pacific Ltd*, 2002 BCCA 478, 217 DLR (4th) 83 (QL); *Siska Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 2; *St. Mary's Indian Band v Cranbrook (City),* [1997] 2 SCR 657 (QL); *R v Sparrow*, [1990] 3 CNLR 160 (QL); *Nowegijick v The Queen*, [1983] 1 SCR 29,1983 CarswellNat123; *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 (QL).

Statutes and Regulations Cited:

*Specific Claims Tribunal Ac*t, SC 2008, c 22, s 14.

Indian Act, RSC 1952, c 149, s 35.

Indian Act, RSC 1927, c 98, ss 34, 35, 39, 50, 51, 48, 64, 2.

Water Act, RSBC 1948, c 361, s 21.

Canadian National Railways Act, RS 1927, c 172, s 17.

Railway Act, RS 1927, c 170, ss 189, 5, 192, 190, 191.

An Act to Amend the Canadian National Railways Act, SC 1929, c 10, s 17.

Expropriation Act, RS 1927, c 64, s 9, 11, 3, 2, 4-15, 23, 34.

The Municipal Expropriation Act, RSS 1953, c 151, ss 3, 2.

The Community Planning Act, SS 1957, c 48, ss 2, 22, 30.

Authors Cited:

Black's Law Dictionary, 10th ed, *sub verbo* "fee simple absolute".

Sullivan and Driedger on the Construction of Statutes, 4th ed (Markham, ON: Butterworths Canada, 2002).

Black's Law Dictionary, 10th ed, *sub verbo* "fair market value".

Appraisal Institute of Canada, *Canadian Uniform Standards of Professional Appraisal Practice*, (Ottawa: 2018).

Headnote:

This Claim arises out of a series of surrenders and expropriation, between 1932 and 1958, of parcels of land reserved for the Makwa Sahgaiehcan First Nation (Makwa, Claimant Band or Makwa Band), Indian Reserve No. 129B (IR 129B or Reserve).

Makwa Indian Reserve No. 129B, comprising 9,243.7 acres, was confirmed by Order in Council PC 1776 on August 5, 1930.

Settlers had squatted (taken up occupation of the land without colour of right), which had been marked off to be set apart as reserve, at or close in time to the date it was confirmed as a reserve. The number of squatters continued to rise to the point at which the occupied land had the trappings of a village.

1932 Townsite Surrender:

As early as September 1931, settlers had entered the Reserve, taken up regular occupation, and built permanent structures within the boundaries of the Reserve. As they had no legal authority to occupy the land, officials of the Department of Indian Affairs (DIA) characterized them as "squatters". The DIA made no effort to remove the squatters despite the provisions of the *Indian Act*, RSC 1927, c 98 [*Indian Act*, 1927] that empowered them to do so.

On February 9, 1932, an Indian Agent, on instructions from his superior, took a surrender vote from the members of the Makwa Band for the sale of 28.29 acres of land in IR 129B for establishment of a townsite. After the surrender was completed, the DIA took control of the land and sold the subdivided lots to the squatters and newcomers.

The Specific Claims Tribunal (Tribunal) found that the Crown's acceptance of the surrender by Order in Council was exploitative in that it was given in circumstances in which the choices available to the Band were to refuse to surrender and live with a *de facto* taking of their land or receive money, amount unknown. The DIA had pressed the Band to vote for surrender and had misrepresented the powers of the Canadian National Railway (CNR), which had applied to the DIA for land for a railway right of way, station house, and a townsite. This tainted the dealings in a manner that made it unsafe to rely on the vote conducted at the meeting held February 9, 1932, as an indication of the Band's understanding and intention. The Tribunal found that the actions of Crown officials breached Crown fiduciary duties of loyalty, consultation and adequate consideration of the interest of the Band in preserving its land base. The DIA gave no consideration to removal of the squatters. The interests of the squatters were given priority over the interest of the Band in the preservation of its land base. The DIA had informed Councillor Peepeekoot that the CNR had applied for land in the Reserve for railway and townsite purposes, and its power to expropriate, without explaining that the CNR could not expropriate for townsite purposes. The surrender was arranged in haste. There was an element of self-interest for the DIA in taking the surrender, as it would resolve the trespass that the DIA had permitted to continue.

It was in the administration of the Reserve that the Crown was found in breach of fiduciary duties.

The Claim arising from the 1932 surrender was found valid under the paragraph 14(1)(c), *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], ground:

> **(c)** a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;…

Railway Taking, 1933:

In a purported exercise of authority under section 48 of the *Indian Act*, 1927, Order in Council PC 1913–916 dated May 10, 1933, transferred lands to the CNR for purposes of a railway and station grounds.

The *Railway Act*:

The *Canadian National Railways Act*, RS 1927, c 172 [*CNR Act*, 1927], as amended in 1929, incorporated section 189 of the *Railway Act*, RS 1927, c 170 [*Railway Act*, 1927].

Under section 189 of the *Railway Act*, 1927, the CNR may not alienate any lands taken for the purposes of the railway.

The *CNR Act*, 1927, exempted the CNR from the "taking and using" provisions of the *Railway Act*. The 1929 amendments to the *CNR Act* removed the exception of the *Railway Act* provisions for the taking and using of land, but maintained the provisions of the *Railway Act* to the extent of inconsistency with the *CNR Act*.

Only the *Railway Act* provides for the taking of federal Crown land. There is no inconsistency between the *Railway Act*, and the *Expropriation Act*, RS 1927, c 64, [*Expropriation Act*, 1927], in relation to the acquisition of land vested in the federal Crown. Moreover, only the *Railway Act* provides for the taking of reserve land.

As in *Canadian Pacific Ltd. v Matsqui Indian Band*, [2000] 1 FC 325, 1999 CarswellNat 1267, subsection 189(3) of the *Railway Act*, 1927, applies to limit the interest acquired, with the consent of the Governor in Council under section 192, in reserve land.

Makwa's *Sui Generis* Interest in the Reserve:

The *sui generis* interest of a band in reserve land brings into play Crown fiduciary duties. The factual circumstances of the CNR's acquisition of an interest in the Reserve establish an alternative ground for the Claim that is independent from the application of the *Railway Act*.

The interest of the CNR was not in fact established by the exercise of the CNR's power to expropriate land (subsection 17(2)(c), *CNR Act*, 1929). The acquisition of the CNR's interest

was the result of the May 10, 1933 Order in Council, which provided for the "transfer" to the CNR of an interest in land in the Reserve.

The Crown, when consenting to a taking of an interest in reserve land, is bound by a duty of minimal impairment (Osoyoos *Indian Band v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746 [Osoyoos]). It is presumed that the Crown intended the taking to be of the minimum interest needed to serve the particular public purpose.

The "taking" did not occur upon the deposit of the plan by the CNR. An order in council under section 48 of the *Indian Act*, 1927, was required. The words "taken" in section 48 of the *Indian Act*, 1927, and "take" and "right of way" in Order in Council PC 1913–916 dated May 10, 1933, are ambiguous and can mean that lands are only taken for a limited estate (*Osoyoos* at para 86; *Squamish Indian Band v Canadian Pacific Ltd*, 2000 BCSC 933, [2000] 4 CNLR 39 [*Squamish, BCSC*] (QL)).

Indigenous interests are *sui generis*. Traditional real property rules are not applicable to the interpretation of statutory instruments affecting indigenous interests in land (*St. Mary's Indian Band v Cranbrook (City)*, [1997] 2 SCR 657 (QL)). A non-technical approach to interpretation of the Order in Council and section 48 of the *Indian Act*, 1927, may be most appropriate (*Osoyoos* at para 70).

A railway company does not necessarily need a fee simple interest to build a railway (*Canadian Pacific Ltd. v Paul*, [1988] 2 SCR 654, cited in *Osoyoos*).

The Crown had a fiduciary obligation to minimally impair the Indian interest in the Reserve. The duty to minimally impair the Indian interest is consistent with the *sui generis* nature of the Indian interest in reserve land (*Osoyoos*).

The Indigenous interest in land cannot be extinguished without a clear and plain intention to do so (*R v Sparrow*, [1990] 3 CNLR 160 (QL)). Upon analysis of the operative terms of the *Indian Act*, 1927, section 48, and Order in Council PC 1913–916, May 10, 1933, the transfer does not evince the clear and plain intention of the Crown to extinguish the Indian interest in the reserve land. Where terms used in statutory instruments that enact takings of reserve lands are ambiguous, the interpretation that impairs the Indian interests as little as possible is to be

preferred (*Osoyoos* at para 68, applying *Nowegijick v The Queen*, [1983] 1 SCR 29, 1983 CarswellNat123, and *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 (QL)).

The Indian interest survives a grant, ostensibly of fee simple, where the public purpose does not necessitate its extinguishment.

The absence on May 10, 1933, of a timely public purpose for the interest acquired by the CNR put the Crown in breach of fiduciary duty (*Semiahmoo Indian Band v Canada* (1997), [1998] 1 FC 3, 1997 CarswellNat 1316).

The taking was of a limited interest in the nature of an easement. The *sui generis* Indian interest survived the taking.

The Tribunal found that the Claimant has established grounds for the Claim as it relates to the railway right of way and station grounds under paragraphs 14(1)(c) and (d), *SCTA*:

> **(c)** a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;
>
> **(d)** an illegal lease or disposition by the Crown of reserve lands;…

1939 Townsite Surrender & Expansion:

On August 17, 1939, a surrender of 17.08 acres of IR 129B was taken for an expansion to the townsite.

At least 14 squatters had occupied lots on the Reserve prior to the surrender. Some had constructed dwellings. Despite the abandonment of the plan to extend the railway, there was demand for additional land for the village.

Although the taking of the surrender had the incidental effect of serving the interests of the DIA, the transaction was not improvident or exploitative.

Sales at Undervalue:

The DIA was advised by a land surveyor of the market value of the lots within the subdivision plan for the surrendered land. The DIA rejected the surveyor's valuations and

offered the lots for sale, in some cases to persons who had occupied them in trespass, for less than the well supported prices proposed by the surveyor.

The Crown, post-surrender, breached its fiduciary duty to exercise the prudence of an informed person acting in its own interest by offering the lots for sale at less than market value as determined by the surveyor. The paragraph 14(1)(c) ground of the *SCTA* is established. The Claim is valid pursuant to paragraph 14(1)(c), *SCTA*:

> **(c)** a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;…

1958 Townsite Expansion:

Over a period of seven years, from 1950 to 1958, the Village of Loon Lake sought to acquire additional lands from the Reserve for future townsite expansion. During this period, negotiations occurred between members of the Village Council, the DIA and provincial officials. The DIA consulted with the Band throughout.

On June 5, 1957, 19 of 23 Band members present at a surrender meeting voted in favour of a proposal to exchange 100 acres of reserve land for 480 acres of hay land adjoining the boundary of the Reserve. Only the male Band members voted; the women had been prevented from voting by the men. Although the vote was not taken in compliance with the surrender provisions of the *Indian Act*, it is a strong indication of the desire of the membership to provide reserve land for the Village in exchange for farm land, as reserve, on a 1 to 4.8 acre basis. The transaction was neither exploitative nor improvident. In 1958, pursuant to section 35 of the *Indian Act*, RSC 1952, c 149, the Crown authorized a transfer of the lands in question to the Province of Saskatchewan, for the Village. The expropriation was based on the power of a municipal council under *The Municipal Expropriation Act*, RSS 1953, c 151, and *The Community Planning Act*, SS 1957, c 48, to expropriate land.

The Tribunal found that the Crown did not, in circumstances in which the obstruction by male members of female members exercising their right to vote made compliance with the surrender provisions of the *Indian Act* impossible, breach its fiduciary duty by facilitating this outcome.

There was no breach of fiduciary duty or statute in the "taking" under section 35 of the *Indian Act*, 1952. The Claimant has not established a valid Claim arising from the 1958 "taking" for expansion of the Village of Loon Lake.

1957 Disposition of Six Acres for Meadow Lake School:

At the same time that the Village requested land for expansion of the townsite it asked for additional land for a school-site. The land was taken pursuant to section 35 of the *Indian Act*, 1952. The provincial expropriation power was found in section 53 of *The Saskatchewan School Act.* Although the consent of the Band was not required for the section 35 taking, in 1957, the Council of the Band passed a Resolution agreeing to give the School Unit Board six acres of reserve land for a proposed new school.

Order in Council PC 1958–614 dated May 1, 1958, consented to the taking pursuant to section 35 of the *Indian Act*, 1952. The transaction was completed accordingly. Here, again, there was no statutory breach or breach of fiduciary duty.

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I. CONTEXT: TREATIES, THE RESERVES, AND SETTLERS

[1] Treaty making was the means by which the requirements of the *Royal Proclamation* of 1763 would be met. Treaty 6 was the means by which Canada made the territories of the Indigenous peoples of what became the Province of Saskatchewan available for settlement by others.

[2] A large portion of what became the Province of Saskatchewan was ceded by Indigenous groups, including the Makwa Sahgaiehcan First Nation (Makwa, Claimant, Band or Makwa Band), which adhered to Treaty 6. Treaty terms included provision for the setting apart of land as reserve for the ongoing use and benefit of the Indigenous treaty parties, which came to be known as "bands", presently known as "First Nations". From 1876 onward, reserve lands have been administered by Crown officials in the Department of Indian Affairs (DIA or Department) under the *Indian Act*.

[3] Makwa Lake Indian Reserve No. 129B (Reserve or IR 129B), comprising 9,243.7 acres, was confirmed by Order in Council PC 1776 on August 5, 1930. Makwa Lake Indian Reserves Nos. 129 and 129A, previously established in 1919, contained, respectively, 4,491 and 638 acres.

[4] Towns developed along the lines of rail with the westward extension of the Canadian National Railway (CNR).

[5] The Reserve lay along the route chosen by the CNR for a branch line from St. Walburg, Saskatchewan, to Bonnyville, Alberta. Settlers arrived and occupied tracts of land in the Reserve.

II. INTRODUCTION

[6] This Claim arises out of a series of surrenders and expropriation of parcels of land reserved for the Makwa Band, IR 129B, between 1932 and 1958.

[7] Settler occupation of the Reserve commenced in or around 1930, the year in which the Reserve was established. A village was emerging in anticipation of construction of a CNR branch line that would pass through the Reserve. The first surrender, made in 1932, enabled settlers who had squatted on the land to obtain grants of title. Although the railway never materialized, the village continued to grow. Further surrenders and expropriations for railway

and townsite purposes took place up to 1958.

[8] The Claimant alleges non-compliance with the provisions of the *Indian Act* and breaches of fiduciary duties of the Crown in connection with the surrenders and expropriations.

III. PROCEDURAL HISTORY OF THE CLAIM

A. Specific Claims Branch

[9] Makwa filed the *1932 Townsite Surrender* and *1933 Railway Expropriation Claim* with the Minister of Indian Affairs in October 1999; the claim was re-submitted in November 2008. The claim was rejected by the Specific Claims Branch (SCB) in December 2010.

[10] Makwa filed the *1939 Townsite Expansion Surrender Claim* with the Minister of Indian Affairs in January 2000. The SCB rejected the claim in July 2009.

[11] Makwa filed the *1958 Townsite Expansion Exchange Claim* with the Minister of Indian Affairs in July 2000. The claim was rejected for negotiations by the SCB in October 2009.

[12] Makwa filed the *Townsite Land Sales Claim* with the Minister of Indian Affairs in September 2000. The claim was rejected for negotiations by the SCB in December 2010.

B. Specific Claims Tribunal

[13] On December 8, 2011, Makwa filed a Declaration of Claim with the Specific Claims Tribunal (Tribunal) which combined the *1932 Townsite Surrender and 1933 Railway Expropriation Claim*, the *1939 Townsite Expansion Surrender Claim*, the *1958 Townsite Expansion Claim*, and the *Townsite Land Sales Claim.*

[14] On January 12, 2017, Makwa filed an Amended Declaration of Claim with the Tribunal.

[15] On September 11, 2018, Makwa filed a further Amended Declaration of Claim with the Tribunal. This document included the *1957 Meadow Lake School Unit Expropriation Claim.*

[16] Each of the above named Claims could be advanced as a stand-alone Claim, as each is based on a surrender or taking of an interest in a distinct parcel of land from IR129B. The factual grounds for each are distinct, with little or no overlap of evidence. The *1932 Townsite Surrender*

and *1933 Railway Expropriation Claim*, raises two related transactions, a "surrender" of one parcel of land and a "taking" of another under the authority of separate provisions of the *Indian Act*, 1927. To some extent the same evidence is relevant to both, although each could stand on its own based on the facts as found.

[17] Makwa seeks specific relief in relation to each Claim under, variously, paragraphs 14(1)(b), (c), (d) and (e) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*]:

> **14 (1)** Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:
>
> …
>
> **(b)** a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation – pertaining to Indians or lands reserved for Indians–of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;
>
> **(c)** a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;
>
> **(d)** an illegal lease or disposition by the Crown of reserve lands;
>
> **(e)** a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority;…

[18] The Respondent, Her Majesty the Queen in Right of Canada, filed a Response with the Tribunal on February 15, 2012, an Amended Response on February 13, 2017, and a further Amended Response on October 10, 2018.

[19] The hearing of this Claim was divided into two separate stages, validity and compensation, pursuant to a Bifurcation Order issued on November 28, 2018.

[20] The Parties did not file with the Tribunal expert reports or call experts to testify. Oral submissions on the validity of the Claim were heard in Saskatoon, Saskatchewan, on December 4–6, 2018. Supplemental written submissions were filed by the Claimant on February 19, 2019, and by the Respondent on March 27, 2019. Supplemental reply submissions were filed by the Claimant on April 15, 2019.

[21] These Reasons for Decision address the validity of the Claim.

IV. OVERVIEW

[22] In July 1929, Order in Council PC 1184 had authorized construction of a CNR branch line from St. Walburg, Saskatchewan, to Bonnyville, Alberta. The filed plan showed the railway passing through land that had been identified to be set apart as IR 129B (Exhibit 1).

[23] Makwa IR 129B, which comprised 9,243.7 acres, was established on August 5, 1930.

[24] By September 1931, settlers entered the Reserve, took up regular occupation, and built permanent structures adjacent to the anticipated line of rail. As they had no legal authority to occupy the land, the authorities characterized them as "squatters".

[25] By letter dated October 28, 1931, the CNR asked the DIA to provide land in the Reserve for the railway and a station house, and an additional 25 acres for a townsite to adjoin the railway right of way, "in order to take care of the Settlers in the Loon Lake District" (Common Book of Documents (CBD), Vol 1, MAK-000014). This request conformed with the practice of the CNR facilitating the establishment of towns along its railway lines.

[26] The CNR had the power to expropriate land for railway purposes. The *Indian Act* required the consent of the Governor in Council to the exercise of this power in relation to reserve lands. In practice, such consent would be given on the recommendation of the Department of Indian Affairs. The Governor in Council determines whether a valid public purpose exists.

[27] As the CNR lacked the power to expropriate land for purposes other than railways, reserve land could be used for settlement only if the members of the band voted to surrender the land under provisions of the *Indian Act*. It was in the discretion of the DIA whether to initiate the process for surrender. The same was the case for the process by which land in the reserve could be taken (expropriated) for railway purposes.

[28] On February 9, 1932, Acting Indian Agent J. T. Hill took a surrender vote for 28.29 acres of land in the Reserve for establishment of a townsite. Hill noted in his February 15, 1932, report that the surrender had been passed unanimously at a meeting of all Band members. The DIA also

initiated the process by which the CNR would be able to expropriate 46.67 acres of reserve land for railway purposes.

[29] The CNR informed the Department in April 1932, that the townsite proposition had been dropped for the present. However, the CNR continued with the survey and subdivision of the townsite and arrangements with the Province of Saskatchewan for access roads.

[30] The DIA knew by March 31, 1932, that the construction of the railway may not proceed. It nevertheless initiated the process for the taking by the CNR of land in the Reserve for purposes of a railway and station house. Order in Council PC 1913–916 dated May 10, 1933, ordered the transfer of 46.67 acres to the CNR for a right of way and station grounds. Construction of the railway had not been resumed.

[31] On October 10, 1933, Indian Agent Hill reported to his superiors that the townsite "is practically covered with buildings (business and residential). The population of this new town is 146, and the buildings have a conservative assessed value of $69,402.00" (CBD, Vol 1, MAK-000050). Although the Band had voted in favour of a surrender, the statutory requirement of Governor in Council acceptance of the surrender had not yet been obtained.

[32] The CNR advised the DIA on December 21, 1933, that it had abandoned construction of the proposed railway branch line and would not proceed with the townsite. Subsequently, the CNR advised the DIA that it had not given authority to "squatters" to occupy the lots. On June 25, 1934, the CNR furnished townsite plans to the DIA and relinquished its interest in the townsite in favour of the DIA.

[33] The situation facing Makwa and the DIA as 1933 came to a close was this:

1. The CNR had been granted land for railway purposes, but no longer intended to use the land for those purposes;

2. The CNR had abandoned its plan to develop a townsite;

3. The surrender made in February 1932 had not yet been confirmed by order of the Governor in Council; and,

4. The squatters had *de facto* occupation of the proposed townsite and had established a village.

[34] The DIA took this action to resolve the situation: On July 18, 1934, on the recommendation of the DIA, the Governor in Council confirmed the 1932 surrender of 28.29 acres for townsite purposes (Order in Council PC 1542). The DIA took control of the land and sold the subdivided lots to settlers. However, this did not fully resolve the matter of settler occupation of unsurrendered reserve land. Messrs. Grandy and Craig, and the Royal Canadian Legion occupied and constructed improvements on reserve land outside of the surrendered area without any form of permanent tenure. They paid "rent" to the Indian Agent on an informal basis; the money was generally paid to the First Nation for extra food supplies.

[35] In 1935, the Band surrendered land for a church.

[36] In 1938, there was a surrender of 2.17 acres for a hospital.

[37] The DIA's solution to the trespasses and the desire of the Village for additional land was, once again, by way of surrender. On August 17, 1939, a surrender of an additional 17.08 acres for sale was taken for purposes of an expansion to the townsite, which included the lands occupied by Grandy, Craig, and the Royal Canadian Legion. They and other settlers bought up the newly subdivided lots.

[38] In 1949, the need for land for townsite expansion was raised. The local Member of Parliament suggested an exchange of reserve land for nearby provincial land. In a letter dated December 19, 1952, the DIA indicated that the Village of Loon Lake had several meetings with the "Indians" about purchasing some land and asserted that any deal with the Band Council would have to be ratified by a vote of the members of the Band.

[39] Negotiations ensued between the Band and the Village to establish a price per acre. By resolution of Band Council in 1954, a sale of 67.65 acres at $50.00 per acre was agreed upon. The DIA held a surrender vote, but the result, although all who voted were in favour, was not accepted by the DIA as it was not assented to by a majority of eligible Band members. The men of the Band had prevented the women from voting.

[40] A second surrender meeting was held on July 6, 1955. Only eight male Band members were present; none of them voted for the sale of the land.

[41] Further negotiations took place. These broke down as the Village lacked the money to pay $75.00 per acre that the Band then wanted for a sale of 190 acres. The discussion turned to the possibility of a land exchange: 100 acres for the Village and 480 acres of provincial Crown land to be added to the Reserve.

[42] On June 5, 1957, the Indian Agent met with members of the Band. A vote was taken, males only, 19 voted in favour of a land exchange, four supported the idea but wanted different land than that offered.

[43] Obtaining an *Indian Act* surrender was not possible as the men prevented the women from voting; a majority vote could not be obtained.

[44] The DIA took recourse to section 35 of the *Indian Act*, RSC 1952, c 149 [*Indian Act*, 1952], which provided for the exercise of a body having powers of expropriation in relation to reserve land by consent of the Governor in Council.

[45] On June 26, 1958, Order in Council PC 1958–886 consented to the Province of Saskatchewan taking the surface rights to 100 acres of IR l29B pursuant to section 35 of the *Indian Act*, 1952, in exchange for the transfer of 480 acres of land from the Province.

[46] On September 25, 1958, the lands transferred from the Province of Saskatchewan were formally set aside as Makwa Lake Indian Reserve No. 129C.

[47] In 1957, with the concurrence of the male members of the Band, the DIA facilitated the taking of 6 acres of reserve land for a school.

V. POSITION OF PARTIES

A. Claimant

[48] The Claimant argues that the Department of Indian Affairs pursued the 1932 and 1939 surrenders for an improper motive, namely to make lawful the occupation in trespass of land within IR 129B by squatters, and thus avoid responsibility for not taking measures to evict them.

It is contended that the Band was pressed into voting to surrender the land by misrepresentation, withholding of information, preference of settler interests over the best interests of the Band and the self-interest of the DIA. In the result, the Claimant argues that the surrenders are tainted, and should not be recognized as expressions of the will of the Band. The Claimant also says that the transactions, both by way of surrender and expropriation, were improvident and exploitative.

[49] The Claimant argues that the original failure of Crown officials to protect reserve lands from trespass set in motion a chain of events that resulted in the loss of land in the Reserve by a series of surrenders and takings by expropriation spanning three decades, 1932 to 1958. Numerous breaches of statute and fiduciary duty are asserted.

B. Respondent

[50] The Respondent takes the position that its pre-surrender fiduciary duty was limited to preventing exploitative bargains. There was no post-surrender breach as the land was developed as intended.

[51] The Respondent argues that there is neither direct evidence of improper motive, conflict of interest, undue pressure nor sufficient evidence to support an inference of wrongdoing by the Crown due to the actions of the DIA. The Respondent says that the evidence establishes full compliance with the requirements of the *Indian Act*, 1927, and its later iterations.

[52] The Respondent argues that the Crown, by its officials in the DIA, acted in the best interests of the Band throughout, and the transactions were neither exploitative nor improvident. There was thus no breach of its statutory and fiduciary duties to the Band.

VI. *INDIAN ACT* AND FIDUCIARY LAW

[53] The Claimant relies on evidence that it argues reveals the failure of the Crown, by acts and omissions of the DIA, to comply with the requirements of the *Indian Act* that apply to trespass, surrenders, and expropriation. The Claimant also relies on decisions of the Supreme Court of Canada and Federal Court of Appeal that speak to the statutory regime and fiduciary duties of the Crown with respect to reserve lands. These, largely as set out in the Claimant's Memorandum of Fact and Law, are found out below and discussed further in the analysis of the evidence and application of the law.

[54] The Respondent argues that it complied with the requirements of the *Indian Act* and other applicable statutes, and with its fiduciary obligations. The Respondent provides an analysis of the relevant statutory provisions and case law.

A. Trespass on Reserve

[55] The Claimant submits that the DIA had the power and duty to eject the squatters that occupied land within the Reserve prior to the 1932 and 1939 surrenders.

[56] Section 34 of the *Indian Act*, 1927, prohibits trespass on reserve:

> **34.** No person, or Indian other than an Indian of the band, shall without the authority of the Superintendent General, reside or hunt upon, occupy or use any land or marsh, or reside upon or occupy any road, or allowance for road, running through any reserve belonging to or occupied by such band.

[57] Section 35 of the *Indian Act*, 1927, called on the DIA to remove trespassers:

> **35.** If any Indian is illegally in possession of any land on a reserve, or if any person, or Indian other than an Indian of the band, without the license of the Superintendent General,
>
> (*a*) settles, resides or hunts upon, occupies, uses, or causes or permits any cattle or other animals owned by him, or in his charge, to trespass on any such land or marsh;
>
> …
>
> (*c*) settles, resides upon or occupies any road, or allowance for road, on such reserve;
>
> the Superintendent General or such other officer or person as he thereunto deputes and authorizes, *shall*, on complaint made to him, and on proof of the fact to his satisfaction, issue his warrant, signed and sealed, directed to any literate person willing to act in the premises, commanding him forthwith as the case may be,
>
> (*a*) to remove from the said land, marsh or road, or allowance for road, every such person or Indian and his family, so settled, or who is residing or hunting upon, or occupying, or is illegally in possession of the same;… [emphasis added]

[58] Section 39 of *Indian Act*, 1927, provided for the recovery of possession of reserves:

> **39.** If the possession of any lands reserved or claimed to be reserved for the Indians, or of any lands of which the Indians or any Indian or any band or tribe of Indians claim the possession or any right of possession, is withheld, or if any such lands are adversely occupied or claimed by any person, or if any trespass is committed thereon, the possession may be recovered for the Indians or Indian or band or tribe of Indians…

B. Surrender under Sections 50–51 of the *Indian Act*, 1927

[59] Two of the five takings of IR 129B at issue in this Claim were by surrenders, specifically, the *1932 Townsite Surrender* and the *1939 Townsite Expansion Surrender*.

[60] Sections 50 and 51 of the *Indian Act*, 1927, and later iterations of the *Act*, prohibited the direct sale of reserve land to third parties and set out the requirements for a surrender of reserve lands. Sections 50 and 51 provide:

> **50.** Except as in this Part otherwise provided, no reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Part…
>
> **51.** Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of any officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.
>
> 2. No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.
>
> 3. The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before any person having authority to take affidavits and having jurisdiction within the place where the oath is administered.
>
> 4. When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.

C. Surrender and Fiduciary Duties

[61] Dickson J. for the majority in *Guerin v R*, [1984] 2 SCR 335, 1984 CarswellNat 813 [*Guerin*], found that the surrender provisions are a source of the Crown's fiduciary obligation to a band:

> An Indian band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763. It is still recognized in the surrender provisions of the *Indian Act*. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians. [para 81]

[62] Compliance with the procedural requirements of the *Indian Act* is relevant to a

determination whether the consent of a band to the surrender of its reserve land is properly obtained. These comprise the background against the *manner* in which the assent of the band members is to be ascertained. Estey J. for the Supreme Court of Canada in *Cardinal v R*, [1982] 1 SCR 508, 1982 CarswellNat 139 [*Cardinal*] stated:

> It has also been argued that the interpretation which is now being considered is one which exposes the membership of the band to a risk of loss of property and other rights, contrary to the general pattern and spirit of the Indian Act. It is perhaps well to observe in this connection that there are precautions built into the procedures of Pt. I of the Act, dealing with surrender. Firstly, the meeting must be called to consider the question of surrender explicitly. It may not be attended to at a regular meeting or one in respect of which express notice has not been given to the band. Secondly, the meeting must be called in accordance with the rules of the band. Thirdly, the chief or principal men must certify on oath the vote, and that the meeting was properly constituted. Fourthly, only residents of the reserve can vote, by reason of the exclusionary provisions of subs. (2) of s. 49. Fifthly, the meeting must be held in the presence of an officer of the Crown. And sixthly, even if the vote is in the affirmative, the surrender may be accepted or refused by the Governor in Council. *It is against this background of precautionary measures that one must examine the manner in which the assent of eligible members of the band is to be ascertained under s. 49*. [emphasis added; para 19]

[63] It is incumbent on the Crown in implementing the conditions of a surrender to fulfil its fiduciary obligations. Dickson J. (as he then was), in *Guerin*, characterized the fiduciary duty to the band as one of utmost loyalty:

> …the Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. …*Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal*. [emphasis added; para 107]

[64] The issue in *Guerin* was whether there was a post-surrender breach of a Crown duty.

[65] In *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, 1995 CarswellNat 1278 [*Apsassin*], the Supreme Court of Canada considered questions over both pre- and post-surrender Crown duties. The plaintiff band argued that the paternalistic scheme of the *Indian Act* imposes a duty on the Crown to protect Indians from making foolish decisions with respect to the alienation of their land. The Crown argued that bands should be treated as independent agents in regard to the disposition of their

lands. McLachlin J. (as she then was) said:

> My view is that the *Indian Act*'s provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection. The band's consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. The purpose of the requirement of Crown consent was not to substitute the Crown's decision for that of the band, but to prevent exploitation. As Dickson J. characterized it in *Guerin* (at p. 383):
>
> > The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.
>
> It follows that under the *Indian Act*, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident — a decision that constituted exploitation — the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains. [para 35]

[66] On the more general question of the existence of fiduciary duties, McLachlin J. said:

> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 S.C.R. 99 [1988] 1 C.N.L.R. 152 (abridged version)]; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power *trusts* the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation. [emphasis in original; *Apsassin* at para 38]

[67] The majority decision in *Apsassin* provides further guidance with respect to how the particular facts and circumstances of a case can figure into the analysis of the Crown's pre-surrender fiduciary duties. As stated by Gonthier J.:

> I should also add that I would be reluctant to give effect to this surrender variation if I thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention. [*Apsassin* at para 14]

[68] In *Apsassin*, McLachlin J. found a post-surrender obligation on the Crown to act in the best interests of the band by taking available means to correct an error. She addressed the applicable standard of conduct:

> The matter comes down to this. *The duty on the Crown as fiduciary was "that of a man of ordinary prudence in managing his own affairs"*: *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302 at p. 315. A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess value, however remote the possibility. The Crown managing its own affairs reserved out its minerals. It should have done the same for the Band. [emphasis added; *Apsassin* at para 104]

[69] In *Semiahmoo Indian Band v Canada* (1997), [1998] 1 FC 3, 1997 CarswellNat 1316, at para 37 [*Semiahmoo*], the Federal Court of Appeal considered the application of fiduciary law in the context of a surrender of reserve land. It found that an assessment of the nature and scope of the Crown's fiduciary duty in relation to a surrender must take account of the specific relationship between the parties when reserve lands are surrendered:

> The authorities on fiduciary duties establish that courts must assess the specific relationship between the parties in order to determine whether or not it gives rise to a fiduciary duty and, if yes, to determine the nature and scope of that duty. This approach applies equally in the context of the fiduciary duty owed to Indian Bands when they surrender reserve land. In my view, while the statutory surrender requirement triggers the Crown's fiduciary obligation, the Court must examine the specific relationship between the Crown and the Indian Band in question in order to define the nature and scope of that obligation. [footnote omitted]

D. Expropriation of Interests in Reserve Lands

[70] Several of the takings at issue in the present matter were by expropriation, namely the 1933 taking of reserve land for right of way and station ground purposes, the 1957 taking for a school, and the 1958 taking of 100 acres for addition to the townsite.

[71] Section 48 of the *Indian Act*, 1927, provides that reserve land can be taken for public purposes by a legal entity with the statutory power to expropriate, but only with the prior consent of the Governor in Council:

> **48.** No portion of any reserve shall be taken for the purpose of any railway, road, public work, or work designed for any public utility without the consent of the Governor in Council, but any company or municipal or local authority having statutory power, either Dominion or provincial, for taking or using lands or any interest in lands without the consent of the owner may, with the consent of the Governor in Council as aforesaid, and subject to the terms and conditions imposed by such consent, exercise such statutory power with respect to any reserve or portion of a reserve.

[72] Section 48 also provides:

> 2. In any such case compensation shall be made therefor to the Indians of the band, and the exercise of such power, and the taking of the lands or interest therein and the determination and payment of the compensation shall, unless otherwise provided by the order in council evidencing the consent of the Governor in Council, be governed by the requirements applicable to the like proceedings by such company, municipal or local authority in ordinary cases.

[73] Section 35 of the *Indian Act*, 1952, conferred similar powers:

> **35.** (1) Where by an Act of the Parliament of Canada or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.
>
> (2) Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) shall be governed by the statute by which the powers are conferred.

[74] Section 35 also provided for a grant in lieu of taking:

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

[75] Interests in reserve land granted pursuant to section 48 of the *Indian Act*, 1927, are similarly limited to those that may be taken under the statute conferring expropriation powers to the applicant. Section 48 only authorizes takings "for the purpose[s] of any railway, road, public work, or work designed for any public utility". Like section 35 of the *Indian Act*, 1952, section 48 of the *Indian Act*, 1927, also refers to the expropriation statute behind the *Indian Act*: "…any company or municipal or local authority having statutory power…may, with the consent of the Governor in Council as aforesaid, and subject to the terms and conditions imposed by such consent, exercise such statutory power…".

E. Fiduciary Duties Relating to Unilateral *Indian Act* Takings

[76] In *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746 [*Osoyoos*], the Supreme Court of Canada concluded that section 35 of the *Indian Act*, 1952, when read as a whole and in context, provided that an interest granted by Order in Council under subsection

35(3) would be constrained by the statute conferring expropriation powers upon it (paras 62–63). The Governor in Council could not do an "end run" around the provincial statute in play in that case (para 62).

[77] In *Osoyoos*, the statute conferring expropriation powers (the *Water Act*, RSBC 1948, c 361 [*Water Act*]) expressly limited the power of expropriation to the "estate or interest in or easement over land" that was "'reasonably required' for the purposes of the canal" at issue in that case (para 61).

[78] Iacobucci J. made these findings on Crown duties related to a taking of reserve land under section 35 of the *Indian Act*, 1952:

> In my view, the fiduciary duty of the Crown is not restricted to instances of surrender. Section 35 clearly permits the Governor in Council to allow the use of reserve land for public purposes. However, once it has been determined that an expropriation of Indian lands is in the public interest, a fiduciary duty arises on the part of the Crown to expropriate or grant only the minimum interest required in order to fulfill that public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian lands by the band. This is consistent with the provisions of s. 35 which gives the Governor in Council the absolute discretion to prescribe the terms to which the expropriation or transfer is to be subject. In this way, instead of having the public interest trump the Indian interests, the approach I advocate attempts to reconcile the two interests involved.
>
> This two-step process minimizes any inconsistency between the Crown's public duty to expropriate lands and its fiduciary duty to Indians whose lands are affected by the expropriation. In the first stage, the Crown acts in the public interest in determining that an expropriation involving Indian lands is required in order to fulfill some public purpose. At this stage, no fiduciary duty exists. However, once the general decision to expropriate has been made, the fiduciary obligations of the Crown arise, requiring the Crown to expropriate an interest that will fulfill the public purpose while preserving the Indian interest in the land to the greatest extent practicable.
>
> The duty to impair minimally Indian interests in reserve land not only serves to balance the public interest and the Indian interest, it is also consistent with the policy behind the rule of general inalienability in the *I*ndian Act which is to prevent the erosion of the native land base: Opetchesaht Indian Band v. Canada, [1997] 2 S.C.R. 119, at para. 52. The contention of the Attorney General that the duty of the Crown to the band is restricted to appropriate compensation cannot be maintained in light of the special features of reserve land discussed above, in particular, the facts that the aboriginal interest in land has a unique cultural component, and that reserve lands cannot be unilaterally added to or replaced. [*Osoyoos* at paras 52–54]

[79] In short, no fiduciary duty is engaged in connection with the exercise by the Governor in

Council of its power to allow the expropriation of reserve land for a specified public purpose, subject to compliance with a duty to ensure minimal impairment.

F. Surrender for a Public Purpose

[80] In *Semiahmoo*, the Federal Court of Appeal noted that when the Crown seeks a surrender of reserve land for a public purpose, it must impair the rights of the band as little as possible. The Court stated at paragraph 48:

> …I find that the Trial Judge did not err in concluding that the Crown breached its fiduciary duty when it consented to the 1951 surrender. The spectre of expropriation clearly had a negative impact on the ability of the Band to protect their own interests in the "negotiations" which ultimately led to the surrender. While the Crown must be given some latitude in its land-use planning when it actively seeks the surrender of Indian land for a public purpose, the Crown must ensure that it impairs the rights of the affected Indian Band as little as possible, which includes ensuring that the surrender is for a *timely* public purpose. In these circumstances, the Crown had a clear duty to protect the Band from an exploitative bargain by refusing to consent to an absolute surrender which involved the taking of reserve land for which there lacked a foreseeable public need. [emphasis in original]

G. Power to Correct Errors

[81] Section 64 of the *Indian Act*, 1927, empowered the DIA to correct errors and cancel sales or leases on discovery of errors, and resume the land:

> **64.** If the Superintendent General is satisfied that any purchaser or lessee of any Indian lands, or any person claiming under or though him, has been guilty of any fraud or imposition, or has violated any of the conditions of the sale or lease, or if any such sale or lease has been made or issued in error or mistake, he may cancel such sale or lease and resume the land therein mentioned, or dispose of it as if no sale or lease thereof had ever been made.

[82] In *Apsassin*, the Supreme Court of Canada was unanimous in finding that the Crown was in breach of its fiduciary obligations when it sold the subsurface rights to a reserve that had been surrendered, when the purpose for which the surrender had been given, namely making agricultural land available for soldiers, could have been achieved without the outright sale of the minerals.

[83] McLachlin J. found the Crown in breach of its fiduciary obligations when the Department failed to rectify the error once it came to their attention, noting that the Crown was under a mandatory duty to use the powers set out in section 64 of the *Indian Act*, 1927, and that the

"ongoing fiduciary duty to act to correct error in the best interests of the Indians may be inferred from the exceptional nature of s. 64" (*Apsassin* at para 115). She continued:

> That section gave the DIA the power to revoke erroneous grants of land, even as against *bona fide* purchasers. It is not unreasonable to infer that the enactors of the legislation intended the DIA to use that power in the best interests of the Indians. If s. 64 above is not enough to establish a fiduciary obligation to correct the error, it would certainly appear to do so, when read in the context of jurisprudence on fiduciary obligations. Where a party is granted, power over another's interests, and where the other party is correspondingly deprived of power over them, or is "vulnerable", then the party possessing the power is under a fiduciary obligation to exercise it in the best interests of the other: *Frame v. Smith*, *supra*, per Wilson J; and *Hodgkinson v. Simms*, *supra*. Section 64 gave to DIA power to correct the error that had wrongly conveyed the Band's minerals to the DVLA. The Band itself had no such power; it was vulnerable. In these circumstances, a fiduciary duty to correct the error lies.
>
> The DIA's duty was the usual duty of a fiduciary to act with reasonable diligence with respect to the Indians' interest. Reasonable diligence required that the DIA move to correct the erroneous transfer when it came into possession of facts suggesting error and the potential value of the minerals that it had erroneously transferred. [paras 115–16]

VII. TOWNSITE SURRENDER, 1932, AND RAILWAY TAKING, 1933

A. Trespass and Crown Knowledge

[84] The Respondent argues that the evidence does not support the contention that the DIA knew that land within IR 129B had been occupied by squatters before it initiated steps to obtain a surrender.

[85] Makwa IR 129B, comprising 9,243.7 acres, was confirmed by Order in Council PC 1776 on August 5, 1930.

[86] The Reserve land came within federal administration under the *Indian Act*, 1927, on August 5, 1930.

[87] Sometime prior to June 27, 1929, the CNR submitted a plan to the Acting Minister of Railways and Canals for the proposed location of a Canadian National Railway branch line between St. Walburg, Saskatchewan, and Bonnyville, Alberta, pursuant to section 21 of the *Canadian National Railways Act*, RS 1927, c 172 [*CNR Act*, 1927]. In July 1929, the proposed CNR branch line was authorized by Order in Council PC 1184. One year passed before the

formal process for creation of the Reserve was concluded by Order in Council PC 1776 dated August 5, 1930.

[88] The on-the-ground oversight of reserves and ongoing contact with band chiefs and councillors was the responsibility of the Indian Agent. The earliest documentary record of the presence of an Indian Agent assigned to Makwa is a letter from a more senior DIA official dated January 7, 1932, advising that the CNR had applied to purchase a right of way and townsite in IR 129B.

[89] The letter to the Indian Agent was prompted by a request made by the CNR on October 28, 1931, to provide 25 acres within IR 129B to establish a townsite to adjoin the railway right of way, "in order to take care of the Settlers in the Loon Lake District" (CBD, Vol 1, MAK-000014). This meant the settlers that had squatted on the Reserve. The Indian Agent would have known that they were not in lawful occupation.

[90] The Reserve was formally established on August 5, 1930. It had been surveyed. The local Indian Agent would surely have known the location of the Reserve boundaries and, if exercising any supervision of the land to be protected, would have known when squatters took up occupation of the Reserve.

[91] The DIA later prepared a list entitled "Squatters on Loon Lake Townsite" (CBD, Vol 1, MAK-00002). It names the squatters and the date on which each commenced occupation of the land. Of these, at least 14 are shown as on the land before January 1932. Some had set up house on the Reserve by September 1931, before the CNR requested the DIA to provide land in the Reserve for a townsite.

[92] At least 14 lots were occupied by squatters on the land by the time the surrender vote was taken on February 9, 1932. This could not have escaped the attention of the Indian Agent.

[93] It is clear on the evidence that the DIA knew of the presence of trespassers not later than upon receipt of the written request from the CNR dated October 28, 1931. It is probable that the DIA knew of their presence before then.

[94] The DIA, as the responsible Crown agency, could have made a complaint to the

Superintendent, who would be required by section 35 of the *Indian Act*, 1927:

> …(*a*) to remove from the said land, marsh or road, or allowance for road, every such person or Indian and his family, so settled, or who is residing or hunting upon, or occupying, or is illegally in possession of the same;…

B. Surrender, 1932, and Railway Taking, 1933

[95] The foregoing and following evidence entwines the 1933 Railway Taking and the 1932 Surrender and must be considered together.

[96] MacInnes, the Acting Secretary of the Department of Indian Affairs, informed the CNR that lands for a townsite and lands for railway right of way were two different matters, and the former would, under the *Indian Act*, require a surrender by the Band for purposes of sale.

[97] The Department advised the Indian Agent on January 7, 1932, that the CNR had applied to purchase a right of way and a townsite in IR 129B. The letter enclosed surrender forms and asked the Indian Agent to "gather the members of the Band together for this purpose" at the earliest date possible (CBD, Vol 1, MAK-000016).

[98] On January 17, 1932, Councillor Peepeekoot wrote to the DIA expressing his concern that the railway was going through the new reserve. He said that "the Treaty Indians" did not want the railroad to go through "our new [l]and" which was going to be used for ranching purposes (CBD, Vol 1, MAK-000017). Whether or not he knew that the CNR application included land for a townsite, he would have known that one was springing up.

[99] Although Councillor Peepeekoot raised his concern with reference to the railway, the land the railway wanted for a townsite was immediately adjacent to the railway land. So, MacInnes, a senior official, knew that the Band intended to use its IR 129B for ranching shortly after it initiated the process for surrender. Nevertheless, the DIA forged ahead with its plan to obtain a surrender.

[100] On February 3, 1932, MacInnes sent a letter to Indian Agent Lang Turner saying, in part:

> It would appear from this letter that he is under the impression that the right of way would never be fenced and would interfere with the utilization of the adjoining reserve for ranching purposes. [CBD, Vol 1, MAK-000019]

[101] MacInnes characterized Peepeekoot's concern as having only to do with fencing along

the line of rail. This is not borne out by the contents of the Councillor's letter.

[102] MacInnes instructed Indian Agent Turner to inform Peepeekoot:

> …that a railway company has the power under the law of the land to take land which is required for railway purposes from private owners, whether they are white men or Indians. The railway must of course pay for the land so taken but the law does not permit private owners to prevent the construction of a railroad which is considered to be of general benefit to the country. He should also be advised that the law provides that when the settlement of the adjoining country demands it, the railroads can be compelled to construct fences along their right of way. If these points were made clear to the Councillor, they might possibly remove some objections which otherwise might hinder in the taking of the surrender which was forwarded to you on the 7th instant. [CBD, Vol 1, MAK-000019]

[103] Turner was told to inform Councillor Peepeekoot "that a railway company has the power under the law of the land to take land which is required for railway purposes from private owners, whether they are white men or Indians" (CBD, Vol 1, MAK-000019). It is assumed that Indian Agent Turner did what he was told.

[104] The Crown practice in relation to takings of reserve land was for the DIA to recommend that the Governor in Council consent to a taking. This is revealed on the face of the May 10, 1933, Order in Council that granted an interest to the CNR:

> THEREFORE His Excellency the Governor General in Council, *on the recommendation of the Superintendent General of Indian Affairs*, is pleased to order that the said lands be and they are hereby transferred to the said Canadian National Railway Company, pursuant to the provisions of Section 48 of the Indian Act. [emphasis added; CBD, Vol 1, MAK-000041]

[105] MacInnes' message to Peepeekoot made no reference to the fact that, unlike in the case of "white men", a railway could only exercise powers of expropriation under a provision of the *Indian Act* that required, upon the recommendation of the DIA, the consent of the Crown. MacInnes' statement was misleading as no mention was made of the role of the DIA in allowing the taking.

[106] There is no evidence that the Indian Agent informed Peepeekoot of the differences between the exercise of *Indian Act* provisions for expropriation and surrender. The former did not require band approval, the latter did.

[107] MacInnes' instructions to Indian Agent Turner close with this (CBD, Vol 1, MAK-000019): "If these points were made clear to the Councillor, they might possibly remove some objections which otherwise might hinder in the taking of the surrender which was forwarded to you on the 7th instant." The point of substance, on the face of the letter, is this: Railways have the power, acting on their own, to expropriate land reserved for the Indians as if the land was no different than that "private[ly] own[ed]" by "white men".

[108] The Claimant argues that the letter makes the point that, in considering whether to surrender their reserve land, the Indians should be mindful of the perspective of the DIA with respect to "settlement" generally, and the railway power to expropriate in the public interest in order that settlement by "white men" could be advanced. MacInnes' instructions to the Indian Agent connects the taking by expropriation for railway purposes to the CNR request for land for a townsite, and would naturally have been understood by Peepeekoot and the Band as applying to both.

[109] The fact that the DIA implemented different processes for the railway right of way and the townsite did not remove the linkage between them, as the surrender was taken with the intention that the land be sold to the CNR for a townsite. MacInnes' February 3, 1932, direction to the Indian Agent, namely "a railway company has the power under the law of the land to take land which is required for railway purposes from private owners, whether they are white men or Indians" (CBD, Vol 1, MAK-000019), may, likely would, have connected the two in Peepeekoot's mind. There is little likelihood that he would have known that each required a different process, one voluntary on the part of the Band, the other not.

[110] The DIA advised the CNR that it was "not…able to state what price per acre the Indians would demand for surrende[r] of land for townsite purposes" (CBD, Vol 1, MAK-000015).

[111] On February 9, 1932, Acting Indian Agent J. T. Hill took a surrender vote for 28.29 acres of IR 129B for establishment of a townsite. The surrender condition was "[t]o have and to hold the same unto His said Majesty the King, his heirs and successors forever, in trust to sell the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our Welfare and that of our people" (CBD, Vol 1, MAK-000020).

[112] Hill noted in his February 15, 1932, report to the Indian Commissioner that the surrender had been passed unanimously at a meeting of all Band members. Councillor Peepeekoot and the other voting members are named on the voters list and marked present. Agreement with the surrender is signified by a short vertical mark adjacent to each name in the appropriate column. The marks are identical and set in line from the top to the bottom of the list. All were made by the same hand.

[113] Hill's report may give some insight into what was on the minds of the Band members on the day of the vote:

> On instructions from Ottawa I proceeded to Loon Lake and took a surrender of 28.29 Acres for a C. N. R. townsite, on the 9th instant.
>
> I had a full representation of the Indians and they gave a unanimous vote in favour of the transfer. As this area is covered with poplar bush they requested me, and I promised them to do what I could toward getting them the job of clearing it. This work would be very helpful, as they are having a pretty hard time owing to the severity of the winter. I found it necessary to issue some relief. [CBD, Vol 1, MAK-000025]

[114] The Respondent does not rely on Hill's reference to possible employment as evidence that the vote reflected the autonomous will of the Band.

[115] In any case, by letter dated March 11, 1932, the CNR's Land Commissioner informed the Indian Commissioner that:

> …while I appreciate the fact that it is difficult for the Indians to make a living during these times, we have no funds with which to provide for the clearing of the land, as we always leave it to the squatters to do their own clearing. [CBD, Vol 1, MAK-000030]

[116] There is evidence before the Tribunal that, the Claimant argues, could explain the turnaround from the concern expressed in Peepeekoot's January 17, 1932, letter. This is the reference to expropriation in MacInnes' instructions to the Indian Agent which conflates the expropriation powers of the railway company with the imminent decision whether to surrender the land.

[117] The surrender documents do not specify the price to be paid by the CNR for the surrendered land. They do contain a detailed description of the metes and bounds of the land. Clearly, a surveyor had attended at the site. The preparatory work for the taking of the surrender

vote was complete by January 7, 1932.

[118] There is no record that permits a determination whether the surrender meeting was called in accordance with the rules of the Band, as required by section 51 of the *Indian Act*, 1927, or whether such rules existed.

[119] There is no report from the Indian Agent of discussion of the options available to the membership, i.e. whether or not to vote in favour of surrender. Yet, in the space of 23 days from the date that Councillor Peepeekoot wrote with his concern that reserve land would be taken for railway purposes, he and all voting members of the Band are recorded as having agreed to surrender about 28 acres of their Reserve.

[120] The DIA requested payment for the townsite land on March 16, 1932. The CNR replied on March 22, 1932, that the railway line construction was uncertain and asked that submission of the surrender for Governor General in Council approval be withheld. The "received" stamp of March 26, 1932, confirms that the DIA received this correspondence on that date.

[121] On March 3, 1932, the CNR cancelled its railway line construction contract with Tomlinson Construction Ltd.

[122] On March 31, 1932, despite the uncertainty surrounding the construction of the railway, the CNR took steps to complete the acquisition of the right of way, as did the DIA. By Order in Council PC 1913–916 dated May 10, 1933, the transfer of 46.67 acres to the CNR "for [a] right of way and station grounds" was ordered (CBD, Vol 1, MAK-000041).

[123] The surrender vote was taken in February 1932, but as of May 10, 1933, the surrender had not been accepted by the Governor in Council and the Band had received no compensation. By October 1933, the population of the townsite had increased to 146 and more buildings had been constructed.

[124] As noted above, on March 3, 1932, the CNR cancelled its railway line construction contract with Tomlinson Construction Ltd. Nevertheless, on March 31, 1932, the CNR took steps to complete the acquisition of the right of way, and paid the agreed price to the DIA. In turn, the Governor in Council, on the recommendation of the DIA, by Order in Council PC 1913–916

dated May 10, 1933, provided for the transfer of 46.67 acres of the reserve land to the CNR for a "right of way and station grounds" (CBD, Vol 1, MAK-000041). Conveyances of an interest in two parcels of land for the railway and station grounds were made on July 27, 1933.

[125] The CNR advised the DIA on December 21, 1933, that it had abandoned construction of the proposed railway branch line and would not proceed with the townsite. It is apparent that officials of the CNR and the DIA discussed the future of the townsite: On June 25, 1934, the CNR furnished townsite plans to the Department and relinquished its interest in the townsite in favour of the Department "on the understanding that you will accept the plans for registration and developing the townsite generally, releasing the Canadian National Realties Limited and the Canadian National Railway Company from all claims" (CBD, Vol 1, MAK-000059). The Department confirmed this understanding on March 22, 1935. Seemingly, all that remained of the *raison d'être* for the townsite surrender was the unlawful presence of settlers on the Reserve.

[126] As early as December 1933, or, in any event, no later than June 1934, the DIA knew that the purpose for the grant to the CNR no longer existed and that the CNR no longer wanted the "surrendered" land for a townsite. The surrender of the Claimant's interest in the land had not taken legal effect as it had not yet been accepted by the Governor in Council. There is no evidence that the DIA informed the Band of these material changes to the rationale for the railway grant and the surrender.

[127] On July 18, 1934, by Order in Council PC 1542, the Governor in Council confirmed the 1932 surrender of 28.29 acres for townsite purposes.

[128] The DIA sold the subdivided lots within the surrendered lands to occupants of the "townsite", thus making their occupation lawful. This, however, did not complete the development of the townsite.

[129] The lands taken for station grounds remained in the possession of the CNR until the certificate of title was cancelled on December 18, 1974. On January 27, 1975, the station ground lands (with the exception of four parcels) were transferred to the Village of Loon Lake and subdivided, reserving to the Crown all mines and minerals. The remaining four parcels were transferred to "Her Majesty the Queen in the right and the use of the Province of Saskatchewan"

on December 18, 1974, and were transferred to the Village of Loon Lake in October 1985 (Claimant's Supplemental Submissions at para 14). As of 2019, various individuals and two corporations (the Saskatchewan Housing Corporation and North American Word Outreach Inc.) held the title to the land.

[130] On July 27, 1990, certificates of title were issued to the Village of Loon Lake for the land taken for the railway right of way.

C. Analysis: Trespass

[131] The impetus for the proposed branch line was to connect St. Walburg, Saskatchewan, to Bonnyville, Alberta. The incidental effect would be the potential for settler towns to emerge along the railway right of way. In the course of oral submissions, Counsel allowed it that I could take notice that there was a pattern of townsites springing up along the route of railways as these advanced westward.

[132] The evidence does not establish when construction of the railway commenced and passed through what was, or would become, the Reserve. What is known from the evidence is that by August 10, 1931, preparatory work for the laying of track had commenced. It is likely that the CNR commenced the preparatory work for construction of the branch line immediately after the 1929 approval of its plan, and would have entered on the land before it was fully established as a Reserve. The evidence establishes the presence of squatters on the Reserve by September 1931, but not the date of their arrival. What can be gleaned from the evidence is that the area occupied by squatters was established by 1931.

[133] Why there? Well, it would have been public knowledge that the CNR had received authorization for a branch line. Settlers looking for land to farm would naturally wish to be close to a railway. As the Reserve was created out of Crown land, it is likely that the adjacent land was Crown land as well. The squatters could have located elsewhere than on the Reserve and, had they known, may have. It just happened that they located themselves on the Reserve. If they had been removed by the DIA, there is nothing in the evidence to suggest that they would not have settled elsewhere.

[134] The material circumstances grounded in evidence are that squatters arrived sometime

after the CNR branch line was approved in July 1929. The DIA administration took hold on August 5, 1930. It is clear that the DIA knew of the presence of squatters on the Reserve upon receipt of the CNR's October 28, 1931, letter request for land.

[135] The CNR and the squatters were on the Reserve on August 5, 1930, and thereafter without the statutory authority provided for by the *Indian Act.* They were, therefore, on the land in contravention of sections 34 and 35, the trespass prohibitions of the *Act*.

[136] The CNR had, arguably, some colour of right as it had been granted authority to build a branch line before the formal creation of the Reserve by order of the Governor in Council.

[137] The DIA had the power to eject squatters in trespass on the Reserve. Was it, in the then present circumstances, their duty to do so? The Crown, as represented by the DIA, was a fiduciary in its relationship with Makwa as it held the legal title to the Reserve, and had discretionary control in its administration of the reserve lands under the *Indian Act,* 1927.

[138] The DIA, like the squatters, would have known of the CNR plan to put the railway through the Reserve. The location would have been generally known, as the CNR had filed a plan for the proposed right of way in July 1929.

[139] The only plausible explanation for the subsequent developments is the knowledge of the DIA that the railway was coming, and that a settler townsite was emerging in advance of its completion. It would have known that the CNR would seek land for a right of way and a townsite, as that was the pattern as the railway extended westward. Presumably it would generally be unreserved Crown land, but in the present case it was reserve land. Of course a surrender would be required. But what would happen if the Band denied consent?

[140] The surrender vote was taken on February 9, 1932. On October 28, 1933, the Department wrote to the CNR about the illegal occupation of the townsite property without departmental authorization or compensation to the "Indians". It was noted that following the surrender, "a number of parties immediately took possession" and 47 occupants had erected buildings on the Reserve (CBD, Vol 1, MAK-000054). There had as yet been no grants of title to the existing squatters and the newcomers. The DIA condoned the then present and subsequent trespasses.

D. Analysis: the Surrender

[141] The law of Crown fiduciary, pre- and post-surrender, originated with *Guerin* and developed further in *Apsassin*. Both cases were concerned with the alienation of reserve land for which there was, from the outset, a concomitant benefit to the bands. In *Guerin*, the profits from development of the land for a golf course; in *Apsassin*, a relocation to a traditional hunting territory.

[142] In the present matter, the benefit to the Band from the surrender was the anticipation that compensation, amount then unknown, might someday be paid. The interest of the Band in compensation does not settle the question whether, from the perspective of the Band, they had a choice.

[143] Reserve land cannot be sold without band consent, i.e. "surrender". In *Apsassin*, at paragraph 35, McLachlin J. said:

> My view is that the *Indian Act*'s provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection. The band's consent was required to surrender its reserve. Without that consent the reserve could not be sold.

[144] As found in *Apsassin*, fiduciary duties applied throughout the process of surrender, starting with the DIA acting on the CNR's request for land for a townsite, for which consent of the Band as an autonomous actor in the transaction was required. Duties of loyalty, disclosure and acting with prudence in managing the Band lands continued up to and after the acceptance of the surrender in July 1934.

[145] The possibility that a vote of band members in favour of surrender may not be an expression of the true intent of the band as an autonomous actor was acknowledged by Gonthier J.:

> I should also add that I would be reluctant to give effect to this surrender variation if I thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention. [*Apsassin* at para 14]

[146] It would have been apparent to the Band that despite its duty to administer the Reserve for the benefit of the Band, the DIA was going to allow the squatters to remain on the Reserve.

The remedy for unlawful occupation of the Reserve was a surrender, which was sought entirely on the initiative of the DIA.

[147] The question is this: Would equity countenance the proposition that, in these circumstances, the vote to surrender was an expression of the informed consent of the Band as an autonomous actor?

[148] The surrender transaction occurred entirely at the instance of the Crown as represented by the DIA, and served the interests of the settlers and the DIA.

[149] Where actions are a matter of choice, the exercise of an actor's autonomous will depend on the actor's knowledge of the available choices. As McLachlin J. observed in *Apsassin* at paragraph 39:

> …the Band trusted the Crown to provide it with information as to its options and their foreseeable consequences…

[150] While the context for the above observation differs from that in the present matter, the question here is whether the Band was aware that it had the option to refuse a surrender. Of course the fact that they were asked to give a surrender implies that they had a choice.

[151] The actions of the DIA in obtaining the 1932 surrender are a basis for doubt as to whether the members of the Band understood that they could have voted not to surrender their reserve land. The desired land was where squatters had settled and the Band had been informed of the CNR's power to expropriate (CBD, Vol 1, MAK-000019): "If these points were made clear to the Councillor, they might possibly remove some objections which otherwise might hinder in the taking of the surrender which was forwarded to you on the 7th instant."

[152] The interest served by the surrender was that of the CNR and of course the squatters, but it was not to them that the Crown owed its loyalty. The surrender also avoided the DIA having to act to eject the trespassers and the controversy that would result. Hence, whether conscious or not, there was an element of self-interest in the DIA obtaining the surrender.

[153] The actions of the DIA in the then present circumstances of trespass and construction of permanent improvements by squatters raise an inference that senior officials of the DIA were determined to obtain a vote in favour of surrender. Acting Indian Agent Hill was sent with the

required paperwork, and returned with the desired outcome in hand.

[154] The acceptance of the surrender by order in council after the CNR abandoned its plan to construct the branch line and establish a townsite supports an inference that the first priority of the DIA throughout was to make lawful the occupation of the Reserve by squatters.

[155] In *Apsassin*, McLachlin J. found that a fiduciary must exercise its power with "loyalty and care" and with "reasonable diligence with respect to the Indians' interest" (paras 38, 116).

[156] I find that the actions of Crown officials breached Crown fiduciary duties of loyalty, consultation, and adequate consideration of the interest of the Band in preserving its land base.

[157] In conclusion, I find that the acceptance of the surrender by order in council was exploitative in that it was given in circumstances in which the choices available to the Band were to refuse to surrender and live with a *de facto* taking of their land or receive money, amount unknown, for it. This tainted the dealings in a manner that made it unsafe to rely on the vote conducted at the meeting held February 9, 1932, as an indication of the Band's understanding and intention.

[158] The legal status of the township grants is not in question in this proceeding. The question that arises before the Tribunal is whether the Claimant has established a valid claim under subsection 14(1) of the *SCTA*:

> **14 (1)** Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:
>
> …
>
> **(c)** a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;…

[159] It was in the administration of the Reserve that the Crown acted on a surrender tainted by the motives and actions of the DIA in breach of fiduciary duties. The Claim arising from the 1932 surrender is valid on the paragraph 14(1)(c) of the *SCTA* ground. This finding obviates the need to deal with the trespasses as a distinct claim.

VIII. RAILWAY TAKING, 1933

A. Interest acquired by the CNR

1. Evidence: the "Taking"

[160] Order in Council PC 1184 dated July 2, 1929, approved the construction by the CNR of a branch line from St. Walburg, Saskatchewan, to Bonnyville, Alberta. The Order in Council refers to a plan of the proposed location.

[161] On August 5, 1930, by Order in Council PC 1776, the Governor in Council set apart land "for the use of the Indians as Makwa Lake Indian Reserve No. 129B" (CBD, Vol 1, MAK-000006).

[162] In October 1930, the CNR notified the DIA that its "right-of-way of the proposed [e]xtension" would affect lands under the DIA's control (CBD, Vol 1, MAK-000008).

[163] On March 31, 1932, the CNR notified the DIA that it had filed a plan of right of way at the Land Titles Office in Battleford. The date of filing is not in evidence. It was after the Reserve was set apart, as if filed previously the right of way land would already have been held by the CNR.

[164] The "taking" relied upon by the Respondent was made on the authority of section 48 of the *Indian Act*, 1927, which provides that reserve land can be taken for public purposes by a company with the statutory power to expropriate, but only with the consent of the Governor in Council:

> **48.** No portion of any reserve shall be taken for the purpose of any railway, road, public work, or work designed for any public utility without the consent of the Governor in Council, but any company or municipal or local authority having statutory power, either Dominion or provincial, for taking or using lands or any interest in lands without the consent of the owner may, with the consent of the Governor in Council as aforesaid, and subject to the terms and conditions imposed by such consent, exercise such statutory power with respect to any reserve or portion of a reserve.
>
> 2. In any such case compensation shall be made therefor to the Indians of the band, and the exercise of such power, and the taking of the lands or interest therein and the determination and payment of the compensation shall, unless otherwise provided by the order in council evidencing the consent of the Governor in Council, be governed by the requirements applicable to the like proceedings by such company, municipal or local authority in ordinary cases.

[165] On April 25, 1932, the CNR provided Mr. MacKenzie, Secretary, DIA, with a plan of survey for a right of way and station grounds for a parcel of land on section 23-58-22 W3 of the Reserve, and advised that a plan would follow for land in sections 26 and 36-58-22 W3. These had been deposited in the Land Titles Office prior to the date of enactment of the section 48 Order in Council. The plans are not in evidence.

[166] In a purported exercise of authority under section 48 of the *Indian Act*, 1927, the Governor in Council, by Order in Council PC 1913–916 dated May 10, 1933, ordered "that the said lands be and they are hereby transferred to the said Canadian National Railway Company, pursuant to the provisions of Section 48 of the Indian Act" (CBD, Vol 1, MAK-000041). The full text reads:

> WHEREAS the Canadian National Railway Company has applied to the Department of Indian Affairs for forty-six acres and sixty-seven hundredths of an acre, more or less, for right of way and station grounds in the Makwa Indian Reserve, No. 129B, in the Onion Lake Indian Agency, in the Province of Saskatchewan, which may be described as follows: -
>
> > Those parcels of land situate in Section 23 Township 58, Range 22, West of the Third Meridian, coloured red on registered plan No. A.Q. 1772, containing together 24.07 acres, more or less, and those parcels situate in Sections 26 and 36, Township 58, Range 22, West of the Third Meridian, coloured red on registered plan No. A.Q. 4312, containing together 22.60 acres, more or less, copies of which are recorded in the Department of Indian Affairs under numbers RR 2499 and 2550.
>
> AND WHEREAS the Superintendent General of Indian Affairs reports that the sum of $305.56 has been received in full compensation for the land required, in accordance with a valuation made by an officer of the Department of Indian Affairs;
>
> *THEREFORE His Excellency the Governor General in Council, on the recommendation of the Superintendent General of Indian Affairs, is pleased to order that the said lands be and they are hereby transferred to the said Canadian National Railway Company, pursuant to the provisions of Section 48 of the Indian Act.* [emphasis added]

[167] In July 27, 1933, certificates of title for the right of way and station grounds, comprised of 46.67 acres, were issued to the CNR.

2. Consent to a Taking, and Authority for Transfer

[168] Section 48 of the *Indian Act*, 1927, empowers "any company or municipal or local

authority having statutory power, either Dominion or provincial, for taking or using lands or any interest in lands without the consent of the owner may, with consent of the Governor in Council as aforesaid, and subject to the terms and conditions imposed by such consent, exercise such statutory power".

[169] Where consent under section 48 is given, the taking of land is generally "governed by the requirements applicable to the like proceedings" in relation to "the exercise of such power, and the taking of the lands or interest therein". However, subsection 48(2) provides for an exception to the general rule:

> 2. In any such case…the exercise of such power, and the taking of the lands or interest therein…shall, *unless otherwise provided by the order in council* evidencing the consent of the Governor in Council, be governed by the requirements applicable to the like proceedings by such company…in ordinary cases. [emphasis added]

[170] In the present matter, the operative part of the Order in Council reads: "…the Governor General in Council, on the recommendation of the Superintendent General of Indian Affairs, is pleased to order that the said lands be and they are hereby transferred to the said Canadian National Railway Company, pursuant to the provisions of Section 48 of the Indian Act" (CBD, Vol 1, MAK-000041). Hence, the Governor in Council purported to exercise the power conferred by subsection 48(2) to "otherwise" provide by ordering the transfer of the lands to the CNR.

[171] It is notable that the Order in Council does not expressly provide for the exercise by the CNR of its power to take land without the consent of the owner. If strict adherence to section 48 for the consent of the Governor in Council to the exercise of the CNR's power to take land is required, the omission of consent to the exercise of the CNR's power to take the land means that the condition precedent to the exercise of the subsection 48(2) power to do "otherwise" by ordering the transfer to the CNR is absent. The Claimant has not argued its Claim on this specific basis, but has relied on the principle that strict compliance with expropriation statutes is required.

[172] Assuming, but not finding, that compliance with the condition precedent may be implied, the position of the Respondent on the nature of the interest purportedly "transferred" nevertheless fails on the bases in law advanced by the Claimant.

B. Position of Claimant

1. The *Railway Act*, Subsection 189(3)

[173] The Claimant's primary submission rests on the application of subsection 189(3) of the *Railway Act*, RS 1927, c 170 [*Railway Act*, 1927]:

> **189.** No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council.
>
> 2. Any railway company may, with such consent, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, so much of the lands of the Crown lying on the route of the railway which have not been granted or sold, as is necessary for such railway, and also so much of the public beach, or bed of any lake, river or stream, or of the land so vested covered with the waters of any such lake, river or stream as is necessary for making, completing and using its said railway and works.
>
> 3. The company may not alienate any such lands so taken, used or occupied.

[174] The Claimant argues that whatever interest may have vested in the CNR, it is subject to the restraint on alienation in the *Railway Act*, 1927, subsection 189(3). As the CNR abandoned the plan to construct the line of rail, and later sold the "taken" land to various individuals and corporations and now forms part of the Town of Loon Lake, the Claimant invokes subsection 189(3) and says that the purported alienation was unlawful.

[175] The premise of the Claimant's position is that the Indian interest in the land survived the transfer of the land as the CNR could not have received anything more than an interest in the nature of a statutory easement. The Claimant relies on *Canadian Pacific Ltd. v Matsqui Indian Band*, [2000] 1 FC 325, 1999 CarswellNat 1267 [*Matsqui*], in which the Federal Court of Appeal found, based on the subsection 189(3), *Railway Act*, 1927, restraint on alienation, that the interest in reserve land granted to the Canadian Pacific Railway by letters patent issued on August 25, 1891 (para 107), was a limited interest, and that the land remained in the reserve for purposes of taxation under the Matsqui Band's bylaw. The Claimant submits that, as in *Matsqui*, the interest transferred to the CNR was a statutory easement.

[176] The Claimant also argues that irrespective of the application of the *Railway Act*, the interest in reserve land transferred to the CNR was less than the entire interest of the Crown, and the underlying interest of the Claimant was not extinguished. The Claimant's argument is based on the application of principles of fiduciary duty due to the *sui generis* nature of the Indian interest in reserve land.

[177] The Claimant maintains that whatever interest the CNR may have acquired lapsed upon the CNR's withdrawal of the planned railway construction or, alternatively, upon the purported transfer of its interest to the Village of Loon Lake, whereupon its right to possession of the land was restored.

2. Position of Respondent

[178] In substance, it is the Respondent's position that the "transfer", which in submissions it refers to as a "grant", confers on the CNR the same interest it would have received if it had in fact exercised its expropriation power under section 17 of the *CNR Act*, 1927, and proceeded with an expropriation "governed by the requirements applicable to the like proceedings by such company, municipal or local authority in ordinary cases" (subsection 48(2), *Indian Act*, 1927).

[179] As for the operation of the *Railway Act*, 1927, section 189, the Respondent submits:

> …sections 17(2)(b) and (c) of the 1929 amendment to the *CNRA* provided that when a plan signed by the Minister of Railways and Canals on behalf of a railway company is deposited, the land shown on the plan becomes vested in the railway company, unless a limited estate is taken (emphasis added). Section 189(3) of the *Railway Act* is inconsistent with sections 17(2)(b) and (c) of the *CNRA* and therefore does not apply. [footnote omitted; Respondent's Memorandum of Fact and Law at para 56]

[180] The Respondent argues, in effect, that under subsections 17(2)(b) and (c) of the 1929 amendment to the *CNR Act*, 1927 (*An Act to Amend the Canadian National Railways Act*, SC 1929, c 10, [*CNR Act*, 1929]), the CNR acquired an interest in fee simple absolute in the lands when it deposited the plan in the Battleford Land Titles Office. That interest is defined in *Black's Law Dictionary* as:

> An estate of indefinite or potentially infinite duration. [*Black's Law Dictionary*, 10th ed, *sub verbo* "fee simple absolute"]

[181] The Respondent contends that section 17 of the *CNR Act*, 1929, displaces the operation of the *Railway Act*, 1927, section 189, in respect of takings of Crown land, and that the vesting of title in the CNR by the deposit of the plan, absent words of limitation, takes the entire interest of the Crown. This, maintains the Respondent, is inconsistent with the operation of subsection 189(3) of the *Railway Act*, 1927, as the restraint on alienation, and its consequence for the nature of the interest taken as found in *Matsqui*, are incompatible with the rights of the holder of the fee.

[182] It must be borne in mind throughout my analysis that reserve land is Crown land. The term "reserve" is defined in subsection 2(j), *Indian Act*, 1927, as "any tract…of land set apart by treaty or otherwise for the use or benefit of…a particular band of Indians, *of which the legal title is in the Crown*" (emphasis added). The Respondent says that the CNR acquired an interest in fee simple absolute in the Crown lands "transferred" by the Order in Council and, as the land ceased to be Crown land it was no longer part of the Makwa Reserve.

[183] In short, the Respondent's position is that no space is left for a continued Indian interest as the Indian interest was extinguished by the vesting in the CNR of the interest of the Crown, without limitation, under subsections 17(2)(b) and (c) of the *CNR Act*, 1929.

IX. ANALYSIS OF RAILWAY LEGISLATION

[184] The navigation of the applicable statutory framework for the expropriation of land for railway purposes is a somewhat complex task. There are three statutes in play: the *Railway Act*, 1927, the *CNR Act*, 1929, and the *Expropriation Act*, RS 1927, c 64 [*Expropriation Act*, 1927]. The latter applies due to its incorporation by the *CNR Act*.

[185] A full understanding of the interaction of these statutes may require an understanding of the history of the development of railways as settlement moved westward across the prairies. To that extent, the record before the Tribunal may be deficient. Such was apparently the case in *Matsqui*, noting the comment made by Marceau J.A. at paragraph 12:

> My second comment is more involved. It could be more satisfactory if we were better informed as to all the facts that surrounded and followed the enactment of the CPR Act and the contract it was giving effect to.

[186] I have nevertheless proceeded based on the evidence, the statutory language and submissions of Counsel, the latter being somewhat lacking in detailed analysis, despite the shortcomings.

[187] References below to jurisprudence, in particular (*Reference* and *Re Railway Act 1952 (Canada)*), are for the narrative purpose of tracking the evolution of railway legislation. No principle of law set out in these cases is applied in reaching conclusions on the application in 1933 to the CNR of the *Railway Act*, 1927. The conclusions are based on statutory interpretation.

A. The *Railway Act*, 1927

[188] It is, in this matter, uncontroversial that the statutory power supporting the authority of the Governor in Council to exercise the section 48, *Indian Act*, 1927, power was the *CNR Act*.

[189] The Claimant, however, relies on the application of the *Railway Act*, 1927. The pathway to the application of the *Railway Act*, 1927, to the CNR begins with section 5:

> **5.** This Act shall, subject as herein provided, apply to all persons, railway companies and railways, within the legislative authority of the Parliament of Canada, whether heretofore or hereafter, and howsoever, incorporated or authorized, except Government railways, to which however it *shall apply to such extent as is specified in any Act referring or relating thereto.* [emphasis added]

[190] As the CNR was a Government railway, the application of the *Railway Act* depended on its operation being "specified in any Act referring or relating thereto". This, in the present matter, is the *CNR Act*.

[191] If the *Railway Act*, 1927, applied to the CNR, then, under the *Railway Act*, 1927, heading, "THE TAKING AND USING OF LANDS", sub-heading "*Restrictions—Crown Lands*", the now familiar section 189 would apply to limit the interest taken due to the subsection 189(3) restriction on alienation:

> **189.** No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council.
>
> 2. Any railway company may, with such consent, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, so much of the lands of the Crown lying on the route of the railway which have not been granted or sold, as is necessary for such railway, and also so much of the public beach, or bed of any lake, river or stream, or of the land so vested covered with the waters of any such lake, river or stream as is necessary for making, completing and using its said railway and works.
>
> 3. *The company may not alienate any such lands so taken, used or occupied.* [emphasis added]

[192] The reference in section 189, *Railway Act*, 1927, to "lands vested in the Crown" means the Crown, Canada, and as reserve land is by definition Crown land, both the *Railway Act*, 1927, and the *Indian Act*, 1927, section 48, prohibit the taking of land without the consent of the Governor in Council.

[193] But the question is whether the *Railway Act*, 1927, and in particular section 189, apply in respect of the land in the Makwa Reserve purportedly transferred to the CNR.

B. The *CNR Act*, 1929: Exception upon Exception

[194] The *CNR Act*, 1929, subsection 17(1) provides that "[a]ll the provisions of the *Railway Act* shall apply to the Company", but with exceptions:

> **17.** (1) All the provisions of the *Railway Act* shall apply to the Company, except as follows: —
>
> (*a*) such provisions as are inconsistent with the provisions of this Act;
>
> …
>
> (*c*) such provisions as are inconsistent with the provisions of the *Expropriation Act* as made applicable to the Company by this Act.

[195] Central to an understanding of the relationship among the railway statutes in play in the present matter is the question whether the "taking and using" provisions of the *Railway Act*, 1927, were, in 1933, entirely excluded from operation to the CNR by the *CNR Act*, *1929*. As noted above, section 189, *Railway Act*, 1927, is such a provision.

[196] In *Reference re: Railway Act (Canada)*, [1926] SCR 239 [*Reference*] (QL), Anglin C.J.C., in the context of a taking of private land, considered the question whether section 13 of the *CNR Act*, 1919, which provided for the application of the *Railway Act*, but excepted the application of the *Railway Act* provisions for the taking and using of land. It was held:

> *In this view of the matter ss. 239 et seq. which deal with the obtaining of possession in cases of resistance, must be regarded as having to do with "the taking or using of lands" and therefore within the purview of the exception to the application of the Railway Act made by s. 13 of the Canadian National Railway Company Act.*
>
> In conformity with this view we find a specific provision made by clause (c) of subs. 2 of s. 13 for the application to expropriations by the Canadian National Railway Company of the provisions of the Railway Act respecting the ascertainment of compensation, which might otherwise be deemed to have been excluded under the general exception made in regard to "the taking or using of lands".
>
> While, therefore, the subsequent proceedings in regard to the ascertainment and payment of compensation for lands to be acquired by the Canadian National Railway Company are to be taken under the sections of the Railway Act commencing with s. 215, which provides for the notice of expropriation, it is the jurisdiction for the acquisition of possession conferred by s. 21 of the Expropriation Act (R.S.C., c. 143) which the company must invoke in order to obtain possession compulsorily. [emphasis added; page 3]

[197] In short, the decision turned on the provision of the *CNR Act*, 1919, which excepted the

"taking and using" provisions of the *Railway Act*. The *CNR Act*, 1927, section 17, like the 1919 *Act*, excepted the Company and its undertaking from the provisions of the *Railway Act* relating to "the taking or using of lands", and provided that the provisions of the *Expropriation Act* apply "to the Company…in lieu of the provisions of the Railway Act so excepted" (*CNR Act*, 1927, section 17):

> **17.** *All the provisions of the Railway Act*, excepting those provisions which are inconsistent with this Act, *and excepting also the provisions of the Railway Act relating to* the location of lines of railway, the making and filing of plans and profiles—other than highway and railway crossing plans—*and the taking or using of lands*, shall apply to the Company and its undertaking, it being declared that all the provisions of the Expropriation Act, except where inconsistent with this Act, apply *mutatis mutandis* to the Company and its undertaking, in lieu of the provisions of the Railway Act so excepted. [emphasis added]

[198] The *CNR Act* was amended in 1929 (*CNR Act*, 1929). The amended section 17 removed the exception, set out in the 1919 and 1927 iterations, of the "taking and using" provisions of the *Railway Act*, and the phrase "in lieu of the provisions of the Railway Act so excepted". Hence, the taking and using provisions of the *Railway Act* that applied in the 1919 and 1927 *CNR Acts* were no longer excepted from application to expropriations by the CNR under the *CNR Act*.

[199] I note further that the above amendment was discussed in its historical context in C*anada (AG) v Canadian Pacific Railway Co (Re Railway Act 1952 (Canada))*, [1958] SCR 285 [*Re Railway Act 1952 (Canada)*] (QL):

> That the Canadian Pacific Company, if the section is valid, is bound by it, is conceded; but the situation of the Canadian National Railways is somewhat different. Chapter 13 of the statutes of Canada, 1919, provided for the incorporation of Canadian National Railway Company, and by s. 13 the provisions of the Expropriation Act, now R.S.C. 1952, c. 106, relating to the taking and using of lands were, for the purposes of the company's undertaking, made applicable to the company. The latter was created to embody the ultimate amalgamation of all lines within the National system and the undertaking of the company would therefore depend upon either the absorption by amalgamation of existing lines or the construction by it of new lines. *Section 13 in its original form remained in force until 1929, c. 10, s. 2, when, in an amendment of s. 17--which it had then become--the words "the taking and using of lands" were omitted.* At the same time the company was authorized by subs. (3) of s. 17 to acquire lands required for any of the companies comprised in the National system, a schedule of which had been annexed to the original enactment. [emphasis added; page 5]

[200] The 1929 removal of the above words "the taking or using of lands" suggests that, as of

1929, it was the intention of Parliament that the taking and using provisions of the *Railway Act* not be entirely displaced in favour of the application, under the *CNR Act*, of the *Expropriation Act* and that the provisions of the *Expropriation Act* no longer apply, in all instances of takings, "in lieu of the provisions of the Railway Act so excepted". However, subsection 17(1)(c) of the *CNR Act*, 1929, like the 1927 *Act*, provided that the *Railway Ac*t would not apply to takings where an inconsistency existed between the *CNR Act/Expropriation Act* and the *Railway Act*. In the event of inconsistency the *Expropriation Act* would clearly govern. Hence, the central question in the present matter is whether, in relation to Crown land set apart as a reserve there is inconsistency between the taking provisions of the *Railway Act* and the *CNR Act/Expropriation Act*.

[201] As noted in *Re Railway Act 1952 (Canada)*, subsection 17(3) of the *CNR Act* was also amended in 1929, to authorize a railway company to acquire lands required for any of the companies comprised in the national system. As the power to take land already existed elsewhere, subsection 17(3) does not imply yet another power to take but rather speaks to the relationship between the CNR and companies "comprised in the Canadian National Railways".

[202] Consider, once again, the effect of subsections 17(1)(a) and (c) of the *CNR Act*, 1929:

> **17.** (1) All the provisions of the *Railway Act* shall apply to the Company, except as follows:—
>
> (*a*) such provisions as are inconsistent with the provisions of this Act;
>
> …
>
> (*c*) such provisions as are inconsistent with the provisions of the *Expropriation Act* as made applicable to the Company by this Act.

[203] The question, then, is whether the CNR had the power under the *CNR Act* or the *Expropriation Act* to take federal Crown land. If it did so on terms that were inconsistent with section 189 of the *Railway Act*, 1927, then subsections 17(1)(a) or (c) would except the CNR from the operation of the *Railway Act*.

[204] I digress at this point to note that the *Expropriation Act* may not apply if the *Railway Act*, and only that *Act*, made specific provision for the taking and using of *reserve* land as there would be no inconsistency with the *CNR Act* or *Expropriation Act*. More will be said on this topic below. For the moment the question is whether the CNR had the power under the *CNR Act* or the

Expropriation Act to expropriate Crown, Canada, land (Crown land).

C. *Expropriation Act,* 1927: Vesting of Land "Taken" in the Crown

[205] The objective of the taking of land under the *Expropriation Act* is to vest the land taken in the federal Crown. If the land is already vested in the Crown, the *Expropriation Act* should be interpreted so as to avoid tautology.

1. *Expropriation Act,* 1927, Section 9: Land Taken for the Use of Her Majesty

[206] The *Expropriation Act*, 1927, section 9, provides that "[l]and taken for the use of His Majesty" upon the deposit of "a plan and description…signed by the minister" in "the office of the registrar of deeds for the county or registration division in which the land is situate …*shall thereupon become and remain vested in His Majesty*" (emphasis added). Sections 9(2) and (3) provide that:

> **2.** When any land taken is required for a limited time only, or only a limited estate or interest therein is required, the plan and description so deposited may indicate, by appropriate words written or printed thereon, that the land is taken for such limited time only, or that only such limited estate or interest therein is taken, and by the deposit in such case, the right of possession for such limited time, or such limited estate or interest, *shall become and be vested in His Majesty.*
>
> **3.** All the provisions of this Act shall, so far as they are applicable, apply to the acquisition for public works of such right of possession and such limited estate or interest.

[207] Section 9 would of course not apply to land already vested in His Majesty.

2. *Expropriation Act,* 1927, Section 11: Land Occupied by the Crown for a Public Work

[208] The Respondent's position assumes that the *CNR Act/Expropriation Act* confers on the CNR the power to expropriate land vested in the federal Crown, but fails to set out the precise statutory basis for its argument.

[209] Consider section 11, *Expropriation Act*, 1927, which provides:

> **11.** A plan and description of any land at any time in the occupation or possession of His Majesty, and used for the purposes of any public work, may be deposited at any time in like manner and with like effect as herein provided, saving always the lawful claims to compensation of any person interested therein.

[210] I do not understand section 11 to provide for a taking of Crown land. On the face of it, section 11 applies when land vested in the Crown or otherwise occupied or in the possession of the Crown is, prior to the deposit of the plan, being "used for the purposes of any public work". Such was not the case in the present matter. The land was reserve land of the Makwa Band. The CNR had commenced grading for construction of the line of rail, but without lawful authority to enter the Reserve.

[211] Section 11 appears to be directed to the taking of any interests in Crown land that are associated with an existing public use, that is "of any person interested therein" and provide for compensation for any interest so taken. It does not contemplate the "taking" of the interest of the Crown, as the land is already "in the occupation or possession of His Majesty".

D. *Expropriation Act*, 1927, and Public Land

[212] The *Expropriation Act*, 1927, provides for the taking by Canada of public land. Does this power apply in relation to land vested in His Majesty? The question seems to answer itself.

[213] In any case, section 3 of the *Expropriation Act*, 1927, sets out the power of the minister to take land:

> **3.** The minister may by himself, his engineers, superintendents, agents, workmen and servants,
>
> (*a*) enter into and upon any land to whomsoever belonging…;
>
> (*b*) enter upon and take possession of any land, real property, streams, waters and watercourses, the appropriation of which is, in his judgment, necessary for the use, construction, maintenance or repair of the public work, or for obtaining better access thereto;…

[214] Under section 2(f), minister "means the head of the department charged with the construction and maintenance of the public work".

[215] Section 2(d) defines the term "land":

> (*d*) "land" includes all granted or ungranted, wild or cleared, *public or private lands*, and all real property, messuages, lands, tenements and hereditaments of any tenure, and all real rights, easements, servitudes and damages, and all other things done in pursuance of this Act, *for which compensation is to be paid by His Majesty under this Act;* [emphasis added]

[216] The phrase "for which compensation is to be paid by His Majesty under this Act" applies, on a reading of the full definition of land in its grammatical context, to all categories of land previously described, including "public land". It is, however, self-evident that compensation would not have to be paid by the Crown, Canada, to itself for the "taking" of federal Crown land for a public purpose. The term "public land" does not, therefore, mean land vested in the federal Crown.

[217] Sections 4 to 15 provide for the taking of land at the direction of the "minister". "Minister", under section 2(f) means "the head of the department charged with the construction and maintenance of the public work". This refers to the federal minister responsible for the federal public work. Sections 23 and 34 govern compensation for the taking of an interest in land. Under section 23, taking possession of the land or filing the plan and description of the land in the office of the registrar of deeds vests the land "absolutely" in His Majesty. However, as noted above, Crown land is already vested in His Majesty.

[218] The term "public land", would of course include the public land situate within a province. The *Expropriation Act*, 1927, section 15, imposed a requirement additional to those applicable in the case of a taking of provincial Crown land:

> **15.** If the land taken is Crown land, under the control of the government of the province in which such land is situate, a plan of such land shall also be deposited in the Crown land department of the province.

[219] Given this absence of scope for takings of federal Crown land already vested in His Majesty, the difficulty with the position of the Respondent lies in the absence of inconsistency, in relation to the taking of Crown land, between the *Expropriation Act* and the *Railway Act*. The former makes no provision for the acquisition of land vested in the Crown, Canada. The latter does, and expressly prohibits the acquisition of Crown land by a railway company without the consent of the Governor in Council:

> **189.** No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council.
>
> 2. Any railway company may, with such consent, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, so much of the lands of the Crown lying on the route of the railway …as is necessary for such railway…for making, completing and using its said railway and works. [*Railway Act*, 1927]

[220] There is, therefore, no inconsistency between the *Railway Act* and the *Expropriation Act* in relation to the acquisition of land vested in the Crown. The 1929 amendment to the *CNR Act* removed the exception of the *Railway Act* provisions for the taking and using of land, and as explained above, the *Expropriation Act* does not provide for the taking of federal Crown land. As only the *Railway Act* provides for this, only that *Act* applies.

E. *CNR Act,* 1929, Subsection 17(2)(a)

[221] The Respondent relies on section 17, *CNR Act*, 1929, but did not frame its argument with reference to subsection 17(2)(a), *CNR Act*, 1929, which provides that "[a]ll the provisions of the *Expropriation Act*, except where inconsistent with the provisions of this Act, shall apply *mutatis mutandis* to the Company". Could this, even in the absence of inconsistency between the *Expropriation Act* and the *Railway Act*, over-ride the effect of subsection 17(1)(c), which excepts from the operation of the *Railway Act* only "such provisions as are inconsistent with the provisions of the *Expropriation Act* as made applicable to the Company by this Act"? I conclude that, in the absence of inconsistency between the *Expropriation Act* and the *Railway Act*, subsection 17(2)(a) could not have the effect of preventing subsection 17(1)(c) from applying.

[222] As discussed above, the 1929 amendments to the *CNR Act*, section 17, removed the 1927 exception of the "taking or using of lands" of the *Railway Act*, and the provision that the *Expropriation Act* would apply in lieu thereof. This being so, the taking and using powers under the *Railway Act* apply.

[223] If the application of subsection 17(2)(a) could, in the absence of inconsistency between the *Expropriation Act* and the *Railway Act*, impose the substantive provisions of the *Expropriation Act* in a case of the taking of federal Crown land the result would be absurdity as there would, despite the adoption of the *Railway Act* by section 17, be no scope for its application. Subsection 17(2)(a) does not say, and should not be inferred to mean, that the scope of authority for taking should be expanded to allow the Company to take a type of land not provided for in the *Expropriation Act*, i.e. federal Crown land.

[224] I conclude that the purpose of subsection 17(2)(a) is to apply the procedural provisions of the *Expropriation Act* to takings under the *Railway Act*. This brings the process of expropriation into conformity with the process by which land is taken under the *Expropriation Act*.

F. The *Railway Act* and Reserve Lands

[225] The present matter concerns the taking of reserve lands. If I am incorrect in my conclusion that neither the *Expropriation Act*, section 11, nor the definition of "public lands" in that *Act* provide for a taking of Crown, Canada, lands, the question remains as to whether a taking of Crown lands reserved for "Indians" was expressly provided for in the "taking and using" provisions of the *Railway Act*, 1927. If so, there can be no inconsistency with the *CNR Act* or the *Expropriation Act* as neither make specific provision for the taking of reserve lands.

[226] The *Railway Act*, 1927, expressly contemplates the taking of reserve lands. Section 192, *Railway Act*, 1927, which, like section 189, appears under the heading "THE TAKING AND USING OF LANDS" and sub-heading "*Restrictions—Crown Lands*". Under the further sub-heading "*Indian Lands*" is section 192, which provides:

> **192.** No company shall take possession of or occupy any portion of any Indian reserve or lands, without the consent of the Governor in Council.
>
> 2. When, with such 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, compensation shall be made therefor as in the case of lands taken without the consent of the owner.

[227] As neither the *CNR Act* nor the *Expropriation Act* provide for the taking of reserve lands there is no inconsistency, and the *Railway Act*, 1927, section 192, governs.

[228] Section 192, *Railway Act*, 1927, applies, and so must section 189, as both appear under the same *Railway Act* heading. Both apply to Crown land as reserve land is, by definition, land vested in the Crown. Hence, as found in *Matsqui*, subsection 189(3) applies to limit the interest acquired, with the consent of the Governor in Council under section 192, in reserve land.

G. *Indian Act*, 1927, Section 48, and *Railway Act*, 1927, Sections 189–192: Presumption of Coherence

[229] My finding on the application of the *Railway Act*, 1927, section 189, above accords with the presumption of coherence.

[230] It is presumed that the statutes of Parliament are intended to be coherent and consistent. Sullivan and Driedger state:

THE STATUTE BOOK AS A WHOLE

> ***Governing principle***. In effect, the statute book constitutes the complete text of every legislative provision. The presumptions of coherence and consistency apply not only to Acts dealing with the same subject but also, albeit with lesser force, to the entire body of statute law produced by a legislature. The legislature is presumed to know its own statute book and to draft each new provision with regard to the structures, conventions, and habits of expression as well as the substantive law embodied in existing legislation. [footnotes omitted; *Sullivan and Driedger on the Construction of Statutes*, 4th ed (Markham, ON: Butterworths Canada, 2002) at 323]

[231] When two statutory provisions apply in the same context, both provisions are to be applied, if the provisions are not in conflict. Sullivan and Driedger state:

> When two provisions are applicable to the same facts, the courts attempt to apply both. If the provisions are not in conflict (and conflict for this purpose is narrowly defined), then it is presumed that both provisions are meant to apply in accordance with their terms. [*Sullivan and Driedger on the Construction of Statutes*, 4th ed (Markham, ON: Butterworths Canada, 2002) at 263]

[232] The *Railway Act*, 1927, sections 189 to 192, and the *Indian Act*, 1927, section 48, have the same subject matter; both provide for the acquisition by a railway company of an interest in land vested in the federal Crown. The latter applies to reserve land. Both contain similar provisions for the taking of Crown land. The consent of the Governor in Council is required for a taking of an interest in Crown land for railway purposes under the *Railway Act*, 1927, section 189 and subsection 189(2), and a taking of an interest in reserve land for railway purposes (*Indian Act*, 1927, section 48). The *Indian Act*, 1927, section 48, provides for consent on terms "subject to the terms and conditions imposed by such consent" to a taking. The *Railway Act*, 1927, subsection 189(2) does the same, "…upon such terms as the Governor in Council prescribes, take and appropriate…".

[233] The *Indian Act* and the *Railway Act* both provide for the acquisition of an interest in Crown lands with consent of the Governor in Council. The "taking" of an interest in Crown land reserved for Makwa was permitted by the Governor in Council pursuant to the *Indian Act*, section 48, and coherent with section 189 of the *Railway Act*, 1927. The coherence of the statutes is further illustrated by section 192 of the *Railway Act*, 1927, which, like section 48 of the *Indian Act, 1927*, requires Governor in Council consent to the exercise of the taking power under the *Railway Act* where the land is reserve land.

[234] In the present matter, the consent of the Governor in Council by Order in Council dated

May 10, 1933, satisfied the requirements of both section 48 of *Indian Act*, 1927, and subsection 189(2) of *Railway Act*, 1927, both of which provide for the imposition of terms. Both empowered the Governor in Council to transfer an interest in Crown land, and this in fact was carried out in conformity with the requirements of both statutes.

H. "Transfer" to the CNR by Order in Council PC 1913–916, May 10, 1933

[235] In what is in essence an alternative ground for the Claim, the Claimant submits that the application of fiduciary principles in relation to the *sui generis* Indian interest in reserve lands limits, in the present circumstances, the interest acquired by the CNR without the need for reliance on section 189 of the *Railway Act*, 1927.

1. Circumstances Surrounding the Acquisition of an Interest in the Reserve

[236] If, contrary to the foregoing, it is assumed that federal land can, with the consent of the Governor in Council under the *Indian Act*, 1927, section 48, be taken by the operation of section 17 of the *CNR Act*, 1927, by the filing of a plan in a provincial land title office, the position of the Respondent is nevertheless untenable on the facts as the deposit of the plan in the Land Titles Office in Battleford took place after the allotment of the Reserve, but before the Governor in Council authorized the exercise of the CNR's power to take land in the Makwa Reserve. On these facts, the Respondent cannot rely on the deposit of the plan to assert any interest in land within the Reserve.

[237] The CNR later deposited survey plans of the lands described in the Order in Council. This also took place prior to the enactment of the Order in Council, and therefore did not effect a taking of the defined parcels of reserve land.

[238] Here, on the facts, the CNR acquired an interest by way, on the terms of Order in Council PC 1913–916 dated May 10, 1933, of a "transfer". This was effected with the consent of the Governor in Council, thus meeting the requirements of section 48 of the *Indian Act*, 1927, and sections 189 to 192 of the *Railway Act*, 1927.

2. "Transfer" in Lieu of Taking

[239] Subsection 35(3), *Indian Act*, 1952, considered in *Osoyoos*, expressly provides for a grant

in lieu of taking. Section 48, *Indian Act*, 1927, contains no such express provision. It does, however, provide for the following:

> 2. In any such case compensation shall be made therefor to the Indians of the band, and the exercise of such power, and *the taking of the lands or interest therein* and the determination and payment of compensation shall, *unless otherwise provided by the order in council evidencing the consent of the Governor in Council*, be governed by the requirements applicable to the like proceedings by such company, municipal or local authority in ordinary cases. [emphasis added]

[240] There is no evidence that, subsequent to the date of the Order in Council, the "taking" was made as "governed by the requirements", procedural or otherwise, of the *CNR Act*. The purported taking was by way of a "transfer".

[241] The CNR did not in fact proceed with an expropriation "governed by the requirements applicable to the like proceedings by such company, municipal or local authority in ordinary cases" (*Indian Act*, 1927, subsection 48(2)). The Governor in Council exercised its discretion, conferred by subsection 48(2), to effect the "taking of the lands or interest therein" without being "governed by the requirements applicable to the like proceedings by such company, municipal or local authority in ordinary cases". Instead, the Governor in Council provided otherwise by transferring an interest in the Makwa Reserve to the CNR.

[242] The premise of the Respondent's position is that the CNR necessarily acquired the same interest in land in the Reserve as it would under subsections 17(2)(b) and (c) of the *CNR Act*, 1929. This is incorrect as, in relation to a "taking" under the authority of the *Indian Act*, 1927, section 48, the Governor in Council may provide "*otherwise*". This is symmetrical with the power of the Governor in Council under the *Railway Act*, 1927, subsection 189(2) to allow the acquisition by a railway company with the consent required by section 189 to "…***upon such terms as the Governor in Council prescribes***, *take and appropriate, for the use of its railway and works, so much of the lands of the Crown*…" (italics and bold added).

[243] In summary, the interest of the CNR was not in fact established by the exercise of subsection 17(2)(c) of the *CNR Act*, 1929. The acquisition of the CNR's interest was the result of the May 10, 1933, Order in Council, which makes a "transfer" of an interest in land in the Reserve.

X. TAKINGS AND EXTINGUISHMENT OF THE INDIAN INTEREST

[244] With the above understanding of the role of the 1933 Order in Council elaborated, I now turn to the Claimant's argument regarding fiduciary obligations that apply when reserve land is "taken" under statutory authority.

A. The *Sui Generis* Indian Interest

[245] The Claimant, in an argument that does not rely on the application of the *Railway Act*, 1927, section 189, cites the decisions of the Supreme Court of Canada, namely *Canadian Pacific Ltd. v Paul*, [1988] 2 SCR 654 [*Canadian Pacific v Paul*], *Guerin, Apsassin* and *Osoyoos*, the decisions of the Supreme Court of British Columbia and Court of Appeal in *Squamish Indian Band (Squamish Indian Band v Canadian Pacific Ltd, 2*000 BCSC 933, [2000] 4 CNLR 39 [*Squamish, BCSC*] (QL); *Squamish Indian Band v Canadian Pacific Ltd,* 2002 BCCA 478, 217 DLR (4th) 83 [*Squamish, CA*] (QL)), and the decision of the Tribunal in *Siska Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 2, for the following general proposition: The Indian interest is *sui generis*, and interests in reserve lands which have been "taken" with the consent of the Governor in Council must, having regard for the circumstances surrounding the "taking" and the language of the statutory authority, if the instrument creating the interest will bear it, be understood as preserving the *sui generis* Indian interest.

B. Fiduciary Law and Crown Intent

[246] Assuming, without finding, that the taking was, on the effective date, for a permitted public purpose, was there a "taking" on the authority of section 48 of the *Indian Act*, 1927, that resulted in the transfer to the CNR of the entire interest of the Crown in the land, including the interest of the Claimant?

[247] In *Squamish, BCSC*, Saunders J., now J.A., grappled with such questions. The Tribunal invited the Parties to provide supplemental submissions on the application of *Squamish Indian Band*. The issue in *Squamish Indian Band* was over land held by the Canadian Pacific Railway. Saunders J.'s discussion of "taking" under section 48 of the *Indian Act*, 1927, is, however, pertinent to the issues at hand:

> While s. 35 of the 1886 Indian Act and s. 48 of the 1927 Indian Act contemplated a "taking" of land by a railway, with consent of the Crown, nothing in those

> sections required that the interest "taken" by a railway be an absolute interest, leaving no residual interest for either the Crown or the Indian peoples. I rest this conclusion on two legs. First, the statutory power of the railway referred to in all versions of the Indian Act is limited by the restraint on alienation found in the Railway Act empowering the taking.
>
> *Second, in relation to the meaning of the word "taken", I refer to s. 35 of the 1886 Indian Act and make the following observations. If "taken" in s. 35 means sold or alienated, it stands in contradiction to s. 38, or at least is an unrecognized exception to the clear ban on alienation of reserve land without surrender found in s. 38. Further, the word "taken" does not always mean fully acquired. For example, The Dictionary of Canadian Law, 2d. ed. (Scarborough: Carswell, 1995) at 1234 defines "take lands" as:*
>
> > *enter upon, take possession of, use and take lands for a limited time or otherwise or for a limited estate or interest.*
>
> [emphasis added; *Squamish, BCSC*, at paras 186–87]

[248] The proposition in both paragraphs above that the term "taken", as it appears in section 48 of the *Indian Act*, 1927, does not necessarily connote an alienation of the entire interest of the Crown and with it the band's interest is supported by the emergent jurisprudence on fiduciary duty. The Supreme Court of Canada in *Osoyoos* also found that the word "taken" in section 35 of the *Indian Act*, 1952, was ambiguous, containing scope for the taking of "a range of interests in land, up to and including a fee simple interest" (para 58). The court in *Osoyoos* reiterates this point at paragraph 86, citing the same dictionary definition of "take lands" as cited by Saunders J. in *Squamish, BCSC:*

> …the word "take" in relation to land does not necessarily refer to the acquisition of full title. Rather, *The Dictionary of Canadian Law* (2nd ed. 1995) defines "take lands" as including to "enter upon, take possession of, use and take lands for a limited time or otherwise or for a limited estate or interest".

[249] There was, in *Squamish, BCSC*, no issue over the existence and effect of Crown fiduciary duty on the exercise by the Governor in Council of the power conferred by section 48 of the *Indian Act*, 1927. The decision turned on the application of the *Railway Act*, 1927, subsection 189(3). There, the abandonment of the railway purpose for which the land was taken triggered the reversion of the land to the Crown.

[250] In the present matter the question is whether the taking of land under section 48, *Indian Act*, 1927, is, as Saunders J. put it in *Squamish, BCSC*, the taking of "an absolute interest, leaving no residual interest for either the Crown or the Indian peoples" (para 186). As Saunders J. took

note at paragraph 187, "the word 'taken' does not always mean fully acquired".

C. Claimant's Reliance on *Sui Generis* Interest and Fiduciary Law

[251] The Claimant relies on principles of fiduciary law applicable to takings of interests in reserve land, as found in *Osoyoos*, and jurisprudence that cautions against "the strict reference to intractable real property rules" in disputes arising over reserve lands (*St. Mary's Indian Band v Cranbrook (City)*, [1997] 2 SCR 657 (QL) [*St. Mary's*] at para 15). The latter are conveniently summarized in *St. Mary's*. In *St. Mary's*, at paragraph 14, Lamer C.J. referred to previous decisions of the Supreme Court of Canada in *Guerin* and *Apsassin* on the nature of the Indian interest, and once again cautioned against the application of "traditional real property rules" in matters that affect the *sui generis* nature of "native land rights":

> I want to make it clear from the outset that native land rights are sui generis, and that nothing in this decision should be construed as in any way altering that special status. As this Court held in Guerin v. The Queen, [1984] 2 S.C.R. 335, Canadian Pacific Ltd. v. Paul, [1988] 2 S.C.R. 654, and Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 S.C.R. 344, native land rights are in a category of their own, and as such, traditional real property rules do not aid the Court in resolving this case.
>
> But what does this really mean? As Gonthier J. stated at paras. 6 and 7 in Blueberry River, supra, it means that we do not approach this dispute as would an ordinary common law judge, by strict reference to intractable real property rules… [paras 14–15]

D. Factors Influencing the Legal Nature of the Interest Transferred

[252] As noted above, the Respondent argues that the taking was under the *CNR Act* and that it vested the CNR with an estate in fee simple absolute. In effect, the Respondent's position is that no space is left for a continued Indian interest as this would exist only if the land reverted to the Crown under subsection 189(3) of the *Railway Act*, 1927. In other words, the Indian interest was extinguished by the vesting in the CNR of the land, without limitation, under subsections 17(2)(b) and (c) of the *CNR Act*, 1929.

[253] The position of the Respondent takes no account of the development of fiduciary law exemplified by the decision of the Supreme Court of Canada in *Osoyoos*. There, Iacobucci J., for the majority, set out the principles of fiduciary law that apply in relation to the exercise by the Crown of the section 35, *Indian Act*, 1952, power to permit the expropriation of interests in

reserve lands.

[254] The section 35 power in the *Indian Act*, 1952, is sufficiently broad to result in the alienation of the Indian interest. In *Osoyoos*, Iacobucci J. found, at paragraph 57, that "s. 35 evinces a clear and plain intent to authorize the taking of 'any interest' in reserve land, which, in the context of the Indian Act, necessarily includes the aboriginal interest in reserve land". Thus, in a case where the public purpose in question required the taking of the entire Crown interest, a taking authorized by section 35 could result in the alienation of the Indian interest in the reserve. As section 48, *Indian Act*, 1927, provides for a taking of reserve land with consent of the Governor in Council, the extent of the power of taking and the principles of fiduciary law that exist in the case of a taking under section 35, *Indian Act*, 1952, would likewise apply (*Osoyoos*).

[255] In *Osoyoos*, Iacobucci J. established fiduciary duties in the context of a compulsory taking of reserve land:

> In my view, the fiduciary duty of the Crown is not restricted to instances of surrender. Section 35 clearly permits the Governor in Council to allow the use of reserve land for public purposes. However, once it has been determined that an expropriation of Indian lands is in the public interest, a fiduciary duty arises on the part of the Crown to expropriate or grant only the minimum interest required in order to fulfill that public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian lands by the band. This is consistent with the provisions of s. 35 which give the Governor in Council the absolute discretion to prescribe the terms to which the expropriation or transfer is to be subject....
>
> This two-step process minimizes any inconsistency between the Crown's public duty to expropriate lands and its fiduciary duty to Indians whose lands are affected by the expropriation. In the first stage, the Crown acts in the public interest in determining that an expropriation involving Indian lands is required in order to fulfill some public purpose. At this stage, no fiduciary duty exists. However, once the general decision to expropriate has been made, the fiduciary obligations of the Crown arise, requiring the Crown to expropriate an interest that will fulfill the public purpose while preserving the Indian interest in the land to the greatest extent practicable. [paras 52–53]

[256] The *sui generis* nature of the Indian interest grounds the duty of minimal impairment:

> The duty to impair minimally Indian interests in reserve land not only serves to balance the public interest and the Indian interest, it is also consistent with the policy behind the rule of general inalienability in the Indian Act which is to prevent the erosion of the native land base: Opetchesaht Indian Band v. Canada, [1997] 2 S.C.R. 119, at para. 52. The contention of the Attorney General that the duty of the Crown to the Band is restricted to appropriate compensation cannot be maintained in light of the special features of reserve land discussed above, in

> particular, the facts that the aboriginal interest in land has a unique cultural component, and that reserve lands cannot be unilaterally added to or replaced. [*Osoyoos* at para 54]

[257] *Osoyoos* explained that interpretations of what was in fact "taken" by an Order in Council pursuant to the *Indian Act* in a given instance should be consistent with those duties where the language will bear it.

[258] The Crown is presumed to have acted intra vires in making the transfer and its intentions will be understood in this light (*Osoyoos* at para 69). If an interpretation of the Order in Council is consistent with the Crown's fiduciary duty of minimal impairment is more plausible and appropriate than one that is not, it is to be preferred (*Osoyoos* at paras 89–90).

E. The Interest Required to Serve the Public Purpose

1. The Public Purpose in the Present Matter

[259] In the circumstances of this Claim, a transfer of reserve land for railway purposes is all that the Order in Council provided for. The Order in Council was specific: The purposes were for a right of way and station grounds.

[260] The interpretation of the words "taken for the purpose[s]" in section 48, *Indian Act*, 1927, must conform with the limits imposed by fiduciary duty as found in *Osoyoos*, namely "to expropriate or grant only the minimum interest required in order to fulfill *that* public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian lands by the band" (emphasis added; para 52). This limitation ensures that "once the general decision to expropriate has been made, the fiduciary obligations of the Crown arise, requiring the Crown to expropriate an interest that will fulfill the public purpose while preserving the Indian interest in the land to the greatest extent practicable" (*Osoyoos* at para 53).

2. Interest Limited to that Reasonably Required

[261] The decision in *Osoyoos* speaks further of the nature of the interest that can be granted on the authority of section 35, *Indian Act*, 1952. The interest must be reasonably required to serve the public purpose for the taking:

> By reference to "the powers referred to in subsection (1)", s. 35(3) authorizes the Governor in Council to grant or transfer only "such lands" as could have been

> taken by the Province under the relevant statutory authority, in this case, the Water Act. In other words, the Governor in Council could only grant the "estate or interest in or easement over land" that was "reasonably required" for the canal. This interpretation of s. 35 is not only consistent with its plain and ordinary meaning, but it is also supported by the principle of interpretation which favours a narrow reading of statutes which limit Indian rights (see para. 67 below).
>
> In the result, in the circumstances of this case, because the source of the power to expropriate was the Water Act, the discretion to grant "land" pursuant to s. 35(3) was limited to the land or interest in land "reasonably required" for the canal. [paras 63–64]

[262] Although the finding that no greater interest than that reasonably required for a canal could be granted under the authority of section 35, *Indian Act*, 1952, took account of the limitation on the terms of the *Water Act,* a more general limitation of "reasonable requirement" conforms with the duty of minimal impairment, and is indicated by reference in *Osoyoos* to *Canadian Pacific v Paul*:

> This raises the question of what type of interest is reasonably required for the canal. The evidence before the Court is insufficient to provide a clear answer. The respondents argue that since the canal is a permanent structure, they therefore must have the exclusive right to use and occupy the land. However, while the canal seems to be a permanent structure on the land, this fact should not be overstated. There was no evidence to indicate what kind of structure the canal is. Stripped to its essence, it is a ditch lined with concrete. Furthermore, it may be inferred that the fee simple to the land was not necessary to construct the canal since no transfer of title was made at the time of its construction. As well, since the canal was already built when the transfer was made, the interest in question is that which is reasonably required to operate and maintain the canal only. Moreover, it is obvious that the fee simple is not necessary to operate and maintain the canal since those activities are currently the responsibility of the Town of Oliver, which appears to have some kind of leasehold interest in the land. A canal is similar in nature to a railway in that both are permanent structures on the land involving operation and maintenance activities, and this Court has found that a grant of a statutory easement can be sufficient for the purposes of building and maintaining a railway *(Canadian Pacific Ltd. v. Paul, [1988] 2 S.C.R. 654, at p. 671). As noted above, **as a general matter** the Court should be reluctant to take away interests in land in the absence of conclusive evidence.* [italics and bold added; para 65]

[263] There is no evidence in the present matter that the CNR required an interest in fee simple to achieve the public purposes of a railway right of way and station grounds. The findings in *Canadian Pacific v Paul* and *Osoyoos* point to the adequacy of a statutory easement.

3. Clear and Plain Intention to Extinguish

[264] In *Osoyoos*, the Supreme Court of Canada makes the point that a purported taking of an interest that may result in the extinguishment of the aboriginal interest will have that effect if the intention of the Crown to do so is clear and plain:

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

[265] In *R v Sparrow*, [1990] 3 CNLR 160 at 12 [*Sparrow*] (QL), the Supreme Court of Canada makes the same point: To extinguish the Indigenous interest, the intention of the Crown must be clear and plain.

[266] The Respondent argues that the CNR acquired, by the operation of subsection 17(2)(c) of the *CNR Act*, 1929, an estate in fee simple absolute.

[267] The result of the Respondent's argument would be that the *sui generis* interest of the Claimant would have been extinguished by the fee simple grant.

[268] The onus of proof of extinguishment is on the Crown (*Sparrow*).

[269] If the transfer, upon analysis of the operative terms of the *Indian Act*, 1927, section 48, and Order in Council PC 1913–916, May 10, 1933, does not evince the clear and plain intention of the Crown to extinguish the Indian interest in the reserve land, the Claimant does not have to rely on subsection 189(3), *Railway Act*, 1927, for the proposition that its interest in the "taken" land was never extinguished.

4. Principles of Interpretation of Instruments of "Taking"

[270] Where terms used in statutory instruments that enact takings of reserve lands are ambiguous, the interpretation that "impairs the Indian interests as little as possible should be preferred, so long as the ambiguity is a genuine one, and the construction that is favourable to the Indian interests is one that the enactment will reasonably bear, having regard to the legislative purposes of the enactment" (*Osoyoos* at para 68, applying *Nowegijick v The Queen*, [1983] 1 SCR 29, 1983 CarswellNat 123 [*Nowegijick*] and *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 [*Mitchell*] (QL)). This is especially true where statutory authority is constrained and where

the taking is not clear and plain. The *Nowegijick* and *Mitchell* considerations, and the approach to expropriations reflected more generally in Canadian law, would be present even without the specific fiduciary duties that also arise upon a taking of reserve lands.

[271] It is clear from the above that a "taking" of land in a reserve by order of the Governor in Council under section 48 of the *Indian Act*, 1927, does not necessarily extinguish the band's interest or the Crown title upon which reserve status depends. *Osoyoos* instructs that the statutory regime must be examined for its ambiguities and restrictions, and interpreted in a way that retains the underlying Indigenous interest if possible. It has been held that the terms "taken", "land" and "right of way" are ambiguous as to extent of the interest involved (*Squamish, BCSC*; *Osoyoos* at para 82, regarding "right of way"). As noted above the term "transfer" is ambiguous, as it could, under subsection 48(2), *Indian Act*, 1927, be "of the lands or interest therein".

5. Crown Intention and Fiduciary Duty

[272] In cases of expropriation, Iacobucci J., in *Osoyoos* at paragraph 43 says, citing *St. Mary's* and *Apsassin*:

> Courts must "go beyond the usual restrictions imposed by the common law", in order to give effect to the true purpose of dealings relating to reserve land… This is as true of the Crown's purpose in making a grant of an interest in reserve land to a third party as it is of an Indian band's intentions in surrendering land to the Crown.

[273] The intended effect of Crown actions must be understood in the light of applicable fiduciary duties. Recognition of the Indian interest as *sui generis* is central to the question whether Crown powers under section 48, *Indian Act*, 1927, are constrained by fiduciary duty, in particular the duty of minimal impairment.

[274] In *Osoyoos*, the statute conferring expropriation powers (the *Water Act*) allowed the taking of any "estate or interest in or easement over land" (para 60). Iacobucci J. found that the interest taken must be "reasonably required" for the purposes of the canal (para 61). It could, therefore, be a lesser interest than the entire interest of the Crown.

[275] The Crown intention in transferring the land "for right of way" must be understood as conferring only the minimal interest required to serve the intended public purpose. There is no evidence that the CNR required an interest in fee simple absolute in order to construct and

operate a railway and station house. Nor can this be inferred. This is clear from the decision of the Supreme Court of Canada in *Osoyoos*, where the Court was divided over the nature of the interest reasonably required for works of a permanent nature. In dissent, per Gonthier J.:

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

[276] The minority view was not embraced by Iacobucci J., who, speaking for the majority, at paragraph 65, cited *Canadian Pacific v Paul* at 671, as authority for finding that "[a] canal is similar in nature to a railway in that both are permanent structures on the land involving operation and maintenance activities, and this Court has found that a grant of a statutory easement can be sufficient for the purposes of building and maintaining a railway".

6. Ambiguity of Terms and Preservation of the Indian Interest

[277] Subsection 48(2), *Indian Act*, 1927, provides for the "taking of the lands or interest therein". This phrase creates ambiguity as to whether the interest transferred was a limited estate in the nature of an easement or the entire proprietary interest of the Crown.

[278] A finding that the transfer did not extinguish the interest of Makwa in land within the Reserve is consistent with the direction from the Supreme Court of Canada in *St. Mary's* that traditional common law principles of property law may not be applied where the preservation of the *sui generis* Indian interest in reserve land is at stake. Moreover, because of the *sui generis* characteristics of Indigenous interests, a non-technical approach to interpretation of the Order in Council and section 48 of the *Indian Act*, 1927, may be most appropriate (*Osoyoos* at para 70).

[279] An application of traditional property law rules with the result contended by the Respondent would be contrary to the law as found in *Osoyoos*. The result of this analysis would be that the CNR could use the land for purposes other than the particular purpose served by the

taking. This could not have been intended.

[280] As the transfer for station grounds was tied to railway purposes of the CNR it could not have been intended to convey an interest that would entirely displace the *sui generis* Indian interest.

XI. THE RETAINED *SUI GENERIS* INDIGENOUS INTEREST IN THE TRANSFERRED LAND

A. "Revival" of the Indian Interest

[281] In *Squamish, BCSC*, Saunders J. considered the effect of abandonment of land taken for railway purposes:

> I therefore conclude that CPR's office construction plan does not save this property for CPR. The plans of CPR have been presented in evidence and include cessation of all railway traffic on Lot J, and impending cessation of railway traffic on Block I. The plans have existed for some time and have been accompanied by abandonment of the rail line and lifting of the track. It is not premature to say as to Lot J that it has reverted to the Crown, and as to Block I, that once rail service ceases, it also will revert to the Crown. [para 258]

[282] Saunders J. considered the interest of the Squamish Indian Band upon the reversion of the land to the Crown:

> Is it possible, then, that on determination of CPR's interest, the reserve status is revived? The Squamish Indian Band says this is so and refers to St. Mary's Indian Band v. Cranbrook (City), [1997] 2 S.C.R. 657. That case involved a portion of a reserve that had been surrendered in 1966 to be sold and developed as a municipal airport. The surrender included a term whereby the lands would revert to the Indian Band should the lands cease to be used for public purposes. In deciding that the lands were not "designated lands" under the Indian Act, Lamer C.J.C. found that the lands had been conditionally surrendered. In his reasons, he acknowledged at p. 393 that there can be conditions to an absolute surrender. Logic would say, I think, that although a surrender and subsequent sale appears to break the vesting and use required to characterize land as being within a reserve, such conditions to a surrender, if met, would revive the reserve status. Perhaps this may be seen through the prism of time. In the immediate sense the lands are not reserve, yet the vestigial long term use and benefit remains because there is no expressed intention, or statutory imperative, to transfer that long term use and benefit to another - in this case Canada. [para 216]

[283] Whether or not the statutory authority for the expropriation by the CNR in the present matter and the Canadian Pacific Railway in *Squamish, BCSC*, differ, Saunders J.'s findings apply here as the takings in favour of the CNR did not extinguish the *sui generis* interest of Makwa in

its reserve lands.

[284] Saunders J. found that the restoration of title to Canada revived the Indian interest in the land as reserve. The Crown interest in the land was subject to a resulting trust.

[285] The decision of the Court of Appeal in *Squamish, CA*, dismissing the appeal of the decision of the trial judge neither upheld nor over-ruled Saunders J.'s finding that the interest of the Squamish Indian Band had been revived:

> 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. [para 129]

[286] The question of the effect of fiduciary duty on interests granted under section 35 of the *Indian Act*, 1952, was not considered by the courts in *Squamish Indian Band*. The question over the ongoing existence of the Indian interest is resolved by the finding in *Osoyoos* that the Indian interest survives a grant, ostensibly of fee simple, where the public purpose does not necessitate its extinguishment. The concept of revival is unnecessary if the interest was not extinguished. The Crown bears the burden of proof of extinguishment.

[287] There is no evidence before the Tribunal in the present matter that extinguishment of the Indian interest was necessary to serve the public purpose for which the land was granted.

B. Abandonment of the Interest of the CNR

[288] Work on the rail bed had stopped by March 3, 1932. On March 22, 1932, the CNR wrote to the Department of Indian Affairs to advise that construction of the railway had been suspended indefinitely. The CNR cancelled its railway line construction contract with Tomlinson Construction Ltd. on March 3, 1932. The line of rail had not been constructed. The CNR informed the DIA that it would not proceed with the construction of the spur line and townsite on December 21, 1933. The DIA knew that the construction of the railway may not proceed. On May 10, 1933, despite the uncertainty surrounding the construction of the railway the Superintendent General of Indian Affairs recommended to the Governor in Council that parcels of reserve land be granted to the CNR for railway and station grounds purposes.

[289] Uncertainty over the construction of the railway called for caution on the part of the DIA.

If the construction of the railway did not proceed, the public purpose for the grant would no longer exist.

[290] There was, as of May 10, 1933, no present public purpose for the "taking" as it was not known whether the railway would be constructed. Upon *de facto* abandonment of the railway project on December 21, 1933, the public purpose for the "taking" ceased to exist.

[291] In *Semiahmoo*, Isaac C.J. found, at paragraph 48, that the Crown breached its fiduciary duty in consenting to a surrender, because there was no "timely public purpose" for the surrender:

> On the basis of the foregoing, I find that the Trial Judge did not err in concluding that the Crown breached its fiduciary duty when it consented to the 1951 surrender. The spectre of expropriation clearly had a negative impact on the ability of the Band to protect their own interests in the "negotiations" which ultimately led to the surrender. While the Crown must be given some latitude in its land-use planning when it actively seeks the surrender of Indian land for a public purpose, the Crown must ensure that it impairs the rights of the affected Indian Band as little as possible, which includes ensuring that the surrender is for a *timely* public purpose. In these circumstances, the Crown had a clear duty to protect the Band from an exploitative bargain by refusing to consent to an absolute surrender which involved the taking of reserve land for which there lacked a foreseeable public need. [emphasis in original; para 48]

[292] No fiduciary duty is engaged in connection with the exercise by the Governor in Council of its power to allow the expropriation of reserve land for a specified public purpose (*Osoyoos* at para 53). The premise underlying this finding must be that there exists a valid public purpose for the taking.

[293] In the present matter, as in *Semiahmoo*, the absence on May 10, 1933, of a timely public purpose for the interest acquired by the CNR put the Crown in breach of fiduciary duty. In *Semiahmoo*, the breach was the acceptance of the surrender by the Governor in Council. Here, the Governor in Council purported to transfer the land for a public purpose that, in light of the CNR putting into "abeyance" its plan to construct the railway and station grounds, may never come to pass. If anything, the taking in the present circumstances is more egregious than in *Semiahmoo*, as the acquisition of the land by the CNR was by unilateral action of the Crown under section 48 of the *Indian Act*, 1927. Unlike in a case of surrender, the consent of the Band was not required. The discretion of the Crown was unfettered by the need for Band consent, and

the Band was completely vulnerable.

[294] The Crown has the discretion and a duty not to accept a surrender made by vote of the members of a band if it is evident that the sale of the land is exploitative or otherwise improvident. In a case of expropriation the same interest is at stake. The duty to prevent exploitation applies, at a minimum, in a case of expropriation as Crown discretion is unfettered by the need for consent.

[295] A transfer to the CNR of title in fee simple without an express right of reversion if the specified public purpose did not materialize would have put the Crown in breach of its duty to protect the Band from exploitation by the diminution of its land base. A transfer of fee simple would have left the CNR with the ability to abandon the public purpose for the grant and use the land for any non-railway purpose of its choosing including sale. As the Crown knew that the railway may not proceed, the transfer of any interest in the land was in breach of duty. When the CNR formally abandoned its planned spur line and townsite on December 21, 1933, it was beyond doubt that the purpose for the grant no longer existed.

[296] The known possibility that the railway would not be built means that a remedy based on the fact it was never built is not dependent on hindsight. There was, as of May 10, 1933, a foreseeable need but it was also foreseeable that the need would never materialize. The Crown, as a fiduciary, was duty bound to protect the Indian interest in the Reserve until it was known that the public interest necessitated a transfer of reserve land to the CNR. It was a breach of duty to proceed before it was known whether or not the public purpose would be fulfilled.

[297] In this case, as in *Apsassin*, there was a duty on the Crown to cancel the sale under the authority of section 64, *Indian Act*, 1927, for violation of the condition of the grant that the lands be used for railway purposes:

> **64.** If the Superintendent General is satisfied that any purchaser or lessee of any Indian lands, or any person claiming under or through him, has been guilty of any fraud or imposition, or has violated any of the conditions of the sale or lease, or if any such sale or lease has been made or issued in error or mistake, he may cancel such sale or lease and resume the land therein mentioned, or dispose of it as if no sale or lease thereof had ever been made.

[298] In either case, there would remain no interest in the land that would impair the enjoyment

of the Claimant's legal and possessory interest.

XII. CONCLUSION

[299] For the above reasons, I find that the interest acquired by the CNR was, under the *Railway Act*, 1927, no more than an interest in the nature of a statutory easement. Irrespective of whether the statutory power was the *CNR Act/Expropriation Act* or the *Railway Act*, the intention of the Crown with respect to the nature of the interest transferred to the CNR must, on the facts as found, be interpreted taking account of the *sui generis* nature of the Indian interest in reserve land and the resulting fiduciary duties of the Crown. The same result applies, the CNR interest was in the nature of an easement. If it was a taking of the entire interest of the Crown, the Crown was in breach of its fiduciary duty to preserve the Makwa interest in its Reserve land until it was clear that the CNR would proceed with construction of the railway.

XIII. SUMMARY OF FINDINGS: RAILWAY TAKING, 1933

A. Statutory Authority for Taking of Crown Land Reserved for Indians

1. Application of the Statutory Framework

[300] In a purported exercise of authority under section 48 of the *Indian Act*, 1927, Order in Council PC 1913–916 dated May 10, 1933, transferred 46.67 acres of land within the Makwa Indian Reserve No. 129B to the CNR for purposes of a railway and station grounds. The putative statutory authority for a taking of land was the *CNR Act*, 1929.

[301] There are three statutes in play: the *Railway Act*, the *CNR Act*, and the *Expropriation Act*. The *CNR Act*, 1929, subsection 17(1), provides for the application of the *Railway Act*, 1927, except where its provisions are inconsistent with those of the *CNR Act* and the *Expropriation Act*, 1927.

[302] The land in question is reserve land, and thus, by definition, land vested in the Crown, Canada.

[303] The *Expropriation Act* does not provide for the taking of Crown, Canada, land.

[304] The *Railway Act*, 1927, section 189, makes express provision for the taking by a railway company of an interest in Crown, Canada, land.

[305] Section 192 of the *Railway Act*, 1927, expressly contemplates the taking of reserve lands.

[306] Moreover as neither the *CNR Ac*t nor the *Expropriation Act* provide for the taking of Crown, Canada land, or a taking of reserve land, there is no inconsistency, and the *Railway Act*, 1927, sections 189–192, governs.

2. Alienation of Crown Land Acquired under the *Railway Act*

[307] Subsection 189(3), *Railway Act*, 1927, provides that an interest in Crown land taken for railway purposes may not be alienated.

[308] Hence, as found in *Matsqui*, subsection 189(3) applies to limit the interest in reserve land acquired by the CNR to a statutory easement.

B. Extinguishment of the *Sui Generis* Indian Interest in Reserve Land

[309] Under the *CNR Act/Expropriation Act*, the deposit of a plan in a land titles office suffices to take land shown on the plan. If the plan does not contain words of limitation, the acquired interest is unlimited.

[310] If it is assumed that the governing statute was the above, the "taking" did not in fact occur upon the deposit of the plan in the Land Titles Office at Battleford as the Governor in Council had not previously authorized the exercise of the CNR's statutory authority to take land.

[311] Here, on the facts, the CN acquired an interest by way, on the terms of PC 1913–916 dated May 10, 1933, made under section 48 of the *Indian Act*, 1927, of a "transfer".

[312] In summary, the interest of the CNR was not in fact established by the exercise of subsection 17(2)(c) of the *CNR Act*, 1929. The acquisition of the CNR's interest was the result of the May 10, 1933, Order in Council, which makes a "transfer" of an interest in land in the Reserve.

[313] Construing the nature of the interest acquired by way of transfer brings into play the fiduciary duties of the Crown. These have their origin in the *sui generis* Indian interest in reserve land.

[314] The term "taken", as it appears in section 48 of the *Indian Act*, 1927, does not necessarily connote an alienation of the entire interest of the Crown.

[315] In *St. Mary's*, Lamer C.J. cautioned against the application of "traditional real property rules" in matters that affect the *sui generis* nature of "native land rights" (para 14).

[316] The Crown had a fiduciary obligation to minimally impair the Indian interest in the Reserve. The duty to minimally impair the Indian interest is consistent with the *sui generis* nature of the Indian interest in reserve land (*Osoyoos*).

[317] A railway company does not necessarily need a fee simple interest to build a railway. A statutory easement may suffice (*Canadian Pacific v Paul*, cited in *Osoyoos*).

[318] The Indigenous interest in land cannot be extinguished without a clear and plain intention to do so (*Sparrow*). Upon analysis of the operative terms of the *Indian Act*, 1927, section 48, and Order in Council PC 1913–916, May 10, 1933, the transfer does not evince the clear and plain intention of the Crown to extinguish the Indian interest in the reserve land. Where terms used in statutory instruments that enact takings of reserve lands are ambiguous, the interpretation that impairs the Indian interests as little as possible is to be preferred (*Osoyoos* at para 68, applying *Nowegijick* and *Mitchell*).

[319] The Indian interest survives a grant, ostensibly of fee simple, where the public purpose does not necessitate its extinguishment.

[320] As a fee simple interest is not required to support the presence of railway works, on the application of fiduciary principles, a lesser interest was transferred by the Order in Council.

C. Breach of Fiduciary Duty

[321] The absence on May 10, 1933, of a timely public purpose for the interest acquired by the CNR put the Crown in breach of fiduciary duty (*Semiahmoo*).

[322] The Crown, as a fiduciary, was duty bound to protect the Indian interest in the Reserve until it was known that the public interest necessitated a transfer of Reserve land to the CNR. It was a breach of duty to proceed before it was known whether or not the public purpose would be

fulfilled.

[323] In this case, as in *Apsassin*, there was a duty on the Crown to cancel the sale under the authority of section 64, *Indian Act*, 1927.

D. Restoration of the Makwa use and possession of the Land

[324] The former station grounds and right of way were transferred to other entities between 1975–1990. Upon the abandonment of the CNR's plan to construct a railway on the land, the Makwa interest in the use and possession of the land was restored.

XIV. DISPOSITION

[325] The former station grounds and right of way were transferred to other entities between 1975 and 1990. The legal status of those interests is not in question in this proceeding. The question that arises before the Tribunal is whether the Claimant has established a valid claim under subsection 14(1) of the *SCTA*.

[326] I find that the Claimant has established grounds for the Claim as it relates to the railway right of way and station grounds under paragraphs 14(1)(c) and (d):

> **(c)** a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;
>
> **(d)** an illegal lease or disposition by the Crown of reserve lands;…

XV. RESERVE LAND ALIENATIONS, 1935–1939

A. 1935 Surrender for Church Purposes

[327] In September 1933, the Anglican Diocese of Saskatchewan asked the DIA for information "on what terms the Church could secure this plot of land" (CBD, Supplementary Document List, Vol 3, SUPP-00290). An official referred the matter to the local Indian Agent, "with a view to ascertaining the attitude of the Indians" (CBD, Supplementary Document List, Vol 2, SUPP-00248).

[328] The Claimant is not seeking relief from the Tribunal in relation to this, and the transaction discussed immediately below. The evidence is, however, relevant to the matters that

remain in issue to the extent that it illustrates the persistence with which the DIA pursued the Band to make land available for the Village. Hill approached the "Loon Lake Indians" about the potential surrender of lands for church purposes. On November 19, 1934, the Indian Agent reported that "[d]uring the last fifteen months I had consulted the Indians on at least three occasions with respect to the matter but a majority were not in favour of surrendering any more land for any purpose – they were dissatisfied with the townsite and railway situation" (CBD, Supplementary Document List, Vol 1, SUPP-0070). The Indian Agent later reported that "[o]n the 17th instant I again visited the reserve and met the Indians at a fully attended meeting when they voted unanimously in favour of surrendering one acre" (CBD, Supplementary Document List, Vol 1, SUPP-00070).

[329] On July 16, 1935, the Indian Agent met with the Band and took the formal surrender of one acre of land for leasing purposes. The Indian Agent reported that fifteen voted in favour of the surrender, three opposed it, and that there were three absentees. The Crown issued a lease to the Synod of the Diocese of Saskatchewan on September 17, 1935, for the land to be used as a site for the erection and operation of an Anglican Church.

B. 1938 Red Cross Surrender

[330] In October of 1933, Indian Agent J. T. Hill reported on the squatters at the Loon Lake townsite and noted the presence of the Red Cross Hospital outside the surveyed townsite. After being asked to report on the matter in 1935, Inspector Murison reported that the Red Cross Hospital was under a lease agreement with the Department and that there were no available lots to which the Hospital could be moved.

[331] The Loon Lake Band voted in favour of surrender for the sale of 2.17 acres of land to the Red Cross Society on October 15, 1938, at a nominal sale price of $1.00. The Claimant does not seek relief from the Tribunal in relation to this transaction.

C. 1939 Townsite Surrender & Expansion

[332] By letter to Indian Agent Hill dated August 10, 1935, Mr. Kershaw, Secretary of the Local Ratepayers Association of Loon Lake, requested from the Department an addition of five blocks to the Loon Lake townsite, stating that there seemed to be a good demand for lots and the

expansion would benefit the Department.

[333] On August 29, 1935, Indian Agent Hill forwarded this request to the Department and wrote that the request was justified and would take care of the needs of the town for a long time. The Department did not act on this request.

[334] By letter dated March 24, 1939, the Loon Lake Board of Trade requested from the Department an expansion of the Loon Lake townsite. Mr. Caldwell, Chief of the Reserves Division, forwarded this request to Dr. Robertson, Inspector of Indian Agencies, on April 11, 1939, for his recommendation.

[335] On May 9, 1939, Indian Agent Hill recommended giving the Loon Lake Board of Trade's request favourable consideration. He informed Robertson that "squatters" had occupied some of the lots on the proposed addition. New buildings had been constructed on the Reserve.

[336] Hill reported that 14 surveyed lots within the surrendered land remained unsold. However, all but three were occupied by squatters, who had erected buildings on the lots.

[337] On August 17, 1939, the Band, in the presence of Indian Agent Hill, voted in favour of a surrender of 17.08 acres of IR 129B for addition to the Loon Lake townsite. The documents were signed with "x" marks by "Chief Peepeekoot" and Bear Boy and witnessed by John (surname illegible; CBD, Vol 1, MAK-000090). The copy of the voters' list certified on August 17, 1939, indicated that there were 24 eligible voters, that 21 were present, and that all those present voted in favour.

[338] Hill also reported that improvements had also been constructed on land within the proposed expansion. Three of the lots, one occupied by the Royal Canadian Legion and two owned by two members of the community, were sold to them in 1943. All had occupied the land prior to the 1939 surrender and had constructed permanent improvements. This was known to the DIA. On July 23, 1940, the Secretary of the DIA, wrote to Donald Cameron, the Clerk in Charge for the Indian Agency saying, in part:

> It would appear that you have received $15.00 from Dr. J. D. Grandy, $15.00 from Mr. J. Craig, and $3.00 from the Loon Lake Canadian Legion. The privileges enjoyed by all three named are not covered by either permit or lease, and action should at once be taken to have the matter regularized in such manner.

> I would suggest, therefore, that you have Dr. J. D. Grandy, Mr. J. Craig and the Loon Lake Canadian Legion make separate applications for either permits or leases. These should be forwarded by you with a recommendation as to terms and conditions. This should be done as soon as possible. [CBD, Vol 1, MAK-000094]

[339] The surrendered land had not yet been subdivided into lots. Presumably, this is the reason the Secretary proposed that leases or permits be entered with the three squatters.

[340] The surrendered land was subdivided and all lots were sold by 1950.

[341] Although a surveyor hired by the DIA advised that the lots were valued between $115.00 and $400.00, all but the three lots which sold in 1943 had by 1950 been sold for $50.00–$85.00.

[342] The surrender was confirmed by Order in Council PC 1958–1061 on July 31, 1958, but was backdated to September 1, 1939. The apparent explanation for backdating the effective date of the Order in Council was to protect the interests of those who purchased lots within the surrendered land. The Claimant takes no issue with the legality of this measure.

D. Analysis, 1939 Surrender

1. Pre-Surrender Breach of Fiduciary Duty

[343] The Claimant maintains that the above surrenders did not comply with the requirements of the *Indian Act*, or were so tainted by improper Crown conduct that they must, as between the Claimant and the Crown, be found invalid as if made without statutory authority or, at the least, obtained by actions in breach of fiduciary duty. The Respondent argues that it met the statutory requirements of the *Indian Act* for surrender.

[344] The process by which the 1932 and 1939 surrenders were taken substantially complied with the procedural requirements of the *Indian Act*, which were found in *Apsassin* to be declaratory. The 1932 surrender cannot be considered valid as it is tainted by the actions of the DIA in its determination to obtain the surrender.

[345] The Claimant anchors its argument in the breaches connected with the 1932 surrender. It proceeds thusly; but for the 1932 surrender, there would be no townsite, as the existence of a townsite depends on the legitimate, lawful, occupation of parcels of land by people who share in community. The 1932 surrender was tainted sufficiently that it could not be accepted as

reflecting the true intent of the Band. A further surrender of more land for the same purpose suffers the same taint, and whether or not compliant with the procedural requirements of the *Indian Act*, must be considered as taken in breach of fiduciary duty.

[346] The Respondent argues that it met its fiduciary obligation, which, in the pre-surrender context, is limited to preventing exploitative bargains. The Respondent argues that the First Nation knew that it could refuse to surrender the land. The Respondent also argues that there was a good market for the land and that the sale of the lots would generate revenue for the First Nation.

[347] A surrender of the land occupied by the squatters was the only means by which their occupation could become lawful. Without a valid surrender, the squatters would have continued to be in trespass, contrary to sections 34 and 35 of the *Indian Act*, 1927. No titles could issue, and the DIA would have to evict them.

[348] The circumstances surrounding the taking of the 1939 surrender raise a question over whose interest would be advanced by the surrender of land for townsite expansion. The interests of the squatters, in particular the officers of the Royal Canadian Legion, the local physician, and another member of the community, all of whom had built permanent improvements on the Reserve, would be served. Once again as in 1932, a surrender would relieve the DIA of its obligation to deal with the trespassers.

[349] There is no information in the records of the DIA on what was discussed internally with respect to the interests of the Band, and whether there was any thought given to the obligation of the Crown to protect the interest of the Band in the face of encroachment by settlers. Due to misfeasance, the DIA found itself in much the same position in 1939 as it did in 1932. It was responsible for the protection and preservation of interest of the Band in its reserve lands, but stood idly by while settlers squatted on the land and constructed permanent improvements to an extent that it acquired all the trappings of a village. In less than a decade businesses had been established, along with community amenities, outside of the area surrendered in 1932.

[350] As was the case in 1932, a vote in favour of surrender would solve a problem created by a lack of vigilance on the part of the DIA.

[351] The fact that the squatters and the DIA would benefit from another surrender does not necessarily taint the surrender in the sense of it not reflecting the will of the Band. Nor does it lead inexorably to a conclusion that the surrender was not in the interests of the Band.

[352] The reality in 1939 was that a settler village existed on a tract of land slightly in excess of 25 acres within the boundaries of the Reserve. There is evidence that the desired land was rocky, unsuitable for farming. The March 24, 1939, letter from the Loon Lake Board of Trade said that the Band had been consulted and was in favour of making land available. The evidence does not reveal the kind of pressure exerted by the DIA in obtaining the 1932 surrender.

[353] It was in the interest of the Band that it receive compensation for settler occupation of a small tract of land that at the time had little or no utility to it. The surrender was, therefore, not improvident.

[354] Despite the presence of self-interest of the DIA in relation to the unchallenged occupation of several parcels of reserve land by villagers, the surrender was beneficial to the Band as it received compensation for those parcels of land and additional land that lacked practical value.

[355] The question before the Tribunal is whether the Claimant has established a valid claim under subsection 14(1) of the *SCTA*:

> **14 (1)** Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:
>
> …
>
> **(c)** a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;…

[356] The transaction was not improvident or exploitative; hence the acceptance of the surrender by the Governor in Council did not breach the fiduciary duties of the Crown.

2. Post-Surrender Breach of Fiduciary Duty

[357] A post-surrender breach of fiduciary duty occurred: The DIA sold the lots created by the surrender at less than fair market value.

[358] The Parties agree that the lands surrendered in 1932 and 1939 were sold for less than fair market value. The Respondent argues that this admission of fact does not mean that the Crown breached a duty to the Claimant. This position fails to take account of the meaning of the phrase "fair market value" as defined in *Black's Law Dictionary*:

> The price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction; the point at which supply and demand intersect." [*Black's Law Dictionary*, 10th ed, *sub verbo* "fair market value"]

[359] The same concept appears in a leading text:

> The most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress. [Appraisal Institute of Canada, *Canadian Uniform Standards of Professional Appraisal Practice*, (Ottawa: 2018), at 75–76, online: <https://www.aicanada.ca/wp-content/uploads/CUSPAP-2018.pdf >, citing *The Appraisal of Real Estate*, 3rd Canadian ed., Sauder School of Business (Vancouver: 2010) at 2.8]

[360] The Respondent argues that there were factors affecting the real estate market that militated against the DIA selling the subdivided lots at fair market value. This fails to recognize that the price a willing buyer and willing seller will agree upon is determined by the marketplace. A prudent seller will not accept less than the market will bear; a prudent purchaser will not pay more. An admission that a sale was for less than fair market value means that the DIA sold the lots at under-value. This is, therefore, an admission of a breach as the duty is that of a prudent person in the conduct of its own affairs.

[361] If the admission by the Respondent was based on a misunderstanding of the concept of fair market value, this was brought to the attention of the Parties by the Tribunal in the course of the hearing. The Respondent made no submissions in this regard and did not seek to resile from the admission.

[362] It is, however, unnecessary to determine the question of breach of fiduciary duty under this part based on the Respondent's admission that the lots were offered for sale, and thus sold at less than fair market value.

[363] There is evidence that the unsold lots made available by the 1939 surrender were not offered for sale at fair market value.

[364] The DIA received independent advice on the market value of the lots from the 1939 surrender. The surveyor, Donnelly, valued the lots between $115.00 and $400.00. The lots were valued "considerably higher than those of the original portion of the townsite", as, according to Donnelly, "[q]uite a nice little town has grown up west of Second Avenue. There is a good hotel, and judging from the numbers of commercial trave[l]ers visiting it last fall, the countryside business seemed to be quite good" (CBD, Supplementary Document List, Vol 1, SUPP-00195). He said his valuations were "extremely reasonable".

[365] There is no evidence that Donnelly was a qualified land appraiser. He was, however, tasked with valuing the surveyed lots. This implies an understanding on the part of the DIA that he had the required knowledge and experience. He explained the market considerations that supported his valuations.

[366] In May and June 1942, several complaints were made by local residents that the lot prices were "too high" which they claimed was unfair and discriminated against the new purchasers' vis-à-vis those that had in the past purchased lots for $50.00 to $100.00 each. J. A. Craig, a DIA official, wrote:

> The village of Loon Lake is situated in the edge of Indian Reserve 129B. The C.N.R. townsite Company surveyed the original village apparently with the object of purchasing the land for a townsite. The railroad, as you know, failed to continue the line to this point, and the C.N.R. Townsite Company dropped the idea of purchasing the land. However, the village was built on the premise that the lots would be sold by someone eventually. The owners, [t]he Indian Department, eventually sold the lots to the ones who had built on the lands as surveyed.
>
> This original portion of the village is the business section, and the purchase price of the lots were from $50 to $100 for corner lots. The village grew and the people asked the Indian Department to add about three blocks to the village. They apparently agreed to do this and several people built on the site after measuring off as near as possible where the various lots would be. About two years after several of these houses were built the Indian Department surveyed the addition to the village, and agreed to sell the lots. However, they raised the price of these lots from the original $50 for residential lots, to $125 and some $150.
>
> We think that this is very high, and that a certain amount of discrimination is shown, as men who have a large business built on a $100 lot against a laborer

> who will have to pay $150 for a lot on which to place his small home. Then again we know of one lot on the addition that was sold for $60 and was considered a fair price. [CBD, Vol 1, MAK-000099]

[367] H. W. McGill, Director of the Indian Affairs Branch, indicated he would take these complaints under consideration and consult with Donnelly, but felt the valuations were fair because the town had grown and needed the extensions. The new lots were much larger than the original ones and there was considerable business in the area. This supported Donnelly's valuations as being based on market factors.

[368] In October 1942, McGill instructed Christianson, General Superintendent of Indian Agencies, to check into the complaints about unfair lot valuations. McGill maintained that:

> …the…situation has been very carefully reviewed by us with Mr. Donnelly and he very definitely maintains that the values which he placed on the various lots are quite reasonable, as the Loon Lake Townplot has become of some importance and is now the centre of fairly extensive countryside business. [CBD, Vol 1, MAK-000108]

[369] In November 1942, General Superintendent Christianson reported back that when the lots were originally assessed the railway was under construction and the thought was that Loon Lake would be a thriving town. The changed status of the railway had, however, been taken into account by Donnelly, who noted that the "prospect of a railway coming through the town was abandoned" (CBD, VOL 1, MAK-000110). So, Donnelly had taken it into account that the plan for a railway had been abandoned when he valued the lots.

[370] Christianson said that "[a]t the present time Loon Lake is simply a small hamlet secluded in the bush" (CBD, VOL 1, MAK-000110). The location of the town was known to Donnelly, who would have taken this into account in valuing the lots.

[371] Christianson recommended the lots be valued at $75.00 for corner lots and $50.00 for inside lots, but those with larger widths be valued at $85.00 for corner lots and $60.00 for inside lots.

[372] D. J. Allan, Superintendent of Reserves and Trusts, wrote on November 12, 1942, that he was at a loss on whose advice to take, stating that although the townsite was remote from the railway facilities it was adjacent to a "lake much appreciated by local people as a summer resort"

(CBD, Vol 1, MAK-000111). Allan added that "the prices set by Surveys is high". Six days later, Allan recommended that Superintendent Christianson's valuations be adopted:

> Further to our conversation yesterday with Mr. White and Mr. Donnelly, I was frankly not impressed with the soundness of Mr. Donnelly's arguments for a higher price for these lots. I personally think that the attitude taken by Mr. White, that conditions had so changed since the survey was made that Mr. Donnelly's prices are already far out of line, is correct. You will recall that Mr. White specifically recommended that Mr. Christianson's prices be adopted. The writer finds Mr. Christianson's arguments much more convincing than those of Mr. Donnelly and recommends to you that the recommendation of our men in the field, and the prices set by them, be adopted.
>
> In order if possible to secure cash sales of the lands presently occupied by squatters, I would suggest that we first offer all lands presently occupied for sale to the occupants for cash at the price quoted by Mr. Christianson. When we have exhausted the possibilities of this suggestion we can then decide whether or not to fix the prices definitely for the balance of the lots as recommended by Mr. Christianson, or we might, for the said balance, fix the future price at one-half of Donnelly's prices as asked for by Mr. Gregory, which would be slightly higher than the figures set by Messrs. Christianson and Cameron. If we adopted 50% of Donnelly's prices the loss would run from $62.50 for the cheapest lots to $75.00 for the corner lots. The question of the Legion Hall property could be left as the subject of private negotiation. [CBD, Vol 1, MAK-000112]

[373] Allan subsequently instructed Christianson to arrange with Indian Agent Cameron to get in touch with the occupants and "offer each of them an opportunity to buy for cash the lots they occupy at the price recommended in your report" (CBD, Vol 1, MAK-000113). On December 1, 1942, McGill reported to M. P. Gregory that on the recommendations of the General Superintendent of Indian Agencies, the price of lots had been reduced to $50.00 a lot, $75.00 for a corner lot, with increases for wider lots, and that the squatters would be entitled to "some special consideration" (CBD, Vol 1, MAK-000115).

[374] In *Apsassin*, at paragraph 55, McLachlin J. noted in obiter that the Crown had a "fiduciary duty to exact a fair price" for land being sold.

[375] The rationale for selling the lots for less than the value attributed by the surveyor is, to say the least, unconvincing. The notion that sales to squatters at prices higher than those previously demanded would be "discriminat[ory]" ignores the market considerations properly applied by the surveyor. The idea that this would be unfair to the "squatters" and that they deserved "special consideration" failed to take account of the requirement that the DIA deal with

the land as would a person of ordinary prudence in managing its own affairs.

[376] The evidence establishes the probability that some of the lots created out of the land surrendered in 1939 were offered for sale at less than fair market value. The lots were sold, and there is little likelihood that the sale prices exceeded the asking price.

[377] The Claimant raises a lack of diligence by the DIA in enforcing the payment terms of numerous of the agreements for the sale and purchase of lots within the surrendered lands. An extract from a "Report of the Land Sales Arising from the 1932 and 1939 Surrenders of Makwa Sahgaiehcan First Nation Reserve 129B", prepared by researcher Jayme Benson, is in evidence. This is a detailed review of payment records for the sold lots. It reveals long delays in payment. However, it also shows that interest was collected on payments in arrears. A discrete claim based on delay in collecting payments is not made out on the evidence.

3. Disposition

[378] The remedy under the *Specific Claims Tribunal Act* for the breaches of fiduciary duty in connection with the 1939 surrender is compensation based on my finding that the Claimant has established a ground for the Claim under paragraph 14(1)(c) of the *SCTA*, in particular a breach of Crown fiduciary obligations in the administration of reserve lands.

E. 1958 Townsite Expansion

1. The Specific Relationship and Will of the Band

[379] By 1949, the Village of Loon Lake was well established. The Village Council wanted more land to allow for the growth of the community.

[380] On October 28, 1950, Mr. Harvey Bell, solicitor for a group of Makwa Band members, presented a petition dated October 20, 1950, to the DIA, signed by 20 members, asking for subdivision of part of the Reserve to accommodate the growing population of the Village of Loon Lake. The signatories valued the relationship with the Loon Lake villagers, who employed and bought produce from them, and "…remember our children at Christmas time…" (CBD, Vol 1, MAK-000126). The gender of the signatories is not noted, but their signatures appear under two columns, both headed "[h]is or her name or mark". Some names appear under each column. The signatures are rendered in a distinctive, non-Latin, orthography.

[381] One month later, Mr. Bell wrote again, explaining in part that:

> What these Indians had in mind was to reciprocate with the citizens of Loon Lake for the many kindnesses which have been extended to them by the citizens of that village, a feeling which does them credit. [CBD, Vol 1, MAK-000128]

[382] The local Member of Parliament suggested an exchange of reserve land for nearby provincial land. In a letter dated December 19, 1952, the Department stated that the Village of Loon Lake had several meetings with the "Indians" about purchasing some land and that any deal with the Band Council would have to be ratified by a vote of the membership.

[383] A Band Council Resolution in 1954 authorized the sale of 67.65 acres for $50.00 per acre. The Superintendent, Indian Agency, opined in a March 11, 1954, letter that it would be impossible to get 50% approval of the Band for the surrender and sale of 67.65 acres of land because "[a]lthough all the male members of the band appear to be in favour of this sale, they will not allow their women to vote" (CBD, Vol 2, MAK-000130). He noted that he had discussed it with the Band Council several times, but the Council was adamantly opposed to women voting.

[384] At a surrender vote conducted November 27, 1954, 20 of the 25 eligible male voters were present and voted in favour of the surrender and sale. No female Band members voted. The Superintendent recommended approval of the sale, but the Director of Indian Affairs considered the surrender vote void because it was not assented to by a majority of Band electors.

[385] A second surrender meeting was held July 6, 1955. Only eight male Band members were present. None of them voted for the sale of the land. There is no immediate explanation for the fact that 20 of the 25 male members voted in favour of surrender on November 27, 1954, and only eight attended the meeting on July 6, 1955, all of whom opposed surrender. Later events suggest that the Band decided to hold out for a better deal.

[386] A year later, a fresh proposal arrived. The Village Council asked for 190 acres for expansion and proposed an exchange of property "between the Indians and the Provincial Government" (CBD, Vol 2, MAK-000152). The Indian Agency Superintendent met on July 11, 1956, with the chief and council and other Band members. The Band was not in favour of an exchange but would sell 190 acres at $75.00 per acre. The Village Council did not have that kind

of money.

[387] The Province of Saskatchewan put forward a new proposal for a land exchange. The Superintendent met with the Band on May 1, 1957, and reported that the Band indicated interest in a land trade but not for the tract of land offered.

[388] The DIA's minutes of a June 5, 1957, meeting with the Band stated that he explained the purpose of the meeting was to consider either a trade or sale of 100 acres of IR 129B to the Village. The proposed trade was an exchange of 100 acres of reserve land adjacent to the existing Village land for 480 acres of hay land adjoining the boundary of the Reserve. A vote was taken on the land exchange proposal, but there is no record of a vote on either of the two formal surrender documents that the Department had provided to the Agent. Nineteen members voted in favour of a land exchange and four voted against it. The four who voted against wanted to exchange for different land. Again, only male members voted.

[389] Despite the Superintendent's recommendation to accept the June 5, 1957 vote, more senior DIA officials refused to approve it as it was not passed by a majority of eligible members. Once again, the male members of the Band refused to permit the women to vote.

[390] In summary, the documentary record reveals a sporadic negotiation over a period of seven years. The participants included members of the Village Council, DIA and provincial officials. The DIA consulted with the Band throughout. There were proposals and counter-proposals. The outcome of the negotiation was satisfactory to 19 of the 23 members who attended the June 5, 1957 meeting. The four who were not in agreement supported a land exchange but wanted land other than that which was on the table.

[391] The outcome of the June 5, 1957, vote is a strong indication of the desire of the membership to provide reserve land for the Village in exchange for farm land, as reserve, on a 1 to 4.8 acre basis. The Superintendent accepted the outcome of the June 5, 1957, vote as representing the will of the Band. To resolve the matter, it recommended to the Governor in Council that it permit the Province of Saskatchewan to expropriate the land that the Village of Loon Lake sought to acquire.

[392] On June 26, 1958, Order in Council PC 1958–886 consented to the Province of

Saskatchewan taking the surface rights of 100 acres of IR l29B pursuant to section 35 of the *Indian Act*, 1952, in exchange for 480 acres of provincial Crown land. The Order in Council recited that:

> …the electors of the Loon Lake Band of Indians, for whose use and benefit the said Reserve has been set apart, by a vote taken at a meeting of the Band on June 11, 1957, recommended approval of the application and agreed to accept in payment therefor four hundred and eighty acres of land from the Province… [CBD, Vol 2, MAK-000213]

[393] The reference to a "June 11, 1957" vote is in error as to the date. Northing turns on this.

[394] As for the "vote", it was not taken in compliance with the surrender provisions of the *Indian Act*. It is, however, a clear expression of the will of the male members of the Band.

[395] On August 5, 1958, Province of Saskatchewan Order in Council 1288/58 transferred to Canada the administration and control of surface rights of 480 acres of land. On September 25, 1958, the lands transferred from the Province of Saskatchewan were formally set aside as Makwa Lake Indian Reserve No. 129C.

[396] The Claimant argues that the DIA achieved indirectly the result that it could not achieve directly by obtaining a surrender and that this was improper, a breach of fiduciary duty.

[397] The DIA facilitated discussions among representatives of the Province of Saskatchewan, the Village and the Band. Villagers and the Band Council had met. Offers were made and countered. The DIA appeared keen to accommodate the Village in advancing its request for additional land, but the evidence does not support the Claimant's contention that it had "abnegated" control over the provision of the land in the sense of removing the Band from a central role in establishing the terms and making an autonomous decision to make land available to the Village.

[398] In the result, the Band gave up less land than it had offered at one point in the negotiation and received 4.8 acres, to be added to the Reserve, for every acre it would provide.

[399] The result was satisfactory to those who voted on June 5, 1957. The obstacle to proceeding by surrender was the ongoing opposition of the men to women having their say in the matter. There is no evidence of divisions in the Band over the land along lines of gender. The

exchange was, on the face of it, beneficial to the Band. The DIA found a way to give effect to the wishes of the Band.

[400] In *Apsassin*, the Supreme Court of Canada recognized that effect should be given, in the case of surrender, to the autonomy of Indigenous groups in decisions affecting reserve lands. While this transaction did not involve a surrender, it did reflect the autonomous will of the Band.

[401] In *Osoyoos* (per Iacobucci J. at paragraph 52), the Supreme Court of Canada recognized that the fiduciary duty of the Crown is not restricted to instances of surrender, but also extends to expropriations by the Crown pursuant to the *Indian Act*, 1952.

[402] The decision of the Federal Court of Appeal in *Semiahmoo*, arose out of a surrender of reserve land. At paragraph 37, the Federal Court of Appeal said this:

> The authorities on fiduciary duties establish that courts must assess the specific relationship between the parties in order to determine whether or not it gives rise to a fiduciary duty and, if yes, to determine the nature and scope of that duty. This approach applies equally in the context of the fiduciary duty owed to Indian Bands when they surrender reserve land. In my view, while the statutory surrender requirement triggers the Crown's fiduciary obligation, the Court must examine the specific relationship between the Crown and the Indian Band in question in order to define the nature and scope of that obligation. [footnote omitted]

[403] In the present matter, when account is taken of the specific relationship between the Band and the DIA in relation to the land "taken" by expropriation in 1958, the nature and scope of the fiduciary duty is to be determined by taking account of the wish of the Band to give effect to the land exchange that was negotiated with the Village and the Province. Although the number of male members of the Band is not in evidence, the DIA recorded that all were in favour. There is no evidence to the contrary. The outcome of the June 5, 1957, vote of the male members of the Band is a strong indication of the will of the Band that is uncontested by any other evidence. The Crown gave effect to the autonomy of the Band in circumstances where the land exchange was neither exploitative nor improvident. The Crown did not breach its fiduciary duties with respect to this transaction.

2. Legal Authority for the Expropriation

[404] The present position of the Claimant is at odds with the wishes of the membership of the

Band as expressed in the petition dated October 20, 1950. I infer from the layout of the petition that it was signed by some male and some female members. The Claimant's position is also at odds with the June 5, 1957, vote upon which all male members voted in favour of a land exchange.

[405] The Claimant's alternative arguments to breach of fiduciary duty rely on:

1. Construction of the limits within which section 35 of the *Indian Act*, 1952, may permit the alienation of reserve land; and,

2. Construction of provincial legislation conferring the power to take land for use of a village.

a) *Indian Act*, 1952, Section 35

[406] Order in Council PC 1958–886 consented to the Province of Saskatchewan taking the surface rights of 100 acres of IR l29B pursuant to section 35 of the *Indian Act*, 1952.

[407] In the present matter, the limits on the exercise of section 35, are established by the fiduciary duties of minimal impairment and timely presence of a public purpose (*Osoyoos*; *Semiahmoo*). The more general duties of disclosure, loyalty, prudence and prevention of improvident transactions also apply.

[408] Where fulfilling the public purpose requires the taking of the entire interest in the land it may be authorized under section 35 (*Osoyoos* at para 57).

[409] In the present matter, the exchange of reserve land for provincial Crown land necessitated the removal of the Band interest in 100 acres of reserve land and the addition of 480 acres of provincial land to the Reserve. To give as good as you get is manifestly reasonable.

[410] It may, as the Claimant argues, be true that there was no immediate market demand for the number of lots that could be subdivided out of 100 acres of land. However, the suggestion that reserve land be made available as the market grew would be completely at odds with the exchange, as the 480 acre addition to the Reserve was to be made as a single transaction.

b) Statutory Power of Expropriation

[411] The Claimant also argues that the Governor in Council had no legal authority to permit the expropriation as the Province of Saskatchewan, to which the grant was made in lieu of expropriation, had no power to expropriate land for expansion of the townsite.

[412] The Claimant's primary argument is that the taking of land for expansion of the townsite by subdividing the land and selling lots was not a public purpose under the provincial legislation cited by the Respondent to authorize a taking of land without the consent of the owner.

[413] Section 35 of the *Indian Act*, 1952, provides for the exercise of the expropriation of land by a municipal or local authority if consented to by the Governor in Council:

> **35.** (1) Where by an Act of the Parliament of Canada or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.

[414] The process for expropriation is governed by the empowering statute unless otherwise directed:

> (2) Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) shall be governed by the statute by which the powers are conferred.

[415] The Governor in Council may authorize a grant in lieu of taking:

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

[416] This is the text of Order in Council PC 1958–886:

> WHEREAS the Minister of Municipal Affairs for the Province of Saskatchewan has applied for the lands described in the Schedule hereto, being a part of Makwa Lake Indian Reserve number one hundred and twenty-nine B in the said Province and comprising one hundred acres;
>
> AND WHEREAS the electors of the Loon Lake Band of Indians, for whose use and benefit the said Reserve has been set apart, by a vote taken at a

> meeting of the Band on June 11, 1957, recommended approval of the application and agreed to accept in payment therefor four hundred and eighty acres of land from the Province, such land to comprise the surface rights of the West half (W½) of Section twenty-nine (29) and the Northwest quarter (NW¼) of Section Thirty-two (32) both in Township Fifty-eight (58) in Range Twenty-one (21) West of the Third Meridian (W3M);
>
> THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Minister of Citizenship and Immigration, pursuant to Section 35 of the Indian Act, is pleased hereby to consent to the taking of the lands described in the Schedule hereto and to transfer the administration and control thereof to Her Majesty in right of the Province of Saskatchewan. [CBD, Vol 2, MAK-000213]

[417] On its face, Order in Council PC 1958–886 is an exercise of the authority of the Governor in Council under the *Indian Act*, 1952, section 35.

[418] Order in Council PC 1958–886 satisfies the requirement of subsection 35(1), *Indian Act*, 1952, that consent be given to the exercise by "a province, a municipal or local authority" to exercise a power conferred by provincial legislation to take land without the consent of the owner. It also supplants the subsection 35(2) requirement for compliance with the procedures in the expropriation statute by providing for a direct transfer of the land, as authorized under subsection 35(3).

[419] The Respondent relies on the power of a municipal council under *The Municipal Expropriation Act*, RSS 1953, c 151 [*Municipal Expropriation Act*], read together with *The Community Planning Act*, SS 1957, c 48 [*Planning Act*], to expropriate land.

[420] The Claimant notes the absence in Order in Council PC 1958–886 of any reference to the statute conferring the power to take land, and that neither *Act* cited by the Respondent expressly confers on the applicant, namely the Minister of Municipal Affairs, the power to take lands without the consent of the owner.

[421] In *Osoyoos*, the section 35 Order in Council recited that the applicant was the Minister of Agriculture. As in the present matter, the recitals did not refer to the *Act* relied upon by the Minister. It was conceded by the parties that the Minister relied on the *Water Act* for the power to expropriate, as the land was taken for irrigation canal purposes. There is a parallel in the present matter, as the record reveals that the purpose of the taking was for the purpose of the

townsite. This would engage the application of the powers conferred by the *Acts* relied upon by the Respondent.

[422] In *Osoyoos*, the power to expropriate was assigned under the *Water Act*, subsection 21(1), to holders of water licences. This was said, at paragraph 61, to empower the Minister of Agriculture to expropriate any estate in land reasonably required for the purposes of the canal. The parallel in the present matter is the empowerment of the Minister of Municipal Affairs to exercise powers of expropriation conferred by the *Municipal Expropriation Act*.

[423] I return to the primary submission of the Claimant, namely, that the expropriation was not for a permitted public purpose.

[424] The legislative scheme in place in Saskatchewan that conferred expropriation powers and their exercise in 1958 brought into play both *Acts* relied on by the Respondent. The relationship among these, and the powers and permitted purposes for a taking, may be understood on examination of defined terms that appear in each enactment.

[425] The *Municipal Expropriation Act*, subsection 3(1) provides: "If the council desires to acquire land for any purpose authorized by the appropriate municipal Act, and cannot acquire the land by agreement with the owner, the council may pass a bylaw to expropriate the same in the name and on behalf of the municipality."

[426] Under the *Municipal Expropriation Act*, section 2.1 "'council' means the council of a municipality". Under section 2.5, the term "municipality" includes a village.

[427] A taking under the *Municipal Expropriation Act* is permitted for any purpose authorized by "the appropriate municipal Act" (subsection 3(1)). There is no list of "appropriate" municipal Acts.

[428] Under the *Planning Act*:

1. Under section 2.1, "council" means "the council of a…town, village".

2. Section 2.3 defines "land" to include "a right or interest in…land".

3. Subsection 22(1) provides for a "community planning scheme". This contemplates a plan for land use "within or outside the municipality" that, "in the opinion of the council, is related to the physical, social or economic circumstances of the municipality and affects or may affect the development of the municipality".

4. Subsection 30(1) empowers the council, for the purpose of carrying out the community planning scheme, to acquire land.

5. Subsection 30(2) empowers the council to expropriate land if it cannot be acquired from the owner at a fair price. In that event compensation is to be determined by arbitration under the *Municipal Expropriation Act*.

6. Section 2.8 defines "townsite" as "a subdivision of land into lots intended for residential or business purposes or both". This can apply under subsection 22(1) to land "within or outside the municipality".

[429] When read together, it is evident that the *Planning Act* is an "appropriate municipal Act" under the *Municipal Expropriation Act*, and provides authority for the taking of land for residential purposes.

[430] The Claimant relies on the established law that requires strict compliance with the requirements of statutes that confer the power to take land by expropriation. The *Municipal Expropriation Act*, subsection 3(1) requires a bylaw where the council cannot acquire the land by agreement with the owner. The Claimant correctly asserts that there is no evidence that council enacted a bylaw "to expropriate the same in the name and on behalf of the municipality".

[431] The Claimant also says that subsection 3(1) of the *Municipal Expropriation Act* permits expropriation only when the consent of the owner cannot be obtained, and that in the present matter consent was given.

[432] It is the case that the Governor in Council had consented to the transfer of the surface rights to the land in question. This was the consent of the Crown as the holder of title to the land. However, the only way that the Band, for whose use and benefit the Crown held title, could provide legal consent to the transfer of the land to the Province of Saskatchewan was by way of

surrender. A surrender could not be obtained, thus the transfer could not be made with consent of the beneficial owner.

[433] The Claimant would be correct in asserting the need for strict compliance with the expropriating statutes if the Governor in Council had exercised only the subsection 35(1) *Indian Act*, 1952, power. However, it went further and, as authorized by subsection 35(3), provided for a direct transfer of the land in lieu of a taking. In cases where the Governor in Council transfers land pursuant to subsection 35(3), the Governor in Council can "short-cut" the formal expropriation process (per Iacobucci J., for the majority, in *Osoyoos* at para 62). This obviated the need for a bylaw.

[434] The intended dedication of the land for townsite expansion was completed by the Province of Saskatchewan under *The Provincial Lands Act*, RSS 1953, c 45. The Lieutenant Governor in Council, as authorized by subsection 20(1)(f), set aside the taken lands for a townsite.

[435] In part, the Claimant grounds its 1958 "taking" Claim in equity. There is no evidence that the transaction was inequitable. On its face, the exchange of 100 acres of reserve land for 480 acres of farm land to be added to the Reserve suggests that the Band got the better of the deal.

[436] The evidence is sufficient for a finding that the *sui generis* interest in the land transferred to the Village was "taken" pursuant to an exercise of the autonomous will of the members of the Band. The present matter is unique on its facts, as the land in question would in probability have been surrendered but for the inability of the women to vote at a surrender meeting. It is speculation, but it seems likely that the male perspective was influenced by their experience over the decades in which the *Indian Act* permitted only the male members of a band to vote at a meeting called for consideration of surrender of an interest in a reserve.

F. Conclusion

[437] There was no breach of fiduciary duty or statute in the "taking" under section 35 of the *Indian Act*, 1952. The Claimant has not established a valid Claim arising from the 1958 "taking" for expansion of the Village of Loon Lake.

XVI. 1957 DISPOSITION OF SIX ACRES FOR MEADOW LAKE SCHOOL

[438] At the same time that the Village requested land for expansion of the townsite it asked for additional land for a school-site. An official of the Province's Department of Education informed the Department that section 53 of *The Saskatchewan School Act* allowed for the expropriation of land. The Deputy Minister of the Ministry of Indian Affairs advised the Province of Saskatchewan that the Department would be able to invoke section 35 of the *Indian Act* and would be pleased to cooperate in trying to make land available for the required school purposes.

[439] The Indian Agent met with the Band Council on June 5, 1957. The Indian Agent reported that a Band Council Resolution was passed agreeing to give the School Unit Board six acres of reserve land for a proposed new school. The June 5, 1957, Band Council Resolution accepted the price of $75.00 per acre for the school as a separate matter from the land exchange then being negotiated with the Province of Saskatchewan. Although their consent to a section 35 taking was not required by the *Indian Act*, consent was given.

[440] The Claimant argues that the Crown did not ensure minimal impairment of the Band's interest in the six acres taken for the Meadow Lake School. The Claimant argues that Canada should have consulted with the Band regarding the proposed location of the school, and whether those lands had previously been used by the Band for any specific purpose, so that any impairment of the Band's use and enjoyment of the lands could be mitigated. Further, the Claimant questions whether the area taken may have been in excess of the School Unit Board's immediate need.

[441] The Claimant argues that the area taken was in excess of the School Unit Board's immediate need and that in any event a leasehold interest would have satisfied the public need.

[442] There was a valid public purpose and insufficient evidence to support the claim that there was no present need for the land for school purposes or that the impairment was excessive. While no evidence was provided regarding discussions that may have happened at the meeting on June 5, 1957, this would logically have been an opportunity for the Band to raise any concerns they may have had regarding the taking of the lands for the school. Further, the Band Council Resolution, while not needed for the taking, is a strong indication that at that time, the Band had no objection to the taking of the six acres for the school. There is likewise an

insufficient evidentiary foundation to enable the Tribunal to determine whether a leasehold tenure would be adequate to meet the public interest.

[443] Order in Council PC 1958–614 dated May 1, 1958, consented to the taking pursuant to section 35 of the *Indian Act*, 1952. The transaction was completed accordingly. Here, again, there was no statutory breach or breach of fiduciary duty.

XVII. DISPOSITION, IN SUMMARY

A. Townsite Surrender, 1932

[444] The actions of Crown officials breached Crown fiduciary duties of loyalty, consultation and adequate consideration of the interest of the Band in preserving its land base. This tainted the dealings in a manner that made it unsafe to rely on the vote conducted at the meeting held February 9, 1932. The transaction was exploitative. It was in the administration of the Reserve that the Crown breached its fiduciary duties.

[445] The Claim arising from the 1932 surrender is valid on the paragraph 14(1)(c) of the *SCTA* ground:

> **(c)** a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;…

B. Railway Taking, 1933

[446] The ultimate failure of the Crown to protect the Band from the alienation of the land was in breach of the duty to preserve and protect the Indian interest from exploitation.

[447] The Claimant has established grounds for the Claim as it relates to the railway lands under paragraphs 14(1)(c) and (d) of the *SCTA*:

> **(c)** a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;
>
> **(d)** an illegal lease or disposition by the Crown of reserve lands;...

C. 1939 Townsite Surrender & Expansion, and Sales at Undervalue

[448] Although the taking of the surrender had the incidental effect of serving the interests of the DIA, the transaction was not exploitative or improvident. However, the Crown, post-surrender, breached its duty by offering the lots for sale at less than market value as determined by the surveyor. The paragraph 14(1)(c) of the *SCTA* ground is established.

D. 1958 Townsite Expansion

[449] The Crown did not, in circumstances in which the obstruction by male members of female members exercising their right to vote made compliance with the surrender provisions of the *Indian Act* impossible, exceed statutory authority or breach a fiduciary duty by facilitating this outcome.

E. 1957 Disposition of Six Acres for Meadow Lake School

[450] Order in Council PC 1958–614 dated May 1, 1958, consented to the taking pursuant to section 35 of the *Indian Act*, 1952. The evidence reveals no statutory breach or breach of fiduciary duty.

HARRY SLADE

Honourable Harry Slade, Chairperson

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20191213

File No.: SCT-5003-11

OTTAWA, ONTARIO December 13, 2019

PRESENT: Honourable Harry Slade, Chairperson

BETWEEN:

MAKWA SAHGAIEHCAN FIRST NATION

Claimant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Crown-Indigenous Relations

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant MAKWA SAHGAIEHCAN FIRST NATION**
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AND TO: **Counsel for the Respondent**
As represented by Lauri Miller and David Culleton
Department of Justice