DUNSTIN V. HELL'S GATE ENTERPRISES LTD, et al.

British Columbia Supreme Court, Cumming J., November 14, 1985

J. S. Trollestrup and L.J. Zivot, for all plaintiffs except The Queen in right of Canada
M. Taylor, for The Queen in right of Canada, plaintiff
R. Burke and G.D. Hoffman, for Kumsheen Raft Adventures Ltd., defendant.
H.R. Eddy, for The Queen in right of British Columbia, defendant by counterclaim.

The plaintiffs, members of an Indian band, claim an injunction to restrain the defendants, a raft outfitting business, from using an access road running across the Indian reserve. The defendants counterclaimed for a declaration that the road was a public highway. The band had allowed other outfitters to use the road and the lands for access purposes under contract, but the defendants refused to enter into a similar contract.

Under the Terms of Union, 1871, the Dominion government undertook to secure the construction of a railway to connect the seaboard of British Columbia with the railway system of Canada. Under s.13 of the Terms of Union, the Dominion government assumed responsibility for Indians in the province and the trusteeship and management of the lands reserved for their use and benefit. In turn the B.C. government undertook to convey further tracts of lands to the Dominion government for the use and benefit of Indians. In 1878 the Indian Commissioner of Indian Reserves allocated the reserve in question, however, the allocation was nothing more than a recommendation and was not acted upon until a later date. There was ongoing political and legal differences between the two levels of government respecting Indians lands in B.C. which were settled by agreement and legislation. It was finally agreed and effected by P. C. 208/1930 (Canada) that all public lands in the Railway Belt, except Indian lands, should be retransferred to the province. The reserve in question was listed as an exception. The agreement was confirmed by provincial, federal and imperial legislation in 1930.

Held: Action dismissed and judgment awarded to the defendants.

1. A public highway was in existence on the site of the present access road prior to 1880, the year when the public lands in the Railway Belt were transferred by the province to the Dominion to aid in the construction of the Canadian Pacific Railway line. The onus of showing that the road was a public highway prior to that time rested with the defendants and they have met that onus.

2. The ordinary high-water mark of the rivet bordering the reserve established by a survey in 1885 does not differ materially today. If there has been accretion of land, the access road, which ran down to the ordinary high-water mark in 1880, would extend over that accreted land to the new ordinary high-water mark.

3. Prior to 1880 none of the plaintiffs had acquired any interest in the reserve lands. The allotment of 1878 not the approvals of such allocations operated to grant any beneficial interests in land. The process simply resulted in an administrative wit hdrawal of provincial Crown land from homestead pre-emptions or other resource dispositions.

4. In 1880 the province transferred to the Dominion title to all public lands in the province subject to the rights of the public with respect to the use of common and public highways existing at that date, including the access road in question. The public rights which existed at that time were and are perpetual and cannot be extinguished except by proper legal authority. The instrument by which the reserve was created did not extinguish the public right or close the access road.

* * * * * *

CUMMING J.:

I. THE ACTION

This dispute focuses upon the Tuckozap Indian Reserve No. 24 (Tuckozap). The plaintiffs claim an injunction to enjoin the defendants from, among other things, using what is described as the "present access road" which runs a short distance across the reserve from the Lytton-Lillooet Highway to the east bank of the Fraser River just north of its confluence with the Thompson River. The defendant Kumsheen Raft Adventures ltd. (Kumsheen) responds with the claim that the

"present access road" was, prior to 1880, part of a public highway and remains so today and that, as such, it is open to use by members of the public, including Kumsheen, for their lawful pursuits.

Tuckozap is one of 33 reserves held by The Queen in right of Canada for the Lytton Indian Band. It is a triangular-shaped area containing approximately 200 acres located at the confluence of the Fraser and Thompson Rivers. Tuckozap is of significance to the members of the Lytton band and has long been used as a fishing and camping area. It contains an ancient burial site. The area was "allotted" as an Indian reserve on July 10, 1878, by Commissioner Sproat, then Commissioner of Indian Reserves.

In the late 1970's the sport of river rafting down the Thompson and Fraser Rivers began to evolve as a popular recreational pursuit and a number of rafting concerns (the outfitters) started to take advantage of this recreational demand. The outfitters require sites to launch and land their rafts and require, as well, access to those sites. Tuckozap, at the confluence of the two rivers, where the waters are relatively calm, has become a heavily used point for these purposes. The Lytton Indian Band has accommodated the outfitters, permitting them to use reserve land for access to the launching sites. The band, in association with other Indian bands, has entered into contracts with the River Outfitters Association of British Columbia which permit members of that association to use Tuckozap as an access point and also for picnic and camping purposes upon payment of an agreed-upon scale of fees. The defendant Kumsheen Raft Adventures Ltd. (Kumsheen) refused to enter into a similar agreement and, in these proceedings, challenges the band's interest in portions of Tuckozap and its right to control access across the reserve from the Lytton-Lillooet Highway to the Fraser River. It is the question of ownership and the right to control the use of Tuckozap land, and specifically the present access road, that has led to this litigation.

II. HISTORICAL BACKGROUND

In order to appreciate and resolve the issues in this case it is relevant to consider the history: factual, political and legislative, relating to the creation of Tuckozap and to the use and development of highway facilities to and through the area which it comprises.

Historically, persons wishing to travel up and down the Fraser or Thompson River corridors required a means of crossing at the Thompson River. Prior to Confederation the native people used their own boats to cross the Thompson. As early as 1860 a ferry was in service to take passengers across the Thompson and along the Fraser corridor. The ferry landed for a number of years on the left bank of the Fraser River near the southern tip of what is now Tuckozap.

In 1874 a contract was let by the provincial government for the construction of a bridge across the Thompson where it meets the Fraser. The extraordinary height of the rivers caused by the spring freshets in 1875 carried away both main piers of the bridge before the superstructure was placed in position and construction was delayed. Construction, under a renegotiate? contract, was completed in June, 1876. There was, by necessity, an approach to this bridge on the Tuckozap side and public moneys were expended on the construction of it as part of the then Lillooet-Lytton Highway. Again, in the summer of 1894, unprecedented flood levels of the river caused the total destruction of a number of the bridges on the Thompson River, including the one at Lytton and, in 1896, a new bridge, considerably longer and six-and-a-half feet higher than the old structure which it replaced was built on the same location. In 1912 the present bridge across the Thompson River was constructed some short distance upstream from the 1895 bridge, and it now forms part of the existing Lytton-Lillooet Highway.

On July 20,1871, British Columbia joined Confederation. Under s.11 of the Terms of Union, 1871, the Dominion government undertook to secure the construction of a railway to connect the seaboard of British Columbia with the railway system of Canada. For its part the Government of British Columbia agreed to convey to the Dominion government from public lands along the line of the railway throughout its length in British Columbia, and not to exceed 20 miles on each side of the line (the Railway Belt), in furtherance of the construction of the railway. Under s.13 of the Terms of Union, 1871, the Dominion government assumed responsibility for Indians in the province and the trusteeship and management of the lands reserved for their use and benefit. In turn, the Government of British Columbia undertook to convey further tracts of land to the Dominion government for the use and benefit of Indians.

It appears from the Reserve General Register, maintained by the Department of Indian Affairs, that on July 10, 1878, a Mr. Sproat, then Indian Reserve Commissioner, "allocated" Tuckozap to the Lytton Indian Band. This allocation appears to be, however, nothing more than a recommendation at that time, for it was not acted upon until a later date.

On May 8, 1880, the Legislative Assembly of British Columbia passed the Act to grant public lands on the Mainland to the Dominion in aid of the Canadian Pacific Railway, 1880 (B.C.). Section 1 set out a description of the land granted, which included the lands comprising the Tuckozap reserve, and s.2 provided:

> 2. This Act shall not affect or prejudice the tights of the public with respect to common and public highways existing at the date hereof within the limits of the lands hereby intended to be conveyed.

In mid-November, 1885, Captain W.S. Jemmett carried out a survey of what he described as:

> ...an Indian Reserve situate on the left bank of the Fraser River and the right bank of the Thompson River about 1 mile above Lytton. This reserve belongs to the Lytton Indians and is known as the Tuckozap or No. 24 Reserve.

This survey formed part of the basis for the plan of Lytton Indian Reserves No. TBC85, drawn by Jemmett in 1887 and approved by the Chief Commissioner of Lands and Works and the Chairman of the Indian Reserve Commission on June 24, 1887.

III. THE LYTTON-LILLOOET TRAIL AND THE PRESENT ACCESS ROAD

I shall return later to a more detailed consideration of the legislative and administrative steps taken by both levels of government when I come to consider the nature and extent of the title asserted by the plaintiffs. I am concerned, at this stage, with the history of the development of access across the Thompson River at its junction with the Fraser and northward over the Tuckozap lands towards Lytton.

Counsel for the defendant Kumsheen conceded that it is essential to the case for Kumsheen that it demonstrate that prior to May 8, 1880, when the public lands in the Railway Belt were transferred by the province to the Dominion to aid in the construction of the Canadian Pacific Railway line, a public highway was in existence on the site of the present access road. To succeed on this issue Kumsheen must establish on a preponderance of probabilities which, in these circumstances, requires cogent and substantial evidence, that such a highway did, in fact, exist: see Reed v. Town of Lincoln (1974), 53 D.L.R. (3d) 14 at p.25, 6 O.R. (2d) 391 at p.402, per Martin J.A., cited in Watson v. Township of Rideau et al. (1982), 36 O.R. 567 at p.570, per Grange J.; see also Brown et al. v. The Queen in Right of B.C., [1978] 6 W.W.R. 565 at p.570, per Andrews J. In my opinion, Kumsheen has done so.

From the exciting time when gold was discovered in the Colony of British Columbia in 1558, the construction of toad access to the interior of British Columbia, including the construction of the Cariboo Wagon Road through the Fraser Canyon to Lytton and beyond, was one of the main priorities of the colonial government of the day under Governor Sir James Douglas. A detachment of some 300 Royal Engineers was brought from England to assist in the surveying and in the actual construction of roads leading from the Lower Mainland to the interior. In the 1860' s, before the Thompson River at Lytton was bridged, a ferry service was established. Typical of the arrangements made in this regard is the contract dated August 25, 1868, made between Peter O'Reilly, Assistant Commissioner of Lands and Works for the Yale-Lytton District, acting on behalf of the Government of British Columbia, and Louis Allard, Publican, of Lytton, under which Mr. Allard was granted, for a period of two years from July 1, 1868:

> …the exclusive right of ferrying passengers, animals and freight for hire across the Thompson Rivet, within the limits described as follows, namely, two miles up the Thompson River from its mouth, up the east bank of the Fraser River to 8 bluff rock situated about half a mile from the mouth of the Thompson River, and extending down the Fraser River fifty yards from the mouth of the Thompson.

Under this contract Mr. Allard undertook:

> …to keep in running order, at the point above specified a strong and suitable scow boat with tackle and apparel complete and capable of carrying and conveying with safety not less than six loaded pack animals at a time. Also a strong and proper boat for the transport of foot passengers....

for which he was entitled, in consideration of paying to the government in quarterly instalments in advance the annual sum of $75, to levy and collect tolls according to the scale set out in the agreement:

	$ c
For every passenger, with personal luggage,	.50
For every Man and horse	1.00
“ “ Cattle per head	.50
“ “ Pack Trains, each animal,	.50
“ “ Sheep and hogs,	.25
“ “ Freight per 100 Ibs.	.25

Persons on government services were, together with their baggage, animals and freight, entitled to free passage. The absence of any specific charge reserved for wagons or other vehicles suggests that the road north from the ferry landing was a pack trail rather than a wagon road. That this is so is supported on the evidence by a letter written by Mr. Thomas Seward, whose pre-emption property was located just north of Tuckozap, some three miles from the ferry landing, to the Honourable Robert Beaven, then Commissioner of Lands, in September, 1874, in which he wrote:

> ... since the tender for the Thompson Bridge has been accepted I am building a wagon road leading to my farm, a distance of three miles running parallel with the present trail already made.

According to the evidence of Mr. D. MacSween, now manager property services, for the Ministry of Highways and Public Works, whose duties include the reviewing of the status of all public roads in every Indian reserve in the province and who, as the result of his studies and research, has become an expert in the history of road construction in British Columbia, the provincial government records disclose that in 1872 the sum of $1,425 had been expended by the government on the trail that went north across the Tuckozap reserve from the ferry.

It is apparent that the present access road reaches the beach on the east bank of the Fraser at a point south of the northern limit of the area of Mr. Allard's ferry franchise. Survey plans of the Town of Lytton, prepared by the Royal Engineers in June, 1860, show graphically the approximate locations of the ferry routes, and the existence of the trail coming down from the north to teach the beach on the east bank of the Eraser at a point indicated as the high-water mark, where the ferry, crossing from Lytton, landed.

A photograph, taken some time after 1876, shows the Thompson River Bridge at Lytton which had been completed that year. The northern approach to it, part of the Lytton-Lillooet Highway, clearly appears from the photograph to turn to the right as it heads north. Counsel for the defendant Kumsheen led evidence to support his contention that, in fact, the roadway north of the bridge, when it was completed, turned, not to the right but to the left, and proceeded downwards for a distance of about 100 yards to a point where it joined the trail leading from the ferry landing to the old trail. Evidence of witnesses who inspected the ground, supported as it was by other photographs, confirms the fact that a roadway did exist on this lower location. But I am satisfied that it was a construction access road built by the bridge contractors for the purpose of hauling bridge timbers, which came from an area near Kamloops, some distance to the east and on the other side of the Thompson, and had to be transported across the Thompson and hauled to the site as the bridge construction proceeded from its north end. The significance of this evidence is that, while it does not support the suggestion that the public highway proceeded from the north end of the bridge down towards the rivet bank, it does provide strong confirmation of the fact that the ferry landing was where the defendant Kumsheen says it was, namely, on the left bank of the Eraser where the present access road reaches the beach.

Careful consideration of the Seward correspondence with the Commissioner of Lands and Works and of further correspondence between Mr. Arthur Stevenson, then superintendent of construction for the Department of Public Works at Lytton, and his departmental superiors, leads me to the conclusion that Mr. Seward's wagon road, at its southern end, came down to what had been the trail leading from the ferry landing to the bench land above. The road which Seward was building in 1874, after the contract for the bridge had been let, was "running parallel with the present trail". At that time the design of the bridge called for the location of its north end some distance downstream on the right bank of the Thompson from the point where it was ultimately built. On March 11, 1875, Stevenson reported that "Seward has built a road from his farm to within 100 yards of the river". The construction access road, which lies riverward of the travelled highway shown on the post 1876 photograph to which I referred, meets the present access toad about 100 yards from the north end of the bridge. After the piers of the bridge under construction washed out in the spring of 1875, the bridge was redesigned to land further upstream and higher on the bluff than originally planned. I therefore think it reasonable to conclude that Mr. Seward, as

he proceeded with the building of the wagon road south from his farm towards the bridge to be built where originally planned and where he thought it would be, would take it down to the river, where the present access road runs, to the point within a hundred yards of the bridge. On May 6, 1876, Stevenson was instructed to "make approach and clear Seward' s road". This I interpret to mean that Stevenson should construct the new approach to the bridge shown in the photograph so as to connect with the wagon toad on the higher ground. But before this was done Seward had carried his wagon road down to the ferry landing along the trail leading to it; a trail on which public money had been spent and which was, admittedly, a public highway.

Commissioner Sproat, as already noted, "allotted" the area under consideration as an Indian reserve in 1878. Attached to his report of July 10, 1878, in which he sets out a form of legal description of the area allotted, is a small plan of Mr. Seward's pre-emption claim which shows the Lillooet trail running close by it on the west. Commissioner Sproat was assisted in his work by Mr. Edward Mahun, who as surveyor to the Indian Reserve Commission, prepared what he described as a "rough sketch of the left bank of the Fraser-Lytton", The sketch shows the existence of the Lytton-Lillooet Road to the north of the bridge across the Thompson and shows, as well, a stub running down from the toad to the east bank of the Fraser at a point which, I am convinced, corresponds to the ferry landing. The evidentiary value of the Mahun sketch as it relates to the road or trail leading to the ferry is attested to by Mr. MacSween who, on cross-examination, said:

Q .. what evidence would you look for that could satisfy you as to where a road was located, 8 provincial government road, in 1880, what would be your minimum standard of evidence that would convince you in terms of probability of road that existed in 1880?

A I don' t think that there is any minimum or maximum of information that a person could have, I think that you have to look at the evidence that you can dig up and look at it all and see if some picture emerges from that. In some, well, as I mentioned before you never have enough information to tie down every question that arises with respect to toads.

Q But would you agree that surveyor sketches would probably be the most cogent evidence?

A Yes. That' s what I would most like to have for this road would be a traverse of that. The alignment of that road that would run from the bridge and where it ran from there or from the ferry.

Q So if you were asked to form an opinion as to what roads existed in 1880 and where did those roads go, you would place the greatest emphasis on a surveyor's sketch if one existed?

A If one existed, yes.

Q …You are familiar and you have seen Mr. Mahoon's [sic Mahun's] sketch of 1878, Mr. McSween [sic MacSween]?

A Yes.

Q And do you know from your examination, I would like the enlargement. Mr. Mahoon [sic Mahun] was, he was attached to the joint commission headed by Mr. Sproat, Mr. Mahun was attached?

A Yes.

Q Commissioner Sproat. And it was the Indian Reserve Commission in those days , and they usually had a surveyor attached to them, did they not?

A Yes.

Mr. Bartell, a qualified British Columbia land surveyor, called on behalf of Kumsheen, testified that he carried out certain surveys of the area in question and physically inspected the ground from the north end of the bridge to a point well north of the present access road. He expressed the opinion, based essentially on the topography of the ground in the area as he found it, "that the current take-out road [the present access road] is very probably a redevelopment of the road servicing the ferry landing at the confluence of the Thompson and Fraser Rivers". Mr. Bartell felt confirmed in this opinion because his examination of the area to the ,north discovered no evidence of any other road leading up from the river bank to the bench above or parallelling the present highway. Mr.

MacSween, in turn, agreed that the topography is such that the location of the present access road is the logical site for the location of the toad leading from the ferry to the bench above the beach and on to the north. He said:

Q In terms of topography of the land, the road that now exists at this location is the most likely way to get from the beach to the top of the bank a hundred years ago?

A It' s the most convenient route and most easily accessible route if you were travelling in a northerly direction, yes.

Q The easiest route to get from the beach to the top of the bench?

A Within the confines of the reserve, yes. There may be other points further to the north of the reserve that I haven' t looked at all.

Q But you would have to go a considerable distance north on the left bank of the Fraser, you weren't able to find any by standing in this area in general, there is no spot from a topographical point of view farther north on the left bank of the Fraser with which to make that to get access to the, from the beach to the top of the bench?

A I'm sorry, I didn't look far enough ahead there to be able to make a value judgment on that?

. . . . .

THE COURT: Just on that point, as I understand the ferry contracts the ferry couldn't go much farther up the Fraser?

MR. BURKE: That's correct. That's true,

THE COURT: Wasn't it half a mile up?

MR. BURKE: Yes.

After the completion of the bridge in 1876 the ferry across the Thompson was terminated and, presumably, the trail from the landing at the beach on the left bank of the Fraser to the bench above fell into disuse. In 1894 extreme high river-flows washed out the 1876 bridge, and in 1895 a new bridge, somewhat higher in elevation and longer, was built on the same location. Mr. MacSween agreed that, although he had found nothing in the government's records to indicate what was done, it is reasonable to assume that during the outage the ferry was pressed back into service to provide a temporary crossing. It is also logical that the trail was used again. A photograph of the 1895 bridge, taken some time before 1912, shows what appears to be a wharf or a groin creasing the beach where the trail reaches it. Again, according to Mr. MacSween, there is no record in the files of the provincial government relating to this structure, but he agreed that it may have been built by the contractors engaged in building the railway. A steam stern-wheeler, the "Skuzzy", was built for the railway contractor, Andrew Onderdonk, and was used from 1882 to 1884 to transport railway construction materials from Boston Bar to Lytton. She may well have off-loaded at the ferry landing from where the materials could be hauled back over the bridge to Lytton. I refer to the "Skuzzy" and the point where she may have off-loaded, not to suggest that the Crown Dominion had dedicated this route as a highway, but merely to provide some further confirmation of the location of the road which already existed.

A number of aerial photographs of the area of concern were entered as exhibits. They were taken on various dates in the years 1928, 1948, 1964, 1976 and 1978. Those taken in 1968 and in the 1970's show clearly the current access road, but none of the witnesses at the trial, who examined them in the artificial light of the court-room, could discern any evidence in the earlier photographs of the old trail leading from the ferry. I have examined them closely in natural daylight and think that the 1928 aerial photograph shows some trace of the trail, but I do not found my decision on my own untrained observation. The trail had fallen into disuse for several decades and was considerably overgrown, which provides an explanation for the lack of clarity in the earlier photographs.

Mr. Louis Phillips, a member of the Lytton band and its chief for several years, was called on behalf of the plaintiff band. He gave evidence that the present access road was first built by a firm of highway paving contractors who were repaving the Lytton-Lillooet Highway. Mr. Phillips was born in 1907 and, I find, over the pears his memory has failed him. Mt. Edmund Bauder, called on behalf of Kumsheen in rebuttal, testified that in 1971 he was employed by Dawson

Construction limited as superintendent on the job for the repaving contractors. The firm acquired access to a water supply in connection with this work. Mr. Bauder said that on the site he discovered an old route which he said was the alignment of the present access road and that he had his crew clear it to provide access to the beach for water trucks. Mr. Bauder said that his firm did not pave the road. It has since been paved, but there 16 no evidence as to when or by whom.

The route of the present access road shows also on the 1964 aerial photograph. According to Mr., MacSween some work was done on the highway in the 1960's; a straightening out of the curve north of the bridge and realigning it somewhat closer to the river. Presumably, the contractor involved in that work used the toad for the same purposes as did the crews working under Mr. Bauder. The effect of that realignment would be to shorten the length of the present access road to the highway from the river.

On a consideration of the whole of the evidence, and having in mind the onus upon Kumsheen to establish its claim by strong and cogent evidence, I am satisfied that the present access road is located on the route of what was, prior to 1880 and by virtue of ss.71 and 72 of the Land Act, 1875 (B.C.), No. 5, 8 common and public highway, the soil of which was vested in Met Majesty the Queen in right of British Columbia. For the reasons which I have given I am of the view and so hold that it existed then as a wagon road. If I am wrong in that conclusion, there was at least an existing trail of sufficient width to enable loaded pack-horses to pass, and that was a public highway. Once that is established, the onus shifts, and it is incumbent on the parties who assert that the public rights have been extinguished to do so upon "clear irrefragable evidence": see Cameron v. Wait, infra.

IV. THE ORDINARY HIGH-WATER MARK

Considerable time at the trial was spent on the question of the location of the ordinary high-water mark of the Thompson and Fraser Rivers where they flow past the southern end of the Tuckozap reserve, The following extracts from the instructions issued under the authority of the Canada Lands Surveys Act, R.S.C. 1970, c.L-5, point up the matters to be considered:

> In common law, a natural boundary at any instant is the designated natural feature as it exists at that instant, and the boundary position changes with the natural movements of the feature so long as these movements are gradual and imperceptible from moment to moment....
>
> In the case of water boundaries, except where applicable legislation, judicial decisions, or existing rights are to the contrary, use "ordinary high water mark" as the feature defining the boundary.

The instructions include, as well, these definitions:

> 6. A "traverse" is a continuous series of connected straight lines the lengths and bearings of which have been measured.
> …
>
> 9. "Offset" means the measurement of the bearing and length of a single straight line from a point fixed by survey to another nearby point which it is required to fix.
> …
>
> 19. The "bed" of a body of water has been defined as the land covered so long by water as to wrest it from vegetation, or as to mark a distinct character upon the vegetation where it extends into the water or upon the soil itself.
>
> 20. The "ordinary high water mark" of a body of water is the limit or edge of its bed and in the case of non-tidal waters it may be called "the bank" or "the limit of the bank".
>
> 21. The "right" or "left bank" of a river or stream is that bank which is on the right or left side of the bed as the case map be when the observer is looking downstream.

These instructions and definitions, it is fair to say, simply reflect rules of the common law and standard surveying practices which have existed for many, many years. In Clarke v. City of Edmonton, [l929] 4 D.L.R. 1010 at pp.1012-3, [1930] S.C.R. 137 at pp.141-2, Lament J. said:

The matters to be considered in determining whether a given piece of land forms part of the bed of the river or has been wrested therefrom were stated in Romer, J., in Hindson v. Ashby, (1896] 1 Ch. 78, at p.84; [1896] 2 Ch. 1, as follows:

> I think that the question whether any particular piece of land is or is not to be held part of the bed of a river at any particular spot, at any particular time, is one of fact, of ten of considerable difficulty, to be determined, not by any hard and fast rule, but by regarding all the material circumstances of the case, including the fluctuations to which the river has been and is subject, the nature of the land, and its growths and its user.

His Lordship also quoted the following passages from the judgment of Curtis, J., of the Supreme Court of United States in the case of Howard v. Ingersoll (1851), 13 Howard (U.S.) 381, which he said were in accordance with English law on the point. Curtis, J., said (pp.427-8):

> The banks of a river ate those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the banks, by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water. But neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor of a middle stage of water, can be assumed as the line dividing the bed from the banks. This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect of vegetation, as well as in respect to the nature of the soil itself....
>
> But in all cases the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearances they present; the banks being fast land, on which vegetation, appropriate to such land in the particular locality, grows wherever the bank is not too steep to permit such growth, and the bed being soil of a different character and having no vegetation, or only such as exists when commonly submerged in water.

When Captain Jemmett carried out his survey in November of 1885, he fixed the ordinary high-water mark of the river bordering Tuckozap by a series of traverses and offsets made, in the case of the left bank of the Fraser, from the beach and, in case of the Thompson, from the bank above the river. Messrs., Bartell and Collins, both qualified and experienced land surveyors, examined the site and expressed the opinion that the ordinary high-water mark today does not differ materially from that established by the Jemmett survey. Against these opinions the plaintiff relied upon that of Professor Church, a fluvial geomorphologist, who opined that the ordinary high-water mark lies 15 to 20 feet below the level fixed by Captain Jemmett. In his report Professor Church explains his method for determining the high-water level as follows:

> The site was visited on Friday, September 13 and an inspection conducted to identify indications of ordinary high water. The upper limit of "pitting" on the tight bank concrete pier of the Thompson River crossing of Highway 12 served to define a candidate datum, which was then tested by a level survey of the confluence vicinity. The survey was accomplished by placing a surveyor' a optical level ... at the elevation of the supposed high water datum and scanning the shores to search for other evidence of high water....

and then goes on to detail his observations.

I cannot prefer Professor Church' s opinion over that of the surveyors. Professor Church is not a qualified surveyor, although he did say that he had done some surveying. Several of the photographs appended to his report illustrating the observations he made through his telescope clearly show the presence of river-bed soil and gravel well above what he claimed to be the high-water level. His selection of what he said was the upper level of the "pitting" observed on the concrete pier of the bridge as a "candidate datum" is unsound. The "pitting" is more a function of stream flow frequency than of the level of ordinary high water. And he said the definition of "ordinary high water" has no consistent relation to stream flow frequency. Furthermore, Professor Church said that no particular expertise is required to identify the upper limit of pitting; any observant layman could do it. Mr. Frandrich, president of Kumsheen, was called in rebuttal. He gave evidence, which I accept, that early that day he had examined the bridge pier and found pitting in the concrete of the same character as that described by Professor Church to a level 10

feet above the upper limit which Professor Church had selected. Professor Church could only speculate that Captain Jemmett had erred, either as a result of applying different criteria used at the time to determine the ordinary high-water mark, or of having been deceived by evidence left on the ground by extremely high rivet flows in 1874 or 1882. There is no evidence that the instructions to or practices of surveyors in Captain Jemmett's day were any different than those in use today. Nor is there anything to substantiate the suggestion that Captain Jemmett allowed himself to be deceived. Professor Church said that "in a large sense" the site is stable. If there has been any progradation or accretion to the left bank of the Fraser resulting in the shifting riverward of the ordinary high-water mark at this location it has, in my view, been very slight. I cannot accept the contention that Captain Jemmett erred by 15 to 20 feet, and I find that the ordinary high-water mark is substantially as he located it, modified only to the extent indicated by Mr. Bartell on the plan he produced.

It is well-settled law that land gained by accretion accrues to the benefit of the riparian owner: see Re Monashee Enterprises Ltd. and Minister of Recreation d Conservation for B.C. (1981), 124 D.L.R. (3d) 372, 28 B.C.L.R. 260, 23 L.C.R. 19 (B.C.C.A.). It was connected by counsel for the province, and for all the plaintiffs, that if it found that a public highway existed on the site of the present access road down to the ordinary high-water mark of the Fraser River prior to 1880, and if there has been some accretion of land from its then terminal, riverward, the public right of way extends over that accreted land bounded by the extension riverward of the boundaries of the toad to the new ordinary high-water mark. That concession was, in my opinion, properly made, and I adopt it.

V. THE LEGISLATIVE HISTORY

I turn now to review the legislative and administrative steps taken by the two governments following the passage of the Railway Belt legislation.

By the Public Lands in British Columbia Act, R.S.C. 1886, c.56, the Government of Canada directed that the lands in the Railway Belt be placed on the market and offered for sale to settlers and authorized the Governor in Council to regulate the manner in which, and the terms and conditions on which, the lands should be surveyed, laid out, administered, dealt with and disposed of and to extend the jurisdiction of the Dominion Lands Board to public lands in British Columbia which 'are the property of Canada. Following the passage of this Act, numerous Orders-in-Council providing regulations for the settlement, disposal and administration of Dominion lands in the Railway Belt of British Columbia were passed between April 12, 1866 and May 13, 1910. Paragraph (a) of s.38 of the regulations established by Order-in-Council dated September 17, 1889 (P.C. 2169), provided that the Governor in Council might withdraw from the operation of regulations such lands as have been or may be reserved for Indians. This provision of the regulations, along with many others, wee rescinded by Order-in-Council passed May 13, 1910.

The long litany of ongoing political and legal differences between the two levels of government , and the efforts to resolve them, have been fully recorded elsewhere and it is not necessary to review them in great detail here. Suffice it to say at this juncture that some measure of accord was arrived at and recorded in the memorandum of agreement made between Mr. J.A.J. McKenna, a special commissioner appointed by the Dominion government to investigate the conditions of Indian affairs in British Columbia, and the Honourable Sir Richard McBride as Premier of the Province of British Columbia, and signed at Victoria, British Columbia, on September 24, 1912. The recital sets out the good intentions of these gentlemen as follows:

> Whereas it is desirable to settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian affairs generally in the Province of British Columbia, therefore the parties above named , have, subject to the approval of the Governments of the Dominion and of the Province, agreed upon the following proposals as a final adjustment of all matters relating to Indian affairs in the Province of British Columbia....

The memorandum goes on to record the following heads of agreement:

> 1. and 2. A commission shall be appointed .·· [and] shall have power to adjust the acreage of Indian Reserves in British Columbia in the following manner:
>
> (a) At such places as the Commissioners are satisfied that more land is included in any particular reserve as now defined, than is reasonably required for the use of Indians of that tribe or locality, the Reserve shall, with the consent of the Indians as required by the Indian

Act, be reduced to such acreage as the Commissioners think reasonably sufficient for the purposes of such Indians.

(b) At any place at which the Commissioners shall determine that an insufficient quantity of land has been set aside for the use of the Indians of that locality, the Commissioners shall fix the quantity that ought to be added for the use of such Indians.

3. The Province shall take all steps as are necessary to legally reserve the additional lands which the Commissioners shall apportion to any body of Indians in pursuance of the powers above set out.

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

7. The lands comprised in the Reserves as finally fixed by the Commissioner a shall be conveyed by the Province to the Dominion ... subject only to a condition that in the event of any Indian tribe or band in British Columbia at some future time becoming extinct, then any lands within the territorial boundaries of the Province which have been conveyed to the Dominion ... for such tribe or band, and not sold or disposed of ... shall be conveyed ... to the Province.

8. Until the final report of the Commissioner is made, the Province shall, withhold from pre-emption or sale any lands which they have a disposing power and which have been heretofore applied for by the Dominion as additional Indian reserves or which may during the sitting of the Commission, be specified by the Commissioners as lands which should be reserved for Indians.

On its face and , indeed, as confirmed by subsequent actions at both levels of government, the agreement itself did nothing dispositive of land rights; it merely agreed that a commission should be set up to make recommendations in that regard.

That next step disclosed in the material before me occurred on January 5, 1913, when the Governor in Council passed P.C. 205, purporting to withdraw from the operation of the regulations for the administration and disposal of lands within the Railway Belt certain lands which had been reserved for Indians, described in the schedule attached, which had been surveyed and shown on attached, which had been surveyed and shown on official plans of various townships. Under the headings “Indian Reserve, Official Plan o which Shown” and “Date of Confirmation”, the following appeared with respect to Tuckozap:

Indian Reserve	Official Plan on which Shown	Date of Confirmation
Lytton No. 24	S.W. ¼ Tp. 15, R.26 West 6 Mer.	15th April, 1911
(Tuckozap)	N.E. ¼ Tp. 15, R. 27 West 6 Mer.	16th Sept., 1907

An examination of the recorded surveys and official plans makes it mote than abundantly clear that the reference to the 1/4 Tp. 15, R.27, in the schedule to P.C. 205, is simply a clerical, typographical error. This case cannot in any way turn upon such a trifling little mistake. I have no hesitation in concluding that the reference should be to the S.E. 1/4 of the referenced parcel of land.

I shall return to further consideration of P. C. 205. It is sufficient to note at this point that Mr. Burke on behalf of the defendant, Kumsheen, submits that it signified nothing. He points out, firstly, that the regulation under which it purports to have been passed had, some three years previously, been rescinded and that, in any event, it does not, in terms, purport to create any rights to an interest in land.

The supplement to the Annual Report of the Department of Indian Affairs for the year ended March 31, 1913, sets out a schedule of Indian Reserves in the Dominion. In that schedule Tuckozap Reserve No. 24, comprising 211 acres, is described as follows:

Kamloops district, at the confluence of the Thompson and Fraser rivers, on the left bank of the latter, in township 15, ranges 26, 27, west of 8th meridian.

Thus far, and although title to the public lands comprising the Railway Belt had been transferred by the province to the Dominion some thirty years previously, nothing really definitive had been settled with regard to the reserves in them. All rested in the realm of bureaucratic recommendation and political intention with nothing conclusive accomplished in any effective legal sense. Positive steps, it had been agreed, would await the report of the Royal Commission on Indian Affairs for the Province of British Columbia, appointed as a consequence of the McKenna-McBride Agreement. On May 31, 1916, the commission recorded minutes of a decision in the following terms:

> In virtue of powers and instructions from the Governments of the Dominion of Canada and the Province of British Columbia ... authorizing and empowering us as a Commission to fix, determine and establish the number, extent and locality of the Reserves to be set aside, allowed, established and constituted for the use and benefit of the Indians of the Province of British Columbia, we ... do hereby declare the following to be the Reserves for the under mentioned Indian tribes respectively....

With respect to the Lytton Agency -- Lytton Tribe, effective March 15, 1915 -- the commission ordered:

> That the Indian Reserves of the Lytton Tribe or Band, Lytton Agency, described in the official schedule of Indian Reserves, 1913 ... and numbered from one (1) to twenty-seven (27), both inclusive, BE CONFIRMED as now fixed and determined and shewn on Official Plans of Survey, viz:...
>
> No. 24 -- Tuckozap, 211 acres (Reduced to 196.25 by allowance of C.N.P.R. Co.'s right-of-way of 14.75 acres).

It remained for the Governments of British Columbia and Canada respectively to take the appropriate legislative steps to implement the recommendations of the 1916 Royal Commission on Indian Affairs. To this end, on March 29, 1919, the province enacted the Indian Affairs Settlement Act, 1919 (B.C.) c.32, which, after reciting in the preamble the McKenna-McBride Agreement, the appointment of the Royal Commission and the receipt of its report and recommendations, by s.2 empowered the Lieutenant-Governor in Council to:

> 2. ... do, execute, and fulfill every act, deed, matter, or thing necessary for the carrying-out of the said Agreement between the Governments of the Dominion and the Province according to its true intent, and for giving effect to the report of the said Commission, either in whole or in part, and for the final adjustment and settlement of all differences between the said Governments respecting Indian lands and Indian Affairs in the Province.

and power to carry on further negotiations and enter into further agreements

> 3. … as may be found necessary for a full and final adjustment of the differences between the said Governments.

On July 1, 1920, Parliament passed the British Columbia Indian Lands Settlement Act, 1920 (Can.) c.51, in terms parallelling the provincial statute giving like powers, from the Dominion aspect, to the Governor in Council. In the three-year period following, representatives of the two governments, Mr. W.E. Ditchburn, representing the Dominion and Major J.W. Clarke, representing the province, appointed "for the purpose of adjusting, readjusting, confirming and generally reviewing the report and recommendations of the Royal Commission", carried out their assignment and ultimately submitted their report. Order-in-Council No. 911, approved by the Lieutenant-Governor in Council on July 26, 1923, after reciting the McKenna-McBride Agreement and all the intervening steps that had been taken, approved and confirmed the report of the Royal Commission, as amended, "as constituting full and final adjustment and settlement of all differences". On July 24, 1924, the Governor in Council passed P.C. 1265 in terms parallel to those of the provincial Order-in-Council of the prior year. P.C. 1265 goes on to note that:

> … to ensure uniformity, the Royal Commission was requested to extend to the Railway Belt their examination into the needs of the Indians for reserves in that portion of British Columbia, and to make recommendations; that the work was accordingly carried out and their report and recommendations are to be found in the general report on Indian Reserves throughout the Province.

and approves the following:

> As the lands in the Railway Belt ate under the sole jurisdiction of the Dominion the Minister recommends that the findings by the Royal Commission with reference to reserves within the Railway Belt be confirmed, but that no reduction or cut-off made in the areas of the reserves, as recommended by the said Royal Commission.

Agreement was near, but not quite complete.

There then developed the proposal, which had been agitated for some time, that lands in the Railway Belt not required for railway purposes or for the purpose of establishing reserves for the use and benefit of Indians be transferred by the Dominion back to the province. Dr. Duncan C. Scott and the same W.E. Ditchburn, on behalf of the Dominion, and Messrs. Barry Cathcart and O.C. Bass, on behalf of the province, were designated by the respective governments:

> … to consider the interests of the Indians of British Columbia, the Department of Indian Affairs and the Province of British Columbia, arising out of the proposed transfer ... and to recommend conditions under which the transfer might be made with due regard to the interests affected....

Lands in the Peace River block, lying outside the Railway Belt, had previously been conveyed by the province to the Dominion and it was contemplated that these, as well, would be reconveyed to the province. And it was, of course, also contemplated that further tracts of public lands lying outside both of these areas would be conveyed by the province to the Dominion pursuant to s.13 of the Terms of Union. These gentlemen recorded their agreement in a memorandum signed at Victoria, British Columbia, on March 22, 1929. They set forth as their guiding principle the following:

> As the tenure and mode of administration of Indian Reserves in the Railway Belt ... would be governed by the terms of the conveyance by the Province to the Dominion of the Indian Reserves outside those areas it was thought advisable to agree if possible upon a form of conveyance particularly as that question had been before the Governments for some time and remained undecided....

Under "Head 1" of their memorandum of agreement the form of conveyance from the province to the Dominion of the Indian reserves outside the Railway Belt and the Peace River block was settled. "Head 5" of the agreement referred to the Indian claims to the foreshore of their reserves and set out the text of a letter from the late Premier John Oliver to the Superintendent General of Indian Affairs dated April 23, 1924, in which the provincial policy that riparian rights would accrue to the Indians through the Indian Department to the same extent as they would apply to a person other than an Indian was confirmed as the policy to be followed by the province in the future.

"Head 6" of the agreement contains the following:

> Regarding Indian Reserves in the Railway Belt we have agreed that the Indian Reserves set apart by the Dominion Government in the Railway Belt ·· shall be excepted from the re-conveyance of the Railway Belt and shall be held in trust and administered by the Dominion under the terms and conditions set forth in the Agreement … between Mr. J.A.J. McKenna and the Hen. Sir Richard McBride ·· and in the form of conveyance marked "A" of the Indian Reserves outside the Railway Belt....

On February 3, 1930, the Governor in Council passed P.C. 208, approving the Scott-Cathcart Agreement and the form of conveyance which it recommended. Schedule 3 to P.C. 208 gave the following description for Tuckozap:

> Kamloops District, at the confluence of the Thompson and Fraser Rivers on the left bank of the latter, in Tp. 15 R's. 26, 27, W. 6th M.

and noted, as a date of confirmation, “O.C. 26th, January, 1913", which is, of course, P.C. 205 previously referred to.

Schedule 4 to P.C. 208 is the approved form of conveyance recommended by the Scott-Cathcart Agreement for the transfer of lands outside the Railway Belt by the province to the Dominion for Indian reserve purposes. It contains the following key provision:

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

On February 20, 1930, a memorandum of agreement was entered into between the governments of the Dominion and the province which contained the following provisions:

> 1. Subject as hereinafter provided, all and every interest of Canada in the lands granted by the Province to Canada as hereinbefore recited (being lands in the Railway Belt and the Peace River Block) are hereby re-transferred by Canada to the Province and shall, from and after the date of coming into force of this agreement, be subject to the laws of the Province then in force relating to the administration of Crown lands therein.
> …
>
> 13. Nothing in this agreement shall extend to the lands included within Indian Reserves in the Railway Belt and the Peace River Block, but the said reserves shall continue to be vested in Canada in trust for the Indians on the terms and conditions set out in a certain order of the Governor General of Canada in Council approved on the 3rd day of February, 1930. [P.C. 208].

Subsequently, the memorandum of agreement of February 20, 1930, was approved by British Columbia by the Railway Belt Retransfer Agreement Act, 1930 (B.C.), c.60, passed March 25, 1930; by the Dominion by the Railway Belt and Peace River Block Act, 1930 (Can.), c.37, passed May 30, 1930; and by the Parliament at Westminster by the British North America Act, 1930 (20-21 Geo. V., c.26) [now the Constitution Act, 1930], passed July 30, 1930. To complete the account of the transfer to the Dominion by the province of Crown lands outside the Railway Belt and the Peace Rivet Block for Indian reserves, I quote from a paper prepared by Mr. MacSween for a Continuing Legal Education Seminar on "Indians and the Law" in January, 1985. He wrote:

> In spite of the Scott-Cathcart Agreement and the passage of Privy Council Order 208, British Columbia continued to argue minerals, surveys, size, its number of reserves in respect of all those Indian Reserves outside the Railway Belt, etc. Finally though, the provincial negotiators so exasperated Premier Pattullo and the Federal Government, that at the protest of that Dominion, Pattullo ordered the lands to be transferred forthwith and they were so transferred on the 29th day of July, 1938, by Provincial Order-in-Council 1036. The two documents, Privy Council Order 208 and Order-in-Council 1036, are identical in form except that they were written from a Federal point of view and a Provincial point of view respectively.

It is upon this state of affairs that the question of title must be determined.

VI. THE PLAINTIFFS' TITLE

Prior to 1880, none of the plaintiffs had acquired any interest in the Tuckozap lands. Title to all public lands was vested in the Crown in the right of the province. The "allotment" of the Tuckozap reserve by Commissioner Sproat on July 10, 1878, did not operate to grant any beneficial interest in land. Indeed, on its face, it recites:

> The Commissioner having been unable to get the Gov'ts to act in the matter, the following temporary reserves, subject to legal claims and definite assignments of reserves within the area, are made, pending the adjustment of the question by the gov'ts -- so that the state of matters may at all events not be made worse than it is.

and it is not even a reserve of lands for the purpose of conveying them to the Dominion government for the use of Indians, as provided for by s.60 of the Land [Crown) Act of 1875.

It is common ground that neither the allocation of land by the Indian Reserve Commission or its successor individual commissioners, not the approvals of such allocations by the Chief Commissioner of Lands and Works, had any proprietary significance. That process simply resulted in an administrative withdrawal of provincial Crown land from homestead pre-emptions or other resource dispositions. The Indians were administratively in their use of the allocated lands. That protection could be, and in point of fact was, withdrawn in the case of the so-called "cut-off" lands. The allocation process did lead to the preparation of legal surveys of lands allocated as such lands were candidates for reserve status. The Tuckozap reserve was surveyed and the survey plan (ex. 3) was endorsed with the approval of the Chief Commissioner of Lands and Works on June 24, 1887, almost nine years later.

The effect of the grant of the lands in the Railway Belt has been considered by the courts many times. In A.-G. B.C. v. A.G. Can.; Re B.C. Fisheries (No. 2) (1913), 15 D.L.R. 308 at pp.312-3, [1914] A.C. 153 at pp.165-6, 5 W.W.R. 878, Viscount Haldane L.C. said:

The construction of the language of the grant of the railway belt has already come before this Board on more than one occasion. In Attorney-General for British Columbia v. Attorney-General for the Dominion, 14 App. Cas. 295, it was decided that the grant was in substance an assignment of the rights of the province to appropriate the territorial revenues arising from the land granted. Nevertheless, it was held that it did not include precious metals, which belonged to the Crown in right of the province, because, as was said by Lord Watson, such precious metals are not partes soli or incidents of the land in which they are found, but belong to the Crown as of prerogative right, and there are no words in the conveyance purporting to transfer royal or prerogative as distinguished from ordinary rights. It was pointed out in the judgment in this case that the word "grant", as used in the statute under construction, was not, strictly speaking, suitable to describe a mere transfer of the provincial right to manage and settle the land, and appropriate its revenues. The title remained in the Crown, whether the right to administer was that of the province or that of the Dominion. It is true that, in the course of the judgment. Cord Watson also expressed the view that when the Dominion had disposed of the land to settlers, it would again cease to be public land under Dominion control and revert to the same position as if it had been settled by the province without ever having passed out of its control. Their Lordships, however, have not on the present occasion to consider questions which might arise if this had taken place, inasmuch as the belt so far as is materiel for the purposes by this appeal, is still unsettled and remains under the control of the Dominion.

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

This view is in harmony with what has been decided by this Board in another case in which the effect of the grant of the railway belt came into question, Burrard Power Co. v. The King, [1911] A.C. 87, where it was held that a grant of water rights on a lake and rivet within the belt made by the Government of the province, was void. The grounds of the decision of the Board in that case were, that the grant of the lands to the Dominion had passed the water rights incidental to the lands, and that these lands, so long as unsettled, were public property within the meaning of sec. 91 of the British North America Act, and were, therefore, under the exclusive legislative authority of the Dominion, and could not be dealt with under a Water Clauses Act passed by the provincial Government.

In A.-G. Can. v. Western Higbie et al., (1945) 3 D.L.R. 1, [1945] S.C.R. 385, the Supreme Court of Canada was concerned with the effect of reciprocal Orders-in-Council passed by the provincial and Dominion governments in 1924 to implement the so called "Six Harbours Agreement" which settled, at least for the time being, the dispute over the control of public and other harbours in the province. With reference to the transfer as between the two levels of government of the control of public lands, Chief Justice Rinfret said at pp.14-5 D.L.R., pp·402-3 S.C.R.:

The Orders in Council may be upheld as valid, because both Governments, in acting as they did, were exercising powers which are part of the residual prerogative of the Crown, or because the transfer from one Government to another is not appropriately effected by ordinary conveyance. His Majesty the King does not convey to himself. As to that proposition, reference may be made to A.-G. B. C. v. A.-G. Can. (1887), 14 S.C.R. 345 at p.357 and (1889), 14 App. Cas. 295; E. & N.R. Co. v. Treat (1919), 48 D.L.R. 865, S.C.R. 263. In the latter case, Mr. Justice Newcombe, delivering the judgment of this Court, stated, among other things, as follows (pp.876-7 D.L.R., pp·275-6 S.C.R.):

> It is objected that, although the Territories were made part of the Dominion and became subject to its legislative control, there was no grant or conveyance of the lands by the Imperial Crown to the Dominion; but that was not requisite, nor was it the proper method of effecting the transaction. It is not by grant inter partes that Crown lands ate passed from one branch to another of the King's government; the transfer takes effect, in the absence of special provision, sometimes by Order in Council, sometimes by despatch. There is only one Crown, and the lands belonging to the

> Crown are and remain vested in it, notwithstanding that the administration of them and the exercise of their beneficial use may, from time to time, as competently authorized, be regulated upon the advice of different Ministers charged with the appropriate service. I will quote the words of Lord Davey in Ontario Mining Co. v. Seybold, [1903] A.C. 73, at p.79, where his Lordship, referring to Lord Watson's judgment in the St. Catherine's Mllg & Lbr. Co. v. The Queen (1888) 14 App. Cas. 46, said:
>
> > In delivering the judgment of the Board, Lord Watson observed that in construing the enactments of the British North America Act, 1867, "it must always be kept in view that wherever public lands with its incidents is described as ' the property of' or as 'belonging to' to the Dominion or a province, these expressions merely import that the right to its beneficial use or its proceeds has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its legislature, as the case may be, the land itself being vested in the Crown." Their Lordships think that it should be added that the right of disposing of the land can only be exercised by the Crown under the advice of the Ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province.

and at pp.16-7 D.L.R., pp.404-5 S.C.R., he continued:

> After all, there is no real conveyance of property, since His Majesty the King remains the owner in either case and, therefore, it is only the administration of the property which passes from the control of the Executive of the Province to the Executive of the Dominion. When the Crown, in tight of the Province, transfers land to the Crown in right of the Dominion, it parts with no right. What takes place is merely a change of administrative control. (Theodore v. Duncan, [1919] A.C. 696 at p.706; Burrard Power Co. v. The King, [1911] A. C. 87 at p.95). In Theodore v. Duncan, Viscount Haldane delivering the judgment, stated at p.706:
>
> > The Crown is one and indivisible throughout the Empire, and it acts in self-governing States on the initiative and advice of its own Ministers in these States. The question is one not of property or of prerogative in the sense of the word in which it signifies the power of the Crown from statutory authority, but is one of Ministerial administration, and this is confined to the discretion in the present instance of the same set of Ministers under both Acts. With the exercise of that discretion no Court of law can interfere so long as no provision enacted by the Legislature is infringed. The Ministers are responsible for the exercise of their functions to the Crown and to Parliament only, and cannot be controlled by any outside authority, so long as they do nothing that is illegal.
>
> In Burrard Power Co. v. The King, Lord Mersey, delivering the judgment, observed (p.95): "Before the transfer they were public lands, the proprietary rights in which were held by the Crown in right of the Province. After the transfer they were still public lands, but the proprietary rights were held by the Crown in right of the Dominion...."
>
> And in E. & N.R. Co. v. Treat, 48 D.L.R. 139, Viscount Haldane, dealing with a conveyance, Viscount Haldane, dealing with a from the Province of British Columbia to the Dominion, of the Railway Belt, observes at pp.142-3: "In an instrument which In reality did no more than operate as a transfer by the Crown of administration in right of the Province to administration in right of the Dominion.... "

But the question is, what in truth did the province transfer to the Dominion by the statute of 1880? Obviously, it could deliver no more than it held. And what it held was title to all the public lands in the province subject to, or, perhaps, mote properly described as, encumbered by, the rights of the public with respect to the use of common and public highways existing at the critical date.

I have found that on the site of the present access road there was a public highway prior to 1880. The Crown Dominion acquired all of the province's interest in those lands, but no more, and it rook it subject to those same public rights: see Gage v. Bates (1858), 7 U.C.C.P. 116 (Ont.C.A.), per Richards J. at p.121. That would be the result as a matter of general law, but the question is put beyond doubt by the provisions of s.2 of the Act, which specifically reserves those public rights. The very language of s.2 has if not its birth at least its prior adoption in an Act of the Legislature of Ontario, 1896 (Ont.), authorizing the transfer of lands in that province to the Dominion for railway purposes, and was considered by the Supreme Court of Canada in C.P.R. Co. v. Department of

Lands and Forest, [1923] 1 D.L.R. 480, [1923] S.C.R. 155, 27 C.R.C. 393. At p.486 Duff J. (as he then was) said:

> The more natural construction of the section appears to be that which treats the words "existing at the date hereof within the limits of the lands hereby intended to be conveyed" as an adjectival phrase qualifying highway and the words "within the limits of the lands hereby intended to be conveyed" as an adverbial element qualifying "existing". This appears to be the grammatical construction of the language.

and, at p.487, he continued:

> Read as they stand, without any kind of distortion, the words seem quite apt to reserve the rights of the public in respect of existing common and public highways, the rights of the public (that is to say the rights of His Majesty's liege subjects) to use such highways for what may be called highway purposes, rights not vested in the Crown as proprietor but generally under the guardianship of the Crown as parens patriae. As applied to highways existing at the time, the date of the passing of the Act, the language seems to be clear, precise and apt.

The public rights which existed when the province passed the Railway Belt legislation were and are perpetual and cannot be extinguished except by proper legal authority. A grant by the Crown will not suffice; still less would the mere transfer from the Crown in right of the province to the Crown in right of the Dominion do so. See Nash v. Glover (1876), 24 Gr. 219 (Ont.), where Vice-Chancellor Proudfoot said, at p.220:

> I apprehend that under these Acts there is no power in the executive to extinguish an original road allowance; that the only mode in which that can be accomplished is, the manner pointed out by the Act. The road allowances are perpetual, until altered or extinguished by the proper legal authority. The Acts recognize the power of the municipality to open road allowances, notwithstanding possession has been had.

and at p.221:

> In Dawes v. Hawkins 8 C.B.N.S. 848 ... Byles, J. , says, "It is also an established maxim, 'once a highway, always a highway'. For the public cannot release their rights and there is no extinctive presumption or prescription. The only methods of legally stopping a highway are either by the old writ of ad quod damnum, or proceedings before magistrates under the statute".

and at p.222:

> This whole subject was investigated in Regina v. Hunt 1 E. & A. 294, and it was held that after a road has once acquired the legal title of a highway, it is not in the power of the Crown, by grant of the soil and freehold thereof to a private person, to deprive the public of their right to use the road.
> …
>
> … other cases ... establish that an original road allowance cannot be extinguished except by proceedings under the Acts referred to; that a grant even by the Crown cannot extinguish it; that the right of the public remains in perpetuum; though it may lie dormant, it may be revived, until steps under the Acts killed it.

See also Cameron et ux. v. Wait (1878), 3 O.A.R. 175, where Burton J.A. said at p.181:

> In delivering judgment in Purdy v. Farley, 10 U.C.R. 568, Mr. Justice Burns says: "I take it to be a clear principle of law that every intendment is to be made in favour of the public, and against the individual who seeks to deprive the public of the right which it confessed the public once had ... and that is incumbent upon the individual who asserts a private right acquired over a public one which has once vested that he shall do so upon clear irrefragable evidence, and that nothing shall be left to depend upon conjectural inference and assumption...."

and Harrison C.J.O. said at p.183:

> The locus in quo, which is an allowance for road laid out in the original survey of the Township of Haldimand, was at one time beyond dispute a common and public highway.

> Unless, therefore, it has lost that character and become the private property of the plaintiffs, or one of them, their action must fail.
>
> A highway once established must so continue until altered or put an end to by some competent authority.
>
> Mere non-user of a highway is clearly not enough to destroy its character as a highway: Badgeley v. Bender, 3 O.S. 221; Nash v. Glover, 21 Gr. 219.
>
> The old common law procedure for altering or stopping up a highway, and which is the origin of all subsequent legislation on the subject, was by writ ad quod damnum: Rex v. Ward, Cro. Car. 266.
>
> There was an original writ issuing out of and returnable in the Court of Chancery, directed to a sheriff, to enquire by a jury whether the changing a highway would be detrimental to the public or not, the inquisition upon which being a proceeding only ex parte was traversable, and anciently the aggrieved party might have been heard against it before the Chancellor: Angell on Highway, sec. 325.

See also Newfoundland Telephone Co. Ltd. v. King (1983), 43 Nfld. d P.E.I.R. 146 (Nfld.S.C.).

Mr. Taylor, on behalf of the Crown federal, advanced the argument that P.C. 205, passed January 26, 1913, effectively withdrew the lands in Tuckozap from the operation of the regulations of 1889 relating to the survey, management and disposal of lands within the Railway Belt, and that as a consequence, that tract of lands thereafter ceased to be public lands within the Railway Belt. From this basing point he suggested that the reserve was created. I have some difficulty in following the logic of this argument, but none in rejecting it. To begin with, it is clear, on its face, that P.C. 205 is not a grant or transfer of title at all, it is a mere withdrawal from the operation of certain regulations of the lands referred to in the schedule attached to it. More importantly, P.C. 205 was purportedly passed under the authority of para. (a) of s.38 of the regulations for the administration and disposal of lands within the 40 mile Railway Belt established by Order-in-Council of September 17, 1889. P.C. 205 was passed in the mistaken view that the regulations enacted in September of 1889 were still operative, but it had overlooked the fact that by s.25 of the Order-in-Council passed May 13, 1910, pursuant to s.4(1) of the Dominion Lands Act, c.20 they had been rescinded. That the demise of these regulations, which had occurred in 1910, was overlooked by the federal authorities, is confirmed by the fact that on October 5, 1926, by P.C. 1512, purportedly passed pursuant to the Railway Belt Act, R. S. C. 1906, c.59, the regulations established by Order-in-Council of September 17, 1889 (P.C. 2169), were again rescinded. It would seem that P.C. 1512/1926 administered a somewhat redundant "coup de grace"

In a final effort to breathe some life into P.C. 205, Mr. Taylor referred to s.76 of the Dominion Lands Act, which is cast in terms substantially the same as para. (a) of s.38 of the 1889 regulations as authority for its passage, and contended further that it should be treated as an admission as to title. In this regard, he cited the Higbie case, supra, in which Chief Justice Rinfret said, at pp.13-5 D.L.R., pp.401-3 S.C.R,:

> It cannot be said that the Orders in Council, either from the Province or from the Dominion, are lacking in legislative authority, or ratification. Counsel, both for the appellant and for the Province of British Columbia (Intervener), were able to point to some statutes giving more or less legislative authority, or ratification, to what was being done through those Orders in Council by both the Province and the Dominion. But, even if the argument on that point might be said not to be altogether convincing, there remains that these Orders in Council were Acts of the highest authority and they were acted upon by both parties to them for more than 17 years when the present action was instituted. They constitute an unequivocal admission that these harbours, including the spot now under discussion, became the property or of the Dominion, not only at the time when the Orders in Council we re adopted respectively by the interested parties, but also in 1871 at the time when British Columbia entered Confederation.
> …
>
> … and we fail to see why such an admission should not be accepted by the Courts as a valid recognition of the rights and the jurisdiction of the Dominion in the premises.

I do not agree with this submission. While the two levels of government might, as between themselves, bind themselves by admissions so made, they cannot, by such means, eradicate the rights of the public, and particularly the rights of the public to use existing highways.

Mr. Burke, on behalf of Kumsheen, contended that the line established by Captain Jemmett constituted a fixed and immutable boundary and that title to any land which exists, as a result of accretion, lying between that line and the present ordinary high-water mark, is vested in the provincial Crown. I do not agree with this submission. It is based on the proposition, which was supported by Mr. Taylor, that the report of the Royal Commission on Indian Affairs in 1916, approved as it was by Orders-in-Council and legislation passed by both the provincial and Dominion authorities, constituted the grant of title to the Tuckozap reserve to the Crown Dominion. Manifestly, the report and these other instruments are not a grant of title. The report of the Royal Commission is merely a recommendation, and what transpired subsequently does no more than approve that recommendation and authorize the taking of appropriate steps to carry it out.

I agree with the submission of Mr. Eddy that the operative instrument which created Tuckozap Indian Reserve No. 24 (and other Indian reserves in the Railway Belt) is P.C, 208/1930, which was incorporated by reference into the memorandum of agreement made February 20, 1930, between the two governments and was, in turn, approved by statutes passed in Victoria, Ottawa and Westminster, that same pear. P.C. 208 was recognized by Mr. Justice Andrews in Moses et al. v. The Queen in right of Canada, [1977] 4 W.W.R. 474 at p.485, as the "culmination of many years of negotiations and agreements entered into between representatives of the government of the Dominion and the government of the province with respect to Indian lands within the province" It marked the last step in the reserve-creation process in respect of lands lying within the Railway Belt and is the analogue to the Order-in-Council 1036/1938, which relates to reserve lands outside the Railway Belt. P.C. 208 directs that the Scott-Cathcart Agreement be carried out according to it terms. That agreement provided that reserves within the Railway Belt were to be "held in trust and administered by the Dominion under the terms and conditions" set forth in the McKenna-McBride Agreement and in the "form of conveyance" which the Scott-Cathcart Agreement recommended. The Scott-Cathcart Agreement would not have been necessary had Indian reserves within the Railway Belt already been formally constituted. P.C. 208 implements an agreement which had been reached as to the terms of tenure which neither P.C. 205/1913 nor the report of the Royal Commission in 1916 purport to do, and is fully supported by statutory authority to achieve its purpose. The terms of tenure in Tuckozap are not complex. The key to their understanding lies in the preamble and in paras. 1 and 6 of the Scott-Cathcart Agreement. The form of conveyance agreed upon related to lands outside the Railway Belt; the agreement with respect to lands within the belt was that they would be held upon the same terms and conditions. With respect to lands within the belt, Schedule 4 to P.C. 208 (the form of conveyance) is not, in truth, a conveyance at all, but is a document of tenure, much like a declaration of trust. It sets forth the agreed-upon commitment that the federal Crown would hold reserve lands within the belt on terms identical to those upon which it would receive a transfer of lands outside the belt. There is but one form of tenure for Indian reserves in British Columbia which were created under P.C. 208/1930 and P.C. 1036/1938. Their terms ate identical.

Mr. Eddy, for the Crown provincial, goes no further. Re does not contend that the fifth reservation contained in Sch. 4 to P.C. 208 which, for convenience, Z repeat here, and which reads as follows:

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

had the effect of closing public highways. Mr. Tollestrup, on the other hand, does. His submission is that, as a result of what was agreed upon and enacted in 1930, all roads not in actual use on February 3, 1930, ceased to exist across Indian reserves. He says that there must be read into the proviso the words "in actual use" before. the phrase "the dare hereof". This is a strained construction. In my view the word "existing" modifies the term "other highways", while the word "travelled" applies to “streets, roads (and) trails". That this is the preferable construction is supported by the following extract from the Manual of Instructions for the Survey of Canada Lands:

> In an Indian Reserve inside the Railway Belt, roads which:
> …
>
> (b) cannot be shown to have existed in their present location prior to February 3, 1930 … are to be considered as forming part of the Reserve.

If Mr. Tollestrup's constructions were correct, para. (b) of this instruction would have read: "cannot be shown to have been in use as at February 3, 1930" (emphasis mine).

Mr. Tollestrup further says that P.C. 208 is an agreement and that it is "legislation, like the Highway Act [R.S.B.C. 1979, c.167] or the Municipal Act [R.S.B.C. 1979, c.290], which abrogates the

maxim: '...once a highway, always a highway'. In my opinion neither the approval of the form and conditions of tenure, nor the constitution of the Indian reserves within the Railway Belt under such tenure, called the attention of the Governor in Council or any other authority to the specific question of the public interest in particular highways. Without such a particularized exercise of discretion, properly and legally implemented, the public right to use highways could not be extinguished, and certainly could not be extinguished by the agreements which were entered into. The authorities which I have already referred to at pp.595-96 [pp.77-79, supra] above, make this clear.

In the result I hold that the public highway which existed on the site of the present access road prior to 1880 continues in existence; is has not been effectively closed.

Mr. Eddy did suggest, in the course of his argument, that the plaintiffs "have a clear case for an application under Section 9 of the Highway Act for immediate closure of the road". By the same token, the province has the right under the resumption provision contained in Sch. 4 to P.C. 208, the validity of which was upheld in Moses v. The Queen, supra, to resume up to one-twentieth of the reserve for road building purposes and so it could, if deemed appropriate, acquire further land to widen the road. Such questions ate, of course, for others to determine, and require no comment from me.

VII. CONCLUSION

Kumsheen is entitled to a declaration that Kumsheen is entitled to use the Eraser and Thompson Rivers in the vicinity of the Tuckozap Indian Reserve No. 24, together with the associated bars and beaches of the rivers below the ordinary high-water mark in exercise of the common privilege of navigation, subject to all legislatively authorized dispositions or regulatory actions, present or future, which may affect the privilege.

There may be other, more specific declarations, which, in the light of these reasons, should be made. In the event that counsel are not able to agree upon them, those matters may be spoken to at a convenient time.

The plaintiff's claim for an injunction and other relief claimed in the statement of claim must be dismissed, with costs to the defendant Kumsheen Raft Adventures Ltd.