Date: 19970407
Docket: A970164
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

OSOYOOS INDIAN BAND

APPELLANT

AND:

THE TOWN OF OLIVER and HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE K.C. MACKENZIE

Counsel for the Appellant:	Albert C. Peeling Pat Hutchings
Counsel for the Respondent Town of Oliver:	William Buholzer
Counsel for the Attorney General of British Columbia:	Hunter Gordon
Place and Date of Hearing:	Vancouver, B.C. March 17 & 18, 1997

[1] This is a case stated by the Osoyoos Indian Band Board of Review pursuant to section 80(1) of the Osoyoos Indian Band Property Assessment Bylaw P.R. 95-01, enacted pursuant to section 83(1)(a) of the *Indian Act*, R.S.C. 1985, c. I-5. The Board of Review seeks the opinion of the court on two questions, namely:

1. Are lands, taken pursuant to s.35 of the *Indian Act*, "land or interests in land" in a reserve of a Band within the meaning of s.83(1)(a) of the *Indian Act* such that those lands are assessable and taxable pursuant to Band Assessment Bylaws and taxable pursuant to Band Taxation Bylaws?

2. If s.35 of the *Indian Act* authorizes the removal of lands from reserve status, does federal Order in Council 1957-577, by which the Lands were transferred, remove the Lands from reserve status so that they are not assessable and taxable by the Osoyoos Indian Band?

[2] The material facts as stated by the Board of Review are as follows:

1. The Governor in Council enacted Order in Council 1957-577 on April 25, 1957 ("Order in Council") pursuant to section 35 of the *Indian Act* in respect to certain lands in Osoyoos Indian Reserve Number 1 ("Lands"). The Order in Council provided, in part:

> **WHEREAS** the Minister of Agriculture for the Province of British Columbia has applied for the lands hereinafter described, being a portion of Osoyoos Indian Reserve number one, in the said Province for the irrigation canal purposes;
>
> **AND WHEREAS** the sum of $7,700 has been received from the Province of British Columbia in full payment for the land required in accordance with a valuation approved by the Band Council of the Osoyoos

> Band of Indians on the 30th day of March, 1955 and officials of the Indian Affairs Branch;
>
> **THEREFORE** His Excellency the Governor General in Council, on the recommendation of the Minister of Citizenship and Immigration, pursuant to the provisions of Section 35 of the *Indian Act*, is pleased hereby to consent to the taking of the said lands by the Province of British Columbia and to transfer the administration and control thereof to Her Majesty the Queen in right of the Province of British Columbia:

2. The Lands were then, and continue to be, occupied by an irrigation canal.

3. The Federal Crown transferred the administration and control of the Lands to Her Majesty the Queen in right of the Province of British Columbia. The Lands were registered by way of Certificate of Indefeasible Title in the name of Her Majesty the Queen in right of the Province of British Columbia on September 12, 1961, in the Kamloops Registry of the British Columbia Land Title Office.

4. The Lands are occupied by the Town of Oliver.

5. The Osoyoos Indian Band Council ("Band Council") enacted property assessment and property taxation bylaws pursuant to section 83 of the *Indian Act* ("Assessment Bylaws") which are applicable to land in Osoyoos Reserve Number 1. The Assessment Bylaws apply to assessments in 1996.

6. The Assessment Bylaws provide for the appointment of an assessor for carrying out the purposes of the Bylaw. Pursuant to that power, the Band Council appointed the B.C. Assessment Authority as an assessor.

7. On August 28, 1995 the Band Council passed a resolution (1995-65) which directed the B.C. Assessment Authority to assess the Lands and include them on the assessment roll of the Osoyoos Band and the Assessment Authority placed the Lands on the folios of the Osoyoos Indian Band.

8. The Lands have been assessed as follows:

	Land	**Improve-ments**	**Total Assessed Value**
Lot A	$ 37,100	$ 95,300	$132,400
Lot B	$ 36,200	$ 99,200	$135,400
Lot C	$ 63,800	$110,000	$173,800
Lot D	$ 26,400	$ 56,900	$ 83,300
	$163,500	$361,400	$524,900

[3] The Order in Council recited that the Governor in Council acted pursuant to section 35 of the *Indian Act*, R.S.C. 1951, c. 149 which reads as follows:

> **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.
>
> (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.
>
> (4) Any amount that is agreed upon or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General of Canada for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).

The recitals in the Order in Council add that the Minister of Agriculture had applied for the lands for irrigation canal purposes. The Minister's powers of expropriation for such purposes were contained in section 21 of the *Water Act*, R.S.B.C. 1948, c. 361, as follows:

> **21.** (1) In this and the following three sections "land" includes any estate or interest in or easement over land.
>
> (2) Every licensee shall have the right to expropriate any land reasonably required for the construction, maintenance, improvement, or operation of any works authorized under his licence, and the holder of any licence that authorizes the diversion of water for domestic purpose or waterworks purpose shall have the right to expropriate, in addition, any land the control of which by the licensee would help to prevent pollution of the water authorized to be diverted, and, with the consent of the Lieutenant-Governor in Council, the holder of any licence that authorizes the construction of a dam shall have the right to expropriate, in addition, any land that would be flooded if the dam were constructed and utilized to the maximum height authorized. The owner of land so expropriated shall be compensated therefor by the licensee, and the procedure to be followed in expropriating land and the method of determining the compensation shall be as prescribed in the regulations.

The power to expropriate was not formally invoked which would have been the first step toward an exercise of the power, with the consent of the Governor in Council, under section 35(1) of the *Indian Act*. Instead the Governor in Council acted on the Minister's application under section 35(3) without a formal expropriation.

[4] The only instrument authorizing the transfer of the lands in question is the Order in Council. Normally such an Order in Council would be coupled with a deed or other instrument conveying title to the intended recipient. However, when the intended transfer is from the Federal Government to a province, the principle of indivisibility of the Crown intervenes and a conveyance of title is not involved. Paul Lordon has explained the procedure:

> **4.6.1** *Transfers between the Federal Government and the Provinces*
>
> A transfer of property between the federal government and a province is not done by ordinary conveyance, because of the principle of indivisibility of the Crown. Her Majesty is the owner of the property whether in right of Canada or the province and cannot grant to Herself. Only administrative control of the property passes. The transfer is, therefore, made by reciprocal Orders in Council and is confirmed by statute where third party rights are involved.
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> *Public Lands Grants Act*, R.S.C. 1985, c. P-30, s. 4(2);
> *Ontario Harbours Agreement*, S.C. 1963, c. 39; S.O. 1962-63, c. 95;
> ***A.G. B.C. v. A.G. Canada***, [1906] A.C. 552 (P.C.);
> ***A.G. Canada v. Higbie***, [1945] S.C.R. 385.
>
> Paul Lordon, Q.C., *Crown Law*, p. 283, para. 4.6.1.

Mr. Lordon continues:

> The various reasons for having reciprocal Orders in Council, in addition to the foregoing are as follows:
>
> 1. It is desirable that there be no question (to the extent envisaged by the transfer of administration and control in question) that the province acknowledges responsibility for the lands and that Canada's possible liability as beneficial user has ceased.

2. The time of the transfer is clearly established; this is important in cases of third person liability.
3. If the transfer is for a specified term of years, or the equivalent of a determinable fee for a specific purpose, or indeed with a right of first refusal, then it is clear that the transferee government should evidence and acknowledge the limitation on its "title".
4. With the "proprietorship" of the land also comes legislative jurisdiction over those lands. Again it is important that the accepting government assume its functions in this regard.

The transfers of property from the federal government to the provinces was, in certain instances, accompanied by conditions. In these circumstances, the transfer became effective only after the conditions were met.

A.G. Manitoba v. A.G. Canada, [1904] A.C. 799 (P.C.).

Apparently there was no reciprocal Order in Council passed by the Province but its actions, either directly or through agents, in constructing and operating the irrigation works on the lands was an effective acknowledgement of the Federal order. No issue is taken with the occupation of the lands for irrigation purposes by Oliver. However, the operative words of the Order in Council, "consent to the taking of the said lands by the Province" and the "transfer" of "administration and control thereof" to the Province, are the only words of disposition. A transfer of jurisdiction over the lands from the Federal Government to the Province was clearly intended. Was it an unlimited transfer or only for the purpose stated in the recital?

Question 1

[5] In ***Robinson et al. v. The British Columbia Hydro and Power Authority*** (1991), 84 D.L.R. (4th) 562, Millward J. of this court held that section 35(3) of the *Indian Act* is capable of authorizing the conveyance of a fee simple interest in lands from a reserve. The plain words of the section lead irresistibly to that conclusion. Section 2 of the *Indian Act* states that reserve "(a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band". Section 83 limits the right of taxation to "land, or interests in land, in the reserve". In ***St. Mary's Indian Band et al. v. Cranbrook (City)***, [1996] 2 C.N.L.R. 222, the Court of Appeal has confirmed that the transfer of a fee simple absolute removes land from a reserve. In my view these authorities and the plain words of the statute are conclusive that land taken pursuant to section 35 is no longer reserve land and it is not assessable or taxable under section 83(1)(a). Accordingly, the answer to Question 1 is "no".

Question 2

[6] The operative words of the Order in Council "consent to the taking" of the lands by the Province and "transfer the administration and control thereof" to the Province. There are no words of limitation. The recitals state the application for

the lands by the Minister of Agriculture was "for irrigation canal purposes". In ***Robinson***, Millward J. concluded that similar words in the order in council pursuant to section 35(3) were descriptive only. However, that transfer involved letters patent expressing a grant of the fee in unrestricted and unequivocal terms. Here no letters patent were issued. The only expression of the terms of the transfer is contained in the Order in Council. Counsel for the Band contended that these are words of limitation and created either an "easement" or a "determinable fee" with a "reversion" remaining in the Federal Government on behalf of the Band if and when the lands cease to be used for irrigation purposes. In the ***St. Mary's Indian Band*** case the Court of Appeal concluded that words of limitation included in the grant created a fee subject to a condition which failed under settled principles of property law. The surrender was therefore absolute. There are no words in the Order in Council here which could be characterized as a condition. Conceptually, title remains in Her Majesty. Only administration and control changes from the Federal emanation of the Crown to the Provincial emanation. There are no restrictions on the extent of the transfer of administration and control which would limit it to the equivalent of an easement. In my view, the transfer here must be a transfer of administration and control unlimited in time, the equivalent of an absolute fee, or a transfer determinable on the lands ceasing to be used for irrigation purposes. The lands are still being used for irrigation purposes and no event which

could terminate the transfer of administration and control has occurred.

[7] In ***Canadian Pacific Ltd. v. Matsqui Indian Band*** (1996), 134 D.L.R. (4th) 555, 581, Teitelbaum J. of the Federal Court Trial Division held that a determinable fee in reserve lands removed the lands from the reserve for taxation purposes while the fee continued. I think the same conclusion follows here. While administration and control of the lands remains in the Province the lands are not part of the reserve, and the powers to tax pursuant to section 83(1)(a) of the *Indian Act* cannot reach them. Mr. Peeling argued that the Matsqui Indian Band decision is inconsistent with the decision of the Court of Appeal in ***St. Mary's Indian Band*** and that a determinable fee can be taxed. I do not agree. I do not think that issue was addressed by Hutcheon J.A. On the facts of that case the Court of Appeal found the interest transferred to be a fee absolute rather than any more limited interest. In my view, the authority of the ***Matsqui Indian Band*** case remains unimpaired and it should be followed. It is therefore unnecessary to decide whether the transfer is terminable if the lands cease to be used for irrigation purposes. On either view, the lands are not presently in the reserve.

[8] The description of the lands in the Order in Council concludes: "Reserving thereout and therefrom all mines and minerals and the right to work the same." An argument was

advanced on behalf of the Band that this reservation left an interest in the lands in the reserve which could support taxation under section 83(1)(a). It is not clear to me whether the reservation of mines and minerals was intended to be a reservation from the transfer to the Province or, alternatively, it was a reservation contained in the original grant for reserve purposes and merely a part of the description of the lands in the Order in Council. I was advised that the certificate of title issued to Her Majesty in the Right of the Province for these lands makes no reference to this reservation and counsel could not be of further assistance. Mr. Peeling contended that it was a reservation from the transfer to the Province by the Order in Council. Assuming without deciding that minerals remain in the reserve, in my view the reservation is insufficient to include the surface in the reserve for section 83 purposes. I note that at least one of the rights of way at issue in the ***Matsqui Indian Band*** case, described as CN Letter Patent Matsqui #5 (at 134 D.L.R.(4th) 566), contained a similar reservation of mines and minerals but it did not support taxation of the determinable fee in the surface.

[9] The answer to question 2 is "yes".

"K.C. Mackenzie, J."