PRB 99-8E

THE NANOOSE BAY TEST RANGE: OWNERSHIP AND EXPROPRIATION

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BACKGROUND

In 1965, Canada and the United States agreed upon the establishment, operation and maintenance of a torpedo test range at Nanoose Bay in the Strait of Georgia, to be more formally known as the Canadian Forces Maritime Experimental and Test Ranges (CFMETR).**(1)** The land for the base at Nanoose Bay had been expropriated by the federal government in 1951. The foreshore was transferred to Canada by British Columbia in 1988, for military use over a period of 60 years.**(2)**

In 1984, the Supreme Court of Canada found that several straits on the west coast of British Columbia, including the Strait of Georgia, had been included in the pre-Confederation boundaries of British Columbia. Therefore, the Province of British Columbia still had ownership of the seabed of the Strait, notwithstanding an earlier Supreme Court of Canada decision that the boundaries of British Columbia, with respect to the territorial sea, ended at the low water mark.

On 5 September 1989, the federal and provincial governments signed a ten-year "licence of occupation" under the British Columbia *Land Act.* In May 1997, the British Columbia government gave notice that it would terminate the licence, because it was not satisfied with the progress of Canada-U.S. negotiations on the Pacific Salmon Treaty.**(3)**

Discussions with the federal government followed, but these appear to have collapsed in mid-May 1999. On 14 May 1999, the government of Canada announced that it had begun the process of expropriating the seabed at CFMETR.

The Minister of National Defence explained the expropriation as follows:

The Government of Canada cannot permit itself to be put in breach of its international obligations. As such I have reluctantly asked the Minister of Public Works and Government Services to initiate the process of expropriation [to ensure that there is no disruption of operations when the current licence expires on September 4, 1999]. I have done this because CFMETR is important to the national security of Canada, significant to the economic well-being of the local communities in the Nanaimo area, and essential to Canada's ability to fulfil our defence commitments at home and abroad.**(4)**

The Notice of Intention to Expropriate says simply that the lands are required "for a purpose related to the safety and security of Canada or of a state allied or associated with Canada and it would not be in the public interest further to indicate that purpose."**(5)**

British Columbia responded by condemning "the first hostile expropriation of provincial land by Ottawa in recent history."**(6)**

OWNERSHIP OF THE SEABED

In 1967, the Supreme Court of Canada considered a reference to determine whether the seabed within the three-mile limit of the west coast territorial sea, and the associated mineral resources, were owned by the Province of British Columbia or Canada.**(7)** Although the case dealt specifically with the British Columbia offshore, it is widely acknowledged to have established the precedent for the ownership of offshore resources on both coasts. The Supreme Court held that Canada had both jurisdiction over and property rights in the territorial sea, from the low-water mark of the province to the territorial boundary recognized by international law.**(8)**

The Supreme Court found that the pre-Confederation colonies had never gained sovereignty over, or property rights in, the territorial sea. The territorial sea had therefore been outside the boundaries of British Columbia at Confederation, and those boundaries had not been extended since. Canada was the sovereign state having the rights over the offshore recognized by international law, such as the 1958 Geneva Convention.

In 1984, a more specific question was placed before the Supreme Court in *Re Strait of Georgia*.**(9)** Without challenging the general principle set forth in *Offshore Minerals*, British Columbia claimed that the historical documentation surrounding the establishment of the province proved that certain bodies of water, and the seabed beneath them, had in fact been within the boundaries of the province at Confederation, and were therefore still the property of the province. The question put to the Supreme Court of Canada was:

Are the lands or any part or parts thereof including the mineral and other natural resources of the seabed and subsoil, covered by the waters of the Strait of Juan de Fuca, the Strait of Georgia (sometimes called the Gulf of Georgia), Johnstone Strait and Queen Charlotte Strait (bounded on the south by the international boundary between Canada and the United States of America, on the west by a line from Tatoosh Island lighthouse to Bonilla Point reference mark and on the north by a straight line drawn across Queen Charlotte Strait from Greeting Point on Nigei Island to McEwan Point on Bramham Island) the property of the Queen in Right of the Province of British Columbia?**(10)**

Dickson J. summarized the issue before the court:

In the 1967 *Off-shore Reference* this court applied the reasoning in *Keyn* [an 1876 British case standing for the proposition that the realm of England extended only to the low-water mark, and all beyond was the high seas] to the territorial sea surrounding British Columbia. It held that though immediately prior to Confederation this three-mile strip might well have been "British territory," the Imperial Parliament had done nothing to extend the boundaries of British Columbia to include this strip, and therefore the normal assumptions should prevail, namely, that the territory of the colony just prior to Confederation ended at the low-water mark...

In order to succeed in the present Reference, therefore, British Columbia must demonstrate that prior to Confederation either the lands and waters in question were "within the realm" as the term is used in *The Queen* v. *Keyn* or else that by

some overt act Britain incorporated them into the territory of the Colony of British Columbia so as to displace the "normal assumption" cited in the 1967 *Offshore Reference*...

If [British Columbia] cannot make good on either claim, then the lands and waters were not within the province at Confederation, the United Kingdom retained them between 1871 and the period (1919-1931) during which Canada acquired sovereign status and succeeded to the rights of the United Kingdom.**(11)**

The Supreme Court found that the historical documentation, and in particular the 1866 Imperial *Act for the Union of the Colony of Vancouver Island with the Colony of British Columbia* had incorporated the straits in question within the boundaries of the colony of British Columbia, and that they therefore continued to be within the boundaries of the Province of British Columbia after Confederation. The western boundary of first the colony and then the Province of British Columbia was the "Pacific Ocean," meaning the open Pacific, "thus making the western boundary of the United Colony the coastline formed by the several islands off the coast of British Columbia, including Vancouver Island."**(12)** The straits at issue were within the boundaries of British Columbia, and therefore the seabed and subsoil of those straits were the property of the province.

THE TREATIES

The original treaty establishing CFMETR**(13)** provided that the United States would be responsible for the supply, installation and maintenance of the technical equipment required for the operation of the new torpedo testing range. It also provided that the United States would retain ownership of all removable property it brought into or purchased in Canada and placed on the site, including structures that could be readily dismantled. The agreement was for a ten-year period, but was then to remain in force until it was terminated by mutual agreement or by either party's giving 12 months' written notice to the other.

Although the agreement continued until terminated, it was renewed by an exchange of notes in 1976**(14)** because the United States wished to update existing range equipment and to install an advanced underwater acoustic measurement system at Jarvis Inlet. Renewing the treaty at that time allowed the parties to make the necessary minor changes to the annex. In 1986, the treaty was again renewed for ten years, by an exchange of notes, to allow for long-term planning and commitment of resources.**(15)** In 1996, no renewal took place because of Canada's requirement for an environmental clause to be added. In March 1998, however, the United States accepted a text proposed by Canada for the incorporation of environmental protocols that would be referenced by the international agreement.**(16)**

Press reports suggest that the value of the equipment involved in the torpedo testing facility is considerable:

The B.C. lease on the sea floor beneath Nanoose Bay on Vancouver Island allows the testing facility to deploy 30 underwater arrays -- metal towers measuring about 15 metres in height, each with four three-metre-long arms equipped with sophisticated hydrophones.

These arrays track submarine torpedoes, and monitor the movements of vessels. Canadian military aircraft and helicopters involved in marine defence manoeuvres also use the Nanoose range.**(17)**

The B.C. lease does not include the federally owned onshore facilities or actual waters at the Nanoose testing range. But the ocean floor is studded with $100 million worth of test equipment, and cutting off use of the sea-bed would seriously interfere with the naval operations.**(18)**

THE LICENCE OF OCCUPATION

In 1989, the federal and provincial government signed a "licence of occupation" under the provincial *Land Act*.**(19)** Although the *Land Act* defines "Crown land" as "land, whether or not it is covered by water," the federal-provincial agreement is clearly based on precedents that involved land, rather than a seabed. For example, it provides for written notice to be given to the licensee by "posting the same in a conspicuous place on the Land."

Article 6 of the agreement allows the province to cancel the licence of occupation on 90 days' written notice, in certain circumstances, which include:

6.01(a) the Owner [the province] requires the Land for his own use or in his sole discretion considers that it is in the public interest to cancel the rights herein granted, in whole or in part...

(c) the Owner, in his sole discretion, considers that it is no longer necessary for the Licensee to use the Land for purposes permitted therein.

This provincial discretion to cancel is so broad that it is difficult to know how it would be interpreted. The *Backgrounder* to the press release from the Premier's office announcing the cancellation of the lease on 23 May 1999**(20)** refers to the fact that the agreement "provides for cancellation at the sole discretion of the Province of British Columbia when the Province considers that it is no longer necessary for the licensee to use the seabed." Arguably, it is inappropriate for a provincial government to decide unilaterally that the federal government no longer needs a seabed supporting defence structures crucial to an international treaty obligation.

The *Backgrounder* also clearly states that "British Columbia is cancelling the Licence of Occupation for the Nanoose torpedo range in response to the American failure to cooperate with Canadians over West Coast fishing issues." This suggests that the province is taking over the responsibility for defining the "public interest" in matters of fisheries and defence policy.

In August 1997, the Government of Canada initiated a court challenge in the Superior Court of British Columbia to prevent an early termination of the agreement with the Government of British Columbia. Canada argued that:

- the Province's right to cancel the Licence when it "considers that it is within the public interest" to do so does not extend to public interest matters within the expertise and exclusive authority of Canada, including Fisheries, Foreign Affairs and Defence;

- there was an implied term in the agreement that the Province would exercise its contractual rights in good faith; and

- that no Party, acting reasonably and in good faith, could have concluded that it was in the public interest to cancel the Licence.

By the spring of 1999, with the natural expiration of the licence of occupation only six months away, it was evident that its cancellation, and the subsequent court case, were increasingly irrelevant to the final outcome of the issue. On 5 May 1999, the negotiators for the two parties signed a "without prejudice" document called *Points of Principle*,**(21)** which commenced:

The following represent the best efforts of the two negotiators to arrive at points of principle concerning an amended licence of occupation for the Whiskey Golf Test Range.

The negotiators will recommend an amended licence based on these principles. It is recognized that certain policy issues have yet to be resolved before either party commits to enter into an amended licence arrangement.

The term of the amended agreement shall be 40 years (30 additional years).

2. The fees for the additional 30 years shall be based on an annual payment of $4 million; plus a one-time payment of $5 million as an adjustment for the 89-99 period, payable on the date of signing of this amended licence...

Point 7 provided that "an environmental schedule ... will include a provision confirming that no nuclear warheads will be present at any time within the licence area."

The Department of National Defence claims that negotiations reached an impasse by 10 May 1999, after the government of British Columbia introduced "fisheries issues unrelated to the operations of CFMETR."**(22)** On the other hand, British Columbia's Minister of Intergovernmental Relations claimed that the negotiations collapsed because the federal government "backed away" from the *Points of Principle*, and "wouldn't prohibit nuclear warheads."**(23)**

In any case, on 21 May 1999 the Minister of Public Works and Government Services issued a Notice of Intention to Expropriate on behalf of Canada. On 13 September 1999, after a summer of contentious public hearings on the issue, the same Minister confirmed the expropriation, offering less than $2 million compensation instead of the total of $125 million compensation referred to in the *Points of Principle*. British Columbia has launched a constitutional challenge against the expropriation.**(24)**

EXPROPRIATION OF THE SEABED

Generally speaking, the federal government can expropriate provincially owned property, provided it does so for a valid federal purpose. Peter Hogg notes that "federal legislative power will extend to bind the Crown in right of a province, and there have been cases in which the federal Parliament has validly expropriated provincial Crown property,"**(25)** and refers to several cases where this proposition has been upheld.

It should be noted, however, that the courts are inclined to place strict limitations upon the federal power of expropriation. Two of the cases cited by Professor Hogg are railway cases from the first quarter of the century. The third, *Re Exported Natural Gas Tax*, dealt with the taxation of provincial property, rather than its expropriation. The question of the federal expropriating power was raised during argument, however, and the majority of the court held that the federal power to expropriate provincial property extended only to "the property absolutely essential to the Dominion undertaking":

One has to bear in mind, however, in dealing with the arrogation of property rights by federal authority in the exercise of some right, that, whatever the terminology may be, it is only such part of the property right and such extent of the taking of that right, as may be tied inherently and of necessity to the exercise of the authority in question by the federal level of government that the Constitution will permit.**(26)**

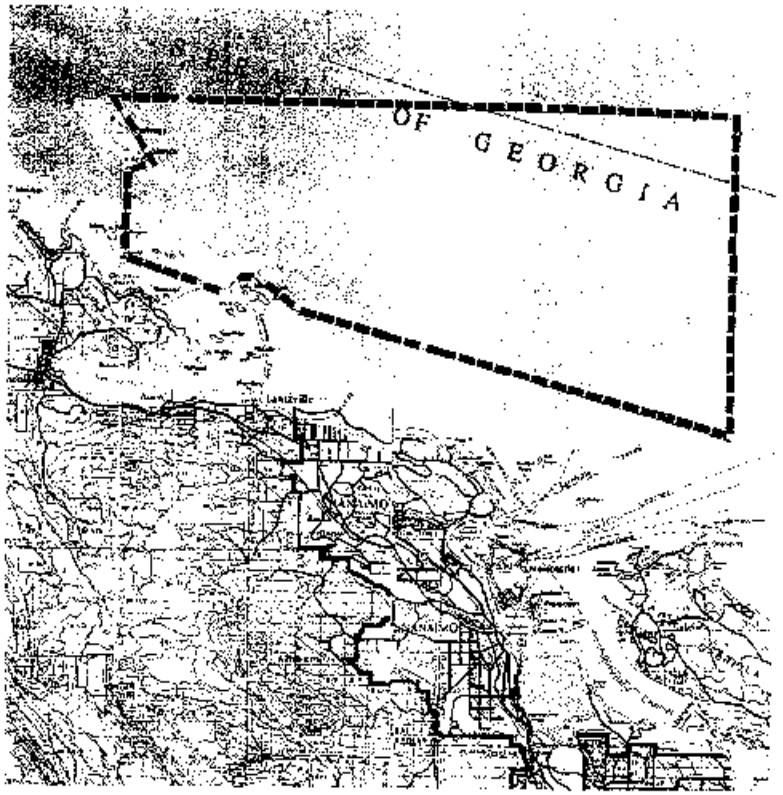
On the other hand, international defence treaties would seem to be at the very core of federal jurisdiction and in *Re Strait of Georgia* the Supreme Court of Canada took pains to point out that the provincial powers of ownership of the seabed are limited:

It is important to note that the question raised in this reference is not concerned with legislative jurisdiction nor with political or economic considerations. No question arises as to the power of Parliament to legislate in relation to matters within its exclusive legislative jurisdiction as, for example, control over shipping, navigation, trade and commerce, customs, fisheries and *defence*. The sole question here is the matter of proprietorship in lands.**(27)** [italics added]

Perhaps the only safe conclusion to be drawn with respect to the intended expropriation of the CFMETR seabed is that such action appears both legally justifiable and politically controversial.

APPENDICES

1. Map
2. The Licence
3. Points of Principle
4. Statement of Claim


OF GEORGIA

103025

LICENSE No.

YOUR FILE

OUR FILE I400379

THIS AGREEMENT executed in triplicate and dated for reference the 5th day of September, 1989.

"IN PURSUANCE OF THE LAND ACT (Section 36)."

Between

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, represented by the Minister Responsible for Crown Lands, Parliament Buildings, Victoria, British Columbia

(hereinafter called the "Owner")

OF THE FIRST PART

And

HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by the Minister of National Defence, Ottawa, Ontario

(hereinafter called the "Licensee")

OF THE SECOND PART

WITNESSES THAT WHEREAS the Owner has agreed to grant the Licensee a license over that parcel of land described in the schedule attached entitled Legal Description (hereinafter referred to as the "Land");

NOW, THEREFORE, in consideration of the fee to be paid by, and the covenants of, the Licensee, the parties agree as follows:

Article I - Grant of License

(1.01) The Owner, on the terms set forth herein, hereby grants to the Licensee a license to enter on the Land for the purposes described in the schedule attached entitled Special Proviso Schedule.

Article II - Duration

(2.01) Notwithstanding the date of execution and delivery of this license the duration of the license and the rights herein granted shall be for a term of ten years commencing on the 5th day of September, 1989 (herein called the "Commencement Date") unless cancelled in accordance with the terms hereof.

Article III - License Fee

(3.01) The Licensee shall pay to the Owner, in advance, on the Commencement Date, the license fee as prescribed in the Fee Schedule attached.

Article IV - Covenants of the Licensee

(4.01) The Licensee covenants with the Owner

(a) to pay the license fee due at the address of the owner first above written or at such other place as the Owner may specify from time to time;

(b) to observe, abide by and comply with all applicable laws, bylaws, orders, directions, ordinances and regulations of any competent governmental authority in any way affecting the Land and improvements situate thereon, or their use and occupation and without derogating from the generality of the foregoing, the Navigable Waters Protection Act of Canada.

(c) not to commit or suffer any willful or voluntary waste, spoil or destruction on the Land or do or suffer to be done thereon anything that may be or become a nuisance or annoyance to owners or occupiers of adjoining land;

(d) to indemnify and save the Owner harmless against all losses, damages, costs and liabilities, arising out of

(i) any breach, violation or non-performance of any covenant, condition or agreement in this license by the Licensee,

(ii) any personal injury, death or property damage occurring on the Land or happening by virtue of the Licensee's occupation of the land,

and the Owner may add the amount of such losses, damages, costs and liabilities to the license fee and the amount so added shall be payable to the Owner upon demand;

(e) to keep the Land in a safe, clean and sanitary condition satisfactory to the Owner and to make clean and sanitary any portion of the Land or any improvement that the Owner may direct by notice in writing to the Licensee;

(f) with prior written notice, to permit the Owner, or his authorized representative, to enter upon the Land at a time agreeable to both parties, to inspect the Land and any improvements thereon;

(g) to use and occupy the Land in accordance with the provisions of this license including those set forth in the Special Proviso Schedule;

(h) on the expiration or at the earlier cancellation of this license

(i) to peaceably quit and deliver possession of the Land to the Owner,

(ii) to remove all buildings, machinery, plant equipment and apparatus and all other improvements to or things on the Land,

(iii) to restore the surface of the Land as close as possible to its original condition,

and to the extent necessary, this covenant shall survive the expiration or cancellation of this license;

(i) not to interfere with the activities of any other person to enter on and use the Land under a prior or subsequent license granted by the Owner;

(j) not to deposit on the Land or any part of it, any earth, fill or other material for the purpose of filling in or raising the level of the Land without the prior written consent of the Owner;

(k) not to dredge or significantly displace beach materials on the Land without the prior written consent of the Owner;

(l) not to place any improvements on the Land or carry on any activity on the Land or on the surface of the water covering the Land that may constitute an interference with the riparian rights of the owner or occupier of the land adjacent to or in the vicinity of the Land;

(m) to publish a notice not less than once a month during the term of this license, which notice will be substantially in the form attached as Schedule "A" to the Special Proviso Schedule.

Article V - Assignment

(5.01) The Licensee shall not assign this license or sublicense any part of the Land.

Article VI - Cancellation

(6.01) In the event that

(a) the Owner requires the Land for his own use or in his sole discretion, considers that it is in the public interest to cancel the rights herein granted, in whole or in part,

(b) the Licensee ceases to use the Land for the purposes permitted herein,

(c) the Owner, in his sole discretion, considers that it is no longer necessary for the Licensee to use the Land for the purposes permitted herein.

the Owner may on 90 days written notice to the Licensee, cancel this license and the rights herein granted, in whole or in part.

(6.02) In the event that the Licensee fails to observe or perform any of the covenants, agreements, provisions or conditions contained herein, and such failure continues for a period of 60 days next after the giving of written notice by the Owner to the Licensee of the nature of the failure, the Owner may cancel this license in accordance with the Land Act and notwithstanding section (4.01) (i), any buildings, machinery, plant equipment and apparatus and all other improvements to the Land shall become, at the discretion of the Owner, the property of the Owner.

(6.03) In the event that

(a) the license hereby granted should be taken in execution or attachment by any person or the Licensee commits an act of bankruptcy, becomes insolvent or is petitioned into bankruptcy or voluntarily enters into an arrangement with his creditors,

(b) the Owner discovers that the Licensee either in his application for this license or otherwise has, in the opinion of the Owner, misrepresented or withheld any fact material to the application,

this Owner may on 90 days written notice to the Licensee, cancel this license and the rights herein granted.

(6.04) Thirty days after the expiration or cancellation of this license, any improvements or fixtures that remain unremoved from the Land shall be absolutely forfeited to and become the property of the Owner and the Owner may remove them from the Land and the Licensee shall, on demand, compensate the Owner for all costs incurred by the Owner respecting their removal.

(6.05) The Licensee shall not be entitled to any compensation whether for damages or otherwise, in respect of a cancellation of this license by the Owner under this Article.

103025

Article VII - Notice

(7.01) Where service of a notice or a document is required under this license, the notice or document shall be in writing and shall be deemed to have been served if delivered to, or if sent by prepaid registered mail addressed to, the Owner and the Licensee at the addresses specified for each on the first page of this license, and where service is by registered mail the notice or document shall be conclusively deemed to have been served on the eighth day after its deposit in a Canada Post office at any place in Canada.

(7.02) Either party may, by notice in writing to the other, specify another address for service of notices under this license and where another address is specified under the section, notices shall be mailed to that address in accordance with this Article.

(7.03) Notwithstanding section 7.01, any written notice to be served or given by the Owner to the Licensee under this license shall be effectively given or served by posting the same in a conspicuous place on the Land.

Article VIII - Miscellaneous

(8.01) No term, condition, covenant or other provision herein shall be considered to have been waived by the Owner unless such waiver is expressed in writing by the Owner. Any such waiver of any term, condition, covenant or other provision herein shall not be construed as or constitute a waiver of any further or other breach of the same or any other term, condition, covenant, or other provision and the consent or approval of the Owner to any act by the Licensee requiring the consent or approval of the Owner to any act by the Licensee requiring the consent or approval of the Owner shall not be considered to waive or render unnecessary such consents or approvals to any subsequent similar act by the Licensee.

(8.02) No remedy conferred upon or reserved to the Owner is exclusive of any other remedy herein or provided by law, but such remedy shall be cumulative and shall be in addition to any other remedy herein or hereafter existing at law, in equity, or by statute.

(8.03) This License is subject to: 108025

(a) all subsisting grants or rights of any person made or acquired under the Coal Act, Forest Act, Mineral Tenure Act, Mining (Placer) Act, Petroleum and Natural Gas Act, Range Act, Water Act or Wildlife Act, or any extension or renewal of the same whether or not the Licensee has actual notice of them,

(b) any prior dispositions made pursuant to the Land Act, AND

(c) the exceptions and reservations of rights, interests, privileges and titles referred to in section 47 of the Land Act.

(8.04) The Licensee acknowledges and agrees with the Owner that

(a) any interference with the rights of the Licensee under this license by virtue of the exercise or operation of the rights, privileges or interests described in section 8.03 shall not constitute a breach of the Owner's obligations hereunder and the Licensee releases and discharges the Owner from and against any claim for loss or damage arising directly or indirectly out of any such interference,

(b) all costs and expenses, direct or indirect, that arise out of any interference by the Licensee with the rights, privileges and interests described in section 8.03 shall be borne solely by the Licensee,

(c) he shall not commence or maintain proceedings under section 60 of the Land Act in respect of any interference with his rights hereunder arising directly or indirectly out of the exercise or operation of the rights, privileges or interests described in section 8.03, AND

(d) all schedules referred to in this licence form an integral part of this license.

(8.05) This license shall not entitle the Licensee to exclusive possession of the Land, and the Owner may grant licenses to others to use the Land, for any purpose other than that permitted herein, so long as the grant does not materially affect the exercise of the Licensee's rights hereunder. The question of whether a grant materially affects the exercise of the Licensee's rights hereunder shall be determined by the Owner in his sole discretion.

(8.06) The terms and provisions of this license shall extend to, be binding upon and enure to the benefit of the parties hereto and their successors.

(8.07) Time is of the essence in this agreement.

Article IX - Interpretation

(9.01) In this license, unless the context otherwise requires, the singular includes the plural and the masculine includes the feminine gender and a corporation.

(9.02) The captions and headings contained in this license are for convenience only and are not to be construed as defining or in any way limiting the scope or intent of the provisions herein.

(9.03) Where in this license there is a reference to an enactment of the Province of British Columbia or of Canada, that reference shall include a reference to any subsequent enactment of like effect, and unless the context otherwise requires, all statutes referred to herein are enactments of the Province of British Columbia.

(9.04) If any section of this license or any part of a section is found to be illegal or unenforceable, that part or section, as the case may be, shall be considered separate and severable and the remaining parts or sections, as the case may be, shall not be affected thereby and shall be enforceable to the fullest extent permitted by law.

105025

IN WITNESS WHEREOF, the parties have executed this license as of the day and year first above written.

SIGNED on behalf of Her Majesty)
the Queen in Right of the)
Province of British Columbia by)
a duly authorized representative)
in the presence of:)

851 Yates Street)
Victoria, B.C.)

Authorized Representative

SIGNED, SEALED AND DELIVERED on)
behalf of Her Majesty the Queen)
in Right of Canada in the)
presence of:)

Director General
Properties and Utilities
Department of National Defence

c/s

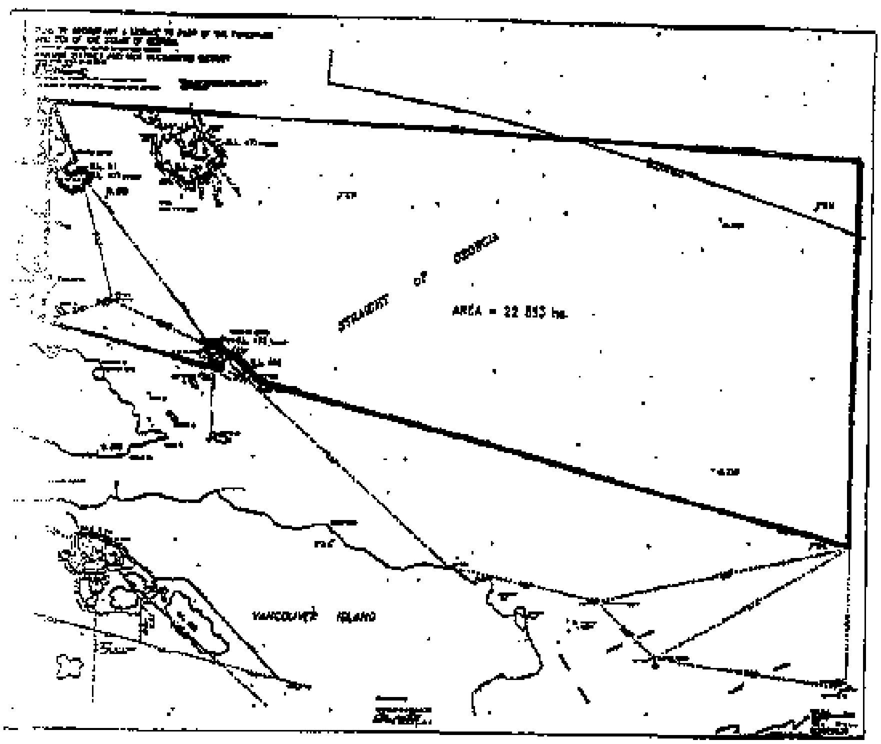
British Columbia Crown Lands

LICENSE No. 102025 | FILE No. 1400379

1.1 Legal Description

All that foreshore or land covered by water being part of the bed of the Strait of Georgia, Nanaimo District and New Westminster District and including foreshore to the highwater mark of all Islands within the License area, more particularly shown outlined in red on plan below and containing 22,553 hectares more or less.

1.2 Sketch Plan



GOVERNMENT OF BRITISH COLUMBIA

Nanoose Bay Expropriation

Intergovernmental Relations

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Points of Principle

Without Prejudice

The following represent the best efforts of the two negotiators to arrive at points of principle concerning an amended licence of occupation for the Whiskey Golf Test Range.

The negotiators will recommend an amended licence based on these principles. It is recognized that certain policy issues have yet to be resolved before either party commits to enter into an amended licence arrangement.

1. The term of the amended agreement shall be 40 years (30 additional years).

2. The fees for the additional 30 years shall be based on an annual payment of $4 million; plus a one-time payment of $5 million as an adjustment for the 89-99 period, payable on the date of signing of this amended licence.

3. The annual fee shall be adjusted each 5 years beginning in 2004 by a factor equal to the change in the CPI over the preceding 5 years unless the parties agree that extenuating circumstances or amendments to the licence warrant a different adjustment

4. An amending provision will provide for amendments to the licence including any boundary adjustments that may be required for operational or technological reasons or to address local issues which may arise. All amendments will be by mutual agreement.

5. The boundary will be adjusted at the SW corner to remove approximately 5% of the area from the licence. DND agrees that surface use of an additional 5% of the area will be unrestricted for the general public.

6. The province will consult with DND prior to approving any other use of the seabed in the area of the licence to determine the impact on DND's permitted use. In addition, the province will consult with DND concerning possible seabed uses in the area located within a 1km. strip adjacent to the northern boundary of the licence area which, due to noise occurrence, might materially impact the permitted use within the licence area.

7. An environment schedule, along the lines of Annex A to these principles, will be included in the licence and will include a provision confirming that no nuclear warheads will be present at any time within the licence area. In addition, unforeseen environmental issues that arise from time to time might require amendment to the schedule.

8. A Dispute Resolution process will be established to address differences between the parties arising from #6 and #7 above

9. Emergency response plans and related public information will be published and distributed in the nearby settled areas.

5 May 1999

ENVIRONMENTAL PRINCIPLES TO BE INCLUDED IN A "WHISKEY GOLF" LICENSE

The Governments of Canada and British Columbia agree to adopt responsible environmental stewardship. Standardized procedures to ensure prevention, response to and mitigation of environmental damage will be adopted. This will include development of guidelines for exercising associated response teams in various related scenarios

Sufficient sorbent material shall be available to prevent escape of any spilled fuel or petroleum products.

Products used for cleaning of vessels and other equipment shall be environmentally friendly.

All reasonable effort must be made to minimize the loss or escape of debris from operations in the area. A record of debris is to be kept and be available for inspection.

Monitoring of the sediments on the ocean floor shall be conducted in the first year and every third year thereafter to assess whether any contaminants from operations in the area are reaching unacceptable levels (consistent with standards set by Canada or by British Columbia). If results after three series of monitoring (after year seven) indicate levels are not changing and standards are being met, monitoring, can be extended to every eight years.

Use of explosives is to be restricted unless authorized by permit from the Department of Fisheries and Oceans

Prior to use of sonar, a visual survey of the area is to be carried out to detect if any whales are present. If whales are detected, no sonar activity is to occur within 4,000 yards (two nautical miles).

In addition to the above suggested conditions, the license should state that the actual area covered by the license can be restricted to lands under the sea below the low chart datum.

GOVERNMENT OF BRITISH COLUMBIA

Nanoose Bay Expropriation

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- Points of Principle agreement between the B.C. Government and the Government of Canada
- News Updates
  - Sept. 3 News Release
- Map showing the Location of Nanoose within the strait of Georgia
- Map showing Vancouver Island, Nanoose Bay and the Whiskey Golf torpedo testing range
- Federal government Notice of Intention to Expropriate Nanoose Bay
- Expropriation Act Public Hearing Rules

BRITISH COLUMBIA HAS LAUNCHED A CONSTITUTIONAL CHALLENGE AGAINST THE NANOOSE EXPROPRIATION IN B.C. SUPREME COURT: WRIT FILED SEPTEMBER 3, 1999 STATEMENT OF CLAIM FILED OCTOBER 6, 1999

The Plaintiff's claim is for a declaration that a purported expropriation of lands belonging to the Province of British Columbia within the Strait of Georgia in the area known as Canadian Forces Maritime and Experimental Test Range near Nanoose, British Columbia, would be constitutionally invalid pursuant to the Constitution of Canada, and, in particular, for the following orders:

1. (a) A declaration that it is a requirement of the Constitution of Canada that legislation passed by Parliament or the Legislatures must be sufficiently definite and precise so as to indicate its subject matter and so be attributable to a matter for which Parliament or the Legislatures have been empowered under the Constitution to make laws,

   (b) A declaration that the Expropriation Act, R.S.C. 1985 c. E-21 is inconsistent with that requirement and, therefore, of no force and effect pursuant to s. 52 of the Constitution Act, 1982.

2. (a) A declaration that it is a requirement of the Constitution of Canada that the federal government may only expropriate property where that part of the property right taken and such extent of the taking of the right is tied inherently and of necessity to that exercise of the constitutional authority in relation to which Parliament has been empowered to make laws.

   (b) A declaration that the Expropriation Act, R.S.C. 1985 c. E-21 is inconsistent with that requirement and, therefore, of no force and effect pursuant to s. 52 of the Constitution Act, 1982.

3. (a) A declaration that it is a requirement of the Constitution of Canada that lands and public property belonging to the provinces may not be expropriated by the federal government except in accordance with a law enacted:

   i. specifically to implement the authority expressly referred to in s. 117 of the Constitution Act, 1867, to assume provincial lands or public property required for fortifications or defence of the country, or

   ii. under s. 91 of the Constitution Act, 1867, specifically

for that purpose and the taking of the provincial lands or public property is absolutely essential to the carrying out of the matter for which Parliament has been empowered to make that law.

(b) A declaration that the Expropriation Act, R.S.C. 1985 c. E-21 is inconsistent with that requirement and, therefore, invalid or inapplicable and of no force and effect so far as it purports to authorize the expropriation of provincial lands or public property.

(c) In the alternative, if the Expropriation Act R.S.C. 1985 c. E-21 is consistent with that requirement, a declaration that the purported expropriation of those lands (the "lands") in the vicinity of Nanoose Bay comprising the Canadian Forces Maritime Experimental and Test Range referred to in a Notice to Expropriate pursuant to s. 5 of the Expropriation Act published in the Canada Gazette on May 22, 1999, and filed in the Land Title Offices in Victoria and New Westminster is not absolutely necessary for the purpose of national defense.

(d) A declaration that, since the expropriation of those lands is not absolutely necessary, the Expropriation Act, R.S.C. 1985 c. E-21 is constitutionally invalid or inapplicable in the circumstances of this case.

4. A declaration that, notwithstanding the Expropriation Act, R.S.C. 1985 c. E-21, the purported expropriation of these lands is of no force and effect and the title to the land is, and always has been, absolutely vested in the Crown in Right of the Province of British Columbia.

5. An order for reasonable compensation from the Crown in Right of Canada for its use of these lands.

6. Such further orders as the Court may deem meet and just.

7. An order for costs.

DATED September 3, 1999

STATEMENT OF CLAIM FILED OCTOBER 6, 1999

Form 13 (Rule 20(1))

NO. A992357
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

PLAINTIFF

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, ATTORNEY GENERAL OF CANADA and THE MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES

DEFENDANTS

STATEMENT OF CLAIM

1. The Plaintiff is Her Majesty's Attorney General for the Province of British Columbia (the "Province") and has the regulation and conduct of all litigation for or against the government of the Province or a Ministry of that government.

2. The Defendant is Her Majesty's Attorney General for Canada ("Canada") and has the regulation and conduct of all litigation for or against the government of Canada or a department of that government.

3. The Defendant, Minister of Public Works and Government Services, is the statutory decision maker for Canada in matters conducted under the Expropriation Act R.S.C. 1985 c. E-21 (the "Expropriation Act").

4. The seabed and subsoil, including the mineral and other natural resources, within and under the waters of the Strait of Georgia, including the foreshore and lands underlying an area known as the Canadian Forces Maritime and Experimental Test Range (hereinafter "CFMETR") in the vicinity of Ballenas Islands to Entrance Island near Nanoose, in the Province of British Columbia, an area of approximately 22,500 hectares (the "Provincial lands") is land and public property of and belonging to the Province within the meaning of s. 109 of the Constitution Act, 1867, and under the Province's legislative and regulatory authority under s. 92(5) of the Constitution Act, 1867.

5. Provincial proprietorship of these lands was confirmed on a reference to B.C. Court of Appeal and the Supreme Court of Canada in 1984, A.G.B.C. v. A.G. Canada (the Georgia Strait Reference).

6. On or about May 21, 1999, the Defendant Minister, acting on behalf of Canada, purported to issue a Notice of Intention to Expropriate these Provincial lands underlying CFMETR, which Notice was issued pursuant to the Expropriation Act.

7. On or about June 25, 1999, the Defendant Minister issued a Corrected Notice of Intention to Expropriate pursuant to subsections 6 and 8(2) of the Expropriation Act revising the map description of the area to be expropriated.

8. On or about September 13, 1999, the Minister of Public Works and Government Services, on behalf of the Federal Government, filed a Notice of Confirmation of Expropriation pursuant to section 11(3) of the Expropriation Act for an amended area totalling approximately 21,703 hectares.

9. The Plaintiff claims that the purported expropriation of these Provincial lands by Canada was done improperly and without constitutional authority.

10. The Notice of Intention to Expropriate specified that these Provincial lands involved:

> "...are required by Her Majesty the Queen in right of Canada for a purpose related to the safety or security

of Canada or of a state allied or associated with Canada and it would not be in the public interest further to indicate that purpose"

and, pursuant to section 5(3) of the Expropriation Act, no further purpose was indicated.

11. The Provincial lands and waters comprising the CFMETR base at Nanoose Bay have been operated by Canada as a range for the testing of torpedoes and underwater sonar devices since approximately 1965.

12. Since 1965, through an exchange of a series of diplomatic notes, Canada and the United States have shared the operational responsibilities for CFMETR. The last Exchange of Notes occurred in 1986 for a ten year period, and has not been renewed. Upon non-renewal, the license to the U.S. Navy continued in force on a year to year basis.

13. Canada did not seek the consent of B.C. in entering into any of the Exchange of Notes.

14. The United States Navy is the primary user of the facility, and since 1965 has been responsible for approximately 90% of the torpedo testing.

15. Canada's use of the facility has been, and continues to be, less than 10% in terms of range hours.

16. The Nanoose Bay site of CFMETR offers convenience and an economic advantage to the United States Navy, and also to the Canadian Navy, over other ocean sites in that the seabed is relatively flat with a soft surface, which allows for ease of recovery of fired torpedos, but the particular site is not necessary for the security of Canada.

17. The Plaintiff further says that the CFMETR base is not required for the purposes of Fortifications or the Defence of Canada within the meaning of s. 117 of the Constitution Act, 1867.

18. The Plaintiff further says that the CFMETR site is not required for the safety or security of Canada or of a state allied or associated with Canada within the meaning of s. 5(3) of the Expropriation Act, but rather simply offers an economic advantage to Canada over other sites.

19. The United States Navy has available to it other appropriate sites within U.S. waters to conduct these operations, but prefers the CFMETR site for economic reasons.

20. The Plaintiff says that the Constitution of Canada, and in particular s. 109 thereof, and the Terms of Union, 1871, guaranteed to the Province of British Columbia its continued ownership of its lands except as otherwise provided in the Constitution Act, 1867.

21. The Plaintiff claims that this expropriation is not otherwise authorized by the Constitution Act, 1867.

22. The Plaintiff claims that the Expropriation Act is not legislation passed pursuant to s. 117 of the Constitution Act, 1867, and therefore cannot be the legislative basis for the exercise of any purported right of Canada to assume any lands which are the property of the Province for fortification or defence of the country.

23. The Plaintiff claims that the Expropriation Act is not legislation passed pursuant to s. 91(7) of the Constitution Act, 1867.

24. In the alternative, the Plaintiff claims that the Expropriation Act is unconstitutionally vague in that it fails to be sufficiently definite and

precise so as to indicate its subject matter, and so does not provide the authority for Parliament to act in the case of this expropriation and, therefore, this expropriation is of no force and effect.

25. The Parliament of Canada has not passed any constitutionally valid legislation governing the use of the Provincial lands underlying CFMETR.

26 The Plaintiff further claims that the Expropriation Act is overly broad and so inconsistent with the requirements of the Constitution Act, 1867, insofar as it purports to apply to expropriation of lands which are not required of necessity or tied inherently to the exercise of valid federal legislative authority. The said Act would purport to apply to the expropriation of lands which would be desired by the federal government merely as a matter of economic advantage, but would not be required of necessity, in the course of otherwise valid federal activities, or would not be tied inherently to those otherwise valid federal activities.

27. The Plaintiff claims that federal expropriatron of the Provincial lands is not necessary where a License of Occupation is readily available.

28. The Plaintiff further claims that, on the facts of this case, the federal expropriation of the Provincial lands at Nanoose Bay was not required because a License of Occupation was readily available to Canada.

29. On or about May 5, 1999, negotiators for British Columbia and Canada had reached an agreement in principle on a satisfactory License of Occupation concerning the Provincial lands.

30. In the absence of a valid and subsisting License of Occupation, Canada has occupied and used the Provincial lands without compensation being paid to the Province for the use of these lands.

31. The Plaintiff further claims that the unilateral decision of Canada to commence expropriation proceedings rather than continue with negotiations is contrary to the constitutional conventions and the principles of federalism contained within the Constitution of Canada.

WHEREFORE the Plaintiff claims:

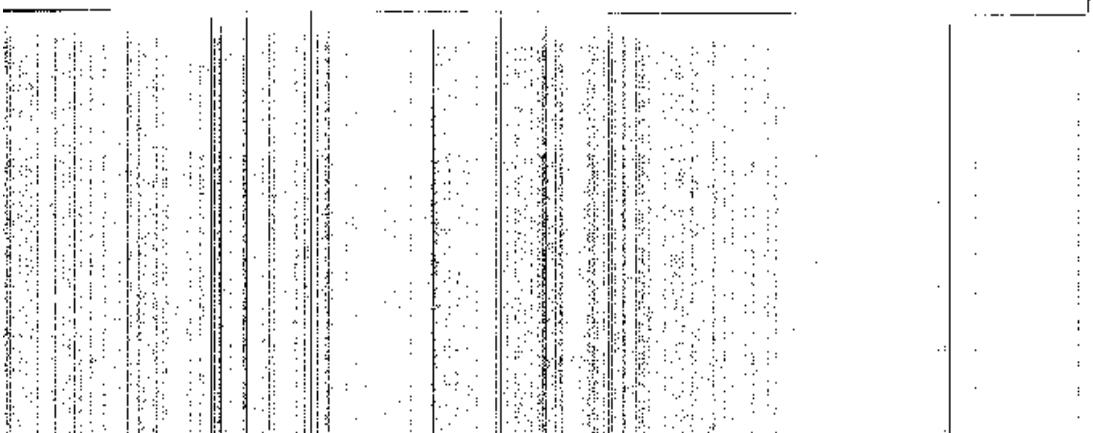
A. A declaration that the purported expropriation of the lands at CFMETR is constitutionally invalid pursuant to the Constitution of Canada.

B. (i) A declaration that it is a requirement of the Constitution of Canada that legislation passed by Parliament or the Legislatures must be sufficiently definite and precise so as to indicate its subject matter and so be attributable to a matter for which Parliament or the Legislatures have been empowered under the Constitution to make laws.

(ii) A declaration that the Expropriation Act, is inconsistent with that requirement and, therefore, of no force and effect pursuant to s. 52 of the Constitution Act, 1982.

C. (i) A declaration that it is a requirement of the Constitution of Canada that the federal government may only expropriate property where that part of the property right taken and such extent of the taking of the right is tied inherently and of necessity to that exercise of the constitutional authority in relation to which Parliament has been empowered to make laws.

(ii) A declaration that the Expropriation Act, is inconsistent with that requirement and, therefore, of no force and effect pursuant to s. 52 of the Constitution Act, 1982.



D. (i) A declaration that it is a requirement of the Constitution of Canada that lands and public property belonging to the provinces may not be expropriated by the federal government except in accordance with a law enacted:

(1) Specifically to implement the authority expressly referred to in s. 117 of the Constitution Act, 1867, to assume provincial lands or public property required for fortification or defence of the country, or

(2) under s. 91 of the Constitution Act, 1867, specifically for that purpose and the taking of the provincial lands or public property is absolutely essential to the carrying out of the matter for which Parliament has been empowered to make that law.

(ii) A declaration that the Expropriation Act, is inconsistent with that requirement and, therefore, invalid or inapplicable and of no force and effect so far as it purports to authorize the expropriation of provincial lands or public property.

(iii) In the alternative, if the Expropriation Act, is consistent with that requirement, a declaration that the purported expropriation of those lands (the "Provincial lands") in the vicinity of Nanoose Bay comprising the Canadian Forces Maritime Experimental and Test Range referred to in a Notice to Expropriate pursuant to s. 6 of the Expropriation Act published in the Canada Gazette on May 22, 1999, and filed in the Land Title Offices in Victoria and New Westminster is not absolutely necessary for the purpose of national defence.

(iv) A declaration that, since the expropriation of those lands is not absolutely necessary, the Expropriation Act, is constitutionally invalid or inapplicable in the circumstances of this case.

E. A declaration that, notwithstanding the Expropriation Act, the purported expropriation of these Provincial lands is of no force and effect and the title to those Provincial lands is, and always has been, absolutely vested in the Crown in right of the Province of British Columbia.

F. An order for reasonable compensation from the Crown in Right of Canada for its use of these lands.

G. Such further order as the Court may deem meet and just.

H. An order for costs.

PLACE OF TRIAL: VANCOUVER, BRITISH COLUMBIA

DATED: October 6, 1999

GEORGE H. COPLEY, Q.C.
Solicitor for the Plaintiff

THIS STATEMENT OF CLAIM is filed by George H. Copley, Q.C., solicitor for the Plaintiff, whose place of business and address for delivery is Ministry of Attorney General, Legal Services Branch, 6th Floor - 1001 Douglas St, Victoria, British Columbia, V8V 1X4 - (250) 356-8400.

(1) See Appendix 1 for the location of the range.

(2) "B.C. Ends Seabed Lease for Nanoose Torpedo Range in Response to U.S. Intransigence on Salmon Talks," *Backgrounder*, press release from the office of the Premier of British Columbia, 23 May 1997.

(3) "'We have taken this step in the public interest because we have been disturbed and frustrated by the unco-operative and unfriendly approach taken by the United States in our efforts to negotiate new terms for the Pacific Salmon Treaty,' said Premier Glen Clark," press release, see note 2.

(4) "Government of Canada Begins Expropriation Process to Retain Seabed Testing Site at Nanoose Bay," Department of National Defence, press release, 14 May 1999.

(5) *Canada Gazette*, Part I, 22 May 1999, 1503.

(6) "Backgrounder," *Intergovernmental Relations: Nanoose Bay Expropriation* website, **http://www.nanoose.gov.bc.ca/backgrounder.html**, accessed June 1999.

(7) *Reference re Offshore Mineral Rights (B.C.)*, [1967] S.C.R. 792, 65 D.L.R. (2d) 353.

(8) In 1967, international law recognized a three mile wide territorial sea.

(9) [1984] 1 S.C.R. 388, 8 D.L.R. (4th) 161.

(10) See note 9, 8 D.L.R. (4th) 161, at p. 165.

(11) See note 9, 8 D.L.R. (4th) 161, at p. 172.

(12) See note 9, 8 D.L.R. (4th) 161, at p. 191.

(13) Treaty Series 1965 No. 6.

(14) Treaty Series 1976 No. 18.

(15) Treaty Series 1986 No. 40.

(16) This agreement was conveyed by means of a Diplomatic Note from the United States on 13 March 1998. See "Chronology of Events: Canadian Forces Maritime Experimental Test Ranges (CFMETR)," Department of National Defence press release, 14 May 1999.

(17) Larry Pynn, "B.C.'s Threat to End Lease Could Cost U.S. Millions," *Vancouver Sun*, 23 May 1997, p. A1.

(18) Ross Howard, "B.C. Cancels Military Lease," *The Globe and Mail* (Toronto), 23 May 1997, p. A1.

(19) See Appendix 2 for the Lease of Occupation.

(20) See note 2, above.

(21) *Intergovernmental Relations: Nanoose Bay Expropriation* website, **http://www.nanoose.gov.bc.ca/backgrounder.html**, accessed June 1999; See Appendix 3 for the "Points of Principle."

(22) "Chronology of Events: Canadian Forces Maritime Experimental Test Ranges (CFMETR)," Department of National Defence press release, 14 May 1999.

(23) Andrew Petter, "Nanoose Expropriation: An Unprecedented Abuse of Federal Power," *Victoria Times Colonist*, 25 May 1999, A11.

(24) See Appendix 4 for the Statement of Claim.

(25) Section 28.5(c), *Constitutional Law of Canada* (Looseleaf edition).

(26) [1982] 1 S.C.R. 1004, at p. 1052-3).

(27) See note 9, above, 8 D.L.R.(4th) 161, at 166.