The Creation of Indian Reserves in British Columbia (a research guide)

Part I: Reserves Outside the Railway Belt
(1908 - 1938)

Part II: Reserves Inside the Railway Belt
(1871 - 1930)

Prepared by Chris Kelly
for the
Litigation Support Directorate
of the
Department of Indian Affairs and Northern Development

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Part II: Reserves Inside the Railway Belt

Preface

The great majority of land which has been segregated for the use of Aboriginal people in British Columbia was first set aside either during the Colonial period prior to 1871, by the Indian Reserve Commission from 1875-1908, or by the Royal Commission on Indian Affairs from 1913 -1916. Each of the reserves which were set aside during these periods has its own establishment history; however, they also fall into broader categories which correspond to the status of the Crown land on which they were established, i.e. whether the control and management of the land was with the Colonial Government, the Provincial Government or the Federal Government.

This paper reviews the processes of establishing reserves in British Columbia in two of the above noted categories: the establishment of reserves on crown lands controlled by the Federal Government during the period from 1871 to 1934; and, the establishment of reserves on crown lands controlled by the British Columbia Government during the period from 1908 to 1938. The establishment of reserves during the Colonial period and on lands controlled by the Provincial Government for the years 1871-1908 have been dealt with by Dorothy Kennedy in a previous study. [1]

The paper is divided into two parts with a common introduction. The introduction

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[1]For a comprehensive Guide to the establishment of reserves in the pre-confederation period and the work of the First Indian Reserve Commission see, *A Guide to the Establishment of Indian Reserves in British Columbia*, Dorothy Kennedy. B.C. Indian Language Project. Prepared for the Claims Research and Assessment Directorate, Department of Indian and Northern Affairs.

outlines the major events in the establishment of all reserves in British Columbia from 1871 to 1938. Part one gives a detailed account of the process regarding reserves established outside the former Railway Belt from 1908-1938 (i.e. Provincial crown land) and part two gives a detailed account of the process regarding reserves inside the former Railway Belt from 1871 to 1930 (i.e. Federal crown land). [2]

The purpose of this paper is to provide a blueprint to the processes which have resulted in the present status of reserves established inside and outside the former Railway Belt. Hopefully, this will assist in determining the validity of competing interests in "lands reserved for Indians" in British Columbia.

[2]The Railway Belt as it is known was a strip of land forty miles wide and five hundred miles long stretching from the Alberta border to the Pacific Ocean. The land was transferred from British Columbia to the Federal Government to assist the latter in financing the Canadian Pacific Railway. Further discussion can be found in the body of the following paper.

Introduction

British Columbia expressed an interest in Canada at the time of Confederation in 1867 but did not join the burgeoning union until four years later. Among other reasons, the expansive Hudson's Bay Company territory separating Ontario and British Columbia made an earlier union impractical. The *Constitution Act, 1867*, however, made provision for the admission of the territories west of Ontario into the Canadian federation by an Imperial Order in Council.[3] When the Hudson's Bay Company surrendered its interest in Rupert's Land on September 19, 1869 the immediate impediment to union was removed. [4] The Imperial Government passed an Order in Council dated June 23, 1870 admitting Rupert's Land and the Northwest Territories into Canada and bringing Canada to British Columbia's doorstep.[5] After Canada had control of these lands federal negotiators agreed to discuss with British Columbia the terms of its entry into

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[3] "*Constitution Act," 1867*, s.146, 30 & 31 Victoria, Chapter 3 (U.K.) Revised Statutes of Canada, Appendix II, Number 5: It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-Western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve subject to the Provisions of this Act; and the Provisions of any Order in Council in the Behalf shall have the effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

[4]Schedule C to "Rupert's Land and Northwest Territory Order," Revised Statutes of Canada 1970, Appendix II, Number 9.

[5] "Rupert's Land and Northwest Territory Order," Revised Statutes of Canada, 1970, Appendix II, Number 9.

Confederation.

While British Columbians were divided about their commitment to joining Confederation, the Colonial Legislative Council determined their desired terms and in June 1870 appointed three members to negotiate with Ottawa. The negotiators returned with an offer from John A. MacDonald's Conservative Government that they considered generous. It was accepted by the Council on January 18, 1871 after little debate.

On April 1, 1871 the Federal House of Commons accepted the Terms of Union with British Columbia and on April 5, 1871 the Senate followed suit. An Imperial Order in Council dated May 16, 1871 admitted the Province of British Columbia into the Canadian Confederation. Prime Minister, John A. Macdonald, chose J.W. Trutch to be the Province's first Lieutenant-Governor and from the members of the Legislative Council , Trutch chose Joseph Foster McCreight to be the first Premier.

The greatest inducement to uniting put forth by Canada to the somewhat reluctant new Canadians was the promise to build the Canadian Pacific Railway to connect them with central Canada. In exchange, however, the Federal Government bargained for the transfer of land in order to finance construction. For unlike the other western provinces, British Columbia had control of its public lands when the Legislative Council negotiated the Terms of Union, and subject to the promises contained therein, entered Confederation still with control of its public lands.[6] The promise to transfer control of public lands in order to contribute to railway construction is contained in Article 11 of

[6]Kirk N. Lambrecht, The Administration of Dominion Lands, 1870-1930, p. 4. Canadian Plains Research Center, 1991.

the Terms of Union. Article 11 reads as follows:

The Government of the Dominion undertake to secure the commencement simultaneously within two years from the date of the Union, of the construction of a Railway from the Pacific towards the Rocky Mountains, and from such point as may be selected, east of the Rocky Mountains, towards the pacific to connect the seaboard of British Columbia with the Railway system of Canada; and further, to secure the completion of such Railway within ten years from the date of the Union.

And the Government of British Columbia agree to convey to the Dominion Government in trust, to be appropriated in such manner as the Dominion Government may deem advisable in the furtherance of the construction of the said Railway, a similar extent of public lands along the line of Railway, throughout its entire length in British Columbia, not to exceed, however, Twenty (20) miles on each side of the said line, as may be appropriated for the same purpose by the Dominion Government from the public lands in the Northwest Territories and the Province of Manitoba. Provided that the quantity of lands which may be held under preemption right or by Crown grant within the limits of the tract of land in British Columbia to be so conveyed to the Dominion Government shall be made good to the Dominion from contiguous public lands; and provided, further, that until the commencement, within two years, as aforesaid, from the date of Union, of the construction of the said Railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any way than under right of preemption, requiring actual residence of the preemptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said Railway, the Dominion Government agree to pay to British Columbia, from the date of the union, the sum of $100,000 per annum, in half-yearly payments in advance.[7]

Pursuant to the *Constituion Act, 1867*, the Federal Government also became responsible for "Indians" and "lands reserved for Indians" once British Columbia was part of Canada.[8] The proper administration of this responsibility would require an additional transfer of control of public lands. This promise was contained in Article 13 of the Terms of Union.

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[7] May 16, 1871 "British Columbia Terms of Union," in Revised Statutes of Canada, 1985

[8] s. 91(24), *Constitution Act, 1867,* 30 & 31 Victoria., c.3 Imperial Statutes.

Atricle 13 also contains the only apparent agreement with respect to Aboriginal land policy between British Columbia and Canada at the time of union. It reads as follows:

> The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.
>
> To carry out such policy, tracts of land of such extent as has hitherto been the practice of the British Columbia Government to appropriate for that purpose shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians, on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.[9]

The meanings of Articles 11 and 13 became the subject of contention between the two levels of Government soon after the deal was consummated.

With respect to Article 13 they disagreed first over the amount of land that the Province was required to set aside for Aboriginals. The Article demanded a policy as liberal as the one in place before Union. Unfortunately, there was, arguably, no fixed policy in place respecting land allotments for Aboriginals prior to Union. The Colonial Government's practice in many cases had been to set aside approximately 10 acres per family but this was not uniform. Nevertheless, in other parts of the country Canada had a policy of much more liberal grants and Federal officials argued that the disparity would eventually lead to dissatisfaction. When discussions with the Province towards appropriating new lands for reserves got under way in 1873, the Federal Government demanded allotments of 80 acres per family.

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[9]May 16, 1871 *British Columbia Terms of Union*, in Revised Statutes of Canada, 1985

After two years of arguing and a shortlived compromise in 1874, the solution to the deadlock came in the form of proposals from William Duncan, a lay missionary prolific in his suggestions and influence on Provincial Indian Affairs. Duncan's proposals, after substantial further commentary and negotiation, formed the basis for the 1875-76 Agreement between British Columbia and Canada to appoint a Joint Commission to adjust and allot reserves. The agreement read as follows:

1. That with a view to the speedy and final adjustment of the Indian Reserve question in British Columbia on a satisfactory basis, the whole matter be referred to three Commissioners, one to be appointed by the Government of the Dominion, one by the Government of British Columbia, and the third to be named by the Dominion and the Local Governments jointly.

2. That the said Commissioners shall, as soon as practicable after their appointments, meet at Victoria and make arrangements to visit, with all convenient speed, in such order as may be found desirable, each Indian nation (meaning by nation all Indian tribes speaking the same language) in British Columbia, and, after full enquiry on the spot into all matters affecting the question, to fix and determine for each nation, separately, the number, extent and locality of the Reserve or Reserves to be allowed to it.

3. That in determining the extent of the Reserves to be granted to the Indians of British Columbia, no basis of acreage be fixed for the Indians of that Province as a whole, but that each nation of Indians of the same language be dealt with separately.

4. The Commissioners shall be guided generally by the spirit of the Terms of the Union between the Dominion and the Local Governments, which contemplates a "liberal policy" being pursued towards the Indians, and, in the case of each particular nation, regard shall be had to the habits, wants and pursuits of such nation, to the amount of territory available in the region occupied by them, and to the claims of the white settlers.

5. That each Reserve shall be held in trust for the use and benefit of the nation of Indians to which it has been alloted, and in the event of any material increase or decrease hereafter of the numbers of a nation occupying a Reserve, such a reserve

shall be enlarged or diminished, as the case may be, so that it shall bear a fair proportion to the members of the nation occupying it. The extra land required for any Reserve shall be allotted from Crown Lands, and any land taken off a Reserve shall revert to the Province.

6. That so soon as the Reserve or Reserves for any Indian nation shall have been fixed and determined by the Commissioner as aforesaid, the existing Reserves belonging to such nation, so far as they are not in whole or in part included in such new Reserve of Reserves so determined by the Commissioners, shall be surrendered by the Dominion to the Local Government so soon as may be convenient, on the latter paying to the former , for the benefit of the Indians, such compensation for any clearings or improvements made on any Reserve so surrendered by the Dominion and accepted by the Province, as may be thought reasonable by the Commissioners aforesaid.[10]

The 1875-76 Agreement got the reserve allotment process underway but the bickering continued. The work of the Indian Reserve Commission in its different manifestations from 1875 to 1908 was marked by Provincial complaints over the size of reserves and pleas for reassessment. In spite of the ongoing war of words and complaints about the expense of its operations, the Indian Reserve Commission continued, with different faces, to set aside lands for the use of Indians.

The original Commission consisted of three members: Alexander Anderson, Archibald McKinlay and Gilbert Malcolm Sproat. In 1878 two of the Commissioners were let go and the work was continued by a single Commissioner, Mr. Sproat. Sproat soon fell out of favour and in 1880 was replaced by Peter O'Reilly. O'Reilly continued the work of the Commission until 1898 when the job of reserve commissioner was added to the duties

[10]The Agreement was manifest in joint Orders-in-Council passed in 1875 and 1876, hence the 1875-76 Agreement: November 10, 1875 Federal Order-in-Council P.C. 1088, Found on N.A.C. RG 2; see also January 6, 1876 British Columbia Order-in-Council 1138, Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

of the Superintendent of Indian Affairs for British Columbia, A.W. Vowell. Vowell resigned in 1910, although the refusal of the Province to sanction further reserves in 1908 had effectively terminated the Commission and he was not replaced.[11] Through its different manifestations the Indian Reserve Commission allotted approximately 1000 reserves.

The negotiations over the transfer of Railway Belt lands continued after the Indian Reserve Commission had begun its work and concluded in December 1884 with the statutory transfer of a five hundred mile long by forty mile wide strip of land within the Province to the Federal Government. Initially the reserve establishment process continued as before; however, over time the Federal Government began to exercise greater authority over the Railway Belt lands and by 1890 began to assert a right to unilaterally set aside reserves on Federal lands in British Columbia without reference to the 1875-76 Agreement or the approval procedures agreed to for reserves outside the Railway Belt. From 1890 to 1930 the Federal Government followed a policy of approving the reserves by Federal Order in Council only.

Meanwhile as the new century approached a dispute was brewing over the meaning of Clause 5 in the 1875-76 agreement establishing the Indian Reserve Commission. Clause 5 as noted earlier reads as follows:

5. That each Reserve shall be held in trust for the use and benefit of the nation of

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[11]For a comprehensive Guide to the establishment of reserves in the pre-confederation period and the work of the First Indian Reserve Commission see, *A Guide to the Establishment of Indian Reserves in British Columbia*, Dorothy Kennedy. B.C. Indian Language Project. Prepared for the Claims Research and Assessment Directorate, Department of Indian and Northern Affairs.

Indians to which it has been allotted, and, in the event of any material increase or decrease hereafter of the numbers of a nation occupying a Reserve, such a reserve shall be enlarged or diminished, as the case may be, so that it shall bear a fair proportion to the members of the nation occupying it. The extra land required for any Reserve shall be allotted from Crown Lands, and any land taken off a Reserve shall revert to the Province. [12]

Facing a rapidly declining Aboriginal population and unreliable census data, British Columbia, by Clause 5 of the 1875-76 Agreement, asserted a right to the return of reserve lands in the event of a decrease in a Band's population from its original estimates. At times they also claimed that the reversionary interest contained in this clause established their underlying title and beneficial ownership to the reserves in the Province.

Provincial reversionary interest claims to reserve lands were not unique to British Columbia. Other provinces claimed interests in lands reserved for Aboriginals based on their interpretation of the distribution of public lands by the *Constitution Act, 1867*. The *Constitution Act, 1867*, except as altered by subsequent amendments, sets out the areas of legislative jurisdiction and control of public lands in Canada. Subject to specific exceptions, or a competing trust that existed at Confederation, each province was assigned both legislative jurisdiction over and control of public lands in the Province. [13] The Federal Government was given legislative jurisdiction over "lands reserved for

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[12] The Agreement was manifest in joint Orders-in-Council passed in 1875 and 1876, hence the 1875-76 Agreement: November 10, 1875 Federal Order-in-Council P.C. 1088, Found on N.A.C. RG 2; see also January 6, 1876 British Columbia Order-in-Council 1138, Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

[13] La Forest, *Natural Resources and Public Property Under the Canadian Constitution* (Toronto: University of Toronto Press: 1969), p. 14.

Indians" ; however, judicial decisions have noted that this did not necessarily include control of those lands.

Ontario's claim to a reversionary interest in lands reserved for Aboriginals, pursuant to the Royal Proclamation of 1763, was tested in 1888 in the case of St. Catharine's Milling Company. [14]

"There by a formal treaty (the North-West Angel Treaty No. 3) of October 1873, between commissioners appointed by the government of Canada on behalf of the Queen and the chiefs of the Salteaux tribe of the Ojibway Indians, the Indians surrendered to the government of Canada, for certain considerations, their right over 50,000 square miles of land described in the proclamation (Royal Proclamation, 1763), not less than 32,000 miles of which was in Ontario. Acting on the assumption that this land now vested in the Crown in right of the Dominion, the Dominion Government issued to the St. Catherine's Milling Company a timber permit to a specified area of the surrendered land. The company having availed itself of the permit, the Attorney-General of Ontario began an action against it on the ground that the beneficial ownership of the land was vested in the province of Ontario. "[15]

Ontario won in Provincial Court, and at the Supreme Court of Canada, before the judgement was appealed to the Judicial Committee of the Privy Council in England, then the court of last resort in Canada. Canada argued that at the time of Confederation the title in lands reserved for Indians by the Royal Proclamation in 1763 was owned by the Aboriginals for whom they were reserved and were thereby excepted from provincial ownership at Confederation. Therefore, since Canada had purchased the surrender of the Aboriginal interest in the lands by treaty, it had also purchased underlying title and control of those public lands. The Judicial Committee of the Privy Council rejected

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[14] St. Catherine's Milling and Lumber Co. v R. (1887), 13 S.C.R. 577, (1889), 14 A.C. 46.

[15] La Forest, p. 112.

Canada's argument. They decided that Aboriginal title in reserves was not akin to ownership or underlying title and so its purchase would not convey title to the Federal Crown:

"It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indians' title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished".[16]

The paramount title to lands reserved pursuant to the Royal Proclamation of 1763, or otherwise reserved for Indians, was stated to be in the Crown. Aboriginal title to the reserves was a personal interest in the use of the land, existing alongside and in competition with the Province's interest, that could only be surrendered to the Crown. After the surrender of Aboriginal title, the land would automatically revert to the Crown and underlying title would be determined, not by purchase, but by the distribution of public lands in the *Constitution Act, 1867*. Based on the distribution of public lands under the *Constitution Act, 1867*, noted above, the court decided that in lieu of a properly constituted agreement amending the constitutional provisions, the surrendered lands would automatically revert to the Province as owner of all the public lands in the Province, except as expressly reserved. [17]

As noted, the Federal Parliament's authority to make laws in relation to "Indians" and "land reserved for Indians", pursuant to section 91(24) of the *Constitution Act, 1867*, is

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[16] St. Catherine's Milling and Lumber Company v R. (1889), 14 A.C. 46 at 54.

[17] La Forest, p. 115.

an exception to the Provinces' legislative jurisdiction over lands in the province."[18] In the St. Catherine's Milling Company lawsuit Canada had also argued that their legislative jurisdiction over "lands reserved for Indians" implied the ownership of underlying title. The Judicial Committee of the Privy Council found that the right to legislate included the right to accept surrenders but this right did not affect the property interest of the Province. [19] In lieu of agreements amending the provisions of the *Constitution Act, 1867,* the Federal Government would not hold the Crown's underlying proprietary interest in reserves as a result of their legislative jurisdiction.

Although the St. Catharines Milling Company decision added fuel to British Columbia's claims, it did not settle the questions surrounding reversionary interests and title to reserves in British Columbia. Article 13 of the Terms of Union and Clause 5 of the 1875-76 Joint Commission Agreement contain provisions which arguably amended the distribution of lands in the *Constitution Act, 1867,* and they had not been the subject of judicial interpretation. This lack of certainty coupled with the Province's refusal to address claims to Aboriginal title, which had never been surrendered in most of the Province, caused the negotiations over reserve establishment to proceed in a confused and hesitant manner. It also prevented the Federal Government from setting a fixed policy for the administration of reserve lands.

The dispute over the Province's claimed reversionary interest resulted in the breakdown of the first Indian Reserve Commission and effectively disabled the Federal Government

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[18] *Constitution Act, 1867*, 30 & 31 Victoria., c.3 Imperial Statutes.

[19] La Forest, p. 114.

from selling or leasing lands on the behalf of Bands. In order to surmount these difficulties the two governments entered into negotiations which led to the McKenna-McBride Agreement in September 1912. In essence, by the McKenna-McBride agreement British Columbia agreed to convey its claimed rights in reserves to the Federal Government in exchange for the reassessment of reserve allotment in the Province by a Royal Commission and a half share of the revenues to be derived from the sale of lands removed from reserve status.

As the Commission was underway, however, the Federal Government took the position that the McKenna-McBride agreement did not apply to reserves which had been allotted in the Railway Belt. Since the Railway Belt lands were Federal crown land, they argued that there was no provincial interest in reserves established on them whatsoever. Since British Columbia had no interest in the reserves, the Province had not bargained for any adjustment or revenues from their sale.

The reassessment of reserves pursuant to the McKenna-McBride Agreement was performed by a Royal Commission consisting of five members. The Commissioner visited reserves throughout the Province and held public hearings between1913 and 1916, before delivering a final report to the two governments which recommended either the creation, confirmation or adjustment of reserves. Depite the controversy over the application of the McKenna-McBride Agreement to the reserves in the Railway Belt, the Commissioners made recommendations regarding those reserves. The Federal Government, however, maintained the position that their findings were simply recommendations and ultimately refused to confirm any cut-offs.

It was 7 years after the delivery of the Commissioners' report before either government passed an Order in Council accepting the schedule of reserves included in the Commissioners' report. During the delay both governments passed legislation authorizing their representatives to do whatever was necessary to complete the process. This included a further review and amendment of the Commissioners' reserve schedule by W.E. Ditchburn and J. W. Clarke. The Commissioners' report, as amended by Ditchburn and Clarke, was accepted by the Province by Order in Council on July 26, 1923, and by the Federal Government on July 9, 1924. The only difference in the accepting Orders in Council was the Federal Government's specific refusal to accept the cut-offs recommended by the Commissioners to reserves in the Railway Belt.

After the passage of the confirming Orders in Council, the governments began to negotiate the terms of the conveyance of the Province's interest in the reserves situate outside the Railway Belt. These negotiations proceeded slowly until they became entwined in new negotiations for the return of all the Railway Belt lands to British Columbia. As the negotiations for the reconveyance of the Railway Belt lands heated up, Federal negotiators visited British Columbia to deal with the effect of the transfer on reserves in the Railway Belt and to ensure that after the transfer reserves inside and outside the Railway Belt would share a common form of tenure. Their negotiations resulted in the Scott-Cathcart Agreement, signed on March 3, 1929. Among other things this Agreement stipulated the terms to be included in the conveyance of reserves outside the Railway Belt, in particular the reservation of certain powers of expropriation in favour of the Province. The Scott-Catchcart Agreement also excepted the reserves inside the Railway Belt from the reconveyance of the Railway Belt to the Province, and it directed that those reserves would be held on the same terms as the reserves outside

the Railway Belt after they had been conveyed to the Federal Government.

The Railway Belt Re-transfer Agreement was signed on February 20, 1930 but despite the Scott-Catchart Agreement disputes over cut-offs to the Railway Belt reserves and the form of conveyance for reserves outside the Railway Belt continued into the 1930's. They were eventually settled, however, and on July 29, 1938 British Columbia conveyed the reserves outside the Railway Belt to Canada pursuant to the terms which had been agreed to in the Scott-Cathcart Agreement.

PART I

Reserves Outside the Railway Belt (1908 - 1938)

The Breakdown of the First Indian Reserve Commission

When the Federal Government assumed the power to legislate for "Indians and lands reserved for Indians" in British Columbia, they also became responsible for their administration. [20] As noted in the introduction, the administration of "lands reserved for Indians" included making the regulations which governed the surrender of an Aboriginal interest in a reserve, to the Crown, so that the land could be dealt with by sale or other arrangement . The *Indian Act* regulations that were developed in regard to surrenders directed the Federal Government to ensure, before giving their consent, that the contemplated transaction would benefit the Band. The Federal Government was also directed to obtain the consent of the Band members by majority vote before accepting a surrender of an Aboriginal interest.[21] When British Columbia claimed, as a result of the characterization of their alleged reversionary interest, that any surrender of the

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[20]It was held in Attorney-General of Canada v. Attorney-General of Ontario, (1897) A.C. 199, that the power to legislate includes the power of administration and control.

[21]Statute of Canada, 49 Victoria, Chapter 43, 1886 s. 39: No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, except on the following conditions:

(a) The release or surrender shall be assented to by a majority of the male members of the band, of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor-in-Council or by the Superintendent General; but no Indian shall be entitled to vote or be present at such council unless he habitually resides on or near and is interested in the reserve in question;

(b) The fact that such release or surrender has been assented to by the band at such council or meeting, shall be certified on oath before some judge of a superior, county or district court, or stipendiary magistrate, by the Superintendent General, of by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men present thereat and entitled to vote; and when such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.

Band's interest in reserve land automatically returned the land to Provincial ownership, without any right of compensation to the Bands, it created an administrative deadlock. If the *Indian Act* applied to the British Columbia reserves, the Federal Government could not consent, and the Bands would not consent, to a surrender without any benefit in return. The failure to negotiate a solution created tremendous uncertainty for transactions that did involve reserve lands and precipitated the final breakdown of the first Indian Reserve Commission.

The Province's claim to a reversionary interest was known to the Federal Department of Indian Affairs prior to 1890, but not clearly defined. At the time its impact was not significant, however, because the Federal Government was pursuing a policy that did not encourage the alienation of lands set aside for Aboriginals. This was particulary the case in British Columbia where settlers demands were not that pressing and the value of lands which might be sold was minimal. Soon after, however, awareness of the disabling potential of British Columbia's claim began to concern Federal officials responsible for the administration of Indian Affairs. [22]

In July 1890, Deputy Superintendent General Lawrence Vankoughnet attempted to solicit a legal opinion from Deputy Minister of Justice R. Sedgewick regarding Canada's ability to convey a valid title to purchasers of reserve land, outside the Railway Belt in

[22] From 1873 to 1936, except for the period from 1883-1887 and a brief period in 1930, the Minister of the Interior held the top post at the Indian Affairs Department as Superintendent General. According to E. Brian Titley, however, Indian Affairs was a relatively small part of the portfolio and most of the decisions fell to the Deputy Superintendent General (E. Brian Titley's work "A Narrow Vision" is noted further in the text).

British Columbia, once the Aboriginal interest had been surrendered to the Crown .[23] Although Vankoughnet made repeated requests for direction, Sedgewick did not respond until November 29, 1892. In his response he suggested that Clause 5 of the 1876 Agreement did create a reversionary interest in the Province and the Federal Government had no power to sell any lands situate on a reserve. The Federal Government did not apparently view the problem as critical, however. According to Sedgewick, the Minister of Justice had instructed him to withhold release of his opinion for two years in the hope that in the meantime the two governments would reach a negotiated solution. [24] When asked for advice again in 1893 by Hayter Reed, the new Deputy Superintendent General of Indian Affairs, the Deputy Minister of Justice suggested that the Federal Government should not accept any surrenders for sale in British Columbia.[25]

In Sedgewick's briefly worded opinion, the reversionary interest did not originate from the distribution of lands under the *Constitution Act, 1867* but from Clause 5 of the 1875-76 Agreement; therefore, it had a different character and created unique administrative problems. Since the Clause 5 reversionary claim was based on reserve population, and the Aboriginal population of British Columbia had dwindled significantly since the existing reserves were set aside, the claim created insecurity in the Band's rights to

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[23] Because of the statutory transfer of the Railway Belt lands from British Columbia to Canada in 1883, Canada felt confident that British Columbia did not have a valid claim to underlying title to reserves established in the Railway Belt.

[24] November 29, 1892 letter from R. Sedgewick, Deputy Minister of Justice to L. Vankoughnet, Deputy Superintendent General of Indian Affairs. Indian Affairs file 68,812, found on N.A.C. RG 10 volume 3837.

[25] March 1, 1893 letter from A. Power, Acting Deputy Minister of Justice to H. Reed, Deputy Superintendent General of Indian Affairs. Indian Affairs file 74,147, found on N.A.C. RG 10 volume 3847.

reserve lands and resulted in occasional protests from Aboriginals. It also provided fuel for ever increasing Provincial calls for an adjustment of reserves. Nevertheless, according to the Department of Justice, the character of the reversion left some room for manoeuvring. Soon after Sedgewick gave the opinion that Canada could not sell surrendered land, he gave the further opinion that leasing surrendered land was possible if the surrender was from a Band that had not been reduced in numbers since the allotment by the first Indian Reserve Commission. [26]

Reporting on the administration of Indian Affairs in British Columbia in 1894, J.A.J. McKenna commented on the effect of the Province's claim:

> The reversionary right in Indian reserves outside the Railway Belt in British Columbia, which was conceded to the Province by the Agreement of 1876, the terms of which are set forth in Order in Council of November 10, 1875 is the subject of much inconvenience to the Indian Department in administering Indian Affairs in British Columbia: and as that reversionary right precludes the Department from selling surplus lands and hampers it greatly even in leasing land, the way is closed to the gathering of funds in British Columbia which would help bear the cost of Indian management and considerably relieve the Federal Exchequer. [27]

As the turn of the century approached British Columbia was discontented in its relationship with the Federal Government. The issues around reserve size and ownership were still live and causing problems for both governments. In 1899 the Provincial Government took steps to reinforce their claim to a reversionary interest in reserves.

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[26] January 31, 1893 letter from R. Sedgewick, Deputy Minister of Justice to L. Vankoughnet, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-3-X1, found on N.A.C. RG 10 volume 7783.

[27] November 29, 1894 memorandum from J.A.J. McKenna to the Department of Indian Affairs. Indian Affairs file 27150-3-X1, found on N.A.C. RG 10 volume 7783.

At the insistence of the Federal Government, British Columbia's *Land Act, 1875* had provided for the conveyance of reserve lands to Canada in order to fulfil the provincial obligations under Article 13 of the Terms of Union.[28] The *Land Act, 1899* was amended by the Province to provide for reconveyance to the Province. It read: "and in trust to reconvey the same to the Provincial Government in case such lands at any time ceased to be used by such Indians." [29]

As a further sign of British Columbia's unhappiness, the first Premier of the new century, James Dunsmuir, formally suggested a renegotiation of the Terms of Union. Included in his request for "Better Terms of Union," [30] is a complaint about the size of existing reserves. Writing to Superintendent General Clifford Sifton on February 2, 1901, he suggested the Federal Government appoint a new Commission to adjust reserves in proportion to the number of Indians occupying the land. [31] Sifton rejected the idea for a new Commission but agreed that the state of reserves in British Columbia was unsatisfactory. To his mind, however, the more pressing issue was title, not size. His reply to the Premier stated:

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[28] *Land Act, 1875* Statutes of British Columbia, ch.5, s. 60:The Lieutenant-Governor in Council shall, at any time, by notice, signed by the Chief Commissioner of Lands and Works (CCLW), and published in the British Columbia Gazette, reserve any lands not lawfully held by record, pre-emption, purchase, lease, or Crown grant, for the purpose of conveying the same to the Dominion Government, in trust, for the use and benefit of the Indians; or for railway purposes, as mentioned in Article 11 of the Terms of Union, or for such other purposes as may be deemed advisable.

[29] *Land Act, 1899* Revised Statutes of British Columbia, c. 38, s. 9.

[30] British Columbia Sessional Papers, 9th Parl., 2nd Session, 1901, p. 581

[31] February 2, 1901 letter from J. Dunsmuir, Premier of British Columbia to C. Sifton, Minister of the Interior. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780.

"When the question is taken up, it seems to me it would be better to take it up with a view to getting rid of the reversionary right by an agreement under which such lands as might be agreed upon as necessary to meet the requirements of the Indians should be held by the Dominion for them in the same manner as Indian reserves are held in other provinces..."[32]

A strong economy and rapidly increasing land values exacerbated the conflict over Indian lands during the tenure of Richard McBride, elected as Premier of British Columbia in 1903.[33] In the last decade large scale immigration to the Province brought settlers who were hungry for land and envious of the Bands' reserves. According to Titley, the Provincial Government regarded reserves as a brake to development and a waste of good land. Despite this view, the work of the first Indian Reserve Commission continued but pressure mounted for the review of existing reserves. Provincial anger over the size and location of reserves contributed to further intransigence over the claim to a reversionary interest and the subsequent refusal to consider Aboriginal title claims to any lands in British Columbia.[34]

The reversionary interest claim combined with a change in reserve lands policy by the Federal Department of Indian Affairs brought the administration of reserve lands to a critical point early in McBride's tenure. As noted earlier, before the turn of the century

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[32] April 2, 1901 Letter from C. Sifton, Minister of the Interior to J. Dunsmuir, Premier of British Columbia. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780.

[33] E. Brian Titley, *A Narrow Vision, Duncan Campbell Scott & the Administration of Indian Affairs in Canada*, University of B.C. Press, Vancouver. p. 138.

[34] Titley, p. 138.

Federal officials had generally opposed efforts to purchase land that had been set aside for Aboriginals in the West, even if it was unused. In their estimation the demands of settlers were not that great and cheap land prices meant the sale would not be of significant benefit to the Aboriginals or the Federal Exchequer. However, with the influx of settlers into the new Provinces, including British Columbia, and increased land values, the Department of Indian Affairs announced it was now willing to facilitate the disposal of unused reserve lands and invest the proceeds for the maintenance of the Aboriginals, in order to alleviate the burden on the public purse and the demands of settlers. [35] Changes were made to the *Indian Act* to accommodate the new policy. [36] Pursuant to the new policy, the Federal Government entered into negotiations in 1905 for the sale of portions of the Tsimshian Reserve on the Northwest Coast of British Columbia.

The Tsimshian reserves were set aside by Indian Reserve Commissioner Peter O'Reilly, in 1884. In 1905 the Grand Trunk Pacific Railway Company approached the Provincial Government about purchasing land adjacent to the reserves and the Federal Government about purchasing portions of the reserves for a railway terminal. The Federal Government agreed to negotiate with the Railway Company after informing them that in order to purchase the lands they would have to obtain a surrender from the Band and deal with the Province's claim to a reversionary interest. On April 6, 1906 the

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[35] 1909 Report of the Deputy Superintendent General of Indian Affairs, Canada Sessional Papers 1909(27) J103 S3 1909:15 (vol. XLIII).

[36] *Amendments to the Indian Act, 1911*, Statutes of Canada, Chapter 14, Geo. 1-2, s. 46: Allowing for compensation for expropriations from reserves to be determined by statute unless specified otherwise in the approving Order-in-Council. Still require the consent of the Governor-General. s. 49(a) Allowing for forced removal from reserves located near a town pursuant to an order from a judge of the Exchequer Court.

Governor-General approved a Privy Council Order noting the application for reserve lands. The Order in Council asserts the application of the *Indian Act* provisions governing the surrender of a reserve, stating:

" before the same can be disposed of to the Grand Trunk Pacific Railway Company it will be necessary to obtain from the Indians a surrender in accordance with the provisions of the *Indian Act*; but before submitting the question of surrender to the Indians, it is considered advisable to ask the British Columbia Government to waive its claim to any reversionary interest it may have in the land under the agreement come to between the Province of British Columbia and the Dominion in 1876..." [37]

The Order in Council also acknowledges the Province's claim to an ownership interest. Federal officials forwarded the request to the Government of British Columbia who declined to waive its claimed interest. [38]

The Railway Company accepted a Federal patent to 13, 519 acres of the Tsimshian reserve for $103,200 on July 17, 1906, despite the fact that the Federal Government was clear that the Company would have no recourse against Canada if British Columbia established their reversionary claim. [39] The surrender was conducted on August 17, 1906, and consented to by Order in Council dated September 21, 1906.[40]

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[37] April 20, 1907 British Columbia Sessional Papers 1907 J110 L5S7 1907; also April 2, 1906 Federal Order-in-Council. Found on N.A.C. RG 2.

[38] April 20, 1907 British Columbia Sessional Papers 1907 J110 L5S7 1907

[39] December 13, 1907 House of Commons Debates, J103 C1 1970/8-1 1907/8 vol. 1.

[40] Letter from E.L. Newcombe, Deputy Minister of Justice to F. Pedley, Deputy Superintendent General of Indian Affairs. Indian Affairs book of Justice Opinions, v. 3, found on N.A.C. RG 10 volume 11195.

In light of the difficulties over the Tsimshian transaction, Deputy Superintendent General Frank Pedley met with Premier McBride on September 22, 1906 to discuss the administration of reserves in British Columbia and come to an agreement to deal with the impasse created by legislative jurisdiction and reversionary interest being with different arms of the Crown. After the meeting, Pedley submitted a proposal to McBride for the better administration of reserves, containing three recommendations:

1. That the Government of British Columbia confirm titles heretofore made by the Dominion in cases where reserves had been duly surrendered, and further to agree that the Dominion shall have full power and authority to sell or lease and convey title in fee simple.

2. That the Dominion agree that when lands have been converted into money, to hold the proceeds upon the extinction of the Indian interest therein, subject to such rights of British Columbia thereto as may exist by law.

3. That British Columbia agree that precious metals shall be considered to form part of a reserve to be disposed of by the Dominion for the benefit of the Indians on the same basis as the land of such reserves.[41]

British Columbia did not respond to the proposals until after the McBride government was re-elected in December. [42] The response took the form of a report by Provincial Attorney General Frederick J. Fulton, approved by the Executive Council on February 27, 1907. The Order in Council denied that the Aboriginals had any beneficial interest

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[41] September 24, 1906 letter from F. Pedley, Deputy Superintendent General of Indian Affairs to R. McBride, Premier of British Columbia. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780; also June 9, 1909 article from the *Victoria Daily Times*, Aw1 R4515; also October 8, 1906 letter from J.D. McLean, Acting Deputy Superintendent General of Indian Affairs to Sir W. Laurier, Prime Minister of Canada. Indian Affairs file 27150-2, found on N.A.C. RG 10 volume 7779.

[42] *Vancouver Province* January 23, 1907 and February 9, 1907.

in reserves and that the Federal Government had any right to deal with them on their behalf, stating in part:

...the Dominion are not entitled to hold in trust more lands as Indian Reserves in the Province of British Columbia, than are reasonably required for the personal use and occupation of the Indians. It is further abundantly clear that the title of the Indians in these reserves is simply a right of use and occupation, and that the Dominion Government holds no proprietary rights in the reserves (and this latter was admitted by the Minister of the Interior in debate in the House of Commons on 25th of January last) and that when any Indian Band or Nation abandons or surrenders its right or title to a reserve, the entire beneficial interest in such reserve or portion of a reserve, immediately becomes vested in the Province, freed from incumbrances of any kind... It follows then, that the Dominion Government has no right or power to make or grant a lease or transfer of any Indian reserve, or portion of a reserve, in this Province, and that where any lease or transfer has been made, the reserve, or portions of a reserve, so leased or transferred, now belongs to the Province.

It would appear that in at least three instances transfers or leases have been made by the Dominion Government of portions of Indian reserves, namely: 3.21 acres Niyuke Reserve in Kootenay, 7 acres of False Creek Reserve at Vancouver and 13, 567 acres of the Tsimshian Reserve...[43]

The Report continued by demanding a general readjustment of reserves based on the decrease in Indian population since Clause 5 was agreed to; and by requesting a conference to discuss readjustment:

In the year 1893 the Indian population in British Columbia was 25,618 and the total acreage held as Indian reserves was 480,505. In 1901 the Indian population had decreased to 24,523, while the acreage of reserves had increased to 525,840...This being the case it is submitted that the Reserve question should be readjusted, and the surplus lands over what is reasonably sufficient should be surrendered to the Province.[44]

The following week McBride informed Pedley that the Provincial Government was upset

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[43] February 28, 1907, British Columbia Order-in-Council 125. Indian Affairs file 33/General v.6 found on N.A.C. RG 10 volume 11047.

[44] ibid.

with the handling of the Tsimshian negotiation and would no longer enter into any agreements with the Federal Government to do with Aboriginal lands.[45] On April 3, 1908 Reserve Commissioner Vowell reported that the Executive Council of British Columbia had decided to refuse participation in further allotments of reserve lands and would only consider sales or exchanges in the future. In light of this situation Vowell noted that further work of the Commission would be put in abeyance until the title question could be sorted out.[46]

[45] March 13, 1907 letter from R. McBride, Premier of British Columbia to F. Pedley, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780.

[46] DIA Annual Reports 1908, p. 269- 1909, p. 273-1910, p. 252

"Lands Reserved for Indians"

While British Columbia and Canada argued over the size and title to the reserves set aside by the First Indian Reserve Commission, during its tenure and after, both governments treated the lands as "lands reserved for Indians", that is, the legislative jurisdiction and administrative responsibility of Canada. The administrative gridlock that occurred when one arm of the government made the rules governing surrenders and the other claimed the benefit from such a surrender would not have existed if British Columbia had denied the jurisdiction of the Federal Government to make the laws governing surrenders by asserting the lands were not "lands reserved for Indians". In the Tsimshian transaction the application of *Indian Act* requirements to the surrender were not disputed by the Province but the character of the lands after surrender was. The fact that both governments treated the segregated lands as reserves would not, however, conclusively establish them as "lands reserved for Indians" at law. The 1000 or so reserves allotted by the First Indian Reserve Commission were not approved by subsequent Orders in Council by either government, and were not officially gazetted, as required by the Provincial *Land Act, 1884*, resulting in controversy over whether they were properly reserved.

The proposition that lands that had been set aside but not gazetted were not properly reserved was tested in court when R. Edward Gosnell attempted to pre-empt lands which had been set aside for the Malahat Band by the first Indian Reserve Commission. Mr. Gosnell applied to the Chief Commissioner of Lands and Works for a pre-emption record on August 7, 1911, and was refused on the basis the lands were part of a reserve.

He brought a Petition to the Supreme Court of British Columbia claiming the reserve had not been Gazetted and so was not properly set aside. The *Land Act, 1884* s. 56 read as follows:

The Lieutenant-Governor in Council shall, at any time, by notice, signed by the Chief Commissioner of Lands and Works, and published in the British Columbia Gazette, reserve any lands not lawfully held by record, pre-emption, purchase, lease, or Crown Grant, for the purpose of conveying the same to the Dominion Government, in trust, for the use and benefit of the Indians, or for railway purposes, as mentioned in Article 11 of the Terms of Union, or for such other purposes as may be deemed advisable. [47]

In the Province's answer to the Petition, the Minister of Lands stated: " The lands applied for by the Petitioner are within the boundaries of a duly created Indian Reserve, and therefore, were not open to pre-emption by the Petitioner or any other person."[48] Gosnell lost at the Supreme Court of British Columbia. He appealed to the British Columbia Court of Appeal where the Federal Government intervened and argued alongside the Province that the lands were in fact reserved for Indians. Gosnell's appeal was dismissed at the British Columbia Court of Appeal. He appealed further and the Supreme Court of Canada quashed the appeal for "want of jurisdiction". The Chief Justice of British Columbia's order dismissing the case read:

" There has been a working out of the segregation of the lands reserved for Indians by means of a commission; these lands reserved by the commissioners have been recognized as properly reserved by successive representatives of the Crown, from the date of their reservation, and have not at any time been occupied by the Dominion representatives and so far as I can see, it would be virtually a trespass upon the lands for the Provincial Government to accept any pre-emotion record. No formal transfer or conveyance was necessary to effectually segregate these lands. This was a transaction altogether outside the regular course which is provided for in the local statutes. These reserves, segregated under the Terms of Union, I think were well reserved without any formal notice in the

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[47] *Land Act*, Statutes of British Columbia, 1884, chapter 16, section 56.

[48] Case in Appeal, in the Supreme Court of Canada, R.E. Gosnell, v the Minister of Lands and the Attorney-General for Canada, p. 5, found on N.A.C. RG 10 volume 11210, file 4.

Gazette."[49]

The participation of both governments in this case again evidences their treatment of the lands as reserves. Throughout the remainder of the reserve establishment process both governments treated the lands set aside by the First Reserve Commission as "lands reserved for Indians", the legislative jurisdiction and administrative responsibility of the Federal Government. It should be noted, however, that their treatment does not conclusively determine the legal status of the lands.

[49] Case in Appeal, in the Supreme Court of Canada, R.E. Gosnell, v the Minister of Lands and the Attorney-General for Canada, p. 61, found on N.A.C. RG 10 volume 11210, file 4.

Aboriginal Rights-Attempts at a Court Reference

Pedley discussed British Columbia's claim to surrendered lands and their refusal to participate in the administration of reserves with the Minister of Justice and outlined the Federal position in a memorandum to the Governor-General in Council dated May 20, 1907. [50] In it he noted the Federal Government did not claim any property rights in reserves but held the beneficial interest in reserves in trust for the benefit of the Bands. The memorandum stated that the authority to deal with the lands by transfer or lease resulted from Canada's legislative jurisdiction under the *Constitution Act, 1867,* and went on to state:

> Whatever construction the Attorney General may be pleased to place upon the 5th Clause of the Agreement entered into in 1876 it is clear that the Indians were in no ways a party to such an agreement and that their rights, which had always been recognized, could not, therefore, be affected thereby...there is absolutely nothing in evidence or to be inferred from any official record or document in this Department that supports the contention of the Attorney General's that the beneficial interest in the reserves belongs to Province...it is recommended that in reply to the dispatch accompanying the Minute of the Executive Council a request should be made for an agreement to submit the matter in question to the Supreme Court under the 60th Section of the *Supreme Court Act* in order to determine authoritatively the rights of the Indians in the reserve. [51]

In response to the Province's request for a conference, Pedley recommended that the

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[50] May 20, 1907 letter from F. Pedley, Deputy Superintendent General of Indian Affairs to E.L. Newcombe, Deputy Minister of Justice. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780.

[51] May 21, 1907 letter from F. Oliver, Superintendent General of Indian Affairs to the Earl Grey, Governor General in Council. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780.

Federal Government refuse to discuss title claims until they could be decided at court and confine any conference discussion to the amount of land presently allotted to Indians and whether it was sufficient for their needs.[52] In the meantime, Justice Minister Newcombe suggested the issuance of patents for reserve land be withheld until the reserve title question was determined by the courts. [53]

British Columbia did not object to a court reference initially but it wanted to avoid the Supreme Court of Canada by having the case heard before the Full Court of the Province with a right of appeal directly to the Judicial Committee of the Privy Council.[54] While Canada pressed for their cooperation in getting the matter before the Supreme Court of Canada, British Columbia went ahead before the Provincial court.[55] The Federal

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[52] September 17, 1907 letter from E.L. Newcombe, Deputy Minister of Justice to F. Pedley, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780; also November 8, 1907 letter from F. Pedley, Deputy Superintendent General of Indian Affairs to E.L. Newcombe, Deputy Minister of Justice. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780; also November 22, 1907 letter from E.L. Newcombe, Deputy Minister of Justice to F. Pedley, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780; also November 25, 1907 memorandum from F. Oliver, Superintendent General of Indian Affairs and W.R. Aynsworth, Minister of Justice to the Earl Grey, Governor General in Council. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780; also December 19, 1907 Dominion Order-in-Council P.C. 2739. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780.

[53] April 16, 1908 letter from E.L. Newcombe, Deputy Minister of Justice to F. Pedley, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780.

[54] G.E. Shankel, *The Development of Indian Policy in British Columbia*. Unpublished Ph.D. Thesis at University of Washington, p. 254.

[55] November 5, 1908 telegram from F. Oliver, Superintendent General of Indian Affairs to F. Pedley, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780.

Government sent a Department of Justice representative to observe the proceedings but did not take part in the trial.[56] The Province did not accomplish much by proceeding to trial without the participation of the Federal Government. Their position did upset the Aboriginal community, however, and contributed to an increase in Aboriginal rights protests.

During this period , the Provincial Government's anxiety over Aboriginal land issues was increasing in any event, as the Aboriginal community was beginning to actively pursue a recognition of Aboriginal title. After 1887, when the Northwest Coast Bands were reportedly disappointed by the lack of results from a Commission appointed to look into their grievances, the Aboriginal community had been quiet with demands for a recognition of title and more concerned with obtaining sufficient reserve land and withstanding encroachment by settlers. According to Cail, however, the new confusion over title generally encouraged them to again petition for a hearing on the question of Aboriginal title. [57]

The first stirring of concerted Aboriginal protest in the new century came in 1906 when a meeting at Cowichan resulted in a decision to send a deputation to King Edward VII with a Petition regarding land claims. Their Petition stated:

1. That the title to their lands had never been extinguished,

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[56] November 6, 1908 telegram from J.D. McLean, Secretary, Department of Indian Affairs to F. Oliver, Superintendent General of Indian Affairs. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780.

[57]R.E. Cail, *Land, Man and the Law, The Disposal of Crown Land in British Columbia*, 1871-1913, University of British Columbia Press, Vancouver, British Columbia, p. 233.

2.That white men had settled on their land against their wishes,

3. That all appeals to the Canadian Government had proved vain,

4. That they had no vote and were not consulted with respect to Agents.[58]

The first effort was unsuccessful; nevertheless, a second delegation representing twenty tribes carried a new Cowichan Petition to His Majesty in 1909 and requested their claims be put before the Judicial Committee of the Privy Council for a decision.[59] Their request was denied but the Petition was referred to the Governor-General of Canada with directions to report on the handling of the issue by the domestic Government.[60] In the same year the Nishga Tribe formed a land committee and met with other coastal groups to form the Indian Tribes of British Columbia. The Indian Tribes were assisted by the first non-Aboriginal group formed to lobby for Aboriginal rights in British Columbia. They were called "the Friends of the Indians", and were led by A.E. O'Meara, a lawyer who had become an Anglican Minister in 1906. [61] O'Meara pursued a direct reference to the Judicial Committee of the Privy Council on Aboriginal title for the next two decades.

After considering the Aboriginal's case, the Federal Government increased their efforts to get British Columbia to agree to a stated case on all the outstanding Aboriginal land

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[58]Shankel, p. 193

[59] May 15, 1909 petition of the Cowichan Tribe prepared by J.M. Clark, Counsel for British Columbia Indians. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780.

[60]March 31, 1909 letter from Lord Crewe, Secretary of State for the Colonies to Lord Grey, Governor General of Canada. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780.

[61]Titley, p. 139

issues, including Aboriginal title. By February 1910, Newcombe and Pedley had developed the questions which Canada wanted before the courts [62]. Negotiations towards achieving a stated case progressed to the point whereby in May British Columbia sent its Chief Law Officer, Lafleur, to Ottawa with instructions to work with Federal officials to determine the questions that required answers in order to settle the Aboriginal land disputes. Out of a series of meetings, Lafleur and Newcombe assembled a list of ten questions for the court: [63]

1. Was the right of title of the Crown as represented by the Government of British Columbia at the time of Union in or to the lands in the Province, which were at the time ungranted...subject to any interest, right or title by the Indians?

2. If so, does such interest, right or title ... constitute an interest other than that of the Province in the said lands within the meaning of Section 109 of the *Constitution Act, 1867.* Is such interest, right or title of the said tribes of Indians an interest independent of and legally sustainable in competition with the beneficial interests of the Province? Are the said tribes of Indians entitled to remain in possession of the said lands according to their respective limits as against the Government of the Province or any person to whom the Province may grant the same, until the said interest, right or title of the said tribes of Indians shall have been ceded, surrendered, or otherwise repudiated?

3. Were the several areas of tracts of land in the Province of British Columbia which were at the time of Union claimed by the various Indians inhabiting the Province within their respective limits, and which they were and had been from time immemorial in the possession of the said tribes respectively and which had not yet been ceded to or purchased by the Crown, lands reserved for the use and benefit of the Indians within the

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[62] April 7, 1910 letter from E.L. Newcombe, Deputy Minister of Justice to F. Pedley, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780; also April 18, 1910 letter from F. Pedley, Deputy Superintendent General of Indian Affairs to E.L. Newcombe, Deputy Minister of Justice. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780.

[63] June 4, 1910 letter from E.L. Newcombe, Deputy Minister of Justice to J.D. McLean, Secretary, Department of Indian Affairs. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780.

meaning of Article 13 of the Terms of Union with British Columbia?

4. If tracts of land be conveyed in trust for the use and benefit of the Indians, does the Province retain any right, title or interest in such tracts of land? If so, what is the nature of the right, title or interest so remaining to the Province, and would any, if so, what beneficial interest or right to possession or administration of said lands accrue or revert to the Province upon the extinction of the Indians?

5. If it should become expedient in the interest of the Indians or the administration of their affairs to sell and convert into money any tract of land or portion of a tract of land so conveyed to the Dominion in trust for these and benefit of the Indians, is it within the power or authority of the Dominion Government to see the same and grant a title in fee simple thereof if the said lands are surrendered by the Indians for sale under the provisions of the Indian Act: if in the circumstances aforesaid the Dominion Government cannot convey the lands so surrendered in fee simple, what title, if any, can the Dominion convey and by what means is a title in fee simple to be assured.

6. Is it competent to the Parliament of Canada to legislate with regard to the lands so conveyed by the Local Government to the Dominion in trust for the use and benefit of the Indians, so as to authorize the sale by the Dominion of said lands or parts thereof and the granting by the Dominion of a title thereto in fee simple, if the Indians consent to surrender the said lands or such part thereof in order that the same may be sold for their benefit?

7.(Reference to mineral rights).

8. (Reference to timber rights).

9. Did the Orders in Council of Canada, November 10, 1875, and the Orders in Council of British Columbia, June 6, 1876, operate to diminish or effect (sic) in anywise the interest right or title which the Indians previously had and which were claimed by virtue of their aboriginal title?

10. (Refers title to reserves set aside before Confederation).[64]

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[64] Indian Affairs file 27150-3-2, found on N.A.C., RG 10 Volume 7780.

Premier McBride refused to allow consideration of the first three questions concerning Aboriginal title and the initiative failed. [65] Aboriginal supporters continued protesting and petitioning the governments to obtain a court decision on title questions. A deputation of "The Friends of the Indians" presented demands to McBride in December. Aboriginals protested in Victoria the following March. In answer to both groups Premier McBride maintained the position that the Aboriginals had no claim to title to the public lands of the Province: "There has been, as I say, large reserves set apart and I am quite satisfied that if there had been anything at all in this question of the Indian title that the issue would have been long since disposed of."[66] McBride later wrote to Bishop Perrin, member of the Friends of the Indians, in reference to the meeting and stated, " that the Government has determined there is no issue with regard to Indian title to lands such as is sought to be raised by your Association and that there is therefore no such question to be adjudicated upon by the Courts." [67]

The vocal protests for a recognition of Aboriginal title did not encourage McBride's government to modify or relax their claim to a reversionary interest. In 1910 the Provincial Government took steps to safeguard their interest by amending the *Land Registry Act* to prohibit the registration of any title deriving from Canada to land that

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[65] Report of the Joint Committee of the Senate and House of Commons on the Claims of the Allied Tribes, 1927, p.11.

[66]December 14, 1910 memorandum of meeting, between the Provincial Government and the "Friends of the Indians of British Columbia." Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780.

[67]December 23, 1910 letter from R. McBride, Premier of British Columbia to Bishop Perrin. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780.

formed part of an Indian reserve without the sanction of the Lieutenant-Governor.[68] In 1911 the Province further tightened its grip by amending the *Land Act* to provide for the disposition of the province's interest in a reserve, reversionary or otherwise.[69]

The reversionary interest claim so debilitated the Federal ability to administer reserve lands that in addition to pursuing a court reference, Federal officials continued to devise methods to circumvent the alleged interest.[70] After the stated case initiative failed, Pedley worked out a proposal to purchase the provincial interest for a fixed rate of $2.50 an acre whenever reserve land was surrendered for sale. Newcombe counselled against the proposal and suggested the purchase of the alleged reversionary interest might be admitting a greater provincial interest than the Aboriginals would be comfortable with.[71] Nevertheless, faced with ongoing administrative stalemate, Duncan Scott, the Acting Deputy Superintendent General of Indian Affairs, pursued the idea and referred the plan, with Newcombe's objections, to the Governor-General in Council for consideration.[72] As a result Canada made the offer to purchase the claimed reversionary

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[68] *Land Registry Act*, Statutes of British Columbia, 1910, Section 2, Chapter 27.

[69] Revised Statutes of British Columbia, 1911, 2 Geo. 5, c.129, s,127 reads as follows: "Provided always that it shall be lawful for the Lieutenant Governor-in-Council to at any time, grant, convey, quit claim, sell or dispose of, on such terms as may be deemed advisable, the interest of the Province, reversionary or otherwise, in any Indian Reserve of any portion thereof."

[70] May 16, 1910 letter from F. Pedley, Deputy Superintendent General of Indian Affairs to Mr. Stewart. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780.

[71] October 29, 1910 letter from E.L. Newcombe, Deputy Minister of Justice to D.C. Scott, Acting Superintendent General of Indian Affairs. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780.

[72] October 20, 1910 report from F. Oliver, Superintendent General of Indian Affairs to the Earl Grey, Governor General of Canada. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780; also November 3, 1910 letter from D.C. Scott, Department of Indian Affairs to F.

interest without admitting it for the stated purpose of quieting the claims and enabling the lands to be administered more easily . [73] This offer did not meet with the approval of the Province.

The Department of Justice continued to push for a court reference. The *Indian Act* was amended, adding section 37(a) , to allow the Federal Government to initiate proceedings in the Exchequer Court of Canada in cases in which "possession of any lands reserved or claimed to be reserved for the Indians" was withheld. [74] In December, 1910 the Department of Justice informed Indian Affairs officials that J.M. Clark, counsel for the Nishga, was lobbying the province to agree to a reference. If they were unable to achieve one, Newcombe suggested employing the new amendments to the *Indian Act* to obtain a reference to the Exchequer Court. [75]

Oliver, Superintendent General of Indian Affairs. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780.

[73] Draft of 1911 despatch from the Secretary of State for Canada to T.W. Paterson, Lieutenant Governor of British Columbia. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780.

[74] 1910, Chapter 28, Statutes of Canada, *An Act to Amend the Indian Act*. Section 37A: If the possession of any lands reserved or claimed to be reserved for the Indians is withheld, or if any such lands are adversely occupied or claimed by any person, or if any trespass is committed therein, the possession may be recovered for the Indians, or the conflicting claims may be adjudged and determined, or damages may be recovered, in an action at the suit of His Majesty on behalf of the Indians, or of the band or tribe of Indians claiming possession or entitled to the declaration, relief or damages claimed. 2. The Exchequer Court of Canada shall have jurisdiction to hear and determine any such action.

[75] December 3, 1910 letter from E.L. Newcombe, Deputy Minister of Justice to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780.

The Aboriginals and their supporters continued actively lobbying for a court reference into 1911. A delegation of Chiefs met with the Premier and other members of the Provincial executive in March to present a memorial read by Reverend P.R. Kelly. [76] The Nishga Tribe took up the mantle and travelled to Ottawa with a memorandum for the Department of Justice called "Statements of Facts and Claims". [77] Then a deputation visited Prime Minister Laurier in Ottawa, on April 26, 1911, to request his assistance in achieving a decision on Aboriginal title. They received his assurance that the Federal Government would pursue a court reference:

"The matter for us to immediately consider is whether we can bring the Government of British Columbia into Court with us. We think it is our duty to have the matter enquired into. The Government of British Columbia may be right or wrong in their assertion that the Indians have no claim whatever. Courts of Law are just for that purpose-where a man asserts a claim and it is denied by another. But we do not know if we can force a Government into Court. If we can find a way I may say we shall surely do so, because everybody will agree it is a matter of good government to have no one resting under a grievance. The Indians will continue to believe they have a grievance until it has been settled by the Court that they have a claim, or that they have no claim."[78]

On May 17, 1911 an Order in Council drafted by the Department of Justice was passed, reflecting Prime Minister Laurier's assurance and referring to the Nishga Memorandum. It reported the failure to come to an agreement on Aboriginal land issues in British Columbia and Canada's intention to proceed to the Exchequer Court against a Provincial

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[76] March 3, 1911 transcript of an interview between Chiefs and the Provincial Executive. Indian Affairs file 27150-3-2, found on N.A.C. RG 10, Volume 7780.

[77] Report of the Joint Committee of the Senate and House of Commons on the Claims of the Allied Tribes, 1927 p. 53.

[78] Ibid, p. 11.

grantee or licensee.[79] Two days later the Governor-General assented to a further amendment of Section 37(a) of the *Indian Act, 1910* designed to further accommodate a reference on Aboriginal title. The amendment authorized Canada to bring the matter before Exchequer Court if "any lands of which the Indians or any individual Indian or Band, claim the possession of or any right of possession" are withheld. [80] The Order in Council directing the Government to pursue the reference was, however, not forwarded to Indian Affairs officials until April 18, 1912 . [81] By this time Laurier's government had been defeated in a general election. They were replaced by a new government less interested in obtaining a court decision on the title issues.

The Federal elections in 1911 replaced Sir Wilfred Laurier's Liberal government with a Conservative government headed by Sir Robert Borden. McBride and Borden developed a cordial relationship and their governments entered into direct negotiations on the questions dealing with Aboriginal land.[82] The intention to obtain a court decision was deferred in favour of finding a negotiated solution. Aboriginal title soon fell off the agenda.

The Provincial claim to a reversionary interest still stood as the most vexing to the

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[79] May 17, 1911 Federal Order-in-Council P.C. 1081. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780; also Joint Committee, 1927

[80] September 3, 1909 letter from F.J. Fulton, Chief Commissioner of Lands and Works to J.D. McLean, Acting Deputy Superintendent General of Indian Affairs. Department of Transportation and Highways file 4767 v. 1.

[81] Report of the Joint Committee of the Senate and the House of Commons on the Claims of the Allied Tribes, 1927, p. 11.

[82] Cail, p. 233.

Federal Government's ability to administer reserve lands. The claim, if proved, created a gridlock with respect to the administration of lands that had been set aside by the first Indian Reserve Commission, and while unproven, created insecurity over any title to reserve lands derived from Canada. As long as British Columbia maintained its position there would be no voluntary surrenders of reserve land. Bands would clearly refuse to consent to the surrender of any lands they were not going to be compensated for. The result, on the one hand, was the inability to access land suited for public or private development if situated on a reserve, and on the other, the inability to consider the sale of reserve land in order to generate revenue towards the cost of administration and development of the reserves.

In a rapidly developing Province the co-administration regime that effectively resulted from British Columbia's claim guaranteed that disputes would develop in ever increasing number. And, the Tsimshian reserve sale negotiations showed the impracticality of dealing with the problem on a case by case basis, particulary if the two governments had conflicting political agendas. At the same time, however, the Province's stance on Aboriginal title was keeping the dispute from being resolved by the courts. After years of conflict, however, politically compatible governments were sitting in Ottawa and Victoria and negotiations between the two levels of government were proceeding towards settlement of the reversionary interest dispute.

McKENNA - MCBRIDE AGREEMENT

On November 6, 1911, after the election of the Conservative government in Ottawa and the reopened dialogue on Indian land disputes, Premier McBride and his Attorney General W.J. Bowser travelled to Ottawa to meet with Prime Minister Borden. Later while reporting on the meeting to the British Columbia Legislature, McBride connected the Province's claim to a reversionary interest and their desire to have the reserves reassessed. [83] The linking of these issues provided the basis for the negotiations that culminated in the McKenna-McBride Agreement the following year.

The Federal Government responded to the new atmosphere on May 24, 1912 by appointing J.A.J. McKenna as Special Commissioner to " investigate claims put forth by and on behalf of the Indians of British Columbia , as to lands and rights, and all questions at issue between the Dominion and Provincial Governments, and to negotiate on behalf of the Dominion towards settlement." [84] McKenna conducted an enquiry into the state of affairs in British Columbia, travelling to different parts of the Province and meeting with Aboriginal representatives, and reported on three basic disputes:

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[83]British Columbia Sessional Papers, 12th Parl., 3rd Session, 1912, p. N2 "The title of the Crown in right of the Province to Indian reserve lands was never questioned until within the past few years... We still maintain that the reversionary interest... is the property of the Province... It may be well, in that connection, to refer to the large excess acreage held on account of Indian reserves in British Columbia, and to the necessity, in view of the increase in white population of having an immediate adjustment of all reserve so that the excess acreage may be released to the Province."

[84] May 24, 1912 Commission signed by T. Mulvey, Secretary of State. Indian Affairs file 27150-3-5, found on N.A.C. RG 10 volume 7782.

aboriginal title claims; the reversionary interest claim; and, the adjustment of reserve size. To keep the peace with the Province, he suggested that no dispositions of land except by expropriation occur within reserves during the negotiations. [85] As Duncan Scott later reported to the Special Joint Senate and Commons Committee investigating the claims of the Allied Tribes in 1927, McKenna singled out the claimed reversionary interest as the root of the administrative entanglement and of Indian unrest in the province. [86] And, although his mandate included discussions with respect to Aboriginal title, McKenna knew McBride would not consent to any forum where that issue would be considered. He gambled that a more secure form of tenure in the reserves would alleviate the concerns of the Aboriginals and quell the mounting appeals for a recognition of Aboriginal title. Writing to Premier McBride on July 29, 1912 he noted the Province's refusal to deal with the question and agreed to take the whole issue off the bargaining table and concentrate on the claim to reversionary interest.

McKenna's lengthy letter to Premier McBride traced the history of the reserve title dispute. He disputed the Provinces claim that the reversionary interest now claimed was contemplated in the 1875-76 Agreement; he felt it had first reared its head in the

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[85] May 18, 1912 letter from J.A.J. McKenna, Special Commissioner to F. Pedley, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-3-4, found on N.A.C. RG 10, Vol. 7781.

[86] October 26, 1912 Report from J.A.J. McKenna, Special Commissioner ... "The position taken by the Province was that the title of the Indians to the land reserved for them was mere use and occupance; that under the said Article(Article 13 Terms of Union) no beneficial interest in such lands was to be taken by the Dominion as guardian of the Indians; and that any portions thereof became extinguished through surrender or cessation of use or occupation, or diminishment of numbers and the land reverted unburdened to the Province...The undersigned, therefore concentrated his efforts to the extinction of the interest claimed by the province, and to securing for the Indians of British Columbia, lands by the same title as that under which lands are held by the Dominion for Indians in other parts of Canada."

Provincial *Land Act, 1899* because of a misapplication of the findings in St. Catharine's Milling to British Columbia. He went on to state that the decision in that case, regarding the ownership of underlying title to reserves, has no application in British Columbia because Article 13 of the Terms of Union directs the Province to convey the reserves to Canada and acts as an amendment to the distribution of public lands in the *Constitution Act, 1867.* [87] Despite the denial of the claim McKenna agreed to bargain for its elimination.

Two months later Special Commissioner McKenna and Premier McBride signed the agreement that would drive the reserve establishment process for the next thirty years. The McKenna-McBride Agreement, signed on September 24, 1912, provided for the transfer of British Columbia's alleged interest in reserves to Canada, and British Columbia's participation in further reserve allotments, in exchange for a reassessment of existing reserves in the province. The terms of the Agreement were as follows:

1. A Commission shall be appointed as follows: Two Commissioners shall be named by the Dominion and two by the Province. The four Commissioners so named shall select a fifth Commissioner who shall be Chairman of the Board.

2. The Commission so appointed shall have the 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 the Indian of the 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

[87] July 29, 1912 report from J.A.J. McKenna, Special Commissioner of the Government of Canada to R. McBride, Premier of British Columbia. Indian Affairs file 59,335-3, found on N.A.C. RG 10 volume 3822.

reasonably sufficient for the purposes of such Indians.

b) At any place which the Commissioners shall determine that an insufficient quantity of land has been set aside for the use of the Indians of the locality, the Commissioners shall fix the quantity that ought to be added for the use of such Indians. And they may set aside land for any Band of Indians for whom land has not already been reserved.

3. The Province shall take all such 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 Commissioners shall determine are not necessary for the use of the Indians shall be subdivided and sold by the province at public auction.

5. The net proceeds of all such sales shall be divided equally between the province and the Dominion, and all moneys received by the Dominion under this Clause shall be held or used by the Dominion for the benefit of the Indians of British Columbia.

6. All expenses in connection with the Commission shall be shared by the province and the dominion in equal proportions.

7. The lands comprised in the Reserves as finally fixed by the Commissioners aforesaid shall be conveyed by the Province to the Dominion with full power to the Dominion to deal with the said lands in such manner as they may deem best suited for the purpose of the Indian including a right to sell the said lands and fund or use the proceeds for the benefit of the Indians, 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 as aforesaid for such tribe or band, and not sold or disposed of as hereinbefore mentioned, or any unexpended funds being the proceeds of any Indian Reserve in the Province of British Columbia, shall be conveyed or repaid to the Province.

8. Until the final report of the Commission is made, the Province shall withhold from preemption or sale any lands over 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. If during the period prior to the Commissioners making their final report it shall be ascertained by either government that any lands being part of an Indian Reserve are required for right-of-way or other railway purposes, or for

Dominion or Provincial or Municipal Public Work or purpose, the matter shall be referred to the Commissioners who shall thereupon dispose of the question by an Interim Report, and each government shall thereupon do everything necessary to carry the recommendations of the Commissioners into effect.[88]

The McKenna-McBride Agreement established the framework for a continuation of the reserve establishment process. This framework acknowledged the legislative jurisdiction of the Federal Government, noting the application of the *Indian Act* to contemplated reserve cut-offs, and the Province's proprietary interest. The Province's interest was to be conveyed, once the size of the reserves were fixed, to allow for better administration. After conveyance all that would remain of the reversionary interest was the right to the return of reserve lands to provincial jurisdiction in the event a Band became extinct.

In order to arbitrate the question of reserve size a Royal Commission would be constituted and authorized to adjust previously allotted reserves and provide new reserves for Bands which had not yet received an allotment. Once their Final Report was delivered British Columbia agreed to convey their proprietary interest to Canada who would then be free to administer reserve lands, for the benefit of the Aboriginals, without the necessity of negotiating with the Province as well. Until the delivery of the Final Report an agreement for approving of reserve takings for public purposes was provided for in the Interim Report.

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[88] September 24, 1912 memorandum of agreement signed by J.A.J. McKenna, Special Commissioner appointed by the Dominion and R. McBride, Premier of British Columbia. Indian Affairs file 27150-3-2, found on N.A.C. RG 10 volume 7780.

The Royal Commission for Indian Affairs in British Columbia(1913-1916)

Canada approved the McKenna-McBride Agreement by Order-in-Council on November 27, 1912 followed by British Columbia on December 15 of the same year. However, the integrity of the Agreement suffered when the confirming Orders in Council removed the Royal Commission's powers to make any binding recommendations. Following a review of the *Enquiries Act, 1906,* the Minister of Justice recommended the proceedings of the Commission, including Interim Reports, be subject to the approval of both governments.[89] Both governments concurred but agreed " to consider favourably the Reports, whether final or interim, of the Commission, with a view to give effect, as far as reasonably may be, to the acts, proceedings and recommendations of the Commission, and to take all such steps and proceedings as may be reasonably necessary with the object of carrying into execution the settlement provided for by the Agreement in accordance with its true intent and purpose."[90]

The Governor-General in Council approved the appointment of the Royal

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[89]January 20, 1920 letter from J.W. Farris, Attorney-General, Province of British Columbia to A.S. Meighen, Minister of the Interior. British Columbia Archives and Records Service, GR 1325, file 457-8-12; also January 20, 1920 letter from J.W. Farris, Attorney-General, Province of British Columbia to A.S. Meighen, Superintendent General of Indian Affairs. Department of Lands file 026076 v. 2, found at the Surveyor General's Office.

[90] November 27, 1912 Federal Order-in-Council P.C. 3277. Indian Affairs file 27150-3-5A, found on N.A.C. RG 10 volume 7782; also December 31, 1912 British Columbia Order-in-Council 1341. Indian Affairs file 27150-3-5, found on N.A.C. RG 10 volume 7782; also December 31, 1912 report from W.J. Bowser, Attorney-General, Province of British Columbia to T.W. Paterson, Lieutenant Governor of British Columbia.

Commission on April 23, 1913.[91] Canada had selected lawyers NW. White and J.A.J. McKenna as their representatives and British Columbia chose Legislative Assembly member James Pearson Shaw and lawyer Day Hort Macdowall. [92] Pursuant to the McKenna-McBride Agreement these four picked Edward Ludlow Wetmore, former Chief Justice of Saskatchewan as the fifth member and Chairman. [93] In addition the Federal Government appointed J.G.H Bergeron to act as secretary and solicitor for the Commissioners.[94]

On May 19, 1913 the Commissioners and Mr. Bergeron were sworn in before Justice Morrison of the British Columbia Supreme Court. Immediately after, they met with Premier McBride to discuss their duties and then commenced temporary hearings in the Provincial Executive Chamber. [95] A few days later, they found permanent offices in Belmont House, Victoria where their work continued for the rest of the Commission.

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[91] April 4, 1913 Commission by the Privy Council appointing the five members of the Royal Commission on Indian Affairs for British Columbia. Indian Affairs file 27150-3-5, found on N.A.C. RG 10 volume 7782.

[92] March 31, 1913 Federal Order-in-Council P.C. 644. Indian Affairs file 27150-3-5, found on N.A.C. RG 10 volume 7782.

[93] April 12 1913 letter from R.L. Borden, Prime Minister of Canada to T.W. Crothers, Acting Minister of the Interior. Indian Affairs file 59,335-1 found on N.A.C. RG 10 volume 3822; also April 12, 1913 Federal Order-in-Council P.C. 802. Indian Affairs file 27150-3-5, found on N.A.C. RG 10 volume 7782; also April 4, 1913 Commission by the Privy Council appointing the five members of the Royal Commission on Indian Affairs for British Columbia Indian Affairs file 27150-3-5, found on N.A.C. RG 10 volume 7782.

[94] April 30, 1913 Federal Order-in-Council P.C. 970. Indian Affairs file 27150-3-5, found on N.A.C. RG 10 volume 7782.

[95] Report of the Royal Commission on Indian Affairs for the Province of British Columbia, 1913-1916, p. 18.

On their second day of active duty the Commissioners passed a resolution requesting a broadening of their mandate in order to deal with issues beyond the simple adjustment of reserve acreage. The Aboriginals had well known grievances over foreshore, water, hunting and fishing rights and it seemed inevitable that in the course of their work they would be asked to deal with matters outside the scope of the McKenna-McBride Agreement. Since the Commission's work would take them to reserves all over the Province to listen to the Aboriginals, they predicted it would create dissatisfaction if they were unable to report on these matters. They recommended that they deal with these issues as well and report on future policy for the administration of Indian Affairs in British Columbia. [96]

Before they set out, the Commissioners also requested a practical authority in order to deal expeditiously with cut-offs to reserves. Since the McKenna-McBride Agreement affirmed the requirement for Band consent to the reduction of a reserve they requested authority under the *Indian Act* to conduct the surrenders if a Band was ready to make one. [97] This power was granted. On the recommendations of Indian Affairs the Commissioners were empowered by Order-in-Council, May 27, 1913 to accept surrenders of land under s. 49(1) of the *Indian Act*. [98]

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[96] May 20, 1913 minute of a meeting of the Royal Commission on Indian Affairs for the Province of British Columbia Indian Affairs file 27150-3-5, found on N.A.C. RG 10 volume 7782.

[97] May 21, 1913 letter from J.G.H. Bergeron, Secretary, Royal Commission on Indian Affairs for British Columbia to T.W. Crothers, Minister of Labour and of the Interior per Interim. Indian Affairs file 27150-3-5, found on N.A.C. RG 10 volume 7782.

[98] May 27, 1913 Federal Order-in-Council P.C. 1247. Indian Affairs file 27150-3-5, found on N.A.C. RG 10 volume 7782.

The full Commission then set out to the Cowichan Agency for their first course of field work. They visited various reserves meeting with band representatives, explaining the purpose and extent of the Commission's powers and, taking statements under oath regarding land matters. They also met with representatives of public bodies from Duncan, Ladysmith, Comox and Courtenay and took statements from them as well. Then they returned to Victoria briefly before resuming field work on the Islands in the Strait of Georgia.

After the first period of field work the Commissioner's found out that the Federal Government had rejected the request to expand the scope of their investigations and had followed Acting Superintendent General of Indian Affairs T. W. Crother's recommendations that the Commissioners' mandate be limited to the terms of the McKenna-McBride Agreement. The Commissioners were invited to submit a special report on the condition of the Aboriginals and make suggestions on future policy and administration, but were to ensure they were not misled regarding the scope of the inquiry.[99] Bergeron delivered this decision to Premier McBride in July. [100]

The Commissioners returned to Victoria from the Gulf Islands in Mid-July and held formal hearing until August 14. Throughout the seasonable months this became their pattern. After visiting the Agencies and collecting statements under oath they would

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[99] June 10, 1913 Federal Order-in-Council P.C. 1401. Indian Affairs file 27150-3-5, found on N.A.C. RG 10 volume 7782; also May 31, 1913 memorandum from T.W. Crothers, Acting Superintendent General of Indian Affairs. Indian Affairs file 27150-3-5, found on N.A.C. RG 10 volume 7782.

[100] July 15, 1913 letter from J.G.H. Bergeron, Secretary, Royal Commission on Indian Affairs for the Province of British Columbia to R. McBride, Premier of British Columbia. Indian Affairs file 539, found on N.A.C. RG 10 volume 11021.

return to Victoria and conduct formal hearing by other interested parties including railway companies and private individuals or corporations. They would then make decisions on whether to recommend confirmation, enlargement or reduction of reserves.

In the fall the Commissioners did field work in the Bella Coola, Queen Charlotte Okanagan, Lytton and Kamloops Agencies before returning to Victoria to hold formal hearings in late September. The first years activity resulted in recommendations for the confirmation of 176 reserves, additions to three and reductions to seventeen. In the course of their work the Commission also made recommendations to the Provincial government for the reservation of lands that were claimed by Aboriginals but not yet designated reserves in order to avoid alienation and subsequent competing claims. After hearing 56 special references from individuals, railways, municipalities and other public bodies, the Commissioners made eighteen recommendations by way of Interim Report to the two governments.

The McKenna-McBride Agreement, Interim Reports were a mechanism to deal with immediate public needs. If a Government referred an application to the Commissioners they were directed by the Agreement to dispose of the problem by an Interim Report. Both Governments had agreed to do whatever was needed to confirm the Commissioners' recommendations. The Commissioners, however, disagreed about the purpose of the Interim Reports. McKenna argued they were only meant to deal with expropriations and could not authorize cut-offs or reserve confirmations. These, he felt should be done through the submission and approval of a Final Report. He suggested Final Reports be submitted once the work in each Agency was completed rather than submitting one massive report in order to avoid a huge bottleneck at the end of the

process. [101] This was particularly important since Premier McBride had suggested the Province would not approve Interim Reports. [102] According to Ware the treatment of Interim Reports was inconsistent. [103] Most were still not approved by the province in 1916.[104] McKenna's suggestion was refused. In 1915 the Commission attempted to obtain the confirmation of whole reserves by Interim Report.

In December 1913 Commission Chairman Wetmore resigned citing personal health reasons. [105] His resignation slowed the work of the Commission and despite the objections of the new Deputy Superintendent General, Duncan Scott, the Commissioners discontinued field work and partially adjourned for the winter. [106] Over

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[101] December 11, 1913 letter from J.A.J. McKenna, Dominion Commissioner, Royal Commission on Indian Affairs for the Province of British Columbia to W.J. Roche, Superintendent General of Indian Affairs. Indian Affairs file 59,335-1, found on N.A.C. RG 10 volume 3822.

[102] September 16, 1913 memorandum from H.E. Hume to F. Pedley, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-3-5, found on N.A.C. RG 10 volume 7782.

[103]R. Ware, *The Lands We Lost, A History of Cut-off Lands and Land Losses from Indian Reserves in British Columbia*, Union of British Columbia Indian Chiefs Lands Claims Research Centre, 1974.

[104] August 16, 1916 letter from J.A.J. McKenna, Dominion Commissioner, Royal Commission on Indian Affairs for the Province of British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 59,335-1, found on N.A.C. RG 10 volume 3822.

[105] November 29, 1913 letter from E.L. Wetmore, Chairman, Royal Commission on Indian Affairs for British Columbia to L. Corderre, Secretary of State. Indian Affairs file 27150-3-5, found on N.A.C. RG 10 volume 7782.

[106]November 28, 1913 memorandum from D.C. Scott, Deputy Superintendent General of Indian Affairs to W.J. Roche, Superintendent General of Indian Affairs. Indian Affairs file 27150-3-5, found on N.A.C. RG 10 volume 7782; also November 29, 1913 letter from E.L.

the winter months the Commission restricted its work to conducting formal hearings and responding to forty-two special references. These latter resulted in 11 recommendations in the form of Interim Reports. They considered the others to be outside the scope of their Commission. The Commissioners also took advantage of this relative hiatus to arrange for the valuation of reserves, requested by Premier McBride, and to consider the "Indian Land Title Claim". The claim was clearly outside the Commissions mandate; however, they forwarded relevant materials to the Superintendent General of Indian Affairs and the Attorney General of British Columbia for their consideration. [107]

Montreal lawyer, Saumarez Carmicheal was chosen to replace Commissioner White as Canada's representative on the Commission so Commissioner White could become the new Chairman. [108] Under the new Chairman the Commission conducted another 159 formal hearings before resuming field work in May, 1914. These hearings resulted in 24 recommendations by way of an Interim Reports including the confirmation of reserves. Resuming field work in May the Commission inspected 555 reserves before November visiting the West Coast, Kwawkewlth, Kamloops, Williams Lake, Stuart Lake, Kootenay, and Lytton Agencies. They also conducted an investigation of the reserves included in

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Wetmore, Chairman, Royal Commission on Indian Affairs for British Columbia to L. Corderre, Secretary of State. Indian Affairs file 59,335-1, found on N.A.C. RG 10 volume 3822.

[107] Report of the Royal Commission on Indian Affairs for the Province of British Columbia, Progress Report by Acting Chairman MacDowall, April 21, 1914, p. 150.

[108] March 2, 1914 letter from R.L. Borden, Prime Minister of Canada to the Duke of Connaught, Governor General. Indian Affairs file 27150-3-5, found on N.A.C. RG 10 volume 7782; also April 17, 1914 Federal Order-in-Council P.C. 1059. Indian Affairs file 27150-3-5, found on N.A.C. RG 10 volume 7782.

the Treaty 8 area of north-eastern British Columbia.

Over the 1914-15 winter months the Commissioners did some field work finalizing inspections in the New Westminster Agency but the majority of their work consisted of meetings to decide on confirmations, reductions and additions to reserves in the Lytton and Kamloops Agencies. The Commissioners also made 27 recommendations by way of Interim Report including recommendations that a number of reserves be confirmed by both governments in order that their water rights could be properly protected by the Department of Indian Affairs. Materials and recommendations were forwarded to the Department of Indian Affairs on other matters affecting the rights and privileges of Indians in British Columbia including specific land claims, medical services, administrative efficiency and fishing rights. [109]

In April 1915 the Commissioners got back on the road for their final summer of field work. They visited the Babine Agency before returning to Victoria in early May where they split up to be more efficient. Shaw and Carmichael went to revisit Stuart Lake and continued on to Bella Coola and Fort St. James. The others stayed in Victoria until the end of May when McKenna and MacDowall went on to Stikine. All were reunited in Victoria in early July but a week later McKenna and MacDowall returned to Babine to meet with Bands that had been previously unavailable. The full board was again reunited in Victoria on July 19 and attended to applications by public bodies. The most notable was the Vancouver Harbour Commissioners application to acquire the Kitsilano

[109] Report of the Royal Commission on Indian Affairs in B.C.. Progress Report by Acting Chairman MacDowall, dated March 22, 1915 , p. 164.

Reserve which was addressed by an Interim Report on August 12, 1915. [110] In late summer the Commission visited the reserves of the Squamish Tribe as well as those in Pemberton, Lillooet and Harrison. Finally in late September they visited the Nass Agency, Metlakatla and the Port Simpson Indians and returning to Victoria began work on their Final Report.

The Commission was dissolved on June 30, 1916. On that day they delivered a Special Report on matters affecting the administration of Indian Affairs in British Columbia[111] and the Final Report on reserves in British Columbia. [112] In all the Commissioners confirmed 666,640.25 acres worth approximately $19,980.00, cut-off 47,058.49 acres worth approximately $1,522,704 and added 87,291.17 acres worth approximately $444,838.[113]

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[110] Report of the Royal Commission on Indian Affairs in British Columbia, Progress Report by Chairman White dated December 20, 1915, p. 174.

[111] June 30, 1916 Special Report of the Royal Commission on Indian Affairs for the Province of British Columbia. British Columbia Archives and Records Service, GR 672, Box 5, File 4.

[112] June 30, 1916 report of the Royal Commission of Indian Affairs for the Province of British Columbia.

[113] Titley, p. 141

Aboriginal Reaction to the Royal Commission

After the momentum that had built up towards achieving a court reference on Aboriginal title during Laurier's tenure, the Royal Commission solution was inevitably going to meet with the disapproval of politically active Aboriginal groups. This was exacerbated by the limits to the Commissioner's authority, especially in light of the McKenna-McBride Agreement's claim that its fulfilment would effect "a final adjustment of all matters relating to Indian Affairs in the Province of British Columbia".[114] Despite assurances from the Federal Government that the final adjustment referred only to the issues between governments, the organized Aboriginal community lobbied against the Royal Commission and continued its efforts towards securing a judicial decision on Aboriginal title.

On January 22, 1913, after the signing of the McKenna-McBride Agreement, the Nishga met and approved a statement that formed the basis of a new Petition to the Judicial Committee of the Privy Council. In their statement they claimed that their Aboriginal title to the Nass Valley was recognized by the Royal Proclamation of 1763 and that none of their traditional lands should be taken from them until their interest was purchased by the Crown. In direct conflict with the premise underlying the Royal Commission they claimed the right to set aside their own reserves and determine a system of individual ownership. The statement included a denial of McKenna's claim

[114] September 24, 1912 memorandum of agreement between J.A.J. McKenna, Special Commissioner, Department of Indian Affairs and R. McBride, Premier of British Columbia. Indian Affairs file 27150-3-2 found on N.A.C. RG 10 volume 7780.

that the Province's alleged reversionary interest was the source of their dissatisfaction and criticized the Province for disavowing any responsibility for treating with the Aboriginals by hiding behind Canada's administrative responsibility pursuant to section 91(24) of the *Constitution Act, 1867*. They further demanded representation on any Commission that purported to determine their rights. [115]

Protests were renewed when the Commissioners began their work and explained the limits on their authority. On September 19, 1913 Aboriginal delegates travelled to Victoria to present a memorial protesting the fact that the Government did not intend to submit the determination of Aboriginal title to the Commission and that they had been informed by Commission members that they only had authority to deal with the size of reserves.[116] The Department of Indian Affairs reacted by circulating copies of the McKenna-McBride Agreement to Indian Agents in an attempt to better convey the scope and objectives of the Commission.[117]

The Nishga petition to the Judicial Committee of the Privy Council was referred to the Federal Government on June 19, 1913. [118] After his appointment as Deputy

[115] Memorandum from D.C. Scott, Deputy Superintendent General of Indian Affairs, attached to June 6, 1914 Federal Order-in-Council P.C. 751. Indian Affairs file 59,335 v. 3A, found on N.A.C. RG 10 volume 3822.

[116]Shankel p. 198.

[117] October 10, 1913 letter from J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs to A.N. Tyson, Inspector of Indian Agencies, Vancouver Inspectorate. Indian Affairs file 27150-3-5, found on N.A.C. RG 10 volume 7782; also October 10, 1913 letter from J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs to W.S. Simpson, Indian Agent, Telegraph Creek, R.E. Loring, Indian Agent, Hazelton, and C.C. Perry, Indian Agent, Metlakatla. Indian Affairs file 27150-3-5, found on N.A.C. RG 10 volume 7782.

Superintendent General of Indian Affairs, on October 11, 1913, Duncan Scott was immediately presented with this problem. The Minister of Justice, Charles Doherty, advised that although he considered the claim to be of dubious merit it was valid enough to justify consideration by the courts. He also noted, however, that the McKenna-McBride Agreement appeared to contemplate a reversal in policy from the previous Government's intention to support a claim for Aboriginal title; therefore, the policy question should be determined first. [119] After further consultations with the Department of Justice, Superintendent General Roche and Prime Minister Borden, Scott formulated a proposal to refer the Aboriginal title question to the Exchequer Court of Canada, with leave to appeal to the Privy Council, if the Aboriginals would accept certain conditions in the event they won. These were designed to address what in Scott's opinion were the two largest impediments to a determination: the refusal of British Columbia to consent to a stated case which would include any reference to Indian title; and uncertainty as to the extent of compensation which might be demanded by the Aboriginals if they were successful before the courts, and if the Crown found it good policy to extinguish their title.

The conditions were as follows:

1. The Indians of British Columbia shall, by their Chiefs or representatives, in a binding way, agree, if the Court, or on appeal, the Privy Council, decides that they have a title to lands of the Province to surrender such title receiving from the Dominion benefits to be granted for extinguishment of title in accordance with past usage of the Crown in satisfying the Indian claim to unsurrendered territories, and to accept the findings of the

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[118] Report of the Joint Committee of the Senate and the House of Commons into the Claims of the Allied Tribes, 1927, p. 12.

[119]December 17, 1913 letter from C. Doherty, Minister of Justice to W.J. Roche, Minister of the Interior. (Abo. collection).

Royal Commission on Indian Affairs in British Columbia as approved by the Governments of the Dominion and the Province as a full allotment of Reserve lands to be administered for their benefit as part of the compensation.

2. That the Province of British Columbia by granting the said reserves as approved shall be held to have satisfied all claims of the Indians against the Province. That the remaining considerations shall be provided and the cost there of borne by the Government of the Dominion of Canada.

3. That the Government of British Columbia shall be represented by counsel, that the Indians shall be represented by counsel nominated and paid by the Dominion.

4. That, in the event of the Court or the Privy Council deciding that the Indians have no title in the lands of the Province of British Columbia, the policy of the Dominion towards the Indians shall be governed by consideration for their interests and future development.[120]

On hearing of the offer, counsel for the Nishga, O'Meara, restated the Nishga's insistence on a direct reference to the Judicial Committee of the Privy Council. The Minister of Justice, Doherty replied that there could be no reference to the Judicial Committee of the Privy Council except as an appeal from the domestic courts because of constitutional reasons and the Aboriginals should be counselled to decide on the merits of the proposal rather than procedure.[121] Later Scott noted that the proposals contained in the 1914 Order in Council had never formally been made to the Aboriginals since he considered they should not be forced to agree to a Report they had not seen. They were, however,

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[120] June 6, 1914 Federal Order-in-Council P.C. 751. Indian Affairs file 59,335 v. 3A, found on N.A.C. RG 10 volume 3822.

[121] Report of the Joint Committee of the Senate and the House of Commons into the Claims of the Allied Tribes, Appendix G. November 14, 1914 letter from C.J. Doherty, Minister of Justice to Reverend A.E. O'Meara.

aware of its contents.[122]

The Nishga petition became the symbol of the struggle for the recognition of Aboriginal title. In February 1915 a deputation of Nishga met with Scott in Ottawa and offered counter-proposals to those contained in the June 20, 1914 Order in Council. They suggested that if title was recognized, after the work of the Royal Commission, they should have an opportunity to apply for additional lands. If there was a dispute it should be referred to the Secretary of State for the Colonies. They also proposed that compensation for surrender of Aboriginal title have regard for all the terms and provisions of any Treaty in Canada. If these proposals were not acceptable they reiterated their plea for assistance in having a determination on Aboriginal title made by direct reference to the Judicial Committee of the Privy Council. [123] At Spences Bridge on February 27, 1915 chiefs from Chilcotin, Kootenay, Lillooet, Okanagan, Shushwap and Thompson Bands gathered in protest against the work of the Royal Commission and announced their support for the proposals made by the Nishga delegation.

Out of this meeting an alliance of Coast and Interior Bands was formed that became known as the Allied Tribes. The Allied Tribes, led by Aboriginal spokesmen Andrew Paull and Peter Kelly, and advised by O'Meara, kept the mystique of the Nishga petition alive. On May 26, 1916 they rejected the work of the Royal Commission and

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[122] October 13, memorandum from A.S. Williams, Acting Deputy Superintendent General of Indian Affairs to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 59,335 v. 4, found on N.A.C. RG 10 volume 3821; also February 7, 1917 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to Senator H. Bostock. Indian Affairs file 59,335-1, found on N.A.C. RG 10 volume 3822.

[123]June 17, 1915 letter from C. Doherty, Minister of Justice to the Duke of Connaught, Governor-General in Council. Indian Affairs file 27150-3-3, found on RG 10 volume 7781.

demanded that the approval of the Report of the Royal Commission be delayed until the issues in the Nishga petition were disposed of.[124]

Without the acceptance of the conditions outlined in the May 11, 1914 Order in Council, Scott advised that nothing further be done regarding Aboriginal title. [125] With the work of the Royal Commission winding down, Commissioner McKenna offered to act as a Special Commissioner to negotiate with the Aboriginal representatives, towards obtaining their consent to the proposed court reference, but no action was taken.[126] The Federal Government directed their energies towards securing approval of the Royal Commission Report.

On September 25, 1915 the Governor-General's Secretary advised O'Meara that His Royal Highness , "considers it the duty of the Nishga Tribe of Indians to await the decision of the Commission, after which, if they do not agree to the conditions set forth by the Commission, they can appeal to the Privy Council in England, when their case

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[124]May 26, 1916 Statement of Nishga and Interior Tribes of British Columbia. Indian Affairs file 27150-3-3, found on N.A.C. RG 10 volume 7781; also May 29, 1916 letter from A.E. O'Meara to the Duke of Connaught, Governor-General of Canada. Indian Affairs file 27150-3-3, found on N.A.C. RG 10 volume 7781.

[125] September 15, 1916 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to T. Mulvey, Undersecretary of State. Indian Affairs file 27150-3-3, found on N.A.C. RG 10 volume 7781.

[126] March 8, 1916 letter from J.A.J. McKenna, Dominion Commissioner, Royal Commission on Indian Affairs for the Province of British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 59,335-2, found on N.A.C. RG 10 volume 3822.

will have every consideration". [127]

[127] September 25, 1916 letter from E.S. Stanton, Governor-General's Secretary to A.E. O'Meara. Indian Affairs file 59,335, v. 3A found on N.A.C. RG 10 volume 3820.

Attempts to Ratify the Report of the Royal Commission

The Federal Government hoped for a quick ratification of the Final Report of the Royal Commission in order to avoid controversy, but circumstances contrived to make an early review by the Provincial Government impossible. In December 1915, before the McBride government had a chance to consider the Report, McBride stepped down and was replaced by William J. Bowser. The Federal Government made a draft Report available to Premier Bowser in March 1916 and pressed for an early consideration and approval of the Commission's recommendations, but to no avail. [128] After the Final Report was delivered Superintendent General Roche implored Bowser to pass an Order in Council accepting the report. He also refuted his contention that implementing legislation was necessary prior to acceptance. [129] By August any chance of a smooth passage was lost. Federal officials were informed that Bowser had not taken any action and would not deal with the Report before the elections in December. [130]

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[128] March 13, 1916 letter from W.J. Bowser, Premier of British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-3-5A, found on N.A.C. RG 10 volume 7782; also March 24, 1916 letter from W.J. Roche, Superintendent General of Indian Affairs to W.J. Bowser, Premier of British Columbia. Indian Affairs file 59,335-1, found on N.A.C. RG 10 volume 3822.

[129] April 29, 1916 letter from W.J. Roche, Superintendent General of Indian Affairs to W.J. Bowser, Premier of British Columbia. Indian Affairs file 59,335-1, found on N.A.C. RG 10 volume 3822.

[130] August 28, 1916 telegram from J.A.J. McKenna, Dominion Commissioner, Royal Commission on Indian Affairs for the Province of British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 59,335-1, found on N.A.C. RG 10 volume 3822; also October 16. 1916 letter from J.A.J. McKenna, Dominion Commissioner, Royal Commission on Indian Affairs for the Province of British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 59,335-1, found on N.A.C. RG 10

Bowser's government lost the September general election and was replaced by a Liberal government headed by Harlan C. Brewster further dashing any hopes of a quick ratification. Brewster did not share the Federal Governments sense of urgency about adopting the Report and did not want to give up the reversionary interest as agreed to in the McKenna-McBride Agreement.[131] He informed the Federal Government that the Province would have to give careful consideration to the Report and would not approve of any findings they felt unable to give effect to. [132]

Scott met with Brewster in Ottawa, in early 1917, in an attempt to alleviate growing dissatisfaction in the Aboriginal community by eliciting a favourable attitude from the Province, but Brewster insisted he would not commit to a favourable review of the Report before careful scrutiny. [133] When pressed near the end of 1917 the Provincial Government stated it was giving the Report serious consideration but because of the size of the Report did not expect their review to be quickly completed. [134] Since it appeared the Province was trying to renegotiate the McKenna-McBride Agreement, and

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volume 3822.

[131] Titley, p. 143.

[132] March 8, 1917 letter from W.J. Roche, Superintendent General of Indian Affairs to H.G. Brewster, Premier of British Columbia. Indian Affairs file 59,335-1 found on N.A.C. RG 10 volume 3822.

[133] March 1, 1917 letter from H.G. Brewster, Premier of British Columbia to W.J. Roche, Superintendent General of Indian Affairs. Indian Affairs file 59,335-1 found on N.A.C. RG 10 volume 3822; also March 8, 1917 letter from W.J. Roche, Superintendent General of Indian Affairs to H.G. Brewster, Premier of British Columbia. Indian Affairs file 59,335-1 found on N.A.C. RG 10 volume 3822; also Narrow p. 145.

[134] October 4, 1917 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 59,335-1 found on N.A.C. RG 10 volume 3822.

get better terms for giving up the reversionary interest, former Commissioner McKenna was quoted in the local press as suggesting that Canada might offer the return of the Railway Belt in exchange for the Province giving up its interest in cut-offs and approving the Final Report.[135] Brewster's Minister of Lands, T.D. Pattullo responded that the Government was following the policy that the ownership of land was justified by use and the Aboriginals were in control of land that was not being used.[136]

In January 1918 Premier Brewster suggested to W.E. Ditchburn, Chief Inspector of Indian Affairs in British Columbia, that the Report was under review but in his travels around the Province he had come across issues which formed the basis of complaint and would require addressing. Brewster's interest sparked some hope that negotiations would be reopened but he died in March with his complaints unarticulated and the Report unapproved.

From the time of delivery, controversy surrounded the confirmation of the Final Report. Senator Bostock declared the requirement for government approval contrary to the spirit of the McKenna-McBride Agreement which was supposed to provide for the end of gridlock. [137] Government approval was required, however, and gridlock continued

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[135] *Victoria Colonist*, February 19, 1918; February 19, 1918 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies for British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 59,335-1 found on N.A.C. RG 10 volume 3822.

[136] February 20, 1918 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 59,335-1 found on N.A.C. RG 10 volume 3822.

[137] Senate Debates, May 12, 1916, 6th Session, 12th Parliament, 6 George V, p. 524-25

into 1918. Anxious to provide some results to quell ever increasing Aboriginal unrest, the Federal Government considered approving the Report with respect to reserves inside the Railway Belt, and outside subject to Provincial approval, but no action was taken.[138]

John Oliver took over after Brewster's death and inherited a Minister of Lands very concerned with the reserve issue. Soon after, T.D. Pattullo entered into negotiations with Scott that continued for the next fifteen years: first over the content and approval of the Report; and, then over the terms of the final conveyance of reserves. Considered by some scholars as " hostile to the Indian interest," [139] Oliver's government was also reluctant to accept the surrender of the claim to a reversionary interest. [140] As land values increased so did the value of the claimed interest. According to Federal officials, negotiations over the reversionary interest to the Kitsilano reserve alone was distorting the process. Scott wrote Premier Oliver March 20, 1918 requesting action on the Report without success. Later in the year Scott and Superintendent General Meighen met with Oliver in Ottawa but still failed to secure the Province's commitment to approve the Report.

Pattullo focussed on the issue of guaranteeing that the cut-offs to reserves recommended by the Royal Commissioners would be accepted. He wrote Meighen on December 17,

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[138] April 3, 1918 letter from A.S. Meighen, Superintendent General of Indian Affairs to the Duke of Devonshire, Governor General of Canada. Indian Affairs file 27150-3-5B found on N.A.C. RG 10 volume 7782.

[139]Titley, p. 145

[140] Shankel, p. 233

1918[141] requesting advice on the necessity for Aboriginal approval for the cut-offs recommended by the Royal Commission and refused to consider the Report further until answered. [142] Meighen responded that consent would be necessary since the *Indian Act* required it if they were reserves:

> It was evidently the view of those who made the agreement that the lands to be dealt with were Indian reserves under the legal meaning of that term, and I think they were quite right, as these reserves had been set apart under a former arrangement between the Dominion and the Province. [143]

It was becoming a political problem in British Columbia to have the additions to reserves approved. Ditchburn reported that members of the Legislature had become aware of the effect on their constituencies and were complaining to Oliver. [144] Although the Federal Government had requested that the Report remain confidential to avoid creating a reason for agitation by Aboriginal groups, or a backlash by the public, it became obvious the Province was not treating it as such. In early 1919 Pattullo distributed maps in the Legislature describing the effects of the Report's

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[141] December 17, 1918 letter from T.D. Pattullo, Minister of Lands to A.S. Meighen, Minister of the Interior. Indian Affairs file 59,335 v. 3, found on N.A.C. RG 10 volume 3820.

[142] September 24, 1912 memorandum of agreement between J.A.J. McKenna, Special Commissioner, Department of Indian Affairs and R. McBride, Premier of British Columbia. Indian Affairs file 27150-3-2 found on N.A.C. RG 10 volume 7780.

[143] January 7, 1919 letter from A.S. Meighen, Minister of the Interior to T.D. Pattullo, Minister of Lands. Indian Affairs file 59,335 v. 3, found on N.A.C. RG 10 volume 3820.

[144] January 9, 1919 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 59,335-1, found on N.A.C. RG 10 volume 3822.

recommendation on the members constituencies. [145]The Federal Government bristled at this move and began to consider making a case against allowing the cut-offs. [146] Scott suggested that if the Province continued in this vein perhaps Canada should again push for a court decision on the title issues. [147] On March 4, 1919 Scott released the Report to the public stating that the local Aboriginals should have a chance to respond to the complaints from members of the Provincial Legislative Assembly.[148]

Prior to the Report's public release, British Columbia introduced legislation allowing the Lieutenant-Governor to approve the Report or continue negotiations towards approval. The bill was assented to on March 29, 1919. After a preamble describing the McKenna-McBride Agreement and the subsequent requirement for government approval the Act reads as follows:

1. This Act may be cited as the "*Indians Affairs Settlement Act.*"

2. To the full extent to which the Lieutenant-Governor in Council may consider it reasonable and expedient, the Lieutenant Governor in Council may do, execute, and

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[145] February 10, 1919 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-3-5B, found on N.A.C. RG 10 volume 7782.

[146] January 9, 1919 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 59,335-1, found on N.A.C. RG 10 volume 3822.

[147] February 17, 1919 memorandum from D.C. Scott, Deputy Superintendent General of Indian Affairs to A.S. Meighen, Minister of the Interior. Indian Affairs file 27150-3-5B, found on N.A.C. RG 10 volume 7782.

[148] Titley, p. 146; also November 2, 1919 memorandum from D.C. Scott, Deputy Superintendent General of Indian Affairs to A.S. Meighen, Minister of the Interior. Indian Affairs file 59,335 v. 3, found on N.A.C. RG 10 volume 3820.

fulfil 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 full and final adjustment and settlement of all differences between the said Governments respecting Indian lands and Indian affairs in the Province.

3. Without limiting the general powers by this Act conferred, the Lieutenant-Governor in Council may, for the purpose of adjusting readjusting, or confirming the reductions, cut-offs, and additions in respect of Indian reserves proposed in the said report of the Commission, carry on such further negotiations and enter in such further agreements, whether with the Dominion Government or with the Indians, as maybe found necessary for a full and final adjustment of the differences between the said governments.[149]

Canada did not consider complementary legislation immediately, but instead prepared themselves for further negotiations by compiling examples of cut-offs which dissatisfied them. Scott considered legislation unnecessary and was frustrated with the Province who in his opinion had never told the Federal Government what their complaints were but simply would not approve the Report. As grantor of the lands Scott felt Provincial approval should come first. [150]

By June Pattullo had advised Meighen that the Province was ready to approve the reserves whose acreage had been confirmed by the Commissioners but wanted further

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[149] March 29, 1919 *Indian Affairs Settlement Act*, Statutes of British Columbia, 1919, Chapter 32.

[150] March 17, 1919 memorandum from D.C. Scott, Deputy Superintendent General of Indian Affairs to A.S. Meighen, Minister of the Interior. Indian Affairs file 59,335 v. 4, found on N.A.C. RG 10 volume 3821; also February 27, 1919 memorandum from D.C. Scott, Deputy Superintendent General of Indian Affairs to A.S. Meighen, Minister of the Interior. Indian Affairs file 59,335-3, found on N.A.C. RG 10 volume 3822.

negotiations on additions and cut-offs to reserves. [151] Scott welcomed this and suggested the Province pass an Order in Council doing so and that both governments then appoint representatives to look into additions and cut-offs. [152]

With the negotiations progressing Scott conferred with the Department of Justice and advised Meighen that the Federal Government should pass legislation similar to the Province's in order to ensure they would be in a position to approve the Report once the disagreements were worked out. [153] Pattullo communicated through Ditchburn that the Province also wanted a guarantee that Aboriginal consent to cut-offs would not be an impediment to settlement. [154] After advising Meighen that according to the terms of the McKenna-McBride Agreement the Federal Government was responsible for securing the consent of the Bands to cut-offs, Federal officials included a provision in the proposed legislation removing the requirement for Aboriginal consent to the cut-offs recommended by the Royal Commission.

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[151] June 10, 1919 letter from T.D. Pattullo, Minister of Lands to A.S. Meighen, Minister of the Interior. Indian Affairs file 27150-3-5B, found on N.A.C. RG 10 volume 7782.

[152] June 20, 1919 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to T.D. Pattullo, Minister of Lands. Indian Affairs file 27150-3-5B, found on N.A.C. RG 10 volume 7782.

[153] August 9, 1919 letter from W.S. Edwards, Acting Deputy Minister, Department of Justice to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-3-5B, found on N.A.C. RG 10 volume 7782; also August 11, 1919 memorandum from D.C. Scott, Deputy Superintendent General of Indian Affairs to A.S. Meighen, Minister of the Interior. Indian Affairs file 27150-3-5B, found on N.A.C. RG 10 volume 7782.

[154] November 1, 1919 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 59,335 v. 3, found on N.A.C. RG 10 volume 3820.

In November, 1919 Pattullo met Scott and Meighen in Ottawa where they requested he provide a memorandum fully outlining the Province's concerns with the Report. Pattullo responded to the request with the following proposals:

1. The Government of the Dominion of Canada shall secure the consent of the Indians to these cut-offs.
2. That the following special exceptions be made to the additions and be adjusted by further consideration. a) Andimaul. b) Deeker Lake. c) Burns Lake. d) Anaham Lake. e) Marysville. f) Creston. = total: 6055 acres.
3. That in respect of all the additions that wherever the additions are not occupied by the Indians, and are holding up other settlement, that they shall be sold by public auction, as per Clause 4 of the agreement between the Province and the Dominion. In the interpretation of the word 'occupied' they must be substantially in occupation, and not merely colourably.
4. That when any lands are to be sold as per Section 7 of the agreement, that the sale shall be subject to the approval of the Province and of the Indians, or in the alternative shall be sold at public auction.
5. With respect to additional reserves, should any reserve be found not to contain the acreage estimated by the Commission, there shall be no obligation on the part of he province to supply additional lands, and should any additional reserve be larger than the acreage estimated by the commission, the acreage estimated by the commission shall govern.
6. (Same water rights as non-Aboriginals).[155]

Scott had no particular quarrel with suggestion's 1, 2 and 5 but reported that 3 and 4 would eliminate any gains achieved by the McKenna-McBride Agreement. [156] Pattullo's suggestions were so badly met that Meighen did not meet with him during the remainder of his stay. Angered, Pattullo withdrew the proposals and left Ottawa. On December 1, Meighen responded that the withdrawal was meaningless since the proposals were so out

[155] October 29, 1919 Memorandum by H. Cathcart, Superintendent of Lands. Department of Lands file 026076 v. 2, found at the Surveyor General's Office.

[156] November 14, 1919 memorandum from D.C. Scott, Deputy Superintendent General of Indian Affairs to A.S. Meighen, Minister of the Interior. Indian Affairs file 59,335 v. 3, found on N.A.C. RG 10 volume 3820.

of line and " totally foreign" to the spirit of the McKenna-McBride Agreement. [157] Pattullo responded to Meighen but dealt less with the issue at hand than with his sense of being shabbily treated. [158] According to Scott the Kitsilano reserve dispute was still affecting the overall negotiations. [159]

Meighen responded coldly to Pattullo in January and again requested the Province outline their concerns with the Report. [160] In the meantime, Federal officials continued working on legislation to facilitate settlement and when they introduced Bill 13 for consideration by the House of Commons on March 12, 1920 the negotiating atmosphere improved considerably. The proposed legislation allowed the Governor-General in Council to negotiate a settlement and accept the report, including cut-offs, without the consent of the Aboriginals. A copy was forwarded to Pattullo who was pleased with the concession and suggested that both parties should appoint representatives to conduct a formal review of the Report. [161] Meighen agreed subject to final statutory authority. He also approved of the proposal to appoint officers to make a full review of the Report

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[157] December 1, 1919 letter from A.S. Meighen, Superintendent General of Indian Affairs to T.D. Pattullo, Minister of Lands. Indian Affairs file 59,335 v. 3, found on N.A.C. RG 10 volume 3820.

[158] December 19, 1919 letter from T.D. Pattullo, Minister of Lands to A.S. Meighen, Minister of the Interior. Indian Affairs file 59,335 v. 3, found on N.A.C. RG 10 volume 3820.

[159] January 2, 1920 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to A.S. Meighen, Minister of the Interior. Indian Affairs file 59,335 v. 3, found on N.A.C. RG 10 volume 3820.

[160] February 6, 1920 letter from A.S. Meighen, Minister of the Interior to T.D. Pattullo, Minister of Lands. Indian Affairs file 59,335 v. 3, found on N.A.C. RG 10 volume 3820.

[161] March 21, 1920 letter from T.D. Pattullo, Minister of Lands, to A.S. Meighen, Minister of the Interior. Indian Affairs file 59,335 v. 3, found on N.A.C. RG 10 volume 3820.

towards fulfilling the terms of the McKenna -McBride Agreement.[162]

Bill 13 passed the House of Commons on April 12, 1920 and was assented to on July 1, 1920. After a preamble setting out the McKenna-McBride Agreement and the history of the Royal Commission it reads as follows:

1. The Act may be cited as the *British Columbia Indian Lands Settlement Act.*

2. To the full extent to which the Governor in Council may consider it reasonable and expedient the Governor in Council may do, execute, and fulfil every act, deed, matter or thing necessary for carrying out of he said Agreement between the Government of the Dominion of Canada and the Province of British Columbia according to its true intent, and for giving effect to the report of the said Royal Commission, adjustment and settlement of all differences between the said Governments respecting Indian lands and Indian affairs in the Province.

3. For the purpose of adjusting, readjusting or confirming the reductions or cutoffs from reserves in accordance with the recommendations of the Royal Commission, the Governor in Council may order such reductions or cutoffs to be effected, without surrenders of the same by the Indians, notwithstanding any provisions of the Indian Act to the contrary, and may carry on such further negotiations and enter into such further agreements with the Government of the Province of British Columbia as may be found necessary for a full and final adjustment of the differences between the said Governments.[163]

The section amending the McKenna-McBride Agreement's requirement for Indian consent to cut-offs was heavily debated in the House of Commons and Senate. [164] The Senators were assured by the leader of the Government in the Senate, however, that

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[162] May 27, 1920 letter from A.S. Meighen, Minister of the Interior to T.D. Pattullo, Minister of Lands. Indian Affairs file 59,335 v. 3, found on N.A.C. RG 10 volume 3820.

[163] *The Indian Land Settlement Act*, Statutes of Canada, 1920, chapter 51.

[164] Commons Debates, 1920, p. 787-794(March 26) and p. 953(April 6).

acceptance of the Report would not affect claims for a recognition of Aboriginal title. [165]

[165] Senate Debates, 1920, 4th Session, 13th Parliament, 11 George V, p. 475

Ditchburn-Clark Review

Provincial Ratification of the Report of the Royal Commission

On September 15, 1920 Scott and Pattullo met in Victoria to discuss settlement and agree on the officers who would review the report. W.E. Ditchburn, Chief Inspector of Indian Agencies in British Columbia was put forward as the Federal representative and J.W. Clark, Superintendent of the Immigration Branch, Department of Lands, as the Province's. Scott and Pattullo also agreed to request that J.A. Teit, an ethnologist who had acted on behalf of the Allied Tribes of B.C., participate in the review as Ditchburn's assistant and the representative of the Aboriginal interest.[166] Scott suggested that this would be the only opportunity for the Aboriginals to express themselves on the reserve issue. After consultation with certain chiefs, Teit accepted. [167] He was appointed December 11, 1920. [168]

Ditchburn was instructed to conduct the review in the spirit of frankness but to bear in mind that any cut-offs, additions or other changes to reserve boundaries were negotiable.[169] In November, he reported on the progress of their work noting that the

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[166] October 6, 1920 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to J.A. Teit, Allied Tribes of British Columbia. Indian Affairs file 27150-3-13 v. 1, found on N.A.C. RG 10 volume 7784.

[167] October 1, 1920 memorandum from D.C. Scott, Deputy Superintendent General of Indian Affairs to J.A. Lougheed, Superintendent General of Indian Affairs. Indian Affairs file 27150-3-13 v. 1, found on N.A.C. RG 10 volume 7784.

[168] December 11, 1920 Federal Order-in-Council P.C. 5000. Indian Affairs file 27150-3-13 v. 1, found on N.A.C. RG 10 volume 7784.

[169] October 6, 1920 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs, to W.E. Ditchburn, Chief Inspector of Indian Agencies, British Columbia Indian Affairs

Province had requested the review include the cut-offs in the Railway Belt which had been recommended by the Royal Commission. [170] This issue would later prove to be another major stumbling block in the ultimate confirmation of the Report and conveyance of the reserves.

The Federal Government concluded that cut-offs to individual reserves, where they had already bargained for the Province's reversionary interest, or to reserves in the Railway Belt, where they argued the reversionary interest was acquired pursuant to the conveyance of the Belt in 1883, would not be agreed to since the Province had not offered or given anything in exchange for adjustments of these reserves. The Province, however, claimed the conveyance of the Railway Belt did not extinguish their reversionary interest and continued to insist on a review of cut-offs. In order to avoid a halt to the process Ditchburn and Clark felt compelled to include them.

The review proceeded smoothly throughout 1921 and Ditchburn reported significant progress in most agencies. They were without the services of Teit, however, who had taken ill and was unable to report on the Aboriginal reaction to the work of the Commission.[171] While Teit was recovering, Ditchburn and Clark conducted a review of the less contentious areas first, visiting the Babine, Bella Coola, Cowichan, Kwawkewlth,

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file 27150-3-13 v. 1, found on N.A.C. RG 10 volume 7784.

[170] December 10, 1920 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-3-13 v. 1, found on N.A.C. RG 10 volume 7784.

[171] May 20, 1921 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, British Columbia to J.D. McLean, Acting Deputy Superintendent General of Indian Affairs. Indian Affairs file "Ditchburn-Clark," found on N.A.C. RG 10 volume 11302.

New Westminster, Queen Charlotte, Stikine, Stuart Lake and West Coast Agencies. [172] They delayed visiting areas where the Indian Rights Association had a strong following, particularly Kamloops, Okanagan, Skeena River and Nass River(Nishga) pending the recovery of Teit. Teit recovered sufficiently to conduct meetings with Aboriginal representatives in early 1922 but was forced to leave off again when outbreaks of influenza struck his family. [173] After repeated illness he died in November of 1922.

The Railway Belt and reversionary disputes, combined with delays associated with Teit's illness, slowed the review, but the most time consuming delays resulted from competing claims to land. Early in the review Ditchburn reported that he had been concentrating on getting additions to reserves to compensate for the fact that some of their lands had been alienated by white settlement.[174] Later negotiations were slowed by instances where the Province had alienated lands where there had been previous improvements by Aboriginals. Ditchburn reported that these specific cases required close attention which delayed the review. He was instructed to attempt to have the Province secure lands in exchange but not to allow progress towards settlement to stop on this

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[172] June 20, 1921 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-3-13 v. 1, found on N.A.C. RG 10 volume 7784.

[173] March 24, 1922 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-3-13 v. 1, found on N.A.C. RG 10 volume 7784.

[174] December 20, 1933 letter from C.C. Perry, Assistant Indian Commissioner for British Columbia to H.W. McGill, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v. 4, found on N.A.C. RG 10 volume 11046.

point.[175]

In order to ensure Aboriginal representation in the settlement discussions after Teit's death, a three member sub-Committee of the Allied Tribes, chaired by Reverend Paul Kelly was appointed to make representations on the reserve issue, at an August 1922 meeting between Superintendent General, Stewart, Scott and Ditchburn and a Committee from the Allied Tribes.[176] For a period the Federal Government viewed the review of the sub-Committee as a possible precursor to treaty negotiations, which would include broader claims like hunting and fishing privileges, and medical and educational benefits in exchange for the surrender of Aboriginal title; but, this initiative was ultimately put aside in order to concentrate on the fulfilment of the terms of the McKenna-McBride Agreement and the elimination of the Province's claim to reversionary interest.[177]

The Allied Tribes sub-committee travelled to the reserves, listened to representations from Bands, and submitted a report. From their report Ditchburn generated a list of additional reserves which were subsequently appended to the Ditchburn-Clark

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[175] May 23, 1922 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-3-13 v. 1, found on N.A.C. RG 10 volume 7784.

[176] August 4, 1922 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 59,335 v. 3, found on N.A.C. RG 10 volume 3820.

[177]November 28, 1922 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file "Ditchburn-Clark," found on N.A.C. RG 10 volume 11302.

recommendations.[178] According to Ditchburn, however, the Aboriginal sub-Committee's reviews were indiscriminate and the reports sporadic and unclear.[179] He reluctantly communicated them to the Province, stating the Federal Government would only recommend some additional fishing stations on the West Coast and grazing lands for some Interior Bands.[180]

Over the winter the review progressed quickly towards a conclusion. In November Premier Oliver committed the Province to providing additional lands to achieve a final settlement. [181] After discussing the disputes in each Agency, Ditchburn reported that Clark had recognized the necessity of finality and made acceptable concessions. Ditchburn and Clark completed their inquiry on March 19, 1923. The only area they could not agree was over grazing land in the Kootenays. The Royal Commission had recommended three additional reserves for the Shushwap, Lower Columbia Lake and St. Mary's Band which had been refused by the provincial grazing commissioner. Subject to an acceptable and fair solution to that issue, Ditchburn recommended that no further requests from Aboriginals be entertained in the interest of finally settling the question.

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[178] August 4, 1922 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 59,335 v. 3, found on N.A.C. RG 10 volume 3820.

[179] January 17, 1923 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046.

[180]January 16, 1923 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, British Columbia to T.D. Pattullo, Minister of Lands. Indian Affairs file 33/General v.5, found on N.A.C. RG 10 volume 11046.

[181] November 28, 1922 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to W.E. Ditchburn, Chief Inspector of Indian Agencies, British Columbia Indian Affairs file "Ditchburn-Clark," found on N.A.C. RG 10 volume 11302.

He was optimistic about the chances for a rapid acceptance of the Report by the British Columbia Government who were concerned with the claims by Aboriginals on other fronts. [182]

In April, Pattullo and Superintendent of Lands Cathcart met with Scott in Ottawa and agreed to recommend the Royal Commission Report as revised by Ditchburn-Clark to the Lieutenant-Governor in Council subject to a few exceptions. [183] They refused to consider the Allied Tribes Supplementary List of Reserves at that time and as a solution to the shortage of grazing land in the Kootenays recommended a grazing commonage to be shared amongst the bands. According to Ditchburn the Aboriginals had asked for far too much. [184]

Scott replied favourably to Pattullo's position, though he mildly attempted to insist on the List of Supplementary Reserves. [185] He had already suggested to Ditchburn, however, that he was ready to recommend approval. [186]

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[182] March 27, 1923 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-3-13 v. 1, found on N.A.C. RG 10 volume 7784.

[183] July 1, 1920 *British Columbia Indian Lands Settlement Act*, Statutes of Canada, 1920, Chapter 51.

[184] July 25, 1923 transcript of a meeting between C. Stewart, Superintendent General of Indian Affairs and the Allied Tribes of British Columbia, p. 9. Indian Affairs file 59,335 v. 1, found on N.A.C. RG 10 volume 3820.

[185] April 9, 1923 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to T.D. Pattullo, Minister of Lands. Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046.

[186] April 6, 1923 letter from T.D. Pattullo, Minister of Lands to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v. 5, found on N.A.C.

Ditchburn and Clark continued into May 1923 to work at cleaning up the schedule of reserves and came to a few more negotiated solutions. In June pressure from Aboriginal representatives against approving the Royal Commission Report was escalating and Scott exhorted Ditchburn to continue to urge provincial officials to prepare a memorandum for the Executive Council. [187] On July 26, 1923 the Lieutenant-Governor assented to Order in Council 911 approving the Report of the Royal Commission as amended by Ditchburn-Clark.

Order in council 911 recommended:

That the Report of the Royal Commission of Indian Affairs as made under date of the 30th day of June 1916, with the amendments thereto as made by the representatives of the two Governments, viz: Mr. W.E. Ditchburn, representing the Dominion Government and Major J.W. Clark, representing the province, in so far as it covers the Adjustments, readjustments or confirmation of the Reductions, Cut-offs and additions in respect of Indian Reserves proposed in the said report of the Royal Commission, as set out in the annexed schedules, be approved and confirmed as constituting full and final adjustment and settlement of all differences in respect thereto between the Governments of the Dominion and the Province, in fulfilment of the said Agreement of the 24th day of September 1912, and also of Section 13 of the Terms of Union, except in respect to the provision for lands for Indians resident in that portion of British Columbia covered by treaty No. 8 which forms the subject of Interim Report No. 91 of the Royal Commission; The settlement of which will be allowed to remain in abeyance until some more suitable time, but which shall not prevent the Government of the Province from dealing with vacant Crown lands under the provisions of the lands laws of the Province from time to time in force and effect. Provided that all new reserves and the lines necessary to define the cut-offs and the new boundaries of the reserves affected thereby be surveyed by duly qualified British Columbia Land Surveyors under the direction of

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RG 10 volume 11046.

[187] June 25, 1923 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to W.E. Ditchburn, Chief Inspector of Indian Agencies, British Columbia. Indian Affairs file "Ditchburn-Clark," found on N.A.C. RG 10 volume 11302.

and at the expense of the Dominion Government. The appointment of such surveyors shall be subject to the approval of the Surveyor-General of the Province. The work to be carried out under the provisions of the Land Act and general instructions for British Columbia surveyors and the field notes and plans shall be subject to the approval of the Surveyor-General for the province, a copy of same to be deposited in the Department of Lands. All surveys to be completed not later than the 31st day of December 1926, subject to an extension of time if found necessary.
Provided also that upon completion and due acceptance of such surveys, conveyance be made by the province to the Dominion in accordance with Section 7 of the said Agreement of the 24th day of September, 1912.

Attached was the schedule of reserves as confirmed or amended by the Commissioners and Ditchburn-Clark.

After the passage of Order in Council 911 Ditchburn continued to ask for a decision regarding the Supplementary List of Reserves. On June 14, 1926 the Province gave their final refusal.[188]

[188] October 21, 1924 letter from H. Cathcart, Superintendent of Lands, Department of Lands to W.E. Ditchburn, Indian Commissioner for British Columbia Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046; also June 14, 1926 letter from H. Cathcart, Superintendent of Lands, Department of Lands to W.E. Ditchburn, Indian Commissioner for British Columbia Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046.

Aboriginal Title Claims Continue

Federal Ratification of the Report of the Royal Commission

While the Federal and Provincial Governments continued their private negotiations towards approving the Royal Commission Report, the Allied Tribes continued their protest against the validity of the Royal Commissions work. In February 1919 the Allied Tribes issued a statement to the Federal Government demanding that the Report not be adopted until the issue of Aboriginal title was addressed. The statement included the following:

We are instructed that the position taken by the Allied Tribes with regard to the findings of the Royal Commission may be briefly stated as follows:

1. They think it clear that fundamental matters such as tribal ownership of their territories require to be dealt with before subsidiary matters such as the findings of the Royal Commission can be equitably dealt with.

2. They are unwilling to be bound by the Agreement regarding reserves mentioned in the Petition which was made in the year 1912 between the Government of Canada and the Government of British Columbia, as therein stated, "as a final adjustment of all matters relating to Indian affairs in the province of British Columbia" and under which the findings of the Royal Commission have been made. On the contrary the Allied Tribes contend that both the Agreement and the order-in-Council adopting it which was passed on November 27, 1912 are beyond the power of the Government of Canada.

3. They hold strongly the view that the matter of lands to be reserved and other matters outstanding between the Indian Tribes and the two Governments, such as foreshore rights, fishing rights, hunting rights and water rights, should be adjusted in the light of a judgement of the judicial Committee determining the land rights of the Indian Tribes of British Columbia.

4. Upon the securing of such judgement they will be prepared to consider the findings of the Royal Commission, when approved by the two Governments, so that so far as reasonably possible those findings may be used as a basis for finally adjusting the matter

of lands to be reserved.[189]

After the Royal Commission Report was made public the Allied Tribes responded to the Provincial Government's requests that they state the grounds of their refusal to accept the findings of the Royal Commission and outline the basis for what they feel would be a just settlement. On November 12, 1919 they presented a comprehensive statement of their position and their claims. Their basis for refusing to accept the work of the Royal Commission was its lack of finality:

> The so-called settlement which the two governments that entered into the McKenna-McBride Agreement, have made up is very far indeed from being complete. The Report of the Royal Commission deals only with lands to be reserved. The reversionary title claimed by the Province is not extinguished, as Special Commissioner McKenna said it would be. Foreshores have not been dealt with. No attempt is made to adjust our general rights, such as fishing rights, hunting rights and water rights. With regards to fishing rights and water rights, the Commissioners admit that they can make nothing sure. It is clear to us that all our general rights, instead of being taken from us as the McKenna-McBride Agreement attempts to do by describing the so called settlement thereby arranged as a "final adjustment of all matters relating to Indian affairs in British Columbia" should be preserved and adjusted. [190]

With specific reference to the Report of the Royal Commission, the statement also complained about the reserve adjustments made by the Commissioners who cut-off lands of greater value than those that were added. Finally the Allied Tribes proposed twenty conditions for settlement:

1. That the Proclamation issued by King George III in the year 1763 and the Report

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[189] Notes for Governor-General McGivern by A.E. O'Meara October 24, 1924. Indian Affairs file, 59,335, part 3A found in N.A.C. RG 10, Volume 3820.

[190] Report of the Joint Committee of the Senate and the House of Commons into the Claims of the Allied Tribes, 1927 Appendix A.

presented by the Minister of Justice in the year 1875 be accepted by the two Governments and established as the main basis of all dealings and all adjustments of Indian land rights and other rights which shall be made.

2. That it be conceded that each Tribe for whose use and benefit land is set aside (under Article 13 of the "Terms of Union") acquires thereby a full permanent and beneficial title to the land so set aside together with all natural resources pertaining thereto; and that Section 127 of the Land Act of British Columbia be amended accordingly.

3. That all existing reserves not now as parts of the Railway Belt or otherwise held by Canada be conveyed to Canada for the use and benefit of the various Tribes.

4. (Foreshore rights).

5. That adequate additional lands be set aside and that to this end a per capita standard of 160 acres of average agricultural land having in case of lands situated in the dry belt a supply of water sufficient for irrigation be established. By the word "standard" we mean not a hard and fast rule, but a general estimate to be used as a guide, and to be applied in a reasonable way to the actual requirements of each tribe.

6. That in sections of the Province in case of which the character of available land and the conditions prevailing make it impossible or undesirable to carry out fully or at all that standard the Indian Tribes concerned be compensated for such deficiency by grazing lands or otherwise, as the particular character and conditions or each such section may require.

7. That all existing inequalities in respect of acreage and value between lands set aside for the various Tribes be adjusted.

8. That for the purpose of enabling the two Governments to set aside adequate additional lands and adjust all inequalities there be established a system of obtaining lands including compulsory purchase, similar to that which is being carried out by the Land Settlement Board of British Columbia.

9. That if the Governments and the Allied Tribes should not be able to agree upon a standard of lands to be reserved that matter and all other matters relating to lands to be reserved which cannot be adjusted in pursuance of the preceding conditions and by conference between the two governments and the Allied Tribes be referred to the Secretary of State for the Colonies to be finally decided by that Minister in view of our lands rights conceded by the two Governments in accordance with our first condition

and in pursuance of the provisions of Article 13 of the "Terms of Union" by such method of procedure as shall be decided by the Parliament of Canada.

10. That the beneficial ownership of all reserves shall belong to the Tribe for whose use and benefit they are set aside.

11. That a system of individual title to occupation of particular parts of reserved lands be established and brought into operation and administered by each Tribe.

12. That all sales, leases and other dispositions of land or timber or other natural resources be made by the Government of Canada as trustee for the Tribe with the consent of the Tribe and that of all who may have rights of occupation affected, and that the proceeds be disposed of in such a way and used from time to time for such particular purposes as shall be agreed upon between the Government of Canada and the Tribe together with all those having rights of occupation.

13. (Fishing, hunting and water rights.)

14. (Fishing rights again).

15. That compensation be made in respect of the following particular matters:
(1)Inequalities of acreage or value or both that may be agreed to by any Tribe.
(2)Inferior quality of reserved lands that may be agreed to by any Tribe.
(3)Location of reserved lands other than that required agreed to by any Tribe.
(4)Damages caused to the timber or other natural resources of any reserved lands as for example by mining or smelting operations.

16. (Medical and educational benefits.)

17. That all compensations provided for by the two preceding paragraphs and all other compensation claimed by any Tribe so far as may be found necessary be dealt with by enactment of the Parliament of Canada and be determined and administered in accordance with such enactment.

18. That all restrictions contained in the Land Act and other Statutes of the Province be removed.

19. (Citizenship rights)

20. That all moneys already expended and to be expended by the Allied Tribes in

connection with the Indian land controversy and the adjustment of all matters outstanding be provided by the Governments.[191]

The Provincial Government did not respond.

Meanwhile the Allied Tribes counsel, O'Meara, continued to lobby for a direct reference to the Judicial Committee of the Privy Council. His efforts were fruitless, however. March 17, 1920 the Governor-General's Secretary wrote O'Meara to reiterate the previous decision by their Lordships communicated through Sir Almeric Fitzroy in 1913:

If the contention by the Nishga Indians is as it appears to be, that they have suffered an invasion of some legal right, the proper course would , in the opinion of the Lord President of the Council, be for them to take such steps as may be open to them to litigate the matter in the Canadian Courts from whose decision an appeal in the ordinary way can come to the Judicial Committee. It would seem that any intervention by the Crown by referring the matter specially direct to the said Committee would be an unconstitutional interference with the local jurisdiction.

If however, the claim of the Indians does not test on any legal basis, but is, in effect a complaint of the executive action of the Provincial or the Dominion government, it would appear that, in accordance with constitutional principles governing relations between the Crown and the Colonial governments a special reference to the Judicial Committee to consider the action of the Dominion or provincial Government could only be ordered on the recommendation of the Secretary of State for the Colonies, and the latter could only advise such a reference after consulting, and in accordance with the advice received from the Dominion Government.[192]

In 1921 the victory of the Liberal government led by Mackenzie King prompted renewed

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[191] ibid.

[192] March 17, 1920 letter from Lieutenant Colonel H.G. Henderson, Secretary for the Governor General to A.E. O'Meara. Indian Affairs file 59,335 v. 3A, found on N.A.C. RG 10, Volume 3820.

activity by the Allied Tribes because while in opposition, King had been a vocal opponent of the *Settlement Act* in the House of Commons. [193] On May 31, 1922 they submitted a memorandum to the new Prime Minister suggesting the Federal Government and the Allied Tribes work towards a negotiated settlement and ignore the Report of the Royal Commission. The suggestion was well enough received by the Government that Superintendent General Stewart and Scott travelled to British Columbia to meet with representatives of the Allied Tribes on July 22, 1922. At the meeting Stewart agreed to enter into treaty negotiation based on an undefined concept of aboriginal ownership. The Allied Tribes reiterated the demands included in the 1919 petition and left feeling that they had secured a commitment to continued negotiations towards settlement. Further meetings were promised but postponed as a result of Superintendent General Stewart's other priorities.[194]

In July 1923 Stewart, Scott and Ditchburn met once again with the Allied Tribe executive. Prior to the meeting, Scott and Ditchburn met with Oliver and Pattullo and discussed the claims of the Allied tribes. Scott requested that the Province send a representative to the upcoming conferences but Oliver refused, on Pattullo's recommendation, in order to avoid the appearance that the Province was considering a recognition of Aboriginal title.[195] The week after the meeting, the Province passed Order

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[193]Titley p. 149

[194] July 25, 1923 transcript of a meeting between C. Stewart, Superintendent General of Indian Affairs and the Allied Tribes of British Columbia. Indian Affairs file 59,335 v. 1, found on N.A.C. RG 10 volume 3820.

[195] July 30, 1923 report of a meeting from D.C. Scott, Deputy Superintendent General of Indian Affairs to J. Oliver, Premier of British Columbia. Indian Affairs file 27150-3-13 v. 1, found on N.A.C. RG 10 volume 7784.

in Council 911 confirming the Report of the Royal Commission. At the July meeting with the Federal representatives, Allied Tribes spokesman P.R. Kelly reiterated the Allied Tribes concerns that the acceptance of the Royal Commission report purported to effect the "final adjustment" of the outstanding issues around Aboriginal affairs in British Columbia. Stewart confirmed that the Federal Government was still willing to enter into negotiations for the surrender of the Aboriginal interest and asked that the Allied Tribes present a list of specific demands to Scott. [196]

Scott met with the Allied Executive for five days, August 7-12, 1923. He reported to Stewart that nothing new had come out of the meetings. The Allied Tribes had essentially presented the same conditions as they had in the 1919 statement to the Provincial Government plus an additional request for $2,500,000 cash compensation based on annuities that would have been received had there been an earlier treaty. In Scott's opinion the demands were:

"far from being reasonable claims, they are exacting and extravagant. Favourable consideration would lead to the expenditure of such large sums of money on the Indians of British Columbia that an envious feeling would be created in the minds of other Indians...In spite of this vigorous protest from the Indians as to the acceptance of the Report of the Royal Commission, I cannot, with a due sense of responsibility and having the best interests of these people at heart, recommend any other action but the adoption of the report." [197]

The Allied Tribes continued to protest the adoption of the report. In April 1924 the Executive Committee visited Ottawa and reported that the Federal Government had

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[196]August 4, 1922 address of Charles Stewart to representatives of the Allied Tribes of British Columbia. Indian Affairs file 27150-3-13, found on N.A.C. RG 10 volume 7784.

[197]Report of the Joint Committee of the Senate and the House of Commons into the Claims of the Allied Tribes, 1927 Appendix H.

agreed not to adopt the Royal Commission Report in its present form and would await Executive Committee consent before final approval. [198] Minister Stewart wrote Kelly on May 14, 1924 granting him access to the Schedule of Reserves but denying him any further input into the reserve establishment process. He also noted that in order in avoid litigation he was willing to agree that Aboriginal title had never been ceded in British Columbia if the Aboriginals would accept the terms in the Scott Memorandum approved by the June 6, 1914 Order in Council.[199] Kelly wrote requesting a report on the government position vis-a vis the report of the Royal Commission and reiterated his claim that Stewart had assured him no action would be taken before the Allied Tribes had a chance to consider the Government position. Stewart made the recommendation that the Government approve the Report. Later in the House of Commons, he explained that although the fulfilment of the McKenna-McBride Agreement had not satisfied the Aboriginals, Canada felt compelled to ratify the Royal Commission Report as the Province was on the verge of withdrawing their confirmation and returning them all to square one. [200]

On July 9, 1924 the Dominion passed Order in Council, 1265 confirming the Report of

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[198] April 1924 circular letter to the Allied Tribes of British Columbia, Indian Affairs file 201/3-8-1 v. 1 found on N.A.C. RG 10, volume 7150.July 17, 1924 letter from Rev. P.R. Kelly, Allied Tribes of British Columbia to C. Stewart, Minister of the Interior Indian Affairs file 59,335 v. 3A, found on N.A.C. RG 10 volume 3820.

[199] May 14, 1923 letter from C. Stewart, Superintendent General of Indian Affairs to Rev. P.R. Kelly, Allied Tribes of British Columbia. Indian Affairs file 27150-3-13 v. 1, found on N.A.C. RG 10 volume 7784.

[200] Commons Debates, 1925, 14th Parl., 4th Sess., 1925, p. 4993

the Royal Commission as amended by Ditchburn-Clark. [201] The Order in Council mirrored Provincial Order in Council 911 except for the following clause with respect to cut-offs in the Railway Belt:

The Minister further states 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.
As the lands in the Railway belt are under the sole jurisdiction of the Dominion, the Minister recommends that the findings of the Royal Commission with reference to reserves within the Railway Belt be confirmed, but that no reduction or cut-offs be made in the areas of the reserves, as recommended by the said Royal commission.

After the final approval of the Royal Commission Report the Allied Tribes returned to their campaign for a determination of Aboriginal title by the Judicial Committee of the Privy Council. When Prime Minister King visited a delegation of Nishga at Prince Rupert on October 13, 1924 Arthur Calder presented a statement claiming the adoption of the Royal Commission Report by Federal Order in Council left the Nisgha no choice but to pursue a court reference. King responded with a promise to consider the matter and do whatever was necessary to "secure for the Indian Tribes of the Province absolute justice." [202]

Frustrated with a perceived lack of progress a delegation to Ottawa was successful in

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[201] July 9, 1924 Federal Order-in-Council P.C. 1265. N.A.C. RG 2.

[202]October 13, 1924 Statement for W.L.M. King, Prime Minister of Canada presented on behalf of the Nishga Tribe. Indian Affairs file 59,335 v. 3A, found on N.A.C. RG 10, Volume 3820.

interviewing the Prime Minister in April 1925 and presenting him with another memorandum. These efforts resulted in the appointment of a Cabinet sub-committee to consider the matter. The sub-committee, which consisted of Stewart, Justice Minister LaPointe, and Public Works Minister J.H. King, received a lengthy report by Scott on the issues but did not make any decisions.

Allied Tribes representatives, Kelly and O'Meara returned to Ottawa and were successful in having their latest petition, suggesting the appointment of a Special Parliamentary - Committee to consider their claims, read into the House of Commons on June 14, 1926.[203] Though slowed by a period of political disarray that saw King's Liberal Government resign in July, 1926, and then form a new government in September, the Allied Tribes continued to press for a Special Parliamentary Committee to consider their claims and hopefully assist them in getting the case for Aboriginal title before the Judicial Committee of the Privy Council. On March 8, 1926 Stewart announced the formation of such a Special Committee to consider the claims of the Allied Tribes. The Committee convened on March 27, 1926.

The Committee listened to testimony from, among others, Ditchburn and Scott for the Federal Government and Paull, Kelly and O'Meara on behalf of the Allied Tribes before submitting their report. The Committee's Report broke the claims into two parts: the claim for a recognition of Aboriginal title; and the claims presented to the Provincial Government in November 1919. With respect to the claim for Aboriginal title they concluded as follows:

"It is the unanimous opinion of the members thereof that the petitioners have not

[203]Commons Debates, Session 1926, v. 5 pp. 4417-4419

established any claim to the lands of British Columbia based on aboriginal title, and that the position taken by the Government in 1914, as evidenced by Order in Council (P.C. 751, June 6, 1914) and Mr.Doherty's letter above quoted (responding to O'Meara on November 14, 1914)afforded the Indians full opportunity to put their claim to the test. As they have declined to do so, it is the further opinion of your Committee that the matter should be regarded as finally closed." [204]

The Committee ultimately based their decision on Scott's testimony that Aboriginals in British Columbia received benefits as great as any Aboriginals who had previously treated with Canada for the surrender of their Aboriginal interest. They went on to deal with each of the claims in the November 1919 Memorandum presented to the Provincial Government. With respect to reserves they felt that at the conclusion of the reserve establishment process then underway, the Aboriginals would have most of what they desired. The Committee made suggestions on other issues and finally recommended an additional $100,000 per year be spent towards improving medical and health facilities and developing land based projects on the reserves in British Columbia. [205]

The work of the Special Parliamentary Committee effectively ended the public protest over land claims in British Columbia for the duration of the reserve creation process. In 1927 the *Indian Act* was amended to make it illegal to raise money to pursue Aboriginal land claims.[206]

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[204] Report of the Joint Committee of the Senate and the House of Commons into the Claims of the Allied Tribes, 1927, p. x.

[205] ibid., p. xvii.

[206] *1927, An Act to Amend the Indian Act*, R.S.C. 1927 chap. 32: "Every person who without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band , shall be guilty of an offence and

Reserve Conveyance Negotiations-Scott Cathcart Agreement

Federal officials felt that the ratification of the Royal Commission Report essentially signalled the end of the reserve establishment procedure set out in the McKenna-McBride agreement. Orders in Council's 1265 and 911 required the Federal Government to complete surveys in the next couple of years and upon completion directed the Province to convey the reserves to Canada. As it turned out completing the surveys and agreeing on a schedule of reserves took close to a decade. Convincing the Province to complete the conveyance took five more years.

Problems first arose out of the Federal Government's refusal to agree to the cut-offs in the Railway Belt that had been recommended by the Royal Commission. Although Pattullo was aware of the Federal position prior to Provincial ratification, the wording of Order in Council 1265 angered him.[207] He complained to Scott, who restated the Federal Government's position that the Province has no claim to a reversionary right in the Railway Belt due to the statutory conveyance in 1883 and therefore no right to insist on cut-offs. [208] Unsatisfied with this explanation, the Province continued to use this issue

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liable upon summary conviction for each such offence to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment for any term not exceeding two months."

[207] August 30, 1925 letter from T.D. Pattullo, Minister of Lands to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 59,335 v. 3A, found on N.A.C. RG 10 volume 3820.

[208] September 27, 1924 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to T.D. Pattullo, Minister of Lands. Indian Affairs file 59,335 v. 3A, found on N.A.C. RG 10 volume 3820.

to hold up negotiations, off and on, until it was finally dropped in 1934.

While awaiting the completion of surveys Scott worked to have the Province's Lands officials recognize the validity of Federal patents to surrendered reserve lands and register them in the Provincial land registry system. [209] Scott had been confident that the confirmation of the Royal Commission Report would put the Federal Government in a position to deal with reserve lands without considering a Provincial interest. After Ditchburn informed him that Land Registry offices still refused to register Federal patents, Scott suggested that Ditchburn start a campaign to educate the officers on the negotiations that had taken place and the impact of Clause 7 of the McKenna-McBride Agreement. [210] Ditchburn began to distribute copies of Order in Council 1265 to various Provincial officials in an effort to convince the officials that the patents issued by the Federal Government to reserve lands were now valid. [211]

In the eyes of the Province, however, the Federal presumption was premature. Pattullo wrote Scott wondering how Canada could be validly conveying reserve land in British

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[209] October 20, 1924 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to W.E. Ditchburn, Indian Commissioner for British Columbia. Indian Affairs file 33/General v. 6, found on N.A.C. RG 10 volume 11047.

[210] November 20, 1924 letter from W.E. Ditchburn, Indian Commissioner for British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v. 6, found on N.A.C. RG 10 volume 11047; also November 26, 1924 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to W.E. Ditchburn, Indian Commissioner for British Columbia. Indian Affairs file 33/General v. 6, found on N.A.C. RG 10 volume 11047.

[211] December 3, 1924 letter from W.E. Ditchburn, Indian Commissioner for British Columbia to H. Crane, Inspector of Legal Offices, Province of British Columbia Indian Affairs file 33/General v. 6, found on N.A.C. RG 10 volume 11047.

Columbia when the land had not yet been conveyed to it and was still therefore vested in the Province. He suggested that any interest to be granted in reserve lands at that time should be made through the Provincial Department of Lands and provide for a Crown grant by the Province after the surrender of Indian title. [212]

British Columbia's refusal to register patents issuing from Canada was linked to their desire to keep back, or acquire, depending on the validity of their long-standing claim to a proprietary interest in reserves, certain rights in reserve lands. When the grants to surrendered reserve lands issued from British Columbia rather than Canada they took the form of a Provincial Crown Grant. The Crown Grant reserved the right in the Province to certain resources and to expropriate land required for certain public purposes.

The most significant slowdown in the process of obtaining the conveyance of the reserves outside the Railway belt to the Federal Government occurred over British Columbia insistance on reserving rights, e.g. the right to expropriate without compensation for public purposes, to themselves similar to the ones contained in the Provincial Crown Grant to individuals. Scott first became aware of the Province's intention to reserve these rights from the conveyance of reserves to Canada from a report of Ditchburn's discussions with Pattullo in April 1925. Writing on the state of negotiations, Ditchburn expressed a strong personal disagreement with the Provincial position. He suggested that Canada insist British Columbia transfer its entire title without reservations, other than

[212] February 5, 1925 letter from T.D. Pattullo, Minister of Lands to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046.

to precious metals, and that expropriations for public purposes should be dealt with under the provisions of the *Indian Act* which offered better protection to the Aboriginal interests. [213]

Negotiations showed no signs of progress until April 1926 when Pattullo clarified the Provincial position and proposed that the parties work towards a conveyance of all the reserves by one instrument rather than dealing with them one at a time. However, until there was a conveyance, he insisted that title to grants of reserve land must always issue from the Province, after a formal surrender of the Aboriginal interest, so that the reservations contained in the Provincial Crown grant would be preserved. [214] Scott felt that the process insisted on by British Columbia was cumbersome and unnecessary, but temporary. He requested the immediate conveyance of reserves that were already surveyed and agreed to withhold issuing patents to unsurveyed reserves until they were also conveyed. [215]

By June 2, 1926 it appeared that Scott and Pattullo were close to an agreement. Pattullo stated that he was prepared to recommend conveyance for the reserves that had already been surveyed as soon as they agreed to the form. Pattullo forwarded a copy of

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[213] April 30, 1925 telegram from W.E. Ditchburn, Indian Commissioner for British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046.

[214] April 17, 1926 letter from T.D. Pattullo, Minister of Lands to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046.

[215] April 27, 1926 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to T.D. Pattullo, Minister of Lands. Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046.

the standard provincial Crown grant as his proposed form. [216] At first Scott insisted that the conveyance contemplated in Article 13 of the Terms of Union and the McKenna-McBride Agreement was an Order in Council transferring the Province's entire interest to Canada and that the proposed reservations would be an unconstitutional infringement on the Federal legislative jurisdiction over "lands reserved for Indians". [217] Pattullo responded with minor inconsequential concessions on August 5, 1926, insisting that the provisions were necessary to protect the public interest. [218]

In February 1927 Pattullo appeared to make a significant compromise on the form on conveyance by only claiming the right to resume roads. In response to the Federal concerns that the reservations generally were an infringement on its legislative jurisdiction, he justified the road resumption power by reference to the Provincial legislative jurisdiction over highways in the Province. [219] Once again it appeared the negotiators were close to a compromise. They agreed that the appropriate form of transfer should be an Order in Council with a schedule of reserves attached. In June Pattullo delivered a draft form for the Order in Council providing for :

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[216] June 2, 1926 letter from T.D. Pattullo, Minister of Lands to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046.

[217] April 1, 1927 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to T.D. Pattullo, Minister of Lands. Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046.

[218] August 5, 1926 letter from T.D. Pattullo, Minister of Lands to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046.

[219] February 2, 1927 letter from T.D. Pattullo, Minister of Lands to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046.

the lands set out in the schedule attached hereto be conveyed to His Majesty the King in the right of the Dominion Government in trust for the use and benefit of the Indians of the Province of British Columbia, subject however to the right of the Dominion Government to deal with the said lands in such manner as they may deem best suited for the purpose of the Indians including a right to sell the said lands and fund or use the proceeds for the benefit of the Indians subject to the condition that in the event of any tribe or band in British Columbia at some future time becoming extinct that any lands hereby conveyed for such tribe or band, and not sold or disposed of as heretofore provided, or any unexpended fund being the proceeds of any such sale shall be conveyed or repaid to the grantor, and that such conveyance shall also be subject to the following provisions:

1. ... to resume any part of the said lands which it may be deemed necessary to resume for making roads, canals, bridges, towing paths, or other works of public utility or convenience; so, nevertheless, that the lands so to be resumed shall not exceed one-twentieth part of the whole of the lands aforesaid, and that no such resumption shall be made of any lands on which any building may have been erected, or which may be in use as gardens or otherwise for the more convenient occupation of any such building:

2... to take and occupy such water privileges, and to have and enjoy such rights of carrying water over, through or under any parts of the hereditament hereby granted, as may be reasonably required for mining or agricultural purposes in the vicinity of said hereditament, paying therefor a reasonable compensation to the aforesaid:

3....to take from or upon any part of the hereditament hereby granted, without compensation, any gravel, sand, stone, lime, timber or other material which may be required in the construction, maintenance, or repair of any roads, ferried, bridges, or other public works:

4....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.

Initially, Scott thought the drop from six provisoes in the standard Provincial crown grant to four in the proposed form was a bit of a victory and suggested he was inclined to accept all except the reservation of water rights. [220] After further consideration and

[220] June 15, 1927 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to W.E. Ditchburn, Indian Commissioner for British Columbia. Indian Affairs file 33/General v.

discussions with Ditchburn, however, Scott restated their earlier position. Writing to Pattullo on December 6, 1927 he claimed that the reservations contained in the draft Order-in-Council have never been contemplated since the time of Union and would result in the Province having control over the management of Indian reserves contrary to the *Constitution Act, 1867* and any arrangements between the Province and Canada since. He requested that the transfer of the reserves be made " without any restrictions whatsoever". [221] The Federal position shook Pattullo who, when requesting that British Columbia Attorney- General A.M. Manson to look into the problem, opined:

"To transfer these reserves without any restrictions whatever, would place the rights of the Indians in a very different and much more independent position than is occupied by the whites who hold title. In fact, it would put the Indian Department in a position of complete independence of the general welfare of the province. The Indian lands would simply be a kingdom unto themselves. " [222]

Nevertheless, throughout 1928 Scott insisted on the outright transfer of the reserves to the surprise of some Provincial officials who thought Scott and Pattullo had already reached a compromise. [223]

5, found on N.A.C. RG 10 volume 11046.

[221] December 6, 1927 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to T.D. Pattullo, Minister of Lands. British Columbia Department of Lands file 026076 v. 4, found at the Surveyor General's Branch.

[222] January 13, 1928 memorandum from T.D. Pattullo, Minister of Lands to A.M. Manson, Attorney General of British Columbia. British Columbia Department of Lands file 026076 v. 4, found at the Surveyor General's Branch.

[223] November 29, 1928 letter from G.R. Naden, Deputy Minister of Lands to D.C. Scott, Deputy Superintendent General of Indian Affairs. British Columbia Department of Lands file 026076 v. 4, found at the Surveyor General's Branch.

The stand-off might have continued longer had the conveyance of reserves not become joined with the negotiations over the retransfer of Railway Belt lands to British Columbia. Since 1926, while Pattullo and Scott were negotiating the terms of reserve conveyance, Premier Oliver had been pursuing a claim to have the Railway Belt and Peace River Block lands returned to the Province on the basis that there was no longer any reason for the Federal Government to retain them. Upon first hearing of the claim Ditchburn suggested to Scott the idea of linking the re-conveyance of the Railway Belt to the conveyance of reserves in order to obtain an immediate conveyance and finally eliminate the reversionary interest. Scott thought enough of the idea to pass on the recommendation to Stewart. [224]

Premier Oliver was ultimately successful in having a Royal Commission under Saskatchewan Court of Appeal Justice John Martin appointed March 7, 1927 to review the claim. Martin decided that the province had no claim in law to require Canada to reconvey the lands, but on the basis of fairness recommended they should. [225]

Oliver's lengthy premiership ended in 1927, shortly after Justice Martin's recommendation. His replacement, John Duncan, only lasted one year before losing the August 1928 general election to a Conservative government headed by Simon Fraser

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[224] January 6, 1926 letter from W.E. Ditchburn, Indian Commissioner for British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 59,335 v. 3A, found on N.A.C. RG 10 volume 3820; also January 12, 1926 memorandum from D.C. Scott, Deputy Superintendent General of Indian Affairs to C. Stewart, Superintendent General of Indian Affairs. Indian Affairs file 59,335 v. 3A, found on N.A.C. RG 10 volume 3820.

[225] Royal Commission on Reconveyance of Land to British Columbia. Found on N.A.C. RG 33/109 volume 1.

Tolmie. When Tolmie's government took over in 1928 the terms of the conveyance for the reserves and the Railway Belt were still outstanding. The new Provincial Government continued Oliver's quest for a return of the Railway Belt . In December 1928 Premier Tolmie and Superintendent General Stewart met in Ottawa to discuss the issues surrounding the reconveyance of the Railway Belt lands and come to an agreement in principle. The two governments, however, did not agree on how to proceed with the conveyance of reserve lands.[226]

In March 1929, Scott came to Vancouver to negotiate a settlement of reserve conveyance outside the Railway Belt and deal with impact of the Railway Belt reconveyance on reserves inside the Railway Belt. With Scott and Ditchburn representing Canada and Superintendent of Lands H. Cathcart and Attorney General O.C. Bass representing British Columbia they reached an agreement, on March 29, 1929, now known as the Scott-Cathcart Agreement. The terms are as follows:

The undersigned having been designated by their respective Governments to consider the interest of the Indians of British Columbia, the Department of Indian Affairs and the Province of British Columbia, arising out of the proposed transfer to the Province of the lands in the Railway Belt and Peace River Block, and to recommend conditions under which the transfer may be made with due regard to the interests affected beg to report as follows:

As the tenure and mode of administration of the Indian Reserves in the Railway Belt and the Peace River block would we thought, 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 and

[226] December 26, 1928 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to W.E. Ditchburn, Indian Commissioner for British Columbia. Indian Affairs file 59,335 v. 3A, found on N.A.C. RG 10 volume 3820.

furthermore to consider a few important matters germane to Indian Affairs in the Province with the hope of making recommendations which would promote the ease and harmony of future administration.

1. We have agreed to recommend the form of conveyance from the Province to the Dominion of the Indian reserves outside the Railway Belt and the Peace River Block hereunto annexed marked "A".

2. We have agreed that, the provisions of section 47 of the "Land Registry Act" (Revised Statutes of British Columbia 1924, chapter 127) being no longer necessary in view of the settlement now arrived at, the said section should be repealed, and the representatives of the Province undertake to so advise and recommend, and, pending such repeal, will recommend that in proper cases arising, registration may be permitted by Order-in-Council as provided in said section 47.

3. We have considered that this provision(Clause 4, McKenna-McBride Agreement) might beneficially be varied so that it be provided that on agreement between the two Governments, through their respective Departments, the lands may be either subdivided for sale, or disposed of en bloc, as may appear most advantageous in the circumstances of each particular case, but that such sale and disposal shall be by public auction; and as to disposal of timber, mineral and similar rights, the same should be dealt with by agreement between respective Governments through their proper Departments, and we shall recommend accordingly to our respective Governments.

4. It was brought up by the Dominion representatives that a necessity existed for additional lands for Indians in various portions of the Province, not provided for by the Royal commission on Indian Affairs, and it was suggested that such lands be granted by the province at a reduced or nominal price, apart from the prices fixed in the Land Act, the province to have its reversionary interest in such lands, or the proceeds of sale or disposal thereof, as in Indian Reserves proper, on the extinction of the Indian interest. In such event, the province to reimburse the Dominion the purchase price paid by it for said lands.

It is with great respect, considered good policy to have this question of Indian lands finally settled, and that some consideration be given by the Provincial Government to a reduction in price.

5. (Foreshore rights).

6.Regarding Indian Reserves in the Railway Belt and Peace River Block, we have agreed

that the Indian Reserves set apart by the Dominion Government in the Railway Belt and in the Peace River Block(as shewn in Schedule hereto annexed), and also the Indian Reserves set apart before the transfer of the Railway Belt and the Peace River Block shall be excepted from the conveyance of the Railway Belt and the Peace River Block and shall be held in trust and administered by the Dominion under the terms and conditions set forth in the Agreement dated 24th September, 1912, between Mr. J.A. J. McKenna and the Hon. Sir Richard McBride, (as confirmed by Dominion Statute, Chapter 51 of the Statutes of 1920, British Columbia Statute, Chapter 32 of the Statutes of 1919) in the Dominion Order-in-Council Number 1265, approved 19th. June, 1924, and Provincial Order-in-Council Number 911, approved 26th. of July, 1923, and in the form of conveyance marked "A" of the Indian Reserves outside the Railway Belt and the Peace River Block.[227]

The Scott-Cathcart Agreement, among other things, agreed on the form of conveyance for reserves outside the Railway Belt. The form was attached as Schedule A to the Agreement. It was the same form proposed by Pattullo in June 1927 except for one additional proviso added at the insistence of Canada's representatives:

Provided also that the Department of Indian Affairs shall through its proper officers be advised of any work contemplated under the preceding provisoes, that plans of the location of such work shall be furnished for the information of the Department of Indian affairs, and that a reasonable time shall be allowed for consideration of the said plans and for any necessary adjustments or arrangements in connection with the proposal. [228]

With the Scott-Cathcart Agreement signed, the governments had also provided for the harmonization of tenure for reserves inside and outside the Railway Belt. The Federal Government, after arguing against Provincial interference in the management of reserves

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[227] March 3, 1929 memorandum of agreement between D.C. Scott, Deputy Superintendent General of Indian Affairs, W.E. Ditchburn, Indian Commissioner for British Columbia, H. Cathcart, Superintendent of Lands and O.C. Bass, Deputy Attorney-General of British Columbia.

[228] March 3, 1929 memorandum of agreement between D.C. Scott, Deputy Superintendent General of Indian Affairs, W.E. Ditchburn, Indian Commissioner for British Columbia, H. Cathcart, Superintendent of Lands and O.C. Bass, Deputy Attorney-General of British Columbia.

for years, conceded the Province's right to keep back the powers contained in the agreed form of conveyance from the grant of reserves outside the Railway Belt and granted them the same powers to reserves inside the Railway Belt. Both governments passed Orders-in Council approving the Scott-Cathcart Agreement. [229]

[229] March 2, 1930 Federal Order-in-Council P.C. 208, March 2, 1930 approved the Agreement and the Schedules containing a list of railway belt reserves without cut-offs. Found on N.A.C. RG 2; also September 24, 1930 Federal Order-in-Council P.C. 1151. Found on N.A.C. RG 2.

The Negotiations after Scott-Cathcart: Order in Council 1036

After the Scott-Cathcart Agreement was signed it again seemed the reserve conveyance negotiations between the two levels of government were finalized and the transfer imminent. There were still some surveys to undertake, but everything else necessary to complete the transfer of the Province's interest had been agreed to. Canada, however, reconveyed the Railway Belt, pursuant to an agreement entered into on February 20, 1930 and the *Railway Belt and Peace River Block Act* assented to on May 30, 1930, without securing a date for the conveyance of the reserves. [230] The Province waited until 1938 before passing the Order in Council completing the conveyance of reserves outside the Railway Belt.

Informed that surveys in the Nass-Skeena area were delaying final conveyance, Scott concentrated on obtaining an Order in Council authorizing the registration of outstanding patents to former reserve lands, and the repeal of s. 47 of the *Land Registry Act* to provide for the future registration of patents, as agreed to by Clause 2 of the Scott-Cathcart Agreement.[231] At the time Ditchburn estimated there were about 200 outstanding patents whose registration had been barred by s. 47 of the *Land Registry Act*.

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[230] May 30, 1930 *Railway Belt and Peace River Block Act*. Statutes of Canada, 1930, 20-21 George V Chapter 37.

[231] June 4, 1929 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to W.E. Ditchburn, Indian Commissioner for British Columbia. Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046.

On Scott's instructions Ditchburn requested the passage of the agreed to Order in Council. [232] The new Superintendent of Lands, Neuman Taylor refused, however, on the basis that the descriptions of land were too vague for a comprehensive Order in Council, but advised that Provincial officials would register individual patents once full descriptions of the lands were received. [233] Provincial officials also assured the Federal Government that s. 47 of the *Land Registry Act* would be repealed in the next legislative session and that the final conveyance of reserves outside the Railway Belt would take place as soon as the surveys were complete in Nass Skeena [234]. Section 47 of the *Land Registry Act* was not repealed at the next legislative session, in spring 1930, but expecting an early conveyance, Ditchburn did not anticipate any interference with the registration of Federal patents as a result. [235] Taylor again reassured the Federal Government of their intention to register outstanding patents in the interim, upon receipt of sufficient descriptions. [236] Federal officials began preparing for the final conveyance near the end

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[232] June 10, 1929 letter from W.E. Ditchburn, Indian Commissioner for British Columbia to H. Cathcart, Superintendent of Lands. Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046; also June 10, 1929 letter from W.E. Ditchburn, Indian Commissioner for British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046.

[233] February 15, 1930 letter from N. Taylor, Superintendent of Lands to W.E. Ditchburn, Deputy Superintendent general of Indian Affairs for British Columbia. Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046.

[234] March 15, 1930 letter from W.E. Ditchburn, Indian Commissioner for British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046.

[235] June 19, 1930 letter from W.E. Ditchburn, Indian Commissioner for British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046.

[236] June 27, 1930 letter from N. Taylor, Superintendent of Lands to W.E. Ditchburn, Indian Commissioner for British Columbia. Indian Affairs file 33/General v. 5, found on N.A.C.

of 1930. Indian Affairs Agents throughout British Columbia were sent copies of the Scott-Cathcart Agreement and told to inform the Aboriginals in their districts of the purpose of conveyance. [237] Provincial and Federal officials sent copies of Reserve Schedules back and forth for confirmation. [238]

Although the belief that a final conveyance would occur quickly was too optimistic, there was progress in other areas of the reserve establishment question. Ditchburn had been negotiating with G.R. Naden, Minister of Lands since 1928 for an amendment to s. 65 of the *Land Act* to allow the Federal Government to purchase Crown Land at a discount in order to add to reserves.[239] Their discussions led to the insertion of Clause 4 into the Scott-Cathcart Agreement. In the 1932 legislative session the Province passed Section

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RG 10 volume 11046.

[237] November 5, 1930 memorandum from W.E. Ditchburn, Indian Commissioner for British Columbia to various Indian Agents in British Columbia. Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046; also November 11, 1930 letter from A. Strang, Acting Indian Agent, Lytton Agency to W.E. Ditchburn, Indian Commissioner for British Columbia . Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046; also November 11, 1930 letter from A.H. Barber, Indian Agent, Nicola Agency to W.E. Ditchburn, Indian Commissioner for British Columbia. Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046.

[238] April 28, 1931 letter from N. Taylor, Superintendent of Lands to W.E. Ditchburn, Indian Commissioner for British Columbia. Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046; also July 9, 1931 letter from A.F. Mackenzie, Secretary, Department of Indian Affairs to W.E. Ditchburn, Indian Commissioner for British Columbia. Indian Affairs file 27150-3-18 v. 1, found on N.A.C. RG 10 volume 7785.

[239] January 14, 1929 letter from H. Cathcart, Deputy Minister of Lands to W.E. Ditchburn, Indian Commissioner for British Columbia. Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046; also May 2, 1930 letter from W.E. Ditchburn, Indian Commissioner for British Columbia to S.F. Tolmie, Premier of British Columbia. Indian Affairs file 33/General v. 5, found on N.A.C. RG 10 volume 11046.

5, *Land Act, 1932*, thereby fulfilling their promise to provide the Federal Government with a mechanism to purchase land at a reduced rate. During the same session, British Columbia repealed s. 47 of the *Land Registry Act*. [240] However, work preparing the schedule of reserves for the final conveyance was reported to be progressing very slowly.[241]

The schedule was being prepared by the Provincial Lands Branch officials making lists of reserves and submitting them to the Federal Government for review and changes. When it appeared that the lists were becoming final another crisis broke out over cut-offs in the Railway Belt. This time they had been brought up by the new Minister of Lands, N.S. Lougheed who Ditchburn reported as being particularly interested in securing the Seabird Island cut-off which was valued at over $120,000.[242] A few weeks later Ditchburn reported that Cathcart had informed him that no further work would be undertaken on Aboriginal land matters until cut-offs in the Railway Belt were dealt with.[243]

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[240] March 4, 1931 letter from W.E. Ditchburn, Indian Commissioner for British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 901/30-1 v. 1, found at the Federal Records Centre in Ottawa, locator number X-315-228.

[241] *An Act to Amend the Land Act*, 1931 s. 5, Chapter 131 Revised Statutes of British Columbia: Provided that in case of any area of lands sold to the Crown in the right of the dominion for the use of the Indians, the Minister may at his discretion reduce the price of those lands to not less than two dollars and fifty cents per acre for first-class lands and not less than one dollar and twenty-five cents per acre for second-class lands.

[242] March 2, 1932 letter from W.E. Ditchburn, Indian Commissioner for British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v. 2, found on N.A.C. RG 10 volume 11045.

[243] March 4, 1932 letter from W.E. Ditchburn, Indian Commissioner for British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v.

Superintendent General T.G. Murphy intervened to attempt to arrange a solution with Premier Tolmie and bring the land discussions to a close. [244] Tolmie referred the matter to Lougheed who again refused to proceed with the conveyance until Railway Belt cut-offs were resolved. In spite of the Scott-Cathcart Agreement, he insisted that the Province had never given up their reversionary interest to the reserves in the Railway Belt. [245] The debate between Lougheed and Murphy continued for the rest of 1932 without any resolution. [246]

When the Federal Government requested the Province comply with the Scott-Cathcart Agreement and convey the reserves outside the Railway Belt, Provincial officials refused on the basis that the reserve schedule was not complete. Murphy denied this assertion and claimed the lack of progress was due to the Railway Belt cut-offs issue. Provincial

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2, found on N.A.C. RG 10 volume 11045.

[244] March 18, 1932 memorandum from D.C. Scott, Deputy Superintendent General of Indian Affairs to T.G. Murphy, Superintendent General of Indian Affairs. Indian Affairs file 33/General v. 4, found on N.A.C. RG 10 volume 11046; also March 24, 1932 letter from T.G. Murphy, Minister of the Interior to S.F. Tolmie, Premier of British Columbia. Indian Affairs file 27150-3-18 v. 1, found on N.A.C. RG 10 volume 7785.

[245] April 6, 1932 letter from N.S. Lougheed, Minister of Lands to T.G. Murphy, Minister of the Interior. Indian Affairs file 27150-3-18 v. 1, found on N.A.C. RG 10 volume 7785.

[246] September 15, 1932 letter from N.S. Lougheed, Minister of Lands to T.G. Murphy, Minister of the Interior. British Columbia Department of Lands files; also December 5, 1932 letter from T.G. Murphy, Superintendent General of Indian Affairs to N.S. Lougheed, Minister of Lands. British Columbia Department of Lands file 026076 v. 4, found at the British Columbia Surveyor General's Office. May 31, 1932 letter from T.G. Murphy, Superintendent General of Indian Affairs to N.S. Lougheed, Minister of Lands. British Columbia Department of Lands files.

officials continued to state that the reserve schedule was incomplete into 1933. [247]

The stand-off over Railway Belt cut-offs saw Scott's retirement and Ditchburn's demise. Scott was replaced by Dr. H.W. McGill. Ditchburn was not replaced and Assistant Indian Commissioner Perry became head of the Department of Indian Affairs in British Columbia.

The new Federal negotiators had to contend with a newly elected Liberal party headed by T.D. Pattullo. Pattullo travelled to Ottawa in early 1934 and met with Deputy Superintendent General McGill to discuss the outstanding reserve issues. [248] At the time Federal officials were convinced the reserve schedule had been completed for at least a year. [249]

Whether the schedule was ready or not, British Columbia continued to refuse to consider conveyance and maintained their claim to Railway Belt cut-offs. This was the situation until August 1934 when Acting Secretary of Indian Affairs T.R.L. MacInnes

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[247] June 29, 1933 letter from H. Cathcart, Deputy Minister of Lands to C.C. Perry, Assistant Indian Commissioner for British Columbia. Indian Affairs file 33/General v. 4, found on N.A.C. RG 10 volume 11046.

[248] December 20, 1933 letter from C.C. Perry, Assistant Indian Commissioner for British Columbia to H.W. McGill, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v. 4, found on N.A.C. RG 10 volume 11046; also December 29, 1933 letter from H.W. McGill, Deputy Superintendent General of Indian Affairs to C.C. Perry, Assistant Indian Commissioner for British Columbia. Indian Affairs file 33/General v. 4, found on N.A.C. RG 10 volume 11046.

[249] February 2, 1934 memorandum from H.W. McGill, Deputy Superintendent General of Indian Affairs to T.G. Murphy, Superintendent General of Indian Affairs. Indian Affairs file 27150-3-18 v. 1, found on N.A.C. RG 10 volume 7785.

travelled to Victoria to negotiate a solution. MacInnes and Assistant Commissioner Perry met with Deputy Minister of Lands Cathcart and were successful in having the claims dropped and the conveyance process restarted. [250] By December everything was set. Cathcart wrote to McGill letting him know the schedule was finished and the Order-in-Council which would convey the reserves had been drafted. [251]

The negotiations seemed to simply lose momentum at that point. The Order-in-Council was not passed. A year later Indian Affairs officials suggested some amendments to the schedule of reserves dealing with Provincial rights of way. As a result Provincial officials complained that it was the Federal Government who was now delaying the conveyance.[252] The Federal Government denied responsibility for any delays stating that the schedule for their purposes had been approved since August 1935. [253] In March 1936 Cathcart confirmed that nothing further was required in order to convey. When no conveyance was forthcoming by December, Commissioner Perry asked why. He was told

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[250] August 24, 1934 memorandum by T.R.L. MacInnes and C.C. Perry, Assistant Indian Commissioner for British Columbia. Indian Affairs file 27150-3-18 v. 1, found on N.A.C. RG 10 volume 7785.

[251] December 17, 1934 letter from H. Cathcart, Depty Minister of Lands to H.W. McGill, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-3-18 v. 1, found on N.A.C. RG 10 volume 7785.

[252] January 3, 1936 letter from C.C. Perry, Assistant Indian Commissioner for British Columbia to A.F. MacKenzie, Secretary, Department of Indian Affairs. Indian Affairs file 27150-3-18 v. 1, found on N.A.C. RG 10 volume 7785.

[253] January 14, 1936 letter from A.F. MacKenzie, Secretary, Department of Indian Affairs to C.C. Perry, Assistant Indian Commissioner for the Province of British Columbia. Indian Affairs file 27150-3-18 v. 1, found on N.A.C. RG 10 volume 7785.

by Cathcart that unforseen circumstances had caused a delay. [254]

The matter languished until November, 1937 when the Minister of Mines and Resources, T.A. Crerar, began another push for conveyance. [255] Premier Pattullo responded to this new initiative by further delaying tactics. In a flagrant disregard for the Scott-Cathcart Agreement he issued instructions to the heads of interested Provincial departments to review the form of conveyance that had been agreed to in the Scott-Cathcart Agreement to be sure the provisions on behalf of the Province were adequate for ensuring the efficient administration of their departments. [256] In April 1938 Pattullo and Cathcart attempted to reopen negotiations towards excluding natural resources from the conveyance, including minerals, timber and water. [257] Pattullo met with Crerar in Ottawa shortly after. Crerar refused the amendments on the basis that the parties were bound by the Scott-Cathcart Agreement. [258]

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[254] January 19, 1937 letter from H. Cathcart, Minister of Lands to H.G. McGill, Director of Indian Affairs. Indian Affairs file 27150-3-18 v. 1, found on N.A.C. RG 10 volume 7785.

[255] November 8, 1937 letter from T.A. Crerar, minister of Mines and Resources to T.D. Pattullo, Minister of Lands. Indian Affairs file 27150-3-18 v. 1, found on N.A.C. RG 10 volume 7785.

[256] February 22, 1938 memorandum from C. Pepler, Deputy Attorney General of British Columbia to H. Cathcart, Deputy Minister of Lands. British Columbia Department of Lands file 026076 v. 5, found at the Surveyor General's Office.

[257] March 29, 1938 letter from H. Cathcart, Deputy Minister of Lands to D.M. McKay, Indian Commissioner for British Columbia. British Columbia Department of Lands file 026076 v. 5, found at the British Columbia Surveyor General's Office.

[258] May 9, 1938 letter from T.A. Crerar, Minister of Mines and Resources to T.D. Pattullo, Premier of British Columbia. Indian Affairs file 27150-3-18 v. 1, found on N.A.C. RG 10 volume 7785.

The following month the Province began relaxing their stance on renegotiating the Scott-Cathcart Agreement. The Federal Government sent R.A. Hoey, Superintendent of Welfare and Training, to Victoria to negotiate a final settlement. On June 7 a conference was held at the Empress Hotel in Victoria with Pattullo, Wismer, Cathcart, and the Minister of Lands, Wells Gray for the Province and R.A. Hoey and D.M. McKay for the Federal Government. The conference resulted in the Province agreeing to convey base metals. [259] The following week McKay communicated the Federal Government's intention to remain firm that the conveyance be in the form agreed to in Scott-Cathcart except for a proviso exempting precious metals. [260] The following month Minister Crerar telegraphed Premier Pattullo to request the date for conveyance. On July 23, 1938 Pattullo telegraphed Crerar to inform him that Wismer had been given instructions to prepare the Order in Council conveying the reserves on the terms agreed to in the Scott-Cathcart Agreement. [261] On July 29, 1938, the Lieutenant-Governor assented to Order in Council 1036 conveying the reserves outside the Railway Belt to Canada. The terms were those that had been agreed to in Scott-Cathcart.[262]

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[259] June 13, 1938 letter from D.M. McKay, Indian Commissioner for British Columbia to H.W. McGill, Director, Indian Affairs Branch. Indian Affairs file 27150-3-18 v. 1, found on N.A.C. RG 10 volume 7785.

[260]June 13, 1938 letter from D.M. McKay, Indian Commissioner for British Columbia to G.S. Wismer, Attorney General for British Columbia. Indian Affairs file 27150-3-18 v. 1, found on N.A.C. RG 10 volume 7785.

[261] July 23, 1938 memorandum from T.D. Pattullo, Premier of British Columbia to G.S. Wismer, Attorney General for British Columbia.

[262] July 29, 1938 British Columbia Order-in-Council 1036. Lands and Trusts Services, DIAND, British Columbia Region.

PART II

Reserves Inside the Railway Belt (1871 - 1930)

Reserve Creation and the Conveyance of the Railway Belt Lands to Canada (The Indian Reserve Commission Years)

According to the Terms of Union the railway to the Pacific was to be completed by 1881, but when that date came the Province had not yet conveyed the Railway Belt lands. The delay in the conveyance of the Railway Belt lands to the Federal Government, and in the commencement of railway construction, was contributed to by three interrelated controversies: whether the Federal government was obligated to provide an Island terminus for the railway; which route would the railway finally follow; and, whether the Province was obligated to provide arable land for the Railway Belt pursuant to Article 11 of the Terms of Union. Because of the negotiations engendered by these disputes the final conveyance of the Railway Belt did not take place until December 19, 1883 and included a significant amount of land which had already been set aside as reserves for Aboriginals by joint Federal-Provincial action.

The meaning of "seaboard" in Article 11 of the Terms of Union was the subject of an immediate dispute between the two governments. British Columbia argued that the transcontinental line was to terminate at Esquimalt on Vancouver Island. Federal representatives replied that they were only obliged by the Terms of Union to reach Burrard Inlet on the mainland coast. In 1873, early into the controversy, John A. Macdonald's government appeared to settle the dispute by passing an order in council

indicating that Esquimalt would be the terminus. [263] However, soon after the announcement Macdonald's ministry resigned and Prime Minister Alexander MacKenzie came to power.

MacKenzie and his government took a strong stand against the obligation to construct the Island segment of the railway line. On Sept. 20, 1875 they offered to build the segment, but as compensation for delays in the commencement of construction, not in recognition of an obligation in the Terms of Union. British Columbia rejected this offer January 10, 1876. This dispute over the Island railway, plus delays in the commencement of main line construction, created an unhappy friction between the two governments during this period.

The tension from the railway dispute spilled over into other Federal-Provincial dealings including the negotiations towards designating land to be set aside as reserves for Aboriginals. As noted in Part One of this paper, the obligations contained in Article 13 were an additional subject of contention soon after Confederation resulting in the appointment of a Joint Federal-Provincial Commission to allot reserves. The Joint Indian Reserve Commissioners began their work in the winter of 1876 by travelling to villages to meet with Aboriginal representatives and allot new reserves or confirm old ones.[264] Increasing tensions between settlers and Aboriginals led the Commissioners to the interior in 1877 where they began to allot reserves in what would later become part of the Railway Belt. During the summer of 1877 they allotted 24 reserves in this area

[263] Ormsby, p. 273.

[264]Kennedy, p. 33

to the Adams Lake, Harrison River, Kamloops, Little Shuswap Lake, Neskainlith Halaut (Neskonlith), Spallumcheen and Squamish Bands.

After the Joint Indian Reserve Commission was disbanded in 1878 the work of reserve allotment was continued by the one remaining Commissioner, G.M. Sproat. In May 1878 Sproat took up his duties in the lower Fraser Valley, much of which would be eventually included in the Railway Belt, and spent the summer allotting land along the proposed railway line past Kamloops. In his first summer as sole Commissioner he allotted 107 reserves in the Railway Belt to the Bonaparte, Boothroyd, Boston Bar, Cooks Ferry, Kanaka Bar, Lower Nicola, Nicomen, Oregon Jack Creek, Siska Flat, Skuppah and Spuzzum Bands. That summer Sproat also began arranging for the surveys of reserves inside and outside the proposed Railway Belt in anticipation of a early conveyance of the reserves to the Federal Government pursuant to Article 13. Surveyors W.S. Jemmett and Ashdown S. Green were commissioned to begin the survey work under the direction of E. Mohun.[265]

Meanwhile, the disputes over the Canadian Pacific Railway's terminus and route continued. The proponents of an Esquimalt terminus championed a route from Kamloops which would reach the Pacific Ocean at Bute Inlet then cross the Seymour Narrows to Vancouver Island and carry on down the east side of Vancouver Island to Esquimalt. This route was losing favour in Ottawa, however, because reports showed it would require 8 miles of tunnels through hard rock plus a bridge over the Strait of Georgia. A proposed route through the lower Fraser valley to Burrard Inlet was becoming more popular. After much discussion, Alexander MacKenzie announced the choice of the

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Fraser Valley route from Kamloops in December 1877. The choice signalled trouble for the proponents of the Island railway, however. By Order in Council in May 1878 Alexander MacKenzie's government rescinded the Macdonald government's Order in Council announcing an Esquimalt terminus. [266]

Fortunately for the proponents of an Esquimalt terminus the decision to abandon an Island terminus was itself overturned shortly after. John A. Macdonald returned to power as Prime Minister in the summer of 1878 and restored the promise of an Island railway later in the year. [267] The Provincial Government responded by reserving a strip of land along the proposed Railway Belt lands by notice in the Provincial Gazette. [268] On April 22, 1879 Prime Minister Macdonald revived the June 7, 1873 Order in Council fixing Esquimalt as the terminus.

Soon after he began work in the Fraser Valley, Indian Reserve Commissioner Sproat saw the announcement in the Provincial Gazette announcing the reservation of the strip of land for conveyance to the Federal Government in association with the proposed railway route from Kamloops to Yellowhead Pass. The reservation described a 40 mile wide strip starting from Burrard Inlet, following the Fraser River to Lytton then up the Thompson River to Kamloops, along the North Thompson valley to Tete Jeunne Cache, and up the Fraser Valley to Yellowhead Pass. Sproat was concerned with the effect of the

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[266] Ormsby, p. 275.

[267] ibid, p. 277.

[268] August 3, 1878 Public Notice by T.B. Humphreys, Provincial Secretary, as published in the *B.C. Gazette*.

reservation on his work allotting reserves for Aboriginals since he understood that Article 11 contemplated the transfer of the strip for railway purposes only. He was also concerned with the potential effect of conveying traditional hunting grounds to railway contractors and queried whether he should be allotting reserves in this area at all.[269] The question was taken under advisement by the Minister of the Interior, John A. Macdonald who directed Sproat to continue to allot reserves as if the Railway Belt had not been appropriated. [270]

Sproat returned to the Fraser Valley in 1879 to complete the allotments along the proposed Railway route. [271] He allotted another 69 reserves to the Cheam, Chilliwack, Coquitlam, Hope, Katzie, Langley, Lower Nicola, Matsqui, Ohamil, Skawahlook, Squawtits (Peters), Sumass and Yale Bands and continued to oversee their surveys. After considerable internal discussion regarding suitable candidates, Sproat advised British Columbia's Chief Commissioner of Lands and Works, G.A. Walkem, that Mohun and Jemmett had been hired to survey reserves in the Interior and their plans would be forwarded to both governments when complete. He suggested that the surveyors would follow as closely as possible the dictates of the *Province's Land Amendment Act, 1879* but

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[269] August 15, 1878 letter from G.M. Sproat, Indian Reserve Commissioner to D. Mills, Superintendent General of Indian Affairs. Indian Affairs file 10,343, found on N.A.C. RG 10 volume 3667.

[270] Margin notation on a September 16, 1878 letter from L. Vankoughnet, Deputy Superintendent General of Indian Affairs to D. Mills, Superintendent General of Indian Affairs. Indian Affairs file 10,343, found on N.A.C. RG 10 volume 3667; also October 7, 1878 letter to G.M. Sproat, Indian Reserve Commissioner. Indian Affairs file 10,343, found on N.A.C. RG 10 volume 3667.

[271] "Summary of Year's Work" submitted by G.M. Sproat, Commissioner, 24th November 1879. Canada Sessional Paper (1880) :3 : 141-142.

that the irregular shape of reserves would sometimes make it impossible to conform to regular sections and subsections.[272] Walkem accepted the surveyors but refused to accept surveys that did not conform with the *Land Amendment Act, 1879.* Sproat suggested he would revise his instructions and perhaps revisit some reserves. [273]

In November 1879 newspaper reports of impending tenders for construction of the Canadian Pacific Railway again inspired Sproat to discuss the particular rights of Aboriginals living within the proposed Railway Belt. He wrote John A. Macdonald pointing out that some of the reserves which had already been allotted in the strip were still not properly determined due to disputes over water rights for irrigation. He also noted that railway rights of way would be required through Aboriginal lands and reminded the Prime Minister of the necessity to compensate Aboriginals for any lands taken from reserves, pursuant to s. 20 of the *Indian Act, 1876.*[274]

In December 1879 John A. Macdonald reaffirmed the choice of the Fraser Valley route and requested that the British Columbia Government take steps to convey the lands which had been reserved as soon as possible.[275] The Province responded by passing

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[272] May 24, 1879 letter from G.M. Sproat, Indian Reserve Commissioner to G.A. Walkem, Chief Commissioner of Lands and Works. Indian Affairs file 12,068, found on N.A.C. RG 10 volume 3679.

[273] May 27, 1879 letter from G.M. Sproat, Indian Reserve Commissioner to J.A. Macdonald, Superintendent General of Indian Affairs. Indian Affairs file 12,068, found on N.A.C. RG 10 volume 3679.

[274] October 18, 1879 letter from G.M. Sproat, Indian Reserve Commissioner to J.A. Macdonald, Superintendent General of Indian Affairs. Indian Affairs file 16,674, found on N.A.C. RG 10 volume 3699.

[275] December 16, 1879 Federal Order-in-Council P.C. 296. N.A.C. RG 2.

legislation, assented to on May 8, 1880, granting the Federal Government a strip of land not to exceed twenty miles on either side of a line,

" beginning at English Bay or Burrard Inlet and following the Fraser River to Lytton, thence up the Valley of the North Thompson, passing neat to Lakes Albreda and Cranberry, to Tete Jeunne Cache; thence up the Valley of the Fraser river to the summit of Yellow Head, or boundary between British Columbia and the North-West Territories..."[276]

Construction of the mainline began at Yale on May 14, 1880.

In preparing to administer Dominion Lands in the Province after the conveyance the Federal Government had passed a statute in 1875 entitled "*An Act to extend to the Province of British Columbia The Dominion Land Acts*". [277] However, the day before the passage of the 1880 Provincial Act conveying the Railway Belt the Federal Government passed a further statute repealing the 1875 Act extending the jurisdiction of the *Dominion Lands Act* and providing as follows:

Whereas it has been ascertained that the conformation of the country upon and in the vicinity of the located line of the Canadian Pacific Railway, through the Province of British Columbia, is such that it is inexpedient to attempt to apply the provisions of the Dominion Lands Acts to the survey, administration and management of the Lands hereinafter mentioned: Therefore:

s.2 The Governor-General in Council shall have full power and authority by Orders to be made from time to time, to regulate the manner, terms and conditions in and on which any lands which have been or may be hereafter transferred to the Dominion of

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[276] May 8, 1880 *Act to authorize the grant of certain Public Lands on the Mainland of British Columbia to the Government of the Dominion of Canada for Canadian Pacific Railway Purposes*, Statutes of British Columbia, 43 Victoria, Chapter 11, 3rd Session, 3rd Parliament.

[277] 1875 *Act to extend to the Province of British Columbia The Dominion Lands Act.* Statutes of Canada, 38 Victoria, Chapter 51.

Canada under the terms and conditions of the admission of British Columbia into the Dominion, shall be surveyed and laid out, administered, dealt with and disposed of, and from time to time to alter or repeal any such Order and the regulations therein made, and make others in their stead: Provided that no regulations respecting the sale, leasing or other disposition of such lands shall come into force until they shall have been published in the Canada Gazette and shall have been laid before both Houses of Parliament for one month, without being disapproved of by either House.[278]

So at the time of the May 1880 grant there were no regulations in place for survey, disposal, and administration of Dominion Lands within the Province.

Sproat was discharged and ceased work as Indian Reserve Commissioner on July 31, 1880 after allotting three more reserves in the Railway Belt to the Cook's Ferry Band.[279] He was replaced by Peter O'Reilly, a former Provincial magistrate, whose career as Indian Reserve Commissioner spanned from 1880 to 1898. O'Reilly set aside 48 reserves in the Railway Belt at various times during his tenure. His first Railway Belt allotments were in May 1881. That summer, in addition to reserves already allotted by the Joint Commission and Sproat, he set aside 25 reserves for the Yale, Adams Lake, Ashcroft, Bonaparte, Oregon Jack Creek and Pavilion Bands, before travelling to Vancouver Island to continue his work.

In 1882, while work continued on the mainland section of the railway line, British Columbia entrepreneur Robert Dunsmuir offered to undertake construction of the

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[278] May 7, 1880 *Act to repeal the Act extending the "Dominion Lands Acts" to British Columbia, and to make other provision with respect to certain Public Lands in that Province.* Statutes of Canada, 43 Victoria, Chapter 27.

[279] August 11, 1880 letter from G.M. Sproat, Indian Reserve Commissioner to L. Vankoughnet, Deputy Superintendent General of Indian Affairs. Indian Affairs file 19,581, found on N.A.C. RG 10 volume 3711.

Esquimalt to Nanaimo section in exchange for the Nanaimo coalfields and a land grant of 1,900,000 acres. In response British Columbia rescinded its 1875 transfer of Vancouver Island lands to Canada. [280] Later that same year a shorter route from Alberta to Kamloops was found, through Kicking Horse Pass.

Throughout the process of establishing the final route further negotiations continued over the content of Article 11. Since June 1880 Prime Minister Macdonald had been demanding additional land as compensation for previously alienated and unarable lands in the Railway Belt. This dispute remained unresolved into 1883. On February 10, 1883 Smithe's government passed an Order in Council admitting that approximately 800,000 acres had been alienated in the Railway Belt and other lands were useless for agricultural purposes. [281] The admission opened the door for the discussion of an additional land transfer and the settlement of other outstanding issues including Premier Smithe's desire to have the Federal Government complete construction of a dry-dock at Esquimalt.

Federal Government agent J.W. Trutch responded with a settlement proposal on May 5, 1883. [282] Pursuant to the proposal the Province would be obligated to do the following:

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[280] 1882 "*Act to repeal the 'Esquimalt and Nanaimo Railway Act, 1875*'," Statutes of British Columbia, 45 Victoria, Chapter 16.

[281] February 10, 1883 Provincial Order-in-Council found in B.C. Legislative Assembly Sessional Papers, 4th Parl., 1st Session, 1883.

[282] May 5, 1883 letter from J.W. Trutch to Premier Smithe found in B.C. Legislative Assembly Sessional Papers, 4th Parl., 1st Session, 1883.

1. Amend the 1880 Provincial Act from a conveyance of the land associated with the Yellowhead Pass route to a promise to grant a twenty mile strip on either side of the railway line wherever it was finally placed;
2. Grant a twenty mile wide strip of land on Vancouver Island to the Federal Government;
3. Grant a 3,500,000 acre block in the Peace River area to the Federal Government;

In exchange the Federal Government would agree to do the following:

1. Complete construction of the dry-dock at Esquimalt;
2. Grant Dunsmuir a $750,000 subsidy and transfer him the Vancouver Island lands granted towards construction of the Island segment of the Railway;
3. Open up the lands in the Railway Belt for settlement on liberal terms.

The Smithe government accepted the proposal and passed a new statute embodying the Agreement on May 7, 1883 .[283] This legislation, however, included a preamble which suggested the obligation to construct the Vancouver Island railway had been included in the Terms of Union. Prime Minister Macdonald disagreed with that contention and the Federal Government insisted on a new Act. [284] Later the same year the Federal Government informed the Province that Yellowhead Pass had been formally abandoned and the Kicking Horse Pass route adopted. And, anticipating the transfer of the Railway Belt lands, the Dominion appointed J.W. Trutch by Order in Council dated November

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[283] May 12, 1883, "*An Act Relating to the Island Railway, the Graving Dock, and Railway Lands in the Province,*" 1883 Statutes of British Columbia, 47 Victoria, Chapter 14.

[284] Ormsby, p. 285.

13, 1883 to organize a Dominion Land Service in British Columbia and facilitate the settlement of lands in the Railway Belt .[285] Soon after the Province passed a new Act, assented to on December 19, 1883 which repealed the May legislation and restated the Federal Provincial Agreement.[286] The sections which are most important to this paper are as follows:

2. Section 1 of the Act of the Legislature of British Columbia, No. 11 of 1880, intituled "An Act to authorize the grant of certain public lands on the mainland of British Columbia to the Government of the Dominion of Canada for Canadian Pacific Railway purposes," is hereby amended to read as follows: From and after the passing of this Act there shall be and there is hereby granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust to be appropriated as the Dominion Government may deem advisable, the public lands along the line of the railway before mentioned, wherever it may be finally located, to a width of twenty miles on each side of the said line as provided in the Order in Council. Section 11, admitting the Province of British Columbia into Confederation; but nothing in this section contained shall prejudice the right of the Province to receive and be paid by the Dominion Government the sum of $100,000 per annum, in half yearly payments in advance, in consideration of the lands so conveyed, as provided in section 11 of the Terms of Union: provided always that the line of Railway before referred to, shall be one continuous line of Railway only, connecting the seaboard of British Columbia with the Canadian Pacific Railway, now under construction East of the Rocky Mountains.

3. There is hereby granted to the Dominion Government, for the purposes of constructing, and to aid in the construction a Railway between Esquimalt and Nanaimo, and in trust to be appropriated as they may deem advisable (but save as is hereinafter excepted) all that piece or parcel of land situate in Vancouver Island, described as follows...

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[285] Noted in Dominion Order in Council P.C. 112G dated May 24, 1886. Indian Affairs file number 2663 v. 1. Found in N.A.C. RG 43 v. 269.

[286] December 19, 1883 "*Act Relating to the Island Railway, the Graving Dock, and Railway Lands of the Province,*" 1884 Statutes of British Columbia, 47 Victoria, Chapter 14.

5. Provided always that the Government of Canada shall be entitled out of such excepted tract to lands equal in extent to those alienated up to the date of this Act by Crown grant, pre-emption, or otherwise, within the limits of the grant mentioned in section 3 of this Act.

6. The grant mentioned in section 3 of this Act shall not include any lands now held under Crown grant, lease, agreement for sale, or other alienation by the Crown, nor shall it include Indian reserves of settlements, nor Naval or Military reserves.

7. There is hereby granted to the Dominion Government three and a half million acres of land in that portion of the Peace River District of British Columbia lying East of the Rocky Mountains and adjoining the North-West Territory of Canada, to be located by the Dominion in one rectangular block.

The Federal Government assented to a complementary *Settlement Act*, April 19, 1884.[287] This Act included the following sections important to this discussion:

11. The lands granted to Her Majesty, represented by the Government of Canada, in pursuance of the eleventh section of the Terms of Union, by the Act of the Legislature of the Province of British Columbia, number eleven of one thousand eight hundred and eighty, intituled "An Act to authorize the grant of certain public lands on the mainland of British Columbia to the Government of the Dominion of Canada for Canadian Pacific Railway purposes", as amended by the Act of the said Legislature, assented to on the nineteenth day of December, one thousand eight hundred and eighty-three, as aforesaid, intituled "An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province," shall be placed upon the market at the earliest date possible, and shall be offered for sale on liberal terms to actual settlers:

(2). The said lands shall be open for entry to bona fide settlers in such lots and at such prices as the Governor in Council may determine:

(3). Every person who has squatted on any of the said lands prior to the nineteenth day of December, one thousand eight hundred and eighty-three, aforesaid, and who has made substantial improvements thereon, shall have a prior right of purchasing the lands so improved, at the rates charged to settlers generally:

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[287] April 19, 1884 "*Act respecting the Vancouver Island Railway, the Esquimalt Graving Dock, and certain Railway Lands of the Province of British Columbia, Granted to the Dominion*" *1884* Statutes of Canada, 47 Victoria, Chapter 6.

(4). The Governor-in-Council may, from time to time, regulate the manner in which and terms and conditions on which the said lands shall be surveyed, laid out, administered, dealt with and disposed of: Provided, that regulations respecting the sale, leasing or other disposition of such lands shall not come into force until they are published in the Canada Gazette:

(5). The Act forty-third Victoria, chapter twenty seven, intituled "An Act to repeal extending 'The Dominion Land Acts' to British Columbia, and to make other provision with respect to certain lands in that Province," is hereby repealed.

Once the disputes were settled construction continued rapidly and the last spike was driven on November 7, 1885. On July 4, 1886 the train ran through from Montreal to Port Moody.

O'Reilly did not set aside any additional reserves in the Railway Belt between the summer of 1881 and the transfer of Railway Belt lands. In total 229 reserves were allotted by the Indian Reserve Commission prior to December 19, 1883.

Reserve Creation After Conveyance of the Railway Belt
(The Indian Reserve Commission Years)

The transfer of the Railway Belt lands resulted in a series of property rights disputes between the two levels of government. Because of the doctrine of "Crown indivisibility" (which loosely defined means that the ultimate ownership of public land is with the Crown and governments as agents of the Crown have only strictly defined powers to manage and appropriate revenues) transfers of interests in land between agents of the Crown are often complex and require interpretation. Initially, the reserve allotment process continued as before with the Commissioner setting aside reserves and forwarding plans for the approval of the Provincial Government. Soon after the conveyance, however, the Federal Government began to assert the right to unilaterally establish reserves in the Railway Belt based on the philosophy that the Province had no proprietary interest in those lands.

Shortly after the transfer a dispute broke out over the ownership of substantial quantities of gold which had been found to exist in the Railway Belt. By Order in Council dated August 9, 1884 British Columbia's Government claimed the grant of the Railway Belt was for railway purposes only, and did not transfer the ownership of minerals to Canada, so her government officials should not be issuing mining licences.[288] After discussion the governments agreed to a stated case to be put before the courts. [289]

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[288] "Papers Relating to the Question of ownership of the Precious Metals in the Railway Belt," *B.C. Legislative Assembly Sessional Papers*, 4th Parliament, 4th Session, 1886.

[289] June 25, 1885 Federal Order in Council agrees to stated case without prejudice, N.A.C. RG 2.

The dispute weaved its way through the courts and came before the Judicial Committee of the Privy Council in 1889 for a final decision. The decision favoured the Province stating in part that the transfer of the Railway Belt was only an assignment of the right to appropriate the territorial revenues arising from public lands and did not include the prerogative rights of the Crown. As a result the prerogative rights of the Crown, which include the right to precious metals, remained with the Province who had had the right to them prior to admission into Confederation. In addition, once the public lands were settled the Railway Belt ceased to be public lands and reverted to the same position as if they had been settled by the Province:

> The title to the public lands of British Columbia has all along been, and still is, vested in the Crown; but the right to administer and to dispose of these lands to settlers, together with all royal and territorial revenues arising therefrom, had been transferred to the Province, before its admission into the federal union. Leaving the precious metals out of view for the present, it seems clear the only "conveyance" was a transfer to the Dominion of the provincial right to manage and settle the lands, and to appropriate their revenues...whereas "all mines of gold and silver within the realm, whether they be in the lands of the Queen or of subjects, belong to the Queen by prerogative...It therefore appears to their Lordships that a conveyance by the Province of "public lands," which is, in substance an assignment of its right to appropriate the territorial revenues arising from such lands, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown.[290]

The decision prompted a settlement in which Canada would not lease minerals other than coal, except by fee simple grants, and British Columbia had the right to buy lands in the Railway Belt which contained minerals for $5.00 an acre, except in Indian reserves where Canada kept the right to administer minerals. [291]

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[290] Attorney-General of British Columbia v. Attorney-General of Canada, Law Reports 1889, A.C. pp. 295-306. "The Precious Metals Case".

[291] Embodied in 1890 Federal Order-in-Council P.C. 2065, N.A.C. RG 2.

British Columbia's Government was also concerned that the Department of the Interior provide regulations which would open up the Railway Belt for more rapid settlement. The first regulations governing the survey, administration and disposal of Dominion Lands in British Columbia were passed by Order in Council under the authority of the *Settlement Act, 1884,* in April 1885. [292] These regulations later became significant for the reserve creation process because of the following clauses:

77. The following powers are hereby delegated to the Governor in Council, to be exercised, from time to time by special Orders in Council, upon the recommendation of the Minister of the Interior:

(a) To withdraw from the operation of these regulations, subject to existing rights as defined or created under the same, such lands as have been or may be reserved for Indians;

82. The Minister of the Interior may, in his discretion, from time to time appoint such fit and properly qualified persons to act as Dominion Land Surveyors in the Province of British Columbia as to him may seem expedient or necessary; whenever it may be deem expedient or necessary; the Governor in Council may by Order in Council, declare that sections 87 to 124 inclusive of the Dominion Lands Act, 1883, or any of them shall be extended and take effect in the Province of British Columbia, on a day to be appointed in and by such order, and from and after the day so appointed, the said sections 87 to 124 inclusive of any of them shall have the same effect as if they had been embodied in and formed part of these Regulations.

The Province objected to the Regulations , however, based on the perception that they would inhibit rapid settlement. "The privilege of homestead entry is confined to such lands as have been surveyed and the survey thereof formally confirmed by the Dept. of

[292] April 20, 1885 Federal Order-in-Council, N.A.C. RG 2. Found in Indian Affairs file E5670-07263, vol. 2 1990.

the Interior."[293] The Federal Government responded by continuing to work towards alleviating the Province's concerns and provide for settlement. In 1886 they enacted *An Act Respecting Certain Public Lands in British Columbia ("the Public Lands Act")* which granted the Governor in Council the power to authorize the extension of the jurisdiction of the Dominion Lands Board to British Columbia and/or extend the Dominion Land Surveyor regulations to the Railway Belt. [294] They then passed an Order in Council, which was forwarded to the Province, maintaining the position that surveys were being vigorously prosecuted and every effort being made to provide for settlement within the Railway Belt. [295] Towards furthering the goal of settlement the April 1885 Regulations were extended on May 11, 1886 to July 1, 1887 and renewed again on September 17, 1887. The Railway Belt lands were always administered separately from Dominion lands outside the Province but on as near the same basis as possible.[296]

The September 17, 1887 Regulations included the following clause:[297]

9. The Governor in council may order the survey by a Dominion Land Surveyor of such public highways as he may deem expedient, through any lands subject to these regulations:

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[293] "Papers Relating to Dominion Lands within the Province," *B.C. Legislative Assembly Sessional Papers*, 4th Parliament, 4th Session, 1886: May 28, 1885 Provincial Order-in-Council.

[294] Chapter 56, Victoria 49, 1886 *An Act respecting certain Public Lands in British Columbia.*

[295] May 24, 1886 Federal Order-in-Council P.C. 112G. Railways and Canals file 2663 v.1, found on N.A.C. RG 43 volume 269.

[296] *Report of the Royal Commission on Reconveyance of Land to the Province of British Columbia*, 1927, p. 38, found on N.A.C. RG 33/109 volume 1, file 3.

[297] September 17, 1887 Federal Order-in-Council, N.A.C. RG 2.

2. On the approval of the survey of a public highway, the fact shall be notified to the Lieutenant-Governor of British Columbia by the Minister of the Interior, and, by virtue of such notification, such public highway shall become the property of the said Province, the legal title thereto remaining in the Crown for the public use of the Province; but no such road shall be closed up or its direction varied, or any part of the land occupied by it sold or otherwise alienated, without the consent of the Governor General in Council:

4. In the meantime, and until any such road shall have been located and constructed, a convenient right of way not exceeding 66 feet in width over any such land is hereby reserved for the use and convenience of settlers and landholders in passing from time to time, to and from their locations or lands, to and from any now existing public road or trail: Provided always, that such settler or land-owner making use of the aforesaid privilege shall not damage the fences or crops of the occupier of any such located, sold or leased land:

This clause is noted to make the point that these regulations arguably applied to reserves in the Railway Belt unless and until they were formally withdrawn from their operation.

While the disputes over ownership rights and settlement were being worked out, Indian Reserve Commissioner O'Reilly continued to set aside new reserves. He returned to the Railway Belt in 1884 to allot 6 reserves to the Spuzzum and Harrison River Bands and again briefly in May 1886 to allot an additional reserve to the Lytton Band.

In the summer of 1886 O'Reilly also met with John A. Macdonald who had travelled to British Columbia after the completion of the Canadian Pacific Railway. Macdonald impressed upon him the need to push the Chief Commissioner of Lands and Works for the approval of reserves throughout the province which had been set aside by the Joint Commission and Sproat. O'Reilly responded by forwarding plans of those reserves after they were surveyed to the Chief Commissioner and was successful in having many of the

reserves approved.[298]

O'Reilly also oversaw the survey of reserves in the Railway Belt which were conducted vigorously until 1886 when the Minister of the Interior's emphasis and appropriations in the Railway Belt were concentrated on surveying agricultural lands for settlement and the Department of Indian Affairs surveyors were concentrated outside the Railway Belt. By 1886, 220 surveys had been conducted according to the Provincial system of survey.

Under the authority of the *Public Lands Act, 1886* the Dominion passed new Regulations for the survey, administration, disposal and management of Dominion Lands within the Forty-mile Railway Belt, in the Province of British Columbia on Sept. 17, 1889. These regulations included the earlier clauses with respect to the withdrawal of Indian reserves from the regulations, the transfer of roads to the Province and the qualifications for Dominion Surveyors.

Later in 1889 a controversy emerged over the qualifications of Jemmett and Skinner , who had conducted most of the surveys of reserves within the Railway Belt. There was no question they were not qualified as Dominion Land Surveyors and their surveys would not be legal on Dominion land that was subject to the Dominion Land Acts. The question was whether or when Dominion Land Act Regulations regarding surveyors had become applicable to Dominion Land in British Columbia.

Over the course of a few months the Deputy Superintendent General of Indian Affairs,

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[298] June 25, 1887 letter from P. O'Reilly, Indian Reserve Commissioner to J.A. Macdonald, Superintendent General of Indian Affairs. Indian Affairs file 29858-4 v.5, found in Lands and Trusts Services, B.C. Region DIAND under Registry Number B-64646.

Lawrence Vankoughnet and the President of the Association of Dominion Land Surveyors, J.S. Denis debated the necessity for new surveys of the reserves in the Railway Belt. Vankoughnet took the position that the passage of the *Public Land Act, 1886* granting the Governor in Council the power to extend the Dominion Lands Board to British Columbia determined the date the Dominion surveyors regulations became applicable. And, since there had not been any surveys in the Railway Belt after that date, he argued there was no problem with past surveys. [299] Denis took the position that as soon as the lands became Dominion lands section 99 of the *Dominion Lands Act* required the surveyors to be Dominion Land Surveyors and therefore any surveys after December 19, 1883, at the latest, would be invalid. [300]

Vankoughnet asked Deputy Minister of Justice Sedgewick for an opinion on when the Dominion regulations regarding surveyors took effect in the Railway Belt. Sedgewick noted that the extension of Dominion regulations regarding surveyors did not take place until regulations made under section 4 of the *Public Lands Act, 1886* came into effect. Section 4 reads as follows:

> The Governor in Council may from time to time, regulate the manner in which, and the terms and conditions on which, the said lands shall be surveyed, laid out, administered, dealt with and disposed of; but regulations respecting the sale, leasing or other disposition of such lands shall not come into force until they are published in the Canada Gazette.

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[299] June 4, 1889 letter from L. Vankoughnet, Deputy Superintendent General of Indian Affairs to J.S. Dennis, President, Association of Dominion Land Surveyors. Indian Affairs file 57,430, found on N.A.C. RG 10 volume 3817.

[300] June 24, 1889 letter from J.S. Dennis, President, Association of Dominion Land Surveyors to L. Vankoughnet, Deputy Superintendent General of Indian Affairs. Indian Affairs file 57,430, found on N.A.C. RG 10 volume 3817.

This meant that no regulations could have come into force before 1886 and supported Vankoughnet's position that no re-surveying was required since none had been done since 1886. Sedgewick expressed the further opinion that since the Department of the Interior was busy systematically surveying the entire Railway Belt lands pursuant to Dominion Land Regulations, the question should soon be moot. [301] This was supported by the Deputy Minister of the Interior who informed Vankoughnet that when his surveyors find evidence of a previous survey done under provincial law they retrace the lines and incorporate them into the township plans. The township plans are then approved by the Surveyor General thereby legalizing them.[302]

The difficulties over surveys did not end there, however. The surveys which had been performed prior to the coming into force of Dominion regulations for surveys had been conducted under the British Columbia system of survey which was different than the survey system found in the *Dominion Land Act* and the regulations which had subsequently been extended to British Columbia. By 1891 only two reserves in the Railway Belt had been surveyed according to the Dominion system. Deputy Minister of the Interior Burgess suggested that there was an urgent need to have the reserves tied into the system in force in the Railway Belt. [303] Vankoughnet was not as impressed with

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[301] December 28, 1889 letter from R. Sedgewick, Deputy Minister of Justice, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, Indian Affairs file 57,430, found on N.A.C. RG 10 volume 3817.

[302] January 24, 1890 letter from A.M. Burgess, Deputy Minister of the Interior to L. Vankoughnet, Deputy Superintendent General of Indian Affairs. Indian Affairs file 57,430, found on N.A.C. RG 10 volume 3817.

[303] May 14, 1891 letter from A.M. Burgess, Deputy Minister of the Interior to E. Dewdney, Minister of the Interior. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

the urgency of the situation; nevertheless, he instructed O'Reilly to attempt to have the surveyors under his charge redraw the lines in the Railway Belt reserves. At the time, however, the surveyors under O'Reilly's charge were busy surveying reserves outside the Railway Belt and were unable to attend to Railway Belt reserves. [304]

Later in 1891 a dispute over two reserves set aside at the townsite of Hope prompted the Federal Government to take the position that provincial approval was not necessary to set aside reserves in the Railway Belt. The reserves in question had been allotted by Sproat on land that was occupied by Aboriginals but had been previously surveyed for a townsite by Colonel Moody in 1861. The dispute over the status of the land had arisen before the conveyance of the Railway Belt and at that time had focussed on the equities between the Aboriginal and white settlers; however, the conveyance of the Railway Belt lands had arguably changed the legal position of all the parties. Because of the dispute British Columbia's Chief Commissioner of Lands and Works originally refused to confirm the allotments in 1887 but had then confirmed the same plans on May 8, 1889. After receiving a copy of the approved plans Surveyor General Edward Deville proposed to the Deputy Minister of the Interior that the Province could not approve or disapprove of reserves in the Railway Belt and that reserves in the Railway Belt could only be designated by order of the Governor in Council on the joint recommendation of the Minister of the Interior and the Superintendent General of Indian Affairs. [305] This was heartily agreed with by Deputy Minister of Justice

[304] June 13, 1891 letter from P. O'Reilly, Indian Reserve Commissioner to L. Vankoughnet, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

[305] August 8, 1891, letter from E. Deville, Surveyor General to J.R. Hall, Acting Deputy Minister of the Interior. Indian Affairs file 27165-10, found on N.A.C. RG 10 volume 7792.

Sedgewick: "I entirely concur with the view of the Surveyor-General that the Commissioner of Crown lands of British Columbia has no power either to approve or disapprove of the establishment of Indian reserves in the Railway Belt."[306]

The Federal Government began to act on the assumption that Railway Belt reserves were legally created unilaterally by Federal Order in Council. There was, however, some discussion about whether different forms of approval were necessary for reserves allotted and/or surveyed during different stages of the Railway Belt conveyance.[307] Chief Surveyor Sam Bray argued that to be safe, all the reserves which had been allotted to date in the Railway Belt should be immediately confirmed by Order in Council, although almost none had yet been surveyed pursuant to the Federal system. [308] As noted earlier, however, Federal officials had become increasingly concerned with the necessity of defining lands pursuant to the Federal rather than the Provincial system of survey and were unwilling to confirm the reserves according to old surveys or pursuant to the Reserve Commissioners field notes.[309]

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[306]September 26, 1891 letter from R. Sedgewick, Deputy Minister of Justice to theDeputy Superintendent General of Indian Affairs. Indian Affairs file 27150-3-X1, found in N.A.C. RG 10, vol. 7783.

[307] August 25, 1891 letter from S. Bray, Chief Surveyor, Department of Indian Affairs to L. Vankoughnet, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27165-10, found on N.A.C. RG 10 volume 7792.

[308] December 15, 1891 letter from S. Bray, Chief Surveyor, Department of Indian Affairs to L. Vankoughnet, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

[309] March 5, 1892 letter from E. Deville, Surveyor General to L. Vankoughnet, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

Bray then suggested that O'Reilly be instructed to appoint a surveyor to resurvey the reserves in the Railway Belt except those which Bray felt were legally created prior to the transfer of the Belt, i.e. : those allotted by the Joint Commission; or, allotted by Sproat and confirmed by the Province's Chief Commissioner of Lands and Works prior to the transfer of the Belt on December, 19, 1883. [310] Bray felt that the reserves allotted by the Joint Commission did not require any approvals pursuant to the terms of the their appointment and that Sproat's allotments required the approval of the Chief Commissioner of Lands and Works (none had in fact been approved by December 19, 1883). Bray also excluded six reserves set aside for the Cooks Ferry Band on October 15, 1889 which had already been confirmed by Federal Order-in-Council.[311]

Surveyor General Deville also pressed Vankoughnet for a commitment to resurvey the reserves in the Railway Belt so that they could be withdrawn from the operation of the Dominion land regulations and be administered under the *Indian Act*. [312] Vankoughnet did not commit himself but a further correspondence was carried on throughout 1892 towards splitting the costs of surveys between the Department of the Interior and the Department of Indian Affairs. Before the reserve surveys could begin in 1893, however, Deputy Minister of the Interior Burgess decided to apply the available appropriations

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[310] December 17, 1891 letter from S. Bray, Chief Surveyor, Department of Indian Affairs to the Deputy Minister. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

[311] October 31, 1890 Federal Order-in-Council P.C. 2410, found on N.A.C. RG 2.

[312] March 5, 1892 letter from E. Deville, Surveyor General to L. Vankoughnet, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

to the survey of land required for new settlement. [313]

The new Deputy Superintendent General of Indian Affairs, Hayter Reed, looked into the confirmation of the reserves again in October 1893 and requested the Department of the Interior prepare an Order in Council which would withdraw the reserves from Dominion land regulations and place them under the control of the Department of Indian Affairs. Deputy Minister Burgess agreed and requested a complete schedule of reserves in the Railway Belt in order to do so. [314] Chief Surveyor of Indian Affairs, S. Bray and Reserve Commissioner O'Reilly attempted to provide a comprehensive schedule. [315] After receiving the schedule, however, Deputy Minister Burgess informed Vankoughnet that Dominion Land Officers were having difficulty identifying the position of some of the reserves enumerated therein. [316] The Order in Council confirming the reserves was therefore placed on hold.

In December 1895 Reed again contacted Burgess about an Order in Council confirming the reserves in the Railway Belt. Burgess replied that the Department of the Interior still

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[313] March 11, 1893 letter from J.R. Hall, Secretary, Department of the Interior to L. Vankoughnet, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

[314] October 19, 1893 letter from A.M. Burgess, Deputy Minister of the Interior to H. Reed, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

[315] November 20, 1893 letter from L. Vankoughnet, Deputy Superintendent General of Indian Affairs to P. O'Reilly, Indian Reserve Commissioner. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

[316] December 19, 1893 letter from A.M. Burgess, Deputy Minister of the Interior to H. Reed, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

did not have sufficient descriptions of all the reserves in the Railway Belt.[317] Reed believed the Department had nearly all the information required and promised to place it at the disposal of Burgess's Department.[318]

Throughout 1897 the Minister of the Interior felt they still did not yet have sufficient descriptions of all the Railway Belt reserves to recommend a confirming Order in Council. The Secretary of the Department of Indian Affairs contacted O'Reilly again requesting copies of field notes and surveys to assist preparing the descriptions of the reserves. [319] O'Reilly retired before the schedule was complete. He had done little work in the Railway Belt since 1886, allotting 1 reserve to the Semiahmoo Band in June 1887, 6 to the Cooks Ferry Band in October 1889, 1 to the Spallumcheen Band in August 1893 and 2 to the Katzie in 1898. Very few new surveys of reserves in the Railway Belt had been conducted in that time period as well.

O'Reilly was replaced as Indian Reserve Commissioner by A. W. Vowell in 1898. As noted in Part One, Vowell remained Commissioner until 1908 when the Indian Reserve Commission was disbanded as a result of a dispute over reversionary interests in reserves. During his tenure Vowell allotted 12 new reserves in the Railway Belt to the Chilliwack,

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[317] November 3, 1896 letter from A.M. Burgess, Deputy Minister of the Interior to H. Reed, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

[318] March 27, 1896 letter from H. Reed, Deputy Superintendent General of Indian Affairs to A.M. Burgess, Deputy Minister of the Interior. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

[319] May 26, 1897 letter from J.D. McLean, Acting Secretary, Department of Indian Affairs to P. O'Reilly, Indian Reserve Commissioner. Indian Affairs records found on N.A.C. RG 10 volume 11015.

Ahtsalitz, Hope and Yale Bands.

A mild debate continued, between the Department of Indian Affairs and the Department of the Interior, over whether a sufficient description of the reserves existed to have them confirmed by a blanket Order in Council or whether surveys were required, pursuant to the Dominion Land Regulations, tying the reserves into the other lands in the Railway Belt before they could be confirmed. Upon again being requested by the Department of Indian Affairs to proceed with obtaining the Order in Council in March 1900, the Surveyor General informed them that sufficient descriptions were not yet available and due to a shortage of staff would not be available in the near future.[320]

After the turn of the century, except for 18 reserves in the Railway Belt, there was still no confirming Order in Council for the same reasons as before. The Surveyor General continued to insist that they did not have sufficient descriptions of the reserves and not enough staff to undertake the work. [321] The Department of the Interior did, however, begin including the reserves while conducting the surveys of the surrounding townships and redrew their lines to bring them in line with the township grids. These township plans were then approved by the Surveyor-General making them valid surveys under Dominion Land Regulations. Over the next thirty years the remainder of the Railway Belt reserves were tied into the Dominion survey system.

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[320] March 20, 1900 letter from E. Deville, Surveyor General to J.D. McLean, Secretary, Department of Indian Affairs. Department of the Interior file 1092, found on N.A.C. RG 88 volume 303.

[321] March 20, 1900 letter from E. Deville, Surveyor General to J.D. McLean, Secretary, Department of Indian Affairs. Department of the Interior file 1092, found on N.A.C. RG 88 volume 303.

In 1907, when a dispute between the Federal and Provincial Government over the Province's claimed reversionary interest in the Tsimpsean reserve brought the reversionary issue to a head, the Railway Belt reserves were not exempt. As noted in Part One of this paper, pursuant to an interpretation of the 1875-76 Agreement to establish the Joint Indian Reserve Commission, British Columbia claimed a proprietary interest in all the reserves in the Province including those inside the Railway Belt. [322] Initially, the Federal Government was concerned that there might be some validity to the claim for the reserves that had been set aside before the transfer of the Railway Belt based on the argument that they had been excepted from the conveyance of the Railway Belt. Surveyor General Deville offered the opinion that due to the decision in the Precious Metals case, which had stated that lands held by pre-emption or Crown grant at the time of the transfer would revert to British Columbia, it was not clear whether reserves set aside before the transfer might be treated the same way.[323] But while uncertainty about the status of reserves set aside before the transfer continued for a few years, Federal officials staunchly refused to consider a Provincial interest in reserves allotted subsequent to the transfer.

On May 13, 1910 an Order in Council was passed approving new regulations for the survey, administration and disposal of Railway Belt lands. [324] Two provisions of note

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[322]Describe the Agreement particularly Clause 5.

[323] September 11, 1907 letter from E. Deville, Surveyor General to F. Pedley, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

[324] December 18, 1910 letter from J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs to the Secretary, Department of the Interior. Indian Affairs file found on RG 10.

were as follows:

25. Orders in Council of 17th September 1889, 13th of November 1890, 12th December 1891, 21st March 1892, 10th November 1893, 11th July 1895, 17th April 1900, 20th August 1902, 17th March 1903 and the 13th July 1904, respecting the survey, administration and disposal of lands in the railway belt...are hereby rescinded.

26. The provisions of this Order in Council shall become effective on the second day of July, A.D. 1910.

These regulations did not contain the provision allowing the withdrawal of reserves from the regulations in force generally in the Railway Belt. This would have meant that the general Dominion Land Regulations, such as those governing land taken for roads, rather than the *Indian Act* provisions, would apply reserve lands in the Railway Belt that had not been withdrawn pursuant to earlier regulations. However, these regulations never became effective. July 1, 1910, the day before the regulations were to become operative, saw the passage of a new Order in Council stating that the regulations would not become effective until proclaimed by a further Order in Council.[325] There is no evidence of a further Order in Council.

In November 1910 the Judicial Committee of the Privy Council handed down another decision clarifying the rights of the respective governments in Railway Belt lands. The controversy arose over water rights in the Railway Belt that had been purportedly

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[325] July 1, 1910 Federal Order-in-Council, N.A.C. RG 2. Published in Canada Gazette, vol. xliv p. 80.

granted under provincial legislation: *The British Columbian Water Clauses Consolidation Act.* The Federal Government objected on the grounds that the provincial legislation did not apply on Federal land. The decision supported Canada's claim to greater ownership rights in the Railway Belt by stating that Canada held the proprietary rights and legislative jurisdiction in public lands in the Railway Belt until they were settled:

> Their Lordships are of the opinion that the lands in question, so long as they remain unsettled are "public property" within the meaning of Section 91 of the British North America Act, 1867, and as such are under the exclusive legislative authority of the Parliament of Canada by virtue of the Act of Parliament. 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...[326]

Despite the decision there was increasing concern that the Province might pursue its claim to a reversionary interest in the Railway Belt, which prompted renewed vigour in the quest for orders in council confirming the reserves. In March 1911 Assistant Deputy Superintendent General J.D. McLean again requested on behalf of the Department of Indian Affairs that Surveyor General Deville arrange for the confirmation of Railway Belt reserves by Order in Council. [327] Deville agreed with the suggestion and once again requested a complete list of the reserves. [328] From the lists of reserves which the

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[326] Burrard Power Company Limited v The King, Law Reports, 1911, A.C. pp. 87-95

[327] March 20, 1911 letter from J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs to E. Deville, Surveyor General. Indian Affairs file 27150-4 found on N.A.C. RG 10 volume 7785.

[328] May 3, 1911 letter from E. Deville, Surveyor General to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs. Indian Affairs file 27150-4 found on N.A.C. RG 10 volume 7785.

Department of the Interior were aware of Deville compiled three separate lists of Railway Belt reserves: those which are ready for confirmation having been tied into the township surveys being conducted by the Department of the Interior; those not sufficiently tied into the Dominion lands system of survey to confirm; and those already confirmed by Order in Council. [329] After receiving Deville's lists, McLean wrote to advise that there were additional reserves that had not been included but agreed that they should proceed with confirming the reserves that were appropriately surveyed without waiting for the others. [330]

On January 25, 1913 the Governor General passed Order in Council P.C. 205 acknowledging that the 156 reserves on the attached schedule had been surveyed and were part of official plans of their respective townships and, pursuant to s. 38 of the Sept. 17, 1889 Regulations, withdrew the reserves from the operation of the Regulations " subject to existing rights as defined or created thereunder..." . [331]
P.C. 205 actually transfers the reserves as shown on the township plans not according to the original survey in case where there had been surveys conducted by surveyors under the direction of the Indian Reserve Commissioners prior to 1886. The reserves not included in P.C. 205 would be included in subsequent orders in council prepared in

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[329] November 21, 1911 letter from E. Deville, Surveyor General to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs. Indian Affairs file 27150-4 found on N.A.C. RG 10 volume 7785.

[330] December 30, 1911 letter from J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs to E. Deville, Surveyor General . Indian Affairs file 27150-4 found on N.A.C. RG 10 volume 7785.

[331] January 25, 1913 Federal, Order-in-Council P.C. 205. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

the office of the Surveyor General as they were surveyed. With few exceptions the township plan was the official survey noted for those reserves as well.

Railway Belt Reserves and the Royal Commission on Indian Affairs in British Columbia

As noted in Part One of this paper the reversionary interest dispute resulted in the breakdown of the First Indian Reserve Commission and a deadlock in the administration and disposal of lands which had been set aside for Aboriginals as reserves. In order to overcome the deadlock the Federal Government appointed J.A.J. McKenna to negotiate with the Province towards finding a solution. The negotiations resulted in the McKenna-McBride Agreement signed on September 24, 1912 in which the Federal Government agreed to the appointment of a Royal Commission to adjust existing reserves, and to share the proceeds from the sale of lands that might be cut-off with the Province, and the Province agreed to convey the adjusted reserves to the Federal Government free of the claimed reversionary interest. [332] However, the Federal Government did not recognize the claim to a reversionary interest in the Railway Belt reserves and while they did decide to permit the Royal Commission to make recommendations with respect to the boundaries of those reserves they ultimately decided to refuse to confirm any reductions.

Prior to signing the McKenna-McBride Agreement, J.A.J. McKenna wrote a lengthy report to Premier McBride outlining the history of the Aboriginal reserve dispute and the Federal position on reversionary interest. Included in the body of the report was the

[332] September 24, 1912 Memorandum of Agreement signed by J.A.J. McKenna, Special Commissioner representing the Dominion Government and R. McBride, Premier of British Columbia representing the Provincial Government, found on N.A.C. RG 2 volume 1051.

following statement with regards to the Railway Belt reserves:

The mere setting aside of certain lands within the Railway Belt cannot have deprived the Dominion of any of the rights it has in the lands. It must hold the reserves by as good a title as it holds the rest of the Railway Belt lands. Even if it were held that the reversionary provision of the Agreement of 1875-76 legally and effectively impaired the Dominion title to reserves carved out of the public lands of the Province, the provision would not operate to impair the Dominion interest in lands in the Railway Belt marked off as reserves.[333]

On November 17, 1913, six months after the Royal Commission took up offices in Victoria, Commissioner McKenna raised the issue of whether the Commission should be dealing with reserves in the Railway Belt on the same footing as those outside the Railway Belt. Himself considering that they should not, he made the following motion which was seconded by the other federal appointee on the Commission, N.W. White.:

WHEREAS the Railway Belt was, under Article eleven (11) of the Terms of Union, conveyed by British Columbia to Canada, and to make up, as is specifically set forth therein, for land within said Belt which had been previously granted or pre-empted, a further tract of land situated in the Peace River portion of the Province was conveyed to Canada by British Columbia, and, as no compensation in land or otherwise was made by British Columbia for Indian Reserves which had, up to the transfer been set aside in the said Belt; and WHEREAS the Government of Canada in setting aside thereafter Reserves in the said Belt simply made use of land over which the Government of Canada had sole disposing power, and neither consulted the Government of British Columbia in such setting aside of land for Indians, nor sought the concurrence or confirmation of the Provincial authorities; BE IT RESOLVED

that this Commission has no authority under paragraph "a" of Section 2 and Sections 4 and 5 of the Agreement attached to the Commission to cut off any portion of the land

[333] July 29, 1912 letter from J.A.J. McKenna, Special Commissioner to R. McBride, Premier of British Columbia. Indian Affairs file 59,335-3, found on N.A.C. RG 10 volume 3822.

reserved for Indians in the Railway Belt. [334]

The resolution was defeated by the votes of the two provincial appointees and the deciding vote of Chairman Wetmore; but, as McKenna reported to Deputy Superintendent General W.J. Roche, he was directed to prepare a brief to the two governments concerning the issue once the Commissioners broke for the winter.[335]

In a brief addressed to Roche on January 31, 1914, McKenna argued that the Province had not excepted any Indian reserves from the transfer of Railway Belt lands in the December 19, 1883 statute conveying the lands nor could they have any interest in reserves set aside since the transfer. With respect to reserves set aside before the transfer, he noted that the 3,500,000 acres granted by the Provincial Government as compensation for lands within the Railway Belt that had been pre-empted or Crown granted by the Province prior to the transfer did not mention Indian reserves or presume to compensate for their exception. McKenna went on to point out that in fact the provincial statute transferring the Railway Belt lands evidenced a deliberate intention to include Indian reserves in the transfer.[336] To support this he pointed to the transfer of the Vancouver Island lands, by the same statute, which were to be granted to Dunsmuir as compensation for building the Island portion of the railway. The wording

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[334] January 31, 1914 letter from J.A.J. McKenna, Royal Commission on Indian Affairs for the Province of B.C. to W.J. Roche, Superintendent General of Indian Affairs. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

[335] November 22, 1913 letter from J.A.J. McKenna, Royal Commission on Indian Affairs for the Province of B.C. to W.J. Roche, Superintendent General of Indian Affairs. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

[336] January 31, 1914 letter from J.A.J. McKenna, Royal Commission on Indian Affairs for the Province of B.C. to W.J. Roche, Superintendent General of Indian Affairs. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

of that transfer specifically excluded Indian reserves. As he notes it would be hard to argue a similar exception should be implied in the language transferring the mainland Railway Belt lands when none was mentioned.

With respect to reserves set aside after the transfer, McKenna disputed the application of the 1875-76 Agreement to lands now owned by the Dominion. He pointed to the Rothwell-McKenna Agreement between British Columbia and Canada in 1897 which fixed the date for transfer of the Railway Belt to the Dominion at December 19, 1883 in order to determine the limit for valid provincial alienation of lands within the Belt.[337] And he argued the following sections described all the lands which were excepted from that transfer:

(2) From the tract of lands so transferred shall be reserved all lands granted by the Province on or before the date above mentioned, the 19th December 1883, and all lands covered by pre-emption entry at that date; and all such lands so granted or pre-empted, shall be held to have remained under the control of the Province: provided that all lands covered by pre-emption or cancelled prior to the said date and all lands covered by pre-emption entry which were abandoned by the pre-emptor or cancelled after that date shall be deemed to belong to the Province.

(3) From the said tract of lands so transferred on the 19th December, 1883, shall also be reserved all lands covered at that date by sales actually made or by applications to purchase on account of which moneys had been paid to the Province; and all lands so covered shall be held to have been under the control of the Province; Provided that all lands so covered of which the sales had been cancelled prior to the said date or for which the applications lapsed prior to the aid date for non-fulfilment of the conditions shall be regarded as having passed to the Dominion; and that all lands so covered of which the sales were abandoned after the said date, or for which the applications lapsed after the said date, shall be deemed to belong to the Province.

[337] Confirmed December 13, 1887 by Federal Order-in-Council, N.A.C. RG 2.

These sections do not mention future allotted reserves. As a consequence, McKenna argued that British Columbia had no claim to a reversionary interest in reserves in the Railway Belt whether set aside before or after the conveyance to the Federal Government. Since they did not have a reversionary interest, he further argued they had not bargained for an adjustment of those reserves and had no right to insist on cut-offs:

> That being so, there is no ground at all upon which British Columbia can claim that under the McKenna-McBride Agreement, which does not mention the Railway Belt, Indian reserves in the Belt may be reduced and the Province share in the proceeds of the sale of any lands which, with the consent of the Indians, may be cut-off any such reserves.[338]

On January 31, 1914 McKenna addressed a second letter to Roche regarding the registration of Dominion patents to reserve lands in the Railway Belt which Provincial officials had been refusing to register based on the claim to a reversionary interest. He recommended the Department continue to issue said patents and not acquiesce to the Provincial pressure. [339] As a result, Assistant Deputy and Secretary of Indian Affairs, J.D. MacLean asked the Department of Justice for an opinion on how to treat the Province's claim. [340]

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[338] January 31, 1914 letter from J.A.J. McKenna, Royal Commission on Indian Affairs for the Province of B.C. to W.J. Roche, Superintendent General of Indian Affairs. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

[339] January 31, 1914 letter from J.A.J. McKenna, Royal Commission on Indian Affairs for the Province of B.C. to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

[340] February 17, 1914 letter from J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs to E.L. Newcombe, Deputy Minister of Justice. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

Before Deputy Minister of Justice E.L. Newcombe responded, however, Federal ownership rights in the Railway Belt were supported by another Judicial Committee of the Privy Council decision affirming the earlier Burrard Power decision. At issue in this case was whether the Province could grant exclusive fishing licenses in the Railway Belt. The decision stated in part:

The construction of the language of the grant of the railway belt has already come before this board on more than one occasion. In AG of British Columbia v. AG of Canada (Precious Metals) 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 belong 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 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 judgement in that case that the word grant as used in the statutes 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 judgement Lord 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, in as much as the Belt, so far as is material for the purposes of this appeal, in still unsettled and remains under the control of the Dominion.

There Lordships can see nothing in the judgement above referred to which casts 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. [341]

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[341] Attorney-General for the Province of British Columbia v Attorney-General for the Dominion of Canada, Law Reports, 1914, A.C. pp. 153-175.

Deputy Minister of Justice Newcombe responded to McLean's request for advise on February 1915 by stating perfunctorily that British Columbia had no right to insist on cut-offs in the Railway Belt and the Royal Commission had no authority to deal with lands in the Railway Belt. He also informed MacLean that he had written McBride the previous year with his opinion but had not received a response.[342] Deputy Superintendent General Duncan C. Scott sent Newcombe's opinion on to the Secretary of the Royal Commission, J.G.H. Bergeron, and directed the Commission to govern itself accordingly. [343] Bergeron passed the letter on to the Commissioners who in turn forwarded it to Premier McBride.[344]

McKenna was, however, dissatisfied with Newcombe's treatment of the issue. He had requested advice on the Federal Government's position regarding its legal rights in Railway Belt reserves and felt that merely denying the Commission the authority to deal with the reserves did not address the difficulties in administration resulting from the 1875-76 Agreement: "If it is desired to postpone the defining of the Dominion's legal rights in Indian Reserves in the Railway Belt, it would, in my judgement, be wiser for the Commission to deal with them as with other Reserves, the question of the Dominions

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[342] March 16, 1914 letter from J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs to E.W. Bateman, Right-of-Way Agent, Canadian Pacific Railway. Indian Affairs file 22165-1, found on N.A.C. RG 10 volume 7673.

[343] January 30, 1915 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to J.G.H. Bergeron, Secretary, Royal Commission on Indian Affairs for the Province of British Columbia. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

[344] February 6, 1915 letter from J.G.H. Bergeron, Secretary, Royal Commission on Indian Affairs for the Province of British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

legal rights in them to be decided when the Final Report of the Commission is before both governments for approval...,"[345]

Scott forwarded McKenna's letter to Newcombe for further comment. [346] Newcombe responded again by stating the Commission did not have authority to deal with Railway Belt reserves and he would recommend against adopting McKenna's strategy. [347] Scott continued to press for an opinion on the interest, if any, of the Province in Railway Belt reserves.[348] Newcombe responded directly to the question on June 23, 1915:

" The entire beneficial interest of the Province in the Railway Belt, which passed to the Dominion by the statutory transfer, included in my opinion any interest which the Province had in lands which had been or might thereafter be set apart as Indian reserves, and I think it would be proper policy for your department to administer these reserves upon the assumption that they are not affected by any provincial interest beyond that which may attach to any other lands in the Railway Belt."[349]

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[345] February 8, 1915 letter from J.A.J. McKenna, Royal Commission on Indian Affairs for the Province of British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

[346] February 22, 1915 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to J.A.J. McKenna, Royal Commission on Indian Affairs for the Province of British Columbia. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

[347] February 24, 1915 letter from E.L. Newcombe, Deputy Minister of Justice to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

[348] April 8, 1915 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to E.L. Newcombe, Deputy Minister of Justice. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

[349] June 23, 1915 letter from E.L. Newcombe, Deputy Minister of Justice to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

With Newcombe's opinion in hand Scott asked McKenna to what extent the Commissioners had already dealt with Railway Belt reserves. [350] McKenna responded that nearly all of the Railway Belt reserves had been visited and most had been the subject of decisions by the Commissioners. [351] Scott wrote back enclosing Newcombe's opinion but instructed the Commissioners to continue with McKenna's strategy of dealing with the boundaries of the Railway Belt reserves. He suggested that their non-binding recommendations would not affect the legal position of the Federal Government with respect to the reversionary interest claim.[352] The Commissioners carried on their work in the Railway Belt. The Final Report dated June 30, 1916 recommended cut-offs from eleven reserves totalling 6065.13 acres and the confirmation of an additional 40 reserves in the Railway Belt.

While the work of the Commissioners was being undertaken the Federal Government passed anOrder in Council, dated April 6, 1915 confirming 8 reserves which had been allotted by Indian Reserve Commissioner Vowell.

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[350] June 25, 1915 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to J.A.J. McKenna, Royal Commission on Indian Affairs for the Province of British Columbia. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

[351] July 8, 1915 letter from J.A.J. McKenna, Royal Commission on Indian Affairs for the Province of British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

[352]February 2, 1916 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to J.A.J. McKenna, Royal Commission on Indian Affairs for the Province of British Columbia. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

Royal Commission Report Confirmation and Cut-offs to Railway Belt Reserves

As discussed in Part One of this paper, the Federal Government was frustrated by the Province's lack of progress in even considering the Report of the Royal Commission. As a result, in April 1918, Scott recommended that the Federal Government unilaterally approve the Report, in so far as it dealt with reserves in the Railway Belt, and make approval for reserves outside the Railway Belt contingent upon the approval of the Government of British Columbia. [353] An Order in Council was drafted but the course of action ultimately abandoned. The Federal Government waited until British Columbia approved the Royal Commission's Report, as amended by Ditchburn and Clark's work, before passing their own confirming Order in Council. They continued, however, to refuse to consider any cut-offs to reserves in the Railway Belt and confirmed the Report except for the recommended cut-offs.

The potential dispute over cut-offs in the Railway Belt was left unaddressed until federal representative W.E. Ditchburn, Chief Inspector of Indian Agencies in British Columbia, and provincial representative J.W. Clark, Superintendent of the Immigration Branch, Department of Lands, began their review of the Royal Commission Report in late 1920. While reviewing the Royal Commissions work and preparing for negotiations with Clark, Ditchburn noted the Commissioners recommendations for cut-offs within the Railway Belt and requested instructions on how to proceed. [354] Scott sent him the

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[353] April 3, 1918 memorandum from D.C. Scott, Deputy Superintendent General of Indian Affairs to the Privy Council. Indian Affairs file 27150-3-5B, found on N.A.C. RG 10 volume 7782.

correspondence between himself and Deputy Minister of Justice Newcombe concerning the issue and noted that while he had concurred with Newcombe's position he had also recommended that the Commissioners report on the reserves in the Railway Belt. He instructed Ditchburn as follows: "They had no power to "cut off" lands in that area and their reports in this regard are merely recommendations which may, or may not, be confirmed by the Dominion Government. You should, therefore, be prepared to advise upon the recommendations of the Commission within the Railway Belt. " [355]

In May, 1921 Ditchburn wrote to Clark to solicit an understanding of British Columbia's attitude regarding cut-offs in the Railway Belt.[356] Clark responded that, "the Government of British Columbia cannot concur with the finding of the Deputy Minister of Justice (Newcombe) but is decidedly of the opinion that the reversionary interest in the Indian lands of the Province situated within the Railway Belt did not pass with the granting of the public lands in the Belt in 1884. "[357] Ditchburn telegraphed Scott and informed him that the Province still maintained its right to a reversionary interest in

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[354] December 20, 1920 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, B.C. Region, Department of Indian Affairs to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General found on N.A.C. RG 10 volume 11046.

[355] December 17, 1920 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs W.E. Ditchburn, Chief Inspector of Indian Agencies, B.C. Region, Department of Indian Affairs. Indian Affairs file 33/General v. 6, found on N.A.C. RG 10 volume 11047.

[356] May 21, 1921 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, B.C. Region, Department of Indian Affairs to J.W. Clark, Superintendent of B.C. Soldier Settlement, Department of Lands. B.C. Lands file 026076 v.3, found at the Surveyor General's Branch.

[357] June 6, 1921 letter from J.W. Clark, Superintendent of B.C. Soldier Settlement, Department of Lands to W.E. Ditchburn, Chief Inspector of Indian Agencies, B.C. Region, Department of Indian Affairs. Indian Affairs file 33/General found on N.A.C. RG 10 volume 11047.

Railway Belt reserves. [358] The same day he wrote to Clark suggesting that the Province put the question before the Attorney General to confirm the opinion of the Lands Department. [359] Clark did so and the Deputy Attorney General of British Columbia, W.H. Carter provided the following opinion:

"In my opinion the reversionary interest in Indian reserves in the Railway Belt did not pass to the Dominion by the Grant of the public lands in this Belt under the Act of 1884."[360]

Meanwhile, Scott wrote to Ditchburn:

"This is a matter which of course cannot be decided without the consent of the Governments, and it may be necessary in the end to have a judicial decision. As I before stated to you, I thought uniformity of treatment would be obtained by having the Commission deal with the reserves in the railway belt. I think you and Major Clark should also deal with them, and it will be time enough to consider the question of reversionary interest when the cut-offs are confirmed and have to be sold, when the claims of the province can then be decided."[361]

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[358] June 7, 1921 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, B.C. Region, Department of Indian Affairs to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v.4, found on N.A.C. RG 10 volume 11046.

[359] June 7, 1921 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, B.C. Region, Department of Indian Affairs to J.W. Clark, Superintendent of B.C. Soldier Settlement, Department of Lands. B.C. Lands file 026076 v.3, found at the Surveyor General's Branch.

[360] June 8, 1921 letter from W.H. Carter, Deputy Attorney-General of British Columbia to J.W. Clark, Superintendent of B.C. Soldier Settlement, Department of Lands. B.C. Lands file 026076 v.3, found at the Surveyor General's Branch.

[361] June 8, 1921 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to W.E. Ditchburn, Chief Inspector of Indian Agencies, B.C. Region, Department of Indian Affairs. Indian Affairs file 33/General v.6, found on N.A.C. RG 10 volume 11047.

Ditchburn continued to press the Province to relinquish its claim to a reversionary interest into 1923. [362] He spend a good deal of time reviewing the documents conveying the Railway Belt and the legal decisions considering the respective rights of the Province and the Federal Government. Eventually, as the Ditchburn- Clark review was winding down in February 1923, he was successful in getting support to refuse Federal Government consideration of Railway Belt reserve cut-offs. At one point he suggested that even the Province knew their claim was on shaky ground having sold their claimed reversionary interest in the Deadman Creek Reserve to a Mr. Smith Curtis for $.50 an acre at a time when the going rate outside the Railway Belt was $2.50. [363]

On March 12, 1923 Ditchburn made his full case in a letter to Major Clark. In that letter he relied on the wording of the December 19, 1883 Provincial Act transferring the Belt and, like McKenna, made much of the exception of reserves from the Vancouver Island grant and not from the mainland one. "I take it, therefore, that it was clearly understood by the British Columbia Government of 1884 that the Indian Reservations within the Forty -mile Belt along the line of the Canadian Pacific Railway were being conveyed to the Dominion Government by this Act, or as provided for by the Thirteenth Article of the Terms of Union."[364] He also quoted liberally the decision by the Judicial

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[362] August 16, 1922 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, B.C. Region, Department of Indian Affairs to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v.6, found on N.A.C. RG 10 volume 11047.

[363] March 12, 1923 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, B.C. Region, Department of Indian Affairs to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v.6, found on N.A.C. RG 10 volume 11047.

[364] March 12, 1923 letter from W.E. Ditchburn, Chief Inspector of Indian Agencies, B.C. Region, Department of Indian Affairs to J.W. Clark, Superintendent, Immigration Branch, Department of Lands. B.C. Lands file 026076 v.3, found at the Surveyor General's Branch.

Committee of the Privy Council in the Fisheries Reference of 1914. He concluded by refusing " ...to discuss with you, as a representative of the British Columbia Government, any matters with regard to the Report of The Royal Commission of Indian Affairs pertaining to Indian Reserves within the Railway Belt...," [365] Clark responded by once again stating the Provincial position and referring him to the February 26, 1907 report by Attorney-General Fulton (discussed in Part One of this paper) setting out the Provincial position on ownership of reserves and denying any proprietary interest to the Aboriginals in reserves anywhere in the Province. [366] Nevertheless, Ditchburn refused to compromise. He completed reviewing the work of the Commissioners but refused to consider the Province's recommended cut-offs to the Railway Belt reserves.

On March 3, 1924 Scott recommended to Minister of the Interior Charles Stewart that the Report of the Royal Commission as amended by Ditchburn and Clark be confirmed except for the cut-offs in the Railway Belt.[367] These recommendations were accepted by the Governor in Council on July 19, 1924 in P.C. 1265. With respect to cut-offs in the Railway Belt P.C. 1265 states as follows:

The Minister further states 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

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[365] Ibid.

[366] March 15, 1923 letter from J.W. Clark, Superintendent, Immigration Branch, Department of Lands to W.E. Ditchburn, Chief Inspector of Indian Agencies, B.C. Region, Department of Indian Affairs to. B.C. Lands file 026076 v.3, found at the Surveyor General's Branch.

[367] March 4, 1924 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to C. Stewart, Superintendent General of Indian Affairs. Indian Affairs file 27150-3-5B, found on N.A.C. RG 10 volume 7782.

work was accordingly carried out and their report and recommendations are to be found in the general report on Indian Reserves throughout the Province.

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

While the negotiations carried on towards obtaining confirmation of the Royal Commission Report, the Federal Government continued to pass orders in council confirming reserves and withdrawing them from the operation of Dominion Land Regulations. By Order in Council dated October 17, 1918, 22 areas where Aboriginals had made improvements to lands adjoining permanent reserves (two which had been allotted by the Royal Commission) were confirmed.[368] One additional reserve was confirmed and withdrawn on March 21, 1921. And on June 14, 1924 a further 16 reserves were transferred to the Department of Indian Affairs. During this period as well the wording of orders in council purporting to confirm reserves, most notably P.C. 205, came under some criticism for simply stating they were withdrawing the reserves from the operation of Dominion Land Regulations without positively confirming them as reserves. A study of the various orders in council shows inconsistency in the language used.

[368] October 17, 1918 Federal Order-in-Council P.C. 2544. Indian Affairs file 27150-4, found on N.A.C. RG 10 volume 7785.

Reserve Creation and the Reconveyance of Railway Belt Lands to British Columbia

As noted in Part One of this paper, the Federal Government's refusal to accept cut-offs in the Railway Belt upset Provincial officials and became a major stumbling block in the negotiations over the conveyance of reserves outside the Railway Belt. After lengthy debate, however, the cut-off issue was overshadowed by British Columbia's claim for the reconveyance of the entire Railway Belt. When this claim was successful the cut-off issue was apparently dealt with by the negotiation of the Scott-Cathcart Agreement which set out the terms under which Railway Belt reserves would be excepted from the reconveyance.

British Columbia's Minister of Lands, T.D. Pattullo, articulated the Province's position on cut-offs in a letter to Scott dated August 30, 1924:

> So far as I am aware the Provincial Government has never admitted that the Indian Reserves in the Railway Belt are under the sole jurisdiction of the Dominion. In fact our understanding all along has been to the contrary; that those reserves in the Belt which were established prior to its transfer to the Dominion were in exactly the same position as other reserves throughout the Province. No distinction was made, even by reference to a difference in standing in the agreement as made between Sir Richard McBride and Mr. McKenna under which the Royal Commission was appointed, nor is there any distinction made in the Report of the Royal Commission which includes the reserves in the Railway Belt.[369]

In early 1926 Scott attempted to bring the issue of Railway Belt cut-offs directly before

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[369] August 30, 1924 letter from T.D. Pattullo, Minister of Lands to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 55,335 v.3A, found on N.A.C. RG 10 volume 3820.

Premier Oliver. He informed him that:

With respect to the reserves in the Railway Belt we are administering them upon the assumption that they are not affected by any Provincial interest beyond that which may attach to any other lands in the Railway Belt as advised by the Deputy Minister of Justice. If the Province is disposed to take issue with the Dominion in respect of the Reserves in the Railway Belt, I would suggest that the matter be determined by the Exchequer Court of Canada or such other tribunal as may be agreed upon.[370]

Premier Oliver responded that his personal disposition was to consider the reserves set aside before the transfer as alienated lands which did not pass with the transfer. With respect to those set aside after, he noted that the object of the conveyance was to sell the lands towards the construction of the Railway and added: "I think it is quite apparent that the Indian reserves could not be sold or used for railway purposes." [371]

After looking into the question British Columbia began preparations towards entertaining a court reference. On June 14, 1926 British Columbia's Deputy Minister of Lands requested on behalf of Minister Pattullo that the Attorney-General make the arrangements to refer the question of reversionary rights in Railway Belt reserves for a judicial decision.[372] However, action on this front did not progress quickly. On October 13, 1927 Ditchburn reported to Scott that Pattullo was still awaiting a memorandum

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[370] April 21, 1926 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to J. Oliver, Premier of British Columbia. Indian Affairs file 901/30-1-13, found on N.A.C. RG 10 volume 10240.

[371] April 30, 1926 letter from J. Oliver, Premier of British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 901/30-1-13, found on N.A.C. RG 10 volume 10240.

[372] June 14, 1926 letter from H. Cathcart, Deputy Minister of Lands to the Attorney-General of British Columbia. B.C. Lands file 026076 v.4, found at the Surveyor General's Branch.

from the Attorney General.[373] The parry and thrust between Oliver, and Pattullo and Scott continued throughout 1926, and the dispute over Railway Belt cut-offs remained an open impediment to negotiations for the conveyance of reserves outside the Railway Belt.

On May 21, 1926 Premier Oliver presented a formal Memorandum to the Government of Canada "Respecting the Claim of British Columbia for a Reconveyance to the Province by the Government of Canada of the Lands conveyed by the Province to the Dominion in Sequence to Paragraph 11 of the Terms of Union" putting forth evidence and requesting an investigation into their claim.[374] After persisting for over a year he was successful, on March 7, 1927, in having a Royal Commission under Saskatchewan Court of Appeal Justice J.W. Martin appointed to review the claim. Martin decided that the Province had no claim in law to require Canada to reconvey the lands, but on the basis of fairness recommended they should: [375]

> The situation is one which, in my opinion, calls for a remedy, and the remedy should be the restoration to the Province of the lands held by the Dominion in both the Railway Belt and the Peace River Block. When this is done, British Columbia will be placed in a position of equality with the other Provinces in respect of the cost of the construction of the Canadian Pacific Railway.

As also noted in Part One of this paper, upon hearing that the Federal Government was

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[373] October 13, 1927 letter from W.E. Ditchburn, Indian Commissioner for British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 59,335 v.3A, found on N.A.C. RG 10 volume 3820.

[374]May 21, 1926 memorandum submitted by J. Oliver, Premier of British Columbia to the Federal Government. Indian Affairs file 33/General v.5, found on N.A.C. RG 10 volume 11046.

[375] *Report of the Royal Commission on Reconveyance of Land to British Columbia.* Found on N.A.C. RG 33/109 volume 1, file 3.

favourably considering the Province's claim, Ditchburn and Scott prepared to seize the opportunity to negotiate for a relinquishment of the Province's reversionary interest claims.

Throughout 1928 the impetus towards the reconveyance of the Railway Belt lands was growing and Ditchburn continued to correspond with Scott regarding the clarification of reserve matters including the Province's claim to a reversionary interest in the Railway Belt reserves. In February Scott was instructed by Minister Stewart to visit British Columbia to discuss the Aboriginal land issues arising from the proposed transfer. In preparing for the meeting Scott drafted a memorandum for Minister Stewart outlining the outstanding issues. In the memorandum Scott stated he would negotiate for the unconditional conveyance of reserves outside the Railway Belt and the acceptance of the schedule of reserves inside the Railway Belt on the same terms. [376] Scott left Ottawa for Victoria on March 5, 1929. [377]

On March 22, 1929 the Scott-Cathcart agreement was signed. Clause 6 dealt with reserves in the Railway Belt:

Regarding Indian Reserves in the Railway Belt and Peace River Block, we have agreed that Indian Reserves set apart by the Dominion Government in the Railway Belt and in the Peace River Block (as shown in Schedule hereto annexed), and also the Indian Reserves set apart before the transfer of the Railway Belt and Peace River Block by the Province to the Dominion shall be excepted from the reconveyance of the Railway Belt and Peace River Block, and shall be held in trust and administered by the Dominion

[376] February 20, 1929 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to C. Stewart, Superintendent General of Indian Affairs. Indian Affairs file 901/30-1-18 v.1, found in the N.A.R.C., locator number X315.

[377] February 28, 1929 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to S.F. Tolmie, Premier of British Columbia.

under the terms and conditions set forth in the Agreement dated 24th September, 1912 between Mr. J.A.J. McKenna and the Honourable Sir Richard McBride (as confirmed by Dominion Statute, Chapter 51 of the Statutes of 1920, British Columbia Statute, Chapter 32 of the Statutes of 1919) in the Dominion Order in Council Number 1265, approved 19th July, 1924, and Provincial Order in Council Number 911, approved 26th July 1923, and in the form of conveyance marked "A" of the Indian Reserves outside the Railway Belt and Peace River Block.

Scott was successful in having the annexed schedule of reserves in the Railway Belt reflect no cut-offs or reductions. As discussed in Part One he was not, however, successful in achieving an unconditional conveyance of the reserves outside the Railway Belt. The form of conveyance, which pursuant to Scott-Cathcart contained terms which also applied to the Railway Belt reserves, included a number of conditions in favour of the Province:

the lands set out in the schedule attached hereto be conveyed to His Majesty the King in the right of the Dominion Government in trust for the use and benefit of the Indians of the Province of British Columbia, subject however to the right of the Dominion Government to deal with the said lands in such manner as they may deem best suited for the purpose of the Indians including a right to sell the said lands and fund or use the proceeds for the benefit of the Indians subject to the condition that in the event of any tribe or band in British Columbia at some future time becoming extinct that any lands hereby conveyed for such tribe or band, and not sold or disposed of as heretofore provided, or any unexpended fund being the proceeds of any such sale shall be conveyed or repaid to the grantor, and that such conveyance shall also be subject to the following provisions:

1. ... to resume any part of the said lands which it may be deemed necessary to resume for making roads, canals, bridges, towing paths, or other works of public utility or convenience; so, nevertheless, that the lands so to be resumed shall not exceed one-twentieth part of the whole of the lands aforesaid, and that no such resumption shall be made of any lands on which any building may have been erected, or which may be in use as gardens or otherwise for the more convenient occupation of any such building:

2... to take and occupy such water privileges, and to have and enjoy such rights of carrying water over, through or under any parts of the hereditament hereby granted, as may be reasonably required for mining or agricultural purposes in the vicinity of said hereditament, paying therefor a reasonable compensation to the aforesaid:

3....to take from or upon any part of the hereditament hereby granted, without compensation, any gravel, sand, stone, lime, timber or other material which may be required in the construction, maintenance, or repair of any roads, ferried, bridges, or other public works:

4....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.

When the reconveyance agreement was being drafted towards the end of 1929 it was considered sensible to include the terms from the Scott-Cathcart Agreement.[378] A controversy arose over the proposed wording of the clause excepting the Railway Belt reserves from the reconveyance. Ditchburn investigated the problem and found out that Provincial officials objected to the words "of which said reserves a list has been agreed upon between the parties to this agreement" which he suspected was essentially in connection with the matter of Royal Commission cut-offs and reductions to Railway Belt reserves. He suggested if the amendment was made as recommended there should be a sentence noting that there would be no cut-offs to reserves in the Railway Belt as

[378] November 11, 1929 letter from A.M. Manson, Attorney-General of British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 901/30-1-18 v.1, found at the N.A.R.C., locator number X315.

recommended by the Royal Commission.[379]

On January 24, 1930 Scott recommended passage of an Order in Council approving the Scott-Cathcart Agreement. He responded to Ditchburn's concern with the draft Re-transfer Agreement by pointing out that Provincial officials had approved the schedule attached to Scott-Cathcart and the wording for the reserve clause in the draft Re-transfer Agreement. The draft agreement noted that the Railway Belt reserves would continue to be held on the terms set out in the Federal Order inCouncil approving the Scott-Cathcart Agreement.[380] This Federal Order in Council, P.C. 208, was passed on February 3, 1930 approving the Scott-Cathcart Agreement and directing it to be carried out according to its terms.[381] In total 313 reserves in the Railway Block were excepted from the reconveyance as confirmed by P.C. 208 plus an additional four in the Peace River Block.

On February 20, 1930 Canada and British Columbia signed an agreement for the transfer of the Railway Belt and Peace River Block. Section 13 dealt with Indian reserves:

13. Nothing in this agreement shall extend to the lands included within Indian reserves in the Railway Belt, 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 on the

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[379] January 10, 1930 letter from W.E. Ditchburn, Indian Commissioner for British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v.5, found on N.A.C. RG 10 volume 11046.

[380] January 31, 1930 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to W.E. Ditchburn, Indian Commissioner for British Columbia. Indian Affairs file 33/General v.5, found on N.A.C. RG 10 volume 11046.

[381] February 3, 1930 Federal Order-in-Council P.C. 208. N.A.C. RG 2.

Governor General of Canada in Council approved on the 3rd day of February, 1930(P.C. 208).[382]

The Transfer Agreement was approved by federal statute assented to on May 30, 1930.[383] The Transfer Agreement was confirmed also by United Kingdom statute, *The Constitution Act, 1930* giving it constitutional status:

1. The Agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the British North America Act, 1867 of any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

On September 24, 1930 the Provincial Government passed Order in Council 1151 approving the Scott-Cathcart Agreement.[384]

The impending transfer had also provided an impetus to finish surveys of reserves in the Railway Belt and have them confirmed. [385] 67 reserves were confirmed between the passage of P.C. 1265 and the signing of the Railway Belt re-transfer agreement: P.C. 409 dated March 19, 1925 withdrew and transferred 22 reserves; P.C. 1142 withdrew and transferred 1 reserve; P.C. 300, February 20, 1929 withdrew and transferred 17 reserves;

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[382] February 20, 1930 Memorandum of Agreement signed by E. Lapointe, Minister of Justice and C. Stewart, Minister of the Interior for the Federal Government and by S.F. Tolmie, Premier of British Columbia and F.P. Burden, Minister of Lands for the Provincial Government.

[383] May 30, 1930 *Act respecting the transfer of the Railway Belt and the Peace River Block.* Statutes of Canada, 20-21 George V, Chapter 37, 1930.

[384] September 24, 1930 Provincial Order-in-Council 1151. Indian Affairs file 901/30-1-18 v.1, found in the N.A.R.C., locator number X315.

[385] March 30, 1928 letter from D.C. Scott, Deputy Superintendent General of Indian Affairs to J.W. Greenway, Department of the Interior. Indian Affairs file 88,268-1A, N.A.C. RG 10 volume 3869.

P.C. 301 withdrew and transferred 6 reserves; P.C. 751 withdrew and transferred 11 reserves; and P.C. 770 withdrew and transferred 10 reserves.

After the re-conveyance of the Railway Belt 19 additional reserves were confirmed by federal Order in Council: P.C. 1771 withdrew and transferred 14 reserves; and P.C. 2988 transferred another 5 reserves.

Negotiations After Scott-Cathcart-Railway Belt Cut-offs Revisited

In 1932 British Columbia's new Minister of Lands, N.S. Lougheed brought up the issue of Railway Belt cut-offs once again. Ditchburn reported that Lougheed was particularly interested in securing the Seabird Island cut-off the largest, and most valuable, of the Railway Belt cut-offs recommended by the Royal Commission.[386] A few weeks later Ditchburn reported that Deputy Minister of Lands Cathcart had informed him that no further work would be undertaken on Aboriginal land matters until cut-offs in the Railway Belt were dealt with.[387]

The Superintendent General of Indian Affairs T.G. Murphy intervened to attempt to arrange a solution with Premier Tolmie and bring the discussions to a close. [388] Tolmie referred the matter to Lougheed who again refused to deal with Aboriginal land matters until Railway Belt cut-offs were resolved. Despite the terms of the Scott-Cathcart Agreement, with the annexed schedule of Railway Belt reserves, and the Provincial Order in Council approving it, he insisted that the Province had never given up their

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[386] March 2, 1932 letter from W.E. Ditchburn, Indian Commissioner for British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v. 2, found on N.A.C. RG 10 volume 11045.

[387] March 4, 1932 letter from W.E. Ditchburn, Indian Commissioner for British Columbia to D.C. Scott, Deputy Superintendent General of Indian Affairs. Indian Affairs file 33/General v. 2, found on N.A.C. RG 10 volume 11045.

[388] March 18, 1932 memorandum from D.C. Scott, Deputy Superintendent General of Indian Affairs to T.G. Murphy, Superintendent General of Indian Affairs. Indian Affairs file 33/General v. 4, found on N.A.C. RG 10 volume 11046; also March 24, 1932 letter from T.G. Murphy, Minister of the Interior to S.F. Tolmie, Premier of British Columbia. Indian Affairs file 27150-3-18 v. 1, found on N.A.C. RG 10 volume 7785.

reversionary interest to the reserves in the Railway Belt.[389] The debate between Lougheed and Murphy continued for the rest of 1932 without any resolution. [390]

British Columbia continued to maintain their claim to Railway Belt cut-offs until August 1934 when Acting Secretary of Indian Affairs, T.R.L. MacInnes travelled to Victoria to negotiate a solution. MacInnes and Assistant Indian Commissioner for British Columbia C.C. Perry met with Cathcart and were successful in finally having the claim formally dropped by a representative of the British Columbia Government. [391]

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[389] April 6, 1932 letter from N.S. Lougheed, Minister of Lands to T.G. Murphy, Minister of the Interior. Indian Affairs file 27150-3-18 v. 1, found on N.A.C. RG 10 volume 7785.

[390] September 15, 1932 letter from N.S. Lougheed, Minister of Lands to T.G. Murphy, Minister of the Interior. British Columbia Department of Lands files; also December 5, 1932 letter from T.G. Murphy, Superintendent General of Indian Affairs to N.S. Lougheed, Minister of Lands. British Columbia Department of Lands file 026076 v. 4, found at the British Columbia Surveyor General's Office. May 31, 1932 letter from T.G. Murphy, Superintendent General of Indian Affairs to N.S. Lougheed, Minister of Lands. British Columbia Department of Lands files.

[391] August 24, 1934 memorandum by T.R.L. MacInnes and C.C. Perry, Assistant Indian Commissioner for British Columbia. Indian Affairs file 27150-3-18 v. 1, found on N.A.C. RG 10 volume 7785.

Conclusion

Ending the dispute over Railway Belt cut-offs cleared the way for a final resolution of the reversionary interest debate by the Province formally transferring its claimed underlying interest in "lands reserved for Indians" to the Federal Crown. After the passage of Order in Council 1036 the Province's claim to a proprietary interest in the reserves outside the Railway Belt was effectively ended and the administrative gridlock dissolved. The reserves in the Province were now conclusively within the legislative jurisdiction and control of the Federal Government with the Aboriginal interest held in trust on behalf of the Bands for whom they were allotted. Pursuant to the McKenna-McBride Agreement the Province retained a right to the return of reserve lands to provincial control in the event that a Band became completely extinct, however, they ultimately surrendered that right as well by further Order in Council passed on May 13, 1969. [392]

[392] Order in Council 1555, dated May 13, 1969.