

**Lower Similkameen Indian Band
Vancouver, Victoria and Eastern Railway
Right of Way Inquiry**

Backgrounder

Starting in 1878, lands were set aside in the Similkameen River valley of southcentral British Columbia for Indian reserves for the Lower Similkameen Band. The valley lies between the Cascade Mountains and the Okanagan River.

These lands were described as dry farm land and rocky bluffs with some areas of good soil that produced hay, oats, vegetables and fruit. The residents were engaged in farming and raising livestock. There were also several small villages located on these lands.

In 1905, the Vancouver, Victoria and Eastern Railway and Navigation Company (VV&E), a subsidiary of the Great Northern Railway (now the Burlington Northern and Santa Fe), asked the Government of Canada for a right of way through the Lower Similkameen Band's lands. Its request was granted, and a railway was built linking mines in the upper valley to the Great Northern line in Washington State.

The former right of way at issue in this inquiry lies between Keremeos and the U.S. border, a distance of about 24 km. Arrangements were made to compensate the Band for the land and improvements. The Indian Agent for the Department of Indian Affairs valued the land at \$5 per acre and made separate valuations for improvements, clearing, and cultivation, which would be paid directly to individual band members. In comparison, prior to the Agent's valuations, the solicitor acting on behalf of the VV&E estimated the value of the land to be approximately \$25 per acre. In some cases, the railway paid more than \$100 for adjoining lands of similar quality owned by non-Aboriginals.

Shortly after these arrangements were made, the Band Chief wrote to the department protesting against the valuations and stating that the Band had not yet received any money. R.C. Armstrong, a local Justice of the Peace, also wrote to the department stating that he had been paid \$100 per acre for his land, adjacent to the Band's lands. He claimed the Band wanted arbitration and offered to act on the Band's behalf.

Surveyor Ashdown Green was sent to investigate and, after visiting the area, reported that the Indians had been dealt with reasonably and had no cause for complaint. The money owed to band members for improvements was then paid. The Band, however, continued to complain that the compensation received was not fair.

Although the provincial and federal governments had been negotiating the status of lands to be reserved for Indians since 1871, when British Columbia became a province of Canada, it was not until 1938 that the legal status of the lands of most B.C. First Nations was finalized, including the lands of the Lower Similkameen people. With the passage of Order in Council 1036, the provincial government transferred title to the lands to Canada to be held in trust for the use and benefit of the Indians. Although all concerned had treated the Band's lands as Indian reserves from the outset, it is apparent from the Supreme Court of Canada's 2001 decision in *Wewaykum* that only after this transfer did the lands become Indian reserves.

In 1944, the line was leased to the parent Great Northern Railway and, in 1954, the line above Keremeos was abandoned. In 1972, a flood washed out the railway bridge south of Keremeos and the line became impassable. In 1977, the Lower Similkameen Band contacted the successor railway company to find out how it could reacquire the right of way, but was informed that no decision had been made.

On application by the railway, the Canadian Transport Commission in 1985 approved formal abandonment of the rail line. In the course of this process, the Band advised that it did not object "as long as the crossing right of ways are returned" to the Band. Although the former right of way has been disused since 1972, its legal status continues to be controversial, with the railway, the federal government and the Band all asserting an interest in it.

Issues

Compensation

1. Duty to obtain adequate compensation

Did Canada have a duty to the Lower Similkameen Band to obtain adequate compensation based on fair market value and/or the compensation that was provided to other land owners in the area?

Yes. There were three parallel and consistent sources of duty to ensure that the Lower Similkameen Band obtained adequate compensation for the right of way lands – a statutory duty, a common law duty and a fiduciary duty. Although the fiduciary duty was not that owed in the context of an existing reserve, it was nevertheless the highest pre-reserve-creation duty owed.

2. Breach of duty

Did Canada breach its duty to the Lower Similkameen Band to obtain adequate compensation?

Taking into consideration both fair market value and the level of compensation paid to neighbouring, non-Aboriginal land owners in the area, the Lower Similkameen Band was paid an unreasonably low amount for its land. The ICC found that, from the outset, the department did not follow statutory requirements. No evidence was presented that would justify any difference between compensation paid for Aboriginal and for non-Aboriginal land. Therefore the panel concluded that the duties to compensate the Band adequately for the taking of the lands were breached.

The panel also found that there was no evidence that Canada considered the impact of the railway on the way of life of the Similkameen people. Compensation was not paid for damage that included poorly maintained fences resulting in the death of livestock, the destruction of a gravesite and a number of spiritual sites, environmental damage, as well as the disruption of towns, villages, and wildlife migration patterns.

3. Duty to name an arbitrator

Did Canada have a duty to name an arbitrator regarding the taking of the lands and, if so, was that duty breached?

Once the Band notified Canada that it was not happy with the compensation paid, Canada had a duty to examine the grievances but did not have a duty to hold an arbitration and appoint an arbitrator. The panel found that Canada's failure to address seriously and conscientiously the problem that had been identified was one aspect of the Crown's breach of fiduciary duty to obtain adequate compensation for the Band.

4. Breach of duty with respect to investigation by Ashdown Green

Did Canada breach its duty to the Lower Similkameen Band with respect to the 1906 investigation conducted by Ashdown Green regarding the value of the lands taken for the right of way?

Ashdown Green was asked by his superiors at the Department of Indian Affairs to investigate the price paid to the band for the right of way lands. Although the panel thought this was not done very well, it was unable to find that Canada had breached a duty to the Band with respect to Ashdown Green's investigation.

5. Reversionary interest in the land

Did Canada have a duty to ensure that the lands taken reverted back to Canada and then to reserve status for the benefit of the Lower Similkameen Band once the land was no longer needed for the railway?

The panel concluded that the lands in question have been reserve lands since they were conveyed by British Columbia to Canada for that purpose. Upon abandonment, the interest of the railway reverted to Canada for the use and benefit of the Lower Similkameen Band, and Canada has a duty to ensure that this is reflected in the legal status of the lands. The panel concluded that the former right of way now has full reserve status.