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**CROWN LAND GRANTS:
A HISTORY OF THE
ESQUIMALT AND NANAIMO RAILWAY LAND GRANTS
THE RAILWAY BELT AND
THE PEACE RIVER BLOCK**

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W.A. Taylor, B.C.L.S.

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**ESQUIMALT AND NANAIMO RAILWAY CO.
LAND GRANT**

The chronological events pertinent to the establishment of the E & N Grant(s) referred to here, are only those which contribute to the jurisdiction and ownership question. What seemed like a simple agreement - start the Railway within two years (and as it only took three years to build the whole thing it should have been over in 1876) developed into a frustrating attempt by the Province to get the best deal possible for the settlers. They continued their efforts for 49 years! The purpose of the railway was to serve and develop settlement, yet the Dominion Government which really was only the agent in trust, apparently attempted to interpret the agreement from a very early date, to favour the yet unsecured contractor. This caused the loss by settlers of their subsurface rights to coal and base metals.

During the period prior to the establishment of the E & N Belt the Colony of Vancouver Island and then the Province had been continually making surveys in the Districts as far north as Cranberry. The Chief Commissioner of Lands and Works reported to the Legislature, 9th February 1885 that he had made arrangements with the E & N Railway Co. to continue making the surveys.

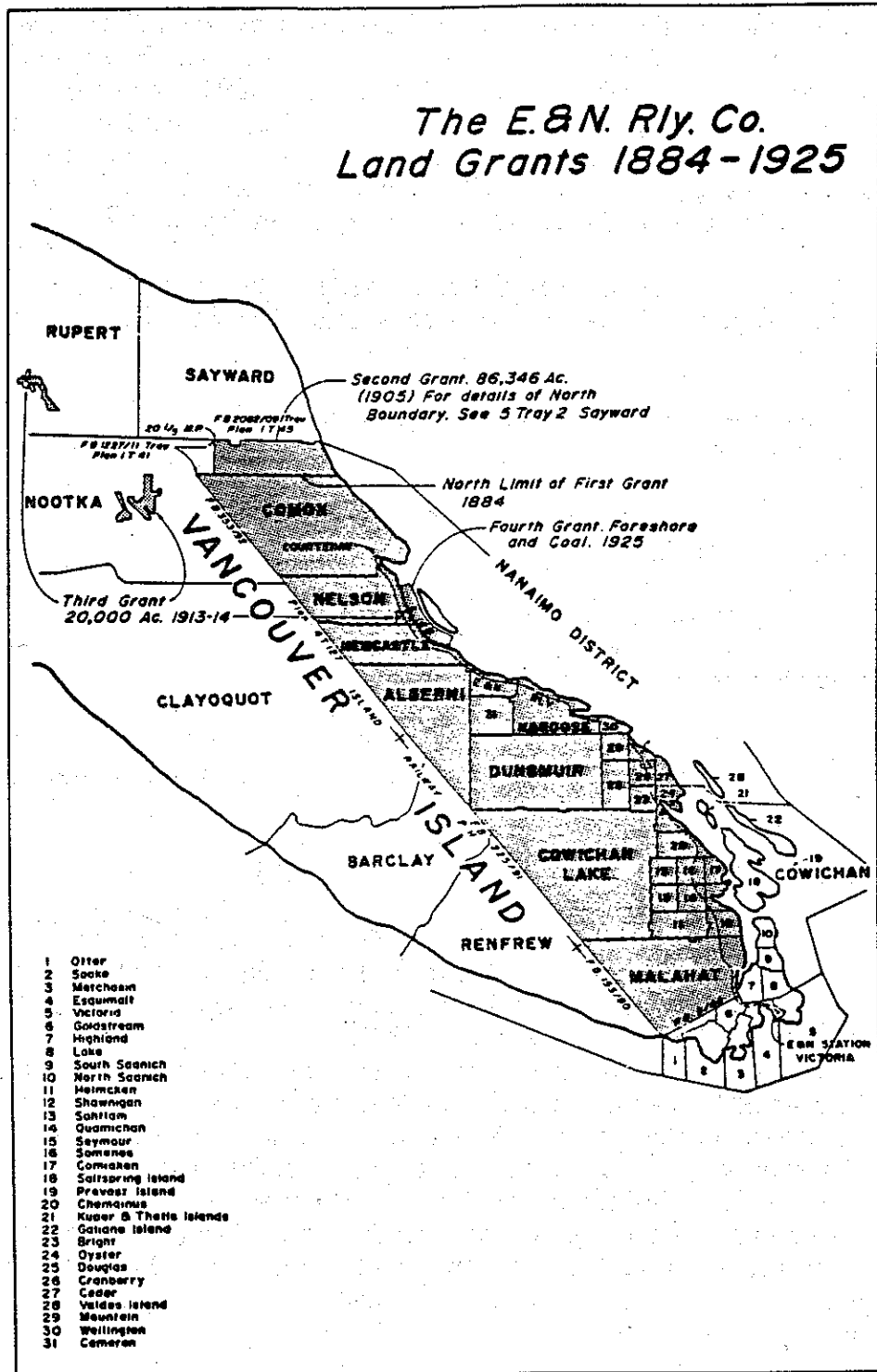
May 16, 1871 - The Terms of Union (as provided for in the British North America Act of 1867) which admitted the colony of British Columbia into the Dominion of Canada specified as one of its conditions the construction of a Railway.

CLAUSE 11 - TERMS OF UNION

"11. *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 furtherance of the construction of the said 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 North-west Territory and the Province of Manitoba: Provided that the quantity of land which may be held under pre-emption 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

MAP OF THE E & N RAILWAY COMPANY LAND GRANTS 1884 - 1925



lands; and provided further that until the commencement, within two years, as aforesaid, from the date of the 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 other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the railway, the Dominion Government agree to pay to British Columbia, from the date of the Union, the sum of 100,000 dollars per annum, in half-yearly payments in advance."

The "seaboard of British Columbia" was the controversial phrase, whether it meant a terminus at Burrard Inlet or whether the railway was to cross Seymour Narrows and proceed southerly on Vancouver Island to Esquimalt.

In order to facilitate the most advantageous result that the Province could expect from the bitter discussions which ensued, a Reserve was established as identified below.

1874 - B.C. Gazette, July 18th, page 139

"a strip of land Twenty Miles in width along the Eastern Coast of Vancouver Island between Seymour Narrows and the Harbour of Esquimalt, is hereby Reserved."

Note: This description, of course was never used in the conveyance but it did effectively prevent further alienation until the final settlement by the Settlement Act of 1883.

ESQUIMALT AND NANIAMO RAILWAY ACT, 1875

The Dominion made a definite statement that Esquimalt would be the terminus and the Provincial Legislature passed an Act to authorize the grant of certain public lands to the Government of Canada, for Railway purposes. This Act became known as the Esquimalt and Nanaimo Railway Act of 1875. The land described was a strip not to exceed 20 miles in width on either side of the line between the Town of Nanaimo and Esquimalt Harbour. The idea of the railway crossing at Seymour Narrows was abandoned at this point. The Dominion initiated a bill to authorize construction. However, it was defeated in the Senate and the construction of the line and conveyance of the land did not proceed. Although it was a Dominion Government responsibility to arrange the construction of the Railway, because of the long delay the Province attempted to contract with the Vancouver Land and Railway Co. (Lewis Clement) and also the Victoria, Esquimalt and Nanaimo Railway Co. (Robert Dunsmuir) to commence construction, but could not get acceptable guarantees from either company.

Settlers continued to move into the Reserved lands and expected eventually to get a Grant. The 1875 E & N Railway Act was repealed in 1882 (Chapter 18 S.B.C. 1882). The 1874 Gazetted Reserve was in effect till rescinded in 1883 and was replaced by:

1883 - B.C. Gazette June 14th, page 192 - a Reserve on a tract bounded by:

*"On the South, by a straight line drawn from the head of Saanich Inlet to Muir Creek, on the Straits of Fuca;
On the West, by a straight line drawn from Muir Cree, aforesaid, to Crown Mountain;
On the North by a straight line drawn from Crown Mountain towards Seymour Narrows, to the 50th parallel of latitude, to a point on the coast opposite Cape Mudge; and
On the East, by the coast line of Vancouver Island to the point of commencement."*

Note: This was not as actually conveyed in the first grant.

The Dominion Government finally secured a contractor and entered into an agreement with the Esquimalt and Naniamo Railway Co. (Robert Dunsmuir and Associates) on the 28th of August 1883. The line was to be completed by the 10th of June 1887. The first move, under the Terms of Union, to transfer land in aid of the Railway had now to be made.

FIRST LAND GRANT - SETTLEMENT ACT, 1884

1884 - Chapter 14 S.B.C. - An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province (known as the Settlement Act.)

Sections 3 and 4 outlined the boundaries (note the difference between the grant and the 1883 gazette.) Sections 5 and 6 deal with credit to be given for granted lands.

The minerals in Section 3 do not include Gold and Silver see Bainbridge vs. Esquimalt and Naniamo Railway Co. (4 B.C. Reports 181.)

"3. *There is hereby granted to the Dominion Government, for the purpose of constructing, and to aid in the construction of a Railway between Esquimalt and Naniamo, 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:-*

Bounded on the South by a straight line drawn from the head of Saanich Inlet to Muir Creek on the Straits of Fuca;

On the West by a straight line drawn from Muir Creek aforesaid to Crown Mountain;

On the North by a straight line drawn from Crown Mountain to Seymour Narrows; and

On the East by the Coast of Vancouver Island to the point of commencement; and including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein, and therefore.

4. *There is excepted out of the tract of land granted by the preceding section all that portion thereof lying to the northward of a line running East and West half way between the mouth of the Courtenay River (Comox District) and Seymour Narrows.*

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 the Act by Crown grant, preemption, 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 or settlements, nor Naval or Military reserves."*

"23. *The company shall be governed by sub-section (f) of the hereinbefore recited agreement, and each bona fide squatter who has continuously occupied, and improved any of the lands within the tract of land to be acquired by the company from the Dominion Government for a period of one year prior to the first day of January 1883, shall be entitled to a grant of the freehold of the surface rights of the said squatted land, to the extent of 160 acres to each squatter, at the rate of one dollar an acre."*

Note that the preemptors were only to get surface rights (not coal or timber or base metals) and the inclusion of these, in the grant to the Company seriously prejudiced the rights of the settlers who had been moving in all this time. They persevered in their claim to a full grant.

From the time of joining Confederation in 1871 until 1884 the Province could not issue any grants in the Railway Reserve, despite the large number of preemptors. The Province had however issued them preemption records. Surveys had been proceeding under Provincial sponsorship. Copies of the plans were turned over to the Dominion Government and in 1886 the Dominion began issuing Patents to lands in Nelson, Cranberry, Quamichan, Cowichan, Comiaken, Shawnigan, Chemainus, Alberni, Newcastle, Cedar and Comox Districts. There is a schedule attached to an order in council of December 30th, 1885 listing names of those eligible for Grants. There are some small differences between this list and the Patents issued.

The Dominion Patents issued reserved all the base metals and coal to the Crown and gave the E & N Railway the right to take land for right of way or station grounds, without payment of compensation.

The land granted to the Dominion by the Settlement Act of 1884 was granted by that government on the 21st April 1887 to the E & N Railway Co., on completion of construction of the railway to the "entire satisfaction" of the Governor in Council. The Grant was recorded in the Victoria Land Registry, 25 May 1887 and the description is essentially as in the Settlement Act of 1884. The actual amount of land previously Granted and being preempted which was an exception from the title was not specified, and this is understandable because of the controversy that was raging about the bona fide settlers not being given the timber and subsurface rights.

Right finally triumphed over might and the settlers won their claim to full title.

VANCOUVER ISLAND SETTLERS' RIGHTS ACT - 1884

1904 (Chapter 54 S.B.C. 1904) The Vancouver Island Settlers' Rights Act passed the Provincial Legislature and gave the settlers, who could show bona fide occupation and improvement of lands within the E & N belt, prior to enactment of the Settlement Act (1884) and who applied to the Lt. Gov. in Council in the following year, the right to obtain Crown Grants in fee simple. The E & N Railway Co. appealed to the courts and the Dominion Government but the 1904 Act was allowed to stand. The company subsequently approached the Province to obtain lands in lieu of those alienation under the 1904 Settlers' Rights Act. Settlement of this question resulted in what later became the Third Grant. Relevant parts of the V.I. Settlers' Rights Act are quoted hereunder.

"1. *This Act may be cited as the Vancouver Island Settlers' Rights Act, 1904'.*

2. *In this Act, unless the context otherwise requires --*

(a) *"Railway Land Belt" shall mean the lands described by section 3 of chapter 14 of 47 Victoria, being an act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province"*

(b) *"Settler" shall mean a person who, prior to the passing of the said Act, occupied or improved lands situate within the said railway land belt, with the bona fide intention of living thereon.*

3. *Upon application being made to the Lieutenant-Governor in Council within twelve months from the coming into force of this Act, showing that any settler occupied or improved land within said railway land belt prior to the enactment of chapter 14 of 47 Victoria, with the bona fide intention of living on the said land, accompanied by reasonable proof of such occupation or improvement and intention a Crown grant of the fee simple in such land shall be issued to him or his legal representative free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied or improved by said settler.*

4. *The rights granted to the settler under this Act shall be asserted by and defended at the expense of the Crown."*

Meanwhile it was time to carry out the commitment of Section 5 of the Settlement Act.

SECOND LAND GRANT - 1905

Provincial Order in Council #391 of the 30th June 1905 transferred to the Dominion Government, 86,346 acres in lieu of lands already alienated by the Province prior to the Settlement Act of 1884. The area was described as commencing at a point on the eastern shore of Vancouver Island where it is intersected by the 50th parallel; thence due West along the 50th parallel twenty and one fifth (20 1/5) miles; thence due South six and thirty five hundredths (6 35/100) miles, more or less, to a line running East and West half way between the mouth of Courtenay River and Seymour Narrows; thence due East to a point on the Eastern shore of Vancouver Island on Oyster Bay; thence north-westerly following the shore line of Vancouver Island to the point of commencement, containing 87,114 acres, more or less, excepting thereout those portions of Lots forty eight (48) and one hundred and ten (110) Sayward District which are situated at the South of the 50th parallel, and which together contains 768 acres, leaving a net area of 86,346 acres.

This area was transferred from the Dominion Government to the E & N Railway, Co. on 4th October 1905 by Dominion Grant No. 68 (Fiat No. 114538).

THE VANCOUVER ISLAND SETTLERS' RIGHTS AGREEMENT RATIFICATION ACT, 1910

(Chapter 17, S.B.C. 1910) allowed the Company to select 20,000 Acres as compensation for lands claims by settlers under the 1904 Settlers' Rights Act. Clause 12 of the Ratification Act also provided for a Grant to the company of certain foreshore and coal underlying the sea (see Fourth Grant).

The company further agreed to discontinue any proceedings against settlers (they had evicted some in 1885) who were individually mentioned in the Schedule attached to the Act with a description of their land (some of which had not been granted as of 1910).

The Grants to settlers, in pursuance of the 1904 Settlers' Rights Act were on a special form of Provincial Grant and are in C.G. Volume 67 in the Ministry of Crown Lands. There are no exceptions other than the standard Gold and Silver and right to cut timber and take building material. Many of these grants are CONFIRMATORY GRANTS of land previously granted by the Dominion Government (which grants contained undesirable exceptions).

The non-reservation from the Grants of timber, base metals and coal and petroleum is significant. In the Land Act of 1891, the exceptions from a Grant were laid down as "*minerals precious or base other than coal.*" In 1899 the Land Act was amended to prohibit any Crown Grant conveying coal and petroleum and the Grants thereafter were to carry this express provision. Despite this in the Grants issued around 1910 no exceptions were made and this was because of Section 3 of the Vancouver Island Settlers' Rights Act of 1904 which entitled the Settlers to grant in fee simple in "*accordance with the Land Act in force at the time when the land was first occupied.*" That put their rights back prior to the Settlement Act of 1883 and hence their right to timber, base metals, coal and petroleum. Under the Land Act of 1884, the timber passed with the grant and there was no royalty payable to the Crown for timber cut.

Further attempts by the Province to give retroactive consideration by way of grants, to settlers who had missed their chance under the 1904 Settlers' Act, were made in 1917, 1919 and 1920 by introduction of Amending Acts to the Vancouver Island Settlers' Rights Act of 1904. The 1917 Act failed to get Dominion Government approval. The other two were not assented to and none of them became law.

THIRD LAND GRANT - 1913

An Act to authorize the Issuance of certain Crown Grants to the Esquimalt and Nanaimo Railway Company (Chapter 60 S.B.C. 1913) lists part of the lands to comprise the 20,000 Acres but is incomplete because the full selection had not been made at that time. The complete list is as follows:

<u>Lot</u>	<u>District</u>	<u>Acreage</u>	<u>C.G.</u>	<u>Date</u>
174	Nootka	1100	3/263	28/6/13
175	"	2965	"	"
176	"	1192	"	"
177	"	1418	"	"
178	"	974	"	"
179	"	672	"	"
180	"	1751	"	"
181	"	<u>1086</u>	"	"
		11158 - 11158		

240	Rupert	5008 - 5008	4/263	"
31G	Nelson	319	5/263	"
32G	"	631	"	"
33G	"	640	"	"
34G	"	325	"	"
35G	"	193	"	"
36G	"	126	"	"
37G	"	172	"	"
38G	"	472	"	"
39G	"	<u>606</u>	"	"
		3484 - 3484		
1370	Rupert	<u>350</u> 20000	22/263	22/1/14

It will be realized that only the Lots on this list within Nelson District are within the E & N belt proper - i.e. the area transferred by the Settlement Act which passed the base metals and land covered by water. Further reference will be made to this question.

FOURTH GRANT - 1925 (Foreshore and Coal)

Clause 12 of the Schedule forming part of the Vancouver Island Settlers' Rights Agreement Ratification Act (Chapter 17 S.B.C. 1910) which authorized the third grant also made provision for granting to the Company on application, certain foreshore rights and coal underlying the sea. Crown Grant 3736/508 of 23 July 1925 granted to the company the foreshore part of and the coal underlying Lot 149 Nanaimo District containing 10,157 acres more or less and the coal only (no surface) under Lots 148 (61.6 Ac.) and Lot 150 (0.92 Ac.) These lots are in the Fanny Bay and Union Bay Areas.

Most of the foreshore part of Lot 149 has since been reconveyed to Crown under Certificate of Title No. 404512-I.

BOUNDARIES OF THE 1ST AND 2ND GRANTS

Within the boundaries of the E & N Land Grant proper, (the First and Second grants) the area which the E & N Railway Co. received amounted to approximately 1,900,000 Acres.

The easterly boundary of the E & N Land Grant has been determined by the Privy Council as a boundary at high water mark which excluded the foreshore rights. The decision was over the meaning of the expression "coastline" in the first grant - the reference is the Esquimalt and Nanaimo Railway Co. vs H.W. Treat, T.L.R. Vol. 35 (1918-19) p. 737.

The southerly boundary of the Grant was surveyed in 1885 by William Ralph, D.L.S. A trial line was run straight from the initial post at the head of Saanich Inlet to connect with a post previously set at the mouth of Muir Creek - a distance over 16 1/4 miles. This random link passed the true corner by 1800 links to the N.W. of it, a correction to bearing was made of 47 minutes and the whole line run again, blazed and posts set every 1/2 mile. The operation was begun on May 13, 1885 and completed August 20th the same summer. Considering the topography of the country and lack of access it was a remarkably efficient, well marked survey.

The west boundary of the Grant, a line from the post at Muir Creek to Crown Mountain, was begun by William Ralph, D.L.S. in 1890. To obtain the direction for this long line he took the latitude and longitude of the points of commencement and termination, from the nautical charts of that era and calculated by spherical trigonometry the distance on a great circle to be 138.6 miles. He also determined the correction to bearing, for convergence of the meridian to be applied to every mile of line run and commenced to run the line on August 4th, 1890 setting posts every 1/2 mile as he went. By September 20th he had run 23 miles. In 1891 he commenced at this point on May 16th and ran to the 72 mile post by September 16th - or 49 miles in 4 months. He began again on March 1892 from the 72 mile post and ran through to a post at 135 miles on the slopes of Crown Mountain, set on September 19th, 1892.

The north boundary being the 50th parallel of latitude was begun from a post on Discovery Passage by Colonel William J.H. Holmes D.L.S. who ran 16 miles in 1909 and 1910 through to the 20 1/5th mile post and south 6 miles and 28 chains and west to connect with William Ralph's survey of 1892.

MINERAL RIGHTS

All precious or "*Royal*" metals remain with the Crown unless specifically conveyed and in the grants to the E & N Railway Co. was no exception. Gold and Silver in the E & N Block therefore belong to the Crown unless subsequently granted under a Mineral Grant as a result of the staking of a Mineral Claim.

As previously referred to, most if not all Provincial grants to individuals made within the E & N Block will carry the base metals with the surface. (Not grants of Reverted Lands, just early grants.)

Dominion Government grants if not followed by a confirming Provincial grant including base metals, etc. - will not carry coal, coal oil, mines or minerals and these would be part of the grant to the E & N although underneath private property.

However, with the passage of the Mineral Land Tax Act Chap. 53, S.B.C. 1973 and the possibility of any minerals being surrendered or forfeited to the Crown it is no longer possible to determine the mineral ownership - Crown or private, by looking

at the Crown Grants. A search is necessary in the Land Title Office to determine the surrender or forfeiture position.

The resulting position of the Crown following surrender or forfeiture of "minerals" is anything but clear because of the changing definition of "minerals". Prior to 1974 in the Mineral Act the definition was:

- (a) ore of any metal or metals and
- (b) every natural substance that can be mined and
- (c) every substance that occurs in fragments or particles lying above or adjacent to the bed rock source from which it is derived and commonly described as talus but does not include coal, petroleum, natural gas, building and construction stone, limestone, marble, shale, clay, sand, gravel, volcanic ash, earth, soil, diatomaceous earth, marl or peat.

In 1974 the definition was changed, (a) (b) and (c) remain substantially the same but the exclusion now reads "but does not include coal, petroleum, natural gas, sand, gravel, earth, soil or peat." * See following Table.

The inference from this is that exclusions prior to 1974 which by the change are not now excluded from being a mineral, are in fact minerals. The definition of Mineral in the Mineral Land Tax Act is quite different again and includes many of the substances excluded by both previous descriptions. "Mineral means any non-living substance formed by the process of nature which occurs within, upon, or under land irrespective of chemical or physical state, but does not include soil, earth, surface water and ground water."

Mineral Act

Mineral Land Tax Act 1973

Excluded prior to 1974

Excluded after 1974
In force 1/3/75, B.C.
Reg. 618/74, then postponed, B.C. Reg. 154/75.

Excluded after 1973

<u>Excluded prior to 1974</u>	<u>Excluded after 1974</u>	<u>1977</u>	<u>Excluded after 1973</u>
coal, petroleum	no change	<u>Amendment</u>	now mineral
natural gas	" "		" "
building and construction stone	now mineral	non mineral	" "
limestone, marble & clay	" "	" "	" "
sand, gravel	no change	" "	" "
volcanic ash	" "	" "	" "
diatomaceous earth	now mineral	" "	" "
earth, soil	no change	" "	no change

nark	now mineral	non mineral	now mineral
peat	no change	" "	" "
			dolomite

According to the Mineral Act, after 1974, mineral includes building and construction stone, limestone, marble, clay, volcanic ash, diatomaceous earth and marl. As far as the E & N Land Grant is concerned all these natural substances passed from the Crown and many, if not all of them have passed from the E & N by subsequent conveyance. There are numerous different forms of conveyance by the E & N and the substances reserved to themselves therein vary. It can not be assumed that all minerals as defined in the Mineral Land Tax Act can be surrendered or forfeited by the E & N as some of the constituent substances forming the new definition may now be in private ownership. They would need to be surrendered by the individual title holders.

Amendment 1977

N.B. The definition of Mineral in the Mineral Act was restored to what it was prior to 1974, with the addition of dolomite as a non mineral.

WATER RIGHTS

Broadly speaking the beds of all bodies of water and streams navigable or otherwise, within the outer limits of the areas granted by the first and second grants were conveyed to the E & N Railway Co. An exception would be that in a Provincial Grant within the belt if there is a body of water on the ground that is not coloured "*in a colour other than red*" on the tracing attached to the Crown Grant - then of course it passed with the land to the grantee by Section 52 of the Land Act. However, by the same principle should a body of water in such a grant be coloured other than red it then did not form part of the Grant and is the property of the Crown Provincial, NOT the E & N Railway. An example of this is the Cowichan River within Section 15, Range 7, Quamichan District in the vicinity of the Silver Bridge at Duncan. The land was the subject of a Provincial Grant - the river was excepted therefrom and is considered to be Crown land (1977 opinion) (Surveyor General Branch file 0165963).

These broad principles do not apply to ownership of water areas within Indian Reserves in the E & N Grant, or elsewhere.

In this vein, Section 52 of the Land Act does not apply to lands granted by the E & N Railway Co. It should be realized that the case of *Rotter vs Canadian Exploration Co.* (Vol. 33 W.W.R.) dealt with a situation where a sale of land on the bank of a non-navigable river where the river was owned by the owner of the bank and the sale was made according to a plan of survey showing the edge of the river as the boundary of the parcel sold. Despite this it was held by the Supreme Court of

Canada that title passed on sale of the surveyed lot, to the middle thread of the stream. (Salmo River-Kootenay District).

When the E & N sell land bordering a non-navigable river it would seem likely that they come under this rule of English common law and if so the beds of many of the rivers in the E & N Block are now privately owned by individuals. But this opens up the possibility that where any of these properties whose titles go to the middle of the stream have reverted to the Crown for non-payment of taxes or have been conveyed to the Crown, that the Crown is now the owner of these half rivers. This question has not yet been referred to the Courts as far as E & N Grants are concerned.

The unquestioned ownership by the E & N of all the beds of navigable waters does relieve the Ministry of Crown Lands of the necessity to deal with dispositions in these areas and prevents the operation of Sections 94 and 95 of the Land Title Act, to deal with accretions and changes in the Natural boundary. In the same manner Section 116 dealing with extending rights of way over accreted areas and adjusted areas which enlarges the upland at the expense of the Crown foreshore cannot operate where the bed of the body of water is not owned by the Crown.

RAILWAY RIGHT OF WAY

Although the intention was to construct a Railway from Esquimalt to Nanaimo the south boundary of the E & N grant being a line between the head of Finlayson Arm to Muir Creek, did not make provision for the line to reach Esquimalt -or Victoria where it terminated. Along the present route of the railway - south of the boundary of the Grant much of the lands had been alienated. For example Section 1 Goldstream District was granted in 1880 to Alexander Gilmore (2192/8). The railway is not shown on the grant plan - as of course it was not located. The first absolute title AF-6-471 3042a was transferred complete to James Phair who transferred part to the E & N Railway, AF-19-297-5266S.

A significant part of the right of way between Nanaimo and Courtenay has been surveyed but between Nanaimo and Goldstream the opposite is the case. Very little of the right of way is surveyed, most of it rests on a general exception from the land grant which it passed through and in some cases title has inadvertently been conveyed. This was due to a lack of knowledge of where the line was located because of lack of survey.

As "*mineral land*" in the Mineral Land Tax Act does not include rights of way for railways, the non definition by survey of the above Right of Way complicates the mineral title situation.

Acknowledgment

Documents relative to the E & N Land grants were obtained through the effort of Don F. Pearson, Research Officer, Lands Service.

THE RAILWAY BELT AND PEACE RIVER BLOCK

Railway Mineral Lands

The following condensation of the events leading to ownership by the Dominion Government of the Railway Belt and the Peace River Block are quoted from "Mining and Mining Laws of B.C." p. 20. The references in brackets have been added:

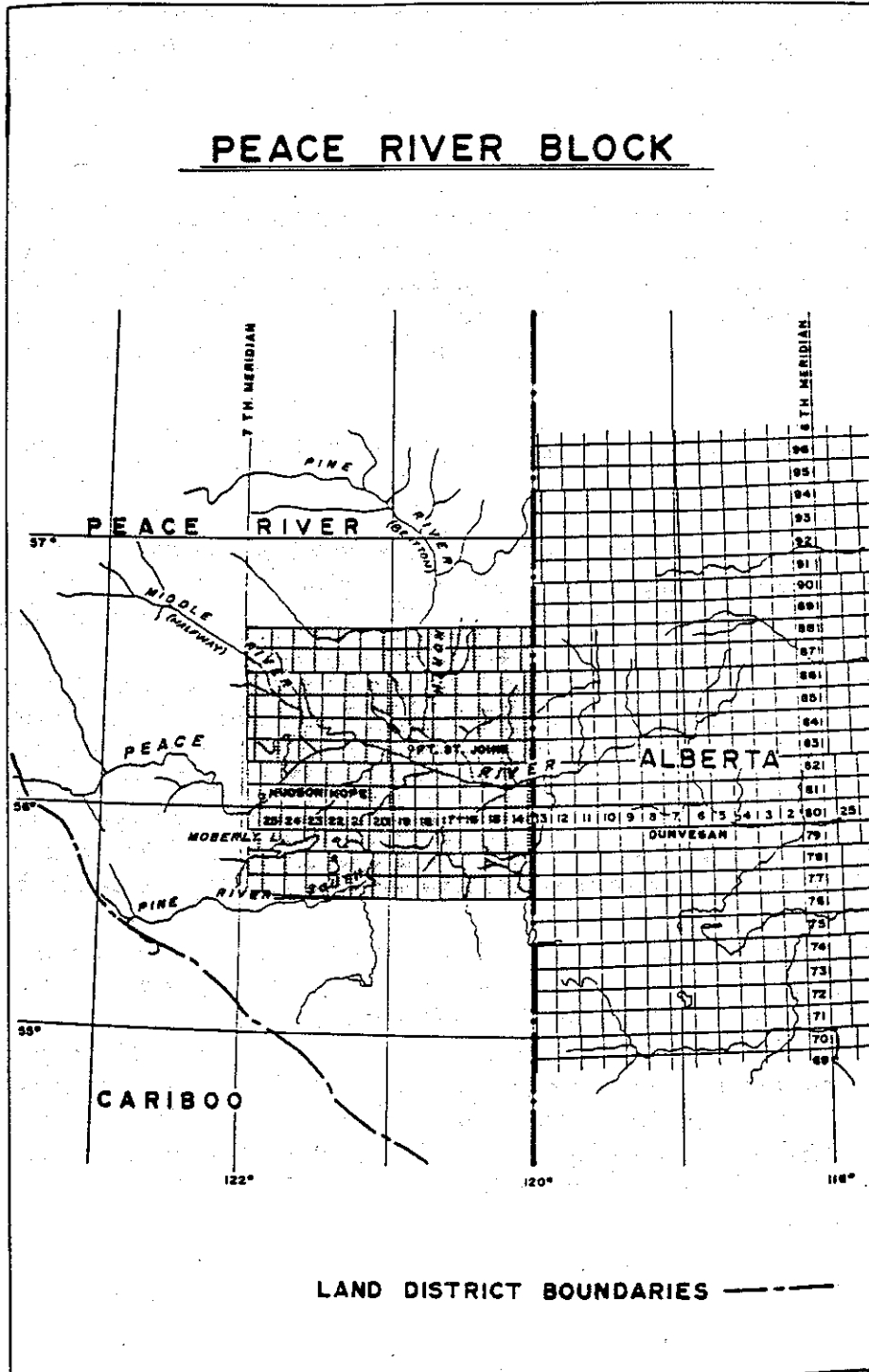
When British Columbia entered into union with the Dominion of Canada (July 20, 1871), one of the terms of its entry was with respect to the building of a railway to link up the seaboard of the Province with the rest of the Dominion. Construction was to commence within two years of union and to be completed within ten years of entry into such union.

To assist in the construction by the Dominion the Province was to grant to the former a strip of public lands along the entire length of the railway, not to exceed 20 miles in width on each side of such railway throughout its length. The amount of land was to be similar to lands granted by the Dominion in the then Northwest Territories (now Alberta and Saskatchewan) and the Province of Manitoba. Lands within the strip already disposed of by Province were to be replaced with land adjoining such strip. The Dominion in return agreed to pay to the Province an annual sum of \$100,000 as allowance for such alienation. (Section 11, of the Terms of Union.)

The railway construction was delayed, much to the dissatisfaction of the Province. Later certain modifications of the Terms of Union were made. (Settlement Act, chapter 14, SBC 1884). The 20 mile strip of land was to be granted on each side of the railway line 'as finally located', and in lieu of granting adjoining land to replace that in the strip already disposed of by the Province, a compact block of 3,500,000 acres was to be granted in the "Peace River Region". (Transferred by Provincial Order-in-Council #450 of 26 June, 1907 - and described as follows:

" All and singular that certain parcel or tract of land situate in the Province of British Columbia in the Dominion of Canada and which is bounded on the East by the Boundary line between the Provinces of British Columbia and Alberta; on the North by a line drawn westerly at right angles to the said boundary line through its point of intersection by the twenty-third base line of the Dominion lands system of survey' on the South by a line drawn westerly at right angles to the said Boundary line through its point of intersection by the twentieth base line of the Dominion lands system of survey' and on the west by a line parallel to the said Boundary line and distant therefrom seventy-five miles, thirty-eight chains and sixty-four links; the said parcel containing three million five hundred thousand acres.)"

MAP OF THE PEACE RIVER BLOCK



The strip of land along the railway became officially known as the "Railway Belt".

It is to be noted that the Province of British Columbia is the owner of all lands within its boundaries, except such as it has alienated. The rights of the Dominion therein are those of an ordinary individual in so far as title is concerned, and it holds only such rights as the Province grants to it. It thus differed from the Province of Alberta, Saskatchewan and Manitoba in that the latter Provinces merely held such lands as the Dominion of Canada, the original paramount owner, granted to such Provinces. These Provinces are now in the same position as British Columbia in having been granted all lands and natural resources within their respective boundaries.

In view of the Dominion of Canada now having transferred to the Province of British Columbia those lands known as the "Railway Belt" and the "Peace River Block", (the Railway Belt Re-Transfer Agreement Act, Chapter 60, S.B.C. 1930), the distinction between claims located therein and those outside such lands will cease to be of importance to future claim holders but it will have a bearing upon those formerly located and held.

PRECIOUS METALS, AND THE CROWN'S RIGHTS THEREIN

The precious metals are gold and silver. Their original ownership rests at all times in the Crown. All other metals are known as base metals and, without special reservation, pass with any grant of land. But the precious metals do not pass from the Crown unless specific words are used to convey them from the Crown to a grantee.

The Crown's prerogative in gold and silver, known as "mines royal", dates back to early days. In Northumberland (Earl) Mines (1568) 1 Plowden 336, known as the "Case of Mines", the Court held that "a mine royal, whether of base metals containing gold and silver, or of pure gold and silver only, may, by grant of the King, be severed from the Crown by apt and precise words". Blackstone derives the King's prerogative right to the precious metals from his right to coin money. But in the "Case of Mines" above the judges rest such prerogative rather upon the divine right of Kings to have the best.

The most important case dealing with this question, in so far as British Columbia is concerned, is that of Attorney-General for British Columbia v. Attorney-General for Canada (1889) 1 M.M.C. 52; 14 App. Cas. 295; 14 S.C.R. 345. This case is also known and referred to as "The Precious Metals Case". In this case it was held by the Privy Council that where no specific words were used conveying the "Railway Belt lands" from the Province of British Columbia to the Dominion (the expression in the conveyance being of "public lands") the Crown in right of the Province retained the precious metals while surrendering its title to the base metals.

Where the Dominion has sold or deeded any such "public lands" so deeded to it by the Province, the free miner has a right, subject to the conditions and terms of the provincial laws, to enter upon such lands for the purpose of searching for and mining gold and silver, and the purchaser from the Dominion can give no title to gold and silver, nor can he claim any.

In the year following the Precious Metals Case, regulations appeared in the B.C. Gazette of February 20th, 1890 which made the interesting fine distinction between the Dominion's right to Gold and Silver in the prairie provinces and its absence of right in British Columbia. The regulations were headed:

"Regulations Governing the Disposal of the Dominion Lands containing Minerals other than Coal in Manitoba and the North West Territories; and of such Mineral Lands in British Columbia as are the Property of the Government of Canada, except Lands containing Gold and Silver."

Apparently these regulations which are long and detailed were adopted before the effect of the decision in the Precious Metals Case was understood. The regulations introduced 4-post staking and size of claims which were not compatible with the requirements of British Columbia in respect of gold and silver and it was soon realized that dual administration was undesirable, and the Report of Committee of the Privy Council dated 11th February 1890 soon followed. It is quoted in full below.

"To the Honourable
The Secretary of State

The Committee of the Privy Council have under consideration a despatch, dated 11th October 1889, from His Honour the Lieutenant Governor of British Columbia, in relation to the Mineral lands within the Railway belt in British Columbia, calling attention to the anomalous position of the Mineral Rights within the Belt, owing to the jurisdiction over the lands being vested in the Dominion Executive, and the rights to administrate the precious metals being a concern of the Province.

The Sub-committee of Council, to whom the question was referred, observe that the Government of British Columbia make the following proposition in order to reach a settlement of the question:-

- 1. That the lands within the railway belt whereon mineral claims have been or shall hereafter be located in accordance with the mining and Mineral laws of the Province shall (sub-modo) be opened to purchase by the occupant (being a person who has duly located under the Provincial Mineral and Mining Laws) at the rates current at the time of purchase, such purchase to carry the right to all base metals, and the purchase money shall be received by Province, and accounted for by the Province to the Dominion Government.*

2. *That the grant of the land shall follow the location of the mining or mineral interest, that is to say, the grant of land shall be made in the same way as it would, (under the Mining and Mineral Laws of the Province) be made by the Province in case the location was not within the Railway Belt.*
3. *That with respect to mining leases and privileges other than the grant of the absolute fee simple, the Provincial Laws shall be followed, as to surface rights, in the same manner as if the land over which the lease or privilege is applied for were situated outside the Railway Belt, and the rental or royalty to be derived from such lease or privilege must necessarily vary according to the circumstances of the case, such proportion of the rental as may be agreed upon between the Chief Commissioner of Lands and Works of the Province of British Columbia, and the Minister of the Interior shall be payable, in respect to such lease, by the Province to the Dominion, or in the event of difference, shall be fixed by a Judge of the Supreme Court of British Columbia, but with the right to the Province at any time to acquire from the Dominion the fee simple on the land upon payment to the Dominion Government of the price current at the time.*
4. *That the grant or lease or other privilege, as the case may be, shall be given or assented to by the Dominion upon the certificate of the Chief Commissioner of Lands and Works that the requirements of the Provincial laws have been complied with, and that, in case of the grant of the fee simple, the purchase money has been duly paid.*

The Sub-committee are of the opinion that it is eminently in the public interest that an agreement should be come to between Your Excellency's Government and the Government of British Columbia providing for the administration of the minerals in the Railway Belt, by either one Government or the other.

The proposition made by the British Columbia Government may with advantage, to the proper administration of the minerals, be modified in the manner hereinafter indicated, and Sub-committee submit the following proposition, which, in their judgment, would be more simple and less liable to give rise to difference between the respective Governments.

The Government of Canada propose, as a settlement of the question referred to, as follows:-

- a. *The Government of Canada will not hereafter make any leases or other dispositions of any minerals in the Railway Belt in British Columbia, excepting coal, other than by patent in fee simple of the lands wherein they lie, to the intent that the minerals in the said*

belt, other than coal, may be administrated under the mining laws of the Province.

- b. *All lands of the Dominion which may be for sale from time to time, within the Railway Belt, containing minerals within the meaning of the Mineral Act (B.C.) not being Indian Reserves or settlements, or portions thereof, and not being under license or lease from the Dominion Government, shall be open to purchase by the Provincial Government, at the price of \$5.00 per acre.*
- c. *Any lands sought to be acquired by the Provincial Government under the last clause shall be set apart from alienation by the Dominion upon the Provincial Government depositing in the Department of the Interior a written application thereof, with such description thereof as to enable them to be identified, and thereupon the consideration money shall immediately be paid, and in all cases where the land sought to be acquired has already been surveyed under the authority of either Government, such survey shall be accepted as conclusive and the grant issued thereon, but where the land sought to be acquired has not been surveyed, then, before the issue of the grant, it must be surveyed at the expense of the Provincial Government by a Dominion Land Surveyor acceptable to both Governments.*
- d. *Nothing in this agreement shall apply to coal lands or interfere with the operation of subsection 4 of Section 29 of the Dominion Lands Act.*
- e. *The foregoing clauses of this agreement may be terminated at any time by either Government passing an Order-in-Council to that effect and communicating the same to the other Government.*
- f. *It is understood that all minerals including gold and silver, which may be in an Indian Reserve in British Columbia shall be administrated by the Indian Department, and not by the Government of British Columbia.*
- g. *The British Columbia Government shall indemnify the Dominion Government against all claims which may be presented against it by reason of any mining licenses of gold or silver heretofore issued.*

The Committee concurring in the above submit the same for your Excellency's approval.

The Committee further advise that the Secretary of State be authorized to communicate a copy of this Minute to the Lieutenant Governor of British Columbia.

*(Sgd.) John J. McGee
Clerk, Privy Council"*

There were many instances of transfer of base metals and the surface from the Dominion to the Province in furtherance of this agreement and if one wishes to see one example, refer to B. C. Gazette of January 20th, 1910, p. 352. The description is always by metes and bounds, with reference to the survey plan.

A further Privy Council Order (No. 549), 17 days later on 28th February, 1890 is indicative of the good agreement between governments. The Dominion accepted the amendment proposed by British Columbia. The Order is quoted here in full.

*"To the Honourable
The Secretary of State*

On a joint report dated 26th of February, 1890, from the Minister of Justice and the Minister of the Interior submitting with reference to an order in Council passed on the 11th, of February instant, authorizing a proposal to be made to the Government of British Columbia, having in view an arrangement for the administration by the province of certain Mineral lands in the Railway Belt (so-called) such proposal having been duly communicated to the Government of British Columbia, the following telegraphic message received under even date from the Leader of the Government of that Province:

"Provincial Government willing to accept proposal of Dominion Government as contained in Minute of Council dated 11th February, except providing for indemnity against all claims which may be presented against Dominion by reason of any licenses heretofore issued. Please wire answer immediately so that we can introduce necessary legislation."

The Ministers are of opinion that the clause asking for indemnity referred to in the above despatch may without detriment to the interests of Canada be eliminated from the proposal and they recommend that the Minister of the Interior be authorized to so inform the Honourable Mr. Robson.

The Committee concur in the above report and recommend that the Minister of the Interior be authorized to take action accordingly and that a copy hereof be forwarded by the Secretary of State to the Lieut. Governor of British Columbia.

All which is respectfully submitted for Your excellency's approval.

(Sgd) John J. McGee
Clerk, Privy Council."

It was now British Columbia's turn to agree officially to the arrangement. A Report of a Committee of the Honourable the Executive Council, approved by His Honour the Lieutenant-Governor in Council on the 13th day of March 1890 is quoted in full (see B. C. Sessional Papers for 1890.)

"The Committee of Council have had under consideration an approved Report of a Committee of the Honourable the Privy Council of Canada, dated the 11th day of February, 1890, having reference to the administration of the Mineral Lands within the Railway Belt, and submitting a modified proposition to that made by the Provincial Government in settlement of the matter.

The Government of Canada propose as follows:

- A. The Government of Canada will not hereafter make any leases or other dispositions of any Minerals in the Railway Belt in British Columbia, excepting coal, other than by patent in fee simple of the lands wherein they lie, to the intent that the minerals in the said belt, other than coal, may be administered under the mining laws of the Province.*
- B. All lands of the Dominion which may be for sale from time to time, within the railway belt, containing minerals within the meaning of the Mineral Act (B. C.) not being Indian reserves or settlements, or portions thereof, and not being under license or lease from the Dominion Government, shall be open to purchase by the Provincial Government at the price of \$5.00 per acre.*
- C. Any lands sought to be acquired by the Provincial Government under the last clause shall be set apart from alienation by the Dominion upon the Provincial Government depositing in the Department of the Interior a written application therefor, with such description thereof as to enable them to be identified, and thereupon the consideration money shall immediately be paid, and in all cases where the land sought to be acquired has already been surveyed under the authority of either Government, such survey shall be accepted as conclusive and the grant issued thereon, but where the land sought to be acquired has not been surveyed, then, before the issue of the grant, it must be surveyed at the expense of the Provincial Government by a Dominion Land Surveyor acceptable to both Governments.*
- D. Nothing in this agreement shall apply to coal lands or interfere with the operation of subsection 4 of section 29 of the Dominion Lands Act.*

E. The foregoing clauses of this agreement may be terminated at any time by either Government passing an Order in Council to that effect and communicating the same to the other Government.

The Committee of Council, deeming it desirable that an understanding with the Dominion Government, with regard to the subject in question, should be arrived at without delay, agree to the above proposals, as contained in clauses A to E, and advise that this Minute be approved, and that a copy be forthwith transmitted to the Honourable the Secretary of State for Canada.

Certified

Victoria, 12th March, 1890.

*(Sgd.) Jn. Robson
Clerk, Executive Council."*

The matter of administration of metals was settled as far as the Dominion was concerned by passage of Privy Council Order No. 81H on the 28th April, 1890 - which follows:

"To the Honourable
The Secretary of State.

The Committee of the Privy Council have had under consideration a despatch dated 18th March, 1890, from the Lieutenant Governor of British Columbia, transmitting a copy of a report of His Executive Council accepting the settlement of the question as to the administration of the Mineral lands within the Railway Belt proposed by the Order of the Privy Council of Canada of the 11th February last, as modified by the Order of the 28th of that month.

The Committee on the recommendation of the Minister of the Interior advise that the Secretary of State be authorized to inform the Government of British Columbia that the Government of Canada assume that this matter is now settled as above stated.

All which is respectfully submitted for Your Excellency's approval.

(Sgd.) John J. McGee

Clerk, Privy Council"

Whereas the agreement up to this point called for the payment of \$5.00 per acre by the Province to the Dominion for lands containing minerals to be transferred back to the Province, this was amended on the 13th May 1899 by Privy Council Order #941 which reduced the price to \$1.00 per acre in payment of lands not suited to agriculture or growing of timber. Notice appears in the B.C. Gazette of 29th June 1899 and is easily available and therefore not reproduced here.

RAILWAY BELT ACT, 1895 - (BOUNDARIES OF BELT)

There now arose the question of validating claims of settlers, both purchasers and pre-emptors, as the boundaries of the Railway Belt had not been settled. The Railway Belt Act of 1895 (Provincial) provided the answer and is reproduced here.

CHAPTER 18.

"An Act respecting Lands granted to the Dominion Government.

(21st February, 1895.)

- I. *WHEREAS, by an Act made and passed by the Legislative Assembly of British Columbia in the 47th year of Her Majesty's reign, chapter 14, entitled "An Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province," it was among other things enacted that, from and after the passage of the Act now in recital, there should be and there was thereby 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 might deem advisable, the public lands along the line of the railway, wherever it might 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; and whereas, antecedent to the passage of the said Act, and for the purpose of conveying the lands to the Dominion government, a reserve was, on the 29th day of November, 1883, placed by the Provincial Government upon the lands described as the Belt, and hereinafter referred to:*
- II. *And whereas questions have arisen regarding the boundaries of the land so granted (hereinafter referred to as "the Belt"), and three methods have been proposed for defining the same: One by an Order of His Excellency the Governor-General in Council, approved on the 27th May, 1887; a second by an Order of His Honour the Lieutenant-Governor in Council, approved on the 24th August, 1887; and a third by another Order of His Excellency the Governor-General in Council, approved on the 15th July, 1892:*
- III. *And whereas the date of the final location of the railway is uncertain, and, in the absence of a delimitation of the Belt, grants have been issued to purchasers by both the Dominion and Provincial Governments, and records issued to pre-emptors, the validity of which are open to question:*

IV. *And whereas, by an Act of the Parliament of Canada, made and passed in the 52nd year of Her Majesty's reign, entitled "An Act of provide for the conveyance of certain lands to British Columbia," it is provided that the Governor in Council may, out of the Belt, transfer to the Province of British Columbia lands, not to exceed forty-five thousand and thirty-seven acres in extent, for the purpose of enabling the Government of British Columbia to make valid certain titles and interests which the Province had undertaken to create therein:*

V. *And whereas questions have arisen as to the power of the Dominion Government to hold lands within the Province:*

VI. *And whereas, owing to the questions at issue, purchasers from the Dominion and Province respectively, and pre-emptors and settlers upon lands within the Belt, are unable to procure titles which can be registered under the Land Registry laws of the Province, and the Dominion Government cannot register titles to land within the Belt, and it desirable that an adjustment should be made of the matters referred to in this preamble:*

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:-

1. *This Act may be cited as the "Railway Belt Act, 1895".*
2. *It shall be lawful for the Lieutenant-Governor, by Order in Council, to adopt either of the methods of defining the Belt proposed by the several Orders in Council referred to in clause II. of the preamble to this Act, either in manner suggested in the proposal or subject to such variations as the Lieutenant-Governor may see fit to agree upon, and subject to such terms, conditions, and stipulations (if any) as may be agreed upon between the two Governments.*
3. *Notwithstanding any provisions to the contrary appearing in any Land or other law of the Province heretofore or now in force, all persons who, anterior to the date of the Provincial reserve referred to in paragraph II. of the preamble to this Act, had pre-empted lands within the Belt, must cause the same to be surveyed and prove their claims on or before such date as shall be named by Proclamation of the Lieutenant-Governor in Council, of which date not less than nine months notice shall be given by publication in the British Columbia Gazette; and in default of such lands, or any of them, being surveyed and claims proved by the date to be so published in the Gazette, any pre-emptor so making default shall forfeit all right to complete his title under the laws of the Province.*
4. *It shall be lawful for the Lieutenant-Governor, by Order in Council, to make such provisions as he may think proper for defining and causing the title of the Dominion Government, or of purchasers from the Dominion Government, to be registered under the Land Registry Laws of the Province.*

5. *The Lieutenant-Governor may, by Order in Council, arrange with the Dominion Government for locating or surveying or other-wise ascertaining the lands referred to in clause IV. of the preamble to this Act, and for the transfer of the same to the Province.*
6. *In carrying out the provisions of this Act, the Lieutenant-Governor in Council may arrange such terms, concessions and stipulations as he may deem reasonable and proper.*
7. *Any Order in Council made by the Lieutenant-Governor under authority of this Act shall have the same force and effect as if enacted by Statute of this Legislature."*

Provincial Order in Council of December 6th, 1895 (pursuant to authority of the Railway Belt Act) provides for registration of Dominion Patents and gives preliminary approval to the final agreement of 1897. The Order, No. 466, follows:

"The Committee of Council have had under consideration a Report of the Honourable the Privy Council of Canada, approved by His Excellency the Governor General on the 29th March, 1895, which, after reciting the questions at issue between the respective Governments of the Dominion of Canada and the Province of British Columbia regarding the delimitation of the Railway Belt in British Columbia and the title to lands within the Belt heretofore granted by the Province to Arthur Stanhope Farwell and others, refers also to the Act of the Legislature of British Columbia, passed at the last Session, known as "The Railway Belt Act, 1895," and to the negotiations which have proceeded thereunder between the two Governments culminating in an arrangement embodying the terms therein set out, which terms the report now under consideration offers as a method of settlement of the questions at issue and which with certain amplifications are the terms hereinafter set out:

The Committee observes that by virtue of the Provincial "Railway Belt Act, 1895", and of an Act of the Federal Government, passed during the last Session, Chapter 4, and called "The Railway Belt Lands Act, 1895," any agreement to be entered into between the two Governments is to be as binding as if the same were specified and set forth by Acts of the Parliament and Legislature respectively:

The Committee of Council considering that the terms of agreement arrived at and as embodied in the said Report of the Privy Council approved on the 29th March, 1895, specify a fair and equitable basis of settlement, advise that the same be accepted on the part of the Province of British Columbia and therefore beg to recommend to Your Honour to order as follows:

1. *The Province shall accept as the boundary of the Railway Belt the limits laid down and marked out by the Dominion Order in Council, approved on the 27th May, 1887, and by the map attached thereto (a copy of which is annexed to the said Report of the Privy Council, approved by His Excellency on the 29th March 1895) or the nearest section line to the boundary of the Belt which would be found by actual measurement, as may be found by the Minister of the Interior most convenient:*
2. *The Province shall by Order in Council make provision under which Dominion titles shall be registered in the Land Registry Offices of the Province and in order to make such provision it shall be ordered as follows:*
 - (a) *It shall be the duty of the Registrar General of Titles, and of each Deputy Registrar of Titles, to register titles to land within the Railway Belt as defined by the first section of this Order, arising under any patent or grant issuing or purporting to issue under authority of the Dominion Government as fully and effectually to all intents and purposes as titles arising under Provincial grants to other lands in the Province are now registered in the said Office:*
 - (b) *The Lieutenant Governor in Council shall pass such further Orders, and promulgate such rules and regulations from time to time (if any) as shall be requisite for the purpose of giving full effect to "The Railway Belt Lands Act, 1895":*
3. *The Provincial Government obtaining from Arthur Stanhope Farwell, Gustavus Blinn Wright, Simon John Tunstall and James K. Callbreath, George Bohun Martin and James Charles Prevost; Charles Edward Perry, George Byrnes, David MacEwen Eberts, James McIntosh and William Bell Wilson, or their successors in title, releases and surrenders of the lands within the Railway Belt, severally granted to them by the Provincial Government, as mentioned in the said Report of the Privy Council, approved on the 29th March, 1895, such releases and surrenders shall be accepted by the Dominion Government in discharge and satisfaction of the several judgements of the Exchequer Court of Canada and of the Supreme Court referred to in the said Report and of the costs thereof, and the Dominion Government shall thereupon issue patents in fee simple to the said Arthur Stanhope Farwell, Gustavus Blinn Wright, Simon John Tunstall and James K. Callbreath, George Bohun Martin and James Charles Prevost, Charles Edward Perry, George Byrnes, David MacEwen Eberts, James McIntosh and William Bell Wilson, or to their surrender as aforesaid, in cases where there has been a devolution of estate of the same lands except such portions thereof as were previous to the said Report so approved as aforesaid on the 29th March, 1895, sold by the Dominion Government, the several grantees releasing the Dominion Government from any claim or alleged claim in respect of the said lands or in relation thereto:*

(a) *The Provincial Government shall pay to the Dominion Government for such lands as may be granted to the parties aforesaid a consideration of one dollar per acre, the purchase money already received by the Province therefor, but the Dominion shall be entitled to no payment whatever from the patentees or grantees.*

(b) *The several patentees or grantees shall in all cases where registration of the Provincial titles was already effected be entitled to register the Dominion title without fee or charge:*

4. *This arrangement shall not affect the lands known as the Sumas Dyke Lands, referred to in the Act of the Parliament of Canada made and passed in the 52nd year of Her Majesty's reign, entitled "An Act to provide for the conveyance of certain lands to British Columbia," but such lands shall be conveyed by the Dominion to the Province as provided by the said Act.*

5. *The Honourable the Chief Commissioner of Lands & Works shall give all necessary instructions and carry out all details in connection with the arrangement provided for in this Order:*

The Committee submit the same for Your Honour's approval and recommend that a copy hereof (if approved) be forthwith transmitted to the Honourable the Secretary of State for Canada for the information of His Excellency the Governor General in Council.

(signed) Chas. E. Pooley

President Executive Council.

The final agreement of 1897 approved by the Lieutenant Governor on the 30th October and by the Governor General in Council on the 13th December of that year were published in the B.C. Gazette of March 17th, 1898. It is far too long to quote here but being in the Gazette is readily available. Briefly it fixes the date of transfer of the Belt as the 19th December 1883 - excepts from the Belt all lands granted by British Columbia prior to that date as well as lands under pre-emption record of that date, excepts lands sold but not granted and lands under application, and gives a list of Provincial Grants.

The most interesting item is in paragraph 6, which exhibits a great deal of tolerance of unavoidable errors in administration, occasioned by the vagueness of boundaries of the Belt, before it was surveyed.

"6. The title to any lands which upon the completion of the survey of the boundaries of the Belt, or of any portion thereof, have been alienated by the Province under the belief that they were outside of the Belt, but which are ascertained by such survey to be within the boundaries of the Belt, shall be confirmed by the Dominion upon receipt from the Province of the purchase money therefore; and the title to any lands which upon the completion of the survey of the boundaries of the Belt, or of any portion thereof, have been found to have been alienated by the Dominion under the belief that they were within the Belt, but which are ascertained by such survey to be outside the boundaries of the Belt, shall be confirmed by the Province upon receipt from the Dominion of the purchase money therefor."

An example of a survey and grant by the Province, not knowing it was within the Railway Belt is Lot 828, K.D.Y.D. - the Maple Leaf M.C.

A brief memorandum of the working of the arrangement was made by Henry Cathcart in 1917 on Surveys and Lands Records file 5157/99. It should be noted that he makes the point that this arrangement did not include administration of Minerals on Indian Reserves (at that time).

"In the year 1890 an arrangement was made by Order-in-Council between the Governments of the Dominion and the Province providing for the administration of and the granting of titles to lands acquired under the "Mineral Act" within the Railway Belt by which such administration was placed within the jurisdiction of the Province; the Dominion Government agreeing that thereafter they would not make any leases or other disposition of any Minerals in the Railway Belt, excepting coal, other than by patent in fee simple of the lands wherein they lie to the intent that minerals in the said Belt, other than coal, may be administered under the Mining Laws of the Province, that all lands of the Dominion which may be for sale from time to time within the Railway Belt containing minerals within the meaning of the B.C. Mineral Act, not being Indian reserves or settlements or portions thereof, and not being under licence or lease from the Dominion Government shall be open to purchase by the Provincial Government at the price of \$5.00 per acre; also that any lands sought to be acquired by the Provincial Government under this provision shall be set apart from alienation by the Dominion upon the Provincial Government depositing in the Department of the Interior a written application therefor, with such description thereof as to enable them to be identified.

Later on this arrangement was modified to some extent in respect to the time for making payment, and the price of such lands was reduced to \$1.00 per acre where such lands were found to be of no value for agricultural purposes or for the timber growing thereon.

The procedure which has been adopted in carrying out the terms of this arrangement is that laid down in the Mineral Act in so far as the location of the Mineral Claims is concerned, and the procedure to acquire title thereto with the addition that when such claims are surveyed and application is being made for Crown Grant the applicant is required to remit to the Department of Lands the purchase money for the surface of the claim either at the rate of \$5.00 per acre or \$1.00 per acre as the case may be, which is then transmitted to the Department of the Interior, at Ottawa, with an application for the vesting of the surface in the Government of the Province. When such vesting Order is received the Crown Grant is issued by the Province to the applicant covering the minerals, precious and base, as well as the surface.

Although, under the said Agreement, the Province should notify the Dominion when a Mineral Claim is recorded and furnish a description of the land covered thereby, it is found to be utterly impossible to comply with this requirement for the reason that the location is generally too indefinite for identification purposes. Furthermore, a large percentage of the claims so located are never carried to completion, being allowed simply to lapse - the Department of Lands having no knowledge of the location of such claims. The course followed is to await the survey of the claim and the application for the Crown Grant before taking up the matter of the surface with the Dominion Government. This course has worked well in the majority of cases, but, in a few instances, when such applications were made to the Department of the Interior it was found that either the whole or some portion of the lands covered by the claims in question had already been disposed of by the Dominion Government by homestead entry or by purchase, and in consequence such portions were not available for the mineral locators. As the surface and base metals are vested in the Dominion and only the gold and silver vested in the Province, unless the alienations made by the Dominion within the Belt, reserve the base metals, and the Dominion is in a position to grant such base metals to the Province, all that remains for the Province to grant is the gold and silver.

In one instance where the surface had already been dealt with by the Dominion Government application was made by the Province for the base metals and a reply was received to the effect that it was considered that the Department of the Interior, as matters then stood, should not convey to the Province the minerals under the lands affected, but that no objection would be made to doing so, providing the consent of the homesteaders was obtained and filed with the Department of the Interior.

For various reasons the Department of Lands could not see its way to follow this course, and the decision was reached that all that could be done in such cases was to issue a Crown Grant for the gold and silver. This course has been followed in some instances, whilst in others, such a Grant is not satisfactory to the owners, and in consequence a difficulty has arisen in regard to the administration of these lands.

For the reasons above mentioned, it would be impossible, in many cases, and I think inadvisable that the Dominion Government should be notified when a Mineral entry is made so that the lands covered thereby might be reserved for the mineral locator, and if the present course is continued that the Dominion Government get their first notice after survey and when application for the surface is made, there is nothing to prevent such surface being disposed of, between the Mineral entry and the date of such application, to parties other than the claim owners."

The arrangement did not always work well for the reasons given by Mr. Cathcart in his last paragraph and the Province continued to press for a return of all the base metals. This culminated in the Dominion returning the base metals underlying Patented lands to the Province on the 20th of August 1925 by Privy Council Order No. 1336 (with the exceptions enumerated in the last paragraph thereof).

"WHEREAS by Order in Council of the 11th February, 1890, P.C. 2065/G, an arrangement was entered into with the Province of British Columbia for the administration of mineral lands in the Railway Belt in that Province, under the terms of which the Government of Canada undertook not to make any disposition of minerals in the Railway Belt (except coal) other than by patent in fee simple to said Province of the lands in which such minerals were found, to the intent that the minerals in the said Belt, other than coal, should be administered under the Mining Laws of the Province;

AND WHEREAS all grants by letters patent issued under the authority of the Railway Belt Act, Chapter 59, Revised Statutes, 1906, of land in Railway Belt mainland, British Columbia, with the exception of grants to the Province of British Columbia of the surface rights of mineral claims, reserve all mines and minerals to the Crown.

AND WHEREAS title to the precious metals was not transferred to the Crown, as represented by the Dominion at the date of the transfer of the Railway Belt, and these minerals, therefore, belong to the Province; the base metals were transferred to the Crown, as represented by the Dominion, at the date of the transfer of the Railway Belt and, therefore, belong to the Dominion.

AND WHEREAS the Minister of the Interior reports that the precious and base metals are frequently found in combination in the same base metals and it is impossible to dispose of metals so combined or administer them under separate administration; that as stated above, the Dominion of Canada has agreed not to make any disposition of any minerals in the Railway Belt, except coal, other than by grant to the Province, and that under these conditions, it is inconvenient and impracticable for the Dominion to administer the base metals in the Railway Belt underlying patented Dominion Lands;

AND WHEREAS the revenue derived from the base metals by disposition to the Province of the surface rights and base metals underlying available Dominion lands is nominal and in most cases not exceed the office expenses;

AND WHEREAS the Province has been pressing for some years for title to the base metals underlying patented Dominion lands and, recently, a number of cases have arisen where it is represented that it is essential to the development of the mining interests in the Province that arrangements be made whereby title to the base metals underlying patented Dominion lands may be disposed of by the Province.

THEREFORE the Deputy of His Excellency the Governor General in Council, on the recommendation of the Minister of the Interior is pleased to order that the undisposed of base metals, except coal, petroleum and natural gas, underlying lands for which Dominion government patents have been issued under the authority of the said Railway Belt Act, up to and including the date hereof and in which all mines and minerals have been reserved with the exception of lands within the boundaries of existing Dominion Parks and Forest Reserves in the Railway Belt and lands which have been granted for rights of way for the Canadian Pacific and Canadian National Railways, be and the same are hereby vested in His Majesty, King George the Fifth, for the purposes of the Province of British Columbia.

*(signed) E.J. Lemaire,
Clerk of the Privy Council*

*The Honourable
The Minister of the Interior".*

As was mentioned previously, after the passage of the Railway Belt Re-Transfer Agreement Act of 1930 returned the undisposed-of lands and the underlying base metals in the Railway Belt and Peace River Block to the Province, the administration of metals problem ceased to exist, except within Indian Reserves. (Indian Reserves were not included in the re-transfer and the base metals underlying them remained with the Dominion.)

The same problem of dual government dealing, with precious and base metals in Indian Reserves in the Railway Lands (and outside of it) remained until 1943. Gold and Silver in Indian Reserves had remained with the Province but other minerals became the property of the Dominion when Indian Reserves within the Belt were transferred to the Dominion with the Belt. In order to get administration of base metals back to the Province the Indian Reserves Minerals Resources Act, S.B.C. 1943, Chapter 40 - was enacted pursuant to Agreement with the Dominion. Two important principles are extracted from that Act and quoted here.,

"AND WHEREAS it has been agreed between the Governments of the Dominion of Canada and the Province of British Columbia, that as a matter of policy and convenience and for the development of such minerals and without thereby affecting the constitutional or legal rights of either of the said Governments, the Province of British Columbia would have charge of the development of all mineral claims both precious and base, in, upon, or under the said Indian Reserves;

NOW AND THEREFORE THIS AGREEMENT WITNESSETH that the parties have mutually agreed, subject to the approval off the Parliament of Canada and the Legislature of the Province of British Columbia, as follows:-"

"And provided further that no prospecting or right of entry on the said Indian Reserve shall be authorized or permitted until permission so to do has been obtained from the Indian Agent for such Reserve; such permission shall be subject to such terms and conditions as the said Indian Agent may specify and shall be granted only to such persons whose application for permission has been approved by the Gold Commissioner for the mining Division of the Province in which such Reserve is situated;

And provided further that base minerals and mineral rights shall only be subject to this agreement upon being surrendered pursuant to the Indian Act.

3. The term "mineral" shall mean and include gold, silver, and all naturally occurring useful minerals, but shall not include peat, coal, petroleum, natural gas, bitumen, oil shales, limestone, marble, clay, gypsum or any building stone when mined for building purposes, earth, ash, marl, gravel, sand or any element which forms part of the agricultural surface of the land."

Note that the term "mineral" in this Act does not include "building and construction stone, limestone, marble, clay, diatomaceous earth and marl" as does the definition of "mineral" in the Mineral Act of 1974.

RAILWAY LANDS

Access - Roads

Allowance for Roads, Privy Council Order #1887 of 1887

Regulations for the Disposal of Dominion Lands within the Railway Belt in the Province of British Columbia were promulgated by Privy Council Order No. 1887 dated 17 September 1887.

Sections 3, 5 and 9 dealt with the provision of an allowance for roads in the future and access to other settlers lands until roads were built, and are quoted here in full:

- "3. The Dominion Lands in British Columbia shall be laid off, so far as practicable; in quadrilateral townships, each containing thirty-six sections of as nearly one mile square as the convergence of meridians permits, together with an allowance of twelve acres in each section for road purposes"
- "5. Each section shall be divided into quarter-sections of one hundred and sixty acres, more or less, together with an allowance for roads of three acres in each, subject to the provisions hereinafter made".
- "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;"
- "(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;
- (3) The Governor in Council may authorize any person to locate and build public highways or to build public highways located in accordance with Clause nine of these Regulations;
- (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 land holders 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;
- (5) Every patent issued for lands subject to these Regulations shall contain a provision reserving to the Governor in Council the power to order the survey through such lands by a Dominion Land Surveyor of such public highways as he may deem expedient, and for that purpose to take any existing road, and any requisite area of land, whether the area of the roads and lands so taken be or be not in excess of the allowance for roads in any section, quarter-section or legal sub-division; also to enter upon such lands and take therefrom any gravel, stone, timber or other material required for the construction of such highway or any bridge connected therewith; and also to enter upon any such land for the purpose of cutting any drains necessary for the building of such highways."

ALLOWANCE FOR ROADS, PRIVY COUNCIL ORDER #1509 OF 1918

Although numerous amendments were made to the Regulations from year to year nothing happened to change the road access situation until, P.C. Order #1509 (22, June, 1918) amended the above Section 9. (The Order appeared in the B.C. Gazette of 8th August 1918.) It is reproduced here in full:

"9. (1) *The word 'highway' as used in this Section shall mean all public wagon roads, streets, roads, trails, lanes, bridges and trestles, but shall not include canal, towing paths or other like public ways.*

(2) *The authorities of the Province of British Columbia shall, during the pleasure of the Governor in Council and subject to the provisions of these Regulations, be authorized and empowered to make and establish such public highways through or over Dominion Lands in the Railway Belt, exclusive of areas set apart as Dominion Forest Reserves and Parks, but including lands held under homestead entry, contract of sale, lease, license or any other form of occupancy, and also including foreshores and lands covered with water, as if the British Columbia Highway Act, Chap.99, of the Revised Statutes of British Columbia, 1911, as amended by Chap. 29 of the Statutes of 1913, were applicable to the said Dominion Lands.*

(3) *Notwithstanding the powers conferred upon the Provincial authorities by the preceding subsection, the Governor in Council may authorize the location and construction by any person of such public highways as he may deem expedient through any land subject to these Regulations, and for that purpose may take or authorize to be taken without any notice and without any consent on the part of the person owning or occupying such land or having any claim, estate, right, title or interest therein, any requisite area of land, and any existing roads whether the area so taken be or be not in excess of the Provincial allowance for roads, in any section, quarter-section or legal subdivision, and may also enter upon or authorize entry upon any such lands and the taking therefrom of any gravel, stone, timber or other material required for the construction of such highways or for the purpose of cutting and maintaining any drains that may be considered necessary.*

(4) *Whenever any highway is made and declared and has been put into actual use by the public or whenever the Governor in Council has established a highway as provided in the last preceding Subsection such public highway shall become the property of the Province, the legal title thereto remaining in the Crown for the public use of the Province subject to revision in the case of closing or abandonment as herein-after specified, provided that the ownership of any minerals under such roads shall not be affected by the making or establishing of any such highway.*

(5) *No road so established by the Governor in Council 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 in Council.*

(6) *Whenever any road constructed by the Provincial authorities over any of the lands subject to these Regulations is later closed by the same authorities or by reason of abandonment or otherwise ceases to be a public highway, or whenever any road established by the Governor in Council is closed in the manner specified herein, then, in either such case the part of such highway, is still situated across or adjacent to Dominion Lands, shall revert to and become the property of the Crown in the right of Canada and may be dealt with by the Minister subject to these Regulations.*

(7) *Until necessary highways providing means of egress and ingress to the lands of settlers and landholders shall have been located and constructed, a convenient right of way not exceeding sixty-six feet in width over any Dominion Lands disposed of 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 highways, providing always that such settler or landholder making use of the aforesaid privilege shall not damage the fences or crops of the occupier located on the land over which such right of way is reserved.*

(8) *Notwithstanding any other provisions of these Regulations, in case the Provincial authorities and the Governor in Council should both establish highways across the land of any owner or occupier, no greater area shall be taken without compensation from such owner or occupier for the purpose of the said highways than is permitted to be taken by the Provincial authorities under the said British Columbia Highway Act.*

(9) *Every homestead entry, contract of sale, license or any other form of occupancy, patent or other grant hereafter issued of any Dominion Lands within the Railway Belt shall be subject to a reservation providing for the taking of an area for road purposes and compensation for the same as provided herein.*

(Signed)

RODOLPHE BOUDREAU,
Clerk of the Privy Council."

From the above it is seen that there has been a continuing authority to resume land for road building in the Railway Belt - and the amount that could be taken does not appear to be limited.

OWNERSHIP OF BEDS OF NON-NAVIGABLE WATER

The ownership of the land under water areas in the Railway Belt and Peace River Block where the Grant to the upland was made by the Federal Government - roughly between 1885 and 1930.

In respect to Navigable water, the ownership of the bed of the body of water is, prima facie, in the Crown. The area given on the Township map and in the fiat is usually exclusive of the area of navigable water and an indication of what land passed with the Crown.

In regard to non-navigable water, many sets of Dominion Instructions exist, commencing in 1871, but the first volume that precisely spells out who owns the bed of non-navigable waters appeared in 1913. The following quote is from Dominion Manual 1913, clause 136:

"Riparian owners whose lands border upon unnavigable waters are held to be owners of the bed of such water in front of their holdings ad filum aquae. Their rights in this regard may depend to some extent upon the precise terms of the description by which their lands have been conveyed to them. An exception is made by the Irrigation Act for the provinces of Saskatchewan and Alberta providing that no grant shall be made by the Crown of any exclusive property or right in the land forming the bed or shore of any lake, river, stream or other body of water. The word "shore" in this section is presumed to be intended to designate that part of the bed which is uncovered when the water is low."

(NOTE: Nothing refers to water areas being excepted in British Columbia.)

Subsequent Dominion Manuals are substantially the same, i.e. there is no reference to an exception of land covered by water in the Railway Belt. But in fact Sec. 200 of the Dominion Manual of 1946 clarified the situation in British Columbia - that there was no exception unless the Grant specifically said so:

"200. A grant of land carries land covered with water lying within the parcel, unless the contrary be made to appear. Islands within the middle thread of non-tidal streams are presumed to pass with the grant of land abutting upon the stream."

In the Surveyor General Branch Records vault there is a volume of specimen forms of grant used by the Dominion, in the Railway Belt and Peace River Block. The indications are - and one cannot be more definite than that - that from about 1918 onwards the form used in British Columbia did except water areas from the grant, see quote:

"...these presents shall not vest in the grantee any exclusive or other right, title or privilege in, to, or in respect of any watercourse, source of water supply or any stream, river, lake, creek, spring, ravine, or gulch or water power within or bordering on or passing through the said lands, or the bed, or shores thereof..."

The conclusion is that to be sure in any particular case one must look at the form of grant in the L.T.O. to check for the water exceptions but as a general rule early grants in the 1800's and up to about 1918 will not be found to except the water, whereas later ones probably will.

(The Regulations for Disposal of Dominion Land in the Railway Belt embodied in Privy Council Order #1877 of 17 September 1887 do not make reference to excluding non-navigable water from grants, though many other exceptions are referred to, i.e. timber, minerals, right of passage along water ways and rights to carry water, etc.)

Section 52 of the Land Act only applies in cases where the grant was made under the Great Seal of the Province.

An interesting question arises - where a grant was made by the Province under the Great Seal, but under the Mineral Act on a special form of Mineral Grant, in furtherance of the agreement between the two governments, (referred to previously at length in this paper), does Section 52 of the Land Act apply?

Navigability at Law

The circumstances to be considered are that had the grant been made by the Dominion before 1918 instead of by the Province, the water areas would not have been excepted in the Grant. The transfer from the Dominion to the Province in every case was by metes and bounds description, in an Order in Council being a recital of the outer boundary dimensions of the Mineral Claim as surveyed. Nothing was withheld by the Dominion. Is Sec. 52 of the Land Act retroactive and applicable in these circumstances? An example of such a situation arises with the Iron Mask Lake (slough) within Lot 1311, K.D.Y.D. the May Fraction Mineral Claim.

The decision in the "Rotter" case which found that a grantee bordering a non-navigable waterway owned to the middle thread, should be considered where the Land Act does not apply and is compatible with the quoted clause 136 of the Dominion Manual of 1913.

As to what is navigable and what is not the concensus is that navigability depends on the potential of commercial use of a waterway for a profit.

Two cases in British Columbia bear this out - the "Rotter" case previously referred to, *Rotter vs. Canadian Exploration Ltd.* S.C.C. 1960, Vol. 33, W.W.R., which dealt with the Salmo River just north of the highway turn-off to Creston, and the second case dealt with the Kootenay River - upstream from Bonnington Falls where the City of Nelson power house is located on the river bank, *W.K.P. & L, vs. City of Nelson*, 1906 B.C. Reports, Vol. 12, p. 52. In both cases the rivers were non-navigable.

Certain of the very early federal grants (and this may well be confined almost entirely to the Fraser Valley area) were actually Homesteads, surveyed prior to Confederation under Provincial survey instructions and became what is now known as the 5th System of Survey of Dominion Lands. Presumably no assistance in determining the ownership of beds of water can be had from the Dominion Survey Manuals in these cases.

As to interference with the water area, the bed of which is privately owned, it would not appear that the owner of the bed had the right to fill it in (divert the water) in view of Section 3 of the Water Act (R.S.B.C. 1960, Chap. 405) unless he had a licence. The word "stream" included a "lake" (Sec. 2)

See Section 41(9) of the Water Act for penalties. It follows, that as the Crown owns the water, government officials have control over it, including Fisheries, who under that Act have wide powers of entry on private lands (Sec. 5, Chap. 150, R.S.B.C. 1960).