Citation: Chingee v. Attn. Gen. et al. 2002 BCSC 1568

Date: 20021108
Docket: L020087
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BERNIE CHINGEE, SHEILA CHINGEE, JUSTIN CHINGEE and JOKEY CHINGEE

PLAINTIFFS

AND:

THE HONOURABLE GEOFF PLANT, Attorney General and Minister Responsible for Treaty Negotiation, and his delegates,

THE HONOURABLE MICHAEL de JONG, Minister of Forests and his staff, agents, employees and delegates,

THE HONOURABLE RICHARD NEUFELD, Minister of Energy and Mines and his staff, agents, employees and delegates,

THE HONOURABLE STAN HAGEN, Minister of Sustainable Resource Management and his staff, agents, employees and Delegates

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE COHEN (IN CHAMBERS)

Counsel for Plaintiffs:	M.L. Mandell, Q.C. E.A. Gilmour
Counsel for the Attorney General of British Columbia:	L.J. Mrozinksi D.A. Leavitt
Counsel for the Attorney General of Canada:	K.J. Phillips L.M. Borowyk
Date and Place of Trial:	June 25, 27, 28 & July 9, 2002 Vancouver, BC

I. INTRODUCTION

1. THE TREATY

[1] In the summer of 1899, Canada entered into a treaty known as Treaty No. 8 with certain Beaver, Chipewyan, Cree and other Indians (the "Treaty").

[2] The Treaty provides, *inter alia*:

> And Her Majesty the Queen Hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in severalty, to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute, and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to

> the locality which may be found suitable and open for selection.
>
> [emphasis mine]

2. THE AGREEMENT

[3] On March 27, 2000, the authorized representatives of Canada, British Columbia and the McLeod Lake Indian Band ("MLIB") entered into an Adhesion and Settlement Agreement whereby the MLIB and its members adhered to the Treaty (the "Agreement").

[4] The MLIB adhered to the Treaty via Articles 2.1 and 3.1 of the Agreement, which provide, as follows:

> 2.1 McLeod Lake joins in the cession made by Treaty No. 8 and agrees to adhere to the terms thereof in consideration of the undertakings made therein and may exercise the rights set out in Treaty No. 8 throughout the Treaty No. 8 Area.
>
> ...
>
> 3.1 This Agreement will not be construed as a modification or novation of Treaty No. 8.

[5] Article 2.6 of the Agreement provides:

> 2.6 The rights acquired by McLeod Lake under Treaty No. 8 and articles 2.3 to 2.5, inclusive, are rights acquired under a treaty and land claims agreement, respectively, within the meaning of sections 25 and 35 of the *Constitution Act, 1982*.

[6] Article 8 of the Agreement, which is entitled “Land in Severalty” provides, as follows:

> 8.1 In article 8, “Individual” means a Member as of the Effective Date, except that if such Member is a minor or has been declared incapable of managing his or her affairs by a court of competent jurisdiction or under applicable legislation, it means the legal representative of that Member instead of, and for and on behalf of, that Member.
>
> 8.2 Pursuant to Treaty No. 8, any Individual of McLeod Lake who prefers to live apart from existing McLeod Lake reserves and the Proposed Reserve Lands or any Additional Reserve Lands has the option to select land in severalty to the extent of 160 acres.
>
> 8.3 Canada has established a process for Individuals to elect land in severalty or to be counted towards McLeod Lake’s reserve land entitlement. This process is set out in Attachment “B”.
>
> 8.4 Within two months of the Effective Date, Canada and British Columbia will enter into joint negotiations with each Individual who, in accordance with the process set out in Attachment “B”, elected land in severalty and is eligible to receive it. During the negotiations, Canada and British Columbia will consult with each such Individual as to the locality of the 160 acres to determine if the lands selected by the Individual are suitable and open for selection.
>
> 8.5 If the land selected by the Individual is found to be suitable and open for selection pursuant to article 8.4, British Columbia will convey the land to the Member, or to a legal representative in

trust for such Member, as the case may be, with a proviso as to non-alienation without the consent of the Governor General in Council.

8.6 The total amount of McLeod Lake's reserve entitlement set out in article 4.4.2 will be reduced by 128 acres for each Individual who elects to receive land in severalty pursuant to article 8.4. If prior to any conveyance pursuant to article 8.5, any Individual provides Canada and British Columbia with a statutory declaration that he or she no longer wishes to receive land in severalty, then 128 acres will be returned to McLeod Lake's reserve land entitlement and provided as reserve lands as set out in this Agreement and any obligations of Canada and British Columbia to such Individual or Member, as the case may be, set out in articles 8.4 and 8.5 will end.

8.7 Canada and British Columbia require that an Individual who elects land in severalty provide a release and indemnity to Canada and British Columbia with respect to that Individual's election to take land in severalty.

8.8 Canada will provide a release to British Columbia for land in severalty provided pursuant to article 8.5.

8.9 This Agreement does not prejudice and will not be interpreted in any manner to prejudice the position that each of the Parties may take, or the position that any Individual may take, in relation to the form of conveyance of land in severalty or the status of such lands, including, without limitation, the constitutional or reserve status of such lands.

[emphasis mine]

3. THE PLAINTIFFS' CLAIM

[7] The plaintiffs, who are all members of the MLIB, have elected to receive their entitlement to lands under the Treaty and the Agreement in severalty.

[8] In June 2000, pursuant to the terms of the Agreement, the authorized representatives of MLIB entered into negotiations with the authorized representatives of Canada and British Columbia, with a view to fulfilling the plaintiffs' entitlement to receive their lands in severalty.

[9] During the negotiations, an impasse developed over whether the lands selected by the plaintiffs, in fulfilment of their severalty land entitlement, are lands falling within the meaning of s. 91(24) of the ***Constitution Act***, ***1867***.

[10] The parties have now agreed that the issue of the legal status of lands may be determined by the court pursuant to Rule 18A. The parties have also agreed on the following facts:

(i) Prior to the signing of the Agreement, conflicting legal opinions and position papers were obtained by all parties regarding the legal status of severalty lands. In the Agreement, the question of

the constitutional status of severalty lands was left open.

(ii) The Agreement was a settlement of all outstanding litigation between the parties.

(iii) Both the Treaty and the Agreement provide the MLIB, *inter alia*, with a land entitlement, which may be taken either as a reserve or as lands “in severalty”.

(iv) The plaintiffs are Indians within the meaning of the ***Indian Act***. Pursuant to the terms of the Agreement, the plaintiffs have all elected to take their land entitlement under the Agreement in severalty.

(v) Canada and British Columbia have accepted the plaintiffs’ elections under the Agreement.

(vi) In the summer of 2000, representatives of the plaintiffs, British Columbia and Canada entered into negotiations to fulfil the plaintiffs’ severalty lands entitlement.

(vii) The plaintiffs, British Columbia and Canada disagree regarding the legal status of the lands once taken in severalty by the plaintiffs.

(viii) The plaintiffs maintain that lands taken in severalty will be “Lands reserved for the Indians” within the meaning of section 91(24) of the ***Constitution Act, 1867***.

(ix) British Columbia and Canada maintain that the lands taken in severalty will be fee simple lands subject to Provincial jurisdiction under section 92(13) of the ***Constitution Act, 1867***.

II. THE ISSUE

[11] Pursuant to s. 91(24) of the ***Constitution Act***, ***1867***, Canada has jurisdiction over "Indians, and Lands reserved for Indians". Pursuant to s. 92(13), British Columbia has jurisdiction over "property and civil rights in the Province".

[12] The issue in the instant case is whether the lands selected in severalty by the plaintiffs classify as "Lands reserved for Indians" pursuant to s. 91(24), or are they provincial lands in fee simple pursuant to s. 92(13)?

III. THE RELIEF SOUGHT BY THE PLAINTIFFS

[13] The plaintiffs seek a declaration that the lands which have been provided by British Columbia, pursuant to Article

8.4 of the Agreement, are "Lands reserved for Indians" within the meaning of s. 91(24) of the ***Constitution Act, 1867***.

IV. THE HISTORICAL BACKGROUND OF THE TREATY

[14] Canada entered into the Treaty in an effort to open up the area for peaceful settlement. By contrast, the Indians were primarily concerned with protecting and preserving their ability to sustain a livelihood in light of advancing settlement. These intentions were explained by Wilson J., in dissent on another issue, in ***R. v. Horseman***, [1990] 1 S.C.R. 901, on p. 909 at paras. 10 and 11, as follows:

> In one of the most detailed studies of the history of the negotiations leading up to Treaty No. 8, *As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (1973), R. Fumoleau explains why the Canadian government sought an agreement with the Treaty 8 Indians. The Klondyke gold rush gave rise to serious problems throughout 1897 and 1898, with miners travelling through territory occupied by the Indians and paying little respect to their traditional way of life. Inevitably conflict broke out as the Indians retaliated. The government of Canada quickly realized that it was necessary to reach an understanding with the Indians about future relations. Commissioners Laird, Ross and McKenna were therefore sent out to negotiate a treaty with the Indians.
>
> Mr. Daniel's study of these negotiations reveals that the Indians were especially concerned that the most important aspect of their way of life, their ability to hunt and fish, not be interfered with. He points out that the Commissioners repeatedly sought to assure the Indians that they would continue to be free to pursue these activities as they always had ...

[15] While the severalty lands provision in the Treaty was a response to the Indians' way of life, and a recognition that large communal reserves were not well suited to them, it was also because Canada was concerned that the Indians would not enter into a Treaty if they believed that they would be forced to live on reserves. A report of the Treaty Commissioners to the Superintendent General of Indian Affairs, dated September 22, 1899, states, as follows:

> The Indians are given the option of taking reserves or land in severalty. As the extent of the country treated for made it impossible to define reserves or holdings, and as the Indians were not prepared to make selections, we confined ourselves to an undertaking to have reserves and holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required. There is no immediate necessity for the general laying out of reserves or the allotting of land. It will be quite time enough to do this as advancing settlement makes necessary the surveying of the land. Indeed, the Indians were generally averse to being placed on reserves. It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves. We had to very clearly explain to them that the provision for reserves and allotments of land were made for their protection, and to secure to them in perpetuity a fair portion of the land ceded, in the event of settlement advancing.

[16] Canada and the Indians agreed upon the Treaty terms through a process of oral negotiations. As Campbell J.

explained in ***Benoit v. Canada***, [2002] 2 C.N.L.R. 1 on p. 36 at para. 73 (F.C.T.D.):

> Within this context, the Treaty Commissioners were given their specific instructions. Prior to treaty, there were a number of discussions surrounding which specific terms would be offered when Treaty 8 was negotiated. Some of this debate was due to the fact that, although the government had little experience with the Aboriginal People of the Peace-Athabasca district, they did recognize that these people could still rely on their traditional practices to survive. Additionally, the social organization of Aboriginal People in Treaty 8 was somewhat different than previous treaty groups, with the Aboriginal People in Treaty 8 living in much smaller familial groups (Flanagan, 23-24). Ultimately, the Crown decided to offer annuities to Aboriginal People and scrip to the Metis. Contrary to other treaty negotiations, here the negotiators had the option of offering reserves or land in severalty.

[17] The oral nature of the negotiations leading up to the signing of the Treaty is evidenced by several contemporaneous accounts of the negotiations from representatives of the Crown, including Commissioner D. Laird, one of the Treaty Commissioners. On June 23, 1899, Commissioner Laird reported on the negotiations, as follows:

> As soon as we arrived here we notified the Indians that we would meet them in council on the following day, the 20th inst. at eleven o'clock. They were a little late in assembling, but turned out in satisfactory numbers. I outlined to them the terms on which we were prepared to make a treaty. After the chief, some of his headmen and others made objections to certain of the proposals, they finally agreed to accept the terms offered, and the meeting

> dismissed to assemble the following day at 3 o’clock to sign the treaty which was to be drafted in the meantime.

V. THE TREATY LANDS

[18] When British Columbia joined Confederation in 1871, it retained its public lands, subject to the right of Canada to assume lands for defence purposes. Certain of those lands, including some of the lands covered by the Treaty, and known as the Peace River Block (the "Block"), were transferred back to Canada in 1884.

[19] On March 22, 1929, Mr. Duncan Scott, representing Canada, and Mr. Henry Cathcart, representing British Columbia, entered into an agreement regarding the re-transfer of the Block lands to British Columbia from Canada. The Scott-Cathcart Agreement provided that all Indian reserves in the Block created from 1884 to 1930 remained federal lands, with the balance of the Block lands returning to provincial jurisdiction. In the result, British Columbia has had control over the Block lands since 1930.

VI. SUMMARY OF THE PARTIES' POSITIONS

[20] The parties differ in their positions regarding the significance of the Treaty and the Agreement in determining the legal status of the severalty lands received by the plaintiffs.

[21] Counsel for the plaintiffs submitted that the Treaty is a reflection of Canada and the Indians' intentions, and that the post-Treaty conduct of Canada, as demonstrated through the historical documents, suggests that Canada and the Indians understood and fully intended that the lands selected by the Indians in severalty under the Treaty enjoyed the same constitutional status as other Treaty rights, and are thus to be received by the plaintiffs under the terms of the Agreement as s. 91(24) lands.

[22] Counsel for Canada argued that the legal status of the lands selected in severalty by the plaintiffs must be determined first by reference to the Agreement, and thereafter, if necessary, by reference to the Treaty. He contended that the Agreement is the modern expression of the Treaty that "breathes life" into the historical document, and, as such, should be interpreted by the court for the purpose of determining the intent of the parties with regard to the legal status of the lands selected in severalty.

[23] Counsel submitted that the Agreement should be the starting point for the analysis because Canada does not presently have the unilateral ability to comply with the Treaty. Counsel contended that the Treaty, without the Agreement, would be ineffective as an instrument of land

conveyance in British Columbia, as the relevant lands are currently under British Columbia's jurisdiction and the Province was not a signing party to the Treaty.

[24] Counsel also submitted that as the original Treaty Commissioners were unable to successfully negotiate with the MLIB members during the term of their mandate, consequently evidence of the parties' mutual intention must first be found in the terms of the Agreement, not in the Treaty, if in fact such intention can be found at all.

[25] In contrast, counsel for British Columbia submitted that neither the Agreement, nor the Treaty were relevant to determining the legal status of the lands selected in severalty by the plaintiffs. Simply put, counsel asserted that as a matter of law, the Province cannot legislate directly with respect to s. 91(24) lands reserved for Indians. She said it follows then that the Province cannot have entered into the Agreement to directly transfer federal lands to an individual member of the MLIB. Accordingly, if the Province can only transfer lands over which it possesses a power of administration and control, the recipient of the severalty lands can only receive the same lands subject to provincial laws and regulations.

[26] In support of her assertion on this point, counsel made reference to Article 8.9. She argued that, as no agreement was reached between the parties respecting the legal status of lands selected in severalty by the plaintiffs, the Agreement could not therefore be used as an interpretive tool for determining the issue. She submitted that any judicial interpretation of the parties' respective obligations under the terms of the Agreement must therefore proceed on the basis that the parties did not reach an agreement on this issue, except that it would be negotiated.

[27] Counsel also asserted that the Treaty should play no role in determining the legal status of the lands selected in severalty by the plaintiffs. She said that the Treaty is not relevant, because in Article 8.4 of the Agreement, the parties merely agreed to negotiations, leaving the legal status of the lands in severalty as an open issue during the negotiations. More specifically, she contended that the parties did not agree to be bound by the terms of the Treaty, which, therefore, are irrelevant to determining the legal status of the lands. She argued that unless there is some constitutional obligation on all of the parties to the Agreement to abide by the Treaty, "its meaning and intent is of no moment".

[28] However, counsel also argued, in the alternative, that the evidence supports an interpretation of the Treaty that the lands selected by the plaintiffs in severalty, when received by the plaintiffs, remain provincial lands subject to provincial laws and regulations.

VII. DECISION

1. The Meaning of Article 8.9 of the Agreement

[29] In my opinion, there is nothing in the wording of Article 8.9, or the other provisions in Article 8, to limit the application of Article 8.9 to the negotiations between the parties regarding the legal status of the severalty lands. Rather, I am of the view that the plaintiffs are entitled to seek a ruling on the issue by asking the court to consider the terms of the Agreement as an aid to determine the legal status of the severalty lands.

[30] Moreover, I do not agree with counsel for British Columbia that, because of its embodiment in the Agreement, the Treaty itself is of no moment. Through the Agreement, the parties have adhered to the Treaty. In particular, Article 2.1 stipulates that the MLIB "joins in the cession made by Treaty No. 8", and "may exercise the rights set out in Treaty No. 8 throughout the Treaty No. 8 Area". As well, Article 3.1

stipulates that the Agreement does not modify or act as a novation of the Treaty.

[31] Therefore, it is my opinion that the language and intent of the Treaty is the starting point for the court's analysis on the legal status of the severalty lands to be conveyed to the plaintiffs by British Columbia pursuant to the terms of the Agreement.

2. The Principles of Treaty Interpretation

[32] Counsel accept that the principles of treaty interpretation applicable to the instant case can be summarized, as follows:

(i) treaties are to be construed liberally: ***R. v. Marshall***, [1999] 3 S.C.R. 456;

(ii) a treaty must be construed not according to the technical meaning of the words, but in the sense in which it would naturally have been understood by the Indians: ***Nowegijick v. R.*** [1983] 1 S.C.R. 29;

(iii) any ambiguities are to be resolved in favour of the Indians, and any limitations which restrict the rights of Indians under treaties must be narrowly construed:

Saanichton Marina Ltd. v. Claxton (1989), 36 B.C.L.R. (2d) 79 (B.C.C.A.); and ***R. v. Badger***, [1996] 1 S.C.R. 771;

(iv) the goal of treaty interpretation is to give effect to the mutual intentions of the parties at the time a treaty was entered into: ***R. v. Sioui***, [1990] 1 S.C.R. 1025;

(v) extrinsic evidence and historical and cultural context can be used as interpretive aids even absent any ambiguity on a treaty's face: ***R. v. Marshall***, *supra*. In addition to documents evidencing the intention of the parties at the time of the treaty, this includes subsequent events which demonstrate a consistency with the intentions of the parties: ***Lac La Ronge Indian Band v. Canada***, [2001] 4 C.N.L.R. 120;

(v) treaty rights must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern

context: ***R. v. Sundown,*** [1999] 1 S.C.R. 393; and ***Simon v. The Queen***, [1985] 2 S.C.R. 387.

3. The Parties' Positions on the Interpretation of the Treaty

[33] Counsel for British Columbia submitted that the wording of the Treaty, though not exhaustive, supports an interpretation that severalty lands are provincial fee simple lands. She said that the Treaty repeatedly distinguishes between two categories of grants to the Indians, “reserves” or “band reserves”, and “land in severalty”, and contemplates a legally distinct method of transferring land in severalty. While reserves are to be laid aside by Canada, land in severalty is to be “conveyed”. Counsel argued that the reserve and severalty parcels were therefore intended by Canada to constitute two distinct treaty benefits.

[34] Counsel further submitted that the reference to the word “severalty” is perhaps the most significant indication in the express wording of the Treaty of the intention of the parties. There can be no doubt, she said, given the definition of “severalty”, well entrenched in the common law by 1899, that severalty lands were intended to be held by an individual as a separate holding, apart from a community of individuals.

[35] Similarly, counsel for Canada submitted that the Treaty makes a distinction as to form and status, namely, distinguishing those living on reserves versus those choosing to live apart from band reserves and taking their lands in severalty.

[36] Counsel explained that the definition of the term “reserve” in the ***Indian Act*** of 1876, and subsequent ***Acts***, specifies that the legal title is vested in Canada. She noted that the present day ***Indian Act***, R.S.C. 1985, c. I-5 defines the term “reserve” as a tract of land, the legal title to which is vested in Canada, that has been set apart by Canada for the use and benefit of a band. Counsel said that the key elements are, thus, that the lands have been set aside by Canada, and that legal title is vested in Canada.

[37] Counsel for Canada submitted that, by contrast, lands selected in severalty under the Treaty contemplate exclusive ownership of those lands by a single party, as opposed to the sharing of title through joint tenancy, or tenancy in common, or the holding of title by Canada. This is supported, counsel said, by the definitions of severalty, which clearly indicate that lands selected in severalty are held by an individual.

[38] Counsel cited ***Stroud's Judicial Dictionary***, 5th ed., at 2398, citing ***Blackstone's Commentaries on The Laws of England, 1897***, which defines "severalty" in the following terms:

> He that holds lands or tenements in severalty, or is sole tenant thereof, is he that holds them in his own right only, without any person being joined or connected with him in point of interest during his estate therein.

[39] Similarly, ***Black's Law Dictionary***, 1979, 5th ed., at 1232, provides:

> Severalty, estate in. An estate which is held by the tenant in his own right only, without any other being joined or connected with him in point of interest during the continuance of his estate.

[40] As well, ***The New Shorter Oxford English Dictionary on Historical Principles***, 1993, at 2799 defines "severalty" as follows:

> The tenure of land held by an individual absolutely, not jointly or in common with another; the condition of land so held.

[41] Counsel noted that unlike reserve land, which is "set aside" and held by Canada for the use and benefit of an Indian band, severalty land is "conveyed" directly to the individual who desires to take severalty lands. He also noted that even lands which are special reserves under s. 36 of the ***Indian Act*** require that the lands be set aside by Canada, and that the

lands be held for the use and benefit of a band, and not an individual member of a band.

[42] Plaintiff's counsel did not argue that severalty lands had to fall under any particular administrative regime, such as the ***Indian Act***. She submitted that the federal power to regulate Indian lands was much broader than the definition of "reserve" found in the ***Indian Act***. She also contended that severalty lands were reasonably equivalent to reserve lands.

[43] Counsel submitted that the wording of the Treaty suggests that Canada and the Indians understood and intended that lands selected in severalty was a Treaty term, and that severalty lands, like other terms of the Treaty, were part of the Treaty relationship where the severalty lands would be protected by Canada for the perpetual use of those for whose benefit they were allotted. She argued that the clear implication was that severalty lands enjoyed the same constitutional status as other Treaty rights.

[44] Counsel also submitted that the historical documents, and the post-Treaty conduct of Canada, and of the Indians entitled to the benefit of the Treaty, indicate that severalty lands were intended to be under federal legislative jurisdiction. She said that through its conduct in administering lands chosen in severalty, including their setting aside,

confirmation and surrender, Canada treated the severalty lands in the same way as they treated reserve lands taken for a band.

[45] Counsel explained that following the signing of the Treaty, the selection of severalty lands and large band reserves proceeded over a period of many years. Various federal government officials accepted requests for reserves, including lands selected in severalty. Counsel noted that the conduct of federal government officials in setting aside severalty lands, immediately after the Treaty was concluded, was to treat both categories of land as federal lands.

[46] For example, in November 1900, Sergeant Butler of the North West Mounted Police informed Commissioner Laird in writing that he had met with Indians at Peace River Landing and, according to their wishes and the provisions of the Treaty, had set aside lands selected in severalty for some individuals. Sergeant Butler staked the severalty lands with signs reading “Temporary Indian Reserve”. Commissioner Laird replied that he approved of Sergeant Butler’s conduct, and that the severalty lands would be surveyed the following summer.

[47] Similarly, in 1900, Mr. J.A. Macrae, Inspector of Indian Agencies and Reserves, wrote to the Secretary of Indian

Affairs notifying him that Indians had chosen lands in severalty at Rat River and Vermillion and that the usual steps should be taken to notify the Department of the Interior to ensure that the lands were protected against alienation.

[48] Counsel also submitted that most often federal government officials did not differentiate between lands set aside in severalty and communal reserves. They often referred to severalty lands as reserves. For example, in 1903, Chief Surveyor Mr. Sam Bray informed the Deputy Superintendent of Indian Affairs that an Indian named John Stephens was occupying lands near Lesser Slave Lake and that these lands should be set aside as severalty lands for him. Just as Commissioner Laird had done, Mr. Bray referred to these lands as an Indian reserve:

> If the land on which he is now located is not secured to him as an Indian Reserve it will run continual risk of being taken possession of by white men. There appears to be no objection why the said land should not be surveyed and confirmed as an Indian Reserve with the view of allowing John Stephens to continue in possession of it, or to give him eventually a location ticket covering the said land.

[49] Furthermore, counsel said that Mr. Bray’s reference to a location ticket indicates that federal government officials recognized that severalty lands were not lands held in fee simple by an individual Indian, as otherwise, she said there

would have been no reason for Mr. Bray to contemplate the issuance of a location ticket.

[50] Counsel for the plaintiffs also pointed to the government's policy of confirming Indian reserves through federal Orders in Council as evidence that land in severalty was viewed the same as reserve land. For example, in 1903, the Deputy Minister of Indian Affairs forwarded descriptions of several reserves which had been chosen in severalty by individual Indians in 1901. He asked that these severalty lands be confirmed by Order in Council. Similarly, Order in Council No. 982, dated April 15, 1914, confirmed Indian Reserve No. 150 G as lands set aside in severalty pursuant to Treaty No. 8:

> AND WHEREAS under the conditions of Treaty No. 8, under which the Reserves were set apart, the Indians were entitled to select their lands in severalty, that is in small areas located in situations specially desired for individual Indians.
>
> AND WHEREAS certain lands have been selected to be set apart in severalty and are known as Indian Reserve No. 150 G and comprise:...

[51] Counsel also argued that the federal government administered the severalty lands in the same manner as for the surrender of communal reserves. She explained that under the ***Indian Act***, a surrender is required for the release of the Indian interest in the land. She noted that surrender was

also taken for the release of a severalty interest in the land. For example, Indian Reserve No. 151 H was described by government officials as being “originally set aside in severalty for Louison Cardinal...”. Order in Council No. 315, dated February 22, 1929, accepted the surrender of this reserve in accordance with the provisions of the ***Indian Act***.

[52] Similarly, federal government officials described Indian Reserve No. 151 K as having been established in severalty for William McKenzie by an Order in Council dated June 23, 1925. The government accepted the surrender of these lands by Order in Council No. 84, dated January 19, 1929, which stated that:

> The said surrender has been given in order that the said lands may be sold for the benefit of the said Mrs. William McKenzie by the Department of Indian Affairs.
>
> The Minister recommends, as the said surrender has been duly authorized, executed and attested in the manner required by the 51st Section of the Indian Act, that the same be accepted by Your Excellency in Council.

[53] In addition, counsel submitted that when questions arose as to the status of lands chosen in severalty, the authorities acknowledged that those lands had the same status as communal Indian reserves. In what she called a key exchange of correspondence, counsel submitted that a Treaty Commissioner revealed his understanding that severalty lands were treaty

rights with the same constitutional status, entitling those who selected these lands to the same treaty benefits as others who selected reserves.

[54] In November 1900, Inspector Macrae wrote the Secretary of Indian Affairs to clarify whether the government's intention had been that Indians who chose land in severalty would receive 160 acres for each family member, and what benefits were to be accorded to Indians who chose lands in severalty. According to Inspector Macrae:

> It is generally understood that Indians taking land in severalty are to receive exactly the same benefits as those who take land in a reserve....

[55] Inspector Macrae's query was sent on to Commissioner Laird, who replied December 5, 1900, that there was no doubt that Indians taking land in severalty were to receive 160 acres for each family member. Furthermore, he confirmed Inspector Macrae's understanding that Indians taking land in severalty were to receive the same benefits as those taking lands in a communal reserve:

> When an Indian who selects and settles upon land in severalty (which is his reserve) is prepared to cultivate the soil or keep stock, he is entitled to receive the articles promised. ...
>
> In short, Mr. Macrae has correctly summarized the intention of the Treaty on the 2nd point which he

> has raised when he says: “It is generally understood that Indians taking land in severalty are to receive exactly the same benefits as those who take land in a reserve, and that the moment at which they become entitled to those benefits which are intended for the promotion of agriculture, is the one at which they commence to cultivate their land taken in severalty.”

[56] Counsel noted that in 1908, Commissioner Laird was again called upon to clarify the intention of land entitlement provisions in the Treaty. Indians from Lesser Slave Lake had complained to the government that a surveyor had disputed their right to choose land in severalty. The Indians stated, in their correspondence, that their understanding at the time of the Treaty was that they were to be given a choice of large reserves or small reserves, namely lands in severalty:

> ...remember, as I do, the promises you made us at the time of the first Treaty [Treaty 8]: “Indians, you may get the lands you are living on – but make a choice and the land you will choice [sic] for yourselves or children will be given you.
>
> (?) my brother (?) and I took large reserves. Some of my people wanted only little reserves. One of my counsellors took a good place, put a stopping place on it, made some improvements, and is making a good living. Some others, long before treaty, had land which they fenced, worked, put up houses, had gardens and so expecting to get their lands, when last fall, a surveyor, by the name of Salby [sic], came through the lands and reserves pretending that we Indians have no right to possess lands.

[57] Commissioner Laird wrote confirming that the Indians had the right under the Treaty to choose lands in severalty, and

that this right should not be interfered with by government officials:

> It seems to me, however, that there should be no interference with the exercise of the right to hold land in severalty which the Treaty accords to the Indians, and that if surveyors of the Department of the Interior are not aware of the provisions of the Treaty it would be well that they should be advised thereof.

[58] In sum, counsel said that the evidence of the conduct of Canada and the Indians in implementing the severalty provision closely following the signing of the Treaty discloses a mutual understanding that severalty lands were legally equivalent to reserve lands. There was no difference, she said: Canada allotted severalty lands through an Order in Council; Canada continued to administer the lands as Indian lands for the benefit of the people who took severalty lands and their descendants; when an individual severalty elector died, the Crown recognised that the person’s interest in the land passed to his or her heirs as an Indian entitlement to land.

[59] Counsel said that the intention of Canada and the Indians was clear leading up to, and immediately following, the signing of the Treaty. She also submitted that the content of the Treaty is to be found in the substance of the promises and mutual understanding of the parties, and could not be limited by the text of the Treaty when it was found later that the

expectation of the parties was different based upon technical words inserted into the text of the Treaty.

[60] By contrast, counsel for British Columbia submitted that in practice, though most government officials conceived of all Indian Lands as being subject to the ***Indian Act***, the Commissioners clearly distinguished between reserve lands and severalty lands.

[61] In a letter dated April 17, 1899, J.A. McKenna, one of the Treaty Commissioners, advocated against the reserve system for the Indians to be covered by the Treaty, and recommended that the Treaty Commissioners have the authority to grant individual title to certain Indians:

> From what I have been able to learn of the North country, it would appear that the Indians there act rather as individuals than as a nation, and that any tribal organization which may exist is very slight. They live by hunting, and by individual effort, very much as the half-breeds in that country live. They are averse to living on reserves; and as that country is not one that will ever be settled extensively for agricultural purposes it is questionable whether it would be good policy to even suggest grouping them in the future. The reserve idea is inconsistent with the life of a hunter, and is only applicable to an agricultural country. The most the Indians are likely to require in the way of reserves are small fishing stations at certain points which they might desire to have secured for them. I do not think the Commissioners should go further in the way of general reservations, unless they should find that circumstances compel them. But they should have authority to guarantee to every Indian settled upon, or in occupation of land, an

> individual title thereto. The limit might be put at 160 acres as the Indians are likely to require very small holdings.

[62] Counsel for Canada also cited this passage as support for the conclusion that land in severalty was not intended to be a reserve interest.

[63] Counsel for Canada and British Columbia, while recognizing some of the discrepancies in the treatment of severalty lands, emphasized that in the years following the signing of the Treaty, some federal government officials responsible for administering the Treaty nevertheless distinguished between reserve and severalty lands. Counsel cited, as an example, a 1922 memo by a solicitor in the Department of Indian Affairs, which indicates a legal view at the time consistent with the notion that severalty lands were quite distinct from reserves, and that severalty lands were more in the nature of fee simple lands.

[64] Counsel also relied on a letter, dated February 26, 1959, written by W.C. Bethune, Chief of Reserves and Trusts to the Regional Supervisor in Alberta, wherein, counsel submitted, the writer reinforces the view that Canada shared that province’s interpretation of the land in severalty provision in the Treaty. The letter states, as follows:

> I believe you will find in previous correspondence with your office, in the opinion of the Department Legal Advisor, none of the three areas are Indian Reserves within the meaning of the Indian Act. In addition, we do not think that they were ever intended to be Indian reserves and for that matter I believe you will agree that according to the wording of Treaty No. 8 the original occupants were entitled to receive a Crown Grant in the form of Letters Patent subject to a restriction against sale.

4. Conclusion

[65] In my opinion, although the lands selected by the plaintiffs in severalty under the terms of the Treaty and the Agreement are outside the reserve system governed by Canada under the ***Indian Act***, I find that the legal status of those lands is, nonetheless, s. 91(24) lands. I come to this conclusion based on the following four factors:

1. My interpretation, based on the treaty interpretation principles set out earlier in these reasons, of Canada and the Indians' intentions, as evidenced by the negotiations leading up to the signing of the Treaty, the historical documents surrounding the signing and implementation of the Treaty, and the parties' post-Treaty conduct;

2. The historical fiduciary duty of the Crown, as evidenced by the proviso as to non-alienation in the Treaty, and Article 8.5 of the Agreement;

3. On a recognition set out in the authorities, that lands reserved for Indians need not solely be regarded as "reserve lands" under the ***Indian Act***; and,

4. On a recognition that strict legal impediments cannot thwart the intention of the parties.

Interpretation of the Treaty

[66] In my opinion, the court's interpretation of the Treaty should play the defining role in determining the legal status of the severalty lands. In this regard, the Supreme Court of Canada has expressly rejected an approach to the interpretation of Indian interests in land which relies on a strict, formalistic interpretation of words contained in a treaty. In ***R. v. Marshall***, *supra,* the Court explained, at para. 14, as follows:

> Subsequent cases have distanced themselves from a "strict" rule of treaty interpretation, as more recently discussed by Cory J., in *Badger*, *supra*, at para. 52:
>
> > ...when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement: see Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*

> (1880), at pp. 338-42; *Sioui*, *supra*, at p. 1068; *Report of the Aboriginal Justice Inquiry of Manitoba* (1991); Jean Friesen, *Grant me Wherewith to Make my Living* (1985). The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction.
>
> [Emphasis mine]

[67] In the instant case, the terms of the Treaty were discussed and agreed to with the Indians orally, and then reduced to writing afterwards by the Commissioners. Accordingly, the content of the Treaty must be found in the substance of the promises actually made to the Indians and agreed to by them. Therefore, Canada's obligations under the Treaty should not be limited, or altered, by the wording that Canada's representatives afterwards chose for the written text of the Treaty, and in particular, should not be limited by any technical terms those representatives decided to insert into the Treaty language.

[68] Thus, while counsel for Canada and British Columbia argued that a literal interpretation of the wording of the

Treaty discloses an interest in severalty lands as being in fee simple, I am not persuaded that the Indians recognized or understood the subtle distinction in the Treaty language now being relied upon by counsel. Nor is there evidence that the Indians were made aware of, or were in agreement, as to the possible effect of the Treaty language on the legal status of the severalty lands.

[69] As counsel for the plaintiffs submitted, there is no evidence that the distinction between “set aside” and “convey”, or the common law meaning of “severalty” versus the meaning of “reserve” under the ***Indian Act***, was ever part of the discussions with the Indians who entered into, or adhered to, the Treaty. There is no evidence to support a finding that the Treaty Commissioners ever told the Indians that, if they selected lands in severalty under the Treaty, those lands would be legally different than if they took their entitlement as reserve lands. As such, with respect, I find counsel for British Columbia and Canada’s analysis with regard to the legal meaning of those words in the Treaty to be less than helpful.

[70] Moreover, the court cannot rely exclusively on the literal wording of the Treaty, but must carefully examine the Treaty context, including the circumstances at the time it was

signed, and the conduct of the parties afterwards. In my opinion, based on the principles of treaty interpretation, the court must turn to the historical documents and evidence of the post-Treaty conduct of Canada and the Indians to ascertain the mutual intentions of those parties when entering into the Treaty.

[71] It is my view that, though the literal wording of the Treaty makes a distinction between reserves and lands selected in severalty, it does not follow on the face of the document that the distinction is meant to suggest that land selected in severalty is, therefore, to be treated as fee simple. Indeed, the majority of the evidence regarding the post-Treaty conduct of Canada and of the Indians suggests that the parties viewed severalty lands as a sort of sub-class of reserves. And, while there is some limited evidence that some representatives of the federal government viewed severalty lands as more akin to fee simple than reserve lands, I am satisfied that any ambiguities on the face of the Treaty, or apparent from subsequent conduct, must be interpreted in favour of the Indians. As stated by Cory J. in ***R. v. Badger***, *supra*, on p. 794 at para. 41:

> ...any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this

> principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed.

[72] Thus, on the whole of the evidence, I am satisfied, and find, that it was the intention of Canada and of the Indians at the time of the signing of the Treaty, and confirmed by their post-Treaty conduct, that lands selected in severalty were to be conveyed to the Indians as s. 91(24) lands.

Fiduciary Duty of the Crown

[73] I consider the above conclusion to be consistent with the fiduciary duty owed by Canada to protect Indians in the enjoyment of their rights, and, in particular, in the possession and use of their lands.

[74] The Treaty, and Article 8.5 of the Agreement, provide for "the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada."

[75] Pursuant to the ***Indian Act***, there is a restriction on the direct transfer of an interest in reserve lands to a third party. Instead, the land must first be transferred to the Crown. This requirement has a long history; it is found in the Royal Proclamation of 1763, and has been enshrined in the ***Indian Act*** since its earliest version, today in s. 37.

[76] In ***Guerin v. The Queen***, [1984] 2 S.C.R. 335, the Supreme Court of Canada held that the surrender requirement, and the concurrent responsibilities of the Crown, are the source of a fiduciary duty requiring the Crown to deal with the land for the benefit of the Indians. The Court explained, at p. 383, as follows:

> The Royal Proclamation of 1763 provided that no private person could purchase from the Indians any lands that the Proclamation had reserved to them, and provided further that all purchases had to be by and in the name of the Crown, in a public assembly of the Indians held by the governor or commander-in-chief of the colony in which the lands in question lay. As Lord Watson pointed out in *St. Catherine's Milling*, *supra*, at p. 54, this policy with respect to the sale or transfer of the Indians' interest in land has been continuously maintained by the British Crown, by the governments of the colonies when they became responsible for the administration of Indian affairs, and, after 1867, by the federal government of Canada. Successive federal statutes, predecessors to the present Indian Act, have all provided for the general inalienability of Indian reserve land except upon surrender to the Crown, the relevant provisions in the present Act being ss. 37-41.
>
> The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. ...

[77] In the instant case, however, severalty electors wishing to alienate their lands are not required to first transfer that land to the Crown. At the time the Treaty was entered into, Canada still owned the land. Counsel for British

Columbia and Canada thus submitted that the proviso as to non-alienation in the Treaty, and in the Agreement, is strong evidence that severalty lands are something other than s. 91(24) lands: counsel queried, "why would Canada include a non-alienation proviso in the Treaty if it intended to maintain control over the land in any event"?

[78] However, in my view, the Indians' interest in the severalty lands is a unique creature of the Treaty: it is *sui generis*. Although the proviso as to non-alienation does not require Canada to maintain legal control over severalty lands, as it does reserve lands, it is nevertheless, in my view, an extension of the historical protection of Indians from improvident bargains. It is, as plaintiff's counsel stressed, a hallmark of the Crown’s traditional fiduciary duty, one of the most basic principles of Indian land law, and is therefore indicative of s. 91(24) jurisdiction. I thus agree with counsel for the plaintiffs, that the inclusion of this proviso in the Treaty and in the Agreement grounds the Crown's fiduciary relationship, and is very strong evidence that the severalty lands fall within federal jurisdiction.

[79] As counsel for the plaintiffs submitted, there is no evidence that Canada intended that the fiduciary relationship of the Indians and the Crown would end if Indians selected

their lands in severalty, or that that this result was ever explained to the Indians. Instead, counsel said, and I agree, that the totality of the historical evidence strongly suggests the contrary.

Lands Reserved for Indians Need Not Be *Indian Act* Reserves

[80] I am also in agreement with counsel for the plaintiffs that the suggestion by counsel for British Columbia and for Canada that there are only two options, either reserve land under the ***Indian Act***, or land in fee simple, and that by consequence, if the severalty land is not reserve land it must be fee simple, is, with respect, an oversimplification of the issue.

[81] The ***Indian Act*** is but one vehicle which has been used to define Indian interests in land protected by Canada, but it is not the only mechanism that has been used for this purpose. The Supreme Court of Canada has recognized federal jurisdiction over lands reserved for Indians under s. 91(24) in a form other than ***Indian Act*** reserves.

[82] In ***Delgamuukw v. The Queen***, [1997] 3 S.C.R. 1010, (“**Delgamuukw**”) the Court confirmed that the jurisdiction of the federal government pursuant to s. 91(24) extends beyond existing reserves and encompasses all lands set aside for the

use and benefit of Indians, including lands held pursuant to aboriginal title. At para. 174 Lamer C.J. said, as follows:

> The province's principal submission is that 'Lands reserved for the Indians' are lands which have been specifically set aside or designated for Indian occupation, such as reserves. However, I must reject that submission, because it flies in the face of the judgment of the Privy Council in *St. Catherine's Milling*. One of the issues in that appeal was the federal jurisdiction to accept the surrender of lands held pursuant to aboriginal title. It was argued that the federal government, at most, had jurisdiction over "Indian Reserves." Lord Watson, speaking for the Privy Council, rejected this argument, stating that had the intention been to restrict s. 91(24) in this way, specific language to this effect would have been used. He accordingly held that (at p. 59):
>
> > ...the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms of conditions, for Indian occupation.
>
> Lord Watson's reference to 'all lands' encompasses not only reserve lands, but lands held pursuant to aboriginal title as well. Section 91(24), in other words, carries with it the jurisdiction to legislate in relation to aboriginal title. It follows, by implication, that it also confers the jurisdiction to extinguish that title.

[83] The Court's recent decision in ***Ross River Dena Council Band v. Canada,*** [2002] SCJ No. 54 ("***Ross River***"), confirms that the federal government has jurisdiction, pursuant to s. 91(24), over lands beyond reserves as defined in the ***Indian Act***.

[84] In ***Ross River***, both the majority and minority judgments held that the royal prerogative, exercisable by the federal government pursuant to s. 91(24), to create a reserve was limited by statute, in that a reserve must meet the definition in the ***Indian Act***. However, they appear to be in agreement that the royal prerogative, exercisable by the federal government pursuant to s. 91(24), to set aside lands for Indians in a format other than a reserve was not limited by statute. At para. 58, LeBel J., speaking for the majority, said, as follows:

> However, in the Yukon, so long as the Crown intends to create a reserve as defined by the Indian Act, Parliament has put limits on the scope and effects of the power to create reserves at whim, through the application of the statutory definition of a reserve in s. 2(1). If the Crown intended to transfer land to a First Nation outside the scope of the Indian Act, the role and effects of the prerogative would not be constrained by this Act and would have to be examined in a different legal environment.

[85] At paras. 6 and 7 of the minority judgment, delivered by Bastarache J., His Lordship said, as follows:

> In the past, the Crown exercised its prerogative to create reserves in a number of ways. Although some lands set apart for Indian bands constitute "reserves" within the meaning of the Indian Act, other lands have been set apart or aside for the use of Indian bands, yet are not recognized as "reserves" under the Act. For example, in this case, the Crown exercised its prerogative to "reserve" or set aside lands for the use of the Ross River Band, but did not manifest an intention to create a

> "reserve" within the meaning of s. 2(1) of the Indian Act. In my view, the definition of "reserve" in s. 2(1) serves to identify which lands have been set apart as "reserves" within the meaning of the Act; the definition does not limit the Crown's ability to deal with lands for the use of aboriginal peoples. A "reserve" is defined as "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band". The legislation does not indicate precisely when land will be considered to have been "set apart" for the use and benefit of a band, nor does it indicate the steps necessary for a "setting apart" of land to have occurred. This is, essentially, the issue that is before us here. As I stated earlier, we have determined that for land to have been "set apart" within the meaning of the Act, there must, at the very least, exist an act by the Crown to set apart land for the use of the band combined with an intention to create a reserve on the part of persons having authority to bind the Crown.
>
> My colleague asserts that the definition of "reserve" in s. 2(1) limits the royal prerogative to create reserves in that it precludes the possibility of transferring the title to the land from the Crown to the First Nation (since the definition provides that legal title is "vested in Her Majesty"). I agree with him that if a tract of land meets the definition of "reserve" under the Indian Act, the title must remain in the Crown and the land must be dealt with subject to the Act. However, I do not see how the definition otherwise limits the royal prerogative to set aside or set apart land for Aboriginal peoples. In other words, it merely defines with greater specificity which of these lands will be considered "reserves" for the purposes of the Act. In my opinion, the Crown is still free to deal with its land in any manner it wishes, including, as noted by my colleague, the transfer of title by sale, grant or gift to a First Nation or some of its members, though that land would not then constitute an Indian Act "reserve".

[86] In my view, the opinions expressed in both ***Delgamuukw*** and ***Ross River*** make it clear that the federal government has jurisdiction, pursuant to s. 91(24), over all lands set aside

for the benefit of Indians, even if those lands do not constitute reserves as defined by the ***Indian Act***. Similarly, in the case at bar, I think that Canada has the constitutional power and capacity, under s. 91(24), to recognize severalty lands as being under its jurisdiction.

Strict Legal Impediments Cannot Thwart the Parties' Intentions

[87] Finally, I return to counsel for British Columbia's submission that, in the absence of some express constitutional obligation to the contrary, British Columbia cannot be compelled to convey lands to Canada for the benefit of the severalty electors under the Agreement, nor is Canada obligated to accept such lands. This is so, counsel said, irrespective of any interpretation of the Treaty by the court which may find that the plaintiffs are entitled to receive the severalty lands as federal lands. She said that if the severalty lands were intended to be subject to s. 91(24) of the ***Constitution Act, 1867***, Canada had long ago put it out of its power to comply with such an obligation. Thus, she submitted, because British Columbia cannot convey federal lands to the plaintiffs, and its obligations regarding the conveyance of the severalty lands to the plaintiffs arise only out of the Agreement, it follows that the plaintiffs must

receive their lands subject to provincial laws and regulations.

[88] Similarly, counsel for Canada submitted that British Columbia, by undertaking in the Agreement to convey lands to individuals who elect to take their lands in severalty, and without any act by Canada, lacks the constitutional jurisdiction to unilaterally create federal lands that would fall within Canada's jurisdiction over "Lands reserved for the Indians" pursuant to s. 91(24). Consequently, counsel argued, severalty lands must remain provincial lands after conveyance to the plaintiffs, subject only to the proviso as to non-alienation.

[89] On this point, I am in agreement with counsel for the plaintiffs that counsel for British Columbia and Canada have confused the plaintiffs' entitlement to receive their severalty lands as s. 91(24) lands pursuant to the terms of the Treaty and the Agreement, with the form of conveyance of those lands to them by the Province.

[90] In ***Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)***, [1995] 4 S.C.R. 344, the Supreme Court of Canada held that the federal government breached its fiduciary duty to a British Columbian Indian band, who had previously surrendered their reserve to the

federal government to “sell or lease” the land for their benefit, by selling both the surface rights and the valuable mineral rights in the reserve, unjustifiably departing from its long standing policy of reserving mineral rights for the benefit of the aboriginal peoples when surface rights were sold. In arriving at its decision, the Court had to determine whether the Indian band had met the technical legal requirements for surrender of their reserve, because the band had made an initial surrender in 1940, followed by a modified surrender in 1945. In relation to this issue, the majority stated that the intention of the parties should prevail over the technical legal requirements, because the Indian interest in land is *sui generis*. Gonthier J., for the majority, stated in para. 6, as follows:

> In my view, principles of common law property are not helpful in the context of this case. Since Indian title in reserves is *sui generis*, it would be most unfortunate if the technical land transfer requirements embodied in the common law were to frustrate the intention of the parties, and in particular the Band, in relation to their dealings with I.R. 172 [the surrender of surface rights in a reserve]. For this reason, the legal character of the 1945 surrender, and its impact on the 1940 surrender, should be determined by reference to the intention of the Band. Unless some statutory bar exists (which, as noted above, is not the case here), then the Band members' intention should be given legal effect.

[91] In my view, in the same way that technical common law land transfer requirements could not frustrate the parties' intention in relation to the surrender of surface rights and mineral rights in a reserve in the ***Blueberry River Indian Band*** decision, in the instant case the historical circumstances of federal and provincial Crown land ownership in British Columbia cannot operate to frustrate Canada and the Indians' intentions regarding the legal status of the severalty lands.

[92] Therefore, in my opinion, the federal and provincial governments should not be permitted to rely on a technical legal argument to deny the plaintiffs their Treaty rights. The fact that the existing legislative scheme does not provide for what must be done to satisfy the plaintiff's entitlement under the Treaty and the Agreement to receive their severalty lands as s. 91(24) lands, cannot be used by Canada and British Columbia to frustrate what the court has determined is the clear intent of the Treaty, and the governments' obligations to the plaintiffs under the Treaty and the Agreement.

[93] Thus, I am satisfied that both governments together can, and must, fulfil their contractual and Treaty obligations by creating a mechanism to convey the severalty lands to the plaintiffs as s. 91(24) lands.

VIII. DISPOSITION

[94] In the result, I find that the plaintiffs are entitled to a declaration that the lands which have been provided by British Columbia, pursuant to Article 8.4 of the Agreement, are "lands reserved for Indians" within the meaning of s. 91(24) of the ***Constitution Act***, ***1867.***

“B.I. Cohen, J.”
The Honourable Mr. Justice B.I. Cohen