1999 SKQB 218

Q.B. A.D. 1987
No. 2655 J.C.S.

IN THE QUEEN'S BENCH
JUDICIAL CENTRE OF SASKATOON

BETWEEN:

CHIEF MILES VENNE, and all of the Councillors of the Lac La Ronge Indian Band, representing themselves and all other members of the Lac La Ronge Indian Band, and all members of the James Roberts Band of Cree Indians and Amos Charles Band of Cree Indians, and all of the lawful successors of those two Bands

PLAINTIFFS

- and -

HER MAJESTY THE QUEEN In Right of Canada, and HER MAJESTY THE QUEEN in Right of the Province of Saskatchewan

DEFENDANTS

D. J. Kovatch and J. D. Jodouin — for the plaintiffs

M. R. Kindrachuk — for the defendant, Her Majesty the Queen in Right of Canada

P. M. McAdam — for the defendant, Her Majesty the Queen in Right of Saskatchewan

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JUDGMENT GEREIN J.

November 30, 1999

CONTENTS

A. CLAIMS AND ISSUES

[1] The claims of the plaintiffs are several and varied, but they essentially fit within these three categories:

(1) Entitlement to lands and monies pursuant to a treaty agreement;

(2) Entitlement to certain lands situate in the vicinity of Candle Lake, Saskatchewan, because they were once set apart as an Indian Reserve; and

(3) Entitlement to certain lands situate in the town of La Ronge, Saskatchewan, because they were once set apart as an Indian Reserve.

I have concluded that the plaintiffs should succeed in respect to the first, but fail in respect to the other two.

[2] Within the stated categories, there are many issues which the litigants describe in somewhat different terminology. I choose to describe them as follows:

(1) What is the correct interpretation of the Reserve Lands clause of Treaty No. 6 in respect to the method to be employed in calculating land entitlement?

(2) What is the correct interpretation of the clause to provide ammunition and twine as contained in the adhesion to Treaty No. 6?

(3) If Canada has not fulfilled its obligation under the Reserve Lands clause, is it relieved from doing so by a band resolution, dated May 8, 1964, of the Lac La Ronge Indian Band?

(4) If Canada has not fulfilled its obligation under the Reserve Lands clause, was the entitlement of the Lac La Ronge Indian Band extinguished by certain Orders-in-Council?

(5) Has Canada fulfilled its obligation to the plaintiffs under the Reserve Lands clause and the clause to provide ammunition and twine?

(6) What steps must be taken in order to create an Indian Reserve?

(7) Were certain lands at Candle Lake, Saskatchewan, set apart as an Indian Reserve?

(8) Were certain school lands in the Town of La Ronge, Saskatchewan, set apart as an Indian Reserve?

(9) Did Canada owe a fiduciary duty to the Lac La Ronge Indian Band; and if so, did they fulfill that duty?

(10) If the Lac La Ronge Indian Band is entitled to additional Reserve Land, is Canada estopped from obtaining additional land from Saskatchewan by reason of paragraph 10 of the *Natural Resources Transfer Agreement*?

[3] Three further issues were raised and I describe them as follows:

(1) What was the effect of a "reservation" noted in the records of the Department of the Interior, of the Government of Canada, on March 20, 1930?

(2) Did the lands at Candle Lake pass to the Province of Saskatchewan through the operation of the Natural Resources Transfer Agreement?

(3) If the lands at Candle Lake did pass to the Province of Saskatchewan, were they subject to a trust or other interest in favour of the Lac La Ronge Indian Band?

As I have concluded that an Indian Reserve was never set aside at Candle Lake, there is no need to determine these three issues and I refrain from doing so.

B. INTRODUCTION

[4] In parts of Canada there has been contact between Indians and non-Indians for about five hundred years. It has been so in the prairies for at least one hundred and fifty years. Absent a few exceptions, the two peoples have co-existed in peace and while

harmony has not always been present, disputes were generally resolved without recourse to armed conflict. Peaceful co-existence between the two disparate peoples was achieved in part through the negotiation and execution of various treaties. These came into existence as Europeans gradually moved across this country and the treaties were some seventy in number.

[5] The earliest treaty was in 1640 and is commonly called the Two-Row Wampum Treaty. It was between the five nations of the Iroquois and the Dutch Crown at New Amsterdam, which is now New York City. As long ago as then, land and its use was a subject of negotiation. At that time the Iroquois surrendered their beaver hunting grounds north of Lakes Ontario and Erie. On two later occasions, in 1701 and 1726, they further surrendered their beaver hunting grounds to the British Crown.

[6] Between 1725 and 1794 there were nine treaties between the British Crown and the Mi'Kmaqs, Abenakis and Malecites along the Atlantic Seaboard. All of these treaties addressed the subject of peace and friendship and had that as their purpose. They did not address the subject of land, its use or its surrender. They did confirm the right of the Indians to hunt and fish throughout the territory.

[7] The Hurons entered into treaties with the British Crown in 1760 and 1764. The first guaranteed the Indians free passage back to their home lands and the right to practise their religion and customs. The second was a treaty of peace and friendship.

[8] Following the American Revolution there was a great influx into Canada of the United Empire Loyalists. They had to be accommodated and land made available. Here truly began the process of land surrender. There were twenty-nine treaties executed between 1764 and 1862. They speak mainly of the surrender and extinction of Indian

title to the land; although in some there was provision for monetary payments, the setting aside of Reserves and the protection of fishing and hunting rights.

[9] In 1850 the Robinson Superior Treaty and the Robinson Huron Treaty came into existence. They followed the directives of the Royal Proclamation of October 7, 1763, and by those treaties the Indians surrendered title to the land which stretched from the shores of Lake Huron and Lake Superior up to the height of land which separated the waters flowing into Hudson's Bay from those flowing into the Great Lakes. The two treaties also provided for annuities; guaranteed hunting and fishing rights to the Indians; and contained schedules setting aside identified land for Indian Reserves.

[10] Between 1850 and 1854, fourteen treaties were entered into on Vancouver Island. They were primarily concerned with the surrender of Indian title to land so that settlement could take place and commercial development proceed.

[11] That then brings us to the numbered treaties. Confederation took place in 1867. Settlement of the West was moving ahead. The railroad was being constructed along with the telegraph system. Manitoba was created a province in 1870 and some of the Indians in that territory were less than satisfied with the situation and wanted a treaty. As a result, Treaty No. 1 was negotiated and concluded on August 3, 1871 with the Chipewayans and Swampy Crees. In this document, as in all of the numbered treaties, the Indians did ". . .cede, release, surrender, and yield up to Her Majesty the Queen. . ." all the lands encompassed within the area described in the treaty. There was provision to create Reserve Lands of 160 acres per family of five; to pay annuities of $3.00 per person; to provide schools; and to provide agricultural implements. A gift of $3.00 was to be paid to each Indian in extinguishment of all claims.

[12] Treaty No. 2 was executed less than three weeks later, on August 23, 1871. It contained provisions similar to those of Treaty No. 1. Shortly after the document was executed, disagreement arose as to what had been promised to the Indians as opposed to what was actually written into the treaty. In time a memorandum was created listing the things that had been promised, but not included in the document. By an Order-in-Council in 1875, that memorandum was made a part of the two treaties.

[13] Treaty No. 3 was signed on October 3, 1873, with the Ojibbeway Indians. As before, the Indians surrendered their land, but now it was to the Government of Canada for Her Majesty the Queen. However, the price increased. Reserve lands were to consist of 640 acres for each family of five or in proportion thereto. The annuities were set at $5.00. The gifts were $12.00 for each person. The annual sum of $1,500.00 was to be expended for the purchase of ammunition and twine. Provision was made for schools and the right to hunt and fish throughout the surrendered lands.

[14] Increased settlement, continued progress in constructing the railroad, the arrival of the Northwest Mounted Police and a desire to introduce steam navigation on Lake Winnipeg, were some of the motivating factors leading up to the next two treaties. On September 15, 1874, Treaty No. 4 was signed and Treaty No. 5 followed on September 24, 1875. Their content was similar to that of Treaty No. 3. The boundaries of Treaty No. 5 were extended in 1908, 1909 and 1910. When that had been done, the treaty process was complete within the Province of Manitoba.

[15] The next treaty was Treaty No. 6 which was entered into with the Plain and the Wood Cree Tribes of Indians and related to much of what is now Saskatchewan. The document was signed by different parties on various dates, more particularly August 23 and 28, 1876, near Fort Carlton, Saskatchewan, and September 9, 1876, near Fort Pitt.

For some time prior the Indians had sought a treaty for they could see their traditional way of life disappearing. They obtained what had been provided in the preceding treaties, but they also secured other benefits. It was agreed that a medicine chest would always be available; that $1,000.00 would be expended for seed grain in each of the first three years; and that assistance would be provided in time of need.

[16] Since Treaty No. 6 is the foundation of this action the entire body of the Treaty without the numerous signatures, is reproduced as Appendix "A" to this judgment. The source is *The Treaties of Canada With The Indians of Manitoba and The North-West Territories* by The Honourable Alexander Morris, P.C., first printed in 1880, and now published by Fifth House Publishers (Saskatoon: Fifth House Publishers, 1991).

[17] Treaty No. 7 was with the Blackfoot confederacy and the Stoney Indians who were located in southern Alberta. It is dated September 22, 1877, and its terms are similar to the earlier treaties, although there was no provision for a medicine chest or assistance in time of need. With the conclusion of this treaty, seven treaties had been negotiated in six years and Canada had secured title to the whole of the fertile belt between Lake Superior and the foothills of the Rocky Mountains.

[18] Treaty No. 8 was entered into in 1899 and related to northern Saskatchewan, northern Alberta and an area in north eastern British Columbia. Treaty No. 9 was signed in 1905 and was concerned with that portion of northern Ontario which had not been dealt with in the Robinson treaties. In 1929 to 1930, this treaty was extended to include all the territory of northern Ontario up to James Bay and Hudson Bay. Treaty No. 10 was executed in 1905 and dealt with the last of Saskatchewan territory not earlier encompassed in a treaty. The last numbered treaty was Treaty No. 11 and it was entered into with the Dene in 1921.

[19] The last two treaties in Canada were executed in 1923 with the Chipewayans and Mississaugas. They were in respect to central Ontario and dealt with hunting and fishing rights.

[20] As it happened, many Indian Bands were not signatories to an original treaty. When they later expressed a desire to enter into Treaty, they would do so by signing an Adhesion Agreement. Such a document was executed on February 11, 1889, by the James Roberts Band and the William Charles Band, the former of which is the antecedent to the plaintiff, the Lac La Ronge Indian Band. Like Treaty No. 6, the Adhesion Agreement is central to this case. Therefore, it is reproduced in its entirety absent signatures, as Appendix "B" to this judgment. The source is *Indian Treaties and Surrenders*, Volume II, first printed in 1891 and now published by Fifth House Publishers (Saskatoon: Fifth House Publishers, 1992).

[21] The foregoing summary is not intended to even approach a full portrayal of the treaty process. It was a complex activity which involved the full spectrum of human needs, desires and aspirations. It was carried out by many people who were subject to the strengths and weaknesses which constitute the human condition. I am satisfied that all parties were motivated in part by self-interest, a condition both natural and known by all concerned. All were looking to the future. The Indians were seeking an alternative to what was disappearing from their lives. They were not looking for a whole new way of life, but rather assistance within that which they knew. On the other hand, the Crown was involved in creating a new nation and to that end was seeking to secure title to the land on which that nation was to stand and grow. In pursuing their respective goals, I believe the parties acted in good faith and with honesty and integrity.

[22] As I see it, there is a unity to the treaty process. While it stretched over almost three hundred years there is a progression and a building on what went before. This is particularly so with the Robinson treaties and then the numbered treaties. The parties involved negotiated within the context of what had gone before and with knowledge of their present needs and what they believed would be their future needs. The documents they created expressed their agreements as they understood them at that time. Unfortunately, time has moved us far from the original documents and our present perspective assists us little to understand all that which was stated long ago. However, we do have the written words and we can put them in an historical context and thereby come to a conclusion as to their meaning. While the task is difficult and not without risk, it is not impossible.

C. LAND ALLOTMENTS TO THE LAC LA RONGE INDIAN BAND

[23] On August 23 and 28 and September 29, 1876, at Carlton and Fort Pitt the Crown entered into a treaty with the Plain and Wood Cree Indians and other tribes of Indians. One of the terms agreed upon was that Reserve Lands would be set aside for the Indians. However, the predecessor to what is now the Lac La Ronge Indian Band was not a signatory to Treaty No. 6 for it occupied land which was primarily north of that encompassed by the treaty.

[24] As time passed the Indians of that Band expressed a desire to enter into a treaty (Ex. P-1, p. 96). In response, Order-in-Council P.C. No. 2554, dated November 29, 1888, authorized the negotiation of an arrangement providing to those Indians the same benefits as were provided in Treaty No. 6 in exchange for the surrender of land comprising some 11,066 square miles. It was recommended that this be accomplished by an adhesion to Treaty No. 6 rather than executing another distinct treaty (Ex. P-1, p. 99).

Negotiations followed and on February 11, 1889, the James Roberts Band, now known as the Lac La Ronge Indian Band, and the William Charles Band, now known as the Montreal Lake Band, signed an Adhesion Agreement. They agreed to transfer, surrender and relinquish all their right, title and interest whatsoever in certain described lands. The Indians, in return, were to receive all the benefits provided in Treaty No. 6.

[25] Instructions were soon after given by letter dated April 20, 1889, to Indian Commissioner, Mr. Hayter Reed, that he was to procure the ploughs, seed potatoes, livestock, ammunition, twine and other items promised (Ex. P-1, p. 143). In October, 1889, Mr. A.W. Ponton, an assistant surveyor employed by the Department of Indian Affairs, surveyed a reserve for these Indians at Montreal Lake (Ex. P-2, p. 381). It was known as Indian Reserve No. 106 and contained 23 square miles (14,720 acres). For the next eight years no further land was set aside, despite the desire of the Indians to obtain more and the efforts of government officials to locate additional suitable land.

[26] Then in July, 1897, Mr. Ponton completed the survey of a reserve in the area of Sturgeon Lake and so advised by his report dated August 13, 1897 (Ex. P-2, p. 325). On April 14, 1899, he submitted his plan and field notes (Ex. P-2, p. 379). The reserve was confirmed by Order-in-Council P.C. 2710, dated January 6, 1900 (Ex. P-2, p. 405). It was located on the Little Red River and was known as Indian Reserve No. 106A or the Little Red River Indian Reserve. It contained 56.5 square miles (36,160 acres) and was intended for the use of both the Montreal Lake Band and the Lac La Ronge Indian Band.

[27] There then were ongoing discussions, but again no further land was set aside for some ten years. The Indians desired reserves in the area of Lac La Ronge and Stanley Mission for that was where they resided. In September and October, 1909, Mr. J.

Lestock Reid surveyed thirteen reserves containing in total 5,354.4 acres. They were described as follows:

> No. 156 containing 1,586.8 acres at Hudson Bay Post southwest side of the Lake;
> No. 156A, Potato River Reserve, containing 1,011.6 acres at southwest side of the Lake;
> No. 156B, Kitsakie Indian Reserve, containing 204.34 acres at mouth Montreal River, west side of Lake;
> No. 156C, Sucker River Indian Reserve, containing 55.4 acres on west side of Lac La Ronge;
> No. 157, Stanley Indian Reserve, containing 621 acres south of Churchill River opposite Stanley;
> No. 157A, Stanley Indian Reserve, containing 9.4 acres junction of Churchill and Rapid River;
> No. 157B, Old Fort Indian Reserve, containing 13.4 acres at the north end of Lac La Ronge;
> No. 157C, Four Portages Indian Reserve, containing 5 acres at northwest corner of Lake;
> No. 157D, Fox Point Indian Reserve, containing 140.2 acres southeast side of Lake;
> No. 157E, Fox Point Indian Reserve, containing 10.3 acres an island east of Fox Point;
> No. 158, Little Hills Indian Reserve, containing 1,278 acres on Montreal River, west of Lake;
> No. 158A, Little Hills Indian Reserve, containing 94.6 acres on Montreal River; and
> No. 158B, Little Hills Indian Reserve, containing 324 acres on Montreal River.

All of these reserves were much later confirmed in 1930 by thirteen individual Orders-in-Council (Exs. P-3, p. 682; P-5, pp. 1483 to 1486; P-5, pp. 1529 to 1532).

[28] In the meantime, in 1910, the Lac La Ronge Indian Band broke into two groups: the James Roberts group residing around La Ronge and the Amos Charles group

residing around Stanley Mission. The latter group should not be confused with the William Charles Band which signed the Adhesion Agreement. Nothing turns on this split for they rejoined in 1949 and have since existed as the Lac La Ronge Indian Band.

[29] There subsequently was much activity in respect to lands situate in the vicinity of Candle Lake. I will later return to this subject, but now simply note that none of those lands have been treated as Reserve Lands by the Dominion of Canada.

[30] In 1935, a reserve containing 1,596.6 acres was surveyed adjacent to the existing Little Red River Indian Reserve. This was confirmed by Order-in-Council P.C. 1297, dated March 31, 1948 (Ex. P-8, p. 2436). That same Order-in-Council divided the reserve between the Montreal Lake Band on the one hand and the Amos Charles and James Roberts Bands on the other. The one area was then to be known as the Montreal Lake Reserve No. 106B and the other as the Little Red River Indian Reserve No. 106C. As a result of the division, the Amos Charles and James Roberts Bands obtained 32,007.9 acres.

[31] In 1948 a further 6400 acres was surveyed for the Lac La Ronge Indian Band. It was confirmed by Order-in-Council P.C. 1419, dated March 21, 1950, and was to be known as Little Red River Indian Reserve No. 106D (Ex. P-9, p. 2504).

[32] After that there were on-going and extensive negotiations. These culminated in a meeting at which a Band Council Resolution was executed by seven councillors, there being no chief chosen at the time (Ex. P-11, p. 3105). According to the resolution the Band agreed to accept 63,330 acres of land as its full entitlement under Treaty No. 6.

[33] Matters still dragged and another nine years passed before all the land was set aside for the Lac La Ronge Indian Band. The newly created Reserves totalled 63,385 acres and were the following:

(a) Morin Lake Indian Reserve No. 217, containing 32,640 acres - Order-in-Council P.C. 1968 - 1732, dated September 17, 1968 (Ex. P-12, p. 3456).

(b) Grandmother's Bay Indian Reserve No. 219, containing 11,092 acres - Order-in-Council P.C. 1970 - 1613, dated September 16, 1970 (Ex. P-12, p. 3577).

(c) Bittern Lake Indian Reserve No. 218, containing 17,338 acres - Order-in-Council P.C. 1973 - 2676, dated September 11, 1973. No copy of the Order-in-Council is filed, but there is a letter of recommendation dated September 3, 1973, from the Minister of Indian Affairs and Northern Development (Ex. P-13, p. 3792).

(d) Morin Lake Indian Reserve No. 217 (Addition), containing 2,315 acres - Order-in-Council P.C. 1973 - 2677, dated September 11, 1973 (Ex. P-13, p. 3806).

[34] From my review of the materials filed, the following is a summary of the reserve lands set apart for the Lac La Ronge Indian Band. On four occasions lands were set aside as follows:

1899 - I.R. No. 106 A		36,160.0 acres
1909 - I.R. No. 156 to 158B		5,354.4 acres
1935 - I.R. No. 106A		1,596.6 acres
1948 - I.R. No. 106D		6,400.0 acres
	TOTAL	49,511.0 acres

However in that same year of 1948, Indian Reserve No. 106A was divided and the Lac La Ronge Indian Band retained only 32,007.9 acres in what was designated as I.R. No. 106C. As a result, at that time the Band's total allotment was reduced to 43,762.3 acres. Then between 1968 and 1973 an additional 63,385 acres were set apart bringing the total present allotment to 107,147.3 acres or approximately 167.4 square miles.

D. INTERPRETATION OF TREATY NO. 6

(1) Contentious Clauses of Treaty No. 6

[35] There are two clauses about which there is disagreement and which require interpretation. The first is contained solely within the treaty itself and provides as follows:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, provided all such reserves shall not exceed in all one square mile for each

> family of five, or in that proportion for larger or smaller families, in manner following, that is to say :--
>
> That the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them ;
>
> Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as she shall deem fit, and also that the aforesaid reserves of land or any interest therein may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained ; and with a view to show the satisfaction of Her Majesty with the behavior and good conduct of her Indians, she hereby, through her Commissioners, makes them a present of twelve dollars for each man, woman and child belonging to the bands here represented, in extinguishment of all claims heretofore preferred ;

The clause clearly provides that one square mile or 640 acres of land shall be provided for each family of five. Put otherwise, it provides that each Indian is to receive 128 acres (640 ÷ 5).

[36] What the clause does not clearly stipulate is when the number of the Indians is to be ascertained. Is the benefit to be restricted to only those Indians alive when the treaty was executed or is it to be extended to include those who came after, and if so, for how long? The plaintiffs argue for an expansive interpretation; the defendants for a restrictive one.

[37] The second clause which requires interpretation pertains to ammunition and twine and has its genesis in Treaty No. 6. The clause as contained in the Treaty reads:

> It is further agreed between Her Majesty and the said Indians that the sum of fifteen hundred dollars per annum, shall be yearly and every year expended by Her Majesty in the purchase of ammunition and twine for nets for the use of the said Indians, in manner following, that is to say :--In the reasonable discretion as regards the distribution thereof, among the Indians inhabiting the several reserves, or otherwise included herein, of Her Majesty's Indian Agent having the supervision of this treaty ;

The Adhesion Agreement, executed some thirteen years later in 1889, contains this provision.

> And we hereby agree to accept the several benefits, payments and reserves promised to the Indians adhering to the said treaty at Fort Pitt or Carlton ; with the proviso as regards the amount to be expended annually for ammunition and twine, and as respects the amount to be expended for three years annually in provisions for the use of such Indians as are settled on reserves and are engaged in cultivating the soil, to assist them in such cultivation, that the expenditure on both of these items shall bear the same proportion to the number of Indians now treated with as the amounts for those two items as mentioned in Treaty No. 6 bore to the number of Indians then treated with.

Here the plaintiffs argue that they were to receive an amount based on an additional $1,500.00 a year for ammunition and twine. The defendants argue that there should be a sharing of the original $1,500.00.

[38] I consider the interpreting of the two clauses to be quite different and distinct matters and I will deal with them separately, beginning with the Reserve Land clause. However, before doing that I will review what I consider to be the applicable law.

(2) The Law

(a) Rules of Treaty Interpretation

[39] In respect to the law, there are several topics to be addressed. The first is the approach to be taken when interpreting a treaty and here counsel are in agreement. The principles have been conveniently listed in *Saanichton Marina Ltd. v. Claxton* (1989), 36 B.C.L.R. (2d) 79 (B.C.C.A.) at p. 84:

> In approaching the interpretation of Indian treaties the courts in Canada have developed certain principles which have been enunciated as follows:
>
> (a) The treaty should be given a fair, large and liberal construction in favour of the Indians;
>
> (b) Treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians;
>
> (c) As the honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned;
>
> (d) Any ambiguity in wording should be interpreted as against the drafters and should not be interpreted to the prejudice of the Indians if another construction is reasonably possible;

> (e) Evidence by conduct or otherwise as to how the parties understood the treaty is of assistance in giving it content.
>
> The expression of these principles is to be found in *Nowegijick v. R.*, [1983] 1 S.C.R. 29, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 144 D.L.R. (3d) 193, 83 D.T.C. 5041, 46 N.R. 41 [Fed.]; *Simon v. R.*, [1985] 2 S.C.R. 387, 23 C.C.C. (3d) 238, [1986] 1 C.N.L.R. 153, 24 D.L.R. (4th) 390, 71 N.S.R. (2d) 15, 171 A.P.R. 15, 62 N.R. 366; *R. v. Bartleman*, supra; *R. v. Taylor* (1981), 34 O.R. (2d) 360 at 367, 62 C.C.C. (2d) 227 (C.A.).

The stated principles of interpretation have been approved by the Supreme Court of Canada in a number of decisions. *R. v. Horseman*, [1990] 1 S.C.R. 901; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; and *R. v. Badger*, [1996] 1 S.C.R. 771.

[40] In *R. v. Horseman, supra,* at p. 907, Madam Justice Wilson, albeit in dissent, set out the rationale for treaty interpretation.

> This Court has already established a number of important guidelines for the interpretation of Indian treaties. In *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, Dickson J. (as he then was) stated at p. 36:
>
> . . . treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. . . . In *Jones v. Meehan*, 175 U.S. 1 (1899), it was held that Indian treaties "must . . . be construed, not according to the technical meaning of [their] words . . . but in the sense in which they would naturally be understood by the Indians". [Emphasis added]

In *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 402, Dickson C.J. pointed to his observation in *Nowegijick* and reiterated that "Indian treaties should be given a fair, large and liberal construction in favour of the Indians".

The interpretive principles developed in *Nowegijick* and *Simon* recognize that Indian treaties are *sui generis* (per Dickson C.J. at p. 404 of *Simon, supra*). These treaties were the product of negotiation between very different cultures and the language used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party's understanding of their effect at the time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time.

But the interpretive principles set out in *Nowegijick* and *Simon* were developed not only to deal with the unique nature of Indian treaties but also to address a problem identified by Norris J.A. in *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), at p. 649 (aff'd [1965] S.C.R. vi):

In view of the argument before us, it is necessary to point out that on numerous occasions in modern days, rights under what were entered into with Indians as solemn engagements, although completed with what would now be considered informality, have been whittled away on the excuse that they do not comply with present day formal requirements and with rules of interpretation applicable to transactions between people who must be taken in the light of advanced civilization to be of equal status.

In other words, to put it simply, Indian treaties must be given the effect the signatories obviously intended them to have at the time they were entered into even if they do not comply with to-day's formal requirements. Nor should they be

> undermined by the application of the interpretive rules we apply to-day to contracts entered into by parties of equal bargaining power.

When interpreting an Indian treaty the court should not focus on formal requirements of contract; but should otherwise seek to ascertain the intention of the parties at the time when the treaty was negotiated. In doing this, reference should be had to the historical context. In *R. v. Taylor and Williams* (1982), 34 O.R. (2d) 360 (Ont. C.A.) at p. 364 and 367. MacKinnon A.C.J.O. said:

> Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect.
>
> . . .
>
> Finally, if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms. As already stated, counsel for both parties to the appeal agreed that recourse could be had to the surrounding circumstances and judicial notice could be taken of the facts of history. In my opinion, that notice extends to how, historically, the parties acted under the treaty after its execution.

See also *R. v. Marshall*, [1999] S.C.J. No. 55 (Q.L.) (S.C.C.) judgment dated September 17, 1999.

[41] This approach was approved by Mr. Justice Lamer (now Chief Justice) in *R. v. Sioui, supra,* at p. 1068. I also note that he stated at p. 1069 that the interpretation must be realistic and balanced.

> . . .Even a generous interpretation of the document, such as Bisson J.A.'s interpretation, must be realistic and reflect the intention of both parties, not just that of the Hurons. The Court must choose from among the various possible interpretations of the common intention the one which best reconciles the Hurons' interests and those of the conqueror.

In the end the principles of interpretation are aids in ascertaining the intentions of the parties, bearing in mind their respective interests and aspirations.

[42] In summary, treaty interpretation seeks to ascertain the intention of the parties. One begins with a consideration of the words themselves, but they should be read in their historical context.

(b) Admissibility of Extrinsic Evidence

[43] In the interpretation of an Indian treaty, as with any contract, parol evidence is not admissible absent ambiguity or where it would add to or subtract from the meaning of the written words. In *R. v. Horse,* [1988] 1 S.C.R. 187 at p. 201, Mr. Justice Estey said this.

> I have some reservations about the use of this material as an aid to interpreting the terms of Treaty No. 6. In my view the terms are not ambiguous. The normal rule with respect to interpretation of contractual documents is that extrinsic evidence is not to be used in the absence of

> ambiguity; nor can it be invoked where the result would be to alter the terms of a document by adding to or subtracting from the written agreement. . . .

However, he went on to consider the writings of Lieutenant-Governor Morris having said this at p. 203.

> In my opinion there is no ambiguity which would bring in extraneous interpretative material. Nevertheless I am prepared to consider the Morris text, proffered by the appellants, as a useful guide to the interpretation of Treaty No. 6. At the very least, the text as a whole enables one to view the treaty at issue here in its overall historical context.

The rule as to restricting the uses of extrinsic evidence was repeated in *R. v. Sioui, supra*, at p. 1049.

> As this Court recently noted in *R. v. Horse*, [1988] 1 S.C.R. 187, at p. 201, extrinsic evidence is not to be used as an aid to interpreting a treaty in the absence of ambiguity or where the result would be to alter its terms by adding words to or subtracting words from the written agreement.

[44] I understand the law to be this. Extrinsic evidence is admissible if it is tendered to portray the historical context in which the treaty was negotiated and signed. *R. v. Horse, supra*; *R. v. Horseman, supra*; *R. v. Sioui, supra*. However, it is not admissible to assist in the interpretation of the actual writing itself, absent ambiguity or where it will add to or subtract from the writing. *R. v. Horse, supra,* and *R. v. Sioui, supra*.

[45] However, within the topic of extrinsic evidence there are some matters which require comment. I will deal with each in turn as a separate subject.

i. Evidence of Conduct In Modern Times

[46] As already stated, where ambiguity exists the court may take into account subsequent conduct in determining the intent of the parties when they entered into a treaty. With this in mind, counsel for the plaintiffs called several former cabinet ministers and senior civil servants to testify about their approach to Indian land claims. These people served in the respective federal and provincial governments during the 1960's to the 1980's. The plaintiffs also called people who had served within the Federation of Saskatchewan Indians and people who had worked with Indian Bands during those same periods of time.

[47] Counsel for the defendants objected to the testimony on the ground that it was too remote from the execution of the treaty. It was suggested that testimony be restricted to a time frame of 20 to 30 years following execution of Treaty No. 6. I was not inclined to reject the evidence simply on the ground of remoteness and I therefore reserved my decision until after the evidence was tendered and its content ascertained.

[48] In my opinion, the evidence should not be excluded just because it is remote. The rationale for admitting evidence of conduct is that the parties themselves knew what they intended by their agreement and they will presumably conduct themselves in a manner consistent with their intent. It is a simple situation when one looks to the parties themselves. However, those Indians and Crown officials are long dead. Yet the conduct of their successors should or may be admitted into evidence in certain circumstances.

[49] In my opinion, the jurisprudence is somewhat vague on this question. While there are decisions dealing with the admissibility of subsequent conduct, they do not speak directly to the question of time constraints. They speak of understanding historical context when interpreting a treaty and counsel suggests this means the history at the time of the treaty. In *R. v. Sioui, supra*, there is this comment at p. 1060.

> . . . Moreover, the subsequent conduct which is most indicative of the parties' intent is undoubtedly that which most closely followed the conclusion of the document.

I do not read this as speaking to a restricted time frame. Obviously, the actual parties would have first hand knowledge of what transpired and their conduct would be very informative. Later conduct may be less so, but still useful.

[50] In *R. v. Taylor and Williams, supra*, the court was required to determine the treaty hunting and fishing rights of the accused. In doing so, the court accepted evidence that such rights had been exercised since the time of the treaty up to the present. A like approach was adopted in *R. v. Bartleman* (1985), 12 D.L.R. (4th) 73 (B.C.C.A.) where the court looked at hunting practices over a period of some 160 years up to 1980. Those cases would suggest that no time frame be imposed.

[51] While I agree with that position I do so on this basis. If there is a consistency in the conduct the entire course of conduct is admissible. Where the original parties acted in a certain way and their successors have continued to act in the same way, then all the conduct should be admitted. You have the benefit of the initial conduct, which goes to explain intent, reinforced by continued practise. It may be otherwise where

the later conduct deviates from that at the outset. In such an instance a person who was not a party is applying a new interpretation which is not grounded on what went before and therefore is highly questionable.

[52] In the instant case I must examine and weigh what various Crown officials did over the years. Some of those officials were around when Treaty No. 6 was executed and it fell to them to implement the various provisions, including the one related to the creation of Reserves. It is appropriate, and even essential, to look at their conduct. However, the Crown is not subject to mortality like human beings. Rather, it continues to act through succeeding individuals and one must look to the ongoing conduct to ascertain its continuity and consistency with what was done originally.

[53] It is very useful to read what a signatory said about a treaty provision at or about the time when the document was executed. It is equally useful to know whether or not subsequent conduct by other people accorded with what was said. However, it is of no value to learn that some person, fifty years later, acted differently based on his or her own personal reading of the provision in the treaty. That conduct has no link to the contemporaneous historical circumstances and therefore should not be admitted.

[54] In summary, a court will accept evidence about the subsequent conduct of the parties to a treaty because it may shed light on their intentions. The conduct of successors will also be admitted if it is consistent with what went before because it is simply an extension of the original conduct and reinforces it. In effect, the present relates back to the past. In this scenario it would be artificial to impose an arbitrary time frame of 20 or 30 years and I refuse to do so. On the other hand, if the conduct changes over time, that changed conduct is not admissible for it cannot be said to be an extension of the original conduct.

[55] However, that does not end the matter. Much evidence was introduced in the form of documents, correspondence and discussions as amongst government officials and representatives of Indians from the period 1960 onwards. It was tendered on the basis that it disclosed how the various parties interpreted the Reserve Land clause. Having heard the evidence, I now conclude that it should not be admitted and I have excluded it from my deliberations.

[56] What transpired amongst various cabinet ministers, their officials and Indian personnel involved treaty interpretation only in a secondary or peripheral way. By that I mean that each person or group of persons may have had a particular opinion about how the land entitlement should be calculated, but their focus and efforts were directed to resolution of their disagreement. They were pursuing and involved in a settlement process. Compromise was a key consideration.

[57] The various negotiations and positions adopted within those negotiations speak to modern attitudes and not to the intent which was present when the treaty was negotiated. Accordingly, they cannot assist in ascertaining that original intent and should therefore be excluded.

ii. Oral History

[58] During this trial I heard from Indians who testified about what their ancestors said about the meaning and intent of the Reserve Land clause. This testimony clearly was hearsay, but in my opinion is properly admissible. Here I take guidance from these remarks of Lamer C.J. in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at p. 558.

> In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.

[59] I realize that the Chief Justice was speaking about practices, customs and traditions and not about parol evidence to assist in the interpretation of a treaty clause. However, I believe the approach described should be extended to such testimony.

[60] At the time of the treaty, and for some time after, the Indians did not create written records. Thus we cannot look to documents to ascertain their thoughts at the relevant time. This is in marked contrast to the Crown and its agents. However, the Indians did verbalize their thoughts and to the extent those thoughts can be ascertained from the oral tradition, a court should do so.

[61] In my opinion, the testimony meets the requirements of necessity and circumstantial probability of reliability. See *R. v. Khan*, [1990] 2 S.C.R. 531 and *R. v. Smith*, [1992] 2 S.C.R. 915. The thoughts were expressed by persons now deceased and relate to a time when no dispute about the right had yet arisen. Furthermore, the right was that of the entire band and not just the individual speaking. Declarations by deceased persons of such rights are admissible as an exception to the hearsay rule. See *The Law of*

Evidence In Canada by J. Sopinka, S.N. Lederman and A.N. Bryant (Toronto: Butterworths, 1992), commencing at p. 216 and ending at p. 220.

> Statements made by persons as to reputations of public or general rights, marital relationships and ancient historical matters are admissible under this common-law exception. The rationale for this head of admissibility, like the other exceptions, turns on the elements of necessity and circumstantial probability of reliability. It is necessary because the subject-matter of the declaration is so ancient in time that no primary evidence to substantiate the fact exists. It also carries with it a certain degree of reliability on the ground that because the reputation affects the community as a whole or a family, it is probably trustworthy for the reputation would not have developed otherwise.
>
> . . .
>
> Declarations by individuals relating to the reputation of a public or general right have been held admissible if certain conditions are established. As with other common-law exceptions to the hearsay rule, it is a precondition to admissibility that the declarant be dead. Since the subject-matter of the declaration usually involves reputation of ancient rights, the statements, in all likelihood, would be those of deceased persons. This precondition, however, is just as applicable where the right in question is contemporary.
>
> The right or interest in question must be of a public or general nature as opposed to private. Rights are public if they affect the interest of the community as a whole, and such matters as right of highway, or ferry, or the right of the public to make use of ports or fishery in tidal waters, have been recognized as such. General rights, on the other hand, are those affecting a segment of the community only, and usually fall within the category of customs and land boundaries of a particular township, county, or a municipal

> region. Thus, reputation evidence with respect to such matters is admissible. Evidence of private rights, however, is not. . . .
>
> . . .
>
> One other condition that must be met is that the declaration must have been made *ante litem motam*, i.e., before any dispute or controversy over the right has arisen. This requirement would eliminate more than declarations made after the initiation of litigation. If the dispute had advanced to the point where it would be likely to produce bias in the mind of the declarant, the statement would not be allowed even if a formal legal action has not been instituted.

[62] While I have admitted the testimony, I have utilized it with caution and the view that it is of limited value. The witnesses who purported to present the words spoken in the past were individuals who have been actively involved in the pursuit of Indian rights. As well, the words presented have passed through the minds of those witnesses and perhaps have been coloured or distorted by their personal beliefs. This is not to say that any witness was dishonest. In fact, I believe the very opposite to be the case as to every person who gave evidence in this trial. However, that does not mean individuals do not unknowingly succumb to personal bias or interest.

[63] For example, it was stated that a person who was present when the Adhesion Agreement was signed spoke of "the current population formula". This seems improbable as the phrase was not coined until rather recently. What has probably happened is that the witness has interpreted what the ancestor said and then passed on the interpretation. While this demonstrates a problem, it does not mean the evidence should be excluded or ignored. Rather, it must be considered, weighed and given the value it deserves. This very same process is applied to all evidence.

iii. Historians

[64] Several persons testified about historical events. All had extensive knowledge and expertise which had been acquired by one or more means, including education, research, study and practical experience through work in the area of Indian treaties. On behalf of the defendants it was argued that these people should not be permitted to testify or to give opinion evidence about historical matters. It was submitted that all of the relevant documents had been tendered in evidence and the court was well able to review them and reach its own conclusions. To permit opinion evidence from historians or the like would be to abdicate the court's function.

[65] I do not see it that way. The documentary evidence is voluminous; one might well say mountainous. It would be foolish to reject assistance in understanding and appreciating the content of the documents. As well, the opinions of these people can assist the court in determining the significance of certain events and writings. The guidance and opinions of these experts simply help the court to reach its ultimate determination. This largely accords with what was said by Mr. Justice Teitelbaum in *Wewayakum Indian Band v. Canada and Wewayakai Indian Band* (1995), 99 F.T.R. 1 (F.C.C.) at p. 189; affirmed as to result under the name *Roberts v. Canada*, October 12, 1999 (F.C.A.) ([1999] F.C.J. No. 1529 (Q.L.)).

> There was some discussion regarding Geddes' ability to give expert or opinion evidence. Geddes was not before me as an expert witness nor was he ever qualified as an expert and therefore he was not entitled to give an expert opinion. However, Geddes as an historian, can give answers to specific questions that he feels capable of answering whether calling for an opinion or not and providing the

> answer or answers will be helpful to the court in ultimately determining the issues that are to be decided. In this regard, I note the comments of Sopinka, J., at p. 528 of **The Law of Evidence**:
>
> > "Courts now have greater freedom to receive lay witnesses' opinions; but as such evidence approaches the central issue that the court must decide, one can still expect an insistence that the witnesses stick to their primary facts and refrain from giving the inferences. It is always a matter of degree. As the testimony shades to a legal conclusion resistance develops."
>
> Therefore, I allowed questions calling for an opinion provided that Geddes felt capable of answering the questions, that the answers would be helpful to the court and that the opinion does not lead towards a legal conclusion of an issue that I as the Judge must decide. I also wish to emphasize that I will and have accorded the answers elicited the weight I believe the answers deserve taking into account that the opinion evidence is from a lay witness.

[66] The Supreme Court of Canada discussed the admissibility of expert evidence in *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. Marquard*, [1993] 4 S.C.R. 223; and *R. v. Mohan*, [1994] 2 S.C.R. 9. In the last, at p. 20, the criteria for admissibility of an expert opinion are set out as: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; and (d) a properly qualified expert. These exist in the instant case. In *Delgamuukw v. British Columbia,* [1989] 6 W.W.R. 308 (B.C.S.C.) at p. 317 McEachern C.J. spoke about historians in particular and said this.

> I still hold the views I previously expressed with respect to general history, that is to say opinion evidence may be given about topics of common or general knowledge, but conclusions based upon inferences drawn from unproven

facts, and therefore subject to revision, and not admissible on any other ground, belong not to the courtroom, but rather to the historical community.

The course of this trial, however, demonstrates that where historical facts are clearly in issue, of which Indian land claims are an example (see *Kruger v. R.*, [1978] 1 S.C.R. 104, [1977] 4 W.W.R. 300, 34 C.C.C. (2d) 377, 75 D.L.R. (3d) 434, 14 N.R. 495), it becomes necessary to recognize that a general rule such as the one I have just stated may not be sufficiently comprehensive, particularly where there is an admissible written historical record. While new facts may be discovered, we are only concerned in this litigation with a proper understanding of the material which has been admitted into evidence.

. . .

It is neither sensible nor possible to prove every fact individually and separately from other related contemporaneous or serial events. I still have the view that, for the purposes of litigation, historians cannot usefully pronounce on matters of broad inference which may be open to serious disagreement or to subsequent revision. But I think they can give much useful evidence into which some opinions and inferences will be interwoven with references to admissible documentary declarations. Such opinions will be most useful, if not invaluable, in placing historical events or occurrences in context, and in explaining how some of these matters relate or do not relate to others.

I agree with Mr. Willms, however, and I do not understand Mr. Adams to disagree, that experts cannot usurp the function of the court in construing written material. What a document says is for the court, but in this process the court not only needs but urgently requires the assistance of someone who understands the context in which the document was created.

> It is accordingly my judgment that qualified experts may give many useful opinions, based upon inferences from the documents about recorded facts of history in order to explain matters in issue, but they may not, in my view, either construe a written document which is the province of the court, or generalize upon the broad sweep of history which is so often subject to learned disagreement and revision.

I have also considered the remarks of Mr. Justice Binnie in *R. v. Marshall, supra*, along with several articles including: "*Snow Houses Leave No Ruins*": *Unique Evidence Issues in Aboriginal and Treaty Rights Cases* by Brian J. Gover and Mary Locke Macaulay, (1996) 60(1) Sask. L.R. 47; *Litigating Native Claims* by William B. Henderson, (1985) 19 L.S.U.C. Gazette 174; and *Evidentiary Problems In Aboriginal Title Cases* by William B. Henderson, (1991), Spec. List. L.S.U.C. 165.

[67] I now confirm that the testimony of the various expert witnesses was admissible and I have taken it into my deliberations. While they did not agree about everything, there was considerable consensus. In any event, I came to the conclusion that without exception they were objective and forthright in any opinion which was given.

(3) <u>The Reserve Land Clause - The Problem</u>

[68] This case is largely about what was intended by the following provision contained in Treaty No. 6 and again reproduced here for ease of reference.

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due

> respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, provided all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say :—
>
> That the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them ;

The benefit conferred by this provision flows to the Lac La Ronge Indian Band as the successor to the James Roberts Band which entered into the Adhesion Agreement in 1889. The Lac La Ronge Indian Band claims that it has not yet been allotted all of the land to which it is entitled under the Treaty agreement. Canada and Saskatchewan say it is otherwise and submit that the land already set aside was sufficient to extinguish the entitlement. The differing positions are the result of different readings of the Reserve Land clause.

[69] The problem is easy to state. The clause stipulates that the reserves ". . . shall not exceed in all one square mile for each family of five. . . ." The equivalent is 128 acres per person. What is not stated is the time when you count the persons in order to calculate the quantum of land which will fulfill the entitlement. The plaintiffs submit you take the population of a band at the time the land is last surveyed and/or set apart. The defendants submit you take the population of a band at the time the land was first surveyed and set apart. The first is commonly referred to as the "current population formula" and the second as the "first survey formula".

[70] A cursory reading of the above would suggest the two formulas are the same and in many instances they have produced an identical result. If land was surveyed for a band and sufficient land was set aside to provide 128 acres for every member of the band alive at that time, then the full entitlement was provided. In that instance the current population and the population at first survey would have been the same.

[71] The situation is different where you have a "multiple survey band". This occurs where there has been more than one survey and allotment of land, but the band has not received its full entitlement. In such a case, the plaintiffs submit that the population to be used is that which exists at the time of the latest allotment. If the population has increased then the entitlement increases. The defendants submit that the population to be used is that which existed at the time of the initial or first survey. This method brings about an entitlement which is fixed once and for all.

[72] A simple example will help to illustrate the difference. In 1900 a band has a population of 100 persons. In that year a survey is done and 12,800 acres are set aside. That would fully satisfy the entitlement and this would be so regardless of which formula was applied. However, let us suppose that in 1900 only 10,000 acres were set aside, leaving a short fall of 2,800 acres. Then in 1905 it is decided to fulfill the band's entitlement and then the band's population is 110 persons. Using the current population formula, the remaining entitlement would be 4080 acres (110 x 128 - 10,000). The entitlement grew with the population. Using the first survey formula, the remaining entitlement would be 2,800 acres (100 x 128 - 10,000). Here there is no growth in the entitlement.

[73] The Lac La Ronge Indian Band is a multiple survey band. On several occasions land was surveyed and set aside, but certainly at the outset the land allotted did

not fully satisfy the band's entitlement. More recent allotments may have done so. Depending on which formula is used, the Lac La Ronge Indian Band has a large outstanding entitlement or it has been allotted land which greatly exceeds its entitlement. That is the matter to be addressed and determined and any determination is dependant upon how the Reserve Land clause is interpreted.

[74] Within Treaty No. 6 and in particular within the Reserve Land clause there is no express assertion as to when the population of a band is to be counted. On this point there is total silence. To my mind the clause is clearly ambiguous and one may then look to outside sources in an attempt to ascertain what was intended. This extrinsic evidence will include oral history, what was said at the time as disclosed in writings and the subsequent conduct in carrying out the terms of the treaty. Another source is what was done in respect to other treaties.

(4) Provision for Reserve Lands In Other Treaties

[75] Treaty No. 6 was not negotiated and signed in a vacuum or in isolation. It was a part of an ongoing process whereby the Crown acquired aboriginal title to land and in return granted benefits, including Reserve Lands. Many of the terms in the treaties have similarities, but there are also differences. Despite the latter there is a certain continuity throughout and this is so in respect to the provision of Reserve Lands. With this in mind, I now outline what the series of numbered treaties provided as to reserve lands. As I proceed I will also have reference to the writings of Lieutenant-Governor Alexander Morris in his book entitled *The Treaties of Canada With the Indians of Manitoba and the North-West Territories*. I consider this to be appropriate as it has been accepted on other occasions as an authoritative work in the area. See *R. v. Horse, supra*.

[76] I begin with the two Robinson Treaties which were signed on September 7, 1850, and September 9, 1850. They set the pattern of what was to come. At p. 16 Morris says that the Robinson Treaties ". . . were the forerunners of the future treaties, and shaped their course. . . ." Those two treaties provided for the creation of Reserves for Indians. However, unlike Treaty No. 6, those treaties specified the size and very location of the Reserve Lands and the descriptions were set out in detail in schedules to the respective treaties. In the first treaty there were three Reservations described and in the second there were seventeen. Thus, there could be no confusion or uncertainty about what lands were reserved to the Indians.

[77] After that came the numbered treaties. The first two were negotiated by Mr. Wemyss M. Simpson, Indian Commissioner, together with Mr. Adams G. Archibald, Lieutenant-Governor of Manitoba. Included in their instructions were copies of the Robinson Treaties and they were obviously intended to serve as guides in the negotiations with the Indians. In a letter dated July 22, 1871, as reproduced by Morris at p. 32, Lieutenant-Governor Archibald speaks as follows about his upcoming task.

> I look upon the proceedings, we are now initiating, as important in their bearing upon our relations to the Indians of the whole continent. In fact, the terms we now agree upon will probably shape the arrangements we shall have to make with all the Indians between the Red River and the Rocky Mountains. It will therefore be well to neglect nothing that is within our power to enable us to start fairly with the negotiations.
>
> . . .
>
> I fear we shall have to incur a considerable expenditure for presents of food, etc., during the negotiations; but any cost for that purpose I shall deem a

> matter of minor consequence. The real burden to be considered is that which has to be borne in each recurring year.
>
> I doubt if it will be found practicable to make arrangements upon so favorable a basis as that prescribed by His Excellency the Governor-General, as the maximum to be allowed, in case of a treaty with the Lake Indians.
>
> Nor indeed would it be right, if we look to what we receive, to measure the benefits we derive from coming into possession of the magnificent territory we are appropriating here, by what would be fair to allow for the rocks and swamps and muskegs of the lake country east of this Province.

[78] On July 27, 1871, Lieutenant-Governor Archibald first met with the Indians, of which a thousand were assembled, and at that time he opened the proceedings with an address which included the following as reported by Morris commencing at p. 28. The remarks are lengthy, but I reproduce them because they say much about the attitude of generosity on the part of the Crown.

> "Your Great Mother wishes the good of all races under her sway. She wishes her red children to be happy and contented. She wishes them to live in comfort. She would like them to adopt the habits of the whites, to till land and raise food, and store it up against a time of want. She thinks this would be the best thing for her red children to do, that it would make them safer from famine and distress, and make their homes more comfortable.
>
> "But the Queen, though she may think it good for you to adopt civilized habits, has no idea of compelling you to do so. This she leaves to your choice, and you need not live like the white man unless you can be persuaded to do so of

your own free will. Many of you, however, are already doing this.

"I drove yesterday through the village below this Fort. There I saw many well-built houses, and many well-tilled fields with wheat and barley and potatoes growing, and giving promise of plenty for the winter to come. The people who till these fields and live in these houses are men of your own race, and they shew that you can live and prosper and provide like the white man.

"What I saw in my drive is enough to prove that even if there was not a buffalo or a fur-bearing animal in the country, you could live and be surrounded with comfort by what you can raise from the soil.

"Your Great Mother, therefore, will lay aside for you 'lots' of land to be used by you and your children forever. She will not allow the white man to intrude upon these lots. She will make rules to keep them for you, so that as long as the sun shall shine, there shall be no Indian who has not a place that he can call his home, where he can go and pitch his camp, or if he chooses, build his house and till his land.

"These reserves will be large enough, but you must not expect them to be larger than will be enough to give a farm to each family, where farms shall be required. They will enable you to earn a living should the chase fail, and should you choose to get your living by tilling, you must not expect to have included in your reserve more of hay grounds than will be reasonably sufficient for your purposes in case you adopt the habits of farmers. The old settlers and the settlers that are coming in, must be dealt with on the principles of fairness and justice as well as yourselves. Your Great Mother knows no difference between any of her people. Another thing I want you to think over is this: in laying aside these reserves, and in everything else that the Queen shall do for you, you must understand that she can do for you no more than she has done for her red children in the East. If she were to do more for you that would be unjust for

> them. She will not do less for you because you are all her children alike, and she must treat you all alike.
>
> "When you have made your treaty you will still be free to hunt over much of the land included in the treaty. Much of it is rocky and unfit for cultivation, much of it that is wooded is beyond the places where the white man will require to go, at all events for some time to come. Till these lands are needed for use you will be free to hunt over them, and make all the use of them which you have made in the past. But when lands are needed to be tilled or occupied, you must not go on them any more. There will still be plenty of land that is neither tilled nor occupied where you can go and roam and hunt as you have always done, and, if you wish to farm, you will go to your own reserve where you will find a place ready for you to live on and cultivate.

[79] On August 3, 1871, Treaty No. 1 was executed. It provided that 160 acres of land would be laid aside and reserved for each family of five, or in that proportion for larger or smaller families. It also stated the location of the various reserves. In contrast to the Robinson Treaties, the amount of land was not quantified, but as in those treaties, the place was specified. As well there is this provision in respect to a census.

> Her Majesty's Commissioner shall, as soon as possible after the execution of this treaty, cause to be taken an accurate census of all the Indians inhabiting the district above described, distributing them in families, and shall in every year ensuing the date hereof, at some period during the month of July in each year, to be duly notified to the Indians and at or near their respective reserves, pay to each Indian family of five persons the sum of fifteen dollars Canadian currency, or in like proportion for a larger or smaller family, such payment to be made in such articles as the Indians shall require of blankets, clothing, prints (assorted colours), twine or traps, at the current cost price in Montreal, or otherwise, if

> Her Majesty shall deem the same desirable in the interests of Her Indian people, in cash.

In the Robinson Treaties there is no equivalent clause, presumably because payments were made to chiefs in a lump sum and not on the basis of population.

[80] A short time later, on August 21, 1871, Treaty No. 2 was executed. As stated by Mr. Wemyss M. Simpson, Indian Commissioner, in his report of November 3, 1871, the Indians who signed this treaty:

> ". . .had no special demands to make, but having a knowledge of the former treaty, desired to be dealt with in the same manner and on the same terms as those adopted by the Indians of the Province of Manitoba."
>
> [Morris - p. 41]

Negotiations were brief and the terms agreed upon were the same as in the treaty executed eighteen days earlier. In that same report Mr. Simpson said this:

> ". . .Although many years will elapse before they can be regarded as a settled population - settled in the sense of following agricultural pursuits - the Indians have already shown a disposition to provide against the vicissitudes of the chase by cultivating small patches of corn and potatoes. . . ."
>
> [Morris - p. 42]

[81] Treaty No. 3 was entered into on November 3, 1873. On that occasion some differences appeared. First, the allotment of reserve land was increased to 640 acres for each family of five. Secondly, the location of the reserve lands was not

specified. Thirdly, it was provided that the lands would be selected and set aside by the officers of the Government in conference with the Indians. Fourthly, the selections would be made in the next summer or ". . . as soon thereafter as may be found practicable. . . ." Thus the provisions respecting Reserve Lands had moved from being very fixed and precise in the Robinson Treaties to simply giving an assurance that Reserve Lands would be available and providing a means to ascertain in time the particular lands. This new approach did not reflect any change in attitude about the Indians' entitlement to land. Rather it flowed from the uncertainty of the Indians as to where they wished to locate and probably also when they wished to take up their land.

[82] This treaty, as well as the next three, which includes Treaty No. 6, were negotiated by Lieutenant-Governor Morris and thus his writings are those of a person who actually participated in the process which culminated in several treaties. He described Treaty No. 3 as one of great importance.

> . . .This treaty was one of great importance, as it not only tranquilized the large Indian population affected by it, but eventually shaped the terms of all the treaties, four, five, six and seven, which have since been made with the Indians of the North-West Territories--who speedily became apprised of the concessions which had been granted to the Ojibbeway nation. . . .
>
> [Morris - p. 45]

In his official dispatch dated October 14, 1873, he said this about the provision in the treaty for setting aside Reserve Land:

> . . .I have further to add, that it was found impossible, owing to the extent of the country treated for, and the want of

> knowledge of the circumstances of each band, to define the reserves to be granted to the Indians. It was therefore agreed that the reserves should be hereafter selected by officers of the Government, who should confer with the several bands, and pay due respect to lands actually cultivated by them. A provision was also introduced to the effect that any of the reserves, or any interest in them, might hereafter be sold for the benefit of the Indians by the Government with their consent. I would suggest that instructions should be given to Mr. Dawson to select the reserves with all convenient speed ; and, to prevent complication, I would further suggest that no patents should be issued, or licenses granted, for mineral or timber lands, or other lands, until the question of the reserves has been first adjusted.
>
> [Morris - p. 52]

[83] Treaty No. 4, which encompassed some 75,000 square miles in southern Saskatchewan, was executed on September 15, 1874. The provision about Reserve Lands is the same as in Treaty No. 3. In discussing the negotiations of Treaty No. 4, Lieutenant-Governor Morris said the following to those gathered. The remarks clearly indicate the attitude of flexibility held by the Crown.

> . . .And now I will tell you our message. The Queen knows that her red children often find it hard to live. She knows that her red children, their wives and children, are often hungry, and that the buffalo will not last for ever and she desires to do something for them. More than a hundred years ago, the Queen's father said to the red men living in Quebec and Ontario, I will give you land and cattle and set apart Reserves for you, and will teach you. What has been the result? There the red men are happy ; instead of getting fewer in number by sickness they are growing in number ; their children have plenty. The Queen wishes you to enjoy the same blessings, and so I am here to tell you all the Queen's mind, but recollect this, the Queen's High

Councillor here from Ottawa, and I, her Governor, are not traders ; we do not come here in the spirit of traders ; we come here to tell you openly, without hiding anything, just what the Queen will do for you, just what she thinks is good for you, and I want you to look me in the face, eye to eye, and open your hearts to me as children would to a father, as children ought to do to a father, and as you ought to the servants of the great mother of us all. I told my friends yesterday that things changed here, that we are here to-day and that in a few years it may be we will not be here, but after us will come our children. The Queen thinks of the children yet unborn. I know that there are some red men as well as white men who think only of to-day and never think of to-morrow. The Queen has to think of what will come long after to-day. Therefore, the promises we have to make to you are not for to-day only but for to-morrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the ocean. When you are ready to plant seed the Queen's men will lay off Reserves so as to give a square mile to every family of five persons, and on commencing to farm the Queen will give to every family cultivating the soil two hoes, one spade, one scythe for cutting the grain, one axe and plough, enough of seed wheat, barley, oats and potatoes to plant the land they get ready. The Queen wishes her red children to learn the cunning of the white man and when they are ready for it she will send schoolmasters on every Reserve and pay them. We have come through the country for many days and we have seen hills and but little wood and in many places little water, and it may be a long time before there are many white men settled upon this land, and you will have the right of hunting and fishing just as you have now until the land is actually taken up. (His Honor repeated the offers which had been given to the Saulteaux on the previous day.) I think I have told you all that the Queen is willing to do for you. . . .

[Morris - p. 95]

[84] Treaty No. 5 was executed on September 20 and September 24, 1875, and embraced approximately 100,000 square miles. Several things were changed in this treaty. First, the allotment of reserve land was reduced to 160 acres for each family of five or in proportion thereto. Secondly, certain specific locations were set out for certain bands. The areas included the Beren River region, the vicinity of Fisher River and Poplar River, and certain lands in the vicinity of Norway House and Otter Island. These provisions are reminiscent of Treaties No. 1 and No. 2. However, there was no specified location of Reserve Lands for several Indian Bands which was the approach in Treaties No. 3 and No. 4. A third variation is that within the treaty it was expressly stated that the Reserve Lands at the Beren River region would be set aside within two years and at Fisher River within "three years". There was no like stipulation in respect to the other Indian Bands.

[85] That brings me to Treaty No. 6 which was executed on August 23 and August 28, 1876, and which underlies this action. The Reserve Land clause has already been quoted and there is no need to do so again. What is worthy of mention is that a portion of the treaty appears to have been written out in advance of negotiations and other portions written in after completion of negotiations (Ex. P-60). Thus the reference to a family of five was written into the document in advance while the quantum of land for such a family was inserted at a later time as was the process for determining the actual Reserve Lands. This approach strongly suggests that Lieutenant-Governor Morris had certain flexibility in respect to the specifics of Reserve Land. He chose not to follow the earlier practise of expressly describing the Reserve Lands, as in Treaties No. 1, No. 2 and No. 5, or by providing that government officers would set aside reserve lands, as in Treaties No. 3 and No. 4. Instead he chose to provide that the reserve lands would be set aside by a "suitable person". In short, while there was an ongoing process in treaty negotiations, there were variations within the process.

[86] During the course of the negotiations, Lieutenant-Governor Morris explained to the Indians that they did not have to abandon their way of life immediately, but that they should not delay the selection of land for too long.

> At this juncture, a messenger arrived from the Duck Lake Indians, asking that I should tell them the terms of the Treaty. I replied that if the Chiefs and people had joined the others they would have heard what I had to say, and that I would not tell the terms in advance, but that the messenger could remain and hear what I had to say. He expressed himself satisfied and took his seat with the others. I then fully explained to them the proposals I had to make, that we did not wish to interfere with their present mode of living, but would assign them reserves and assist them as was being done elsewhere, in commencing to farm, and that what was done would hold good for those that were away.
>
> [Morris - p. 184]

> "First I wish to talk to you about what I regard as something affecting the lives of yourselves and the lives of your children. Often when I thought of the future of the Indian my heart was sad within me. I saw that the large game was getting scarcer and scarcer, and I feared that the Indians would melt away like snow in spring before the sun. It was my duty as Governor to think of them, and I wondered if the Indians of the plains and lakes could not do as their brother where I came from did. And now, when I think of it, I see a bright sky before me. I have been nearly four years working among my Indian brothers, and I am glad indeed to find that many of them are seeking to have homes of their own, having gardens and sending their children to school.

"Last spring I went to see some of the Chippewas, this year I went again and I was glad to see houses built, gardens planted and wood cut for more houses. Understand me, I do not want to interfere with your hunting and fishing. I want you to pursue it through the country, as you have heretofore done ; but I would like your children to be able to find food for themselves and their children that come after them. Sometimes when you go to hunt you can leave your wives and children at home to take care of your gardens.

"I am glad to know that some of you have already begun to build and to plant ; and I would like on behalf of the Queen to give each band that desires it a home of their own ; I want to act in this matter while it is time. The country is wide and you are scattered, other people will come in. Now unless the places where you would like to live are secured soon there might be difficulty. The white man might come and settle on the very place where you would like to be. Now what I and my brother Commissioners would like to do is this : we wish to give each band who will accept of it a place where they may live; we wish to give you as much or more land than you need ; we wish to send a man that surveys the land to mark it off, so you will know it is your own, and no one will interfere with you. What I would propose to do is what we have done in other places. For every family of five a reserve to themselves of one square mile. Then, as you may not all have made up your minds where you would like to live, I will tell you how that will be arranged : we would do as has been done with happiest results at the North-West Angle. We would send next year a surveyor to agree with you as to the place you would like.

"There is one thing I would say about the reserves. The land I name is much more than you will ever be able to farm, and it may be that you would like to do as your brothers where I came from did.

"They, when they found they had too much land, asked the Queen to it sell [sic] for them ; they kept as much

> as they could want, and the price for which the remainder was sold was put away to increase for them, and many bands now have a yearly income from the land.
>
> "But understand me, once the reserve is set aside, it could not be sold unless with the consent of the Queen and the Indians ; as long as the Indians wish, it will stand there for their good ; no one can take their homes.
>
> [Morris - p. 204-205]

[87] One Peter Erasmus was an interpreter at the negotiations and also attended at Indian councils. He described the negotiations surrounding Treaty No. 6 in Chapter 14 of his autobiography, *Buffalo Days and Nights*, as told to Henry Thompson (Glenbow-Alberta Institute). The introduction and Chapter 14 are Exhibit D-4. At pp. 262 - 263 there is this account of a conversation about land allotment in which mention is made of living persons. Erasmus made an error as to the acreage, but I attach no importance to that.

> William Bull was usually the best of companions but for the first few days I thought he was very quiet and somewhat despondent. Actually he seemed to be occupied in some deep thought, so I finally asked him what was troubling him.
>
> "The chief has asked for a great stretch of land about which he now speaks as if it had already been promised to him. I listened carefully to your interpretations of the Governor's answer to his request. The Governor stated that he had no authority to grant any such request and merely stated that as James Seenum was a chief and had asked, he would pass the request on to his superiors. Is that right, Peter?"

> "Yes, it certainly is. To have an unrestricted amount of land for one chief would have broken the terms of the treaty to all those others who had already signed. Surely Chief Seenum does not think that he has been promised the land from the Dog Rump Creek as far west as the Whitemud River, with the Beaver River at the north and the Saskatchewan River as its southern boundary?"
>
> "Yes! That is exactly what he told me only the last night before the camp broke up. I tried to explain to him that this was not true but he would have none of my explanation, and we had some words between us. That is why I asked to go along with you. It would be a good thing if you would speak to him about the real truth as spoken by the Governor."
>
> "Well of course I will talk to him, but if he does not listen to the words of his own councillor, how will he listen to me? If he is not satisfied with the terms of the treaty why did he sign? It seemed to me that he understood everything that I spoke about the night of the first council of the chiefs. I explained to them that each man, woman and child <u>then living</u> would be apportioned eighty acres each, according to the number of Indians then belonging to his tribe."
>
> "I and the others all understood exactly as you now explain. Further than that, the Governor also mentioned the amount of land each Indian would be entitled to when they picked their reserves next year. For myself, I can only occupy a small portion of the land my family would be entitled to, but I understand that all the land, regardless of the amount each family uses, will belong to the band and can be used by our children's children."
>
> [Emphasis added]

[88] Treaty No. 7 is the last one about which Lieutenant-Governor Morris wrote. It was negotiated by David Laird, Lieutenant-Governor of the North West Territories and

Lieutenant Colonel James F. McLeod, Commissioner of the North West Mounted Police and signed on September 22, 1877, with a supplementary treaty being signed on December 4 of the same year.

[89] This treaty incorporated terms which were contained in earlier treaties, although it was not identical to any one treaty. Thus, the land to be set aside was one square mile for each family of five, but the locations of the Reserve Lands were set out. However, no mention is made of what process will be followed in assigning the reserves or that a census will be taken. Lieutenant-Governor Morris describes the similarity of this treaty in these words.

> . . .The terms of the treaty, were substantially the same as those contained in the North-West Angle [No. 3] and Qu'Appelle treaties [No. 4], except that as some of the bands were disposed to engage in pastoral pursuits, it was arranged to give them cattle instead of agricultural implements. . . .
>
> [Morris - p. 250]

He later quotes these remarks of Lieutenant-Governor Laird.

> "Many years ago our Great Mother made a treaty with the Indians far away by the great waters in the east. A few years ago she made a treaty with those beyond the Touchwood Hills and the Woody Mountains. Last year a treaty was made with the Crees along the Saskatchewan, and now the Queen has sent Col. McLeod and myself to ask you to make a treaty. But in a very few years the buffalo will probably be all destroyed, and for this reason the Queen wishes to help you to live in the future in some other way. She wishes you to allow her white children to come and live on your land and raise cattle, and should you agree to this

she will assist you to raise cattle and grain, and thus give you the means of living when the buffalo are no more. She will also pay you and your children money every year, which you can spend as you please. By being paid in money you cannot be cheated, as with it you can buy what you may think proper.

"The Queen wishes us to offer you the same as was accepted by the Crees. I do not mean exactly the same terms, but equivalent terms, that will cost the Queen the same amount of money. Some of the other Indians wanted farming implements, but these you do not require, as your lands are more adapted to raising cattle, and cattle, perhaps, would be better for you. The Commissioners will give you your choice, whether cattle or farming implements. I have already said we will give you money, I will now tell you how much. If you sign the treaty every man, woman and child will get twelve dollars each ; the money will be paid to the head of each family for himself, women and children ; every year, for ever, you, your women and your children will get five dollars each. This year Chiefs and Councillors will be paid a larger sum than this ; Chiefs will get a suit of clothes, a silver medal, and flag, and every third year will get another suit. A reserve of land will be set apart for yourselves and your cattle, upon which none others will be permitted to encroach ; for every five persons one square mile will be allotted on this reserve, on which they can cut the trees and brush for firewood and other purposes. The Queen's officers will permit no white man or Half-breed to build or cut the timber on your reserves. If required roads will be cut through them. Cattle will be given to you, and potatoes, the same as are grown at Fort McLeod. The Commissioners would strongly advise the Indians to take cattle, as you understand cattle better than you will farming for some time, at least as long as you continue to move about in lodges.

[Morris - p. 268]

[90] While adhesions were executed no new treaties were negotiated until June 21, 1899, when Treaty No. 8 was signed. As in others, it provided one square mile for a family of five, but unlike any other it also provided for ". . .land in severalty to the extent of 160 acres to each Indian. . . ." It also stated, as in Treaty No. 6, that a suitable person would be sent to set aside Reserve Lands. No mention is made of a census nor of when the Reserves would be set aside. The following appears in the Commissioners' report dated September 22, 1899.

> We assured them that the treaty would not lead to any forced interference with their mode of life, that it did not open the way to the imposition of any tax, and that there was no fear of enforced military service. We showed them that, whether treaty was made or not, they were subject to the law, bound to obey it, and liable to punishment for any infringements of it. We pointed out that the law was designed for the protection of all, and must be respected by all the inhabitants of the country, irrespective of colour or origin; and that, in requiring them to live at peace with white men who came into the country, and not to molest them in person or in property, it only required them to do what white men were required to do as to the Indians.
>
> . . .
>
> In addition to the annuity, which we found it necessary to fix at the figures of Treaty Six, which covers adjacent territory, the treaty stipulates that assistance in the form of seed and implements and cattle will be given to those of the Indians who may take to farming, in the way of cattle and mowers to those who may devote themselves to cattle-raising, and that ammunition and twine will be given to those who continue to fish and hunt. The assistance in farming and ranching is only to be given when the Indians actually take to these pursuits, and it is not likely that for many years there will be a call for any considerable expenditure under these heads. . . .

> 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.
>
> [Exhibit P-87 - document 24A; pp. 132-133]

The reference to Treaty No. 6 indicates a knowledge on the part of both sides as to what had been negotiated earlier and a willingness to achieve some consistency.

[91] Treaty No. 9 was executed over a number of days in the years 1905 and 1906 and pursuant to it the Indians ceded some 90,000 square miles located in Ontario. Again the Reserve Land to be set aside was one square mile for a family of five, but the size and location of the Reserves was set out in a schedule to the Treaty. This is a return to Treaties No. 1 and No. 2 and a movement from the approach adopted in the other numbered treaties. A likely explanation is that non-aboriginal society was quickly advancing into the area.

[92] Treaty No. 10 related to some 85,000 acres in northern Saskatchewan and Alberta and was executed over several days in 1906 and 1907. Again the Reserve allotment was to be one square mile for a family of five although severalty was possible to the extent of 160 acres; a suitable person was to set apart the Reserves; and there is no mention of a time frame to set aside the Reserves. In his report of January 18, 1907, Mr. J.A.J. McKenna, Commissioner, wrote as follows:

> It appeared for a time as if there would be some considerable difficulty in effecting a settlement on the lines of the treaty, for it was evident from the trend of the talk of the leaders among the Indians that there had been at work an influence which tended to make them regard the treaty as a means of enslaving them. I was able to disabuse their minds of this absurd notion and to make it clear that the government's object was simply to do for them what had been done for neighbouring Indians when the progress of trade or settlement began to interfere with the untrammelled exercise of their aboriginal privileges as hunters.
>
> [Exhibit P-87 - document 28A; p. 190]
>
> . . .
>
> In the main, the demand will be for ammunition and twine, as the great majority of the Indians will continue to hunt and fish for a livelihood. It does not appear likely that the conditions of that part of Saskatchewan covered by the treaty will be for many years so changed as to affect hunting and trapping, and it is expected, therefore, that the great majority of the Indians will continue in these pursuits as a means of subsistence.
>
> The Indians were given the option of taking reserves or land in severalty, when they felt the need of having land set apart for them. I made it clear that the government had no desire to interfere with their mode of life or to restrict

> them to reserves and that it undertook to have land in the proportions stated in the treaty set apart for them, when conditions interfered with their mode of living and it became necessary to secure them possession of land.
>
> [Exhibit P-87 - document 28A; p. 193]

Even after the expiration of more than twenty years following adhesion to Treaty No. 6, the same opinions and assurances were being expressed and given.

[93] Treaty No. 11 was signed on June 27, 1921, some 45 years after Treaty No. 6 and pursuant to it the Indians ceded title to some 372,000 square miles. The provision dealing with Reserve Lands reads in its entirety as follows:

> And His Majesty the King hereby agrees and undertakes to lay aside reserves for each band, the same not to exceed in all one square mile for each family of five, or in that proportion for larger or smaller families;

There is absolutely no indication as to how or when it would be done. In fact, no Reserves were set aside for many years.

[94] That concludes my review of what was actually stated in the treaties about the creation of Reserve Lands for Indians and the comments of the Honourable Alexander Morris about the negotiation of those treaties. I turn now to the actual creation of the Reserves with the purpose of ascertaining whether subsequent conduct sheds any light on the intention of the parties to treaty.

(5) Subsequent Conduct In Calculating Reserve Lands

[95] I now embark upon a review of what transpired in respect to the setting aside of some Reserve Lands and the creation of Indian Reserves. In the course of compiling what follows I read much in many documents. It is impossible to recount it all and I therefore will focus on what may be instructive as to how the quantum of land was calculated.

[96 My beginning is not in Saskatchewan with Treaty No. 6, but rather in the Province of British Columbia. I do so because counsel for the plaintiffs suggest that it enables me to obtain some insight into the thinking of a government official about the quantum of land in Indian Reserves. The Honourable R.W. Scott played a role in respect to treaties and it is useful to know what his thoughts were on November 5, 1875, when seeking a settlement of an Indian land claim in British Columbia. Treaty No. 6 was less than a year away. In a memorandum of that date, as acting Minister of the Interior, he wrote the following.

. . .

> In lieu therefore of the propositions submitted by Mr. Walkem and sanctioned by the Order in Council of the British Columbia Government, the undersigned would respectfully propose, the following:--
>
> 1. That with a view to the speedy and final adjustment of the Indian Reserve question in British Columbia on a satisfactory basis, the whole matter be referred to three Commissioners, one to be appointed by the Government of the Dominion, one by the Government of British Columbia, and the third to be named by the Dominion and the Local Governments jointly.

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

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

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

5. That each Reserve shall be held in trust for the use and benefit of the Nation of Indians to which it has been allotted, and in the event of any material increase or decrease hereafter of the members of a Nation occupying a Reserve, such Reserve shall be enlarged or diminished as the case may be, so that it shall bear a fair proportion to the Members of the Nation occupying it. The extra land required for any Reserve shall be allotted from Crown Lands, and any land taken off a Reserve shall revert to the Province.

6. That so soon as the Reserve or Reserves for any Indian Nation shall have been fixed and determined by the Commissioners as aforesaid, the existing Reserves belonging to such Nation, so far as they are not in whole or in part included in such new Reserve or Reserves so

> determined by the Commissioners, shall be surrendered by the Dominion to the Local Government so soon as may be convenient, on the latter paying to the former, for the benefit of the Indians such compensation for any clearings or improvements made on any Reserve so surrendered by the Dominion and accepted by the Province as may be thought reasonable by the Commissioners aforesaid.
>
> . . .
>
> [Exhibit P-22; Tab 9]

[97] I take the above into my deliberations while exercising caution. Mr. Scott does anticipate that the size of a Reserve may increase or decrease in accordance with existing population. It is suggested that this supports the plaintiffs' position. While it is something of an indication, I do not consider it to be as conclusive as the plaintiffs would have it.

[98] It must be remembered that the situation was different than on the Prairies. In British Columbia there was a different regime and there clearly was recognition of a need for flexibility and an acceptance of it. However, that must be taken within the context of the negotiations which were about to begin there. It was anticipated that the process would lead to the creation of Reserves of determined size. In fixing the size of the reserve, the land was not to be calculated on the basis of acreage per person, but on a liberal policy with regard ". . .to the habits, wants and pursuits of such nation, to the amount of territory available in the region occupied by them, and to the claims of the white settlers." This is a very different approach from that taken in Treaty No. 6 and of course Mr. Scott was aware of the different approaches taken in respect to Treaty No. 1 through Treaty No. 5. Accordingly, while Mr. Scott was amenable to Indian Reserves increasing or decreasing in size in British Columbia, and while he may have held a like

opinion about Reserves elsewhere, I cannot be certain about the latter on the basis of what is quoted from his memorandum.

[99] I now turn to a review of land allotment for various Indian Reserves. I have been referred to numerous instances and will briefly describe each, proceeding in a chronological order.

[100] (1) Pay-pas-tays. This was the first instance in the historical record before me where steps were taken to set aside lands and it occurred in 1880. In fact, the effort appeared to fail because of a dispute over the size of the Reserve. This is a portion of the report of Mr. George A. Simpson, Indian Reserve Surveyor, dated December 1, 1880.

> Shortly after my arrival at Edmonton, I was instructed by the Indian Agent to survey a reserve for Chief Pay-pas-tays (The Woodpecker), located opposite Fort Edmonton, and two miles from the south side of the Saskatchewan. As this would materially interfere with the "claims" of the settlers, I prevailed on the chief to move two miles further south, and commenced the survey on the 2nd of August. On the 16th instant, the chief ordered my party to stop work, giving as a reason that he was not satisfied with the area of the reserve. . . .
>
> . . .
>
> The number given me as being paid in this band in 1879, was 241, and upon this basis I informed them that they would get 48 square miles, but the number in the band at the time of payment this year was only 189, and on this account Mr. Wadsworth notified me to give them not more than 40 square miles, or the allowance for 200 souls. . . .
>
> [Exhibit D-15 - Appendix 14, p. 40]

[101] Counsel for the plaintiffs contends that this was an instance where the allotment was based on current population. This is correct, but it also can be said that the population used was that at the time of the first survey. What it does clearly show is that the Department of Indian Affairs, which had come into existence in 1880, was prepared to move from a higher to a lower population figure. I do not know what was the ultimate disposition or if a Reserve was ultimately set aside.

[102] (2) Cowessess. This band entered into Treaty No. 4 on September 15, 1874, and at the time had a population of 74 members. The pertinent statistical information follows.

Date of first survey	- 1880
Population	- 502 persons
Entitlement	- 64,256 acres
Set aside	- 40,320 acres
Deficiency	- 23,936 acres
Date of second survey	- 1884
Population	- 367 persons
Entitlement	- 46,976 acres
Set aside (additional)	- 9,600 acres
Total allotment	- 49,920 acres

[Exhibit P-54, Tab 8]

Here the Department made the final allotment on the basis of the current population at the time of the second survey and not that which existed at the time of the first survey.

[103] (3) Red Gut Band. This band was a party to Treaty No. 3 and Kenneth Tyler, called by the plaintiffs, suggests that current population was used in this instance. However, his testimony was vague and lacked details and I therefore have placed no reliance on it in respect to this Band.

[104] (4) Thunderchild Band. What occurred in respect to this Band is obtained from the testimony of Kenneth Tyler and Exhibit P-55, Tab 12. The man known as Chief Thunderchild was originally a member of Little Black Bear's Band who had entered into Treaty No. 4. Thunderchild and a group of stragglers entered into Treaty No. 6 on September 24, 1879, and at that time their number was 54 or 55. In 1881 a survey was completed and 24 square miles (15,360 acres) were allotted. According to what is set out in Exhibit P-54, in the thumbnail sketch, the population in 1881 was 66 persons which means the allotment was excessive whether you take that date or the date of entering Treaty.

[105] In any event, in 1883 Thunderchild was joined by Napahas who had been a headman in Thunder Companions Band which had signed Treaty No. 6 in 1876. It was decided that they would remain together and in 1884 an additional 8.5 square miles (5440 acres) were surveyed as Indian Reserve No. 115A, Thunderchild's original reserve being Indian Reserve No. 115. As a result, the two bands which came to be known as the Thunderchild Band, had a total of 32.5 square miles or 20,800 acres. Their combined population appears to have been 160 persons. Mr. Tyler suggests this was an instance when the Department acted on current population. In support of this he refers to a letter dated February 18, 1884, in which the Acting Assistant Commissioner writes:

> As the numbers of the bands now stand the Reserve as surveyed would be about eight square miles too small but the extra quantity of land required could easily be had adjacent to it, if the Department deemed it expedient to have it added on -

[106] Mr. Tyler testified that if the 1880 or 1881 populations would have been utilized, then the additional allotment should have been 13 square miles instead of 8.5 square miles. However, I do not know how or why he arrives at the population figures that would suggest that conclusion. If it is somewhere in the evidence, I couldn't find it.

[107] What I do know is that in 1881 the Thunderchild population was supposedly 65 persons, having increased from 54 persons in 1979. I do not know the population of the Napahas group at any time. As a result, I do not know whether the survey of 1884 related only to that group and the number of persons in it. If that were so, it was the first survey for the Napahas group. In the end, I can draw little from what transpired in respect to the Thunderchild Band. As best I can make out, account was taken of the current population at the time of the first survey: - one for Thunderchild and one for Napahas. By that I assume a survey was done for Thunderchild in 1881 and for Napahas in 1884, although I cannot be sure of this. In the end, uncertainty as to what transpired is what dominates here.

[108] (5) Alexis Band. As described by Mr. Tyler, this was a Band located in Alberta which had a reserve surveyed in 1880. The land allotment was based on a population of 81 or 82 persons. However, it was known at the time that several persons were away and therefore did not appear on the pay lists. In 1891 additional land was set aside and at that time the allotment was based on the 1890 population of 219. This obviously was an instance when current population was utilized, but it is not known

whether the increase was the result of natural growth in the population or the inclusion of those who were absent in 1880. Thus, it is a somewhat ambiguous piece of evidence.

[109] (6) Yellow Quill Band. This Band adhered to Treaty No. 4 on August 24, 1876, and at the time had a population of 158 persons. In 1881 a survey was done and Reserves were established at Nut Lake and Fishing Lake. At the time the population was 293 persons which resulted in an entitlement to 37,504 acres. In fact, only 32,428.8 acres were set aside leaving a shortfall of 5,072.2 acres.

[110] A faction of the Band located at Kinistino, Saskatchewan, requested land and a survey was conducted in 1899. At that time the population was 357 persons which could justify an entitlement to 45,696 acres. Reserve Lands of 9,638.4 acres were set aside bringing the total allotment to 42,067.2. This acreage exceeded what was warranted based on population at time of first survey, but was less than the full entitlement based on present population. See Exhibit P-55, Tab 9. A significant letter of September 6, 1898, was written by Mr. A.E. Forget, Indian Commissioner, to the Secretary, Department of Indian Affairs.

> In reply to your letter of the 16th. instant, I beg to state that for the reasons given by Mr. Agent Swinford in the extract of report transmitted to me and in a letter dated the 2nd. ultimo received from the same official, (copy herewith enclosed) I consider that it would be advisable to secure for the Band at Nut Lake the extension of the Reserve recommended by the Agent.
>
> With regard to your enquiry as to making a reduction. in the reserve in one direction if extended in the other, I beg to say that as these Indians do not appear to have received their quota of land, I would favour basing the total area of the Reserves for this Band on the present population of the

Fishing Lake and Nut Lake Indians, including the Kinistino group. This will permit of the setting apart of a small Reserve of 15 square miles for the latter, where they are at present settled, as already recommended in my letter of the 21st. June last, and an extension north of the Reserve at Nut Lake up to the area they would be entitled to on that basis, without any reduction elsewhere. Should, however, it be desirable to extend the reserve further north than the above would allow, then I would recommend that a corresponding reduction be made elsewhere.

There were 358 Indians paid in this Band last month and two were reported absent, making a total of 360 of a population, which would entitle them to 72 square miles. The aggregate area of the two Reserves is 51.1 square miles, making a discrepancy of 20.9 sq. miles. Of this quantity 15 sq. miles could be set apart in Townships 41 and 42, Range 15, West 2nd. P.M., and the balance of 5.9 added to the present Reserve at Nut Lake.

Recapitulation.

360 Indians entitled to	72 sq. miles.	
Fishing Lake Reserve		34.5 sq. miles
Nut Lake "		16.6 " "
Proposed Reserve for Kinistino group.		15. " "
" addition to Nut Lake Reserve.		5.9 " "
	72	72 sq. miles.

[Exhibit P-55, Tab 9, p. 150]

The above accords with an earlier letter of Mr. Forget dated June 21, 1893 (Ex. P-2, p. 342) and by 1903 the stated quantity of land had been surveyed.

[111] In 1902 the existing population was 378 and an additional 3,961.6 acres were set aside, bringing the total to 46,028.8 acres which exceeds any entitlement based on the population of 293 persons at the time of the first survey in 1881, but less than full entitlement of 48,384 acres based on a 1902 population of 378 persons. That entitlement had not been fulfilled was acknowledged at the time by the Department of Indian Affairs.

[112] Here is a clear instance when present or current population was the basis for calculation of Reserve Land entitlement. It is worthy of mention that this occurred in respect to the second survey in 1899, which was only ten years after the James Roberts Band adhered to Treaty No. 6. The documents also indicate that Mr. Forget was not alone in his approach at that time.

[113] (7) Horse Lake Band. This Band was a party to Treaty No. 8. The first survey was done in 1905 when the population was 112 persons. The entitlement would have been 14,336 acres, but 15,642 acres were set aside. However, a second survey was conducted in 1914 and an additional 4,032 acres were allotted. At the time of the second survey the population was 151 persons which would generate an entitlement of 19,328 acres. In fact, the band received 19,674 acres which was excessive, but more in keeping with the population in 1914 than in 1905 when the first survey was done. There was something of a justification for the excess in that the Reserve Lands contained some ponds and marshes. See Exhibit P-58, Tab 24.

[114] (8) Peter Ballantyne Band. This band is a party to Treaty No. 6 by reason of the Adhesion Agreement signed on February 11, 1889, as at that time the band was a

part of the James Roberts Band. The population as of that date is not known, but as of 1900 it was 338 persons. A survey was done, probably in 1919, when the population was 374 persons which justifies an entitlement of 47,872 acres of which 16,805.64 acres were set aside. That left a short fall of 31,066.36 acres. An additional survey occurred in 1921 which resulted in additional lands being set aside so as to bring the total to 22,551 acres. In a letter dated April 26, 1929, Mr. A.F. MacKenzie, Acting Assistant Deputy and Secretary, Department of Indian Affairs, wrote to Mr. F.E. Peters, Surveyor General, Department of the Interior, and in the course of that letter said this about the Peter Ballantyne Band.

> Also if time and finances permit, additional lands to be laid out for the Pelican Narrows band at Ballantyne Bay. This band has a population of 456, which would entitle them to 58,368 acres, of which 22,551.30 acres have already been laid out in six parcels, leaving a balance of 35,817 acres.
>
> [Exhibit P-56, Tab 14, p. 224]

In that same year an additional 10,425.5 acres were set aside.

[115] (9) Key/Shoal Lake Band. This is a Treaty No. 4 Band and a survey was done in 1883. At time of treaty the population was 132 persons and at date of first survey it was 195 persons. The entitlement was 24,960 acres and at the time 24,320 acres was set aside, leaving a shortfall of 640 acres. Additional surveys were done in 1889 and 1893 resulting in a total allotment of 29,736.6 acres. This amount exceeded even the entitlement based on a population of 215 persons in 1893.

[116] I now look specifically at how land was allotted to the Lac La Ronge Indian Band. It adhered to treaty in 1889. The first Reserve was surveyed in 1897, being the

Little Red River Reserve. Varied opinions then appeared in the correspondence about the calculation of land entitlement. In a letter dated April 14, 1899, Mr. A.W. Ponton, Surveyor, reported to the Department of Indian Affairs, about surveying Indian Reserve 106A on the Little Red River. In that letter he wrote:

> The adhesion of the Montreal Lake and Lac la Ronge Indians to Treaty No. 6 was taken during the winter of 1888 and 1889 by Commissioner Lieut Col. A.G Irvine acting under authority of Order-in-Council, dated 29th November 1888 (F. 56622). The census of the Bands in 1889 gave their numbers as 435, which would entitle them under the stipulations of Treaty 6, to 87 square miles of land—Of this area the reserve surveyed by the undersigned at Montreal Lake in 1889 — known as Indian Reserve No. 106 — provides 23 Square Miles, and the reserve forming the subject matter of this letter — known as 106A — provides 56.5 Square Miles, or a total of 79.5 square miles, and it would therefore appear that they are still entitled to 7.5 square miles over and above the area already set aside and reserved for their use —
>
> [Exhibit P-2, p. 381]

Mr. Ponton clearly adopted population figures from the date of treaty even though ten years had passed. In contrast there is this memorandum from Mr. Duncan Campbell Scott, then an accountant with the Department of Indian Affairs, to the Deputy Superintendent General dated March 22, 1907, some eight years later.

> With reference to the land due the Montreal Lake and Lac la Ronge Indians I find that the Reserves were located upon the population as it was in 1889, namely, 435. The population is now 715; a considerable increase. ... It seems

> to me that these Indians have too small an area of land for their population, ... They certainly have a claim to some additional land, and I think while we are investigating this point the surrender of 106A might go on.
>
> [Exhibit P-2, p. 485]

[117] However, there also was the following letter of June 6, 1908, from Mr. J.D. McLean, Secretary, Department of Indian Affairs, to Mr. W.J. Chisholm, Inspector of Indian Agencies.

> . . .when you next visit the Carlton Agency go carefully into the question with Mr. Agent Borthwick of providing an extra reserve for the bands of Chiefs James Roberts and William Charles who apparently are connected with a band of Chief Amos Charles of Lac la Ronge.
>
> There appears to be no doubt that these Indians are deficient of a considerable area of land under the treaty. Mr. Borthwick has gone into the question of natural increase in order to ascertain the number of Indians who were entitled to land at the time of the treaty. He estimates this number at 466. The two reserves for the said band namely Nos. 106 and 106A contain respectively 23 and 56.5 square miles. If Mr. Borthwick's figures are correct the area to which these Indians are still entitled is 13.5 square miles.
>
> [Exhibit P-2, p. 584]

The reply from Mr. Chisholm, dated December 27, 1908 contains the following.

> I examined the pay-sheets from the admission of these bands [Wm. Charles and James Roberts] to treaty and checked the calculation made in the agency office and submitted by Mr. Agent Borthwick with a view to showing

> the number in these bands from whom in accordance with the provisions of the treaty lands have still to be set apart. I observe that the Agent began his calculation from the annuity payments of February 1889 when treaty was signed for these bands and when the combined population was 377 instead of from the second payment which was made in October of the same year when the bands numbered 435. The increase included a net natural increase for the interval of 6 persons and accessions from the non-treaty Indian population of 52. In this respect the Agent's method of calculation appears to be strictly correct, as the first aim is to ascertain the number at present in the bands who were eligible, had they presented themselves, to be enrolled at the date of the signing of the treaty.
>
> [Exhibit P-2, p. 598]

After eliminating two people, Mr. Chisholm calculates 463 as the number of persons to be entitled to have land set aside. He then goes on to say this:

> Accordingly these bands would be entitled to 92.6 square miles in all, while they have received 79.5 and 13.1 square miles remains to be set apart.
>
> [Exhibit P-2, p. 598]

[118] A Mr. E. Jean, an official in the Department of Indian Affairs, wrote a memorandum dated September 27, 1910, in which he said the following.

> . . .The number of Indians paid on Feb. 12th 1888 when adhesion was taken was:
>
> Montreal Lake, 99
> Lac la Ronge 279.

In 1889 Mr. Surveyor Ponton surveyed Reserve 106 for the Montreal Lake Band which according to the Pay sheets of that year numbered 101 souls, thus entitling them to 20.2 square miles under the stipulations of Treaty No. 6. Reserve 106 contains 23 sq. miles thus giving Montreal Lake Band more land than it was entitled to according to the population of 1889.

Reserve 106A was surveyed in June and July 1897 and the payments made that year show the population as follows:—

Montreal Lake, 148.
Lac la Ronge, 484.

This Reserve was set apart for the benefit of the two Bands.

. . .

. . .The population of the Montreal Lake Band in 1897 (143 souls) would entitle them to 28.6 square miles and the 9 square miles referred to with the 23 sq. miles in Reserve 106 gave them a total of 32 square miles.

. . .

The population of Lac la Ronge Band in 1897 was 484 souls entitling them to 96.8 square miles.

. . .

Of course the population of the two Bands has kept increasing since 1897 by the admission of Indians to Treaty and [unreadable] they are both entitled to more land than they have received so far. The population in 1909 was:—

Montreal Lake, 187.

Lac la Ronge, 516.

> This would give the former 37.2 square miles and the latter 103.2 square miles.
>
> [Exhibit P-3, p. 685]

That individual did not go back to the population at date of treaty or date of first survey. He calculated entitlement on the basis of the then current population. I could find nothing in the documents at about that time or for a period following in which Mr. Jean's approach was rejected.

[119] In a letter dated September 26, 1922, Mr. J.D. McLean, Assistant Deputy and Secretary, wrote the following to Mr. W.R. Taylor, Indian Agent.

> You mention in your letter an area of 7 sq. miles. Kindly inform us as to how this area is arrived at. This matter was gone into in 1920. For the three bands, Montreal Lake or William Charles, Lac la Ronge or James Roberts, and Stanley or Amos Charles, the following reserves are already surveyed, -
>
> Montreal Lake No. 106 containing 14720 acres
> Little Red River No. 106A, containing 36160 acres
> Lac la Ronge, containing 2832.6 acres
> Stanley, containing 2153.8 acres. . . . . .Total 55866.4 acres.
>
> At that time the population was as follows,—
>
> | | | |
> |---|---|---|
> | Montreal Lake band | 271 | |
> | Lac la Ronge band | | 379 |
> | Stanley band | 264 | |
> | Total | | 914 |

> At 128 acres each, they would be entitled to 116992 acres, leaving a deficit of 61125.6 acres. . . .
>
> If the above figures are correct, the Lac la Ronge band have received 38922.6 acres and are entitled to 48412 acres, leaving a deficit of 9519.4 acres. That is if you consider that Indian reserve No. 106A belongs to that band. The Montreal Lake band numbers 271 and would be entitled to 34688 acres; they have 14720, a deficit of 19968 acres. The Stanley band numbers 264 and would be entitled to 33792 acres; they have 2153.8, a deficit of 31638.2 acres. . . .
>
> [Exhibit P-4, p. 951]

In a further letter between them, dated February 9, 1923, Mr. McLean wrote.

> Accordingly to the population of 315, which the Lac la Ronge band had in 1910, when the Stanley band was separated, they would be entitled to 63 sq. miles of reserve. They have now 27.2 in reserve No. 106-A and say, half of the 10.4 sq. miles of reserve at Stanley and Lac la Ronge, which is 5.2 sq. miles, making a total of 32.4 sq. miles. They have therefore 30.6 sq. miles coming to them.
>
> According to the population of 235 which the Stanley band had when they were separated from the Lac la Ronge band in 1910, they would be entitled to 47 sq. miles. They have an interest of 20.3 sq. miles in reserve No. 106-A and say, half of the interest in the 10.4 sq. miles laid out at Lac la Ronge and Stanley, that is 5.2 sq. miles, making a total of 25.5 sq. miles. There are, therefore, 21.5 sq. miles still due the Stanley band.
>
> Kindly inform the Chiefs of these two bands of the amount of land to which they are entitled and request them at their earliest opportunity to select the locations in which they desire to have these lands reserved.

[Exhibit P-4, p. 959]

It is unknown why the year 1910 was selected. Perhaps it was because in that year the band split. However, 1910 was not the year of first survey. In fact it was midway between the year of first survey, 1897, and the year of the letter, 1923. The letter does appear to accept that increases in population were to be taken into account.

[120] Finally I note the following comments by Mr. Duncan Campbell Scott, now Deputy Superintendent General, in a letter dated September 4, 1929, to the Deputy Minister of Justice.

> I note the request of the Province of Manitoba to have the Agreement stipulate some limitation in respect of the areas of land to be selected in fulfillment of Treaty obligations with the Indians. The various treaties provide for so many acres per capita and the practice of the Department has been to take the census of the band at the time the survey of the required acreage is made. The acreage of hereinafter stated will be varied at the time of survey to meet the decrease or increase of the membership at such time. I do not think accordingly that it would be proper to include any limitation of acres in the Agreement. When these [------] come to be made the Department will be able to satisfy the Province of Manitoba as to our strict adherence to treaty conditions. Clause 8 of the Alberta Agreement, as it [stands?], properly safeguards the rights of the Indians as well as the rights of the Province. The acreage still required to be set aside in fulfillment of treaty obligations based on the present membership of bands is as follows:. . .
>
> [Exhibit P-5, p. 1372]

[121] In the case of the Lac La Ronge Indian Band, there were several surveys. In none of them was the full entitlement set aside and one cannot point to a document in which the Department categorically states that a particular allotment was based on the then current population formula. However, what does appear to be clear is that no allotment was made on the basis of the first survey population and in some allotments there was recognition of an increasing population.

(6) Oral History

[122] There was evidence that Indians in general believe that in calculating land entitlement the current population should be used. This position is supposedly based on what has been passed down in the Indian tradition since the time of treaty. Several witnesses were called to testify about this and I briefly summarize what they said.

[123] Mr. Harry Nicotine is a member of the Red Pheasant Band and has been actively and extensively involved in matters of land entitlement. His great-grandfather, The Man Who Stood Between Two Mountains, was a signatory to Treaty No. 6. His son, of course, was Mr. Nicotine's grandfather and he and Mr. Nicotine had many discussions. This gets us pretty close to the Treaty itself.

[124] According to Mr. Nicotine, his grandfather told him that ". . .the land that they received was the population times 128 acres, and that the current population at the time would be used, and also in the future" (trial transcript, Vol. 4, p. 799). The grandfather also told him that if a Band didn't get all its land, then when more land was given it was to be obtained under current population. The grandfather said that this information came from his father and Chief Red Pheasant.

[125] Mr. Nicotine testified that he spoke to other elders, including Allan Ahenakew. He was told by Mr. Ahenakew that they should receive land on the basis of current population times 128 acres. This view was passed on to Ahenakew from Ahtakakoop.

[126] Mr. David Ahenakew testified that the policy of the Federation of Saskatchewan Indians was grounded in what had been passed on by Elders. He testified that the Elders had stated that the quantum of land was to be based on current population. That same approach applied whether or not a Band had received land.

[127] Mr. Cy Standing also testified about how elders had passed on what had been told to them about the meaning of Treaty. It was on the basis of this that the Federation developed their policy that current population should be used in calculating land entitlement.

[128] As I have already said, I do not question the honesty or integrity of the three witnesses. I equally do not question that they sincerely wanted to assist the court. However, while I have considered their testimony and have taken it into my deliberations I have not found it very helpful.

[129] The terminology used is troubling. I find it difficult to imagine that The Man Who Stood Between Two Mountains used the phrase “current population” and spoke of what happens when there are multiple surveys, there likely having been none in his time. The same applies to what was attributed to the Elders.

[130] A more basic concern is the role of the witnesses themselves. Each one of them has been very actively involved in Indian politics and each has been a vigorous

advocate of the current population formula. It is far from desirable to have oral history or ancient wisdom and knowledge presented by such individuals. It is most likely that what was originally communicated has become distorted for having passed through the mind of the current narrator and being subjected to his ideas and opinions. To be meaningful and of value, the knowledge of the Elders, who hold a unique position in Indian culture and society, should have been put forward by the Elders themselves and not filtered through a third party.

[131] Were the rules of evidence to be strictly applied, the testimony would be rejected as being hearsay and not saved by some exception, such that the Elders could not testify. However, because I do not know the availability of the appropriate Elders, I have decided to bend the rule and admit the testimony. Its weight is another matter.

(7) Interpretation of Reserve Land Clause

[132] The portion of the treaty land clause which requires interpretation reads in this way.

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves . . . provided all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, ...

It was clearly stated that each Indian was to receive 128 acres of land. It is just as clear that the clause does not state the date which is to be used to identify the Indians who are to obtain the treaty benefit. In this regard the clause is ambiguous for there are several possible dates, namely: the date of treaty, the date of first survey or the date of allotment,

these being the three spoken about in this trial. The Crown submits that the correct interpretation is the date of first survey whereas the plaintiffs argue for the date of allotment. In my opinion, the latter should prevail.

[133] In coming to my conclusion I have read and reread and pondered over much time the very words of the Treaty as a whole and the reserve land clause both in itself and as a part of the whole. I have looked at the Treaty in its historical context, including what is known about the circumstances which surrounded its execution. I have also looked at how the clause was later implemented and land entitlement calculated. All of this was done bearing in mind the rules applicable to treaty interpretation and the approach described by now Chief Justice Lamer in *R. v. Sioui, supra*, at p. 1068 and p. 1069.

> In my view, the treaty essentially has to be interpreted by determining the intention of the parties on the territorial question at the time it was concluded. It is not sufficient to note that the treaty is silent on this point. We must also undertake the task of interpreting the treaty on the territorial question with the same generous approach toward the Indians that applied in considering earlier questions. Now as then, we must do our utmost to act in the spirit of *Simon*.
>
> The historical context, which has been used to demonstrate the existence of the treaty, may equally assist us in interpreting the extent of the rights contained in it. . . .
>
> . . .
>
> . . . Even a generous interpretation of the document, such as Bisson J.A.'s interpretation, must be realistic and reflect the intention of both parties, not just that of the Hurons. The Court must choose from among the various possible interpretations of the common intention the one which best reconciles the Hurons' interests and those of the conqueror.

[134] What now follows is the reasoning which led me to my stated conclusion. I begin with the observation that the Treaty was intended to confer benefits upon all parties. The Crown was to obtain title to a very large portion of land and thereby enjoy an opportunity to effect peaceful settlement of the area. That the benefit was considerable was recognized by Lieutenant-Governor Archibald who prior to negotiating Treaties No. 1 and No. 2 wrote in a letter of July 22, 1871 as follows:

> Nor indeed would it be right, if we look to what we receive, to measure the benefits we derive from coming into possession of the magnificent territory we are appropriating here, by what would be fair to allow for the rocks and swamps and muskegs of the lake country east of this province.
>
> [Morris - p. 32]

The benefit to the Crown was immediate. Upon execution of the Treaty, title to the land passed to the Crown. At that point the Indians had fulfilled their Treaty obligation.

[135] On the other hand, the Indians received a benefit which was not inconsiderable. They were to be assisted in modifying their lifestyle so they could survive the disappearance of the buffalo and accommodate the influx of the settlers. For most this involved a change from the nomadic life they had enjoyed to an agrarian one with which they were not familiar. The assistance was to take several forms. What is most important is that the Treaty is forward looking in addressing the benefits conferred upon the Indians. In like manner, the Reserve Lands clause is drawn in the future tense. There can be no question but that the parties to the Treaty saw this and intended it. The document would make no sense were it to be read otherwise.

[136] None of the writings about the treaty negotiations speak of a date for calculation of land entitlement. Subject to what follows, there equally is no suggestion the matter was ever raised or discussed. What we do know is that the Crown made it clear that the Indians were not required to immediately abandon their way of life and settle on Reserves. They were encouraged to act soon, and were told a surveyor would be sent the next year, because of growing pressure from settlers seeking land in the West, but it was for the Indians alone to decide when they would take up their Reserve Lands. No time frame was set out in the Treaty and none was mentioned in the contemporaneous writings of Morris. Equally there is no mention in the account of Mr. A.J. McNeill or Lt. Col. A.G. Irvine who described the negotiations surrounding the Adhesion Agreement of 1889.

[137] Counsel for the Crown quite correctly point out that there is an exception to the above. It is contained in the work, *Buffalo Days and Nights*, and consists of these words of Erasmus as found at p. 263.

> . . .I explained to them that each man, woman and child then living would be apportioned eighty acres each, according to the number of Indians then belonging to his tribe.

Erasmus was present throughout the negotiations as an interpreter. Equally important, he was present at the Indian councils wherein he participated in the discussions and was therefore privy to the thoughts and understandings of the Indians. Counsel therefore suggest that his use of the phrase “then living” speaks volumes about what was understood by the Indians and what was presumably conveyed by the Crown.

[138] One can read the quoted words as restricting entitlement to then existing persons. However, I believe another reading is possible and I prefer it. Erasmus was refuting the belief of Chief Seenum that he was entitled to a particular tract of land. In doing so, Erasmus pointed out that the land entitlement could not exceed the stipulated acreage provided for each person. He was speaking of an existing situation and described what would happen at that time. Put otherwise, he was saying that at that time Chief Seenum was not entitled to what he wanted, but only 128 acres for each person alive at that time.

[139] The statement was correct for the situation which it addressed. I do not believe it appropriate to take it further or view it as having been intended to address the future. Were it otherwise, I would have expected the subject to at least have been addressed in some of the other writings. As well, if the matter was discussed as part of the negotiations and an understanding reached, one would expect it to have been included in the Treaty itself.

[140] Which brings me to the next matter. By the time Treaty No. 6 was executed, the Crown had acquired considerable knowledge and experience in negotiating treaties. Even if one looks only at the numbered treaties, there were five which preceded Treaty No. 6. They built on each other and through that process the Crown must have been familiar with the aspirations and needs of the Indians as well as its own requirements. Its negotiators knew what was likely feasible and how that was best achieved. At the same time, while those negotiators had to work within restrictions, they also enjoyed a certain latitude. Thus, much of Treaty No. 6 was written in advance but certain portions were left blank to be filled in when agreement was reached. The land acreage was one such item.

[141] When one looks at the treaties which preceded Treaty No. 6, it is evident that the Crown could be very specific when it considered it necessary. Thus, in the two Robinson Treaties both the size and location of some twenty reservations were detailed. In Treaty No. 1 it was the location alone which was specified and Treaty No. 2 followed suit. Treaty No. 3 and No. 4 are the same as Treaty No. 6. In Treaty No. 5, there was variety. Some specific locations were set out for certain Bands, but not for other Bands. In addition, it was stipulated in the treaty itself that certain Reserve Lands would be set aside within two years. Thus, the Crown was accustomed to setting aside Reserve Lands at the time of executing a treaty. This approach obviously fixed the date of calculating the entitlement and the Crown must have known this. It was an approach taken not long before Treaty No. 6 was executed.

[142] Furthermore, the treaties contain specific terms in other areas. In Treaty No. 6 it states exactly when assistance will be provided for the pursuit of agriculture and the exact duration of that assistance. It specifies when annuity payments will be made. It specifies that a surveyor will be sent in the next year. Thus detail and exact stipulations were not foreign to the Crown or its agents and negotiators.

[143] Given that history I find it difficult to conclude that the Crown intended that land entitlement be fixed at a particular date or upon the happening of a particular event, such as a survey. If that was the intention, it would have been a simple matter to so state in the document itself. It had been done on previous occasions. At the same time, there is nothing to suggest the Indians intended or agreed that land entitlement would be fixed at a particular date.

[144] In my opinion, the true situation was this. The Indians were going through a difficult period and did not know what the future held. They did not know when they

would settle upon a Reservation and were probably hoping that it would be later rather than sooner. Their immediate concern was that land would be available when needed.

[145] On the other hand, the Crown was aware of the western migration, but felt no compulsion or urgency to settle the Indians on Reservations. The tardiness following execution of several of the treaties attests to this. At the same time, the Crown anticipated the Indians would in time be assimilated into the new society and did not anticipate that the overall Indian population would increase to any significant degree. Both have proven to be wrong, although the second is a fairly recent phenomenon. In the result, the Crown felt no need to fix a date for determining entitlement.

[146] Within that setting, the parties saw the creation of Reserves as a future event, with no time constraints. It would happen when it happened and the parties would deal with it at that time. What was important was that the obligation to provide land was established within the treaty and the means to define that obligation was likewise established. What was left open was the actual quantum of land required to fulfill the obligation. That would remain unknown until the treaty obligation was fulfilled. Therefore, I conclude that it was the intention of the parties to Treaty No. 6 that land entitlement would be calculated as of the date when the treaty obligation was fulfilled. In my opinion, this is the most reasonable interpretation and the one which best reconciles the competing interests of the parties.

[147] When I look to subsequent conduct, and more particularly what is revealed in the documents, I am not much assisted in my task. The documents do not reveal an absolutely consistent policy or approach. There is no written document expressly outlining a specific policy. There are documents which address the question of calculating entitlement, but there is no completely consistent theme throughout.

[148] Different officials speak of different approaches. Thus, Mr. Thomas Borthwick, Indian Agent, in a letter dated April 21, 1908, states that in calculating land entitlement, the population number to be used is that at the time of treaty and he expressly excluded natural increase. This approach was endorsed by Mr. Duncan Campbell Scott, an accountant, and later Superintendent General, and adopted by Mr. W.J. Chisholm, Inspector of Indian Agencies. One can contrast this with a letter of Mr. A.E. Forget, Indian Commissioner, dated September 6, 1898, and a memorandum dated September 27, 1910, of Mr. E. Jean, an official in the Department of Indian Affairs, wherein he calculates entitlement on the basis of the population in 1909.

[149] It is somewhat different when I look to what was actually done by the Department of Indian Affairs. As was pointed out by counsel for the Province of Saskatchewan, 77 Indian Bands have been recognized in Saskatchewan and of those, 72 have received Reserve Land. However, only 23 of those bands have received land on more than one occasion and those are the ones to look at because the Lac La Ronge Indian Band has received land on more than one occasion. Of those 23 bands, 20 are distinguishable for one or another reason. Some had no entitlement when they received additional lands; some did not receive lands until the modern era; and some received additional lands for fishing stations or as hay lands and such was not intended to fulfill Treaty obligations. I consider the foregoing to be basically accurate, although I consider an additional three bands to be indicators of the approach by the Department of Indian Affairs.

[150] Counsel goes on to submit that the three of which he spoke are of little assistance because their factual circumstances were unique. Two were in a “state of formation” and the third had a complicated history, including an issue about surrendering

land. While the submissions are factually accurate, I still consider two of the three to be an indication of the Crown's position at the time.

[151] The first was the Cowessess Band which was a party to Treaty No. 4. There were two surveys with the second occurring in 1884, at a time when the population had decreased, and the reduced number was used to calculate entitlement. The second was the Thunderchild Band and as I stated earlier at page 63, I cannot be certain what happened here. The third is the Yellow Quill Band which adhered to Treaty No. 4. In this instance there was a second survey in 1899 and a third in 1902 and in each case the entitlement was based on the population at that time.

[152] The additional three are the Horse Lake Band, the Peter Ballantyne Band and the Key/Shoal Lake Band. In each instance additional land was set aside and the allotment was based on the current population. Finally, there is the situation of the Lac La Ronge Indian Band itself where additional allotments were based on increasing populations.

[153] There then is the testimony about the Indian tradition and what was passed down through the years. After giving it much thought, I find that I do not have much confidence in the accuracy of what was presented to me. Therefore, this testimony has not influenced my conclusion.

[154] In the end, no single thing provides a definitive answer. The clause itself is ambiguous. The writings which are contemporaneous to the Treaty provide some insight, but no clear answer. The historical documents are ambivalent in that they speak of more than one approach. The actual conduct whereby allotments were made are not numerous,

but they indicate that in at least some instances they were made on the basis of populations at the date of the subsequent surveys.

[155] Yet when I consider all of the foregoing as a whole I have no hesitation in concluding that both the Indians and the Crown had the common intention that a band's entitlement to Reserve Lands would be calculated when the Crown's treaty obligation was met and fulfilled in its entirety. Thus, if fulfilment extended over a period of time, the treaty obligation was not met until the end of the process and the extent of that obligation fell to be determined by reference to the population at the end. To use the vernacular, a part payment would not suffice. It would not fix or crystallize the whole entitlement. To the extent that the Crown has not acted in accordance with that interpretation, there remains an obligation to the Lac La Ronge Indian Band.

[156] Before leaving this topic I should address some concerns raised by counsel for the Dominion of Canada. He suggested the stated interpretation would be unreasonable and would not achieve reconciliation because it leads to absurd results.

[157] At this juncture I want to return to the Reserve Land clause itself. It obviously contemplates a request for land originating with the Indians. That starts the process. Thereafter the Indians, together with a Crown representative, are to select the lands. Once this has been done, the Crown has a duty to set apart all of the entitlement to the Indians. Once the Indians have done everything required of them, the Crown has a duty not to delay the setting apart of the lands.

[158] From what I have been able to ascertain, the historical practise has been this. There was agreement as to the size of the entitlement. However, the Crown then unilaterally, and usually after lengthy delay, set aside a tract of land which was less than

the entitlement. Had they fulfilled their obligation at the time there would have been no basis for complaint and a major part of this lawsuit would have been avoided. With those observations I turn to deal with the matters raised.

[159] The first concern is that the interpretation would extinguish a Band's claim where it did not receive its full entitlement on the date of first survey and subsequently experienced a decline in population. This is a possibility. If the two sides leave the matter open, then the entitlement could go up or down. However, this would follow upon a deliberate decision to permit that situation to exist. On the other hand, the fluctuation could be prevented by the parties mutually agreeing that the entitlement is fixed. Alternatively, the Crown could crystallize the situation by setting aside the full entitlement and thereby completing the process.

[160] The second concern is that there is an inequity in the case of multiple survey Bands because they have had the use of certain land in the past and no account is taken of this. In response, I fail to see any inequity. The Band was entitled to the land and there can be no complaint if it enjoyed the fruits of that to which it was lawfully entitled. If there was any inequity, it arises because it did not receive its full entitlement and was precluded from obtaining the benefit of that.

[161] The third concern is that there would be no distinction between a Band which received all but one acre of its entitlement on the date of first survey and a Band with the identical current population which has received no land. Both would have the same entitlement despite the fact that the one had the use and benefit of its land, whereas the other did not. First of all, I very much doubt that a shortfall of one acre should extend an entitlement. However, what is more to the point is that the Band which neglected to

request and obtain its entitlement must bear responsibility for the consequences. It is not right to visit the one Band's neglect upon the other which acted diligently and wisely.

[162] The fourth and final concern is that my interpretation makes it difficult, if not impossible, to determine when a Band's entitlement has been satisfied. This is because there is of necessity a delay between the census, the selection, the survey and the setting apart of the lands. The sequence of events is accurate, but I do not see it as a critical problem. If the Crown is asked to fulfill its Treaty land obligation and it undertakes to do so, that becomes the date on which the population is ascertained. So long as the parties thereafter carry out their obligations with reasonable dispatch, once the required land is set aside the entitlement is fully satisfied. If the Indians unreasonably delay the process, they cannot gain a benefit by doing so. If the Crown unreasonably delays the process, it may happen that the entitlement will increase. What is reasonable will always be a question of fact and good faith will avoid all problems. Accordingly the concerns raised do not cause me to question my interpretation.

[163] In conclusion, I interpret the Reserve Land clause of Treaty No. 6 such that when entitlement to land is being calculated the existing population (current population) at the time of calculation is to be used. As the Adhesion Agreement of 1889 entitles the Lac La Ronge Indian Band to the benefits of Treaty No. 6, that Band should have its Reserve Land entitlement calculated in the manner stated.

(8) Interpretation of Ammunition and Twine Clause

[164] Treaty No. 6 provides that $1,500.00 a year will be spent to acquire ammunition and twine for the Indians. The Adhesion Agreement of 1889 provides that

those Indians are to obtain a like benefit, but the amount is qualified. The two clauses read as follows:

> It is further agreed between Her Majesty and the said Indians that the sum of fifteen hundred dollars per annum, shall be yearly and every year expended by Her Majesty in the purchase of ammunition and twine for nets for the use of the said Indians, in manner following, that is to say : —In the reasonable discretion as regards the distribution thereof, among the Indians inhabiting the several reserves, or otherwise included herein, of Her Majesty's Indian Agent having the supervision of this treaty ;
>
> [Treaty No. 6]

> And we hereby agree to accept the several benefits, payments and reserves promised to the Indians adhering to the said treaty at Fort Pitt or Carlton ; with the proviso as regards the amount to be expended annually for ammunition and twine, and as respects the amount to be expended for three years annually in provisions for the use of such Indians as are settled on reserves and are engaged in cultivating the soil, to assist them in such cultivation, that the expenditure on both of these items shall bear the same proportion to the number of Indians now treated with as the amounts for those two items as mentioned in Treaty No. 6 bore to the number of Indians then treated with. . . .
>
> [Adhesion Agreement]

The issue is whether a single $1,500.00 is to be used for the benefit of all the Indians, or are those Indians who adhered to Treaty in 1889 to receive a separate benefit. I have concluded that the latter was intended.

[165] If the clause in the Adhesion Agreement was intended to provide that there be a sharing in the original benefit, it would have been a very simple task to so state. Instead, the drafters chose to speak in terms of proportionality and it relates to the expenditure. In other words, a method was set out whereby the expenditure itself would be calculated using the sum of $1,500.00 as the benchmark. The clause contemplates a new and distinct expenditure which will have the effect of providing to the later adherents an identical benefit as that earlier provided in the Treaty itself.

[166] A second consideration is that if the original benefit is simply shared, the value of the benefit is reduced for those who were parties to Treaty No. 6. This would be unfair to those Indians and I do not believe the Crown could unilaterally effect such a change to the Treaty. As well, I do not believe that the Crown would deliberately so act and bring about such a result.

[167] Accordingly, I hold that the parties to the Adhesion Agreement of 1889 are entitled to a separate benefit of an expenditure for ammunition and twine. The amount of that expenditure is to be predicated on $1,500.00 and proportionate to the Indian populations at the date of execution of the respective documents. The calculation is to achieve a value which is effective as of 1889.

E. BAND COUNCIL RESOLUTION

[168] On May 8, 1964, seven councillors of the Lac La Ronge Indian Band signed the following resolution which had been unanimously passed at a Band council meeting. At the time the Band had no chief.

Department of Citizenship and Immigration
Indian Affairs Branch
Band Council Resolution

The Council of the Lac La Ronge Band of Indians, in the Carlton Indian Agency, in the Province of Saskatchewan at a meeting, held at La Ronge this eightth [sic] day of May A.D. 1964

DO HEREBY RESOLVE:

That We, the Councillors of the Lac La Ronge Band, hereby agree to accept 63,330 acres as full land entitlement under Treaty No. 6.

(1) The land entitlement will be based on 35.24% of the Band population of 1,404 in 1961; the date we requested land from the Province of Saskatchewan and will comprise 63,330 acres.

(2) Mineral rights will be transferred with the land.

(3) Land transferred will reach to the high water mark.

(4) This selection of lands makes up the full and final land entitlement of the Lac La Ronge Band under Treaty No. 6.

(Chief)

"Daniel Cook"	"A. Halkett"
(Councillor)	(Councillor)
"John Cook"	"John Morin"
(Councillor)	(Councillor)
"Isaiah Charles"	"Henry Charles"
(Councillor)	(Councillor)

"Angus Merasty"
(Councillor) (Councillor)

[Exhibit P-11, p. 3105]

[169] The defendants submit that the plaintiffs are bound by the resolution which constitutes an acknowledgment that the stated acreage completes the Band's full entitlement under Treaty No. 6 and constitutes a release to the Crown of any further obligation as the stipulated acreage in fact has been set aside. The plaintiffs submit that they are not bound by the resolution as it was passed absent the necessary informed consent and as well, it came about in consequence of the Crown's breach of its fiduciary duty to the Band.

[170] The Band Council Resolution was the culmination of a series of discussions which commenced many years earlier. To properly appreciate and assess the resolution it is necessary to see it in the context of that which preceded it. To this end I go back ten years to 1954. Since I have concluded that there was an absence of informed consent, I include in this review certain opinions of Department officials which were never communicated to the Band councillors.

(1) The Facts

[171] On February 25, 1954, Mr. L.L. Brown, Superintendent of Reserves and Trust for the Department of Indian Affairs, sent a memorandum to Mr. J.P.B. Ostrander, Superintendent - Welfare Services, Department of Citizenship and Immigration, Indian Affairs Branch. These remarks form a part of that memorandum.

> In the second place, it is obviously his [Superintendent Knapp of the Fort Vermilion Agency] understanding, and presumably that of the Indians as well, that on the basis of their Treaty they are entitled to a fixed amount of land based on their present population. In so far as I am aware, it has never been definitely determined whether the land credit set up in a Treaty is to be determined on the basis of the number of band members at the date of Treaty, at any time thereafter or at the present date. As I mentioned to you, I tried to find the answer to this problem some years ago and was surprised to find that the problem had never been determined. It seems obvious that it should be at as soon a date as possible and it is our intention to refer the matter to our legal advisor to take whatever steps he considers necessary to have the point determined. . . .
>
> [Exhibit P-9, p. 2643]

The legal opinion referred to was provided on May 20, 1954, and it is less than definitive. Following are excerpts from that opinion.

> From an examination of departmental records and applicable treaties it is apparent that it was the intention to set up the reserves as soon as practicable after treaty but for various reasons in the cases cited by you this hasnot [sic] been done and the passing of the years has brought about the difficulties which now confront us, with a further complication of the transfer by Canada of the natural resources to the Provinces of Manitoba, Saskatchewan and Alberta. . . .
>
> On examining your files I find an interesting observation on the point in question made by Dr. Duncan Campbell Scott, a former Deputy Superintendent General of Indian Affairs, to the Deputy Minister of Justice in a letter dated the 4th of September, 1929. A portion of this letter is quoted herewith as follows:

> "The various treaties provide for so many acres per capita and the practice of the Department has been to take the census of the band at the time that the survey of the required acreage is made. The acreage as hereinafter stated will be varied at the time of survey to meet the decrease or increase of the membership at such time. I do not think accordingly that it would be proper to insert any limitation of acres in the Agreement. When these surveys come to be made the Department will be able to satisfy the Province of Manitoba as to our strict adherence to treaty conditions. Clause 8 of the Alberta Agreement, as it stands, properly safeguards the rights of the Indians as well as the rights of the Province. . . ."
>
> In a review of the problem there does not appear to be any possible way to give a firm legal opinion as to the rights of the Crown in right of Canada to arbitrarily set the selection date for purposes of determining the area of a reserve for a band under any of the above treaties.
>
> The established practice of the Crown in right of Canada was in 1929 set out as above by Dr. Scott and by the above quoted section of the Natural Resources Agreements, the Provinces are under obligation from time to time, upon the request of the Superintendent General of Indian Affairs, to set aside, out of unoccupied Crown lands thereby transferred to its administration, such further areas as the Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province.
>
> [Exhibit P-9, p. 2654]

[172] During the next year a reluctance to extend the Reserve system became evident within the Department. On November 18, 1955, Mr. W.C. Bethune, Acting

Superintendent Reserves and Trust, who in time succeeded Mr. L.L. Brown, wrote to Mr. F. Matters, Regional Supervisor of Indian Affairs. In a rather lengthy letter he outlined what information should be included in any submission for the creation of a new Reserve. Those directions were prefaced with these remarks.

> You are aware, I believe, that there has existed in the minds of senior departmental officers doubt as to the wisdom of extending the Indian Reserve system on the ground that it is to some extent outmoded and tends to delay integration of Indians. Undoubtedly, there is some weight to this argument, but it is recognized that in some areas Reserves are needed and are likely to serve a useful purpose for years. Each case will have to be considered on its own merits and the Deputy Minister is prepared to consider individual submissions.
>
> [Exhibit P-9, p. 2725]

Yet, somewhat contrariwise, in a letter dated January 31, 1956, Mr. Bethune states ". . . that the Deputy Minister is very interested in the establishment of new reserves and additions to existing reserves. . . ." However, he discourages discussions with the Province or the Indians prior to the Deputy Minister considering any proposal (Ex. P-9, p. 2734).

[173] By March 23, 1956, Mr. Bethune was Superintendent, Reserves and Trusts. On that date he wrote to R.F. Battle, Regional Supervisor of Indian Agencies, at Calgary, Alberta, in regard to the land entitlement of the Slaves of Upper Hay River Band. He pointed out that on the basis of the 1939 population of 547 Indians, the Band was entitled to 70,016 acres and by surveys in 1940 and 1941 it was allotted 56,152.20 acres. In order to extinguish the land claim, he approved the use of the 1955 population of 583 Indians

which resulted in an increased entitlement of 77,624 acres (Ex. P-87, doc. 53). Thus we have an instance when Mr. Bethune adopted the then existing population as the basis for calculating land entitlement.

[174] On January 26, 1957, the La Loche Band requested that a Reserve be created (Ex. P-10, p. 2762). The Department took the matter under advisement and by October 29, 1959, the Department was considering the situation of not only the La Loche Band, but also the Lac La Hache Band, the Stoney Rapids Band, the Fond du Lac Band and the Lac La Ronge Indian Band (Ex. P-10, p. 2822). At that time, the first four bands had no Reserve Land whereas the Lac La Ronge Indian Band did have Reserves. In a letter dated November 10, 1959, Mr. Bethune agreed that entitlement for the northern bands should be settled, but suggested they concentrate on one group at a time (Ex. P-10, p. 2826). Then in a letter of December 18, 1959, to the Regional Supervisor, Saskatchewan, Mr. Bethune addressed the entitlement of the Lac La Ronge Indian Band and said this.

> During the course of the discussion the remaining land credit of the La Ronge Band was brought up and we advised Mr. Tunstead that we would go into the matter and forward the required information to your office. Attached please find a summary completed by our Land Registry Section showing the reserves already established with their acreage.
>
> The reserves were selected in 1909 when the Band population was 526. On this basis treaty entitlement would then be 67,328 acres, and they would still be entitled to a further 23,707 acres. I might add that as no reserves have been established for the northern Indians the Province, I

> believe, would have no objection to establishing entitlement on the basis of present day population.
>
> [Exhibit P-10, p. 2830]

[175] However, matters did not move ahead. On February 26, 1960, Mr. McLeod, the Regional Supervisor, wrote to Mr. Bethune advising that the Indians were expressing concern about delay as mineral exploration was proceeding in the area. He concluded with a request for instructions about procedures ". . .bearing in mind that all of the Bands concerned are illiterate and that all transactions must be done through an interpreter" (Ex. P-10, p. 2840).

[176] Then on June 23, 1960, Mr. McLeod reported that he had heard nothing further from the Northern Indians and that they had ". . .the false idea that Indian reservations are not necessary as they have the whole northern areas for their own use. . ." (Ex. P-10, p. 2852). Thus, the Indians no longer appeared to be anxious to settle land entitlement. By memorandum dated November 7, 1960, sent to Mr. McLeod, Regional Supervisor, Mr. Bethune suggested a procedure for dealing with the La Loche Band and urged that the matter be ". . .cleared up as soon as possible, but it must be with the full concurrence of the Indians" (Ex. P-10, p. 2875). That brings me to the events which directly led to the Band Council Resolution.

[177] On December 7, 1960, Mr. R.M. Hall, a solicitor in Prince Albert, Saskatchewan, wrote to Mr. McLeod, the Regional Supervisor, about the Lac La Ronge Indian Band's land entitlement.

> We have been consulted on behalf of the Lac La Ronge Band which at the time of the Treaty in question we

> understand was called James Roberts Band. Our clients advise us that under the Treaty provision was made for 60,000 acres of land for this Band. This was computed on the basis of one section of land for every five members of the Band. We understand that of this amount only 6,000 acres has been allocated and we have been requested to take the necessary steps to have the balance allocated.
>
> We would appreciate it if you would give us what information you can in regard to this matter.
>
> [Exhibit P-10, p. 2879]

There is nothing which explains how the 60,000 acres were calculated. In any event, Mr. McLeod responded as follows on December 9, 1960, and on that same date sent a copy of the Hall letter to Mr. Bethune and requested information as to any entitlement.

> I have your letter of December 7th regarding a claim presented to your firm by the above mentioned band of Indians concerning some 60,000 acres of land under treaty provisions.
>
> We are forwarding your letter to our Branch in Ottawa requesting that a search of the records be made to ascertain, according to treaty, what additional lands the James Roberts Band are entitled to.
>
> Enclosed please find a copy of Treaty No. 6 wherein you will note on Page 18 that James Roberts and William Charles signed adhesions to Treaty No. 6 at Montreal Lake on February 11, 1889.
>
> In view of the fact that the province now administers all lands in Northern Saskatchewan, the question of additional lands for use of La Ronge Indians would have to be discussed with the Northern Administrator, Department

> of Natural Resources, whose office is located in Prince Albert.
>
> We have requested Superintendent Neil Wark of the Carlton Indian Agency to call and discuss this particular claim with you.
>
> It would appear that Chief James Roberts represented the Lac La Ronge Indians and Chief William Charles represented the Indians in the Stanley Mission area when completing adhesions to Treaty No. 6. These two bands amalgamated at a later date and are now known and recognised as the Lac la Ronge and Stanley Band.
>
> Possibly we could arrange to hold a meeting with the Indians in the La Ronge area during the Christmas week, when they will be at their homes and all in from trap lines. In this manner we could work out with them the location they wish to select.
>
> [Exhibit P-10, p. 2880]

Mr. Bethune responded to Mr. McLeod on January 6, 1961.

> It is apparent from our current files that the Band in question have a fairly substantial land entitlement to their credit. However, to determine the exact acreage of this credit it will be necessary for us to review several old files and treaty records which are now with the Public Archives of Canada.
>
> These files and records will be examined at the earliest possible date so that you may be supplied with sufficient information to answer the inquiry from Cuelenaere, Hall and Schmit.
>
> [Exhibit P-10, p. 2888]

In the meantime, Superintendent Wark and two assistants met with the Band council on December 28, 1960. The minutes disclose there was discussion about Reserve locations, but it appears nothing was said about the quantum of the entitlement (Ex. P-10, p. 2883).

[178] Mr. McLeod next wrote to Mr. Bethune on February 6, 1961. He specifically inquired about what population was to be used in calculating land entitlement of the La Loche Band.

> Could you inform us please whether the population figures at the time Treaties were signed, or the population figures at the present time should be used when calculating the amount of land due various bands requesting land settlement pursuant to Treaties 9 and 10. If the effective date should be the day treaty was signed, could you please give us the population of the following band on that date:
>
> Portage la Loche No. 13
>
> Fond du Lac No. 5
>
> Stoney Rapids No. 7
>
> Lac la Hache No. 31
>
> Lac la Ronge No. 156
>
> [Exhibit P-10, p. 2899]

Mr. Bethune responded as follows on February 13, 1961.

> I believe we should take the position that the reserve entitlement of Indians should be based on the population of the bands at the time reserves are set apart for them. As far as I know, this attitude has not been challenged by any

> province, and there is some justification for it. A problem is created when bands only received a portion of their reserve entitlement in past years, but it is thought that this situation can be worked out on a reasonable basis. The Portage la Loche, Fond du Lac, Stoney Rapids and Lac la Hache Bands have no reserves so this situation does not arise in those cases. The Lac la Ronge Band on the other hand has had some reserves set apart for them, and I think that it would be just as well to clear up some of the other cases before we deal with the Lac la Ronge Band.
>
> If the Deputy Minister of Natural Resources agrees to the setting aside of 16,640 acres for the La Loche Band, then we can assume that the Province is prepared to set aside reserves based on the current population.
>
> [Exhibit P-10, p. 2902]

[179] On March 28, 1961, Mr. J.W. Churchman, Deputy Minister of Natural Resources Saskatchewan, inquired of Mr. G.F. Davidson, Deputy Minister of Citizenship and Immigration ". . .whether the population figure to be taken is the population at the date the treaty was signed or the present time" (Ex. P-10, p. 2910). The response of Mr. Davidson on April 12, 1961, was as follows:

> It is our view that in cases of this kind, where bands have no reserves, the acreage to which they are entitled must be calculated on the basis of population at the time reserves are being selected and set apart. This method is acceptable to the Provinces of Alberta and British Columbia and has been used in both areas in very recent years.
>
> [Exhibit P-10, p. 2911]

It will be noted that the answer is qualified as applying only to bands with no reserves.

[180] Then was born what is known as the *Compromise Formula*. It is the creation of Mr. Bethune. A handwritten calculation of the Lac La Ronge Indian Band's entitlement, using the formula, is contained in Exhibit P-10, p. 2912. In a letter dated May 17, 1961, Mr. Bethune sets out for Mr. McLeod, how the land entitlement of the Lac La Ronge Indian Band is to be calculated.

> Reference is made to our letter of January 6, 1961, in connection with claim advanced by the Lac La Ronge Band through the law firm of Cuelenaere, Hall & Schmit of Prince Albert, for additional land in accordance with the terms of Treaty No. 6.
>
> Following is an outline of land allotments to Lac La Ronge Indians from 1897 to present time.
>
> The Lac La Ronge Band consisting of the former James Roberts and Amos Charles (Stanley) Bands, adhered to Treaty No. 6 on February 11, 1889. By the terms of this Treaty they were entitled to one square mile for each family of five. Although the Treaty was signed in 1889, lands for these Indians were not selected until 1897. The population of the above two bands in 1897 was 484, which would, in accordance with the terms of the Treaty, represent an entitlement of 96.8 square miles or approximately 61,952 acres.
>
> In 1897 an area of 56.5 square miles (36,160 acres) near Prince Albert on Township 52, Range 1, 27 and 28 W2M, Saskatchewan, were surveyed and set aside for the Montreal Lake Band and the Lac La Ronge Band. Of the above area, 9 square miles were for the Montreal Lake Band and the remainder for the Lac La Ronge Indians. The land was designated Little Red River Indian Reserve and confirmed by P.C. 2710 dated January 6, 1900. By Order in Council P.C. 1297, dated March 31, 1948, the above reserve

was officially divided between Montreal Lake and Lac La Ronge Indians whereby the Lac La Ronge Band was confirmed in 32,007.9 acres and their portion of the above reserve became designated as Little Red River Indian Reserve No. 106C.

By Provincial Executive Order No. 2144/48, dated December 3, 1948, an additional area of 6,400 acres was set aside for the Lac La Ronge Indians. This reserve was confirmed by P.C. 1419, dated March 21, 1950, and designated Little Red River Indian Reserve No. 106D.

The Lac La Ronge Indians were using a number of fishing and trapping areas in the territory of Lake La Ronge. These lands comprising altogether an area of 5,354 acres were surveyed in 1909 and confirmed as Indian reserves by several Orders in Council in 1930. For particulars, see the Summary hereafter. Following the amalgamation of the two bands (James Roberts and Amos Charles Bands) into one band known as Lac La Ronge Band, the above reserves were by Order in Council P.C. 217, dated January 12, 1951, confirmed for the use and benefit of the Lac La Ronge Band of Indians.

Summary: According to the above, the Lac La Ronge Indians received to date the following lands:

Little Red River	106C	32,007.90	acres
Little Red River	106D	6,400.00	"
Lac La Ronge	156	1,586.00	"
Potato River	156A	1,011.60	"
Kitsakie	156B	204.34	"
Sucker River	156C	55.40	"
Stanley	157	621.00	"

Stanley	157A	9.40	"
Old Fort	157B	13.40	"
Four Portages	157C	5.00	"
Fox Point	157D	140.20	"
Fox Point	157E	10.30	"
Little Hills	158	1,278.00	"
Little Hills	158A	94.65	"
Little Hills	158B	324.00	"
TOTAL		43,761.99	acres

Our feeling is that when the reserve entitlement of a band is satisfied at the one time it should be based on the total population of the band at that time, no matter whether it was at the time of treaty or many years afterwards. Where partial settlement of land entitlement was reached at several times the problem becomes somewhat more difficult, and requires a reasonable attitude on the part of the Indians, ourselves and the provincial authorities. The Lac La Ronge Band first received a reserve in 1897 and, based on the population of the Band at that time, it represented 51.65% of their total entitlement. In 1909, additional lands were set aside for their use and, based on the 1909 population, the additional lands represented 7.95% of the total they would have been entitled to at that time. In 1948, additional land was set aside for their use, representing 5.16% of what their full entitlement would have been based on the 1948 population. It might, on this basis, be argued that the Lac La Ronge Band has received 64.76% of their total reserve entitlement. The balance, 35.24%, based on the 1961 population of 1,404, would amount to 63,330 acres.

I think you might explore with the Province, and later with the Indians, the possibility of settling in full the treaty entitlement of Lac La Ronge Band on the basis of a further

> reserve or reserves totalling 63,330 acres. Until you ascertain the attitude of the province, I think it would be inadvisable to take the matter up with the band or the Law firm writing on their behalf.
>
> [Exhibit P-10, p. 2913]

In fact, Mr. Bethune had come a long way considering that in December, 1959, he had stated the Band's entitlement to be only 23,709 acres.

[181] Once again everything moved slowly. Then, almost a year later, on March 6, 1962, Mr. W.J. Brennan, Acting Regional Supervisor, sent a memorandum to Indian Affairs Branch setting out the entitlement of the five northern bands. As to the Lac La Ronge Indian Band he wrote this.

> This Band has up to the present time received of their allotment a total of 43,761.99 acres. This acreage has been acquired over a period of many years. It is, therefore, not fully known in this office just what procedure or policy would be used in determining the amount of land this Band might still lay claim to. We would refer you to your letter dated May 17, 1961, a photostat copy of which is attached. You have here suggested that this band has a balance of 35.24% of their total allotment left. On the basis of the population mentioned in your letter they would then have a total of 63,330 acres yet to be taken up. The La Ronge Band have requested that this allotment be given to them in two parcels, one parcel at Potato Creek approximately 20 miles south of the La Ronge settlement and the other portion to be located immediately south of the Prince Albert National Park in the area known as the community pasture. Both areas are to be of equal size or as near as possible. There may be some objection on the part of the Province to the latter parcel which would be on the south boundary of the National Park.

[Exhibit P-10, p. 2949]

This letter suggests the Band had been informed of the intended allotment and there had been some discussion within the Band for there had been a determination that the allotment would be given in two parcels.

[182] Mr. J.G. McGilp then took over as Regional Supervisor Saskatchewan. On August 31, 1962, he sent a memorandum to Indian Affairs Branch saying that it was imperative that the five northern bands be provided with their land allotment (Ex. P-10, p. 2959). On September 12, 1962, Superintendent Wark of the Carlton Agency requested a survey of a new reserve area for the Lac La Ronge Indian Band (Ex. P-10, p. 2960). On September 27, 1962, McGilp requested a survey for several bands including the Lac La Ronge Indian Band (Ex. P-10, p. 2969).

[183] By this time the Federal and Provincial governments were engaged in discussions. Thus on October 26, 1962, Jules D'Astous, Chief, Economic Development Division for Indian Affairs, advised Mr. McGilp that Saskatchewan was considering the proposals of Canada and went on to say:

> . . .On September 18, Hon. H.G. Kuziak and Mr. J.W. Churchman were in Ottawa and have discussed with our Minister and Director the question of the calculation of land entitlement on the basis of population. It was pointed out during this meeting that our view is that in cases where Indian Bands have no Reserves, the acreage to which they are entitled must be calculated on the basis of population at the time Reserves are being selected and set apart.

[Exhibit P-10, p. 2970]

Again reference was made to Indian Bands who have no Reserves.

[184] Then on January 10, 1963, the Honourable Mr. Eiling Kramer, Minister of Natural Resources, Saskatchewan, provided a memorandum to the provincial cabinet wherein he reviewed certain legal advice and some of the history of the treaty land entitlement question in the Province. As to the Lac La Ronge Indian Band he said this.

> The Lac la Ronge Band had a population in 1909 of 526 which would have entitled it then to about 67,800 acres. The band presently has 43,761 acres and is asking for an additional 63,000 acres to complete the treaty entitlement.
>
> [Exhibit P-10, p. 2976]

[185] Subsequently, on April 4, 1963, Mr. Kramer wrote to Mr. R.A. Bell, Minister of Citizenship and Immigration. The letter in its entirety reads as follows:

> Over the past year or more there has been intermittent correspondence between your Deputy Minister and mine about selection of additional Indian Reserve lands in Saskatchewan. We were originally asked to set aside for Canada certain lands selected by the Band at La Loche. Subsequently it was established that there were several other Bands in northern Saskatchewan which apparently had never selected Reserves.
>
> My colleagues and I have given careful thought to the various considerations attendant to this matter and have arrived at the following conclusions -
>
> (1) The Province is prepared to meet its legal obligation as far as the original treaty is concerned.

(2) If the Band concerned would prefer to consider a cash settlement or possibly some sort of housing program in lieu of land, the Province is prepared to discuss this possibility.

(3) In selecting lands the following provisions will apply:

(a) The known or estimated population at the date of the treaty will be used in calculating land entitlement.

(b) A one-hundred foot public reserve will be retained by the Province along lakes and rivers.

(c) Mineral rights will not be transferred to the Band.

(d) A right-of-way for future roads will be provided in transfer agreement.

(e) Federal Government will undertake, at its expense, a monumented survey of the boundaries, with cut lines and blazed trees within three years of the date of the agreement.

(4) It would be preferable to have all Bands which are entitled to select lands complete selection at this time.

Upon advice from you that these proposals are acceptable, we will proceed with the next steps to facilitate the setting aside of the lands.

[Exhibit P-10, p. 2980]

The proposals were not acceptable in part and the Honourable Mr. Guy Favreau, the new Minister of Citizenship and Immigration, responded by letter dated May 13, 1963, and *inter alia* said this.

> . . .I may say that from the information available it is very doubtful that the Indians are interested in any alternative settlement, nor is the Department satisfied that a cash settlement or a housing program would be particularly beneficial to these Indians at this time. The chances of recrimination are less if we comply with the terms of the existing treaties. It is therefore proposed to deal with this matter on the basis of a land settlement.
>
> . . .
>
> On reading these treaties in their full context, it is obvious that the selection of land is to take place at some future date on the basis of one square mile for a family of five. This has always been interpreted to mean at the time of the selection. Precedent is in favour of the Indians in this regard. . . . We have definite figures as to the present population, but such is not the case with regard to the population at the time of the signing of the treaties. This means that the settlement on the basis of the present population is clean-cut and without the danger of disputes arising.
>
> [Exhibit P-10, p. 2988]

The provincial cabinet then modified its position as reflected in a memorandum of July 19, 1963, from Mr. Kramer to his Deputy Minister, Mr. J.W. Churchman.

> At their meeting on July 16th, Cabinet agreed that the Minister of Natural Resources, in co-operation with the Committee on Indian Affairs, was to proceed with

discussions with Hon. Guy Favreau on the Indian Land question on the basis of:

(a) present population or last census figures;

(b) that sufficient access to water be granted but not full access on all frontage;

(c) that mineral rights be transferred with the land;

(d) that road questions be settled by compensation at a future date when roads are needed;

(e) that when land on water is requested, the depth of parcel be at least twice the water frontage.

[Exhibit P-10, p. 2998]

[186] Yet the Province appears to have continued to distinguish between those Bands which had received no reserve lands and those which had received some. Thus one finds the following in the report of October 8, 1963, prepared by Mr. A.H. MacDonald, Director, Northern Affairs Branch, Department of Natural Resources.

> A few of the Indian Bands have not been provided with reserve land and under the transfer agreement of 1930 the Province is obligated to set aside such lands if and when requested. There has been considerable correspondence on this but for various reasons no direct transfer of land has taken place. There is some difference of opinion on which population figures to use (whether present or population at Treaty time) to determine the amount owing to each band. There is also a difference of opinion on both sides as to whether Reserves which tend to segregate Indians and isolate them from others are in tune with the time. The main reasons given by Indian Affairs are that there is a legal obligation to set up reserve lands in trust at any rate.

> Bands for which no reserves have been established are as follows:
>
> | | | |
> |---|---|---|
> | Fond du Lac | - | present population 367. |
> | Stony Rapids | - | present population 339. |
> | Lac la Hache | - | present population 201. |
> | Lac la Loche | - | present population 122. |
>
> As you are aware, Treaties 8 and 10 stipulated 640 acres of land for each five members of a band. The James Roberts Band at Lac la Ronge claims an additional 23,707 acres to be added to the reserve already established.
>
> The Saskatchewan Government is prepared to make a settlement in lieu of land in the form of cash or a housing programme or a school programme or any other type of programme which might be acceptable to the Indian population. This suggestion was put forth by the Minister, Mr. Kramer, and the Deputy, Mr. Churchman, during a meeting in July with the Hon. Guy Favreau, Minister of Citizenship and Immigration. Mr. Churchman reports as follows:
>
> > "The Minister seemed to think that the proposal had some merit and it was his suggestion that it should be referred to the new Federal - Provincial Committee which has recently been set up or is in the process of being finalized, which will discuss matters pertaining to Indians, which are of interest to the Provincial and the Federal authorities."
> >
> > [Exhibit P-10, p. 3020]

[187] In an internal memorandum dated November 26, 1963, Mr. J.W. Churchman, Deputy Minister advised Mr. MacDonald, Director of Northern Affairs, as follows:

The government has approved the following criteria as a basis on which to conduct negotiations with the Indian Affairs Branch of the Department of Citizenship and Immigration for meeting out commitments under the treaties with respect to land for Indian Bands who have not as yet claimed their land rights.

(1) That the amount of land be based on the present population or the last census figure.

(2) That sufficient access be granted to water but not full access on all frontage. We don't grant this to independent lessees and we think we have a good case not to tie up the whole front of a water body with an Indian reserve.

(3) That mineral rights be transferred with the land.

(4) That the road question be settled by compensation at a future date when the roads are needed.

(5) That when land on water is requested that the depth of the parcel be at least twice the water frontage.

As you will have noted from the copy of my letter to Mr. McGilp, it is not possible for me to attend a meeting in La Loche and I would appreciate if you would represent the Department at that meeting.

The foregoing is the basis upon which you may proceed with the negotiations.

[Exhibit P-10, p. 3028]

The memorandum refers to Indian Bands who have not as yet claimed their land rights. The La Loche Band was one and following negotiations a settlement was achieved based on that Band's current population.

[188] Attention then turned to the Lac La Ronge Indian Band. On March 31, 1964, Mr. J.G. McGilp, Regional Supervisor for Saskatchewan wrote to the Indian Affairs Branch. He advised them of the La Loche settlement and then went on to say the following.

> I have been informed unofficially by Department of Natural Resources officials that they would favour an early allocation of reserve lands to the Fond du Lac, Stony Rapids, Lac La Hache, and La Ronge Bands if the Indian Affairs Branch can make arrangements with these bands as we had at La Loche. I am fully aware of the dangers of exerting any pressure whatsoever on the Indians and so pressure will be avoided at all costs. The publicity give to the La Loche allocation has prompted the La Ronge Band to invite me to a Band meeting on April 2nd when I expect to receive from them a request for approximately 60,000 acres of land to which I believe they are entitled under Treaty No. 6.
>
> [Exhibit P-11, p. 3075]

The next day, April 1, 1964, Mr. S.C. Read, a Field Officer wrote a memorandum to Mr. McGilp. He outlined the history of the Lac La Ronge Indian Band and suggested that its land entitlement be calculated using the "Bethune formula", but using the 1964 population rather than that in 1961. He suggests this to be "only fair and just" taking into account the delay (Ex. P-11, p. 3077).

[189] Mr. McGilp and Mr. Wark met with the band council on April 2, 1964. There was a discussion about land entitlement, but the specifics are not known. On April 6, 1964, Mr. McGilp wrote to Mr. Churchman urging the adoption of the compromise formula using the 1964 population.

> . . .It might, on this basis, be argued that the Lac La Ronge Band has received 64.76% of their total reserve entitlement. The balance, 35.24%, would entitle them to an additional 71,680 acres of land, this based on the population in April 1964 of 1,590 members.
>
> In March, 1964, the Band Council invited me to attend a meeting to be arranged in La Ronge for the purpose of discussing land entitlement. On April 2nd Superintendent Wark and I met the Council when the possibility of bringing their claim before an Indian Claims Commission was raised. I have advised the Council that before thinking of the proposed Indian Claims Commission I should like to approach you on their land entitlement.
>
> The Indians have given me a marked map showing the areas they would like to see set aside for their use. . . .
>
> [Exhibit P-11, p. 3084]

However, the Province did not agree to the increased allotment. As a result, on April 20, 1964, Mr. McGilp advised the Indian Affairs Branch as follows:

> At a meeting in Regina yesterday, Mr. Churchman informed me that he is prepared to recommend the allocation of 63,330 acres of land to the La Ronge Band to extinguish their land entitlement under Treaty 6. This was the figure raised with him in our request of two years ago and he believes that it only remains to clarify the actual parcel or parcels of land. I informed him that subject to your approval

and that of the Indians, I accept the figure of 63,330 acres, based on the band population of 1,404 when the request was made in 1961.

Mr. Churchman and I then examined the parcels of land marked on maps by the La Ronge Council on April 2nd, 1964, when I met with them at La Ronge.

Mr. Churchman has suggested that instead of the six separate sites suggested by the Indians, one or two large parcels should be chosen. I told Mr. Churchman I shall meet the Indians again and tell them of his suggestion. I am asking Superintendent Wark to arrange a meeting with La Ronge Council members as soon as possible, either in Prince Albert or La Ronge, so that I can advise them of the province's offer of 63,330 acres. I am sure the Indians will accept this figure. At the meeting we shall also re-examine proposed site or sites of the new reserve lands. I am fairly confident that the Indians will be prepared to request two or three sites instead of the six they suggested on April 2nd.

Tentatively a transfer of lands will be arranged in the next few months based on these considerations:

(1) The land entitlement will be based on 35.24% of the band population of 1,404 as outlined by us in 1961, and will comprise 63,330 acres.

(2) Mineral rights will be transferred with the lands.

(3) Lands transferred will reach to the high water mark.

(4) This selection of lands makes up the full and final land entitlement of the La Ronge Band under Treaty No. 6.

[Exhibit P-11, p. 3091]

[190] On May 8, 1964, the meeting with the band council took place. The handwritten minutes of that meeting are here reproduced in their entirety.

> Meeting held Kitsaki Hall May 8/64. Time 2. P.M.
> Present - Mr. McGilp, Mr. Wark, Mr. Read, Mr. Smith, L.M. Lovell.
>
> Councillors Henry Charles, Abbey Halkett, John Morin, John Cook, Isaiah Charles, Angus Merasty, Daniel Cook.
>
> Henry Charles elected Chairman.
>
> Mr. McGilp - explained why scattered area's picked could not be excepted [sic].
>
> Amount coming 63,330 acres.
>
> Council all in favor of excepting [sic] the above figure for settlement, (band resolution signed).
>
> Council decided that a longer period should be had to select land area's + three area's should be taken to satisfy Band members at Stanley, La Ronge, + Little Red River Reserve's.
>
> Band members at La Ronge agree to take their allotment No. 1 west of Egg Lake, number of acres 36 000, approximately.
>
> Band members from L.R.R. Reserve request area north of Christopher Lake marked on map No. 2 approximately 9,000 acres. (Township 53 range 26). This area chosen so Band members in future will be able to move south due to decline in fur + fish.

> Band members from L.R.R. Reserve request area on west side of Bittern Lake marked on map No. 2. Approximately 17.000 acres (Township 57 range 26)
>
> Band members from Stanley request area north of Otter Lake bridge consisting of 10,000 acres more or less.
>
> No 1. = 36.000
> No 2. = 17.000
> No 3. = 10.000.
>
> Band resolution to be included in minutes. No firm deal will be made by Indian Affairs on land allotments before first approaching the Lac La Ronge Band Council. Indian Affairs will arrange a meeting with Band Council + Provincial government. Mr. McGilp is now prepared to take the land area request to the Provincial government.
>
> Funds for travelling expenses can be obtained previous to meeting.
>
> Moved by Abbey Halkett meeting ajourn [sic]
>
> John Morin
>
> [Exhibit P-11, p. 3103]

A somewhat different version was subsequently typed up.

> The meeting was called to order at 2:00 p.m. by the chairman.
>
> Mr. McGilp read correspondence from the Deputy Minister of Natural Resources outlining why some of the land areas previously selected were not available. The Deputy Minister, also, suggested that his Department would prefer them taking it all in one block, if possible.

It seemed apparent that the Province would be prepared to agree on land entitlement based on 1961 population figures when request was first made. This would amount to 63,330 acres.

The following resolution was passed unanimously:

"That we, the Councillors of the Lac La Ronge Band, agree to accept 63,330 acres as full land settlement under Treaty No. 6.

1. The land entitlement will be based on 35.24% of the Band population of 1,404 in 1961; the date we requested land from the Province of Saskatchewan will comprise 63,330 acres.

2. Mineral rights will be transferred with the land.

3. Land transferred will reach to the high water mark.

4. This selection of land makes up the full and final land entitlement of the Lac La Ronge Band under Treaty No. 6."

After some discussion the Council decided that they should ask for three blocks of land in order to satisfy Band members at Stanley, La Ronge and Little Red River. The following areas were selected:

1. Approximately 36,000 acres, West of Egg Lake in the Sikachu, Sanderson, Morin Lake area.

2. Approximately 17,000 acres, West of Bittern Lake.

3. Approximately 10,000 acres, North of Otter Lake bridge.

Mr. McGilp is now prepared to take the land area request to the Provincial Government.

> No firm deal will be made by Indian Affairs on land allotments without first approaching the Band Council.
>
> Indian Affairs will arrange a meeting with the Band Council and Provincial authorities.
>
> The meeting adjourned at 4:00 p.m.
>
> [Exhibit P-11, p. 3102]

In time the stipulated acreage was set apart and the land entitlement of the Lac La Ronge Indian Band was considered to be satisfied in full.

(2) Authority of The Band Council

[191] In my opinion, the Band council did not have the requisite authority to enact the resolution of May 8, 1964, and thereby commit the whole of the Band membership to the settlement. That being so, the resolution was invalid.

[192] I commence by quoting the following several sections from an early version of the *Indian Act*, R.S.C. 1927, c. 98, in order to compare them with more recent enactments.

> **158.** If any band has a council of chiefs or councillors, any ordinary consent required of the band may be granted by a vote of a majority of such chiefs or councillors, at a council summoned according to its rules, and held in the presence of the Superintendent General or his agent.
>
> . . .

176. On a day and at a place, and between the hours prescribed by the Superintendent General, if the day fixed for the same is within eight days from the date at which the councillors were elected, the said councillors shall meet and elect one of their number to act as chief councillor, and the councillor so elected shall be the chief councillor.

177. The council shall meet for the despatch of business, at such place on the reserve and at such times as the agent for the reserve appoints, but which shall not exceed twelve times or be less than four times in the year for which it is elected, and due notice of the time and place of each meeting shall be given to each councillor by the agent.

178. At such meeting of the council the agent for the reserve, or his deputy appointed for the purpose with the consent of the Superintendent General, shall

(*a*) preside, and record the proceedings;

(*b*) control and regulate all matters of procedure and form and adjourn the meeting to a time named or *sine die*;

(*c*) report and certify all by-laws and other acts and proceedings of the council to the Superintendent General;

(*d*) address the council and explain and advise the members thereof upon their powers and duties.

2. No such agent or deputy shall vote on any question to be decided by the council.

179. Full faith and credence shall be given in all courts and places whatsoever to any certificate given by such agent or deputy under the provisions of paragraph (*c*) of the last preceding section.

> **180.** Each councillor present shall have a vote on every question to be decided by the council, and such question shall be decided by the majority of votes, the chief councillor voting as a councillor and having also a casting vote, in case the votes would otherwise be equal.
>
> 2. Four councillors shall be a quorum for the despatch of any business.

[193] It will be seen that a general authority to act on behalf of the band was conferred by s. 158 upon the Band council where such existed. The scheme for conducting business was paternalistic and largely dominated by the agent of the Superintendent General. In time the situation changed, although the conduct of business meetings is still subject to supervision by government representatives.

[194] In 1951 the above quoted sections were repealed and the *Indian Act*, S.C. 1951, c. 29, then contained these provisions which continue to the present time.

> **2.**(3) Unless the context otherwise requires or this Act otherwise provides
>
> > (*a*) a power conferred upon a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band, and
> >
> > (*b*) a power conferred upon the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.
>
> . . .

> **79.** The Governor in Council may make regulations with respect to band meetings and council meetings and, without restricting the generality of the foregoing, may make regulations with respect to
>
> (*a*) presiding officers at such meetings,
>
> (*b*) notice of such meetings,
>
> (*c*) the duties of any representative of the Minister at such meetings, and
>
> (*d*) the number of persons required at the meeting to constitute a quorum.

Thus Parliament distinguished between a Band and a Band council and recognized that the two had different authority and powers. A council could not act for a Band in all instances which was a change from the earlier situation. Where the consent of a Band, as opposed to a Band council, was required, it must come from a majority of the electors and not just the Band councillors. By reason of s. 79, Department Officials still played a significant role in the conduct of business meetings.

[195] Another development was that Parliament saw fit to confer specific powers upon a band council and to that end enacted the following sections.

> **80.** The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,
>
> (*a*) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases,

(*b*) the regulation of traffic,

(*c*) the observance of law and order,

(*d*) the prevention of disorderly conduct and nuisances,

(*e*) the protection against and prevention of trespass by cattle and other domestic animals, the establishment of pounds, the appointment of pound-keepers, the regulation of their duties and the provision for fees and charges for their services,

(*f*) the construction and maintenance of water courses, roads, bridges, ditches, fences and other local works,

(*g*) the dividing the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade or calling in any such zone,

(*h*) the regulation of the construction, repair and use of buildings, whether owned by the band or by individual members of the band,

(*i*) the survey and allotment of reserve lands among the members of the band and the establishment of a register of Certificates of Possession and Certificates of Occupation relating to allotments and the setting apart of reserve lands for common use, if authority therefor has been granted under section sixty,

(*j*) the destruction and control of noxious weeds,

(*k*) the regulation of beekeeping and poultry raising,

(*l*) the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies,

(*m*) the control and prohibition of public games, sports, races, athletic contests and other amusements,

(*n*) the regulation of the conduct and activities of hawkers, peddlers or others who enter the reserve to buy, sell or otherwise deal in wares or merchandise,

(*o*) the preservation, protection and management of furbearing animals, fish and other game on the reserve,

(*p*) the removal and punishment of persons trespassing upon the reserve or frequenting the reserve for prescribed purposes,

(*q*) with respect to any matter arising out of or ancillary to the exercise of powers under this section, and

(*r*) the imposition on summary conviction of a fine not exceeding one hundred dollars or imprisonment for a term not exceeding thirty days or both fine and imprisonment for violation of a by-law made under this section.

. . .

82.(1) Without prejudice to the powers conferred by section eighty, where the Governor in Council declares that a band has reached an advanced stage of development, the council of the band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,

(*a*) the raising of money by

> (i) the assessment and taxation of interests in land in the reserve of persons lawfully in possession thereof, and
>
> (ii) the licencing of businesses, callings, trades and occupations,
>
> (*b*) the appropriation and expenditure of moneys of the band to defray band expenses,
>
> (*c*) the appointment of officials to conduct the business of the council, prescribing their duties and providing for their remuneration out of any moneys raised pursuant to paragraph (*a*),
>
> (*d*) the payment of remuneration, in such amount as may be approved by the Minister, to chiefs and councillors, out of any moneys raised pursuant to paragraph (*a*),
>
> (*e*) the imposition of a penalty for non-payment of taxes imposed pursuant to this section, recoverable on summary conviction, not exceeding the amount of the tax or the amount remaining unpaid, and
>
> (*f*) with respect to any matter arising out of or ancillary to the exercise of powers under this section.
>
> (2) No expenditures shall be made out of moneys raised pursuant to paragraph (*a*) of subsection one except under the authority of a by-law of the council of the band.

Sections 80 and 82 are presently numbered as s. 81 and 83 in the *Indian Act,* R.S.C., 1985, c. I-5, and have been since the revision in 1970. There has been no declaration pursuant to s. 82 in respect to the Lac La Ronge Indian Band.

[196] The role and authority of a band council was discussed in some depth in *Whitebear Band Council v. Carpenters Provincial Council of Saskatchewan et al.*, [1982] 3 W.W.R. 554 (Sask. C.A.). Commencing at p. 559, Mr. Justice Cameron said this.

> As *municipal councils* are "creatures" of the legislatures of the provinces, so *Indian band councils* are the "creatures" of the Parliament of Canada. Parliament, in exercising the exclusive jurisdiction conferred upon it by s. 91(24) of the B.N.A. Act to legislate in relation to "Indians, and Lands reserved for the Indians", enacted the Indian Act, R.S.C. 1970, c. I-6, which provides -- among its extensive provisions for Indian status, civil rights, assistance, and so on, and the use and management of Indian reserves -- for the election of a chief and 12 councillors by and from among the members of an Indian band resident on an Indian reserve. These elected officials constitute Indian band councils, who in general terms are intended by Parliament to provide some measure -- even if rather rudimentary -- of local government in relation to life on Indian reserves and to act as something of an intermediary between the band and the Minister of Indian Affairs.
>
> More specifically, s. 81 of the Act clothes Indian band councils with such powers and duties in relation to an Indian reserve and its inhabitants are usually associated with a rural municipality and its council: a band council may enact by-laws for the regulation of traffic, the construction and maintenance of public works, zoning, the control of public games and amusements and of hawkers and peddlers, the regulation of the construction, repair and use of buildings, and so on. Hence a band council exercises -- by way of delegation from Parliament -- these and other municipal and governmental powers in relation to the reserve whose inhabitants have elected it.
>
> I think it worth noting that the Indian Act contemplates a measured maturing of self-government on Indian reserves. Section 69 of the Act empowers the

Governor in Council to "permit" a band to manage and spend its revenue moneys -- pursuant to regulation by the Governor in Council -- and by s. 83 the Governor in Council may declare that a band "has reached an advance stage of development", in which event the band council may, with the approval of the minister, raise money by way of assessment and taxation of reserve lands and the licensing of reserve businesses. Until then, the band council derives its funds principally from the government of Canada.

The Governor in Council has made no declaration under s. 83 of the Act declaring the Whitebear Band Council to have reached an advanced stage of development; however, the Whitebear Band Council is the subject of an order of the Governor in Council made pursuant to s. 69 of the Act, and has been empowered to control, manage and expend in whole or in part its revenue moneys in accordance with the regulations made pursuant to this section, which require it to establish, as it has done, an account with a recognized financial institution, under the authority of three persons, two of whom are members of the band. The chief and Mr. Paul, both members of the council, were given this authority.

In addition to their municipal and governmental function, band councils are also empowered by the Indian Act to perform an advisory role, and in some cases to exercise a power of veto with respect to certain activities of the minister in relation to the reserve, including the spending of Indian moneys, both capital and revenue, and the use and possession of reserve lands.

Moreover, in light of the provisions of the single contribution agreement and some of the terms of the consolidated contribution agreement, it appears that in practice Indian band councils from time to time act as agents of the Minister of Indian Affairs and representatives of the members of the reserve with respect to the implementation of certain federal government programs designed for Indian reserves and their residents -- a complementary role consistent with their function.

> In summary, an Indian band council is an elected public authority, dependent on Parliament for its existence, powers and responsibilities, whose essential function it is to exercise municipal and government power -- delegated to it by Parliament -- in relation to the Indian reserve whose inhabitants have elected it; as such, it is to act from time to time as the agent of the minister and the representative of the band with respect to the administration and delivery of certain federal programs for the benefit of Indians on Indian reserves, and to perform an advisory, and in some cases a decisive, role in relation to the exercise by the minister of certain of his statutory authority relative to the reserve.

A similar position was adopted in *Paul Band v. The Queen,* [1984] 2 W.W.R. 540 (Alta. C.A.) at p. 549.

> Band councils are created under the Indian Act and derive their authority to operate qua band councils exclusively from that Act. In the exercise of their powers they are concerned with the administration of band affairs on their respective reserves whether under direct authority of Parliament or as administrative arms of the minister. They have no other source of power. Band councils are thus within the exclusive legislative jurisdiction and control of the Parliament of Canada over "Indians, and lands reserved for Indians" assigned to it by s. 91(24) of the Constitution Act, 1867, and such councils are thus immune to provincial legislation.

[197] There also is authority for the proposition that a representative action may be brought on behalf of a Band by a chief or members of the Band. That very thing has occurred in this case. Approval for the procedure is to be found in *Mathias et al. v. Findlay,* [1978] 4 W.W.R. 653 (B.C.S.C.); *Custer v. Hudson's Bay Company*

Developments Ltd. et al., [1983] 1 W.W.R. 566 (Sask. C.A.); *A-G. Ontario v. Bear Island Foundation* (1985), 15 D.L.R. (4th) 321 (Ont. H.C.); and *Oregon Jack Creek Indian Band v. Canadian National Railway Co.* (1989), 56 D.L.R. (4th) 404 (B.C.C.A.).

[198] As I read s. 2(3) of the *Indian Act* there is a clear division of power between the Band and the Band council. This was the situation that existed in 1964. To ascertain the powers of a Band council one must look to s. 80 (now s. 81) of the *Act*. That section enumerates the specific powers of the Band council and if a particular action does not fit within any of the designated purposes, then it is *ultra vires* and of no effect. Any power beyond s. 80, or any residual powers, rest with the Band and not the Band council.

[199] Nowhere in s. 80, or elsewhere in the *Act* for that matter, is a Band council authorized to settle or compromise any treaty land entitlement. That power must rest with the Band itself and with its individual members. The land entitlement is amongst the most significant treaty rights which an Indian enjoys. It probably is the most important one and akin to a birthright. No Indian should be deprived of that entitlement, or even a portion of it, without an opportunity to speak to the matter.

[200] It therefore makes good sense that Parliament did not empower the Band council to alienate or in any way compromise that right. Since the council does not have the power, it must be vested in the Band and the council is required to act in accordance with s. 2(3) of the *Act* and ascertain the wishes of the electors. Accordingly, I hold that the band council was not empowered to pass the resolution of May 8, 1964. It follows that the resolution is invalid and of no effect. As the electors of the Band did not authorize the settlement, neither the Band nor its members are bound by it.

[201] I note that for a surrender of reserve lands to be effective it is necessary that, amongst other requirements, it be approved by a majority of the electors of a Band. See ss. 37 to 41 of the *Act*. If a surrender of existing Reserve Lands requires that, it would be strange indeed if the initial right to the Reserve Land could be forfeit by some less stringent process. I do not believe it can be.

(3) Informed Consent

[202] Having come to my stated conclusion about the authority of the Band council, it is not necessary to address the topic of informed consent to the Band council resolution. However, should I be in error in respect to the council's authority, I will very briefly state my conclusion as to whether the councillors were capable of giving an informed consent to the resolution.

[203] One of the councillors who signed the resolution was John David Cook and he testified at the trial. His testimony was informative and a portion of it is worth reproducing here. What follows is from the trial transcript commencing at p. 623, l. 18 and continuing to p. 627, l. 16:

> Q Mr. Cook, I want to start by showing you a band council resolution that appears in Exhibit P-11 at page 3, 105, it's dated May the 8th, 1964. Have you ever seen that band council resolution?
>
> A Yes, I seen that when they had the meeting over in La Ronge, that was brought up to me then.
>
> Q Okay. So we have showed that to you before --
>
> A Yeah.
>
> Q -- and you recognized it?

A Yes.

Q And if I can point out to you, sir, a signature, the second one from the top on the left-hand side --

A Uhum.

Q -- there is a name that looks like John Cook?

A Yes, yes.

Q And is that your signature?

A Yes, that's the way I sign my name.

Q Okay. Do you recall the band council meeting where that resolution was passed?

A I don't remember where, but the way the agent used to do, you see, they had the councillors in La Ronge sign the paper like this, like when I signed that I don't know what it was, what this thing was about.

Q Okay. You didn't know what that was about?

A No, no.

Q Okay. Do you know how much land an acre is?

A Well, before I didn't know, but I talked to one lawyer and I asked him "what's an acre" and they told me the footage size of one acre. That's later on, and not -- I didn't know what an acre was before.

Q Okay. Would that lawyer have been me?

A That's right, we -- I don't know, about three or four years ago, hey.

Q Okay. Okay.

A I asked a lawyer "what's an acre" so I know what's an acre. That's all I know.

Q Okay. Sir, a little further down the page are the words "full and final settlement", I believe?

A Uhum.

Q Do you see these words: “This selection of land makes up the full and final land entitlement of the Lac La Ronge band under treaty number 6"?

A Oh, uhum.

Q Now can you tell us what that sentence means to you?

A I don’t know what the sentence means to me but, as I said when I was interviewed before, I always thought that we had plenty of land for the, like the reserves they used to call them, and Nehemiah Charles used to tell me that we had lots of land coming, so that’s where -- that’s as far as I know.

Q Okay.

A I didn’t even know how much land we had coming.

Q Okay. Now do you recall anything about the meeting at which -- the meeting on May the 8th, 1964, do you recall anything about that meeting?

A No, not that I remember.

Q Let me show you -- and, My Lord, I’m showing him two pages before, handwritten minutes appearing at page 3, 103 in the same exhibit -- are you able to read that or do you want me to read it for you?

A You read it for me and then I will -- I’m not that good reader.

Q Okay. Sir, I’m going to read you some of these minutes, --

A Uhum.

Q -- and you listen carefully, and then I will ask you if that helps you remember anything else about the meeting, okay?

A Uhum.

Q “Mr. McGilp explained why scattered areas picked could not be accepted. Amount coming 63,330 acres. Council all in favor of accepting the above figure for settlement. Band resolution signed. Council decided that a longer period should

> be had to select land areas and three areas should be taken to satisfy band members at Stanley, La Ronge, and Little Red River reserves. Band members at La Ronge agree to take these allotments: Number 1 west of Egg Lake, number of acres 36,000 approximately", and it goes on from there. Does that help you, at all, remember anything about the meeting?
>
> A No, no, no.
>
> Q Okay. Do you recall, when you were on the band council, ever hearing anything about current population formula?
>
> A No.
>
> Q Do you recall ever hearing anything about date of first survey formula?
>
> A No.
>
> Q Do -- the number that appears in the band council resolution and the minutes is 63,330 acres. Do you know how that number was arrived at?
>
> A No.

In my mind it is evident that Mr. Cook did not comprehend the nature and consequences of the resolution. He did not appreciate what he was doing and was not capable of giving an informed consent to the resolution which he signed.

[204] The other six councillors who signed the resolution are now dead. Absent their appearance at the trial, I cannot conclude that their knowledge of the circumstances was as sparse as that of Mr. Cook. However, when I review the evidence I am not persuaded that any attempt was made to inform the Band members, the councillors or their lawyer about the alternative ways of calculating land entitlement. No information was provided about negotiations with other bands. There is nothing which indicates that the method of calculating the acreage to be allotted was explained to the councillors or anyone else.

[205] Rather, it seems evident that the government officials engaged in discussions amongst themselves and eventually came to a position which was acceptable to both levels of government. They next proceeded to tell the councillors that it was in their best interests to agree and indicate their agreement by signing the resolution. In short, events were orchestrated so that the outcome was a foregone conclusion. This is not to say the officials acted dishonestly or with malice; it was more a matter of misconstruing their role in the whole process.

[206] The whole subject of land entitlement was and remains a complex subject. To become knowledgeable about it would have taken considerable time and effort. Even had the lawyer been present at the Band council meeting, I doubt he could have given sound advice unless the entire record had been provided to him and I have no reason to believe it had ever been made available to him.

[207] Accordingly, I am satisfied that the consent given by way of the Band Council Resolution was not an informed consent. It follows that the resolution is ineffective and not binding upon the plaintiffs.

F. EXTINGUISHMENT OF LAND ENTITLEMENT BY ORDERS-IN-COUNCIL

[208] In time land was set aside for the Lac La Ronge Indian Band and the allocations were approved by four Orders-in-Council dated September 17, 1968, September 16, 1970, and two dated September 11, 1973. The total allocation was 63,385 acres. The Province of Saskatchewan submits that these Orders-in-Council had the effect

of extinguishing the Treaty land entitlement of the Lac La Ronge Indian Band. Canada does not join in this submission.

[209] The first Order-in-Council, which is dated September 17, 1968, provides as follows:

> WHEREAS the Minister of Indian Affairs and Northern Development reports as follows:
>
> > That the Lac la Ronge Band of Indians residing in the Province of Saskatchewan joined Treaty No. 6 on February 11, 1889;
> >
> > That the per capita land entitlement under Treaty No. 6 is 128 acres;
> >
> > That in 1897, 1909 and 1948 various parcels of land were set aside for the Lac la Ronge Band of Indians as partial settlement of their treaty land entitlement;
> >
> > That in 1961 it was determined on the basis of their population the Lac la Ronge Band was entitled to an additional 63,330 acres to extinguish their treaty land entitlement;
> >
> > That three acres were selected by the Indians to constitute the 63,330 acres one of which has now been surveyed and found to contain 32,640 acres;
> >
> > That this land is now vested in Her Majesty in right of Canada under Certificate of Title No. 67-PA-12139, dated September 14, 1967; and

> That the Lac la Ronge Band now wish this land to be set apart for their use and benefit as Morin Lake Indian Reserve No. 217.
>
> THEREFORE, His Excellency the Governor General in Council, on the Recommendation of the Minister of Indian Affairs and Northern Development, pursuant to the Indian Act, is pleased hereby to set apart as an Indian Reserve, the lands described in Schedule 'A' hereto as Morin Lake Indian Reserve No. 217 for the use and benefit of the Lac la Ronge Band of Indians.
>
> [Exhibit P-12, p. 3456]

The other three Orders-in-Council are No. P.C. 1970-1613, dated September 16, 1970; No. P.C. 1973-2676, dated September 11, 1973; and No. P.C. 1973-2677, dated September 11, 1973 (Exhibit P-12, p. 3577 and P-13, p. 3792 and p. 3806). All are worded in a manner similar to the first and two contain the phrase ". . . to extinguish their treaty land entitlement;" as contained in the Order quoted above. The Province points to this as extinguishing any future Treaty land entitlement. I find that I do not agree.

[210] The law is clear that Parliament, prior to April 17, 1982, could by legislation extinguish a Treaty right. However, for extinguishment to be effective, the intent of Parliament to effect that object must be clear and plain. See *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; and *R. v. Gladstone*, [1996] 2 S.C.R. 723. I do not believe the required intent is manifest in the described Orders-in-Council.

[211] It is significant that the reference to extinguishment of treaty land entitlement is contained in the preamble of each document. That preamble simply

summarizes what the Minister reported and what led up to the Order-in-Council. It may well have been that the Minister believed the entitlement was extinguished and that may have persuaded the Governor General in Council to enact the Order, but that body did not speak about extinguishment.

[212] The operative portion of each Order-in-Council was that portion contained at the end where it is stipulated that certain lands are set apart as an Indian Reserve. In that portion, which sets out what the Governor General in Council was actually bringing about, there is no mention of extinguishing Treaty land entitlement. Had that been the goal or purpose, surely it would have been so stated. It would have been an extremely simple matter to move the words of extinguishment to the end of each order or to repeat those words at the end.

[213] In *Driedger On The Construction of Statues*, 3rd ed., (Toronto: Butterworths, 1994) at p. 259, the following is said about the preamble in legislation.

> The primary function of a preamble is to recite the circumstances and considerations that gave rise to the need for legislation or the 'mischief' the legislation is designed to cure. However, the recitals constituting a preamble may mention not only the facts which the legislature thought were important but also principles or policies which it sought to implement or goals to which it aspired.

Taking guidance from this and upon reading the Orders-in-Council, I have no hesitation in concluding that the Governor General in Council did not intend to address the subject of extinguishing Treaty land entitlement and in fact did not do so.

[214] In addition, had the Governor General in Council purported to do otherwise, it would have acted in excess of its authority. There is no question but that Parliament can delegate authority, but when exercised it must be within that which is authorized by the enabling legislation. The *Indian Act, supra*, s. 73(3), states that "the Governor General in Council may make orders and regulations to carry out the purposes and provisions of this Act." In that same section there are several instances where regulations are authorized. Nowhere is there authorization to extinguish Aboriginal rights. Considering the nature of those rights and the implications of dealing with them, it is not difficult to understand why Parliament would retain unto itself full authority, with its attendant obligations, to deal with those rights.

[215] For the reasons stated I reject the submission that the Treaty land entitlement of the Lac La Ronge Indian Band was extinguished by the enactment of the described Orders-in-Council.

G. RESERVE CREATION

[216] The plaintiffs claim entitlement to certain lands located at Candle Lake and within the present townsite of La Ronge, Saskatchewan. It is alleged that these lands were long ago set aside as Indian Reserves and remain such to the present time. In order to adjudicate this claim, it is necessary to first determine what is required to bring an Indian Reserve into existence. My deliberations have focused on the process utilized in the Prairies for that is the region which falls within the ambit of the numbered treaties and more particularly Treaty No. 6.

[217] From my review I hold the view that there is no specific procedure or single process which alone can create an Indian Reserve. Rather, the components of the process

may well vary from time to time, but in each instance the result will be the same. The one constant is that the Crown must intend to create an Indian Reserve and take steps to carry out that intention. Included in the latter will always be a demarcation of the land and almost invariably consultation in advance with the Indians about the location of the land. Thus, the question of whether a reserve was created is a factual one and in each case one must look to the prevailing circumstances to find the answer.

[218] This accords with the following remarks of Richard Bartlett in his article *The Establishment of Indian Reserves On The Prairies*, [1980] 3 C.N.L.R. 3. At p. 7 he discusses the case of *In re Bosworth and Corporation of Gravesend*, [1905] 2 K.B. 426 (C.A.) and then writes:

> The decision emphasizes the need in determining if land has been "set apart" as an Indian reserve to be concerned with the practical and factual distinction or separation of a tract of land from another rather than the formalities attaching to such.

[219] A discussion about Reserve creation should begin with the treaty itself which here is Treaty No. 6. The relevant portion of that document reads as follows:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, . . . in manner following, that is to say: —
>
> That the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians

> thereof as to the locality which may be found to be most suitable for them;

There clearly was a commitment to lay aside Reserves. There equally was a commitment that a person would be designated to carry out the task and that there would be consultation. However, much was left unsaid which brought about an undefined and flexible process.

[220] Nothing was said about how the suitable person would be selected or how that person would carry out the work. It is not stated whether the suitable person, once appointed, would enjoy absolute authority or would be required to obtain approval for the actual setting apart of a Reserve. In fact, I believe either could occur. While there was to be consultation, which undoubtedly was to be in good faith, that consultation was to relate to locality and not to specific lands. In practise it did frequently deal with the latter, but the Indians did not have an absolute right to select a particular tract of land. What the treaty did was to create a basic approach within which it was left to the parties to work out what was required to achieve a mutually satisfactory result.

[221] Lieutenant Governor Morris said little about how Reserves would be created, but what he did say suggests that it would be an informal process. In respect to Treaty No. 3 he said:

> . . .I have further to add, that it was found impossible, owing to the extent of the country treated for, and the want of knowledge of the circumstances of each band, to define the reserves to be granted to the Indians. It was therefore agreed that the reserves should be hereafter selected by officers of the Government, who should confer with the several bands, and pay due respect to lands actually cultivated by them. . . .

[Morris - p. 52]

He later spoke about surveyors.

> Chief [of Fort Francis] — "It will be as well while we are here that everything should be understood properly between us. All of us — those behind us — wish to have their reserves marked out, which they will point out, when the time comes. There is not one tribe here who has not laid it out."
>
> Commissioner Provencher. . . — "As soon as it is convenient to the Government to send surveyors to lay out the reserves they will do so, and they will try to suit every particular band in this respect."
>
> Chief — "We do not want anybody to mark out our reserves, we have already marked them out."
>
> Commissioner — "There will be another undertaking between the officers of the Government and the Indians among themselves for the selection of the land; they will have enough of good farming land, they may be sure of that."

[Morris - p. 70]

[222] He then writes as follows as part of the negotiations leading up to the signing of Treaty No. 6.

> "I am glad to know that some of you have already begun to build and to plant; and I would like on behalf of the Queen to give each band that desires it a home of their own; I want to act in this matter while it is time. The country is

> wide and you are scattered, other people will come in. Now unless the places where you would like to live are secured soon there might be difficulty. The white man might come and settle on the very place where you would like to be. Now what I and my brother Commissioners would like to do is this: we wish to give each band who will accept of it a place where they may live; we wish to give you as much or more land than you need; we wish to send a man that surveys the land to mark it off, so you will know it is your own, and no one will interfere with you. What I would propose to do is what we have done in other places. For every family of five a reserve to themselves of one square mile. Then, as you may not all have made up your minds where you would like to live, I will tell you how that will be arranged: we would do as has been done with happiest results at the North-West Angle. We would send next year a surveyor to agree with you as to the place you would like.
>
> . . .
>
> "But understand me, once the reserve is set aside, it could not be sold unless with the consent of the Queen and the Indians; as long as the Indians wish, it will stand there for their good; no one can take their homes.
>
> [Morris - pp. 204-205]

He went on to say that the Indians would have some flexibility in their choice, but the survey would seemingly end this.

> "You can have no difficulty in choosing your reserves; be sure to take a good place so that there will be no need to change; you would not be held to your choice until it was surveyed.
>
> [Morris - p. 218]

[223] In the end only two things mattered. The first was that Reserves be set apart. The second was that there be an intention that the land set apart be constituted a Reserve. How that result was achieved is of secondary importance.

[224] There is no legislation which speaks to the establishment of an Indian Reserve. However, legislation does provide some assistance in ascertaining what is the correct process. The oldest statute to which I have reference is *The Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, S.C. 1868, c. 42. The *Act* did not contain any provision for Reserve creation, but it did recognize the fact of and presence of Reserves. Section 6 provided:

> All lands reserved for Indians or for any tribe, band or body of Indians, or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as before the passing of this Act, but subject to its provisions; and no such lands shall be sold, alienated or leased until they have been released or surrendered to the Crown for the purposes of this Act.

[225] In 1876 the first *Indian Act* was enacted, being S.C. 1876, c. 18. In s. 3.6 the term "reserve" was defined.

> The term "reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered, and includes all the trees, wood, timber, soil, stone, minerals, metals, or other valuables thereon or therein.

This continued as the definition in the *Indian Act* of 1927 (R.S.C. 1927, c. 98) and it remained unchanged until 1951 when it was abbreviated to read as follows in *The Indian Act*, S.C. 1951, c. 29, s. 2(1)(o).

> "reserve" means a tract of land, the legal title to which is vested in His Majesty, that has been set apart by His Majesty for the use and benefit of a band;

The definitions clearly recognize that Reserves could be created by various means. It could be "by treaty or otherwise". What is essential in the definition is that the land be "set apart".

[226] Down through the years the *Indian Act* has undergone many changes. This happened in 1880, 1886, 1906, 1927 and 1951. In each instance Parliament increased the Department's involvement and control in the affairs within Indian Reserves. Detailed attention was given to many matters. Despite this careful attention to various matters, it was obviously felt that there was no need to change the process whereby Reserves came into existence. Parliament was content with the informal and flexible process which had been employed in the past and was prepared to have it continue into the future. The process worked and there was no need to change it.

[227] While not extensive, there is jurisprudence on the subject. In the case of *The St. Catherines Milling and Lumber Company v. The Queen, On The Information Of The Attorney General For The Province Of Ontario*, (1887) Vol. XIII S.C.R. 577, the issue was whether title to certain lands rested with the Province of Ontario or the Dominion of Canada. It was argued that title had been in the Indians of the region and

acquired from them by Canada. The argument was rejected on the basis that the lands had not been reserved for the Indians. At p. 641, Mr. Justice Henry said this.

> A question of importance arises under the confederation act. By one of the sections of that act all lands *reserved for the Indians* were placed under the control of the Dominion Parliament. We must then inquire what was reserved for them. There are many ways of reserving real estate. It may be reserved by will, by deed, by proclamation, and so on, but it requires an act of some description. As regards the wild lands inhabited by nomadic tribes of Indians, by what process is it shown that they were ever *reserved* by anybody? They are in the same state as they were at the conquest. We find that several large tracts of land were at different times specially reserved for the use of Indian tribes, and have been held in trust for them by the Government. When the Indians did not require them they were sold and the money held for their use. There was another class. In many of the treaties by which the Indians gave up their right to portions of the country certain portions of the territory they were about to transfer were reserved for them in the treaties themselves. When, therefore, the Imperial act was passed there was sufficient material for the operation of the clauses relating to lands "reserved for the Indians."
>
> But, I would ask, how can it be said that the lands in question in this suit were ever reserved? They were always the property of the crown. The Indians had the right to use them for hunting purposes, but not as property the title of which was in them. Thus, then, we have these words in the statute explained by the knowledge we have of certain lands being expressly reserved for the Indians.
>
> Reservation cannot be effected by implication; there must be some act.

> The words in the Imperial statute refer only to lands expressly reserved, and the other wild lands in the country are not affected by the provision referred to.

There are two things which I consider important about this decision. First the court saw no need to define the process by which a Reserve is established. Second, there is a clear statement that there must be a positive act to establish a Reserve.

[228] Another early decision worthy of mention is *Esquimalt and Nanaimo Railway Co. v. McLellan et al.*, [1918] 3 W.W.R. 645 (B.C.C.A.). The Province of British Columbia granted to the Dominion of Canada a tract of land but it did not include Indian Reserves. Canada then granted the lands to the railway company. McLellan obtained from the railway company a grant of the surface of a part of the lands and from the province a lease of the coal under that surface. The lease was granted because the provincial authorities considered the land to be an Indian Reserve and that it had not passed to Canada. At trial an index of government reserves was produced and the page containing the subject lands also had the written words "These reserve are available for Indian settlements, schools, parks or other public purposes". The railway company successfully attacked the validity of the lease both at trial and on appeal.

[229] After noting that the lands were never used for school purposes, Macdonald C.J.A. went on to say this at p. 649.

> Then, can the inference be drawn that they were Indian reserves or settlements from the words cited from the said book? Indian reserves consist of lands conveyed or assigned to the Crown in right of the Dominion for the use of the Indians. To say that lands are available for Indian reserves does not make them Indian reserves within the

> construction which I would place upon the language of the grant when it says that the grant shall not include Indian reserves or settlements. It is not suggested, and there is no evidence from which such an inference can be drawn, that this land was ever used as an Indian reserve or settlement; at most, if any value is to be attached to said index book as evidence in the case, the land in question was merely designated as land fit to be made an Indian reserve or settlement. It is, however, in my construction of the deed, not such lands, but *de facto* Indian reserves or settlements which are excepted.

I consider this to be authority for the proposition that there must be some manifestation of an intention to create an Indian Reserve.

[230] The authority of the federal government to create Indian Reserves was described by Mr. Justice Mahoney in *Town of Hay River v. The Queen* (1980), 101 D.L.R. (3d) 184 (F.C.T.D.) at p. 186.

> The authority of the Governor in Council under para. 19(*d*) of the *Territorial Lands Act* to "set apart and appropriate such areas or lands as may be necessary to enable the Government of Canada to fulfil its obligations under treaties with the Indians" is not the source of authority to set apart Crown lands as a reserve in that part of Canada to which the Act applies, *i.e.*, the Yukon and Northwest Territories. It is, rather, the authority to create a land-bank for that purpose. The *Indian Act* defines "reserve" but nowhere deals with the creation of a reserve. Notwithstanding the words "pursuant to the Indian Act" in para. (2) of the Order in Council, the authority to set apart Crown Lands for an Indian reserve in the Northwest Territories appears to remain based entirely on the Royal prerogative, not subject to any statutory limitation. . . .

[231] Then there is the more recent case of *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654. In that case the issue was whether the railway company or an Indian Band controlled land on which a crossing was located. It was held that at one time the land was Reserve land, but in the particular circumstances that status had changed. As a result, the railway company was entitled to a permanent injunction. However, in the course of the judgment by the court these remarks were made at p. 659.

> The trial judge found that, while there is no evidence of any formal allotment of the lands, it appears clear that the lands so acquired were, on acquisition, allotted *de facto* to the Meductic Maliseet Tribe whose members were the ancestors of those Indians now comprising what is known as the Woodstock Band.

It appears that the court approved that finding and agreed that no formality was essential to the creation of a Reserve for these remarks were made at p. 675.

> It is clear that by virtue of the 1851 deed the land in question was vested in the Crown. Shortly thereafter it became an Indian reserve. The trial judge placed some importance on the fact that there was no formal allocation of the land as a reserve prior to Confederation. It seems to us, however, to be somewhat inconsistent to demand such formality for allocation as a reserve while at the same time accepting the lack of a "formal grant" of land to the Woodstock Railway Company. We are of the view that it can be accepted that the land in question was part of the Woodstock Reserve before Confederation.

[232] A most recent case of interest is *R. v. Nikal*, [1996] 1 S.C.R. 1013. The central issue was whether a certain river was part of an Indian Reserve. That has nothing

to do with the case before me, but the judgment is of interest in that it contains comments about instructions to agents of the Crown. In that instance instructions were given to Commission O'Reilly and at p. 1039 of the judgment Mr. Justice Cory said the following in respect to those instructions.

> The instructions referred to were also given to Indian Commissioners in Manitoba, Keewatin and the Northwest Territories, and they state that the Commissioners are to ascertain what fishing grounds should be reserved in order that application might be made to the Department of Marine and Fisheries to have those areas secured for the use of the Indians. These instructions reveal that Commissioner O'Reilly was not given the authority to allot an exclusive fishery, and that the most he could do was make recommendations.
>
> [Emphasis in original]

In the end the court held that the Indians had not been granted exclusive fishing rights by O'Reilly because he was not authorized to make such a grant.

[233] By analogy, when determining whether a Reserve was established a court must attempt to ascertain the instructions which preceded the acts of creation. Here one can look to the general practice of the Crown. On this topic Mr. Justice Cory made these comments in *R v. Nikal, supra,* at p. 1029.

> In this case much has been said as to the general practice of the Crown in allocating reserves to native peoples. Evidence as to a general practice may be particularly helpful in determining the scope or extent of

> native rights. The relevant evidence is sometimes lost and that which remains must be carefully placed in context so that its true significance is neither distorted nor lost.
>
> The historical evidence as to the standard practice of the Crown can be conveniently divided into pre- and post-Confederation periods. This evidence, taken from documents in the public archives, demonstrates that in both periods there was a clear and specific Crown policy of refusing to grant, in perpetuity, exclusive rights to fishing grounds. The Crown would, however, grant exclusive licences or leases over particular areas for a fixed period of time. Obviously this practice was far from an absolute assignment of a fishery right.
>
> [Emphasis in original]

A like approach and result is to be found in the companion case of *R v. Lewis*, [1996] 1 S.C.R. 921.

[234] The last Canadian decision to which I make reference is *Ross River Dena Council Band v. Canada*, [1998] 3 C.N.L.R. 284 (Y.S.C.). The matter is under appeal to the Court of Appeal. In that case the issue was whether a tobacco tax was payable. The answer depended on whether the tobacco products were being sold on land which was an Indian Reserve. The court answered in the affirmative.

[235] The facts on that issue were that on November 27, 1962, the Superintendent of the Yukon Indian Agency asked for the subject land to "be used for the Ross River Indian Band village site." The request was granted on January 26, 1965 and appeared to have been "reserved by notation in departmental records." At p. 293 of the report Justice Maddison says this.

> The *Indian Act* never has provided a method of creating a reserve. It follows that reserves have been "established in many different ways and several methods now appear to be recognized as having validly set apart land for the use and benefit of Indians.": Jack Woodward, *Native Law*, 1996, p. 231. And as La Forest, G.V. said in *Natural Resources and Public Property under the Canadian Constitution*, University of Toronto Press, at p. 121:
>
> > In the areas not reserved by the proclamation [of 1763], reserves were established under many different types of authorities and instruments.

In concluding that a reserve had been created Justice Maddison made these observations commencing at p. 293.

> The area reserved on January 26, 1965, was a tract of land that was (and is) vested in her Majesty. It had been applied for, for the use and benefit of a band: the Ross River Band. It was applied for, for a permanent use: a village site. That constitutes "use and benefit of a band" as in the *Indian Act* definition of "reserve". The active words of the document reserving the land are as close to the wording of the statue as all but one of the four admitted Yukon Reserves for which the Court has been provided the wording. The public servants who put the setting-aside in process were Her Majesty's agents. The only thing in the way of the land being accepted as a reserve is the public servants' philosophy of integration which resulted in bureaucratic pigeonholing. That erects an unwarranted obstacle to the establishment of reserves which is not required by the statutory definition, is unfair and unjust to the Indian Band.

[236] I now turn to American jurisprudence on the subject for it is informative and helpful. In *Minnesota v. Hitchcock* 185 U.S. 373 (1902), the court had to decide whether a parcel of land was an Indian Reserve. In concluding that it was Brewer J. said:

> . . .Prior to the treaty of October 2, 1863, the boundaries of the lands occupied by the Chippewa Indians had been defined by sundry treaties, and by that treaty a large portion of the lands thus occupied were ceded by the Indians; that is, the Indians ceded to the United States all their interest and right of possession. While there was no formal action in respect to the remaining tract, the effect was to leave the Indians in a distinct tract reserved for their occupation, and in the same act this tract was spoken of as a reservation. Now, in order to create a reservation, it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes. Here the Indian occupation was confined by the treaty to a certain specified tract. That became, in effect, an Indian reservation. . . .

[237] A similar issue arose in *Northern Pacific Railway Company v. Wismer* 246 U.S. 283 (1918). In that case lands would vest in the railway company upon the filing of a plat and this was done on October 4, 1880. The respondent argued that the lands in dispute had not vested because they were part of the Spokane Indian Reservation when the plat was filed.

[238] As to the reservation, it happened that on August 16, 1877, an Indian Inspector entered into a treaty with the Spokane Tribe. The treaty provided that the Indians' title to their traditional lands was extinguished and set out lands which were to constitute their Reservation. This was reported by the agent and his superiors approved. The land was formally set aside and reserved by Executive Order of the President on

January 18, 1881, some three months after the filing of the plat. The land was used as a Reservation until 1910.

[239] It was held that the Reservation existed prior to the filing of the plat. The agent had been authorized to negotiate the treaty and his actions were approved no later than 1878. The Executive Order was not required to create the Reservation, but simply gave formal sanction to what had been done before.

[240] In *Sac and Fox Tribe Of The Mississippi In Iowa and United States v. Les Licklider* 576 F. 2d. 145 (1978) the court again had to decide whether a Reservation had been created. The court held that the lands were a *de facto* Reservation and stated that no formal act was required to set apart a Reservation. The lands had been occupied by the Tribe for many years and the Government had treated the lands as a Reservation. As to the last, the Government had sent an Indian Agent to reside on the Reservation, made treaty annuity payments there and constructed a boarding school at the location. Thus the court looked to the intention of the government as disclosed in the surrounding circumstances. Several other decisions adopt that same approach. See *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *United States v. Walker River Irrigation District, et al.*, 104 F. 2d. 334 (1939); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955); and *Sokaogon Chippewa Community v. Exxon Corporation*, 805 F. Supp. 680 (1992).

[241] Finally, it is recognized that the plaintiffs attach significant importance to and place considerable reliance upon the opinions of Professor Bartlett. His ultimate conclusion about reserve creation is found at the very end of his article, *The Establishment of Indian Reserves On The Prairies, supra*.

> It is concluded that a reserve is created within the meaning of the Indian Act upon its being "set apart" in accordance with the obligation imposed by treaty and the Natural Resources Transfer Agreement. "Setting apart" is suggested to consist of the survey and selection of the lands, following such consultation with the Indians as is required by treaty. The obtaining of provincial concurrence pursuant to the Natural Resources Transfer Agreement is also, of course, required in the establishment of reserves after 1930. The treaty language, negotiations, and departmental practice and usage all demand such a conclusion. It recognizes the judicial concern with the de facto setting apart of land. As Mr. Justice Clarke declared in the United States Supreme Court:
>
> > . . . [T]o hold that, for want of a formal approval by the Secretary of the Interior, all of the conduct of the Government and of the Indians in making and ratifying and in good faith carrying out the agreement between them. . . is without effect, would be to subordinate the realities of the situation to mere form.

The quotation is from the case of *Northern Pacific Railway v. Wismer, supra,* at p. 288. I substantially agree with Professor Bartlett. We differ in that I would qualify the effect of the survey to take into account the surrounding circumstances. In many instances, if not most, the qualification would not effect the outcome.

[242] In summary, I hold as follows. There is no single method to create a Reserve. However, there are certain things which are essential. The Crown must make a deliberate decision to establish a Reserve; there must be consultation with the Indians; there must be a clear demarcation of the lands; and there must be some manifestation by the Crown that the lands will constitute an Indian Reserve.

[243] The position of the plaintiffs is that if there is consultation and demarcation, whether by survey or reference to the township plan, then a Reserve comes into existence. In my opinion, that approach is too broad and simplistic. There were times when this happened and a Reserve did result. There were instances when the surveyor was instructed to create the Reserve. No further approval was needed. There were other instances when the instructions were not all inclusive and the Crown did not expressly give its approval, but by its silence and subsequent attitude the Crown manifested its acquiescence in the land being constituted a Reserve. Then there were other instances when the instructions clearly limited the authority. In such a case a survey in itself was not sufficient.

[244] It is my conclusion that the land was not "set apart" until the Crown treated it as such. That could happen in more than one way, including an absence of protest.

[245] As best I can make out, on the prairies all of the Reserves are the subject of an Order-in-Council. However, I do not consider such Orders to be an essential part of the process of establishing a Reserve. There are many instances, including several involving the Lac La Ronge Indian Band, where Reserves were marked out, accepted as such by the Crown, and only many years later confirmed by Orders-in-Council. However, in the interim they were viewed by all as Reserves and accordingly were validly constituted Reserves. The Orders-in-Council were no more than an administrative act which confirmed or clarified what already was a reality.

[246] I recognize that the foregoing is most evident prior to 1893. It has been argued that subsequently the wording of Orders-in-Council would suggest that it was the Orders themselves which set apart the Reserve lands. I do not accept this view as it

constitutes a qualitative change in the Orders themselves and I can find no basis for it in either legislation or judicial pronouncement. Furthermore, in most instances it does not accord with reality and the ongoing practices.

[247] With the foregoing in mind, I now turn my attention to the plaintiffs' claim that Reserves were created at Candle Lake and La Ronge. Here, as was the situation in respect to the interpretation of the Treaty, the evidence was copious and I have considered the whole of it. However, in my review which follows both as to Candle Lake, and later as to the La Ronge school lands, I have set out only what I consider necessary to convey to the reader what occurred in each instance. This approach was adopted after more than one false start and did not avoid a very lengthy document, although some reduction was achieved.

H. CANDLE LAKE LANDS

[248] The issue here is whether lands at Candle Lake in Saskatchewan were set aside as an Indian Reserve for the Lac La Ronge Indian Band. The plaintiffs submit that this was done in 1931 and as the lands have never been surrendered, the Reserve still exists today. The defendants submit that while consideration was given to creating a Reserve in the vicinity of Candle Lake, no lands were actually set aside so as to create a Reserve.

(1) The Facts

[249] On March 24, 1927, Order-in-Council P.C. No. 524 set aside a large tract of land for the Prince Albert National Park. At the same time it withdrew certain other lands from disposition under the *Dominion Lands Act* pending an investigation into their

suitability for inclusion in the Park. These included lands around Candle Lake. Almost immediately concerns were expressed by a number of people about the negative impact the Park would have on the Indians' opportunity to hunt and fish. Letters were written by W.M. Graham, Indian Commissioner at Regina, Saskatchewan, J.D. McLean, Assistant Deputy and Secretary Department of Indian Affairs, Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs and Reverend George E. Lloyd, Bishop of Saskatchewan (Ex. P-4, pp. 1105-1116).

[250] At about the same time Commissioner W.M. Graham was also pressing to have additional lands set aside for the Lac La Ronge and Stanley Bands in an area adjacent to Little Red River Reserve 106A. By letter dated August 2, 1927, Mr. A.F. MacKenzie, Acting Assistant Deputy and Secretary, Department of Indian Affairs, instructed Mr. H.W. Fairchild to cruise the lands in the vicinity of Little Red River Indian Reserve 106A (Ex. P-4, p. 1117). Mr. Fairchild was not a Dominion Lands Surveyor, but was an engineer employed by the Department of Indian Affairs and did survey work in respect to Reserves in Western Canada.

[251] By letter dated February 8, 1928, Mr. Fairchild reported to Mr. McLean on his cruise and recommended that sixteen sections of land, approved by the Chief and Headmen, be added to Little Red River Indian Reserve 106A (Ex. P-4, p. 1126). By letter of that same date, Mr. J.B. Harkin, Commissioner, Canadian National Parks, Department of the Interior, wrote to Duncan Campbell Scott. He suggested that the Montreal Lake Reserve be surrendered and replacement lands be set aside contiguous to the Little Red River Reserve and in the vicinity of Candle Lake.

> A suggestion which has been made is to set aside any areas available contiguous to the Little Red River Reserve

> and to add them to that Reserve and in addition to obtain a reserve on the shores of Candle Lake. This suggestion appears to me to be a good one as those Indians who wish to farm could do so on the Little Red River Reserve and those Indians who wish to live in an area providing good hunting, trapping and fishing could take up their abode on the Candle Lake Reserve. I understand that Candle Lake Provides [sic] excellent fishing and it is situated in one of the best hunting and trapping districts in Northern Saskatchewan.
>
> [Exhibit P-4, p. 1124]

[252] On March 30, 1928, Mr. A.F. MacKenzie, for the Assistant Deputy and Secretary, Department of Indian Affairs, wrote to the Secretary, Department of the Interior, advising that certain lands had been selected for the Montreal Lake, Lac La Ronge and Stanley Bands. The legal descriptions of the lands were set out and the letter concluded with this paragraph.

> You are requested to have these lands reserved from sale or settlement with a view to having them constituted as an addition to the Montreal Lake Indian reserve No. 106A.
>
> [Exhibit P-4, p. 1134]

It was shortly ascertained that of the lands selected, only eleven sections were available (Ex. P-4, p. 1153). This information was conveyed to the Secretary, Department of Indian Affairs, by letter dated May 1, 1928 (Ex. P-4, p. 1156).

[253] On April 20, 1928, Mr. MacKenzie wrote to the Commissioner of Dominion Lands, Department of the Interior, requesting that the eleven sections be reserved from sale or settlement (Ex. P-5, p. 1258). On that same day he instructed Mr.

Fairchild to seek out other suitable lands and, if some were located, to cruise them and report (Ex. P-5, p. 1259). On August 6, 1928, the Agent of Dominion Lands, at Prince Albert, Saskatchewan, confirmed that the requested reservation had been effected except for a quarter section of land which had been homesteaded during the intervening time (Ex. P-5, p. 1266).

[254] The Department of Indian Affairs continued its efforts to obtain some of the Park lands as an addition to Little Red River Indian Reserve 106A. The Department of the Interior was prepared to see this happen if the Montreal Lake Indian Reserve were surrendered. As neither the Indians nor the Department of Indian Affairs were agreeable to the proposed surrender, the Park lands never did become available (Ex. P-5, pp. 1265-1283; Ex. P-5, pp. 1335-1340). However, on October 18, 1928, Order-in-Council P.C. 1846, cancelled the reservation of the lands which had been reserved pending a determination of their suitability for inclusion in the Park (Ex. P-5, p. 1334). As a result the lands around Candle Lake became available. In March of 1929, steps were taken to post for settlement the lands which had been released from the Park (Ex. P-87, p. 38).

[255] As appears from correspondence in July and August, 1929, the Amos Charles and James Roberts Band continued to request that land be surveyed for them around Little Red River Indian Reserve No. 106A. Commissioner Graham supported the request (Ex. P-5, p. 1361-1366). Nothing happened for some time, but there was some activity in respect to other lands.

[256] By letter dated September 11, 1929, Mr. A.F. MacKenzie sent to the Commissioner of Dominion Lands at the Department of the Interior a list of Indian Reserves ". . .which have been selected and surveyed but which have not been confirmed". He asked that this be done and the list included Indian Reserve No. 106 at

Montreal Lake and Indian Reserves Nos. 156 to 158B at Lac La Ronge and on the Churchill River (Ex. P-5, p. 1375). The latter were thirteen in number and had been surveyed in 1909 by Mr. J. Lestock Reid. The requested Orders-in-Council were made in January, February and April of 1930 (Ex. P-5, pp. 1483-89; P-5, pp. 1529-32).

[257] Mr. MacKenzie again wrote to the Commissioner of Dominion Lands on January 9, 1930. He spoke of the possibility that the National Parks Branch may relinquish its reservation of certain lands and that it was important that these lands be added to Indian Reserve 106A. He accordingly requested that some seven townships of land adjacent to Candle Lake be withheld from sale or settlement.

> In connection with additional lands to which the Indians of the Lac la Ronge bands are entitled under the terms of Treaty, I have to advise you that it is the intention of the Department to endeavour to select some or all of these in the vicinity of Candle Lake and with this in view it is hoped to send a departmental representative into that district this year.
>
> I should like to be advised, therefore, if you could, pending the selection, withhold from sale or settlement all those lands not already disposed of in Tp. 55, Rgs. 22, 23 & 24, Tp. 56, Rgs. 23 & 24 and the S. 1/2 Tp. 57, Rgs. 22 and 23, as well as unsurveyed Tp. 56, R. 22, all West of the 2nd Meridian.
>
> [Exhibit P-5, p. 1478]

[258] The next day, January 10, 1930, Mr. MacKenzie wrote to Commissioner Graham to advise that the Department was still considering a surrender of the Montreal Lake Reserve in exchange for land in the vicinity of Candle Lake. He requested Mr.

Graham to obtain information about the suitability of Candle Lake and advised that if the scheme were considered feasible, a thorough cruise would be made.

> It has been under consideration if it would not be advisable to endeavour to obtain a surrender from the Indians of the Montreal Lake Indian reserve No. 106, situate South West of Montreal Lake, for the purpose of exchanging the reserve for lands in the vicinity of Candle Lake.
>
> . . .
>
> After you have obtained what information you can on the liklihood [sic] of obtaining such a surrender and the suitability of the reserve being located at Candle Lake, I shall be pleased to receive an expression of your opinion on the proposed exchange. If the scheme is considered feasible, the Department will of course arrange for a thorough cruise to be made of the lands adjoining Candle Lake before final action is taken.
>
> [Exhibit P-5, p. 1480]

Mr. Graham's response was less than enthusiastic as he believed the lands at Candle Lake to be inaccessible (Ex. P-5, p. 1481).

[259] Thereafter, memoranda passed within the Department of the Interior with a view to ascertaining the status of the Candle Lake lands. Ultimately it was ascertained that all of the lands, except for one township, had been surveyed and were open for entry except for certain lands included within timber berths (Ex. P-5, pp. 1490-1496). On March 12, 1930, Mr. W.W. Stinson, Dominion Lands Administration sent to Mr. H.B. Perrin, Dominion Lands Branch, a memorandum and sketch and stated:

> The Department of Indian Affairs has recently made application for a reservation to be placed against the vacant land in the following townships:
>
> . . .
>
> It points out that the Indians of the Lac La Ronge bands are entitled under the terms of Treaty to additional land and, under the circumstances, it is desired to make a selection of land in the vicinity of Candle Lake. The Department of Indian Affairs expects to have one of its men visit that district during the coming season. Please see sketch immediately hereunder which indicates the standing of the land applied for according to Departmental records.
>
> These townships were formerly reserved for inclusion in the Prince Albert National Park but were released on the 23rd April last, and the Agent was instructed to post for settlement purposes the vacant and available lands.
>
> [Exhibit P-5, pp. 1501-2]

On March 20, 1930, Mr. J.W. Martin, Commissioner of Dominion Lands, wrote to the Agent of Dominion Lands, Prince Albert, Saskatchewan, informing him that the Department had authorized a reservation in favour of the Department of Indian Affairs in respect to the lands stipulated by Mr. MacKenzie in his letter of January 9, 1930. The agent was instructed to make the necessary notation.

> I beg to inform you the Department has recently decided to authorize you to place a reservation in your records in favour of the Department of Indian Affairs against the vacant and available land in the above described townships and parts of townships.
>
> Please note against the land that is at present held under lease or entry or other disposition that in the event of

> the existing disposition being cancelled at a later date the land is to be reserved for the Indian Department.
>
> In connection with land held under entry you should not accept an application for inspection from an individual. If you receive such an application you should notify the applicant why cancellation proceedings cannot be taken on his behalf, but you may in such case take proceedings on behalf of the Department.
>
> [Exhibit P-5, p. 1503]

On that same date, March 20, 1930, the following entry was made in the Dominion Land Registry with respect to the Candle Lake lands.

> Reserved 20 March 1930 Candle Lake Indian Reserve # OnC PC File 5463148.
>
> [Exhibit P-36]

[260] The Department of the Interior then took steps to identify existing mineral claims and land dispositions. In a memorandum dated May 13, 1930, Mr. W.S. Gliddon, Director, Land Patents and Records Division, wrote the following to Mr. J.W. Martin.

> Certain lands within the block applied for, as indicated on the sketch, hereunder, have been disposed of and certain mineral claims as shown on the blue prints, beneath, have been located herein.
>
> The Department of Indian Affairs have represented that it will be satisfactory for its purposes if the lands available are placed under temporary reservation for the purposes of that Department, and I beg to recommend that the necessary action be taken to that end.

[Exhibit P-5, p. 1539]

Steps were also taken to value the school lands within the subject area in order to select alternate lands for the School Lands Endowment Fund (Ex. P-5, p. 1542; P-6, p. 1545).

[261] In a letter dated September 18, 1930, Mr. A.F. MacKenzie wrote to Mr. H.W. Fairchild, instructing him to determine which of the Candle Lake lands would be suitable for a reserve.

> On completion of your work at Janvier, you are requested to proceed to the Candle Lake District making an inspection with a view to determining what sections in Tp. 55, Rgs. 22, 23 & 24, Tp. 56, R. 23 & 24, S. 1/2 Tp. 57, R. 22 & 23 and unsurveyed Tp. 56, R. 22, all W. 2. M. would be most suitable for the purposes of an Indian reserve.
>
> As you are aware there is still considerable acreage due to the Indians of the Lac la Ronge bands and it is desired to know if it would be advisable for the Department to select in the Candle Lake District the lands to which these bands are entitled.
>
> As the Indians who own the Little Red River Indian reserve No. 106A are members of these bands, it is considered desirable that such Indians as you should find it necessary to employ when making this cruise, should be the principal or head men of this reserve, and in any event you should arrange for one of the head men of this reserve to accompany you.
>
> I am enclosing copies of Sectional Sheets Nos. 269, 319 and 369.

[Exhibit P-6, p. 1561]

In fact, Mr. Fairchild was unable to perform the task assigned. This handwritten notation appears on the top of the letter of instructions.

> Mr. Fairchild did not complete his work at Janvier early enough in the season to make this inspection.

[262] The next significant event was that the *Natural Resources Transfer Agreement* took effect on October 1, 1930. Just prior to that on September 23, 1930, the Premier of Saskatchewan, the Honourable J.T.M. Anderson, wrote to the Federal Minister of the Interior, the Honourable T.G. Murphy, asking for an inventory and analysis of the lands to be transferred to the Province (Ex. P-6, p. 1563). Presumably as a part of the project to meet the request, certain undated lists of Indian Reserves were drawn up. The one list is entitled “Indian Reserves in Saskatchewan Confirmed Between September 1, 1905 and October 1, 1930". Another list is entitled “Indian Reserves Not Confirmed Prior to October 1, 1930" and contains the “Proposed Candle Lake I.R.”. In respect to that reserve there is the notation “Temp. Res. pending selection. Further action rests with Prov.” (Ex. P-6, pp. 1570-88).

[263] In a letter of December 12, 1930, Major John Barnett, Deputy Minister of Natural Resources Saskatchewan speaks of a reservation of lands at Candle Lake for the Department of Indian Affairs and asks Mr. J.W. Martin, to provide “. . .details and correspondence covering such reservation”. He also noted a number of homesteads had been entered in the area (Ex. P-6, p. 1627). Shortly after, on January 4, 1931, Commissioner W.M. Graham wrote to the Secretary, Department of Indian Affairs, about securing the land at Candle Lake for the Indians.

> With further reference to my letter to you dated November 25th last, in regard to the question of the selection of lands for the James Roberts and Amos Charles Bands in the Candle Lake District, I would be glad to know if the Department have made any progress towards securing the lands selected. The matter is one of great importance and, in my opinion, the Department should press for a settlement of the question at as early a date as possible.
>
> [Exhibit P-6, p. 1697]

[264] A new consideration then appeared. It was seen that the Candle Lake area had potential as a summer resort development as well as for homesteading and enquiries were made. On January 19, 1931, Mr. J.N. Gale, a Melfort lawyer, wrote to the Deputy Minister of Indian Affairs.

> I have been advised by the Minister of Natural Resources, Saskatchewan, to the effect that your Department has reserved several miles of land surrounding Candle Lake.
>
> I believe there is a possibility of summer resort development being made along that Lake some time in the near future. I would be much obliged if you would advise whether it is possible for a party to secure the right to a small portion of the land adjoining the Lake to be used as a site for a summer cottage.
>
> [Exhibit P-6, p. 1700]

Mr. A.F. MacKenzie, by then Secretary Department of Indian Affairs, responded on February 4, 1931, as follows:

> In reply to your letter of the 19th ultimo, I have to advise you that the reservation of lands made by this

> Department in the vicinity of Candle Lake was made for the purpose of permitting the Department to select an Indian reserve at that point. It is impossible to state at the present time what lands will finally be included in this selection. However, the Department expects to have the lands which have been temporarily reserved cruised and reported upon during the present year, in order to be in a position to definitely inform the provincial authorities what lands are actually required for Indian reserve purposes.
>
> [Exhibit P-6, p. 1705]

[265] By telegram dated March 28, 1931, Major Barnett again requested details about the Candle Lake reservation from Mr. J.W. Martin (Ex. P-6, p. 1706). He was advised on April 2, 1931, that the file could not be located (Ex. P-6, p. 1707), but on April 17, 1931, he was sent a statement of the lands reserved for Candle Lake Indian Reserve (Ex. P-6, p. 1708). Subsequently a letter was written to the Department of Natural Resources Saskatchewan on May 18, 1931, in which Mr. H.E. Hume, Deputy Commissioner, Dominion Lands Administrator, outlined what had transpired in respect to the Candle Lake lands.

> On the 9th January 1930 the Department of Indian Affairs advised this Department that certain additional lands were required in connection with the Lac La Ronge Indian Reserve and requested that said lands be withheld from sale or settlement and placed in a temporary reserve, pending further action.
>
> The necessary notation was made in the Departmental records to the effect that the lands required were temporarily reserved for the Department of Indian Affairs, and instructions were issued to the Agent of Dominion Lands at Prince Albert to have a homestead inspector visit the School lands which the Department of Indian Affairs desired to

obtain and place a valuation on the same, and select other Dominion lands of equal value to be exchanged for the School lands to be surrendered.

At the time the instructions were issued to the Agent of Dominion Lands at Prince Albert to have the inspection made, it appears that the inspectors, owing to the pressure of work, were not in a position to make the inspection, and consequently, in view of the probable transfer to the Province of the natural resources, no further action has been taken up to the present time.

In order, however, that you may be in a position to deal with this matter, as the natural resources were transferred to the Province of Saskatchewan as of the 1st October last, I am now enclosing the following documents: -

1. Copy of a communication dated 9th January, 1930, from the Acting Assistant Deputy and Secretary of the Department of Indian Affairs.

2. Copy of Departmental communication dated 20th March, 1930, to the Agent of Dominion Lands at Prince Albert, requesting an inspection and valuation of the lands referred to.

3. Copy of the list of School lands to be surrendered, together with the standing and the respective areas of each quarter-section.

4. Copy of a communication dated 6th June, 1930, to the Agent of Dominion Lands, furnishing a list of the School lands to be inspected and valued.

5. Copy of letter from Agent of Dominion Lands, Prince Albert, of 3rd July, 1930, to the Department relative to this matter, together with a copy of Inspector Whelan's letter of the 3rd June, 1930, and the reports which accompanied same.

> A copy of this communication is being forwarded to the Secretary, Department of Indian Affairs, in order that the said Department may be advised that this matter has now been referred to the Department of Natural Resources, Regina, Saskatchewan, to be dealt with.
>
> [Exhibit P-6, p. 1714]

A copy of the letter was sent to the Secretary, Department of Indian Affairs.

[266] It will be noted that Mr. Hume speaks of the natural resources as having been transferred to the Province of Saskatchewan as of October 1. He repeated this opinion in a letter of July 15, 1931, to a Mr. Roy Lester who had inquired about the availability of land (Ex. P-6, p. 1724). The Department of Natural Resources Saskatchewan took a different view and referred Mr. Lester back to the Department of the Interior where Mr. Hume then told him the matter was being taken up by the Department of Indian Affairs (Ex. P-6, p. 1743). Mr. Hume then wrote to the Department of Indian Affairs on August 6, 1931, and asked whether the Candle Lake lands were still required by the Department (Ex. P-6, p. 1750). Mr. A.F. MacKenzie replied as follows in a letter dated August 31, 1931.

> In reply to your letter of the 26th instant, I have to advise you that the Department has not yet selected from those lands which have been temporarily withheld from sale or settlement in the Candle Lake District, the lands which may be required there for a permanent reservation. The Department hopes, however, to make the selection during the present year. It is desired, therefore, that the temporary reservation against the lands remain until this selection is completed.

[Exhibit P-6, p. 1762]

[267] In the meantime, in response to an inquiry from Commissioner Graham (Ex. P-6, p. 1716), Mr. MacKenzie wrote to him on June 6, 1931, and advised:

> The Department hopes to arrange to have a cruise made this summer of the lands available between Indian reserve No. 106A and Candle Lake, to ascertain if lands of a suitable nature could be obtained for these Indians in that vicinity.
>
> [Exhibit P-6, p. 1717]

Then on August 27, 1931, he sent this telegram to Mr. Graham.

> SELECTION NOT YET MADE Stop THIS DEPARTMENT THEREFORE DOES NOT CONTROL HAY IN THIS AREA AND APPLICATION FOR PERMITS SHOULD BE MADE TO PROVINCIAL AUTHORITIES.
>
> [Exhibit P-6, p. 1755]

[268] On August 28, 1931, Commissioner Graham again wrote to Mr. MacKenzie urging that the requests of the Amos Charles and James Roberts Bands be dealt with as soon as possible because the unoccupied lands would be taken up quickly now that they had been turned over to the Province (Ex. P-6, p. 1759). On August 29, 1931, Mr. A.S. Williams, Acting Deputy Superintendent General of Indian Affairs, sent this memorandum to a Mr. Buskard, Secretary to the Minister of Indian Affairs.

> I return herewith letter which the Honorable the Minister had received from the Secretary of the Prince Albert Board of Trade and in which reference is made to the reservation of certain lands for Indian use in the Candle Lake district. In the year 1930, on request of this Department, the Interior Department placed a reservation upon all undisposed of lands in Tp. 55, Rgs. 22, 23 and 24; Tp. 56, Rgs. 23 and 24; the S. 1/2 of Tp. 57, Rgs. 22 and 23, and unsurveyed Tp. 56, Rgs. 22, all west of the 2nd M. The understanding was that later this Department would consider making a selection out of this area, of certain lands for the use of the Indians of the Montreal Lake Reserve. The matter is still under consideration, and no selection has as yet been made, and in fact, there is some doubt as to whether any of these lands will eventually be acquired for Indian use, as it appears that the Indians of that district have some objection to removing to these particular lands.
>
> As a reply to the letter addressed to the Minister, I can only suggest that the Secretary be informed that these lands have not actually been set aside, as an Indian Reserve, but that a temporary reservation has been placed thereon, and that the matter of selection by this Department is at present receiving consideration.
>
> [Exhibit P-6, p. 1761]

[269] On August 31, 1931, Mr. A.F. MacKenzie wrote to the Commissioner of Dominion Lands as follows:

> . . .I have to advise you that the Department has not yet selected from those lands which have been temporarily withheld from sale or settlement in the Candle Lake District, the lands which may be required there for a permanent reservation. The Department hopes, however, to make the selection during the present year. It is desired, therefore, that

> the temporary reservation against the lands remain until this selection is completed.
>
> [Exhibit P-6, p. 1762]

On the same date he sent this letter of instruction to Mr. H.W. Fairchild, Surveyor.

> If on your return from the work at Chipewyan you find there will be sufficient funds available from this year's appropriation, you are requested to proceed to the Candle Lake district to make an inspection with a view to determining what sections in Tp. 55, Rgs. 22, 23 and 24; Tp. 56, Rgs. 23 & 24, S.1/2 Tp. 57, R. 22 & 23 and unsurveyed Tp. 56, R. 22 all W.2.M. would be most suitable for the purposes of an Indian reserve.
>
> There are still approximately 52 square miles due to the Indians of the Lac la Ronge bands, and it is desired to know if it would be advisable for the Department to select any or all of this area in the Candle Lake district.
>
> As the Indians who own the Little Red River Indian reserve No. 106A are members of these bands, it is considered desirable that you should ascertain if these Indians would favourably regard the selection of reserve lands in that vicinity. Such Indians as you should find it necessary to employ when making this cruise should be the principal or head men of this reserve, and in any event you should arrange for one of the head men of this reserve to accompany you.
>
> I am enclosing copies of Sectional Sheets Nos. 269, 319 and 369 and Tp. plans 55 R 22, 23, 24, Tp. 56 R 23 & 24 Tp. 57 R 22 & 23 all W2nd.
>
> [Exhibit P-6, p. 1763]

[270] On September 3, 1931, Mr. MacKenzie advised Mr. Graham about the above. The latter quickly requested that an experienced Inspector look over the lands prior to a final selection to ensure the Indians didn't get more useless land and the request was met (Ex. P-6, pp. 1766, 1769 and 1773). On the same date of September 3, Mr. MacKenzie, in a further letter, instructed Mr. Fairchild to ascertain from the local provincial Crown lands agent what lands were covered by timber or other licences (Ex. P-6, p. 1767). In the end Mr. Fairchild was unable to go to Candle Lake, but Mr. MacKenzie wrote to Mr. Graham on September 19, 1931 and suggested that the Inspector proceed with a cruise of the lands.

> With further reference to your letters of August 28th last and September 8th, I have to advise you that as it is probable that Mr. Fairchild will not be able to proceed to the Candle Lake district after his return from Fort Chipewyan, it is requested that you will arrange to have the Inspector to whom you refer in your letter proceed to that district to make a cruise of the lands which have been temporarily reserved, in order to ascertain what lands, if any, should be applied for as a permanent reserve.
>
> The lands which this Department requested the Department of the Interior to temporarily withhold from sale or settlement are all undisposed lands in
>
> Tp. 55, R. 22, 23 and 24
> Tp. 56, R. 23 & 24
> S 1/2 Tp. 57, R. 22 and 23
> unsurveyed Tp. 56, R. 22, all W.2.M.
>
> the object of the Department in having these lands temporarily withheld from disposal was in order to select as large an area of suitable lands as possible for the Indians of the Lac la Ronge bands, who are still entitled to approximately 52 sq. miles.

> As the Indians who own the Little Red River Indian reserve No. 106A are members of these bands, it is considered desirable that the Inspector should ascertain if these Indians would favourably regard the selection of lands in that vicinity. Such Indians as he should find it necessary to employ in making the cruise should be the principal or head men of this reserve, if they are suitable for the work, and in any event the Inspector should arrange for one of the head men of the reserve to accompany him.
>
> The Department has recently been unofficially informed that there is an Indian legend in connection with Candle Lake, which makes lands in the country adjoining the lake undesirable in the eyes of the Indians. The Inspector in making his report is requested to list, in order of preference, the quarter sections which he may select.
>
> Before proceeding to the district, he should consult the Agent of Crown Lands in that district and ascertain what areas in that locality are at present covered by timber or other licences.
>
> I am enclosing copies of Section 1 sheets Nos. 269, 319 and 369, also Township plans
>
> 55, R. 22, 23 and 24
> 56, R. 23 and 24
> 57, R. 22 and 23, all W.2.M.
>
> [Exhibit P-6, p. 1777]

[271] Within the Department of the Interior, Mr. H.E. Hume, Chairman, Dominion Lands Board, spoke about the *Natural Resources Transfer Agreement* and its relationship to Indian Reserves selected, but not confirmed. In a memorandum to a Mr. Eastman on September 25, 1931, he said the following:

> In view of the wording of the various Resources Agreements with the Western Provinces, it would appear that lands selected and surveyed for the purpose of an Indian Reserve but not yet confirmed, continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada.
>
> At the earliest possible date please have prepared a list for each Province showing lands selected and surveyed as above, but not yet confirmed as Indian Reserves. These lists will be submitted to the Deputy Minister for authority to transmit the same to the respective Provinces, drawing attention to the provisions of the various Agreements, and pointing out that the parcels included in the list continue to be vested in and administered by the Government of Canada.
>
> [Exhibit P-6, p. 1783]

Then in a memorandum dated September 29, 1931, Mr. Hume sought an opinion from Mr. K. R. Daly, Departmental Solicitor, about the reservation of lands at Candle Lake.

> On the 20th March 1930 the Agent of Dominion Lands, Prince Albert, Saskatchewan, was instructed to place a reservation in his records in favour of the Department of Indian Affairs against the vacant and available land in the above described townships, and parts of townships. He was also asked to note that the land that is at present held under lease or entry or other disposition that in the event of the existing disposition being cancelled at a later date the land was to be reserved for the Indian Department.
>
> Several enquiries have been received from individuals asking whether any of the lands so reserved would be made available for settlement in the near future. The Department of Indian Affairs advised this office on the 31st ultimo that they hoped to make a selection from the lands reserved for a permanent reservation during the present season, but desired

> that the temporary reservation against these lands remain until the selection is completed.
>
> In view of Section 10 of the agreement with the Province of Saskatchewan will you kindly state whether, in your opinion, this Department is in a position to take any further action in connection with this reservation or whether all correspondence relative thereto should be transferred to the Saskatchewan Government.
>
> [Exhibit P-6, p. 1786]

This handwritten notation appears at the bottom of the memorandum.

> Am of opinion, as no formal reservation has been by [----------] Council all correspondence [-------] transferred to Province.

On the next day, September 30, 1931, Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs, sent the following memorandum to Mr. Buskard, Private Secretary to the Minister.

> The temporary reservation of the lands which this Department has had withheld from sale or settlement in Townships 55, 56 and 57, Ranges 22, 23 and 24, as referred to in your memorandum of the 22nd instant, was for the purpose of enabling the Department to make an inspection of this area with a view to selecting reserves for the Lac la Ronge Indians and not for the Indians of the Montreal Lake Reserve. The Lac la Ronge Indians are divided into the James Roberts Band and the Stanley Band. These Bands have not been allotted all their lands, and under the conditions of the Treaty they are still entitled to receive approximately fifty-two square miles.

> Arrangements have been made to have an inspection of this area made during the coming month and when the report of this inspection is received, it is hoped that the Department will be in a position to release from temporary reservation a considerable portion of the area.
>
> [Exhibit P-6, p. 1787]

[272] Mr. Hume, by letter dated October 2, 1931 (Ex. P-6, p. 1791) advised Major Barnett, that the Department of Indian Affairs desired to maintain the reservation at Candle Lake and sent him copies of inquiries about the availability of that land. He also stated that the matter was under the control of the Department of Natural Resources Saskatchewan. It then appeared that the Department of Natural Resources was intending to open the Candle Lake lands for settlement. (Ex. P-6, p. 1805). Mr. Duncan Campbell Scott responded by pointing out that the Department of the Interior had agreed to postpone disposal of the lands until after a selection of an Indian Reserve was made and he expressed the opinion that the Province should make no disposition until that selection had been made (Ex. P-6, p. 1806).

[273] In the meantime, Mr. W. Murison, Inspector of Indian Agencies, in the company of two headmen of the James Roberts Band, did a cruise of the lands at Candle Lake and selected 33,401.2 acres. His report of November 4, 1931, to Commissioner Graham reads as follows:

> I beg to report that I left Regina on the afternoon of October 8th and proceeded to the Candle Lake District for the purpose of making a selection of lands for the Amos Charles and James Roberts Bands, in the Ile a la Crosse Agency. I was met at Prince Albert by the two Headmen of the James Roberts Band, namely, John Bell and John Morin, who accompanied me when cruising the land.

Attached hereto you will find a map of the townships set aside for this purpose, showing the lands selected by me enclosed in blue markings. This selection was approved by the Headmen from the James Roberts Band, and they assured me that the Amos Charles Band would be pleased with it. I am also attaching a statement showing in detail the sections, township and ranges of the lands selected.

I called upon the Agent of Crown Lands in Prince Albert, before proceeding to look the land over, and ascertained the areas under timber limit. He assured me that there were no other licenses or permits granted in the townships set aside. There are a few acres of timber limit on Sections 1, 2, 12 & 14, in Township 55; Range 23, and a small limit taking in portions of Sections 29, 30, 20 & 19, in Township 55, Range 22. These parcels are all very small and are not very valuable.

There are three trappers who filed on homesteads in Ranges 22 & 23 before the land was withdrawn from entry. These are the only homesteaders residing on the lands selected. I was informed that a few others had made entry but had not returned to the district after doing so, and had made no improvements. When cruising the land I saw no signs of any other residents except the three mentioned.

I may state that the land is all covered with a heavy growth of bush. The soil is a sandy loam on the portions selected, but should be fair agricultural land when the bush is cleared off it. There are very few portions of it which are stony, but some of the land is muskeg.

When selecting the land I had in mind picking out lands suitable for farming, grazing, hay, and also to keep the areas in as compact parcels as possible. The land cannot be called choice, but it is certainly the best that is available, and I would recommend that the selection be approved.

> I was impressed with the abundance of wild life in the area which I cruised. Elk, moose, and jumping deer are very plentiful, and there appears to be a good supply of fish in the Candle Lake. This location, therefore, with these resources, should prove a very attractive one for Indians.
>
> [Exhibit P-6, p. 1811]

By letter of the same date, Commissioner Graham informed Mr. MacKenzie of the selection and sent him Inspector Murison's report. He concluded his letter with these remarks.

> If this selection is approved, I think the Department should take prompt action to secure it.
>
> [Exhibit P-6, p. 1809]

[274] However, there was opposition to the selection. In a letter dated November 6, 1931, Major Barnett wrote to Commissioner Graham as follows:

> I regret that, following our conversation, I neglected to write you further with respecto [sic] to Candle Lake.
>
> Under the Agreement for the Transfer of the Natural Resources, it is provided that "the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfill its obligation under the treaties with the Indians of the Province."
>
> The Candle Lake area is one which must fall under this category, as we are advised by the Interior Department

> that it is an area that was transferred to us on the Transfer of the Resources. Consequently, the point to be determined is whether our Minister can or should agree to the transfer of this area to Indian Department under Clause 10 of the Agreement which I have just quoted. We desire to meet in the fullest spirit of co-operation the Indian Department, in order that the provisions of Section 10 of the Agreement of Transfer may be complied with in spirit as well as in the letter thereof. At the same time, we feel that, if the Indian Department secured as an Indian Reserve the townships on the West side of Candle Lake, access to North Central Saskatchewan is going to be blocked to a very large degree, as both the National Park and such Indian Reservation would stand directly in the path of settlement and the quicker transportation facilities that would follow upon such settlement.
>
> We are particularly concerned with that portion which lies from Candle Lake West. I think, if I remember correctly, you told me that the Indians for whom you desired this additional Reservation were on the Montreal Lake Reserve. It would seem to me that your requirements could be met by reserving Township 57, Ranges 21 and 22 and Township 56, Ranges 21 and 22, lying East of Candle Lake, and on the North half of the Eastern side of this lake. I think it would be very difficult for our Minister to agree now to the reservation of the townships lying to the West side of Candle Lake.
>
> [Exhibit P-6, p. 1827]

On November 10, 1931, Commissioner Graham sent a copy of the letter to Mr. MacKenzie. It was suggested by Commissioner Graham that the lands east of Candle Lake were valueless as farm land and pointed out that only one parcel of 13,522 acres was selected west of the lake. The other two parcels selected were south and east of the

lake (Ex. P-6, p. 1829). Deputy Superintendent General, Duncan Campbell Scott, replied to Major Barnett by letter dated November 20, 1931.

> The Indians of the James Roberts and Amos Charles bands are still entitled under the terms of Treaty to receive reserve lands to the extent of approximately 80 sq. miles. As you are aware, the Department has been selecting a considerable portion of this area in the vicinity of Candle Lake, where it is desired to reserve for them an area of approximately 70 sq. miles, leaving the remaining area due them to be selected in the Lac la Ronge District.
>
> From the information at hand at present, the lands required in the Candle Lake District may be generally described as, - All the unalienated lands in the following Townships, -
>
> Frac. Tp. 55-22-W.2.M.
> Frac. E. 1/2 Tp. 55-23-W.2.M.
> All of Tp. 55-24-W.2.M.
>
> A detailed statement enumerating the particular sections is being prepared and will be forwarded to you in a few days with a request that the lands be set aside as a reserve for the above mentioned bands. When an agreement has been arrived at with your Government as to the actual lands to be set aside for the purpose of these reserves, the Department will then be able to cancel its request that the remaining lands in Tp. 55, Rgs. 22, 23 and 24, Tp. 56, Rgs. 23 and 24, S.1/2 Tp. 57, Rgs. 22 and 23, as well as unsurveyed Tp. 56, R. 22, all W.2.M. withheld from lease, entry or other disposition.
>
> The Department made this request to the Department of the Interior in official letter dated 9th Jan.1930 and under date of 20th March of that year, the Commissioner of Dominion Lands informed this Department that the lands enumerated above were being so reserved and on the latter

> date the Agent of Dominion Lands at Prince Albert was informed of this reservation.
>
> With reference to your letter of the 6th instant to Indian Commissioner, W.M. Graham, commenting on the selection of these lands, I may state that this Department holds that it is entitled to select any lands within the area temporarily reserved not previously alienated, in order to satisfy the conditions of Treaty as provided for in Clause 10 of the Agreement between the Dominion of Canada and the Province of Saskatchewan on the transfer of the natural resources, inasmuch as this selection was arranged with the Department of the Interior prior to the date of the transfer of the natural resources and can be held to be an arrangement within the meaning and intent of Clause 2 of the Agreement.
>
> In connection with your comment to Commissioner Graham with regard to the check that the establishment of this reservation would cause to settlement and the quicker development of such settlement, I may point out that the Department does not propose to apply for this reservation en bloc but by sections and fractional sections, whereby the regulation road allowances would be retained by the Province [illegible] policy of the Department does not obstruct the construction of railways or surveyed roads through its reserves, transportation should not be appreciably affected. You will note that the selection, as proposed, would leave a width of at least half a Township, in Township 55, between the two blocks of the reserve.
>
> [Exhibit P-6, p. 1835]

[275] Also on November 20, 1931, Mr. MacKenzie wrote to Commissioner Graham stating that the James Roberts and Amos Charles Bands were entitled to approximately 80 square miles of land. It was originally intended to take up 72 square miles in the vicinity of Candle Lake, but it was perhaps advisable to take up more land in that area. Having suggested some possibilities, he asked for Graham's comments, ". . .in

order that a final detailed statement of land required may be prepared and forwarded to the provincial authorities" (Ex. P-6, p. 1837). In a response dated November 21, 1931, Mr. Graham advised that he had spoken to Major Barnett about the matter and that the Department of Natural Resources was not likely to agree to transfer the land selected (Ex. P-6, p. 1838).

[276] By letter dated January 12, 1932, Deputy Superintendent General Duncan Campbell Scott, requested of Major Barnett that the selected lands be transferred to the Department of Indian Affairs.

> I am enclosing a detailed list of lands selected by the Department in the Candle Lake District for the Indians of the James Roberts and Amos Charles bands, as referred to in my letter to you of the 20th November last. I shall be pleased if you will take the action necessary to have these lands transferred to this Department for the purposes of the Candle Lake Indian reserve.
>
> You will note that while these bands are entitled to receive approximately 80 sq. miles, the area of the lands for which application is now made is only approximately 75 sq. miles. It will also be noted that the lands in the northerly 2 1/2 miles in Tp. 55, R. 24 are omitted from this list. The list also includes certain quarter sections on which homestead entries have been made, but it is understood that some if not all of these have been cancelled and it is the wish of the Department that all the unalienated lands enumerated in the list be incorporated in the reserve. When assent has been given to this transfer, the Department will not require to have the temporary reservation continued on the remaining lands in Tp. 55, Rgs. 22, 23 and 24; Tp. 56, Rgs. 23 and 24; S. 1/2 Tp. 57, Rgs. 22 and 23; unsurveyed Tp. 56, R. 22, all West 2nd Meridian.

> At one time Timber Berth 1212 partially covered Sec. 34, Tp. 55, R. 23, Secs. 19, 20, 29 and 30, Secs. 25, 26, 35, and 36, Tp. 55, R. 22. It is thought that the existence of this timber licence, if it is still in good standing, need not affect the transfer of these lands, as your Department and the licencee could be protected by a clause reserving the right for your Department to continue the present licence under your regulations governing such licence.
>
> [Exhibit P-7, p. 1862]

[277] The response was long in coming and was a rejection of the request. By letter dated January 9, 1933, almost a year later to the day, Mr. T.J.M. Anderson, Premier of Saskatchewan, advised Mr. T.G. Murphy, of the refusal to transfer the land and the rationale for that decision.

> In reply to your letter of December 17th regarding the selection of land by the Indian Department in the Candle Lake district, I have had my Departmental officials prepare a map of the area requested for Indian purposes, which I attach thereto. The two areas outlined in red are the areas which the Department of Indian Affairs requested should be transferred to them under the second part of Clause 10 of the Natural Resources Transfer Agreement.
>
> Section 10 of the Natural Resources Transfer Agreement provided of course that the Dominion retained all Indian Reserves already created and selected prior to the Transfer Agreement. It also provided that "the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province."

In other words, it is clear that, while the Province undertakes to transfer such lands to the Indian Department, it must through the Minister in charge agree with the selection made. That is to say, it is reserved to the Province to determine whether the further lands to be transferred to the Indian Department are such as can be transferred without too great injury to Provincial interests.

No selection of this particular land was made by the Indian Department prior to the Transfer of the Resources, and an inspector from the Indian Department was only sent in to look over the land at some considerable time after the Transfer; so that these lands can only come within the concluding part of Paragraph 10 of the Transfer Agreement, and the Province must therefore consider its own interests before the Provincial Minister in charge could possibly agree with the further transfer being made.

You will see from the attached map that these two areas are separated from East to West by three rows of sections, which is going to mean that the land in between becomes virtually useless and valueless for Provincial purposes. Schools cannot be established and general facilities cannot be given to any people who might desire to settle in this area. In addition to this, within both of the blocks outlined in red considerable land has already been disposed of, not only by the Province, but prior to that by the Dominion during the course of their administration. Within the area asked for are four valuable timber berths, over which third parties have been given rights, and for which the Province is now responsible. We cannot make a transfer of these areas covered by timber berth licenses in any event. In addition to this, in the Eastern block there are seven parcels of land which were disposed of by the Dominion and which the Province must administer in order to carry out its obligations to the settlers who have located thereon. The very fact that they have settled there involves necessities for schools, roads and other local improvements, and even if they were selected from the proposed Indian Reserve,

provision would have to be made for additional settlement in order to provide them with school and other local improvement facilities.

You will also notice that, in the area enclosed in red and which the Indian Department asked for, four parcels of land have been patented and presumably settled. In addition to this, in accordance with our general water conservation policy, 13¼ parcels of land have been reserved for park and water development, and if these are included in an Indian Reserve, the Province must re-cast all its general policy so far as its program is concerned.

In the Eastern block, 20 parcels of land have been disposed of to new settlers and in the Western block 10 parcels of land have been disposed of to new settlers, since the Province took over the administration, and the area has now been cut up to such an extent that it would be quite impossible to create the territory suggested into an Indian Reserve.

The Indian band for whom the Reserve is desired are situated much further North than the area selected, and we do not think it right or proper that further Reservations for Indian bands should be selected in the areas much nearer to settlement and much further South than their ordinary and regular habitat. If further land is required and is owing under the Indian Treaty to this band, the Province feels very strongly that selections should be made either in the vicinity of Montreal Lake or further North still in the vicinity of Lac la Ronge, where I think the original selection was intended to be made.

The area of land lying between Candle Lake and the Southeastern boundary of the National Park is very narrow at the present time, and, on account of the necessity of providing schools and local improvement facilities for new settlers, the Departmental officials are strongly of the opinion that it is very inadvisable and will work a very serious detriment to the welfare of the Province if further

> Indian Reserves are created in this particular area. There is also a very strong popular feeling against the creation of Indian Reserves in the particular area selected. The Canadian Legion has protested officially, as have individuals interested.
>
> For all these reasons, I am of the opinion that the area selected is not one which, as Provincial Minister concerned, I can agree should be transferred to the Indian Department. I am of course quite ready to facilitate a selection of land by the Indian Department in some other area which will not be so prejudicial to Provincial welfare.
>
> [Exhibit P-7, p. 1902]

[278] The Department of Indian Affairs then embarked upon a review of its position. Mr. A.S. Williams, Acting Deputy Superintendent General, was of the opinion that the Department could not succeed in its claim. However, he referred the question to the Department of Justice and on September 8, 1933, Mr. W.S. Edwards, Deputy Minister, provided the opinion that the reservation in favour of the Department of Indian Affairs required the province to transfer the land required to carry out the arrangement to create an Indian Reserve. Reliance was placed on s. 2 of *The Natural Resources Transfer Agreement*.

> I have the honour to return you herewith your file 27132-3 which accompanied your letter of February 20th, and 27107-4 lately submitted to this Department upon request. It is noted that before transfer of the natural resources to the Province of Saskatchewan, the Commissioner of Dominion Lands had, at the request of your Department, placed a reservation on the records of Dominion Lands at Prince Albert in favour of your Department against the vacant and available lands in Township 55, in Ranges 22-3-4; Township 56, in Ranges 23-4; unsurveyed Township 56, in Range 22 and the S. half of

Township 57, in Ranges 22-3, all west of the second meridian. The letter of March 20, 1930, from the Commissioner of Dominion Lands to his agent at Prince Albert, carrying the following paragraph,

> "I beg to inform you the Department has recently decided to authorize you to place a reservation in your records in favour of the Department of Indian Affairs against the vacant and available land in the above described townships and parts of townships."

would appear definitely to earmark this land for purposes of the Department of Indian Affairs, and a copy of this document was forwarded to the Department of Natural Resources at Regina on the 18th May, 1931.

While the reservation was in gross in anticipation of a selection by representatives of the Department of Indian Affairs of the approximate acreage to which the Indian bands were entitled, which selection was effected in October 1931, the blanket effectiveness would not I think be diminished by reason of the probability of a certain undefined proportion of the aggregate land being released eventually by the Department of Indian Affairs.

It appears that the Deputy Minister of Natural Resources for the Province of Saskatchewan rejects the selection, as subsequently made by you, on the ground that exemption under the Natural Resources Agreement with Saskatchewan by Clause 10, of lands included in Indian Reserves, and a provision in that clause for setting aside further areas by the Province to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, applied only to lands in the selection of which the Superintendent General and the appropriate Minister of the Province agreed. Clause 2 of the Agreement provides that the Province will carry out any arrangement whereby any person has become entitled to any interest in Crown lands against the Crown; in view of the status of the Department of

> Indian Affairs in the arrangement with the Commissioner of Dominion Lands in respect of the lands above mentioned as a trustee for the Indians, I would suppose that the arrangement under which the said land was earmarked would fall within the clause.
>
> Probably there would be difficulty in bringing these lands within the four corners of Clause 10, as the lands therein considered might be held to include only lands definitely confirmed as Indian Reserves and lands selected and surveyed, but not at the time of the Agreement confirmed as Indian Reserves, and your file shows that the lands in question were not selected until after the Agreement went into effect; as suggested above, however, Clause 2 of the Agreement does appear applicable to the circumstances.
>
> [Exhibit P-7, p. 1930]

It is noted that no reference is made to clause 19 of the agreement. In any event, Premier Anderson rejected the opinion and maintained his refusal to transfer the selected lands (Ex. P-7, p. 1948). Mr. Edwards suggested a reference to the Exchequer Court, but it was not pursued.

[279] The matter then died until 1936 when discussions began anew about setting aside Reserve Lands in the Candle Lake area. In the end, nothing came of them and on May 6, 1939, Mr. T.E. Crerar, Minister of Indian Affairs, wrote to Mr. W.F. Kerr, Minister of Natural Resources, abandoning any claim to the Candle Lake lands.

> Under date of November 24th, 1938, I received a letter from the Honourable T.C. Davis outlining the attitude of the Province toward the proposed Indian Reservation at Candle Lake. Since that date the matter has been the subject of personal discussion with you and Mr. Davis on different occasions. It has also engaged the attention of the officials

of this Department, and particularly those of the Indian Affairs Branch, for some time.

May I advise you therefore that a conclusion has been reached to withdraw the claim we have made to additional land at Candle Lake, concerning which you protested, and to leave your Government free to make the land available for white settlement as suggested in Mr. Davis' letter above referred to.

In doing so however I rely on the understanding as expressed by Mr. Davis that 'compensating factors can be provided the Indians where they live'. It is suggested that this understanding might be implemented by your granting our request for lands for their immediate use as outlined in my letter to you under date of April 27th. Also that at some future time when the question of selection of exclusive hunting and trapping grounds comes up for consideration that you will be generous enough to ignore the acreage limits set down in the treaties.

You are aware that under the treaties the limitation of 640 acres to each family of five is fixed for "farming lands". While this might be adequate for the type of land contemplated by the treaties I think you will agree that it is not a proper yardstick to use in measuring hunting and trapping areas, which occupations by their nature demand a wider range.

These matters must of necessity be left for future consideration and negotiation, and in the meantime it gives me pleasure to release the Candle Lake lands to you free from the claims formerly urged by this Department on behalf of its Indian wards.

[Exhibit P-7, p. 2141]

Mr. Kerr responded as follows in a letter dated May 18, 1939.

> I have for acknowledgment your letter of May 6th last in which you convey the very gratifying information of the release of the Candle Lake lands to this Government free from the claims formerly urged by the Department of Mines and Resources on behalf of its Indian wards.
>
> I wish to express our appreciation of your action in this regard and to extend our sincere thanks for the same.
>
> I have noted the understanding as expressed to you by the Hon. T.C. Davis when the subject matter of these lands was discussed between you and also the point now raised in your letter that the limitation of 640 acres to each Indian family of five, which was fixed for farm lands, might well be extended to provide for a larger acreage where hunting and trapping areas are involved.
>
> As you say these matters must of necessity be left for future consideration and negotiation but I wish to assure you that we will approach these matters of mutual concern in a most sympathetic manner, and I do not anticipate that there will be any difficulty in reaching mutually satisfactory decisions.
>
> [Exhibit P-7, p. 2144]

[280] In that same month, the Registrar of Dominion Lands placed in the register with respect to the Candle Lake lands the notation: "Withdrawn from Reserve by Ottawa letter of May 6, 1939." Thus ended the Candle Lake saga.

(2) Candle Lake Lands - A Reserve?

[281] No Indian Reserve was created at Candle Lake. The Dominion Government was interested in creating a Reserve; it took steps to create a Reserve; it

intended to create a Reserve; it made a tentative decision to create a Reserve; but it did not create a Reserve. At the very end it abandoned the project.

[282] Treaty No. 6 speaks of a deputy. The exact words are these:

> That the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, ...

Within itself the word "depute" contains the notion of superior and inferior. The former possesses authority, but passes it on or shares it with the latter. In each instance it is necessary to ascertain what authority was conveyed to the deputy.

[283] The Dominion of Canada is one of the parties to Treaty No. 6 and as such must participate in the creation of an Indian Reserve. As provided in the treaty, this would be done through its officer, the Chief Superintendent of Indian Affairs. It was that person who possessed the ultimate authority.

[284] Following execution of the Treaty, it was the Dominion of Canada which owned all the land. That being so, it is only reasonable that land could not be alienated without its approval and concurrence. In respect to Indian Reserves it fell to the Chief Superintendent to initiate the process of establishing Reserves by deputing a suitable person. However, it also was his role to decide what authority would be conferred upon his deputy. Thus, the Chief Superintendent could authorize his deputy to actually create a Reserve or he could retain the final decision unto himself. The act of deputation does not of necessity entail a complete abdication of authority. In the historical record there are

examples of both approaches. The Treaty itself does not mandate one approach or the other.

[285] It is useful to look at what transpired when several small Reserves were created for the Lac La Ronge Indian Band in 1909. The process began on July 5, 1909, with Mr. J.D. McLean, Secretary, Department of the Interior, sending a letter of instructions to the surveyor, Mr. J. Lestock Reid. The letter stated as follows:

> . . .I have to say that as it appears a number of prospectors are entering the Lac La Ronge District it is desired to lay out the proposed reserves in that locality as soon as possible. I have therefore to request you to proceed to Lac La Ronge for that purpose as soon as you have completed the work in connection with the surrendered and new reserves of the Thunderchild, Moosomin and Salteaux Indians.
>
> . . .
>
> These six suggested locations [as described earlier in the letter] correspond roughly with the present grouping of the Indian population throughout the district; for they live for the most part in settlements around the lake and on the Churchill, at points which they find most favorable for fish and most convenient to their hunting grounds.
>
> . . .
>
> When you have decided on a location for a reserve and especially when you have completed the survey of it (and of all the proposed reserves) please advertise the fact in the locality by every means in your power and let it be known that no trespass on an Indian Reserve after it has been located and surveyed will be allowed.
>
> [Exhibit P-3, p. 623]

[286] Certain things should be noted. First, there was an urgency about the matter because non-Indians were entering the area. Secondly, the Department indicated the locations and this amounted to some restriction on the authority of the surveyor. Thirdly, the letter expressly directed the surveyor to decide on a location, complete a survey and then proclaim the subject lands to be an Indian Reserve. Once that was done, the Department viewed the process as complete. In that instance, authority to actually create the Reserve was expressly conferred upon Mr. Reid.

[287] This is borne out by what subsequently took place. On December 30, 1909, Mr. Reid forwarded to Mr. McLean the plans and field notes of the Indian Reserves he had surveyed for the Lac La Ronge Indian Band. Mr. McLean forwarded these documents to the Department of the Interior. There later was a lengthy discussion about obtaining Orders-in-Council confirming the Reserves. They were not passed until 1930. In the meantime the Department, the Indians and the world at large treated the tracts of land as described by survey as Indian Reserves. In short, Mr. J. Lestock Reid did what he was empowered to do and that was endorsed by the appropriate officer on behalf of the Dominion Government.

[288] Let us contrast that with what happened in respect to the Candle Lake lands. It is beyond dispute that the Department of Indian Affairs thought it desirable and appropriate to establish an Indian Reserve at Candle Lake. Thus we have Mr. A.F. McKenzie, Assistant Deputy and Secretary of Indian Affairs, writing as follows to the Commissioner of Dominion Lands.

> In connection with additional lands to which the Indians of the Lac la Ronge bands are entitled under the terms of Treaty, I have to advise you that it is the intention

> of the Department to endeavour to select some or all of these in the vicinity of Candle Lake and with this in view it is hoped to send a departmental representative into that district this year.
>
> I should like to be advised, therefore, if you could, pending the selection, withhold from sale or settlement all those lands not already disposed of in Tp. 55, Rgs. 22, 23 & 24, Tp. 56, Rgs. 23 & 24 and the S. 1/2 Tp. 57, Rgs. 22 and 23, as well as unsurveyed Tp. 56, R. 22, all West of the 2nd Meridian.
>
> [Exhibit P-5, p. 1478]

In time, on March 20, 1930, the following entry was made in the Dominion Lands Register in respect to the described lands.

> Reserved 20 March 1930 Candle Lake Indian Reserve # OnC PC File 5463148.

[289] On September 18, 1930, the process moved along when Mr. MacKenzie wrote to Mr. H. W. Fairchild, an experienced surveyor.

> On completion of your work at Janvier, you are requested to proceed to the Candle Lake District making an inspection with a view to determining what sections in Tp. 55, Rgs. 22, 23 & 24, Tp. 56, R. 23 & 24, S. 1/2 Tp. 57, R. 22 & 23 and unsurveyed Tp. 56, R. 22, all W. 2. M. would be most suitable for the purposes of an Indian reserve.
>
> As you are aware there is still considerable acreage due to the Indians of the Lac la Ronge bands and it is desired to know if it would be advisable for the Department to select in the Candle Lake District the lands to which these bands are entitled.

> As the Indians who own the Little Red River Indian reserve No. 106A are members of these bands, it is considered desirable that such Indians as you should find it necessary to employ when making this cruise, should be the principal or head men of this reserve, and in any event you should arrange for one of the head men of this reserve to accompany you.
>
> [Exhibit P-6, p. 1561]

Contrary to the suggestion of counsel for the plaintiffs, this letter does not instruct Mr. Fairchild to establish an Indian Reserve. The instructions differ dramatically from those earlier provided to Mr. J. Lestock Reid in 1909. There is no directive to make a selection or complete a survey, although the latter would largely be unnecessary as the township plan had been established over most of the land. What Mr. McKenzie was really seeking was information about suitability of the land so that an informed decision could be made and the process hopefully moved along. It is also significant that he speaks of the Department selecting the land. That never changed.

[290] As it happened, Mr. Fairchild was unable to attend and inertia set in. However, the project was not abandoned. On February 4, 1931, Mr. McKenzie wrote to Mr. J. M. Gale as follows:

> . . .I have to advise you that the reservation of lands made by this Department in the vicinity of Candle Lake was made for the purpose of permitting the Department to select an Indian reserve at that point. It is impossible to state at the present time what lands will finally be included in this selection. However, the Department expects to have the lands which have been temporarily reserved cruised and reported upon during the present year, in order to be in a position to

> definitely inform the provincial authorities what lands are actually required for Indian reserve purposes.
>
> [Exhibit P-6, p. 1705]

On June 6, 1931, he wrote to Commissioner Graham as follows:

> The Department hopes to arrange to have a cruise made this summer of the lands available between Indian reserve No. 106A and Candle Lake, to ascertain if lands of a suitable nature could be obtained for these Indians in that vicinity.
>
> [Exhibit P-6, p. 1717]

On August 28, 1931, Commissioner Graham wrote to Mr. McKenzie as follows:

> In connection with the lands at Candle Lake, I think it would be well to have one of our officers go up there and look at the lands and make a report as to their suitability. . . .
>
> [Exhibit P-6, pp. 1759-60]

In each of the quoted excerpts from the correspondence, reference is made only to ascertaining suitability. The only mention of selection is in the letter of February 4, 1931, in which Mr. McKenzie speaks of the Department selecting an Indian Reserve. That is why he needs information about the suitability of the subject lands.

[291] That same theme continued in Mr. McKenzie's new letter of instruction dated August 31, 1931, sent to Mr. Fairchild.

> . . .proceed to the Candle Lake district to make an inspection with a view to determining what sections in Tp. 55, Rgs. 22, 23 & 24; Tp. 56, Rgs. 23 & 24, S.1/2 Tp. 57, R. 22 & 23 and unsurveyed Tp. 56, R. 22 all W.2.M. would be most suitable for the purposes of an Indian reserve.
>
> There are still approximately 52 square miles due to the Indians of the Lac la Ronge bands and it is desired to know if it would be advisable for the Department to select any or all of the area in the Candle Lake district.
>
> [Exhibit P-6, p. 1763]

Again we see reference to suitability and advisability. Again there is reference to the Department making a selection. It seems clear that Mr. McKenzie was seeking a report about the lands at Candle Lake in order that the Department could be confident it was making a good selection.

[292] As happened before, Mr. Fairchild was unable to perform the assigned task. However, Commissioner Graham had arranged for Inspector W. Murison to assist Mr. Fairchild and it was then decided to have Inspector Murison proceed on his own. The letter of instruction from Mr. McKenzie is dated September 19, 1931, and the significant portion reads in this way.

> With further reference to your letters of August 28th last and September 8th, I have to advise you that as it is probable that Mr. Fairchild will not be able to proceed to the Candle Lake district after his return from Fort Chipewyan, it is requested that you will arrange to have the Inspector to whom you refer in your letter proceed to that district to make a cruise of the lands which have been temporarily reserved,

> in order to ascertain what lands, if any, should be applied for as a permanent reserve.
>
> [Exhibit P-6, p. 1777]

Once again a request was being made for information. No person was being deputed or in some way being authorized to set aside or create Reserve lands.

[293] In the same vein, Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs, wrote to the Minister's secretary on September 30, 1931.

> The temporary reservation of the lands which this Department has had withheld from sale or settlement in Townships 55, 56 and 57, Ranges 22, 23 and 24, as referred to in your memorandum of the 22nd instant, was for the purpose of enabling the Department to make an inspection of this area with a view to selecting reserves for the Lac la Ronge Indians and not for the Indians of the Montreal Lake Reserve. . . .
>
> Arrangements have been made to have an inspection of this area made during the coming month and when the report of this inspection is received, it is hoped that the Department will be in a position to release from temporary reservation a considerable portion of the area.
>
> [Exhibit P-6, p. 1787]

It is clear that he contemplates the Department selecting the lands and this accords with the thoughts of Mr. McKenzie.

[294] It next happened that on November 4, 1931, Inspector Murison sent his report to Commissioner Graham. It contained these remarks.

> I beg to report that I left Regina on the afternoon of October 8th and proceeded to the Candle Lake District for the purpose of making a selection of lands for the Amos Charles and James Roberts Bands, in the Ile a la Crosse Agency. I was met at Prince Albert by the two Headmen of the James Roberts Band, namely, John Bell and John Morin, who accompanied me when cruising the land.
>
> Attached hereto you will find a map of the townships set aside for this purpose, showing the lands selected by me enclosed in blue markings. This selection was approved by the Headmen from the James Roberts Band, and they assured me that the Amos Charles Band would be pleased with it. I am also attaching a statement showing in detail the sections, township and ranges of the lands selected.
>
> . . .
>
> When selecting the land I had in mind picking out lands suitable for farming, grazing, hay, and also to keep the areas in as compact parcels as possible. The land cannot be called choice, but it is certainly the best that is available, and I would recommend that the selection be approved.
>
> [Exhibit P-6, p. 1811]

Here is the heart of the plaintiff's claim to the lands at Candle Lake. They point to the fact that Inspector Murison met with and consulted with the Indians and then selected the lands. They say this is what is required by the Treaty and what happened on other occasions such as in 1909. Therefore, an Indian Reserve was created.

[295] In my opinion there is a basic fallacy in the reasoning. The letter of instruction very clearly stipulated that Inspector Murison was ". . .to make a cruise of the lands. . .in order to ascertain what lands, if any, should be applied for as a permanent

reserve. . . ." The earlier instructions to Mr. Fairchild, on August 31, 1931, had been to the same effect. In neither instance were any instructions given for lands to be selected for an Indian Reserve. Inspector Murison was never authorized to perform this task. He was never deputed. The final selection was retained for the Department. This was recognized by Commissioner Graham, a seasoned veteran of Indian matters and a strong advocate for the Indians, for he wrote in his letter of November 4, 1931: ". . . If this selection is approved, I think the Department should take prompt action to secure it. . . ." (Exhibit P-6, p. 1809). The use of the word "selection" by Inspector Murison does not bring about the result advocated. He himself recognizes that the "selection" has to be approved by the Department.

[296] However, the Department did take the report of Inspector Murison under advisement and did act on it. Certain lands at Candle Lake were selected by the Department with the intention and for the purpose of establishing an Indian Reserve for the Lac La Ronge Indian Band. Thus we have Deputy Superintendent General, Duncan Campbell Scott, writing to Major Barnett about this very subject on two occasions. The first was November 20, 1931.

> The Indians of the James Roberts and Amos Charles bands are still entitled under the terms of Treaty to receive reserve lands to the extent of approximately 80 sq. miles. As you are aware, the Department has been selecting a considerable portion of this area in the vicinity of Candle Lake, where it is desired to reserve for them an area of approximately 70 sq. miles, leaving the remaining area due them to be selected in the Lac la Ronge District.
>
> From the information at hand at present, the lands required in the Candle Lake District may be generally described as, - All the unalienated lands in the following Townships, -

Frac. Tp. 55-22-W.2.M.
Frac. E. 1/2 Tp. 55-23-W.2.M.
All of Tp. 55-24-W.2.M.

> A detailed statement enumerating the particular sections is being prepared and will be forwarded to you in a few days with a request that the lands be set aside as a reserve for the above mentioned bands. When an agreement has been arrived at with your Government as to the actual lands to be set aside for the purpose of these reserves, the Department will then be able to cancel its request that the remaining lands in Tp. 55, Rgs. 22, 23 and 24, Tp. 56, Rgs. 23 and 24, S.1/2 Tp. 57, Rgs. 22 and 23, as well as unsurveyed Tp. 56, R. 22 all W.2.M. withheld from lease, entry or other disposition.
>
> [Exhibit P-6, p. 1835]

The second was January 12, 1932, when a request was made to have specific lands transferred to the Department.

> I am enclosing a detailed list of lands selected by the Department in the Candle Lake District for the Indians of the James Roberts and Amos Charles bands, as referred to in my letter to you of the 20th November last. I shall be pleased if you will take the action necessary to have these lands transferred to this Department for the purpose of the Candle Lake Indian reserve.
>
> [Exhibit P-7, p. 1862]

Major Barnett, on behalf of the Province of Saskatchewan, rejected the request. Finally, on May 6, 1939, the Department abandoned its claim to the lands.

[297] As already stated, a selection of land was being made by the Department no later than November 20, 1931, and it was completed by January 12, 1932. There was an intention on the part of the Department to set aside the selected lands as an Indian Reserve. However, that intention was never carried into practice. The underlying reasons for the failure were both political, and not very admirable, and the result of an interpretation of the *Natural Resources Transfer Agreement*, which interpretation I suggest was wrong. However, the reasons are not the governing factor. What is determinative is the decision not to proceed.

[298] In the case of the Candle Lake lands the Dominion Government, acting through the Department of Indian Affairs, involved itself directly in the creation of an Indian Reserve. It held unto itself the ultimate authority to establish the Reserve. Until the Department made an unequivocal decision to designate certain lands as an Indian Reserve and then took steps to implement the decision, the intended Reserve could not come into existence. It fell to the Department alone to proclaim the creation of an Indian Reserve at Candle Lake and it failed to do so. It's intention in itself was not sufficient. As the process had not passed beyond that, no Reserve was created.

I. LA RONGE SCHOOL LANDS

[299] At the beginning of this century an Indian Boarding School was established on lands located on the shore of Lac La Ronge. It happened that the school burned down, not once but twice, and the lands were ultimately transferred to Saskatchewan and now form part of the townsite of La Ronge. The plaintiffs submit that the lands were originally set aside as an Indian Reserve and remain so because they were never

surrendered. The defendants submit that the Department of Indian Affairs provided the school and operating funds, but never created an Indian Reserve by doing so.

[300] As with the Candle Lake lands, the issue here is whether an Indian Reserve was created. And yet there is something of a difference. In the case of Candle Lake, the written historical record clearly sets out what transpired and it was necessary only to determine the effect of the actions taken. In the case of the La Ronge school lands the historical record is not so clear. Therefore, it is necessary to decide what occurred and then to determine its effect.

(1) The Facts

[301] I begin this factual narrative by quoting an anonymous, undated handwritten memorandum.

> The Indians in question come under Treaty 6.
>
> The drill for setting aside an area for school purposes is: -
>
> (1) Acquire land and establish it as an Indian Reserve.
>
> (2) Have Band pass a resolution setting aside such land as is necessary for school purposes, for so long as it is used for that purpose.
>
> Telegram hereunder
>
> [Exhibit P-1, p. 112]

I do not have the telegram "hereunder" and I do not know who was the recipient of the memorandum. In any event, the plaintiffs submit that this document clearly indicates that schools were to be established on Reserves and sets out the process to be followed. I shall later return to this.

[302] Following is what happened in respect to the residential school. After the signing of the Adhesion Agreement to Treaty No. 6 in 1889, the Department of Indian Affairs established a day school at Montreal Lake and another at Little Hills which was some nine miles from Lac La Ronge. The schools were not very successful because of the limited talents of the teachers and the poor attendance by the pupils who were required to move about with their families who lived an unsettled life (Ex. P-2, p. 333 and Ex. P-2, p. 335). It appears from the 1899 report of Mr. W.J. Chisholm, Inspector of Indian Agencies, that the Department closed the schools in 1898, but the Church Missionary Society continued to operate them with ". . .the teachers doing rather a missionary than an educational work. . . ." (Ex. P-2, p. 401).

[303] However, down through the years there had been discussion about schooling for the Indian children. As early as January 25, 1890, Commissioner Hayter Reed, in a memorandum to Mr. Vankoughnett, the Deputy to the Superintendent General of Indian Affairs, advised that the Indians at Lac La Ronge wished to have Reserves set aside in the several places where they were then located rather than in one common location. Mr. Reed favoured this, but recognized that the missionaries might wish otherwise. To overcome that problem he suggested a common reserve for mission purposes, which would presumably include schooling.

> The missionaries may probably view the idea of a Reserve in common with more favour, as more convenient for their work, but I would suggest that it will answer the purpose, if we reserve a centrally situated parcel of land for Mission purposes.
>
> [Exhibit P-1, p. 163]

On February 1, 1890, Mr. Vankoughnett reported to the Minister who appears to have approved the suggested approach as on March 1, 1890, Mr. Hayter Reed wrote to Rev. Archdeacon J.A. MacKay as follows:

> . . .—When he [the surveyor] goes up there it is proposed instead of having one large Reserve to allow the Indians where they desire it to take their allotments where they now have them around the Lake, and locating a small reservation (where it was decided to place the large one) for Mission purposes and such Indians asreally [sic] desire to be at that part—. . . .”
>
> [Exhibit P-1, p. 168]

Considerable correspondence then took place about where Reserve Lands should actually be set aside.

[304] In a report dated October 1, 1891 a Mr. Campbell spoke of the arrangement for several small reserves and near the end said this about the day school at Little Hills.

> I visited the school at Little Hills, but was not very favourably impressed.
>
> The Teacher Mr. Hunt, one of the Band, no doubt does his best, but that is as much as can be said in his favour.

> The Venerable Archdeacon J.A. MacKay is alive to the situation, and is awaiting an opportunity to make a change.
>
> [Exhibit P-1, p. 230]

Then in the annual report of November 5, 1895, the possibility of a boarding school was raised.

> The prospect of having a boarding school was then enquired about. After ascertaining that at least 30 children and possibly many more could be secured, I explained the difficulties that lay in the way, such as the great expense that would be incurred in supplying the building material and furniture, and the difficulty in engaging a teacher, such as the Department would like, to accept a position in such a remote spot.
>
> The Chief says he does not think the children are getting on so well as they should under the present teacher, but the Rev. Archdeacon McKay informed me afterwards that the teacher, who is an Indian, is very painstaking and is doing well considering the irregular attendance of the children.
>
> [Exhibit P-1, p. 261]

However, the matter did not move forward.

[305] In a letter dated January 10, 1898, Archdeacon MacKay described for Mr. A.E. Forget, the Indian Commissioner, certain problems with the school at Little Hills (Ex. P-2, p. 333). The Commissioner then sent a copy of the MacKay letter to Mr. J.D. McLean, Secretary of the Department of Indian Affairs and made these comments.

> . . .From this letter it will be seen that there is little hope of the Church Authorities being able to secure the services of a more competent teacher than the one now in charge. This coupled with the small and irregular attendance prevailing at that School, the question arises whether it is worth while to keep such a school open.
>
> [Exhibit P-2, p. 335]

By letter dated February 16, 1898, the Secretary informed him that it would not be advisable to close the school. (Ex. P-2, p. 336).

[306] Later that same year, in his report of September 8, 1898, Indian Agent H. Keith raised the school issue.

> My own opinion is the School is no good and is only a bill of expense the way it has been conducted, I asked some of the Indians why they did not send their children more regularly, but they say they have to take them off hunting. . . .
>
> In view of the many Industrial Schools in the country which have to be kept going, I am afraid to suggest that a boarding School at either Montreal Lake or Lac La Ronge, the latter the best point, be established and that the 2 day schools, which with the Church grant, cost nearly $1000.00 a year to keep up, as they are doing no good, be closed, I do not mean boarding school of an expensive kind, let the Indians furnish the logs and work at the building and supply so much fish at intervals, grow a large quantity of vegetables, as they will grow well at Lac La Ronge, keep a cow or two, all of which would reduce the expense considerably.
>
> [Exhibit P-2, p. 362]

That brings us back to the report of Mr. W.J. Chisholm, of October 28, 1899, referred to earlier, in which he stated the Department had closed the schools, but the Church continued to operate them (Ex. P-2, p. 401).

[307] In his next report of September 25, 1900, Inspector Chisholm wrote of the Indian's desire to have a boarding school.

> Chief James Roberts and the Councillors of his band desired to have an application communicated to the Department on their behalf for the establishment of a Boarding School at Lac La Ronge. They maintain that the Indians of their band are anxious for the education of their children and yet cannot avail themselves of the benefits of a day school, since even those who have their houses at Little Hills remain there but for short intervals during the year. The subject came up incidentally at a former treaty payment, but not until the present did it assume the nature of an application. They maintain further that their children learn nothing at the day school when they attended. Concerning this I may refer to the accompanying report which indicates a very low state of efficiency.
>
> A well equipped Boarding School at this point would fill a sphere of great usefulness, not only for this band but for the others adjacent. The school population is large. All might not attend; but through such a school education would doubtless reach a large number, whereas through the day school it reaches none. . . .
>
> [Exhibit P-2, p. 417]

A handwritten notation on the margin of the above suggests that the matter be taken up with the Rev. Archdeacon J.A. MacKay and the results reported to the Department. As so often happened, the project advanced very slowly, but advance it did. Construction

appeared imminent by the summer of 1905. In his annual report dated September 22, 1905, Inspector Chisholm advised as follows:

> The Lac la Ronge day school was not in session on either occasion as I passed. It is situated at Little Hills, some nine miles west of Lac la Ronge. It may, I presume, be taken for granted that it will be closed as soon as the new Boarding School is prepared to receive pupils.
>
> [Exhibit P-2, p. 444]
>
> . . .
>
> There is nothing as yet to mark the site of the proposed boarding school except the clearing from half an acre of land of the light growth of poplar timber with which it was covered. But it was expected the saw-mill referred to in paragraph 3 above would be in operation about the end of August, and shortly after that the work of building would begin. The site selected is as healthful and as suitable in every respect as could be found in the locality.
>
> [Exhibit P-2, p. 445]

[308] In fact, the school did not get started until 1907. This appears in notes dated September 9, 1907, by an unknown author. They describe in some detail the circumstances of the boarding school.

> NOTES TAKEN RE THE LAC LA RONGE BOARDING SCHOOL.
>
> 9th September, 1907.
>
> ----------Dimensions of School Building----------

Main building,	90 x 26 feet, 2 stories high, shingled.					
Kitchen attached to main building	24 x 20 ft.	"				
Store house	70 ft from	"	"	10 x 15	"	"
Milk	"	80 ft	"	"	12 x 12	"
Fish	"	100 ft	"	"	10 x 12	"

The main building is on a stone foundation. The school was started on the 1st January, 1907, with an attendance of 15 pupils, was started in the building being now used for kitchen, the main building which was begun to be built (above the foundation) in the first week of November, 1906, was not sufficiently completed to carry on the school in it until well on in the summer of this year '07. At the present time there are 14 boys and 20 girls attending school. Of that number there are 12 boys and 17 girls Treaty, and 2 boys and 3 girls non-treaty, taught by a lady-teacher, Miss A. Cunningham, who holds no certificate, but has been teaching on a permit in Manitoba; came here on the 20th of last June, prior to that time the school was kept by Mr. William Bear, who at one time taught in the school kept on John Smith's Reserve in the Carlton Agency.

There are no fire escapes on the school building at the present time, but the intention is to have a balcony on the front of the building its full length at the base of the upper story, with doors at each end of it opening into the two dormitories, and a stair at each end of the balcony leading to the ground, which will prove a means of safety to the occupants of the building. The building is well and substantially built of spruce, it is not yet finished, and will not be so for some time yet, owing to the scarcity of labor; but, however, considerable progress is being made with what is required yet on the building to make it habitable for the winter.

The staff at the school establishment at present, consists of the Rev. J. Brown, Principal and Mrs. Brown as matron. Miss A. Cunningham, teacher, Mr. Wm. Bear also connected with the religious teaching and conducting of the school, etc; Samuel Abraham and his wife, who are acting as fisherman and seamstress respectively for the school.

There is about one acre and a half of land under cultivation in connection with the school in which a very fine crop of potatoes is growing as well as cabbage, turnips, carrots, onions, lettuce and pease [sic].

With reference to expenditure at the school, a report upon that was sent to the Department of Indian Affairs in April last for the year ending 31st March, 1907.

There is the following live stock belonging to the school, viz: -

2 Milch [sic] cows
1 Heifer
1 young bull
2 team horses (Geldings)

These animals were paid for by The Women's Auxiliary, who help the School in various ways.

Re the sanitary condition of the school children, and the school building, etc. vide Doctor H.A. Stewart's report in that connection.

The following books are required for the use of this School, viz: -

Arithmetic,
Geography
History and
Text books such as are being used in the public schools.

[Exhibit P-2, p. 509]

[309] Throughout the years during which the boarding school was coming into existence, there were discussions about setting aside Reserve Lands for the Lac La Ronge Indian Band. In a letter dated June 6, 1908, Mr. J.D. McLean, Secretary, Department of Indian Affairs, instructed Inspector Chisholm to take certain action in respect to the Indians' request for a Reserve.

> This matter originated in a letter from the said Amos Charles, Chief of the Lac la Ronge Band dated 30th August, 1906, in which he requested that a reserve should be made out for him and his band at Lac la Ronge. The Department is prepared to accede to this request and to take the necessary action to secure the land. I shall be obliged as above requested if you will go fully into the matter with Mr. Agent Borthwick, interview the Indians of Lac la Ronge, decide on the locality of the reserve and its approximate extent and report fully on the matter.
>
> [Exhibit P-2, p. 584]

[310] On December 27, 1908, Inspector Chisholm reported that he had met with the Indians at Lac La Ronge and Stanley and that they requested ". . .that the remainder of the lands to which they are entitled be located in several small reserves. . . ." (Ex. P-2, p. 599). Both he and Agent Borthwick supported the request. Mr. Duncan Campbell Scott, who was then an accountant with the Department of Indian Affairs, did the same in a memorandum dated January 11, 1909, to the Deputy Superintendent General (Ex. P-2, p. 602). On January 20, 1909, Secretary McLean wrote to the Secretary, Department of the Interior and advised him that the Department of Indian Affairs intended to survey Reserves for the Lac La Ronge Indian Band at six sites around Lac La Ronge. He stated

that he ". . .shall be obliged if you will be good enough to have a note made of the localities and take such steps as may be necessary to insure that no grants of land, or of timber, or any other rights are made until the said surveys have been executed" (Ex. P-2, p. 604).

[311] The Department of the Interior had concerns about mineral claims in the area which were not to be included within any lands set aside as Indian Reserves. On May 11, 1909, a blueprint was sent to the Secretary, Department of Indian Affairs. It showed the locations of mineral claims around Lac La Ronge. It also showed a "C. of Eng. Mission" on the west side of Lac La Ronge near the mouth of the Montreal River (Ex. P-3, p. 621). On July 5, 1909, Secretary McLean instructed Mr. J. Lestock Reid, D.L.S., to survey the desired Indian Reserves.

> Referring to the recent instructions to you to proceed to survey the surrendered portions of the Key Reserve. I have to say that as it appears a number of prospectors are entering the Lac La Ronge district it is desired to lay out the proposed reserves in that locality as soon as possible. I have therefore to request you to proceed to Lac La Ronge for that purpose as soon as you have completed the work in connection with the surrendered and new reserves of the Thunderchild, Moosomin and Saulteaux Indians.
>
> Before proceeding to the said district please interview Mr. Inspector W.J. Chisholm who has reported at length on the reserves required at Lac La Ronge. These are indicated as follows:
>
> [The locations are described.]
>
> These six suggested locations correspond roughly with the present grouping of the Indian population throughout the district; for they live for the most part in

> settlements around the lake and on the Churchill, at points which they find most favourable for fish and most convenient to their hunting grounds.
>
> Enclosed herewith is a blue print copy of a plan showing the mining locations at Lac La Ronge that have been dealt with by the Dept. of the Interior. That Dept. is very decided in its instructions that these mining locations are not to be interfered with or encroached upon by the proposed Indian Reserves, you will please guide yourself accordingly.
>
> Since the preparation of the said plan and before you will arrive at Lac La Ronge undoubtedly other mining locations will have been located. These also should not be encroached upon as it will be very difficult to remove any previous mining claim or portion of one if it should be included in an Indian Reserve.
>
> When you have decided on a location for a reserve and especially when you have completed the survey of it (and of all the proposed reserves) please advertise the fact in the locality by every means in your power and let it be known that no trespass on an Indian Reserve after it has been located and surveyed will be allowed.
>
> [Exhibit P-3, p. 623]

No mention was made of the Indian boarding school or the lands on which it was situated.

[312] Some two weeks later Archdeacon MacKay wrote to Secretary McLean requesting that Mr. Reid survey the school site.

> I am informed that Mr. Lestock Reid is ready to proceed shortly to Lac la Ronge to [illegible] out reserves under instructions from your Department I would

> respectfully request that the land on which the Indian Boarding School is situated may be surveyed by Mr. Reid. [illegible] claim for the School about half a mile frontage on Lac la Ronge and about a quarter of a mile back.
>
> I would also request that the School be allowed a small Timber Reserve on the Big Stone Lake, anything from half a mile to one square mile. . . .
>
> [Exhibit P-3, p. 626]

Counsel for the plaintiffs suggests the illegible word is "Its" whereas counsel for Saskatchewan suggests it is "We". I simply cannot make it out. In any event, by letter of July 29, 1909, Mr. J. Lestock Reid was instructed to do the survey of the school lands, but nothing was to be done in respect of the timber reserve.

> Referring to your proposed surveys of Indian reserves at Lac La Ronge I beg to inform you that in accordance with the representations made by Ven. Archdeacon J.A. MacKay it has been decided to allot to the Indian boarding school at Lac La Ronge a tract of land having a frontage on the Lake of about half a mile with a depth of about a quarter of a mile. I have to request you tobe [sic] good enough to consult with Mr. MacKay who is probably now at Battleford, or with the Principal in charge of the school, and to survey the said tract of land in the usual manner. The general instructions regarding surveys for this Department with which you are familiar will cover this case.
>
> Mr. MacKay also requested that a timber limit be also surveyed for the school but the Department has decided that no action be taken in this direction for the present.
>
> [Exhibit P-3, p. 629]

On August 6, 1909, Secretary McLean advised Archdeacon MacKay as follows:

> Replying to your letter of the 21st ult. I beg to say that the Department has instructed its surveyor, Mr. J. Lestock Reid, D.L.S., to allot to the Lac la Ronge Indian Boarding School a tract of land as requested by you and asked him to consult with you or with the Principal.
>
> [Exhibit P-3, p. 630]

[313] Mr. J. Lestock Reid reported to Secretary McLean by letters dated December 30, 1909, and January 17, 1910. They respectively read:

> I am sending in to the Department today the plans and field notes of the following Indian Reserves: -
>
> (1) Indian Reserve No. 156
> (2) " " " 156A
> (3) " " " 156B
> (4) " " " 156C
>
> Indian School Lands at Lac la Ronge.
>
> [Exhibit P-3, p. 639]

> Am sending in to the Department the following plans and field notes, being portion of my last season's work.
>
> (1.) Stanley Indian Reserve, No. 157.
> (2.) Indian Reserve No. 157 A.
> (3.) Indian Reserve No. 157 B.
> (4.) Indian Reserve No. 157 C.
> (5.) Indian Reserve No. 157 D.
> (6.) Indian Reserve No. 157 E.
> (7.) Indian Reserve No. 158.

(8.) Indian Reserve No. 158 A.
(9.) Indian Reserve No. 158 B.
(10, Indian Reserve No. 158 C.

[Exhibit P-3, p. 678]

Thus he surveyed thirteen parcels of land described as Indian Reserves and one parcel described as school lands.

[314] On March 4, 1910, Secretary McLean wrote two letters to Mr. P.G. Keyes, Secretary, Department of the Interior. In the first he enclosed plans of the thirteen Indian Reserves surveyed by Mr. J. Lestock Reid in the area of Lac La Ronge. He also enclosed a "Key Plan" which showed the approximate locations of the Reserves and the Indian School land (Ex. P-3, p. 682 and Ex. P-20, p. 6210). The letter concluded with the request that the Reserves be confirmed at an early date by an Order-in-Council. The second letter reads as follows:

> I beg to enclose you a copy of the plan of the Industrial School lands at Lac La Ronge, Sask, surveyed by J. Lestock Reid, D.L.S., of this Department last season.
>
> I shall feel obliged if you will have the necessary Order in Council transferring these lands to this Department passed at an early date.
>
> [Exhibit P-3, p. 684]

As it happened, it was decided by the Department of the Interior to hold the lands under reservation until the Dominion Lands survey system was extended to Lac La Ronge (Ex. P-3, p. 761). In the end, the Orders-in-Council confirming the reserves were not passed until 1929-30.

[315] The Annual Report of the Department of Indian Affairs for the year ending March 31, 1910, discusses Boarding and Industrial Schools across Canada. In the part dealing with the Boarding School at Lac La Ronge as prepared by the Principal, Rev. M.B. Edwards, the school is described as being located on land which is ". . .mission property, and belongs to the Church of England. . ." (Ex. D-10, p. 465).

[316] Nothing of significance happened for the next twenty years. The Department provided funding and the school appears to have carried out the role for which it was established. Then in 1920 the La Ronge settlement was surveyed into lots. The land on which the school was located was within Lot 12, which contained 76 acres. This was larger than the 70.1 acres surveyed by Mr. J. Lestock Reid, but nothing turns on this. In that same year two further things occurred. First, the Church of England claimed ownership of Lot 12 and Lot 9, the latter being used to grow hay and vegetables used by the school (Ex. P-4, p. 910 and Ex. P-4, p. 914). Secondly, with the financial assistance of the Department, a new Boarding School was being constructed as the other had burned down.

[317] As a result of the Church's claim, the Controller of the Department of the Interior, Mr. N.O. Cote, wrote to Mr. J.D. McLean, now Assistant Deputy and Secretary, Department of Indian Affairs, on September 12, 1923, and inquired whether the "Indian School Lands No. A" described in the plan of 1910 corresponded to the Lot 12 claimed by the Church. He also inquired whether the Department objected to the sale of the land to the Church or did it want the land transferred to the control of the Department (Ex. P-4, p. 970). On September 19, 1923, Mr. A.F. MacKenzie wrote to Mr. McLean as follows:

> In reply to your letter of the 12th instant, I have to inform you that the above mentioned lot (Lot 12 La Ronge) embraces the land surveyed by J. Lestock Reid, D.L.S., and applied for in Departmental letter of the 4th March 1910. It is the desire of this Department that this lot be transferred to the control of this Department for the purposes of the Indian boarding school and hospital, as the above mentioned buildings have been erected on this lot by the Department.
>
> [Exhibit P-4, p. 971]

[318] Further inquiries were made and they culminated in this letter of October 22, 1923, by Archdeacon J.A. MacKay.

> Referring to the enclosed letter from the Department of the Interior addressed to you forwarded to me by Mrs. Malaher I have to explain that the Church of England has no claim to the lots therein mentioned. The large lot of 76 acres has a frontage of half a mile on Lac la Ronge. It was surveyed at my request as a School Reserve when I was building the original Boarding school, and it belongs to the Indian Department with all the school buildings. The smaller lot, 8 acres, was cleared for purposes of cultivation while I was in charge of the school, and I had a special grant from the Indian Department for the purpose. The whole thing, school buildings and land, belongs to the Indian Department. When we handed over the school to the M.S.C.B. we, that is the Diocese, had no property to hand over. All that we handed over was the control. If Mr. Hives has made affidavits or statutory declarations in support of the claims of the Church of England, he has done so on his own responsibility or under instructions from the M.S.C.B. The Church has no claim and has no object in entering a claim for the land. The Government has built the school and the Government is supporting the school, and the whole property belongs to the Indian Department of the Government.

[Emphasis in original]
[Exhibit P-4, p. 973]

By letter dated May 20, 1924, the Bishop of Saskatchewan, Rev. G.E. Lloyd, relinquished the Church's claim to the La Ronge lands (Ex. P-4, p. 994). Both Lot 9 and Lot 12 were ". . .transferred to the control of the Department of Indian Affairs for the purpose of the Indian Boarding School and Hospital at La Ronge, Saskatchewan" by Order-in-Council P.C. 619 of May 4, 1925 (Ex. P-4, p. 1005).

[319] In time the Church of England obtained title to a part of Lot 12 on which stood its church and mission house. By Order-in-Council P.C. 21, dated January 3, 1947, 28.4 acres were transferred to the Province of Saskatchewan (Ex. P-8, p. 2344). Almost immediately after, on February 2, the boarding school burned down for the second time. By Order-in-Council P.C. 6002, dated December 13, 1950, the balance of the lands were transferred to the Province (Ex. P-9, p. 2529).

(2) La Ronge School Lands - A Reserve?

[320] I have concluded that the school lands were not established as an Indian Reserve and this is for reasons similar to those respecting the Candle Lake lands. Neither the documentary record nor the *viva voce* evidence, whether viewed separately or in conjunction with each other, support the conclusion that a Reserve was created. In fact, they suggest the contrary. While the Dominion Government established a school, it took no steps to establish a Reserve. Unlike the Candle Lake lands, the evidence does not even suggest an intention to establish a Reserve on the part of the Dominion Government.

[321] Once more the discussion must commence with Treaty No. 6 and this particular provision.

> And further, Her Majesty agrees to maintain schools for instruction in such reserves hereby made, as to her Government of the Dominion of Canada may seem advisable, whenever the Indians of the reserve shall desire it;

It is argued on behalf of the plaintiffs that the Treaty obligation of the Crown was to maintain schools and to do so on Reserves. They point to the telegram earlier set out as demonstrating the correctness of this argument. Thus, they say that you could not have an Indian school without it being on a Reserve and therefore if you have an Indian school the land on which it is situate, of necessity, must be an Indian Reserve. I accept neither the proffered interpretation of the Treaty nor the logic of the reasoning that the presence of a school mandates a conclusion that the land is an Indian Reserve.

[322] The Treaty provision stipulates several things including these.

(1) The Crown will maintain schools.

(2) The schools will be located in reserves.

(3) There are two qualifications in respect of (2) above:

(a) the Indians of the reserve shall desire it, and

(b) the Crown must deem it advisable.

Thus, if the conditions are met, then the Crown must provide a school in the Indian Reserve. To my mind, that is the situation contemplated by the telegram. If events transpired as contemplated by Treaty or as described in the telegram, then it would follow that the school lands were Reserve lands.

[323] However, Treaty No. 6 and the provision quoted do not preclude the Dominion of Canada from establishing schools off of or away from Reserve lands for the benefit of Indian children. Should a school not be desired by the Indians, but be deemed advisable by the Crown, then the school could not be constructed on Reserve land, but it could be constructed elsewhere. Conversely, if the Indians desired a school on their Reserve, but the Crown did not deem it advisable on that Reserve, it could be constructed elsewhere. In short, the Treaty created an obligation. The Crown had a duty to fulfill that obligation. Yet the Crown did not always have to act within the parameters of what was contemplated by the Treaty provision. This being so, it could maintain a school elsewhere than on Reserve land and that is the very thing it did at La Ronge, Saskatchewan.

[324] It is useful to look at the circumstances and events which preceded the construction of the boarding school in 1907. Initially, around 1900, the Department established two day schools; one at Montreal Lake and one at Little Hills. These schools were operated by the Department with the assistance of the Anglican Church. In fact, the Church Missionary Society appears to have taken over the schools in 1898 (Exhibit P-2, p. 401). It has not been suggested that these schools were on Indian Reserves, but I cannot be certain about this. What is certain is that the Department could be flexible about schooling and did work with the Church in providing schooling. Thus it is not strange that in later years there is co-operation with Archdeacon MacKay.

[325] A somewhat unique situation existed in the La Ronge area. The Indians did not want a single large Reserve, but desired several small ones. Ultimately thirteen were established. Furthermore, there were Bands, other than the Lac La Ronge Indian Band, situated in the general area and they also required schooling. It was not feasible to construct and maintain schools on all the reserves. Some other approach had to be found.

[326] The problem was recognized as early as 1890 when Commissioner Hayter Reed made these observations in a memorandum dated July 25, 1890.

> The missionaries may probably view the idea of a Reserve in common with more favour, as more convenient for their work, but I would suggest that it will answer the purpose, if we reserve a centrally situated parcel of land, for Mission purposes.
>
> [Exhibit P-1, p. 163]

Then on March 1, 1890, he wrote to Archdeacon McKay as follows:

> . . .When he [the surveyor] goes up there it is proposed instead of having one large Reserve to allow the Indians where they desire it to take their allotments where they now have them around the Lake, and locating a small reservation (where it was decided to place the large one) for Mission purposes and such Indians asreally [sic] desire to be at that part. . . .
>
> [Exhibit P-1, p. 168]

[327] These quoted pieces of correspondence are not without difficulty. The two documents from which they are extracted are speaking about Indian Reserves and when

the noun “Reserves” is used, as above, in the upper case, reference is obviously being made to an Indian Reserve. It is not so clear when the verb, “reserve” or the noun “reservation” is used. One might wonder why the word “reservation” appears rather than “Reserve” if the writer had in mind an Indian Reserve. The word reservation in its generic meaning would be appropriate and correct if it was intended to simply reserve land for mission purposes. This appears to be what was contemplated in the first writing. However, things become murky when one looks to the second writing which seems to speak of a second purpose; that is, for “. . . such Indians as really desire to be at that part.” In the end I do not know the answer, although I tend to the view that it was contemplated that land would be set aside for Mission purposes and not as an Indian Reserve.

[328] In my opinion, that is what actually happened, although it took some fifteen years. In his report of September 22, 1905, (Ex. P-2, p. 444) Inspector Chisholm speaks of the pending boarding school. He states that the site has been selected, but is yet unmarked, and some clearing has been done. In any event by September 7, 1907, the boarding school was operational.

[329] The year of commencement is important. Throughout the years, beginning in 1889 to 1900, there had been discussions about establishing Reserves at Lac La Ronge. Yet nothing concrete happened until June 6, 1908, when Secretary McLean wrote to Inspector Chisholm advising the Department was prepared to accede to the Indians request for a Reserve and instructing him to inquire into the matter, decide on a locality and the extent of the reserve and report fully (Exhibit P-2, p. 584). Inspector Chisholm reported back on December 27, 1908. Instructions to conduct surveys in the Lac La Ronge area were sent to Mr. J. Lestock Reid on July 5, 1909.

[330] What is significant is that this last date is almost four years after the site was selected for the boarding school and almost two years after the school was operational. At that time the school was not on Reserve lands. This clearly demonstrates that the Department could and would maintain schools other than on Reserve land. It also shows that the procedure outlined in the telegram earlier quoted was not mandatory, but that the Department could operate in a very different way.

[331] I next turn to the very letters of instruction, which are two in number, in an attempt to ascertain the Department's intention. It must be remembered that we are here dealing with a different Treaty provision and one which does not speak of someone being deputed. In reality the power rests with the Department and it is for the Department to decide what and how things will be done.

[332] The first letter of instruction is dated July 5, 1909, and is addressed to Mr. J. Lestock Reid. The letter instructs him to survey Indian Reserves for the Lac La Ronge Indian Band and then to let it be known that trespass on a reserve will not be allowed.

> When you have decided on a location for a reserve and especially when you have completed the survey of it (and of all the proposed reserves) please advertise the fact in the locality by every means in your power and let it be known that no trespass on an Indian Reserve after it has been located and surveyed will be allowed.
>
> [Exhibit P-3, p. 623]

In this letter absolutely no mention is made of the school lands. This strongly suggests there was no intention on the part of the Department to establish the school lands as a Reserve.

[333] The second letter of instruction is dated July 29, 1909, and while it is reproduced earlier, I do so again for ease of reference and because of its importance.

> Referring to your proposed surveys of Indian reserves at Lac La Ronge I beg to inform you that in accordance with the representations made by Ven. Archdeacon J.A. MacKay it has been decided to allot to the Indian boarding school at Lac La Ronge a tract of land having a frontage on the Lake of about half a mile with a depth of about a quarter of a mile. I have to request you tobe [sic] good enough to consult with Mr. MacKay who is probably now at Battleford, or with the Principal in charge of the school, and to survey the said tract of land in the usual manner. The general instructions regarding surveys for this Department with which you are familiar will cover this case.
>
> [Exhibit P-3, p. 629]

Several things should be noted about this letter. To begin, it was written at the behest of Archdeacon McKay. It was not initiated by the Department. Next, the earlier letter expressly spoke of Indian Reserves whereas this letter is devoid of that terminology. In addition, the letter speaks of allotting land to the Indian boarding school and not to an Indian Band. Finally, there is no mention of consultation with the Indians which is a Treaty requirement. Rather, consultation is to be with Archdeacon McKay or the Principal. This is understandable if the land is for the school and not the Band. When I weigh all of this it seems clear that the Department had no intention to create an Indian Reserve contiguous to the school.

[334] I find confirmation of this in what followed. The two reports of Mr. J. Lestock Reid, dated November 30, 1909, and January 19, 1910, state as follows and I again reproduce them because of their importance.

> I am sending in to the Department today the plans and field notes of the following Indian Reserves: -
>
> (1) Indian Reserve No. 156
> (2) " " " 156A
> (3) " " " 156B
> (4) " " " 156C
>
> Indian School Lands at Lac la Ronge.
>
> [Exhibit P-3, p. 639]

> Am sending in to the Department the following plans and field notes, being portion of my last season's work.
>
> (1.) Stanley Indian Reserve, No. 157.
> (2.) Indian Reserve No. 157 A.
> (3.) Indian Reserve No. 157 B.
> (4.) Indian Reserve No. 157 C.
> (5.) Indian Reserve No. 157 D.
> (6.) Indian Reserve No. 157 E.
> (7.) Indian Reserve No. 158.
> (8.) Indian Reserve No. 158 A.
> (9.) Indian Reserve No. 158 B.
> (10.) Indian Reserve No. 158 C.
>
> [Exhibit P-3, p. 678]

Mr. Reid obviously had read the letters of instruction as assigning two different tasks, the one distinct from the other. He himself distinguished between Indian Reserves and

Indian School Lands. This was a man experienced in surveys and the creation of Indian Reserves and he did not give the designation of Indian Reserve or a number to the school lands.

[335] Later, on March 4, 1910, Secretary McLean treated the plan prepared by Mr. Reid in two different ways. On that date he wrote a letter to Mr. Keyes of the Department of the Interior, enclosing the plans for the thirteen reserves, and requesting that they be confirmed by Orders-in-Council. In a second and separate letter he forwarded the plan of the school and requested an Order-in-Council transferring the lands to the Department (Exhibit P-3, p. 632 and Exhibit P-3, p. 684). These acts clearly establish the intent of the Department as to certain lands. It intended to establish them as Reserves. As to other lands, they were for a school. While the Department was prepared to accommodate Archdeacon McKay, it was never the intention to establish the boarding school lands as an Indian Reserve.

[336] In his letter of October 22, 1923, Archdeacon McKay, who was present throughout, says the same thing.

> . . .It [the boarding school] was surveyed at my request as a School Reserve when I was building the original Boarding School, and it belongs to the Indian Department with all the school buildings.
>
> [Emphasis in original]
> [Exhibit P-4, p. 973]

I realize the purpose of the letter was to refute the suggestion that the Church of England owned the land. However, knowing the involvement of Archdeacon McKay with the Lac La Ronge Indian Band, I cannot believe he would not have stated the land was an Indian

Reserve were that the case. He was there from the beginning and surely would have known the distinction.

[337] It still remains to discuss the *viva voce* testimony of Senator James Miles Venne and Daniel Babiuk along with the field notes of Mr. J. Lestock Reid. I deem this necessary because it is here that one can find a suggestion that the school lands were established as an Indian Reserve.

[338] Senator Venne was born April 14, 1918. He is a former chief of the Lac La Ronge Indian Band and presently is a Senator for that Band as well as the Federation of Saskatchewan Indian Nations and the Prince Albert Band Council. He is the first person named in the style of cause in this action.

[339] The Senator attended the residential school at La Ronge from 1928 to 1936. He testified as follows about the school and the surrounding area and in particular he said this about survey markers.

> Q Okay. Now did you ever hear any stories from the elders about how the school lands were selected? Did you ever hear any stories about that?
>
> A Just once. I -- there was Okimuhkan --
>
> THE COURT: I'm sorry.
>
> A Chief, Okimuhkan, Chief. But I could have said it in Cree exactly what this man said, but there was a chief and there was a minister, Archdeacon McKay, that went to see that place where they want a school to be built like, hey, it was all heavy timber, yeah, they didn't mention the Chief, there was a chief in Cree, hey, and the priest, Archdeacon McKay.
>
> Q And did the Chief and Archdeacon McKay pick out the land, then, is that what you are saying?

A That's what I heard, yeah, from this man, yeah.

Q Okay. Now do you know if that land was ever surveyed or marked off on the ground in any fashion?

A It was -- the only thing was many years after that we seen those markers there for Indian reserves, the same markers, they are bronze, hey, bronze metal. They were round, flat, and about that long, hey, and on it:

"Dominion of Canada Land Surveys, seven years imprisonment for removal"

And IR and a number, hey, for the reserve. Those were the real markers --

Q Okay?
A -- and they were, they were school lands.

Q Did you --

A When we were in school we saw them, hey.

Q And these were markers for the school lands themselves?

A Yeah, yeah.

Q Now did -- have you ever seen markers for some of the other La Ronge band Indian reserves?

A Yes, the same kind.

Q They are the same kind?

A Same kind, yeah.

. . .

Q Now do you know if those reserve markers, or IR markers, are still there?

A Not one except that on solid bedrock, hey, just a little piece there.

Q There is still a little stub in the rock?

A Samuel Charles, Reverend Samuel Charles, found that hey.

Q Uhum?

A I asked him to look for it, he said he was working for the government then, standby crew, and that's when he looked, and he found that marker.

Q Okay.

A That's the one I showed you, hey.

Q Yes.

A Yeah, yeah.

Q Now do you recall approximately when those IR markers were removed?

A Well when -- after the CCF, the CCF government got in power, hey, 1940's, shortly thereafter. I don't know how I'm going to put this, but there was a five-year policy from the federal government, I'm not sure, but assimilation of all Indians in Canada. I don't know what that means either. But anyways, shortly after that, Indian Affairs went around, and one of the council over there, and took the medals, chief's medals, a medallion, and also the parchment where the treaties are written down, all those. Right today there is about four bands that still got those medals and whatnot.

Q Uhum.

A The others, all gone.

Q Okay. So--

A Since 19, early 1940's, after this government got into power.

[Trial transcript: pp. 481-485]

I do not question either the veracity or the recollection of Senator Venne. I accept he saw survey markers as stated. What remains is to decide what conclusion should be drawn from the markers when considered within the whole of the evidence.

[340] When he submitted his reports, Mr. J. Lestock Reid, sent along his field notes and plans and therein lies a problem for there are two sets of notes. In the first set, which is unsigned, the corners of the school lands are shown as being marked with posts bearing the inscription "IR" which would designate "Indian Reserve". The second set of notes, which is dated November 25, 1910, and bears the certification of Mr. Reid, shows the corners of the school lands as being marked with posts bearing the inscription "MR" which would designate "Mission Reserve". The plan of the school lands submitted with the first set of notes shows three corners marked "MR" and one marked "IR". The plans in the survey records of the Department of Indian Affairs shows the four corners marked "MR".

[341] Mr. Daniel Babiuk, a retired surveyor, was qualified as an expert to give opinion evidence about surveying. In the course of his testimony he spoke about the notes and plans described above. He stated positively that the set of notes bearing the certification were the official notes and the ones that a person should rely upon. As to the other set of notes, he could not be certain but opined that they were working field notes. He could not explain the discrepancies, but he accepted that the four corner posts may have borne the inscription IR because that was what Mr. Reid had in his possession at the time. Were such designations erroneous, it may well have happened that Mr. Reid was requested to correct his notes. This happened from time to time. He also pointed out that the notes and plan of the school lands did not describe corner monuments which one would expect at the corners of an Indian Reserve.

[342] When I consider the whole of this evidence, I am satisfied that Mr. Reid installed corner posts bearing the inscription IR. That accords with the testimony of Senator Venne and the unsigned field notes. Equally, I am satisfied that he used those

posts simply because they were at hand. The presence of the posts is not conclusive proof that the school lands were established as an Indian Reserve. Even if Mr. Reid believed he was surveying an Indian Reserve, it does not necessarily become such.

[343] Rather, one must look to all the circumstances and particularly the intention of the Department and how that intent is manifested in its instructions and subsequent conduct. Assuming "IR" inscriptions were installed, it was done in error and later corrected by Mr. Reid himself. This is consistent with the fact that following the surveys the school lands were always treated differently than the lands designated as Indian Reserves. In the end, I am more than satisfied that no Indian Reserve was created in respect to the school lands.

J. FIDUCIARY RELATIONSHIP

[344] There is a fiduciary relationship between Canada and Indian peoples. This is beyond dispute and does not warrant a lengthy discussion. I simply refer to what I believe are the two elemental authorities. In *Guerin v. The Queen,* [1984] 2 S.C.R. 335, the subject matter was a surrender of Indian lands for lease to a golf club. At p. 376 Mr. Justice Dickson (later Chief Justice) said this.

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.

> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.
>
> An Indian Band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the Band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763. It is still recognized in the surrender provisions of the *Indian Act*. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians. In order to explore the character of this obligation, however, it is first necessary to consider the basis of aboriginal title and the nature of the interest in land which it represents.

While the Court was concerned with a surrender of lands, I believe the judgment has wider application and extends to situations involving Crown management of lands and assets in general. This appears to be supported by subsequent decisions. See *Kruger v. The Queen* (1985), 17 D.L.R. (4th) 591 (F.C.A.); *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654 (S.C.C.) and *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 (S.C.C.).

[345] The second case is *R. v. Sparrow*, [1990] 1 S.C.R. 1075 in which the Court was concerned with the interference of an aboriginal fishing right. At p. 1108, Chief Justice Dickson said this.

> In *Guerin, supra*, the Musqueam Band surrendered reserve lands to the Crown for lease to a golf club. The

> terms obtained by the Crown were much less favourable than those approved by the Band at the surrender meeting. This Court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trustlike, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

Then at p. 1110 he continued with these comments.

> Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal

> right may be scrutinized so as to ensure recognition and affirmation.
>
> The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

[346] Thus the Court moved from Crown accountability in respect to property and its management to aboriginal rights and their preservation. From my reading of the *Sparrow* judgment, it seems clear that the Court recognized a fiduciary relationship in respect to aboriginal rights. This is borne out by the following remarks in *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 (S.C.C.) at p. 185 where Mr. Justice Iacobucci said this on behalf of the Court.

> This Court, in *R. v. Sparrow, supra*, recognized the interrelationship between the recognition and affirmation of aboriginal rights constitutionally enshrined in s. 35(1) of the *Constitution Act, 1982*, and the fiduciary relationship which has historically existed between the Crown and aboriginal peoples. It is this relationship that indicates that the exercise of sovereign power may be limited or restrained when it amounts to an unjustifiable interference with aboriginal rights. In this appeal, the appellants argue that the decision of the Board to grant the licences will have a negative impact on their aboriginal rights, and that the Board was therefore required to meet the test of justification as set out in *Sparrow*.

Further discussion to a like effect can be found in *R. v. Badger*, [1996] 1 S.C.R. 771 (S.C.C.); *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (S.C.C.); *R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.); *R. v. Adams*, [1996] 3 S.C.R. 101 (S.C.C.); *R. v. Côtè*, [1996] 3 S.C.R. 139 (S.C.C.); and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.).

[347] Two final things are noted. The categories of fiduciary relationships are never closed and the obligation arises in those relationships which usually possess three general characteristics.

(1) The fiduciary has scope for the exercise of some discretion or power.

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

See *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.) at p. 134 and p. 136.

[348] The plaintiffs submit that Canada failed in its fiduciary obligation in respect to the Band Council Resolution of May 8, 1964, and in withdrawing its claim to the lands at Candle Lake. As to the first, I hold the view that Canada had an obligation in 1964 to ensure that the Lac La Ronge Indian Band did not wrongly or imprudently extinguish its

Treaty land entitlement and in carrying out that obligation it had a duty to fully inform the Band about the various possible approaches. While different, I consider this situation to be analogous to that in *Guerin v. The Queen, supra*. As well, while the facts are entirely different, the requirement to make full disclosure is comparable to that discussed in *Baskerville v. Thurgood*, [1992] 5 W.W.R. 193 (Sask. C.A.). This was not done and so there was a breach of the duty. However, it has already been decided that the Band Council Resolution was invalid because there was no informed consent. The resolution having been set aside for that reason, there is no need to place reliance on the fiduciary duty itself. It becomes integrated into the subject of informed consent.

[349] I see the situation at Candle Lake to be different. Here one is addressing Reserve creation and one looks to Treaty No. 6 itself to determine the rights and obligations of the Band and Canada. There is no justification for speaking about a fiduciary relationship and obligation in conjunction with or super-imposed upon the Treaty obligation to set apart Reserve Lands. It is sufficient to ascertain whether or not there has been compliance with that specific Treaty obligation and to proceed from there.

[350] It must be remembered that Canada has an exclusive role in creating Indian Reserves. It has the ultimate right to select the lands. While there must be consultation with the Indians and while it is expected that the Crown will act with honour, the right of selection is otherwise unfettered. I have found that in respect to the lands at Candle Lake the Crown made a selection, but it was not unqualified or definitive. Rather, it was contingent upon obtaining the land from Saskatchewan, and when that did not occur, for whatever reason, Canada was entitled to terminate the project.

[351] Having done that, it had not fulfilled its Treaty obligation to set aside Reserve lands. However, that being so one should not speak of damages for breach of

some fiduciary duty, but rather of the obligation to fulfill the Treaty promise. In accordance with that approach Canada subsequently created additional Reserves.

[352] Mention has been made of the fact that the Candle Lake lands have proven to be valuable because of resort development and there is a suggestion that somehow this impacts on the question of Canada's fiduciary duty. I do not see this. There is no question that development has occurred and this was foreseen to some extent at the time when the lands were being considered. However, had the lands been set aside as a Reserve there is no assurance that development would have occurred. It thus becomes a highly speculative conclusion that there has been some loss sustained as a result of not getting the specific lands at Candle Lake, but other land instead.

[353] One also must not lose sight of s. 10 of the *Natural Resources Transfer Act*. That section imposes upon Saskatchewan a constitutional obligation to provide land to Canada to fulfill Treaty land entitlement. At the same time, however, it grants to Saskatchewan a constitutional right to have a say as to what lands will be provided. On the evidence presented, there is no basis upon which I can conclude that Saskatchewan would ever have acquiesced to Canada's request for the lands at Candle Lake. As a result, Canada did not enjoy a power which it could unilaterally exercise.

[354] There are two possible scenarios. The one is that which is last described where the subject lands had passed to Saskatchewan. In such a case a fiduciary relationship does not arise for all the characteristics are not present. Canada does not possess an exclusive power or discretion. The other scenario is where the land did not pass to Saskatchewan, but remained with Canada. In that instance Canada had the power or discretion to create a Reserve, but that was conferred by Treaty and it was open to Canada to decline to set aside certain lands, for whatever reason. Such a decision may

disappoint or distress a Band, but that does not constitute a breach of a fiduciary duty. It simply is a breach of a Treaty promise or obligation or a failure to fulfill same and it is that which remains to be done. Here one does not have anything akin to improvident management of Indian property or encroachment upon aboriginal rights. Rather, one has a failure to carry out a promise and the appropriate remedy is enforcement of the promise.

[355] Accordingly, in the circumstances I conclude that while there was a breach of the Crown's fiduciary obligation in respect to the Band Council Resolution, there is no need for this Court to respond to it having declared the resolution invalid. In respect to the lands at Candle Lake, I conclude that there was no breach of a fiduciary duty. Were I to have concluded otherwise, I would have held that the appropriate remedy was for Canada to set aside alternate lands as Indian Reserves.

K. ESTOPPEL

[356] The Province of Saskatchewan submits that it no longer has an obligation to provide land to enable the Dominion of Canada to meet any further Treaty land entitlement of the Lac La Ronge Indian Band. This submission is grounded in the fact that Canada made representations that the 63,385 acres set aside for that Band would complete its land entitlement and on that understanding the land was provided by the Province. I do not agree with the submission.

[357] This submission has its genesis in the *Natural Resources Transfer Agreement* which was the device whereby the Dominion of Canada transferred to the Province of Saskatchewan its title to unoccupied Crown lands and resources within the Province. The agreement came into effect on October 1, 1930, and has the force of law by reason of s. 1 of the *Constitution Act, 1930,* 20-21 George V, c. 26 (U.K.). Thus it is

not simply a contract, but a constitutional document. Section 10 of the agreement provides:

> All lands included in Indian Reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent of General Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the Treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.

[358] There is no dispute about the facts. Both prior to and following the Band Council Resolution of May 8, 1964, there were discussions between the Federal and Provincial Governments about the latter providing land to fulfill the Treaty land entitlement of the Lac La Ronge Indian Band. Throughout those discussions, and most particularly after execution of the Band Council Resolution, assurances were given that the land entitlement claim of that Band was fully and finally settled. In a letter dated October 23, 1972, the Minister of Justice informed the Minister of Natural Resources that a settlement had been achieved and that ". . . this completes the Band's Treaty land entitlement" (Ex. P-13, p. 3682). It was on that assurance that the Province transferred the 63,385 acres to Canada.

[359] The Province now says that the correspondence leading up to the transfer constitutes a contract releasing it from any further obligations under s. 10 of the *Natural Resources Transfer Agreement* in respect to the Lac La Ronge Indian Band. Alternatively, it says that having given the stated assurance, Canada is now estopped from going contrary to it by seeking more land.

[360] In my opinion, there is one answer to both submissions. Section 10 of the *Natural Resources Transfer Agreement* is a statutory mandate which has the added dimension of being a constitutional provision. Neither can be set aside simply through the actions of public servants, even at the Cabinet level, no matter how well intentioned they may be. To hold otherwise would be tantamount to permitting amendment by private agreement. As well, the representations by Canada cannot give rise to estoppel such as to suspend or terminate the operation of valid legislation. See *Sivakumar v. Canada (Minister of Citizenship and Immigration) et al.* (1996), 106 F.T.R. 136 at p. 139; *Husky Oil Ltd. v. Minister of National Revenue (Customs and Excise)* (1991), 44 F.T.R. 18 at p. 23; and *Johnson v. Ramsay Fishing Company Ltd. et al.* (1988), 15 F.T.R. 106 at p. 121. See also *Liability of the Crown*, by Peter W. Hogg, 2nd ed., (Toronto: Carswell, 1989), wherein the author speaks of the Crown being subject to estoppel. He then goes on at p. 190 to say this:

> No representation by a Crown servant can give a government or its officials the power to do something which the law does not allow. For example, when a payment is made out of the consolidated revenue fund without legislative appropriation, the recipient is not permitted to raise an estoppel as a defence to an action by the Crown to recover the illegal payment. Nor can an estoppel be raised where the effect would to allow the government to dispense with the requirements of a statute; the statute must be

> complied with, notwithstanding any representation to the contrary. . . .

[361] Accordingly, unless lawfully amended, s. 10 remains in full force without any limitations. The authority of Canada to request land is unchanged as is Saskatchewan's obligation to provide land. The Province remains bound by the section and must abide its requirements.

[362] Counsel for the plaintiffs submit that the rights of the Band cannot be effected or abrogated through an arrangement between the two levels of government absent the Band's participation. There is no need for me to address this submission in order to dispose of the issue and I therefore decline to do so.

L. QUANTIFICATION OF PLAINTIFFS' CLAIMS

[363] It was agreed amongst counsel, and approved by the Court, that this trial proceed in two stages. Initially liability is to be determined and then at a later date the trial will continue in order to determine whether the plaintiffs are entitled to any further lands or monetary compensation for ammunition and twine. Accordingly, the second part of the trial stands adjourned *sine die*. Any party may seek to have it commence by making a request to the Registrar who shall fix a date in consultation with counsel. If necessary, application may be made to the court for directions.

M. CONCLUSION

[364] In the result, judgment will issue in favour of the plaintiffs stipulating the following:

(1) that in calculating Treaty land entitlement under Treaty No. 6, the population figure to be employed is that at the time when the land is set apart or what is commonly called the current population;

(2) that in calculating entitlement for ammunition and twine under the adhesion to Treaty No. 6, one uses a base amount of $1,500.00 and adjusts that proportionate to the population of those entering into the adhesion to those who entered into the Treaty itself;

(3) that the Band Council Resolution of May 8, 1964, is declared invalid and of no effect whatsoever;

(4) that any land entitlement of the Lac La Ronge Indian Band has not been extinguished by any Order-in-Council;

(5) that no lands at Candle Lake, Saskatchewan, were set apart as an Indian Reserve;

(6) that no school lands within what is now the townsite of La Ronge, Saskatchewan were set apart as an Indian Reserve;

(7) that Canada did not breach a fiduciary duty owed to the plaintiffs in respect to the lands at Candle Lake, Saskatchewan;

(8) that Canada is not estopped from obtaining additional lands from Saskatchewan for the purpose of fulfilling its Treaty obligation to set apart Reserve Lands for the Lac La Ronge Indian Band;

(9) that the matter of determining whether the Lac La Ronge Indian Band is entitled to further Reserve Lands or monetary compensation is adjourned *sine die* to be brought back on by any party;

(10) that the matter of costs is reserved and may be spoken to on a date set by the Registrar in consultation with counsel.

_____ J.

APPENDIX "A"

THE TREATIES AT FORTS CARLTON AND PITT,
NUMBER SIX.

ARTICLES OF A TREATY made and concluded near Carlton, on the twenty-third day of August, and on the twenty-eighth day of said month, respectively, and near Fort Pitt on the ninth day of September, in the year of Our Lord one thousand eight hundred and seventy-six, between Her Most Gracious Majesty the Queen of Great Britain and Ireland, by her Commissioners, the Honorable Alexander Morris, Lieutenant-Governor of the Province of Manitoba and the North-West Territories, and the Honorable James McKay and the Honorable William Joseph Christie, of the one part, and the Plain and the Wood Cree Tribes of Indians, and the other Tribes of Indians, inhabitants of the country within the limits hereinafter defined and described, by their Chiefs, chosen and named as hereinafter mentioned, of the other part.

Whereas the Indians inhabiting the said country have, pursuant to an appointment made by the said Commissioners, been convened at meetings at Fort Carlton, Fort Pitt and Battle River, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and the said Indians of the other ;

And whereas the said Indians have been notified and informed by Her Majesty's said Commissioners that it is the desire of Her Majesty to open up for settlement, immigration and such other purposes as to Her Majesty may seem meet, a tract of country, bounded and described as hereinafter mentioned, and to obtain the consent thereto of her Indian subjects inhabiting the said tract, and to make a treaty and arrange

with them, so that there may be peace and good will between them and Her Majesty, and that they may know and be assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence ;

And whereas the Indians of the said tract, duly convened in council as aforesaid, and being requested by Her Majesty's Commissioners to name certain Chiefs and head men, who should be authorized, on their behalf, to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for the faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have thereupon named for that purpose, that is to say:— representing the Indians who make the treaty at Carlton, the several Chiefs and Councillors who have subscribed hereto, and representing the Indians who make the treaty at Fort Pitt, the several Chiefs and Councillors who have subscribed hereto ;

And thereupon, in open council, the different bands having presented their Chiefs to the said Commissioners as the Chiefs and head men, for the purposes aforesaid, of the respective bands of Indians inhabiting the district hereinafter described ;

And whereas the said Commissioners then and there received and acknowledged the persons so represented, as Chiefs and head men, for the purposes aforesaid, of the respective bands of Indians inhabiting the said district hereinafter described ;

And whereas the said Commissioners have proceeded to negotiate a treaty with the said Indians, and the same has been finally agreed upon and concluded as follows, that is to say :

The Plain and Wood Cree Tribes of Indians, and all other the Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen and her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say :

Commencing at the mouth of the river emptying into the north-west angle of Cumberland Lake, thence westerly up the said river to the source, thence on a straight line in a westerly direction to the head of Green Lake, thence northerly to the elbow in the Beaver River, thence down the said river northerly to a point twenty miles from the said elbow ; thence in a westerly direction, keeping on a line generally parallel with the said Beaver River (above the elbow), and about twenty miles distance therefrom, to the source of the said river ; thence northerly to the north-easterly point of the south shore of Red Deer Lake, continuing westerly along the said shore to the western limit thereof, and thence due west to the Athabaska River, thence up the said river, against the stream, to the Jasper House, in the Rocky Mountains ; thence on a course south-eastwardly, following the easterly range of the Mountains, to the source of the main branch of the Red Deer River ; thence down the said river, with the stream, to the junction therewith of the outlet of the river, being the outlet of the Buffalo Lake ; thence due east twenty miles ; thence on a straight line south-eastwardly to the mouth of the said Red Deer River on the South Branch of the Saskatchewan River ; thence eastwardly and northwardly, following on the boundaries of the tracts conceded by the several Treaties numbered Four and Five, to the place of beginning ;

And also all their rights, titles and privileges whatsoever, to all other lands, wherever situated, in the North-West Territories, or in any other Province or portion of Her Majesty’s Dominions, situated and being within the Dominion of Canada ;

The tract comprised within the lines above described, embracing an area of one hundred and twenty-one thousand square miles, be the same more or less ;

To have and to hold the same to Her Majesty the Queen and her successors forever ;

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, provided all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say :—

That the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them ;

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as she shall deem fit, and also that the aforesaid reserves of land or any interest therein may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained ; and with a view to show the satisfaction of Her Majesty with the behavior and good conduct of her Indians, she hereby, through her Commissioners, makes them a present of twelve dollars for each man, woman and child belonging to the bands here represented, in extinguishment of all claims heretofore preferred ;

And further, Her Majesty agrees to maintain schools for instruction in such reserves hereby made, as to her Government of the Dominion of Canada may seem advisable, whenever the Indians of the reserve shall desire it ;

Her Majesty further agrees with her said Indians that within the boundary of Indian reserves, until otherwise determined by her Government of the Dominion of Canada, no intoxicating liquor shall be allowed to be introduced or sold, and all laws now in force or hereafter to be enacted to preserve her Indian subjects inhabiting the reserves or living elsewhere within her North-West Territories from the evil influence of the use of intoxicating liquors, shall be strictly enforced ;

Her Majesty further agrees with her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her Government of her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by her said Government of the Dominion of Canada, or by any of the subjects thereof, duly authorized therefor, by the said Government ;

It is further agreed between Her Majesty and her said Indians, that such sections of the reserves above indicated as may at any time be required for public works or buildings of what nature soever, may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made for the value of any improvements thereon ;

And further, that Her Majesty's Commissioners shall, as soon as possible after the execution of this treaty, cause to be taken, an accurate census of all the Indians inhabiting the tract above described, distributing them in families, and shall in every year ensuing the date hereof, at some period in each year, to be duly notified to the Indians, and at a place or places to be appointed for that purpose, within the territories ceded, pay to each Indian person the sum of five dollars per head yearly ;

It is further agreed between Her Majesty and the said Indians that the sum of fifteen hundred dollars per annum, shall be yearly and every year expended by Her Majesty in the purchase of ammunition and twine for nets for the use of the said Indians, in manner following, that is to say :— In the reasonable discretion as regards the distribution thereof, among the Indians inhabiting the several reserves, or otherwise included herein, of Her Majesty's Indian Agent having the supervision of this treaty ;

It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any band of the said Indians who are now cultivating the soil, or who shall hereafter commence to cultivate the land, that is to say :— Four hoes for every family actually cultivating, also two spades per family as aforesaid ; one plough for every three families as aforesaid, one harrow for every three families as aforesaid ; two scythes, and one whetstone and two hayforks and two reaping-hooks for every family as aforesaid ; and also two axes, and also one cross-cut saw, and also one hand-saw, one pit-saw, the necessary files, one grindstone and one auger for each band ; and also for each Chief, for the use of his band, one chest of ordinary carpenter's tools ; also for each band, enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation by such band ; also for each band, four oxen, one bull and six cows, also one boar and two sows, and one handmill when any band shall raise sufficient grain

therefor ; all the aforesaid articles to be given *once for all* for the encouragement of the practice of agriculture among the Indians ;

It is further agreed between Her Majesty and the said Indians, that each Chief, duly recognized as such, shall receive an annual salary of twenty-five dollars per annum ; and each subordinate officer, not exceeding four for each band, shall receive fifteen dollars per annum ; and each such Chief and subordinate officer as aforesaid, shall also receive, once every three years, a suitable suit of clothing, and each Chief shall receive, in recognition of the closing of the treaty, a suitable flag and medal, and also, as soon as convenient, one horse, harness and waggon ;

That in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by her Indian Agent or Agents, will grant to the Indians assistance of such character and to such extent as her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them ;

That during the next three years, after two or more of the reserves hereby agreed to be set apart to the Indians, shall have been agreed upon and surveyed, there shall be granted to the Indians included under the Chiefs adhering to the treaty at Carlton, each spring, the sum of one thousand dollars to be expended for them by Her Majesty's Indian Agents, in the purchase of provisions for the use of such of the band as are actually settled on the reserves and are engaged in cultivating the soil, to assist them in such cultivation ;

That a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians, at the discretion of such Agent ;

That with regard to the Indians included under the Chiefs adhering to the treaty at Fort Pitt, and to those under Chiefs within the treaty limits who may hereafter give their adhesion hereto (exclusively, however, of the Indians of the Carlton Region) there shall, during three years, after two or more reserves shall have been agreed upon and surveyed, be distributed each spring among the bands cultivating the soil on such reserves, by Her Majesty's Chief Indian Agent for this treaty in his discretion, a sum not exceeding one thousand dollars, in the purchase of provisions for the use of such members of the band as are actually settled on the reserves and engaged in the cultivation of the soil, to assist and encourage them in such cultivation ;

That, in lieu of waggons, if they desire it, and declare their option to that effect, there shall be given to each of the Chiefs adhering hereto, at Fort Pitt or elsewhere hereafter (exclusively of those in the Carlton District) in recognition of this treaty, so soon as the same can be conveniently transported, two carts, with iron bushings and tires ;

And the undersigned Chiefs, on their behalf, and on behalf of all other Indians inhabiting the tract within ceded, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen ;

They promise and engage that they will in all respects obey and abide by the law, and they will maintain peace and good order between each other, and also between themselves and other tribes of Indians, and between themselves and others of Her

Majesty's subjects, whether Indians or whites, now inhabiting or hereafter to inhabit any part of the said ceded tracts, and that they will not molest the person or property of any inhabitant of such ceded tracts, or the property of Her Majesty the Queen, or interfere with or trouble any person passing or travelling through the said tracts or any part thereof ; and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded.

In witness whereof, Her Majesty's said Commissioners and the said Indian Chiefs have hereunto subscribed and set their hands, at or near Fort Carlton, on the day and year aforesaid, and near Fort Pitt on the day above aforesaid.

. . .

APPENDIX "B"

No. 265.

We the undersigned Chiefs and Headmen, on behalf of ourselves and the other members of the Wood Cree Tribe of Indians, having had explained to us the terms of the treaty made and concluded near Carlton, on the 23rd day of August and on 28th day of said month respectively, and near Fort Pitt on the 9th day of September, 1876, between Her Majesty the Queen, by the Commissioners duly appointed to negotiate the said treaty, and the Plain and Wood Cree and other Tribes of Indians inhabiting the country within the limits defined in said treaty, but not having been present at the councils at which the articles of the said treaty were agreed upon, do now hereby for ourselves and the Bands which we represent, in consideration of the provisions of the said treaty being extended to us and the Bands which we represent, transfer, surrender, and relinquish to Her Majesty the Queen, Her heirs and successors, to and for the use of the Government of the Dominion of Canada, all our right, title and interest whatsoever which we and the said Bands which we represent hold and enjoy, or have held and enjoyed, of, in and to the territory included within the following limits : All and singular that portion or tract of land being the north part of the Land District of Prince Albert, as shown on the maps published by the Honourable the Minister of the Interior, dated at Ottawa on the 31st day of August, 1885 ; the same tract being north of the northerly limit of Treaty No. 6, North-West Territory, containing 11,066 square miles, be the same more or less, and more particularly described as follows : Commencing at a point being the north-west corner of projected Township No. 70, Range 10, west of the Third Initial Meridian ; thence easterly along the northern boundaries of projected Townships Nos. 70 to the north-east corner of projected Township No. 70, Range 13, west of the Second Initial Meridian ; thence southerly following the east boundary of said 13th Range of projected Townships to the northern limits of Treaty No. 6 into the projected Township No. 60 ; thence westerly

following the northerly limit of Treaty No. 6 to the south-eastern shore of Green Lake, being at the north-easterly part of projected Township No. 58, Range 10, west of the Third Initial Meridian ; thence following the westerly shore of Green Lake to the main inlet thereof known as Beaver River ; thence up the right bank of Beaver River to its intersection with the west boundary of projected Township No. 62, Range 10, west of the Third Initial Meridian ; thence northerly following the west boundary of projected townships of Range 10, west of the Third Initial Meridian, to the point of commencement.

Also, all our right, title and interest whatsoever to all other lands wherever situated, whether within the limits of any other treaty heretofore made, or hereafter to be made with Indians, and whether the said lands are situated in the North-West Territories or elsewhere in Her Majesty's Dominions, to have and to hold the same unto and for the use of Her Majesty the Queen. Her heirs and successors forever.

And we hereby agree to accept the several benefits, payments and reserves promised to the Indians adhering to the said treaty at Fort Pitt or Carlton ; with the proviso as regards the amount to be expended annually for ammunition and twine, and as respects the amount to be expended for three years annually in provisions for the use of such Indians as are settled on reserves and are engaged in cultivating the soil, to assist them in such cultivation, that the expenditure on both of these items shall bear the same proportion to the number of Indians now treated with as the amounts for those two items as mentioned in Treaty No. 6 bore to the number of Indians then treated with. And we solemnly engage to abide by, carry out and fulfil all the stipulations, obligations and conditions therein contained on the part of the Chiefs and Indians therein named to be observed and performed, and we agree in all things to conform to the articles of the said treaty, as if we ourselves and the Bands which we represent had been originally contracting parties thereto and had been present at the council held near Fort Pitt or near

Carlton and had there attached our signatures to the said treaty.

IN WITNESS WHEREOF, Her Majesty's special Commissioners and the Chiefs and Councillors of the Bands hereby giving their adhesion to the said treaty have hereunto subscribed and set their hands at Montreal Lake this eleventh day of February, in the year of Our Lord one thousand eight hundred and eighty-nine.

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