Norman Sterriah, on behalf of all members of the Ross River Dena Council Band, and the Ross River Dena Development Corporation *Appellants*

v.

Her Majesty The Queen in Right of Canada and the Government of Yukon *Respondents*

and

The Attorney General of British Columbia and the Coalition of B.C. First Nations *Interveners*

Indexed as: Ross River Dena Council Band *v.* Canada

Neutral citation: 2002 SCC 54.

File No.: 27762.

2001: December 11; 2002: June 20.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for the yukon territory

Indians — Reserves — Creation of reserves in non-treaty context — Indian Band occupying lands in Yukon Territory since 1950s — Lands set aside by officials — Legal requirements for establishment of a reserve — Whether lands set aside have reserve status — Indian Act, R.S.C. 1985, c. I-5, s. 2(1) "reserve" — Territorial Lands Act, R.S.C. 1952, c. 263, s. 18(d).

Following a claim for the refund of taxes paid on tobacco sold in an Indian village in the Yukon, a dispute arose concerning the status of the village. If it was a reserve, an exemption from the tax could rightfully be claimed. The respondents maintained that a reserve had never been created there. In the 1950s, members of the appellant Band, which is recognized as a band under the *Indian Act*, were allowed to settle on the site of what is now their village, there being no treaty governing the lands. Various administrative discussions and actions with respect to the status of the community took place between 1953 and 1965. In 1965, the Chief of the Resources Division in the Department of Northern Affairs and National Resources advised the Indian Affairs Branch of the then Department of Citizenship and Immigration that the village site had been reserved for the Branch. The letter was entered in the Reserve Land Register under the *Indian Act*. On a motion by the appellants, the chambers judge declared the lands occupied by the Band to be a reserve. The Court of Appeal, in a majority decision, allowed the respondents' appeal.

Held: The appeal should be dismissed.

Per Gonthier, Iacobucci, Major, Binnie, Arbour and LeBel JJ.: Given the absence of intention to create a reserve on the part of persons having the authority to bind the Crown, no reserve was legally created. In the Yukon Territory, as well as elsewhere in Canada, there appears to be no single procedure for creating reserves,

although an Order-in-Council has been the most common and undoubtedly best and clearest procedure used to create reserves. Whatever method is employed, the Crown must have had an intention to create a reserve. This intention must be possessed by Crown agents holding sufficient authority to bind the Crown. For example, this intention may be evidenced either by an exercise of executive authority such as an Order-in-Council, or on the basis of specific statutory provisions creating a particular reserve. Steps must be taken in order to set apart land. The setting apart must occur for the benefit of Indians. The Band concerned must have accepted the setting apart and must have started to make use of the lands so set apart. The statutory framework for reserve creation in the Yukon Territory has limited, but not entirely ousted, the royal prerogative. In any case, whether the authority to create a reserve is derived from the royal prerogative or from statute, the Governor in Council is the holder of the power in both cases.

In this case, land was set aside but there was no intention to create a reserve on the part of persons having the authority to bind the Crown. The facts demonstrate that Crown agents never made representations to the members of the Band that the Crown had decided to create a reserve for them, nor did any person having the authority to bind the Crown ever agree to the setting up of a reserve at the site in question. Those Crown officials who did advocate the creation of a reserve never had the authority to set apart the lands and create a reserve. While lands were set aside for the Band, they do not have the status of a reserve.

Per McLachlin C.J. and L'Heureux-Dubé and Bastarache JJ.: LeBel J.'s conclusion that the Crown never intended to establish a reserve in this case was agreed with. However, the royal prerogative to set aside or apart lands for Aboriginal peoples has not been limited by statute, either expressly or by necessary implication. The

Indian Act does not provide any formal mechanism for the creation of reserves. The definition of "reserve" in s. 2(1) of the Act does not limit the Crown's ability to deal with lands for the use of aboriginal peoples. It simply serves to identify which lands have been set apart as reserves within the meaning of the Act. Nor does s. 18(*d*) of the 1952 *Territorial Lands Act* place limits on the Crown's prerogative with respect to the creation of reserves. This section is not directed at the creation of reserves *per se*, but rather permits the Governor in Council to protect from disposition those Crown lands for which other use is contemplated. While s. 18(*d*) provides a mechanism to set apart lands for the creation of a reserve, it is merely one avenue to achieve this result. It has not placed any conditions or limitations on the Crown's prerogative to create a reserve.

Cases Cited

By LeBel J.

Applied: *R. v. Sioui*, [1990] 1 S.C.R. 1025; **referred to:** *R. v. Marshall*, [1999] 3 S.C.R. 456; *Attorney-General v. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508; *Town of Hay River v. The Queen*, [1980] 1 F.C. 262; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654; *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657.

By Bastarache J.

Referred to: *R. v. Operation Dismantle Inc.*, [1983] 1 F.C. 745, aff'd [1985] 1 S.C.R. 441; *Attorney-General v. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508; *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551; *Sparling v. Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015.

Statutes and Regulations Cited

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.

Constitution Act, 1867, s. 91(24).

Constitution Act, 1982, s. 35.

Dominion Lands Act, R.S.C. 1927, c. 113 [rep. 1950, c. 22, s. 26], s. 74.

Indian Act, R.S.C. 1952, c. 149, s. 21.

Indian Act, R.S.C. 1985, c. I-5, ss. 2(1) "band", "reserve" [rep. & sub. c. 17 (4th Supp.), s. 1(1)], "designated lands" [ad. *idem*, s. 1(2)], (2), 18(1), (2), 20 to 25, 28, 36 to 38, 42, 44, 46, 48 to 51, 58, 60, 87(1).

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APPEAL from a judgment of the Yukon Territory Court of Appeal (1999), 182 D.L.R. (4th) 116, 131 B.C.A.C. 219, 72 B.C.L.R. (3d) 292, [2000] 4 W.W.R. 390, [2000] 2 C.N.L.R. 293, [1999] Y.J. No. 121 (QL), 1999 BCCA 750, setting aside a decision of the Yukon Territory Supreme Court, [1998] 3 C.N.L.R. 284, [1998] Y.J. No. 63 (QL), declaring a tract of land an Indian reserve within the meaning of the *Indian Act*. Appeal dismissed.

Brian A. Crane, Q.C., and *Ritu Gambhir*, for the appellants.

Brian R. Evernden and *Jeffrey A. Hutchinson*, for the respondent Her Majesty the Queen in Right of Canada.

Penelope Gawn and *Lesley McCullough*, for the respondent the Government of Yukon.

Richard J. M. Fyfe, *Paul E. Yearwood* and *Patrick G. Foy, Q.C.*, for the intervener the Attorney General of British Columbia.

Leslie J. Pinder, for the intervener the Coalition of B.C. First Nations.

The reasons of McLachlin C.J. and L'Heureux-Dubé and Bastarache JJ. were delivered by

1 BASTARACHE J. – I have had the opportunity to read the reasons of my colleague and I agree that no reserve was created in this case. As noted by my colleague, the essential conditions for the creation of a reserve within the meaning of s. 2(1) of the *Indian Act*, R.S.C. 1985, c. I-5, include an act by the Crown to set aside Crown land for the use of an Indian band combined with an intention to create a reserve on the part of persons having authority to bind the Crown. The evidence in this case reveals that the Crown never intended to establish a reserve within the meaning of the Act.

2 Though I agree with the disposition, I respectfully disagree with my colleague's assertion that the royal prerogative to create reserves has been limited by s. 18(*d*) of the *Territorial Lands Act*, R.S.C. 1952, c. 263. In addition, I think it is important to state clearly the interaction between the Crown prerogative and s. 2(1) of the *Indian Act*. Section 2(1) does not constrain the Crown's prerogative to deal with lands for the use of Indians, but rather provides a definition of "reserve" for the purposes of the Act. Section 18(*d*) of the 1952 *Territorial Lands Act* gives the Governor in Council a discretionary power to protect Crown lands from disposal for a wide range of public purposes, including the welfare of Indians. In my view, neither provision, either expressly or by necessary implication, limits the scope of the Crown's prerogative to set aside or apart lands for Aboriginal peoples.

3 All of the parties agree that the power to create reserves was originally based on the royal prerogative. The power is thought to be part of the Crown's prerogative to administer and dispose of public property including Crown lands (see P. Lordon, Q.C., *Crown Law* (1991), at p. 96). The appellants nonetheless contend that this power has long been regulated by statute, including the successive Indian Acts which date back to Confederation as well as various statutes governing the disposition

and management of Crown lands. They assert in particular that the right to establish reserves in the Yukon Territory is found in the *Indian Act* and the *Territorial Lands Act* which have replaced the prerogative. My colleague disagrees with the appellants that the prerogative has been displaced, but concedes that it has been limited.

4 There is no doubt that a royal prerogative can be abolished or limited by clear and express statutory provision: see *R. v. Operation Dismantle Inc.*, [1983] 1 F.C. 745, at p. 780, aff'd [1985] 1 S.C.R. 441, at p. 464. It is less certain whether in Canada the prerogative may be abolished or limited by necessary implication. Although this doctrine seems well established in the English courts (see *Attorney-General v. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508 (H.L.)), this Court has questioned its application as an exception to Crown immunity (see *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551, at p. 558; *Sparling v. Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015, at pp. 1022-23). Assuming that prerogative powers may be removed or curtailed by necessary implication, what is meant by "necessary implication"? H. V. Evatt explains the doctrine as follows:

> Where Parliament provides by statute for powers previously within the Prerogative being exercised subject to conditions and limitations contained in the statute, there is an implied intention on the part of Parliament that those powers can only be exercised in accordance with the statute. "Otherwise," says Swinfen-Eady M.R., "what use would there be in imposing limitations if the Crown could at its pleasure disregard them and fall back on Prerogative?" [Emphasis added.]
>
> (H. V. Evatt, *The Royal Prerogative* (1987), at p. 44)

5 In my view, s. 2(1) of the *Indian Act*, which sets out the definition of "reserve", does not in any way "provid[e] by statute for powers previously within the Prerogative being exercised subject to conditions and limitations contained in the statute". It is well established that the *Indian Act* does not provide any formal

mechanism for the creation of reserves. The Act is, and always has been, confined to the management and protection of existing reserves, many of which were established long before the federal government assumed jurisdiction over Indians pursuant to s. 91(24) of the *Constitution Act, 1867* (see R. H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland – A Study in Law and History* (1990), at pp. 24-25).

6 In the past, the Crown exercised its prerogative to create reserves in a number of ways. Although some lands set apart for Indian bands constitute "reserves" within the meaning of the *Indian Act*, other lands have been set apart or aside for the use of Indian bands, yet are not recognized as "reserves" under the Act. For example, in this case, the Crown exercised its prerogative to "reserve" or set aside lands for the use of the Ross River Band, but did not manifest an intention to create a "reserve" within the meaning of s. 2(1) of the *Indian Act*. In my view, the definition of "reserve" in s. 2(1) serves to identify which lands have been set apart as "reserves" within the meaning of the Act; the definition does not limit the Crown's ability to deal with lands for the use of aboriginal peoples. A "reserve" is defined as "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band". The legislation does not indicate precisely when land will be considered to have been "set apart" for the use and benefit of a band, nor does it indicate the steps necessary for a "setting apart" of land to have occurred. This is, essentially, the issue that is before us here. As I stated earlier, we have determined that for land to have been "set apart" within the meaning of the Act, there must, at the very least, exist an act by the Crown to set apart land for the use of the band combined with an intention to create a reserve on the part of persons having authority to bind the Crown.

7 My colleague asserts that the definition of "reserve" in s. 2(1) limits the royal prerogative to create reserves in that it precludes the possibility of transferring the title to the land from the Crown to the First Nation (since the definition provides that legal title is "vested in Her Majesty"). I agree with him that if a tract of land meets the definition of "reserve" under the *Indian Act*, the title must remain in the Crown and the land must be dealt with subject to the Act. However, I do not see how the definition otherwise limits the royal prerogative to set aside or apart land for Aboriginal peoples. In other words, it merely defines with greater specificity which of these lands will be considered "reserves" for the purposes of the Act. In my opinion, the Crown is still free to deal with its land in any other manner it wishes, including, as noted by my colleague, the transfer of title by sale, grant or gift to a First Nation or some of its members, though that land would not then constitute an *Indian Act* "reserve".

8 Nor do I agree that s. 18(*d*) of the 1952 *Territorial Lands Act* has placed limits on the Crown's prerogative with respect to the creation of reserves. Section 18 (the predecessor to the current s. 23(*d*)) finds its origin in the *Dominion Lands Act*, R.S.C. 1927, c. 113. That Act allowed for entry onto vacant Crown lands for agricultural purposes. Section 74 of the *Dominion Lands Act* authorized the Governor in Council to keep lands reserved for Indians outside of the scheme of the Act so that the lands would be protected from disposition. The provision also permitted the Governor in Council to protect lands from entry for various other public purposes, including "places of public worship, burial grounds, schools and benevolent institutions". Section 18 of the 1952 *Territorial Lands Act* consolidates and continues the *Dominion Lands Act* powers. Similar to the *Dominion Lands Act*, it authorizes the Governor in Council to set apart areas of land for the welfare of Indians, and also

permits the Crown to protect Crown lands from disposal for a wide range of public purposes.

9 It seems clear from the above that s. 18 of the 1952 *Territorial Lands Act* is not directed at the creation of reserves *per se* but rather permits the Governor in Council to protect from disposition those Crown lands for which other use is contemplated. As my colleague points out, the setting apart of Crown lands which might otherwise be disposed of pursuant to s. 18 of the Act does not in and of itself imply that a "reserve" within the meaning of the *Indian Act* has been created since the Crown must also manifest an intent to make the land a reserve under the Act. Where, however, evidence of this intention is present, the setting apart of land under s. 18(*d*) of the 1952 *Territorial Lands Act* would certainly suffice as the formal act by which the Crown sets apart land for the use and benefit of an Indian band.

10 Though I agree that the setting apart of land under s. 18(*d*) of the 1952 *Territorial Lands Act* would be sufficient to establish an *Indian Act* reserve if the necessary intention on the part of the Crown to do so were present, I cannot see how s. 18(*d*) has placed any conditions or limitations on the Crown prerogative to create reserves. Historically, a wide array of formal and informal instruments has been used to set apart lands as *Indian Act* reserves. In my view, any one of these instruments may be sufficient to constitute the action by which the land is set apart so long as intention on the part of the Crown to create a reserve under the *Indian Act* is also present. I think that there is a danger in saying that s. 18(*d*) of the 1952 *Territorial Lands Act* has somehow limited the Crown's prerogative to create reserves since this implies that only an application under the Act will suffice as the formal action to set apart the lands as a reserve. While s. 18(*d*) provides one mechanism to set apart lands for the creation of a reserve, it is not the only mechanism available to the Crown for this purpose and

I would not wish to imply this as a necessary condition for the creation of a reserve. If the setting apart of land under s. 18(*d*) is not a necessary condition for the creation of a reserve but merely one avenue to achieve this result, then I cannot see how the authority to set apart lands for a reserve under s. 18(*d*) limits the Crown's prerogative to create a reserve.

The judgment of Gonthier, Iacobucci, Major, Binnie, Arbour and LeBel JJ. was delivered by

LEBEL J. —

I. Introduction

11 This appeal raises the issue of how *Indian Act* reserves were created in the Yukon Territory, in a non-treaty context. The appellants claim that the Government of Canada created a reserve by setting aside land for the Ross River Band. The federal government answers that, although land was set aside, no reserve was ever created; no intention to create it has been established on the evidence. For the reasons which follow, I conclude that no reserve was created and that the appeal should fail.

II. Background of the Litigation

12 This case arose out of a claim for a refund of tobacco tax from a store in a small village in the Yukon. According to the appellants, this village is a reserve; hence, an exemption was claimed. The respondents disputed this claim, saying that a reserve had never been created in this place. What began as a tax problem has become a question of aboriginal law which, in turn, requires a survey of the historical

background to the procedure governing the creation of reserves in the Yukon Territory. The particular facts of the long history of the dealings of the Ross River Band with the Department of Indian Affairs must also be reviewed.

13 The Ross River Dena Council Band (the "Band") is recognized as a band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5. It is now located at Ross River, in the Yukon, on lands which it claims are a reserve. Norman Sterriah is the chief of the Band. In 1982, the Band incorporated the appellant, Ross River Dena Development Corporation. The Corporation was set up to provide services for the benefit of Band members and to carry on business as their agent. Despite the dispute about the legal status of the community, it is at least agreed that there is a village at Ross River and that Band members have been living there for a number of years.

14 After a long history of being shifted or pushed from place to place since the predecessors of the Department of Indian Affairs and Northern Development ("DIAND") took them under its wing, in the 1950s, at long last, the members of the Ross River First Nation were allowed to settle down on the site of what is now their village, located at the junction of the Pelly and Ross Rivers. The lands in dispute in this case are not governed by treaty, as the Yukon Territory belongs to those regions of Canada where the treaty-making process with First Nations had very little practical impact, particularly in respect of the creation of reserves. (See *Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 2, *Restructuring the Relationship*, Part 2, at pp. 479-84.)

15 Despite the absence of a treaty, the agents of the Department in the 1950s knew that the Band was living on the shores of the Ross River. The acknowledgement of this fact triggered a process of administrative discussion and action which led or not

to the creation of a reserve on this site. By letter dated October 21, 1953, the Superintendent of the Yukon Agency sought the permission of the Indian Commissioner for British Columbia to establish an Indian reserve for the use of the Ross River Indians. By letter dated November 10, 1953, the Indian Commissioner for British Columbia supported the recommendation. On April 1, 1954, the Superintendent of the Yukon Agency wrote to the Dominion Lands Agent in Whitehorse to advise that tentative arrangements had been made to apply for a tract of land for an Indian reserve at Ross River; Ottawa did not act on the request.

16 On May 4, 1955, the federal Cabinet issued a procedural directive entitled Circular No. 27 which set out an internal government procedure for reserving lands in the territories for the use of a government department or agency. In 1957, the federal government decided to dismiss the recommendation to establish 10 reserves. On November 27, 1962, the Superintendent of the Yukon Agency applied to the Indian Affairs Branch (then in the Department of Citizenship and Immigration) to reserve approximately 66 acres of land under s. 18 of the *Territorial Lands Act*, R.S.C. 1952, c. 263, to be used for the Ross River Indian Band Village site. Correspondence was then exchanged over the following three years with respect to the proposed size and location of the site. On January 26, 1965, the Chief of the Resources Division in the Department of Northern Affairs and National Resources advised the Indian Affairs Branch that the site had been reserved for the Indian Affairs Branch. The letter was entered in the Reserve Land Register pursuant to s. 21 of the *Indian Act*, R.S.C. 1952, c. 149. It was also recorded in the Yukon Territory Land Registry of the Lands Division of the former Department of Northern Affairs and National Resources.

17 The Band takes the view that this administrative process, combined with the actual setting aside of land for its benefit, created a reserve within the meaning of the

Indian Act. It appears that this opinion was not shared either by the Yukon territorial government or the Indian Affairs Branch. The dispute may have remained dormant for a while. It broke into the open and reached the courts on the occasion of a problem concerning the applicability of tobacco taxes.

18 The respondent Government of Yukon had imposed taxes on the Band under the *Tobacco Tax Act*, R.S.Y. 1986, c. 170. The Band claimed an exemption and asked for a refund of taxes already paid on tobacco sold in the village. It asserted that the Government of Yukon was taxing personal property of an Indian or of a band on a reserve, which was exempt pursuant to s. 87(1) of the *Indian Act*. The Government of Yukon refused to make the refund because it did not recognize that the Band occupied a reserve. According to the Yukon government, the Band was merely located on lands which had been "set aside" for its benefit by the Crown in right of Canada. The federal government gave full support to this position and subsequently fought the claim of the appellants as to the existence of a reserve.

19 In the meantime, negotiations were taking place in the Yukon with respect to the land claims and rights of First Nations. An agreement known as the "Umbrella Final Agreement" was entered into by the Council for Yukon Indians, the Government of Yukon and the Government of Canada in 1993. It is a framework agreement which provides for its terms to be incorporated into subsequent agreements with individual First Nations. According to the Yukon government, seven of these agreements are now in force, dealing, among other topics, with land "set aside" and not part of a reserve. The Band chose to remain outside this process of treaty negotiation pending a decision from the courts regarding whether a reserve was created pursuant to the *Indian Act*.

III. Judicial History

A. *Yukon Territory Supreme Court*, [1998] 3 C.N.L.R. 284

20 The appellants filed a motion in the Yukon Territory Supreme Court asking for a declaration that the lands the Band occupied at the Ross River site constitute a reserve within the meaning of the *Indian Act*. The federal government replied that the land had only been set aside for the Indian Affairs Branch on behalf of the Band. There had been no intent to create a reserve. Moreover, the creation of a reserve in the Yukon required an Order-in-Council, under the royal prerogative. This step had never been taken in the case of the Ross River Band.

21 Maddison J. declared the tract of land in question "to be an Indian Reserve within the meaning of the *Indian Act*" (para. 33). Maddison J. held that the definition of "reserve" in s. 2 of the *Indian Act* does not require any particular form of proclamation, conveyance, notification, transfer, order or grant; rather, the statutory definition emphasizes the act of "setting apart". He recognized that there was no Order-in-Council or other such official instrument creating or recognizing the Ross River lands as an Indian reserve, but he found that such formal recognition was not necessary to bring the lands within the definition of "reserve" in the *Indian Act*. Maddison J. found, at para. 29, that:

> 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 statute 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.

B. *Yukon Territory Court of Appeal* (1999), 182 D.L.R. (4th) 116

22 The respondents then appealed to the Yukon Territory Court of Appeal. A majority of the court allowed the appeal, with Finch J.A. in dissent.

(1) Richard J.A.

23 Richard J.A., for the majority, held that the decision of the Yukon Territory Supreme Court should be overturned. He found that the lands occupied by the Band and its members were "lands set aside" but not a "reserve" under the *Indian Act*. He noted that the distinction between "lands set aside" and "reserves" was well established in the history of the Yukon, although the terminology may have varied over time.

24 Richard J.A. found that it was the prerogative of the Crown to establish a reserve which was usually formally evidenced by an Order-in-Council. He found that there was no evidence that in 1965 the Crown ever intended to create a reserve for the Band, either directly or by express or implied delegation. He held that there was in fact a deliberate decision not to create a reserve. He added that there was also no evidence that the Head of the Resources Division had authority to create a reserve and the letter did not purport to be an act of the Governor in Council or an exercise of the royal prerogative. A generous or liberal reading of the definition of "reserve" in the *Indian Act* would not have provided any assistance, because the land was not set apart for the use and benefit of a "band". Richard J.A. commented that the question at issue was whether a reserve had in fact been created and not whether a reserve should have been created.

(2) Hudson J.A. (concurring)

25 Hudson J.A. held that the chambers judge's suggestion that some Crown officers had conspired to impose the policy of integrating Aboriginal peoples into the dominant society was not supported by the evidence. He stated that the evidence indicated that the public servants complained about the policy adopted by the government and, in fact, expressly favoured the goal of cultural preservation through the reservation of land for the benefit of Aboriginal peoples.

(3) Finch J.A. (dissenting)

26 Finch J.A. noted that neither the *Indian Act* nor the *Territorial Lands Act* provided any formal mechanism for the creation of an "Indian reserve" as defined in the *Indian Act*. He determined that the definition of a reserve must be read against the background of the Crown's relationship with Aboriginal peoples to whom the Crown owed a fiduciary duty.

27 Finch J.A. found that the correspondence and conduct of officials from the federal government responsible for Indian Affairs created a reserve in 1965, despite the absence of any Order-in-Council or other official instrument reflecting an exercise of the Crown's prerogative. In his opinion, the statutory powers conferred in the *Territorial Lands Act* displaced the Crown's prerogative and allowed the Department of Northern Affairs and National Resources to create reserves in the course of exercising statutory powers delegated to them by the Governor in Council. Finch J.A. further found that the Cabinet directive contained in Circular No. 27 was a delegation of statutory authority sufficient to authorize public officials to create a "reserve" as defined in the *Indian Act*.

28 Finch J.A. found that the definition of "reserve" in the *Indian Act* required only an intention to allocate an area of Crown land for the use and benefit of a band, and an act by a public official with the authority to give effect to that intent. Finch J.A. decided that the appropriate government official had set apart certain land intending it to be reserved for the use and benefit of the Band. To hold otherwise would be inconsistent with the Crown's fiduciary obligations.

IV. Relevant Statutory Provisions

29 *Indian Act, 1876*, S.C. 1876, c. 18

> **3.** The following terms contained in this Act shall be held to have the meaning hereinafter assigned to them, unless such meaning be repugnant to the subject or inconsistent with the context: —
>
> . . .
>
> 6. 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.

Indian Act, R.S.C. 1985, c. I-5

> **2.** (1) In this Act,
>
> "band" means a body of Indians
>
> (*a*) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,
>
> (*b*) for whose use and benefit in common, moneys are held by Her Majesty, or
>
> (*c*) declared by the Governor in Council to be a band for the purpose of this Act;

. . .

"reserve"

(*a*) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, and

(*b*) except in subsection 18(2), sections 20 to 25, 28, 36 to 38, 42, 44, 46, 48 to 51, 58 and 60 and the regulations made under any of those provisions, includes designated lands;

. . .

(2) The expression "band", with reference to a reserve or surrendered lands, means the band for whose use and benefit the reserve or the surrendered lands were set apart.

. . .

18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

21. There shall be kept in the Department a register, to be known as the Reserve Land Register, in which shall be entered particulars relating to Certificates of Possession and Certificates of Occupation and other transactions respecting lands in a reserve.

87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely,

(*a*) the interest of an Indian or a band in reserve lands or surrendered lands; and

(*b*) the personal property of an Indian or a band situated on a reserve.

Territorial Lands Act, R.S.C. 1952, c. 263

18. The Governor in Council may

. . .

(*d*) 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 and to make free grants or leases for such purposes, and for any other purpose that he may consider to be conducive to the welfare of the Indians;

Territorial Lands Act, R.S.C. 1985, c. T-7

> **23.** The Governor in Council may
>
> . . .
>
> (*d*) set apart and appropriate such areas or lands as may be necessary
>
> (i) to enable the Government of Canada to fulfil its obligations under treaties with the Indians and to make free grants or leases for that purpose, or
>
> (ii) for any other purpose that the Governor in Council may consider to be conducive to the welfare of the Indians;

V. Analysis

A. *The Issues*

30 This appeal raises two well-defined issues about the creation of reserves. The first one is the nature of the legal requirements which must be met for the establishment of a reserve as defined in the *Indian Act*. The second issue concerns whether, given these requirements, the lands set aside for the Ross River Band have the status of a reserve.

B. *The Position of the Parties*

(1) Appellants

31 The appellants submit that reserves have been created in a number of ways. In their view, while the power to create reserves may originally have been exercised under the royal prerogative, this was displaced beginning in 1868 with the passage of *An 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 royal prerogative has been further displaced by the combination of the definition of "reserve" in s. 2(1) of the *Indian Act* and s. 18(*d*) of the 1952 *Territorial Lands Act* (now s. 23(*d*)). The exercise of this statutory authority thus requires no formal instrument signifying the exercise of the royal prerogative such as an Order-in-Council or letters patent.

32 The appellants submit that reserves can be created by treaty or otherwise, including by being set aside by survey. The lack of an Order-in-Council setting lands aside has not been determinative of the creation of a reserve. Indeed, the courts should continue to take a flexible approach to the Crown's actions in its relations with First Nations. The appellants adopt the view of Finch J.A. that two conditions are required to create a reserve: (1) an intention to create a *de facto* reserve, and (2) an act by a public official with authority to give effect to the intention. The appellants have also stated the criteria for creating a reserve as follows: (1) the Crown, as a matter of fact, has set apart a specific tract of land; (2) the specific tract has been set apart for the permanent use and benefit of a band of Indians; and (3) the underlying title to these lands remains in the Crown.

33 The appellants submit that the village site inhabited by the Band meets the test for the creation of a reserve. They claim that a specific tract of land was set apart for their use in 1965. The lands have been used by the Band ever since. Government officials as early as 1953 expressed an intention to create a reserve for the Band, and

continued to take this view in spite of Ottawa's intransigence. However, since the lands were set aside under the *Territorial Lands Act* according to the appellants, a reserve was created. The Crown had a clear purpose in setting aside the lands: to establish a settled community where the Band would be able to live in permanent dwellings. Further, DIAND adopted a policy in 1971 which recognized the Band's beneficial interest in the land and required the Department to consult and compensate the Band if a right-of-way should be needed over its lands.

(2) Respondents

(i) *Government of Canada*

34 The Government of Canada submits that the power to create reserves in the Yukon Territory continues to be an exercise of the royal prerogative. The Crown in this case never intended to create a reserve, and never by a duly authorized official or body exercised the royal prerogative to do so. Intention to create a reserve is key, and the evidence accepted in the courts below was that no such intention ever existed. The Government of Canada submits that, as the Band is not the signatory of any treaty, reserve-creation principles based on treaty-created reserves are inapplicable. Further, the *Territorial Lands Act* does not grant authority to create reserves; even if it did, the authority to do so would reside in the Governor in Council who has not exercised that power to create a reserve for the Band.

35 The Government of Canada submits that the power to create reserves is part of the royal prerogative because of the special nature of the relationship of First Nations to the Crown. By convention and long-standing practice, only the Governor in Council is able to exercise this power; its exercise cannot be delegated to ministers of the Crown

or other delegates. The exercise of the royal prerogative requires an outward public manifestation through an Order-in-Council; warrants, commissions or orders under the sign manual; or proclamations, writs, letters patent, letters close, charters, grants and other documents under the Great Seal. In most cases, reserves have been created by means of Orders-in-Council, although there have been exceptions. In the view of the Government of Canada, these exceptions do not prove that the creation of reserves is no longer a prerogative power. In this case, there is no treaty manifesting an intention to create a reserve, nor any other concrete evidence of it. While some Crown servants may have favoured the creation of a reserve, their views were never adopted by the Crown which had a stated policy against the creation of reserves in the Yukon Territory.

36 The royal prerogative can only be limited by means of express language in statute. Neither the *Indian Act* nor the *Territorial Lands Act* supplants the prerogative by means of explicit language with respect to reserve creation. The Government of Canada rejects the trial judge's application of the definition of the word "reserve" in the *Indian Act* as inconsistent with the purposive, contextual approach to interpretation advocated by this Court. The Government of Canada adds that the context of the *Indian Act* makes it clear that not all lands occupied by Indians under the Act are reserve lands; First Nations may also reside on Crown lands that have not been set apart as reserves. Moreover, in many cases, powers in relation to reserves under the Act must be exercised by the Governor in Council. Finally, because the creation of a reserve has effects upon the general population as well as the specific band, it is critical that the process of establishing a reserve be appropriately public to ensure clarity, certainty and public notice.

(ii) *Government of Yukon*

37 The Government of Yukon has taken no position on the questions in this appeal. However, the Government of Yukon stated its concern about the impact of any decision in this case on the Umbrella Final Agreement, which sets the pattern for land settlement agreements between it and the First Nations of the Yukon Territory. The Umbrella Final Agreement treats reserves and lands set aside, or settlement land, differently. Lands set aside must become settlement land, outside of the *Indian Act*, under the Umbrella Final Agreement; on the other hand, reserves are to be retained or converted to settlement land. Different tax regimes affect each type of land, with reserves entitled to the exemption under s. 87 of the *Indian Act*, whereas lands set aside have been granted a moratorium on the collection of certain types of tax. Further, federal grants in lieu of taxes are paid to the Government of Yukon on lands set aside, but not on reserve lands. A judgment of this Court finding that the Ross River lands are a reserve would impact on other First Nations in the Yukon Territory and could disrupt the current land agreement.

(3) Interveners

38 Two interveners, the Attorney General of British Columbia and the Coalition of B.C. First Nations (the "Coalition") made sharply conflicting submissions on the key issues raised in this appeal. In support of the Government of Canada, the Attorney General of British Columbia submitted that the creation of reserves remains essentially a matter of royal prerogative. The *Indian Act* is concerned with the management of reserves but does not provide for their creation. Moreover, a finding that an *Indian Act* reserve has been established requires evidence of an outward manifestation of intent to bring a tract of land under the management and protection scheme of the Act.

39 The Coalition submitted broad arguments on the nature of the relationship between the Crown and First Nations. It views reserve creation as an exercise of the royal prerogative, constrained by the Crown's legal and equitable obligations to First Nations, as well as by statute. In this context, it submits that reserves may come into existence by various means like the treaty process, unilateral government action, or even *de facto* through the historical development of a particular native community which gives the reserve definite boundaries over time.

40 Given the position of the parties and the issues they raise, I will review the legal process of reserve creation in the Yukon Territory, after a few comments about the history of the process in Canada. I will then turn to the evidence in order to determine whether it establishes that a reserve was created at Ross River.

C. *The Creation of Reserves*

41 A word of caution is appropriate at the start of this review of the process of reserve creation. Some of the parties or interveners have attempted to broaden the scope of this case. They submit that it offers the opportunity for a definitive and exhaustive pronouncement by this Court on the legal requirements for creating a reserve under the *Indian Act*. Such an attempt, however interesting and challenging it may appear, would be both premature and detrimental to the proper development of the law in this area. Despite its significance, this appeal involves a discussion of the legal position and historical experience of the Yukon, not of historical and legal developments spanning almost four centuries and concerning every region of Canada.

42 The key issue in this case remains whether the lands set aside nearly half a century ago for the Ross River Band have the status of a reserve as defined in the

Indian Act. Was the process purely an exercise of the prerogative power? Did statute law displace this power completely or in part? These questions must be answered in order to determine whether a reserve now exists at the junction of the Ross and Pelly Rivers.

43 Canadian history confirms that the process of reserve creation went through many stages and reflects the outcome of a number of administrative and political experiments. Procedures and legal techniques changed. Different approaches were used, so much so that it would be difficult to draw generalizations in the context of a specific case, grounded in the particular historical experience of one region of this country.

44 In the Maritime provinces, or in Quebec, during the French regime or after the British conquest, as well as in Ontario or later in the Prairies and in British Columbia, reserves were created by various methods. The legal and political methods used to give form and existence to a reserve evolved over time. It is beyond the scope of these reasons to attempt to summarize the history of the process of reserve creation throughout Canada. Nevertheless, its diversity and complexity become evident in some of the general overviews of the process which have become available from contemporary historical research. For example, in the course of the execution of its broad mandate on the problems of the First Nations in Canada, the Royal Commission on Aboriginal Peoples reviewed the process in its report ("*RCAP Report*") (see *Looking Forward, Looking Back*, vol. 1, at pp. 142-45; *Restructuring the Relationship*, vol. 2, at pp. 464-85). The report gives a good overview of the creation of reserves, emphasizing its very diversity. A more detailed study of the topic may also be found in R. H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland — A*

Study in Law and History (1990); see also J. Woodward, *Native Law* (loose-leaf), at pp. 247-48.

Northern Canada

45 In this appeal, more detailed attention must be given to a review of the process of reserve creation in Northern Canada. Treaties 8, 10 and 11 provided for the creation of reserves in Northern Canada (consisting in part of the northern Prairie provinces and the western portions of the Northwest Territories, southeastern Yukon Territory, and northeastern British Columbia). These have been characterized as "resource development" agreements in the sense that there was no desire to turn the Aboriginal peoples of these areas into farmers as had been the case in the South. Moreover, First Nations were told generally that they would not be forced to live on the reserve allotments nor would their traditional economic life be disrupted. However, as in the more southerly numbered treaties, the federal government was often slow to meet its obligation to create reserves, leaving many First Nations to continue the struggle to settle land claims into very recent times (see *RCAP Report*, vol. 2, *supra*, at pp. 479-84). In a number of cases, some First Nations never acceded to treaties purporting to cover their lands. In other cases, no treaties were ever signed, as is the case in most of the Yukon Territory. However, in the last two decades there has been some movement to formulate land settlement claims with the Inuit (which led to the creation of Nunavut), the Dene and Yukon First Nations. These agreements generally provide for some form of Aboriginal self-government, but do not necessarily provide for the creation of reserves (as in the Umbrella Final Agreement in the present case).

46 The legal methods used to give a form of legal existence to these reserves have varied. Each of them must be reviewed in its own context. I will hence focus now

more narrowly on the legal nature of the process which prevailed in the Yukon and on its application to the facts in this case.

D. *Reserve Creation in the Yukon*

47 Three different sources for the authority to create reserves have been identified by the parties. The appellants essentially submit that the authority to create a reserve is statute based. In their view, statute law has displaced the royal prerogative as the primary source of authority. As mentioned above, the federal government answers that the reserve-creation power in the Yukon Territory continues to flow from the royal prerogative. One of the interveners, the Coalition, advances the submission that the authority to create reserves derives from the combined application of prerogative powers and statute.

(1) Statute

48 In order to determine whether statutory authority exists, it is necessary to turn first to the provisions of the *Indian Act*. Under s. 2(1) of the *Indian Act*, the term "reserve" in the context of the Act is defined as follows: "[A] tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band". In certain sections of the *Indian Act* (namely, ss. 18(2), 20 to 25, 28, 36 to 38, 42, 44, 46, 48 to 51, 58 and 60, and the regulations made under those sections), the definition of "reserve" is extended to include "designated lands", which s. 2(1) defines to mean "a tract of land or any interest therein the legal title to which remains vested in Her Majesty and in which the band for whose use and benefit it was set apart as a reserve has, otherwise than absolutely, released or surrendered its rights or interests, whether before or after the coming into force of this definition".

This latter expansion of the definition is not of relevance in the instant case, so my analysis will focus on the definition proper.

49 The definition in s. 2(1) of "reserve" exists primarily to identify what lands are subject to the terms of the Act. The Act outlines property rights of Indians on reserves, establishes band governments and outlines their powers, identifies how Indians are or are not subject to taxation, and provides for a variety of other matters.

50 Under the *Indian Act*, the setting apart of a tract of land as a reserve implies both an action and an intention. In other words, the Crown must do certain things to set apart the land, but it must also have an intention in doing those acts to accomplish the end of creating a reserve. It may be that, in some cases, certain political or legal acts performed by the Crown are so definitive or conclusive that it is unnecessary to prove a subjective intent on the part of the Crown to effect a setting apart to create a reserve. For example, the signing of a treaty or the issuing of an Order-in-Council are of such an authoritative nature that the mental requirement or intention would be implicit or presumptive.

51 While s. 2(1) of the *Indian Act* defines "reserve" for the purposes of the Act as land set apart by the Crown for the use and benefit of Indians, nothing in the Act bestows upon the Governor in Council, the Minister of DIAND, or any other statutory delegate, the authority to perform the actions necessary to create a reserve. Nor does the Act explain what must be done to set apart lands for the purpose of creating a reserve: the Act neither sets out the material element nor the intentional element required for the setting apart of land to take place. One must look elsewhere for sources of any such statutory authority.

52 The appellants concede that the royal prerogative was the original source of the Crown's authority to create a reserve. In such instruments as the Mi'kmaq treaties in the early 1760s discussed in *R. v. Marshall*, [1999] 3 S.C.R. 456, the Crown interacted directly with the First Nations without the interposition of any statutory authority. Such a situation is a pure act of prerogative authority. Only since the latter part of the eighteenth century has legislation been enacted which could eliminate or reduce the scope of the royal prerogative with respect to reserve creation.

53 The appellants submit that, while the royal prerogative may have once been the source of authority for creating reserves, it has been superseded by statute. The question, then, which must first be answered is whether and to what degree the royal prerogative has been limited in the scope of its application to reserve creation. This analysis necessarily implies determining how the royal prerogative is limited.

(2) Royal Prerogative

54 Generally speaking, in my view, the royal prerogative means "the powers and privileges accorded by the common law to the Crown" (see P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at p. 1:14). The royal prerogative is confined to executive governmental powers, whether federal or provincial. The extent of its authority can be abolished or limited by statute: "once a statute has occupied the ground formerly occupied by the prerogative, the Crown [has to] comply with the terms of the statute". (See P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 17; see also, Hogg, *supra*, at pp. 1:15-1:16; P. Lordon, Q.C., *Crown Law* (1991), at pp. 66-67.) In *Attorney-General v. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508 (H.L.), Lord Dunedin described the interplay of royal prerogative and statute, at p. 526:

> Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.

Lord Parmoor added, at p. 568: "The Royal Prerogative has of necessity been gradually curtailed, as a settled rule of law has taken the place of an uncertain and arbitrary administrative discretion". In summary, then, as statute law expands and encroaches upon the purview of the royal prerogative, to that extent the royal prerogative contracts. However, this displacement occurs only to the extent that the statute does so explicitly or by necessary implication: see *Interpretation Act*, R.S.C. 1985, c. I-21, s. 17; Hogg and Monahan, *supra*, at p. 17; Lordon, *supra*, at p. 66.

55 The appellants submit that statute has long since displaced the royal prerogative in the area of reserve creation. The first post-Confederation statute which dealt with Indians, *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, gave the Secretary of State authority to control and manage the lands and property of Indians and, in s. 3(6) of the *Indian Act, 1876*, defined a reserve to include any land "set apart by treaty or otherwise", implying that there were several ways by which a reserve could be created. The essential element then, and which continues today, is that the lands be set apart.

56 Further, s. 18(*d*) of the 1952 *Territorial Lands Act*, the successor to the *Dominion Lands Act*, R.S.C. 1927, c. 113, repealed S.C. 1950, c. 22, s. 26, states that the Governor in Council may "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 and to make free grants or leases for such purposes, and for any other

purpose that he may consider to be conducive to the welfare of the Indians". The appellants submit that this provision, in combination with the provisions discussed above in the *Indian Act*, has supplanted the royal prerogative.

57 The respondents counter that s. 18(*d*) provides for the creation of a land bank from which the Crown may create reserves, but that it does not provide for the actual creation of reserves themselves. The respondents rely upon *Town of Hay River v. The Queen*, [1980] 1 F.C. 262 (T.D.), in which Mahoney J. stated in *obiter*, at p. 265, that "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".

58 In my view, the statutory framework described by the appellants has limited to some degree but not entirely ousted, the royal prerogative in respect of the creation of reserves within the meaning of the *Indian Act* in the Yukon. Whenever the Crown decides to set up a reserve under the *Indian Act*, at a minimum, s. 2(1) puts limits on the effects of the decision of the Crown in the sense that the definition of a "reserve" in the *Act* means (1) that the title to reserve lands remains with the Crown, and (2) that the reserve must consist of lands "set apart" for the use and benefit of a band of Indians. If the royal prerogative were completely unlimited by statute, the Crown would essentially be able to create reserves, in any manner it wished, including the transfer of title by sale, grant or gift to a First Nation or some of its members. However, in the Yukon, so long as the Crown intends to create a reserve as defined by the *Indian Act*, Parliament has put limits on the scope and effects of the power to create reserves at whim, through the application of the statutory definition of a reserve in s. 2(1). If the Crown intended to transfer land to a First Nation outside the scope of the *Indian Act*, the role and effects

of the prerogative would not be constrained by this Act and would have to be examined in a different legal environment.

59 Section 18(*d*) of the 1952 *Territorial Lands Act* has similarly placed limits on the royal prerogative with respect to the creation of reserves by establishing a new and different source of authority whose exercise may trigger the process of reserve creation. It indicates that at least some of the lands used to fulfill treaty requirements, which include the creation of reserves for signatory First Nations, are to be drawn from lands set apart and appropriated for that purpose by the Governor in Council under the terms of the 1952 *Territorial Lands Act*.

60 That said, it would not be accurate to state that the royal prerogative has been completely ousted from the field by the 1952 *Territorial Lands Act*. Section 18(*d*) does, on its face, seem to bestow a power on the Governor in Council to set apart lands for the creation of reserves. However, as the respondent Government of Canada points out, this does not necessarily mean that this section grants authority to actually create the reserve and that the prerogative no longer plays any part in the process. The setting apart and appropriating of land is not the entire matter; the Crown must also manifest an intent to make the land so set apart a reserve. The use of the words "as may be necessary" implies a separation in time between the appropriation of the lands and the fulfilment of the treaty obligations. In other words, once the land is appropriated, it does not yet have the legal status of a reserve; something more is required to accomplish that end. This requirement reflects the nature of a process which is political, at least in part. Given the consequences of the creation of a reserve for government authorities, for the bands concerned and for other non-native communities, the process will often call for some political assessment of the effect, circumstances and opportunity of setting up a reserve, as defined in the *Indian Act*, in a particular location or territory.

61 The appellants have not pointed to any other statutory provision which identifies the process by which the Crown takes lands set apart and appropriated under s. 18(*d*) and turns them into a reserve. Indeed, the Act remains entirely silent in this respect. Rather, the appellants seem to rely on a logical leap from the fact of setting apart and appropriating the land to the creation of a reserve. As I have said, the language of s. 18(*d*) does not make that leap. If Parliament had meant in s. 18(*d*) to grant the Governor in Council the power to both appropriate lands for the purpose of meeting treaty obligations to create reserves and to create the reserves from the lands appropriated, it would have used more specific language to effect such a grant of authority.

62 Even if I were to find that s. 18(*d*) has occupied the field with respect to the creation of Indian reserves, it is nevertheless clear from the language of the section that the Governor in Council has been given the power to create reserves from lands set apart. The Governor in Council is given discretion (indicated by the use of the word "may") to decide whether to set apart lands and whether to designate said lands as the reserve of any particular First Nation. Further, the Governor in Council is under no obligation to set apart particular lands for the use and benefit of a band, unless that has been provided for under treaty or some other land settlement agreement. Otherwise, the Governor in Council is free to designate any Crown land the Crown chooses as a reserve for a particular band. Although this is not at stake in the present appeal, it should not be forgotten that the exercise of this particular power remains subject to the fiduciary obligations of the Crown as well as to the constitutional rights and obligations which arise under s. 35 of the *Constitution Act, 1982*.

63 It is worth noting that, in either situation, it is the Governor in Council who exercises the authority granted. The royal prerogative in Canada is exercised by the Governor General under the letters patent granted by His Majesty King George VI in 1947 (see *Letters Patent constituting the office of Governor General of Canada* (1947), in *Canada Gazette*, Part I, vol. 81, p. 3014 (reproduced in R.S.C. 1985, App. II, No. 31)). In the usual course of things, the Governor General exercises these powers for the Queen in right of Canada, acting on the advice of a Committee of the Privy Council (which consists of the Prime Minister and Cabinet of the government of the day). Thus, if the power to create reserves is derived from the royal prerogative, the Governor General, or Governor in Council, would normally exercise that power. On the other hand, s. 18(*d*) of the 1952 *Territorial Lands Act* specifically designates the Governor in Council as the holder of the power to set apart and appropriate lands for the fulfilment of treaty obligations. In effect, the holder of the power is the same person in both cases.

64 The question arises in both cases as to whether the powers of the Governor in Council must be exercised personally or if those powers may be delegated to a government official. As the intervener Coalition submits, one must look both at the Crown and Aboriginal perspectives to determine on the facts of a given case whether the party alleged to have exercised the power to create a reserve could reasonably have been seen to have the authority to bind the Crown to act to appropriate or set apart the lands and then to designate them as a reserve. In my view, the correct test of this is to be found in this Court's judgment in *R. v. Sioui*, [1990] 1 S.C.R 1025, at p. 1040:

> To arrive at the conclusion that a person had the capacity to enter into a treaty with the Indians, he or she must thus have represented the British Crown in very important, authoritative functions. It is then necessary to take the Indians' point of view and to ask whether it was reasonable for them to believe, in light of the circumstances and the position occupied by the party they were dealing with directly, that they had before them a person capable of binding the British Crown by treaty.

65 While these words were said in the context of treaty creation, they seem relevant in principle to the creation of a reserve. In both cases, an agent of the Crown, duly authorized, acts in the exercise of a delegated authority to establish or further elaborate upon the relationship that exists between a First Nation and the Crown. The Crown agent makes representations to the First Nation with respect to the Crown's intentions. And, in both cases, the honour of the Crown rests on the Governor in Council's willingness to live up to those representations made to the First Nation in an effort to induce it to enter into some obligation or to accept settlement on a particular parcel of land.

66 However, from the passage from *Sioui*, it is also clear that not just any Crown agent will do. Many minor officials who are Crown agents could hardly be said to act to bind the Crown in this case or any other, in a process which involves significant political considerations or concerns about the Crown's duties and obligations towards First Nations. The Crown agent must "have represented [the Crown] in very important, authoritative functions" (*Sioui*, *supra*, at p. 1040). Similarly, where reserves have been created by means of an Order-in-Council, there is no question that it is the Governor in Council who is making the representations and who is exercising the power to create the reserve. On the other hand, in the circumstances of this case, the registration in the Yukon Territory Land Registry of the setting aside of land for the Indian Affairs Branch is not sufficient to show intent to create a reserve given the widely varying types of interests in land recorded in that Register.

E. *Summary of Principles Governing the Creation of Reserves Applicable to this Case*

67 Thus, in the Yukon Territory as well as elsewhere in Canada, there appears to be no single procedure for creating reserves, although an Order-in-Council has been

the most common and undoubtedly best and clearest procedure used to create reserves. (See: *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at pp. 674-75; Woodward, *supra*, at pp. 233-37.) Whatever method is employed, the Crown must have had an intention to create a reserve. This intention must be possessed by Crown agents holding sufficient authority to bind the Crown. For example, this intention may be evidenced either by an exercise of executive authority such as an Order-in-Council, or on the basis of specific statutory provisions creating a particular reserve. Steps must be taken in order to set apart land. The setting apart must occur for the benefit of Indians. And, finally, the band concerned must have accepted the setting apart and must have started to make use of the lands so set apart. Hence, the process remains fact-sensitive. The evaluation of its legal effect turns on a very contextual and fact-driven analysis. Thus, this analysis must be performed on the basis of the record.

68 It should be noted that the parties did not raise, in the course of this appeal, the impact of the fiduciary obligations of the Crown. It must be kept in mind that the process of reserve creation, like other aspects of its relationship with First Nations, requires that the Crown remain mindful of its fiduciary duties and of their impact on this procedure, and taking into consideration the *sui generis* nature of native land rights: see the comments of Lamer C.J. in *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657, at paras. 14-16.

F. *The Evidence Relating to the Creation of a Reserve at Ross River*

69 To succeed, the appellants in this case have to show at least that land had been set apart for them. No real dispute arises with respect to the setting aside of land, nor with respect to the absence of an Order-in-Council, which latter issue, in my view, is not determinative of the issue. The key question remains whether there was an

intention to create a reserve on the part of persons having the authority to bind the Crown. In other words, what is critical is whether the particular Crown official, on the facts of a given case, had authority to bind the Crown or was reasonably so seen by the First Nation, whether the official made representations to the First Nation that he was binding the Crown to create a reserve, and whether the official had the authority to set apart lands for the creation of the reserve or was reasonably so seen.

70 The appellants pointed to parts of the evidence which, in their opinion, indicated that such an intention had existed and had led to the setting apart of the lands where the Band had been living for many years. The appellants point to a number of individuals involved in the management of native affairs in the Yukon who recommended to the Minister of Citizenship and Immigration, Indian Affairs Branch, and/or the Supervisor of Lands and Mining, Department of Northern Affairs and National Resources, that a reserve be created for the Band. They placed strong emphasis on their recommendations as well as on the fact that a village was established at Ross River, as had also been recommended.

71 In my view, the critical flaw in the appellants' reliance on the authority of these Crown officials to bind the Crown appears when one asks whether these agents either (1) made representations to the Ross River Band that they had authority to create reserves; or (2) both made the representations and set apart the lands by legal act. On this appeal, the appellants have made no attempt to show that in fact these Crown agents ever made representations to the members of the Ross River Band that the Crown had decided to create a reserve for them. Nowhere in the appellants' lengthy review of the facts is there any reference to such evidence. Nor did Maddison J., in his reasons for judgment at trial, make any such reference. The evidence presented by the appellants all relates to recommendations made by Crown officials to other Crown officials, which

recommendations were generally ignored or rejected. There appears to have been a long-lasting and deep-seated tension, even disagreement, as to the opportunity of creating new reserves between the civil servants working directly with native groups in the Yukon and their superiors in Ottawa. The evidence shows that no person having the authority to bind the Crown ever agreed to the setting up of a reserve at Ross River. Every representation made by those Crown officials actually in a position to set apart the lands was to the effect that no reserves existed in the Yukon Territory and that it was contrary to government policy to create reserves there. There is simply no evidence provided by the appellants which suggests that any Crown agents with the authority to set apart lands went to the members of the Band and in effect said: "The Crown is now creating a reserve for you, a reserve of the type contemplated under the *Indian Act* and which will be subject to all of the terms of that Act". Conversely, those Crown officials who did advocate the creation of a reserve, whether or not they made representations to the Band, never had the authority to set apart the lands and create a reserve.

72 Some specific facts are particularly telling in this respect. They confirm that the appellants failed to demonstrate the existence of the intentional component of the reserve-creation process. At most, as indicated above, they proved that there had been a long-standing disagreement between the local agents of DIAND and its predecessors and its central administration in Ottawa. This conflict originated in the 1950s. For example, the Indian Commissioner for British Columbia, who was also in charge of native affairs in the Yukon, recommended that a number of new reserves, including one at Ross River, be created in the territory. The Deputy Minister of the Department of Citizenship and Immigration, Indian Affairs Branch, advised the Acting Minister against such a move and no action was taken.

73 A few years later, in 1957, the Deputy Minister recommended against the creation of new reserves. As a result, the Government of Canada decided not to implement a recommendation to set up 10 new reserves including one at Ross River. In 1958, the Deputy Minister received new recommendations against the creation of reserves.

74 In 1962, the Yukon Agency of the Indian Affairs Branch of the Department of Citizenship and Immigration applied to the Department of Northern Affairs and National Resources and asked that land be set aside for the Ross River Indian Village site, presumably pursuant to the *Territorial Lands Act*. After a series of correspondence about the location and size of the site, the Department of Northern Affairs and National Resources informed the Indian Affairs Branch that land had been set aside "for [the] Indian Affairs Branch", but not specifically for the Ross River Band.

75 After the village was established and the land was set aside, the Department constantly maintained the position that it had not intended to create a reserve. In 1972, a published list of reserves restated the official position that no reserve had been created in the Yukon, within the meaning of the *Indian Act*. In 1973, the Department reversed in part its previous stance. It acknowledged that six reserves had been created by Orders-in-Council, between 1900 and 1941. The Ross River site was not among them.

76 After 1965, the reality of these set-asides which do not constitute reserves seems to have been well established. There was an early illustration of this fact. In 1966, the Government of Yukon took back control of a lot on the site of the Ross River Indian Village and leased it to a private citizen. There was consultation with the Band, but no authorization or consent was requested from it. No suggestion was made at the time that the Band's consent would be required. Finally, as we shall see, the existence

of these lands set aside, while not having the status of reserves, was recognized during the negotiations leading to the conclusion of the Umbrella Final Agreement.

G. *The Effect of the Setting Aside*

77 As argued by the respondent, the Government of Canada, what happened in this case was the setting aside of lands for the use of the Band. No reserve was legally created. This procedure may raise concerns because it may amount to a bureaucratic attempt to sidestep the process of reserve creation and establish communities which remain in legal limbo. The use of this procedure may leave considerable uncertainty as to the rights of the Band and its members in relation to the lands they are allowed to use in such a manner. Nevertheless, it must not be forgotten that the actions of the Crown with respect to the lands occupied by the Band will be governed by the fiduciary relationship which exists between the Crown and the Band. It would certainly be in the interests of fairness for the Crown to take into consideration in any future negotiations the fact that the Ross River Band has occupied these lands for almost half a century.

78 The Umbrella Final Agreement acknowledges that these set asides were common practice in the Yukon. Indeed, as pointed out in the factum of the Government of Yukon, the Umbrella Final Agreement provides for rules and procedures designed to deal with the status of lands set aside, which set-aside lands are clearly distinguished from *Indian Act* reserves. Under this agreement, lands set aside must become settlement land under a Yukon First Nation Final Agreement. Such settlement land is specifically identified as not being reserve land. Thus, it may well be thought that the alleged claim of the appellants should have been pursued through the negotiation process, given the absence of intention to create a reserve on the part of the Crown.

VI. Conclusion

79 For these reasons, the appeal should be dismissed, with no order as to costs.

Appeal dismissed.

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