2001 SKCA 109 **Docket: 3473**

THE COURT OF APPEAL FOR SASKATCHEWAN

CORAM: TALLIS, VANCISE & GERWING JJ.A.

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 other 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

RESPONDENTS (Plaintiffs)

- and -

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

APPELLANTS (Defendants)

- and -

HER MAJESTY THE QUEEN in Right of Alberta

INTERVENER

- and -

BIGSTONE CREE NATION

INTERVENER

- and -

ATHABASCA TRIBAL COUNCIL

INTERVENER

COUNSEL:

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DISPOSITION:

On Appeal From:	Q.B. No. 2655 of 1987, J.C. of Saskatoon
Appeal Heard:	June 23 - 25, 2001
Appeal Allowed:	October 23, 2001
Cross-Appeal Dismissed:	October 23, 2001
Written Reasons:	October 23, 2001
Reasons By:	The Honourable Mr. Justice Vancise
In Concurrence:	The Honourable Mr. Justice Tallis The Honourable Madam Justice Gerwing

Vancise J.A.

Introduction

[1] In 1889, the Lac La Ronge Indian Band (the Band) entered into an adhesion agreement with The Queen in Right of Canada on the same terms and conditions as those granted the Indians who treated with Canada under Treaty No. 6 in 1876. In return for surrendering some 11,066 square miles of territory, the Band was to receive certain benefits including one square mile of treaty reserve land per family of five (128 acres per Indian). Canada first surveyed land for the Band's reserve in 1897 and set apart 56.5 square miles as reserve lands. This allotment was 7.5 square miles less than the Band's full treaty land entitlement. Over the years treaty reserve lands comprising some 107,147.3 acres or 167.4 square miles were set apart for the Band.

[2] The Band sues for a declaration that Canada and Saskatchewan failed to fulfill their treaty obligations under Treaty No. 6 and claims it is entitled to additional lands and monies. In particular, the Band claims to be entitled to the treaty land entitlement of 128 acres per Indian based on the present population of the Band rather than the population of the Band at the time of first survey or first census taken after the signing of the adhesion to Treaty No. 6 in 1889. They also claim certain lands at Candle Lake and certain school lands situated in the Town of La Ronge which they contend were set aside as reserves but not formally transferred to the Band.

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[3] The trial judge ordered that the population of the Band to be used in calculating the treaty land entitlement under the Adhesion Agreement to Treaty No. 6, is the population at the time the full land entitlement under the Adhesion Agreement is set apart. This is commonly known as the current population formula and not the population of the Band at the time of first survey or first census.

[4] The claim by the Band for a declaration that certain lands at Candle Lake and certain school lands in the Town of La Ronge were set apart as an Indian Reserve was dismissed.

[5] Canada appeals the declaration that the treaty land entitlement is based on or is calculated using the "current population formula," that is the population of the Band at the time the entire treaty land entitlement is set apart. Saskatchewan appeals the entire judgment.

[6] The Band cross-appeals the dismissal of its claim to certain lands at Candle Lake and to the school land in the Town of La Ronge.

Issues

[7] The principal issue raised on the appeals by Canada and Saskatchewan is whether at the time Treaty No. 6 was negotiated, the parties intended to calculate the treaty land entitlement on the basis of the population of the Band at the time the land was first set apart, with certain adjustments, or when the treaty land entitlement was not fully allotted or set apart, on the basis of the present or current population of the Band.

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[8] Depending on the answer to that issue, it may be necessary to determine whether the land entitlement of the Band was extinguished by an agreement between the Band and Canada which resulted in an Order in Council of the Government of Canada purporting to finally settle the outstanding land entitlement between Canada and the Band.

[9] If Canada is obligated under the Treaty to transfer further reserve land to the Band, the issue of whether Canada is constitutionally estopped from claiming land from Saskatchewan under s. 10 of the *Natural Resources Transfer Agreement* of 1930[1] (the "*NRTA*") to fulfill any outstanding treaty obligation may have to be decided.

[10] The Band, appellant by cross-appeal, appeals the decision that the Candle Lake lands and the school lands at La Ronge were not set apart as Indian reserves. They also appeal a finding that Canada did not breach its fiduciary obligation owed to the Band with respect to the Candle Lake and school lands.

Background

[11] There are very few differences between the parties on the essential facts in this dispute. Although many hundreds of documents were produced and filed as exhibits during

[1] The *Constitution Act, 1930*, 20-21 Geo. V, c.26 (U.K.), Schedule (3), Reprinted in R.S.C. 1985, App. II, No. 26.

the course of a very lengthy trial, there are less than 100 that are relevant to the treaty land entitlement provision in Treaty No. 6.

[12] A better understanding of the issues will be gained from a brief description of the treaty negotiations in the North-West Territories.

[13] The trial judge set out the history and chronology of treaty making in Canada in some detail. What follows is a more abbreviated description dealing only with those treaties essential to an understanding of the issues involved in the interpretation of Treaty No. 6. A more detailed description of relevant portions of the numbered treaties will be considered when I deal with the historical context of the negotiations between the parties.

[14] It is sufficient for my purposes to commence with the Robinson Treaties of 1850. The Robinson Treaties provided for the surrender by the Indians of lands North of Lakes Superior and Erie. In consideration for the surrender, Canada agreed to: the allocation of land for Indian Reserves; the payment of annuities; and, the guarantee of hunting and fishing rights. The location of the reserves and the population of the Band were specified in the treaties.

[15] In Western Canada, following the entry into Confederation of Manitoba in 1870, the numbered treaties were negotiated to fulfill the objectives and needs of both Canada and the Indians. Canada wanted to facilitate the opening up of a large tract of fertile land for settlement and to minimize conflict between the Indians and the non-Indians. The Indians were anxious to negotiate with Canada because of the increased pressure of settlement by non-Indians on the great plains, the disappearance of the buffalo herds and the loss of their traditional nomadic way of life.

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[16] In 1871, Canada concluded the first of these treaties, Treaty No. 1, with the Chipewyans and Swampy Crees. In this Treaty, the Indians surrendered to Her Majesty the Queen (Canada) all the lands within the area described in the Treaty. In return, the Treaty provided for the payment of annuities, the building of schools and the furnishing of agricultural implements. It also contained a reserve land provision specifying the location of the reserve and provided a formula for determining the size of the reserve, 160 acres per family of five (32 acres per person).

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[17] The Plains and Wood Cree tribes signed Treaty No. 6 which covered most of what is now Saskatchewan on August 23 and 28, 1876 near Fort Carlton and on September 9, 1876 at Fort Pitt. In return for ceding territory to Canada, the Indians received what had by then become standard in the numbered treaties: an agreement to set aside a reserve of 640 acres per family of five (128 acres per Indian); annuities of $5 per member per year; an annual sum of $1,500 for the purchase of ammunition and twine; and, the right to hunt and fish throughout the surrendered lands. In addition to the standard provisions, the Plains and Wood Cree extracted an agreement from Canada that a medicine chest would always be available on the reserve and that $1,000 would be paid to the Band for seed grain in each of the first three years of the Treaty. Treaty No. 6 provided for the creation of reserves but the exact location and size of the reserves were not specified.

[18] In 1889, the William Charles Band which lived in the Montreal Lake area and the James Roberts Band which lived near Lac La Ronge signed an adhesion to Treaty No. 6 in which they agreed to accept the same benefits, payments and size of reserves promised to the Indians who entered into Treaty No. 6.

[19] The Robinson Treaties served as the model for the numbered treaties negotiated between Canada and the Indian Bands. Although each numbered treaty contained some

slight differences, each builds upon what had been previously negotiated between Canada and the Indian Bands. The trial judge described it this way:

> [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. . . .[2]
>
> [emphasis added]

[20] Briefly, this describes what led up to the reserve land allotments of the Band.

[21] Under the Adhesion Agreement, the Band received 43,726.3 acres of reserve land between 1899 and 1948. In 1964, Canada and Saskatchewan set aside a further 63,385 acres for reserve land, bringing the total to 107,147.3 acres or 167.4 square miles.

[22] **Relevant provision of Treaty No. 6, the Adhesion Agreement and Relevant Statutes:**

Treaty No. 6:

> 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

[2] Trial Judgment at pp. 9 & 10, paras. 21 & 22.

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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.

Adhesion Agreement:

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 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.[3]

Rupert's Land and North-Western Territory Order:[4]

Whereas by the "Constitution Act, 1867," it was (amongst other things) enacted that it should be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Address from the Houses of the Parliament of Canada, to admit Rupert's Land and the North-Western Territory, or either of them, into the Union on such terms and conditions in each case as should be in the Addresses expressed, and as the Queen should think fit to approve, subject to the provisions of the said Act. And it was further enacted that the provisions of any Order in Council in that behalf should have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

Section 35(1) of the Constitution Act, 1982:[5]

35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

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[3]Appeal Book, Vol. 4 at p. 1137a.

[4](U.K.), (June 23, 1870), reprinted in R.S.C. 1985, App. II, No. 9.

[5]Being Schedule B to the *Canada Act*, 1982 (U.K.), 1982, c.11, reprinted in R.S.C. 1985, App. II, No. 44.

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Natural Resources Transfer Agreement:

1. In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the Constitution Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall from and after the coming into force of this agreement and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this agreement shall continue to belong to Canada whether paid in advance or otherwise, it being the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals, or royalties before the coming into force of this agreement, and that the Province shall not be liable to account to Canada for any such payment made thereafter.

2. The Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all the parties thereto other than Canada or in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province or to interests therein, irrespective of who may be the parties thereto.

. . .

10. 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 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, 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.

. . .

19. Except as herein otherwise expressly provided, nothing in this agreement shall be interpreted as applying so as to affect or transfer to the administration of the Province (*a*) any lands for which Crown grants have been made and registered under the Land Titles Act of the Province and of which His Majesty the King in right of His Dominion of Canada is, or is

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> entitled to become, the registered owner at the date upon which this agreement comes into force, or (*b*) any ungranted lands of the Crown upon which public money of Canada has been expended or which are, at the date upon which this agreement comes into force, in use or reserved by Canada for the purpose of the federal administration.

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Decision of the Court of Queen's Bench

A. Interpretation of the Reserve Land Provision

[23] The trial judge found that the basis for calculating the reserve land to be set aside under the reserve land provision in Treaty No. 6 was the population of the Band at the time the treaty land entitlement was fulfilled in its entirety. The trial judge considered a number of factors to arrive at this conclusion. He stated that given the history of treaty negotiations, "the Crown could be very specific when it considered it necessary,"[6] in determining land entitlements. The specific approach taken in the Robinson Treaties and Treaty Nos. 1 and 2 fixed the date of calculating the treaty land entitlement and while there was no such provision in Treaty No. 6, the trial judge concluded that if the Crown wanted the entitlement to take place at a certain time or on the happening of a specific event it would have been a simple matter to so state it in the treaty. Given that state of affairs surrounding the negotiations he concluded that "there is nothing to suggest the Indians intended or agreed that land entitlement would be fixed at a particular date".[7]

[24] After setting out the circumstances surrounding the negotiations between the parties, including the reluctance of the Indians to settle on reserves and Canada's desire to have the Indians assimilated into the new society the trial judge stated:

> [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

[6] Trial Judgment at para. 141.

[7] Trial Judgment at para. 143.

> 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.[8]

[25] He then examined the subsequent conduct of the officials of the Department of Indian Affairs and concluded that it was of not much help to determine the common intention of the parties. He did conclude that there was evidence that some land was based on "increasing populations".[9]

[26] The trial judge concluded by stating:

> [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 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.
>
> . . .
>
> [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.[10]

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[8] Trial Judgment at para. 146.

[9] Trial Judgment at para. 152

[10] Trial Judgment at paras. 154, 155 & 163.

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[27] He rejected Saskatchewan's argument that the land entitlement had been satisfied by a Band Council Resolution in 1964. He found the Band Council did not have the statutory authority to enter into the settlement agreement or to enact the resolution of May 8, 1964 accepting 63,330 acres in full settlement of the land entitlement due the Band under the Adhesion Agreement. In so finding, he relied on *Whitebear Band Council v. Carpenters Provincial Council of Saskatchewan et al.*[11] and *Paul Band v. Her Majesty the Queen.*[12] He also found that there was no provision in the *Indian Act*[13] granting authority for a Band council to settle or compromise any treaty land entitlement. As a result, the resolution was invalid and of no effect.

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B. Candle Lake and School Lands

[28] The trial judge found that the Candle Lake lands were never set apart as a reserve. After a review of the Canadian and American authorities he found that there is no single method to create a reserve. He found however, that there are three essential elements required to create a reserve:

1. the Crown must make a deliberate decision to establish a reserve;
2. there must be consultation with the Indians; and,
3. there must be a clear demarcation of the reserve land.

[29] He reviewed the facts pertaining to the selection of the Candle Lake lands – namely, the positions of the Federal and Provincial Governments concerning their respective obligations to transfer lands for reserves under the Natural Resources Transfer Agreement.

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[11] [1982] 3 W.W.R. 554 (Sask. C.A.).

[12] [1984] 2 W.W.R. 540 (Alta. C.A.).

[13] R.S.C. 1927, c.98.

He found that, while there was an intention by Canada to set aside the lands selected at Candle Lake as a reserve, the intention was not acted upon. Canada did not make an unequivocal decision to designate certain lands as a reserve and then take the necessary steps to implement the decision. As a result, no reserve was created and the Candle Lake claim was rejected.

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C. School Lands

[30] The trial judge found, for many of the same reasons he stated in connection with the Candle Lake Lands question, that the school lands at La Ronge were not set aside as an Indian Reserve. He found that Canada had established a school for the Indians in the Town of La Ronge but took no steps to establish a reserve and indeed had no intention of establishing a reserve. This claim was also rejected.

D. Breach of Fiduciary Duty Owed to Band

[31] He found that while Canada owed a fiduciary obligation to the Indians, Canada had not breached its duty.

E. Ammunition and Twine

[32] The trial judge found that to calculate the ammunition and twine entitlement under the adhesion to Treaty No. 6, one adjusts the base amount of $1,500 used for those entering into the treaty itself in proportion to the population of those entering into the Adhesion.

General Principles

[33] During the course of the long trial, the trial judge reserved his decision on the admissibility of evidence. He reserved his decision on the admissibility of extrinsic evidence, oral history and the subsequent conduct of the parties to determine the intention of the parties at the time of entering into the Treaty and the Adhesion Agreement. While none

of the parties have appealed his ultimate rulings on the admissibility of evidence, I am setting out the decisions made on the admissibility of the evidence as part of the background to the appeal.

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Extrinsic Evidence

[34] The trial judge found that, absent ambiguity, extrinsic evidence would not be admitted. In so doing he followed *R. v. Horse*[14] which he found had been confirmed by the Supreme Court in *R. v. Sioui*.[15] The restrictive approach to the admissibility of extrinsic evidence was overtaken by both the majority and minority judgments in *R. v. Marshall.*[16] There it was decided that extrinsic evidence of the historic and cultural context in which the treaty was negotiated was admissible to assist in determining the intention of the parties *absent ambiguity*. Nothing turns on the trial judge's ruling, since he found the Treaty was ambiguous and he considered evidence concerning the historical and cultural context in which the Treaty was negotiated.

Subsequent Conduct

[35] The trial judge ruled that evidence in the form of documents, correspondence, and discussions between government officials and representatives of the Indians pertaining to the conduct of the parties subsequent to the negotiations of the Treaty was admissible. He excluded, however, evidence from 1960 onwards by reason that it represented an attempt at compromise and settlement of an outstanding land claim and did not deal with the fundamental question – the meaning of the Treaty, based on the intention of the parties at the time the Treaty was negotiated. I agree with that decision.

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[14][1988] 1 S.C.R. 187.

[15][1990] 1 S.C.R. 1025 at p. 1049.

[16][1999] 3 S.C.R. 456.

Oral History

[36] The trial judge relied on *R. v. Van der Peet*,[17] to expand the extent to which oral testimony would be admitted in Indian treaty cases. (See also *Mitchell v. Minister of National Revenue.*[18]) In *Van der Peet*, Lamer C.J. decided that the courts should admit evidence of a practice, custom or tradition integral to a distinctive aboriginal custom tendered orally by reason of the absence of written records and documentation. He decided that the courts must not undervalue evidence presented by aboriginal claimants simply on the basis that it does not conform to evidentiary principles applied in civil cases.

[37] The trial judge found that extrinsic evidence could be admitted as there are no written documents available because the Indians did not create and leave a written record at the relevant times. They did, however, express their thoughts orally and to the extent that those thoughts were expressed before any dispute had arisen between the parties as to the entitlements under the Treaty, the evidence met the criteria of reliability and necessity. The trial judge admitted the evidence of the elders but used it "with caution" because the individuals who testified on behalf of the Band have been actively involved in the "pursuit of Indian rights" and there was a chance that their personal opinions may have coloured their testimony regarding the history of the negotiations. I agree with that decision.

Treaty Interpretation

a) Standard of Review

[17] [1996] 2 S.C.R. 507 at pp. 558-59.

[18] 2001 S.C.C. 33; (2001), 199 D.L.R. (4th) 385 at paras. 31- 35.

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[38] The standard of review of findings of fact in aboriginal and treaty rights cases was articulated by Lamer C.J.S. in *Delgamuukw v. British Columbia*:[19]

[78] I recently reviewed the principles governing the appellate review of findings of fact in *Van der Peet, supra*. As a general rule, this Court has been extremely reluctant to interfere with the findings of fact made at trial, especially when those findings of fact are based on an assessment of the testimony and credibility of witnesses. Unless there is a "palpable and overriding error", appellate courts should not substitute their own findings of fact for those of the trial judge. The leading statement of this principle can be found in *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, *per* Ritchie J., at p. 808:

> These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial.

The same deference must be accorded to the trial judge's assessment of the credibility of expert witnesses: see N.V. Bocimar *S.A. v. Century Insurance Co. of Canada*, [1987] 1 S.C.R. 1247.[20]

Appellate courts are only justified in overturning findings of fact and substituting their own findings of fact if there is palpable and overriding error.

b) General Principles

[39] The principles of interpretation were most recently re-stated by Madam Justice McLachlin (now Chief Justice) in *R. v. Marshall* (in dissent but not on this point). She set out those principles and the authorities from which the principles were derived. She stated:

> 1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: *R. v. Sundown*, [1999] 1 S.C.R 393, at para. 24; *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 78; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1043; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 404. See also: J. [Sákéj] Youngblood Henderson, "Interpreting *Sui Generis* Treaties" (1997), 36 Alta. L. Rev. 46; L. I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test" (1997), 36 *Alta. L. Rev.* 149.

[19] [1997] 3 S.C.R. 1010.

[20] *Ibid*. at para. 78.

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2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories: *Simon, supra,* at p. 402; *Sioui, supra,* at p. 1035; *Badger, supra,* at para. 52.

3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed: *Sioui, supra,* at pp. 1068-69.

4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed: *Badger, supra,* at para. 41.

5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties: *Badger, supra,* at paras. 52-54; *R. v. Horseman,* [1990] 1 S.C.R. 901, at p. 907.

6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time: *Badger, supra,* at paras. 53 *et seq.*; *Nowegijick v. The Queen,* [1983] 1 S.C.R. 29, at p. 36.

7. A technical or contractual interpretation of treaty wording should be avoided: *Badger, supra*; *Horseman, supra*; *Nowegijick, supra*.

8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic: *Badger, supra,* at para. 76; *Sioui, supra,* at p. 1069; *Horseman, supra,* at p. 908.

9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context: Sundown, [1999] 1 S.C.R. 393, at para. 32; *Simon, supra,* at p. 402.[21]

[40] Those principles of treaty interpretation have been developed over time by the Supreme Court of Canada and had previously been summarized in *Saanichton Marina Ltd. v. Claxton et al.*[22]

i) Extrinsic Evidence

[21] *Marshall* at para. 78.

[22] (1988), 18 B.C.L.R. (2d) 217.

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[41] As noted above, extrinsic evidence can be used as an aid for interpretation of an Indian treaty even in the absence of ambiguity. The flexible approach to the use of extrinsic evidence in interpreting a treaty was set out by Binnie J. at paras. 10 to 14 in *Marshall.* He rejected a narrow approach in favour of the flexible approach as set out by Lamer J. in *Sioui* where he stated:

> 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 Huron's interests and those of the conqueror.[23]

[42] Madam Justice McLachlin adopted a similar approach in *Marshall* (in dissent although not on this issue):

> [81] The second issue of interpretation raised on this appeal is whether extrinsic evidence can be used in interpreting aboriginal treaties, absent ambiguity. Again, the principle that every treaty must be understood in its historical and cultural context suggests the answer must be yes. It is true that in *R. v. Horse*, [1988] 1 S.C.R. 187, at p. 201, this Court alluded with approval to the strict contract rule that extrinsic evidence is not admissible to construe a contract in the absence of ambiguity. However, subsequent decisions have made it clear that extrinsic evidence of the historic and cultural context of a treaty may be received absent ambiguity: *Sundown*, *supra*, at para. 25; *Badger*, *supra*, at para. 52. As Cory J. wrote in *Badger*, *supra*, at para. 52, courts interpreting treaties "must take into account the context in which the treaties were negotiated, concluded and committed to writing".[24]

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[23] *Sioui* at pp. 1068 & 69.

[24] *Marshall* at para. 81.

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[43] Thus, the Court's task is to determine the meaning of the land entitlement provisions of Treaty No. 6 as based upon the shared intention of the parties at the time the treaty was signed. The shared intention must be determined by reference to the written text of the treaty, the written record of the negotiations, the historical and cultural context in which the treaty was negotiated, as well as the subsequent conduct of the parties. Mr. Justice Binnie in *Marshall*, however, injected a note of caution in interpreting treaties. He stated:

> [14] "Generous" rules of interpretation should not be confused with a vague sense of after-the-fact largesse. The special rules are dictated by the special difficulties of ascertaining what in fact was agreed to. The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown's approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty (*Sioui, supra*, at p. 1049), the completeness of any written record (the use, e.g., of context and implied terms to make honourable sense of the treaty arrangement: *Simon v. The Queen*, [1985] 2 S.C.R. 387, and *R. v. Sundown*, [1999] 1 S.C.R. 393), and the interpretation of treaty terms once found to exist (*Badger*). The bottom line is the Court's obligation is to "choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles" the Mi'kmaq interests and those of the British Crown (*Sioui, per* Lamer J., at p. 1069 (emphasis added)). In *Taylor and Williams, supra*, the Crown conceded that points of oral agreement recorded in contemporaneous minutes were included in the treaty (p. 230) and the court concluded that their effect was to "preserve the historic right of these Indians to hunt and fish on Crown lands" (p. 236). . . [25]

ii) Interpretation of the Reserve Land Provision

[44] The principal issue is to determine the date or dates when the reserve land entitlement is to be calculated – the date the reserve was first surveyed and set apart, or in circumstances where a Band did not receive its entire entitlement of reserve land, the date of last survey. The latter results in an entitlement based on current population. Treaty No. 6 does not specify the time frame when the population of the Band is to be determined for this purpose.

[25] *Marshall* at para. 14.

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[45] All the parties, agree that where a band received its full land entitlement on the date of first survey, Canada has fully discharged its obligation under the treaty to provide reserve land to a band.

[46] They disagree, however, on the interpretation to apply to Treaty No. 6 where a band did not receive its full entitlement on the date of first survey. Canada contends that the amount of land owed to a band under the treaty crystallizes on the date of first survey, subject to certain adjustments to permit adjustment for the *bona fide* population of the band. Canada argues that it was the joint intention of Canada and the Indian Bands that the reserves would be set apart within a reasonable time after the negotiation of the treaty based on the existing population. Despite the increase in the population of the band, it is only entitled to the shortfall needed to satisfy Canada's obligation if the band did not receive its full entitlement. The Band contends that where the treaty land entitlement is not satisfied on the date of first survey, the Band has a continuing claim which grows until the Band receives its entire entitlement.

[47] The two interpretations have vastly different consequences. If the interpretation by Canada is correct, then the Band has received all, if not more, of its treaty land entitlement. If the Band's interpretation is correct, the Band is entitled to receive more than of 800,000 acres or approximately 5,000 square miles of land over and above the land which has already been allotted.

[48] The respondent Band placed great emphasis in both its written and oral submissions on the formal undertakings of Canada contained in the treaties. It contends that those undertakings create a special trust relationship between Canada and the Indians. In addition, the Band places particular emphasis on the fiduciary relationship incorporated in the words "recognition and affirmation" in s. 35(1) of the *Constitution Act, 1982* which section reads:

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> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[49] The fiduciary relationship was set out in *R. v. Sparrow*[26] by Dickson C.J. and LaForest J.:

> There is no explicit language in the provision [s.35.1] that authorizes this court or any Court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. . . [27]

They continued:

> The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.[28]

[50] Notwithstanding that *Sparrow* dealt with aboriginal rights, the Band contends that the same principles apply to treaty interpretation. In other words, the principles set out in *Sparrow* by Dickson C.J. and LaForest J. that are to be used in approaching the recognition and affirmation of aboriginal rights in s. 35(1) ought to be, in their opinion, used in approaching the recognition and affirmation of treaty rights. (See also *R. v. Badger*.[29]) The Band also specifically refers to the comments of Binnie J. in *Marshall*, reaffirming the position as outlined in *Sparrow* and *Badger*, that the honour of the Crown is at stake when dealing with aboriginal peoples. The Band contends that this special trust relationship of the government *vis-à-vis* aboriginal peoples must be the first consideration in interpreting the treaty. The honour of the Crown, however, does not mean that Canada is bound to accept the interpretation of the Treaty advanced by the Indians.

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[26] [1990] 1 S.C.R. 1075.

[27] *Sparrow* at p. 1109.

[28] *Ibid*. at p. 1114.

[29] [1996] 1 S.C.R. 771.

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[51] The Band also contends the treaty must be given a large and liberal construction with the result that any ambiguous expression of intention must be resolved in favour of the Indians. This contention overlooks the warning of Binnie J. in *Marshall* that even generous interpretations must be reasonable. The overriding principle is to determine the intention of the parties at the time the treaty was negotiated.

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[52] Canada and Saskatchewan do not take serious issue with those principles of interpretation. In fact, they take no issue with the principles of interpretation stated by the trial judge. They do point out, however, that there is no evidence of sharp dealing by Canada's representatives and negotiators. Indeed, they emphasize that Canada's representatives dealt with the Indians in a fair, generous and open manner. The way in which the negotiators dealt with the Indians is demonstrated by the words of Lieutenant-Governor Archibald in his dealings with the Indians in connection with Treaty Nos. 1 & 2. He stated:

> 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 the 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.[30]

Later on that year, on July 22, 1871 in a letter to the Secretary of State for the Provinces he wrote:

> I doubt if it will be found practicable to make arrangements upon so favourable 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.

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[30] Exhibit P-31, Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and North-West Territories*, (Toronto: Belfords, Clarke & Co., 1880 reprinted by Fifth House Publishers, 1991) at p. 28.

> But to this subject I shall probably take occasion to call your attention at an early day.[31]

The trial judge found that in pursuing their respective goals "the parties acted in good faith and with integrity."[32] This spirit of openness found its way into the numbered treaties as evidenced by the extra concessions the Indians extracted from Canada when negotiating Treaty No. 6. There is no evidence that the parties did not act in good faith and with honesty and integrity.

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c) Interpretation of Land Entitlement Provision

[53] I am attracted to the approach used by McLachlin J. in *Marshall* to interpret the treaty.[33] She adopted a two-step approach due to the fact consideration must be given to both the words of the treaty as well as the historic and cultural context which existed at the time the treaty was negotiated. The first step involves an examination of the words of the treaty "to determine their facial meaning in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences."[34] The second step involves considering the facial meaning having regard for the historical and cultural backdrop against which the treaties were negotiated. McLachlin J. stated that when faced with a range of interpretations "Courts must rely on the historical context to determine which comes closest to reflecting the parties' common intention."[35]

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[31] *Ibid*. at p. 32.

[32] Trial Judgment at para. 21.

[33] Although she was in dissent in the result, the approach used permits a consideration of all the principles of interpretation of treaties employed by the majority.

[34] *Marshall* at para. 82.

[35] *Ibid*. at para. 83.

This, as Lamer J. stated in *Sioui*[36] requires choosing "from among the various possible interpretations . . . the one which best reconciles the [parties'] interests."

[54] Thus, it is necessary to consider the written text of the treaty, the treaty negotiations, the record of the treaty negotiations, both written and oral, the historical context in which the negotiations were carried out and the subsequent conduct of the parties.

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i) Step One

[55] First, one must consider the words of the treaty in order to determine what it provides for on its face. The reserve land provision does not specifically provide for an actual date as to when the reserve land is to be selected. The treaty does not mention the method to be employed when there is a shortfall, the date of determining the Band's population, or the effect of multiple surveys of reserve land. An examination of the reserve land provision reveals:

> 1. an agreement by Her Majesty the Queen to "lay aside reserves for farming lands. . . and other reserves for the benefit of the said Indians.
>
> 2 . . . .[the reserve] shall not exceed in all one square mile for each family of five or in that proportion for larger or smaller families . . .".
>
> 3. A reserve is set aside when 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."

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[36] *Sioui* at p. 1069.

[56] Thus, there is a reserve land entitlement of 128 acres for each Indian who is a member of the Band from the area surrendered. This calculation takes into account larger or smaller families as specifically referred to in the reserve land provision of the treaty.

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[57] The reserve land provision read in the context of the document as a whole provides some guidance. When a Band receives its entire allocation, the time for the calculation of the treaty land entitlement is the date of the survey subject to certain adjustments. Those include adjustments for living members who were not members at the time of survey, but who later joined the Band and for whom no land had been allocated. The overriding principle is that each living Indian will be counted once for the purpose of the land entitlement.

[58] The "suitable person" sent out to determine and set apart the reserve land, after consultation as to where the reserve is to be located, must calculate the size of the reserve based on the population of the Band at or near the time the land is surveyed and set apart.

[59] The defining or triggering mechanism for determining the size of the treaty land entitlement is the "deputing" of a suitable person to "lay aside" the reserve. Without that action, no reserve is created. The size of the reserve, by necessity (by virtue of the terms of the Treaty), is based upon the number of Indians who are members of the band at that time. In the absence of this information, the size of the land entitlement could not be ascertained given the formula to be applied in order to determine the size of the land entitlement.

[60] The treaty does not speak directly as to when the Chief Superintendent shall depute and send a suitable person, or when and how the number of Indians shall be determined for this purpose. However, the intention, when read in the context of the whole agreement, including the provision for a census and the negotiations between the parties, is that the entitlement would be calculated on the basis of the population of the Band at or near the time

the land is surveyed. This interpretation is reinforced by the reference in Treaty No. 6 to the taking of "the accurate census of the Indians inhabiting the tract." The census in the area covered by the treaty was to be taken "as soon as possible after the execution of the treaty." The purpose of the survey was to determine to whom an annuity of $5 per Indian was owed. The census and pay lists were also used, as for example in the case of the Montreal Lake Band in 1889, as the basis for calculating the land entitlement.[37]

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[61] Based on this facial interpretation, it is not reasonable to contend that the date to determine the reserve should be based on the population of the Band at or on some unknown future date. The date for calculation of the reserve land entitlement occurs when the land is surveyed and set aside. That is subject only to certain adjustments to permit a *bona fide* determination of population entitled to treat. These additions would result in an increase in the size of the treaty reserve entitlement. Such a flexible approach permits a *bona fide* determination of a band's population by making provision for later adherents to be counted and included in the determination of the size of the reserve. If a Band's population was fixed at first survey one year after the date of the negotiation and execution of the treaty and a reserve set apart on that basis, the entitlement could be increased if late adherents to the treaty elected to treat and become members of a Band. This indeed did happen with the Lac La Ronge Band.[38]

[62] Thus, the language of the Treaty while not specific, is sufficiently clear to find that the obligation of the Crown to set aside reserve lands is crystallized at the date of first survey, subject to *bona fide* adjustments for late adherents. The Band concedes that this is a proper interpretation of the treaty land entitlement where the entire entitlement is allocated at the

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[37] *Infra*, at pp. 45-48.

[38] *Infra*, at p. 61-62.

time of first survey. It does not agree, however, that this interpretation applies when Canada fails to allot the total entitlement at one time resulting in a multiple survey. I disagree with that submission. There is no credible basis for using a different time for calculating reserve land entitlement where a band does not receive its full entitlement. Nothing in the Treaty suggests that a different approach is to be used to determine entitlement if, for whatever reason, the whole amount of the entitlement is not set apart. The entitlement is fixed or crystallizes at the time of first survey or census as adjusted. The failure to allot the entire land may result in a claim for damages, but it does not change the date for the calculation of treaty entitlement.

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ii) Historical Context – Step Two

[63] The next step is to determine whether that initial interpretation accords with the historical context in which the Treaty was negotiated. As mentioned, Canada and Saskatchewan do not disagree with the approach taken by the trial judge in examining the historical context in which Treaty No. 6 was negotiated. They do not agree, however, with the result of his analysis.

[64] The treaty process was driven by a desire to open up the West for colonization and to obtain peace with the Indians. A constant in all the treaties negotiated with the Indians is the ceding of territory by the Indians to Canada in return for the grant of a reserve land base and specific provisions to assist the Indians in making the transition from a nomadic lifestyle based on hunting and gathering to a sedentary one based on agriculture.

Robinson Treaties

[65] In order to understand the historical context and put the negotiation process in proper perspective, one must examine the treaties negotiated prior and subsequent to Treaty No. 6. The starting point is the Robinson Treaties of 1850 which provides for the surrender of the

lands described in the treaty North of Lakes Superior and Erie "save and except the reservations set forth in the schedule hereunto annexed which said reservations shall be held and occupied by the said Chiefs and their Tribes in common with the purpose of residents and cultivations."[39] The Robinson Treaties are noteworthy for three reasons:

1. There is a specific designation of the reserve lands to be left to the Indians;
2. There is no provision in the Treaty for increasing the size of the reserve lands should there be an increase in the size of the population of the Band; and,
3. The land was set aside for residences and cultivation. The location of the reserves and the number of Indians was known.

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[66] Alexander Morris, who served as Lieutenant-Governor of both Manitoba and the North-West Territories and negotiated Treaty No. 6 on behalf of the Crown, stated that William B. Robinson "[succeeded] in making two treaties, which were the forerunners of the future treaties, and shaped their course."[40]

Treaty Nos. 1 and 2

[67] The next treaties to be negotiated were Treaty Nos. 1 and 2, the Stone Fort and Manitoba Post Treaties. Copies of the Robinson Treaties were included in the instructions to the Government of Canada negotiators to be used as guides in the negotiations.

[68] The preamble to Treaty Nos. 1 and 2 states that the Government advised the Indians that it intended to open up the land to settlement and immigration and it was its intention to make treaty and arrangements with the Indians so that there may be peace and goodwill between the Indians and Her Majesty. In consideration for the surrender, Canada agreed to

[39] Treaty No. 6 at p. 305.

[40] Morris at p. 16.

set aside 160 acres per family of five (32 acres per Indian) or in the proportion for larger or smaller families, at a reserve location specified in the treaty. There is no mention as to when the land was to be set aside, however there is a provision for taking a "census of all Indians inhabiting the district . . . distributing them in families."[41] There are also provisions respecting the granting of annuities and implements considered necessary to enable them to carry on a farming operation. Unlike in Treaty Nos. 1 and 2, there is no provision for a census in the Robinson Treaties. That is likely because the number of Indians was known and the location of the reserves was specified by reason that the Indians were resident and not nomadic like the plains Indians who followed the buffalo herds.[42] The treaties which were subsequently negotiated and signed with the nomadic plains tribes differ in this respect and provide a formula for calculating the reserve land entitlement.

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Treaty No. 3

[69] Treaty No. 3, the North-West Angle Treaty, was negotiated with the Saulteaux and Ojibbeway in 1873. The Indians ceded approximately 55,000 square miles of territory and the Crown agreed to "lay aside reserves for farming lands . . . and also to lay aside other reserves when it shall be most convenient and advantageous for each Band."[43] Such selection was to be made after consultation with the Indians on the basis of one square mile per family of five (128 acres per Indian) although the location of the reserve is not specified in the text of the Treaty, selection of the reserve lands was to be made "next summer or as soon thereafter as may be found practicable."[44]

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[41] Treaty No. 1 at p. 315.

[42] Morris at pp. 19 & 20.

[43] Morris at p. 322.

[44] Morris at p. 323.

[70] Alexander Morris described Treaty No. 3 as important because 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."[45]

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[71] Of particular significance to the issue of treaty land entitlement is Alexander Morris' letter of October 14, 1873 in which he reported the conclusion of a treaty between Canada and the Saulteaux and Ojibbeway Indians at the North-West Angle of Lake of the Woods on October 3, 1873. In this letter, he set out the reasons for not specifying the location or size of the reserves to be granted (as had been done in the previous two treaties) he stated:

> 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 licences granted for mineral or timber lands, or other lands, until the question of the reserve has been first adjusted.[46]
>
> [emphasis added]

The underlined portion of the letter explains the rationale for not specifying the location of the reserve lands and the rationale for using a formula to determine the size of the treaty land entitlement.

Treaty No. 4

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[45] Morris at p. 45.

[46] Morris at p. 52.

[72] Treaty No. 4, the Qu'Appelle Treaty, was negotiated near the Qu'Appelle Lakes in the North-West Territories with the Cree and Saulteaux tribes on September 15, 1874. The Indians surrendered some 75,000 square miles of territory. In return they were to receive one square mile for every family of five persons (128 acres per person). In addition to the land entitlement, they received certain agricultural implements and seed. The location and size of the reserve is not set out in the Treaty, but the method for selecting the location and the formula of 128 acres per person is carried forward from Treaty No. 3.

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[73] There was no provision in the treaty for the time for setting aside the reserves. However, in general terms it is indicated that "the Indians asked to be granted the same terms as were accorded to the Indians of Treaty No. 3.

Treaty No. 5

[74] Treaty No. 5, or the Winnipeg Treaty, covers an area of approximately 100 square miles inhabited by the Chippewas and Swampy Cree. Several things are changed in this Treaty from Treaty Nos. 3 and 4. First, the amount of reserve land is reduced from one square mile per family of five to 160 acres for each family of five or in proportion thereto (32 acres per Indian). Second, specific locations are selected for certain bands in the vicinity of Beren River, Fisher River, Popular River, Norway House and Otter Island. There is, however, no location specified for reserve lands for several other Indian bands.

[75] The text in Treaty No. 5 is an amalgam of the provisions contained in Treaty Nos. 1, 2, 3 and 4. Treaty No. 5 provides that reserve lands at Beren River region would be set aside within two years and reserve lands in the Fisher River region would be set aside within three years. There is no similar provision in any other treaty entered into between Canada and the Indians.

Treaty No. 6

[76] The Plains and Wood Cree and Canada's negotiators negotiated Treaty No. 6 at Fort Carlton and Fort Pitt and signed them on August 23 and August 28 of 1876. The treaty covered an area of approximately 120,000 square miles and was the home of the Cree Nation. The reserve land clause in Treaty No. 6 provides for reserve lands to be given to the Indians on the basis of one square mile for family of five or in proportion thereto (128 acres per person).

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[77] During negotiations Lieutenant-Governor Morris explained the operation of the Treaty and the purpose for the setting aside reserve lands for the bands. He indicated that the bands should not delay the selection of land for too long:

> 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 brothers 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 it 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.[47]

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An examination of the original Treaty document reveals that large portions of Treaty No. 6 had been written out in advance of negotiations and other portions were written in after completion of negotiations.[48] For example, 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, along with the formula for determining the actual reserve lands.[49]

[78] In Treaty No. 6, the specific location for the reserves is not designated. The Treaty set out the formula for determining the size of the reserve. No doubt the size of the area surrendered, almost all of Saskatchewan, and the lack of knowledge of the population of the Indians is the reason why the formula used in Treaty No. 3 is specified. Thus, Alexander Morris provided that the reserve lands would be set aside by a suitable person "after consultation with the Indians".

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[47] Morris, pp. 204-205.

[48] See Exhibit P-60, See also Trial Judgment at para. 140.

[49] The provision for the Chief Superintendent of Indian Affairs to depute and send a suitable person to set apart the reserve was written in and differs from Treaty Nos. 3 and 4 which provided that the reserves would be selected by officers of Her Majesty's Government appointed for that purpose after conference with each band of the Indians.

Treaty No. 7

[79] Treaty No. 7, the Blackfoot Treaty 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. The treaty was signed on September 22, 1877. A supplementary treaty was signed in December, 1877. Treaty No. 7 incorporates many of the terms contained in the earlier Treaties although it is not identical to any one treaty. The amount of land to be set aside for reserves is one square mile for each family of five. The location of the reserve lands is specified in the Treaty. There is, however, no mention in the Treaty of what process would be followed for assigning reserves or for the taking of the census to determine the size of the reserves.

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[80] Alexander Morris described the similarity of Treaty No. 7 to the earlier treaties 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 [No. 4] treaties, except that as some of the bands were disposed to engage in pastoral pursuits, it was arranged to give them cattle instead of agricultural instruments.[50]

[81] The comments made by Lieutenant-Governor Laird to the Indians at the time the Treaty was entered into are instructive. They reveal an intention on the part of the Government to offer to each of the bands equivalent terms as were offered to the other Indians. Alexander Morris quotes Lieutenant-Governor Laird speaking to the Chiefs at Fort McLeod:

> 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

[50] Morris at p. 250.

> 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.[51]

[82] A useful summary of the reserve land entitlement provisions in the first seven numbered treaties was prepared by the intervener, the Government of Alberta. (See Appendix A)

c) Reserve Land Entitlement

[83] One must, therefore, determine whether the seven numbered treaties negotiated between 1871 and 1877 and the context in which they were negotiated, are consistent with the interpretation of the text of Treaty No. 6 arrived at in Step One.

[84] In the first seven treaties a uniform approach was taken with respect to the treaty process. Each subsequent treaty built on what had been negotiated in previous treaties. Each

[51] Morris at p. 268.

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treaty was negotiated within the context of what had preceded it and in many cases many of the negotiations for the Government of Canada were involved in the negotiation of most of the treaties.

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[85] It is also evident that the Indians in the later treaties such as Treaty Nos. 3 and 4 were aware of the terms that had been agreed to in the previous treaties and were able to obtain additional concessions. It is striking however, that the formula for selecting the reserve lands and the formula for calculating the amount of the reserve land remained constant from Treaty No. 3 onward. None of these treaties mention that a calculation of treaty land entitlement should be based on a current population formula.

[86] When considered as a whole, the fundamental objective of each of the numbered treaties can be identified. There is a similar pattern respecting the setting aside of reserve land in all of the numbered treaties. They all contain a statement of purpose in the preamble "to open up the settlement, immigration . . . the treaty area." In every treaty there is a clause wherein the Crown agrees to lay aside reserves for the purpose of encouraging the transition to agriculture. Treaty Nos. 3 to 11 contain specific clauses granting benefits such as implements, seed or cattle to encourage the Indians to begin farming or ranching. All of this supports an interpretation that there was an intention to allot the reserve land to the Indians within a reasonable time.

[87] All of the numbered treaties followed the main features of the Robinson Treaties: annuities; reserves; and, the right to fish and hunt on the unceded territory of the Crown.[52] Most importantly, none of the treaties contain a provision for granting reserve lands on the basis of an increase in population, not the Robinson Treaties or any of the numbered treaties.

[52] Morris at p. 16.

[88] The Government of Canada's intention was clearly to provide a land base which would encourage the Indians to pursue an agricultural lifestyle. The amount of land which would be set aside and the amount of benefits to be given to the Indians was to be consistent with and no more than Canada had given to other Indians in the East. Lieutenant-Governor Archibald made this clear during the negotiations respecting the Stone Fort Treaty (Treaty No. 1) when he stated:

> These reserves will be large enough, but you must not expect them to be larger than will be enough to give a farm for each family, where farms shall be required.

[89] He continued:

> 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 do no less for you because you are all her children alike, and she must treat you all alike.[53]

[90] The general intent of Canada was to provide the Indians with reserves large enough to meet the needs of the Band members living at the time the Treaty was signed, with some variation to permit the actual membership of the Band to be determined between the signing date and time of first survey. Indeed, it was recognized that the amount of land provided by the treaty was larger than what they would need at the time.[54]

[91] The size and location of the reserves are not specified in Treaty No. 6 because the Indians themselves were not certain where they wanted the reserves to be located. In some cases there was an unwillingness to treat and select a reserve.[55] Population figures were

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[53]Morris at p. 29.

[54]Morris at p. 205.

[55]Exhibit P-1, Appeal Book, Vol. 4 at p. 1155a.

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difficult to identify due to the nomadic nature of the Indians.[56] In an attempt to determine the common intention of the parties, it is important to keep in mind that Treaty Nos. 1 to 7 were negotiated between 1871 to 1877 at a time when there was great pressure to settle the land.

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[92] An examination of the record of negotiations, and in particular the statements made by Alexander Morris during the negotiations of Treaty No. 6, reveal an intention on the part of Canada to complete the survey and selection process within a reasonable period of time. He stated:

> 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 sell it 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.[57]
>
> [emphasis added]

[93] These statements are consistent with the earlier treaties. For example, in Treaty No. 5 the time for the selection of the reserve is actually specified. In Treaty No. 3 selection was to be made "next summer". Canada intended to send in a surveyor "next year", which was soon as reasonably possible. This is exactly what happened with the Montreal Lake Band. The

[56] Morris at p. 52.

[57] Morris at pp. 204 & 205.

land was surveyed the same year the Band signed the Adhesion Agreement (1889).[58] This is evidence that there was an intention by the parties to survey and allot the land as soon as possible.

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[94] The procedure for the reserve land selection and allocation in Treaty No. 6 was intended to be consistent with the establishment of the reserves in the other treaty areas. That is, the reserve land was to be set aside within a reasonable period of time after the signing of the treaty using the formula agreed on to fix the size of the reserve. The process of sending in a suitable person to set apart the reserve as determined according to current population of permitted the bands: first, to choose the location or locations of the reserve; and second, to organize or perhaps reorganize the band membership as was the case with the Lac La Ronge and Montreal Lake Bands.

[95] Alexander Morris offered this advice regarding the selection and surveying of the reserves under the treaty:

> Next summer, Commissioners will come to make payments here, so that you may not have so far to go, and also that other Indians we have not seen, should come here also, to whom it may be convenient, and I hope that then you will be able to talk with them where you want your reserve. I will speak to you frankly, as if I was talking to my own children ; the sooner you select a place for your reserve the better, so that you can have the animals and agricultural implements promised to you, and so that you may have the increase from the animals, and the tools to help you build houses, &c [sic]. When you are away hunting and fishing, the heat of the sun and the rain is making your crops to grow. I think you are showing wisdom in taking a place away from here, although it has been your home. It is better for the Indian to be away a little piece from the white man. You will be near enough to bring your furs to a good market, and by and by I hope you will have more potatoes than you require, and have some to dispose of. I am very anxious that you should think over this, and be able to tell the Commissioner next year where you want your reserve.[59]

[58] Exhibit P-1 at p. 161.

[59] Morris at pp. 243-244.

[96] There is no comparable statement dealing with the Adhesion Agreement. There are only two accounts of the negotiation of the terms of the Adhesion Agreement. In the first, A.J. McNeill of the Department of Indian Affairs reported that the negotiator Lieutenant Colonel Irvine had explained to the Indians that a reserve would be given to them and a surveyor would be sent to lay it out. The Indians advised him that they had not yet decided where they wanted their reserves to be located.[60] The second account is that which is contained in the report sent to the Deputy Superintendent General of Indian Affairs by Lieutenant Colonel Irvine. He stated that he told the Indians that the reserves would be given to them and that a surveyor would be sent to lay it out. At this time, the Indians had not decided where they "will have" their reserves. In neither account is there any mention of the size of the reserves. There is no suggestion that the Indians did not understand the treaty or were not happy with the terms.[61]

[97] There is no evidence in the treaties or in the documentation surrounding the negotiations of the treaties that Canada intended to leave the question of land entitlement open-ended. Indeed, the evidence is to the contrary. The treaty documents themselves and the notes and reports made at the time of the treaty negotiations support an intention to engage in consultation as to location. That would be shortly followed by a survey of the lands. All of this was to happen within a reasonable period of time.

[98] The intention not to leave the land entitlement open-ended was communicated to the Indians in Treaty No. 6 and was also communicated to the adherents to Treaty No. 6. Canada emphasized that the Indians could take their time in deciding where to locate. They advised that it would be in the best interest of the Indians to make the selection reasonably

[60] Exhibit P-1, Appeal Book, Vol. 4 at p. 1155a.

[61] Exhibit P-1, Appeal Book, Vol. 4 at p. 1155a.

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quickly so that Canada could honour the selection and avoid conflict with new settlers in the area. This, taken with the words of the Treaty itself, does not show that the Crown intended that the selection process would be open-ended and would provide for future increases in populations. It is equally important to note that the Indians did not express any disagreement with the method of land allocation proposed by Canada. They were tough negotiators, as indicated by the record. See, for example, the provision in Treaty No. 6 of a medicine chest to be located on the reserve[62] which was added only as a result of pressure exerted by the Indians.

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[99] I conclude that there was a common intention that the reserve land entitlement would be determined, allocated and set apart within a reasonable period of time. This is consistent with the policy of Canada to open up the lands for settlement and with the Indians' desire to treat with Canada to permit them to make the transition to agriculture.[63] A failure to select and allocate the reserve lands within a reasonable period of time would have had a detrimental effect on the aims of both parties. It would have required keeping large tracts of Crown land off limits to settlement, and would have delayed the transition to agriculture by the Indians.

[100] Finally, in dealing with the historical context and the events surrounding the negotiation of the treaties to determine the intention of the parties, we have the memoirs of Peter Erasmus. Erasmus acted as an interpreter during the negotiations of Treaty No. 6, first for the Indians and then for the treaty commissioners. He was a person who had the trust and confidence of both sides to the negotiations. His memoirs, *Buffalo Days and Nights* were written many years after the fact when he was very old. They do, however, represent an

[62] Morris at p. 218.

[63] Morris at pp. 25 & 26.

account of what happened at the time from someone who was present. He makes mention of a misunderstanding which Chief James Seenum of the Fort Pitt district had about the amount of reserve land which had been promised to him under the treaty. He stated:

> 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 has 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 then living would be apportioned eighty acres each, according to the number of Indians then living would be apportioned eighty acres each, according to the number of Indians then belonging to his tribe."
>
> "I and the others all understand 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.[64]

[64]Exhibit D-5, Peter Erasmus, *Buffalo Days and Nights*, as told to Henry Thompson, Glenbow-Alberta Institute.

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[101] While Erasmus was clearly in error with respect to the number of acres to be provided under the formula (something which I do not regard as fatal), it is clear, at least in his recounting of the events that the formula was to be applied to the band population at a time shortly after a band picked its reserve location. In this respect, I differ from the interpretation placed upon the writings of Erasmus by the trial judge. In my opinion, they represent strong evidence of the contemporary Indian understanding of the Treaty's terms with respect to reserve land entitlement. The amount of the reserve lands will be calculated on the basis of the population of the Indians at the time of entering into the treaty with some flexibility to permit an adjustment for persons who were late adherents to the Treaty.

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[102] Thus, the historical context, the record of negotiations of Treaty No. 6, and the provisions of the other numbered treaties all support an interpretation that the parties intended that the land entitlement would be calculated on the basis of the band population at date of first survey as adjusted for late adherents. It does not support an interpretation which would provide for a calculation of the population at some time in the future, based on a subsequent survey.

Conduct of the Parties Subsequent to the Negotiations in Allocating Reserve Land

[103] It remains to be determined whether the subsequent conduct of Canada in allocating treaty reserve lands is inconsistent with the above-mentioned interpretation. It is clear that there was no consistent course of conduct from which one could deduce the intention of the parties regarding the date to calculate the population of the Band for the purpose of the reserve land entitlement. I agree with the trial judge when he stated that the evidence of subsequent conduct should be used with extreme caution. He stated:

> [51] . . .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.
>
> ….
>
> [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.[65]

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[104] This is why the account of the treaty negotiation process written by Alexander Morris in 1880 is so valuable. Not only does he reproduce the relevant correspondence but he recounts what was said by both parties at the time of the negotiations.

[105] Justice Lamer, for the Court in *Sioui*, stated that the subsequent conduct of the parties which is most indicative of their intent is the conduct which "most closely followed the conclusion of the document."[66] Justice Lamer does not mention a time frame. In this case the trial judge found, at para. 54 of his judgment that the subsequent conduct of the parties to the treaty is relevant as it indicates the parties' intentions. I agree. But as he also properly noted, if the conduct changes overtime then the conduct is not admissible as it is not an extension of the original conduct.

[106] There is another fundamental problem with the issue of subsequent conduct in this case. What is at issue here is not so much a term of the treaty, but the consequence that flows from the partial fulfilment of the treaty obligation. The conduct of officials of the Department of Indian Affairs when dealing with reserve land entitlements runs the risk of

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[65] Trial Judgment at paras. 51 & 53.

[66] *Sioui* at p. 1060.

turning a compromise decision to settle specific requests for land into a demonstration of the intention of the parties at the time the treaty was negotiated and signed. These decisions are not directly related to the interpretation of the Treaty. The use of the subsequent conduct is further complicated by the failure of the Department of Indian Affairs to develop a uniform policy on the selection and survey of Indian reserves since the signing of the treaty.[67]

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[107] The documents submitted by the Band, Canada and Saskatchewan, concerning the treaty land entitlement and the allotment of reserve land by Canada, provide little support for the calculation of reserve land entitlement on the basis of a current population formula. Notwithstanding, the lack of a uniform policy on treaty location and selection, the field surveyors adopted the general practice of determining the land entitlement by counting the members of the band at the time of survey. This was usually done by counting the number of members on the most recent treaty annuity pay list.[68]

[108] I have carefully examined all of the documents referred to by the Band in support of the proposition that entitlement should be based on a current population formula. I do not agree with the argument that they support an entitlement based on current population. When treaty land was finally allocated in 1964, it was not allocated on the basis of present population but on a compromise formula arrived at after negotiations with the Band Council.

[109] The Band has produced a long list of documents, letters and reports from the Department of Indian Affairs which seem to support the allocation of land on the basis of

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[67] Indian Claims Commission Proceedings, *Special Issue on Treaty Land Entitlement* (Minister of Public Works and Government Services Canada, 1996) at pp. 300-301.

[68] *Ibid*. at p. 301. Records obtained by the Indian Claims Commission tend to confirm this was the historical approach of the Department of Indians Affairs, (Indian Claims Commission Documents, pp. 575 and 1199 (See Footnote 175)).

present population. However, there are just as many letters or reports by officials in the Department of Indian Affairs which support the position that any such calculations should be made on the basis of the date of first survey as adjusted. As noted, the period following the signing of the treaty is best characterized as one of uncertainty. There was no consensus among officials as to how the treaties should be interpreted. No where is this better illustrated than by the variety of approaches to treaty land entitlement put forth by the officials in the Department of Indian Affairs. These approaches included date of first survey to present population. There are many references to reserve land entitlements based on current populations when officials in the Department of Indian Affairs were attempting to determine land entitlements. The population of the Indian bands at date of first survey, or date of first census, were, for the most part based on best estimates because the Indians adhered to the treaty at different times. The various approaches demonstrate flexibility – flexibility on the part of Canada in attempting to determine the populations of bands and flexibility in dealing with a band's treaty land entitlement under the various treaties. Ultimately the matter was settled on a compromise formula developed by W.C. Bethune as a method of settling entitlements for multiple survey bands.[69]

[110] Canada contends that the evidence of subsequent conduct does not support entitlement based on current population. By way of example, it points out there were 77 reserve land allocations in Saskatchewan and of those 77 only 23 Indian bands received reserve lands on more than one occasion. Twenty-three reserves were involved in a multi-survey land entitlement, and did not receive all the reserve land entitlement at the time of first survey. Of those, only three bands, Cowesses, Thunderchild and Yellowquill are relied on by the Band as examples of the application of the current population formula. Two of those Bands, Cowesses and Thunderchild, were in the state of formation at the time they originally

[69] *Ibid*. at p. 310. See the full description of this process at pp. 311 to 316.

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received reserve land and cannot be considered as truly multiple surveys because the populations changed.

[111] An examination of the circumstances surrounding the allocation of land to the third, the Cowesses Band, a Treaty No. 4 Band, is of little assistance because the original survey was not based on actual population figures. The initial report of the surveyor made no reference as to how the acreage allocated was determined.[70] He set aside 32,043.2 acres at Crooked Lake, an amount sufficient for 250 Indians under the Treaty No. 4 reserve land clause. The population in 1880 at Crooked Lake was 70 people who were under the leadership of headman O'Soup. The largest part of the tribe under the leadership of Chief Little Child was located in the Cypress Hills

[112] The survey was adjusted in 1881 to bring the size of the reserve lands to 40,320 acres which is enough land to satisfy an entitlement of 315 people. The reserve land set aside again bore no relationship to the actual number of Indians at Crooked Lake at that time.[71]

[113] Eighty-five members of Little Child's Band arrived at Crooked Lake in 1882, and Little Child himself arrived a year later with 111 Band members. In 1883-84, another 9,600 acres was added to the reserve bringing the total acreage to 49,920 acres (enough for a treaty land entitlement of 390 persons).[72]

[114] No one was certain how many of Little Child's Band would leave the Cypress Hills and move to the Crooked Lake area. The survey was therefore based on estimates of the

[70] Exhibit P-54, Volume 20 at p. 6329a.

[71] *Ibid*. at p. 6330a.

[72] *Ibid*. at pp. 6327a, 6328a & 6382a.

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number of Indians who would arrive, not on the actual population that actually moved. Even after the arrival of Little Child, the survey was based on 390 Indians while only 367 Indians were paid the annuity. Contrary to the finding of the trial judge, the survey was not based on current population but rather was based on an estimate of Indians who had not previously been counted as part of the Band. Thus, the Band was in a state of formation and the number of people included in the survey were people who had not previously been counted or had adhered to the Treaty. This allocation does not support an allocation on the basis of current population but is rather based on first survey as adjusted.[73] The land allocation was an attempt by the Department of Indian Affairs to determine the *bona fide* population of the Cowesses Band.

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[115] The allocation of land granted to the Thunderchild Band which was also in a state of formation between 1880 and 1884 and the does not support the conclusion that the lands were allocated on the basis of current population.

[116] The last in this group is the Yellow Quill Band which signed the Adhesion to Treaty No. 4 in 1876. The members of Chief Yellow Quill's Band were divided into three groups and were paid using three separate pay lists from 1876 to 1906. They were split into three Bands in 1907.[74]

[117] Reserves were first surveyed in 1881 for two groups, one at Nut Lake and the other at Fishing Lake. The total population of 293 persons was entitled to a reserve land entitlement of 37,509 acres.[75] Canada actually set aside 32,428 acres for the two reserves. In 1889, the

[73] See the comments of R. Maguire pp. 5399 to 5404.

[74] Exhibit P-55, Appeal Book Vol. 21 at 6491a.

[75] Appeal Book, Vol. 21 at p. 6497a, 6508-6509a.

third group located at Kinistino sought land at a location where they had lived for at least two generations. The Department of Indian Affairs was reluctant to compel the members of the Yellow Quill Band located at Kinistino to move to one of the existing reserves. As a result the Department recommended the establishment of a 15 square mile reserve at Kinistino. That allotment exceeded the reserve land entitlement of the portion of the Band located at Kinistino. There was an the expectation that the Band would grow through later Adhesions, not by a natural population increase, and would take up the entitlement. Therefore, the survey at Kinistino was either a means of justifying the survey without the requirement of a surrender of reserve lands at Nut Lake and Fishing Lake or, more likely, it represented a first survey of the third faction of the Yellow Quill Band. At the time the Yellow Quill Treaty land entitlement was established, considerations other than the current population of the band entered into the calculations of reserve entitlement and the ultimate allotment. This allotment does not support the current population formula.[76]

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[118] When I examine all of the material relevant to the conduct of the parties subsequent to the Treaty negotiation, I am unable to conclude on the basis of the principles of treaty interpretation that an interpretation other than the Treaty land entitlement was to be based upon the populations of the bands at the date of first survey as adjusted was intended.

Allocation of Reserve Land to the Band

[119] The last matter I propose to deal with is the actual allocation of the Treaty land itself to determine whether it supports the current population formula. The reserve land for the Band was first allotted in 1889. The James Roberts and William Charles Bands were not signatories to Treaty No. 6 in 1876. Canada agreed to the request of the two bands to

[76] See comments of R. Maguire, Transcript at pp. 5406 to 5408.

negotiate a treaty. An Order in Council was issued on November 29, 1888,[77] to authorize the negotiation of an arrangement to give members of the James Roberts and William Charles Bands the same benefits as set out in Treaty No. 6. This was to be in exchange for the surrender of some 11,066 square miles of land. It was recommended this be done by adhesion rather than by the execution of a new treaty.

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[120] In February, 1889 the James Roberts Band, (now the Lac La Ronge Band), and the William Charles Band, (now the Montreal Lake Band), signed the Adhesion Agreement. They agreed in the Adhesion Agreement to surrender all their right, title and interest in the lands covered by the agreement in exchange for the benefits provided for in Treaty No. 6.

[121] In July of 1889, Commissioner Reed wrote the Minister of the Interior and advised of his intention to send a surveyor to set out the reserves for the Montreal Lake and Lac La Ronge Bands. In 1889, Mr. Ponton, an assistant surveyor employed by the Department of Indian Affairs surveyed a reserve for the Indians at Montreal Lake (Reserve 106). The population of the Indians at Montreal Lake at that time was 101. The reserve set out by Mr. Ponton measured 23 square miles and contained 14,720 acres. This amount of land satisfied a land entitlement for 115 persons under the Treaty No. 6 formula. They therefore received their entire treaty entitlement under the formula. Mr. Ponton encountered a problem in surveying the Lac La Ronge Reserve in the fall of 1889. Ponton had to wait until ice formed on the lake to conduct the survey and did not stay. In addition to this problem, there is some suggestion in his notes that there was also a disagreement in the Band and between the Band and the Department of Indian Affairs as to the location of the James Roberts reserve. As a result, no lands were set apart for a reserve for the James Robert Band in 1889.[78]

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[77] O/C P.C, No. 2554.

[78] Exhibit P-1 at p. 161. See also Indian Claims Commission Proceedings, *Special Issue on Treaty Land Entitlement*, (Minister of Public Works and Government Services Canada, 1969) at pp. 249-250.

[122] Between 1890 and 1897, discussions were held between the Band and various officials of the Department of Indian Affairs concerning the location, selection and allocation of reserve land. Those discussions resulted in a reserve being surveyed adjacent to Sturgeon Lake in July, 1897. This reserve known as Reserve 106A contained 56.5 square miles. The Bands of Montreal Lake and Lac La Ronge were treated as a single reserve for the purposes of this calculation. The reserve allocation and the treaty land entitlement was therefore based on the 1889 census of 435 persons. 1889 was also the year the Montreal Lake Reserve was surveyed and the Adhesion Agreement was signed. On this basis, the Band was entitled to 87 square miles minus the 23 square miles already surveyed for the Montreal Lake Reserve. This left a balance of 64 square miles and the Band actually received 56.5 square miles. There is no explanation why the full amount of the treaty entitlement was not set aside for the Band at that time. The current population was not used to calculate the land entitlement.[79]

[123] In 1906, Chief Amos Charles of the Lac La Ronge Band inquired about laying out of a reserve for the Band at Lac La Ronge. The Chief Surveyor advised the Band it was entitled to a further 7.5 square miles of reserve land over and above the land which had already been set aside. As noted, that calculation was based on the combined population of the two Bands (Montreal Lake and Lac La Ronge) in 1889 the year they joined the treaty.[80]

[124] In 1907, Duncan Campbell Scott, at that time Accountant for the Department of Indian Affairs (later Deputy Superintendent), wrote a memo concerning the size of the Band's reserve and the reserve lands still outstanding. He noted that the size of the reserve was based

[79] Appeal Book, Vol. 5 at pp. 1488a & 1489a.

[80] See Appeal Book, Vol. 5 at p. 1470a; 1482a and pp. 1487a to 1490a.

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on the Band's population in 1889 but that there had been a considerable increase in population since that time. Some of the increase was a "natural increase" but at least some of the increase was due to "late adherents" who had been hunting apart from the main Band when they joined the treaty. He suggested that the Band might be entitled to more reserve land as a result of the late adherents not because of a natural increase in Band population.

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[125] In 1907, Secretary McLean, of the Department of Indian Affairs wrote to Indian Agent Bothwick at Prince Albert to clarify the method of determining the number of persons in the Band subsequent to the adhesion to the Treaty. Secretary McLean advised that the number of members of the Band since signing the treaty should include only the actual members or persons admitted to Treaty at the time of their adhesion. Indians born after their mother's admission to Treaty were not to be counted.

[126] As a result of these instructions, Indian Agent Bothwick wrote, in 1908, that there were 89 additional Band members apart from the natural increase in population. In his opinion, the reserve land entitlement should be based on a population of 466. That figure was used to calculate the Band's entitlement in 1908. Upon receiving this information, Secretary McLean instructed Mr. Chisholm, Inspector of Indian Agencies at Prince Albert, to look into the matter of providing additional lands. Chisholm calculated that 13.1 square miles were owed to the Bands based on his corrected population figure of 463. In 1909, Mr. J. Lestock Reid surveyed 13 additional reserves containing some 10.4 square miles. These reserves were confirmed by 13 Orders-in-Council.[81] Although the Crown acknowledges that 2.7 square miles was still owing, there is no explanation given for the shortfall of 2.7 square miles.[82]

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[81] See Trial Judgment at p. 12 para 27.

[82] Appeal Book, Vol. 6 at pp. 1707a & 1708a.

[127] In September, 1910, Emile Jean, an official in the Department of Indian Affairs, wrote a memorandum concerning the calculation of reserve lands of the Montreal Lake and Lac La Ronge Bands. In this memorandum he pointed out that the Indian Reserve 106A was set aside jointly for the benefit of both the Montreal Lake Band and the Lac La Ronge Band. However, the Montreal Lake Band had not surrendered nine square miles of existing reserve in exchange for its interests in Indian Reserve 106A. He concluded that the Montreal Lake Band was entitled to a 9/56.5 interest in the reserve and that the Lac La Ronge Band was entitled to a 47.5/56.5 interest.[83]

[128] More importantly Emile Jean stated that, because of the increase in the population of the Band, they were entitled to more land which he calculated on the basis of the 1909 population. This is the first example of a land allocation calculation based on current population.

[129] In 1914, F.A. Paget, a Department of Indian Affairs accountant prepared a report for Deputy Superintendent Duncan Campbell Scott with respect to the reserve entitlement of the Montreal Lake and Lac La Ronge Bands.[84] Mr. Paget concluded that the Montreal Lake Band had received a surplus of 12.2 square miles of reserve land, while the Lac La Ronge Band was still entitled to 14.9 square miles of reserve land. The difference between the 14.9 square miles of entitlement and the 2.7 square miles the Department had earlier determined was owing to the Band, is the result of the Bands being treated separately and the Department of Indian Affairs not demanding a return of the surplus land received by the Montreal Lake Band.

[83] Appeal Book, Vol. 6 at p. 1712a.

[84] Appeal Book, Vol. 6 at pp. 1818a & 1821a.

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[130] Thus, the Department calculated that the Band was entitled to an extra 12.2 square miles in addition to the 2.7 square miles already identified as outstanding. In both cases, the population figures are based on the population at the time the Bands adhered to the 1889 Treaty subject to the adjustments already noted.

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[131] In 1935, a reserve containing 1,596.6 acres was surveyed adjacent to the existing Little Red River Indian Reserve (No. 106A) and was confirmed by O/C P.C. 1297 in 1948. The Order in Council divided the reserve between the Montreal Lake Band and the Amos Charles and James Roberts Bands. The Amos Charles Band and James Roberts Band received 32,007.9 acres as a result of the division. The new reserve was described as the Little Red River Indian Reserve No. 106C.

[132] In 1948, a further 6,400 acres was surveyed for the Lac La Ronge Indian Band. It was called the Little Red River Indian Reserve No. 106D and was confirmed by O/C P.C. 1419 in March of 1950.[85]

> Between 1899 and 1948, the Band received the following reserve lands:
>
> | | |
> |---|---|
> | 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[86] |

[133] As will be seen, a further 63,385 acres was set aside as reserve land for the Band bringing the total allotments to 107,147.3 acres or approximately 167.4 square miles.

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[85] Exhibit P-8 at p. 2436 and Exhibit P-9 at p. 2504. See also Trial Judgment at paras. 30 and 31.

[86] Trial Judgment at para. 34.

[134] In 1950, the Department of Indian Affairs attempted to settle the Band's outstanding land claims. An internal document dated November 4, 1950 indicated that the Band was entitled to an additional 23,707 acres. This figure was arrived at by relying on the Band's population in 1909. That is, a population of 509 persons based on the date the reserves were first selected as adjusted for late adherents. This translates to an entitlement of 67,328 acres with an outstanding claim of 23,707 acres.

[135] Between 1920 and 1935, many calculations were made by the Department of Indian Affairs concerning the reserve land entitlement. There was no consistent approach. In some cases the 1920 population of 914 for the three bands of Lac La Ronge, Montreal Lake and Stanley, was used. That would have resulted in an additional 61,125.6 acres due to all three Bands. At other times, the Department of Indian Affairs' based the calculations on the population of the three Bands in 1910 which would result in an additional 30.6 square miles being owed the Lac La Ronge Band, and an additional 21.5 square miles being owed to the Stanley Band. Departmental reports also stated that the increase in population was due largely to an increase of births over deaths. That is, the increase was natural as opposed to persons who adhered to the treaty. This calculation was used by the Department for almost ten years. During this time, however, no lands were set aside as a reserve.

[136] Matters were further complicated by the transfer of lands from Canada to Saskatchewan under the *Natural Resources Transfer Agreement* of 1930. Prior to this, Saskatchewan had not been involved in the negotiations to settle outstanding land entitlements. Now the Province had to be consulted.

[137] Throughout the 1940s and 1950s the Band made numerous requests to have its land entitlement satisfied. All to no avail. These requests were made at a time when the

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Department of Indian Affairs was downsized and lacked the resources and manpower to do the detailed research necessary to solve the land claims.

[138] It was not until the late 1950s that the Department of Indian Affairs attempted to address the outstanding treaty land entitlements of all bands in Northern Saskatchewan. A hand written departmental document entitled "Band Population as at November 4, 1959" indicates the maximum amount of land owing to five Bands in Northern Saskatchewan: Lac La Hashe; Portage La Loche; Stoney Rapids; Fond du Lac; and, the Lac La Ronge Bands. The Bands, other than the Lac La Ronge Band, had not previously received reserve land. Therefore, their treaty land entitlement was based on current population which was also date of first survey.

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[139] The land entitlement for the Lac La Ronge Band was calculated at this time as comprising 23,707 additional acres based upon the Band's 1909 population. In December of 1959, W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch wrote to the Regional Supervisor of Indian Agencies in Regina stating that the Lac La Ronge Band had a population of 526 in 1909 when reserves were first selected. On this basis he calculated the total treaty land entitlement to be 67,328 acres 23,707 were still to be allotted.[87] This population figure is consistent with the adjusted figure from the date of first survey.

[140] In May of 1961 W.C. Bethune, wrote to the Regional Supervisor in Saskatchewan about the outstanding treaty land entitlement for the Band. He reviewed all of the land set apart for the Band and concluded:

> 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 afterward. Where partial settlement of land entitlement was reached at several times the problem becomes somewhat more difficult, and requires a

[87] Appeal Book, Volume 13 at 3861a.

> 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 64.67% 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.[88]

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[141] Thus, bands who had not received reserve lands would have their entitlement calculated on the basis of the populations of the bands at the time the reserves were set apart. This did not apply to the Lac La Ronge Band, however, because it had already received a portion of its reserve entitlement.

[142] Discussions continued between Canada and Saskatchewan throughout this period concerning the land entitlement of the Band. Ultimately, the Department of Indian Affairs (Canada) requested that Saskatchewan transfer 63,330 acres, an amount which Canada represented was the total reserve entitlement for the Band. This calculation was not based upon the 1909 population but rather upon the compromise formula proposed by Superintendent Bethune.[89]

[143] Mr. J.G. McGilp, the Saskatchewan Regional Supervisor for the Department of Indian Affairs, arranged a meeting with the Band Council on May 8, 1964 for the purpose of settling the land claim entitlement. It was stated at that meeting that the Province would be

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[88] Appeal Book, Volume 13 at pp. 3944a - 3946a.

[89] Exhibit P-10 at p. 2912; Appeal Book, Vol. 13 at pp. 3944a - 3946a.

prepared to agree to a land entitlement based on 35.4% of the 1961 Band population of 1,404. The Band Council agreed to accept the 63,330 acres as "full land entitlement under Treaty No. 6" and agreed that the land entitlement would be based on 35.24% of the Band population of 1,404 in 1961. The mineral rights would also be transferred with the land.

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[144] Over the next nine years four parcels of land totalling 64,285 acres were surveyed and set apart as a reserve land for the Lac La Ronge Band. This land was in addition to the 43,762 acres which had been set apart before the 1964 settlement. In total this provided the Band with an allocation of 107,146.99 acres or approximately 167.4 square miles. In addition to settling the outstanding land entitlement, this land was also intended to extinguish Saskatchewan's obligation to Canada in connection with the furnishing of lands for Indian reserves required by s. 10 of the *Natural Resources Transfer Agreement* of 1930. After reviewing all of this material, I find nothing in the conduct of the parties at the relevant times to support a calculation based on current population. The approach was one of flexibility to attempt to determine the actual population of the Band and thus the land entitlement.

Conclusion

[145] What then is the result of all of this? The trial judge found the parties intended that the creation of reserves was to be a future event with no time constraints. The creation of reserves would happen in due time and the parties would deal with the land entitlement when it arose. He concluded that the parties to Treaty No. 6 intended that the land entitlement would be calculated at the time when the treaty obligation was fulfilled not when the reserve land was first set aside. His rationale is set out at paragraphs 154 and 155:

> [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 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.[90]

He interpreted the references in the Treaty to future events as evidence of an intention to calculate population figures at the time of subsequent surveys using the current population as the starting point.

[146] An examination of the trial judge's reasons for judgment on the interpretation of the reserve land provisions of Treaty No. 6 reveals that he considered the following factors at length: the wording of the treaty; the contemporaneous writings; the subsequent conduct of the parties, and, the actual land allotment to interpret the reserve land provision. He concluded in para. 154 of his judgment, after individual analysis, that no single factor provides a definitive answer: the contemporaneous writings provide no clear answer; the historical documents are ambivalent; and the actual allotments indicate at least on some occasions that they were based on present populations. He also stated that the reserve land provision is "ambiguous" as to the time when the treaty land entitlement is to be calculated. This is clearly an error because the provision is not ambiguous, it is silent on this point.

[147] The factors the trial judge considered individually led him to an inclusive result and he made virtually no findings of fact or discretionary rulings of the kind that are the exclusive province or domain of a trier of fact. Given the error of law and the absence of findings of fact, his final conclusion in para. 155 of the judgment wherein he states he has "no

[90] Trial Judgment at paras. 154-155.

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hesitation" in concluding that the common intention of the parties that "a band's entitlement to Reserve Lands would be calculated when [Canada's] treaty obligation was met and fulfilled in its entirety"[91] must be re-examined by this Court.

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[148] This Court is in as good a position as the trial judge to interpret the words of the Treaty and to draw inferences from the contemporary writings, the history of the negotiations and the subsequent conduct of the parties to determine the common intention of the parties at the time of the signing of the Treaty. In my opinion, the first issue on the appeal raises a question of law, that is what is the proper interpretation of the Treaty based on the principles articulated in *Marshall*?

[149] I am unable as a matter of law or of treaty interpretation to agree with the trial judge's interpretation of Treaty No. 6. In my opinion, the Treaty, the notes of the negotiations made at the time the Treaties were negotiated, the contemporary writings, and the subsequent conduct of the parties do not support that interpretation. I think it is clear from the uniform approach taken to treaty negotiations that Canada intended to adopt the same approach in Treaty No. 6 that it had in the earlier Treaties. In this respect the Robinson Treaties are most important as they indicate an intention to set aside lands for the Indian Bands based upon on the population of the Bands at the time of the treaty. There is no reference in any of the treaty documents or in the treaties themselves that the Crown intended, as a general practice, to leave the matter of the allocation of reserve lands open-ended. There is no reference or statement to support an interpretation that the land entitlement would increase as the population of the Band increased. Indeed, that was contrary to what Canada wanted – finality in connection with the treaty obligations, so that settlement of the West could proceed.

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[91] Trial Judgment at para. 155.

[150] The trial judge found that the treaties spoke to the future selection of the location and entitlement by reason that the Crown had not specified an exact time for the selection and allocation of the reserve land. The trial judge concluded that the use of the future tense in the Treaty and the fact that some of the earlier treaties specified the location and size of the reserve lands, supported a current population interpretation. I do not agree. The use of the future tense and the use of a generic formula for land allocations in the Treaty were due to historical exigencies. The usage and the formula were dictated by the circumstances which existed at the time the Treaty was negotiated. It was not possible to ascertain the exact numbers of the band's members. The people were nomadic and in the process of establishing bands. The Indians themselves were not ready to choose the location of the reserve. In my opinion, the wording of Treaty No. 6 was designed to permit flexibility and to give the Indians the opportunity to select where they wanted to locate. (See the comments of Alexander Morris[92] regarding the reason for not specifying the location or size of the treaty land entitlement in Treaty No. 3.)

[151] As a result of the uncertainty on both sides, a formula was created based on the members of the reserve then living to allow a more flexible and in many cases more just selection of the reserve land that would be allocated. The underlying principle is that each Indian is entitled to be counted once for treaty and land entitlement purposes. The parties intended that the size of the reserves would be determined by reference to a bands population at the time of the first survey. In my opinion, this interpretation is consistent with the wording of the treaty, the statements and record of the parties at the time of negotiating the treaty and the subsequent conduct of the parties concerning selection and survey of reserves.

[92] Morris at p. 52.

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[152] The Band contends that Alexander Morris promised that the Treaty was made not only for the Indians present but for their children and their children's children. They contend the rights were intended to last "as long as the sun shines and the river runs" and that this is further evidence of an intention to use current population as a basis for treaty entitlement. Again, I do not agree. Those comments were made in the context of the continuing relationship between Canada and the Indians and the payment of the annuity. It cannot be interpreted as a commitment to allot land as the size of the Band increases. This is particularly so when one considers the concession made by the Band that where all the land was allotted, the entitlement crystallized and was satisfied.

[153] This approach to land selection and allocation was clearly communicated to the Indians. More importantly, there is no indication that they objected to it. An interpretation which fixes the land entitlement at the date of first survey, subject to certain adjustments to permit the admission of later adherents, is the interpretation that best accords with the common intention of both parties. In my opinion an interpretation which results in a continually expanding obligation based upon increasing band populations is not consistent with the Crowns's objectives. Those objectives were opening up the lands for settlement, providing a generous land base to the Indians, and assisting them in making a transition to agriculture.

[154] The wording of the Treaty, the record of the negotiations and the surrounding historical context all support a finding that the common intention of the parties at the time the treaties were negotiated and executed and at the time of the signing of the Adhesion Agreement was that the parties intended to carry out the selection and survey soon after the date of the signing of the Treaty and the Adhesion Agreement.

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[155] If the date of first survey, as adjusted, is the correct formula for determining the extent of the reserve land owed where there was a single survey, there is no logical reason why it would not be used where there were multiple surveys. I, therefore, disagree with the trial judge's decision that where the total land owed was not allocated, the Crown's obligation continued to run and that future obligations were to be calculated using the current population. The trial judge's conclusion fails to adequately reconcile the competing interests of the parties. In my opinion, it makes no difference whether all of the land was allocated at the date of first survey as adjusted or at some future time. What is important is that the Crown's obligation was crystallized at the date of first survey, as adjusted. It was at this time that the Band was owed a specific amount of reserve land which the Crown was obligated to provide.

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[156] Thus, the amount of reserve land entitlement is based on the 1889 population of the Band as adjusted for late adherents. As the Band did not receive its full entitlement at the date of first survey, it is entitled to an increase in the land entitlement for any late adherents. It is therefore entitled to the difference between the amount of land allotted and the amount of the land entitlement based on a population figure arrived at by multiplying the1889 base population, as adjusted, by 128 acres per Indian.

Amount of Treaty Land Entitlement

[157] In 1908, Indian Agent Bothwick calculated that there were 89 additional members of the Band apart from a natural increase. In his opinion, the Band population at that time was 466. The Department of Indian Affairs completed a review of the reserve land entitlement in 1950. As a result, the Band population as adjusted in 1909 was 509 persons. In December of 1959, W.C. Bethune, the Chief, Reserves and Trusts, Indians Affairs calculated that the Band's population in 1909 was at 526 persons. In my opinion, that number represents a *bona fide* determination of the population on which to base the reserve land entitlements.

[158] Therefore, using the formula of 128 acres per Indian, the land entitlement is 67,328 acres.

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[159] The Band actually received 107,147.3 acres or 167.4 square miles over the last several decades. It follows that the Band is not entitled to any more land based on the Treaty entitlement. The actual entitlement of 67,328 acres was not allocated prior to 1899, the year the land entitlement was crystallized. This does however, raise the issue of whether the Band is entitled to damages for the loss of opportunity of the use of the land which was not set apart for the Band in 1909 (the date of adjustment). How the allocation of 39,819.3 acres in excess of the entitlement will affect any claim for damages must be addressed. That issue of loss of opportunity of the use of the land was raised in *Guerin v. Her Majesty The Queen.*[93] This is not an issue, however, which can or should be dealt with at this time. Prior to the trial, the parties agreed that the trial would proceed in two stages:

1. a determination of an entitlement, if any, to further reserve lands and the basis for allocating an amount for the buying of ammunition and twine; and,
2. a calculation of the compensation or damages, if any, with respect to the land the loss of opportunity for use and for ammunition and twine.

[160] The matter will be sent back to the Court of Queen's Bench for a determination of the amount of compensation to be paid for ammunition and twine, and whether damages should be awarded for loss of opportunity for use of the reserve land.

[161] Given my finding with respect to the proper interpretation of the reserve land provision in Treaty No. 6, it is not necessary to consider the issue of the validity of the 1963

[93] [1984] 2 S.C.R. 335.

Band resolution accepting approximately 63,330 acres in full and final settlement of its reserve land claim or the question of constitutional estoppel raised by Saskatchewan against Canada.

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Candle Lake Lands

[162] The respondent Band, appellant by way of cross-appeal, appeals the decision of the trial judge that the Candle Lake lands were not set aside as an Indian Reserve. The result is that the Band was not entitled to the land.

[163] Neither party to the appeal takes issue with the trial judge's statement of the appropriate legal test for determining whether or not a reserve has been created. Where they differ is whether or not land had been set aside for a reserve at Candle Lake.

[164] The trial judge reviewed all the relevant case law in both Canada and the United States and concluded there was no specific procedure or process which alone can create an Indian reserve. He stated:

> [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.[94]
>
> [emphasis added]
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> . . .
>
> [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

[94] Trial Judgment at para. 217.

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.[95]

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[165] I agree with his finding of fact that no land had been set apart as a reserve. For an Indian reserve to be created there must be a clear intention on the part of the Crown to set apart a defined tract of land as an Indian reserve. The Crown must carry out this intention by, for example a positive act of an official properly "deputed" or authorized to carry out the intention. The trial judge applied those principles and found as a fact that Canada had not set apart the land as a reserve.

Facts

[166] The trial judge examined the facts in minute detail.[96] For our purposes, a summary of the facts will suffice.

[167] In March, 1930, Mr. Stinson of the Dominion Lands Administration wrote to the Dominion Lands Branch advising that the Director had made application for a "reservation" to be placed against certain vacant lands near Candle Lake. An entry was subsequently made against the lands in the Dominion Land Registry which states:

Reserved 20 March 1930 Candle Lake Indian Reserve No. O in C P.C. File 5463148.[97]

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[95]Trial Judgment at paras. 242-244. In arriving at that conclusion he considered the following cases: *Town of Hay River v. The Queen et al*. (1980), 101 D.L.R. (3d) 184 (F.C.T.D.) at p. 186.; *St. Catherine's Milling and Lumber Company v. The Queen* (1887), 13 S.C.R. 577 per Henry J. at pp. 641-642; affirmed without discussion of this issue, [1888] 13 A.C. 46 (P.C.); *Esquimalt and Nanaimo Railway Company v. McLellan et al.*, [1918] 3 W.W.R. 645 (B.C.C.A.) at p. 649; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654 at p. 675; *R. v. Nikal*, [1996] 1 S.C.R. 1013, per Cory J. at pp. 1029, 1039-1040; *Ross River Dena Council Band v. Canada* (1999), 182 D.L.R. (4th) 116 (Y.T.C.A.), per Richard J.A. at pp. 146-150; per Hudson J.A. at pp. 158-160.

[96]Trial Judgment at paras. 249 to 280.

The Acting Deputy General of Indian Affairs advised that the lands "[had] not been actually set aside for an Indian Reserve but a temporary reservation was placed thereon"[98]

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[168] Mr. A. F. MacKenzie, Acting Assistant Deputy and Secretary, Department of Indian Affairs, wrote to Mr. H.W. Fairchild, an engineer employed in the Department of Indian Affairs in 1930, to make an inspection to "determine which of the Candle Lake lands would be suitable for a reserve." Fairchild was, however, not able to do this work that season and did not inspect the Candle Lake lands.

[169] In October, 1930, the *Natural Resources Transfer Agreement* took effect. Section 10 of the *Natural Resources Transfer Agreement* provided that:

> 10. 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 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, 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.

Later that year, the Department of Indian Affairs authorized Mr. Murison, Inspector of Indian Affairs, to "cruise" the land at Candle Lake in order to determine if it was suitable for an Indian Reserve. Murison "cruised the land" with two headmen of the James Roberts Band and selected 33,401.2 acres of land. He sent his report, dated November 4, 1931, to Commissioner Graham who, in turn, advised MacKenzie of the results of the "cruise". He urged prompt action in these words:

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[97] Exhibit P-36.

[98] Exhibit P-5 at p. 1539.

"If this selection is approved, I think the Department should take prompt action to secure it".[99]

[170] A significant amount of correspondence passed between The Department of Indian Affairs and the Saskatchewan Department of Natural Resources concerning the Candle Lake land. Saskatchewan opposed the transfer of any lands in the Candle Lake area to the Indians. Saskatchewan took the position that no reserve had been created with the result that it was not obligated under s. 10 of the *NRTA* to transfer the land to Canada for the Indians.

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[171] On January 12, 1932, Duncan Cameron Scott, Deputy Superintendent, requested that the lands selected at Candle Lake be transferred to Canada for the benefit of the Indians. This request was rejected by Premier Anderson of Saskatchewan nearly one year later. In a detailed response, the Premier took the position that no specific selection of a reserve had been made. He also stated that no setting apart of reserve land had occurred prior to the *Transfer Agreement* in 1930. The result, in the opinion of the Premier was that Canada was not entitled to create the reserve or request the transfer of reserve land in the absence of the concurrence of Saskatchewan.

[172] Saskatchewan refused to transfer the land maintaining that it was not obligated to do so under s. 10 of the *NRTA*.[100] Canada ultimately withdrew its claim for the additional lands at Candle Lake.

Judgment of the Court of Queen's Bench

[99] Exhibit P-6 at p. 1810.

[100] Trial Judgment at para. 278.

[173] The trial judge concluded that no reserve had been created at Candle Lake. He found as a fact that Canada was interested in creating a reserve, intended to create a reserve, but, in the end took no action to create a reserve. He stated:

> [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.[101]

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Analysis

[174] The Band contends that the letter written by Duncan Cameron Scott was an unequivocal selection of land for an Indian reserve. It also contends that nothing further was required for the creation of a reserve and the land should have been conveyed to Canada pursuant to s. 10 of the *NRTA*. The problem with this submission is that Canada had not selected the lands for an Indian reserve. Murison "cruised" the land in 1931, but he was never given instructions to select the lands for a reserve. His instructions were to determine whether the lands were "suitable" for a reserve, they were not to select the lands for a reserve. He was, therefore, not "deputed" pursuant to Treaty No. 6 to select a reserve. The final authority to select the lands around Candle Lake as a reserve rested with the Department of Indian Affairs and that decision was not made prior to October 1930.

[101] Trial Judgment at pp. 202-203.

[175] There is another fundamental problem. The land passed to Saskatchewan in October 1930. After that date, Canada no longer administered or controlled the lands. It was not open to Canada to unilaterally establish an Indian reserve. It needed the concurrence and agreement of Saskatchewan, which it never received.

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[176] The Band contends that the notation of a reservation on the records of the *Dominion Lands Act*[102] created as a matter of law "an arrangement" within s. 2 of the *NRTA* which Saskatchewan was required to honour. Section 2 of the *NRTA* states:

> **2.** The Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all the parties thereto other than Canada or in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province or to interests therein, irrespective of who may be the parties thereto.

The Band contends that by placing the reservation against the lands, the lands were reserved for the Indians within the meaning of the *Constitution Act, 1867*. They contend the notation of a reservation for the purposes of s. 91(24) of the *Constitution Act, 1867* was an "arrangement" pursuant to s. 2 of the *NRTA*.

[177] I disagree. The reservation was purely an administrative act and did not create any legally enforceable interest in the land. The reservation under the *Dominion Lands Act* recorded against the Candle Lake lands did not involve the exercise of any authority conferred by law. The purpose of the reservation was simply to identify lands under consideration for inclusion in an Indian reserve which might be set apart as a reserve.

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[102] S.C. 1908, c. 20.

[178] By comparing s. 74(a) of the *Dominion Lands Act*, which authorizes the Governor in Council to withdraw land from the operation of the *Act*, subject to existing rights as defined or created hereunder, such as have been or may have been reserved for "Indians" within the "reservation," with s. 78 of the *Act* it becomes clear the latter is an administrative act. No Order-in-Council was passed withdrawing this land from the operation of the *Act* under s. 74.

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[179] Section 78 of the *Dominion Lands Act* authorizes the Minister of the Interior to set aside lands for certain purposes. The section states:

> **78.** The Minister may set aside and reserve from entry for homestead or from sale as agricultural lands, any lands which he considers to be unsuited for cultivation without the aid of irrigation, or to be required in connection with any system of irrigation, or any marsh lands, or lands suitable for grazing but not adapted to agriculture, or lands valuable on account of the hay or timber, quarriable stone, salt, petroleum, natural gas, coal, gold, silver, copper, iron or other minerals thereon or therein, or for the protection of ponds, lakes or other water supplies, or for the purposes of a water power, harbour, landing or townsite. . . .

None of these things were done and as a result, the land passed to the administration and control of Saskatchewan. The reservation did not reserve the lands for the Indians and it did not constitute an "arrangement" under s. 2 of the *NRTA*. It was merely a notice of intention to consider lands as an Indian reserve.

[180] The Band also claims to be entitled to the Candle Lake land under s. 19 of the *NRTA*.[103] It follows that if the land was not reserved by Canada by the reservation on the 20th of March, 1930, s. 19 of the *NRTA* does not apply. The opening phrase of s. 19, "Except as herein otherwise provided", makes it clear that the article does not apply to Indian lands as those lands which are specifically provided for elsewhere in the *NRTA*. Section 19 only applies when two conditions exist:

1. the land must have been "reserved by Canada for the purposes of the federal administration"; and,

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[103] *Supra*, at p. 10.

2. there must be no other provision in the *NRTA* which makes express provision for it.

[181] Section 19(b) applies to ungranted Crown lands which on October 1, 1930 had been reserved by Canada for the purpose of federal administration, only where there is no other provision for such lands in other sections of the *NRTA*. For example the section is operative when land was utilized by Canada for federal purposes, such as post offices, military installations and penitentiaries. It has no application to Indian reserves and in my opinion, has no application to the Candle Lake lands.

[182] The trial judge made no error in law or in the application of the law. The Band has no legally recognized interest in the lands at Candle Lake.

[183] The next issue is whether the trial judge made a palpable and overriding error of fact which would permit this Court to set aside the judgment. He found as a fact that:

> [281] The Dominion of Canada 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.[104]

[184] He also found that no person had been "deputed" or authorized to set apart the land: when Inspector Murison "cruised" the land at Candle Lake in 1931, and when instructions were given earlier in that year to Mr. Fairchild to perform the same task, "[i]n 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."[105]

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[104] Trial Judgment at p. 191.

[105] Trial Judgment at paras. 293-298.

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[185] As I previously noted, the standard of review in findings of fact in aboriginal and treaty rights cases was articulated in *Delgamuukw v. British Columbia*. Appellate courts are only justified in overturning findings of fact and substituting their own findings for those of the trial judge if there is palpable and overriding error.

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[186] While Mr. Murison "cruised" the lands in consultation with the Indians, the land was never set apart as an Indian reserve. Neither Mr. Fairfield nor Inspector Murison were authorized to set apart the land as a reserve with the result that no reserve was created. When Canada later requested that Saskatchewan transfer the land for the benefit of the Band pursuant to s. 10 of the *NRTA*, it refused. The result of that refusal is that the land was not set aside subsequently. As noted above, at the time the request was made to Saskatchewan to transfer the land, Canada no longer had the authority to make the decision unilaterally.

[187] It follows that there was evidence on which the trial judge could have made the finding that the land had not been set apart as a reserve. As a result, there was no palpable or overriding error that would permit this Court to set aside this finding and substitute its own findings of facts. Therefore, this ground of appeal is dismissed.

Breach of Fiduciary Duty

[188] The Band contends that Canada breached its fiduciary duty by not pursuing an action against Saskatchewan to compel it to convey the reserve lands to Canada under the *NRTA*.

[189] The trial judge properly set out the law concerning the existence of a fiduciary relationship between Canada and Indian peoples. In *Guerin v. R.*, Dickson J. set out that relationship as follows:

> 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.[106]

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The Supreme Court extended the application of the principle in *R. v. Sparrow*. There Dickson C.J.C. stated:

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 trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[107]

. . .

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

[106] *Guerin* at p. 376.

[107] *Sparrow* at p. 1108.

> 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).[108]

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[190] The Supreme Court of Canada clearly recognized a fiduciary obligation with respect to aboriginal rights. It is a *sui generis* relationship, and therefore, it is unlike a relationship arising out of trust, contract, or other fiduciaries. The Band contends that Canada breached this fiduciary obligation because a reserve was set apart. Canada had an obligation to take all steps necessary to secure possession of the land for the Band, including suing Saskatchewan in order to enforce the provisions of the *NRTA*.

[191] The Band contends that under the terms of Treaty No. 6, Canada had an obligation to set apart reserves for the use of the Indians. This power is discretionary. The Band contends that it was vulnerable and this discretion resting with Canada turns Canada's obligation into a fiduciary one. It relies on *Bruno v. Canada*[109] in support of its contention that Canada's duty of a fiduciary is one of utmost loyalty to its principal.

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[108] *Ibid*. at p. 1110.

[109] [1991] 2 C.N.L.R. 22.

[192] In a fiduciary relationship, the entrusted party may be in breach if he or she does not live up to the expectations of the vulnerable party.[110] The main issue is whether or not the actions of Canada, up until it abandoned its efforts on behalf of the Band to create a reserve at Candle Lake, can be said to have raised the expectations of the Indians such that the failure to create a reserve constitutes a breach of its fiduciary duty.

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[193] The Band contends because that there was a "specific identifiable parcel of land which Canada set apart as a reserve", that there was a breach of a fiduciary duty. Canada was therefore obligated to have the land conveyed to the Band. That obligation included suing Saskatchewan. This ignores the fact that while Canada made a selection of land, it was not "unqualified or definitive" and Canada's right to select a reserve is unfettered.

[194] The trial judge found:

> [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.
> . . .
>
> [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

[110] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 344.

> Reserve, but that was conferred by Treaty and it was open to Canada to decline to set aside certain lands, for whatever reason. Such as decision may disappoint or distress a Band, but that does not constitute a breach of 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.[111]

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[195] I agree with the trial judge's conclusion that there was no breach of a fiduciary duty. This ground of appeal must fail.

Lac La Ronge School Lands

[196] Treaty No. 6 specifically provided that Her Majesty the Queen would "maintain schools for instruction in such reserves [created]. . .whenever the Indians of the reserve shall desire it." The Band claims the Indian Boarding School at La Ronge was situated on land that was set apart as a reserve. It claims the land was never surrendered to Canada and should form part of the reserve lands. Canada contends that the Department of Indian Affairs provided the school and operating funds under the Treaty but never created a reserve.

[197] The issue here, as it was with the Candle Lake lands, is whether a reserve was set apart and created for the Band. The answer is also the same – it was not.

[198] In order to deal with this issue, I will set out only the historical record necessary to permit a consideration of the positions of the parties.

[199] Discussions between the Band and the Department of Indian Affairs concerning the establishment of schools for the Indians began shortly after the signing of the Adhesion

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[111] Trial Judgment at paras. 350, 353 & 354.

Agreement in 1889. The Department of Indian Affairs established a day school at Montreal Lake and another day school at Little Hills. The schools were not very successful.

[200] In 1895, the possibility of establishing a boarding school was raised by the Chief of the Band with the Department – nothing happened. In 1900, the matter was again raised with Inspector Chisholm at a meeting with Chief James Roberts and his councillors. Chisholm recommended the establishment of a boarding school. Discussions concerning the establishment of a boarding school at La Ronge was also discussed by officials of the Department of Indian Affairs with Archdeacon J.A. Mackay. The school did not commence until 1907.

[201] The discussions about the establishment of a boarding school were taking place at the same time as discussions were being held about setting aside reserve lands for the Band. Discussions between the Band and the Department of Indian Affairs resulted in the surveying and setting apart of 13 reserves by J. Lestock Reid.[112] The correspondence dated July 5, 1909, between McLean and Ried made no mention of surrendering land for a boarding school.[113]

[202] Archdeacon Mackay wrote to Secretary McLean requesting that Mr. Reid survey the school site.[114] He requested a school site containing "about a half mile of frontage on Lac La Ronge and about a quarter mile back." He also requested a small timber reserve. Reid, the surveyor, was instructed by Secretary McLean to consult with Archdeacon Mackay or the

[112]Trial Judgment at para. 27.

[113]Exhibit P-3 at p. 623.

[114]Exhibit P-3 at p. 626.

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school principal in order to finalize the location of the boarding school. The letter to Reid stated:

> 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 to be 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 the 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.[115]

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Secretary McLean advised Archdeacon Mackay by letter that Reid had been instructed to "allot to the Lac La Ronge Indian Boarding School a tract of land as requested by you. . .".

[203] Mr. Reid prepared two sets of field notes but only one copy of the field notes was certified. In the uncertified copy the survey posts used to delineate the school lands were marked "I.R.", which signifies Indian Reserve. However, the certified copy of the field notes shows three posts marked as "M.R." (Mission Reserve) and one post marked as I.R. The actual plan of the school lands filed with the Dominion Lands Registry describes the posts or monuments marking the corners of the school lands as M.R. This is the same description of the site as found in the certified field notes.

[204] Secretary McLean wrote to the Secretary of the Interior on March 4, 1910 enclosing the plans for the 13 reserves. He requested that they be confirmed by Order-In-Council at any early date. A second letter was sent to the Secretary of the Interior enclosing a copy of a plan of the "Industrial School lands together with a request that "[he] have the necessary

[115] Exhibit P-3 at p. 629.

Order-In-Council transferring these lands to this Department passed at an early date."[116] In the 1910 Annual Report of the Department of Indian Affairs, the school is described as being on land which is. . . "mission property, and belongs to the Church of England . . ."[117]

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[205] In 1920, the Church of England claimed ownership of the school lands. The Department of Indian Affairs disputed the Church's position and claimed the school lands. In addition, Archdeacon Mackay renounced any claim to the land on behalf of the Church of England.[118] Archdeacon Mackay in his renunciation makes it clear that the land had been surveyed at his request as a School Reserve and belongs to the Department of Indian Affairs, not the Church. Finally, the Bishop of Saskatchewan, Rev. G.E. LLoyd in response to the question of ownership wrote to the Controller of the Department of the Interior on May 20, 1924 and formally relinquished any claim by the Church to the school lands in La Ronge.

Finding of the Trial Judge

[206] The trial judge found the school lands were not established as an Indian Reserve. He stated:

> [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.[119]

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[116] Exhibit P-3 at p. 684.

[117] Exhibit D-10 at p. 465.

[118] Exhibit P-4, p. 973.

[119] Trial Judgment at para. 320.

Analysis

[207] The trial judge found that there was no specific procedure or single process which alone can create a reserve. There are four essential elements for the creation of a reserve:

1. the Crown must make a deliberate decision to create a reserve;
2. consultation with the Band;
3. there must be a clear demarcation of the land; and
4. there must be some manifestation by the Crown that the lands will constitute a reserve.

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[208] The Band contends that the school land was set apart as a reserve when it was surveyed. It argues that the use of the posts bearing the designation I.R. indicates an intention by Canada to create a reserve. In their opinion, Mr. Reid treated the survey of the school lands no differently from the survey of the Indian treaty land. It was not, in their submission, an Industrial School. The trial judge found that the certified copy of field notes, which shows three posts marked as M.R. (Mission Reserve) and one post marked as I.R., and the final plan were indicative of an intention to treat the land differently than a reserve. In making that finding, the trial judge accepted the evidence of Daniel Babiuk, a retired surveyor who was qualified as an expert. Mr. Babiuk testified that the certified notes were the official notes and should be relied on. While the trial judge found that Reid installed posts bearing the inscription I.R., he found that those posts were used because they were available and should not be considered conclusive proof that the school lands were set aside as an Indian reserve. The trial judge, after examining all of the evidence, including the oral evidence of Mr. Venne, found that the I.R. posts were installed in error and that the survey was later corrected. The result is the land was not surveyed or set apart as a reserve.

[209] The trial judge made the following findings of fact: the original monuments delineating the school lands marked I.R. were installed in error; the certified copy of the

surveyor's field notes showed the monuments as M.R.; and, the surveyors certified field notes more accurately depicted the surveyor's intention. This is consistent with the fact that the school lands had been treated differently from reserve lands. There was evidence on which he could have made those findings with the result that he has committed no palpable and overriding error.

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[210] The Band contends that the trial judge erred in finding that the Crown had no intention of creating a reserve. It submits that the trial judge misinterpreted the treaty provision regarding the agreement by Canada to maintain schools on the reserves and placed undue emphasis on the Department's intention. Finally, the Band argues that the trial judge drew erroneous inferences about the intention of Canada in the letters of instruction dealing with school lands.

[211] I do not agree. An examination of the correspondence relied on by the Band reveals the school lands were surveyed at the same time as the 13 reserves in the Lac La Ronge area however, the lands were not surveyed for the purpose of creating of a reserve. There is no evidence that Canada intended to create a reserve out of the school lands.

[212] The trial judge's findings in this respect state:

> [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.[120]

[120] Trial Judgment at para. 320.

[213] There was evidence on which he could have made such findings and in the result the appeal is dismissed.

Disposition

[214] The result is that the appeal proper is allowed and the finding by the trial judge that the Treaty land entitlement for the Band is to be based on the current population is set aside. The Treaty land entitlement is based on the population of the Band as of 1889 adjusted for the late adherents. I fix that population of the Band as 526 with a reserve land entitlement of 67,728 acres.

[215] The cross-appeal by the Band is dismissed in its entirety.

[216] The matter is sent back to the Court of Queen's Bench for a determination of the amount of damages, if any, owed to the Band as a result of loss of opportunity of use of the reserve lands and for a determination of the amount of compensation payable for twine and ammunition.

[217] Canada and Saskatchewan shall have their costs in this Court on the basis of double Column V for items specifically provided for in this Court and on the basis of two times Column IV for those items based on the Queen's Bench tariff and costs in the Court of Queen's Bench.

DATED at the City of Regina, in the Province of Saskatchewan, this 23rd day of OCTOBER, A.D. 2001.

VANCISE J.A.

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I concur

TALLIS J.A.

I concur

GERWING J.A.

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Appendix A

RESERVE LAND ENTITLEMENT

Treaty No.	Written Text Concerning Process for Determining Size, Location	Statement of Intent Respecting Time for Calculating Size of Reserve
1 (1871)	Location specified but precise size to be determined by formula (32 acres/person)	"...the Indians were promised that a census should be taken with as little delay as possible and immediately thereafter the Reserves should be laid off." Lt. Gov. Archibald to Sec. Of State for the Provinces, July 6, 1871, quoted in Indian Claims Commission Proceedings, Ex. DC-2, A.B. Vol. 30 at 10143a.
2 (1871)	Location specified but precise size to be determined by formula (32 acres/person)	No direct statement as to time for setting aside reserve. In general terms, the Indians were, "...disposed to accept the terms of the Treaty made at Stone Fort [No. 1] with which they had already become familiar." Alexander Morris, Ex. P-31, A.B. Vol. 17 at 5191a.
3 (1873)	Location not specified and size to be determined by formula (128 acres/person)	Selection to be made "if possible during the course of next summer, or as soon thereafter as may be found practicable...." Treaty No. 3, Ex. D-4, A.B. Vol. 27 at 8717a -8718a Statement that instructions should be given, "...to select the reserves with all convenient speed..." Alexander Morris, Ex. P-31, A.B. Vol. 17 at 5212a.
4 (1874)	Location not specified and size to be determined by formula (128 acres/person)	No direct statement as to time for setting aside reserves. In general terms, it was indicated that "...the Indians asked to be granted the same terms as were accorded to the Indians of Treaty Number 3...." Alexander Morris, Ex. P-31, A.B. Vol. 17 at 5237a.
5 (1875)	Location specified but precise size to be determined by formula (32 acres/person)	Lands to be allocated within 2-3 years. Treaty No. 5, Ex. D-4, A.B. Vol. 27, at 8740a-8741a.
6 (1876)	Location not specified and size to be determined by formula (128 acres/person)	Several statements by Alexander Morris indicating intention to consult and set apart lands in the near future (see para. 40).
7 (1877)	Location specified but precise size to be determined by formula (128 acres/person)	"With respect to the reserves, the Commissioners thought it expedient to settle at once their location, subject to the approval of the Privy Council. By this course it is hoped that a great deal of subsequent trouble in selecting reserves will be avoided...." David Laird, Lt. Gov., Special Indian Commissioner, Report August 4, 1877, in Alexander Morris, Ex. P-31, A.B. Vol. 17 at 5421a

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