Citation: Ross River Band v. HMTQ and Yukon - 1999 BCCA 750

Date: 19991215

Docket: 98-YU400
Registry: Whitehorse

COURT OF APPEAL FOR THE YUKON

BETWEEN:

NORMAN STERRIAH, on behalf of All Members of THE ROSS RIVER DENA COUNCIL BAND and ROSS RIVER DENA DEVELOPMENT CORPORATION

PETITIONERS
(RESPONDENTS)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA and THE GOVERNMENT OF YUKON

RESPONDENTS
(APPELLANTS)

Before: The Honourable Mr. Justice Richard
The Honourable Mr. Justice Finch
The Honourable Mr. Justice Hudson

B. R. Evernden
J. A. Hutchinson — Counsel for Her Majesty the Queen In right of Canada, Appellant

R. S. Veale
R. S. Niblock — Counsel for the Respondents

Place and Date of Hearing: Whitehorse, Yukon, 26 and 27 May, 1999

Place and Date of Judgment: Vancouver, British Columbia, 15 December, 1999

Dissenting Reasons by:
The Honourable Mr. Justice Finch

Written Reasons by:
The Honourable Mr. Justice Richard (p.44, para.75)

Concurring Reasons by:
The Honourable Mr. Justice Hudson (p.60, para.111)

Reasons for Judgment of the Honourable Mr. Justice Finch:

I

Introduction

[1] I have had the advantage of reading in draft form the reasons for judgment of my colleagues, Mr. Justice Richard and Mr. Justice Hudson. I have, with respect, reached a different conclusion to theirs, and would dismiss the appeal.

[2] As I understand the reasons of my colleagues, we differ on three main points. First, although neither of them expressly state that a reserve can only be created by the exercise of the Royal prerogative, that is a premise underlying both of their judgments. For the reasons expressed below in Part VI A. and B. of my judgment, I respectfully disagree.

[3] Second, we differ as to the legal effect of the Cabinet directive contained in Circular No. 27. My colleagues hold the view that this document delegated only the authority to create “lands set aside”, an internal governmental procedure not the equivalent of a “reserve” as defined in the ***Indian Act***, R.S.C. I-6. I take the view, as expressed in Part VI C. of these reasons that this directive is a delegation of

statutory authority sufficient to authorize public officials to create a “reserve” as defined in the ***Indian Act***.

[4] Third, we differ as to the effect of Mr. Hunt’s letter dated 26 January, 1965. My colleagues hold the view that the Hunt letter was effective only to set lands aside, noting that the lands were reserved “for Indian Affairs Branch”. That opinion follows logically from their view on the first two points of difference. On the other hand, I hold the view that, as found by the learned chambers judge, in the context of all that had gone before, Hunt’s letter effectively expressed the mutual intention of the parties to create a reserve. To hold otherwise would be inconsistent with the Crown’s fiduciary obligations.

[5] The Federal Crown appeals this order of the Supreme Court of the Yukon Territory pronounced 8 June, 1998:

> THIS COURT DECLARES the tract of land consisting of 47.11 acres and reserved by letter dated January 26, 1965 and located in Lot 105, in Ross River, in the Yukon Territory, to be Indian Reserve within the meaning of the ***Indian Act***.

[6] The Court granted the declaration in favour of the petitioners who claimed Indian Reserve status for the land used as the Ross River Indian Band Village Site. The claim was made in order to obtain exemption under s.87 of the ***Indian***

Act, from payment of tax on the sale of tobacco under the Yukon Territory's ***Tobacco Tax Act***, R.S.Y. 1986, c.170. The Government of Yukon, although a party to these proceedings, did not appear by counsel either at trial or on appeal, being content, we were told, to rely on the submissions of the Federal Crown.

[7] The main issue on appeal is whether an Indian Reserve, as defined in the ***Indian Act***, was created at Ross River by the correspondence and conduct of federal government officials responsible for Indian affairs, despite the absence of any Order-in-Council or other official instrument reflecting the exercise of the Crown's prerogative power. The learned chambers judge found that a reserve was so created, and the federal Crown contends that he erred in that conclusion.

II

Legislation

The *Indian Act*

[8] The relevant provisions of this Act are:

> 2. (1) …
> "band" means a body of Indians
> (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart

before, on or after September 4, 1951.

(b) for whose use and benefit in common, moneys are held by Her Majesty, or

(c) declared by the Governor in Council to be a band for the purposes of this ***Act***;

. . .

"reserve"

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

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

. . .

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

. . .

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

21. There shall be kept in the Department a register, to be known as the Reserve Land Register, in which shall be entered particulars relating to Certificate of Possession and Certificates of Occupation and other transactions respecting lands in a reserve. R.S., c. I-6, s.21.

. . .

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

(a) the interest of an Indian or a band in reserve lands or surrendered lands; and
(b) personal property of an Indian or a band situated on a reserve.

[9] The relevant provisions of the ***Territorial Lands Act*** R.S.C. 1985 c. T-7 are:

> **2.** In this Act, …
> "land" includes mines, minerals, easements, servitudes and all other interests in real property;
> . . .
> "territorial lands" means lands in the Yukon Territory or the Northwest Territories that are vested in the Crown or of which the Government of Canada has power to dispose;
> . . .
> SALE OR LEASE OF TERRITORIAL LANDS
> **8.** Subject to this ***Act***, the Governor in Council may authorize the sale, lease or other disposition of territorial lands and may make regulations authorizing the Minister to sell, lease or otherwise dispose of territorial lands subject to such limitations and conditions as the Governor in Council may prescribe. R.S., c.T-6, s.4.
> . . .
> POWERS OF THE GOVERNOR IN COUNCIL
> **23** The Governor in Council may …
>
> (d) set apart and appropriate such areas or lands as may be necessary to enable the Government of Canada to fulfil its obligations under treaties with the Indians and to make free grants or leases for those purposes; and for any other purpose that the Governor in Council may consider to be conducive to the welfare of the Indians;
>
> (my emphasis)

[10] Section 23(d) was formerly numbered s.18, and it is referred to by that section number in the application dated 23 November, 1962 referred to later in these reasons at para. 17.

[11] Neither the ***Indian Act*** nor the ***Territorial Lands Act*** provides any formal mechanism for the creation of an "Indian reserve" as defined in the ***Indian Act***. A "reserve" is a "tract of land" … "set apart by Her Majesty", but the legislation does not indicate how such land is to be set apart or the steps necessary to constitute a "setting apart". This lacuna in the legislation is at the heart of this appeal.

[12] It is also to be observed that there is no treaty affecting any of the lands in question in this case, or indeed for virtually the whole of the Yukon Territory, and therefore only the underlined words in s-s.23 (d) are relevant.

III

The Chambers Judgment

[13] The learned chambers judge found the underlying facts to be undisputed:

> The Petitioner Ross River Dena Council ("RRDC") is an Indian Band within the meaning of the ***Indian Act***, R.S.C. 1985, C. I-5 ("the ***Indian Act***"). RRDC consists of approximately 393 persons who are Indians as defined in the Indian Act.

RRDC is located at Ross River, Yukon Territory, on lands in the name of Her Majesty the Queen in Right of Canada which have been set aside by Her Majesty to be used for the Ross River Indian Band Village Site.

The Petitioner Ross River Dena Development Corporation (“the Corporation”) is a company incorporated on or about October 28, 1982 by the Chief and Council of RRDC. The purposes of the Corporation are to act as the agent for members of RRDC to carry on business and to provide services for the benefit of the members of RRDC. The sole shareholder of the Corporation is Norman Sterriah, who holds the share in trust for the members of RRDC. The Corporation is the sole shareholder of a company called North Star Trading Post Ltd., which operates the Dena General Store ("The Store”). The Store is a retail store run by and for the benefit of the members of RRDC; selling, among other things, cigarettes and tobacco products.

On or about September 2, 1992, the Store obtained a Tobacco Retail Dealer’s Permit from the Government of Yukon (“YTG”) permitting it to sell cigarettes and tobacco products. Cigarettes and tobacco products are purchased for the Store by the Corporation. The products are purchased for retail sale primarily to the members of RRDC. The products are also sold to non-Indians who reside in Ross River. The Corporation purchases the cigarettes and tobacco products as agent for the purchasers of those products. The Corporation obtains the products from a wholesale dealer. As required by s.3 of the ***Tobacco Tax Act***, R.S.Y. 1986, c. 170, the Corporation, as agent for the purchaser of the products from the Store, pays to the wholesale dealer a tobacco tax, under protest. The Store records each sale of cigarettes and tobacco products to members of RRDC for the purposes of collection and refund of the tobacco sales tax from YTG. YTG has refused to provide a refund of the tobacco taxes paid on behalf of the members of RRDC.

[14] The judge then reviewed in some detail the history of the federal government's policy and conduct in the Yukon with respect to the creation of Indian reserves. He found that government policy changed over time, and that internal government documents were contradictory and inconsistent. He said:

> From 1953 to 1973, Canada's position was that it was necessary to have two Orders-in-Council to create an Indian reserve. One to "reserve" it in the records of one department of Canada; another to "confirm" it as an Indian reserve, even though it may have been transferred to the Indian Affairs Branch or another department of Canada as "reserved" land by a previous Order-in-Council. One of these reserves was recognized in an Order-in-Council which "set apart" the land, another which "set aside" the land, another which "reserved" the land, and three others were "confirmed" as Indian Reserves by Orders-in-Council. The dates of the Orders-in-Council range from 1900 to 1941. On this issue, Canada changed its position in 1973. It recognized within the meaning of the ***Indian Act***, as Indian reserves, six earlier "reserved" lands which had not had a second, confirming, Order-in-Council.

[15] The learned chambers judge found, however, that during 1962 to 1965 the lands in question had been recognized by the Crown as an Indian reserve by an exchange of documents between the Superintendent of the Yukon Indian Agency, the Administrator of Lands for the Indian Affairs Program (then administered by the Department of Citizenship and

Immigration), and the Department of Northern Affairs and National Resources, Lands Division. The conclusions of the learned chambers judge were expressed thus:

> That land had been asked for by the Superintendent of the Yukon Indian Agency on November 27, 1962, and was granted on January 26, 1965. The Superintendent applied for the land to "be used for the Ross River Indian Band village site." By 1969 the land reserved had been reduced to 47.11 acres (Documents 121). The remaining 47.11 acres is the land which the petitioners claim is a reserve.
>
> . . .
>
> The area reserved on January 26, 1965, was a tract of land that was (and is) vested in her Majesty. It had been applied for, for the use and benefit of a band: the Ross River Band. It was applied for, for a permanent use: a village site. That constitutes "use and benefit of a band" as in the **Indian Act** definition of "reserve". The active words of the document reserving the land are as close to the wording of the statute as all but one of the four admitted Yukon Reserves for which the Court has been provided the wording. The public servants who put the setting-aside in process were Her Majesty's agents. The only thing in the way of the land being accepted as a reserve is the public servants' philosophy of integration which resulted in bureaucratic pigeonholing. That erects an unwarranted obstacle to the establishment of reserves which is not required by the statutory definition, is unfair and unjust to the Indian Band.

[16] In general, the procedure followed by government officials, as described by the learned chambers judge, appears to have been based on a Cabinet directive of 4 May, 1955, Circular No. 27, which I set out in full:

Circular No. 27

CABINET DIRECTIVE

Procedure for reserving land in the Yukon and the Northwest Territories

The Cabinet has approved the following procedure for reserving land in the Yukon and the Northwest Territories:

1. Any department or agency of the Government at present occupying or requiring land in the Yukon or the Northwest Territories must notify the Department of Northern Affairs and National Resources (Land Division), specifying the area and location presently occupied or required.
2. In the case of an application for a new area, the records of the Land Division will be checked to ascertain that the required area is available;
3. If a land area requested is available, an entry will be made in the Lands Division records indicating the area and the agency for which it is reserved.
4. The Department of Northern Affairs and National Resources will notify the department or agency that the reservation has been established.
5. A complete record will be built up and maintained by the Lands Division to include all reservations for government purposes.

This procedure does not supersede that provided by the Territorial Lands Act, under which land may be transferred by order in council to the administration of another department in cases where the area can be described accurately and the land is permanently required.

R. B. Bryce,
Secretary to the Cabinet.

Privy Council Office,
May 4th, 1955.

[17] It may be helpful to set out the documentary exchange upon which the learned chambers judge based his conclusions. The documents include the original application to reserve land, dated 23 November, 1962:

> APPLICATION TO RESERVE TERRITORIAL LANDS
> (See Section 18 of the ***Territorial Lands Act***)
>
> I, Allen E. Fry being the duly authorized agent of the Citizenship & Immigration: Indian Affairs Branch hereby make application to have reserved in the name of Citizenship & Immigration: Indian Affairs Branch a parcel of Territorial Land in the Whitehorse District comprising 66 acres, more or less, which parcel is described as follows:
>
> > See attached map. Area in question outlined in red. Located on East side of Canol road, Adjacent to Health Centre- continuing south on Canol road for 3700 feet.
>
> For the purpose of to be used for the Ross River Indian band village site.
>
> . . .
>
> This application is submitted in the firm belief that the land involved is not occupied by any individual, corporation, or Government Department for any purpose whatsoever and is not patented land.
>
> Dated at Whitehorse, Yukon
> This 23rd day of November, 1962
>
> ----------
> Authorized Agent
> A.E.Fry, Indian
> Superintendent.
>
> . . .
>
> Chief: Reserved & Trusts.

[18] That application was sent with this covering letter:

166/30-12

Indian Superintendent for Yukon

November 27/62

ROSS RIVER VILLAGE SITE.

I enclose "Application to Reserve Territorial Lands" for the Ross River Band of Indians. The area to be acquired is outlined in red on the attached map.

The Indians were living previously on the North side of the Ross and Pelly Rivers. However, since the building of a Health Centre and store on the South bank and because of the difficulty of getting back and forth across the river, they have established themselves in the area applied for.

Prior to the Second World War and the building of the Canol Road, the Ross River Indians were established in a permanent camp approximately in the subject locations.

It is recommended that favorable consideration be given to this application in order that an organized Indian Community be set up.

E. Fry,
Indian Superintendent.

AF:trt

[19] There was then a delay of over a year, explained in the documentation, and then this letter from Mr. Fry:

Indian Affairs Branch, Ottawa

166/30-1-12

Superintendent Yukon Agency

17 December 1963

Land Application, Ross River

You will recall that I submitted on November 27th, 1962 an application to reserve Territorial lands for the Ross River Band of Indians. The area

to be acquired was outlined in red on an attached map.

I later asked you to hold that application because at my suggestion a meeting was held by all potential land users at Ross River and an agreement reached to defer all applications until such time as Area Development had laid out a proper community plan. The idea was that all applications could then be based on a comprehensive community plan not unco-ordinated applications here and there about the area.

A series of meetings has since taken place and an evaluation of the site for a community has been made. It has been found that the water level rises and remains very high in the ground during the spring and early summer and it is feared that it may be very difficult to prevent contamination of water supplies by any of the possible means of sewage disposal. A sanitary engineer's report has been received indicating this and for this reason the last meeting which convened passed a recommendation that all government departments be encouraged to locate any anticipated establishments at the Canol-Watson Lake Road Junction, which is some seven miles south of the Ross River site.

As it appears now, the future settlement in the area will be at this road junction although an exhaustive survey of that site for feasibility has yet to be done. Nonetheless, the indications are that a comprehensive community plan will not now be drawn up at the old Ross River site because whatever permanent developing community might be established to serve the general area should not be located there.

However, this does not alter the wish of the Indian people to remain in their traditional historic location with the exception that they are moving to the south side of the river. We, therefore, still require land and I would ask that we re-submit our application as forwarded by me last year with the exception that we reduce our application by the first 500’ along the road immediately south of the Health Centre site. The

500’ to commence at the southerly boundary of the Health Centre location. This reduction in our application will allow for future essential requirements to serve the old community such as a trading post and one or two other commercial developments which may take place in proximity to the Indian village.

You will naturally raise the question that we should not be assisting and encouraging the Indian people to locate at a site which has been considered not suitable for the future community in the area. This is a good point but it is clear that the Indian people intend to live at this site and they will camp on this ground whether we reserve it or not so I think we had better reserve it. If they are going to be camped on this site they might as well be living in decent log cabins, constructed with our assistance as remaining in tent frames. There are some reasons to go along with this. The starting point up and down the Pelly River and up the Ross River is at the present site. Those are the routes to the Indian traplines and re-location for the Indians seven miles further south on the Canol Road would simply mean an additional fourteen miles of travel every time they set out on a trapline. Also the Ross River site is not fully occupied at those times of the year when contamination is likely to result from the rising water level. The Indian people do tend to pull out into bush camps for the spring and early summer.

I imagine in time that if a developing thriving community grows at the proposed site at the Junction of the roads, that Indian people may decide to re-locate to that community. We could then reserve a suitable parcel of ground for their use in that location at that time.

The Trader at Ross River intends to hold a parcel of ground at the old site to continue to trade with the Indian people at their own chosen location.

E. Fry,
Indian Superintendent.

AEF/n (my underlining)

[20] The next letter of importance renews the initial application for a reserve:

166/30-12 (R9)
Ottawa 4, January 14, 1964.

Mr. C.T.W. Hyslop,
Chief, Resources Division,
Northern Administration Branch,
Department of Northern Affairs
And National Resources,
OTTAWA, Ontario
Dear Mr. Hyslop:

Re: Land required for Indians
Ross River, Y.T.
Your file: 8-3-905-0-6

This is further to our letter of January 25, 1963 regarding the above noted subject.

Our Mr. Fry now informs us that the Committee setup to introduce some measure of planning in that location has finally recommended that any anticipated establishments be located at the Canol-Watson Lake Road Junction in lieu of the Ross River Site. This is owing to the fact that at the Ross River Site the water level rises and remains high in the ground during the spring and early summer.

However, the committee's recommendation does not alter the wish of the Indian peoples to remain at the Ross River site. Therefore, our application filed with your office on December 14, 1962 still stands with the exception that we reduce our application by the first 500' along the road immediately south of the Health Centre site. The 500' to commence at the southerly boundary of the Health Centre location. This reduction will allow for further essential requirements to serve the old community such as a trading post and one or two other commercial developments which may take place in proximity to the Indian Village.

We would refer to the sketch we submitted with our letter of October 1, 1962 and would appreciate your co-operation in making this parcel of land available to this Department except in the first 500’ as aforementioned.

Yours sincerely,

Jules D’Astons,
Chief,
Economic Development Division

JLM/mh

(my underlining)

[21] A year later the request for a reserve was continued:

Ottawa 2, January 21, 1965. 166/30-12 (R9)

Mr. A.D. Hunt,
Chief, Resources Division,
Northern Administration Branch,
Department of Northern Affairs and
National Resources
OTTAWA 4, Ontario.

Dear Sir:

Re: Land required for Indians
Ross River Settlement, Y.T.,
Your file 8-3-905-0-6

I wish to thank you for your letter of January 18, 1965, regarding the above-noted subject.

Please be informed that the area you outlined in green on the sketch you returned is acceptable and its reservation for the use of the Indians will be appreciated.

If possible, we would request that with your letter of confirmation, you supply us with three copies of

a sketch showing the location and size of the parcel of land reserved to us.

Yours truly,

David Vogt,
Administrator of Lands.
JLM/jm

[22] The following response was relied upon by the learned chambers judge as effecting the creation of a reserve:

David Vogt, Esq., Ottawa 4 January 26, 1965.
Administrator of Lands
Indian Affairs Branch,
Department of Citizenship and
Immigration Our file 8-3-905-0-6
Ottawa 2, Ontario.

Dear Mr. Vogt,

Reservation – Ross River, Y.T.
Indian Affairs Branch

With reference to your letter of January 21, 1965, I wish to advise that the area defined in our letter and sketch of January 18, has now been reserved in our records for Indian Affairs Branch.

As soon as we can obtain additional copies of the sketch from our Whitehorse office, we will furnish you with three copies as requested.

Yours sincerely,

A.D. Hunt,
Chief,
Resources Division

(my underlining)

[23] This letter was written the same day:

> COMMISSIONER OF THE YUKON
>
> Ottawa 4, January 26, 1965.
> Our file 8-3-905-0-6
>
> Reservation – Ross River, Y.T.
> Indian Affairs Branch
>
> With reference to your memorandum of November 25, 1964, I wish to advise that we have been informed by the Indian Affairs Branch that they are in agreement with the reduction in size of their temporary reservation to make room for the land required for the Territorial Government airstrip at Ross River. They have also requested that the remainder of this parcel be reserved for Indian Affairs, and this reservation has accordingly been entered in our records.
>
> I have enclosed a sketch on which the said reservation is outlined in green. Will you please furnish us with four copies of the same so that we may send Indian Affairs three copies as requested and retain one for our files.
>
> Encl. For Director

[24] It is acknowledged by the Crown that Mr. Hunt's letter is recorded in the Reserve Land Register established under s.21 of the ***Indian Act***, and is also recorded in the Registry of the Department of Indian and Northern Affairs, Land Branch, a registry for which there is no statutory mandate.

[25] The learned chambers judge recognized that there was no Order-in-Council or other such official instrument creating or recognizing the Ross River lands as an Indian reserve. But he held that such formal recognition was not necessary to bring the lands within the definition of "reserve" in the ***Indian Act***. He considered the language used in the Orders-in-Council for the creation or confirmation of other Indian reserves in the Yukon, various documents reflecting the changing policy of the federal government departments from time to time responsible for Indian Affairs, and the relevant caselaw and authoritative texts. He concluded that the absence of an Order-in-Council or other such document was not a bar to the creation of reserve. He held:

> The tract of land in this case meets the definition of Reserve in the ***Indian Act***. I declare the land to be an Indian Reserve within the meaning of the ***Indian Act.***

IV

The Parties' Positions

A. The Crown

[26] Counsel for the Crown contends that the learned chambers judge erred in finding that an Indian reserve had been

created. They say government officials cannot create a reserve in the way suggested by the learned chambers judge. Those officials had no authority, either under the ***Indian Act*** or from any other source, to create a reserve. There is no evidence that any such power was ever delegated to them.

[27] Counsel argue that an Indian reserve in the Yukon can be created only by the Crown's exercise of its prerogative or executive power, or by the exercise of powers granted by statute or founded in the common law. Here the Crown says there is no statutory or common law power, and there is no evidence that the federal Crown exercised or intended to exercise the prerogative power to create a reserve.

[28] The Crown says the creation of an Indian reserve is a public executive act, affecting not only the Indian people and the Crown, but all members of the public. An act of such importance requires deliberation, clarity, certainty, and an awareness of the obligations thereby created. The consequences of creating an Indian reserve are so profound, they cannot be achieved without clear evidence on the public record of an intent and an act attributable to the executive branch of government. Here there is no evidence of either act or intent on the part of the executive, and no evidence that the necessary powers had been delegated to any official below

the level of the Governor-in-Council. It would be wrong to infer the necessary executive intent from the conduct of lesser government officials, or from their acquiescence in the Indians' occupation of Crown land, because such an inference would lack clarity, certainty and public notice.

[29] Moreover, the Crown says the letter relied on by the learned chambers judge as supporting the creation of a reserve does not purport to reserve lands for the Ross River Indian band, but rather for the "Indian Affairs Branch". The Crown also says the letter is ineffective to set lands apart for the "use and benefit" of the Ross River Indian band.

[30] The Crown therefore seeks an order setting aside the order appealed from, and declaring that the lands in question do not constitute a reserve within the meaning of the ***Indian Act***.

B. The Petitioners

[31] Counsel for the petitioners support the conclusions of the learned chambers judge, and his reasons for reaching them. Counsel contend that the government of Canada intended, as evidenced by the words and conduct of its servants, to set apart a tract of land for the "use and benefit" of the Indians residing at Ross River, and thereby created an Indian reserve

within the meaning of the ***Indian Act***. Counsel rely on the documents produced by the government itself, quoted above, as showing an application on behalf of the Ross River Indians for a reserve and a response in writing (Mr. Hunt's letter of 26 January, 1965) recording the grant of the reserve as requested.

[32] Counsel say creation of a reserve under s.23(d) of the ***Territorial Lands Act*** does not require an Order-in-Council. The powers conferred by s.23(d) on the Governor-in-Council were transferred or delegated to departmental employees by custom and convention, and by Cabinet directive. The responsible government officials followed the procedure set out in the ***Territorial Lands Act,*** and the resulting reserve conforms to the definition of reserve in s.2 of the ***Indian Act.*** They say that the delegation of power from the Governor-in-Council to the departmental employees is to be found in Cabinet directive No. 27, or to be inferred or implied from the course of the employees' conduct.

[33] Counsel for the petitioners say the historical record both before and after the creation of the reserve is important because it shows the equivocal and uncertain position adopted by the Government of Canada over the years. The petitioners concede they cannot show a clear intention on the part of the

government to create an Indian reserve, but they say evidence of such intent is unnecessary, given the historical record of the documents evidencing creation of a reserve.

C. The Crown's Reply

[34] Counsel for the Crown said in reply that the petitioners' argument was in essence an adoption of the "indoor management rule" in commercial cases, the rule being that a corporation cannot disavow to third parties the acts or words of its servant when a third party has relied on them. In the context of government conduct, a similar principle was expressed in ***Carltona, Ltd. v. Commissioners of Works and Others***, [1946] 2 All E.R. 560, now codified in the ***Interpretation Act*** R.S.C. 1985, c.I-21. Section 24(2)(d) of that ***Act*** provides that a statute conferring power on a minister is to be read as conferring authority to execute the same powers on other subordinate government officials. The Crown says such a rule is applicable only to ministers, and not to the Governor-in-Council, or the whole of Cabinet. The ***Territorial Lands Act*** confers power on the Governor-in-Council and not on any minister or his officials.

V

THE ISSUES

[35] As I understand the evidence and arguments in this case, these issues arise:

1. How are the words “set apart by Her Majesty” in the ***Indian Act*** definition of “reserve” to be interpreted;

2. What acts, words or documents are necessary and sufficient to show that lands have been “set apart”;

3. Were powers sufficient to create reserves delegated, expressly or implicitly, to the subordinate government officials in the Lands Branch of the Department of Northern Affairs and National Resources; and if so,

4. Were the acts, words and documents of the officials in this case sufficient to create a reserve for the petitioners?

VI

DISCUSSION

A. How are the words “set apart by Her Majesty” in the ***Indian Act*** definition of “reserve” to be interpreted?

[36] As already noted above, the ***Indian Act*** defines “reserve” as land that has been “set apart by Her Majesty” for the benefit of a band. No particular process is explicitly mandated; on its plain meaning, the definition appears to require no more than a lawfully executed act, done under whatever authority happens to be applicable, that has the intent and effect of allocating an area of Crown land for the use and benefit of a band. There is no mention of either an “Order-in-Council” or the “Governor-in-Council” as necessary components of the action setting apart the lands.

[37] Moreover, the definition must be read against the background of the Crown’s relationship with aboriginal peoples. It is settled law that the Crown stands in the position of a fiduciary in relation to Canada’s aboriginal peoples, and in particular with respect to dealing with lands for their use and benefit. In ***Guerin v. The Queen***, [1984] 2 S.C.R. 335, Dickson J. (as he then was) said at 376:

> 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.

[38] The Indians' interest in reserve lands is a usufructuary interest that is *sui generis*. It is not capable of description using traditional terminology from the common law of property. The words "set apart" in the definition of "reserve" must therefore be understood in the light of the Crown's trust-like obligations to Indians, and in light of the special nature of the Indian interest in reserve lands.

[39] A series of cases in the Supreme Court of Canada has held that statutory language relating to Indians should be liberally construed, and that technical and formalistic rules will not be allowed to frustrate either legislative or native intentions. In ***Nowegijick v. The Queen***, [1983] 2 C.N.L.R. 89 (S.C.C.) at 94, it was held by Dickson J. that:

> It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. If the statute contains language which can reasonably

> be construed to confer tax exemptions that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption. In ***Jones v. Meehan***, 175 U.S. 1, it was held that "Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians.

[40] In ***Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development),*** [1996] 2 C.N.L.R. 25 (S.C.C.) Mr. Justice Gonthier for the majority held at p.31 that:

> In my view, principles of common law property are not helpful in the contexts of this case. Since Indian title in reserve is *sui generis*, it would be most unfortunate if the technical land transfer requirements embodied in the common law were to frustrate the intention of the parties, and in particular the Band, in relation to their dealings with I.R. 172. For this reason, the legal character of the 1945 surrender, and its impact on the 1940 surrender, should be determined by reference to the intention of the Band. Unless some statutory bar exists (which, as noted above, is not the case here), then the Band's members' intention should be given legal effect.
>
> An intention based approach offers a significant advantage, in my view. As McLachlin J. observes, the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured. It is therefore preferable to rely on the understanding and intention of the Band members in 1945, as opposed to concluding that regardless of their intention, good fortune in the guise of technical land transfer rules and procedures rendered the 1945 surrender of mineral rights null and void. In a case such as this one, a more technical approach operates to the

> benefit of Aboriginal peoples. However, one can well imagine situations where that same approach would be detrimental, frustrating the well-considered plans of the Aboriginals. In my view, when determining the legal effect of dealings between Aboriginal peoples and the Crown relating to reserve lands, the *sui generis* nature of aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings.

[41] And in ***St. Mary's Indian Band v. Cranbrook (City)***, [1997] 3 C.N.L.R. 282 (S.C.C.), Mr. Justice La Forest, after referring to the above passage said at 288-289:

> This passage confirms that we do not focus on the minutiae of the language employed in the surrender documents and should not rely upon traditional distinctions between determinable limitations and conditions subsequent in order to adjudicate a case such as this…
>
> The reason the Court has said that common law real property concepts do not apply to Native lands is to prevent Native intentions from being frustrated by an application of formalistic and arguably alien common law rules. Even in a case such as this where the Indian band received full legal representation prior to the surrender transaction, we must ensure that form not trump substance.

[42] The meaning of the words "set apart" is therefore to be approached with these principles in mind, having regard to how the words would naturally be understood by the petitioners, and remembering that form must not be allowed to triumph over substance.

B. What acts, words or documents are necessary and sufficient to show that lands have been “set apart”?

[43] The Crown contends a reserve can only be created, in the circumstances of this case, by the exercise of the prerogative power, and that to evidence such an exercise there must be an Order-in-Council or other similar official instrument. The Crown relies upon ***Town of Hay River v. The Queen***, [1980] 1 F.C. 262,(1979) 101 D.L.R. (3rd) 184, (Fed.T.D.) where Mr. Justice Mahoney said at 264-265:

> The authority of the Governor in Council under paragraph 19(d) of the ***Territorial lands Act*** to “set apart and appropriate such areas or lands as may be necessary to enable the Government of Canada to fulfil its obligations under treaties with the Indians” is not the source of authority to set apart Crown lands as a reserve in that part of Canada to which the Act applies, i.e. the Yukon and Northwest Territories. It is, rather, the authority to create a land bank for that purpose. The ***Indian Act*** defines “reserve” but nowhere deals with the creation of a reserve. Notwithstanding the words “pursuant to the Indian Act” in paragraph (2) of the Order in Council, the authority to set apart Crown lands for an Indian reserve in the Northwest Territories appears to remain based entirely on the Royal Prerogative, not subject to any statutory limitation. I therefore conclude that, the cause of action being limited to Her Majesty’s alleged failure to observe and follow the requirements of Treaty No. 8, the objection that the plaintiff is without *locus standi* to maintain the action is well taken.

[44] ***Hay River*** was followed by the Federal Court of Appeal in ***Dene Nation v. Canada***, [1992] 2 F.C. 681 at 690 (Fed.C.A.).

[45] In this case, the learned chambers judge noted that the real issue before Mr. Justice Mahoney in ***Hay River*** was a question of standing. The chambers judge declined to follow the comments quoted above. On his view of the judgment, the passage quoted was *obiter dicta*. I would also observe that neither ***Hay River*** nor ***Dene Nation*** purport to say what is necessary in order to show that the prerogative power has been exercised.

[46] A review of other cases and literature indicates that reserves may be created in a variety of different ways. In ***St. Catherine's Milling and Lumber Company v. The Queen*** (1889), 14 App. Cas. P.46, the Privy Council held that the words "lands reserved for Indians" are to be interpreted according to their natural meaning "sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation".

[47] In ***Ontario Mining Company v. Seybold*** (1903), A.C. 73, the appellants claimed lands under letters patent issued by Canada, which had been included in territory previously ceded by the Indians in 1873 under Treaty No. 3. Under the Treaty, Canada undertook to set aside reserves for the Indians. The

disputed land was in fact included in a reserve, although the selection of the reserve was not confirmed by Order-in-Council. As it turned out on the evidence, the ownership of the disputed land was found to rest in the Province of Ontario. However, all courts which considered the case, including the Ontario High Court, the Ontario District Court, the Supreme Court of Canada and the Privy Council, assumed that the selection of lands by Dominion Government officials, after consultation with the Indians, would have been effective to establish a reserve had it not been for the proprietary interest of the Province. In other words, the *de facto* creation of a reserve would have been sufficient notwithstanding the absence of an Order-in-Council or other official instrument.

[48] In ***C.P. Ltd. v. Paul*** (1989), 1 C.N.L.R. 47 at 48, the Supreme Court of Canada recognized the creation of a reserve in the absence of any “formal allocation of the land as a reserve”.

[49] A helpful discussion of the ***Seybold*** case, and other cases, is found in “The Establishment of Indian Reserves on the Prairies” by Richard Bartlett found in [1980] 3 C.N.L.R. He concludes his consideration of how reserves are created with this passage:

> "Setting apart" is suggested to consist of the survey and selection of the lands, following such consultation with the Indians as is required by treaty. The obtaining of provincial concurrence pursuant to the Natural Resources Transfer Agreement is also, of course, required in the establishment of reserves after 1930. The treaty language, negotiations, and department practice and usage all demand such a conclusion. It recognizes the judicial concern with the *de facto* setting apart of land. As Mr. Justice Clarke declared in the United States Supreme Court:
>
> > [T]o hold that, for want of a formal approval by the Secretary of the Interior, all of the conduct of the Government and of the Indians in making and ratifying and in good faith carrying out the agreement between them … is without effect, would be to subordinate the realities of the situation to mere form.
> >
> > (Northern Pacific Railway v. Wismer, 246 U.S.283 at 288-289 (1918)).

[50] On a review of the cases and literature to which we were referred, I have come to the view that the two conditions necessary and sufficient for the creation of a reserve are an intention to create a *de facto* reserve, and an act by a public official with authority to act, that gives effect to the intention. While Orders-in-Council have frequently been used for the latter purpose, it is clear that Indian reserves have been and can be created in their absence.

[51] I think this conclusion is in accord with the principles of interpretation discussed in the previous section of these

reasons. The legislation is silent as to how a reserve may be created. The legal and technical formalities contended for by the Crown do not form part of any statutory requirement. The aboriginal people would not understand them as necessary to the creation of a reserve, and insistence upon them by the Crown would frustrate both the aboriginal intention to have a reserve created and the intention of the government officials who acted to give effect to the aboriginals' wishes.

[52] The Crown argues that, because creation of a reserve gives rise to serious restrictions on the future use and disposition of the lands, and gives powerful rights to the native band occupying the reserve lands, Parliament could not have intended it to be easy for the government to "set apart" land to form a reserve. A related point is that if the Crown cannot set aside land for the benefit of a band without creating a reserve proper under the ***Indian Act***, the Crown may be more reluctant to allocate areas for aboriginal use.

[53] However, these considerations do not change the plain language of the ***Indian Act***, nor do they affect Canada's fiduciary duties. The answer to these arguments lies in the power of Parliament: if the legislature wants to restrict the creation of reserves to Orders-in-Council, then it can do so explicitly. Similarly, if the legislature wishes to authorize

the Crown to create a “land bank” for native use without invoking the reserve provisions of the ***Indian Act***, it can so specify.

C. Were powers sufficient to create reserves delegated, expressly or implicitly, to the subordinate government officials in the Lands Branch of the Department of Northern Affairs and National Resources?

[54] The Crown attacks this conclusion of the learned chambers judge, at para.29 of his reasons:

> The public servants who put the setting-aside in process were Her Majesty’s agents.

[55] The Crown says that reserves may be created only through the exercise of the Royal prerogative, and that there is no evidence that Parliament or the Governor-in-Council had delegated prerogative powers to these public servants. The Crown also says that those agents did not have the authority, and did not hold themselves out as having the authority, to create an Indian reserve. The Crown’s argument appears to be that even if every step necessary and sufficient to “set apart” land for the use and benefit of a band was taken by an official duly authorized to take that step, the sum total of all those steps would nevertheless fall short of creating a

reserve because they did not constitute an exercise of the prerogative taken by the Governor-in-Council.

[56] I do not accept this argument. As noted above, no statute limits the ability of the Crown to create reserves by the exercise of any particular power, or by the actions of any particular government body. The "setting apart" of land under a statutory power will be sufficient to create a reserve provided that the two conditions outlined above, intent to create a *de facto* reserve and authority to act, are met.

[57] In this case, it appears that any prerogative power to create reserves in the territories that may have existed in the past has been extinguished. The prerogative is the residual executive power of the Crown, exercised by convention at the direction of the Prime Minister and the Cabinet. The prerogative is subject to legislative direction: if a statute exists that restricts or displaces an area formerly covered by the prerogative, then the prerogative power is extinguished to the extent of the restriction or displacement. As explained by Professor Hogg in Constitutional Law of Canada (1998) at 15:

> … the prerogative could be abolished or limited by statute, and, once a statute had occupied the ground formerly occupied by the prerogative, the Crown had to comply with the terms of the statute. All of these rules, and especially the last (displacement

> by statute), have had the effect of shrinking the prerogative powers of the Crown down to a very narrow compass.

[58] In Dawson's The Government of Canada, 6th Edition, 1987 Norman Ward put it this way, at 178:

> Statutory powers are fairly obvious and readily ascertained; but the prerogative, finding its origin in the misty past and interpreted by the courts only as the occasion has arisen, is uncertain. Statutory powers are constantly being increased and have, in fact, been expanded enormously in recent years. Prerogative powers, however, can shrink but not grow; for if a new executive power rests on valid precedent, it is no extension but merely a revival; and if it is given a new lease of life by act of Parliament, it becomes a statutory power.

[59] Similarly, J. R. Mallory states, in The Structure of Canadian Government (1984), at 154:

> The powers of the executive to legislate on its own account are twofold: prerogative and delegated. The prerogative power is the last vestige of the Crown's power to make law in its own right. The courts have made it clear that this power is gone forever once Parliament has legislated on a particular topic. It is thus of declining importance, and there are very few matters on which the prerogative power to legislate still exists.

[60] As these commentators make clear, the prerogative is not only residual, but shrinking: it is the last vestige of government by monarchy, and in the modern days of

representative democracy it is on its way out. In my view, courts should be extremely cautious about finding, creating or expanding prerogative powers, especially in areas of high political and social importance. If there is a statute that "occupies the ground" of an area of law, any prerogative powers that may have been enjoyed in that field at one time should be deemed extinguished, absent clear statutory language to the contrary.

[61] There have been many occasions where an Indian reserve has been created by the royal prerogative. However, due to the shrinking nature of the prerogative, examples of past exercises of the power do not establish the current scope of the power: current legislative schemes must be analyzed to determine if the field has subsequently been occupied.

[62] Moreover, in the context of aboriginal law, there is no reason why the royal prerogative should prevail over statutory powers in the creation of reserves, or in the exercise of the Crown's fiduciary duties. These fiduciary duties guide the interpretation of statutes having to do with aboriginal issues, and also form a substantive limit on the exercise of legislative power through section 35 of the ***Constitution Act,*** (1982).

[63] In the circumstances of this case, the administration of Crown land in the territories is governed, thoroughly and extensively, by the ***Territorial Lands Act***, R.S. 1985, c. T-7, as amended, in combination with the ***Yukon Act*** and ***Northwest Territories Act***, which provide for some local territorial governance. The ***Territorial Lands Act*** grants to the Governor-in-Council, and in some cases the Minister of Indian Affairs and Northern Development and other ministers, various powers regarding the disposition, regulation, administration, and setting aside of "territorial lands". Territorial lands are defined in s.2 of the Act as "lands in the Yukon Territory or the Northwest Territories that are vested in the Crown or of which the Government of Canada has the power to dispose." There is provision for the creation of ecologically-based "Land Management Zones", for the sale or lease of land, for mining rights and other Crown grants, for the regulation of timber, for penalties for trespass, and for the setting aside of land for many different purposes, including, in subsection 23(d), the power for the Governor-in-Council to

> Set apart and appropriate such areas or lands … for any … purpose that the Governor-in-Council may consider to be conducive to the welfare of the Indians.

[64] There was obviously a time when administration of Crown lands in the territories fell under the jurisdiction of the Royal prerogative. However in my view the ***Territorial Lands Act***, in combination with the other acts regulating the use of Crown land in the territories, has "occupied the ground" in this area. There is little, if any, room left for the exercise of the prerogative. In the case of "setting apart" lands for the use of natives, the prerogative has been specifically preempted by section 23(d).

[65] Seen in the light of the statutory powers conferred in the ***Territorial Lands Act***, the relevant question in this case is whether the steps taken by the public servants in this case were authorized by section 23(d) of that Act. I should make it perfectly clear that the Crown did not argue that the actions taken here were improper or unauthorized; however, I will answer that question for the sake of clarity and completeness.

[66] The process followed by the federal officials in this case was governed by "Circular No. 27", a Cabinet Directive dated 4 May, 1955 (quoted in full at para. 16 above), which sets out a procedure for "reserving" land in the territories for the administration of a particular government department. (I observe that the Directive uses the words "reserving",

"reserved", or "reservation(s)" five times, and nowhere makes mention of "lands set aside" or "setting lands aside").

[67] The Directive required an application to be filed by the government department desiring the reservation with the Department of Northern Affairs and National Resources (Lands Division), and if the land was available, the reservation was recorded in the Lands Division records. This is precisely what happened in this case: the Department of Citizenship & Immigration, Indian Affairs Branch applied for a reservation (in its name) of the land for the use and benefit of the Ross River Band. The Lands Division allowed the application and recorded the reservation.

[68] Section 23(d) gives the power to set land apart for native use to the Governor-in-Council. I conclude that in this case, the Governor-in-Council, acting through Circular No. 27, delegated the powers granted to it by section 23(d) to the Department of Northern Affairs and National Resources (Land Division). Thus, the "setting apart" of Crown lands for the use of the Ross River Band had a clear statutory basis, and was taken under the authority of a directive issued by the Governor-in-Council.

[69] The last paragraph of Circular No. 27 requires some comment. It says that the procedure outlined "… does not

supersede that provided by the ***Territorial Lands Act*** …". The Court was shown no authority, other than that Act, under which Circular No. 27 could have been issued. As that Act displaced any prerogative power the Crown previously had, I take the last paragraph of Circular No. 27 to mean only that the Governor-in-Council retained authority to act directly under the ***Territorial Lands Act***, without recourse to the process set out in the Circular.

[70] I would also add that all the steps taken by the government officials in this case must be seen in the context of the fiduciary duty owed by the Crown to aboriginals. It would not conform to the honour and integrity of the Crown for it now to deny authority for the acts taken by its officials in the proper course of their duties, and in their fiduciary role as agents of the Crown.

[71] I would answer the third question posed in the affirmative, and hold that government officials in the Department of Indian and Northern Development, formerly the Department of Northern Affairs and National Resources, can effectively create reserves in the course of exercising statutory powers delegated to them by an appropriate authority, in this case, the Governor-in-Council.

D. Were the acts, words and documents of the officials in this case sufficient to create a reserve for the petitioners?

[72] The learned chambers judge found, at para.29 of his reasons:

> The area reserved on January 26, 1965 was a tract of land that was (and is) vested in her Majesty. It had been applied for, for the use and benefit of a band: the Ross River Band. It was applied for, for a permanent use: a village site. That constitutes "use and benefit of a band" as in the ***Indian Act*** definition of "reserve".

[73] Those are all findings of fact with which, in my respectful view, we are not at liberty to interfere. The steps taken by government officials to set apart the reserve lands are fully documented from the government records. The intention of the responsible government officials to create a reserve is equally clear. Given the fiduciary obligations of the Crown, it cannot now be heard to rely on the absence of an Order-in-Council or other formality.

[74] I would dismiss the appeal.

"The Honourable Mr. Justice Finch"

Reasons for Judgment of the Honourable Mr. Justice Richard:

[75] The federal Crown appeals the decision of the chambers judge in which he declared certain lands at Ross River, Yukon Territory, to be an Indian Reserve within the meaning of the ***Indian Act***.

[76] The genesis of the litigation leading to the chambers judge's decision is the imposition of tax on tobacco products pursuant to a territorial statute, ***Tobacco Tax Act***, R.S.Y. 1986, ch.170. The Ross River Dena Council claims an exemption from payment of this tax, relying on s.87(1) of the ***Indian Act***:

> s.87 Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely,
>
> (a) the interest of an Indian or a band in reserve lands or surrendered lands; and
>
> (b) the personal property of an Indian or a band situated on a reserve.

[77] The Government of Yukon (a party to the litigation below) refused to recognize any exemption, for the reason that the Ross River lands are not a reserve.

[78] The issue in this litigation focuses on the distinction between Lands Set Aside and Reserves. For purposes of discussion, I adopt the definition of these terms set forth in the Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of Yukon:

> "Land Set Aside" means land in the Yukon reserved or set aside by notation in the property records of the Northern Affairs Program, Department of Indian Affairs and Northern Development, for the use of the Indian and Inuit Program for Yukon Indian People.
>
> "Reserve" means a Reserve as defined in the ***Indian Act***.

[79] Reserve is defined in the ***Indian Act*** as "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band". The term "band" is also defined in the ***Indian Act***; however, it is agreed that the Ross River Dena Council is a band recognized by the Appellant under the ***Indian Act***.

[80] It is the position of the Appellant that the Ross River lands are Lands Set Aside and are not a Reserve, and that the two are distinct.

[81] The specific document on which the Respondents rely in asserting that the lands constitute a Reserve (and relied upon by the chambers judge) is dated January 26, 1965. It is

addressed to an official in the Indian Affairs Branch of the Department of Citizenship and Immigration and emanates from the office of A.D. Hunt, an official in the Northern Administration Branch of the Department of Northern Affairs and National Resources. It states:

> ". . . I wish to advise that the area defined in our letter and sketch of January 18 has now been reserved in our records for Indian Affairs Branch."
>
> (emphasis added)

[82] As the historical review in the reasons of the chambers judge indicates, the separate and distinct characterizations of Lands Set Aside and Reserves has existed for decades, albeit using varying terminology. The chambers judge in his reasons makes reference to 1916 and 1940 documents which expressly distinguish a) lands which are Reserves as confirmed by federal Order-in-Council and b) reserved lands which are "simply" noted in departmental files. This distinction continued through the 1950s, 1960s and 1970s, as discussed by the chambers judge, and exists today, as evidenced by the Umbrella Final Agreement.

[83] Reserves were historically created by the federal Crown in fulfilment of its obligations under treaties with Indians, and of its fiduciary obligations generally with respect to

Indians. As it is the prerogative of the federal Crown to establish a Reserve, evidence of the formal creation of a Reserve is usually in a federal Order-in-Council.

[84] The vast majority of the Yukon Territory, and much of the Northwest Territories, are not the subject of treaty with Indians. Accordingly, large tracts of land in the territories are subject to claims of aboriginal title.

[85] The Parliament of Canada placed the control, management and administration of all Crown lands in the territories in a federal department (previously under other names such as Department of Northern Affairs and National Resources, presently it is the Department of Indian Affairs and Northern Development) headed by a Minister. In 1950 Parliament legislated with respect to those lands under the control, management and administration of the Minister: ***An Act Respecting Crown Lands in the Yukon Territory and the Northwest Territories***, S.C. 1950, ch.22. That Act provided, *inter alia*:

> s.4 Subject to this Act, the Governor in Council may authorize the sale, lease or other disposition of territorial lands and may make regulations authorizing the Minister to sell, lease or otherwise dispose of territorial lands subject to such limitations and conditions as the Governor in Council may prescribe.
>
> . . .

> s.18 The Governor in Council may
>
> . . .
>
> b) set apart and appropriate territorial lands for the sites of places of public worship, burial grounds, schools, market places, gaols, court houses, town halls, public parks or gardens, hospitals, harbours, landings, bridge sites, airports, landing fields, railway stations, townsites, historic sites or for other public purposes and, at any time before the issue of letters patent, alter or revoke such appropriations;
>
> . . .
>
> (d) set apart and appropriate such areas or lands as may be necessary to enable the Government of Canada to fulfill its obligations under treaties with the Indians and to make free grants or leases for such purposes, and for any other purpose that he may consider to be conducive to the welfare of the Indians.
>
> (e) set apart and appropriate territorial lands for use as forest experimental areas, national forests, game preserves, game sanctuaries, bird sanctuaries, public shooting grounds, public resorts or for any other similar public purpose.
>
> (emphasis added)

[86] Similar provisions are found within the present statute, ***Territorial Lands Act***, R.S.C. 1985, ch.T-7.

[87] Thus, any governmental department or agency which requested or required territorial lands for its use or purposes made application for such to the Northern Affairs department under the ***Territorial Lands Act***.

[88] In 1955 the federal Cabinet issued a procedural directive entitled Circular No.27 which set out an internal government procedure for setting aside or reserving lands in the territories for the use of a government department or agency. The content of this directive was as follows:

Circular No.27
CABINET DIRECTIVE

Procedure for reserving land in the Yukon and the Northwest Territories

> The Cabinet has approved the following procedure for reserving land in the Yukon and the Northwest Territories:
>
> 1. Any department or agency of the government at present occupying or requiring land in the Yukon or the Northwest Territories must notify the Department of Northern Affairs and National Resources (Lands Division), specifying the area and location presently occupied or required.
>
> 2. In the case of an application for any new area, the records of the Lands Division will be checked to ascertain that the required area is still available.
>
> 3. If a land area requested is available, an entry will be made in the Lands Division records indicating the area and the agency for which it is reserved.
>
> 4. The Department of Northern Affairs and National Resources will notify the department or agency that the reservation has been established.
>
> 5. A complete record will be built up and maintained by the Lands Division to include all reservations for government purposes.

> This procedure does not supersede that provided by the Territorial Lands Act, under which land may be transferred by order in council to the administration of another department in cases where the land can be described accurately and the land is permanently required.
>
> R.B. Bryce,
> Secretary to Cabinet
>
> Privy Council Office,
> May 4th, 1955

[89] It is a reasonable inference from the final paragraph of this directive that a more formal procedure, e.g., Order-in-Council, was contemplated for the creation of a Reserve.

[90] In any event, as stated by the chambers judge in his reasons, on November 23, 1962, an official in the Indian Affairs Branch of the (then) Department of Citizenship and Immigration made application to the (then) Northern Affairs department for the setting aside or reserving of the lands at Ross River. The relevant portion of that Application Form reads as follows:

> APPLICATION TO RESERVE TERRITORIAL LANDS
> (See Section 18 of the Territorial Lands Act)
>
> I, *Allen E. Fry* being the duly authorized agent of the *Citizenship & Immigration: Indian Affairs* *Branch* hereby make application to have reserved in the name of *Citizenship & Immigration: Indian Affairs Branch* a parcel of Territorial Land in the *Whitehorse*

District comprising of *66* acres, more or less, which parcel is described as follows:

See attached map. Area in question outlined in red. Located on East side of Canol road. Adjacent to Health Centre - continueing (sic) south on Canol road for 3700 feet.

For the purpose of *to be used for the Ross River Indian band village site.*

. . .

[91] After some changes were made in the application *via* correspondence between government officials, the application was granted by letter of January 26, 1965:

Ottawa 4, January 26, 1965

David Vogt, Esq
Administrator of Lands,
Indian Affairs Branch,
Department of Citizenship and Immigration
Ottawa 2, Ontario

Dear Mr. Vogt,

Reservation - Ross River, Y.T.
Indian Affairs Branch

With reference to your letter of January 21, 1965, I wish to advise that the area defined in our letter and sketch of January 18, has now been reserved in our records for Indian Affairs Branch.

. . .

Yours sincerely,
A.D. Hunt,
Chief,
Resources
Division

[92] The letter of A.D. Hunt is not the act of the Governor-in-Council, nor does it purport to be. There is no evidence of the extent of Mr. Hunt's authority.

[93] In *obiter*, the Federal Court of Canada **in *Town of Hay River v. The Queen***, [1980] 1 F.C. 262 stated that the authority in the previously mentioned s.18(d) (now s.23(d)) of the ***Territorial Lands Act*** to set apart and appropriate territorial lands to fulfill treaty obligations or for the general welfare of Indians is not the authority to create a Reserve but merely the authority to create a land bank for that purpose. The Court stated that the authority to create a Reserve is the Royal Prerogative. But in any event, as mentioned, the Hunt letter does not purport to be a s.18(d) act of the Governor-in-Council, let alone an exercise of the Royal Prerogative.

[94] The consistent evidence before the chambers judge was that the Ross River lands were Lands Set Aside and not a Reserve under the ***Indian Act***. It did not have, from 1965, the attributes of a Reserve under the ***Indian Act***. Noteworthy in the evidence is an occurrence in 1967 when the Governor-in-Council transferred control of a portion of the "set aside" Ross River lands to another government agency, i.e., the Commissioner of the Yukon Territory. Had the Ross River lands

been a Reserve under the ***Indian Act***, the Ross River Dena Council would have had to concur in such transfer by an act of formal surrender -- see ss.37-39 of the ***Indian Act***. There is no evidence of such surrender. Nor is there evidence that the Band received compensation therefor.

[95] It is clear from the documentary evidence that there never was any intention by the federal Crown to create a Reserve at the Ross River site. Indeed, as stated by the chambers judge, there was a deliberate decision not to create a Reserve.

[96] The record indicates that in 1957 a detailed recommendation was prepared for submission to the Governor-in-Council. The recommendation was that “ten Indian Reserves be set apart within the meaning of the ***Indian Act*** for the use and benefit of certain bands of Indians in the Yukon Territory”. The lands referred to in the recommendation were primarily lands that had been “set aside” by notation in departmental files for the use of Indians (though the Ross River lands were not part of this proposal). A decision was made at the Ministerial level in December 1957 not to proceed with the recommendation. The chambers judge reasonably concluded from the documentary evidence that movement towards creation of

these Reserves was thwarted by the then “integration” philosophy of departmental officials.

[97] The chambers judge further quoted from a departmental (DIAND) document dated November 25, 1968:

> The Department’s policy is not to extend the Indian Reserve system to the Yukon and Northwest Territories.

[98] In that document, the Ross River lands are listed, with others, as lands in the Yukon “reserved for Indian use for an indefinite period merely by means of a notation in Territorial land records” and specifically, with respect to the Ross River lands, on January 26, 1965.

[99] That there exists, and has existed, a distinction between Lands Set Aside and Reserves, is beyond doubt. Its existence in the Yukon is notorious. Examples of its vital existence which appear in the record below are:

a) a statement in a 1916 government document, quoted in a 1940 document at Appeal Book, Vol.II, p.192 that those reserves which are simply noted in departmental files should not be confirmed as Reserves by formal Order-in-Council, as they will likely one day be “relinquished”.

b) the concerns expressed at the time of a 1957 federal election regarding the improper disenfranchisement of Yukon

Indians who were not resident on a Reserve (the ***Elections Act*** of the day disqualified Indians resident on a Reserve).

c) The unavailability in the 1970s of a certain Central Mortgage and Housing Corporation housing program for Indians on Reserves, to some Yukon Indians. In a letter to the federal Minister, the President of the Yukon Native Brotherhood urged the federal government to extend this program to Indians residing on Lands Set Aside in the Yukon, stating:

> Due to the fact that no Treaties have been signed in the Yukon, most of our people live on lands that are not Reserves within the meaning of the *Indian Act*. We expect that this problem will be resolved during the course of the Land Claims Negotiations. However, in the meantime Yukon Indian Housing needs immediate attention.

(d) an explicit moratorium (later a remission order) issued by the federal government in 1975, extending to Yukon Indians resident on Lands Set Aside the benefits of s.87 exemption status for income tax purposes. Still later, a similar remission order was contemplated for purposes of the federal GST tax.

(e) the specific distinction between Lands Set Aside and Reserves recognized by the signatories to the Umbrella Final Agreement in 1993.

[100] A reading of the Umbrella Final Agreement indicates that the status of lands occupied by Indians in the Yukon, whether Lands Set Aside or Reserves, will be superseded in due course by formal recognition of aboriginal title to large tracts of land upon settlement of the land claim of each Yukon First Nation, as contemplated by the Umbrella Final Agreement.

[101] It is impossible to gainsay the existence of the distinction between Lands Set Aside and a Reserve. Accordingly, it was, and is, open to the legislators to grant the tax exempt provisions of s.87 ***Indian Act*** to one or both categories of lands. The legislators chose to grant those benefits to Reserves only. Had the legislators intended to also grant those benefits to Lands Set Aside, the legislation would have expressly so provided using language, e.g. as is used in s.4(3) of the Act:

> Sections 114 to 122 and, unless the Minister otherwise orders, sections 42 to 52 do not apply to or in respect of any Indian who does not ordinarily reside on a reserve or on lands belonging to Her Majesty in right of Canada or a province.
>
> (emphasis added)

Or, a remission order could issue from the proper authorities, as was done with respect to income tax.

[102] I note that in an income tax case in a southern jurisdiction, ***Faries v. Minister of National Revenue***, (1992) 92 T.C. 1142 (Tax Court of Canada), no remission order was in effect and the court there held that income that was not earned on a reserve but rather on “lands set aside” for reserve purposes was not exempt from taxation under s.87.

[103] Also, in ***Dene Nation v. Canada***, [1992] F.C. 681 (Federal Court of Appeal), yet another case involving the s.87 exemption from income tax, it was held that the setting aside of lands under the ***Territorial Lands Act*** was not the equivalent of the creation of a reserve as defined in the ***Indian Act***.

[104] The decision of the chambers judge, in effect, erases the distinction between Lands Set Aside and a Reserve. With the greatest of respect, in my view there is no legal basis or authority for doing so.

[105] The chambers judge addresses the reason why Lands Set Aside did not become a Reserve, at paragraph 10:

> The petitioner contends it is Canada’s policy between 1953 and 1973 which resulted in lands being set aside for the Ross River Indians without Canada recognizing those lands as having the status of Indian Reserves. That policy was one of integration. (Documents 33, 38, 45, 47).

and at paragraph 29:

> . . . The public servants who put the setting-aside in process were Her Majesty's agents. The only thing in the way of the land being accepted as a reserve is the public servants' philosophy of integration which resulted in bureaucratic pigeonholing. That erects an unwarranted obstacle to the establishment of reserves which is not required by the statutory definition, is unfair and unjust to the Indian Band.

[106] A review of the extracts from departmental files allows one to readily agree that an earlier policy of integration is a reasonable explanation for the non-establishment of a Reserve at Ross River. Also evident from the record is that the present-day reason or explanation is the pending land claims negotiations process. But in either event, the underlying reasons do not alter the fact that a Reserve was not established. The issue in this litigation is not whether a Reserve should have been created but rather whether a Reserve was in fact created.

[107] The federal Crown has, for various reasons evident in the record, not created at Ross River a reserve with s.87 benefits. In my respectful view it is not the role of the Court to do so.

[108] A generous or liberal reading of the definition of "reserve" in the ***Indian Act*** is of no assistance to the

Respondents, in my opinion, in overcoming its plain and natural meaning. To constitute a Reserve, the lands must be set apart for the use and benefit of a band. The January 26, 1965 letter of Mr. Hunt reserves the lands for the Indian Affairs Branch. This is not mere semantics, nor form vs. substance, in the context of the then existing distinction between Lands Set Aside and Reserves.

[109] Nor is there any evidence of Mr. Hunt's authority to create a Reserve. There is no evidence of an intention of the federal Crown to create a Reserve, either directly or by express or implied delegation to any official.

[110] For these reasons I am of the view that the chambers judge erred in granting the declaration sought and I would allow the appeal.

"The Honourable Mr. Justice Richard"

Reasons for Judgment of the Honourable Mr. Justice Hudson:

[111] This appeal was heard on the 27th day of May 1999, judgment having been reserved.

[112] I have the advantage of being provided the draft reasons for judgment of Mr. Justice Finch and Mr. Justice Richard, which I have studied.

[113] I have concluded that I agree with the conclusions reached and the reasons contained in the draft judgment of Mr. Justice Richard. Accordingly, in the result, the appeal should be allowed and the declaration sought, refused.

[114] The reasons for judgment of Mr. Justice Finch set out the background of the case. Aside from indicating my agreement with the reasons and conclusions reached by Mr. Justice Richard, I have some further comments.

[115] The learned chambers judge, in his reasons for judgment, described a body of unknown persons, variously described as “bureaucrats”, “public servants”, and “civil servants”. He goes on to describe the conduct of these persons as unfair to the aboriginal peoples and therefore a reason to grant the declaration sought. In this, I believe he erred in law.

[116] In paragraph 11, reference is made to the following quote:

> Even though Ministers of the Crown wanted reserves confirmed in the Yukon to remove the uncertainty about the status of the various parcels set aside, the public servants who were bent on integration, prevailed.

[117] In paragraph 12, this is stated:

> During the period 1953 to 1973, Canada's civil servants continued to hold the view that there were no reserves in the Yukon because: unlike Northwest Territories Indians, Yukon Indians were not under treaty;

[118] In paragraph 29, the learned chambers judge said:

> The public servants who put the setting-aside in process were Her Majesty's agents. The only thing in the way of the land being accepted as a reserve is the public servants' philosophy of integration which resulted in bureaucratic pigeonholing. That erects an unwarranted obstacle to the establishment of reserves which is not required by the statutory definition, is unfair and unjust to the Indian Band.

[119] I cannot find in the evidence support for the conclusion that some officers of the Crown have come together and formed a philosophy contrary to that of their political masters, and wrongly took steps to place this philosophy into the policy of the department of government in which they worked.

[120] The conflict here, and at the time of the acts in question, is between two notions. The first notion is that integration was the most beneficial approach to be taken to the development of relationships between the Government and the aboriginal peoples. The second notion is that traditional and historical cultural relationships with the land should be respected and should guide the government's administration of aboriginal matters.

[121] The likelihood that the Ministers of the Crown, the elected representatives of the Canadian people, would hold the view that integration was appropriate, is not anywhere in the evidence negated.

[122] In paragraph 11 of the learned chambers judge's reasons, it is stated:

> By December 4, 1957, after a memorandum from, and meeting with, Deputy Minister Fortier, the two Ministers, Mr. Fulton and Mr. Hamilton, agreed not to apply for the Order-in-Council.

The underlining of the word "agreed" is mine. The two documents referred to, being Documents 48 and 49, provide this:

> I sent to you a copy of my memorandum of November 27th to the Acting Minister, dealing with the recommendation to Council that 10 Indian Reserves be

> set apart for the use and benefit of certain Bands of Indians in the Yukon Territory.
>
> This matter was discussed Monday with Mr. Fulton and Mr. Hamilton and it was finally decided not to submit the recommendation to Council and to let the matter stand as it is now.

[123] And in Document 49:

> I have your letter of November 25th concerning my discussions with Mr. Brown of the Department of Northern Affairs and National Resources, and also the question of confirming a number of reserves in the Yukon Territory.
> Confirmation of reserves is not being proceeded with at the present time, but will be the subject of further consideration by the Minister sometime in January.

[124] This was not a case of an agreement, but was a case of Minister's "deciding" on a matter, presumably on the basis of advice received from relevant advisors.

[125] The petitioner in his affidavit refers to "a policy of integration promoted by the Government of Canada". This could be construed as an admission which the learned chambers judge failed to note.

[126] There is no reason found in the evidence to indicate that the concept of the integration of aboriginal people being perceived to be the more beneficial concept (rightly or wrongly), was not a concept held by the responsible Ministers of the Crown and the Cabinet. One factor that they undoubtedly

considered was that by declaring reserves with respect to Crown lands being reserves rather than occupied on another basis was to disenfranchise the residents.

[127] The strong inference to be found in the reasons for judgment is that there was amongst administrators of the ***Indian Act*** a form of conspiracy to act contrary to the policy set by the elected parliament and the Cabinet. In my view, this is actually contradicted in the evidence wherein it is public servants who are complaining about being subject to the "integration policy" and expressing the view that the reservation of land for the benefit of aboriginals should follow the efforts of cultural preservation rather than integration. The fact that integration was the policy of the government and not the wish of selected public servants, is a conclusion which is clearly evidenced by a large body of the evidence before the court. On this basis, it would appear that the policy of the government at the time was to discourage the creation of reserves in order to achieve integration, or, at least, to delay the creation of reserves for this reason. In finding to the contrary, the learned chambers judge erred.

[128] The learned chambers judge stated in paragraph 29:

> The public servants who put the setting-aside in process were Her Majesty's agents.

This is the basis in the learned chambers judge's reasons for judgment for deciding that the definition of reserve in the ***Indian Act*** had been complied with, because the public servants, as Her Majesty's agents, satisfied the requirement that the setting-aside be by Her Majesty. However, the evidence establishes that the setting aside was reserved to the prerogative of the Crown or executive discretion.

[129] This brings up a second point. The learned chambers judge found that the authority in s. 2 of the ***Indian Act*** granted to Her Majesty could be exercised by any agent of the federal government.

[130] If public servants had this capacity and authority, then Mr. Fry, the author of the letter and application of November 23, 1962, could have had the power to create a reserve as an agent of Her Majesty. His letter and application would have been unnecessary. It would be an absurdity to say that any person in the employ of the government acting in the scope of his employment was authorized to create a reserve, since by this interpretation, an RCMP corporal in charge of Old Crow detachment could create a reserve.

[131] The determination of the availability of a declaration turns on the examination and interpretation of the conduct of the superintendent of the Yukon Indian Agency on

November 1962 and the response by Mr. Hunt, Chief Resources Division of Northern Administration Board, Department of Indian and Northern Affairs and National Resources, in January of 1965. Mr. Fry, the Yukon Indian Agency Superintendent, (and his words show this clearly) was asking for a reservation of land to the Yukon Indian Agency for a purpose. There is no reference to the fact of any request by the Band that this be done at the time. It results from the observations of the Superintendent of the situation at Ross River and a common-sense conclusion which would enable him to more easily administer his office and carry out his duties for the benefit of aboriginal peoples. He says in his letter:

> Prior to the Second World War and the building of the Canol Road, the Ross River Indians were established in a permanent camp approximately in the subject location.
> It is recommended that favorable consideration be given to this application in order that an organized Indian community be set up.

[132] This application by Mr. Fry was postponed to permit other members of the larger community to participate in the planning of the organization of the area. Accordingly, it is clear that the application of Mr. Fry, and several other applications, were with relation to the common interests of all interested parties. As Mr. Fry said on January 17, 1963,

"… then all applications, ours included, will be based on a comprehensive community plan, not of uncoordinated applications here and there about the area." It is of interest to note that the Band was not represented at these meetings, except by Mr. Fry.

[133] Minutes of the planning committee meeting of November 4, 1963, state:

> Mr. Fry further stated that Indian Affairs would be prepared to relinquish a reasonable portion of their temporary reservation at Ross River to ensure that land will be available for essential development in that area.

[134] Mr. Fry, in a note to Indian Affairs Branch, Ottawa, dated December 17, 1963, stated:

> This is a good point but it is clear that the Indian people intend to live at this site and they will camp on their ground whether we reserve it or not, so I think that we had better reserve it.

[135] This background demonstrates that it is a reasonable conclusion to reach that Mr. Hunt, in his letter of January 26, 1965, was acting pursuant to the procedures set out in Circular No. 27 and not pursuant to the ***Indian Act***. Therefore, if he was creating a "reserve" or acknowledging the creation of a "reserve", it was a reserve under the internal policies between departments.

[136] The learned chambers judge appears to have decided that what happened when Mr. Hunt wrote his letter in January 1965 should be interpreted as the creation of a reserve under the ***Indian Act,*** having regard to the unwarranted obstacle described in paragraph 29 of the learned chambers judge's reasons, which was "unfair and unjust to the Indian Band." It may be that viewed from present opinion held with respect to the treatment of aboriginal peoples, the conclusions reached and policies undertaken in 1962 and 1965 might be considered unfair. But, that is irrelevant to the application before the court, which is to decide whether or not there should be a declaration that in 1965 a reserve pursuant to the ***Indian Act*** was created. The unfairness or the unjust nature of the circumstances could give rise to many claims for relief and court proceedings. But, it is my opinion that they do not effect a determination leading to a declaration as to what occurred in 1965.

[137] There is no doubt that "lands set aside" or other withdrawals from public disposal to benefit Indians other than the creation of reserves under the ***Indian Act*** were common before November 27, 1962.

[138] A declaration, in my view, of the results of the conduct of agents of the government, as to whether or not they

create a statutory relationship, should not be made when there is a substantial body of evidence to indicate that the declaration would be in error. In my view, that substantial body of evidence exists here. Virtually all of the documentation refers to a distinction between land set-aside/land set-apart and Indian Reserves under the ***Indian Act***.

[139] Indeed, Mr. Fry's affidavit of January 1965 referred to "that area of land set aside for our use and jurisdiction" and "those lands set aside under our administration". On January 13, 1965, Mr. Voyt, Administrator of Lands of the Indian Affairs Board, described "the area which we understand will be reserved for the use of this branch".

[140] The letter of Mr. Elijah Smith of October 11, 1974, the references in the Umbrella Agreement referred to in the judgment of Mr. Justice Richard, and the several references in government manuals and other publications to the existence of land set aside on the one hand and reserves pursuant to the ***Indian Act*** on the other, indicate clearly that the parties to this litigation in the days and years following the letter of Mr. Hunt on January 26, 1965, at no time considered the land in question as a reserve pursuant to the ***Indian Act*** until the matter of the tobacco tax was raised.

[141] It should not be presumed that the benefits to aboriginal peoples flowing from the decision to set the lands aside on the records of the department for the benefit of the Indian people do not involve fiduciary duties on the part of the government, which, if breached, could result in claims for compensation in monetary or other terms.

[142] Indeed, the likelihood that such matters were and are being discussed in land claims negotiations, of which there is evidence but to which details the court is not privy, would support the Crown's position that no reserve pursuant to the ***Indian Act*** exists with respect to their lands.

[143] Further, a declaration should not be made with respect to something that a court decides should have happened. It is only in those instances where the court is satisfied on the evidence or on necessary inference from the evidence that something did happen, that a declaration should be made. That is not the case here.

[144] In ***Architectural Institute of British Columbia v. Lee's Design & Engineering Ltd.*** (1979), 96 D.L.R. (3d) 385 (B.C.S.C.), it is said (paraphrasing Trainor J.): "Where the relief sought is not a declaration of right, however, but a declaration that past conduct is wrong, the Court should not make such an order."

[145] This court should not interfere with the findings of fact by the learned chambers judge if there are not overwhelming reasons for such a reversal. However, in a circumstance such as this, where the evidence at the hearing in the first instance was written, the appellate court is in possession of all of the matters that were before the hearing judge. There was no *viva voce* testimony and therefore no measuring of demeanour or weighing of the evidence given by witnesses. The Court of Appeal is in as good a position as the judge in the first instance to determine the issues before the court.

[146] It is my finding that to find that persons being mere agents of Her Majesty had the power to declare the creation of a reserve pursuant to the ***Indian Act*** in the absence of evidence of the delegation of such power is a mistake in law. Mr. Hunt is not shown to be a part of the Indian Affairs Branch or in any way subject to the direction of the responsible Minister in that regard. As stated earlier, what happened here happened pursuant to Circular No. 27 and not the ***Indian Act*** or the evidence is so uncertain as to prevent a decision based on the balance of probabilities.

[147] I agree with Mr. Justice Richard that the cases he refers to in support of the refusal of the declaration mandate

that the decision by this court should be to allow the appeal and refuse the declaration sought.

[148] Overriding the examination of the evidence it is common ground that the words of the ***Indian Act*** involve a *lacuna* with respect to the basis upon which a reserve should be created and the mechanics of such creation. That alone should be a reason why the court should not declare the existence of a reserve pursuant to the ***Indian Act***, but that the *lacuna* should be resolved by legislative means or by the exercise of the Crown prerogative.

[149] I agree with the reasons of Mr. Justice Richard that this appeal should be allowed.

"The Honourable Mr. Justice Hudson"