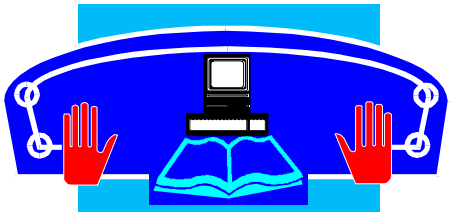

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RESOURCE DEVELOPMENT **AND ABORIGINAL LAND RIGHTS**

Richard H. Bartlett
Chair of Natural Resources Law
Faculty of Law
The University of Calgary

September 1991

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The Canadian Institute of Resources Law was incorporated in 1979 with a mandate to examine the legal aspects of both renewable and nonrenewable resources. Its work falls into three interrelated areas: research, education, and publication.

The Institute has engaged in a wide variety of research projects, including studies on oil and gas, mining, forestry, water electricity, the environment, aboriginal rights, surface rights, and the trade of Canada's natural resources.

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FOREWORD

This book reflects research carried out by Professor Bartlett in the course of his tenure as the 1990 incumbent of the Chair of Natural Resources Law in the Faculty of Law at The University of Calgary. The Chair is a special senior position in the Faculty, established in 1978 with funding from the Canadian oil and gas industry. The Chair is designed to permit the Faculty to recruit outstanding scholars and teachers in natural resources law on either a short-term or long-term basis. Chair incumbents carry out research on natural resources issues and teach both in the Faculty and in programmed aimed at the legal profession and public. The Chair receives significant funding from the Canadian Institute of Resources Law.

Professor Bartlett is leading scholar in the field of aboriginal rights, especially with respect to its implications for natural resources development, and it is in this area that his research was concentrated during his appointment to the Chair. In the course of his stay at Calgary he conducted a public seminar on this subject in May 1990, co-sponsored by the Faculty of Law and the Canadian Institute of Resources Law. The two essays that constitute this volume — "Resource Development and Aboriginal Title in Canada" and "Resource Development and Treaty Land Entitlement in Western Canada" — are the background research papers prepared for that seminar. Together, the papers present an important discussion of the implications of aboriginal land rights for resource development in Canada, both where there is an unextinguished aboriginal title and where rights are defined by treaty.

Professor Bartlett is currently Professor of Law, University of Western Australia, and Professor of Law, University of Saskatchewan.

J. Owen Saunders
Executive Director
Canadian Institute of Resources Law

AVANT-PROPOS

Cet ouvrage est le résultat des travaux de recherche entrepris par le professeur Bartlett en 1990, alors qu'il occupait la Chaire de droit des resources naturelles à la Faculté de droit de l'Université de Calgary. Cette chaire, établie en 1978 avec l'appui financier de l'industrie pétrolière et gazière canadieme, est conçue comme un poste supérieur au sein de la Faculté. Elle permet à la Faculté de recruter, à court ou à long terme, d'éminents spécialistes et professeurs en droit des resources naturelles. Les titulaires de la chaire entreprennent des travaux de recherche clans le domaine des resources naturelles et enseignent aussi bien à la Faculté que clans le cadre de programmed destinés à la profession juridique et au public. L'Institut canadien du droit des resources fournit une contribution financière importance à cette chaire.

Le professeur Bartlett est un spécialiste de premier plan clans le domaine des droits des autochtones, s'intéressant notamment à l'influence que peuvent exercer ces droits sur le développement des resources naturelles. C 'est clans ce domaine qu 'il a concentré ses travaux de recherche en tant que titulaire de la chaire. Au tours de son séjour à Calgary, il a offert au mois de mai 1990 un séminaire sur ce sujet, commandité conjointement par la Faculté de droit et l'Institut canadien du droit des resources. Les deux essais réunis clans ce volume, "Resource Development and Aboriginal Title in Canada" et "Resource Development and Treaty Land Entitlement in Western Canada", sent les documents de travail qui avaient été préparés pour ce séminaire. Ces deux articles présentent une analyse détaillée des répercussions que peuvent avoir les droits immobiliers des autochtones sur le développement des resources au Canada, aussi bien clans le cas où le droit de propriété autochtone n 'est pas prescrit que clans celui où les droits sent définis par traité.

J. Owen Saunders
Directeur exécutif
Institute canadien du droit
des resources

PREFACE

In 1990, Richard Bartlett was appointed to the Chair of Natural Resources Law at The University of Calgary. While holding that position, he undertook a research project with respect to resource development and aboriginal land rights. As part of the project, Professor Bartlett conducted a seminar on that subject at the Faculty of Law, The University of Calgary, on 3 May 1990. The seminar was co-sponsored by the Faculty of Law and the Canadian Institute of Resources Law. The two papers that comprise this volume are the background research papers prepared for the purposes of the seminar.

The frost paper is entitled "Resource Development and Aboriginal Title in Canada". It examines the relationship between aboriginal title and resource development. The paper suggests that the legal framework now in place requires agreement with the aboriginal people as to the terms under which resource development may take place, but also shows that the agreements reached to date have recognized and protected existing resource dispositions and make provision for future resource disposition.

The second paper is entitled "Resource Development and Treaty Land Entitlement in Western Canada". It examines the entitlement to lands and resources established by the treaties with the aboriginal peoples which provided for the settlement of aboriginal title in western Canada. The paper considers the relationship between resource development and the treaty * entitlement. It suggests that the treaty entitlements and the treaties must be fulfilled, or else the courts may impose a freeze upon resource development.

The emphasis of the two papers is upon the need today to reach agreement with the aboriginal peoples upon the terms upon which resource development may proceed, and the need to fulfill the promises and entitlement declared in any such agreement.

PREFACE

En 1990, Richard Bartlett a été nommé titulaire de la chaire de droit des resources naturelles de l'Université de Calgary. A ce titre, il a entrepris des recherches sur l'exploitation des resources et les droits territoriaux des Autochtones et tenu un séminaire sur le sujet à la faculté de droit de l'Université de Calgary le 3 mai 1990. Les deux articles de fond réunis clans cet ouvrage avaient été rédigés en vue de ce séminaire, parrainé par la faculté de droit et l'Institut canadien du droit des resources.

Dans le premier article, intitulé <<Resource Development and Aboriginal Title in Canada» (L'exploitation des resources et les titres des Autochtones au Canada), il examine le lien qui existe entre les titres des Autochtones et l'exploitation des resources. 11 suggère que le cadre juridique actuel requiert qu'un accord soit conclu avec les Autochtones sur les conditions régissant l'exploitation des resources, mais démontre également que les accords signés jusqu'à maintenant considèrent et protègent l'alienation actuelle des resources et tiennent compte de leur alienation éventuelle.

Dans le second article, intitulé «Resource Development and Treaty Land Entitlement in Western Canada» (L'exploitation des resources et les droits territoriaux conférés par les traités clans l'Ouest canadien), il examine les droits sur les terres et les resources établis par les traités qui ont été conclus avec les Autochtones et qui prévoient le règlement des revendications territorials des Autochtones clans l'Ouest canadien. Cet article traite de la relation entre l'exploitation des resources et les droits conférés par les traités. 11 suggère que les droits et les traités par lesquels ils ont été conférés doivent être respectés pour éviter que les tribunaux mettent un frein à l'exploitation des resources.

Ces deux articles font ressortir le besoin d'arriver à un accord avec les Autochtones sur les conditions régissant l'exploitation des resources et de respecter les promesses et les droits stipulés clans tout accord du genre.

RESOURCE DEVELOPMENT **AND ABORIGINAL TITLE IN CANADA**

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ABORIGINAL TITLE AND RESOURCE DEVELOPMENT

The determination of the existence and extinguishment of aboriginal title usually arises in the context of a proposed resource development project. In recent years, in Canada, aboriginal title has been asserted in litigation as a bar to mining, exploration and production of oil and gas, construction of multi-billion dollar oil and gas pipelines and hydro-electric dams and diversions, and forestry cutting regimes. Resource development in most parts of Canada is undertaken pursuant to dispositions issued by the Crown. The assertion of aboriginal title is a challenge to the power of the Crown to issue a disposition and to the disposition's validity. Aboriginal title is a fundamental issue in Canadian resource development.

This paper surveys the relationship of aboriginal title to resource development. It examines the source of title of the Crown and of resource developers on the one part, and of the aboriginal people on the other. It considers the content of their respective titles and the degree to which they come into conflict. The study necessarily raises the question as to which title is dominant under the Constitution. The paper concludes by a consideration of the implications of aboriginal title for resource development.

THE SOURCE OF TITLE OF THE CROWN, RESOURCE DEVELOPERS, AND THE ABORIGINAL PEOPLES — WHAT PRINCIPLE, IF ANY?

The French and British, upon the assertion of sovereignty, laid claim to title to the lands and resources in Canada. The French did not enter into treaties for the surrender of the title of the aboriginal people before purporting to dispose of lands and resources. Upon Quebec and the Maritimes being ceded by the French to the British, the British asserted the same right of disposition upon the justification that the French had ceded sovereignty without recognition of aboriginal title.

Elsewhere in Canada, in particular, in the West, early British Imperial policy dictated recognition of aboriginal title to lands.[1] The British issued The Royal Proclamation, 1763,[2] which

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1. See Richard Bartlett, "Indian Reserves and Aboriginal Lands in Canada – A Homeland: A Study in Law and History" (Saskatoon:

prohibited the issuance of warrants of survey or grants beyond the borders of Quebec, and reserved the country to the West to the Indians. Settlers were required to remove themselves from such lands.

The Royal Proclamation, 1763, established the policy which demanded that only the Crown might acquire traditional aboriginal lands and only upon the consent of the aboriginal peoples. It is the foundation of the policy of entering into treaties and agreements with the aboriginal peoples with respect to their traditional lands, which was thereafter pursued in Ontario, the West, and the North.

But upon what principle of law did the French or the British purport to dispose of the traditional lands of aboriginal peoples or to establish procedures for their acquisition by settlers and resource developers? The principle was declared by the United States Supreme Court in 1823 in *Johnson v. M'Intosh*,[3] and has provided the rationale and authority upon which all the leading Canadian cases are founded!

In *Johnson*, Marshall CJ, of the United States Supreme Court, upheld a grant by the United States over the claims of a private purchaser from the Indian tribes of the same lands. Marshall CJ declared that "discovery gave title" to the discovering nations Marshall CJ reached this conclusion upon an examination of the practice of the European nations in relation to North America, and declared that The Royal Proclamation, 1763, supported this analysis. The Court fully recognized that the country had been inhabited, yet had no compunction about using the term "discovery". The Court expressly rejected the application of the "law which regulates . . . the relations between

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Native Law Centre, University of Saskatchewan, 1990) at 9 (note 18).

2. The Royal Proclamation, 1763 [U.K.] *in* R.S.C. 1985, Appendix II, No.1.
3. *Johnson v. M'Intosh (1823), 8* Wheat. 543, 5 L.Ed. 681 (LJ.S.S.C.).
4. See *St. Catherine's Milling and Lumber Co. v. R. (1888),* 14 A.C. *46* (P.C.) at *48; Calder v. A.G. British Columbia, [1973]* S.C.R. 313,34 D.L.R. (3d) 145, [1973] 4 W.W.R. 1, *per* Judson J, D.L.R. at 151, and *per* Hall J, D.L.R. at 169; *Guerin v. R. (1985), 13* D.L.R. (4th) 321 at *335, [1985]* 1 C.N.L.R. 120 at 132 (S.C.C.), *per* Dickson J.
5. *Johnson v. M'Intosh (1823), 8* Wheat. 543 at 573, 5 L.Ed. 681 at 693.

the conqueror and the conquered", and declared that the circumstances required "resort to some new and different rule, better adapted to the actual state of things''.[6] The Indians were recognized as the "rightful occupants of the soil",7 but the Crown had an "absolute title . . . to extinguish that right' ',[8] and indeed might "grant the soil, while yet in possession of the natives".9

The Court at no point suggested that such a rule was just. Rather, the Court opined that it was the only possible accommodation of the interests of the settler and of the aboriginal people. Marshall CJ explained the need to recognize the rights of the settlers:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.[10]

The aboriginal people were considered "as *occupants, to be protected,* while . . . in the *possession of their lands* [emphasis added]" ,[11] subject to the "absolute title of the Crown to extinguish that right" .[12]

The question of the source of aboriginal title in Canada came before the Privy Council in 1888 in *St. Catherine's Milling and Lumber Co. v. R.*[13] Argument before the lower courts and the Privy Council had emphasized the United States jurisprudence, the practice of the British, and The Royal

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6. *Id.*, Wheat. at 591, L.Ed. at 693. Marshall CT expressly declared that the principles applied in *East India* were inapplicable and rejected the relevance of practice there, *id.,* Wheat. at 599, L.Ed. at 695.
7. *Id.*, Wheat. at 574.
8. *Id.*, Wheat. at 588, L. Ed. at 692.
9. *Id.,* Wheat. at 574.
10. *Id.,* Wheat. at 591, L. Ed. at 693. The Chief Justice observed that the Indian title was not incompatible with a seisin in fee, Wheat. at 592, L.Ed. at 693.
11. *Id.,* Wheat. at 591, L.Ed. at 693.
12. *Id.,* Wheat. at 558, L.Ed. at 592.
13. *St. Catherine's Milling and Lumber Co. v. R. (1888), 14* A.C. 46 (P.C.).

Proclamation, 1763. The Privy Council reviewed the policy of the British administration and concluded that the possession of the Indian tribes could "only be ascribed to the general provisions made by the royal proclamation", which was considered to recognize "a personal and usufructuary right, dependent upon the goodwill of the Sovereign.' '[14] The decision was driven by policy and practice, as had been that of the United States Supreme Court in *Johnson.* But it left unclear the origin of aboriginal title and whether it might arise independently of The Royal Proclamation. The matter was resolved in *Calder v. A.G. British Columbia.*[15] All six of the justices of the Supreme Court of Canada who examined the question determined that aboriginal title was derived from the fact of historic possession by the aboriginal people. After referring to *Johnson* and to *St. Catherine's Milling,* Judson J (Martland and Ritchie JJ concurring) declared that The Royal Proclamation, 1763, was not the exclusive source of aboriginal title, and continued:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indians title means . ...[16]

Hall J (Spence and Laskin JJ concurring) relied upon *Johnson* and concluded that "The aboriginal Indian title does not depend on treaty, executive order or legislative enactment' ',[17] but rather is "a title which has its origin in antiquity — not in a grant from a previous Sovereign' '.[18] In 1985, in *Guerin v. R.,* the " Supreme Court of Canada cited Marshall CJ'S judgment in *Johnson* extensively, and asserted "that Indian title is an independent legal right which, although recognized by The Royal Proclamation of 1763, nonetheless predates it.' '[19] In the result,

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14. *Id.,* at *56, per* Lord Watson.
15. *Calder v. A.G. British Columbia, [1973]* S.C.R. 313, 34 D.L.R. (3d) 145, [1973] 4 W.W.R. 1.
16. *Id.,* S.C.R. at *328,* D.L.R. at 156, W.W.R. at 11.
17. *Id.,* S.C.R. at *390,* D.L.R. at 200, W.W.R. at 61.
18. *Id.,* S.C.R. at *406,* D.L.R. at211, W.W.R. at 74.
19. *Guerin v. R. (1985), 13* D.L.R. (4th) 321 at 336, [1985] 1 C.N.L.R. 120 at 133 (S.C.C.).

the aboriginal title recognized by the Canadian courts may *be* said to be a pragmatic accommodation of the facts of European settlement and aboriginal occupation of the land.[20]

The conclusions of the Canadian courts regarding the source of aboriginal title are not without articulate and forceful critics. The critics would assert reliance on principle of law, rather than pragmatism, to derive the origin of aboriginal title. McNeil asserts that aboriginal title is derived from the presumption of English law that occupation gives rise to a fee simple estate and title, which the assumption of sovereignty by the Crown did not displace.[21] Lester adopts a different perspective; he examines the origin of the title of the Crown to lands in Canada and asserts the need for a formal grant or declaration.[22] Both writers recognize that their analyses are inconsistent with traditional jurisprudence. Both suggest the need for a re-examination. Adoption of their analyses would lead to quite different conclusions as to the nature and content of aboriginal title to those so far adopted by the courts.

THE CONTENT OF ABORIGINAL TITLE: DOES IT INCLUDE THE RIGHT TO DEVELOP RESOURCES? COMPLETE OWNERSHIP OR TRADITIONAL USES ONLY?

The content of aboriginal title is significant in the determination of who may authorize resource development, who is entitled to the benefits of ownership of resources, and, if such rights are not vested in the aboriginal people, whether aboriginal title is a bar to resource development without the consent of the aboriginal people.

There is much uncertainty and unpredictability in the area of aboriginal law, especially when trying to ascertain the content

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20. To similar effect see Brian Slatterly, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 736-737.
21. K. McNeil, *Common Law Aboriginal Title* (Oxford University Press, 1989).
22. G.S. Lester, "The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument", D. Jur. Dissertation (Toronto: York University, unpublished [1981]).

of aboriginal title. In *James Bay Development Corp. v. Kanatewat*,[23] Turgeon JA, delivering the judgment in the Quebec Court of Appeal, declared:

> The Indian right, if it exists, has never been defined in a clear fashion. There exist in this regard many theories founded on doctrines and hypotheses which vary according to the author. Some submit that it is merely a right to hunt and fish. Others see it as a vague right of occupation and even a personal right of usufruct, a usufruct of a very special nature which is not similar to the usufruct of the Civil Code. [translation to English][x]

The origin of aboriginal title has been ascribed to the historic fact of aboriginal possession of the lands. Does this also mean that the content of aboriginal title is limited by the historic uses made by the aboriginal people when in traditional possession of the lands? Marshall CJ described aboriginal title as a "right of occupancy" in *Johnson*.[x] The Privy Council declared in *St. Catherine's Milling* that it was a "personal and usufructuary right' '.[26]

The Privy Council was obviously aware of the civilian understanding of the usufruct when it employed the term in *St. Catherine's* and in *Star Chrome Mining*.[27] Under the civil law, a usufruct consists of the right to use and enjoy the things of another without impairing their *substantial: usu fructus est ius alienis rebus utendi friendi saiva rei sustopha*.[28]

Judicial authority on the ambit of the aboriginal usufruct in Canada is confined to *obiter dicta*. Such *dicta* have, until the 1985 decision in *Guerin*, been consistent and have recognized the rudiments of the civilian notion of the usufruct. In the Supreme Court of Canada, in *Calder v. A.G. of British Columbia*,[29] Hall J referred to "a right to occupy the lands and

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23. *James Bay Development Corp. v. Kanatewat*, *[1975]* C.A. 166 (Que.).
24. *Id.*, at 175.
25. *Johnson v. M'Intosh (1823), 8* Wheat. 543 at 574, 5 L.Ed. 681 (U.S.S.C.).
26. *St. Catherine's Milling, supra*, note 13, at 54.
27. *Star Chrome Mining, [1921]* 1 A.C. 401 (P.C.).
28. See W.W. Buckland, *Manual of Roman Private Law,* 2d ed. (Cambridge: University Press, 1939) at 162.
29. *Calder v. A.G. British Columbia, [1973]* S.C.R. 313,34 D.L.R. (3d) 145, [1973] 4 W.W.R. 1.

to enjoy the fruits of the soil, the forest and of the rivers and streams.' '[30] Judson J emphasized the traditional use of the land: "occupying the land as their forefathers had done for centuries.' '[31] In *Smith,* Estey J, in the Supreme Court of Canada, recited dictionary definitions[32] in attempting to identify the Indian interest in a New Brunswick reserve:

> ***Usufruct***
>
> 1. *Law. The* right of temporary possession, use, or enjoyment of the advantages of property belonging to another, so far as may be had without causing damage or prejudice to it.
>
> 2. Use, enjoyment, or profitable possession (of something) 1811.
>
> ***Usufructuary***
>
> 1. *Lw.* One who enjoys the usufruct of a property, etc.
>
> *(The Shorter Oxford English Dictionary 1959,* at p. *2326.)*

A similar approach was adopted by the Nova Scotia Supreme Court, Appellate Division, in *R.* v. *Isaac:*

> A ' 'usufructuary right" to land is, of course, merely a right to use that land and its "fruit" or resources. It certainly must include the right to catch and use the fish and game and other products of the streams and forests of that land. For the primitive, nomadic Micmac of Nova Scotia in the 18th Century, no other use of land was important.[33]

In 1981, the English Court of Appeal stated: "Apart from the ceded lands — ceded under the treaties — there were Indian reserves — not ceded to the Crown — in which the Indian peoples still retained their 'personal and usufructuary right' to the fruits and produce of the lands and to hunt and fish thereon.''[34]

Such *dicta are* both general and vague, but clearly include traditional hunting, fishing, and trapping in the ambit of the Indian usufruct. They do, however, raise doubts as to what

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30. *Id.,* S.C.R. at 352, D.L.R. at 174, W.W.R. at 30.
31. *Id.,* S.C.R. at 328, D.L.R. at 156, W.W.R. at 11. This observation was said to be "helpful" in *Canadian Pacific Ltd. v. Paul, [1988] 2* S.C.R. 654 at *678.*
32. *Smith v. R. [A.G. Ontario, A.G.* Quebec], [1983] 1 S.C.R. 554 at 569.
33. *R. v. Isaac (1976), 9* A.P.R. 460 at 478, (1975) 13 N.S.R. (2d) 460 at 478 (N. S. S.C., A.D.).
34. *R. v. The Secretary of State for Foreign and Commonwealth Affairs, Ex Parte: The Indian Association of Alberta, [1981]* 4 C.N.L.R. 86 (Alta. C.A.) at 96, *per* Lord Denning M.R.

extent other forms of land use are incidents of the usufruct.

The foregoing judicial *dicta* were interpreted restrictively in *A.G. Ontario v. Bear Island Foundation.*[35] Steele J, of the Ontario Supreme Court, rejected the suggestion that aboriginal rights included any use whatsoever, including all present uses. He determined that "aboriginal rights are limited by the wording of The Royal Proclamation and by decided court cases to the uses to which Indians put the land in 1763.''36 Steele J concluded that such rights were confined to traditional uses for basic survival and personal ornamentation and were limited to the right to hunt for food and clothing, to trap, fish and gather, to use stones for tools, clay for pottery and trees for housing, warmth, canoes and sleighs, but did not extend to mining or lumbering.[37]

However, in two of the landmark cases in the area — *Tijani* and *Guerin — the courts* have expressly refused to declare the content of aboriginal title, and have stressed the need to avoid the application of "abstract principles fashioned a priori' '.[38]

In *Tijani v. The Secretary, Southern Nigeria,*[39] Viscount Haldane of the Privy Council observed, with respect to the various systems of native jurisprudence throughout the Empire:

> A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms

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35. *A.G. Ontario v. Bear Island Foundation (1985),49* O.R. (2d) 353, [1985] 1 C.N.L.R. 1 (Ont. S.C.). Appeal by the Bear Island Foundation was dismissed by the Ontario Court of Appeal: *A. G. Ontario v. Bear Island Foundation, [1989] 2* C.N.L.R. 73 (Ont. C.A.). The Court declared (at 78) that it would express no opinion on the issues raised at trial in the Ontario Supreme Court.
36. *A.G. Ontario v. Bear Island Foundation (1985),49* O.R. (2d) 353 at 391, [1985] 1 C.N.L.R. 1 at 38 (Ont. S.C.).
37. *Id.*, O.R. at 392, C.N.L.R. at 39.
38. *Tijani v. The Secretary, Southern Nigeria, [1921] 2* A.C. 399 (P.C.) at 404.
39. *Id.*

> analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence.[40]

The Privy Council made particular reference to Indian title in Canada as one "illustration of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle' ',[41] and observed that "Abstract principles fashioned a priori are of but little assistance, and are often as not misleading.' '[42] The Privy Council acknowledged that ''a communal usufructuary occupation . . . may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference.' '[43] The significance of the comment for the content of aboriginal title in Canada cannot be understated. The Privy Council clearly considered that a usufruct could contemplate full ownership. Indeed, in *Tijani*, it ordered payment of compensation on that basis.[44]

The reasoning of *Tijani* was adopted by Dickson J in the Supreme Court of Canada in *Guerin*.[45] Dickson J (Chouinard, Beetz, and Lamer JJ concurring) described the Indian interest as *sui generis* and declared:

> It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, [e.g., *Attorney General of Canada v. Giroux*] and those which characterize it a personal, usufructuary right. Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has nonetheless arisen because in neither case is the categorization

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40. *Id.*, at 403.
41. *Id.*
42. *Id.*, at 404.
43. *Id.*, at 409-410.
44. *Id.*, at 411.
45. *Guerin v. R.* (1985), 13 D.L.R. (4th) 321, [1985] 1 C.N.L.R. 120 (S.C.C.).

quite accurate. [footnote eliminated][46]

Dickson J offered only limited guidance as to the suggested ambit of the Indian interest in a reserve:

> The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes *beyond these two features is both unnecessary and potentially misleading.* [emphasis added][47]

The commentary of Dickson J contemplates flexibility in the determination of the Indian interest and emphasizes its enigmatic quality. It would also seem to contemplate, as did the Privy Council in *Tijani*, that a usufruct might be equivalent to full ownership of the land, including commercial exploitation of timber and mineral resources.

In 1988, in *Canadian Pacific Ltd. v. Paul,* the Supreme Court of Canada declared that the "Indian interest in land is truly *sui generis.* It is more than the right to enjoyment and occupancy although . . . it is difficult to describe what more in traditional property law terminology' '.[48] But in the 1990 Supreme Court of Canada landmark decision of *R.* v. *Sparrow* a unanimous Court declared that, for the purpose of determining what aboriginal rights are affiied by s.35 of the *Constitution Act, 1982*, a flexible interpretation should be adopted so as to permit their evolution over time and such that they might be exercised in a contemporary manner.[49] The *dicta* strongly suggests a notion of aboriginal title, under the Constitution, that" would include contemporary forms of resource development.

It can be argued that aboriginal title should, on principle, extend to full ownership of the land. McNeil[50] found such an argument on the presumption that occupation of land gives rise to a fee simple estate and title to the land.

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46. *Id.*, D.L.R. at 339, C. N.L.R. at 135-136.
47. *Id.*, D.L.R. at 339, C. N.L.R. at 136.
48. *Canadian Pacific Ltd.* v. *Paul,* [1988] *2* S.C.R. 654 at 678.
49. *R. v. Sparrow, [1990] 3* C.N.L.R. 160 (S.C.C.); aff'g [1987] 1 C.N.L.R. 145 (B.C.C.A.).
50. K. McNeil, *Common Law Aboriginal Title* (Oxford University Press, 1989).

Slattery argues that aboriginal title "attributes to a native group a sphere of autonomy, whereby it can determine freely how to use its lands" and rejects the suggestion that "a native group is permanently limited in its use of aboriginal lands to customary practices followed at a distant historical period.' '[51] He goes on to say that, "Any rule that would hold them in permanent bondage to ancient practices must be regarded with skepticism" .[52]

The jurisprudence indicates uncertainty as to the content of aboriginal title. *Dicta* and analysis from earlier cases favour the notion that aboriginal title be limited to the traditional uses to which aboriginal people put the land, but the recent declarations of the Supreme Court of Canada indicate a much more enigmatic and contemporary quality of the *sui generis* interest.

And there is no shortage of opinion that aboriginal title extends to full beneficial ownership of the land. Uncertainty as to the content of aboriginal title makes it difficult to answer the questions raised as to the content of the titles of the Crown and of the resource developers: who may authorize resource development, and who is entitled to the benefits of ownership?

The declaration of title in the Crown, whether merely nominal or not, demands that the Crown at least be party to any authorization. But to determine who should secure the benefits of ownership upon lands subject to aboriginal title would require a determination of its content. To date, the *practice* in Canada is clear. Mineral royalties and stumpage on timber have not been paid to aboriginal peoples asserting aboriginal title, nor has resource development taken place upon the basis of a disposition granted by aboriginal peoples. But the matter is uncertain; recently the Lubicon Indian Band in Alberta sought both royalties and entry into dispositions to oil companies operating upon lands to which they laid claim to aboriginal title.

What of the question whether aboriginal title is a bar to resource development without the consent of the aboriginal people? The content of aboriginal title is agreed by all to extend

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51. Brian Slatterly, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 746.
52. *Id.*, at 764.

to traditional uses of the land. Such uses are inconsistent with mining, oil and gas, lumber, and hydro-development. It would seem that aboriginal title is *prima facie* a barrier to resource development, but who has the dominant title under the Constitution — the resource developer or the aboriginal people — and what are the implications for resource development?

THE DOMINANT TITLE: THE RESOURCE DEVELOPER OR THE ABORIGINAL PEOPLE?

In *Johnson, the* United States Supreme Court declared a compromise between the rights of the aboriginal people and those of the settler and resource developer. Chief Justice Marshall declared that the aboriginal people were to be considered "as occupants to be protected . . . in the possession of their lands", subject to the "absolute title of the Crown to extinguish that right" .[53] The criteria of this compromise was developed in the context of the determination of whether and to what extent aboriginal title had been extinguished — a determination that also considered whose was the dominant title.

In 1941, the United States Supreme Court elaborated on the criteria. In *United States v. Sante Fe Pacific Railroad Co.,*[54] an injunction was sought to restrain a railroad company from using the traditional lands of the Haalpai Tribe. The Court reviewed the line of cases derived from *Johnson,* and stressed that the power of Congress to extinguish aboriginal title was supreme:

> The manner, method and time of such extinguishment raise political, not justifiable, issues. . . . And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts.[55]

In examining the "public records", the Court sought a

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53. *Johnson v. M'Intosh, supra,* note *25,* Wheat. at *588,* L. Ed. at 692.
54. *United States v. Sante Fe Pacific Railroad Co. (1941), 314* U.S. *339 (9th* Circ.). The railroad company claimed title under a statutory grant which had provided that the United States would extinguish the Indian title. The grant itself was not considered to have extinguished that title.
55. *Id.,* at *347.*

"clear and plain indication' '[56] that Congress intended to extinguish aboriginal title, because "extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards.' '[57] The Court explained that "the rule of construction, recognized without exception for over a century, has been that 'doubtful expressions, instead of being resolved in favour of the United States, are to be resolved in favour of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith'.' '[58] The Court concluded that neither the grant of a reservation in 1865 nor the temporary forced confinement of the Tribe on the reservation in 1874 was sufficient to extinguish aboriginal title. But the creation of a reservation in 1881, at the request of the Tribe, and the settlement thereon of members of the Tribe, was considered tantamount to an extinguishment by voluntary cession:[59] ''They were in substance acquiescing in the penetration of white settlers on condition that permanent provision was made for them too' '.[60] The Court considered, but refused to decide, if the application of public land pre-emption (homestead) statutes should be "construed as extinguishing any Indian title to land taken under it" .[61]

Subsequent United States courts have refused to find extinguishment of aboriginal title merely because lands have been opened up for settlement and made subject to disposition under public lands legislation.[62] In *United States* v. *Dann*,[63]

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56. *Id.,* at 353.
57. *Id.*, at 354.
58. *Id.,* at *354,* citing *Choate v. Trapp (1912), 56* L.Ed. 941 (LJ.S.S.C.) at 946.
59. *Id.*, at 358.
60. *Id.*
61. *Id.*, at 349 (note 5), quoting Felix Cohen, *Handbook of Federal Indian Law* (Albuquerque: University of New Mexico Press, r1941) at 308. The Court noted Cohen's comment that, "only where it was necessary to give emigrants possessor rights to parts of the public domain, has Congress ever granted tribal lands in disregard of tribal possessor rights' '.
62. *Gila River Pima-Maricopa Indian Community v. United States (1974), 204* Ct. Cl. 137,494 F.2d 1386; cert. denied (1974), 419 U.S. 1021

the Court refused to find that homesteading legislation, which purported to apply to all "unappropriated public lands", extinguished aboriginal title:

> We do not find in these provisions the clear expression of intent that would be required for us to hold that the homestead laws alone extinguished aboriginal Indian title in every state and territory where they were generally applicable.[64]

The Court cited the language of *Sante Fe Pacific Railroad Co.*, that an "extinguishment cannot lightly be implied' '.[65] The Court concluded:

> Congress in passing the homestead laws evinced no clear intent to extinguish aboriginal title to Indian-occupied lands not actually subjected to a homestead grant, and . . . the granting of *some* homesteads within the Indians' aboriginal holdings did not represent a sufficient exercise of dominion over the ungranted lands to effect an extinguishment.[66]

In *United States v. Pueblo of San Ildefonso*,[67] the Court of Claims held that aboriginal title was extinguished on a piecemeal basis when third persons entered the lands conveyed to them under homestead legislation or on the date patents issued for mineral claims. It was observed:

> the process of surveying lands and performing other deeds [under public lands legislation] in anticipation of future white settlement does not itself affect Indian title. . . . or is the bare expectation that lands will be settled sometime in the future sufficient to deprive Indian dwellers of their aboriginal rights.[68]

The Court explained:

> there are no fine spun or precise formulas for determining the end of aboriginal ownership. Unquestionably, the impact of authorized white settlement upon the Indian way of life in aboriginal areas may serve as an important indicator of when aboriginal title was lost. But such authorized settlement is only

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(LJ.S.S.C.); United States v. Pueblo of San Ildefonso (1975), 206 Ct.Cl. *649,513* F.2d 1383.

63. *United States v. Dann (1983), 706* F.2d 919 (9th Circ.).
64. *Id.*, at *929.*
65. *Id.*
66. *Id.*
67. *United States v. Pueblo of San Ildefonso (1975), 206* Ct.Cl. *649,* 513 F.2d 1383.
68. *Id.*, Ct.Cl. at 660, F.2d at 1389.

> one of various factors to be considered in determining when specific lands were "taken" .[69]

Grants of title and issuance of mineral patents may extinguish aboriginal title to the lands encompassed by the grants.[70] The Court explained in *United States v. Atlantic Richfield Co.*,[71] when rejecting an action in trespass by the Inuit inhabitants of the State of Alaska against those holding mining and other dispositions issued by the United States:

> aboriginal title . . . is legally extinguishable when the United States makes an otherwise lawful conveyance of land pursuant to federal statute. Congressionally authorized conveyance of lands from the public domain demonstrates the requisite intent to extinguish the Indian right of exclusive use and occupancy to those lands. Thus, as the United States acknowledges, when the Secretary of the Interior issued a patent to a homesteader in Alaska, aboriginal title was extinguished with respect to the patented land.[72]

The placement of lands in a forest reserve or a grazing district is more problematic .73 Extinguishment of aboriginal title has been found where Indians were forcibly expelled or compensation paid, but otherwise the placement of lands in a forest reserve or grazing district has been held only to determine the *time* of the

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69. *Id.*, Ct. Cl. at 661, F.2d at 1390. Actual European settlement under public lands legislation may extinguish aboriginal title to adjacent areas, depending upon the degree of incursion and the disruption of the aboriginal way of life. In *Plamondon, ex rel. Cowlitz Tribe v. United States*, that white settlers came to outnumber the Indians and that the "Indians intermingled with the whites and no longer maintained an independent existence" (as formerly was considered a factor), along with the establishment of a reservation and the issuance of a Presidential proclamation putting part of the traditional lands up for sale, led to the conclusion that aboriginal title had been extinguished. *Plamondon, ex rel. Cowlitz Tribe v. United States (1972), 199* Ct.Cl. 523 at 527,467 F.2d 935 at 937.
70. Homestead grants in *Marsh v. Brooks* (1853), 55 U.S. 513, 14 L.Ed. 527 (U. S. S.C.).
71. *United States v. Atlantic Richfield Co. (1977), 435* F.Supp. 1009 (Dist.Ct. Alaska).
72. *Id.*, at 1020 (note 45).
73. See *United States v. Gemmill (1976), 535* F.2d 1145 (9th Circ.) at 1149; *Ute Indian Tribe v. Utah (1983), 716* F.2d 1298 (10th Circ.).

extinguishment of aboriginal title when the *fact* of extinguishment was not in dispute.[74] In *Dann*, placement of lands in a grazing district was described as "equivocal' ',[75] and was held not to extinguish aboriginal title. The statute authorizing the placement declared its application to all "vacant, unappropriated, and unreserved lands from any part of the public domain of the United States . . . which are not in . . . Indian reservations" .[76] The Court declared that it could not find "any clear expression of congressional intent to extinguish aboriginal title to all Indian lands that might be brought within its scope", even by "implication in the Act's specific exclusion of Indian reservations" .[77]

Canadian courts have adopted the criteria developed in the United States jurisprudence, in particular, in *United States v. Santa Fe Pacific Railroad Co.* In *Calder*,[78] Judson J (Martland and Ritchie JJ concurring) concluded:

> In my opinion, in the present case, the sovereign authority elected to exercise *complete dominion over the lands in question, adverse to any right of occupancy* which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation. [emphasis added][79]

Judson J adopted the trial judge's opinion that nineteenth century public lands ordinances:

> reveal a unity of intention to exercise and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to "aboriginal title, otherwise known as the Indian title" 80

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74. *United States v. Pueblo of San Ildefonso (1975), 206* Ct.Cl. 649, 513 F.2d 1383.
75. *United States v. Dann (1983), 706* F.2d 919 (9th Circ.) at 932.
76. *Id.,* at 931.
77. *Id.,* at 932.
78. *Calder v. A.G. British Columbia, [1973]* S.C.R. 313, 34 D.L.R. (3d) 145, [1973] 4 W.W.R. 1.
79. *Id.,* S.C.R. at 344, D.L.R. at 167, W.W.R. at 23.
80. *Id.,* S.C.R. at 333, D.L.R. at 160, W.W.R. at 15, restating Gould J in *Calder v. A.G. British Columbia (1969), 8* D.L.R. (3d) 59 (B. C. S.C., A. D.) at 82.

Judson J supported his analysis by reference to contemporary government correspondence that observed that the Indian "claims have been held to have been fully satisfied by securing to each tribe, as the progress of settlement of the country seemed to require, the use of sufficient tracts of land for their wants for agricultural and pastoral purposes.' '[81]

Three other judges of the Supreme Court of Canada emphasized a different aspect of the reasoning in the American case of *Sante Fe Pacific Railroad Co.:* the necessity for there to be a "clear and plain indication" of an intention to extinguish aboriginal title.[82] Hall J (Spence and Laskin JJ concurring) concluded that the title of the Nishga was not extinguished by the public lands ordinances. He observed that insofar as the ordinances declared the fee of the Crown, they merely stated "what was the actual situation under the common law and add nothing new or additional to the Crown's paramount title" .[83] Hall J also noted that no legislation providing specifically that "Indian title to public lands in the Colony is hereby extinguished" was ever passed.[84]

Both Judson J*[5] and Hall J[86] relied upon the Privy Council decisions in *In re Southern Rhodesia* and in *Tijani*,[87] which emphasized a presumption of non-interference with existing rights of aboriginal peoples in circumstances where territory was acquired by conquest and by cession. The presumption limits the degree to which general assumptions of authority to dispose of land, such as in public lands legislation, will be considered to effect a general extinguishment. Judson J noted that the Privy Council decision in *In re Southern Rhodesia* was in accord with the American case of *United States v. Sante Fe Pacific Railroad Co.* The reliance upon the Privy Council

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81. *Id.*, S.C.R. at 333-334, D.L.R. at 160, W.W.R. at 15-16.
82. id., S.C.R. at 404, D.L.R. at 210, W.W.R. at 64.
83. *Id.*, S.C.R. at 410, D.L.R. at 215, W.W.R. at 78.
84. *Id.*, S.C.R. at 412, D.L.R. at 216, W.W.R. at 80.
85. *Id.*, S.C.R. at 335, D.L.R. at 161, W.W.R. at 16.
86. *Id.*, S.C.R. at 401, D.L.R. at 208, W.W.R. at 70.
87. *In re Southern Rhodesia, [1919]* A.C. 211 (P.C.) at 233-234; *Tijani* v. *The Secretary, Southern Nigeria, [1921] 2* A.C. 399 (P.C.) at 409-410.

decisions emphasizes the pragmatic accommodation of the rights of the resource developer and the aboriginal people, which was developed by Marshall CJ in the American case of *Johnson,* and which has been maintained by the Supreme Court of Canada in *Calder.*[88]

Although the Supreme Court of Canada split upon the question of whether aboriginal title had been extinguished in *Calder*, the Court was in agreement that the criteria to be used was that declared in the American case of *Sante Fe Pacific Railroad Co.* As Mahoney J later declared, "Justices Hall and Judson were . . . in agreement on the law, if not its application" .[89] Hall J had implied that specific provision might be necessary to extinguish aboriginal title. The requirement appeared inconsistent with the Canadian cases,[90] where

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88. The presumption was also cited by Dickson J in *obiter* in *Guerin v. R., supra*, note 45, C.N.L.R. at 132-133. The Supreme Court of Canada in *Calder* split 3-3 upon whether the aboriginal title had been extinguished. The result in *Calder* was determined by the seventh member of the court, Pigeon J, who did not consider the question of Indian title. Pigeon, Judson, Martland, and Ritchie JJ concurred in dismissing the appeal of the plaintiffs, thereby upholding the dismissal of the action, on the ground that the Court lacked jurisdiction in the absence of a fiat of the Lieutenant Governor of British Columbia. *Calder v. A.G. British Columbia, [1973]* S.C.R. 313 at 426, 34 D.L.R. (3d) 145 at 226, [1973] 4 W.W.R. 1 at 90.

89. *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development (1979), 107* D.L.R. (3d) 513 at 552, [1979] 3 C.N.L.R. 17 at 56 ('F.C.T.D.) [final declaration, 1979].

90. *Sikyea v. R.* (1964), 50 D.L.R. (2d) 80 (S.C.C.); aff'g (1964),43 D.L.R. (2d) 150,2 C.C.C. 325 (N.W.T.C.A.); *R. v. George* (1966), 55 D.L.R. (2d) 386 (S.C.C.). In *Sikyea v. R.* and in *R. v. George, the* Supreme Court of Canada held the general legislation in the form of the *Migratory Birds Convention Act,* R.S.C. 1952, c.179, effective to regulate Indian hunting rights. The Act made express provision for limited aboriginal hunting and it was upon such element which the Court relied. A similar analysis was also relied on in *Kruger and Manuel v. R. (1977), 75* D.L.R. (3d) 434 (S. C.C.) at 440. The Court upheld the application of provincial game laws to Indians, but Dickson J (as he then was), quoting Davey J in *R. v. White and Bob (1965), 50* D.L.R. (2d) 613 (B. C.C.A.), emphasized the special provision that was made in the legislation for Indian hunting rights, and Davey J's

legislation restricting aboriginal hunting and fishing rights had been held to be effective without such provision. Indeed, the argument that such provision was necessary in order to regulate aboriginal hunting rights was rejected in *Kruger and Manuel*,[91] but Dickson J expressly distinguished the regulation of an aboriginal right and the extinguishment of aboriginal property rights.92 The Court considered that general legislation could regulate Indian hunting rights, but yet might not demonstrate "complete dominion adverse to the right of occupancy" so as to extinguish aboriginal title.[93]

The need for specific provision to extinguish aboriginal title was addressed in *Baker Lake*.[94] *The* Federal Court of Canada rejected the plaintiff's argument "that Parliament's

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observation: "from that I think it clear that the *other* provisions are intended to be of general application and to include Indians" [emphasis added] *(R. v. White and Bob, id.,* at 618, quoted in *Kruger and Manuel v. R. (1977), 75* D.L.R. (3d) 434 (S.C.C.) at 440). In *Sikyea, id., the* Supreme Court of Canada followed the reasoning of Johnson JA, of the Northwest Territories Court of Appeal, who had observed

> **When, however, we find that reference in both the [Migratory Birds] Convention and in the Regulations to what kind of birds an Indian and Eskimo may "take" at any time for food, it is impossible for me to say that the hunting rights of the Indians as to these migratory birds, have not been abrogated, abridged or infringed upon.**

Sikyea, id., 50 D.L.R. at 84, quoting 43 D.L.R. at 158. In *R. v. George* (1966), 55 D.L.R. (2d) 386 (S.C.C.) at 398, Martland J observed that he could "see no valid distinction between the present case and that of *Sikyea*''.

Similarly, the Supreme Court of Canada upheld the application of the *Fisheries Act,* R.S.C. 1970, c.F-14 [now R.S.C. 1985, c. F-14] to Indian fishing rights in *R. v. Derriksan (1976), 71* D.L.R. (3d) 159 (S.C.C.). The *Fisheries Act* and the regulations thereunder have long provided limited rights for Indian fishing.

91. *Kruger and Manuel v. R. (1977), 75* D.L.R. (3d) 434 (S. C. C.) at 437.
92. *Id.* Dickson CJ affirmed the distinction in *R. v. Sparrow, [1990] 3* C.N.L.R. 160 (S.C.C.) at 174.
93. "Complete dominion adverse to the right of occupancy" is the criterion declared in *United States v. Santa Fe Pacific Railroad Co., supra,* note 55, and agreed upon by Justices Hall and Judson in *Calder.*
94. *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development (1979), 107* D.L.R. (3d) 513 at 551, [1979] 3 C.N.L.R. 17 at 55 (F.C.T.D.) [final declaration, 1979].

intention to extinguish an aboriginal title must be set forth explicitly in the pertinent legislation" .[95] Mahoney J emphasized that the ultimate test is the intention of Parliament:

> Once a statute has been validly enacted, it must be given effect. If its *necessary effect is to* abridge or entirely abrogate a common law right, then that is the effect that the Courts must give it. That is as true of an aboriginal title as of any other common law right. [emphasis added][96]

The Court, in *Baker Luke,* applied the criteria set down in *Sante Fe Pacific Railway Co.* and *Calder*, and concluded that the intention of Parliament to extinguish aboriginal title was absent from the public lands legislation enacted by Parliament. The legislation provided for the disposition of all public lands in the Northwest Territories, including timber rights, mineral rights, and the setting aside of lands as Indian reserves. Mahoney J declared that general extinguishment of aboriginal title was not a "necessary result" of the legislation.[97] The learned judge refused to find that the "broad' '[98] power to dispose of public lands contained in the general language of the legislation entailed the extinguishment of aboriginal title, even though special provision was made for Indian reserves. He referred to the "historic fact" that, in enacting the legislation, "Parliament did not expressly direct its attention to the extinguishment of aboriginal title''.[99] The Court, in *Baker Lake,* distinguished Judson J's analysis of public land legislation in British Columbia in *Calder* on the basis that the extinguishment of Indian title was "very much in mind" upon the issuance of the proclamations and legislation and that the legislation was "explicit in its purpose to open up the territory to settlement" .[100] Mahoney J also recognized the harsh physical and climatic nature of the area:

> dispositions of the sort and for the purposes that Parliament might reasonably have contemplated in the barren lands are not

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95. *Id.*, D.L.R. at 551, C.N.L.R. at 56.
96. *Id.*, D.L.R. at 551, C.N.L.R. at 56.
97. *Id.*, D.L.R. at 557, C.N.L.R. at 61.
98. *Id.*
99. *Id.*, D.L.R. at 554, C.N.L.R. at 59.
100. *Id.*, D.L.R. at 556, C.N.L.R. at 60.

> necessarily adverse to the Inuit's aboriginal right of occupancy. Those which might prove adverse cannot reasonably be expected to involve any but an insignificant fraction of the entire territory.[101]

He further observed that "The barren lands were not, for obvious [physical and climatic] reasons, being opened for settlement" .[102]

While recognizing that aboriginal title had not been extinguished, the Court, in *Baker Lake*, did recognize that the actual disposition of lands in the area under the federal *Territorial Lands Act* and the regulations thereunder would operate to abridge and infringe on aboriginal title.[103] In particular, the Court observed that the issuance of mining tenements under the authority of the federal government was "no doubt" valid and "that, to the extent it does diminish the rights comprised in an aboriginal title, it prevails" .[104] Mahoney J cited aboriginal hunting and fishing cases in support of that conclusion, and clearly considered that abrogation in part was a necessary result of the legislation.

In the result, the Court issued a declaration that the lands "are subject to the aboriginal right and title of the Inuit to hunt and fish thereon" .[105] The action was otherwise dismissed, and the interim injunction issued in 1978 at the instance of the Hamlet of Baker Lake was dissolved.

The need for a "clear and plain indication" of legislative intent was an aspect of the United States rule that "doubtful expressions" were to be resolved in favour of the Indians.[106] The Supreme Court of Canada expressly adopted the United States rule in 1983 in *Nowegijick v. R.*, when Dickson J (as he then was) declared for the Court, "treaties and statutes relating to Indians should be liberally construed and doubtful expressions

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101. *Id.*, D.L.R. at 557, C.N.L.R. at 61.
102. *Id.*, D.L.R. at 557, C. N.L.R. at 61.
103. *Id.*, D.L.R. at 556-557, C.N.L.R. at 61.
104. *Id.*, D.L.R. at 557, C.N.R.L. at 62.
105. *Id.*, D.L.R. at 560, C. N.L.R. at 64.
106. This requirement was established in *Santa Fe Pacific Railroad Co., supra*, notes 56, 58.

resolvedin favour of the Indian.''[107]

In *A.G. Ontario v. Bear Island Foundation*,[108] the Province of Ontario brought an application for a declaration that the defendants, the Temgami Indian Band, had no right, title, or interest in a land claim area of 4000 square miles. The Band had filed cautions in the Land Titles Office with respect to the lands. In 1984, the Ontario Supreme Court granted the declaration on the grounds, *inter alia*, that public lands legislation and surveys and the issuance of dispositions thereunder had "fostered settlement and development", "development which has severely interfered with the hunting and fishing rights of the Indians", and had, thereby, "indicated an intention to exercise complete dominion over the Land Claim Area' '.[109] The Court purported to apply the same criteria as were used in the *Sante Fe Pacific Railroad Co.* and *Calder* cases.[110] The result in *Bear Island Foundation* was distinguished from *Baker Lake* because, in *Bear Island Foundation*, there was found "a clear intent by the Crown to open the lands for settlement" .[111]

Despite the basis of distinction suggested by the Ontario Supreme Court in *Bear Island Foundation*, there was some doubt as to the consistency of the *Bear Island Foundation* decision with *Baker Lake*. Both areas were unsuitable for settlement, and the only permanent residents were the aboriginal people and

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107. *Nowegijick v. R., [1983] 2* C.N.L.R. 89 (S.C.C.) at 94.
108. *A.G. Ontario v. Bear Island Foundation (1985),49* O.R. (2d) 353, [1985] 1 C.N.L.R. 1 (Ont. S.C.).
109. *Id.*, O.R. at 465-466, C.N.L.R. at 103. Also see *supra*, note 93.
110. *Id.*, O.R. at 440, C.N.L.R. at 81.
111. *Id.*, O.R. at 440, C. N.L.R. at 81. The legislation provided for surveys and the issuance of patents (28 square miles), land use permits for resorts, timber licences (750 square miles), and mineral dispositions (195 square miles). Most of the area was subject to commercial logging under volume agreements. The area was crossed by 98 miles of railway, 620 miles of highway and main roads, and 178 miles of hydroelectric transmission ties. There were 3 hydroelectric generating dams and 14 water control dams in the area. There were 3 provincial parks, totalling 7,214 acres. Disposition and provincial parks totalled approximately 25% of the Land Claim Area. The area is located in the Canadian Shield, is wholly unsuitable for agriculture, and is heavily forested.

those engaged in resource development. Yet in *Bear Island Foundation*, aboriginal title throughout the entire region was considered extinguished, whilst in *Baker Lake* it was considered that aboriginal title was diminished or extinguished only to the extent that dispositions had issued. Moreover, in *Bear Island Foundation*, the Ontario Supreme Court had nowhere referred to the requirement of a "clear and plain indication' '[112] of the intention to extinguish, which was developed in response to the rule that "doubtful expressions" were to be resolved in favour of the Indians.[113]

The Supreme Court of Canada had a further opportunity to consider the extinguishment of aboriginal title in *Simon v. R.*[1] *14* in 1985. The accused Indian was charged with a violation of provincial hunting legislation in an area of Nova Scotia outside reserve lands.[115] He asserted that he had a treaty right to hunt in that area and that the treaty right afforded a defence. The Supreme Court of Canada agreed and quashed the conviction.

One of the arguments of the Crown at trial had been that any aboriginal rights of the accused had been extinguished. On appeal, the Nova Scotia Supreme Court, Appeal Division, had agreed with the observations of Kimball J in the trial decision:

> I am satisfied that the area in question is an area which has been

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112. This requirement was established in *Santa Fe Pacific Railroad Co., supra*, note 56.

113. This requirement was established in *Santa Fe Pacific Railroad Co., supra*, note 58.

114. *Simon v. R., [1986]* 1 C.N.L.R. 163 (S. C.C.). Also see *R. v. Sioui*, [1990] 3 C.N.L.R. 127 (S.C.C.); aff'g [1987] 4 C.N.L.R. 118 (Que. C.A.). In *Sioui*, Lamer J, for the Court, in determining the intention of the parties to a treaty, concluded that the territorial scope of aboriginal title was limited only by European *occupancy*, which was "incompatible" with the rights conferred by aboriginal title. *Id.*, *[1990]* 3 C.N.L.R. at 158.

115. MacKeigan CT, in *R. v. Isaac,* had also considered the question of extinguishment of original title on Indian reserves in Nova Scotia. He commented, "It would appear that in Nova Scotia, apart from reserves, only a few thousand widely scattered acres have never been granted, placed under mining or timber licences or leases, set aside as game preserves or parks, or occupied prescriptively". *R. v. Isaac* (1975), 13 N.S.R. (2d) 460 at 485, 9 A.P.R. 460 at 485 (N. S. S. C., A.D.).

> occupied extensively by the white man for farming as a rural mixed-farming and dairy-farming area. I am prepared to take judicial notice of the fact that the area is made up of land where the right to hunt no longer exists because the land has been settled and occupied by the white man for purposes of farming and that the Crown grants have been extended to farmers for some considerable length of time so that any right which might at one time have existed to the defendant or his ancestors, to use or occupy the said lands for purposes of hunting, has long since been extinguished.[116]

The Supreme Court of Canada unanimously rejected that conclusion in *Simon*.[117] The Court cited the criteria developed in the American case of *Sante Fe Pacific Railroad Co.* and, in accord therewith, stressed that "extinguishment cannot be lightly implied" .[118] The Court affirmed the principle of interpretation declared in *Nowegijick* that "doubtful expressions" were to be resolved in favour of the Indians.119 The Court explained that in order for the Crown to succeed:

> it is absolutely essential . . . that the respondent [Crown] lead evidence as to where the appellant hunted or intended to hunt and what use has been and is currently made of those lands. It is impossible for this Court to consider the doctrine of extinguishment "in the air"; the respondent must anchor that argument in the bedrock of specific lands.[120]

The Crown did not present evidence as to the use or disposition of the specific land. The comments of the Supreme Court of Canada suggest that evidence of widespread settlement and development in an area is not of itself sufficient to support a " finding of the extinguishment of aboriginal title. Regard must be had to the use and disposition of the specific area of land where extinguishment is asserted. The approach of the Supreme Court of Canada in *Simon* is more in accord with that of *Baker Lake* and American jurisprudence than with that of *Bear Island*

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116. *Simon v. R., [1982]* 1 C.N.L.R. 118 (N. S. S. C., A. D.) at 120, *per* Kimball J, quoting himself at trial in *R. v. Simon (1980),* N.S. Msg. Ct., unreported.
117. *Simon v. R., [1986]* 1 C.N.L.R. 153 (S. C. C.) at 169-171.
118. *Id.*, at 170.
119. *Id.*, at 167. Also see the text at note 107.
120. *Id.*, at 170. Also see *R. v. Sioui*, *[1990] 3* C.N.L.R. 127 (S.C.C.); aff'g [1987] 4 C.N.L.R. 118 (Que. C.A.).

Foundation.[121]

Canadian jurisprudence indicates that, apart from constitutional limitations, the dominant title is held by the settler and resource developer, rather than by the aboriginal people. But the dominance is acknowledged ***only*** to the extent that it is necessary to give effect to grants or to resource dispositions. Aboriginal title will generally be considered to be extinguished only to the extent of disposition. *22

The landmark 1990 case of ***R.*** v. ***Sparrow***[123] has affirmed this analysis. Indeed, the Supreme Court of Canada may have increased the burden of proof of extinguishment of aboriginal title upon the Crown. The Court held that the *Fisheries Act*[124] and the regulations thereunder respecting fishing rights, which made express provision for Indian fishing, did not demonstrate a "clear and plain intention to extinguish the Indian aboriginal right to fish' '.[125] The Court declared, "The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.' '[126] The Court purported to rely on Hall J's judgement in *Calder*, who in turn was relying on the United States jurisprudence. But the phrasing is significantly different. The American case of *United States v. Santa Fe Pacific Railroad Co.,* which Hall J cited twice, required a "clear

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121. The *Bear Island Foundation* decision was appealed, but the Ontario Court of Appeal declined to express any opinion on the question of the extinguishment of aboriginal title by legislation opening up lands for settlement, which had been an issue at trial. The Court of Appeal held that aboriginal title had been extinguished by treaty. *A.G. Ontario v. Bear Island Foundation, [1989] 2* C.N.L.R. 73 (Ont. C.A.).
122. In *Canadian Pacific Ltd. v. Paul, [1988] 2* S.C.R. 654 at 679, the Supreme Court of Canada followed that approach in concluding that the grant of an easement in the nature of a right of way, by statute, extinguished the Indian interest to the extent necessary to give effect to the easement.
123. *R. v. Sparrow, [1990] 3* C.N.L.R. 160 (S.C.C.); aff'g [1987] 1 C.N.L.R. 145 (B.C.C.A.).
124. *Fisheries Act,* R.S.C. 1970, c.F-14 [now R.S.C. 1985, c.F-14].
125. *R. v. Sparrow, [1990] 3* C.N.L.R. 160 (S.C.C.) at 175.
126. *Id.*, at 174-175.

- and plain *indication* of an intention to extinguish aboriginal title' '.[127] The language of the Supreme Court of Canada in *Sparrow* requires a "clear and plain *intention to extinguish",* not merely a "clear and plain *indication of an intention".* The phrasing of the Supreme Court of Canada would seem to deny the argument that general lands legislation can extinguish aboriginal title.

If Canadian jurisprudence indicates that the dominant title is that of the settler and resource developer, as opposed to the title of the aboriginal people, the question which must then be considered is whether constitutional limitations have been imposed on this dominance. The question is considered in the next section.

THE DOMINANCE CHALLENGED — CONSTITUTIONAL LIMITATIONS ON THE EXTINGUISHMENT OF ABORIGINAL TITLE

The grant of federal jurisdiction with respect to "Indians, and Lands reserved for the Indians" in s.91 (24) of the *Constitution Act, 1867,* reflected the recognition that the responsibility was "not a trust which could conveniently be confined to the local Legislatures" .[128] The federal government was thus empowered to protect the Indians and their lands from local interests. Such protection would appear necessarily to extend aboriginal title to traditional lands at common law. This would suggest that the provinces could not, after Confederation in 1867, or Union at a later date, extinguish aboriginal title — that power lay exclusively within the jurisdiction of the federal government.

In *Calder*,[129] counsel for the Province of British Columbia did not even argue that the province could extinguish aboriginal title after Confederation. Counsel agreed "that

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127. *Calder v. A.G. British Columbia, [1973]* S.C.R. 313 at 393 and 404, 34 D.L.R. (3d) 145 at 202, [1973] 4 W.W.R. 1 at 64 and 73, quoting *United States v. Santa Fe Pacific Railroad Co., supra*, note 56.
128. (1847) 6 J.L.A.C. App.T. Report, Section III.
129. *Calder v. A.G. British Columbia, [1973]* S.C.R. 313, 34 D.L.R. (3d) 145, [1973] 4 W.W.R. 1.

Parliament had not taken any steps or procedures to extinguish the Indian right of title after British Columbia entered Confederation", and that "no constitutional question was involved" .[130] This limitation upon the powers of the provinces was assumed by the Quebec Superior Court and the Court of Appeal in *James Bay Development Corp. v. Kanatewat*,[131] and by the Nova Scotia Court of Appeal in *R.* v. *Isaac*.[132]

The Supreme Court of Canada has yet to expressly pass upon the matter, but it has jealously guarded the exclusive federal jurisdiction conferred by s.91 (24). In *Derrickson v. Derrickson*,[133] it refused to apply the ownership and possession provisions of provincial matrimonial property laws to an Indian reserve. Chouinard J declared for the Court:

> The right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under subs.91(24) of the *Constitution Act, 1867.* It

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130. *Id., per* Hall: S.C.R. at 346, D.L.R. at 169, W.W.R. at 25.

131. *James Bay Development Corp. v. Kanatewat, [1974]* R.P. 38 (Que. Sup.Ct); [1975] C.A. 166 (Que.); leave to appeal dism'd (1975),41 D.L.R. (3d) 1974, [1975] S.C.R. 48.

132. *R. v. Isaac (1976),9* A.P.R. 460 at 478, (1975) 13 N.S.R. (2d) 460 at 478 (N. S. S.C., A.D.), *per* MacKeighan CJ. In the *Lubicon Band* and *Meares Island cases* (*infra*, note 149; *infra*, note 157; respectively), all members of the Alberta and British Columbia Court of Appeals, respectively, found there was a serious question to be tried, thereby recognizing the merits of the argument in support of the exclusive jurisdiction of the federal government.

In the lower court decisions in *Bear Island Foundation* (*supra*, note 35) and *Meares Island* (*infra*, note 157), the judges concluded that the provinces had jurisdiction to extinguish aboriginal title. Steele J declared

> In **my opinion, Ontario, after 1867, had, in respect of *unceded* Crown lands, a beneficial interest subject to aboriginal rights, which rights were held at the pleasure of the Crown and which could be extinguished by Ontario legislation.**
>
> **The only limitation on Ontario's power to extinguish aboriginal rights is that the Ontario legislation must fall under a head of general provincial legislative power and competence and not purport specifically to extinguish aboriginal rights.**

A.G. Ontario v. Bear Island Foundation (1985), 49 O.R. (2d) 353 at 472, [1985] 1 C.N.L.R. 1 at 109 (Ont. S.C.). Similar reasons were given by Gibbs J in *Meares Island* (*infra*, note 157). The conclusions of Steele J and Gibbs J were not adopted on appeal.

133. *Derrickson v. Derrickson, [1986] 2* C.N.L.R. 45 (S.C.C.).

> follows that provincial legislation cannot apply to the right of possession of Indian reserve lands.[134]

It is suggested that aboriginal title is also properly regarded as the "essence of the federal exclusive legislative power under subs. 91(24)". The reason for the grant of the power and the weight of judicial authority suggest that only the federal government, after Confederation, had the power to extinguish aboriginal title.

In the result, until 1982, the inquiry as to the extinguishment of aboriginal title in Canada was directed to whether or not such extinguishment had been accomplished under colonial authority prior to Confederation or Union, or under federal authority thereafter. In 1982, s.35(1) of the *Constitution Act* was passed; it declares, "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Section 35(1) has been construed not merely as a rule of construction, but as providing for the entrenchment of existing aboriginal and treaty rights.[135] The Supreme Court of Canada has declared that "section 35(1) is a solemn commitment that must be given meaningful content".[136] Any attempt by the federal government to interfere with aboriginal rights must be justified in the context of the need to maintain the honour of the Crown and the fiduciary obligation of the Crown. In the absence of such justification, aboriginal title may now only be extinguished by a constitutional amendment or by agreement with the aboriginal people concerned.[137]

The dominance accorded by the courts to the title of settler and resource developer over that of aboriginal peoples has been

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134. *Id.,* at 55.

135. *R.* v. *Sparrow, [1990] 3* C.N.L.R. 160 (S.C.C.); aff'g [1987] 1 C.N.L.R. 145 (B.C.C.A.); *R.* v. *Aqawa (1988), 65* O.R. (2d) 505 at 512, [1988] 3 C.N.L.R. 73 at 78 (Ont. C.A.); leave to appeal dism'd 8 November 1990 (S.C.C.); *R.* v. *Arcand, [1989] 2* C.N.L.R. 110 (Alta. Q.B.) at 118.

136. *R. v. Sparrow, [1990] 3* C.N.L.R. 160 (S.C.C.); aff'g [1987] 1 C.N.L.R. 145 (B.C.C.A.) at 180.

137. See Peter W. Hogg, *Constitutional Law of Canada,* 2d ed. (Toronto: Carswell, 1985) at 563-568.

challenged. No longer will a grant or resource disposition issued by the Crown extinguish aboriginal title.

IMPLICATIONS FOR RESOURCE DEVELOPMENT — SETTLING ABORIGINAL TITLE AND THE VALIDITY OF RESOURCE DISPOSITIONS

The criteria and the analysis suggested above indicate a cloud on the title of a province to grant future resource dispositions in the absence of agreement with the aboriginal people. Moreover, past dispositions by a province, where it is alleged aboriginal title is unextinguished since Confederation (1867) or Union (British Columbia, 1871), are suspect. The problems presented are considerable. The ensuing discussion examines those cases where aboriginal title has been asserted as a barrier to resource development. It considers the action the court has taken, and whether and how the dispute has been settled. It is an attempt to ascertain, on the basis of a survey of these disputes, the implications for resource development beyond merely a focus on the legal proceedings. The pattern that emerges is that of negotiation towards an agreement acknowledging aboriginal rights of ownership and participation in resource development. All the agreements have recognized and have given effect to past resource dispositions. Aboriginal people have not necessarily been concerned to prevent development, and indeed have been proponents of oil and gas and mining development, once they have been given an opportunity to participate in the economic benefits.

The cases in which aboriginal title has been asserted in Canada in the face of resource development commenced with *Re Paulette and Registrar of Lund Titles*[138] in 1973. The plaintiff Indian bands sought to file a caveat asserting aboriginal title to the western half of the Northwest Territories, where significant oil and gas development was taking place and the construction of

138. *Re Paulette and Registrar of Land Titles (1973), 39* D.L.R. (3d) 45, [1973] 6 W.W.R. 97 (_N.W.T.S.C.); rev'd (1976),63 D.L.R. (3d) 1, [1976] 2 W.W.R. 193 (N.W.T.C.A.); aff'd *Paulette v. R. (1976),72* D.L.R. (3d) 161 (S.C.C.).

a multi-billion dollar oil and gas pipeline was proposed. The Northwest Territories Supreme Court upheld the plaintiff's right to file a caveat.[139] The federal government responded by entering into negotiations for the settlement of land claims in the region. In 1990, a Comprehensive Land Claim Agreement[140] was reached, with the Dene people, that provided for rights of ownership and participation in resource development. The Dene have already engaged in joint ventures with oil companies in the region. Development proceeded in the interim and all resource dispositions granted in the region were recognized and given effect to in the Agreement.

In November 1973, the Quebec Superior Court issued an injunction to restrain the construction of the James Bay Hydro Project upon the application of the Indians and Inuit of the region. In *Kanatewat v. James Bay Development Corp.*,[141] Malouf J declared that the Quebec statute purporting to authorize the project was *ultra vires*, and that the balance of convenience favoured the petitioner: "The right of petitioner to pursue their way of life in the lands subject to dispute far outweighs any consideration that can be given to such monetary damages." [translation to English] [142] The Quebec government responded by entering into negotiations with the aboriginal people, which resulted in the James Bay Agreement[143] in 1975. The

139. The decision was subsequently overturned on the grounds that a caveat" could not be filed against unpatented lands in the Northwest Territories: *Paulette v. R., id.*

140. Dene/Metis Negotiations Secretariat, Comprehensive Land Claim Agreement Between Canada and the Dene Nation and the Metis Association of the Northwest Territories, April 1990, Yellowknife, N.W.T.

141. *James Bay Development Corp. v. Kanatewat, [1974]* R.P. 38 (Que. Sup.Ct); [1975] C.A. 166 (Que.); leave to appeal dism'd [1975] S.C.R. 48,41 D.L.R. (3d) 1974.

142. *Id.*

143. The James Bay and Northern Québec Agreement: Agreement between The Government of Québec, The Société d'énergie de la Baie James, The Société de développement de la Baie James, The Commission hydroélectrique de Québec (Hydro-Québec) and The Grand Council of the Crees (of Québec), The Northern Québec Inuit Association, and The Government of Canada (Éditeur officiel du Québec, 1976).

Agreement recognizes, *inter alia*, ownership of a small area of the region, rights over much of the region with respect to hunting, trapping and fishing, and financial compensation in lieu of mineral ownership. All past provincial dispositions were recognized and given effect to by the Agreement.*[a] The first clause of the James Bay Agreement provides that the proceedings by the petitioner should not be pursued.

In 1978, the Inuit of the Baker Lake region, in the Northwest Territories, sought an interlocutory injunction to restrain the issuance of mining dispositions in order to protect wildlife, particularly caribou, that were important to their hunting and trapping activities.[145] The evidence showed that approximately one half of the Inuit's real income was derived from hunting, trapping, and fishing.[146] The Federal Court of Canada issued an interim injunction in April 1978 allowing the issuance of the dispositions, but imposing conditions that no mining activities could take place close to water crossings or calving areas. Mahoney J found a serious question to be tried and observed:

> I have no hesitation in finding that the balance of convenience falls plainly on the side of granting an interim injunction. The minerals, if there, will remain; the caribou, presently there, may not.[147]

In November 1979 at trial,[148] the injunction was

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144. One week after the issuance of the injunction, it was suspended by the Quebec Court of Appeal. The Court observed:

> **The public and general interests of the people of Quebec are thus opposed to the interests of some two thousand of its inhabitants. It is our view that at this stage of the proceedings these interests are beyond comparison. [translation to English]**

James Bay Development Corp. v. Kanatewat, *[[1975]* C.A. 166 (Que.) [But also (1974-75) 8 C.N.L.C. 414 (Que. C.A.) at 415]].

One year later, the injunction was discharged. The Court declared that the balance of convenience was clearly against the petitioner. The energy needs of Quebec were declared to far outweigh the ecological damage. The matter never went to trial.

145. *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development, [1979]* 1 F.C. 487 (T.D.) [interlocutory injunction application, April 1978].

146. *Id.*, at 491.

147. *Id.*, at 495.

148. *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern*

dissolved. Negotiations have been proceeding, since 1976, towards a settlement of land claims in the Central and Eastern Arctic, which includes the area of Baker Lake. An Agreement in Principle was reached in December 1989. It provides for rights of Inuit ownership and, in particular, for Inuit rights in future resource development, and recognizes existing resource dispositions.

In 1983, the Lubicon Band of Indians in Alberta sought an interim injunction to restrain on-going oil and gas exploration and development in an area of 8,500 square miles in northern Alberta. The Band, *inter alia*, asserted that it had aboriginal title, which had not been extinguished. The Band asserted that the provincial legislation under which the oil and gas permits and leases were issued was *ultra vires* and, accordingly, that any dispositions made thereunder were a nullity. Forsyth J found that there was a serious question to be tried, but refused to issue an injunction.[149] Forsyth J rejected the argument that the exploration and development would lead to irreparable harm to the Band's traditional way of life. *50 Further, he held that the balance of convenience favoured the oil companies, because they would "suffer large and significant damages" and "a loss of competitive position in the industry" if the injunction was granted, and because of the "admitted inability of the applicants to give a meaningful undertaking to the court as to damages''.[151] The decision of Forsyth J was upheld in 1985 on appeal to the Alberta Court of Appeal.[152]

The decision suggests that with respect to oil and gas exploration and production, the Court would invariably consider that the balance of convenience favoured the oil companies.[153]

Development (1979), 107 D.L.R. (3d) 513, [1979] 3 C.N.L.R. 17 (l?.C.T.D.) [final declaration, 1979].

149. ***Ominayak*** v. *Noreen Energy Resources Ltd., [1984] 4* C.N.L.R. 27 at 31,29 Alta. L. Rep. (2d) 152 at 157 (Q.B.); aff'd [1985] 3 W.W.R. 193 (Alta. C. A.) [hereinafter ***Lubicon*** *Band case].*
150. ***Id.***, C.N.L.R. at 32, Alta. L. Rep. at 157.
151. *Id.,* C.N.L.R. at 33, at Alta. L. Rep. 158.
152. ***Lubicon*** *Band case, [1985] 3* W.W.R. 193 (Alta. C.A.).
153. And see Nigel Bankes, "Judicial Attitudes to Aboriginal Resource Rights and Title" (1985) 13 *Resources: The Newsletter of the*

But, in October 1988, Alberta and the Band reached a settlement of the land claim. Alberta agreed to transfer 245 square kilometres. The Band agreed to recognize all dispositions made by Alberta.[154]

In the above cases, agreements have been reached to settle aboriginal title following proceedings of an interlocutory nature. The aboriginal people may have not succeeded in obtaining an interlocutory order, but their *prima facie* case or the existence of a "serious question to be tied" was recognized. Resource development may have been delayed, but upon settlement, has been assured.

Settlement has not been reached in the following cases. In *A.G. Ontario v. Bear Island Foundation*,[155] the Ontario Supreme Court issued a declaration that the Province of Ontario might issue grants and resource dispositions and that the Band had no interest in the lands claimed. The Court held that the aboriginal title of the Band had been extinguished. The Ontario Court of Appeal dismissed an appeal.[156] At no point have the courts recognized that the Band has a *prima facie* case. The matter appears some way from settlement, although the province has offered a forty square mile reserve and thirty million dollars to the Band by way of settlement.

The failure of the legal proceedings may have stymied settlement in the *Bear Island Foundation* case. Such is not the explanation for the lack of settlement in *Martin v. British Columbia and MacMillan Bloedel* [hereinafter *Meares Island*].

In *Meares Island*,[157] the Clayoquot and Ahousaht Indian

Canadian Institute of Resources Law 1.

154. The dispute had not yet been finally settled as of May 1991, because the Band is negotiating social and economic development funding with, and is seeking compensation for lost oil and gas royalties from, the federal government.

155. *A.G. Ontario v. Bear Island Foundation (1985),49* O.R. (2d) *353, [1985]* 1 C.N.L.R. 1 (Ont. S.C.).

156. *A.G. Ontario v. Bear Island Foundation, [1989] 2* C.N.L.R. 73 (Ont. C.A.).

157. *Martin v. British Columbia and MacMillan Bloedel, [1985] 2* C.N.L.R. 26 (B.C. S.C.); [1985] 2 C.N.L.R. 58 (B. C.C.A.) [hereinafter *Meares Island*].

bands sought an injunction to restrain the logging of Meares Island by MacMillan Bloedel. MacMillan Bloedel held a tree-farm licence issued under the provincial *Forest Act*. Meares Island is to the west of Vancouver Island. It is heavily forested. There are two small Indian reserves on the Island. All five members of the British Columbia Court of Appeal concluded, upon a consideration of *Calder*, that there was a serious question to be tried as to whether aboriginal title existed on Meares Island. The majority of the Court also concluded that the balance of convenience favoured the Indian band, and that an injunction must issue to prevent the Band from suffering irreparable harm.[158] The majority stressed that the logging would permanently destroy the forest, denying to the Indian bands its material, traditional, and symbolic value.

It was forcefully argued that the issuance of the injunction would cast doubts as to provincial sovereignty over resources and bring about a significant detrimental economic impact. The argument was rejected. Seaton JA observed:

> It has also been suggested that a decision favorable to the Indians will cast doubt on the tenure that is the basis for the huge investment that has been and is being made. I am not influenced by the argument. Logging will continue on this coast even if some parts are found to be subject to certain Indian rights. It may be that in some areas the Indians will be entitled to share in one way or another, and it may be that in other areas there will be restrictions on the type of logging. There is a

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158. Seaton JA observed:

> **Meares Island is of importance to MacMillan Bloedel, but it cannot be said that denying or postponing its right would cause irreparable harm. If an injunction prevents MacMillan Bloedel from logging pending the trial and it is decided that MacMillan Bloedel has the right to log, the timber will still be there.**
>
> **The position of the Indians is quite different. It appears that the area to be logged will be wholly logged. The forest that the Indians know and use will be permanently destroyed. The tree from which the bark was partially stripped in 1642 may be cut down, middens may be destroyed, fish traps damaged and canoe runs despoiled. Finally, the Island's symbolic value will be gone. The subject matter of the trial will have been destroyed before the rights are decided.**
>
> **If logging proceeds and it turns out that the Indians have the right to the area with the trees standing, it will no longer be possible to give them that right. The area will have been logged. The courts will not be able to do justice in the circumstances. That is the sost of result that the courts have attempted to prevent by granting injunctions.**

Meares Island, *id.*, *[1985] 2* C.N.L.R. at 71-72.

> problem about tenure that has not been attended to in the past. We are being asked to ignore the problem as others have ignored it. I am not willing to do that.[159]

The decision indicates a preparedness to force the matter to resolution, whether by litigation or by settlement. The matter has since gone to trial. The Province of British Columbia refused to enter into negotiations on account of the issuance of an injunction on interlocutory proceedings. The Court recognized that there was a serious question to be tied as to the existence of aboriginal title, but the province was not prepared on such a basis to extend such recognition to the claim as entering into negotiations would provide. The commencement of negotiations for the settlement of aboriginal title would necessarily require a re-examination of resource dispositions and the power to grant such dispositions throughout the province. The "problem about tenure", as Seaton JA described it,[160] is so fundamental that the province will not alter its position, except upon a final court determination following a trial.

The decision in *Meares Island* — to restrain logging in the area claimed as subject to aboriginal title in British Columbia — has since been followed in *Hunt v. Halcan Log Services*[161] (the Kwakiutl claim) and in *Westar Timber Ltd. v. Ryan*[162] (the Gitksan claim).

CONCLUSION

Resource development has been a paramount objective of legislatures in Canada. In some cases, development has been sought irrespective of aboriginal title. It is a principal thesis of this paper that the changed constitutional setting in Canada, and in particular the enactment of the *Constitution Act, 1982*, now requires an accommodation between aboriginal title and resource development if development is to proceed.

The crucial question is whether aboriginal title was extinguished prior to the introduction of constitutional limits

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159. *Id.*, [1985] 2 C.N.L.R. at 73.
160. *Id.*, [1986] 2 C.N.L.R. at 73.
161. *Hunt v. Halcan Log Services Ltd., [1987] 4* C.N.L.R. 63 (B.C.S.C.).
162. *Westar Timber Ltd. v. Ryan,* [1990] 1 C.N.L.R. 151 (B.C.C.A.).

upon the power of extinguishment. The suggested criteria is "a clear and plain indication" [163] of an intention to exercise "complete dominion adverse to the [aboriginal] right of occupancy''.[164] It is unlikely that general public lands and resources legislation will of itself be considered to have extinguished aboriginal title. Dispositions issued thereunder will have done so, but where none have issued or where the disposition is not "adverse" to aboriginal title, aboriginal title will continue to exist.

This accommodation of resource dispositions and aboriginal title must be seen as a product of the pragmatism of the common law, manifested most clearly by Marshall CJ in *Johnson v. M'Intosh*.[165] *The* common law did not deny the validity of resource dispositions, but neither did it extinguish aboriginal title to any greater extent than required to give effect to the disposition. The common law acknowledged the dominance of the resource developer, recognizing the legitimacy of the acts of the colonial power, but also sought to give due regard to those possessed of existing rights, that is, the aboriginal peoples.

The dominance of the resource developer has been upset by the constitutional arrangements and, in particular, by the *Constitution Act, 1982*, put in place in Canada. Since 1867, the provinces, and since 1982, the federal government, have in Canada been constitutionally restrained from extinguishing aboriginal title. An agreement between an aboriginal group and * the federal government providing for the settlement or accommodation of aboriginal title to resource disposition and development is needed to satisfy the constitutional restraints. Agreements to date have always recognized and protected existing resource interests and have made provision for future resource disposition.

Unsurprisingly, settlements with respect to aboriginal title

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163. This requirement was established in *Santa Fe Pacific Railroad Co.*, *supra*, note *56.*

164. This requirement was established in *Santa Fe Pacific Railroad Co.; see* *supra*, note *93.*

165. Johnson v. M'Intosh (1823), 8 Wheat. 543, 5 L.Ed. 681 (LJ.S.S.C.).

have been hastened by legal action brought to restrain resource development. Where a *prima facie* case or serious question to be tried has been recognized, negotiation and settlement has ensued. The exception and the only instance in the reported cases where resource development has been halted by a claim of aboriginal title is the *Meares Island* case.[166] In that case, damage to the land would have been severe, and yet the economic damage on account of stoppage was minimal. And the "problem about tenure' '[167] in British Columbia is so fundamental that only a final court determination following trial will bring about negotiations and a settlement.

This paper has indicated the framework within which an accommodation between resource development and aboriginal title must be reached. In Canada, agreements have invariably been reached. Resource developers have come to recognize that their interests are not at the heart of the dispute. The principle issue is the question of control and economic rent as between an aboriginal group and government. The existing interests of resource developers have always been protected in any settlement. It is the governments who must, now under constitutional and legislative compulsion, give up some control and economic rent in order to secure a settlement of aboriginal title.

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166. Meares Island, supra, note 157.
167. Id., [1985] 2 C.N.L.R. at 73.

RESOURCE DEVELOPMENT AND TREATY LAND ENTITLEMENT IN WESTERN CANADA

TABLE OF CONTENTS

1. INTRODUCTION

Resource development and Indian treaty land entitlement in western Canada have always been inextricably linked. The settlement and development of the West was accomplished by reaching treaties with the Indian peoples. The Indians surrendered certain rights and privileges to land and resources in return for undertakings by the Crown. Instead of conflict over lands and resources between the Indians, on the one hand, and settlers and developers on the other, there was a compromise of their respective interests. Fulfillment of the terms of the treaties continues as a condition of resource development.

This paper examines the continuing relationship between resource development and treaty land entitlement. It considers the terms of the treaties and the degree to which they have been entrenched in the Natural Resources Transfer Agreements with the prairie provinces. Entrenchment in the Transfer Agreements imposes a constitutional obligation on the prairie provinces to fulfill the terms. The Province of British Columbia is not party to the Transfer Agreements, and is examined separately. The significance of the terms of the treaties and of the obligation imposed by the Agreements is examined in a section which considers the enforcement of treaty land entitlement and the validity of resource dispositions issued in the absence of fulfillment of entitlement. The paper examines recent disputes and settlements, including that respecting the Lubicon in Alberta. It concludes by emphasizing the historic understanding upon which the development of the West was undertaken, and the preparedness of the courts to give full effect to that understanding.

2. RESOURCE DEVELOPMENT WAS THE OBJECT IN TREATING WITH THE INDIANS

Western Canada was the traditional land of many Indian tribes. The southern reaches of the Prairies were the traditional lands of the plains tribes: the Plains Cree, the Saulteaux, the Assiniboine, the Gros Venture, the Blackfoot, and the Sarcee. To the north, the forests were the territory of the Woods and Swampy Cree, Chipewyan, Beaver, Slave, and Sekani tribes. British Columbia, west of the Rockies, was the domain of the Indians of the Coastal Region — the Salish, Nootka, Kwakiutl, Bells Coola, Tsimshian, and Haida — and of the Interior — the Interior Salish, Kootenay, Chilcotin, Cainer, Tsetsaut, Tahltan, and Sekani. [1]

The Royal Proclamation, 1763,[2] established the practice of treating with the Indians for surrender of title to their traditional lands. The pattern was to enter into treaty as European settlement and development moved west. The "numbered treaties" in western Canada were based on the Robinson Treaties, which were entered into to allow for resource development in northern Ontario. In the mid-nineteenth century, attention was directed to northern Ontario because of an 1843 report of the Geological Survey which suggested that the Lake Superior country might be possessed of substantial mineral riches.[3] But the Indian people resisted the activities of the prospectors and miners, much as did the Lubicon Band in Alberta a century and a half later. Peau de Chat, Chief of the Fort William Ojibway, complained:

> The miners bum the land, and drive away the animals, destroying the land .... Much timber is destroyed and I am very

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1. See Diamond Jenness, *The Indians of Canada,* 7th ed. (Toronto: University of Toronto Press, 1977).
2. The Royal Proclamation, 1763 [U.K.] *in* R.S.C. 1985, Appendix II, No.1.
3. See Richard Bartlett, "Mineral Rights on Indian Reserves in Ontario" (1983) 3(2) Can. J. Native Studies 245 at 245.

> sorry for it, when they fiid mineral they cover it over with clay so that the Indians may not see it, and now I begin to think that they wish to take away and steal my land . ..!

Following further Indian protests, Bands from Garden River and Batchewana attacked a mining location of the Quebec Mining Company near Michipicoten, and prevented survey teams from surveying the unsurrendered lands.[5]

A Royal Commission recommended that a treaty of cession with respect to the unsurrendered land be entered into with the Indian people. Treaty Commissioner Robinson negotiated treaties in 1850 which encompassed vast areas on the north shores of lakes Huron and Superior. The Robinson Treaties provided for reserves for the Indians and the right to continue hunting and fishing over the surrendered lands. He explained that:

> In allowing the Indians to retain reservations of land for their own use I was governed by the fact that they in most cases asked for such tracts as they had heretofore been in the habit of using for purposes of residence and cultivation, and by securing these to them and the right of hunting and fishing over the ceded territory, they cannot say that the Government takes from them their usual means of subsistence and therefore have no claims for support . . ..[6]

The Robinson Treaties made specific provision for the sale and development of minerals by the Indians.

The surrender of aboriginal title to the lands comprising the Prairies, and northeast British Columbia, was the object of the "numbered treaties", #1-8 and 10, that were signed, apart from minor adhesions, between 1871 and 1908. The "numbered treaties" were entered into as the pressure of settlement and resource development demanded. Treaties #1 and 2, encompassing the region around Winnipeg (Fort Garry) and immediately to the west where settlement was expected

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4. See K. Roy, ' 'Kidakiminan (Our Land)" (July 1981) Ontario Indian at 40$_0$
5. R.J. Surtees, *Indian Land Cessions in Ontario, 1763-1862: The Evolution of a System* (Ottawa Dept. of Indian and Northern Affairs, 1984).
6. Alexander Morris, *The Treaties of Canada with the Indians of Manitoba, the North- West Territories, and Kee-wa-tin* (Toronto: Belfords, Clarke & Co., 1880, r1971) at 19.

imminently, were concluded in 1871. As the preamble explained, "and whereas the said Indians have been notified and informed ... that it is the desire of Her Majesty to open up to settlement and immigration a tract of country . ..." Treaty #3, encompassing northwest Ontario and southeast Manitoba, was made in order to secure passage to the West and access to the mining potential of the region. It added a reference to "such other purposes as to Her Majesty may seem meet. "

Treaty #3 was the first of the "numbered treaties" to promise one square mile (640 acres) of reserve land per family of five. Treaty Commissioner Morris did not think Treaty #3 could have been arrived at except on such terms. The Fort Francis Chief observed in the course of negotiation:

> *The sound of the rustling of the gold is under my feet where I stand, we* have a rich country; it is the Great Spirit who gave us this; where we stand upon is the Indians' property, and belongs to them.
>
> ...
>
> It is our chiefs, our young men, our children and great grandchildren, and those that are to be born, that I represent here, and it is for them I ask for terms. The white man has robbed us of our riches, and we don't wish to give them up again without getting something in their place. [emphasis in original][7]

Treaty Commissioner Morns commented that, on the closing of the treaty, "a territory was enabled to be opened up, of great importance to Canada, embracing as it does the Pacific Railway route to the North-West Territories — a wide extent of fertile . lands, and, as is believed, great mineral resources."8

The purposes declared in the preamble to Treaty #3 were continued in Treaties #4 (1874), 5 (1875), 6 (1876) and 7 (1877), whereby aboriginal title to the "Fertile Belt" of the southern and central Prairies was surrendered.[9] The treaties were regarded as essential to settlement and resource development in the region. As the Indian Commissioner explained prior to the execution of Treaty #6:

> In the neighborhood of Fort Edmonton, on the Saskatchewan,

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7. *Id.*, at 62.
8. *Id.*, at 46.
9. *Id.*, at 77.

> there is a rapidly increasing population of miners and other white people, . . . a treaty with the Indians of that country . . . is essential to the peace, if not the actual retention, of the country .10

The Chief Factor of the Hudson Bay Company urged the making of treaty because "Gold may be discovered in paying quantities, any day, on the eastern slope of the Rocky Mountains. " [11]

In 1896, the Klondike gold rush began and prospectors travelled through northern Alberta and British Columbia to the Yukon. A contemporary commentator observed:

> From all appearances there will be a rush of miners and others to the Yukon and the mineral regions of the Peace, Liard, and other rivers in Athabasca during the next year . . . . In the face of this influx of settlers into that country, no time should be lost by the Government in making a treaty with these Indians for their rights over this territory. They will be more easily dealt with now than they would be when their country is overrun with prospectors and valuable mines be discovered.[12]

Treaty #8, concluded in 1899, provided for the "traders, travelers to the Klondike, explorers and miners.' '[13] The preamble to Treaty #8 added "trade, travel, mining and lumbering" to the expressed objectives of the treaty. The language was retained in Treaty #10 in 1906, whereby aboriginal title to northern Saskatchewan was surrendered. Aboriginal title to northern Manitoba was surrendered by an adhesion to Treaty #5 in 1908.

Other than Treaty #8, no treaties were entered into in the mainland of British Columbia. In that province, the public lands were vested in the province and, accordingly, the Dominion had no power to appropriate lands for reserves in accordance with treaty. Treaty #8 embraced that part of British Columbia because of the perceived necessity to treat with the Indians to enable resource development to proceed there and because of the

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10. id., at 168.
11. *Id.*, at 170.
12. James Walker to Clifford Sifton, 30 November 1897, *in* Rene Fumoleau, *As Long as This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (Toronto: McLelland and Stewart, 1973) at 56, P. A.C.R.G. 10, B.S. File 75-236-1.
13. *Id.*, at 60.

availability of lands under federal administration in the Peace River Block which might be set aside as reserve lands.

In the result, it is evident that the paramount object of the Crown in right of Canada in treating with the Indians of western Canada was to secure an understanding upon which settlement and resource development might proceed. The next chapter examines how that understanding was incorporated into the terms of the treaties.

3. THE CONDITIONS UPON WHICH RESOURCE DEVELOPMENT MIGHT PROCEED: THE TERMS OF THE TREATIES

The terms of all the numbered treaties are similar. They provide for the surrender of Indian title in return for the establishment of reserves — treaty land entitlement,[14] guarantees as to hunting, trapping and fishing rights, annuities, and certain social and economic undertakings by the Government of Canada.

If the object of the treaties with the Indians from the perspective of the Crown was European settlement and development, the object from the Indian perspective was different. They sought a land and resource base that could ensure their survival as a people. This is evident in the assurances made to the Indians by the Treaty Commissioners. In 1871, Lieutenant Governor Archibald declared in the course of the discussions preceding Treaty #1:

> Your Great Mother, therefore, will lay aside for you "lots" of land to be used by you and your children forever. She will not allow the white man to intrude upon these lots. She will make rules to keep them for you, so that as long as the sun shall shine, there shall be no Indian who has not a place that he can call his home, where he can go and pitch his camp, or if he chooses, build his house and till his land.[15]

Reserves were to be a homeland for the Indians. Lieutenant Governor Archibald went on to say:

> These reserves will be large enough, but you must not expect them to be larger than will be enough to give a farm to each family, where farms shall be required. They will enable you to earn a living should the chase fail . ...[16]

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14. See the Appendix to this paper, "Treaty Land Entitlement: The Treaty Clauses Providing for Establishment of Reserves".
15. Alexander Morris, *The Treaties of Canada with the Indians of Manitoba, the North-West Territories, and Kee-wa-tin* (Toronto: Belfords, Clarke & Co., 1880, r1971) at 28-29.
16. *Id.*, at 29.

The object of providing reserve lands for farming was made explicit in Treaties #3, 5, and 6. Thus the written terms of Treaty #6 provide:

> And her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indian . . . .

The treaty discussions did not confine the rights of the Indians to agricultural use of the land. The Indians were assured of their entitlement to the timber on reserves. In the discussion preceding Treaty #7, Lieutenant Governor Laird declared:

> When your reserves will be allotted to you no wood can be cut or be permitted to be taken away from them without your own consent.[17]

The Treaty Commissioners also declared that the Indians would be entitled to the beneficial interest in minerals found on the reserves. The following exchange is recorded between Lieutenant Governor Morris and the Fort Francis Chief at the time that Treaty #3 was entered into:

> Chief — "Should we discover any metal that was of use, could we have the privilege of putting our own price on it?"
> Governor — "If any important minerals are discovered on any of their reserves the minerals will be sold for their benefit with their consent, but not on any other land that discoveries may take place upon; as regards other discoveries, of course, the Indian is like any other man. He can sell his information if he can find a purchaser.' '[18]

And at the signing of Treaty #7, Lieutenant Governor Laird declared:

> it is your privilege to hunt all over the prairies, and that should you decide to sell any portion of your land, or any coal or timber from off your reserves, the Government will see that you receive just and fair prices.[19]

In *Nowegijick v. R.*, Dickson J, in the Supreme Court of Canada, declared that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians" .[20] The Ontario Court of Appeal[21]

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17. *Id.,* at 272.
18. *Id.,* at 70.
19. *Id.*, at 269-270.
20. *Nowegijick v. R., [1983]* 1 S.C.R. 29 at 36, 1983] 2 C.N.L.R. 89 at

has held that oral discussions should be considered as part of the terms of a treaty. Treaty land entitlement must be construed with regard to such principles of statutory construction.

Such principles of statutory construction have been applied in the United States and have been recognized as vesting full ownership of the land and of the natural resources in the tribe for which the lands were set apart by treaty. In *United States v. Shoshone Tribe,*[22] the United States Supreme Court had to interpret a treaty that set apart lands for the "absolute and undisturbed use and occupation of the Shoshone Indians.' '[23] The Court explained its method of interpretation:

> The phrase "absolute and undisturbed use and occupation" is to be read, with other parts of the document, having regard to the purpose of the arrangement made, the relation between the parties, and the settled policy of the United States fairly to deal with Indian tribes. In treaties made with them the United States seeks no advantage for itself; friendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed. They are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them.[24]

The Court examined the purpose of the treaty:

> The principal purpose of the treaty was that the Shoshones should have, and permanently dwell in, the defined district of country. To that end the United States granted and assured to the tribe peaceable and unqualified possession of the land in Perpetuity.[n]

The Court concluded:

> Minerals and standing timber are constituent elements of the land itself . . . . For all practical purposes, the tribe owned the

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94. The principle has been affirmed in *Simon v. R., [1985] 2* S.C.R. 387 at 410, [1986] 1 C.N.L.R. 153 at 174 *per* Dickson CJ, and in *R. v. Sioui*, *[1990] 3* C.N.L.R. 127 (S.C.C.).

21. *R. v. Taylor and Williams (1981), 34* O.R. (2d) 360, [1981] 3 C.N.L.R. 114 (Ont. C.A.).
22. *United States v. Shoshone Tribe (1938), 304* U.S. 111 (LJ.S.S.C.).
23. *Id.,* at 113.
24. *Id.,* at 116.
25. *Id.*

land . . .[26]

> The treaty, though made with knowledge that there were mineral deposits and standing timber in the reservation, contains nothing to suggest that the United States intended to retain for itself any beneficial interest in them.[27]

The decision was followed and applied to lands set apart by treaty and described as being "held and regarded as an Indian reservation" in *United States v. Klamath and Moadoc Tribes*.[28] The Supreme Court declared that the language did not detract from the rights of the tribes.[29] The decisions accord with the concept of a "homeland for the survival and growth of the Indians and their way of life' ',[30] and suggest that treaties made in Canada should also be considered to vest full ownership in the Indian bands.

The application of the principles of statutory construction favoured by the Supreme Court of Canada dictates that the treaty land entitlement extends to the full resource interest of the land, including mineral and timber. The only uncertainty that might be said to exist is with respect to the precious metals and water.

Precious Metals: Gold and Silver

It has long been established that the precious metals, gold and silver, do not pass in ordinary transactions upon a general designation of land and minerals. The rights of the Crown to land and base metals "stand upon a different title' '[31] to the precious metals. The different title of the precious metals was recognized by the Privy Council in *A.G. British Columbia v. A.G. Canada*[32] in a dispute as to which jurisdiction owned the gold and silver in the "public lands" in the "railway belt"

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26. *Id.*
27. *Id.,* at 117.
28. *United States v. Klamath and Moadoc Tribes (1938), 304* U.S. 119 (lJ.S.S.C.) at 123.
29. *Id.*
30. *Id.; Colville Confederated Tribes v. Walton (1981), 647* F.2d 42 (9th Circ.) at 49.
31. *A.G. British Columbia v. A.G. Canada (1889), 14* A.C. 295 (P.C.) at 302.
32. *Id.*

transferred to the Dominion. Lord Watson concluded that the transfer was a "commercial transaction" ,[33] which was merely "part of a general statutory arrangement", the *British Columbia Terms of Union,* under which the precious metals were generally declared to belong to the province.[34] The Privy Council considered that the object of the transaction was to allow the Dominion to recoup the cost of building the railway by selling the land to settlers: "It was neither intended that the lands should be taken out of the Province, nor that the Dominion Government should occupy the position of a freeholder within the Province.' '[35] Further, the parties "had either excluded gold mines from their arrangements, or had them not in contemplation.' '[36] The Privy Council held that the gold and silver did not pass with the "public lands". Lord Watson opined that the precious metals would have passed if the article in question "had been an independent treaty between the two Governments, which obviously contemplated the cession by the Province of all its interests in the land forming the railway belt, royal as well as territorial, to the Dominion Government" .[37]

It is suggested that the principles of statutory construction derived from *Nowegijick, Taylor and Williams,* and *A.G. British Columbia v. A .G. Canada*[38] require that the precious metals vested for the benefit of the Indians on the reserves set apart pursuant to the numbered treaties. It is suggested that the circumstances of the treaties between the Dominion and the Indians did not contemplate that the Crown would retain such an interest, but that the Indians would be in the position of ' 'freeholders". The object of the treaties was not merely the provision of land for settlement, as in *A.G. British Columbia,* but the provision of a land and resource base for the survival and development of the Indian people. Moreover, the treaties with

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33. *Id.*, at *303-304.*
34. *Id.*, at *303.*
35. *Id.*, at *302.*
36. *Id.*, at *305.*
37. *Id.*, at *303.*
38. *Nowegijick, supra*, note *20; Taylor and Williams, supra*, note 21; *A.G. British Columbia v. A.G. Canada, supra*, note *31.*

the Indians clearly had gold and silver in contemplation. Thus, the printed terms of Treaty #3 did not expressly refer to minerals, but the Indians referred in negotiations to the "sound of the rustling of gold' '[39] in the land, and Treaty Commissioner Morris promised that "if any *important* minerals are discovered on any of their reserves, the minerals will be sold for their benefit with their consent" [emphasis added].[40] Indeed, gold discoveries and the prospect of such discoveries was cited as a reason to treat with the Indians of the western prairies and northeast British Columbia.[41]

Water

The language of the treaties did not expressly refer to the surrender of water or water rights. Treaty #3 and the subsequent treaties declared that the surrender extended to "all their [the Indians'] rights, titles and privileges whatsoever to the lands included" in the surrender.

Nor did the numbered treaties expressly refer to water or water rights attaching to the lands set apart for the Indians, although Indian understanding derived from elders is consistent in suggesting that water and water rights were not surrendered, but were reserved to the Indians.[42]

The determination of the treaty right to water requires the application of the principles of statutory construction and the form of analysis employed in relation to minerals. The object of. the development of farming and other forms of resource development on reserve lands and the guarantees as to hunting, trapping, and fishing suggest that water rights should be implied in the treaty undertakings of the Crown. Reference to principles of construction requiring a "fair, large and liberal

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39. *See the* quotation at note 7 in the text.
40. See the quotation at note 18 in the text.
41. *Supra*, note *7.*
42. See *the* section entitled "Indian Understanding of the Treaties" *in* Richard H. Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights* (Calgary: Canadian Institute of Resources Law, University of Calgary, 1988) at 28.

construction' '[43] and regard for the Indian understanding of the treaties and agreements affirm that conclusion. The United States Supreme Court, in *Winters v. United States*,[44] recognized the common fundamental object of governments in the United States and Canada — that the Indians become "a pastoral and civilized people' '[45] — stressed the conclusion that the government intended "to deal fairly with the Indians by reserving for them the waters.' '[46] The Court emphasized that, without water rights, the object of establishing reserves by treaty could not be fulfilled.

It is suggested that jurisprudence demands a similar result in Canada. As the Department of Indian Affairs opined in 1920:

> The avowed purpose of the Crown when making treaties with Indians, as shown by the policy of this treatment of them extending over many years, was and is to encourage Indians in habits of industry and to induce them to engage in pastural [sic] pursuits and in the cultivation of the soil in order that they may not only become self-supporting but that they may eventually take up the habits and busy themselves with the enterprise of civilized people.
>
> I am satisfied that the courts in construing the treaties between the Crown and the Indians under which reserves were set apart would follow the view taken by the American Courts that there must be implied in such treaties an implied undertaking by the Crown to conserve for the use of the Indians the right to take for domestic, agricultural purposes all such water as may be necessary, both now and in the future development of the reserve from the waters which either traverse or are the boundaries of reserves.[47]

In the only Canadian decision to date directly on point, *Claxton v. Saanichton Marina Ltd.*,[48] the British Columbia

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43. *R. v. Simon (1985), 62* N.R. 366 (S.C.C.) at 377.
44. *Winters v. United States (1908), 207* U.S. *564, 52* L.Ed. 340 (U.S. .S.C.).
45. *Id.,* U.S. at *576,* L.Ed. at 346.
46. The Court, in *Arizona v. California*, *373* U.S. *546 (1963)* at *599,* describing the holding in *Winters.*
47. A.S. Williams to D. Scott, Deputy General Superintendent, Dept. of Indian Affairs, 27 July 1920, P. A.C.R.G. 10, VO1.3660, File 9755-4.
48. *Claxton v. Saanichton Marina Ltd., [1989] 3* C.N.L.R. 46 (B.C.C.A.); aff'g [1987] 4 C.N.L.R. 48 (B C. .S.C.).

Court of Appeal did not hesitate to enforce the right to water implicit in the treaty right of an Indian band to "carry on their fisheries as formerly' '.[49] The Court upheld an injunction restraining the construction of a marina in waters off the reserve which would have interfered with that fishery.

49. *Id.,* at 46.

4. REQUIRING THE PROVINCES TO FULFILL THE CONDITIONS: THE NATURAL RESOURCES TRANSFER AGREEMENTS WITH ALBERTA, SASKATCHEWAN, AND MANITOBA

The terms of the treaties declared the conditions upon which resource development might proceed. Constitutional provision in the form of the Natural Resources Transfer Agreements was necessary to impose the conditions on the provinces. This section examines the need for the constitutional provision and its nature. It then considers the obligation imposed upon the provinces by the Agreements and its relationship to the terms of the treaties.

The Need for a Constitutional Provision

In the numbered treaties, the federal Crown promised to set apart land and resources for the sole and exclusive use of the Indians. All the numbered treaties contemplated subsequent surveys and consultations whereby the lands would be set apart. As Lieutenant Governor Morris explained with respect to Treaty #3, "it was found impossible, owing to the extent of the country treated for, and the want of knowledge of the circumstances of each band, to define the reserves to be granted to the Indians.' '[50] In the northern part of the prairie provinces, the Indians objected to selecting reserves at the time of the treaties. The Treaty Commissioners' Report with respect to Treaty #8 explains:

> As the extent of the country treated for made it impossible to define reserves or holdings, and as the Indians were not prepared to make selections we confined ourselves to an undertaking to have reserves and holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required.[51]

50. Morris, *supra*, note 15, at 52.
51. *Report of Treaty Commission of Treaty #8* (Ottawa: Queen's Printer, 1966) at 7.

The Treaty Commissioners recognized that difficulties might arise if the setting apart of reserve lands were long postponed. Indeed, Lieutenant Governor Morris proposed a "freeze" on land and resource disposition:

> I would suggest that instructions should be given to Mr. Dawson [the Indian Commissioner] to select the reserves with all convenient speed; and, to prevent complication, I would further suggest that no patents should be issued, or licences granted, for mineral or timber lands, or other lands, until the question of the reserves has been first adjusted.[52]

The reserve land treaty entitlement of the Indians had not yet been fully satisfied by 1930, particularly in the northern parts of the prairie provinces. As the Deputy Superintendent General of Indian Affairs observed in a memorandum to the Minister, dated 9 March 1922:

> My attention has been drawn to statements in the Press that the Government contemplates handing over to the Provinces of Manitoba, Alberta and Saskatchewan, the Crown lands of those provinces which are not administered by the Dominion.
>
> As the Dominion has made treaties with the Indians of these Provinces and has assumed the financial burden of paying the Indians the annuities agreed upon in those treaties, I consider that in any agreement between the Dominion and the Provinces handing over the Crown Lands to be administered and controlled by them, the interests of the Indians should be safeguarded by the following provisions:
>
> (I) That the Provinces be obliged to provide lands for Indian reserves free of cost to the Dominion, in order to carry out Treaty stipulations. (Reserves are yet to be selected in the northern parts of Manitoba, Alberta and Saskatchewan).

The need for such a provision arose from the inability of the Dominion to unilaterally take lands **vested** in the right of a province in order to establish reserves. The Privy Council denied that **s.91 (24) of the** *Constitution Act, 1867,* conferred any such power **on** the Dominion.[53]

1966) at 7.

52. Morris, *supra*, note 15, at 52.

53. *Ontario Mining Co. v. Seybold, [1903]* A.C. 73 (P.C.).

The Nature of the Constitutional Obligation

The Natural Resources Transfer Agreements impose a constitutional obligation with respect to outstanding treaty land entitlement upon the provinces. The obligation of the federal government is that declared by treaty, which is, now, constitutional y entrenched by s.35 of the *Constitution Act, 1982.*[54] The Transfer Agreements impose the constitutional obligation upon the provinces in order to enable Canada to fulfill its treaty promises. Accordingly, the Transfer Agreements with the provinces of Alberta, Manitoba, and Saskatchewan provide:

> the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the Minister of Mines and Natural Resources of the Province, select as necessary to enable Canada to fulfill its obligations under the treaties with the Indians of the Province . ..?[5]

The obligation of the provinces must be construed so as to enable the fulfillment of the treaty obligations of Canada.

The interpretation of the Transfer Agreements has been declared to be subject to the principles of statutory construction declared in *Nowegijick v. R.,* that is, they must be given a "broad and liberal construction", with any ambiguity being resolved in favour of the Indians.[56]

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54. *Constitution Act, 1982,* being Schedule B of *Canada Act 1982* [U.K.] *in* R.S.C. 1985, Appendix II, No.44. Also see *R. v. Sparrow, [1990] 3* C.N.L.R. 160 (S.C.C.); aff'g [1987] 1 C.N.L.R. 145 (B.C.C.A.).

55. Natural Resources Transfer Agreements *in Constitution Act, 1930* [U.K.] *in* R.S.C. 1985, Appendix II, No.26. The Saskatchewan and Alberta Natural Resources Transfer Agreements refer to "the appropriate Minister of the Province". The requirement of "agreement with the Minister of Mines and Natural Resources of the Province" was not included in initial drafts of the Transfer Agreements, and appears to have been included in the last stage of the negotiations in response to queries as to the extent of Manitoba's liability.

56. *R. v. Sutherland, [1980] 2* S.C.R. 451 at 461, [1980] 3 C.N.L.R. 71 at 77, [1980] 5 W.W.R. 456 at 465; *R. v. Horse,* [1988] 2 C.N.L.R. 112 (S.C.C.) at 115; *R. v. Horseman, [1990] 3* C.N.L.R. 95 (S.C.C.); aff'g [1987] 4 C.N.L.R. 99 (Alta. C.A.); aff'g [1986] 2 C.N.L.R. 94 (Alta. Q.B.); rev'g [1986] 1 C.N.L.R. 79 (Alta. Prov.Ct.). See the text at

The public lands legislation of each province provides for the transfer of lands to the federal Crown to meet the constitutional obligation. *The Crown Lands Act*[57] of Manitoba and *The Provincial Lands Act*[58] of Saskatchewan expressly empower the Lieutenant Governor in Council to:

> set aside out of the unoccupied Crown lands transferred to the province under the Natural Resources Agreement such areas as the Superintendent General of Indian Affairs, in agreement with the minister selects as necessary to enable Canada to fulfill its obligation under the treaties with the Indians of the province . . . .

Section 7 of the *Public Lands Act*[59] of Alberta provides that the Lieutenant Governor in Council may:

> (c) set aside public land —
>
> ...
>
> (ii) for the purposes of the Government of Canada, either with or without consideration —
>
> ...
>
> (e) transfer the administration and control of any public land to the Crown in right of Canada on the terms and conditions and for the reasons set out in the order;
>
> ...
>
> (h) make any orders that may be necessary —
>
> ...
>
> (ii) to carry out the Transfer Agreement.

The Lands Subject to Selection

Unoccupied Crown Lands

The lands subject to selection and setting aside by the prairie provinces to carry out the Transfer Agreements are the "unoccupied Crown lands hereby transferred" to the administration of the provinces. The lands subject to the provincial obligation are those lands transferred in 1930 which were *then "unoccupied* Crown lands", not merely those "unoccupied" at the present. The federal government sought to ensure the right to select lands from all those unoccupied lands it

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note 20.

57. *The Crown Lands Act, 1987,* R.S.M. 1987, c.C340, s.5(1)d.
58. *The Provincial Lands Act,* R.S.S. 1978, c.P-31, s.20(1)(c).
59. *Public Lands Act,* R.S.A. 1980, c.P-30, s.7.

transferred to the provinces. It sought thereby to preclude the provinces from effectively denying treaty entitlement by allowing subsequent occupation of such lands. The Treaty Land Commission of Manitoba observed that "this section is analogous to Manitoba and Canada agreeing to place a caveat on the Crown land in Manitoba which was then unoccupied and transferred to Provincial administration by that Agreement.' '[60]

The provinces have asserted that the Dominion alienated most of the available land in the southern prairies prior to 1930. The satisfaction of outstanding treaty land entitlement in the southern prairies is accordingly considered by the provinces to be a responsibility which Canada must share, perhaps by contributing to the cost of purchase of private lands.[61] The unavailability y of lands led Manitoba in 1979 to observe:

> "Unoccupied Crown lands" from which Indians have a right of selection for entitlement purposes are deemed by the Province to be those lands which are unoccupied at the time of selection. The supply of unoccupied Crown land has diminished and will likely continue to decrease. It is, therefore, to the Indians' advantage to select entitlement lands as soon as possible to obtain the widest choice of available lands.[62]

A legal opinion to such effect was authored by Samuel Freedman, Q. C., in Manitoba in 1983. However, it is suggested that the better position is that the selected lands be land which was "unoccupied Crown land" in 1930. This opinion was echoed by the Justice Department in Saskatchewan, also in 1983.

The preamble and the text of the numbered treaties indicated a desire to open up the land for "settlement, mining, lumbering, and trading", but to preserve the traditional rights of the Indians to hunt, fish, and trap in the remaining areas. The treaties contained no limitation upon the Indian right to select

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60. Leon Mitchell, *Report of The Treaty Land Entitlement Commission* (Winnipeg: Treaty Land Entitlement Commission, 1983) at 59.
61. Hon. Ted Bowerman, Minister of Northern Saskatchewan, "Indian Lands and Canada's Responsibility: The Saskatchewan Position" (Regina Government of Saskatchewan, 1978).
62. Letter from A.B. Ransom, Minister of Mines, Manitoba Natural Resources and Environment, 15 May 1979, to H.J. Faulkner, federal Minister of Indian Affairs.

reserve lands, except insofar as the Crown reserved "the right to deal with any settlers within the bounds of any lands reserved for any land as She may see fit. " The Natural Resources Transfer Agreements, in specifying the obligation of the provinces to supply "unoccupied Crown lands . . . to enable Canada to fulfill its obligations under the treaties with the Indians", must be construed with regard to those treaties. It is suggested that such construction suggests a meaning of "occupied" as entailing actual development of the land of the character of "settlement, mining, lumbering and trading". It is not considered that mineral exploration activity, whether aerial or surface, can constitute such occupation of the land, and it certainly is of a different order than "mining" itself. Nor may the mere subjection of land to a tenement, such as an exploration or forestry permit, constitute "occupation".

Judicial consideration of the meaning of "occupied" has been confined to determination of which lands have been so taken up for development, such that they are not subject to the Indian right to hunt, trap, and fish for food. However, decisions of the Saskatchewan Court of Appeal offer conflicting authority as to the meaning of "occupied". In *R.* v. *Stronquill*, McNiven JA, in the Court of Appeal, declared forest reserves to be unoccupied Crown lands and referred to a dictionary definition of "unoccupied": "not occupied by inhabitants or in-dwellers — not put to use in this way — not frequented or filled up — empty.' '[63] He equated "unoccupied" with lands which were not subject to human habitation or development. He emphasized the language of the Treaty #4 and declared:

> These forest reserves are still Crown lands — not required for settlement or mining — and the word "unoccupied" in para. 12 should be so interpreted.[64]

McNiven JA further observed:

> If the legislature by setting apart certain crown lands as forest reserves (over 8,000 square miles) can convert them into occupied lands then it would set apart all crown lands as a forest reserve and thus defeat the paramount object of para. 12. The legislature has no power to do indirectly what it cannot do

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63. *R. v. Strongquill*, *[1953] 8* W.W.R. 247 (Sask. C. A.) at 269.
64. *Id.*, at 270.

directly.[65]

The decision has been followed by the Yukon Territorial Court[66] and the Yukon Court of Appeal.[67]

In 1935, in *R.* v. *Smith*,[68] the Saskatchewan Court of Appeal, by using a more extensive definition, held a game reserve to be "occupied". Turgeon JA suggested that Crown land become occupied when it was "appropriated or set aside for a special purpose".[69] In *R. v. Moosehunter*,[70] the Court followed its decision in *Smith* and declared a wildlife management unit to be occupied Crown land. Woods JA observed:

> This is land appropriated or set aside for the protection or management of birds or animals . . . . This, like the establishing of the game preserve in *R. v. Smith* constitutes an occupation by the Crown within the meaning of paragraph 12.[71]

The Supreme Court of Canada has expressly refrained from considering the ambit of "unoccupied Crown land",[72] albeit it commented in *R. v. Mousseau*:

> When the Crown in the right of the Province appropriated or set aside land for the purpose of Provincial Road No. 265, it is

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65. *Id.*
66. *R. v. Smith (1969), 71* W.W.R. 66, [1970] 3 C.C.C. 83 (Yukon T.Ct.).
67. *R. v. Michel and Johnson, [1984]* 1 C.N.L.R. 157 (Yukon C.A.); rev'g [1979] 1 C.N.L.R. 45 (Yukon Msg. Ct.); Seaton JA declared for the Yukon Court of Appeal (at 159-160):

    The courts below held that the naming of the lands as a [game] sanctuary constituted an occupation. I am unable to accept that view. If, by putting land in Schedule II, the Commissioner can escape section 17(3) [proviso protecting aboriginal right to hunt on occupied Crown lands], the subsection is made worthless. The scheduling of the land is simply a provision that no one can hunt in the area. That, according to subsection 17(3), cannot be done. To say that upon the scheduling the land is then occupied is to render section 17(3) inapplicable in every case in which it was designed to apply. In my view, mere scheduling does not constitute occupation. Whether land is occupied is essentially a question of fact. But here the Crown relies wholly on the scheduling to support its stand that the land was occupied. That raises a question of law.

68. *R. v. Smith, [1935] 2* W.W.R. 433 (Sask. C.A.).
69. *Id.,* at 438.
70. *R. v. Moosehunter, [1978] 4* C.N.L.R. 71 (Sask. C.A.).
71. *Id.*
72. *R. v. Sutherland, [1980] 2* S.C.R. 451 at 458, [1980] 3 C.N.L.R. 71 at 75, [1980] 5 W.W.R. 456 at 462; *R. v. Moosehunter [1981]* 1 S.C.R. 282 at 292.

> difficult to regard that land thereafter as unoccupied Crown lands within the meaning of para.13 . ...[73]

The question was considered by the Saskatchewan Court of Queen's Bench in 1987 in *R.* v. *Bill.*[74] Grotsky J held that land subject to an agricultural petit and sowed to barley and hay was occupied Crown land. The Court followed the interpretation of "unoccupied" which had been adopted by the British Columbia Court of Appeal in *R.* v. *Bartleman*:

> unoccupied in the sense that the particular form of hunting that is being undertaken does not interfere with the actual use and enjoyment of the land by the owner or occupier.[75]

Grotsky J declared that "An occupier is one who takes possession; one who has the actual use or possession of the thing; one who holds possession and exercises control over a thing.' '[76]

Thus, it is suggested that the lands subject to selection are those not in fact subject, at the time of transfer in 1930, to a purpose in the character of "settlement, mining, lumbering and trading". This view is consistent with the approach of McNiven JA in *Strongquill*, the decision in *R.* v. *Bill*, and the approach to the interpretation of the Transfer Agreements declared in *R.* v. *Sutherland* and *R. v. Horse .77*

The provincial obligation does not extend to lands the title of which was not in the Crown and which were accordingly not Crown lands. The provinces are not required to consider for selection land the title to which had vested in settlers prior to . 1930.

Mines and Forests

Under the Natural Resources Transfer Agreements, the provinces are obliged to set aside "such further areas . . . as

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73. *R. v. Mousseau* (1980), 111 D.L.R. (3d) 443 (S.C.C.) at 445.
74. *R. v. Bill*, *[1987] 4* C.N.L.R. 79 (Sask. Q.B.).
75. *Id.*, at 84; *R. v. Bartleman*, *[1984] 3* C.N.L.R. 114 at 131, 55 B. C.L.R. 78 (B.C.C.A.).
76. *R. v. Bill, supra,* note *74,* at *84.*
77. *R. v. Strongquill*, *supra,* note *63; R. v. Bill, supra*, note *74; R. v. Sutherland* and *R. v. Horse, supra,* note *56.*

necessary to enable Canada to fulfill its obligations under the treaties with the Indians of the Province". It is suggested that the obligation of the provinces must be considered to extend to the mineral, precious metal, and forest resources.

This understanding is consistent with the oral exchanges during the negotiations which preceded the Transfer Agreements. The drafting instructions of Deputy Superintendent General Scott of the Department of Indian Affairs declared that "the ownership of the timber, coal, oil and base and precious metals should be recognized as forming part of the reserves and as being the property of the Indians' '.[78] The principal negotiator for Canada, O.M. Biggar, K. C., stressed the need for provision ''affirming the exclusive beneficial interest of the Indians in all mines and minerals, including precious metals.' '[79] Biggar drafted the Transfer Agreements in order to achieve this objective.[80] At the last moment in the negotiations,[81] the Transfer Agreements draft was changed to provide for the application of the Canada-Ontario Reserve Land Agreement of 1924,[82] — Clauses 1 and 2 of which expressly provide for the administration and disposition of minerals, including precious metals, for the benefit of the Indians.

Manitoba and Saskatchewan have always recognized that the obligation to transfer the lands includes the mines and minerals. Indeed, Manitoba, in the midst of a dispute as to other aspects of treaty land entitlement, declared in the 1978 Policy Guidelines:

Treaty entitlement transfers shall include mines and minerals as

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78. Memo from D. Scott, Deputy General Superintendent, Dept. of Indian Affairs, 29 January 1925, P.A.C.R.G. 10, Vol.6820, File 492-4-2, Pt.I, as is other correspondence cited hereinafter.

79. O.M. Biggar, K. C., negotiator for Canada, to D. Scott, Deputy General Superintendent, Dept. of Indian Affairs, 30 January 1925, *id.*

80. O.M. Biggar, K. C., negotiator for Canada, to D. Scott, Deputy General Superintendent, Dept. of Indian Affairs, 17 February 1925, *id.*

81. O.M. Biggar, K.C. negotiator for Canada, to D. Scott, Deputy General Superintendent, Dept. of Indian Affairs, 12 December 1929, *id.*

82. *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands,* S.C. *1924, c.48* [hereinafter Canada-Ontario Reserve Land Agreement of 1924].

in all past entitlement transfers in Manitoba in accordance with section 12 of the Manitoba Natural Resources (Transfer) Act.[83]

The transfers to date by Manitoba and Saskatchewan have included the mineral rights, although the two provinces have handled the proceeds of mineral dispositions in different ways. The Orders in Council authorizing the transfers have referred to "minerals", in the language of the Natural Resource Transfer Agreement. It is suggested that the transfer should properly be construed, in accordance with the Transfer Agreements and the treaty, and the object of the transfers, to include the precious metals.

Alberta has a somewhat different history. All transfers between 1930 and 1975 included the base mines and minerals, but reserved the precious metals to the province. The provincial Orders in Council authorized transfers "to set aside and vest title in the Dominion of Canada to all mines and minerals other than gold and silver . ...' '[84] In 1975, in reaction to caveats[85] filed in areas of oil and gas development by Indian bands, including the Lubicon Band, and the selection of mineral lands in Wood Buffalo National Park by the Cree of Fort Chipewyan Band, Alberta decided that it would no longer transfer minerals with treaty land entitlement.

The refusal to transfer minerals blocked, *inter alia*, the treaty land entitlement claim of the Lubicon Band.[86] In 1982, the Lubicon Band commenced legal action to restrain oil and gas development pending settlement, *inter alia*, of the Band's claim. Application for injunctive relief was unsuccessful, the Alberta Court of Queen's Bench and the Court of Appeal holding that the balance of convenience favoured the oil and gas companies.

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83. B. Ransom, Minister of Environment, "Policy Guidelines of Manitoba Covering Indian Land Entitlement" (Winnipeg: 19 October 1978).
84. E.g., Bushe River Reserve, Moose Prairie Reserve, O.C. 1303-49, *Alta. Gaz.*, *15* November 1949, at 1360.
85. In 1977, Alberta passed legislation retroactively banning the filing of caveats on unpatented Crown land: *The Land Titles Amendment Act, 1977*, S.A. 1977, c.27, s.141(2).
86. *Ominayak v. Noreen Energy Resources Ltd., [1985] 3* W.W.R. 193 (Alta. C.A.); [1984] 4 C.N.L.R. 27,29 Alta. L. Rep. (2d) 152 (Q.B.) [hereinafter *Lubicon Band case]*.

The Band then engaged in a protracted publicity and political campaign in support of its claims. In 1985, the Hon. E.D. Fulton, Q. C., was appointed by the Minister of Indian Affairs to inquire into the claims of the Band. He issued a Discussion Paper which outlined the position of the parties, including a renewed preparedness on the part of Alberta to transfer mineral rights to reserve lands.

Since 1985, there have been two settlements of original treaty land entitlement in Alberta — the Cree of Fort Chipewyan (December 1986) and the Lubicon (October 1988) — and two settlements of partial treaty land entitlement — Whitefish Lake (December 1988) and Sturgeon Lake (July 1989). In all the recent settlements, Alberta has agreed to include mines and minerals in the lands set apart. The transfers to the Cree of Fort Chipewyan, the Whitefish Lake Band, and the Sturgeon Lake Band expressly refer to "all mines and minerals' '.[87] Press reports indicated that the Lubicon settlement included mines and minerals in 204.5 square kilometres and surface rights in 40.5 square kilometres of the agreed reserve. No oil and gas development has taken place on the 204.5 square kilometres parcel. As of May 1991, there is **no** *written* settlement agreement with the Lubicon.

Alberta expressly reserved the precious metals in the transfers between 1930 and 1975. It is suggested that such reservation was contrary to the treaties and the Natural Resources Transfer Agreements. None of the recent Alberta settlements expressly refer to gold and silver.

The administration of reserves set apart in the prairie provinces is provided for in the Natural Resources Transfer Agreements:

> The provisions of paragraphs one to six inclusive and of paragraph eight of the agreement made between the Government of the Dominion of Canada and the Government of the Province of Ontario on the 24th day of March, 1924, . . . apply to the lands included in such Indian reserves as may hereafter be set aside under the last preceding clause as if the said agreement had been made between the parties hereto, and the provisions of the

87. Alta. O.C. 67/88, 11 February 1988; O.C. 169/88, 16 March 988; O.C. 590/88, 599/88, 20 October 1988.

> paragraphs shall likewise apply to the lands included in the reserves heretofore selected and surveyed, except that neither the said land nor the proceeds of the disposition thereof shall in any circumstances become administrable by or be paid to the Province.

The power of the federal government to administer and to dispose of reserve lands and minerals, including precious metals, for the benefit of the Indians, is assured. The Clause distinguishes, however, between reserves set apart prior to 1930 and those set apart thereafter. It declares that there is no entitlement in the provinces to minerals or precious metals in reserve lands set apart prior to 1930. It refutes any provincial claim, such as that in the Canada-Ontario Reserve Land Agreement of 1924,[88] of a provincial entitlement to one-half of any consideration payable with respect to mineral dispositions.

However, the prairie provinces are entitled, under the Transfer Agreements, to one-half of any consideration arising from mineral dispositions upon reserves set apart after 1930. Such entitlement is presumably explained as deriving from the claim to be placed in the same position as the original provinces to Confederation, in particular Ontario.

Ontario had acknowledged the entitlement of Treaty #3 reserves to the precious metals, with an exception being made in the 1924 Canada-Ontario Reserve Land Agreement. The 1924 claim of Ontario to the precious metals was founded on the entire beneficial interest vesting in the province, upon entry into. the treaties, and the Privy Council's conclusion that there was no obligation to set aside any reserves pursuant to treaty, with or without precious metals.

The situation of the prairie provinces was entirely different. The public lands were vested in the federal government prior to 1930 and there was no obstacle to setting apart reserve lands, including the precious metals, in pursuance of the treaty obligation. The treaty obligation could have been entrenched in the Natural Resources Transfer Agreements, but it was not. In the result, the treaty obligation for reserves set apart after 1930 includes the beneficial entitlement to all minerals and precious

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88. Canada-Ontario Reserve Land Agreement of 1924, *supra*, note 82.

metals, but the Natural Resources Transfer Agreements grant one half of this entitlement to the prairie provinces. The treaties and the Natural Resources Transfer Agreements are in conflict. There is no justification for the declaration in the Transfer Agreements of the provincial entitlement to one half of the proceeds of mineral dispositions on reserves set apart after 1930. And the only explanation that appears is the demands of the provinces, and the failure of the federal government to protect fully the Indian treaty rights.

Manitoba, in the 1984 Agreement in Principle respecting Treaty Land Entitlement, waived all rights and interests in any entitlement to one-half of the proceeds of mineral disposition it might have asserted under the Natural Resources Transfer Agreement. Saskatchewan has asserted its entitlement under the Natural Resources Transfer Agreement to such portion of the proceeds.[89]

Alberta has sought in the past to have it both ways, and not only to reserve the gold and silver, but also to maintain its entitlement to one-half of the proceeds of other minerals.

Water

It is arguable that, despite any understanding at the time of treaty, the only obligation on the provinces under the Natural Resources Transfer Agreements is to set aside land, and not the water rights incidental thereto. However, it is submitted that the better conclusion is that water rights attaching to lands set aside are within the ambit of the provincial obligation. Ancient canons of the common law and the principles of statutory construction regarding instruments affecting Indians suggest that the obligation extends to the water rights appurtenant to the areas set aside.[90] Further, the Natural Resources Transfer Agreements specifically y refer to the clause of the 1924 Canada-Ontario Reserve Land Agreement which provides for the disposition of hydro power upon Indian reserves, and which states that it

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89. Fond du Lac Band, O.C. 1310-85, *Sask. Gaz.*, 3 January 1986.
90. 39 Halsbury's Laws of England (3d) para. 658, 11 Halsbury's Laws of England (3d) para. 694.

applies to ''lands'' included in Indian reserves.[91] The reference in the Transfer Agreements assumes that the term "lands" embraces treaty and riparian rights to water incidental thereto. The Transfer Agreements seek to "enable Canada to fulfill its obligations under the treaties with the Indians of the Province"; this surely demands a construction of the obligation imposed upon the provinces that extends to the water rights promised by treaty.

However, the statutes of all the prairie provinces purport to reserve to the Crown water rights, waterbeds, and rights of access and portage in all dispositions of Crown land.[92] It is uncertain whether the setting aside of reserve lands is a disposition within the meaning of the prairie provinces' legislation.[93] The legislation would be unconstitutional insofar as it would seek to amend the obligation of the prairie provinces under the Natural Resources Transfer Agreements.[94]

The concern to expressly reserve to the Crown rights to water and waterpower has arisen relatively recent. Initially, the prairie provinces merely sought to confine the area transferred to that acreage denoted on the description and did not expressly reserve water rights.

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91. Clause 11 of the Alberta and Saskatchewan Agreements; Clause 12 of the Manitoba Agreement. Canada-Ontario Reserve Land Agreement of 1924, *supra*, note 82.

92. Saskatchewan: *The Water Corporation Act, S.S. 1983-84,* c.W-4.1, *SS.41, 78-79; The Provincial Lands Act,* R.S.S. 1978, c.P-31, SS.1O, 12, 15, 16; *The Water Power Act,* R.S.S. 1978, c.W-6, SS.5-6.
Manitoba: *The Crown Lands Act, 1987,* R.S.M. 1987, c.C340, ss.4(1)(a)-(c), (e), (f); *Water Power Act,* R.S.M. 1987, c.W60, ss.5-6.
Alberta *Public Lands Act,* R.S.A. 1980, c.P-30, s.3; *Water Resources Act,* R.S.A. 1980, c.W-5, ss.3 [repealed by S.A. 1981, c.40, s.3], 8-9.

93. See *In re Transfer of Natural Resources to the Province of Saskatchewan, [193* 1] S.C.R. 263 at 275 *per* Newcombe J, aff'd [1932] A.C. 28 (P.C.) at 40. *A.G. Canada v. Higbie, [1945]* S.C.R. 385 at 404, *per* Rinfret CJC. But see *Re Thomas (1957), 12* D.L.R. (2d) 135 (Sask. C.A.).

94. *R. v. Sutherland, [1980] 2* S.C.R. 451, [1980] 3 C.N.L.R. 71, [1980] 5 W.W.R. 456.

Saskatchewan

In Saskatchewan, the transfers to the LaLoche and LaRonge Bands in 1970 contained no express reservation of rights to water or waterpower. They provided for the transfer of "lands and lands covered by water" in the areas marked on the plans of survey.95 The major waterbodies were excluded from the plans of survey, but there was no explicit denial of any ownership of an adjacent waterbed arising from riparian ownership or treaty right. But more recently the province has sought to expressly reserve the waterbed and rights of passage and portage on all navigable waterbodies, and all rights to water and waterpower on all waterbodies. This change followed a 1980 amendment of the *Provincial Lands Act* which seeks to avoid the application of statutory reservations,[96] *other than water, in the* setting apart of reserve lands. The amendment bluntly declared that:

> the property in, the right to and the use of all water and water powers in that land and any other property, interests, rights and privileges that the Lieutenant Governor in Council may specify is reserved to the Crown.

It is suggested that the amendment is *ultra vires* insofar as it purports to amend the constitutional obligation to set aside reserve lands.

In 1981, the Order in Council transferring land for the benefit of the English River Band declared:

> such description of land shall not be construed as including any rights to the bed of the Churchill River system, nor to any other land whatsoever, arising from the common law or otherwise, but thereby retaining the property in, the right to and the use of all water and water power in that land and further reserving specifically to the public the right of passing and repassing on the Churchill River system and the right of stoppage wherever necessary for the use thereof, and the right to the use of all

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95. LaLoche and LaRoche Bands, O.C. 247/70, *Sask. Gaz.*, 20 February 1970.

96. The amendment was intended to "remove any doubt" as whether the setting apart of reserve lands is a disposition within the meaning of the *Provincial Lands Act*. Opinion of P.N. McDonald, MacLean, Keith, McDonald and Love to Co-ordinator Treaty Land Entitlement, 25 September 1979.

> existing or necessary portage trails or roads past any rapids of falls or connecting any such lake, river, stream, or body of water . . ..[97]

The Order in Council reserves to Saskatchewan all water rights, and rights of portage and navigation on, and the waterbed of, the Churchill River system. The Order in Council further seeks to deny any claim, arising from common law arguments as to riparian ownership of the waterbed "or otherwise" ,[98] to the waterbed of other waterbodies otherwise lying outside the description.

Saskatchewan has been prepared to transfer the ownership of the waterbed of non-navigable waterbodies which lie within the boundaries of the land description.[99] Saskatchewan's policy is most clearly indicated in the language of the 1985 Order in Council which set aside lands for the Fond du Lac Band:

> ALSO INCLUDED: In relation to all parcels, the beds of lakes, rivers, streams or other bodies of water or watercourses whatsoever, insofar as the said beds are located within the boundaries of the said parcels, but subject to the exclusion of the beds hereinafter referred to.
>
> BUT EXCEPTING AND RESERVING THROUGHOUT:
>
> Firstly:
>
> (a) the bed of the MacFarlane River;
> (b) the bed of the Otherside River;
> (c) the bed of Lake Athabasca;
> (d) the bed of Gibson Lake . . . .
>
> and any rights in relation to the said beds.
>
> - Secondly, in relation to all lakes, rivers, streams, or other bodies of water or watercourses whatsoever, whether or not the beds of same are included in any parcel hereby transferred or excepted and reserved therefrom, and in relation to all other lands within the parcels, any property or other interest in, or privilege or right in respect to, and the use of, all water and water powers.
> - Thirdly, in relation to all lakes, rivers, streams or other bodies of water or watercourses the beds of which are excepted and reserved, reserving to the public the right of passing, repassing and stopping on or along the said lakes, rivers, streams or other bodies of water or watercourses or on or

97, English River Band, Sask. Reg. 15/81.
98. Stony Rapids Band, Sask. Reg. 30/81.
99. Canoe Lake Band, Sask. Reg. 154/80.

> along the land on either side thereof, and the right to the use of all existing or necessary portage trails or portage roads past any rapids of falls or connecting said lakes, rivers, streams or other bodies of water or watercourses.[100]

The waterbeds listed are those of navigable waterbodies. They otherwise lay within the boundaries of the land description. As the Orders in Council indicate, Saskatchewan has not sought to reserve the shoreline.

Manitoba[101]

Manitoba did not transfer any land for treaty land entitlement after 1930 until the early 1970s. At that time the only concern explicitly set forth with respect to water rights and powers was the exclusion of lands under water, which were not within the boundaries of the land described. The Orders in Council explicitly excluded such waterbeds,[102] and thereby sought to exclude any common law presumption of riparian ownership. In 1975, Manitoba became embroiled in a dispute with Bands in the north of the province with respect to the construction of the Churchill-Nelson Hydro Diversion project. Manitoba sought the power to expropriate reserve lands.[103] In January 1976, the relationship between such a provincial power and the hydro development was made explicit in a letter to the Minister of Indian Affairs:

> The Provincial Cabinet have issued specific instructions that all future transfers of Crown land to the Federal Government for the use and benefit of Indian bands, must be subject to some prior guarantee of the Province's right to re-acquire land for highways, hydro rights-of-way and other public purposes at similar rates of compensation for land in the area.[104]

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100. Fond du Lac Band, *supra*, note 89.
101. See generally, J. Gallo, *Treaty Land Entitlement in Manitoba, 1970-1981* (Winnipeg: Treaty and Aboriginal Rights Research Centre of Manitoba, 1982).
102. E.g., Shamattawa Band, Man. O.C. 174/1974, 20 February 1976.
103. Letter from H. Bostrom, Manitoba Minister of Renewable Resources, to J. Buchanan, federal Minister of Indian Affairs, 10 June 1975.
104. Letter from H. Bostrom, Manitoba Minister of Renewable Resources, to J. Buchanan, federal Minister of Indian Affairs, 6 January 1976.

Canada rejected any such stipulation as being contrary to the Natural Resources Transfer Agreement, and suggested that the matter might be tested in court. The matter remained in impasse, 105 and in 1978 Manitoba issued Policy Guidelines[106] which sought to address the provincial concern in another way. The Guidelines declared, *inter alia*:

> 5. Land up to a minimum of 99 feet from ordinary high water will be retained in the name of the province but leases may be made available to bands for use of these areas wh.bout Manitoba or its agencies assuming liability for flood or other damages.
> 6. The province will not transfer lakes or rivers or the beds of same to Indian reserves.

Manitoba subsequently explained that the object of Guideline 5 was "to ensure public access and to prevent flood damage claims", and stated that the reservation of the shoreline was in line with provincial dispositions to all other groups between Manitoba and Canada.[107] The matter remained unresolved until an Agreement in Principle with respect to treaty land entitlement was reached in 1984. The Agreement in Principle provided for a provincial easement in perpetuity with respect to lands transferred in a waterpower reserve or licence area. The easement allowed Manitoba the right to adversely affect water quality, water flow, and such other rights as would permit hydro development. The Agreement in Principle was not ratified, and has since been rejected by the Chiefs' Land Entitlement . Committee.

In 1986, Manitoba transferred lands in a waterpower reserve to the York Factory Band.[108] It retained a flood

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105. A transfer of lands by Manitoba to the Red Sucker Lake Band in 1976 was conditioned: "Canada will ensure that an easement acceptable to Manitoba Hydro will be granted covering their existing facilities at Red Sucker Lake". Man. O.C. 1191/1976, 10 November 1976. See Gallo, *supra,* note 101.
106. B. Ransom, Minister of Environment, "Policy Guidelines of Manitoba Covering Indian Land Entitlement" (Winnipeg: 19 October 1978).
107. Letter from A.B. Ransom, Minister of Mines, Manitoba Natural Resources and Environment, to H.J. Faulkner, federal Minister of Indian Affairs, 15 May 1979.
108. York Factory Band, 2390 acres at York Landing, Man. O.C. 905/86, 13

easement over the lands for the purposes of the Churchill-Nelson hydro project. The land transferred was identified by reference to plans of a survey which did not include land under water. There was no express reservation of water rights or the waterbed. Indeed, the Order in Council purported to transfer all "estates, rights and interests normally reserved to the Crown (Manitoba) under section 5(1) of the Crown Lands Act" .[109] Section 5(1) [now s.4(1)] provides for the reservation of water rights to the Crown.

Alberta

Alberta has not expressly reserved water rights, waterpower, or the waterbed in the transfer of land. Orders in Council merely provided for the setting aside and vesting of title to the land to the Dominion for the benefit of the Indian bands as if the land had never passed to Alberta.[110] The Schedules, containing the land descriptions, referred only to that area "outlined in red". Alberta sought thereby to confine the rights transferred to those within the boundaries of the description.

In the settlements with the Cree of Fort Chipewyan, the Whitefish Lake and Sturgeon Lake (1986, 1988, and 1989, respectively) there is, as in the previous transfers, no express exclusion of rights with respect to water and waterpower. The land transferred is denoted by acreage, by the boundaries marked on the scheduled land descriptions, and by the exclusion of lands covered by specified lakes.

The Size of the Area Required to be Set Aside

The size of the area required to be set aside for reserves has been by far the most intractable problem in attempts to settle

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August 1986.

109. York Factory Band, Man. O.C. 905/86, 14 August 1986. *The Crown Lands Act,* R.S.M. 1970, c.C340, s.5(1) [now *The Crown Lands Act, 1987,* R.S.M. 1987, c.C340, s.4(1)].

110. E.g., Bushe River Reserve, Alta. O.C. 816/499, *Alta. Gaz.*, 30 July 1949; Slavey of Upper Hay River Reserve, O.C., 27 March 1950; Amber River Reserve, Al(a. O.C. 313/50, *Alta. Gaz.* 15 April 1950.

treaty and entitlement.

The numbered treaties provide for an area of land to be set aside so **as to** allow for 160 acres (Treaties #1, 2, and 5) or 1 square mile (640 acres) (Treaties #3, 6, 7, 8. and 10) for each family of five of each Band "or in that proportion for larger or smaller families". The difficulty is in determining the date for which the formula is to be applied.

An opinion of the Saskatchewan Attorney General's Department, dated 12 October 1961, suggested that the area should be based "on the population of the band at the moment the treaty was signed". It is to be observed that the treaties did not contemplate the immediate setting apart of reserves. The Treaty Commissioners' Reports explained that the selection would in some cases be postponed. In such circumstance, it is suggested that the more reasonable construction of the obligation expressed in the treaties entails the determination of the Band population at the time when the reserve lands are set aside for the Band.

Judicial consideration of the question is absent, but some support for this approach is evident in the reasoning of Mahoney J in *R. v. Blackfoot Band Indians*.[111] He was considering whether Treaty #7 required ammunition to be distributed amongst the "said Indians" on a per capita or per stirpes (Band) basis:

> The purpose of the ammunition clause (para. 12) was to assist the Indians to provide for themselves by hunting. No other purpose, within reason, suggests itself. The amount of game a band needed would to a large extent be dictated by its population. Not all Indians were hunters, but it is reasonable to assume that the number of hunters of a given band would at least roughly reflect its population — the number who needed to be hunted for. Reason dictates that the ammunition would have been allocated among the hunters of different bands on a more or less per capita basis.[1] 12

It seems unreasonable to conclude that the area of reserve lands should be determined by the size of Band populations in the

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111. See *R. v. Blackfoot Band Indians, [1982] 4* W.W.R. 230, [1982] 3 C.N.L.R. 53 (F.C.T.D.).

112. *Id.*, W.W.R. at 238, C.N.L.R. at 61.

latter part of the nineteenth century, when the treaties contemplated the postponement of the setting apart of reserve lands. Such a construction would appear to defeat the object of the treaty promises, and would not be in accord with the principle of statutory construction that requires "doubtful expressions '' in Indian treaties to be "resolved in favour of the Indians''.[113]

At the time of the negotiation of the Natural Resources Transfer Agreements, the provinces of Alberta and Manitoba queried the amount of land which they would be liable to transfer to meet outstanding treaty land entitlement. The Government of Canada provided estimates based on the then-contemporary populations. Thus, in 1925, an area of 368 square miles (235,520 acres) was suggested to be owed in Alberta to the Upper Hay River, Fort Providence, Fort Chipewyan, Fond du Lac, Fort Smith, Hay River, and Yellow Face Bands.[114] In 1929, an area of 105,810 acres was estimated to be owed in Manitoba to the Pukatawagan, Barren Lands, York Factory, Fort Churchill, Cross Lake, Island Lake, Saskatchewan, and Norway House Bands.[115] In Saskatchewan estimates, for only some of the Bands, exceeded 200,000 acres.[116]

Scott, the Deputy Superintendent General of Indian Affairs, explained, in response to a Manitoba proposal to limit the area of entitlement:

> The various treaties provide for so many acres per capita and the practice of the Department has been to take the census of the Band *at the time that the survey of the required acreage is made. The* acreage as hereinafter stated will be varied at the time of survey to *meet the decrease or increase of the*

113. This requirement was established in *Nowegijick*, *supra*, note 20.
114. Donald Robertson, Secretary, Dept. of Indian Affairs, to Deputy Minister, Dept. of Indian Affairs, 19 January 1925.
115. D. Scott, Deputy Superintendent General of Indian Affairs, to Deputy Minister of Justice, 4 September 1929.
116. A.F. Mackenzie, Secretary, Dept. of Indian Affairs, to F.M. Peters, Surveyor General, 26 April 1929; T.R. MacInnes, Secretary, Dept. of Indian Affairs, to T. Robertson, Inspector of Indian Agencies, Saskatchewan, 27 May 1937; F.M. Peters, Surveyor General, to D.J. Allan, Superintendent, Reserves & Trusts, 27 December 1938.

> *membership at such time.* I do not think accordingly that it would be proper to insert any limitation of acres in the Agreement.[117]

The Transfer Agreement negotiations proceeded on the understanding that no such limitation would be introduced, but the condition of the agreement of the province to the lands selected was inserted. It is suggested that the consideration directed to this question and the response in the final draft of the Transfer Agreements confirm the correctness of the conclusion that the extent of entitlement should be determined at the time that the lands are set aside for the Band. The practice in the initial establishment of reserve lands for Bands throughout the nineteenth and twentieth century confirms this conclusion. The federal government has always adhered to this principle, which has become known as the "date of first survey" approach.

The prairie provinces have occasionally questioned the approach, but no reserves have been set up inconsistently with it. In 1975, in reaction to claims to mineral rich lands, Alberta asserted that the area to be set apart should be determined by Band populations at the time of treaty. In 1985, in the Lubicon dispute, the mediator, the Hon. E.D. Fulton, Q. C., issued a Discussion Paper which recommended that contemporary population figures be used, but that Canada contribute to the cost of the land entitlement on account of its failure to previously fulfill full treaty entitlement: Alberta had agreed in 1940 to set aside a reserve for the Band, but Canada had failed to request the land and to set it apart.

The two settlements of original treaty land that have since been reached in Alberta — the Cree of Fort Chipewyan (December 1986) and the Lubicon (October 1988) — reflect the suggestions of Fulton. In these claims, Canada has recognized that the area of land to be set aside should be determined by the contemporary Band populations. In the Fort Chipewyan settlement, the Band received approximate y 12,180 acres and $26.6 million dollars. The monies were paid in lieu of land. Indeed, Clause 14 of the Agreement between Canada and the Band declares that "the parties acknowledge that the population

117. Letter, *supra*, note 115.

of the band utilized in calculating the amount of land that should be set aside under Treaty #8 was the 1982 population.' '[118] In the Lubicon settlement, Canada recognized the right of the Band to an area of reserve determined by the contemporary (1988) Band population. The area of the reserve, 245 square kilometres, is the size dictated by the contemporary population multiplied by 128 acres per capita as prescribed by Treaty #8.

Alberta did not agree with Canada that the area of land to be set aside should be determined by contemporary Band population in the 1986 Fort Chipewyan settlement. Indeed, the preamble to the Agreement between Canada and Alberta declares that "Alberta is prepared to provide 24,000 acres of unoccupied Crown land based on the population of the Cree Band at the time of the signing of Treaty No. 8 in 1899." But the Agreement further provides that Alberta will contribute 15 million dollars towards the monies paid in lieu of land to the Band "for the sole purpose of reconciling the difference of opinion" as to Alberta's liability. Clause 7 declares in part:

> As Alberta's obligation to Canada, as provided by section 10 of the schedule to the Constitution Act, 1930, is not clear in every respect, Canada and Alberta are unable to arrive at a mutually satisfactory interpretation of Alberta's obligation. Accordingly, in this case it is agreed that,
>
> a. for the sole purpose of reconciling the difference of opinion;
>
> b. on the express understanding that Alberta neither accepts nor acknowledges Canada's position with regard to the date of population count, the validity of that count nor any other facts on which Canada has based the calculation of the $24,000,000.00; and
>
> c. without prejudice to any future position which Alberta or Canada may adopt with regard to treaty entitlement claims.
>
> Alberta shall pay on behalf of Canada the sum of $15,000,000.00 of the $24,000,000.00 referred to in the agreement between Canada and the Cree Band directly to the Cree Band. Canada and Alberta further acknowledge and agree

118. The Cree of Fort Chipewyan Indian Band Treaty Land Entitlement Settlement Agreement. In modem treaty land entitlement settlements, the procedure that has developed entails two agreements; one agreement between the province and Canada, and one agreement between Canada and the Indian band.

> that this payment of $15,000,000 is made as a compromise to terminate controversy between them in this matter and not as an admission of liability on the part of Alberta, such liability being denied.

The settlement between the Lubicon Band and Alberta was arrived at in negotiations between the Chief and the Premier in October 1988. The settlement followed the filing of a statement of claim in May 1988 by Canada against both Alberta and the Band seeking a declaration that the Indians were entitled to an area of land determined by its contemporary population. The settlement provides for the transfer by Alberta of an area of land determined by the contemporary population of the Band. It is properly seen as an abandonment of its position in the Fort Chipewyan settlement.

Partial Treaty Lund Entitlement

A more difficult question arises in the event of past partial satisfaction of treaty reserve land entitlement. In such circumstance, does the treaty suggest the use of Band population numbers at the date the partial portion of the reserve lands was set aside in the past, the date when the remaining portion of reserve lands is to be set aside in the future, both, or a number derived by reference to families and their descendants who were considered in the setting apart of reserve lands and those who were not? The latter approach appears most in accord with the language of the treaties, but the unavailability of historical " records and the difficulty of implementation may preclude its use. Failing such approach, it is suggested that some regard must be had to Band population numbers when lands are to be set aside in the future, but it is difficult to determine what regard should be accorded Band population numbers at the time partial lands were set aside in the past. It has been suggested that past Band population numbers are irrelevant to the satisfaction of the outstanding obligation, but it might also be argued that a percentage of satisfaction of the outstanding entitlement be determined based on past population numbers. The latter approach was employed in the settlement of the entitlement of the LaRonge Band in Saskatchewan. The approach will hereinafter be called the "multi-survey" formula.

The application of the multi-survey formula to the LaRonge Band was explained by the Manager of Indian Lands:

> The Lac La Ronge Band adhered to Treaty 6 in 1889 which entitled it to reserve lands in the amount of 128 acres per person.
>
> Prior to 1949 various parcels of land were set apart for this Band as partial settlement of its Treaty land entitlement. In 1961 the Band requested the remainder of the lands to which they were entitled under Treaty and a formula was developed to calculate their outstanding entitlement at 63,330 acres as follows:

Data	1897	
Population	484	
Entitlement	61,941	ac.
Lands Received	5,354.1	ac. or
	7.95%	of entitlement
Data	1909	
Population	526	
Entitlement	67,328	ac.
Lands Received	5,354.1	ac. or
	7.95%	of entitlement
Data	1948	
Population	969	
Entitlement	124,032	ac.
Lands Received	6,400	ac. or
	5.16%	of entitlement
Date	1961	
Population	1404	
Entitlement	179,712	ac.
Total Lands Received		
to date	32,007.9	
	5,354.1	
	6,400.0	
	43,762	ac.
	or	
	51.65%	
	7.95%	
	5.16%	
	64.76%	
Balance	35.24%	or
	63,330	acres

> By Band Council Resolution dated May 8, 1964, the Lac La Ronge Band agreed to accept 63,300 acres as their full land entitlement under Treaty 6. At that time they stated that their entitlement was based on 35.24% of their Band population of

> 1,404 in 1961, the date they requested land from the Province of Saskatchewan.[119]

In the early 1970s, the Department of Indian Affairs sought to apply the multi-survey formula to the settlement of the partial treaty land entitlement claim of the Island Lake Band in Manitoba and the Peter Ballantine Band in Saskatchewan. The formula was rejected by the province in Manitoba and by the Band in Saskatchewan. The Lac LaRonge Band filed a statement of claim in 1988,[120] seeking a declaration that despite the application of the multi-survey formula in 1964, the Band had still an entitlement to land under Treaty #6, and asserted that the multi-survey formula violates the Treaty.

In 1954, the Legal Advisor to the Department of Indian Affairs stated that he was unable to give a ' 'firm legal opinion" [121] as to the method to be used to determine the area to be set apart, but placed some emphasis on the practice described by Scott in his memorandum of 1929.[122] The Department of Indian Affairs has in the past advocated use of current population figures to determine entitlement, and then has subtracted lands already set apart. In 1966, the Head of Land Surveys and Titles observed:

> To date there has been no firm statement of policy as regards satisfying land entitlement under the terms of the various treaties. We have examined correspondence on file at Headquarters and have been able to identify a number of precedents and principles, which have governed negotiations with Provincial Governments over the years. Simply stated, these are as follows:
>
> ...
>
> 2. Acreage is calculated on the basis of band population at the time the reserves are selected. Where a band has received some of its entitlement, the area is reduced by the acreage

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119. G.A. Poupore, Manager, Indian Lands, to A.H. Markuson, Regional Land Administrator, Saskatchewan Region, Dept. of Indian Affairs, 11 September 1975.
120. *Cook v. Beckman (8* May 1990) (Sask. C. A.) [unreported].
121. Memorandum from Legal Advisor, Dept. of Citizenship and Immigration, to L.L. Brohn, Superintendent, Reserves and Trusts, 20 May 1954.
122. Letter, *supra*, note 115.

already received.[in]

The practice adopted in the satisfaction of partial treaty land entitlement prior to 1970 generally supports this assessment.[124] A rationale offered by the Department of Indian Affairs has been "that the Indians have not derived any benefit from the lands to which they were entitled since the signing of the relevant treaty.' '[125]

In 1973, following the decision of the Supreme Court of Canada in *Calder*,[126] the federal government announced its determination to ensure that the "lawful obligations" owed the Indians would be met and sought a new initiative with respect to treaty land entitlement. By 1973, the population of the Indian bands had begun to increase dramatically with improved health and social services. At the same time, more of the land of the provinces had become settled and developed; consequently, the availability of land and resources to satisfy partial treaty land entitlement had become a major difficulty in the southern prairie provinces. In Manitoba, the province asserted that entitlement was confiied to the date of first survey, and Alberta contended that the area to be set apart should be determined by reference to Band populations at the time of treaty. In both provinces, the claims on resources lay behind the provincial positions. In Manitoba, the government was concerned to protect hydro development potential, and in Alberta the government was reacting to the "tar sands caveat" and the selection of mineral rich lands by the Cree of the Fort Chipewyan Band. "

In 1976, Saskatchewan introduced the "Saskatchewan formula" to compromise the arguments regarding the

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123. 27 December 1966, as reported in *Report, supra*, note 60, at 61-62.
124. See K. Tayler and B. McCardle, "Case Summaries and Policy Correspondence Relating to Land Entitlement in Cases of Multiple Survey (Before 1976)", Appendix C in letter from J. Dion, President of Indian Association of Alberta, to H.J. Faulkner, federal Minister of Indian Affairs, 30 November 1978. And see Memorandum from J.W. Churchman, Saskatchewan Deputy Minister of Mines and Resources, to A.I. Bereskin, Director of Lands, Saskatchewan, 24 March 1965.
125. *Id.*
126. *Calder v. A.G. British Columbia, [1973]* S.C.R. 313, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145.

- determination of the area of land to which the Indians were entitled in the province. The Minister of Northern Saskatchewan declared:

> The Province is prepared to negotiate with the Federation of Saskatchewan Indians (subject to written confirmation that the Federation can bind all Bands pursuing a land claim) and Canada on settlement of outstanding Treaty Indian land claims based on the Treaties, 1930 commitments in The Natural Resources Transfer Agreement, and using the F.S.I. formula.
>
> This [Saskatchewan] formula would take "present population" x 128 (acres per person) less land already received. "Present population means that the population is permanently fixed as at December 13, 1976.[127]

The Minister of Indian Affairs of Canada reported in 1977:

> I am pleased to confirm that Cabinet has considered and generally agrees with the settlement proposal outlined in your letter of August 23, 1976. Specifically, Canada concurs in the proposition that the official population figures, as at December 31, 1976, be used as the base formula for determining entitlement for those Bands that have not previously selected and received their full treaty entitlements to land.[128]

The Saskatchewan formula was used in the settlement with the Peter Ballantine Band:

Peter Ballantine Band	
1. Confirmed Population, December 31, 1976	2,049.
2. Entitlement in acres (population x 128)	262,272.
3. Original allocation in acres	32,987.64
4. Outstanding entitlement (262,272-32,987.64)	9,284 .36[129]

The correspondence adopting the Saskatchewan formula did not purport to amend expressly the treaty obligation owed by Canada nor the constitutional obligation owed by Saskatchewan under the Natural Resources Transfer Agreement. Nor does the correspondence appear in a fort-n appropriate to such amendments. There is no written agreement between the Indians

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127. Letter from Ted Bowerman, Minister of Northern Saskatchewan, to Chief Ahenakew, Federation of Saskatchewan Indians, 23 August 1976, and letter to Minister of Northern Saskatchewan, from Chief Ahenakew, 31 August 1976.
128. Letter to Ted Bowerman, Minister of Northern Saskatchewan, from Warren Allmand, M.P., 14 April 1977.
129. Federation of Saskatchewan Indians, *Treaty Land Entitlement Rights (1981)* at 21.

and Canada with respect to the Saskatchewan formula, and amendments of the Natural Resources Transfer Agreement require complementary federal and provincial legislation.

Attempts were made to reach a formal agreement, but they failed because of differences as to funding for purchases of lands in the southern prairie provinces. Thereafter, the federal government began to express misgivings as to the Saskatchewan formula and, by 1982, the federal minister was emphasizing regard for the "date of first survey" as the date relevant to the determination of all treaty land entitlement claims, including those where partial entitlement had already been provided. In 1988, the position of the federal government was made clear by its refusal to accept a transfer by Saskatchewan to the Canoe Lake Band which was in accord with the Saskatchewan formula, but which would have exceeded the Band's entitlement based on "date of first survey".

The entitlement Bands and the FSIN[130] responded in two ways. First, on 16 March 1989, the FSIN and the Starblanket and Canoe Lake Bands filed a statement of claim in the Federal Court, seeking a declaration that the Saskatchewan formula constitutes a binding agreement and, alternatively, that treaty entitlement is to be based on current population offset by the land already received. Caveats were also filed to protect land selected by Bands. The federal government filed a statement of defence, which denied that the Saskatchewan formula was a legally binding agreement.

Secondly, in May and June 1989, a formal Memorandum of Agreement was reached between the FSIN and the federal government to establish an independent "Office of the Treaty Commissioner" to make "recommendations concerning rules for application in interpreting the terms" of the treaties, in particular with respect to treaty land entitlement.[131] A Report issued in May 1990, which suggested the adoption of the multi-survey formula.[132]

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130. Federation of Saskatchewan Indian Nations (changed from FSI in about 1981).

131. General Bilateral Accord, 7 May 1989; Agreement on the Office of the Treaty Commissioner, 7 June 1989.

132. *Report and Recommendation on Treaty Land Entitlement* (Saskatoon:

In Manitoba, in the mid- 1970s, provincial objections to the transfer of reserve lands without provincial rights to expropriate lands for hydro development brought an impasse. In 1978, Manitoba issued Policy Guidelines[133] which declared that lands would be set aside on the basis of Indian band populations at the "date of first survey". The Manitoba Indian Brotherhood sought the adoption of the Saskatchewan formula and the transfer of 600,000 acres. In 1981, the New Democratic Party was elected to the Government of Manitoba. The new government adopted the Saskatchewan formula, following the recommendation of the Treaty Land Entitlement Commission to that effect.

In 1984, an Agreement in Principle was signed by the Chiefs' Treaty Land Entitlement Committee and the Governments of Manitoba and Canada. The Agreement in Principle expressly adopted the Saskatchewan formula, albeit it was renamed the "Manitoba formula". Since 1984, both the provincial and federal governments have changed. The Chiefs' Committee demanded the ratification of the Agreement in Principle by March 1987, or else it would consider the Agreement to have been terminated. As the Agreement in Principle was not ratified, the Chiefs' Committee is now seeking entitlement on the basis of current population.

Pending agreement, lands are being selected and set aside for Bands in Manitoba, but only on the basis of the "date of first survey" formula. For example, 2,390 acres were set aside for the York Factory Band in 1989.[134] But the Bands are " deliberately ensuring that the lands set aside do not fully meet the "date of first survey" formula so that the lands can only be said to be provided in *partial* satisfaction of entitlement. A shortfall will remain, which precludes Manitoba or the federal government demanding a release from any outstanding entitlement. The Bands hope that a different formula may be applied to the shortfall.

After 1930, Alberta generally transferred lands in

Office of The Treaty Commission, May 1990).

133. B. Ransom, Minister of Environment, "Policy Guidelines of Manitoba Covering Indian Land Entitlement" (Winnipeg: 19 October 1978).

134. P.C. 1989-2555,21 December 1989.

satisfaction of partial treaty land entitlement claims on the basis of contemporary Band population (date of first survey), less lands already set apart. In March 1976, Canada requested that Alberta either set apart an area of land calculated on that basis for the Tall Cree Band, or agree to a reference to the Federal Court to determine the matter.[135] Alberta refused, and asserted that the area to be set apart should be determined by reference to Band population at the time of treaty.[136] The question of treaty land entitlement became embroiled in the related Lubicon dispute. Not until December 1988 (Whitefish Lake) and July 1989 (Sturgeon Lake) were further settlements with respect to partial treaty land entitlement reached.

In the case of the partial treaty land entitlement settlements with the Whitefish and Sturgeon Lake Bands, there is reflected the uncertainty as to the governing principles. On the one hand, Canada appears to recognize the principle that the area of land due is determined by contemporary Band populations, less the land already set apart. Thus in the Whitefish Lake settlement, the Band was provided with 5,500 acres and 19.166 million dollars; in the Sturgeon Lake settlement, the Band was provided with 16,200 acres and $6.053 million dollars. In both settlements, the total of acreage and cash in lieu of acreage appears to have been determined solely by regard to contemporary populations.

Alberta, on the other hand, appears to have adopted the "multi-survey" formula in the settlements. In both the Whitefish Lake and Sturgeon Lake settlements, the area of land set apart and cash expressly acknowledged as being paid in lieu of land by Alberta is that which would be arrived at upon application of the formula. But, in both settlements, Alberta has also contributed additional monies "as a compromise to terminate controversy" above and beyond the obligation determined under the "multi-survey" formula. The provincial contribution is

135. J. Buchanan, federal Minister of Indian Affairs, to L. Hyndman, Alberta Minister of Federal and Intergovernmental Affairs, 29 March 1976.

136. Warren Allmand, federal Minister of Indian Affairs, to L. Hyndman, Alberta Minister of Federal and Intergovernmental Affairs, 23 June 1977.

33.8% of the total contribution in the Whitefish Lake settlement, and **23.5% in** the Sturgeon Lake settlement.

Bill C-31[137]

Reference to contemporary Band population would seem to demand inclusion of those Band members added to Band lists by reason of Bill C-31. Bill C-31 restored status to former Band members and their children who had lost status, most commonly on account of marriage by an Indian woman to a non-Indian. Bill C-3 1 members were clearly included in the Lubicon settlement. They were excluded from the Fort Chipewyan settlement, because the settlement was determined by regard to the 1982 Band population.

Cash in Lieu

A notable feature of the Alberta settlements in the late 1980s is the preparedness of Bands to accept cash in lieu of land and of Canada and Alberta to pay it. Canada has determined the obligation owed the Band by reference to contemporary population, and has then sought agreement to provide cash in lieu by reference to the market value of the land in the area of the reserve or traditional lands of the Band. Alberta has contributed up to 33.8% of the monies paid beyond that dictated by the "multi-survey" formula. It contributed 62.5% of the monies paid beyond that dictated by the treaty date formula in " the Fort Chipewyan settlement.

Existing Interests

The numbered treaties had reserved to the Crown the "right to deal with any settlers . . . as she shall deem fit [or just]. " The obligation of the Crown in the right of Canada under the treaties requires the setting aside of reserve lands, but expressly leaves to its discretion how to accommodate the rights of settlers.

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137. *An Act to Amend the Indian Act,* S.C. *1985, c.27* — popularly known as "Bill C-31".

The obligation of the provinces consists in seeking to reach agreement upon the selection of reserve lands so that they may be set aside upon the request of the Superintendent General of Indian Affairs in order to fulfill the treaty promises made to the Indians. The provinces cannot impose conditions upon the use to which land may be put when set aside; the Natural Resources Transfer Agreements declare that "such areas as shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province. " If the provinces cannot impose conditions, the provinces may, however, decline to agree upon the selection of lands where prior interests have arisen. The provinces may assert that a refusal to agree to such selection does not constitute a violation of its obligation where Canada has failed to seek an appropriate accommodation. Such accommodation may entail the provision of compensation by the Crown or the honouring of the existing interest in the setting aside of reserve lands.

The Government of Saskatchewan outlined its position on "unfulfilled Treaty Indian Land Claims" in 1976. It distinguished between the largely unoccupied north and the largely occupied south of the province:

> ...
>
> *(2)* That attempts be made to satisfy claims of northern bands as expeditiously as possible on the foregoing basis. The Province is prepared to consider all reasonable requests for land, including a request that Elizabeth Falls and area be . transferred subject to existing encumbrances to the Black Lake/Stony Rapids Band.
>
> Since Elizabeth Falls and area is occupied Crown land, *satisfactory arrangements* must be concluded with the occupants.
>
> (3) That to satisfy claims in the South the following principles receive endorsement
>
> (i) land be sought by attempts to secure federal and provincial unoccupied Crown land and, where it can be arranged, federal and provincial Crown land where the Province can *satisfy the occupants;*
>
> (ii) any Band unhappy with this must look solely to Canada for satisfaction since Canada alienated almost all the land in the South prior to the Resources Transfer Agreement, 1930.
>
> ...

> *(4)* That, at some future time, the Province may give some consideration to Band requests through the Federal trustee to surrender land claims in exchange for revenue sharing in resources and the joint development of currently disposed-of land. [emphasis added][138]

The Government of Canada indicated its position with respect to the availability of federal lands to satisfy outstanding treaty Indian entitlements:

> With respect to the matter of land selections, I am hopeful that all outstanding entitlements can be settled from available provincial Crown lands or through the surrender of entitlements in exchange for resource-sharing or joint ventures as you suggested. However, notwithstanding the provisions of Section 10 of the Resources Transfer Agreement, 1930, and in order to assist the process, Canada would be prepared to consider making available federal lands where possible.[139]

Saskatchewan's position indicated that "satisfactory arrangements must be concluded" with existing interests. Failure to "satisfy" community pasture patrons and the loss of rural support proved to be a factor in the defeat of the provincial (New Democratic) government in 1982.

The federal Department of Indian Affairs has commented on Saskatchewan's position with respect to existing mineral interests:

> the Province took the view that they had an obligation to the mineral rights holders in the form of a vested right. They were prepared to agree to any form of transfer of those mineral rights from Provincial Crown to Federal Crown on behalf of the Band, provided that the company's rights were protected in the process. In this case, the Federal Crown mineral disposition lease or agreement had to be satisfactory to the company. The Province was prepared to assist in the process, but would put no pressure on the company to agree.[140]

The response of the Department of Indian Affairs to

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138. Letter, 23 August 1976, *supra*, note 127.
139. Letter to Ted Bowerman, Minister of Northern Saskatchewan, from Warren Allmand, federal Minister of Indian Affairs, 14 August 1977.
140. Letter to P. MacLean, Dept. of Justice, from E.A. Moore, Indian Minerals (West), 2 July 1980, re: "Mineral Settlement and Leases: Stony Rapids and English River Bands — General Procedures for Establishment of Reserves, Saskatchewan Occupied Land".

Saskatchewan's position was:

> Indian Affairs accepted advice to the effect that the Province could not transfer "occupied" lands. It was accepted also that if the Band insisted on the particular lands, it would be necessary to arrive at a suitable agreement with the company. If the Band insisted on the area due to its mineral value, it was difficult to accept the fact that they wanted the minerals but didn't want them developed. Therefore, the issuance of an Indian Mineral Lease did not appear to be an unreasonable solution. DIAND was somewhat concerned about a number of the negotiated clauses; however, they did not have a particularly strong negotiating position.[141]

One difficulty in the way of transferring lands by way of land entitlement subject to existing mineral interests is the need under the *Indian At/, s.37,* for a surrender by the Indian members of the Band for all mineral dispositions of reserve land. Indian Affairs commented:

> It was obvious that once the reserve was established, there was no way the Band could be required to surrender. The company could not depend upon a traditional surrender if they were to allow the reserve to be set up before obtaining some assurance that their mining rights would be protected in the transfer from Provincial Crown to Federal Crown. It was also agreed that the Band could not surrender future rights. On the other hand, they could by referendum accept the land subject to certain conditions; in this case, a mineral lease issued under the Indian Mining Regulations.[142]

The Department of Indian Affairs described a procedure that might be adopted to overcome the difficulty:

> The basic solution agreed upon by all concerned revolved around the completion of suitable legal documents to accept the simultaneous happening of the following events, all effective at a preselected event, being the issuance of the Saskatchewan Order in Council.
>
> 1. Surrender by mining company to the Province of all Provincial Crown mining rights involved.
> 2. Issuance of an Order in Council by the Province setting aside the lands for the Fond du Lac Band as Indian Reserve No. 228.
> 3. Acceptance by the Federal Government

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141. *Id.*
142. *Id.*

4. Acceptance by Band referendum of the land now called Indian Reserve No. 228, in full settlement of 2,765 acres of treaty rights, notwithstanding the fact that an Indian Mining Lease covering a portion of the reserve would be issued under the Indian Mining Regulations.
5. Acceptance by all parties that the Indian Mining Regulations would be used as the regulations governing the exploration and development of minerals underlying that portion of the reserve covered by the Mining Lease.
6. Issuance by DIAND and acceptance by the company of the Indian Mining Lease.[143]

The disposition of timber interests on a reserve does not require a surrender, but must be undertaken under the *Indian Timber Regulations*.[144] The Department of Indian Affairs has suggested resolving the dilemma of existing timber interests by excluding them from the reserve. It was stated in a legal opinion of the Department:

> that it should be possible to work some arrangement whereby Saskatchewan transfers to Canada the control and administration of this land, subject to the outstanding timber licence to this company. The timber licence rights would not become part of the reserve and would therefore continue to be governed by Saskatchewan laws rather than by the Indian Act.
>
> It might be possible to use a slightly different approach, in which the Indian Timber Regulations would be made inapplicable to this land and in their place a federal Order-in-Council would adopt the Saskatchewan regulations or that part of them which an examination of the Saskatchewan law disclosed are consistent with the Indian Act. If this could be done, the timber interests might be made part of the reserve instead of being excluded from it.[145]

It should be observed that the entitlement to reserve lands under the treaties and the Natural Resources Transfer Agreements is not subject to the exclusion of minerals or timber.

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143. *Id.* Fond du Lac Band, O.C. 908/85, *Sask. Gaz.*, 30 August 1985, and O.C. 1310/85, *Sask. Gaz.*, 3 January 1986.
144. *Indian Timber Regulations,* C.R.C. 1978, c.961.
145. Letter to R.B. Kohls, Director, Membership Branch (Reserves and Treaties), Dept. of Indian Affairs, from J.B. Beckett, Assistant Director, Legal Services, Dept. of Indian Affairs, 16 January 1979, re: "Selection by Bands of Areas covered by Forest Management License Agreement with Simpson Timber Co. (Sask.) Ltd."

The satisfaction of third-party interests has also been required in Manitoba. The transfer of lands to the Red Sucker Lake Band in 1976 was conditioned on rights of access, easements, and leases to existing interests: "Canada will ensure that leases or other acceptable security of occupancy will be offered on reasonable terms. "[146]

The Treaty Land Commission of Manitoba recommended that pre-existing interests be the subject of negotiation and settlement over a specified period. Failing agreement between Canada, Manitoba and the holders of such interests it was recommended that the land be transferred in a manner which honoured the pre-existing interests. *47

All the settlements in Alberta in the late 1980s conform with the policy that existing third-party interests must be satisfied. In the Whitefish Lake settlement, the land to be transferred is expressed to be "subject to third party interests being satisfied in a manner acceptable to Canada, Alberta and the Band' '.[148]

The Sturgeon Lake settlement contemplates that arrangements satisfactory to third-party interests have yet to be made. The Agreements between Canada and the Band, and between Canada and Alberta, provide for the granting of replacement dispositions to the third-party interests, but conditions the transfer of the lands upon the third-party interest being satisfied with the disposition. Canada must obtain a release from the third-party interests.

A fundamental problem in the satisfaction of treaty land entitlement in the southern prairie provinces has been the shortage of suitable land. The question arises, what funds, if any, might be available to purchase private lands? Saskatchewan has insisted in the past that if any financial compensation was required in securing "satisfactory arrangements" with existing interests, it was "solely" the responsibility of the Government

146. Red Sucker Lake Band, Man. O.C. 1191/1976, 10 November 1976. York Factory Band, Man, O.C. 905/86, 16 August 1986.
147. *Report*, *supra*, note 60, at 109.
148. Whitefish Lake Indian Band Treaty Land Entitlement Settlement Agreement.

of Canada.[149] An offer to cost-share by the federal government was rejected by Saskatchewan in 1978. Manitoba took a different view. The 1984 Agreement in Principle between Canada and Manitoba provided for cost-sharing for the purchase of private lands in southern Manitoba. The Agreement in Principle assumed a policy that the entitlement of lands was to be measured as though it was an entitlement to unimproved lands in a 25 mile area around the existing reserve. A similar agreement was suggested for application by federal and provincial representatives in Saskatchewan, but was rejected by the Bands. In the Whitefish Lake settlement in Alberta, the province paid $286,800 in satisfaction of third-party interests in the mines and minerals in the lands to be transferred.

149. Letter, 23 August 1976, *supra*, note 127.

5. BRITISH COLUMBIA

The *British Columbia Terms of Union*[150] of 1871 do not expressly require the province to treat with the Indians and are in contrast to the assurances extracted from the prairie provinces by the federal government when transferring ownership and control over public lands. Such constitutional obligation as there is upon British Columbia is found in Art. 13 of the *Terms of Union* and in Treaty #8. Art. 13 provides:

> tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.

Treaty #8 covers much of northeastern British Columbia. In 1898, British Columbia was formally asked to acquiesce in the entry into Treaty #8 and to indicate its intention to confirm any reserves set apart pursuant to the Treaty,[151] but no response is recorded. Adhesions to Treaty #8 were signed by Indians of the region in 1900 and between 1910 and 1914. In Treaty #8, as in the other "numbered treaties", the Crown promised to lay aside reserves for the Bands.

It is suggested that the promises made in Treaty #8 in British Columbia should not be interpreted differently from the same promises made on the Prairies. The promises contemplated the full beneficial interest of the Indians in the lands, including timber, minerals, and precious metals.

The reserves for the Fort St. John, Hudson Hope, and

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150. *British Columbia Terms of Union* [U.K.] in R.S.C. 1985, Appendix II, No.1O.

151. D. Madill, *B.C. Indian Treaties in Historical Perspective* (Ottawa: Research Branch, Corporate Policy, Indian and Northern Affairs Canada, 1981) at 44.

Saulteaux Bands were set apart in the Peace River Block. Since the Peace River Block had been transferred to the Dominion when the lands were selected in 1907, the reserves were set apart in federal lands.

When the Peace River Block was re-transferred to British Columbia in 1930,[152] the federal government failed to impose conditions so as to protect outstanding treaty land entitlement. The Fort Nelson Band signed adhesions to Treaty #8 in 1910 and 1911, but lands were not set apart for the Band until 1961. The traditional lands of the Fort Nelson Band were located outside the Peace River Block. Upon the re-transfer of the Peace River Block, British Columbia refused to set aside lands in fulfillment of the outstanding obligations under Treaty #8, except on terms which violated the Treaty.

In 1961, British Columbia conveyed 24,448 acres to the federal government in trust for the Fort Nelson Band as a "full and final settlement, of the land entitlement of those Indians residing in that portion of British Columbia covered by Treaty No. 8.''[153] The conveyance was made on the terms and conditions which applied to Crown grants to settlers and purchasers in 1960. It provided for provincial powers with respect to expropriation for public works, construction materials, water privileges and highways, and reserved the minerals to British Columbia.

After 1961, the Fort Nelson Band continued to demand that its treaty entitlement to minerals be satisfied by the conveyance, by British Columbia, of all minerals, precious and base, to Canada, in trust for the Band. On 1 January 1977, it was:

> agreed between Canada, in its own right and on behalf of the Band, and the Province to resolve this long-standing issue of rights to any minerals, precious or base, including coal, petroleum and any gas or gases underlying the Reserve by the parties entering into this Agreement to provide, *inter alia* for ownership, administration and control by the Province of coal, petroleum and any gas or gases underlying the Reserve, and for equal sharing between Canada and the Province of the net profit

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152. *Constitution Act, 1930* [U.K.] *in* R.S.C. 1985, Appendix II, N0.26, Schedule 4, CIS. 1, 13.
153. Fort Nelson Band, B.C. O.C. 2995, 28 November 1961.

> and gross revenue from the disposition of coal, petroleum and any gas or gases, and such other minerals as are herein defined, underlying the Reserve.[154]

The 1977 Agreement does not transfer ownership of minerals to the Band, but declares that while the ownership and administration of the coal, petroleum, natural gas and any metallic minerals, including the precious metals, are vested in British Columbia, the proceeds of disposition thereof shall be shared between the Band and the province.[155] The ownership and administration of lime and timber on the reserve was acknowledged to be in Canada for the benefit of the Band, but subject to the right of British Columbia to take such commodities upon the payment of reasonable compensation.[156]

It is suggested that the 1977 Agreement is a further violation of the treaty entitlement of the Band, which clearly extends to the full beneficial interest in all coal, petroleum, and natural gas. It is further suggested that, in the absence of the 1977 Agreement, the treaty entitlement of the Band could have been enforced pursuant to s.35 of the *Constitution Act, 1982*.[157] The Agreement was given effect to by special legislation of the federal government and of the province.[158]

The Band was required under the terms of the 1977 Agreement to formally surrender its entire interest in the minerals in the reserve to Canada. The requirement that the Band surrender its interest in the minerals indicates that the Band was perceived to be entitled to an interest under Treaty #8.

It is tempting to suggest that the reserves were set apart almost in disregard of the provisions of Treaty #8. However, the promises were fulfilled in one respect: the formula for determining the extent of the area to be set aside was followed.

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154. *Fort Nelson Indian Reserve Minerals Revenue Sharing Act,* S.C. *1980-81-82-83,* c.38, Schedule, Recital E.
155. *Id.,* Schedule, cl.6.
156. *Id.*, Schedule, cl.5.
157. *Constitution Act, 1982,* being Schedule B of *Canada Act 1982* [U.K.] *in* R.S.C. 1985, Appendix II, No.44.
158. *Fort Nelson Indian Reserve Minerals Revenue Sharing Act,* S.C. *1980-81-82-83, c.38; Fort Nelson Indian Reserve Minerals Revenue Sharing Act,* S.B.C. 1980, c.16.

In 1961, the area to be set apart for the Fort Nelson Band was determined according to the membership roll at that time.[159] With a membership of 191 and an allowance of 128 acres per capita, 24,448 acres were set aside for the Band.

Other Bands have alleged outstanding land and resource entitlement under Treaty #8 in British Columbia. The McLeod Lake Band is located in the area covered by Treaty #8, but were missed by Treaty Commissioners at the turn of the century when the Treaty was signed. The federal government has funded land selection activities, but British Columbia has refused to transfer any land. The Band has brought action to enforce its claim, an action which is discussed in the next chapter.

159. Madill, *supra*, note 151, at 59,

6. THE VALIDITY OF RESOURCE DISPOSITIONS AND THE ENFORCEMENT OF TREATY LAND ENTITLEMENT

This chapter examines the validity of resource dispositions and the enforcement of treaty land entitlements. Enforcement may be sought by action by an Indian band against Canada on the treaty by analogy to a contract, or by action by Canada against a province on the Natural Resources Transfer Agreements. The chapter examines the possibility of action by an Indian band seeking treaty land entitlement against either or both the provinces and Canada on the basis of breach of fiduciary obligation. Such an action would overcome the limitations of the other methods of enforcement. The chapter concludes with a consideration of whether a breach of treaty land entitlement denies force and effect to provincial resource dispositions.

Analogous to a Contract

The source of the Indian right to reserve lands is treaty. **Treaties may be enforced by the Indians against Canada on a basis analogous to contractual** undertakings.[160] **In** *Pawis v. R.*,[161] an action in breach of contract was brought with respect to the Robinson-Huron Treaty of 1850. The numbered treaties of western Canada were patterned on the Robinson Treaties. Marceau J concluded:

> The agreement can therefore be said to be tantamount to a contract, and it may be admitted that a breach of the promises contained therein may give rise to an action in the nature of an action for breach of contract.[162]

The treaty right to lands and resources has in no way been modified by the Natural Resources Transfer Agreements.

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160. *A.G. Canada v. A.G. Ontario, [1897]* A.C. 199 (P.C.).
161. *Pawis v. R., [1979] 2* C.N.L.R. 52 (_F.C.T.D.).
162. *Id.*, at 58.

The object of the provision in the Transfer Agreements is expressly declared to be "to enable Canada to fulfill its obligations under the treaties with the Indians of the Province". The prairie provinces are implicitly obliged under the Transfer Agreements to seek to reach agreement so as to fulfill the treaty promises made by Canada. Failure by a province to set aside lands because of a failure to agree upon the lands selected may found an action against the province at the instigation of Canada upon the Transfer Agreement. The Indians are not parties to the Transfer Agreements and, accordingly, cannot bring such an action against a province.

The obligation of the prairie provinces under the Transfer Agreements to seek to reach an agreement can of course only be breached if Canada has sought to select lands to fulfill its treaty obligations. The failure of Canada to seek to select such lands in past years must preclude an action against a province with respect to those times. And indeed, the evidence suggests that Canada did not seek the fulfillment of treaty land entitlement until the late 1950s. The explanation appears to be a combination of ignorance of the non-fulfillment, acquiescence, and a deliberate policy not "to exhaust the land credits" [163] of the Indians. In the case of the Lubicon, a reserve was surveyed in 1940 for the Band, but the Department of Indian Affairs then failed to seek the transfer of the land. Fulton, the mediator in the Lubicon dispute, suggested that the responsibility for the non-fulfillment at that time rested largely with Canada, rather than " with Alberta.

A failure to reach agreement is not *per se* sufficient to found an action. The lack of agreement must indicate a failure to *seek* to reach an agreement. If the province has made *reasonable efforts* to secure such an agreement, it is suggested that no action could succeed. A violation of the Transfer Agreements might be found to exist, however, if a province could not reach agreement in the selection of lands because of its refusal to seek to allow the fulfillment of the treaty promises made to the Indians, for example, the refusal of Alberta to transfer minerals to the

163. Gallo, *supra*, note 101.

Lubicon and the Cree of Fort Chipewyan from 1975 to 1986.[164]

Breach of Fiduciary Obligation

The treaty right to reserve lands also has a fiduciary aspect. In 1897, in *A.G. Canada v. A.G. Ontario*,[165] the Privy Council held that the surrender of traditional lands by the Robinson Treaties did not impose a charge upon the land for the payment of annuities provided under the Treaties. Watson LJ described the obligation with respect to annuities created by the Treaties as a "personal obligation", rather than a right *in rem*.[166] The dispute was between the Dominion and the Province of Ontario as to which government was liable; it was assumed that liability vested in one or the other. The Privy Council rejected the application of the statutory interpretation principle of "liberal construction", because the "advantage" of the Indians was not at issue.[167]

In 1910, the Privy Council reached a similar conclusion in an action by the Dominion against Ontario for recovery of annuities paid by the Dominion under Treaty #3.[168] But Loreburn LC expressly reserved the question of the liability of Ontario to fulfill treaty land entitlement:

> In the course of argument a question was mooted as to the liability of the Ontario Government to carry out the provisions of the treaty so far as concerns future reservations of land for the benefit of the Indians. No such matter comes up for decision in the present case. It is not intended to forestall points of that kind which may depend upon different considerations, and, if ever they arise, will have to be discussed and decided afresh.[169]

It is suggested that an action by *Indians* to secure fulfillment of treaty promises to reserve lands and resources will properly lie against the Crown in the right of the province for

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164. See the section of Chapter 4 entitlement "Mines and Forests".
165. *A.G. Canada v. A.G. Ontario, [1897]* A.C. 199 (P.C.).
166. *Id.*, at 213.
167. *id.*, at 212.
168. *Canada v. Ontario, [1910]* A.C. 637 (P.C.).
169. *Id.*, at 647.

-breach of fiduciary obligation. The 1897 *A.G. Canada v. A.G. Ontario*[170] decision is not applicable to such an action. The action would be by the Indians, not a branch of the Crown; the "advantage" of the Indians *would be* at issue; and the appropriate approach to the construction of the terms of the surrender — the treaty — is well recognized to be "fair, large and liberal' '.[171]

The title to surrendered lands and the corresponding fiduciary obligation vests in the Crown, although administration may vest in the right of the Dominion or the province. As Watson LC explained in *St. Catherine's Milling:*

> it must always be kept in view that, wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a Province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.[172]

It is suggested that liability for implementation of treaty promises or surrender conditions should also vest in the Crown. As Chief Justice McKeown observed in *Fahey v. Roberts*,[173] the Indians "were dealing with the Crown, which is the same whether represented by the Dominion or Provincial authorities". The Chief Justice considered that a different result would entail the Crown "taking advantage of its own wrong" .[174]

In 1983, in *Smith v. R.*,[175] Estey J went to considerable lengths to point out the possible liability for implementation of " the promises to the Indians. He observed, upon concluding that a surrender of an Indian interest was absolute, that:

> This might give rise to differences as between the parties to the release, but does not go either to the validity of the release as a conveyancing instrument or the state of the provincial title. If and when such related, but here extraneous, issues arise, the

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170. *A.G. Canada v. A.G. Ontario, supra*, note 165.
171. *R. v. Simon, supra,* note 43.
172. *St. Catherine's Milling and Lumber Co. v. R. (1888),* 14 A.C. 46 (P. C.) at 56.
173. *Fahey v. Roberts (1916), 51* N. B.R. (2d) 329 (FJ.B.S.C., K. B.) at 344.
174. *Id.*
175. *Smith v. R., [1983] 3* C.N.L.R. 161 (S.C.C.).

courts then concerned may find of interest the comment of Street J in the judgment of the Divisional Court of Ontario in *Ontario Mining Company, Limited and the Attorney General of Canada v. Seybold, [1903]* A.C. *73,* at 81:

> **The surrender was undoubtedly burdened with the obligation imposed by the treaty to select and lay asi& special portions of the tract covered by it for the special use and benefit of the Indians. The Provincial Government could not without plain disregard of justice take advantage of the surrender and refuse to perform the condition attached to it . . . .** [176]

The fiduciary basis of the liability of the Crown for the implementation of the conditions of a treaty was declared by the Supreme Court of Canada in *Guerin v. R.*[177] The case concerned an action for breach of trust arising from the surrender and subsequent lease of reserve lands in a manner contrary to the assurances given to the Band by the Crown. Dickson J (as he then was) (Lamer, Beetz, Chouinard JJ concurring) declared:

> The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.[178]
>
> ...
>
> The Crown cannot promise the band that it will obtain a lease of the latter's land on certain stated terms, thereby inducing the band to alter its legal position by surrendering the land, and then simply ignore that promise to the band's detriment . . ..[179]

It is suggested that both the Crown in right of Canada and in right of a province may be liable for breach of the fiduciary obligation in the event of the non-fulfillment of conditions attached to a surrender by treaty. The liability of the Crown in right of Canada arises from the non-fulfillment of the conditions attached to the surrender made to the Crown in right of Canada. The liability of the Crown in right of a province arises from its failure to perform its fiduciary obligation,[180] by ensuring that

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176. *Id.*, at 169.

177. *Guerin v. l?., [1985]* 1 C.N.L.R. 120, 13 D.L.R. (4th) 321, [1984] 6 W.W.R. 481 (S. C.C.).

178. *Id.*, C.N.L.R. at 136, D.L.R. at 334, W.W.R. at 495.

179. *Id.*, C.N.L.R. at 140, D.L.R. at 344, W.W.R. at 505.

180. The Supreme Court of Canada, in *obiter*, favours such a conclusion; see *R. v. Sparrow, [1990] 3* C. N.L.R. 160 (S.C.C.) at 178, *per* Dickson CJ and La Forest J: "[Section 35(l)] affords aboriginal peoples constitutional protection against provincial legislative power. We are, of

conditions of surrender are met. Only the Crown in right of a province can make the land and resources available for the benefit of the Indians, and thereby fulfill the conditions of the treaties.

Validity of Resource Dispositions

Treaties have a contractual and a fiduciary aspect. But to what extent does the treaty right to lands and resources deny the power of the provinces to issue resource dispositions and of resource companies to engage in development in furtherance of them? It is suggested that the contractual and fiduciary aspects of the treaty right do not exhaust the manner in which it may be enforced. The treaty right is a *sui generis* right which, of its own nature and because of its constitutional character, has been and is beyond the power of the province (by virtue, *inter alia*, of **s.88 of the** *Indian Act)* and beyond the power of Canada (by virtue of s.35 of the *Constitution Act, 1982*) to extinguish.

It is fairly clearly established that the province cannot extinguish aboriginal title.[181] Aboriginal title is "an interest other than that of the Province" ,[182] to which the title of the provinces is subject under s. 1 of the Natural Resources Transfer Agreements. It has also been declared a ' *'sui generis"* interest by the Supreme Court of Canada.[183] An injunction will issue to protect aboriginal title where the balance of convenience favours the Indian band. Thus, in *Martin v. British Columbia and MacMillan Bloedel*,[184] the Clyoquot and Ahousaht Indian bands sought an injunction to restrain the logging of Meares

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course, aware that this would, in any event, flow from the *Guerin case . ..."*

181. *See* Richard H. Bartlett, "Managing Resource Development on Indian Reserve Lands" *in* J. Owen Saunders, cd., *Natural Resources in a Federal State* (Toronto: Carswell, 1986) 190 at 190-191.

182. See *St. Catherine's Milling and Lumber Co. v. R. (1888),* 14 A.C. 46 (P.C.) at 57.

183. *Guerin v. R., [1985]* 1 C.N.L.R. 120 at 136, 13 D.L.R. (4th) 321 at 339, [1984] 6 W.W.R. 481 at 449 (S.C.C.) *per* Dickson J.

184. *Martin v. British Columbia and MacMillan Bloedel* (1985), 2 C.N.L.R. 58 (B.C.C.A.) [hereinafter *Meares Island case].*

Island by MacMillan Bloedel. MacMillan Bloedel held a tree-farm licence issued under the provincial *Forest Act. The* British Columbia Court of Appeal issued an injunction restraining the logging of Meares Island by MacMillan Bloedel. All five members of the Court concluded, upon a consideration of *Calder*, that there was a serious question to be tried as to whether aboriginal title existed on Meares Island. **s The majority of the Court also concluded that the balance of convenience favoured the Indian band, and that the injunction must issue to prevent them suffering irreparable harm.[186]

It was forcefully argued that the issuance of the injunction would cast doubts as to provincial sovereignty over resources and bring about a significant detrimental economic impact. The argument was rejected. Seaton JA observed:

> It has also been suggested that a decision favorable to the Indians will cast doubt on the tenure that is the basis for the huge investment that has been and is being made. I am not influenced by the argument. Logging will continue on this coast even if some parts are found to be subject to certain Indian rights. It may be that in some areas the Indians will be entitled to share in one way or another, and it may be that in other areas there will be restrictions on the type of logging. There is a problem about tenure that has not been attended to in the past. We are being asked to ignore the problem as others have ignored it. I am not willing to do that.[187]

The Court fully recognized the challenge to the validity of resource dispositions posed by the action, and acknowledged that a decision at trial for the Indians might declare the dispositions invalid.

In the same way that aboriginal title, a *sui generis* interest, may challenge the validity of a resource disposition and be protected by injunctive relief, so also may a treaty right. In *Simon v. R.*,[188] Dickson CJ, in the Supreme Court of Canada, declared that "An Indian treaty is unique; it is an agreement *sui*

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185. *Id.*, *per* Seaton at 65, Lambert at 74, MacFarlane at 75, MacDonald at 81, Craig at 88.
186. *Id.*, *per* Seaton at 72, Lambert at 74, MacFarlane at 80.
187. *Id.*, at 73.
188. *Simon v. R., [1985] 2* S.C.R. 387, [1986] 1 C.N.L.R. 153.

generis''.[189] In that case, the Court held that provincial legislation could not restrict a treaty right. Dickson CJ observed that, "The effect of section 88 of the Indian Act is to exempt the Indians from provincial legislation which restricts or contravenes the terms of any treaty.' '[190] The Court concluded that Nova Scotia was not constitutionally empowered to restrict the treaty right. Similarly, in 1990, the Supreme Court declared that a province cannot extinguish a treaty right to practice aboriginal customs in a territory by legislation establishing and regulating a park.[191]

The description of a treaty right as a *sui generis* interest, in the manner of aboriginal title, suggests that it may also be regarded as "an interest other than that of the Province' '[192] to which the transfer to the Province is subject under s. 109 of the *Constitution Act, 1867.* In 1897, the Privy Council, in *A.G. Canada v. A.G. Ontario*,[193] rejected the suggestion that the right to annuities under the Robinson Treaties was such an interest, but the treaty right to reserve lands and resources was expressly distinguished from the treaty right to annuities by the Privy Council in *Canada v. Ontario*,[194] and the reasoning does not appear applicable to an action brought by Indians to enforce that right.

The recognition of the ' 'sui generis" nature of a treaty right to resources was relied upon in the British Columbia Supreme Court in *Claxton v. Saanichton Marina Ltd.*[195] In that case, the Court held that a licence of occupation issued by British Columbia was of no force or effect to the extent that it purported to permit the construction of a marina contrary to a right to the fishery promised by treaty. The Court issued an

189. *Id.*, S.C.R. at 404, C.N.L.R. at 169.
190. *Id.*, S.C.R. at411, C.N.L.R. at 175. See *also R.* v. *White and Bob* (1965), 50 D.L.R. (2d) 613 (B.C.C.A.); aff'd (1965) 52 D.L.R. (2d) 481 (S.C.C.).
191. *R. v. Sioui*, [1990] 3 C.N.L.R. 127 (S.C.C.); aff'g [1987] 4 C.N.L.R. 118 (Que. C.A.).
192. *St. Catherine's Milling and Lumber Co. v. R., supra*, note 182.
193. *A.G. Canada v. A.G. Ontario, [1897]* A.C. 199 (P.C.).
194. *Canada v. Ontario, [1910]* A.C. 637 (P.C.).
195. *Claxton v. Saanichton Marina Ltd., [1987] 4* C.N.L.R. 48 (B.C.S.C.).

injunction on the basis of the "very important' '[196] treaty right of the Band.

On appeal, the British Columbia Court of Appeal emphasized the Supreme Court of Canada's conclusion that treaty rights were "unique, and that the y confer additional protection on the Indians" .[197] The Court cited s.88 of the *Indian Act*[198] and concluded, in the words of Wallace:

> There is no question that if the licence of occupation derogates from the treaty right of the Indians, it is of no force and effect. The province cannot act to contravene the treaty rights of Indians, nor can it authorize others to do so.[199]

The Court upheld the injunction against the marina company.

Similarly, in *Hunt v. Halcan Log Services Ltd.*,[200] *an* injunction issued to restrain logging under a provincial disposition where it was considered that there was a fair question to be tried as to whether the logging violated a treaty right to fish.

The jurisprudence suggests that a provincial disposition which "derogates" from the treaty right to reserve land and resources will to that extent be of no force and effect. The question was considered in the context of oil and gas development in the *Lubicon Band* case,[201] and in the context of forestry in the *McLeod Luke Band* case.[202]

In 1983, the Lubicon Band of Indians sought an interim injunction to restrain on-going oil and gas exploration and development in northern Alberta. The claim was founded upon unextinguished aboriginal title, and, in the alternative, upon outstanding treaty land entitlement under Treat y #8. On the basis of the latter claim, the Band sought an injunction restraining any

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196. *Id.*, at 61.
197. *Claxton v. Saanichton Marina Ltd., [1989] 3* C.N.L.R. 46 (B.C.C.A.); aff'g [1987] 4 C.N.L.R. 48 (B.C.S.C.) at 54.
198. *Indian Act,* R.S.C. 1979, c.I-6.
199. *Claxton v. Saanichton Marina Ltd., [1987] 4* C.N.L.R. 48 (B.C.S.C.) at 58.
200. *Hunt v. Halcan Log Services Ltd., [1987] 4* C.N.L.R. 63 (B.C.S.C.).
201. *Lubicon Band* case, *supra*, note 86.
202. *Chingee v. British Columbia, [1989] 4* C.N.L.R. 90 (B.C. S. C.) [hereinafter *McLeod Lake Band case].*

- activity whatsoever on the part of the oil and gas companies "on the assumption that the Crown, in the right of Alberta, has no right to lease or sell mineral rights in such territory nor to authorize the respondents to carry out exploration and drilling for any oil and gas contained under the lands in question' '.[203] Forsyth J found that there was a serious question to be tried;[204] to that extent, he recognized the correctness of the basis of the claim.

The Court refused, however, to issue an injunction. The Band's argument, for an injunction, was that the continuation of the activities of the oil companies would lead to irreparable harm to their traditional way of life, to hunting and trapping, in particular. Forsyth J rejected the Band's argument, and held that the balance of convenience favoured the oil companies, because they would "suffer large and significant damages" and a "loss of competitive position in the industry" if the injunction was granted.[205] The argument with respect to the issuance of the injunction did not emphasize the denial of the treaty right to land and resources.

The decision of Forsyth J was upheld in 1985 on appeal to the Alberta Court of Appeal.[206] The Alberta Court of Appeal referred to the development of agriculture in parts of the area, and to oil and gas activity in the 1960s and 1970s, and concluded that the evidence supported the finding of Forsyth J that the "deterioration in the way of life" of the Band did not

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203. *Lubicon Band case, supra,* note 86, [1984] 4 C.N.L.R. 27 at 30,29 Alta. L. Rep. (2d) 152 (Q.B.).

204. *Id.,* C.N.L.R. at 31.

205. *Id.,* C.N.L.R. at 158, Alta. L. Rep. at 33. Also see C.N.L.R. at 32, Alta. L. Rep. at 157:

> **This is not a case of an isolated community in the remote north where access is only available by air on rare occasions and whose way of life is dependent to a great extent on living off the land itself. The twentieth century, for better or for worse, has been part of the applicants' lives for a considerable period of time. The influence of the outsi& world comes from various sources, in many cases not connected with any of the activities of any of the respondents. On that basis alone I am satisfied an interim injunction in the various forms sought and for the various reasons advanced by the applicants is not appropriate under the circumstances and the court's discretion should not be exercised in favor of the applicants.**

206. *Lubicon Band case, [1985] 3* W.W.R. 193 (Alta. C.A.).

date from the activities of the respondents.[207] In any event, with respect to producing oil wells, counsel for the Band conceded, and the Court of Appeal agreed, that the balance of convenience must favour the oil companies. With respect to seismic activity and exploration drilling, the Court did not find that the evidence showed a critical reduction in wildlife; the court determined that these activities were necessarily temporary in nature and that "after it ends the wildlife will return in number".[208]

The Alberta Court of Appeal decision suggests that, with respect to oil and gas exploration and production, the court would invariably consider that the balance of convenience favoured the oil companies, if emphasis in argument is laid upon the damage to traditional ways of life. It is suggested that a different result might follow if the argument stressed the denial of a treaty right to land and resources, the fulfillment of which right was a condition of resource development in the region.

In 1988, in *Chingee v. British Columbia*,[209] the McLeod Lake Band sought an injunction to restrain logging in an area of 55,000 acres of traditional lands, within which it sought a reserve of approximately 40,000 acres, based on 128 acres per capita, as provided for in Treaty #8. The Band did not sign Treaty #8, but wished to adhere to it as Treaty #8 covers their traditional lands. The federal government had recognized the Band's right to adhere to Treaty #8, but British Columbia* had refused to convey any land to the federal government for the purposes of a reserve.

The Court held that there was a fair question to be tried.[210] McLachlin CJ concluded that historical material supported the contention "that the band has the right to participate in selection of its reserve lands at least through consultation".[211] The Chief Justice relied on "the historical

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207. *Id.*, at 198.
208. *Id.*, at 202.
209. *McLeod Lake Band* case, [1989] 4 C.N.L.R. 90 (B.C. S.C.).
210. *Id.*, at 91.
211. *Id.*, at *91, per* McLachlin CJ, quoting herself in *Calder v. A.G. British Columbia, [1973]* S.C.R. *313, [1973] 4* W.W.R. 1, 34 D.L.R. (3d) 145.

- application of the treat y's provision for selection of a reserve", and rejected the argument that "the band has no right to select the lands it wishes to have as it has done in this case' '.[212] McLachin CJ further recognized, on the basis ofs. 13 of the *British Columbia Terms of Union,* that "an argument can be made that the province is obligated to cede the territory selected upon the request of the federal government.' '[213]

The Chief Justice noted the loss the Band would suffer to treaty land and resources if logging proceeded:

> If further logging proceeds, the Indians will lose the right to log those particular areas themselves and may suffer some damage to the shorelines of lakes which they would ultimately like to use for recreational purposes. The Band may suffer irreparable harm . ..?[14]

The Chief Justice concluded, however, that the balance of convenience was even on account of the disruption of the business activities of the forest companies. An application for an injunction with respect to the 1000 acres then being logged was accordingly rejected. An injunction did, however, issue with respect to the balance of the claim area, the forest companies involved having offered not to proceed, provided the claim was brought to trial within two years.

It is concluded that the *Lubicon Band* and the *McLeod Lake Band* cases support the suggestion that provincial dispositions, to the extent that they deny the treaty right to reserve lands and resources, are of no force and effect.[215] Whether or not an interim injunction will issue depends on the balance of convenience. If argument is focused on the denial of lands and resources promised by treaty, an interim injunction may issue. At trial, the balance of convenience becomes immaterial, and a permanent injunction should issue to preclude the violation of the treaty right.

A *lis pendens* may, in any event, be registered against

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212. *Id.*, at 91.
213. id., at 91, *per* McLachlin CJ, quoting herself, *supra*, note 211.
214. *Id.*, at 92.
215. *Lubicon Band* case, *supra*, note 201; *McLeod Lake Band, supra*, note 86.

unpatented Crown lands. In *Cook v. Beckman*,[216] the Saskatchewan Court of Appeal suggested that the Lac LaRonge Band might file a *lis pendens* against unpatented Crown land, including that subject to a forest management licence agreement.

The previous discussion outlined the possible enforcement of treaty land entitlement by action upon the treaty, upon the Natural Resources Transfer Agreements, and upon breach of fiduciary obligation. But it may well be that the most effective and speedy remedy of an Indian band to secure enforcement of treaty land entitlement is to challenge the validity of resource dispositions.

216. *Cook v. Beckman (8* May 1990) (Sask. C.A.) [unreported].

7. A CLOUD ON THE TITLE

Fulfillment of the treaty promises made by the Crown to set aside lands and resources for the Indians is a condition of resource development today. The treaties provided fora compromise of the interests of the Indian people in the face of the European settlement and development of the West. That compromise appears to have been forgotten. The failure to provide land and resources to satisfy the treaty land entitlement flies in the face of the assurances given by the Crown at the time of treaty. At the time of Treaty #7, it was said:

> As surely as my past promises have been kept, so surely shall those made by the Commissioners be carried out in the future. If they were broken I would be ashamed to meet you or look you in the face; but every promise will be solemnly fulfilled as certainly as the sun now shines down upon us from the heavens. I shall always remember the kind manner in which you have to-day spoken of me.[217]

The legal significance of the failure to fulfill the promises of lands and resources is now evident. In 1873, Treaty Commissioner and Lieutenant Governor Morris suggested that resource disposition should be frozen until treaty land entitlement was met.[218] Over a century later, the treaty entitlements have yet to be fulfilled, and the courts now appear . prepared to impose the "freeze" first contemplated by Morris. If the condition upon which resource development was first undertaken in the West is not fulfilled, then that development may be stopped.

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217. *Per* Lieutenant Colonel McLeod, Treaty #7, 1877, in Morris, *supra*, note 15, at 275.
218. *Supra*, note 52.

8. A 1991 POSTSCRIPT: DELGAMUUKW AND BEAR ISLAND FOUNDATION

Delgamuukw v. R.[219] and *Bear Island Foundation v. A.G. Ontario*[220] were delivered some time after this paper was written. Both are concerned with aspects of aboriginal title and some comment is appropriate. In general, it may be said that the decision of the Supreme Court of Canada in *Bear Island Foundation* affirms the analysis set forth in the paper. The decision of the British Columbia Supreme Court in *Delgamuukw*, however, suggests that a lesser standard of extinguishment of aboriginal title is imposed on the Crown than the paper would suggest. As this postscript indicates, it is considered that the *Delgamuukw* decision will probably be overturned on this point.

In *Delgamuukw*, the plaintiffs sought to establish aboriginal title, ownership and jurisdiction to their traditional territory, 58,000 square kilometres in North-central British Columbia. McEachem CJ examined jurisprudence from Canada, the United States, Australia, and decisions of the Privy Council. He concluded that aboriginal title at common law arises out of occupation or use of specific land for aboriginal purposes for an indefinite or long, long time before the assertion of sovereignty, and held that the plaintiffs had established such title to most of the area claimed.

The Chief Justice adopted a narrow understanding of the ambit of rights conferred by aboriginal title. He cited the similar understanding of Steele J in *Bear Island Foundation* in the Ontario High Court, and declared:

> In my view, the aboriginal rights of plaintiffs' ancestors included all those sustenance practices and the gathering of all those products of the land and waters of the territory I shall define which they practised and used before exposure to European civilization (or sovereignty) for subsistence or survival, including

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219. *Delgamuukw v. R., [1991] 3* W.W.R. 97 (B.C.S.C.).
220. *Bear Island Foundation v. A.G. Ontario, [1991] 3* C.N.L.R. 79 (S.C.C.).

> wood, food and clothing, and for their culture and ornamentation — in short, what their ancestors obtained from the land and waters for their aboriginal life.[221]

Following the Supreme Court of Canada decision in *Bear Island*, there seems to be little authority left in the remarks of Steele J and, perhaps equally so, in these remarks of the Chief Justice. The Supreme Court of Canada in *Sparrow* suggested that a flexible interpretation of aboriginal rights should be adopted so as to permit their evolution over time.

The real issue in *Delgamuukw*, was whether or not the aboriginal title of the plaintiffs had been extinguished or otherwise terminated. The Chief Justice reviewed the decisions of the Supreme Courts of the United States and Canada and accepted the test, derived from *United States v. Sante Fe Pacific Railroad Co.*, phrased by Supreme Court of Canada in *Sparrow* as follows: "The test of extinguishment to be adopted, in our opinion, is that the sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.' '[222] He rejected the requirement that express language is necessary for extinguishment. There is no express language purporting to extinguish aboriginal title in British Columbia. The Chief Justice sought to explain what could constitute evidence of a "clear and plain intention" to extinguish. He declared:

> the question is not did the Crown through its officers specifically intend to extinguish aboriginal rights apart from their general intention, but rather did they plainly and clearly demonstrate an intention to create a legal regime from which it is necessary to infer that aboriginal interests were in fact extinguished.[223]

The Chief Justice concluded that the general land settlement enactments "construed in their historic setting exhibit a clear and plain intention to extinguish aboriginal interests in order to give an unburdened title to settlers, and the Crown did extinguish such rights to all the lands of the colony" .[224]

The curious feature of the Chief Justice's reasoning at this point is his jettisoning of regard for the authorities he had

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221. *Delgamuukw v. R., supra*, note 219, at 391..
222. *Id.*, at 403.
223. *Id.*, at 404.
224. *Id.*, at 113.

previously relied upon. He does not consider the extensive jurisprudence in the United States or Canada which suggests that general land legislation does not extinguish aboriginal title. Rather the Chief Justice prefers to "agree with the views of the seven judges who recited the same conclusion in *Caller*."[225] The problem with this reliance is that he is not, of course, referring to the seven justices of the Supreme Court of Canada in *Calder*. The decision in the Supreme Court of Canada on this identical question was a 3-3 split. Rather, the Chief Justice is relying on the one judge of the British Columbia Supreme Court, the three judges of the British Columbia Court of Appeal, and the three judges of the Supreme Court of Canada who favoured his question — a curious approach to judicial precedent. The analysis and conclusion of the Chief Justice on the question of extinguishment appears to be contrary to the established authorities. The requirement of a "clear and plain intention" to extinguish suggests the need for a substantial degree of manifestation of that intention. The established authorities indicate that general land legislation does not, of itself, manifest that intention to a sufficient degree.

Bear Island Foundation was appealed to the Supreme Court of Canada. The likelihood of success for the Band seemed remote, given the number of issues confronting it and the findings of fact made by the trial judge. In the Supreme Court of Canada the Band's appeal was dismissed, but it did have some success. The Court observed that "this case, it must be underlined, **raises** for the most part essentially factual issues on which the Courts below were in agreement." The Court accordingly did not take issue with the findings of fact. But it did reject **some** of the legal findings based on those facts. The Court observed:

> in particular, we find that on the facts found by the trial judge the Indians exercised sufficient occupation of the lands in question throughout the relevant period to establish an aboriginal right: see in this context, *Simon Sparrow*. In our view, the trial judge was misled by the considerations which appear in the

225. *Id.*, at 411.

passage . ...[226]

The effect of the Court's observation is to reject the strict interpretation of the requirements and high standard, imposed by Steele J in the Ontario Supreme Court, upon the proof of aboriginal title.

The Supreme Court of Canada went on to observe, however, that it was unnecessary to examine the specific nature of the aboriginal right because the title was "surrendered by arrangements subsequent to that treaty by which the Indians adhered to the treaty in exchange for treaty annuities and a reserve.' '[227] It accordingly dismissed the appeal, but not without stating the obligation of the Crown, namely that "the Crown has failed to comply with some of its obligations under this agreement and thereby breached its fiduciary obligation to the Indians.' '[228] In the result, the Band was assured by the Supreme Court of a remedy to ensure the provision of land to the Band. It represents the first time that the Supreme Court has declared the fiduciary obligation that attaches upon the surrender by aboriginal peoples of aboriginal title to non-reserve land.

Bear Island Foundation indicates a familiar pattern in the **assertion of aboriginal rights. Invariably, local courts are unsympathetic to aboriginal claims. It requires the decision of the highest court in the land to require the local courts to give effect to aboriginal rights. In that context,** *Delgamuukw* appears as a last attempt by a local British Columbia court to rely on the only remaining **issue rationally left to the court to deny a land " claim. It is an attempt that will probably fail.**

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226. *Bear Island Foundation, supra,* note 220, at 81.
227. *Id.*
228. *Id.*

APPENDIX
Treaty Land Entitlement:
The Treaty Clauses Providing for Establishment of Reserves

The Robinson Treaties (1850) were the forerunner of the numbered treaties in the West:

> That for, and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada, to them in hand paid, and for the further perpetual annuity of six hundred pounds of like money, the same to be paid and delivered to the said Chiefs and their Tribes at a convenient season of each year, of which due notice will be given, at such places as may be appointed for that purpose, they the said Chiefs and Principal men, on behalf of their respective Tribes or Bands, do hereby fully, freely, and voluntarily surrender, cede, grant, and convey unto Her Majesty, her heirs and successors for ever, all their right, title, and interest to, and in the whole of, the territory above described, save and except the reservations set forth in the schedule hereunto annexed; which reservations shall be held and occupied by the said Chiefs and their Tribes in common, for their own use and benefit.
>
> - the schedule designated specific areas of territory

Treaty #1 (1871) Winnipeg and Southeast Manitoba:

> and Her Majesty the Queen, hereby agrees and undertakes to lay aside and reserve for the sole and exclusive use of the Indians, the following tracts of land, that is to say: For the use of the Indians belonging to the band of which Henry Prince, otherwise called Mis-Koo-ke-new, is the Chief, so much of land on both sides of the Red River, beginning at the south line of St. Peter's Parish, as will furnish one hundred and sixty acres of each family of five, or in that proportion for larger or smaller families; and for the use of the Indians of whom Na-sha-ke-penais, Na-na-wa-nanan, Ke-we-tayash, and Wa-ko-wush, are the Chiefs, so much land on the Roseau River, as will furnish one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families, beginning from the mouth of the river; and for the use of the Indians, of which Ka-ke-ka-penais is the Chief, so much land on the Winnipeg River, above Fort Alexander, as will furnish one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families; beginning at a distance of a mile or thereabout above the Fort; and for the use of the Indians, of whom Oo-za-we-kwun is Chief, so much land on the south and east side of the Assiniboine, about twenty miles above the Portage, as will

furnish one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families, reserving also a further tract enclosing said reserve, to comprise an equivalent to twenty-five square miles of equal breadth, to be laid out round the reserve; it being understood, however, that if at the date of the execution of this treaty, there are any settlers within the bounds of any lands reserved by any band, Her Majesty reserves the right to deal with such settlers as she shall deem just, so as not to diminish the extent of land allotted to the Indians.

Treaty #2 (1871) Southwest Manitoba and Southeast Corner of Saskatchewan

to have and to hold the same to Her Majesty the Queen and her successors for ever, and Her Majesty the Queen hereby agrees and undertakes to lay aside and reserve, for the sole and exclusive use of the Indians inhabiting the said tract, the following lots of land, that is to say:

For the use of the Indians belonging to the band of which Mekis is Chief, so much land between Turtle River and Valley River on the south side of Lake Dauphin as will make one hundred and sixty acres for each family of five persons, or in the same proportion for a greater or smaller number of persons. And for the use of the Indians belonging to the band of which François, or Broken Fingers, is Chief, so much land on Crane River ruining into Lake Manitoba as will make one hundred and sixty acres for each family of five persons, or in the same proportion for a greater or smaller number of persons. And for the use of the band of Indians belonging to the bands of which Ma-sah-kee-yash and Richard Woodhouse are Chiefs, so much land on the river between Lake Manitoba and St. Martin's Lake, — known as ' 'Fairford River," and including the present Indian Mission grounds, — as will make one hundred and sixty acres for each family of five persons, or in the same proportion for a greater or smaller number of persons. And for the use of the Indians of whom Son-sense is Chief, so much land on the east side of Lake Manitoba to be laid off north of the creek near which a fallen elm tree now lies, and about half-way between Oak Point and Manitoba Post, so much land as will make one hundred and sixty acres for each family of five persons, or in the same proportion for a greater or smaller number of persons. Saving, nevertheless, the rights of any white or other settler now in occupation of any lands within the lines of any such reserve.

Treaty #3 (1873) Lake of the Woods

And Her Majesty the **Queen** hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and also to lay aside and reserve for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, in such a manner as shall seem best, other reserves of land in the said territory hereby ceded, which said reserves shall be selected and set aside where it shall be deemed most convenient and advantageous for each band or bands of Indians, by the officers of the said Government appointed for that purpose, and such selection shall be so made after conference with the Indians: Provided, however, that such reserve whether for farming or other purposes shall in nowise exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, and such selection shall be made if possible during the course of next summer or as soon thereafter as may be found practicable, it being understood, however, that if at the time of any such selection of any reserves as aforesaid, there are any settlers within the bounds of the lands reserved by any band, Her Majesty reserves the right to deal with such settlers as she shall deem **just,** so as not to diminish the extent of land allotted to Indians.

Treaty #4 (1874) Southern Saskatchewan

And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the " Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families.

Provided, however that it be understood that if, at the time of the selection of any reserves as aforesaid, there are any settlers within the bounds of the lands reserved for any band, Her Majesty retains the right to deal with such settlers as she shall deem just, so as not to diminish the extent of lands allotted to the Indians.

Treaty #5 (1875) Central and Northern Manitoba

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves

for the benefit of the said Indians, to be administered and dealt with for them by her Majesty's Government of the Dominion of Canada, provided all such reserves shall not exceed in all one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families — in manner following, that is to say: For the Band of ' 'Saulteaux, in the Beren's River" region, now settled or who may within two years settle therein, a reserve commencing at the outlet of Beren's River into Lake Winnipeg, and extending along the shores of said lake, and up said river and into the interior behind said lake and river, so as to comprehend one hundred and sixty acres for each family of five, a reasonable addition being, however, to be made by Her Majesty to the extent of the said reserve for the inclusion in the tract so reserved of swamp, but reserving the free navigation of the said lake and river, and free access to the shores and waters thereof, for Her Majesty and all Her subjects, and expecting thereout such land as may have been granted to or stipulated to be held by the "Hudson Bay Company," and also such land as Her Majesty or Her successors, may in Her good pleasure, see fit to grant to the Mission established at or near Beren's River by the Methodist Church of Canada, for a church, school-house, parsonage, burial ground and farm, or other mission purposes; and to the Indians residing at Poplar River, falling into Lake Winnipeg north of Beren's River, a reserve not exceeding one hundred and sixty acres to each family of five, respecting, as much as possible, their present improvements.

And inasmuch as a number of the Indians now residing in and about Norway House of the Band of whom David Rundle is Chief are desirous of removing to a locality where they can cultivate the soil, Her Majesty the Queen hereby agrees to lay aside a reserve on the west side of Lake Wimipeg, in the vicinity of Fisher River, so as to give one hundred acres to each family of five, or in that proportion for larger or smaller families, who shall remove to the said locality within "three years,'' it being estimated that ninety families or thereabout will remove within the said period, and that a reserve will be laid aside sufficient for that or the actual number; and it is further agreed that those of the band who remain in the vicinity of "Norway House" shall retain for their own use their present gardens, buildings and improvements, until the same be departed with by the Queen's Government, with their consent first had and obtained, for their individual benefit, if any value can be realized therefor.

And with regard to the Band of Wood Indians, of whom Ta-pas-ta-num, or Donald William Sinclair Ross, is Chief, a reserve at Otter Island, on the west side of Cross Lake, of one hundred

and sixty acres for each family of five or in that proportion for small families — reserving, however, to Her Majesty, Her successors and Her subjects the free navigation of all lakes and rivers and free access to the shores thereof; Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as She shall deem fit, and also that the aforesaid reserves of land or any interest therein may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.

Treaty #6 (1876) Central Saskatchewan and Alberta

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, provided all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say:—

That the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them.

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as she shall deem fit, and also that the aforesaid reserves of land or any interest therein may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.

Treaty #7 (1877) Southern Alberta

It is also agreed between Her Majesty and her said Indians that reserves shall be assigned them of sufficient area to allow one square mile for each family of five persons, or in that proportion for larger and smaller families, and that said reserves shall be located as follows, that is to say.

First — The reserves of the Blackfeet, Blood and Sarcee bands of Indians, shall consist of a belt of land on the north side of the Bow and South Saskatchewan Rivers, of an average width of four miles along said rivers, down stream, commencing at a point on the Bow River twenty miles northwesterly of the

‘ ‘Blackfoot crossing” thereof, and extending to the Red Deer River at its junction with the South Saskatchewan; also for the term of ten years, and no longer, from the date of the concluding of this treaty, when it shall cease to be a portion of said Indian reserves, as fully to all intents and purposes as if it had not at any time been included therein, and without any compensation to individual Indians for improvements, of a similar belt of land on the south side of the Bow and Saskatchewan Rivers of an average width of one mile along said rivers, down stream; commencing at the aforesaid point on the Bow River, and extending to a point one mile west of the coal seam on said river, about five miles below the said ‘‘ Blackfoot crossing;” beginning again one mile east of the said coal seam and extending to the mouth of Maple Creek at its junction with the South Saskatchewan; and beginning again at the junction of the Bow River with the latter river, and extending on both sides of the South Saskatchewan in an average width on each side thereof of one mile, along said river against the stream, to the junction of the Little Bow River with the latter river, reserving to Her Majesty, as may now or hereafter be required by her for the use of her Indian and other subjects, from all the reserves hereinbefore described, the right to navigate the above mentioned rivers, to land and receive fuel and cargoes on the shores and banks thereof, to build bridges and establish ferries thereon, to use the fords thereof and all the trails leading thereto, and to open such other roads through the said reserves as may appear to Her Majesty’s Government of Canada, necessary for the ordinary travel of her Indian and other subjects, when the same may be in any manner encroached upon by such roads.

Secondly — That the reserve of the Peigan band of Indians shall be on the Old Man’s River, near the foot of the Porcupine Hills, at a place called ‘ ‘Crow’s Creek.”

And thirdly — The reserve of the Stony band of Indians shall be in the vicinity of Morleyville.

Treaty #8 (1899) Northwestern Saskatchewan and Northern Alberta, Northeastern British Columbia and the Northwest Territory South of Great Slave Lake.

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from

band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in severalty, to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as She may see fit.

Treaty #10 (1906) Northeastern Saskatchewan including Lac LaRonge

And His Majesty the King hereby agrees and undertakes to set aside reserves of land for such bands as desire the same, such reserves not to exceed in all one square mile for each family of five for such number of families as may elect to reside upon reserves or in that proportion for larger or smaller families; and for such Indian families or individual Indians as prefer to live apart from band reserves His Majesty undertakes to provide land in severalty to the extent of one hundred and sixty (160) acres for each Indian, the land not to be alienable by the Indian for whom it is set aside in severalty without the consent of the Governor General in Council of Canada, the selection of such reserves and land in severalty to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.

Provided, however, that His Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band or bands as He may see fit.

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