INDIAN RESERVES ON THE PRAIRIES

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Indian reserves comprise the only land left to the Indians of the Prairie Provinces. This paper endeavors to examine and explain the rights of ownership and administration held by the Indians and Governments in such lands. It endeavors to determine what the treaties between the Indians and the Crown promised and to what extent they have been fulfilled. Rights with respect to minerals and timber are examined in the course of the study.

I. THE ESTABLISHMENT OF INDIANS RESERVES BY TREATY[1]

Alberta, Manitoba and Saskatchewan make up the Prairie Provinces of Canada. The southern reaches of the Provinces were the traditional lands of the plains' tribes: the Plains Cree, the Assiniboine, the Gros Ventre, the Blackfoot and the Sarcee.[2] To the north the forests were the territory of the Chipewyan, Beaver, Slave and Sekani tribes.[3]

The traditional title of the Indians to their lands was recognized in the terms of the treaties that were entered into between the Crown in the right of the Dominion and the Indians. The treaties provided for the surrender of the Indian title in return for the establishment of reserves, guarantees as to hunting and fishing rights, annuities and certain social and economic undertakings.

The treaties were entered into as the pressure of settlement and development demanded. Indian title in southern Manitoba and Saskatchewan was surrendered by Treaties #1 (1871), #2 (1871), #3 (1873) and #4 (1874). Central Manitoba, Saskatchewan and Alberta was surrendered by Treaties #5 (1875) and #6 (1876). Title to southern Alberta was surrendered by Treaty #7 in 1877. Northern Alberta, Saskatchewan and Manitoba was surrendered by an adhesion to Treaty #6 (1889), Treaty #8 (1899), #10 (1906) and by adhesion to #5 in 1908.

A. THE ESTABLISHMENT OF RESERVES

The "model" Robinson Treaties of 1850 in Ontario had reserved specified tracts of land from the surrender of Indian title. The "numbered" treaties did not carve out Indian reserves from the surrender in such manner. Instead they provided that reserves would subsequently be established within the surrendered area.

Treaties #1, 2, 5, and 7 provided for the establishment of reserves in the vicinity of specified lakes and rivers.

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1. See generally, R. Bartlett "The Establishment of Indian Reserves on the Prairies" [1980] 3 C.N.L.R. 3.
2. D. Jeness, *The Indians of Canada* (7th ed. 1977) Chap. XX.
3. *Id.* at Chap. XXIII.

Treaties #3, 4, 6, 8 and 10 declared that location would be determined by subsequent selection. Lieutenant Governor Morris explained, with respect to Treaty #3:[4]

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

The selection by "officers of the Government" was to take place, under the terms of the treaties, after "conference" (Treaties #3 and 4) or "consultation" (Treaties #6, 8 and 10) with the Indians. Treaties #6, 8 and 10 described the selection of the reserve as follows:

> . . . 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 . . .

The role of the surveyor in selecting lands was indicated in the discussion with respect to Treaty #3:[5]

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

The significance and the finality of the survey was emphasized in the address of Lieutenant Governor Morris in the discussions preceding Treaty #6:[6]

> . . . I would like on behalf of the Queen to give each band that desires it a home of their own; I want to act in this matter while it is time. The country is wide and you are scattered, other people will come in. Now unless the places where you would like to live are secured soon there might be difficulty. The white man might come and settle on the very place where you would like to be. Now what I and my brother Commissioners would like to do this: we wish to give each band who will accept of it a place where they may live; we wish to give you as much or more land than you need; we wish to send a man that surveys the land to mark it off, so you will know it is your own, and no one will interfere with you.

The Indians in Council at Treaty #6 determined to ask "[i]f our choice of a reserve does not please us before it is surveyed we want to be allowed to select another."[7] Lieutenant Governor Morris replied:[8]

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

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4. A. Morris, *Treaties of Canada with Indians* 52. Similar comments were made in the Report of Treaty Commissioner Laird in 1899 upon the signing of Treaty #8, Ottawa, Queen's Printer.
5. *Id.* at 70-71.
6. *Id.* at 204-205.
7. *Id.* at 215.

B. NATURAL RESOURCES

The objects of the reserves and the promises made with respect thereto are evident in the assurances made to the Indians by the Treaty commissioners. In 1871 Lieutenant Governor Archibald declared to the Indians in the course of the discussions preceding Treaty #1:[9]

> Your Great Mother, therefore, will lay aside for you "lots" of land to be used by you and your children forever. She will now allow the white man to intrude upon these lots. She will make rules to keep them for you, so that as long as the sun shall shine, there shall be no Indian who has not a place that he can call his home, where he can go and pitch his camp, or if he chooses, build his house and till his land.
>
> These reserves will be large enough, but you must not expect them to be larger than will be enough to give a farm to each family, where farms shall be required. They will enable you to earn a living should the chase fail, and should you choose to get your living by tilling, you must not expect to have included in your reserve more of hay grounds than will be reasonably sufficient for your purposes in case you adopt the habits of farmers. The old settlers and the settlers that are coming in must be dealt with on the principles of fairness and justice as well as yourselves. Your Great Mother knows no difference between any of her people.

In 1876 at Fort Carlton, Lieutenant Governor Morris declared to the Indians in the discussion preceding Treaty #6:[10]

> I am glad to know that some of you have already begun to build and to plant; and I would like on behalf of the Queen to give each band that desires it a home of their own; I want to act in this matter while it is time. The country is wide and you are scattered, other people will come in. Now unless the places where you would like to live are secured soon there might be difficulty. The white man might come and settle on the very place where you would like to be. Now what I and my brother Commissioners would like to do is this: we wish to give each band who will accept of it a place where they may live; we wish to give yu as much or more land to mark it off, so you will know it is your own, and no one will interfere with you. What I would propose to do is what we have done in other places. For every family of five a reserve to themselves of one square mile. Then, as you may not all have made up your minds where you would like to live, I will tell you how that will be arranged: we would do as has been done with happiest results at the North-West Angle. We would send next year a surveyor to agree with you as to the place you would like.
>
> There is one thing I would say about the reserves. The land I name is much more than you will ever be able to farm, and it may be that you would like to do as your brothers where I came from did.
>
> They, when they found they had too much land, asked the Queen to sell it for them; they kept as much as they could want, and the price for which the remainder was sold was put away to increase for them, and many bands now have a yearly income from the land.
>
> But understand me, once the reserve is set aside, it could not be sold unless with the consent of the Queen and the Indians; as long as the Indians wish, it will stand there for their good; no one can take their homes.

The object of providing reserve lands for farming was made explicit in Treaties #3, 5 and 6 which expressly refer to the Crown obligation to set aside lands "for farming".

The treaty discussions did not confine the rights of the Indians to agricultural use of the land. The Indians were assured of their entitlement

8. *Id.* at 218.
9. *Id.* at 28-29.
10. *Id.* at 204-205.

to the timber on reserves. In the discussion preceding Treaty #7 Lieutenant Governor Morris declared:[11]

> — 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.

The "numbered treaties" make no express reference to minerals or mineral royalties. The Robinson Treaties had specifically provided that if the bands desired to dispose of any "mineral or other valuable production, the same will be sold or leased at their request by the Superintendent General of Indians for the time being . . . for their sole benefit, and to the best advantage." The Robinson Treaties had been negotiated in consequence of the discovery of silver in the region. The Robinson Treaties were said by Treaty Commissioner Morris to have "shaped the course" of the "numbered treaties".[12] Oral assurances were made by the Treaty Commissioners to the Indians in the course of the discussions preceding the "numbered treaties" 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:[13]

> 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."

It has been indicated that the setting aside of reserve lands pursuant to treaty was accomplished by survey of the Department of the Interior in consultation with the Indians concerned. Upon such survey the land might be withdrawn from the Dominion Lands Act[14] and thus not be open for settlement. Such withdrawal was, however, subject to "existing rights", including mineral disposition pursuant to regulations promulgated under the Act. The traditional lands of an Indian band and its accompanying mineral wealth might accordingly be denied the band in favour of a prospector. The policy is described and explained in these communications[15] from the Department of Indian Affairs concerning the establishment of the Lac La Ronge reserve in Saskatchewan:

> . . . I am directed to enclose you herewith a blue print of Lac La Ronge, showing the country around it and the names of the several mineral claims for which entries have been granted in the vicinity as well as the approximate positions of such claims, and the name of the registered owner thereof. In this connection, I am to notify you that your surveyor must not on any account include any of these mineral claims within tracts of land which you may set apart in connection with the Indian Reserves in that locality. (Assistant Secretary, Department of Indian Affairs, March 11, 1909).
>
> . . . until your department has completed the survey of the proposed Indian Reserves, so that the same may be noted in our records, there is no provision whereby the Department may prevent prospectors from locating Mining Claims within the tract nor refuse to grant entry for such claims, if staked in accordance with the regulations, unless the

11. *Id.* at 272. Also see *Id.* at 215.
12. *Id.* at 16.
13. *Id.* at 70.
14. S.C. 1872 c. 23; R.S.C. 1886 c. 43.
15. Peter Ballantyne and Lac La Ronge Indian Bands, "Aski-puko; The Land Alone" (1976) 114.

> Reserve is defined in some way on the ground. (Assistant Secretary, Department of Indian Affairs, March 26, 1912).

The Department of the Interior was encouraged in this policy by the Government of Saskatchewan. The text of the following letter from the Premier of Saskatchewan in 1925 demonstrates the concern the provincial government has historically maintained for mineral development in the North, albeit denying any entitlement therein to the Indian and native inhabitants.[16]

> Mr. D.A. Hall, M.L.A., for Cumberland, our most northerly constituency, has requested me to write to you regarding the matter of Indian Reserves at Lac La Ronge.
>
> He states that he believes there are some thirty odd square miles still due the Indians of the band at Lac La Ronge. At present, he says, there are some five or six Reserves close to Lac La Ronge and also states that he is positive that not ten per cent of the Indians are living on them.
>
> The Indians are apparently aware of the activities of prospectors and others interested in the development of mineral claims and are anxious to prevent further developments of any kind and Mr. Hall states they have applied to Ottawa to have all the territory in the vicinity of the mineral claims made into a Reserve.
>
> The land in the section referred to, is all very hilly, rocky, broken country, quite unsuitable, according to Mr. Hall, for an Indian Reserve. He says there are many other places in that section of the country much more suitable for Reserves and strongly recommends that the Dominion Government have a geological survey made this year, and that nothing be done until this survey has been completed. It would then be an easy matter for the Minister to decide the most suitable lands to be given to the Indians.
>
> It seems to me, highly desirable that no action should be taken which would have the effect of throwing mineralized sections of our northern country into Indian Reserves, if it can be avoided, and I strongly endorse Mr. Hall's suggestion that a geological survey be made before a decision is reached to comply with the request of the Indians.
>
> If mineralized sections are kept out of Indian Reserves, as far as possible, there is a chance for their development in the future. The placing of them within the borders of the Reserves would hamper development very materially.
>
> Hoping that you will give consideration to this matter and with kind regards, . . .

The location of mineral and uranium deposits outside the boundaries of reserves appears as government policy rather than careless selection. There has never been any mineral development upon reserve lands in northern Saskatchewan. Such state of affairs caused the Aski-Puko Report upon the Churchill River Project for the Peter Ballantyne and Lac La Ronge Bands to observe:[17]

> In total, four mining companies have taken the largest part of $2 billion in wealth from the area, with no significant benefit for the North or for Northern natives.

It does not appear that a dissimilar policy was pursued in Alberta and Manitoba. Surprise was expressed by the Federal Minister of Mines and Reserves when significant oil deposits were found on Indian reserves in Alberta:[18]

> . . . it was not expected that developments of minerals or coal or of oil so far as Alberta is concerned would take place on Indian reserves . . .

C. EXISTING INTERESTS

Treaties #1, 3 and 4 declare that the obligation to set aside reserve lands is subject to the proviso that "Her Majesty reserves the right to deal with

16. *Id.*, Premier of Saskatchewan to the Minister of the Interior, Feb. 18, 1925.

17. *Id.* at 128.

18. Hon. T.A. Crerar, 30 May 1938, H.C. Debates 3349.

any settlers within the boundary of any lands reserved for any band as she shall deem just so as not to diminish the extent of land allotted to the Indians". Treaty #2 declared a more substantial limitation on the entitlement to set aside reserve lands:

> Saving, nevertheless, the rights of any white or other settler now in occupation of any lands within the lines of any such reserve.

Lieutenant Governor Archibald reported that at the Treaty #1 negotiations "[w]e told them . . . that they might have their land where they chose, not interfering with existing occupants".[19]

Treaty #5 provided 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*". The term "fit" was retained in all the subsequent numbered treaties. It suggests a greater discretion in the Crown.

Treaties #1 and 2 referred only to the interests of settlers within the reserved lands "at the time of the execution of the treaty." Treaties #3 and 4 referred to the "time of the selection of the reserves." The subsequent numbered treaties deleted such reference. At the time of Treaty #6, Lieutenant Governor Morris explained the operation of the provisions. After referring to the survey of the land he went on:[20]

> Of course, if when a reserve is chosen, a white man had already settled there, his rights must be respected. The rights and interests of the whites and half-breeds are as dear to the Queen as those of the Indians.

Treaty #5 expressly excepted lands to be granted to the Hudson's Bay Company and the Methodist Mission. The other treaties make no provision for the Hudson's Bay Company. When the matter was raised in discussions preceding Treaty #3 Lieutenant Governor Morris merely indicated that he would enquire into the matter.[21]

> Chief — "To speak about the Hudson's Bay Company. If it happens that they have surveyed where I have taken my reserve, if I see any of their signs I will put them on one side."
>
> Governor — "When the reserves are given to you, you will have your rights. The Hudson's Bay Company have their rights, and the Queen will do justice between you."
>
> Chief of Fort Francis — "Why I say this is, where I have chosen for my reserve I see signs that the H.B. Co. has surveyed. I do not hate them. I only wish they should take their reserves on one side. Where their shop stands now is my property; I think it is three years now since they have had it on it."
>
> Governor — "I do not know about that matter; it will be enquired into."

Treaty #7 did not contemplate subsequent selection of lands and thus made no provision for the lands of settlers or the Hudson's Bay Company. The omission was explained by Lieutenant Governor Laird:[22]

> With respect to the reserves, the Commissioners thought it expedient to settle at once their location, subject to the approval of the Privy Council. By this course it is hoped that a great deal of subsequent trouble in selecting reserves will be avoided.

The treaties make no reference to the regard or protection to be accorded existing mining claims or tenements. The only dealings with such arose in the discussions in the Robinson Treaty of 1850 in Ontario. The Treaty expressly reserved scheduled and described tracts of land to the use and

19. *Supra* n. 4 at 34.

20. *Id.* at 205.

21. *Id.* at 73.

22. *Id.* at 261.

benefit of the Indians. Treaty Commissioner Robinson reported with respect to the Garden River Reserve:[23]

> There are two mining locations at this place, which should not be finally disposed of unless by the full consent of Shinguacouse and his band; they are in the heart of the village and show no indications of mineral wealth, they are numbered 14 and 15 on the small map appended to Messrs. Anderson and Vidal's report. I pledged my word on the part of the Government that the sale of these locations should not be completed, and as the locatees have not, I believe, complied with the conditions of the Crown Lands Department there can be no difficulty in cancelling the transaction.

The Treaty provided that if mining locations did exist on the reserve lands, then they should be perfected if the conditions thereof were complied with, and monies arising therefrom be paid to the band:

> The parties of the second part also agree, that in case the Government of this Province should before the date of this agreement have sold, or bargained to sell, any mining locations, or other property, on the portions of the territory hereby reserved for their use; then and in that case such sale, or promise of sale, shall be perfected by the Government, if the parties claiming it shall have fulfilled all the conditions upon which such locations were made, and the amount accruing therefrom shall be paid to the tribe to whom the Reservation belongs.

The practice employed in the establishment of reserves in the late nineteenth century sought to ensure that existing rights did not arise in lands likely to be selected by Indian bands. It was sought to survey reserve boundaries before the general land survey was conducted and thereby preclude the accord of rights in homesteads, purchases, the Hudson's Bay Company or local governments as to school lands under the Dominion Lands Act.[24] Failing such prior survey the Government would often attempt to arrange an exchange.

D. AREA TO BE SET ASIDE

The Crown expressly promised in the "numbered treaties" to lay aside and reserve areas of land "for the sole and exclusive use of the Indians".

The treaties which provided for the surrender of Indian title to the territory of what is now Manitoba provided for reserves in the amount of 160 acres per family of five, i.e. treaties #1, 2, and 5. Such a figure was only arrived at with great difficulty. The record of the Treaty #1 discussion indicates that the Indians "wished to have two-thirds of the Province as a reserve" and that "they have been led to suppose that large tracts of ground were to be set aside for them as hunting grounds, including timber lands of which they might sell the wood as if they were proprietors of the soil." The Treaty Commissioner observed that such demands were "utterly out of the question."[25] All the other "numbered treaties" provided for reserves in the amount of one square mile (640 acres) per family of five. The larger area was first promised in Treaty #3, covering the area from Lake Superior in Ontario to the Manitoba border. The Treaty was necessary in order to secure passage to the prairies from eastern Canada. Treaty Commissioner Morris did not consider that a treaty could otherwise have been arrived at.[26] Morris observed that Treaty #3 "shaped the terms of all the treaties . . . which have since been made

23. *Id.* at 19.
24. *Supra* n. 1.
25. *Supra* n. 4 at 31-33, 36.
26. *Id.* at 48.

with the Indians of the Northwest Territories — who speedily became apprised of the concessions which had been granted to the Ojibway nation."[27] The recorded Treaty discussions do not explain why the smaller areas of land were reverted to in the promises made in Treaty #5. It appears merely that it was thought the Indians subject to Treaty #5, located north of Treaty #1 and 2, should be treated with in accord with Treaties #1 and 2.

E. THE SIOUX

Not all Indian reserves on the prairies are attributable to treaty promises. In the 1860's members of the Sioux tribe of the United States had taken refuge in what is now southern Manitoba and Saskatchewan. They sought reserves of land in the area from the Crown.[28] The Crown agreed to set apart reserves as "a matter of grace and not of right." The Crown did not recognize any claim of the Sioux to lands in Canada and did not enter into any treaties with them. Lands were allocated on the basis of 80 acres per family of five and located in the areas where the Sioux had settled. Reserves were set apart under the authority of order in council following consultation and survey. The reserves were located at Oak River, Oak Lake and Bird Tail Creek in south-western Manitoba and Standing Buffalo, White Cap, and Wahpeton in Saskatchewan. The reserves in Saskatchewan were located away from the United States border. The Wood Mountain reserve was authorized in 1913. The Wood Mountain reserve was set apart for Sioux who had remained behind when Sitting Bull and his followers returned to the United States. It is located close to the border of the United States.

F. NATURAL RESOURCES TRANSFER AGREEMENTS

Crown lands in the provinces of Alberta, Manitoba and Saskatchewan held in right of the Dominion were transferred to the provinces under the Natural Resources Agreements, 1930 by the Constitution Act, 1930.[29] The Act modified the provisions of the Alberta Act, Manitoba Act, and Saskatchewan Act which had declared public lands in the provinces "to be vested in the Crown and administered by the Government of Canada for the purposes of Canada".[30] Clause 1 of the Agreements transferred "the interest of the Crown in all Crown lands . . . subject to any trusts existing in respect therof and to any interest other than that of the Crown in the same" to the provinces "[i]n order that the Province may be in the same position as the original Provinces of Confederation". The clause provided that the lands would be "administered by the Province for the purposes thereof, until the Legislature of the Province otherwise provides, subject to the provisions of any Act of the Parliament of Canada relating to such administration".

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27. *Id.* at 45.
28. See Gortran Laviolette "The Sioux Indians in Canada" and *Supra* n. 4 at Chap. XI.
29. (U.K.) 20 & 21 Geo. 5, c. 26.
30. Alberta Act, S.C. 1905, c. 3, s. 21; Manitoba Act, S.C. 1870, c. 3, s. 30; Saskatchewan Act, S.C. 1905, c. 42, s. 21.

The administration by the Government of Canada of Indian reserves was provided for by clauses 10 and 11 of the Alberta and Saskatchewan Agreements and clauses 11 and 12 of the Manitoba Agreement. The clauses in the three agreements are identical and seek to ensure federal administration of reserve lands and the proceeds thereof for the benefit of the Indians and to guarantee the outstanding treaty land entitlement of the Indians.

G. THE AREA OF RESERVES TODAY

In 1983 the Indian population of the prairie provinces was as follows:[31]

Alberta	41,118	41 bands
Manitoba	48,687	60 bands
Saskatchewan	49,373	68 bands

Details of reserves were as follows:[32]

Alberta	90 reserves	1,631,641 acres
Manitoba	98 reserves	536,855 acres
Saskatchewan	134 reserves	1,377,970 acres

The reserves comprise 0.95% of the total area of Alberta, 0.8% of Saskatchewan, and 0.3% of Manitoba. Status Indians comprise 2% of the total population of Alberta, 6% in Saskatchewan, and 5% in Manitoba.

The reserves approximate 55% of the total Indian reserve land area in Canada. Prairie Indians number approximately 40% of total status Indians in Canada. The reserves are widely distributed throughout the region except for the semi-arid area of south-western Saskatchewan and south-eastern Alberta.[33] They tend to be located on lakes and rivers.

II. OWNERSHIP OF INDIAN RESERVE LANDS IN THE PRAIRIE PROVINCES

A. TITLE AND THE NON-INDIAN INTEREST

The Privy Council established in *St. Catherine's Milling and Lumber Co.* v. *R.*[34] that upon a surrender of the traditional Indian title by treaty to lands in Ontario the entire beneficial interest vested in the Crown in the right of the province pursuant to section 109 of the British North America Act:

> 109. All Lands, Mines, Minerals and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

Lord Watson observed:[35]

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31. Dept. of Indian and Northern Affairs, 1982-83 Annual Report.
32. Number and Acreage of Indian Reserves & Settlements by Band, Minister of Indian and Northern Affairs, Ottawa, 1978.
33. See, J. Richards and K. Fung, "Atlas of Saskatchewan" (1969) *Saskatchewan Indian Communities* 176.
34. (1888) 14 App. Cas. 46 (P.C.).
35. *Id.* at 58-59.

> The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown, subject to "an interest other than that of the Province in the same," within the meaning of sect. 109; and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed.

The Privy Council followed *St. Catherine's* in *Ontario Mining* v. *Seybold* [36] and held *ultra vires* the setting apart of a reserve by the Dominion from lands in Ontario surrendered by treaty by the Indians. The Privy Council did not consider it necessary to decide the consequences of a surrender of a reserve, but did indicate that their Lordships did not "dissent"[37] from the view expressed by the Chancellor of Ontario that the effect of such surrender was:[38]

> . . . again to free the part in litigation from the special treaty privileges of the land and to leave the sole proprietory and present ownership in the Crown as representing the Province of Ontario.

In *A.G. Quebec* v. *A.G. Canada*,[39] decided in 1920, it was necessary for the Privy Council to determine the effect of a surrender of an Indian reserve. The Privy Council concluded that it followed "from the principle laid down by the decision of this Board in *St. Catherine's Milling and Lumber Co.* v. *The Queen* that upon the surrender in 1882 of the Indian interest the title to the lands affected by the surrender became vested in the Crown in right of the Province, freed from the burden of that interest."[40] The Privy Council did not distinguish between the interest of Indians in the vast areas subject to traditional Indian title and the much smaller areas set apart as reserves for the Indians to settle upon. The Alberta Court of Appeal has described the resultant status of Indian reserves:[41]

> Hence, prior to 1924 the law relating to land reserved for the Indians in the provinces referred to in s. 109 of the B.N.A. Act may be summarized as follows. The underlying legal title to land in an Indian reserve is vested in the Crown in right of the province, subject to the interest of the Indians; once that interest is surrendered, the estate of the Crown is disencumbered of the Indian title, so that the land becomes indistinguishable from other Crown lands in the province; the federal government possesses a legislative and administrative right in respect of "land reserved for the Indians", and not any proprietary interest therein.

In 1924 Canada and Ontario entered into an agreement codified as An act for the settlement of certain questions between the governments of Canada and Ontario respecting Indian reserve lands.[42] The agreement sought to resolve the status of reserve lands by providing that they should be administered by the Dominion and might be disposed of by the Dominion for the benefit of the Indians.

In the Prairie Provinces the Dominion retained control and administration of Crown lands until 1930. In 1930 the Natural Resources

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36. [1903] A.C. 73 (P.C.).
37. *Id.* at 84.
38. (1900) 31 O.R. 386 at 395-396.
39. [1921] 1 A.C. 401; 56 D.L.R. 373 (P.C.).
40. *Id.* at 406; 375.
41. *Re Stoney Plain Indian Reserve No. 135* [1982] 1 W.W.R. 302 at 314; [1982] 1 C.N.L.R. 133 at 144. (Alta. C.A.).
42. S.C. 1924, c. 48.

Transfer Agreements transferred such interest to the provinces. The Alberta Court of Appeal declared in *Re Stony Plain Indian Reserve #135*:[43]

> In our view, the interest transferred included the right of reversion which arises on surrender by a band of "land reserved for the Indians." The underlying title to the Indian lands was thereby transferred to the province in order to place Alberta in the same position as the provinces referred to in s. 109 of the B.N.A. Act which entered Confederation in 1867.

The opening lines of section 1 of the Agreement declare the object of the transfer to be that "the province may be in the same position as the original Provinces of Confederation are in virtue of section 109 B.N.A. Act, 1867."

Clause 10 of the Agreement with Alberta and Saskatchewan and clause 11 of the Agreement with Manitoba provides specifically for Indian reserves:

> 10. All lands included in Indian reserve within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfill its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.

This clause entrenches the administration of the reserves by Canada for the purposes of Canada. The Alberta Court of Appeal construed the term "vest" as contemplating the limited interest conferred upon Canada so as to enable it to administer the lands for the benefit of the Indians not so as to extend to any proprietary interest.[44] The Court concluded:

> In essence, ss. 1 and 10 of the transfer agreement placed Alberta in the same position as the original parties to Confederation. Consequently, s. 109 of the B.N.A. Act applied to it in the same manner as it did to such other provinces,

and observed that:[45]

> . . . [T]he interest vested in the Crown by section 10 . . . [refers] to the Indian title which encumbers all reserve lands.

43. [1982] 1 W.W.R. 302 at 315; [1982] 1 C.N.L.R. 133 at 145 (Alta. C.A.).

44. *Id.* at 316; 146:

> "With respect to the use of the word 'vested' in the above section, we think it is appropriate to refer to the statement of Duff J. in delivering the decision of the Privy Council in the *Star Chrome* case, *supra*. In reference to the phrase 'the said tracts of land shall . . . be vested in and managed by the Commissioner of Indian lands' in An Act for the better protection of the Lands and Property of the Indians in Lower Canada, 1850 (Prov. Can.), c. 42, he stated at p. 378:
>
> > It is not unimportant, however, to notice that the term 'vest' is of elastic import; . . . In their Lordships' opinion, the words quoted from sec. 1 are not inconsistent with an intention that the Commissioner should possess such limited interest only as might be necessary to enable him effectually to execute the powers and duties of control and management, of suing and being sued, committed to him by the Act.
>
> Similarly, the word 'vested' in s. 10 refers to the limited interest held by the Crown in order to enable the government of Canada to exercise its authority to administer reserve lands for the benefit of the Indians. While this authority does not give the federal government a proprietary interest in the lands, it does give them the power 'to legislate in respect of the disposition of the Indian title': see *Star Chrome*chase, p. 376."

45. *Id.* at 317, 146.

It is suggested that the language of clause 10 suggests a contrary conclusion to that arrived at by the Alberta Court of Appeal. The Agreements assume an indivisible Crown in which title to all Crown lands is vested. The Agreements are concerned to transfer merely the beneficial interest to the provinces. The transfer of the beneficial interest by clause 1 to the province is expressed to be subject to contrary provision. Clause 10 makes such contrary provision. Clause 10 provides that existing reserves "shall *continue* to be vested in the Crown and administered by the Government of Canada for the purposes of Canada" and reserves set apart in the future are to be administered "as if they [such areas of land] had *never passed* to the Province." It is suggested that the language of clause 10 contemplates that the residual beneficial interest continues in the Crown in right of Canada. The language of clause 10 does not suggest that any interest passed to the provinces under the Agreements. The Alberta Act, Manitoba Act and Saskatchewan Act had originally declared that the public lands in the provinces were "vested in the Crown and administered by the Government of Canada for the purposes of Canada". The language of clause 10 suggests that the interest conferred by those statutes remains vested in the Government of Canada with respect to Indian reserves. Such result is different from that which exists in the original provinces of Confederation, but such is in any event provided for with respect to the proceeds of disposition of Indian reserves under clause 11.

Obiter judicial authority supports such view. In *The Queen* v. *Secretary of State for Foreign and Commonwealth Affairs*,[46] Lord Justice May observed in the English Court of Appeal:

> . . . when the lands constituting Alberta were vested in the province, so as put it in the same position as other provinces, that land which by the treaties had been reserved to the Indians was still kept vested in the Dominion Government who had the responsibility for these people.

B. THE INDIAN INTEREST

1. The Treaty Promises

The numbered treaties promised to set aside "lands" for reserves. The treaties did not *expressly* refer to minerals and timber, but the oral assurances of the Treaty Commissioner indicated that they were included in the Indian interest.

A legal examination of the nature of the interest granted or appropriated conventionally entails the ascertainment of the "plain meaning" of the language employed. The Supreme Court of Canada has very recently indicated that such approach may not be appropriate with respect to treaties, statutes and other instruments relating to Indians. In *Nowegijick* v. *The Queen*,[47] Dickson J. for a unanimous Court, declared that:

> . . . treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians . . .

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46. [1981] 4 C.N.L.R. 86 (Eng. C.A.).

47. [1983] 2 C.N.L.R. 89 at 94 (S.C.C.).

The learned judge cited the decision of the United States Supreme Court in *Jones* v. *Meehan* [48] that "Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians". The Ontario Court of Appeal adopted a not dissimilar approach in *R.* v. *Taylor Williams*,[49] the "bull-frog case", in the construction of the 1818 treaty between the Chippewa of Port Hope and the Crown. The Court declared that the following principles were applicable to the construction of the treaty:[50]

> In approaching the terms of a treaty quite apart from the other consideration already noted, the honour of the Crown is always involved and no appearance of "sharp dealing" should be sanctioned.
>
> . . .
>
> Further, if there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible: *R.* v. *White and Bob*.[51]
>
> Finally, if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms.

The Divisional Court of Ontario[52] held in the same case that the oral discussions recorded in the minutes of the negotiation of the treaty constituted part of the terms of the treaty. The Ontario Court of Appeal supported and accepted counsel's argument on the question.

The application of such principles of construction to the "numbered treaties" suggests that the Indians were promised the full beneficial interest in the lands set apart. Mines, quarries and minerals are part and parcel of the land, and consequently the owner of the surface of the lands is *prima facie* entitled to everything beneath or within it to the centre of the earth.[53] Such venerable principle of the common law supports the conclusion that the treaty promise to set aside reserve lands included the non-precious metals therein.

It has long been established that the precious metals, gold and silver, do not pass upon a general designation of land and minerals:[54]

> . . . it is perfectly clear that ever since that decision [*Case of the Mine* (1567)] it has been settled law in England that the prerogative right of the Crown to gold and silver found in mines will not pass under a grant of land from the Crown, unless by apt and precise words the intention of the Crown be expressed that it shall pass.

Such principle was applied by the Privy Council in *A.G. of British Columbia* v. *A.G. of Canada* [55] in a dispute as to which jurisdiction owned the gold and silver in the "railway belt" transferred to the Dominion. Lord Watson concluded that the transfer was a "commercial transaction" which was merely "part of a general statutory arrangement", the Terms of Union, and accordingly the precious metals did not pass to the

48. (1899) 175 U.S. 1.

49. [1981] 3 C.N.L.R. 114 (Ont. C.A.).

50. *Supra* n. 49 at 124 per MacKinnon A.C.J.O.

51. (1965) 50 D.L.R. (2d) 613 at 652 (B.C.C.A.), *aff'd* (1965) 52 D.L.R. (2d) 481 (S.C.C.).

52. [1980] 1 C.N.L.R. 83 at 86.

53. *Wilkinson* v. *Proud* (1843) 11 M. & W. 33; *Rowbotham* v. *Wilson* [1860] 8 H.L. C. 347 at 360 per Lord Wensleydale; *Case of Mines* (1957) 1 Pl. Com. 310.

54. *Wooley* v. *A.G. of Victoria* (1877) 2 A.C. 163 at 163, per Sir J. Colville (P.C.).

55. (1889) 14 A.C. 295 (P.C.).

Dominion. The learned judge declared, however, 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 farming the railway belt, royal as well as territorial, to the Dominion Government."

It is tentatively suggested that a proper construction of the numbered treaties requires that the precious metals on the reserves be vested for the benefit of the Indians. None of the treaties specifically refer to gold or silver but it is suggested that the principles of construction declared in *Nowegijick* v. *The Queen*, *R.* v. *Taylor and Williams* and *A.G. of British Columbia* v. *A.G. of Canada* require such result. Contemporaneous circumstances and the oral assurances support such a conclusion. The Robinson Treaties were entered into in 1850 in contemplation of precious and non-precious mineral potential and specifically provided that "mineral or other valuable productions" on the reserves might only be sold for the exclusive benefit of the Indians. The written terms of Treaty #3 contain no specific assurance of the mineral entitlement of the Indians, but the oral terms include the promise that "if any *important* minerals are discovered on any of their reserves, the minerals will be sold for their benefit with their consent." And the prospect of imminent discoveries of gold in the western prairies was cited as reason to treat with the Indians in the region. Treaty Commissioner Christie had urged in 1871 that:[56]

> Gold may be discovered in paying quantities, any day, on the eastern slope of the Rocky Mountains. We have, in Montana, and in the mining settlements close to our boundary line, a large mixed frontier population, who are now only waiting and watching to hear of gold discoveries to rush into the Saskatchewan, and, without any form of Government or established laws up there, or force to protect whites or Indians, it is very plain what will be the result.
>
> I think that the establishment of law and order in the Saskatchewan District, as early as possible, is of most vital importance to the future of the country and the interest of Canada, and also the making of some treaty or settlement with the Indians who inhabit the Saskatchewan District.

2. The Indian Act

Since the Dominion retained control and administration of the Crown lands in the Prairie Provinces until 1930 it had full power to invest the Indians with the entire beneficial interest in the reserve lands free of any provincial interest. It is suggested that in accord with the treaties, the Dominion did so. The Indian Act[57] of 1876 expressly defined a reserve so as to include "all the trees, wood, timber, soil, stone, minerals, metals,

56. *Supra* n. 4 at 170.

57. S.C. 1876, c. 18, s-s. 3(6).

The 1876 Indian Act was drafted with particular regard to the needs of the western Indians. The Annual Report of the Ministry of Interior of that year indicates that David Laird was responsible in large part for the language of the Act. 1876 Sessional Paper (#9). David Laird was closely involved in the negotiation of the western treaties and was a signatory to Treaties #4 and 7. Treaties #1-5 had been negotiated by the time of the enactment of the 1876 Indian Act. The circumstances suggest that the Indian Act should be interpreted with particular regard to the treaties with the Indians of the west. As the United States Supreme Court declared in *United States* v. *Powers* (1939) 595 S.Ct. 344; 305 U.S. 527; 83 L. Ed. 330, "[i]f possible, legislation subsequent to the Treaty must be interpreted in harmony with its plain purposes." Also see *Nowegijick* v. *The Queen* [1983] 2 C.N.L.R. 89 at 94 (S.C.C.).

or other valuables thereon or therein". The definition remained unchanged[58] until 1951 when the current,[59] more general phrasing, was adopted which refers to a "tract of land . . . set apart . . . for the use and benefit of a band". Throughout the period the Indian Act has provided for the disposition of timber and minerals for the benefit of the band.

3. Not a Usufruct

Judicial *dicta* elsewhere in Canada has suggested a less extensive Indian interest in reserve lands. Lord Watson in *St. Catherine's Milling and Lumber Co.* v. *The Queen* [60] had termed the Indian interest in traditionally occupied lands in Ontario surrendered in Treaty #3 a "personal and usufructuary right". In subsequent litigation between the Dominion and the Province of Ontario the Chancellor of Ontario delcared in obiter that:[61]

> Now with these royal mines, the Indians had no concern. Whatever their claim might be to the waste lands of the Crown, and hunting and fishing thereon, it was never recognized that they extended to the gold and silver of the country.
>
> Having no interest in the gold and silver they could surrender nothing. The Dominion Government in dealing with these particular Indians in 1873, had no proprietary interest in the gold and silver and could make no valid stipulation on that subject with the Indians which would affect the rights of Ontario.

Such conclusions do not dictate the nature of the Indian interest in reserve lands. Indeed the Chancellor contemplated the possibility of an action by the Indians against the Dominion Government for breach of a promise in Treaty #3 to set aside reserve lands, including the precious metals in Ontario.[62]

> The Indians are not in any way represented in this litigation, and I do not and could not prejudice their claims against any government by what I now decide.

The Privy Council decided such litigation on the ground that the Dominion had no power to appropriate reserve lands to the Indians from public lands in Ontario which belonged to Ontario under section 109 British North America Act.

In 1920 the Privy Council delivered a judgment regarding the ownership upon surrender of reserve lands in Quebec where the nature of the various interests in reserve lands was put in issue. In *Attorney General of Quebec* v. *Attorney General of Canada (The Star Chrome Mining Case)* [63] the Privy Council concluded that title and beneficial ownership was in the Crown in right of the province:[64]

> The Dominion Government had, of course, full authority to accept the surrender on behalf of the Crown from the Indians, but, to quote once more the judgment of the Board in the *St. Catherine's Milling Co.'s Case*, it had "neither authority nor power to take away from Quebec the interest which had been assigned to that Province by the Imperial statute of 1867."

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58. R.S.C. 1886, c. 43, s-s. 2(k); R.S.C. 1906, c. 81 s-s. 2(i); R.S.C. 1927 c. 98 s-s. 2(j).
59. R.S.C. 1970, c.I-6, s-s. 2(1).
60. (1889) 14 A.C. 46.
61. *Ontario Mining* v. *Seybold* (1900) 31 O.R. 386 at 399-400, affirmed on other grounds (1903) A.C. 73 (P.C.).
62. *Id.* at 400.
63. [1921] 1 A.C. 401.
64. *Id.* at 411-412.

Duff, J. for the Privy Council, described the Indian interest in the reserve lands then under consideration as "a usufructuary right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown". The reserve lands had been "set apart and appropriated to and for the use of" the Indians pursuant to an 1851 statute[65] and had "vested" in a Commissioner for Indian lands pursuant to an 1850 Act "for the better protection of the Lands and Property of the Indians in Lower Canada".[66]

The decision of the Privy Council in *Star Chrome Mining* is not considered to require the conclusion that the Indian interest in *all* reserve lands is properly described as merely "usufructuary". Duff J. observed that the language of the statute did "not point to an intention of enlarging or in any way altering the quality of the interest confirmed upon the Indians by the instrument of appropriation or other source of title".[67] The characterization of the Indian interest as a "usufructuary right" may bear upon those reserves established by executive action elsewhere in Canada and those held under original Indian title, but is not applicable to those established by treaty. The "quality" of the Indian interest, in the words of Duff J. in such reserves and the mineral entitlement therein must depend upon the construction and effect accorded the particular instruments by means of which the reserves were established.

The characterization of the Indian interest in reserve lands as a "personal and usufructuary right" has been adopted outside Quebec, albeit in *obiter*, in Ontario,[68] Nova Scotia,[69] New Brushwick,[70] and British Columbia.[71] It has never been adopted or applied with respect to reserve lands in the Prairie Provinces, except in very general and remote *obiter* of Lord Denning in *The Queen* v. *Secretary of State for Foreign and Commonwealth Affairs.*[72] It is suggested that the characterization of the Indian interest in reserve lands in the Prairie Provinces as "usufructuary" in nature would be incorrect and contrary to the promises made by treaty and the implementation of such promises by the Indian Act.

On November 1st, 1984, the Supreme Court of Canada in *Guerin* v. *The Queen* (as yet unreported) held the Crown in right of Dominion liable for breach of its fiduciary obligation with respect to reserve lands of the Musqueam band in British Columbia. In reaching such conclusion, Chief Justice Dickson declared in obiter:

> It does not matter in my opinion, that the present case is concerned with the interest of an Indian band in a reserve rather than with unrecognized aboriginal title in traditional reserve lands. *The Indian interest in the land is the same in both cases*: see *Attorney General of Quebec* v. *Attorney General of Canada* (the *Star Chrome* Case).

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65. S.C. 1851, 14 & 15 Vic., c. 106.
66. S.C. 1850, 13 & 14 Vic., c. 42.
67. [1921] 1 A.C. 401 at 410 (P.C.).
68. *Isaac* v. *Davey* (1975) 5 O.R. (2d) 610 at 623 (Ont. C.A.); *Point* v. *Diblee Construction* (1934) 2 D.L.R. 785 (Ont. S.C.).
69. *R.* v. *Isaac* (1976) 9 A.P.R. 460 at 469 and 478, 497, 499 (N.S.C.A.).
70. *Smith* v. *The Queen* [1983] 1 S.C.R. 554.
71. *Mathias* v. *Findlay* [1978] 4 W.W.R. 653.
72. [1981] 4 C.N.L.R. 86 (Eng. C.A.).

It is urged, for all the reasons provided above, that such *obiter dicta* should not be applied to the reserves in the Prairie Provinces. Chief Justice Dickson recognized the dangers of such a general statement and observed immediately thereafter:

> It is worth noting, however, that the reserve in question here was created out of the ancient tribal territory of the Musquean band by the *unilateral* action of the Colony of British Columbia, prior to Confederation.

The reserve in question in that case was created by unilateral executive action *not* by treaty.

4. The Natural Resources Transfer Agreements

The decisions in *Ontario Mining* v. *Seybold and Star Chrome Mining* led to the 1924 Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands.[73] The Chancellor's comments in *Ontario Mining* had suggested that the precious metals in Ontario had passed to the Province under section 109 of the British North America Act 1867 and were not and could not have been set apart as part of reserve lands by the Dominion. The Privy Council in *Star Chrome Mining* had determined that upon a surrender of reserve lands the beneficial interest therein passed to the Province and had characterized the Indian interest therein as a "personal and usufructuary right". The 1924 statutory agreement sought to recognize these difficulties and provide for the administration, disposition and entitlement with respect to reserve lands and proceeds.

Clauses 1 and 2 provided for the administration and disposition of reserves by the Dominion for the benefit of the Indian bands and thereby rendered the decision in *Star Chrome Mining* inapplicable:

> 1. All Indian Reserves in the Province of Ontario heretofore or hereafter set aside, shall be administered by the Dominion of Canada for the benefit of the band or bands of Indians to which each may have been or may be allotted; portions thereof may, upon their surrender for the purpose by the said band or bands, be sold, leased or otherwise disposed of by letters patent under the Great Seal of Canada, or otherwise under the direction of the Government of Canada, and the proceeds of such sale, lease or other disposition applied for the benefit of such band or bands, provided, however, that in the event of the band or bands to which any such Reserve has been allotted becoming extinct, or if, for any other reason, such Reserve, or any portion thereof is declared by the Superintendent General of Indian Affairs to be no longer required for the benefit of the said band or bands, the same shall thereafter be administered by, and for the benefit of, the Province of Ontario, and any balance of the proceeds of the sale or other disposition of any portion thereof then remaining under the control of the Dominion of Canada shall, so far as the same is not still required to be applied for the benefit of the said band or bands of Indians, be paid to the Province of Ontario, together with accrued unexpended simple interest thereon.
>
> 2. Any sale, lease or other disposition made pursuant to the provisions of the last preceding paragraph may include or may be limited to the minerals (including the precious metals) contained in or under the lands sold, leased or otherwise disposed of, but every grant shall be subject to the provisions of the statute of the Province of Ontario entitled "The Bed of Navigable Waters Act", Revised Statutes of Ontario, 1914, chapter thirty-one.

Clause 9 confirmed any dispositions of reserve lands which the Dominion had previously made:

> 9. Every sale, lease or other disposition heretofore made under the Great Seal of Canada or otherwise under the direction of the Government of Canada of lands which

73. S.C. 1924, 14-15 Geo. V., c. 48.

> were at the time of such sale, lease or other disposition included in any Indian Reserve in the Province of Ontario, is hereby confirmed, whether or not such sale, lease or other disposition included the previous metals, but subject to the provisions of the aforesaid statute of the Province of Ontario entitled "The Bed of Navigable Waters Act", and the consideration received in respect of any such sale lease or other disposition shall be and continue to be dealt with by the Dominion of Canada in accordance with the provisions of the paragraph of this agreement numbered 1, and the consideration received in respect of any sale, lease or other disposition heretofore made under the Great Seal of the Province of Ontario, or under the direction of the Government of the said Province, of any lands which at any time formed part of any Indian Reserve, shall remain under the exclusive control and at the disposition of the Province of Ontario.

A memorandum of the Minister of Indian Affairs suggested that uncertainty existed as to the entitlement with respect to precious metals on the reserves:[74]

> . . . [N]o step has ever been taken to settle the legal position even as to the surface and base metals, and the uncertainty as to the precious metals had stood in the way of the disposition of these, with the result that such precious metals as the reserves may contain have in fact not been dealt with, to the detriment both of the Indians, who would receive the benefit of the disposition, and of the province, which does not obtain the benefit of any taxation on the output of mines, which it might otherwise do.

The memorandum accordingly suggested:[75]

> The geological formations in Ontario are such that precious and base metals ordinarily occur together and are only separated in the course of refinement. To deal with the previous metals consequently involves dealing also with the base metals, and the arrangement proposed by the present draft agreement is that upon the sale or other disposition of minerals lands one-half of the total proceeds should belong to the Dominion for the benefit of the Indians, and the other half to the Province.

Clause 2 of the Agreement makes clear that any disposition of reserve lands in Ontario may include the minerals and precious metals. Clause 6, however, declares a provincial entitlement to one-half of any consideration payable with respect to mineral dispositions:

> 6. Except as provided in the next following paragraph, one-half of the consideration payable, whether by way of purchase money, rent, royalty or otherwise, in respect of any sale, lease or other disposition of a mining claim staked as aforesaid, and, if in any other sale, lease or other disposition hereafter made of Indian Reserve lands in the Province of Ontario, any minerals are included, and the consideration for such sale, lease or other disposition was to the knowledge of the Department of Indian Affairs affected by the existence or supposed existence in the said lands of such minerals, one-half of the consideration payable in respect of any such other sale, lease or other disposition shall forthwith upon its receipt from time to time, be paid to the Province of Ontario; the other half only shall be dealt with by the Dominion of Canada as provided in the paragraph of this agreement numbered 1.

The "next following paragraph", clause 7, provides:

> 7. The last preceding paragraph shall not apply to the sale, lease or other disposition of any mining claim or minerals on or in any of the lands set apart as Indian Reserves pursuant to the hereinbefore recited treaty made in 1873, and nothing in this agreement shall be deemed to detract from the rights of the Dominion of Canada touching any lands or minerals granted or coveyed by His Majesty for the use and benefit of Indians by letters patent under the Great Seal of the Province of Upper Canada, of the Province of Canada or of the Province of Ontario, or in any minerals vested for such use and benefit by the operation upon such letters patent of any statute of the Province of Ontario.

Clause 7 denies any provincial entitlement to proceeds of mineral dispositions from reserves set apart pursuant to Treaty #3 or established by letters patent "for the use and benefit of the Indians". The exclusion of the

74. *House of Common Debates*, 3rd Sess., 14th Parl. 14-15 George V, 1924, at 3234.

75. *Id.*

reserves established under Treaty #3 from the operation of clause 6 is explicable by reference to the terms of a 1902 Agreement[76] which had declared "that the precious metals shall be considered to form part of the reserves" set apart pursuant to such treaty. The exclusion of reserves granted or conveyed for the "use and benefit" of the Indians by letters patent under the Great Seal of the Provinces of Canada, Upper Canada and Ontario recognizes the vesting of the mineral entitlement, precious and non-precious, conferred upon the grant of the fee simple title to *any* person before 1913.[77]

In 1930 the Dominion agreed to transfer the Crown lands to the Prairie Provinces. Clause 10 of the Alberta and Saskatchewan Agreements and Clause 11 of the Manitoba Agreement declared that existing reserves "shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada" and reserves set apart in the future would be "administered by Canada in the same way in all respects as if they had never passed to the Province". Clause 11 of the Alberta and Saskatchewan Agreements and Clause 12D of the Manitoba Agreement provides:

> 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, which said agreement was confirmed by statute of Canada, fourteen and fifteen George the Fifth chapter forty-eight, shall (except so far as they relate to the Bed of Navigable Waters Act) 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 said paragraphs shall likewise apply to the lands included in the reserves heretofore selected and surveyed, except that neither the said lands nor the proceeds of the disposition thereof shall in any circumstances become administrable by or be paid to the Province.

The clause declares the 1924 Canada-Ontario Agreement to be generally applicable to Indian reserves in the Prairie Provinces. Accordingly the power of the federal government to administer and 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 has already been suggested that there is no possible entitlement in the provinces to minerals or precious metals in reserve lands set apart prior to 1930. The clause confirms the validity of this conclusion. It declares that with respect to such reserves "neither the said lands nor the proceeds of the disposition thereof shall in any circumstances become administrable by or be paid to the Province." Such constitutes a clear rejection of any provincial claim founded upon some uncertain entitlement to the precious metals such as lay behind the origin of the provincial entitlement to one-half of any consideration payable with respect to mineral dispositions declared in the Canada-Ontario Agreement.

The exception from the ambit of the provincial entitlement does not extend to reserves set apart after 1930. Accordingly the Provinces are entitled under the Agreements to one-half of any consideration arising from mineral dispositions upon such reserves. Such entitlement is presumably

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76. See Treaty #9, Queen's Printer, 1964, Ottawa at 27.

77. S.C. 1913, 3-4 Geo. V, c. 6 s-s. 53(1); R.S.O. 1980 c. 413 s. 58.

explained as derived from the provincial claim to the precious metals upon such reserves. In accordance with the *dicta* of Chancellor Boyd in *Ontario Mining* v. *Seybold* it might be suggested that the precious metals passed to the Prairie Provinces in 1930, as they passed to the Province of Ontario in 1867. Accordingly the province might assert that the precious metals do not form part of the Indian interest upon the setting apart of the reserve lands from the public lands of the province, just as was argued by Ontario. It is suggested that the circumstances of the setting apart of reserves in the Prairie Provinces after 1930 and in Ontario after 1867 are *not* similar. There was no obligation on the Province of Ontario to set apart reserve lands, with or without the precious metals. In contrast clause 10 of the Alberta and Saskatchewan Agreements and clause 11 of the Manitoba Agreement impose an obligation on the Provinces to set aside areas of unoccupied Crown lands so as to "enable Canada to fulfill its obligations under the treaties with the Indians of the Province". As has already been discussed the treaty promises to set apart reserve lands include the precious metals therein, accordingly the Prairie Provinces are obliged to transfer the precious metals upon the setting apart of reserve lands. There is accordingly, no justification for the declaration of a provincial entitlement to one-half of the proceeds of any mineral disposition upon reserves set apart after 1930.

It does not appear that the Indians were consulted or consented to the terms of the Natural Resources Transfer Agreements. Nor does it appear that the matter attracted any other non-governmental attention: the Debates in Parliament at no point referred to the clauses governing Indian reserves.

The Provincial Governments have relied on the entitlement to one-half of the proceeds of mineral dispositions upon lands set apart after 1930. The Minister of Northern Saskatchewan declared in 1976 in outlining the position of the Government on "Unfulfilled Treaty Indian Land Claims":[78]

> That the Province does not agree to renounce any rights it has to one-half of the royalties, etc., from the development of mineral rights pursuant to The National Resources Transfer Agreement, 1930, but does not assert that right. The Province is prepared to conclude agreements in the course of arriving at a settlement (i.e. The Province is prepared to bargain this right away as part of a final settlement).

III. THE ADMINISTRATION OF INDIAN RESERVES

Control and administration of Indian reserve lands has always been vested in the Federal Government. The Natural Resources Transfer Agreements affirmed such control and administration. Clause 10 of the Alberta and Saskatchewan Agreements and Clause 11 of the Manitoba Agreements expressly declared that such control and administration should "continue" and should extend to reserves set apart thereafter.

The degree of federal government control and administration of reserve lands is essentially unchanged from that declared in 1876 in the first consolidation of legislation termed the Indian Act.[79] The Minister of

78. per Hon T. Bowerman M.L.A., Letter to Chief Ahenakew, Federation of Saskatchewan Indians, August 23, 1976.

79. S.C. 1876, c. 18.

Indian Affairs, then described as the Superintendent General, was empowered to approve who might be allotted reserve lands by the band, remove persons unlawfully occupying reserve lands,[80] punish those removing timber, hay, stone, soil, minerals, metals or other valuables,[81] and direct surveys and the construction of roads, bridges, ditches and fences.[82] No reserve or portion thereof might be disposed of without a surrender.[83] Upon such surrender, which was required in the event of disposition of minerals, the Act provided that the lands should be "managed, leased and sold as the Governor in Council may direct, subject to the conditions of surrender".[84] The Superintendent General was empowered to issue licenses to cut timber in accordance with the regulations established by the Governor in Council, and to remove timber, hay, stone and gravel with the consent of the band, without a surrender.[85] "Proceeds arising from the sale or lease of any Indian lands, or from the timber, hay, stone, minerals or other valuables thereon, on a reserve" were directed to be "paid to the Receiver General to the credit of the Indian fund".[86] The band council was empowered to make rules and regulations, subject to confirmation by the Governor-in-Council, with respect to cattle trespass, maintenance of roads, bridges, ditches and fences, and the allocation of lands on the reserves.[87]

The above-described provisions remain almost entirely unchanged to the present.[88] The band council still has little power to control or administer reserve lands. Such power continues to be vested in the Minister of Indian Affairs. In some instances the powers vested in the Minister of Indian Affairs. In some instances the powers vested in the Minister have become more extensive or have become more detailed. The Indian Act now provides that the Minister may direct the use of reserve lands for Indian schools, administration of Indian Affairs, Indian burial grounds, Indian health projects or, "with the consent of the council of the band, for any other purpose for the general welfare of the band".[89] Timber and minerals are now the subject of regulation,[90] and, in the case of oil and gas, of a separate enactment.[91] The Act makes manifest the control exercised by the Department of Indian Affairs. Section 60 provides:

> (1) The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable.
>
> (2) The Governor in Council may at any time withdraw from a band a right conferred upon the band under subsection (1).

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80. *Id.* at ss. 6-15.
81. *Id.* at ss. 16-17.
82. *Id.* at ss. 5, 24.
83. *Id.* at s. 25.
84. *Id.* at s. 29.
85. *Id.* at ss. 26(3), 45.
86. *Id.* at s. 60.
87. *Id.* at s. 63.
88. R.S.C. 1970 c. 1-6.
89. *Id.* at s-s. 18(2).
90. *Id.* at s-ss. 57(a)(c).
91. Indian Oil and Gas Act, S.C. 1974-75-76, c. 15.

A. TIMBER

The Indian Act of 1876 authorized the Superintendent General to issue licenses subject to such regulations as were established by the Governor in Council to cut timber on reserve lands and ungranted surrendered lands for up to a term of twelve months. Such licenses vested "in the holder thereof all rights or property whatsoever in all trees, timber and lumber cut within the limits of the license". Dues were payable and the timber might be seized to enforce payment. The provisions authorizing the issuance of such licenses did not require the consent of the band council. They remained essentially unchanged[92] until the revision of the Indian Act in 1951. In 1949 the Regulations for the Disposal of Timber from Indian Reserves and Indian lands[93] banned the issuance of licenses with respect to timber on Indian reserve lands without a surrender unless the consent of the band council was given and "the sale of timber appears to be in the interest of the Indians". In 1951 section 57 was enacted:

> The Governor in Council may make regulations
>
> (a) authorizing the Minister to grant licenses to cut timber on surrendered lands, or, with the consent of the council of the band, on reserve lands;
>
> (b) imposing terms, conditions and restrictions with respect to the exercise of rights conferred by licences granted under paragraph (a).

The Indian Timber Regulations[94] replaced the previous detailed provision that had been included in the Act. The Regulations specify the terms and conditions of permits and licences and continue the requirement of a surrender or the obtaining of band council consent before the issuance of a timber licence on reserve lands by the Minister.

B. MINERALS

Minerals on Indian reserves, other than stone and gravel, have always required a surrender prior to their disposition. A surrender has historically required the consent of the members of the band and the acceptance of the Governor in Council.[95] Surrendered lands and minerals were subject to management and disposition by the Department of Indian Affairs "as the Governor in Council may direct" and the conditions of the surrender.[96]

In 1919 the Indian Act was amended to empower the Governor in Council to:[97]

> . . . make regulations enabling the Superintendent General without surrender to issue leases for surface rights on Indian reserves, upon such terms and conditions as may be considered proper in the interest of the Indians covering such area only as may be

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92. S.C. 1880 c. 28 s. 56-68.
R.S.C. 1885 c. 43 s. 54-68.
R.S.C. 1906 c. 81 s. 73-86.
R.S.C. 1927 c. 98 s. 76-89.

93. P.C. 667, Feb. 15, 1949.

94. C.R.C. 1978, c. 961.

95. S.C. 1876, c. 18, ss. 25-26.
R.S.C. 1970, c. I-6 ss. 37-39.

96. S.C. 1876, c. 18, s. 29.

97. S.C. 1919, c. 56, s. 1.

> necessary for the mining of the precious metals by anyone authorized to mine such metals, said terms to include provision of compensating any occupant of land for any damage that may be caused thereon as determined by the Superintendent General.

The amendment was purportedly made to enable the British Columbia Government to exercise its rights upon reserve lands to precious metals. The Annual Report[98] of the Department of Indian Affairs of 1920 observed:

> Owing to local conditions, misapprehension or hostility on the part of a band, it is not always possible to secure a surrender for mining rights. This obstacle has been effectively overcome by the amendment.

The Governor in Council proceeded to make the Regulations for the Disposal of Quartz Mining Claims[99] governing the disposition of surface rights and *sub-surface* mineral rights. In 1927 the Governor in Council made the Regulations for the Prospecting and Disposal of Petroleum and Natural Gas on Indian Reserves and Indian lands.[100] The authority for the issuance of such regulations was founded on the amendment of 1919 and the provision of the Act directing that surrendered lands should be managed and disposed of "as the Governor in Council directs". The absence of any reference in the Act or amendment to sub-surface rights caused the Justice Department to question the validity of the regulations. As the Federal Minister of Mines and Resources candidly observed:[101]

> At the time the regulations were passed, or indeed at the time the provision was inserted in the Indian Act, it was not expected that developments of minerals or coal or of oil so far as Alberta is concerned would take place on Indian reserves, located as they were mostly in the northern part of the province. The opinion of the Justice department is that the power of the Governor in Council to make these regulations does not extend to the sub-surface rights.

In 1938 the Act was amended[102] expressly to empower the Governor in Council to issue such regulations:

> (2) The Governor in Council may make regulations enabling the Superintendent General in respect of any Indian reserve, to issue leases upon such terms as may be considered proper in the interest of the Indians and of any other lessee or licensee of surface rights,
>
> (a) upon surrender in accordance with this part, of any land deemed to contain salt, petroleum, natural gas, coal, gold, silver, copper, iron or other minerals and to grant in respect of such land the right to prospect for mine, recover and take away any or all such mineral, and
>
> (b) without surrender, to any person authorized to mine any of the minerals in this section mentioned, of surface rights over such area of any land within a reserve containing any such minerals as may be necessary for the mining thereof.

The Governor in Council immediately issued regulations providing for the disposition of minerals and oil and gas, upon surrender, on Indian reserves.[103]

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98. Parl. Papers, H.C., 1938 Sessional Paper #27.
99. P.C. 2532, 30 Dec. 1919, and P.C. 242, 4 Feb. 1930. The Regulations do not appear to have been published in the Canada Gazette. P.C. 2113 of 31 Aug. 1938 rescinded such regulations.
100. P.C. 183, 7 Feb. 1927. Apparently not published the Canada Gazette. P.C. 423, 12 March 1929. Rescinded by P.C. 542, 17 March 1937. Rescinded by P.C. 2113, 31 August 1938.
101. Hon. T.A. Crerar, 30 May 1938, H.C. Debates 3349.
102. S.C. 1938, c. 31, s. 1.
103. P.C. 2113, 31 Aug. 1938, P.C. 5069, 10 Nov. 1948, Quartz Mining Regulations P.C. 2103, 31 Aug. 1938, P.C. 5315, 13 July 1946, P.C. 4504, 5 Oct. 1948, Oil and Gas Regulations.

In 1951 the Act was amended to its present form. The Governor in Council is empowered to make regulations:[104]

> . . . providing for the disposition of surrendered mines and minerals underlying lands in a reserve.

The Indian Mining Regulations[105] vest the administration and disposition of minerals, other than oil and gas, on reserve lands in the Department of Indian Affairs and its officials. The Regulations provide for exploration permits and mining leases and the terms and conditions thereof. No regard is accorded control or consent by the band council in the Regulations. Any such control or consent must be exercised or withheld at the time of the surrender. The Act requires that management and disposition of surrendered lands be in accord with the conditions of the surrender. The Regulations provide that a permittee or lessee "shall obtain a right of entry or right to use the land in accordance with any provisions that may be made by the Minister under the Act." The Minister may issue a permit for up to one year, or longer with the consent of the band council, under section 28(2) of the Act.

The Indian Oil and Gas Regulations[106] vest administration and disposition of surrendered oil and gas rights on reserve lands in the Department of Indian Affairs. Rights cannot however be disposed of under the Regulations without the prior approval of the Band Council of the disposition and the terms and conditions thereof.[107] The Regulations provide for the issuance of exploration permits and oil and gas leases and the terms and conditions thereof. Regulations 28 and 31 provide for the grant of surface rights and a right of entry on reserve lands by the Department without the consent of the Band Council. Such power may not have been authorized by section 57(c) of the Indian Act. Regulation 45 provides:

> To the extent that it is practicable and consistent with reasonable efficiency, safety and economy, every person conducting exploratory work, drilling or production operations under these Regulations shall give employment to persons resident on the Indian lands within which the operations are conducted.

In 1974 the Indian Oil and Gas Act[108] was passed. It sought to ratify "for greater certainty" changes to the royalty rates which had previously been changed by the regulations and to broaden the ambit of regulation making power of the Governor in Council. The Governor in Council was expressly empowered to make regulations:

> (a) respecting the granting and leases, permits and licences for the exploitation of oil and gas in Indian lands and the terms and conditions thereof;
>
> (b) respecting the disposition of any interest in Indian lands necessarily incidental to the exploitation of oil and gas in such lands and the terms and conditions thereof;
>
> . . .
>
> (d) prescribing the royalties on oil and gas obtained from Indian lands
>
> . . .
>
> (f) generally for carrying out the purposes of this Act and for the exploration of oil and gas in Indian lands.

104. R.S.C. 1970, c. I-6, s-s. 57(c).

105. C.R.C. 1978, c. 956.

106. C.R.C. 1978, c. 963.

107. *Id.*

108. S.C. 1974-75-76, c. 15.

The Act also imposed a duty on the Minister "in administering this Act" to "consult, on a continuing basis, persons representative of the Indian bands most directly affected thereby".

The Natural Resources Transfer Agreements declared that paragraphs 1 to 6 and paragraph 8 of the 1924 Canada-Ontario Reserve Lands Agreement shall apply to Indian reserves on the Prairie Provinces "as if the said agreement had been made between the parties hereto". Paragraphs 3 to 5 of the 1924 Agreement provides:

> 3. Any person authorized under the laws of the Province of Ontario to enter upon land for the purpose of prospecting for minerals thereupon shall be permitted to prospect for minerals in any Indian Reserve upon obtaining permission so to do from the Indian Agent for such Reserve and upon complying with such conditions as may be attached to such permission, and may stake out a mining claim or claims on such Reserve.
>
> 4. No person not so authorized under the laws of the Province of Ontario shall be given permission to prospect for minerals upon any Indian Reserve.
>
> 5. The rules governing the mode of staking and the size and number of mining claims in force from time to time in the Province of Ontario or in the part thereof within which any Indian Reserve lies shall apply to the staking of mining claims on any such Reserve, but the staking of a mining claim upon any Indian Reserve shall confer no rights upon the person by whom such claim is staked except such as may be attached to such staking by the Indian Act or other law relating to the disposition of Indian Lands.

The 1924 Agreement contemplated the application of provincial standards and rules in the exploration and staking of reserve lands. It is, however, structured in accordance with the mining legislation of Ontario and of the Dominion of that period. The mining legislation of that time provided for a "miner's right" or licence which authorized the holder to enter upon Crown lands to explore and mine. Security of tenure was afforded by staking a claim which might then be mined. Accordingly the 1924 Agreement provided that only holders of provincial "miner's rights" might explore upon an Indian reserve. Upon obtaining the permission of the Indian Agent for the reserve and complying with such conditions as were imposed, such person might stake out a claim on the reserve. Provincial law governed the manner of staking and the size and number of claims. The Agreement provided that "the staking of a mining claim upon any Indian reserve shall confer no rights upon the person by whom such claim is staked except such as may be attached to such staking by the Indian Act or other law relating to the disposition of Indian lands".

The Regulations for the Disposal of Quartz Mining Claims within Indian Reserves[109] implemented the Agreement and declared that a person might "acquire the exclusive right to carry on mining operations in a specified area by staking out and recording a claim" in accordance with the Regulations.[110] But in 1961 the Regulations were amended.[111] They no longer contemplate staking or claims. No rights are conferred upon a person purporting to stake a claim upon an Indian reserve. Further

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109. P.C. 242, 4 Feb. 1930, P.C. 2113, 31 Aug. 1938; P.C. 5069, 10 Nov. 1948.

110. The Regulations governing the disposition of oil and gas did not provide for staking nor did they appear to contemplate that a permittee should be the holder of a miner's right. It does not appear that oil and gas exploration was thought to be subject to paragraphs 3-5 of the Agreement.

111. P.C. 371, 16 March 1961; P.C. 1865; 1 Oct. 1968.

neither the legislation nor regulations of Alberta,[112] Manitoba,[113] or Saskatchewan,[114] any longer provides for a "miner's right". Paragraph 4 of the Agreement accordingly presents a difficulty insofar as it purports to prohibit any person not authorized "to enter upon land for the purpose of prospecting for minerals" by provincial law from being granted permission to prospect for minerals upon any Indian reserve. Since the provinces no longer grant such authority it might appear that no person shall be given permission to prospect upon a reserve. It is, however, suggested that the proper interpretation is that since "miner's rights" are no longer issued and are "extinct" those aspects of paragraphs 3 and 4 which are dependant thereon must be considered inoperative and void.

In the result paragraphs 3 to 5 of the Agreement are no longer of significance to mining on Indian reserves in the Prairie Provinces. The provincial standards and rules therein contemplated have been abrogated or rendered irrelevant. Provincial standards and rules with respect to matters *other* than the "miner's right", staking and claims are however declared applicable by the Regulations to the extent that they are not inconsistent therewith. The Indian Mining Regulations provide:[115]

> 4. Every permittee and every lessee shall comply with the laws of the province in which his permit area or lease area is situated where such laws relate to exploration for, or development, production, treatment and marketing of minerals and do not conflict with these Regulations.

The Indian Oil and Gas Regulations declare that it is a term and condition of every lease, permit, licence or other disposition that the operator will comply with the Indian Act, the regulations and directions made thereunder, the expressed terms and conditions and:[116]

> (d) unless otherwise directed by the Minister in writing, the applicable laws of the province in which a contract area is situated and with any orders or regulations made from time to time thereunder relating to the environment and the exploration for, development, treatment, conservation and equitable production of oil and gas.

The Indian Mining Regulations and the Indian Oil and Gas Regulations make extensive provision for the terms and conditions and duties and rights, arising upon disposition, under the regulations. The application of provincial laws is likely to be confined to areas other than exploration, development and production. Such areas include treatment, marketing, conservation and the environment. The Indian Oil and Gas Regulations expressly refer to provincial laws relating to "conservation and the equitable production of oil and gas" and thereby subjects Indian oil production to the "allowable level of production" set by the Energy Resources Conservation Board of Alberta and the Department of Energy and Mines of Saskatchewan.

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112. Quartz Mining Regulations, Alta. Reg. 377/67.
113. The Mineral Disposition Regulation, 1974, Man. Reg. 328/74.
114. Mineral Disposition Regulations, Sask. O.C. 451/61.
115. *Supra* n. 105.
116. *Supra* n. 106.

IV. OUTSTANDING LAND ENTITLEMENT

A. THE TREATIES

The Crown promised in the "numbered treaties" to set apart land for the sole and exclusive use of the Indians. All the numbered treaties contemplated subsequent acts of survey and consultation whereby the lands would be set apart. As Lieutenant-Governor Morris explained with respect to Treaty #3:[117]

> . . . 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.

In the northern part of the province the Indians objected to selecting reserves at the time of the treaties. The Report with respect to Treaty #8 explains:[118]

> As the extent of the country treated for made it impossible to define reserves or holdings, and as the Indians were not prepared to make selections we confined ourselves to an undertaking to have reserves and holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required. There is no immediate necessity for the general laying out of reserves or the allotting of land. It will be quite time enough to do this as advancing settlement makes necessary the surveying of the land. Indeed, the Indians were generally averse to being placed on reserves. It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves. We had to very clearly explain to them that the provision for reserves and allotments of land were made for their protection, and to secure to them in perpetuity a fair portion of the land ceded, in the event of settlement advancing.

The Treaty Commissioners recognized that difficulties might arise if the setting apart of reserve lands was long postponed. Lieutenant Governor Morris urged with respect to Treaty #3:[119]

> I would suggest that instructions should be given to Mr. Dawson [Indian Commissioner] to select the reserves with all convenient speed; and to prevent further 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 first been adjusted.

Similarly with respect to Treaty #5 he observed:[120]

> To prevent complications and misunderstandings, it would be desirable that many of the reserves should be surveyed without delay.

By 1930 the reserve land treaty entitlement of the Indians had not been fully satisfied, particularly in the northern parts of the provinces. A memorandum of the Deputy Superintendent General of Indian Affairs to the Minister of March 9, 1922 observed:

> 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 now 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:

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117. *Supra* n. 4, Report of Treaty Commissioner re Treaty #3, 14 Oct. 1873.

118. Report of Treaty Commissioner re Treaty #8, 22 Sept. 1899.

119. *Supra* n. 4.

120. *Supra* n. 4 at 153.

> (l) That the Provinces be obligated 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 failure of the Crown in right of the Dominion to fulfill the promises made in the treaties to set apart reserve lands is not actionable as a breach of treaty in international law.[121] Such conclusion was recently affirmed in *Pawis* v. *The Queen* [122] where Marceau J. declared that "the Ojibways did not then constitute an 'independent power', they were subjects of the Queen."

It has been recognized that the obligation created by treaties are analogous to contractual undertakings: *A.G. of Canada* v. *A.G. of Ontario.*[123] In *Pawis* v. *The Queen*, it was sought to bring an action in breach of contract upon the Robinson-Huron Treaty of 1850. Marceau J. concluded:[124]

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

The obligations created by treaty may be amended or abrogated by valid legislation.[125] Such legislation cannot of course be the subject of an action for breach of a treaty.[126] Any amendment of the treaty obligation to lay aside reserve lands by the Natural Resources Transfer Agreement of 1930 does not of itself afford an action for breach of contract.

The preponderance of authority suggests that the treaties did not create a *trust* obligation to set aside reserves, that is, that the land surrendered to the Crown was not subject to the equitable interest of the Indians in the setting aside of reserve lands. An argument that the payment of treaty annuities was protected by such a trust was expressly rejected in *A.G. of Canada* v. *A.G. of Ontario.*[127] The Privy Council described the obligation as a "personal obligation" rather than an obligation *in rem*. Such conclusion was followed in *Pawis* v. *The Queen* [128] with respect to a treaty promise to allow hunting and fishing rights to continue. The matter is not, however, entirely settled. In *A.G. of Canada* v. *A.G. of Ontario*,[129] Lord Loreburn observed:

> 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 consideration, and, if ever they arise, will have to be discussed and decided afresh.

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121. *Cayuga Indian Claims* (1926) 20 A.J.I.L. 574.
122. [1979] 2 C.N.L.R. 52 at 58 (F.C.T.D.).
123. [1897] A.C. 199 (P.C.).
124. *Supra* n. 122 at 58.
125. See *R.* v. *Sikyea* [1964] S.C.R. 642.
126. *Supra* n. 122 at 61.
127. *Supra* n. 123.
128. *Supra* n. 122.
129. [1910] A.C. 637.

B. THE NATURAL RESOURCE TRANSFER AGREEMENTS

The Natural Resources 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 . . .

The Natural Resources Transfer Agreements 1930 were given effect by Imperial, Federal and Provincial legislation. The Agreements might be amended by "agreement confirmed by concurrent statutes of the Parliament of Canada and the Legislature of the Province".[130] The Agreements cannot be unilaterally amended by the province. In *R.* v. *Sutherland* [131] Dickson J. observed for the Supreme Court:

> A provincial legislature may not pass laws to determine the scope of the protection afforded by the Natural Resources Transfer Agreement. If the laws have the effect of altering the agreement, they are constitutionally invalid, if not, they are mere surplusage.

The Agreements impose an obligation with respect to outstanding treaty land entitlement only upon the *provinces.* The obligation of the Federal Government is that declared and enforceable by treaty, not by the Agreements. The Agreements imposed the obligation upon the provinces in order to enable Canada to fulfill its treaty promises.

The provinces are obliged to set aside "areas", "out of the unoccupied Crown lands hereby transferred to its administration", selected by the Superintendent General, in agreement with the provinces, "as necessary to enable Canada to fulfill its obligations under the treaties". The obligation of the Provinces must be construed so as to enable the fulfillment of the treaty obligations of Canada.

Only the Government of Saskatchewan has in recent years set aside lands to enable Canada to fulfill its treaty obligations. It has acknowledged the entitlement to over one-and-a-half million acres of thirty Indian bands. Other bands have claims which have as yet not been validated by the Government of Canada. The Government of Saskatchewan has set aside and transferred the administration and control of the following lands to the Crown in right of Canada:

Fond du Lac Band[132]	15,526.2 hectares
Canoe Lake Band[133]	3,449.6 hectares
English River Band[134]	1,690.04 hectares
Stony Rapids Band[135]	12,745 hectares

Since the election of a new government in Saskatchewan in April, 1982, no further lands have been set aside.

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130. British North America Act, 1930, c. 26 (U.K.), cl. 24 Agreements with Alberta and Manitoba, cl. 26 Agreement with Saskatchewan.

131. (1980) 5 W.W.R. 456; [1980] 3 C.N.L.R. 71.

132. O.C. 1018/78, 27 June 1978 nd O.C. 1726/78, 28 Nov. 1978.

133. O.C. 1088/80, 8 July 1980.

134. O.C. 104/81, 27 Jan. 1981.

135. O.C. 172/81, 13 Feb. 1981.

In Manitoba the claims of twenty Indian bands have been validated. Six remain under review. In September, 1982, the Government of Manitoba appointed a sole Commissioner under the Evidence Act to review "the matter of a basis for contemporary settlement of treaty land entitlements" and to report. The Commissioner reported,[136] with recommendations, on January 18, 1983.

In Alberta the claim of one band has been validated. No transfers have taken place since 1960 because of the refusal of the Government to transfer mineral rights in lands set apart.

1. The Obligation To Seek To Reach An Agreement

The obligation of the province to set aside lands only extends to lands selected "in agreement" with the province, *but* the province is implicitly obliged to seek to reach agreement so as to fulfill the treaty promises made by Canada. Failure by the 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 Agreement. The Indians are not parties to the Agreement and accordingly cannot bring such an action against the province. The obligation of the province 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 the province with respect to those times. 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 effort" to secure such an agreement it is suggested that no action could succeed.

A violation of the Agreement might be found to exist, however, if the 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, e.g., the refusal of Alberta to transfer minerals.

2. The Lands Subject To Selection

(a) Unoccupied Crown Lands

The lands subject to selection and setting aside 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 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

136. Report of Treaty Land Entitlement Commission, 18 Jan. 1983, Winnipeg, Manitoba.

Crown land in Manitoba which was then unoccupied and transferred to Provincial administration by that Agreement."[137]

The preamble and the text of the treaties indicated a desire to open up the land for settlement, trading, lumbering and mining, 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 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.[138] It is suggested that such construction suggests a meaning of "occupied" entailing actual development of the land of the character of "settlement, mining, lumbering and trading."[139] It is not considered that mineral exploration activity, whether aerial or surface, can constitute such occupation of the land and 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 that they are not subject to the Indian right to hunt, trap and fish for food. Such consideration offers a conflict of authority amongst decisions of the Saskatchewan Court of Appeal. In *R.* v. *Stronquill* [140] the Court of Appeal declared forest reserves to be unoccupied Crown lands and referred to a dictionary definition of "unoccupied" consisting in "not occupied by inhabitants or dwellers — not put to use in this way — not frequented or filled up — empty." McNiven J.A. further observed:[141]

> If the legislative 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 paragraph 12. The legislature has no power to do indirectly what it cannot do directly.

The decision has been followed by the Yukon Territorial Court[142] and the Yukon Court of Appeal.[143] In *R.* v. *Michel and Johnson*, Seaton J.A. declared for the Yukon Court of Appeal:[144]

> 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

137. *Id.* at 58.

138. *R.* v. *Smith* [1935] 2 W.W.R. 433 at 436 per Turgeon J.A., *Nowegijick* v. *The Queen* [1983] 2 C.N.L.R. 89 at 94 (S.C.C.).

139. *R.* v. *Weesk* [1984] 2 C.N.L.R. 183 (Ont. Prov. Ct.), *R.* v. *Napoleon* [1982] 3 C.N.L.R. 116 (B.C. Prov. Ct.).

140. (1953) 8 W.W.R. 247 (Sask. C.A.).

141. *Id.* at 270.

142. *R.* v. *Smith* [1970] 3 C.C.C. 83.

143. [1984] 1 C.N.L.R. 157 (Yukon C.A.).

144. *Id.* at 159.

> 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.
>
> . . .
>
> The only ground for classing the area as occupied is the Ordinance. I am of the view that it is wrong in law to conclude that the Ordinance constituted an occupation of the land.

In 1935 the Saskatchewan Court of Appeal held a game reserve to be occupied using a more extensive definition. In *R.* v. *Smith*,[145] Turgeon J.A. suggested that Crown land become occupied when it was "appropriated or set aside for a special purpose". In *R.* v. *Moosehunter*,[146] the Court followed such decision in declaring a wildlife management unit to be occupied Crown land. Woods J.A. 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.

The Supreme Court of Canada has expressly refrained from considering the ambit of "unoccupied Crown land",[147] albeit it has commented in *R.* v. *Mousseau*:[148]

> When the Crown in the right of the Province appropriated or set aside land for the purpose of Provincial Road No. 265, it is difficult to regard that land thereafter as unoccupied Crown lands within the meaning of paragraph 13. . . .

In the result it is suggested that the lands subject to selection are those unoccupied in fact at the time of the transfer in 1930. The meaning of "unoccupied" that is favoured is that ennunciated in *R.* v. *Stangquill*.

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 the selection of land the title to which had vested in settlers prior to 1930.

(b) Existing Interests

The numbered treaties had reserved to the Crown the "right to deal with any settlers . . . as she shall deem fit [or just]." Treaty #2 expressly excepted the lands of settlers within reserve boundaries and Treaty #5, the lands granted to the Hudson's Bay Company. The obligation of the Crown in the right of Canada under the treaties requires the setting aside of reserve lands, but expressly leaves discretion in the Crown in the right of Canada as to how to accommodate the rights of settlers.

The obligation of the province consists in seeking to reach agreement upon the selection of 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 province 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

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145. *Supra* n. 138.

146. [1978] 4 C.N.L.R. 71 (Sask. C.A.).

147. *R.* v. *Sutherland* [1980] 2 S.C.R. 451 at 458; *R.* v. *Moosehunter* [1981] 1 S.C.R. 282 at 292.

148. (1980) 111 D.L.R. (3d) 443 at 445 (S.C.C.).

thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province." If the province cannot impose conditions, the province may decline to agree upon the selection of lands where prior interests have arisen. The province cannot however rely on "the right to deal with any settler" reserved in the treaty. Such right is vested in the Crown in right of Canada not the province. The province may however assert that a refusal to agree to such selection does not constitute a violation of its obligation where the Crown in right of 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 largely occupied south of the Province:[149]

> (1) ...
>
> (2) That attempts be made to satisfy claims of northern lands 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.
>
> I am not unmindful of Canada's role in the so-called "James Bay Agreement" in spite of the fact that the Province of Quebec had complete responsibility to bear and satisfy all charges and expenditures in connection with or arising out of surrenders of land from native peoples as detailed in The Quebec Boundaries Extension Act, 1912. In Saskatchewan and indeed the Prairie Provinces — there is a much stronger and more direct role for Canada to play as outlined in the Treaties and in 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.

The Government of Canada indicated its position with respect to the availability of federal lands to satisfy outstanding treaty Indian entitlements:[150]

> 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.

149. Letter to Chief Ahenakew, Federation of Saskatchewan Indians from Minister of Northern Saskatchewan, 23 Aug. 1976.

150. Letter to Minister of Northern Saskatchewan from Minister of Indian Affairs, Canada, Warren Allmand M.P., 14 Aug. 1977.

The Saskatchewan Government position indicates that "satisfactory arrangements must be concluded" with existing interests. The determination of what is satisfactory has been made by the Provincial Ministers.[151] The Minister for Northern Saskatchewan commented:[152]

> I would expect that many committals will have conditions attached to them. The committals will set with some degree of precision the nature of existing encumbrances on interests which will have to be negotiated before the lands will be transferred. The Province recognizes its obligation to Bands. To that effect, the Bands will be charged with the obligation and duty to negotiate the conditions as set out in the letters of committal . . .
>
> The Province through the Treaty Indian Land Entitlement Co-ordinator shall continue to lend whatever assistance it can to the Bands and the recognized interest holders during the negotiation process. The province will use its best efforts to ensure that the negotiations proceed in a fair and equitable manner, showing no preference or favoritism to either.

Indian Affairs has commented on the Provincial position with respect to existing mineral interests:[153]

> . . . 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.

The response of Indian Affairs was as follows:[154]

> 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.

A difficulty in the way of transferring lands by way of land entitlement subject to existing mineral interests is the need under the Indian Act for a surrender by the Indian members of the band for all mineral dispositions of reserve land. Indian Affairs commented:[155]

> 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.

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151. Letters for Hon. John Munro, Minister of Indian and Northern Affairs (Canada), 23 and 27 March 1981, from Hon. T. Bowerman, Minister of Northern Saskatchewan.

152. Letter of 26 March 1981, to Chief Sol Sanderson, from Hon. T. Bowerman, Minister of Northern Saskatchewan.

153. 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".

154. *Id.*

155. *Id.*

Indian Affairs described the procedure that was adopted to overcome the difficulty:[156]

> 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.
> 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.

The procedure entails a disposition of minerals in a reserve without a surrender. Legislative provisions have always sought to protect Indians and their lands from private purchase and government grant by barring any disposition without a surrender. Section 37 of the Indian Act, as did its predecessor provisions, operates only upon reserve lands and bars any disposition "until they have been surrendered". Section 37 assumes, as any purposive construction of the Act would suggest, that a time lapse will occur after the creation of the reserve and prior to its surrender. It is suggested that a "surrender" conducted prior to or contemporaneously with the existence of a reserve is not effective to validate a disposition as section 37 would bar any such disposition. This conclusion is, of course, in accord with the history and intent of the provision which sought to prevent advantage being taken of Indians in respect to their lands.[157] A vote upon a surrender in respect of land with mineral deposits upon a condition that they may only be selected if the vote is favourable seems to entail the taking of such an advantage.

The disposition of timber interests on a reserve does not require a surrender, but must be undertaken under the Indian Timber Regulations. 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:[158]

> . . . 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-

156. *Id.*

157. E.g., S.C. 1850, 13 & 14 Vic., c. 74.

158. Letter to R.B. Kohls, Director, Membership Branch (Reserves and Treaties) Indian Affairs from J.B. Beckett, Assistant Director, Legal Services, Indian Affairs, 16 Jan. 1979, re: "Selection by Bands of Areas covered by Forest Management License Agreement with Simpson Timber Co. (Sask.) Ltd.".

> in-Council would adopt the Saskatchewan regulations or that prt 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.

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.

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 the holders of such an interest, Canada and Manitoba, it was recommended that the land be transferred in a manner which honoured the pre-existing interest.[159]

The Government of Saskatchewan has insisted that if any financial compensation is required in securing "satisfactory arrangements" with existing interests it is the "sole responsibility" of the Government of Canada.[160] The response of the Government of Canada has been to indicate that "there is at present no authority for Canada to pay such compensation".[161] Indian bands have accordingly tended to agree to honour existing interests.

It is understood that the Governments of Canada and Manitoba, as of August 1984, were near to securing an agreement providing for Federal funds for purchase of lands in southern Manitoba to enable outstanding treaty entitlements to be met.

The Treaty Land Entitlement Commission had recommended the establishment of a purchase policy by negotiation between the parties in return for the Indian agreement to exclude lands designated as being for public purposes from selection.[162]

(c) The Mines and Forests

It has been suggested above that the treaties provided that the reserve lands would include the mineral and forest resources. Such conclusion was arrived at on the basis of the text of the treaties, the contemporaneous circumstances, the Indian Act and the Natural Resources Transfer Agreements. The provinces are obliged to set aside "such further areas . . . as necessary to enable Canada to fulfill its obligations under the treaties with the Indians". It is accordingly suggested that the obligation of the province must be considered to extend to the mineral and forest resources. Such understanding is confirmed by the application of clauses 1 and 2 of the 1924 Canada-Ontario Reserve Lands Agreement under the Natural Resources Transfer Agreements to the lands set aside pursuant to such Agreements. Clauses 1 and 2 specifically contemplate the disposition of minerals, including precious metals, in reserve lands for the benefit of the Indians.

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159. *Supra* n. 136 at 109.

160. Letter of 23 March 1981, to Hon. J. Munro, Minister of Indian Affairs (Canada) from Hon. T. Bowerman, Minister of Northern Saskatchewan.

161. Letters of 26 and 27 May 1981, to Hon. T. Bowerman from B. Loiselle, M.P. Minister, Special Representative, Saskatchewan Treaty Entitlement.

162. *Supra* n. 136 at 106, 110.

The Alberta Government has refused to include mineral rights in areas set aside for reserve lands.[163] The Lubicon Lake Band have asserted an outstanding treaty land entitlement which has not been satisfied because of Alberta's refusal to include the mineral rights. In 1982 the band applied for an injunction to halt exploration activity in the area of their traditional lands. In November 1983 the Alberta Court of Queen's Bench denied the application because of the failure of the band to show irreparable damage.[164]

(d) The Size Of The Area Required To Be Set Aside

The 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 (Treaties #3, 6, 7, 8 and 10) for each family of five of each band "or in that proportion for larger or smaller families".

It is not clear when the size of a band population is to be determined in order to calculate the area to be set aside. An opinion of the Saskatchewan Attorney General's Department of October 12, 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 Reports of the Treaty Commissioners, referred to above, explained that the selection would in some cases be postponed. In such circumstances 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 *The Queen* v. *Blackfoot Band Indians.*[165] The learned judge was considering whether ammunition was required to be distributed by Treaty #7 amongst the "said Indians" on a per capita or per stirpes (band) basis.[166]

> 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.

It would seem unreasonable to conclude that the area of reserve lands should be determined by the size of band populations in the 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 usual rules of construction of contracts or those judicial dicta that suggest that Indian treaties should be liberally construed in favour of the Indians.[167]

163. *Globe and Mail*, 7 April 1984, p. 10. See *supra* n. 136 at 67, 89 and 121.

164. *Globe and Mail*, 4 April 1984, p. 2.

165. [1982] 4 W.W.R. 230; [1982] 3 C.N.L.R. 53 (F.C.T.D.).

166. *Id.* at 238, 61.

167. *Nowegijick* v. *The Queen supra* n. 138.
R. v. *Taylor and Williams* [1981] 3 C.N.L.R. 114 (Ont. C.A.).

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 portion of the reserve lands were 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 may preclude its use. Failing such approach it is suggested 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 lands were set aside in the past. It has been suggested that past band population numbers are irrelevent 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 practice adopted in the establishment of reserves is of some assistance. In 1929 the Deputy Superintendent General of Indian Affairs informed the Deputy Minister of Justice:[168]

> . . . 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.

Such statement was made in the context of the negotiations preceding the Natural Resource Transfer Agreements and in opposition to a proposal by Manitoba that a limitation upon the number of acres subject to entitlement be inserted in the Agreements. Canada did not accede to such proposal.

In 1966 the Head of Land Surveys and Titles of the Department Affairs observed:[169]

> 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:
>
> 1. . . .
>
> 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 already received.

In 1977 the Minister of Indian Affairs for Canada referred in correspondence with the Government of Alberta[170] to the use of contemporary population figures to establish the area of land to which two northern Alberta bands were entitled.

The Government of Saskatchewan has sought to compromise the arguments regarding the determination of the area of land to which the Indians are entitled in the Province. The Minister of Northern Saskatchewan declared:[171]

168. 4 Sept. 1929, *supra* n. 136 at 60.

169. 27 Dec. 1966, *Id.*, at 61-62.

170. 23 June 1977, *Id.*, at 66-67.

171. Letter to Chief Ahenakew, Federation of Saskatchewan Indians, 23 Aug. 1976 and the letter to Minister of Northern Saskatchewan from Chief Ahenakew, 31 Aug. 1976.

> 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 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.

The Minister of Indian Affairs of Canada reported in 1977:[172]

> . . . 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.

The operation of the Saskatchewan formula is indicated in the following example:[173]

Peter Ballantyne 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)	229,284.36

The correspondence adopting the "Saskatchewan formula" did not purport to expressly amend the treaty obligation owed by Canada nor the constitutional obligation owed by the Province under the Natural Resources Transfer Agreement. Nor does the correspondence appear in a form appropriate to such amendment. There is no written agreement between the Indians and Canada with respect to the Saskatchewan formula and amendments of the Natural Resources Transfer Agreement require complementary federal and provincial legislation.[174]

In April 1982 the Progressive Conservative Party was elected to the government of the Province of Saskatchewan and undertook to review the position adopted by the previous administration. In August, 1984, the Government decided to refrain from announcing its position pending the federal election of September 4, 1984.

The Progressive Conservative Government of Manitoba in 1978 announced that lands would be set aside on the basis of Indian band populations at the date of first survey of lands which had been set apart. The Government estimated the area of such lands at 70,000 acres. The Manitoba Indian Brotherhood sought the adoption of the "Saskatchewan formula" and the transfer of 600,000 acres. In 1980 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.[175]

In Alberta the claim of only one band to outstanding treaty land entitlement has been validated by the federal Office of Native Claims. No

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172. Letter to Minister of Northern Saskatchewan from Warren Allmand, M.P., 14 April 1977.

173. From *Saskatchewan Indian Treaty Land Entitlement Rights*, (Federation of Saskatchewan Indians 1981) 21.

174. *Supra* n. 130.

175. *Supra* n. 136.

land was ever set aside for the band. The Progressive Conservative Government of Alberta has indicated that they are only prepared to set aside lands on the basis of population as at the date of treaty.

3. Enforcement and Procedure

The obligation of the provinces to set aside reserve lands is contained in the Natural Resource Transfer Agreements between the Government of Canada and the governments of the provinces. The Indians were not a party to the Agreements. Each Agreement may be amended upon the agreement of Canada and the respective province. The obligation to set aside reserve lands cannot under the Agreements properly be described as owed to the Indians. The obligation is owed to Canada. The obligation is enforceable at the suit of Canada, not the Indians. Indian bands might secure standing in an action upon the Agreements only if the constitutional validity of the Agreements was in question.[176]

It is not considered that any lien or trust in favour of the Indians in the lands transferred to the provinces can be said to arise from the Agreements. The language of the Agreements does not suggest such right in rem, and such authority, as exists, is to the contrary. In *A.G. of Canada* v. *A.G. of Ontario*,[177] the Privy Council rejected the argument that a promise to pay increased annuities under the Robinson Treaties if the surrendered lands produced sufficient revenue constituted a trust upon such lands or created some other interest therein. Lord Watson declared:[178]

> Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities, whether original or augmented, beyond a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province, that the latter should pay the annuities as and when they became due; that the Indians obtained no right which gave them any interest in the territory which they surrendered, other than that of the province. . . .

The obligation of the province contemplates the initial selection by the Superintendent General of Indian Affairs "in agreement with the appropriate Minister of the Province" of such lands as are "necessary to enable Canada to fulfill its obligation under the treaties". In *Ontario Mining* v. *Seybold*,[179] Lord Davey rejected the argument that the Province of Ontario had assented to the selection and setting apart of a reserve by acts of acquiescence on the part of various provincial officers. Lord Davey declared that the "province cannot be bound by alleged acts of acquiescence on the part of the various officers of the departments which are not brought home to or authorized by the proper executive or administrative organs of the Provincial Government, and are not manifested by any Order in Council or other authentic testimony".[180]

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176. *Thorson* v. *A.G. of Canada (No. 2)* (1974) 43 D.L.R. (3d) 1 (S.C.C.); *Rosenberg* v. *Grand River Conservation Authority* (1976) 69 D.L.R. (3d) 384 (Ont. C.A.); *A.G. of Nova Scotia* v. *Bedford Service Commission* (1976) 72 D.L.R. (3d) 639 (N.S.S.C.).

177. [1897] A.C. 199 (P.C.).

178. *Id.* at 213.

179. *Supra* n. 36.

180. *Id.* at 84.

It is suggested that an Order in Council is not necessary for provincial agreement to the selection of a reserve within clauses 10 and 11, although an Order in Council may be necessary to set aside such land in accordance with provincial public lands legislation. Letters of commitment and acceptance issued by the appropriate Minister satisfy the requirements of the Privy Council declared in *Ontario Mining* v. *Seybold* for such agreement.

The Minister of Northern Saskatchewan outlined the procedure which the Government of Saskatchewan would follow in agreeing to the selection of lands:[181]

> The stage is now set to implement the "Saskatchewan Formula". To that effect, and in consideration of the Province's duty to represent all citizens of Saskatchewan, the need to settle entitlements in a fair and orderly fashion, the Province has undertaken a review of all selections presently before its departments. Upon completion of the review, the Province is prepared to commit certain selections for transfer.
>
> In many instances, the commitments will carry conditions that will have to be met before transfer will take place. The Province recognizes its obligation to bands. Therefore, it will be incumbent upon the band involved to discharge those conditions. The band or bands may choose their own negotiator(s). The negotiator may be a member of the band, your department, the Federation of Saskatchewan Indians, a lawyer or any other person, agency or organization. The important factor is that any settlement reached must have Band informed approval.
>
> Letters of commitment will be addressed to your office for approval. Once committed by the Province and accepted by your office, the following principles of understanding will apply:
>
> 1. Upon committal and acceptance, the Province will not entertain any alterations or withdrawals unless there are overwhelming considerations involved;
> 2. Upon committal and acceptance, the selected area will be withdrawn from further disposition unless such further disposition(s) has been provided for under the terms of a pre-existing legal agreement.
>
> The Province through the Treaty Indian Land Entitlement Co-ordinator shall continue to lend whatever assistance it can to the Bands and the recognized interest holders during the negotiation process. The Province will use its best efforts to ensure that the negotiations proceed in a fair and equitable manner, showing no preference or favouritism to either.
>
> To that effect, I enclose letters of commitment for transfer of the following entitlement selections:
>
> . . . . .
>
> I look forward to the day when the above mentioned parcels will be transferred.

The obligation of the provinces to set aside reserve lands arises upon the request of the Superintendent General to set aside the selected lands. A request upon the part of an Indian band does not give rise to such obligation. The Department of Indian Affairs only makes a request for land to be set aside after it has validated the claim of the band. The federal Office of Native Claims determines if in fact there is outstanding treaty land entitlement.

The Crown Lands Act[182] of Manitoba and the Provincial Lands Act[183] 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 Af-

181. Letter of 27 March 1981, to Hon. J. Munro, Minister of Indian Affairs from Hon. T. Bowerman, Minister of Northern Saskatchewan.

182. R.S.M. 1970, c. C340 s-s. 7(1)(d).

183. R.S.S. 1978, c. P-31, s-s. 20(1)(e).

> fairs, in agreement with the minister selects as necessary to enable Canada to fulfill its obligation under the treaties with the Indians of the province. . . .

The Public Lands Act[184] 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 statutes of all the provinces purport to reserve to the Crown minerals, water rights, water beds, and rights of access and portage in all dispositions of Crown land. The setting aside of lands for Indian reserves would *prima facie* appear to constitute a disposition within the meaning of the legislation.[185] It has been suggested that the obligation of the provinces to set aside reserve lands includes the mineral and water rights.[186] The public lands legislation is constitutionally *ultra vires* insofar as it would seek to amend the obligation of the provinces under the Natural Resources Transfer Agreements.[187]

The Government of Saskatchewan amended the Provincial Lands Act in order to endeavor to resolve the difficulty referred to above. The following subsection was added to the Act in 1980:[188]

> (3) The setting aside of areas of land pursuant to clause (1)(e) is deemed not be a disposition of that land for the purposes of:
> (a) this Act; or
> (b) any other Act that:
> (i) restricts or prohibits the disposition of provincial lands; or
> (ii) makes any disposition of provincial lands subject to a reservation in favour of the Crown or of any other person or class of persons;
>
> but the property in, the right to and the use of all water and water powers in that land and any other property, interets, 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 obligation to set aside reserve lands.

Upon the issuance of a provincial Order in Council setting aside the land, the area becomes subject to federal administration and control. The land may be considered to have been "set apart" for the purposes of the Indian Act if the preliminary acts of survey and selection contemplated by the treaty have taken place. In such circumstance, upon issuance of the provincial Order in Council, the tract becomes a reserve within the meaning of the Indian Act.[189]

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184. R.S.A. 1980, c. P-30, s. 7.

185. R.S.A. 1980, c. P-30, s-s. 1(e); R.S.M. 1970, c. C340, s-s. 2(d); R.S.S. 1978, c. P-31, s-s. 2(d).

186. See generally, R. Bartlett "Indian Water Rights on the Prairies" (1980) 11 *Man. L.J.* 59.

187. *R.* v. *Sutherland, supra* n. 146.

188. S.S. 1979-80, c. 66, s. 3.

189. Letter to Balfour, Moss, Milliken, Laschuk, Kyle, Vancise and Cameron from Department of Justice, Canada, Saskatchewan Regional Office, 25 Jan. 1980, regarding Stony Rapids Band.

V. CONCLUSION

The Indians of the Prairie Provinces were promised reserves in return for the surrender of aboriginal title to the lands. The reserves comprise considerably less than 1% of their traditional lands. The treaties promised that the entire beneficial interest in the lands would be held for the benefit of the Indians. Such interest includes the minerals and timber on the lands.

The treaty promises have been only partially fulfilled. Prior to 1930 the Dominion Government sought to exclude any possibility of valuable minerals being found on reserve lands and alienated most of the southern reaches of the provinces without fulfilling treaty land entitlement. Since 1930 the provincial governments have only slowly moved towards the provisions of lands to meet such entitlement. The governments have opposed the provision of such lands because of pre-existing interests, created by Crown disposition, the size of the area sought, and a refusal to transfer minerals. The Governments of Manitoba and perhaps Saskatchewan may be moving finally to satisfy the outstanding entitlement.

A century has already passed since most of the treaties with the Indians of the Prairie Provinces were signed. It is surely time that the treaty promises were fulfilled.