DEVLIN GAILUS
BARRISTERS AND SOLICITORS

556 Herald Street
Victoria, BC, Canada V8W 1S6

Telephone: 250.361.9469
Facsimile: 250.361.9429
www.devlingailus.com

"Overview of Treaty No. 8"

Treaty No. 8 was made on the shores of Lesser Slave Lake in what is now northern Alberta on June 21, 1899. It was the first Treaty to be made with the inhabitants of Canada's northern boreal forest, and marks a departure in treaty-making from the other "numbered" treaties made in the nineteenth century, starting in Ontario and moving westwards.

I will review:
- (A) History of Negotiating the Numbered Treaties
- (B) Negotiation of Treaty No. 8
- (C) Key Provisions of Treaty No. 8 and Judicial Consideration of Same

A. History of Negotiating the Numbered Treaties

Much of western Canada was "owned" under a charter to the Hudson's Bay Company granted by the Crown in 1670. The area was known as Rupert's

Land. The Hudson's Bay also had exclusive trading rights under license over the region adjacent to Rupert's Land, or what became known as the North-Western Territory.

As Canada moved towards confederation, there was the issue of what to do with the Hudson's Bay Company's holdings in North America. Through a series of Imperial statutes, dispatches from Secretaries of State, and Orders-in-Council, a rather complicated formula for the transfer was created to transfer the Hudson's Bay Company territories to Canada. Her Majesty accepted the surrender by Hudson's Bay Company the 22 June 1870.[1] The historical significance of federal control over the lands and resources of the west has been well noted by Chester Martin:

> In truth the transfer of 1870 marked a revolution not only in administration and land policy, but in the very nature of the Canadian federation. It transferred the original Dominion from a federation of equal provinces each by a fundamental section (109 of the British North America Act of 1867) vested with the control of its own lands, into a veritable empire in its own right, with a domain of public lands five times the area of the original Dominion, under direct federal administration. For the new province of Manitoba as well as for the North-West Territories "all ungranted or waste lands" were by statute to be "administered by the Government of Canada for the purposes of the Dominion."[2]

There was, however, the matter of dealing with the First Nations whose traditional territories lay within the vast area of "Dominion Lands" under federal administration and control.

---

[1] *Order of Her Majesty in Council Admitting Rupert's Land and the North-Western Territory in to the Union*, R.S.C. 1970, App. II, No. 9. The admission of Rupert's Land and the North-Western Territory to the Dominion became effective 15 July 1870.

[2] Chester A. Martin, *Dominion Lands Policy*, edited by Lewis H. Thomas. Toronto: The Carleton Library No. 69, McClelland and Stewart Limited, 1973, at 9.

In the Spring of 1870, as preparations were made to send a military expedition to the new Province of Manitoba to establish effective Canadian sovereignty, arrangements were made with the Indians between Lake Superior and Fort Garry to permit the passage of troops through their territory. These discussions led eventually to the making of Treaty Nos. 1 and 2 in 1871. Treaty Nos. 3 through 7 were negotiated between 1871 and 1877, by which time the only lands not under formal Treaty lay far to the north where, it was felt, settlement would be slow to penetrate.

Unlike the "peace and friendship" Treaties in the Maritimes, the promotion of natural resource development was the primary impetus behind the remaining Numbered Treaties, beginning with Treaty No. 8 (1899-1900) and through Treaty No. 9 (1905-1906), No. 10 (1906-1907) and No. 11 (1921-1922).

B. NEGOTIATION OF TREATY NO. 8

Dominion Order In Council 1703, dated 27 June 1898, established a Treaty Commission to negotiate a treaty with those First Nations in the territory situated north of Treaty Nos. 6 and 7. The NWMP had advised that Indians along the route from Edmonton to Pelly River (in the Yukon), the Beaver Indians of the Peace and Nelson Rivers, and the Sicames and Nihamees "were inclined to be turbulent and liable to give trouble" to the miners and traders entering this northern area. The public interest called for treaty making with the Indians whose territory lay "between the height of land and the eastern boundary of British Columbia" with Alberta, so that "the country to be treated for should be thrown open to development". By Order in

Council 2749, dated 6 December 1898, Canada advised British Columbia of its intention to enter into a treaty with the First Nations in north eastern British Columbia.

In 1899 a number of First Nations situated in present day northern Alberta entered into Treaty No. 8 with Canada. Treaty No. 8 was ratified by the Governor-in-Council on February 20, 1900 by Order in Council 363. The Treaty contains numerous express provisions, including:

- the right to pursue "their usual vocations of hunting, fishing and trapping throughout the tract surrendered" except on the tracts of land "taken up" by the Crown for "settlement, mining, lumbering, trading or other purposes";
- the right to reserve lands held in common to be set aside by Canada, to be calculated at 128 acres per person or lands in severalty calculated at 160 acres per person;
- the right to treaty adhesion payments and treaty annuities in perpetuity;
- the right to a medal and a flag, and suits of clothing for Chiefs and Headmen;
- the right to have Canada pay the salaries of teachers instructing band children;
- the right to certain economic benefits:
  - construction implements (axes, hand-saw, augers, grindstones, etc.)
  - agricultural implements ("cows and ploughs") and
  - ammunition and twine.

The Treaty No. 8 negotiations were quite animated, according to the Report of the Treaty Commissioners. The Aboriginal people were "adept at cross-examination" and displayed "considerable keenness of intellect and much practical sense" in pressing their claims. The Treaty Commissioners promised that "the same means of earning a livelihood would continue after the treaty as existed before it". The key negotiations concerned the curtailment of hunting and fishing practices. The Treaty Commissioners reported that they had promised as follows:

> The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.[3]

The Treaty Commissioners also made assurances about the Treaty not interfering with the Indian way of life, no taxation and no enforced military service.

The Treaty Commissioners took the view that reserves would not be required for some time, as few of the Indians were likely to take to cattle-raising. Instead, the Treaty Commissioners anticipated the main demand under the Treaty would be for ammunition and twine, as the Indians would continue their "usual vocations" of hunting and fishing "for a livelihood". The Treaty Commissioners reported that the Indians were generally averse

---

[3] *Report of the Commissioners for Treaty No. 8,* September 22, 1899 (Roger Duhamel, F.R.SC., Queen's Printer and Controller of Stationery, Ottawa, 1966 Cat. NO. Ci 72-0866) at 6

to being placed on reserves but were satisfied that the Dominion would set aside reserves for them in the future.

In the years following the signing of Treaty No. 8 (i.e. 1900 to 1914), a number of First Nations in British Columbia adhered to the Treaty, accepted Treaty annuities or were admitted into Treaty, including the Ft. St. John Band (which later divided into the Doig River and Blueberry River First Nations), the Fort Nelson Band (which later divided into the Prophet River and Fort Nelson First Nations), the Hudson's Hope Band (which later divided into the Halfway River and West Moberly First Nations) and the Saulteau First Nations.[4]

C. Key Provisions of Treaty No. 8

1. Treaty Land Entitlement

(a) Reserve Lands in Common

All of the Numbered Treaties of Western Canada make provision for the survey of reserve lands. With the exception of Treaty No. 5, these lands are not to exceed one square mile for each family of five, or 128 acres for each individual Indian.[5] The land entitlement provision of Treaty No. 8 reads as follows:

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

---

[4] The eighth Treaty 8 First Nation is McLeod Lake, which adhered in 2000 through the *McLeod Lake Indian Band Treaty No. 8 Adhesion and Settlement Agreement* with Canada and British Columbia.
[5] Treaty No. 5 provides for 160 acres for each family of five, or 32 acres per person.

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

Thus, the beneficiaries to Treaty No. 8 are entitled to choose between taking their land entitlement in common (i.e. those who elected "to reside on reserves") or in severalty (i.e. those who elected to "live apart from band reserves"). What is not clear is the method for determining the extent of the entitlement and the effects, if any, arising from its partial fulfillment.

Lac La Ronge Indian Band v. Canada is the leading decision to consider the issue of Treaty land entitlement generally.[6] In *Lac La Ronge*, the Saskatchewan Court of Appeal held that, pursuant to Treaty No. 6, any land entitlement should be determined according to the population of the band at "date of first survey," with certain specified adjustments, even where the Crown did not survey the entire entitlement at that time. In so ruling, the Court of Appeal rejected what has been termed the "current population formula", whereby the population is determined as of the date when the entitlement is fulfilled in its entirety. The Supreme Court of Canada did not grant leave to appeal this decision.[7]

---

[6] [2001] 4 C.N.L.R. 120 (Sask. C.A.) ("*Lac La Ronge*").
[7] [2001] S.C.C.A. No. 647 (Q.L.).

With respect to Treaty No. 8, however, strong legal and historical factors suggest that the actual extent of outstanding Treaty land entitlements far exceeds the obligation determined for Treaty No. 6 by the court in *Lac La Ronge*.[8] Arguably, it remains an open question whether the outstanding TLE claims in British Columbia must be settled according to the current population formula or to the date of first survey formula.

Another peculiar twist in British Columbia is whether the province has a constitutional obligation to provide lands to enable Canada to fulfill its obligation under the TLE provision of Treaty No. 8. The constitutional framework by which Alberta, Manitoba and Saskatchewan received their lands and resources from the Dominion government requires those provinces to contribute provincial Crown land to Canada to satisfy any outstanding TLE obligations.[9] The constitutional framework is considerably different

---

[8] There are significant differences to be observed with respect to the TLE provisions in each Treaty: the emphasis on "reserves for farming lands" in Treaty No. 6, whereas in Treaty No. 8 it is "reserves for bands"; the TLE formula in Treaty No. 6 is a "one-size fits all" entitlement of 128 acres per Indian, where as Treaty No. 8, provides either 128 per Indian in common or 160 acres per Indian in severalty; Treaty No. 6 contains a census provision to determine population at the time of first survey whereas Treaty No. 8 does not. Under Treaty No. 6, the land entitlement was to occur immediately; under Treaty No. 8, it was assumed land selection for reserve would not occur while the aboriginal economy of hunting and fishing continued to flourish.

As well, the differing social organization of the northern Indians, the lack of suitability of northern lands for agricultural purposes, the lack of an urgent public need to acquire these northern lands for settlement, and the minimal anticipated effect of non-aboriginal settlement on the traditional aboriginal way of life were significant factors leading to the inclusion in Treaty No. 8 of the land in severalty provision, thereby differentiating the land entitlement provisions of this Treaty significantly from Treaty No. 6 and the previous Numbered Treaties made to the south.

Finally, the historical record of reserve allocation under Treaty No. 8 contains several examples of multiple surveys. This history shows that the date of first survey formula, as articulated by the Saskatchewan Court of Appeal in *Lac La Ronge*, was never applied in Treaty 8 territory. There have been seven multiple surveys in Treaty No. 8. Of these seven examples, four were in explicit accord with the current population formula (Horse Lake, Tall Cree, Little Red River and Dene Tha'), one included natural increase and decrease over the period between the date of first survey and the date used as the basis for calculating the amount of additional land surveyed subsequently (Janvier), one approximated more closely the current population formula than the DOFS formula (Kinoosayo's Band), and one was a survey of an area of land to meet immediate needs, subsequent to which a recommendation was made to fulfill the still outstanding entitlement at current population (Bigstone).

[9] See, for example, section 10 of the Natural Resource Transfer Agreement between Alberta and Canada,

between Canada and British Columbia. It remains an open question nonetheless whether the terms by which British Columbia received back the Peace River Block imposed a similar constitutional obligation as was imposed on the prairie provinces respecting Canada's outstanding land obligations under Treaty No. 8 in British Columbia at that time.[10]

(b) Lands in Severalty

Are lands in severalty properly considered part of a reserve allotment to a First Nation (even though they are given to a particular individual), or are they the "Indian" equivalent of the old homestead grants i.e. fee simple grants? With respect to the operation of Treaty No. 8 in British Columbia, this issue was decided in the decision of the B.C. Court of Appeal in *Chingee v. Canada (Attorney General).*[11]

The specific question was whether lands in severalty selected by members of the McLeod Lake Indian Band[12] were protected by section 91(24) of the *Constitution Act, 1867* and therefore within the legislative jurisdiction of Canada. The trial judge had held that although "lands in severalty" fall outside the reserve system governed by Canada under the *Indian Act*, the legal status of those lands is, nonetheless, s. 91(24) lands.[13]

The Court of Appeal disagreed, as follows:

---

attached as a schedule to the *Constitution Act, 1930*.

[10] See, in particular, paragraphs 3 and 5 of the Agreement made on February 20th, 1930 between Canada and British Columbia on the subject of the Transfer of the Railway Belt and Peace River Block.

[11] 2005 BCCA 446 ("*Chingee*")

[12] Pursuant to the *McLeod Lake Indian Band Treaty No. 8 Adhesion and Settlement Agreement* and Treaty No. 8.

[13] The trial decision is reported at (2002), 8 B.C.L.R. (4th) 149; 2002 BCSC 1568.

> .... lands in severalty conveyed pursuant to the McLeod Lake Indian Band Treaty No. 8 Adhesion and Settlement Agreement are simply not within the legislative jurisdiction of Canada, such lands neither being offered to Canada by British Columbia as "lands reserved for Indians" nor accepted by Canada as such.

The Court found it significant that the lands covered by Treaty 8 in 1899 and 1900 were subject to a different constitutional and legal regime in British Columbia than in other parts of Treaty 8 territory. With the exception of the Peace River Block, the administration and control of the Treaty 8 lands in British Columbia was vested in the Province. The balance of the lands covered by Treaty 8 in Alberta and the Northwest Territories were under the control of Canada at the time that the Treaty was signed, and therefore, Canada could unilaterally set aside reserves or provide lands in severalty.[14]

The Court of Appeal went on to analyse the meaning of the words "in severalty":

> .... when one considers the provisions of the *Indian Act* concerning enfranchisement, one is driven to the conclusion that, at least on the part of the commissioners, they had in mind that persons who chose land in severalty would be obtaining private enclosed property as opposed to property held in common with other members of the tribe.[15]

Leave to appeal to the Supreme Court of Canada was denied.

(c) Compensation for Loss of Use of TLE Lands

Another interesting question emerges with outstanding TLE claims: compensation for loss of use of reserve lands that ought to have been

---

[14] As has been recognized by the Supreme Court of Canada, this process in British Columbia required the cooperation of both levels of government: *Wewaykum Indian Band v. Canada,* [2002] 4 S.C.R. 245 at 261
[15] *Chingee*, at paragraph 21

surveyed and set aside but were not. How should the courts value compensation for such historic wrongs?

In *Lac La Ronge*, the Saskatchewan Court of Appeal found that there was an outstanding TLE which Canada owed to the First Nation. This conclusion raised the question of whether the First Nation was entitled to damages for the loss of opportunity of the use of the land which was not set apart as at the date of adjustment. The matter was, however, remitted back to trial for a determination.[16]

There is currently an appeal before the Ontario Court of Appeal which may provide assistance for determining how to assess compensation for loss of use in TLE claims. In *Whitefish First Nation v. Canada*,[17] the Crown sold timber rights surrendered by the First Nation on their reserve for less than fair market value in 1888. Although Canada admitted liability, it questioned the valuation of the damages. The court awarded damages that accounted for the rate of inflation from 1888 to 2006, but not for the rate of return for the lost opportunity. The trial judge accepted Canada's arguments that the First Nation would have "dissipated" or wasted all revenues it received from the sale of timber from its Reserves in 1888.

The question raised in the appeal was whether the Crown, by relying upon its historic immunity against the payment of interest on damage awards, can avoid paying equitable compensation to an Indian Band for a historic wrong it indisputably committed. In other words, should equitable compensation fully compensate a First Nation for the loss suffered, including the lost value

[16] *Lac La Ronge*, at paragraphs 159-160
[17] [2006] O.J. No. 245 (O.S.C.J.) ("*Whitefish*")

of the money over time (from 1888 to 2006) of which it was wrongfully deprived? While there may be Crown's immunity at common law and in statute against the payment of interest, does that immunity extend to equitable compensation which assessed damages and may use compound interest as a measuring stick to make a global assessment?

Whitefish is significant because the Crown may rely on it to justify its formula for calculating interest on outstanding liabilities to First Nations, including Specific Claims like TLEs. That formula determines compensation for historical claims at a level far below what equitable compensation might otherwise provide. The Appeal was heard on January 8 and 9, 2007 and, to date, judgment is reserved.

2. Hunting, Fishing and Trapping

The hunting, fishing and trapping provision of Treaty No. 8 provides as follows:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

In *R. v. Horseman*,[18] the Supreme Court of Canada considered the case of Bert Horseman. He was a Treaty 8 Indian who shot a grizzly bear in self-defence and then, a year later, tried to sell the pelt to feed his family. A conservation officer charged him with unlawfully trafficking in wildlife

[18] [1990] 3 C.N.L.R. 95 (S.C.C.) ("*Horseman*")

without a licence. Mr. Horseman raised as a defence his right to hunt under Treaty No. 8.

The Supreme Court held that Treaty No. 8 hunting right clearly included hunting for purposes of commerce.[19]

However, the 1930 Natural Resource Transfer Agreement ("NRTA") between Canada and Alberta modified the Treaty 8 hunting right within the province of Alberta.[20] The NRTA dealt specifically with Indian Reserves and Indian hunting, fishing and trapping rights, as well as encumbrances, limitations and obligations of the Crown in Right of Canada and Alberta, in clauses 10, 11 and 12. Clause 12 provided as follows:

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

In *Horseman*, the Supreme Court of Canada held that clause 12 of the NRTA clearly and plainly intended to extinguish this commercial right to

---

[19] *Horseman*, at 101

[20] By way of a brief background, the administration and control of Crown lands in the provinces of Alberta, Saskatchewan and Manitoba held in right of the Dominion were transferred to the provinces by the three respective Natural Resources Agreements of 1930, and under authority of *The British North America Act, 1930*, 20-21 George V, c.26 (U.K.). The latter *Act* modified the provisions of the *Manitoba Act* of 1870, and the *Alberta* and *Saskatchewan Acts* of 1905 that had declared Crown lands in these provinces to be under the administration and control of the Dominion. The prairie provinces were now placed in the same position as the original Provinces of Confederation were by virtue of section 109 of the *Constitution Act, 1867*.

hunt, while expanding the scope of the right to hunt for food to include the entire province of Alberta, not just Treaty 8 territory.[21]

The Supreme Court of Canada also considered the effect of the NRTA with respect to Treaty No. 8 in *R. v. Badger*.[22] The appellants were hunting for food on privately held lands within their traditional territory under Treaty No. 8 but contrary to the Alberta *Wildlife Act*. They raised their hunting right under Treaty No. 8 as a defence to the charges.

The Supreme Court held that one of the appellants had a Treaty right which may have been infringed and remitted the matter back to trial. The Court ruled that the NRTA had modified Treaty 8 to the extent that the NRTA evinces a clear intention to effect such a modification.[23] The Court observed that, per *Horseman*, the NRTA had extinguished any Treaty protection of the rights to hunt, trap or fish *commercially*, but the NRTA had also expanded the rights to hunt, trap and fish to include the entire Treaty area.[24] Furthermore, the Treaty adherents are not restricted to seasonal limitations, as are other hunters, nor to the type of game which they may kill.

The rights to hunt, trap and fish are not unfettered. The NRTA restricts these rights geographically and makes them subject to provincial regulation.

---

[21] *Horseman*, page 104
[22] [1996] 2 C.N.L.R. 77 (S.C.C.) ("*Badger*")
[23] *Badger*, at paragraph 47
[24] *Badger*, at paragraphs 46 and 83

(a) Geographical Limitations

The right to "access" in *the NRTA does* not refer to a general right of access but, rather, it is limited to a right of access for the purpose of hunting, trapping or fishing.[25]

As well, under Treaty No. 8, the rights to hunt, trap and fish can be exercised "throughout the tract surrendered" to the Crown "saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."

(i) *Crown Land*

The Supreme Court held in *Badger* that Crown lands are considered to be "taken up" or "occupied" when they are actually put to an active use which is incompatible with the Treaty right in question.[26] Thus, the right to hunt cannot be practiced on game preserves, forest and game preserves, or public roads,[27] but can be exercised in land taken up as a forest in which hunting for food is not an incompatible use.[28]

(ii) *Private Lands*

The Numbered Treaties do not afford the right of access to "occupied" private lands except those to which the Indians have a right of access

---

[25] *R. v. Mousseau*, [1980] 2 S.C.R. 89 at 97; *R. v. Sutherland*, [1980] 2 S.C.R. 451 at 459
[26] *Badger,* at paragraph 59
[27] *R. v. Smith*, [1935] 2 W.W.R. 433 (Sask. C.A.); *R. v. Mirasty*, [1942] 1 W.W.R. 343 (Police Ct.); *Mousseau, supra.*
[28] *R. v. Strongquill*, [1953] 8 W.W.R. (N.S.) 247 (Sask. C.A.)

by custom, usage or consent of the owner or occupier, for the purpose of hunting, trapping or fishing.[29]

However, with respect to unoccupied private land, if the privately owned land is not "required or taken up" in the manner described in Treaty No. 8, then Treaty adherents have a right of access to such land. The courts have held that this geographical limitation is based on the concept of "visible incompatible use."[30]

(b) Restriction Through Valid Provincial Regulation?

In Alberta, by the terms of both Treaty No. 8 and the NRTA, provincial game and fishing laws are applicable to "Indians" so long as those laws are aimed at conserving the supply of game or fish. The provincial government's regulatory authority under the Treaty and the NRTA does not extend beyond the realm of conservation.[31]

However, the situation appears to be different in British Columbia, given the absence of an NRTA and since the Supreme Court of Canada's recent decision in *R. v. Morris*.[32] Treaty rights lie squarely within the federal government's constitutional jurisdiction over "Indians and Lands Reserved for Indians."[33] Section 88 of the *Indian Act* provides as follows:

> Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are

[29] *Mousseau,* at page 97
[30] *Badger,* at paragraphs 51 and 54
[31] *Badger,* at paragraph 70
[32] *R. v. Morris*, 2006 SCC 59 ("*Morris*")
[33] *Morris*, at paragraph 43

> inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provisions for any matter for which provision is made by or under this Act.

Under section 88, provincial laws of general application which infringe Treaty rights do not apply to the terms of any Treaties.[34]

The Supreme Court of Canada drew a distinction between "insignificant interferences" with Treaty rights (like requiring a licensing fee to fish in a certain area) and "*prima facie* infringements" of Treaty rights (which are "meaningful diminutions" of a Treaty right). A provincial regulation can impose an insignificant interference and will not trigger the protection of section 88.[35] However, Treaty rights are protected by section 88 from provincial regulations which constitute a *prima facie* infringement. If the regulation is insignificant, it applies on its own force and there is no infringement. If the regulation is a *prima facie* infringement, section 88 protects the Treaty right and the provincial regulation has no constitutional authority over the Treaty right.[36]

So the question in British Columbia now becomes whether a provincial regulation is insignificant or a *prima facie* infringement of the Treaty right – if the latter, then the regulation would appear not to have the constitutional competence to regulate the Treaty right. With respect to conservation measures, the test is now whether there is insignificant infringement or a *prima facie* infringement – that will determine whether the conservation

---

[34] *Morris*, at paragraph 45

[35] *Morris*, at paragraphs 47, 48 and 50

[36] *Morris*, at paragraphs 49, 51 to 55 and also 91-92, 97-99, 100; *R .v. Côté*, [1996] 3 S.C.R. 139, at paragraphs 33, 86 and 87

measure applies to the Treaty right. While *Morris* dealt with a Douglas Treaty, presumably the same section 88 analysis applied to Treaty No. 8.

3. Economic Benefits

Treaty 8 provides the following economic benefits:

> FURTHER, Her Majesty agrees to supply each Chief of a Band that selects a reserve, for the use of that Band, ten axes, five hand-saws, five augers, one grindstone, and the necessary files and whetstones.
>
> FURTHER, Her Majesty agrees that each Band that elects to take a reserve and cultivate the soil, shall, as soon as convenient after such reserve is set aside and settled upon, and the Band has signified its choice and is prepared to break up the soil, receive two hoes, one spade, one scythe and two hay forks for every family so settled, and for every three families one plough and one harrow, and to the Chief, for the use of his Band, two horses or a yoke of oxen, and for each Band potatoes, barley, oats and wheat (if such seed be suited to the locality of the reserve), to plant the land actually broken up, and provisions for one month in the spring for several years while planting such seeds; and to every family one cow, and every Chief one bull, and one mowing-machine and one reaper for the use of his Band when it is ready for them; for such families as prefer to raise stock instead of cultivating the soil, every family of five persons, two cows, and every Chief two bulls and two mowing-machines when ready for their use, and a like proportion for smaller or larger families. The aforesaid articles, machines and cattle to be given one for all for the encouragement of agriculture and stock raising; and for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing.

The Treaty Commissioners emphasized in their 1899 Report that these assistance provisions were drafted to reflect the apparent variety in geographical conditions and developmental potential within the Treaty 8 territory:

> In addition to the annuity, which we found it necessary to fix at the figures of Treaty Six, which covers adjacent territory, the treaty stipulates that assistance in the form of seed and implements and cattle will be given to those of the Indians who may take to farming, in the way of cattle and mowers to those who may

> devote themselves to cattle-raising, and that <u>ammunition and twine will be given to those who continue to fish and hunt. The assistance in farming and ranching is only to be given when the Indians actually take to these pursuits, and it is not likely that for many years there will be a call for any considerable expenditure under these heads.</u> The only Indians of the territory ceded who are likely to take to cattle-raising are those about Lesser Slave Lake and along the Peace River, where there is quite an extent of ranching country; and although there are stretches of cultivable land in those parts of the country, it is not probable that the Indians will, while present conditions obtain, engage in farming further than the raising of roots in a small way, as is now done to some extent. In the main the demand will be for ammunition and twine, as the great majority of the Indians will continue to hunt and fish for a livelihood. It does not appear likely that the conditions of the country on either side of the Athabasca and Slave Rivers or about Athabasca Lake will be so changed as to affect hunting or trapping, and it is safe to say that so long as the fur-bearing animals remain, the great bulk of the Indians will continue to hunt and to trap.[37] [Emphasis added].

These same provisions were the subject of interpretation in the 1973 *Report of the Commissioner of Enquiry Established by the Honourable Minister of the Indian Affairs and Northern Development with respect to the Disposition of the Capital Funds of the Slave Band of Upper Hay River, 1965-1972*:

> With respect particularly to future attempts to establish an agricultural base on the Reserve, it may be appropriate for the Band and the Department of Indian Affairs to consider the provisions of Treaty 8 … Among the relevant terms of the
>
> It is our opinion that the provisions of Treaty 8 above described must be interpreted in terms relevant to the second half of the twentieth century. Clearly, the intention of the Treaty was that, should an Indian Band elect to go into farming and stock raising, the Government would provide the Indian People with sufficient tools, materials, implements and breeding stock to assist in the transition. The commitment of the Government of Canada to the Indians who have made treaties with it can be no less meaningful today that it was seventy years ago. ….
>
> …. It is respectfully suggested that the onus lies upon the Government to establish that it has fulfilled all of the obligations assumed by it under the Treaty, and in the event that it fails to establish that the said obligations have been fully and faithfully performed, it is our opinion that the obligations subsist and that if, as and when a Band elects to "cultivate the soil" or to "raise stock instead of cultivating the soil", the Government has a binding obligation to provide the

[37] *Report of the Commissioners of Treaty No. 8*, page 7

> Members of the Band with the training, agricultural implements, supplies and breeding stock necessary to encourage the establishment of an agricultural and stock raising operation.

These conclusions raise a legitimate query as to what interpretation could have been held by the Indian at the time of signing, other than they would be provided the assistance necessary to move from their traditional "boreal forest" economy to a modern, agricultural economy.

To my knowledge, the agricultural benefits provisions of Treaty No. 8 have not been litigated to date.

The only case of which I am aware that has considered an ammunition and twine provision is *Lac La Ronge Indian Band v. Canada*. However, that case dealt with the ammunition and twine provision of Treaty No. 6, which is considerably different than the one in Treaty No. 8. As well, the particular issue involved the interpretation of an Adhesion Agreement to Treaty No. 6, and how to interpret the ammunition and twine clause in light of the adhesion.[38]

4. Taxation

While Treaty No. 8 does not expressly mention any reference to taxation, the 1899 Report of the Commissioners to Treaty No. 8 noted as follows:

---

[38] [2000] 1 C.N.L.R. 245 (Sask. Q.B.) at 301

> We assured them that the treaty would not lead to any forced interference with their mode of life, that it did not open the way to the imposition of any tax, and that there was no fear of enforced military service.[39] [Emphasis added.]

In *Benoit v. Canada*,[40] Mr. Justice Campbell found that even though there was no tax exemption written into Treaty 8, the evidence suggested that the native signatories had been assured by government negotiators that they would be protected from any future imposition of tax. He relied on the above-noted sentence in the Report of the Commissioners, describing the negotiations with the Aboriginal signatories which led to the signing of the Treaty. He found that the words used by the Commissioners constituted a Treaty promise and a term of the Treaty. He held that the proof had not been made of a common understanding or intention between the signatories of the Treaty. The oral history evidence was clear that the Dene and Cree people believed that a tax exemption had been promised. Accordingly, Campbell J. held that this constituted an "unintended breach" in the trust relationship and that the responsibility to correct it lies with Canada.

However, the Federal Court of Appeal unanimously overturned the ruling of the Trial Judge, on the grounds that Campbell J. made a "palpable error" in relying too heavily on "uncorroborated" oral testimony which was in nature "sparse, doubtful and equivocal" and by "ignoring" all evidence which suggested that the promise of tax immunity had not been made.[41]

What is striking about this judgment is its emphasis on the perspective and intention of the Commissioners and its lack of attention to what the

---

[39] *Report of the Commissioners of Treaty No. 8*, page 6
[40] 2002 FCTD 243
[41] *Benoit v. Canada*, 2003 FCA 236 ("*Benoit*")

Aboriginal signatories intended in signing the Treaty. Nadon J.'s finding that the Trial Judge "misapprehended material evidence" is based on this emphasis in his judgment and his assumption that where an issue is "silent" in the Treaty its presence as a term is assumed to the benefit of Canada. He also found that the oral testimony was unreliable and the Trial judge was unmindful of the hearsay nature of the evidence.[42]

The Supreme Court of Canada dismissed the leave to appeal application with costs.[43]

5. Consultation

The courts have had occasion to consider the duty of consultation owed by the Crown to First Nations in the context of Treaty No. 8. While there are several decisions, the most important for the purposes of this overview of Treaty No. 8 is the Supreme Court of Canada's decision in *Mikisew Cree First Nation v. Canada.*[44]

At issue in *Mikisew* was a proposed 15-metre wide winter road that would pass through Wood Buffalo National Park immediately adjacent to the Mikisew reserve and through several traplines worked by members of the First Nation. The creation of the road would effectively impose a 200-metre wide corridor within which the use of firearms would be prohibited. There were no direct consultations with the Mikisew respecting the road.

[42] *Benoit,* paragraphs 41, 48, 107, 110, 113, and 116
[43] April 29, 2004. S.C.C. Bulletin, 2004, p. 708, [2003] S.C.C.A. No. 387 (Q.L.)
[44] 2005 SCC 69 ("*Mikisew*")

Much of the decision focused on the treaty interpretation issue whether consultation was owed to First Nations under Treaty No. 8 when lands were "taken up" under the terms of that Treaty. The Supreme Court concluded that the First Nation was indeed owed a duty to be consulted about the road. For the purposes of this paper, there are two interesting passages in the judgment of Mr. Justice Binnie, as follows:

> The duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court *as a treaty obligation* as far back as 1895, four years before Treaty 8 was concluded ....
>
> ... the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barreled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well.
>
> [Emphasis in original][45]

The Supreme Court clearly has read into Treaty No. 8 a procedural right to be consulted, which exists quite apart from the substantive rights expressly provided in the text of the Treaty (i.e. hunting, fishing, trapping). In so doing, it did what the Federal Court of Appeal in *Benoit* was unable to do.

[45] *Mikisew*, at paragraphs 51 and 57