

# **Chapter 7**

## **First Nation Lands**

### **Property Rights and Boundary Systems on Canada Lands**

# **Chapter 7**

## **First Nation Lands**

### **Property Rights and Boundary Systems on Canada Lands**

**Authored by  
Gordon E. Olsson CLS**

## *Table of Contents*

INTRODUCTION .....	1
HISTORY .....	3
<i>Early European Relationship with First Nations (1550's to 1760's)</i> .....	3
<i>The Royal Proclamation of 1763</i> .....	5
<i>United Empire Loyalists</i> .....	7
<i>Pre- confederation and Robinson-Huron and Robinson-Superior Treaties</i> .....	8
<i>Difficult times on the Reserves</i> .....	9
<i>Constitution Act, 1867 (British North American Act, 1867)</i> .....	10
<i>First Indian Act, 1876</i> .....	11
<i>Settlement in the Prairies – Treaties and Reserves</i> .....	13
<i>British Columbia – Joins Confederation in 1871</i> .....	14
<i>Newfoundland - Joins Confederation in 1949</i> .....	16
<i>Constitution Act 1982</i> .....	17
THE SUI GENERIS NATURE OF ABORIGINAL RIGHTS .....	18
<i>Introduction</i> .....	18
<i>Aboriginal Rights</i> .....	18
<i>Aboriginal Title</i> .....	19
<i>Aboriginal Rights and Oral Evidence</i> .....	20
<i>Defining the Extent of Aboriginal Rights and Aboriginal Title</i> .....	20
HONOUR OF THE CROWN .....	22
<i>Fiduciary Responsibility</i> .....	22
<i>Where Aboriginal Rights Claimed - Duty to Consult</i> .....	22
<i>Negotiation, not Litigation</i> .....	24
<i>Treaty Rights in Crown Lands</i> .....	25
<i>Water Rights</i> .....	25
LAND MANAGEMENT SYSTEM .....	28
<i>Legislation</i> .....	28
<i>Administration</i> .....	28
<i>Interests and Transactions in First Nations Land</i> .....	29
<i>Devolution of Land Management Functions</i> .....	36
LAND REGISTRATION SYSTEM.....	38
<i>Introduction</i> .....	38
<i>Indian Lands Registry System</i> .....	38
<i>Background</i> .....	41
MINERAL RIGHTS SYSTEM .....	48
<i>Introduction</i> .....	48
<i>Ownership of Mineral Rights</i> .....	48
<i>Mineral Rights Management</i> .....	49
<i>Land Registration</i> .....	49
<i>Land Surveys</i> .....	50
INDIAN OIL AND GAS RIGHTS SYSTEM.....	51
<i>Introduction</i> .....	51
<i>Land Management</i> .....	51
<i>Land Registration</i> .....	53
<i>Devolution</i> .....	53
<i>Land Surveys</i> .....	54
NOTES AND ACKNOWLEDGEMENTS.....	55
REFERENCES.....	56
<i>Books</i> .....	56
<i>Articles, Other Publications</i> .....	57
<i>Websites</i> .....	57
<i>Statutes and Regulations</i> .....	59
<i>Cases</i> .....	60

## INTRODUCTION

Each First Nation before the arrival of the Europeans had its own values, traditions and practices rooted in their ancestral heritage. Following the arrival of the Europeans, First Nation property rights was not an issue as the relationship between First Nations and the Europeans focused on trade and developing alliances for war. However later on, as treaties were signed and reserves were set aside for the First Nations the European culture influenced First Nation land use and tenure. In Eastern Canada both the French and the English influenced First Nations while in Western Canada and in the North the influence was mainly English.

In the early years the policies affecting First Nations lands were far from consistent, both chronologically and geographically. Some consistency was achieved when the *Royal Proclamation of 1763* brought formal and widespread recognition to First Nations regarding rights that they had with respect to lands that had not been ceded or purchased by British Crown. In 1867, under Section 91(24) of the *Constitution Act, 1867 (The British North American Act, 1867)* the Parliament of Canada gained exclusive legislative authority for “Indians, and Lands reserved for the Indians”. The *Indian Act, 1876* added a further degree of consistency to the policy affecting First Nations lands. While government policies finally attained some degree of consistency with regard to the treatment of First Nations lands there still remained a difference between the Europeans and the First Nations view of the land.

In the mid 1800's while First Nations in Eastern Canada were coping with adapting to life on Reserves, First Nations in the West were trading with the Hudson Bay Company and others and were living, for the most part, as they had before European contact. This was all to change as treaties were soon to be made to pave the way for the settlement of the west. The following quote by a Chief of a Southern Alberta tribe presumably made around the time of signing Treaty Number 7 in 1877, talks about the difference in culture between the First Nations and the “white man”:

Why does the white man want our land? You tell us he is rich and strong, and has plenty of food to eat; for what then does he come to our land? We have only the buffalo and he takes that from us. See the buffalo, how they dwelt with us; they care not for the closeness of our lodges, the smoke of our campfires does not fright them, the shouts of our young men will not drive them away; but behold how they flee from the sight, the sound, the smell of the white man! Why does he take the land from us? Who sent him here? He puts up sticks and he calls the land his land, the river his river, the trees his trees. Who gave him the ground, the water, the trees? Was it the Great Spirit? No for the Great Spirit gave to us the beasts and the fish and the white man comes to take the waters and the ground where these fishes and these beasts live – why does he not take

the sky as well as the ground? We who have dwelt on these prairies ever since the stars fell do not put sticks over the land and say, between these sticks this land is mine; you shall not come here or go there.<sup>1</sup>

*Peigan Chief*

A pre-1867 desire to introduce First Nations to the concept of land ownership has resulted in *Indian Act* provisions which still remain today prescribing a “unique” legal property rights system within reserves. However each First Nation still has its individual characteristics, historical values and traditions and practices. As a result there are also informal systems of property rights within Indian reserves for many First Nations.

In recent years First Nations have been going through a renaissance with many achieving self government and instituting their own land management regimes.

In 2003-2004 Indian and Northern Affairs Canada (INAC) administered 2,744 Reserves comprising 3,123,550.8 hectares of land for 614 Bands (First Nations)<sup>2</sup>. There were 719,496 registered Indians in Canada. Of this 45% lived in the Prairie Provinces, 22% in Ontario, 16% in British Columbia, 9% in Quebec, 4% in the Atlantic Provinces and 3% in the territories<sup>3</sup>. Of the registered Indians in Canada approximately 57% live on reserves<sup>4</sup>.

---

1 Robertson, Heather. *Reservations are for Indians*, (Toronto, James Lewis & Samuel, 1970), page 29. The source or date of the quote is not given.

2 *Basic Departmental Data, 2004*, page 99, online: INAC <[http://www.ainc-inac.gc.ca/pr/sts/bdd04/bdd04\\_e.pdf](http://www.ainc-inac.gc.ca/pr/sts/bdd04/bdd04_e.pdf)>

3 *Basic Departmental Data, 2004*, page 11.

4 *Basic Departmental Data, 2004*, page 13.

## HISTORY

### Early European Relationship with First Nations (1550's to 1760's)

Beginning in the late 15th century British and French expeditions explored and started to settle land in the eastern part of Canada. The English influence was mainly in Newfoundland, in the English Colonies along the East Coast of North America and in the area of land known as Rupert's Land. During the 16<sup>th</sup> Century the French settled along the St. Lawrence River and around the Great Lakes. Early relations with the First Nations by both the French and the English focused on developing the fur trade and creating military allies.

Newfoundland was claimed in 1583 by Sir Humphrey Gilbert, who carried a commission from Queen Elizabeth I to take lands under her banner. Newfoundland became England's first possession in North America and her oldest colony, although her title to part of the coast was disputed by the French from time to time.<sup>5</sup> The fate of the First Nation inhabitants, the Beothuks, is not a proud legacy of Canadian history. According the book *Native Rights in Canada – second edition* after the white man's coming, the Beothuks' numbers were steadily reduced through disease, dislocation<sup>6</sup>and, to some extent, a deliberate policy of extermination initiated by European traders and fishermen in alliance with mainland Indians.<sup>7</sup>

In 1605, some 22 years after Newfoundland was claimed by Sir Humphrey Gilbert for England, Samuel de Champlain founded Port Royal near present day Annapolis Royal in Nova Scotia. This was the first permanent French settlement in North America.

The Government of France never recognized aboriginal rights to the land. They made treaties with first Nations however they were peace treaties. For example treaties with the Haudenosaunee (Iroquois), in 1624, 1645 and 1653 were essentially non-aggression pacts<sup>8</sup>. While the French government did not have a policy for the First Nations to give up Aboriginal title and to establish reserves, the Jesuits, (French Catholic missionaries) coming to the New World to seek converts, established Indian settlements at their missions. An early Indian settlement named Sillery was established by the Jesuits near Quebec City in 1638.

A notable event now occurs,—the establishment of the residence of St. Joseph de Sillery, four miles above Quebec, through the munificence of Noel de Sillery,

---

<sup>5</sup> *Newfoundland History, Early Colonization and Settlement Policy in Newfoundland*, online: Marianopolis College

<<http://www2.marianopolis.edu/nfldhistory/NewfoundlandHistory-EarlyColonizationandSettlementofNewfoundland.htm>>

<sup>6</sup> Dislocation in the context of this sentence means to be removed from ones traditional territory and lifestyle.

<sup>7</sup> Cumming, Peter A., Mickenberg, Neil H. *Native Rights in Canada – second edition*, (Toronto, Indian Eskimo Association of Canada in association with General Publishing Co. Limited, 1972) pages 93, 94.

<sup>8</sup> *Report of the Royal Commission on Aboriginal Peoples (RCAP)*, Vol.1, Part One, Chap. 5 - Stage Two, 3.3 Pre-Confederation Treaties in Canada, para. 6, online: INAC <[http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm\\_e.html](http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html)>

a Knight of Malta, who, having become a priest, dedicated his fortune to pious works. At this residence are established two Algonkin families, comprising about twenty persons, who consent to settle there and till the soil for their living,—the beginning of an Indian village, where the native converts can be withdrawn from their savage associations, and kept under French and Christian influences.<sup>9</sup>

Later in the century several other Indian settlements were established along the St. Lawrence River by the Jesuits, some of which eventually would become Indian reserves. In 1680 the Jesuits obtained a Concession by letters patent from Louis XIV, King of France. This land, which is now part of the Kahnawake Reserve, was ceded by the Jesuits for the benefit of the Iroquois.<sup>10</sup> Another was Odanak, donated to the Abenakis and the Sokoquis in 1700 by Miss Marguerite Hertel, widow of Jean Crevier, seigneur of the land of Saint Francois.<sup>11</sup>

On May 2, 1670 The Governor and Company of Adventurers of England trading into Hudson's Bay was incorporated with a Royal Charter from King Charles II. The charter granted the company a monopoly over trade and commerce, in the region known as Rupert's Land. In the charter there is no reference to any French claim to the territory or to the First Nation inhabitants whom they would have traded with.

Until 1713 it seemed that that the British and French were in constant conflict in North America with the various First Nations fighting along one side or the other. By the *Treaty of Utrecht, 1713* France relinquished any claims that it had to Hudson Bay and also ceded lands under French possession in Newfoundland and most of Acadia to Great Britain. Nevertheless the French still had a significant presence in North America occupying the land along the St. Lawrence River and around the Great Lakes.

After 1713 a number of treaties were made between the British Crown and the Micmac Nation. The Micmac tribal territory included all of what is now Nova Scotia and Prince Edward Island, the Gaspé Peninsula of Quebec, the north shore of New Brunswick and inland to the Saint John River watershed, eastern Maine, and part of Newfoundland<sup>12</sup>. The first treaty was signed in 1725. The main thrust of these treaties was to obtain the loyalty of the Micmac to the British. They did not recognize aboriginal title, but rather proclaimed that King George was the rightful possessor of the Province of Nova Scotia.

---

9 *The Jesuit Relations and Allied Documents: Travels and Explorations of the Jesuit Missionaries in New France, 1610—1791*, page 1. Edited by: Reuben Gold Thwaites, Secretary of the State Historical Society of Wisconsin, online: Creighton University <[http://puffin.creighton.edu/jesuit/relations/relations\\_14.html](http://puffin.creighton.edu/jesuit/relations/relations_14.html)>

10 INAC, Indian Lands Registry Instrument Number 5481-169. Also see: *Indian Treaties and Surrenders (Ottawa). Vol.1*, pages 13 and 14. Indian Lands History in Quebec, online: CCCM <[http://www.ccm.nrcan.gc.ca/english/fh\\_e.asp](http://www.ccm.nrcan.gc.ca/english/fh_e.asp). (Kahnawake)>

11 INAC, Indian Lands Registry Instrument Number 74363. Also see Indian Lands History in Quebec, online: CCCM <[http://www.ccm.nrcan.gc.ca/english/fh\\_e.asp](http://www.ccm.nrcan.gc.ca/english/fh_e.asp) (Odanak)>

12 Johnson, Patrick. *The Mi'kmaq*, online: University of Cape Breton <<http://mrc.uccb.ns.ca/mikmaq.html>>

However one of the treaties, an additional treaty of peace that was signed on November 22, 1752, contained provisions regarding hunting, fishing and trading.

4. It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting & Fishing as usual: . . . .<sup>13</sup>

### **The Royal Proclamation of 1763**

During, and even before, the Seven Years War in Europe fighting between France and the British occurred in North America. The native Indians fought mainly alongside the French, which is why in North America the war is often referred to as the French and Indian War. When the Seven Years War ended by the *Treaty of Paris, 1763* the French rule in North America also ended and the British obtained control of all of France's land in North America, except for the islands of St. Pierre and Miquelon which were given to France to serve as a shelter for French fishermen.

After the *Treaty of Paris* the British made the *Royal Proclamation of 1763*. This is without a doubt one of, if not the most significant event in Aboriginal Property rights in Canada.

The Royal Proclamation included several important principles of the British regarding the First Nations which had been developed over many previous years<sup>14</sup>. Under the Royal Proclamation:

- Nations or Tribes living under the protection of the British Crown were not to be disturbed in the possession of land that had not been ceded to or purchased by the British.
- It reserved under the “Sovereignty, Protection and Dominion” of the British Crown for the use of the Indians:

. . . ., all the Lands and Territories not included within the Limits of Our said Three new Governments<sup>15</sup> or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.

- It forbid the purchase or settlement of land which had been reserved for the Indians within the reserved lands and territories described above without the British Crowns “especial leave and license” (permission and authority).

---

13 *1752 Peace and Friendship Treaty Between His Majesty the King and the Jean Baptiste Cope*, online: INAC <[http://www.ainc-inac.gc.ca/pr/trts/pft1752\\_e.html](http://www.ainc-inac.gc.ca/pr/trts/pft1752_e.html)> Also see Indian Treaty collection, *Mikmaq Holdings Resource Guide*, online: Nova Scotia Archives and Records Management <<http://www.gov.ns.ca/nsarm/virtual/mikmaq/cls5.asp>>

14 As an example the founder of Pennsylvania, William Penn, acknowledged the Indian right in land as early as 1683..See William Penn's Instructions to Captain Markham respecting Lord Baltimore, ca. 1683 in: Washburn, Wilcomb E. *The Indian in America*, (New York, Harper & Row, 1975), see footnote 41 on page 85.

15 The three governments referred to were Quebec, East Florida and West Florida. The provisions with regard to the other British Colonies of Nova Scotia and Newfoundland are not so clear.



- Persons who had already settled upon the reserved lands and territories were to “remove themselves from such Settlements”.
- No private person was allowed to purchase from the Indians any lands reserved for them within the colonies. If the Indians should wish to dispose of the lands reserved for them they could only be purchased by the British Crown at a public meeting or assembly of the Indians, to be held for that purpose.

After the Royal Proclamation, British colonial governments in Canada were Quebec (which included land from Labrador south to the Mississippi and Ohio rivers), Nova Scotia and Newfoundland.

The protection of the Indians rights in the Royal Proclamation by the British Crown is an early recognition of Aboriginal Title and the fiduciary responsibility of the Canadian Government to First Nations. It has been referred to as the Indians' Bill of Rights<sup>16</sup> and analogous to the status of the Magna Carta in its' force as a statute<sup>17</sup>.

Provisions in the *Royal Proclamation of 1763* regarding First Nation lands were largely ignored in Nova Scotia (which at that time included present day Prince Edward Island and New Brunswick) in the belief that the Proclamation was not applicable to the colony. The Treaty of 1725 had been deemed sufficient to transfer sovereignty of Nova Scotia to the British Crown and the Colony had been making laws and arrangements for First Nation lands and for Indian protection for several years.<sup>18</sup> As well there was a view that French sovereignty in Acadia (which covered the area of Nova Scotia) had extinguished Indian title. A statement in a 1761 letter written by Jonathan Belcher, Lieutenant Governor of Nova Scotia, to the Lords of Trade is revealing:

Your Lordships will permit me humbly to remark that no other Claim can be made by the Indians in this Province, either by Treaties or long possession (the Rule, by which the determination of their Claims is to be made, by Virtue of His Majesty's Instructions) since the French derived their Title from the Indians and the French ceded their Title to the English under the Treaty of Utrecht.<sup>19</sup>

Certainly few, if any, persons removed themselves from reserved lands and territories that they had already settled on. Nevertheless the Royal Proclamation influenced future relationships with the First Nations and encouraged treaty making. Usually there was a catalyst, for example to obtain land to accommodate the United Empire Loyalists arriving in Canada during and after the American Revolution or to accommodate mining interests to the north of Lake Superior and Lake Huron. After, Rupert's Land, the territory that was granted to the Hudson Bay Company, was returned to Canada in 1869 Canada

---

16 *St. Catharines Milling and Lumber Company v. The Queen*, [1887] 13 S.C.R. 577.

17 *Calder v. Attorney-General of British Columbia*, [1973] 34 D.L.R. (3d) 145.

18 For a discussion on the application of the 1763 Royal Proclamation in the Maritimes see: Surtees, Robert J. *The Original People*, (Holt, Reinhart and Winston of Canada, Limited, 1971) pages 59, 60. Also see *Native Rights in Canada – second edition*, pages 30, 31 and 101.

19 *Native Rights in Canada – second edition*, 1972, page 96.

embarked on a major initiative to make treaties with the various First Nations in the prairies to clear the way for settlement.

### **United Empire Loyalists**

After the start of the American Revolution in 1775, United Empire Loyalists in great numbers flowed into Quebec (which at that time included Upper Canada and Lower Canada). While Lower Canada (present day Quebec) got its share of loyalists, most headed to Upper Canada (present day Ontario). The decision to allow the loyalists to settle on lands on first Nation Territory meant that the British Crown would have to first purchase land from the Indians. As well land was required to be provided for dispossessed Indians that had been loyal to the British.

One such group of Indians was the Six Nations Confederacy comprised of the Mohawks, Oneidas, Onondagas, Cayugas, Senecas and Tuscaroras. On 25<sup>th</sup> October 1784 a tract of land was granted by Governor Frederick Haldimand to the Mohawk Indians of the Six Nations:

“Whereas His Majesty having been pleased to direct that in consideration of the early attachment to his cause manifested by the Mohawk Indians and of the loss (loss) of their settlement which they thereby sustained that a convenient tract of land under his protection should be chosen as a safe and comfortable retreat for them and others of the Six Nations, who have either lost their settlements within the Territory of the American States, or wish to retire from them to the British. I have at the earnest desire of many of these His Majesty’s faithful Allies purchased a tract of land from the Indians situated between the Lakes Ontario, Erie and Huron, and I do hereby in his Majesty’s name authorize and permit the said Mohawk Nation and such others of the Six Nations Indians as wish to settle in that quarter to take possession of and settle upon the Banks of the River commonly called Ouse or Grand River, running into Lake Erie, allotting to them for that purpose six miles deep from each side of the river, beginning at Lake Erie and extending in that proportion to the head of the said river which them and their posterity are to enjoy forever.”<sup>20</sup>

This land was a portion of the land between Lake Ontario and Lake Erie that had been surrendered to the British Crown by the Mississaugas Indian Nation on the 22<sup>nd</sup> of May, 1784.

, hath granted, bargained, aliened, released, and confirmed . . . . . unto His Britannic Majesty, and to his Heirs and Successors, all that tract or parcel of land laying and being between the Lakes Ontario and Erie beginning at . . .<sup>21</sup>

This would eventually be known as surrender #3 of the Upper Canada or Pre-confederation Treaties.

---

20 Grant, Governor Haldimand to the Six Nations. Indian Lands Registry Instrument Number X15173. Also see *Indian Treaties and Surrenders, Volume 1*, 1891, page 251

21 Indenture made at Niagara between the Mississauga First Nation and the British Crown, Indian Lands Registry Instrument Number X15173.

In the subsequent years after the Haldimand grant much of the land was eventually sold. A part of this land in Haldimand County was on land which according to the Six Nations was never surrendered. The dispute known as the Caledonia land dispute is the subject of a land claim, one of several in Canada.<sup>22</sup>

United Empire Loyalists also flowed into Nova Scotia in great numbers. Gratuitous grants of land were given to these Loyalists and this put additional pressure on the government to reserve lands for the First Nations.<sup>23</sup> In 1783 the Nova Scotia government gave several licences, or tickets of location, to the Indians. These were not outright grants and only confirmed the existence of already established settlements or were given on the strength of promises to engage in agriculture.<sup>24</sup> In 1786 a grant of 500 acres of land at the head of St. Margaret's Bay in Halifax County was confirmed to Chief Philip Bernard and two tribal members. Under this grant, which seemed to be the first of its kind in Nova Scotia, the Indians received a direct title to their property.<sup>25</sup>

A great number of the United Empire Loyalists arriving in Nova Scotia settled in the area that is now Saint John. As this region was very remote from Halifax discontentment with the government led to the creation of the colony of New Brunswick in 1784<sup>26</sup>. After New Brunswick became a colony in its own right, it as well granted licenses of occupation for several other tracts of land for the Indians<sup>27</sup>.

### **Pre- confederation and Robinson-Huron and Robinson-Superior Treaties**

The surrender by the Mississaugas Indian Nation to the British Crown on the 22<sup>nd</sup> of May, 1784 became known as surrender #3 of the Upper Canada or pre- confederation treaties. Subsequently the government purchased several other tracts of land from the First Nations which were deemed to be surrenders or treaties and then granted several tracts of land as reserves. By 1840 practically all of what is now southwestern Ontario had been ceded by the First Nations for settlement purposes.<sup>28</sup> It is estimated that there were at least 30 major treaties signed during the pre-confederation period between 1764 and 1862.<sup>29</sup>

---

22 *Caledonia land dispute*, online: Wikipedia <[http://en.wikipedia.org/wiki/Caledonia\\_land\\_dispute](http://en.wikipedia.org/wiki/Caledonia_land_dispute)>.

23 *Native Rights in Canada – second edition*, 1972. pages 102 and 103.

24 McGee Jr., Harold Franklin. *The Native Peoples of Atlantic Canada: A history of ethnic interaction*, (Toronto, McClelland and Stewart Limited, 1974), pages 75 and 76.

25 *The Native Peoples of Atlantic Canada: A history of ethnic interaction*, page 76.

26 *History (New Brunswick)*, online: <<http://www.gnb.ca/cnb/nb/history-e.asp>>

27 A review of New Brunswick Indian Reserves in the Indian Lands Registry will give several examples; i.e. Instrument Numbers X25302 (Aboushagain No. 3) and 5647-175 (Red Bank No. 4).

28 Patterson, George, M.A. *Land Settlement in Upper Canada 1783-1840*, (Toronto, Clarkson W. James, 1921) page 232.

29 *Ontario Treaties, Upper Canada Treaties – establishing a foundation for the future*, page 5, online: INAC <[http://www.ainc-inac.gc.ca/on/at\\_y\\_e.pdf](http://www.ainc-inac.gc.ca/on/at_y_e.pdf)>

To accommodate mining interests to the North of Lake Superior, in 1850 the Robinson-Huron and Robinson-Superior Treaties were negotiated for the north shore of Lake Huron and Lake Superior in what was then the most northern parts of the Province of Canada. Included in the treaties was a list of specific locations of land to be set apart as reserves. The Robertson Superior Treaty listed three “reservations” and the Robertson Huron Treaty listed 17 “reservations”.<sup>30</sup> These treaties and their schedules of “reservations” have been recognized as setting the pattern for all future negotiations for surrenders of land and the creation of reserves.

### **Difficult times on the Reserves**

In the eighteenth and early nineteenth centuries reserves for Indians (in many forms: lands in trust, licenses of occupation, etc.) had been established throughout Nova Scotia, New Brunswick, Prince Edward Island and Quebec (which after the *Act of Union, 1840* became known as the Province of Canada). It was difficult for the Indians to adapt to reserve life.<sup>31</sup> They for centuries before had survived by hunting, fishing and gathering and had been free to travel throughout the country. On the reserves they for the most part were greatly weakened, suffered from poverty and epidemic outbreaks of disease, were isolated, and depended on the “government for subsistence. There were also problems with encroachment, squatters and the taking of reserve land. As well, the usefulness of the Indians as allies in war (initially with the French and later on in the War of 1812 which was carried out from 1812 to 1815 with the United States) had lessened. By 1830 the military, who had the responsibility of looking after Indian affairs, were questioning their value to the military.<sup>32</sup> Governments of the day attempted to deal with the problems that the Indians were experiencing.

In 1842 the Government of Nova Scotia passed an *Act to Provide for the Instruction and Permanent Settlement of the Indians*.<sup>33</sup> The *Act* was intended “to provide for the Education and Civilization of the Aboriginal Inhabitants of this Province, and for the preservation and productive application for their use of the Lands in different parts of this Province, set aside as Indian reservations: . . .” Under Section (III) it provided for the appointment of a Commissioner for Indian Affairs: to supervise and manage lands set apart for Indians; to define their boundaries; and to protect the lands from encroachment and alienation. Under Section (IV) the *Act* provided for the purchase of reserve lands by squatters and under Section (VI) the Commissioner was empowered to allot portions of reserves to each head of family.

---

30 Morris, Alexander. *The Treaties of Canada with the Indians*, (Toronto, Prospero Books, 2000, reprinted from the 1880 edition) pages 16 to 21 and 302 to 309. Note that in the Robertson Treaties the term “reservation” is used which is the same term used in the United States. In later treaties in Canada the term “reserve” is used.

31 McMillan, Alan D. *Native Peoples and Cultures of Canada* (Vancouver, Douglas and McIntyre Ltd., 1988), page 51.

32 Surtees, R. J. *Development of Indian Reserve Policy in Canada*. Ontario History, Vol. LX1, June 1969, No.2. page 87.

33 This Act is available online: *First Nation History* - by Daniel N. Paul <<http://www.danielnpaul.com/NovaScotiaIndianLaw-1842.html>>

In the Province of Canada, the Bagot Commission was established to study and report on the problem. Its 1844 report stated that there were many serious problems on Indian reserves and with Indians and recommended centralization of control over all Indian matters. To combat settler encroachments and trespassing, the Bagot Commission recommended that reserves be properly surveyed and illegal timber cutting eliminated by a timber licensing system. The commissioners were also concerned that Crown protection of Indian land was contrary to the goal of full citizenship in mainstream society. The Commission therefore recommended that Indians be encouraged to adopt individual ownership of plots of land under a special Indian land registry system and they were to be encouraged to buy and sell their plots of land among themselves as a way of learning more about the non-Indian land tenure system and to promote a spirit of free enterprise.<sup>34</sup>

These recommendations were adopted in one form or another in later Province of Canada legislation.<sup>35</sup> Some of the legislation is listed below. For the most part the titles of the various Acts are self explanatory:

- *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, Statutes of the Province of Canada 1850, chapter 42;
- *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, Statutes of the Province of Canada 1850, chapter 74.
- *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, Statutes of the Province of Canada 1857, chapter 26. This Act provided for the enfranchisement of Indians
- *An Act respecting the Management of the Indian Lands and Property, Statutes of the Province of Canada*, 1860, Chapter 151. This Act transferred authority for Indians and Indian lands to a single official of the united Province of Canada.<sup>36</sup>

### **Constitution Act, 1867 (British North American Act, 1867)**

By the *Constitution Act, 1867 (The British North American Act, 1867)* the Provinces of Canada, Nova Scotia and New Brunswick united to form the Dominion of Canada. Section 146 provided for the future admission of Newfoundland, Prince Edward Island, British Columbia, Rupert's Land and the North-western Territory into the Union.

---

34 RCAP, Vol.1, Part two, Chapter 9 - The Indian Act. 4. Civilization to Assimilation: Indian Policy Formulated, online: INAC <[http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm\\_e.html](http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html)> See Note 28 Province of Canada, Journals of the Legislative Assembly of Canada, 1844-1845, Appendix EEE, "Report on the Affairs of the Indians in Canada".

35 RCAP, Vol.1, Part Two, Chapter 9 - The Indian Act, 4.Civilization to Assimilation: Indian Policy Formulated and 5. The Gradual Enfranchisement Act: Assimilating Civilized Indians.

36 RCAP, Vol.1, Part Two, Chapter 9 - The Indian Act. See Notes 29, 30 and 38.

Under Section 91(24) the Parliament of Canada had exclusive legislative authority for “Indians, and Lands reserved for the Indians”. An issue of ownership and responsibility of surrendered Indian Lands arose through Section 109 of the *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.

The result of Section 109 was if a surrender of reserve land was made for the purpose of a sale the Indian interest was extinguished and the land reverted to the provinces which held the underlying legal title. The leading decision with regard to this issue was given in *St. Catharines Milling and Lumber Company v. The Queen*, [1887] 13 S.C.R. 577. As a result, after reserve land was surrendered, the government of Canada was not able to exercise control and administration of the land for the benefit of the Indians - only the provinces could deal with the land.<sup>37</sup>

Subsequently the federal government made arrangements with most provinces to allow it to manage surrendered lands. In these provinces while surrendered lands lose their Reserve status, the administration and control of the lands, with the right to sell lease or otherwise deal with the lands, remain with Canada.<sup>38</sup>

- *Indian Reserves of Nova Scotia Act*, S.C. 1959, c. 50;
- *Indian Reserves of New Brunswick Act*, S.C. 1959, c. 47;
- *Indian Reserve Land Act (Ontario)*, S.C. 1924, c. 48;
- *OC 1969-1555* (British Columbia).

Section 109 did not apply to the Prairie Provinces since the natural resources remained under the administration and control of the government of Canada. When the natural resources were transferred to the Prairie Provinces in 1930, under Section 11 of the *Constitution Act, 1930* all lands included in Indian reserves within the provinces continued to be vested in the Crown and administered by the Government of Canada and further areas subsequently transferred to Canada for Indian reserves were to be administered by Canada as if they had never passed to the Province.

## **First Indian Act, 1876**

Shortly after the *Constitution Act, 1867* two Acts dealing with Indians and Indian Lands were passed: *An Act providing for the organization of the Department of the Secretary of*

---

37 LaForest, Gerald V., *Natural Resources and Public Policy under the Canadian Constitution*, (University of Toronto Press, 1969) pages 111 to 127 and London, Paul, *Crown Law* ( Butterworths, 1991) pages 253 and 254.

38 *Natural Resources and Public Policy under the Canadian Constitution*, pages 126 to 133 and *Crown Law*, pages 255 to 257.

*State of Canada, and for the management of Indian and Ordnance Lands*, S.C. 1868, c.42 and *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, S.C. 1869, c.6.<sup>39</sup> These Acts were based on previous Colonial legislation.

The first Indian Act after confederation, the *Indian Act*, 1876 was generally a consolidation of the previous 1868 and 1869 *Acts*. The *Act* defined the system of “reserves” to be set aside for the members of “bands” who adhered to a treaty:

3.6. The term “reserve” means any tract or tracts of land set apart by treaty or otherwise for the use and benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered, and includes all the trees, wood, timber, soil stone, minerals, metals or other valuables therein.

3.7. The term “special reserve” means any tract or tracts of land and everything belonging thereto set apart for the use or benefit of any band or irregular band of Indians, the title of which is vested in a society, corporation or community legally established, and capable of suing and being sued, or in a person or persons of European descent, but which land is held in trust for, or benevolently allowed to be used by, such band or irregular band of Indians.

The Act also contained many other significant sections dealing with First Nation property rights:

- Under Section 7 a lawful possession of land to an Indian required the approved of the Superintendent-General. Upon approving a location he was to issue a ticket granting a location title to the Indian.
- Under Section 8 land held under a location title could not be seized and under Section 9 upon the death of an Indian the right and interest of the land is devolved to his widow and children.
- Sections 11 to 22 dealt with restrictions and prohibitions on persons, other than an Indian of the band, using or trespassing on, reserve land. Under Section 20 there was provision for compensating for damage to reserve land as a result of any railway, road or public works on the reserve.
- Under Section 25 no reserve or portion of a reserve was to be sold, alienated or leased until a release or surrender of the land was assented to by a majority of the male members of the band of the full age of twenty-one years and it had been released or surrendered to the Crown.
- Section 45 outlined provisions and restrictions regarding granting of “licenses” to cut timber on reserves and on ungranted Indian lands.
- Under Section 64 Indians could not be taxed for land on Reserves.
- Sections 86 to 94 dealt with enfranchisement. Under Section 86 letters patent could be issued, granting an Indian, in fee simple, the land, allotted for that purpose by location ticket. On receiving such letters patent an Indian became enfranchised (was able to vote) and would no longer be deemed an Indian.

---

<sup>39</sup> *Historical Legislation*, online: INAC <[http://www.ainc-inac.gc.ca/pr/lib/phi/histlws/hln/index\\_e.html](http://www.ainc-inac.gc.ca/pr/lib/phi/histlws/hln/index_e.html)>

Noteworthy is that most of the above provisions dealing with land remains in some form or another in current First Nation legislation.

## **Settlement in the Prairies – Treaties and Reserves**

Under the *Constitution Act, 1867* there was provision for Rupert's Land and the North-western Territory to be admitted into the Union. In 1869, the Hudson's Bay Company sold Rupert's Land to Canada. Once the land was part of the Dominion of Canada the priority of the government was to open the land for settlement. However before land settlement could begin the government had to make treaties with the First Nations.

In 1871, the first numbered treaty was signed. The numbered treaties were patterned to great extent after the Robinson Treaties of 1850. They involved ceding the territory the First Nations inhabited and promising reserves in proportion to population - generally one square mile per family of five. They also promised the continued right of hunting, annual cash payments to each Indian, salaries for teachers, stock and articles to encourage ranching and farming, etc.<sup>40</sup>

Alexander Morris, the former Lieut.-Gov. of Manitoba, the North-West Territories, and Kee-wa-tin, in 1880 in his book, *The Treaties of Canada with the Indians – 1880*, wrote:

Since 1870, no less than seven treaties have been concluded, with the Indian tribes, so that there now remain no Indian nations in the North-West, inside of the fertile belt, who have not been dealt with.<sup>41</sup>

Notable is the confirmation on May 17, 1889 by P.C. 1151 of 86 reserves within the areas covered by Treaties 4, 6 and 7, and part of Treaty 2. The Order in Council is accompanied by plans and descriptions of 86 reserves all bound in a book. The book is commonly referred to as *Nelsons Book* after J.C. Nelson D.L.S who was the surveyor in charge of Indian Reserve Surveys for the Department of Indian Affairs. He surveyed most of the reserves included in the book and compiled the plans and descriptions in the book.<sup>42</sup>

By 1921 eleven treaties were ratified between the First Nations and the Government of Canada on behalf of the British Crown. Regions affected by the treaties include portions of what are now Alberta, British Columbia, Manitoba, Ontario, Saskatchewan and the Northwest Territories.

In 1905, Saskatchewan and Alberta and were admitted to the Dominion of Canada as provinces. This had little effect on Indian Property Rights since responsibility for crown lands and for Indians and Indian reserves remained with the Dominion.

---

40 Based on Treaty No.7 in 1877, the treaty with the Blackfoot. Other treaties had slightly different provisions.

41 *The Treaties of Canada with the Indians*, page 10

42 P.C. 1151 accompanied by *Descriptions and Plans of Certain Indian Reserves in the Province of Manitoba and the North-West Territories, 1889*. Indian Land Registry Instrument Number 4000.



The *Constitution Act, 1930* confirmed and gave effect to agreements entered into between the Government of the Dominion of Canada and the Governments of the Provinces of Manitoba, British Columbia, Alberta and Saskatchewan regarding the transfer of administration of lands and resources to the provinces. Under the *Act* Canada retained authority to administer Indian reserves for all purposes. As well under Section 11 of the *Act* the provinces are obliged to transfer unoccupied provincial Crown land to the federal government to enable Canada to fulfil its obligations under the treaties with the Indians of the Provinces.

Little attention was given to dealing with the First Nations in the North West Territories and the Yukon where settlement was sparse and where the land for the most part remained under federal control. However surveys were carried out on some Indian lands in the territories. For example: on Hay River Dene Indian Reserve No. 1 as early as 1914; and on Salt Plain IR No. 195 as early as 1922.<sup>43</sup> Now lands for the First Nations are included within lands established pursuant to various self-government and comprehensive land claim agreements.

### **British Columbia – Joins Confederation in 1871**

A history of First Nation property rights in British Columbia would not be complete without mentioning Sir. James Douglas. In 1851 Douglas, who was then chief factor of the Hudson Bay Company also became governor of the Colony of Vancouver Island.<sup>44</sup> Between 1850 and 1854, he entered into 14 treaties with the First Nations of southern Vancouver Island.<sup>45</sup> The first of these, with the Teechamitsa Tribe on April 29, 1850 in which all the lands lying between Esquimalt and Point Albert was surrendered, included the following statement with regard to the use of land by the Teechamitsa<sup>46</sup>:

The condition or understanding of this sale is that our village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those who may follow after us; and the lands shall be properly surveyed hereafter. It is understood, however, that the land itself with these small exceptions, becomes the entire property of the white people forever; it is also understood that we are at liberty to hunt over the unoccupied land, and to carry on our fisheries as formerly.

While these treaties appear to have complied with the spirit of the *Royal Proclamation of 1763*, Douglas was not able to obtain funds from the British Colonial Office to continue to purchase Indian lands.<sup>47</sup> As well there was a growing unwillingness among the settler population to recognize Indian rights to land. While no further treaties were made, Douglas continued to assign reserves which included areas of land used as Indian settlements, graveyards, gardens, hunting lodges, berry patches, or fishing stations. The

---

43 Online: CCCM <<http://www.cccm.nrcan.gc.ca/>>

44 Reksten, Terry. *The Illustrated History of British Columbia* (Vancouver, Douglas and McIntyre, 2001) pages 38, 41.

45 Cail, Robert E.. *Land Man and the Law – The Disposition of Crown Lands in British Columbia, 1871 – 1913*, (The University of British Columbia 1974) page 171.

46 *Land Man and the Law*, page 172.

47 *Land Man and the Law*, page 172.

areas did not exceed ten acres per family and were to be held as joint and common property of the tribe.<sup>48</sup>

In 1866 the Colony of Vancouver Island was united with the Colony of British Columbia under the name of British Columbia.<sup>49</sup> By this time Douglas had retired and the colonial officials both spoke and acted in direct opposition to the principles of the Royal Proclamation.<sup>50</sup> British Columbia's policy towards Indians and land around the time that British Columbia joined confederation can be found in an 1870 memorandum from Joseph W. Trutch, then Surveyor General of British Columbia, to the Colonial Governor.<sup>51</sup>

The title of Indians in the fee of public land, or in any portion thereof, has never been acknowledged by the Government, but on the contrary, is distinctly denied. In no case has special agreement been made with any of the Tribes of the Mainland for the extinction of their claims of possession; but these claims have been held to have been fully satisfied by securing to each tribe, as the progress of the settlement of the country seemed to require, the use of sufficient tracts of land for their wants for agriculture and pastoral purposes.

By 1871 when British Columbia joined confederation 76 reserves totaling 28,437 acres (less than 1 acre per Indian) had been established.<sup>52</sup>

After 1871 establishing reserves for the remaining tribes was a matter of considerable controversy. In 1876 the federal and provincial governments agreed to the formation of the Joint Allotment Commission to set aside reserve lands.<sup>53</sup> The process involved consulting with each First Nation and sketching the location of the Reserve. This was followed by a survey and finally confirmation by the Commission. By 1908 most of the work had been completed.<sup>54</sup>

In response to settlers' pressure for agriculture land, another Royal Commission was established in 1913. This Commission, called the McKinna-McBride Commission, re-examined the size of every Reserve and while enlarging the size of some recommended that significant land be cut-off from others.<sup>55</sup> When the final report was presented by the Commissions in 1916 the total number of reserves was 1,559 with each Indian having an average of 3.58 acres.<sup>56</sup> However before the administration and control of the reserve lands was transferred to the federal government a further review, known as the Ditchburn-Clark review, was carried out by the two governments. In 1923 and 1924 joint

---

48 *Land Man and the Law*, page 175

49 *The British Columbia Act, 1866*. See Terry Reksten, *The Illustrated History of British Columbia*, page 83.

50 *Land Man and the Law*, page 171.

51 *Land Man and the Law*, page 184.

52 *Land Man and the Law*, pages 189, 190.

53 *Land Man and the Law*, page 207.

54 *Land Man and the Law*, page 217-227.

55 The Report of the British Columbia Claims Task Force, June 28, 1991, page 11.

56 *Land Man and the Law*, page 237.

Orders-in-Council<sup>57</sup> were passed which approved a large number of the reserves and their additions and reductions as outlined in the report of 1916 along with further reductions, including reserves that were completely disallowed.

Finally in 1938, by Provincial Order in Council 1938-1036, reserves listed in an attached schedule were conveyed to Canada. The conveyance included most of the Reserves in B.C. outside of the Railway Belt.<sup>58</sup> The Railway Belt is a strip of land that had been transferred to Canada in 1884 as part of the agreement of British Columbia joining confederation and the commitment to build a railway across Canada. Reserves within the Railway Belt were to be governed by the same terms and conditions found in Order in Council 1938-1036. The 1938-1036 Order in Council contained a reversionary interest - if any of the Reserves became extinct the lands would revert to the province. Up to one-twentieth of the land could be “resumed” for certain public works. The province while paying reasonable compensation could take certain water privileges and could take gravel and other building material for public works. As well under the Order in Council traveled streets, roads, etc., over or through the lands were excepted from the grant.

The 1938-1036 Order in Council also did not include five reserves in the Northeastern part of the province which had been established pursuant to Treaty Number 8 and were transferred to Canada in 1961.<sup>59</sup>

In 1969 by OC 1969-1555 the province waived its reversionary interest in the Reserves.

In 1984 Canada passed the *British Columbia Indian Cut-off Lands Settlement Act*, 1984, c. 2. Under the provisions in this *Act* a band, or its council, may make agreements with Canada and British Columbia for resolving and extinguishing claims to lands that had been cut-off by the Orders-in-Council in 1923 and 1924, pursuant to the 1916 McKinnon-McBride Royal Commission Report.<sup>60</sup>

### **Newfoundland - Joins Confederation in 1949**

Shanawdithit, a female Beothuck<sup>61</sup>, who was probably the last of the original First Nation inhabitants in Newfoundland, died in St. Johns in 1829.<sup>62</sup>

It is not certain when the Micmac (and other Indians, Montagnais, Naskapi and Malecite) currently living in Newfoundland settled there; however they were there in the 19<sup>th</sup>

---

<sup>57</sup> OC (British Columbia)1923-911 and Federal OCPC 1924 – 1265.

<sup>58</sup> OC (British Columbia)1938-1036 and PC 1930-208

<sup>59</sup> OC (British Columbia) 1961-2995

<sup>60</sup> *British Columbia Indian Cut-off Lands Settlement Act* 1984, c.2, online: British Columbia Ministry of Aboriginal Relations <<http://www.gov.bc.ca/arr/treaty/legislation.html>>

<sup>61</sup> There are several spellings of the word Beothuks, including Beothucks which is used in the following reference.

<sup>62</sup> Howley, James P. *The Beothucks or Red Indians The Aboriginal Inhabitants of Newfoundland* (Cambridge, University Press, 1915) page 231, online: Internet Archive< <http://www.archive.org/details/beothucksorredin00howlrich>>

century.<sup>63</sup> The Micmac claim that from 1870 a colonial 'reserve' existed at Conne River.<sup>64</sup> The lands were not officially a reserve under the *Indian Act*, R.S.C. 1985, c.1-5, until 1987 (38 years after Newfoundland joined confederation) when it, Samiajjij Miawpukek Reserve, was established by Orders-in-Council.<sup>65</sup> Subsequently two other Reserves were established in Newfoundland and Labrador; Natuashish No. 2 in 2004 and Sheshalshiu No. 3 in 2006.<sup>66</sup>

### ***Constitution Act 1982***

Before 1982, the *Royal Proclamation of 1763* recognized aboriginal and treaty rights of First Nation people and these rights were recognized in the various treaties and legislation of the government of Canada.

Under the *Constitution Act, 1982* the rights of First Nations are further protected by Section 25, Part 1, Canadian Charter of Rights and Freedoms and by Section 35, Part 2, Rights of the Aboriginal peoples of Canada:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement

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

(2) In this *Act*, "aboriginal peoples of Canada" includes the Indian, Inuit, and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this *Act*, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

---

<sup>63</sup> *Native Rights in Canada – second edition*, pages 93, 94. Also see Johnson, Patrick, *The Mi'kmaq*.

<sup>64</sup> Adrian Tanner, John C. Kennedy, Susan McCorquodale and Gordon Inglis, *Aboriginal Peoples and Governance in Newfoundland and Labrador*, research study prepared for RCAP (1994). Referred to in RCAP Vol. 1, Part Two Chapter 9 - The Indian Act, end note 21.

<sup>65</sup> *PC #1987-1293*, *PC #1294*, Indian Lands Registry Instrument Numbers: 114554 and 114555.

<sup>66</sup> *PC #2003-1985*, Indian Lands Registry Instrument Number: 315435 and *PC #2006-1405*, Indian Lands Registry Instrument Number: 345930.

# THE SUI GENERIS NATURE OF ABORIGINAL RIGHTS

## Introduction

*Sui generis* is a Latin expression, literally meaning of its own kind or unique in its characteristics.

The term is used in the context of aboriginal law to define the nature of aboriginal rights and aboriginal title to land traditionally used or occupied by a First Nation. They are unique, *sui generis*, in that they are not similar to property rights and title in western property law. After nearly 250 years the *sui generis* of aboriginal rights are still being discussed in the courts. In the next few proceeding pages Aboriginal rights and Aboriginal title are discussed along with other matters related to the uniqueness of First Nation Rights.

## Aboriginal Rights

Aboriginal rights refer to a range of rights that are held by aboriginal peoples. While Aboriginal rights were acknowledged prior to 1982 as existing, they were formally recognized and affirmed by Section 35 (1) of the *Constitution Act*, 1982 R.S.C.

In the landmark case *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010<sup>67</sup> Chief Justice Lamer describes Aboriginal rights as falling along a range or spectrum with respect to their degree of connection with the land.

Constitutionally recognized aboriginal rights fall along a spectrum with respect to their degree of connection with the land. At the one end are those aboriginal rights which are practices, customs and traditions integral to the distinctive aboriginal culture of the group claiming the right but where the use and occupation of the land where the activity is taking place is not sufficient to support a claim of title to the land. In the middle are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. At the other end of the spectrum is aboriginal title itself which confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognized and

---

<sup>67</sup> This was an appeal from the June 1993 decision of the British Columbia Court of Appeal on the Gitksan and Wet'suwet'en Aboriginal title claim to some 58,000 square kilometers of land in British Columbia. The Chief Justice, Lamer C.J. did not decide the case, but ordered a new trial. However the case was particularly significant in that it defined the nature of Aboriginal rights and Aboriginal title and laid out rules for future negotiation and litigation with regard to deciding matters of aboriginal rights and title affecting land claims. As well the Justice rejected the province's claim that it had enjoyed the power to extinguish Aboriginal rights, including Aboriginal title. See *Delgamuukw v. British Columbia*, [1997], paragraphs 172 to 183.

affirmed by s. 35(1), including site-specific rights to engage in particular activities.<sup>68</sup>

The Aboriginal rights at the end of the spectrum, where the activity is not sufficient to support a claim of title to the land, might perhaps be compared to an easement. These Aboriginal rights include rights to engage in such activities as hunting, fishing, trapping, trading and gathering.

The following three point test for establishing an aboriginal right has been obtained from the very thorough discussion on aboriginal rights in *Tsilhqot'in Nation v. British Columbia*, [2007] BCSC 1700, a recent important case dealing with aboriginal rights.<sup>69</sup>

1. The ancestors of the claimant Aboriginal group must have engaged in the particular practice, custom or tradition prior to European contact.
2. The ancestral practice, custom or tradition was integral to the distinctive culture of the Aboriginal group prior to European contact.
3. There must be continuity between the claimed Aboriginal right and the pre-contact practice, custom and tradition.

## **Aboriginal Title**

Aboriginal rights and aboriginal title are related concepts; aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land.<sup>70</sup>

The nature of Aboriginal title is described on page 6 in *Delgamuukw v. British Columbia*, [1997]:

Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures. The protected uses must not be irreconcilable with the nature of the group's attachment to that land.<sup>71</sup>

The text in the case goes on to explain that the nature of Aboriginal title is very broad and incorporates present-day needs. It also encompasses mineral rights and the right of exploitation, which is not a traditional use. However, for example, if the exploitation of minerals were to be irreconcilable with the nature of the community's traditional use or attachment to the lands it would not be permitted. If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non- (Aboriginal) title lands to do so.<sup>72</sup>

---

<sup>68</sup> *Delgamuukw v. British Columbia*, [1997] page 8.

<sup>69</sup> *Tsilhqot'in Nation v. British Columbia* [2007], paragraphs 1142 to 1212.

<sup>70</sup> *Tsilhqot'in Nation v. British Columbia* [2007] paragraphs 518 and 1150.

<sup>71</sup> *Delgamuukw v. British Columbia* [1997] page 6.

<sup>72</sup> *Delgamuukw v. British Columbia* [1997] page 8.

A three part test for Aboriginal title is given in *Delgamuukw v. British Columbia*, [1997]:<sup>73</sup>

- The land must have been occupied prior to the time that the crown asserted sovereignty over the land,
- If present occupation is relied on as proof of occupation pre-sovereignty, there must be continuity<sup>74</sup> between present and pre-sovereignty occupation.
- At sovereignty, occupation must have been exclusive.

## Aboriginal Rights and Oral Evidence

An important aspect of *Delgamuukw v. British Columbia*, [1997], contributing to the Justices decision that a new trial was warranted, was that little if any weight had been given to the oral evidence of elders in the previous case.

Comment [MSOffice1]: weight had been

107 . . . . . oral histories were of critical importance to the appellants' case. They used those histories in an attempt to establish their occupation and use of the disputed territory, an essential requirement for aboriginal title. The trial judge, after refusing to admit, or giving no independent weight to these oral histories, reached the conclusion that the appellants had not demonstrated the requisite degree of occupation for "ownership". Had the trial judge assessed the oral histories correctly, his conclusions on these issues of fact might have been very different.

## Defining the Extent of Aboriginal Rights and Aboriginal Title

In *Tsilhqot'in Nation v. British Columbia*, [2007] the Justice demonstrated the need to clearly define the extent of aboriginal title. In this case while the trial judge was able to find continual and exclusive use he was not able to determine the area to which it applied as the boundaries of the area were not clearly defined.

[1335] Given my inability to make a declaration of Tsilhqot'in Aboriginal title, the damage claim must be dismissed.

[1336] I have found there is land inside and outside the Claim Area over which Tsilhqot'in Aboriginal title would prevail. Thus, any dismissal of the claim for damages is without prejudice to the right to renew these claims specific to Tsilhqot'in Aboriginal title land. The resources on Aboriginal title land belong to the Tsilhqot'in people and the unjustified removal of these resources would be a matter for appropriate compensation. It is not my intention to dismiss a valid claim for compensation where such a claim can be tied to Tsilhqot'in title land.

[1337] Reconciliation must take these claims into account.

<sup>73</sup> *Delgamuukw v. British Columbia* [1997], paragraphs 143 to 159.

<sup>74</sup> There is no need to establish "an unbroken chain of continuity". See *Delgamuukw v. British Columbia* [1997], paragraph 153.

Boundary definition of existing treaty areas can also be an issue as demonstrated by the articles of Treaty 8. In the articles the western boundary is described as the "central range of the Rocky Mountains," while the maps accompanying both the treaty and the enabling Order-in-Council, P.C. 2749, dated 6 December 1898, authorizing the signing of Treaty 8, indicate the westerly boundary to the treaty to be the height of land separating the Arctic Drainage system from the Pacific Drainage system, a more westerly range of mountains. The Department of Indian Affairs and the province of British Columbia agree that the more westerly range of mountains was the intended boundary,<sup>75</sup> however a number of Treaty 8 First Nations have filed a claim in the Supreme Court of British Columbia claiming that the western boundary follows the continental divide, which is also described as Arctic-Pacific watershed line.<sup>76</sup>

It is very likely in the years to come that defining the extent of aboriginal rights and aboriginal title will increase in importance.

---

<sup>75</sup> *Treaty 8: The Preclude To Treaty Negotiations*, online: INAC < [http://www.ainc-inac.gc.ca/pr/trts/hti/C-B/prec\\_e.html](http://www.ainc-inac.gc.ca/pr/trts/hti/C-B/prec_e.html) >

<sup>76</sup> Statement of Claim, filed August 4, 2005. No 05 3802 in Victoria. Amended February 10, 2006



## *Honour of the Crown*

### **Fiduciary Responsibility**

With regard to First Nations, a fiduciary responsibility imposes a trust-like responsibility on the Crown, requiring it to act with good faith and care, in dealing with the interests of the Indian people affected by its actions.

The fiduciary responsibility of the federal government to First Nations was recognized in the *Royal Proclamation of 1763*. It was also reflected in many later colonial statutes pertaining to Indians: after confederation in the *Indian Act, 1876* and later versions of it, and in Section 35 of the *Constitution Act, 1982*, particularly with regard to treaty and aboriginal rights.<sup>77</sup>

Justice Canada has identified two categories of fiduciary obligations<sup>78</sup>, based on two important cases decided by the Supreme Court of Canada: "Guerin<sup>79</sup>-type" and "Sparrow<sup>80</sup>-type".

Guerin-type fiduciary obligations arise where the Crown controls assets such as land, natural resources or money on behalf of First Nations. This type of fiduciary obligation occurs frequently in the course of managing reserve lands.

Sparrow-type fiduciary obligations stem from Section 35 of the *Constitution Act, 1982* which protects Aboriginal and treaty rights. Where Aboriginal or treaty rights are potentially affected by government actions, the government has a fiduciary obligation not to unjustifiably interfere with the exercise of these rights. Examples of Sparrow-type situations include an addition to reserve which might affect Aboriginal rights of a competing First Nation and a Section 35, *Indian Act, 1985* taking (expropriation) of reserve lands previously established under a treaty.

### **Where Aboriginal Rights Claimed - Duty to Consult**

An important "Honour of the Crown" case dealing with a duty to consult and accommodate Aboriginal peoples is *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69. In 2000, the federal government approved a winter road, which was to run through the Mikisew's reserve (which is in the area of Treaty 8) without consulting them. After the Mikisew protested, the road alignment was modified (but without consultation) to go around the boundary of the

---

<sup>77</sup> For more information see: *The Crowns Fiduciary Relationship with Aboriginal Peoples, Revised 2002*, Prepared by Mary C. Hurley, Law and Government Division, Parliamentary Research Branch, online: Virtual Library, Library of Parliament, Government of Canada < <http://www.parl.gc.ca/information/library/PRBpubs/prb0009-e.htm>>

<sup>78</sup> *Land Management Manual*, Directive 2.4, Fiduciary Obligations, page 32, online: INAC < [http://www.ainc-inac.gc.ca/ps/lts/pdf/lmm\\_e.pdf](http://www.ainc-inac.gc.ca/ps/lts/pdf/lmm_e.pdf)>

<sup>79</sup> *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

<sup>80</sup> *Sparrow v. The Queen*, [1990] 46 B.C.L.R. (2d) 1.

reserve. The Mikisew's objection to the road went beyond the direct impact of the closure to hunting and trapping of the area covered by the winter road. It also included the injurious effect it would have on their traditional lifestyle.

In the Supreme Court case it was held that the duty of consultation, which flows from the honour of the Crown, was breached. The decision acknowledged that while the Crown had a right to "take up" surrendered lands it also had the obligation to become informed on the impact the project would have the First Nations treaty hunting, fishing and trapping rights and to communicate its findings to the First Nation. And it determined that the Crown must deal with the First Nation in good faith with the intention of substantially addressing their concerns.

The Justices, in paragraph 66 of their decision, state:

Had the consultation process gone ahead, it would not have given the Mikisew a veto over the alignment of the road. As emphasized in *Haida Nation*<sup>81</sup>, consultation will not always lead to accommodation, and accommodation may or may not result in an agreement. There could, however, be changes in the road alignment or construction that would go a long way towards satisfying the Mikisew objections. We do not know, and the Minister cannot know in the absence of consultation, what such changes might be.

The Justices, in paragraph 67, also quote the trial judge who wrote:

. . . it is not consistent with the honour of the Crown, in its capacity as fiduciary, for it to fail to consult with a First Nation prior to making a decision that infringes on constitutionally protected treaty rights. [para. 157]

There is also a duty to consult with regard to activities on land where Aboriginal title and other Aboriginal rights are alleged to exist. This issue came up in the 2007 case *Tsilhqot'in Nation v. British Columbia*, [2007]. In this case it was acknowledged by Justice Vickers that the Tsilhqot'in Nation had Aboriginal rights and Aboriginal title, but he was unable to make a ruling because the location of the boundaries could not be determined. The Justice also determined that, until there is a finding of Aboriginal title, provincial legislation would apply to the land.

[978] Aboriginal title brings with it a right to the exclusive use and possession of land, including the use of natural resources. Until there is a finding of Aboriginal title, there must be a presumption that forest lands not held privately are Crown lands. Provincial legislative provisions apply, even where Aboriginal title and other Aboriginal rights are alleged to exist.

Even though provincial legislation applies the Justice went on to say that the Crown had a duty to consult with the first Nation:

[978]. . . . in situations where the Crown's interest in the land and timber remains unencumbered by a declaration or finding of Aboriginal title. The Crown's duty to consult, if properly discharged, gives adequate protection to any alleged Aboriginal interests. Should there be a later declaration of rights or

---

<sup>81</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73.

title there is a serious risk that, without proper consultation and accommodation, these rights may be infringed. As a result of government action, those persons whose rights or title have been so compromised will have their remedy in damages.

## Negotiation, not Litigation

In recent years the courts have been very reluctant to make decisions determining the actual existence or extent of aboriginal rights and instead laid out rules for deciding aboriginal rights and encouraged negotiation rather than litigation in deciding matters of aboriginal rights and title.

Only one case in Canada is known to have made a decision regarding aboriginal title. In the case *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (T.D.) Justice Mahoney decided that the Inuit of Baker Lake had established their claim to a right to hunt and fish over certain lands in the Northwest Territories. He concluded that the plaintiffs had a common law “aboriginal title to that territory, carrying with it the right freely to move about and hunt and fish over it ...”<sup>82</sup>

In *Delgamuukw v. British Columbia*, [1997], Chief Justice Lamer, spoke of two fundamental principles: One that reconciliation of aboriginal claims between aboriginal interests and of the larger Canadian public should be achieved not through the courts but through negotiation between aboriginal peoples and the Crown. The second is the honor of the Crown to act consistently and in good faith in honoring agreements and in respecting aboriginal rights and interests. In his closing statement he states:

“186 . . . . . By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s. 35(1) “provides a solid constitutional base upon which subsequent negotiations can take place”. Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve . . . . . the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown. Let us face it, we are all here to stay.”

Mr. Justice Vickers in *Tsilhqot'in Nation v. British Columbia*, [2007] while determining aboriginal rights did exist was not able to determine the boundaries of the land to which these rights applied. He as well advocated negotiation in the process of reconciliation (in reaching a settlement).

[1375] I have come to see the Court’s role as one step in the process of reconciliation. For that reason, I have taken the opportunity to decide issues that did not need to be decided. For example, I have been unable to make a declaration of *Tsilhqot'in* Aboriginal title. However, I have expressed an opinion that the parties are free to use in the negotiations that must follow.

---

<sup>82</sup> *Baker Lake v. Minister of Indian Affairs and Northern Development*, page 563. Referred to in *Tsilhqot'in Nation v. British Columbia*, page 495.

[1382] Reconciliation is a process. It is in the interests of all Canadians that we begin to engage in this process at the earliest possible date so that an honourable settlement with Tsihqot'in people can be achieved.

## **Treaty Rights in Crown Lands**

Where treaties have been negotiated and executed aboriginal rights may remain in the ceded territory for traditional Indian activities. Following are two examples in Atlantic Canada in the area ceded by the Peace and Friendship Treaties. In the first the court confirmed that fishing for eel was a continuing treaty right and in the second it ruled that logging was not a treaty right.

In 1993, Donald Marshall jr., a member of the Membertou First Nation, was stopped for fishing in Pomquet Harbour in Antigonish County, Nova Scotia. He was charged with fishing without a licence, selling eels without a licence and fishing during a closed season. He claimed he was allowed to catch and sell fish by virtue of a treaty signed with the British Crown. Marshall said he was catching and trading fish just as the Mi'kmaq people had done since Europeans first visited the coast of what is now Nova Scotia in the 16th century. In September 1999, the Supreme Court of Canada in the Marshall decision confirmed that the Mi'kmaq and Maliseet people of the East Coast continue to have treaty rights to hunt, fish and gather to earn a moderate livelihood.<sup>83</sup>

On the other hand, in May 1998, the Province of New Brunswick charged Joshua Bernard, a Mi'kmaq from the Eel Ground Band, with possession of 23 spruce logs taken from Crown lands without a licence, contrary to the provincial Crown Lands and Forests Act. In this case on July 20, 2005 the Supreme Court of Canada came down with the ruling that the Peace and Friendship Treaties did not apply to a right to trade in logs since it was not a traditional activity at the time of treaty.<sup>84</sup>

## **Water Rights**

Increasingly, the right to water is an issue throughout the world. Canada generally has an abundance of water as compared to other countries in the world, but demands for it are increasing and there are other concerns; for example, water may be polluted by upstream users. First Nations are no exception as often water flows through or forms the boundary of reserves and first Nations as everyone else requires water for not only for its own domestic use, but also for agriculture, ranching and industrial use.

Linda Nowlan, an environmental lawyer and a Faculty Research Associate with the Program on Water Governance, University of British Columbia, in her paper "*Customary*

---

83 *R. v. Marshall*, [1999] 3 S.C.R. 533, online: INAC, The Marshall Processes: Aboriginal and Treaty Rights Negotiations in the Maritimes and Gaspé <[http://www.ainc-inac.gc.ca/ps/clm/atr/index\\_e.html](http://www.ainc-inac.gc.ca/ps/clm/atr/index_e.html)>

84 *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, paragraph 35.

*Water Laws and Practices in Canada*”<sup>85</sup> describes and discusses six different sources of Aboriginal rights to water in Canada:

1. A constitutionally protected aboriginal right on unceded land.
2. Included in aboriginal title on unceded tribal territory.
3. A reasonable incidental right to an existing treaty.
4. A (Indian) reserve based right founded on the *Winters* doctrine.
5. A common law right, such as a riparian right.
6. A statutory right under applicable provincial legislation.

The Winters Doctrine, mentioned in point 4 above, is based on *Winters v. United States*, [1908].<sup>86</sup> This was a decision of The Supreme Court of the United States in which it was held that it was implied in the creation of the reservation that the reserve had a right to an amount of water necessary for agriculture and for other uses necessary in changing to new habits. In reaching this decision, the Court reasoned:

“The reservation was a part of a very much larger tract which the Indians had the right to occupy and use, and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such, the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid, and, without irrigation, were practically valueless.”

“The Indians had command of the lands and the waters, -- command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock" or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?”

Legislation such as the *North-west Irrigation Act*, SC 1894, c.30, applying to lands in the North-west Territories (which in 1894 included land in the present day territories, the Prairie Provinces, Northern Ontario and Northern Quebec) along with subsequent similar federal and provincial legislation, reserved the beds and shores of bodies of water from Crown grants and thus clarified the ownership of beds and shores of bodies of water for public and private lands. However, the ownership with regard to Indian reserves is not so clear.

Does the *ad medium filum aquae* rule apply to Indian reserves? There is not an abundance of case law for reserves in the area of land that was formally the North-west Territories. However it was dealt with in the case *R. v. Ironeagle*, [1999], 186 Sask. R. 131. Ironeagle, along with Cyr, went ice fishing on Lake Pasqua which bordered their reserve and then sold a portion of their catch for \$10 to an under-cover conservation officer. One issue was whether the lake was part of the reserve. The court referred to the

---

85 Nowland, Linda. *Customary Water Laws and Practices in Canada*, (Food and Agriculture Organization: Rome, Italy, 2004), page 1, online: Food And Agriculture Organization Of The United Nations  
<<http://www.fao.org/Legal/advserv/FAOIUCNcs/Canada.pdf>>

86 *Winters v. United States*, [1908] 207 U.S. 564. Also see Nowland, Linda. *Customary Water Laws and Practices in Canada*, page 33.

two cases mentioned below (*R. v. Nikal*, [1996] and *R. v. Lewis*, [1996]). It also referred to the definition of riparian “of or on riverbank” in the Oxford Dictionary. On the principle that riparian rights had no application to navigable waters (based on the mentioned court cases) and that riparian rights had no application to lakes (based on the definition of riparian in the Oxford dictionary) the Justice concluded that the lake was not part of the reserve.

In British Columbia the issue of *ad medium filum aquae* with regard to navigable water has been dealt with by two recent cases: *R. v. Nikal*, [1996] 1 S.C.R. 1013 and *R. v. Lewis*, [1996] 1 S.C.R. 921, dealing with the right to fish. In both cases it was determined that presumption *ad medium filum aqua* did not apply to navigable rivers adjacent to Indian reserves.

*R. v. Nikal* deals fishing on the Buckley River which flows through Moricetown Reserve No. 1 in Northern British Columbia. Justice Cory in delivering the decision stated:

LXXII. It is clear that the *ad medium filum aquae* presumption has no application to navigable rivers in British Columbia. From the earliest times the Courts and legislatures of this country have refused to accept the application of a rule developed in England which is singularly unsuited to the vast non-tidal bodies of water in this country.

*R. v. Lewis* deals with fishing on the Squamish River which is contiguous to the Cheakamus Reserve of the Squamish Indian Band. Justice Iacobucci in delivering the decision states:

62 As a result of the foregoing jurisprudence, I conclude that the applicability of the *ad medium filum aquae* presumption is determined by the navigability of the body of water at issue. It is also relatively clear that the *ad medium filum* presumption cannot apply to navigable rivers in British Columbia, as it was also held inapplicable in Manitoba and in Alberta, which have similar statutory language.

Land surveyors will be interested in future decisions dealing with water rights. Certainly First Nation water rights will attract more attention in the years to come. In the meantime, one must be careful not to assume that the law relating to the ownership of beds and shores of bodies of water applicable to public lands or private lands also applies to Indian lands.

## LAND MANAGEMENT SYSTEM

### Legislation

There are over 40 current statutes pertaining to Indians and Indian reserves administered in whole by Indian Affairs and Northern Development Canada along with regulations. As well Indian Affairs has part responsibility for many other statutes.

The main legislation pertaining to Indians and Indian Reserves is the *Indian Act* R.S.C, 1985, c. I-5. Other legislation deals with Indian rights in surrendered lands; Indian land claim agreements; Indian self-government; Indian oil, gas and mineral rights and Indian rights in a province or a particular Indian reserve. A list of these *Acts*, including links to the actual legislation, is available on Indian Affairs' website<sup>87</sup>

### Administration

#### *Background*

Prior to 1867 responsibility for Indian affairs was with the various colonies of North America. Under Section 91(24) of the *Constitution Act, 1867* the Parliament of Canada obtained exclusive legislative authority for "Indians, and Lands reserved for the Indians".

In 1868 the Department of the Secretary of State of Canada was formed by *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Land* S.C. 1968, c.42.<sup>88</sup> Under Section 4 of the *Act* the Secretary of State was the Superintendent General of Indian affairs and as such had the control and management of the lands and property of the Indians in Canada. When the Department of the Interior was formed in 1873 the responsibility for Indian affairs was transferred to an Indian Affairs Branch of that Department. Even though Indian Affairs became a separate Department in 1880, the Minister of the Interior remained in control as ex-officio Superintendent General of Indian Affairs.<sup>89</sup> In 1936 the Department of the Interior was abolished.<sup>90</sup> Since then responsibility for Indian affairs came under various departments and is now with Indian and Northern Affairs Canada.

---

87 Acts administered by INAC, online: INAC < [http://www.ainc-inac.gc.ca/pr/leg/lgis\\_e.html](http://www.ainc-inac.gc.ca/pr/leg/lgis_e.html) >

88 *Historical Legislation*, online: INAC < [http://www.ainc-inac.gc.ca/pr/lib/phi/histlws/hln/index\\_e.html](http://www.ainc-inac.gc.ca/pr/lib/phi/histlws/hln/index_e.html) >

89 Spry, Irene M., *The Records of the Department of the Interior and Research Concerning Canada's Western Frontier of Settlement* (Canadian Plains Research Center, University of Regina, 1993), page 139.

90 Spry, Irene M., *The Records of the Department of the Interior and Research Concerning Canada's Western Frontier of Settlement*, page 140.

## *Lands and Trusts Services, Indian and Northern Affairs Canada*

The Lands and Trust Services Sector of Indian and Northern Affairs Canada is responsible for the administration of the *Indian Act* along with the associated fiduciary and other statutory responsibilities of the government of Canada to the First Nations.<sup>91</sup>

The Lands Branch of the Sector has the mandate to manage the land related statutory duties under the *Indian Act*. Responsibilities include provision of land research, title clarification, Indian land registration and surveys and provision of policy and advice on land management, and natural resources (minerals and timber, except oil and gas).<sup>92</sup> It also has the responsibility to transfer land management services to First Nations as obligations under the *First Nations Land Management Act*, S.C. 1999.

The administration of estates of deceased Indians and registration of Indians is the responsibility of the Individual Affairs Branch of the Lands and Trust Services Sector.

Negotiation and implementation of specific claims, comprehensive land claims and self-government agreements is the responsibility of the Claims and Indian Government Sector.<sup>93</sup>

As Aboriginal First Nation governments increasingly exercise jurisdiction over their lands as a result of land claims settlement legislation, self government legislation or other legislation such as the *First Nations Land Management Act* the day to day involvement of the federal government in First Nation affairs should lessen.

### **Interests and Transactions in First Nations Land**

In this chapter the term First Nations Lands includes Indian Reserves and Special Reserves. Under the *Indian Act*, 1985 Reserve is defined as:

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

A Special Reserve is a tract of land that has been “set apart for the use and benefit of a band and legal title thereto is not vested in Her Majesty”. Under Section 36 of the *Indian Act*, 1985 the *Indian Act* applies to Special Reserves as though the lands were a reserve.

In a general sense the term First Nation Lands also includes any lands over which First Nations may have an interest in. This could include territory over which first Nations have aboriginal rights, surrendered lands where there may be a reversionary interest or other residual interest. As well there are Indians residing on provincial or federal crown land in settlements which have not been set aside as Indian reserves.

---

91 *Lands and Trust Services*, online: INAC < [http://www.ainc-inac.gc.ca/ps/lts/index\\_e.html](http://www.ainc-inac.gc.ca/ps/lts/index_e.html)>

92 *Lands Branch, Lands and Trust Services*, online: INAC < [http://www.ainc-inac.gc.ca/ps/lts/lnds\\_e.html](http://www.ainc-inac.gc.ca/ps/lts/lnds_e.html)>

93 *Claims and Indian Government Sector*, online: INAC < [http://www.ainc-inac.gc.ca/ps/clm/index\\_e.html](http://www.ainc-inac.gc.ca/ps/clm/index_e.html)>



Where a First Nation has obtained title or control of their land as a result of land claim settlement or self-government legislation land interests and transactions are not subject to the *Indian Act* and are administered by the First Nations themselves.

As mentioned earlier on in this chapter First Nation property rights are very complex. The proceeding material is only intended to given the reader a general appreciation of interests and transactions on first Nations Land. An authoritative reference is the *Land Management Manual* produced by Indian and Northern Affairs Canada.<sup>94</sup>

### *Individual Interests*

An individual band member may be granted the right to use and occupy parcels of reserve land by an allotment. Legal title remains vested in Her Majesty in right of Canada. The creation of an allotment is by way of a Band Council Resolution (BCR), which is then submitted for Ministerial approval. Approval may be for a Certificate of Possession or a Certificate of Occupation.

### ***Certificate of Possession***

Certificates of Possession are dealt with under Sections 20(1) (2) of the *Indian Act*, 1985. If the Minister approves an allotment for a Certificate of Possession it is registered in the Indian Lands Registry (ILR) and a Certificate of Possession is issued as evidence of lawful possession. This is the highest form of ownership available to an individual Band member. It is also permanent for all intents and purposes as it can only be willed to heirs, or sold or transferred to other Band members'.<sup>95</sup>

### ***Certificate of Occupation***

Certificates of Occupation are dealt with under Sections 20(4) (5) (6) of the *Indian Act*, 1985. Where possession of land in a reserve has been allotted to an Indian by the council of the band, the Minister may in his discretion withhold his approval, may authorize the Indian to occupy the land temporarily and may prescribe the conditions as to use and settlement that are to be fulfilled by the Indian before the Minister approves of the allotment. In such situations a Certificate of Occupation is issued to the Indian authorizing occupation of the land for a period of two years. It is issued by the Registrar of Indian Lands and identifies any conditions that are to be met before a Certificate of Possession can be issued.

Although the *Act* states the Minister prescribes the conditions that are to be fulfilled before the allotment is approved and a Certificate of Possession is issued it is normally the Band Council that prescribes the conditions and the Minister only approves it.

---

94 Copies of the Land Management Manual are available from Indian and Northern Affairs Canada (INAC) regional offices or from the Lands Directorate at headquarters. The manual is also available from INAC online: <[http://www.ainc-inac.gc.ca/ps/lts/pdf/lmm\\_e.pdf](http://www.ainc-inac.gc.ca/ps/lts/pdf/lmm_e.pdf)>

95 See Sections 42, 45 and 50 of the *Indian Act*, 1985.

A Certificate of Occupation does not allow the land to be transferred except by demise or descent in which case the heirs-at-law or the beneficiaries must fulfill the stated conditions to be eligible for complete lawful possession<sup>96</sup>. It can be renewed for a second term of two years.

### ***Location Tickets***

Evidence of possession by an Indian in the *Indian Act, 1876* was by a Location Ticket. Under Section 20 (3) of the *Indian Act, 1985* Location Tickets continue to be valid evidence of lawful possession. As well Cardex Holdings are a record of a historical individual interest in reserve land. They were created by BCR and approved by the Minister under the *Indian Act*. There are other similar unsurveyed allotments recognized as a lawful possession under the *Indian Act*, for example, "Notice of Entitlement (NE)" or "No Evidence of Title Issued (NETL)". However the land descriptions associated with these unsurveyed holdings were vague and often inaccurate and a survey is required before any transaction can take place on the lands.<sup>97</sup>

### ***Customary or Traditional Land Allotments***

Many Indian Bands, especially those located in the Prairie Provinces, have chosen not to adopt the allotment features of the *Indian Act*. They follow a 'custom' or 'traditional' land allotment system. The Indian Bands grant occupational rights at the pleasure of the Band Council. The Band Council Resolution conferring such rights usually defines the interests so created as the right to "use and occupy at the pleasure of the Band Council". Indian and Northern Affairs Canada do not administer these interests, which are not lawful possession under the *Indian Act*, and therefore, these holdings are not registered in the ILR. The holders of these interests remain on the property at the pleasure of the First Nation council.<sup>98</sup>

### ***Lands Used for the General Welfare of the First Nation***

Reserve lands may be set aside for "the general welfare of the band" under Section 18(2) of the *Indian Act, 1985*. The use of the land must benefit the entire community and not just a restricted group within the community. Appropriate uses include community infrastructure projects (roads, sewers, airports, etc.), schools, community halls, health offices and burial grounds. It is not used for commercial or economic development purposes. Although not specified in Section 18(2) the current federal policy is to obtain consent of a setting aside for "the general welfare of the band" ~~under~~ through a Band Council Resolution.<sup>99</sup>

Under Section 18(2) of the *Act* an Indian who had possession of the lands, prior to a Section 18(2) taking, is entitled to compensation for loss of use.

---

96 *Land Management Manual*, Directive 3.3, Temporary Possession, page 22, online < [http://www.ainc-inac.gc.ca/ps/lts/pdf/lmm\\_e.pdf](http://www.ainc-inac.gc.ca/ps/lts/pdf/lmm_e.pdf)>

97 *Land Management Manual*, Directive 3-2, Creating Individual Interests, Section 2.4 a), page 7.

98 *Land Management Manual*, Directive 3-2, Creating Individual Interests, Section 2.7, page 7.

99 *Land Management Manual*, Directive 2.2, Transactions and Choosing Authorities, 3.18 c), page 16.

## *Surrenders and Designations*

### ***Surrenders***

It was forbidden for individuals to purchase land reserved for the Indians directly from the Indians as far back as the *Royal Proclamation of 1763*. As well, under Section 25 of the *Indian Act, 1876* no reserve or portion of a reserve was to be sold, alienated or leased until a release or surrender of the land was assented to by the Indian Band.

Surrenders were used to allow an Indian Band to sell or to lease lands to non-Indians. If the objective of surrender was to sell the lands, then the surrender was considered to be an "absolute" surrender. If the objective was to lease lands, or to grant other temporary interests in the lands, then the surrender was considered to be a "conditional" surrender.

The question of ownership of surrendered lands has been discussed previously in this chapter under the Section on the *Constitution Act, 1867*. Pursuant to the *Constitution Act 1867* and several court decisions when reserve land was surrendered the land belonged to the province. Now, however, agreements have been made with most provinces, so that when lands are surrendered the legal title remains vested in Her Majesty in right of Canada.

In some provinces in the past, especially Ontario, Indian lands were surrendered to the federal government by Indian Bands with the intention that the lands be sold for their benefit. In many cases, some of the lands remain unsold to this day. Recently Indian Bands have been requesting that the lands be restored to them and to Indian Reserve status. To permit this restoration, negotiations are normally required with the government of the province in which the lands are situated. In Ontario the negotiations led to a new federal-provincial agreement in 1986 which facilitates the restoration of unsold surrendered Indian lands to Indian Bands.<sup>100</sup>

In recent years, First Nations have become more and more reluctant to surrender outright reserve lands since they did not wish to lose their reserve land base. Whenever possible, only limited rights were surrendered, and then with the condition that when they were no longer needed they would revert to the first Nation. With the recent designation provisions in the *Indian Act* the need for surrenders lessened. Now when surrenders do occur, they are normally part of a land claim settlement or a land exchange.<sup>101</sup>

### ***Designations***

In 1988 the *Indian Act* was amended and the definition of "reserve" was altered to include "designated lands".<sup>102</sup> The *Act* defined designated lands as:

a tract of land or any interest therein the legal title to which remains vested in Her Majesty and in which the band for whose use and benefit it was set apart as

---

<sup>100</sup> The agreement was confirmed by the: *Indian Lands Agreement (1986) Act*, 1988, c. 39. and the *Indian Lands Agreement Confirmation Act* (Ontario), 1989.

<sup>101</sup> *Land Management Manual*, Chapter 2, Directive 2.3, 3.13, page 11.

<sup>102</sup> S.C. 1988, c. 23, s. 1 (now R.S.C., 1985, c. 17 (4th Supp.))

a reserve has, otherwise than absolutely, released or surrendered its rights or interests, whether before or after the coming into force of this definition;

This amendment known as the Kamloops amendment ensures that designated reserve lands are still part of the reserve and subject to a First Nation's by-laws and enable First Nations to levy taxes on designated lands.<sup>103</sup> Also under the definition prior conditional surrenders of land are considered designations.

There are two cases of interest with regard to designations. In *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657 it was confirmed that lands surrendered for an airport were surrendered absolutely, were not designated lands and therefore not subject to taxation. However in *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 2001 SCC 85 it was determined that, although the administration and control of the lands were transferred to the province of British Columbia for an irrigation canal, that the order in council was ambiguous and all that was needed was an easement. Therefore the lands remained in the reserve for the purpose of taxation under s. 83(1) (a) of the *Indian Act*.

Designations are commonly used where a First Nation wishes to grant an interest in Reserve land to a non-band member, which could include a company owned by a First Nation (i.e. a band corporation). Although leases are the most common type of interest granted under a designation, a permit, an easement, or a right-of-way may also be granted.<sup>104</sup>

### *Leases and Permits*

A lease gives the lessee an exclusive interest in reserve land for a specific period of time. As a general rule lands in a reserve shall not be leased, or an interest in them granted, until they have been designated.<sup>105</sup>

A permit gives the permittee a limited and non-exclusive interest in reserve land for a specific, usually short term, period of time.<sup>106</sup> Since a permit does not grant exclusive possession, more than one permit for a parcel of land may be issued to different parties or to the same party for different purposes, as long as the uses do not conflict.

### ***Commercial, Residential and Recreational Leases***

A lease grants an interest in and exclusive possession of reserve lands. It is granted for a specific period of time, often for a long term.<sup>107</sup>

Leases are normally issued pursuant to Section 53(1) of the *Indian Act*, 1985 for commercial, residential and recreational developments following a designation. A

---

<sup>103</sup> *Land Management Manual*, Directive 5.1, General Information, 4.4, page 4.

<sup>104</sup> *Land Management Manual*, Chapter 2, Directive 2.3, 3.14, page 12.

<sup>105</sup> See s. 37(1), 38(2) *Indian Act*, 1985.

<sup>106</sup> *Land Management Manual*, Directive 2.2, Transactions and Choosing Authorities, 3.17(a), page 15.

<sup>107</sup> *Land Management Manual*, Directive 2.2, Transactions and Choosing Authorities, 3.15, page 13.

leasehold interest in designated lands under Section 54 can be assigned to another person and under Section 89 (1.1) is subject to “charge, pledge, mortgage, attachment, levy, seizure, distress and execution”.

### ***Locatee Leases***

A Locatee Lease is a lease on allotted lands. Like all leases, a locatee lease grants an interest in and exclusive possession of the land for a specific period of time.

Under Section 58(1)(b) of the *Act* where land in a reserve is uncultivated or unused, the Minister may, with the consent of the council of the band, where the land is in the lawful possession of any individual, grant a lease of that land for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession of the land; and under Section 58(3) of the *Act* the Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated.

The courts have ruled that locatee leases do not require First Nation council consent.<sup>108</sup> However under departmental policy First Nation councils must have the opportunity to express their views on this type of lease prior to ministerial approval. As well a long-term lease may be seen as conflicting with the designation provisions of the *Indian Act* therefore, a vote of First Nation members is required for all locatee leases of more than 49 years. For agricultural or grazing purposes, a permit under Section 28(2) of the *Act* is preferred, rather than a locatee lease under Section 58 (1) (b) of the *Act*.<sup>109</sup>

### ***Agricultural Leases***

Under Sections 58(1) (c) of the *Act* where land in a reserve is uncultivated or unused and where the land is not in the lawful possession of any individual, the Minister may grant a lease for the purposes of agriculture or grazing. This type of lease is granted without a designation vote, but it does require the consent of the First Nation council.<sup>110</sup> However, a section 28(2) permit is preferable over a lease for agricultural or grazing purposes.<sup>111</sup>

### ***Utility and Agricultural Permits***

These permits are used for utility services to the reserve, and grazing or agricultural purposes where exclusive use is not required.<sup>112</sup> Under Section 28(2) of the *Indian Act*, 1985 the Minister may by permit authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

### ***Disposal of Grass, Timber, Sand, Gravel, etc***

---

108 *Canada v. Boyer* [1986] 2 Canada Federal Court Reports, 396 (F.C.A.)

109 *Land Management Manual*, Directive 2.2 Transactions and Choosing Authorities, 3.16, page 14.

110 *Land Management Manual*, Directive 2.2 Transactions and Choosing Authorities, 3.15, page 13.

111 *Land Management Manual*, Directive 2.2, Transactions and Choosing Authorities, 3.15, page 13.

112 *Land Management Manual*, Directive 2.2, Transactions and Choosing Authorities, 3.17. page 15.

Permits are also issued under Section 58(4) of the *Act*. Under this Section, the Minister may without an absolute surrender or a designation dispose of wild grass or dead or fallen timber; and with the consent of the council of the band, dispose of sand, gravel, clay and other non-metallic substances on or under lands in a reserve.

### ***Buckshee Agreements***

It is common on some reserves for individual band members or the First Nation itself to enter into agreements for others to use reserve land outside the provisions of the *Indian Act*. Such agreements, commonly referred to as Buckshee arrangements or Buckshee leases may or may not be documented and depend on the trust and goodwill of the parties to the agreement.

Since buckshee agreement are not authorized under the *Indian Act*, the Department of Indian and Northern Affairs Canada does not recognize them or administer compensation related to them,<sup>113</sup> nor are they registered in the Indian lands Registry.

### ***Expropriation***

If Reserve land is required for a public use such as a highway, a hydro transmission lines, a hydro dam or for a railway and the province, municipal local authority or corporation that requires the land has statutory expropriation powers the land may be taken or used under Section 35(3) of the *Indian Act*, 1985.

Although not a statutory requirement, it is the policy of Indian Affairs to first obtain the consent of the First Nation council. The only exception may be where the national interest is paramount. Also before using Section 35(3), the possibility of a surrender or designation of the land or use of a permit under Section 28(2) of the *Act* should be discussed with the First Nation council, to determine which approach they prefer.<sup>114</sup>

The interest taken or transferred may be all the interest in the reserve land or something less than full ownership, such as an easement. There is a fiduciary duty to ensure that the taken interest is the minimum required to fulfill the required public use.<sup>115</sup>

Under Section 35.4 the First Nation and affected locatees receive compensation for the loss of land or their interest in the lands.

### ***Reserve Creation and Additions***

Historically the creation of Indian reserves has been by a variety of methods. Some were set aside by religious orders, some were created as refuges by imperial or colonial authorities for Indians fleeing other areas of Canada, some were created by treaty with the Crown, some were purchased from private individuals or from a colonial or

---

113 *Land Management Manual*, Directive 8.2, Administering compensation, 2.7, page 14.

114 *Land Management Manual*, Directive 2.2 Transactions and Choosing Authorities, 3.19, pages 17 and 18.

115 *Land Management Manual*, Directive 2.2 Transactions and Choosing Authorities, 3.19(a), page 17.

provincial government, others were created by provincial governments after Confederation, while still others were simply recognized as such by the Crown.<sup>116</sup>

There is no statutory authority under the Indian Act, or any other federal legislation, to set aside land as a reserve. *The Federal Real Property and Federal Immovables Act, S.C. 1991, c. 50* and its regulations apply to the transfer of land into federal title. Once the land is held by federal title the Governor in Council grants reserve status to the land.<sup>117</sup>

Creating new reserves or adding land to reserves now may occur through treaty land entitlement agreements, land claim settlements, court orders, legal reversions, etc. Legal reversions occur where the original expropriation/transfer documentation included a clause providing for the return of the land to Canada for the purpose of granting reserve status when the land is no longer required for the stated purpose (e.g., for railways, roads, etc.). The Crown may also add land to reserves for other reasons, such as social needs, geographic purposes, return of unsold surrendered land and providing for landless First Nations.<sup>118</sup>

### **Devolution of Land Management Functions**

One can see from the preceding sections on interests and transactions that First Nations have had minimal authority and responsibility in carrying out of land transactions on their Reserves.

In recent years many First Nations have assumed greater control over land management functions. In the 1980's, Indian Affairs and Northern Development developed programs to enhance First Nations involvement in land management under the *Indian Act*. In the 53/60 Delegated Land Management Program First Nations are delegated (under Sections 53 and 60 of the *Indian Act, 1985*) the authority to approve land transactions on behalf of the Minister. More recently Indian and Northern Affairs Canada have piloted a new Reserve Land and Environment Management Program which includes community-based land use planning, land transactions, natural resource transactions, environmental management and compliance.<sup>119</sup>

Other first Nations are opting out of the land management provisions of the *Indian Act* altogether and implementing their own land management regimes. This is being achieved through the *First Nations Land Management Act, S.C. 1999, c.24* and self government. Under the *First Nations Land Management Act* First Nations can opt out of the land management provisions of the Indian Act and establish their own land codes. Under self government agreements, First Nations are obtaining self government and control of their lands through a variety of mechanisms including treaties, legislation, contracts and non-

---

<sup>116</sup> RCAP, Vol.1 Part Two, Chapter 9 - The Indian Act. See end note 17.

<sup>117</sup> *Land Management Manual*, Directive 10-1, 2. Authorities, page 7.

<sup>118</sup> *Land Management Manual* Directive 10-1, 5. ATR Policy Categories. page 10.

<sup>119</sup> *Background First Nations Reserve Land and Environment Management Program*, online: INAC <[http://www.ainc-inac.gc.ca/nr/prs/m-a2005/02676abk\\_e.html](http://www.ainc-inac.gc.ca/nr/prs/m-a2005/02676abk_e.html)>

binding memoranda of understanding.<sup>120</sup> Agreements are tailored to meet the unique political, economic, legal, historical, cultural and social circumstances of the respective Aboriginal groups across the country.<sup>121</sup>

Indian Oil and Gas Canada also has a program where the objective is to have oil and gas resources fully managed and controlled by participating First Nations. This is discussed in the section of this chapter dealing with the Indian Oil and Gas Rights System .

---

120 *Federal Policy Guide, Aboriginal Self-Government, 1995*, Part 1: Policy Framework:- Mechanisms for Implementation, online: INAC < [http://www.ainc-inac.gc.ca/pr/pub/sg/plcy\\_e.html#Intro](http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html#Intro) >

121 *Federal Policy Guide, Aboriginal Self-Government, 1995*, Part 1: Policy Framework:- Different Circumstances, online: INAC < [http://www.ainc-inac.gc.ca/pr/pub/sg/plcy\\_e.html#Intro](http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html#Intro) >



## LAND REGISTRATION SYSTEM

### Introduction

A means of legally recording interests in land is essential for social and economic development in all jurisdictions, including First Nation lands. Such systems provide for the management of land transaction information and provide for access to the information. Because Indian reserves are outside provincial jurisdiction the provincial land titles and registration systems do not include land transactions occurring on Indian reserves.

While there is provision for a land registration system in the *Indian Act*, 1985, it provides little guidance. The *Act* simply states:

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

55. (1) There shall be kept in the Department a register, to be known as the Surrendered and Designated Lands Register, in which shall be entered particulars in connection with any transaction affecting absolutely surrendered or designated lands.

The Indian Lands Registry, as it is commonly referred to, is located in Hull Quebec. Land registration information is available through regional and district offices of the Department of Indian Affairs and Northern Development; however the most common form of access is on-line.

At various times, attempts have been made to categorize the Indian Lands Registry as a land titles system or a land registry system. There is no certificate of title as in a land titles system; however the Indian Lands Registry has many features of a land titles system as well as a registry system and the cadastral system as used in Quebec.

### Indian Lands Registry System

In recent years considerable resources have been spent modernizing the Indian Lands registry and developing on-line access. Now virtually all registry data is obtained on-line through the Indian Lands Registry System which is a database of instruments registered in the Indian Lands Registry.<sup>122</sup> Several types of reports are available through this system. Information can be sought by a variety of methods including: obtaining reports on each reserve, searching particular parcels (which provides a detailed chain of title information pertaining to the parcel) or searching by attributes of particular documents (instruments).

---

<sup>122</sup> Access to the system is through the Electronic Services Website of the Department of Indian and Northern Affairs Canada (INAC): <http://www.ainc-inac.gc.ca/esd/#lts>

Lands and Trusts Services also provide on-line access to other systems relating to Reserve Lands and Crown Lands including:

- The Land Sales System - a database of information pertaining to lands which have been surrendered for sale by Indian Bands.
- The First Nation Land Register System - a database of instruments registered in the Indian Lands Registry relating to Reserve Lands under the *First Nations Land Management Act*, 1999.
- The Self Government First Nations Lands Registry - a database of instruments that are registered in a First Nation's Land Registry established according to its specific Self Government Land Management Act.

All of these systems allow users to perform enquiries and generate reports. Electronic copies of instruments can also be viewed and printed. Copies of instruments and abstracts are generally available from the Indian Lands Registry or can be downloaded free of charge from the website.

The *Indian Lands Registration Manual*<sup>123</sup> produced by the Indian Lands Registry, describes the criteria and procedures for the registration of instruments in the Indian Lands Registry. It is an indispensable reference for those dealing with Indian lands

While anyone may research information on a parcel of reserve land, a Land Status Report can also be obtained from Indian and Northern Affairs. A Land Status Report contains all the pertinent information regarding the encumbrances and/or interests on a particular parcel of reserve land. The report contains information from the Indian Land Registry and if available from appropriate departmental files. The report identifies existing registered interests such as leases, permits, easements, Certificates of Possession, or potential encumbrances such as cardex holdings or designations.<sup>124</sup>

Some Indian lands may have been in provincial jurisdiction prior to becoming an Indian reserve. In these cases, land transaction documents pertaining to the lands prior to them becoming an Indian reserve may be found in the provincial land titles or land registration systems. In the case of an Indian reserve created from provincial crown lands, the last transaction in the provincial system is usually the transfer of the lands from the provincial government to the federal government.

The Indian Land Registry will only accept documents for registration that conform to the *Indian Act* or other legislation dealing with Indian lands such as the *Indian Oil and Gas Act* R.S.C. 1985, c. I-7. It will not register unauthorized transactions and/or transactions which it does not recognize or administer. Examples include customary allotments,

---

123 The manual is available online: INAC < [http://www.ainc-inac.gc.ca/ps/lts/pdf/ilr98\\_e.pdf](http://www.ainc-inac.gc.ca/ps/lts/pdf/ilr98_e.pdf) >

124 *Land Management Manual*, Directive 7-1, Leasing Reserve Lands - An Overview 2.2(c) page 4.

buckshee transactions (leases or permits granted outside the *Indian Act*) or conditional assignments which are prohibited under Section 55(2) of the *Indian Act*, 1985.<sup>125</sup>

First Nations under self-government legislation may use other land registries than the Indian Lands Registry (ILR) and the First Nations Land Register (FNLR).

---

<sup>125</sup> *Land Management Manual*, Directive 2-3, Registration, page 29.

## LAND SURVEY SYSTEM

### Background

#### *Survey System*

In the early year's parcels of land set aside for the Indians may or may not have been defined by survey and may or may not have been monumented. Land descriptions contained such wording as:

##### 1680 Grant

. . . were we not pleased to grant them the land called the Sault, containing two leagues of frontage, beginning at a point opposite the St. Louis Rapids, ascending along the lake in similar depth, with two Islands, Islets and the Beach, lying opposite and adjoining the lands of the said Prairie de la Magdelaine. . .  
<sup>126</sup>

or

##### 1805 Surrender

. . . all that tract or parcel of land commencing on the east bank of the south outlet of the River Etobicoke; thence up the same following the several winding and turnings of the said river to a maple tree blazed on four sides at the distance of three miles and three-quarters, in a straight line from the mouth of said river; thence north twenty-two degrees west twenty four miles and one-quarter; thence north . . .  
<sup>127</sup>

These days most, if not all, Indian reserves in Canada have surveyed exterior boundaries, although natural boundaries such as those bordering on water may or may not have been surveyed or have been subject to substantial changes due to natural changes such as erosion or accretion.

The interior of some reserves, usually the larger and more populated ones, have been subdivided. In Quebec, some reserves may be subdivided into townships or river lots (seigneuries). In Ontario many reserves have been subdivided into various rectangular systems of survey - there are at least seven major versions of lot and concession or township system surveys. In Manitoba, Saskatchewan and Alberta, many reserves have been subdivided in the same manner as the original township surveys carried out at the end of the 19<sup>th</sup> and beginning of the 20<sup>th</sup> centuries in these provinces. These surveys were often carried out for farming and to facilitate allotments. They provide a convenient reference system for other land transactions and have served as a framework for resource development, such as oil and gas.

---

<sup>126</sup> *Indian Treaties and Surrenders (Ottawa). Vol.1*, page 13. 1680 Grant, The Grant is also registered in the Indian Lands Registry, Registration Number 5481-169 (The English translation is slightly different than in Indian Treaties and Surrenders).

<sup>127</sup> *Surrender by the Mississague Nation of Indians in 1805*, Indian Treaties and Surrenders (Ottawa). Vol.1, page 34.

## Administration

Prior to the *Constitution Act*, 1867 responsibility for surveys for Indian lands rested with the various colonies of British North America. The Department of the Interior was created in 1873 and responsibility for Indian land surveys was given to the Surveyor General. It has remained with the Surveyor General of Canada Lands ever since, except for a period from 1880, when Indian Affairs became a department in its own right, to 1936 when responsibility for reserves surveys was given back to the Surveyor General.

Indian reserves along with several other types of First Nations lands are Canada Lands and therefore fall under the provisions of the *Canada Lands Surveys Act* R.S.C, 1985, c. L-6. Section 24 of the Act states:

- 24.** (1) In this Part, "Canada Lands" means
- (a) any lands belonging to Her Majesty in right of Canada or of which the Government of Canada has power to dispose that are situated in Yukon, the Northwest Territories, Nunavut or in any National Park of Canada and any lands that are
    - (i) surrendered lands or a reserve, as defined in the *Indian Act*,
    - (ii) Category IA land or Category IA-N land, as defined in the *Cree-Naskapi (of Quebec) Act*, chapter 18 of the Statutes of Canada, 1984,
    - (iii) Sechelt lands, as defined in the *Sechelt Indian Band Self-Government Act*, chapter 27 of the Statutes of Canada, 1986,
    - (iv) settlement land, as defined in the *Yukon First Nations Self-Government Act*, and lands in which an interest is transferred or recognized under section 21 of that *Act*,
    - (v) lands in the Kanesatake Mohawk interim land base, as defined in the *Kanesatake Interim Land Base Governance Act*, other than the lands known as Doncaster Reserve No. 17, or
    - (vi) Tliche lands, as defined in section 2 of the *Mackenzie Valley Resource Management Act*; and
  - (b) any lands under water belonging to Her Majesty in right of Canada or in respect of any rights in which the Government of Canada has power to dispose

Under Section 24 (2), of the *Act* surveys of Canada Lands shall be made in accordance with the instructions of the Surveyor General. Under Section 25 surveys are made on the request of a minister of the department of the Government of Canada administering the lands, which in the case of First Nations Lands is the Minister of Indian and Northern Affairs Canada.

Section 19 of the *Indian Act*, 1985 states:

- 19.** The Minister may
- (a) authorize surveys of reserves and the preparation of plans and reports with respect thereto;

(b) divide the whole or any portion of a reserve into lots or other subdivisions;  
and

There is a general power to survey, under Section 47(1) of the *Canada Lands Surveys Act* any lands belonging to Her Majesty in right of Canada or of which the Government of Canada has power to dispose. Presumably this section could be used to survey in a province non-reserve lands which are administered by Indian Affairs and Natural Resources Canada for the use of Indians. However it is not normally used and any required surveys are carried out under provincial Acts and Regulations.

Surveys of land held by First Nations under self government legislation, not included in the definition of Canada Lands under Section 24 of the *Canada Lands Surveys Act*, are not under the management of the Surveyor General of Canada Lands.

### ***The Canada Centre for Cadastral Management***

The Canada Centre for Cadastral Management (CCCM) is a part of Geomatics Canada in the Earth Sciences Sector of Natural Resources Canada. The Surveyor General of Canada Lands is also Director of the Canada Centre for Cadastral Management.

CCCM maintains regional offices in close proximity to the regional offices of Indian Affairs and Northern Development in order to provide efficient consulting services and technical advice on legal surveys.

The primary role of CCCM stems from the statutory responsibilities entrusted to the Surveyor General of Canada for the management of surveys and the custody of records under the *Canada Lands Surveys Act*.

Approximately 500,000 people (mostly First Nations and Inuit) live on Canada Lands. The main objective of CCCM is to provide the land survey component of the property rights system for Canada Lands. Together with the land management and land registration components of the property rights system the Canada Lands Survey system forms the basis for secure land tenure.

### ***Management of Surveys***

CCCM regulates surveys of Canada Lands to ensure that the standards of the Canada Lands Survey System have been met. Any surveyor engaged to undertake a legal survey or prepare a plan of Canada Lands must carry out the work in accordance with the instructions of the Surveyor General. The *General Instructions for the Survey of Canada Lands* have traditionally been published as hard copy manuals however the current version, the e-Edition, is in electronic form and available over the internet.<sup>128</sup> It includes links to legislation, copies of various interdepartmental and intergovernmental agreements, administrative requirements for surveys and survey standards.

---

128 *General Instructions for Surveys, e-Edition*, online: CCCM [http://www.cccm.nrcan.gc.ca/english/manual\\_e.asp](http://www.cccm.nrcan.gc.ca/english/manual_e.asp)

Prior to undertaking a survey on an Indian reserve (and other Canada Lands defined in Section 24 of the *Canada Lands Surveys Act*) a surveyor requires the approval of the Indian Band Council and specific survey instructions from the Surveyor General of Canada Lands. There are some exceptions: for example specific instructions are not required for Indian oil and gas surveys; however prior authorization from the Band Council is required and the provisions for these surveys in *General Instructions for Surveys, e-Edition*, must be followed.

Requirements and procedures may vary, but normally after a survey is completed the survey plan is reviewed by the Indian Band Council and approved by Indian Affairs and Northern Development. It is also reviewed by the Surveyor General of Canada Lands (to ensure that it meets the survey standards) and if it is satisfactory it is confirmed (for official plans) or approved (for administrative plans) and recorded in the Canada Lands Surveys Records.

A person seeking to acquire rights in Indian lands must pay for any surveys required. Usually the First Nation or individual band member pays for surveys of land allotments made by Indian Bands to Band members.

In addition to its regulatory function CCCM provides survey related support including contract management for various Aboriginal governance programs, including the *First Nations Land Management Act*, Treaty Land Entitlement programs and Indian and Northern Affairs Canada's Lands and Trusts Services program.

CCCM is also involved in arranging for surveys of provincial lands which are to become Indian reserves such as those to be acquired for Treaty Land Entitlements. In these cases survey are carried out in accordance with provincial legislation. However standards for the survey of Canada Lands are also followed, providing provincial authorities agree and there is no conflict with provincial legislation or provincial survey standards.

### *Canada Lands Surveys Records*

Under Section 3 (2) of the *Canada Lands Surveys Act* the Surveyor General has the custody of all the original plans, journals, field notes and other papers connected with surveys of Canada Lands. The official repository for these documents is the Canada Lands Surveys Records at the Canada Centre for Cadastral Management headquarters in Ottawa.

It is now possible to access Canada Lands surveys documents through the CCCM website. Plans can be searched for and downloaded through a number of attributes, including plan number and Indian reserve. The website also includes contacts, interactive mapping of Reserve lands, *General Instructions for Surveys, e-Edition*, other information on survey instructions, copies of historical publications and information on products and services.<sup>129</sup>

---

129 Online: CCCM < [http://www.cccm.nrcan.gc.ca/english/index\\_e.asp](http://www.cccm.nrcan.gc.ca/english/index_e.asp)>

### *Interdepartmental Agreement*

An important reference document for those involved with surveys or land transactions on Indian lands is the *Interdepartmental Agreement with the Department of Indian Affairs and Northern Development re Land Transactions on Reserve Lands, 2003*.<sup>130</sup> This agreement outlines the roles and responsibilities of Lands and Trust Services of Indian Affairs and Northern Development and the Canada Centre for Cadastral Management (CCCM), Earth Sciences Sector of the Department of Natural Resources Canada.

The agreement applies to Indian reserves, designated lands, surrendered lands, and any other lands held and administered by the Department of Indian Affairs and Northern Development for the use and benefit of First Nations. It does not apply to those First Nations who, through self-government legislation, may use the Self Government First Nations Lands Registry or to dispositions made pursuant to the *Indian Oil and Gas Regulations*.

Of particular value is Chart A in the schedule to the agreement which is shown below. This chart gives the minimum requirements for land surveys and land descriptions for: the Indian Lands Registry (ILR) for First Nations under the *Indian Act, 1985*; and for the First Nations Land Registry (FNLR) for First Nations under the *First Nations Land Management Act, 1999*.

---

130 *General Instructions for Survey, e-Edition, Part B – Agreements*, online: CCCM  
<[http://www.cccm.nrcan.gc.ca/english/man/b1-2\\_e-ed\\_v3\\_e.asp](http://www.cccm.nrcan.gc.ca/english/man/b1-2_e-ed_v3_e.asp)>



**CHART "A"**  
**ILR and FNLR, MINIMUM LAND DESCRIPTION REQUIREMENTS**

Purpose	See specific notes on the following page	Standards for these products are set out in the <i>Manual of Instructions for the Survey of Canada Lands</i>		
		Administrative Plan - Sec. 31	Registration Plan (See Sec. B3 for field work)	Registration Plan (Field Survey mandatory)
<b>I ADDITIONS TO RESERVE</b>		No	No	Yes / Prov. Plan
<b>II RE-SURVEYS OF JURISDICTIONAL BOUNDARIES</b>		No	No	Yes
<b>III SALES</b>				
Surrender Vote Sec. 38(1) and accepting OC Disposition	See Note 3	Yes	Optional	No
Section 35 (highways, etc.)		No	No	Yes
Section 35 (easements)		Yes	Optional	No
<b>IV FIRST NATION PURPOSES</b>				
Designation Vote Sec 38(2) and accepting OC Welfare of First Nation (Sec.18(2))	See Note 3 See Note 1	Yes No	Optional Yes	No No
<b>V LAWFUL POSSESSION</b>				
Allotment Sec 20	See Note 1	Yes	Optional	No
Transfers Sec 24, 43, 49	See Note 1	Yes	Optional	No
Access Agreements	See Note 4	Optional	Optional	No
<b>VI LEASES Sec. 53, 58</b>	See Note 5			
<b>- 10 years or more</b>	See Note 1			
- land		No	Yes	No
- building unit with interest in land		Yes	Optional	No
- building unit only		Yes	Optional	No
<b>- less than 10 years</b>	See Note 4			
- land		Optional	Optional	No
- building unit only		Optional	No	No
<b>VII PERMITS Sec. 28(2)</b>				
- 10 years or more	See Note 5	Yes (Note 2)	Optional	No
- less than 10 years	See Note 4	Optional	Optional	No
- Utilities distribution (Blanket Permit)	See Note 4	Optional	Optional	No

*Definition: "OC" means Order-in-Council*

## *Survey Documents*

The *Interdepartmental Agreement* refers to two types of survey plans, "Official Plans" and "Registration Plans"

### ***Official plans***

An official plan is a graphical description of boundaries of land prepared from field notes of a survey, confirmed pursuant to Section 29 of the *Canada Lands Surveys Act*. An official plan is based on a fully monumented survey carried out by a Canada Lands Surveyor.

The *Interdepartmental Agreement* states the types of land transactions that require official plans. In general official plans are required where the boundaries defined by the plans are jurisdictional boundaries, such as additions to Reserves and resurveys of Reserve external boundaries. They are also required for Section 35 dispositions where rights to exclusive use of the land is transferred, such as for highways.

### ***Registration Plans***

A registration plan is a graphical description of the boundaries of land prepared from existing information which can include: land descriptions, field notes of survey, controlled aerial photographs or imagery, maps and information found in land transaction documents. It is approved pursuant to Section 31 of the *Canada Lands Surveys Act*.

As a general rule, registration plans are used for all new internal subdivisions or other surveys required for internal interests in a reserve. The *Interdepartmental Agreement* provides guidance as to when field survey work is required. Field survey work is required when, for example, none of the limits of the parcel to be created coincide with an existing surveyed and monumented boundary; or if the registration plan will result in the creation of more than five unsurveyed parcels within an individual surveyed parcel.

## MINERAL RIGHTS SYSTEM

### Introduction

The definition of reserve in the *Indian Act, 1876* included trees, wood, timber, soil stone, minerals, metals or other valuables. However, now well over a hundred years later not all reserves have mineral rights and a specific reference to minerals is not included in the definition of reserve in the *Indian Act, 1985*.

Many factors have lead to the matter of mineral rights being extremely complex.

### Ownership of Mineral Rights

Minerals or certain minerals may or may not be included in Reserve lands. Furthermore ownership of minerals or mineral rights differs from one reserve to another and from region to region. Unfortunately orders in council or legislation or other agreements that have established reserves are often silent with regard to mines and minerals. It may be necessary to refer to all available documentation including legislation, provincial agreements and the instruments that established the reserves when determining mineral rights.<sup>131</sup>

The retention of precious metals is a prerogative right of the Crown. They are not transferred with the property unless expressly included. In British Columbia in 1867 Governor Douglas took steps to declare that all mines and gold belonged to the Crown and subsequently they were not included when Reserve land was transferred to Canada.<sup>132</sup>

Reserves created before 1930 in Alberta, Saskatchewan and Manitoba provide an interesting case study. In the various orders-in-council establishing the Reserves there were no noted reservations with regard to mines and minerals. It is less certain with regard to precious metals (gold and silver) because of the prerogative of the Crown to retain them. However the definition of reserve in the *Indian Act, 1876* appears to include gold and silver. The definition states that the term “reserve” includes all the trees, wood, timber, soil stone, minerals, metals or other valuables therein.

A First Nation must surrender to Her Majesty any rights to metallic minerals underlying a reserve, if development is to take place.<sup>133</sup> The issue of ownership of surrendered Reserve lands has been discussed previously in this chapter under the heading the

---

131 *Building a Future, Metallic Minerals, Development Policy and Metallic Minerals*, online: INAC <<http://www.ainc-inac.gc.ca/pr/pub/bldg/min/>>

132 *Proclamation [December 28, 1857]* See Cail, Robert E., *Land Man and the Law – The Disposition of Crown Lands in British Columbia, 1871 – 1913*, page 71.

133 *Exploration and Development of Metallic Minerals*, online: INAC <[http://www.ainc-inac.gc.ca/pr/pub/bldg/min/edmm\\_e.html](http://www.ainc-inac.gc.ca/pr/pub/bldg/min/edmm_e.html)> Also see the *Indian Act, 1985*, Sections 37 to 39, and Section 93.

*Constitution Act 1867*. To summarize, if Reserve lands are surrendered the administration and control of the lands including mines and minerals resides with the provinces, except for the Prairie Provinces and the Territories. Agreements have been made with most of the provinces to allow the federal government to manage surrendered lands including mines and minerals.

First Nations frequently combine minerals with petroleum, oil and gas in a broad general form of surrender.<sup>134</sup> Generally the disposal of sand and gravel, stone, peat and water do not require a surrender as permits may be issued under Section 58(4) of the *Indian Act*, 1985.

## **Mineral Rights Management**

In British Columbia, the province administers mineral rights upon their surrender pursuant to the *Indian Act* through the *British Columbia Indian Reserves Mineral Resources Act* 1943-44, c. 19. Under the *Act*, one-half of the revenue collected belongs to the Province of British Columbia and one-half is remitted to the Receiver General of Canada.

In the rest of Canada mineral rights are administered by the Lands Branch, Lands and Trusts Services of Indian Affairs and Northern Development.

When the federal government manages the surrendered mineral rights, the *Indian Mining Regulations* C.R.C., c. 956 provide the framework for their disposition. Dispositions are effected through permits and leases. Under Section 4 of the regulations compliance is required with provincial laws respecting exploration, development, production and treatment, except where inconsistent with the regulations themselves.

A permit, issued under Sections 5 and 6 of the *Indian Mining Regulations* grants the right to explore for and develop minerals within the permit area. A permit does not convey the rights to the land or any mineral found on or in the land, but may give exclusive rights to the permit holder to select a portion of the permit area for leasing purposes. Permits are frequently used to authorize the exploration of large tracts of land. Under Section 7 of the *Regulations* a permit is issued for no more than one year with provisions for extensions.

A lease, issued pursuant to Section 5, 6 and 19 of the *Indian Mining Regulations*, grants the right to explore for, develop and produce minerals within the lease area. Under Section 23 of the *Regulations* a lease is granted for a 10-year period, unless otherwise specified, with provisions for renewal.

## **Land Registration**

All documents granting an interest in reserves or surrendered lands regarding minerals are registered in the Indian Lands Registry. There are not a great number of registered mineral related documents. A report dated 1991 states that the Indian Lands Registry has

---

<sup>134</sup> *Mineral Potential Indian Reserve Lands Canada, 1991*, 6.0 Mineral Surrenders, online: INAC <[http://www.ainc-inac.gc.ca/ntr/can\\_e.html](http://www.ainc-inac.gc.ca/ntr/can_e.html)>

recorded 564 mineral related permits, leases and/or agreements since record keeping began.<sup>135</sup>

### **Land Surveys**

The Surveyor General of Canada Lands manages surveys and has the custody of survey plans for sub-surface and surface rights for mineral development just the same as for other surveys under the *Canada Lands Surveys Act* 1985 on Canada Lands. Under Sections 21 and 22 of the *Indian Mining Regulations*, if a survey is deemed necessary, the Surveyor General issues survey instructions for surveys of lands on which a lease may be issued.

---

135 *Mineral Potential Indian Reserve Lands, 1991*, 7.0 Mineral Permits And Leases On Indian Lands, online: INAC <[http://www.ainc-inac.gc.ca/ntr/can\\_e.html#CONCLUSION](http://www.ainc-inac.gc.ca/ntr/can_e.html#CONCLUSION)>

## INDIAN OIL AND GAS RIGHTS SYSTEM

### Introduction

Generally oil and gas is included within the broad definition of minerals. As mentioned in the previous section on Indian minerals not all Indian reserves include minerals and it often is necessary to refer to provincial agreements and various instruments that established the reserves to determine ownership.

Currently most oil and gas development on Indian reserves occurs in the Provinces of Saskatchewan, Alberta and British Columbia.<sup>136</sup>

Indian Oil and Gas Canada (IOGC), established in 1987, has overall responsibility for the management of oil and gas rights on Indian lands. This federal agency reports to the Minister of Indian Affairs and Northern Development. Indian Oil and Gas Canada's offices are located on Tsuu T'ina Nation lands, adjacent to the City of Calgary.<sup>137</sup>

### Land Management

Oil and gas development in all jurisdictions, including that in First Nations lands, is complex. The few pages that can be devoted to this subject in this chapter can only touch on the main aspects of exploration, development and land surveys.

Federal legislation dealing with oil and gas development on Indian reserves is the *Indian Oil and Gas Act* R.S.C, 1985, c. I-7 and the *Indian Oil and Gas Regulations*, 1995. The *Indian Oil and Gas Act* applies to lands reserved for the Indians, including interests therein, surrendered in accordance with the *Indian Act*.<sup>138</sup>

#### *Exploratory licences*

Exploratory licences are issued under Section 6 of the *Indian Oil and Gas Regulations* for exploratory work on Indian lands. Such work includes mapping, surveying and other investigation work related to the exploration for gas and oil. They do not include the right to drill for oil and gas.

#### *Permits and leases*

Permits and leases are granted under Section 10 of the Regulations.

A permit gives the permittee the right to drill for oil and gas within the permit area. Under Section 16 the term of a permit is normally one year, however it can be extended.

---

<sup>136</sup> *Overview of Indian Oil and Gas Canada Information Sheet*, online IOGC <[http://www.pgic-iogc.gc.ca/data/1/rec\\_docs/204\\_OverviewSheet\\_e.pdf](http://www.pgic-iogc.gc.ca/data/1/rec_docs/204_OverviewSheet_e.pdf)>

<sup>137</sup> *History of Indian Oil and Gas Canada*, online: IOGC <[http://www.pgic-iogc.gc.ca/bins/content\\_page.asp?cid=2-47&lang=1](http://www.pgic-iogc.gc.ca/bins/content_page.asp?cid=2-47&lang=1)>

<sup>138</sup> *Indian Oil and Gas Act*, R.S.C.1985, c. I-7, See definition Indian Lands

A permit does not give the permittee the right to exploit (develop) the oil and gas. In the event that oil or gas is discovered, a permittee shall convert the permit to a lease, for all or part of the permit area in accordance with Section 20 of the Regulation.

A lease, in addition to giving the holder the right to drill for oil and gas, gives the holder the right to produce and treat oil and gas within the lease area and transport, market or sell the oil and gas, and carry on incidental operations. The term of a lease is generally five years with provision to continue for successive five-year periods.

Permits and leases normally cover development in one geological zone. As a result, a layering effect of permits and leases can occur if several geological zones are being developed in the same area.

Pursuant to Section 22 of the *Regulations* before drilling for and producing oil and gas on Indian lands a well licence and a surface rights contract are required.

The well license is issued by the provincial authority responsible for issuing the licenses.

### *Surface Rights*

Surface rights are dealt with by Section 27 of the *Regulations*. Surface rights give the holder the right to use or occupy the surface of the land required for extraction, transportation and if applicable treatment of the oil or gas. If the operations require an exclusive right to use or occupy the land, such as for the well site itself, a surface lease is required. If the operations only require a right to cross over the land, such as for a flowline or pipeline, a right-of-way agreement (easement) is required.<sup>139</sup>

Surveys required for surface rights are discussed below under the heading Land Surveys.

### *Spacing Units and Target Areas*

The location and density of wells is regulated by a system based on spacing units and target areas.<sup>140</sup> Where available, the township system is used as a reference. Not only does it provide a convenient grid, but the grid is defined on the ground by survey monuments, thus making a direct connection between the land and the interest granted.

The Indian Oil and Gas Regulations define “spacing unit” as an area that is designated as such by a provincial authority that is responsible for the drilling for, or production of, oil or gas on non-Indian lands. In Alberta the normal spacing unit for an oil well is one quarter section (160 acres) and for a gas well, one section (640 acres).<sup>141</sup> The spacing unit normally comprises a surface area and the subsurface vertically beneath that area. It is also possible to have the spacing unit prescribed with respect to a specified geological

---

<sup>139</sup> See Section 27. 1(a) and (b) of the *Indian Oil and Gas Regulations*.

<sup>140</sup> The term “spacing unit” is used in Alberta. The term used in Saskatchewan is “drainage unit” and in British Columbia “spacing area”.

<sup>141</sup> *Oil and Gas Conservation Regulations* (Alberta) Regulation 151/71 Section 4.020(1)

formation or zone.<sup>142</sup> In such cases, more than one spacing unit could be designated for each quarter section or section.

Drilling must be within a specified target area which in Alberta, Saskatchewan and British Columbia, are prescribed in provincial Regulations.<sup>143</sup>

### *Pooling*

Another important aspect of oil and gas management is pooling. While the following description is based on the situation in the province of Alberta, other provinces have similar provisions.

In Alberta, an oil company must hold, under lease or permit, an entire spacing unit prior to being granted permission to drill a well. Often a spacing unit includes more than one mineral owner (federal government, provincial government, private owner). When this occurs, the company is required to pool the area of each mineral owner in the spacing unit. Once the lands are pooled, each owner can claim a prorated portion of the total royalties for the spacing unit.<sup>144</sup> Pooling is common along the boundaries of Indian reserves since these boundaries often do not follow the section lines of the adjoining township system.

### **Land Registration**

Although the *Indian Oil and Gas Act* and the regulations are silent on the registration of subsurface and surface agreements they are entered in the Indian Lands Registry.

A system of recording and indexing oil and gas agreement information is also maintained by Indian Oil and Gas Canada in Calgary.

### **Devolution**

The goal of Indian Oil and Gas Canada's First Nations Oil and Gas Management program is to have oil and gas resources fully managed and controlled by participating First Nations themselves.<sup>145</sup> The enabling legislation is the *First Nations Oil and Gas and Moneys Management Act 2005, c.48*. It is expected that in 2009 the first, First Nations will obtain management and control of oil and gas on their reserves under the legislation.<sup>146</sup>

---

<sup>142</sup> *Oil and Gas Conservation Regulations* (Alberta) Regulation 151/71 Section 4.010(1)

<sup>143</sup> *Oil and Gas Conservation Regulations (Alberta and Saskatchewan). Drilling and Production Regulation (British Columbia)*.

<sup>144</sup> See Section 41 and the definition of pooling in the *Indian Oil and Gas Regulations 1995*.

<sup>145</sup> *First Nations Oil and Gas Management Initiative - Pilot Project*, online: IOGC <[http://www.pgic-iogc.gc.ca/bins/content\\_page.asp?cid=2-46&lang=1#](http://www.pgic-iogc.gc.ca/bins/content_page.asp?cid=2-46&lang=1#)>

<sup>146</sup> *Indian Oil and Gas Canada, 2007-2008 Annual Report*.



## Land Surveys

Under the Indian Oil and Gas Regulations surveys are required for surface rights. The survey plans are to be prepared in accordance with the requirements of the *Canada Lands Surveys Act* and any instructions issued by the Surveyor General of Canada for such surveys. Under Section 40 of the *Indian Oil and Gas Regulations* 1995 survey plans are subject to review by the Surveyor General and are recorded in the Canada Lands Surveys Records. Instructions for these surveys are given in the *General Instructions for Surveys of Canada Lands, e-Edition*. Specific survey instructions are not required.

If a dispute arises under a contract regarding the location of a well, facility or boundary there is provision under Section 40 of the *Regulations* for a survey to be made.

For the granting of sub-surface rights, descriptions of land are required. Generally, these descriptions are prepared by CCCM staff using existing survey plans. However, administrative plans of projected township system subdivisions have also been prepared for unsubdivided reserves to facilitate description writing. Occasionally field surveys are carried out, usually for situations where natural boundaries are involved.

Accurate descriptions are necessary, and in particular accurate areas are required when only part of a spacing unit is in an Indian reserve. When this occurs, the Indian reserve portion of the spacing unit is pooled with portions owned by the province or private owners outside of the Indian reserve. Obviously, the larger one's share of the spacing unit, the larger the royalty, and oil and gas royalties can involve large amounts of money. CCCM is often involved in resolving discrepancies or clarifying areas of portions of spacing units.

Occasionally, pipelines or other facilities unrelated to oil and gas development on an Indian reserve will cross the Reserve. In such situations, rights are issued under the *Indian Act* and are administered by Lands, Reserves and Trusts Services of Indian Affairs and Northern Development.

## *Notes and Acknowledgements*

This Chapter is substantially a rewrite of “Chapter 7, Indian Lands” in the provisional 1990 book “Property Rights and Boundary Systems on Canada Lands”. Although the material in the 1990 book was invaluable as a basis for the development of this chapter, much has been revised and significant new material has been added. Any material carried over from the 1990 book has been independently verified.

I knew this chapter was going to be a significant undertaking when I took it on – little did I realize how much time I would spend on it and how great a challenge it would become. One of the biggest hurdles was to try to condense over 400 years of First Nation history, legislation and jurisprudence into one chapter and to keep some sort of perspective between individual events and to balance the significance of events geographically. I had planned on writing a much shorter chapter but soon found to do the subject justice I had to greatly exceed my original target.

I would like to thank Dr. Brian Ballaytne, Cadastral Systems & Boundary Issues Advisor, and Coordinator of CCCM, Khaleel Khan, Cadastral Systems and Boundary Issues Specialist of CCCM and Jim MacKenzie, Deputy Surveyor General, Western Region of CCCM who provided valuable assistance in preparing this chapter. Brian and Khaleel were kind enough to review a near final version of this chapter. I am indebted to Brian who after first reviewing the chapter, very diplomatically pointed out that I was missing important topics on Aboriginal rights and provided valuable assistance in providing court cases and other information and coached me in writing about the missing topics. Kaheel not assisted greatly by reviewing and commenting on the chapter but also provided me with a copy of his Masters thesis paper which paralleled a great deal of the material in this chapter and served as a double check for much of what I had written. Jim kindly reviewed and commented on the part of the chapter on the Land Survey System.

## References

### Books

- Adrian Tanner, John C. Kennedy, Susan McCorquodale and Gordon Inglis. *Aboriginal Peoples and Governance in Newfoundland and Labrador*, research study prepared for RCAP (1994). Referred to in RCAP Vol. 1, Part Two Chapter 9 - The Indian Act, end note 21.
- Berton, Pierre. *Flames Across the Border 1813-1814* (McClelland and Stewart, 1981)
- Cail, Robert E. *Land Man and the Law – The Disposition of Crown Lands in British Columbia, 1871 – 1913*, (The University of British Columbia 1974)
- Cumming, Peter A., Mickenberg, Neil H. *Native Rights in Canada – second edition*, (Toronto, Indian Eskimo Association of Canada in association with General Publishing Co. Limited, 1972)
- Henderson, James (Sakej), Benson, Marjorie L., Findlay, Isobel M. *Aboriginal Tenure in the Constitution of Canada*. (Toronto, Carswell, 2000)
- Howley, James P. *The Beothucks or Red Indians The Aboriginal Inhabitants of Newfoundland* (Cambridge, University Press, 1915), online: Internet Archive<  
<http://www.archive.org/details/beothucksorredin00howlrich>>
- *Indian Treaties and Surrenders* (Ottawa). Vol.1
- Khan, Khaleel. *Land Surveys on Indian Reserves: An Inquiry Into Benefits* (Thesis in partial fulfillment of the requirements for the Degree of Master of Science, University of Calgary, 2001)
- LaForest, Gerald V. *Natural Resources and Public Policy under the Canadian Constitution*, (University of Toronto Press, 1969)
- London, Paul. *Crown Law* ( Butterworths, 1991)
- McEwen, Dr. Alec et al. *The Law and Practice of Land Surveying in Alberta* (Alberta Land Surveyors' Association 2007).
- McGee Jr., Harold Franklin. *The Native Peoples of Atlantic Canada: A history of ethnic interaction*, (Toronto, McClelland and Stewart Limited, 1974)
- McMillan, Alan D. *Native Peoples and Cultures of Canada* (Vancouver, Douglas and McIntyre Ltd., 1988)
- Morris, Alexander. *The Treaties of Canada with the Indians*, (Toronto, Prospero Books, 2000, reprinted from the 1880 edition)
- Patterson, George, M.A. *Land Settlement in Upper Canada 1783-1840*, (Toronto, Clarkson W. James, 1921)
- Reksten, Terry. *The Illustrated History of British Columbia* (Vancouver, Douglas and McIntyre, 2001)
- Robertson, Heather. *Reservations are for Indians*, (Toronto, James Lewis & Samuel, 1970)
- Smith, Derek G. *Canadian Indians and the Law: Selected Documents, 1663-1972* (Toronto, McClelland and Stewart Limited, 1975)
- Spry, Irene M. *The Records of the Department of the Interior and Research Concerning Canada's Western Frontier of Settlement* ( Canadian Plains Research Center, University of Regina, 1993)
- Surtees, R. J. Development of Indian Reserve Policy in Canada. *Ontario History*, Vol. LXI, June 1969, No.2.
- Surtees, Robert J. *The Original People*, (Holt, Reinhart and Winston of Canada, Limited, 1971)
- Thompson, Don W. *Men and Meridians, Volume 2, 1867 to 1917* (Ottawa, Queens Printer, 1967)
- Washburn, Wilcomb E. *The Indian in America*, (New York, Harper & Row, 1975)

## Articles, Other Publications

- Hurley, Mary C. *The Crowns Fiduciary Relationship with Aboriginal Peoples, Revised 2002*, (Law and Government Division, Parliamentary Research Branch): online: Virtual Library, Library of Parliament, Government of Canada < <http://www.parl.gc.ca/information/library/PRBpubs/prb0009-e.htm>>
- Johnson, Patrick. *The Mi'kmaq*, online: University of Cape Breton <<http://mrc.uccb.ns.ca/mikmaq.html>>
- Nowland, Linda. *Customary Water Laws and Practices in Canada*, (Food and Agriculture Organization: Rome, Italy, 2004), online: Food And Agriculture Organization Of The United Nations <<http://www.fao.org/Legal/advserv/FAOIUCNcs/Canada.pdf>>
- Paul, Daniel N. *First Nation History*, online: <<http://www.danielnpaul.com/NovaScotiaIndianLaw-1842.html>>
- Reuben Gold Thwaites, Secretary of the State Historical Society of Wisconsin, *The Jesuit Relations and Allied Documents: Travels and Explorations of the Jesuit Missionaries in New France, 1610—1791*, online: Creighton University <[http://puffin.creighton.edu/jesuit/relations/relations\\_14.html](http://puffin.creighton.edu/jesuit/relations/relations_14.html)>
- *Report of the British Columbia Claims Task Force*, June 28, 1991. (unpublished)
- *The Royal Charter for incorporating The Hudson's Bay Company, A.D. 1670*, online: <[http://www.solon.org/Constitutions/Canada/English/PreConfederation/hbc\\_charter\\_1670.html](http://www.solon.org/Constitutions/Canada/English/PreConfederation/hbc_charter_1670.html)>

## Websites:

### *Indian and Northern Affairs Canada (INAC)*

- *1752 Peace and Friendship Treaty Between His Majesty the King and the Jean Baptiste Cope*, online: INAC <[http://www.ainc-inac.gc.ca/pr/trts/pft1752\\_e.html](http://www.ainc-inac.gc.ca/pr/trts/pft1752_e.html)>
- *Acts administered by INAC*, online: INAC < [http://www.ainc-inac.gc.ca/pr/leg/lgis\\_e.html](http://www.ainc-inac.gc.ca/pr/leg/lgis_e.html)>
- *Backgrounder First Nations Reserve Land and Environment Management Program*, online: INAC <[http://www.ainc-inac.gc.ca/nr/prs/m-a2005/02676abk\\_e.html](http://www.ainc-inac.gc.ca/nr/prs/m-a2005/02676abk_e.html)>
- *Basic Departmental Data*, 2004, page 99, online: INAC <[http://www.ainc-inac.gc.ca/pr/sts/bdd04/bdd04\\_e.pdf](http://www.ainc-inac.gc.ca/pr/sts/bdd04/bdd04_e.pdf)>
- *Building a Future, Metallic Minerals, Development Policy and Metallic Minerals*, online: INAC <<http://www.ainc-inac.gc.ca/pr/pub/bldg/min/>>
- *Cede, Yield and Surrender: A History of Indian Treaties in Canada*, online: INAC <[http://www.ainc-inac.gc.ca/pr/trts/hti/tpd/vid\\_e.html](http://www.ainc-inac.gc.ca/pr/trts/hti/tpd/vid_e.html)>
- *Claims and Indian Government Sector*, online: INAC < [http://www.ainc-inac.gc.ca/ps/clm/index\\_e.html](http://www.ainc-inac.gc.ca/ps/clm/index_e.html)>
- *Development Policy and Metallic Minerals*, online INAC <[http://www.ainc-inac.gc.ca/pr/pub/bldg/min/dpmm\\_e.htm](http://www.ainc-inac.gc.ca/pr/pub/bldg/min/dpmm_e.htm)>
- *Exploration and Development of Metallic Minerals*, online: INAC <[http://www.ainc-inac.gc.ca/pr/pub/bldg/min/edmm\\_e.html](http://www.ainc-inac.gc.ca/pr/pub/bldg/min/edmm_e.html)>
- *Fact Sheet: Aboriginal Claims in Canada*, online INAC <<http://www.ainc-inac.gc.ca/pr/info/acc-eng.asp>>
- *Federal Policy Guide, Aboriginal Self-Government, 1995*, online: INAC < [http://www.ainc-inac.gc.ca/pr/pub/sg/plcy\\_e.html#Intro](http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html#Intro)>
- *Historical Legislation*, online: INAC <[http://www.ainc-inac.gc.ca/pr/lib/phi/histlws/hln/index\\_e.html](http://www.ainc-inac.gc.ca/pr/lib/phi/histlws/hln/index_e.html)>
- *Indian Lands Registration Manual*, online: INAC < [http://www.ainc-inac.gc.ca/ps/lts/pdf/ilr98\\_e.pdf](http://www.ainc-inac.gc.ca/ps/lts/pdf/ilr98_e.pdf)>
- *Indian Lands Registry System*, online: Access is through the Electronic Services Website, INAC: <http://www.ainc-inac.gc.ca/esd/#lts>
- *Land Management Manual*, online: INAC < [http://www.ainc-inac.gc.ca/ps/lts/pdf/lmm\\_e.pdf](http://www.ainc-inac.gc.ca/ps/lts/pdf/lmm_e.pdf)>
- *Lands and Trust Services*, online: INAC < [http://www.ainc-inac.gc.ca/ps/lts/index\\_e.html](http://www.ainc-inac.gc.ca/ps/lts/index_e.html)>

- *Lands Branch, Lands and Trust Services Sector*, online: INAC <[http://www.ainc-inac.gc.ca/ps/lts/lnds\\_e.html](http://www.ainc-inac.gc.ca/ps/lts/lnds_e.html)>
- *Mineral Potential Indian Reserve Lands Canada, 1991*, online: INAC <[http://www.ainc-inac.gc.ca/ntr/can\\_e.html](http://www.ainc-inac.gc.ca/ntr/can_e.html)>
- *Modern Treaties*, online: INAC <[http://www.ainc-inac.gc.ca/ps/clm/gbn/mot\\_e.html](http://www.ainc-inac.gc.ca/ps/clm/gbn/mot_e.html)>
- *Ontario Treaties, Upper Canada Treaties – establishing a foundation for the future*, online: INAC <[http://www.ainc-inac.gc.ca/on/aty\\_e.pdf](http://www.ainc-inac.gc.ca/on/aty_e.pdf)>
- *Report of the Royal Commission on Aboriginal Peoples (RCAP)*, online: INAC <[http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm\\_e.html](http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html)>
- *The Comprehensive Land Claims Policy*, online: INAC <[http://www.ainc-inac.gc.ca/ps/clm/gbn/clc\\_e.html](http://www.ainc-inac.gc.ca/ps/clm/gbn/clc_e.html)>
- *The Marshall Processes: Aboriginal and Treaty Rights Negotiations in the Maritimes and Gaspé*, online: INAC, [http://www.ainc-inac.gc.ca/ps/clm/atr/index\\_e.html](http://www.ainc-inac.gc.ca/ps/clm/atr/index_e.html)
- *Treaty 8: The Preclude To Treaty Negotiations*, online: INAC <[http://www.ainc-inac.gc.ca/pr/trts/hti/C-B/prec\\_e.html](http://www.ainc-inac.gc.ca/pr/trts/hti/C-B/prec_e.html)>

#### ***Indian Oil and Gas, Canada (IOGC)***

- *Overview of Indian Oil and Gas Canada Information Sheet*, online IOGC <[http://www.pgic-iogc.gc.ca/data/1/rec\\_docs/204\\_OverviewSheet\\_e.pdf](http://www.pgic-iogc.gc.ca/data/1/rec_docs/204_OverviewSheet_e.pdf)>
- *History of Indian Oil and Gas Canada*, online: IOGC <[http://www.pgic-iogc.gc.ca/bins/content\\_page.asp?cid=2-47&lang=1](http://www.pgic-iogc.gc.ca/bins/content_page.asp?cid=2-47&lang=1)>
- *First Nations Oil and Gas Management Initiative - Pilot Project*, online: IOGC <[http://www.pgic-iogc.gc.ca/bins/content\\_page.asp?cid=2-46&lang=1#](http://www.pgic-iogc.gc.ca/bins/content_page.asp?cid=2-46&lang=1#)>

#### ***Canada Centre for Cadastral Management (CCCM)***

- *Canada Centre for Cadastral Management (CCCM)*, online: CCCM <http://www.cccm.nrcan.gc.ca/>
- *General Instructions for Surveys, e-Edition*, online: CCCM [http://www.cccm.nrcan.gc.ca/english/manual\\_e.asp](http://www.cccm.nrcan.gc.ca/english/manual_e.asp)
- *Interdepartmental Agreement with the Department of Indian Affairs and Northern Development re Land Transactions on Reserve Lands, 2003, Part B – Agreements*, online: CCCM <[http://www.cccm.nrcan.gc.ca/english/man/b1-2\\_e-ed\\_v3\\_e.asp](http://www.cccm.nrcan.gc.ca/english/man/b1-2_e-ed_v3_e.asp)>
- *Indian Lands History in Quebec*, online: CCCM <[http://www.cccm.nrcan.gc.ca/english/fh\\_e.asp](http://www.cccm.nrcan.gc.ca/english/fh_e.asp)>

#### ***Other Websites***

- *British Columbia Indian Cut-off Lands Settlement Act 1984, c.2*, online: British Columbia Ministry of Aboriginal Relations <<http://www.gov.bc.ca/arr/treaty/legislation.html>>
- *Caledonia land dispute*, online: Wikipedia <[http://en.wikipedia.org/wiki/Caledonia\\_land\\_dispute](http://en.wikipedia.org/wiki/Caledonia_land_dispute)>.
- *History (New Brunswick)*, online: <<http://www.gnb.ca/cnb/nb/history-e.asp>>
- *History and Heritage of British Columbia*, online: <<http://www.britishcolumbia.com/history/>>
- *Indian Treaty collection, Mi'kmaq Holdings Resource Guide*, online: Nova Scotia Archives and Records Management <<http://www.gov.ns.ca/nsarm/virtual/mikmaq/cls5.asp>>
- *Newfoundland History, Early Colonization and Settlement Policy in Newfoundland*, online: Marianopolis College <<http://www2.marianopolis.edu/nfldhistory/NewfoundlandHistory-EarlyColonizationandSettlementofNewfoundland.htm>>

## Statutes and Regulations

### Canada

- *An Act to Provide for the Instruction and Permanent Settlement of the Indians*, 1842 (Nova Scotia)
- *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, Statutes of the Province of Canada 1850, chapter 42;
- *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, Statutes of the Province of Canada 1850, chapter 74.
- *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, Statutes of the Province of Canada 1857, chapter 26.
- *An Act respecting the Management of the Indian Lands and Property*, Statutes of the Province of Canada, 1860, Chapter 151.
- *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, S.C. 1968, c.42
- *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, S.C. 1869, c.6.*
- *Act of Union, 1840*
- *Canada Lands Surveys Act*, R.S.C, 1985, c. L-6
- *Constitution Act, 1867 (The British North American Act, 1867)*
- *Constitution Act, 1930*
- *Constitution Act, 1982*
- *Federal Real Property and Federal Immovables Act*, 1991, c. 50
- *First Nations Land Management Act*, S.C. 1999, c.24
- *First Nations Land Management Act*, S.C. 1999, c.24
- *First Nations Oil and Gas and Moneys Management Act*, 2005, c.48.
- *Indian Act*, 1876
- *Indian Act*, R.S.C, 1985, c. I-5.
- *Indian Lands Agreement (1986) Act*, 1988, c. 39.
- *Indian Oil and Gas Act*, R.S.C. 1985, c. I-7
- *Kamloops amendment to the Indian Act*, S.C. 1988, c. 23, s. 1 (now R.S.C., 1985, c. 17 (4th Supp.))
- *North-west Irrigation Act*, SC 1894, c.30
- *Royal Proclamation of 1763*
- *Treaty of Paris, 1763*
- *Treaty of Utrecht, 1713*
  
- *Indian Mining Regulations C.R.C., c. 956*
- *Indian Oil and Gas Regulations, 1995,*

### Provincial Legislation

- *British Columbia Indian Cut-off Lands Settlement Act*, 1984, c. 2.
- *British Columbia Indian Reserves Mineral Resources Act 1943-44*, c. 19.
- *Indian Lands Agreement Confirmation Act (Ontario)*, 1989.
- *Indian Reserve Land Act (Ontario)*, S.C. 1924, c. 48;
- *Indian Reserves of New Brunswick Act*, S.C. 1959, c. 47;
- *Indian Reserves of Nova Scotia Act*, S.C. 1959, c. 50;
  
- *Oil and Gas Conservation Regulations (Alberta) 151/71*

## Cases

- *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (T.D.)
- *Calder v. Attorney-General of British Columbia*, [1973] 34 D.L.R. (3d) 145.
- *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010
- *Guerin v. The Queen*, [1984] 2 S.C.R. 335.
- *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73.
- *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69.
- *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 2001 SCC 85
- *R. v. Ironeagle*, [1999] 186 Sask. R. 131
- *R. v. Lewis*, [1996] 1 S.C.R. 921,
- *R. v. Marshall*, [1999] 3 S.C.R. 533,
- *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, paragraph 35.1
- *R. v. Nikal*, [1996] 1 S.C.R. 1013
- *Sparrow v. The Queen*, [1990] 46 B.C.L.R. (2d) 1.
- *St. Catharines Milling and Lumber Company v. The Queen*, [1887] 13 S.C.R. 577.
- *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657
- *Tsilhqot'in Nation v. British Columbia*, [2007] BCSC 1700
- *Winters v. United States*, [1908] 207 U.S. 564