Federal Court  Cour fédérale

Date: 20190612

Docket: T-238-80

Citation: 2019 FC 789

Ottawa, Ontario, June 12, 2019

PRESENT: The Honorable Mr. Justice Zinn

BETWEEN:

**JIM SHOT BOTH SIDES AND ROY FOX,
CHARLES FOX, STEVEN FOX,
THERESA FOX, LESTER TAILFEATHERS,
GILBERT EAGLE BEAR,
PHILLIP MISTAKEN CHIEF,
PETE STANDING ALONE,
ROSE YELLOW FEET,
RUFUS GOODSTRIKER, AND
LESLIE HEALY,
COUNCILLORS OF THE BLOOD BAND,
FOR THEMSELVES AND ON BEHALF OF
THE INDIANS OF BLOOD BAND RESERVE
NUMBER 148; AND THE BLOOD RESERVE
NUMBER 148**

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

Table of Contents

"We know parts of the land, as we know each other as relatives.
We are kin with the land."
Wilton Goodstriker

I. INTRODUCTION

[1] Blood Tribe Reserve No. 148 [the Blood Reserve or Reserve] is in southern Alberta. It is the largest reserve in Canada occupying an area of 547.5 square miles.[1] It is the reserve of the Plaintiffs, the Kainai,[2] or the Blood Tribe.

[2] The northern boundary of the Blood Reserve is at the confluence of the St. Mary[3] and Belly[4] Rivers, near where old Fort Kipp was located. The Reserve extends south and west, bounded by the Belly River and the St. Mary River to an east west line about 14 miles north of the Canada-US border. It lies just north of Cardston, Alberta, a town settled in 1887 by members of The Church of Jesus Christ of Latter-day Saints [the Mormons] who moved there from the Territory of Utah, apparently to escape restrictions on polygamous relationships.

[3] Treaty 7, made on September 22, 1877, was between Canada, the tribes of the Blackfoot Confederacy, the Stoney, and the Sarcee Indians. The Blackfoot Confederacy [the Confederacy] was comprised of three tribes: the Siksika [Blackfoot], Kainai [Blood], and Piikani [Peigan]. Treaty 7 promised the Blood Tribe and each of the others, a reserve. The location of the Blood

[1] There is also a 6.5 square mile timber limit described as Reserve 149B, which lies to the south and west of the Reserve. Although it is referenced in these Reasons, it is not at issue in this action.
[2] Also called the Aakainawa.
[3] Sometimes referred to as the St. Marys River or the St. Mary's River.
[4] The Belly River is a tributary of the Oldman River.

Tribe reserve is set out in Treaty 7; however, that location was changed by agreement between the Blood Tribe and Canada.

[4] The Blood Tribe claims that its Reserve does not accord with the land promised by Canada. The territory it lays claim to is known to the Blood Tribe as the "Big Claim." The Big Claim territory extends west of the current Blood Reserve to the former Kootenai River[5] (now the Waterton River) and south to the Canada-USA border. It includes Cardston and a part of Waterton Lakes National Park.

[5] There are two other aspects in this action to the claim of the Blood Tribe to land. They too relate to the boundaries of the promised reserve.

[6] The first aspect relates to the surveying of the reserve. Canada did two surveys of the area that was to become the Blood Reserve. The first was done in 1882 [the 1882 Survey] and the second was done in 1883 [the 1883 Survey]. The 1882 Survey places the southern boundary of the reserve at an east-west line about 9 miles north of the Canada-US border, marking out an area of 650 square miles. The town of Cardston falls within the area of the 1882 Survey. The 1883 Survey (marking the present Reserve) moved the southern boundary 5 miles north, marking out an area of 547.5 square miles. The Blood Tribe asserts that the 1882 Survey, at law, created a reserve and the reduction of 102.5 square miles by the 1883 Survey required that it surrender that land as is provided for in *The Indian Act, 1880,* SC 1880, c 28 [*The Indian Act, 1880*]. The

[5] Sometimes spelled Kootenay River: not to be confused with the present-day Kootenay River in British Columbia, Montana and Idaho.

Blood Tribe gave no such surrender. It therefore submits that it is entitled to that land or compensation for the loss of it.

[7] The second aspect relates to the promised geographic size of the reserve under the formula set out in Treaty 7. Canada promised the Blood Tribe and each of the other tribes under Treaty 7, a reserve equal to "one square mile for each family of five persons, or in that proportion for larger and smaller families." This is the Treaty Land Entitlement [TLE]. The reserve described by the 1882 Survey equates to the membership of the Blood Tribe being 650 families or 3,250 persons. The reserve described by the 1883 Survey equates to the membership of the Blood Tribe being 547.5 families, or 2,738 persons. The Blood Tribe says that its membership at the relevant time was such that its promised reserve under the TLE is larger than provided for under either survey. Accordingly, it says that Canada breached this treaty promise, and failed in its fiduciary duty to honestly and to accurately implement the treaty promises.

[8] For its part, Canada says that the reserve size as defined by the 1883 Survey, the current Reserve, meets its TLE obligation under Treaty 7, and that the 1882 Survey was a preliminary survey and "did not create a reserve." Under its theory of the case, no surrender was required to change the southern boundary described in the 1882 Survey to that in the 1883 Survey.

[9] Canada pleads that this action is time-barred by virtue of the *Limitations Act*, RSA 2000, c L-12 [*Limitations Act* 2000], and its precursors, as made applicable by section 39 of the *Federal Courts Act*, RSC 1985 c F-7 [*Federal Courts Act*], and section 11 of the *Crown Liability Act*, RSC 1970, c C-38 [*Crown Liability Act*], and their respective precursors.

[10] In reply, the Blood Tribe submits that Canada's breach of its Treaty obligations to the Blood Tribe only became actionable in 1982 with the passage of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 [*Constitution Act, 1982*]. It therefore submits that Canada's limitation defence must fail. It further submits that at law, the 1882 Survey created a reserve and under *The Indian Act, 1880*, a surrender was required to effect a change in 1883. It also submits that Canada from at least the date of Treaty 7 onwards, as regards the proper Blood Tribe reserve size and location has breached its fiduciary duty to it, and that the Blood Tribe has suffered a loss of land or is entitled to compensable damages.

[11] If there is a finding of liability on any of the claims asserted by the Blood Tribe, the issue of remedy will be determined later in Phase III of this action.

[12] Appendix A is a map showing the current boundaries of the current Blood Reserve, and the Big Claim area. Appendix B is a map showing the current Blood Reserve and the area covered by Treaty 7. Appendix C is another map showing the location of the timber limit, marked as Blood No 148A, the southern limit of the Reserve and some of the geographic features including Mountain View and Lee (or Lee's) Creek which are referred to in the Reasons. Appendix D is a copy of the text of Treaty 7.

A. Procedural History of this Action

[13] The Blood Tribe commenced this action by Statement of Claim filed January 10, 1980. Canada filed its Statement of Defence on April 3, 1980. Nothing much happened until the fall of 1996.

[14] On August 7, 1996, the Blood Tribe filed a motion confirming that this action would be continued in Federal Court, notwithstanding that it had advanced its land entitlement claim under the Specific Claims Policy of the Department of Indian Affairs and Northern Development.

[15] Canada rejected the land entitlement claim in November 2003, taking the position that no outstanding obligation existed with respect to the TLE claim. The Blood Tribe then formally requested the Indian Claims Commission [ICC] to conduct an inquiry into its rejected claim. In a decision dated March 30, 2007, the ICC made two recommendations to the parties. First, it recommended that the "claim for the Big Claim lands constituting the reserve not be accepted." Second, it recommended to the parties that "the claim that the 1882 Nelson survey established the Blood Tribe reserve be accepted" as it established the reserve and a surrender was required to move the southern boundary as happened in 1883. The findings and recommendations of the ICC are not binding on the parties or this Court.

[16] The parties could not agree on the claims and so reactivated this action. It was case-managed and the trial of this action divided into three phases. As noted, the action was bifurcated between liability and remedy.

[17] Phase I was held on the Blood Reserve in May 2016, for the purpose of receiving oral history evidence from members of the Blood Tribe. This portion of the evidence was taken some two years before the remainder of the evidence, as the Elders who had oral history evidence were aging.

[18] Phase II was held at the Federal Court in Calgary, Alberta, in May and June 2018, to hear fact and expert witness evidence. The parties then made extensive written submissions followed by oral submissions in Calgary, Alberta, in December 2018. Phase III, dealing with remedy, will be held in Calgary, Alberta, at a future date if the Court finds that Canada is liable to the Blood Tribe for any of the claims in this action.

[19] The Statement of Claim was amended by an Order dated February 24, 1999. In an affidavit filed in support of its motion, a solicitor for the Blood Tribe attested that the amendment was required, as "the proclaiming of the new Limitations Act in Alberta on March 1, 1999 has necessitated that the Plaintiffs review the Statement of Claim to ensure that their rights are fully protected." She further attests that there "have been considerable developments in the law since the filing of the original Statement of Claim in 1980 and the Plaintiffs have conducted research that has resulted in the submission of the Specific Claim in 1996" and the proposed Amended Statement of Claim "reflects those changes and research." Canada did not oppose the amendment.

[20] On April 11, 2016, the Blood Tribe served and filed a Notice of Constitutional Question questioning "the constitutional applicability to the within matter of the *Limitations Act*, R.S.A. 2000 Ch. L-12, *Limitation of Actions Act*, R.S.A. 1980 cL-15, *Limitations of Action Act*, R.S.A. 1970, c. 209, *Limitations of Action Act*, S.A. 1935, c. 8 or any of the preceding Acts passed by the Provincial Legislature of Alberta dealing with limitation periods to bring legal claims before the courts as they relate to Indians, and Lands reserved for Indians [*sic*]."

[21] In the alternative, the Plaintiffs also challenged the constitutional validity of section 39 of the *Federal Courts Act* (and its predecessors), and section 32 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 (and its predecessors), insofar as they purport to incorporate provincial laws that would bar claims as they relate to "Lands reserved for the Indians" as unlawful subdelegation, in breach of Canada's constitutional duty to consult First Nations in matters affecting them, and in breach of section 35 of the *Constitution Act, 1982*.

[22] The focus of the Plaintiffs' submission on the constitutional questions they raise is whether their claims can be "subject to a provincial limitation period, as a provincial limitation statute cannot deprive the Bloods of 'lands reserved for Indians' once a reservation is created."

[23] In its written closing, the Blood Tribe submitted that it had proved three causes of action on the evidence: (a) an actionable breach of treaty obligation; (b) the creation of a reserve in law prior to July 2, 1883, and the illegal taking of part of it in 1883; and (c) a breach by Canada of its fiduciary duty to the Blood Tribe.

[24] In its written reply submissions, the Blood Tribe addressed the constitutional questions and further submitted in response to Canada's limitation defence that "no civil cause of action in breach of treaty legally existed until April 17, 1982 and therefore no limitation period can run for that cause of action until that time."

[25] Canada raises two objections to this challenge. First, it submits that because the Blood Tribe has not made any submission on the questions raised in its Notice of Constitutional

Question in its initial written submissions "the Court should decline to hear any submissions on this issue." Second, it submits that the Court should decline to hear any constitutional issues raised in the reply or in oral submissions that are not included in the Notice of Constitutional Question.

[26] Canada also submitted that the Blood Tribe had not pleaded a claim for breach of treaty in the Amended Statement of Claim, and thus that cause of action was not properly before the Court. It says that that the recent claim of breach of treaty coupled with the submission that prescription and limitations do not run against such claims prior to April 17, 1982, would "certainly create undue hardship and prejudice" to Canada.

[27] When these concerns were raised by Canada in its oral submissions, Canada was provided with an opportunity to file written sur-reply submissions addressing the Plaintiffs' reply submissions on the constitutional questions, and on whether prescription and limitations run against a claim for breach of treaty before April 17, 1982. Canada filed its sur-reply on January 30, 2019. The Plaintiffs say that Canada made some "impermissible" arguments and asked to file a brief sur-sur-reply of their own. Upon review, I concluded that there was nothing impermissible in Canada's sur-reply submissions and refused the motion.

B. Canada's Objections Based on the Pleadings

a. Failure to Plead a Breach of Treaty

[28] I will first address Canada's submission that the Blood Tribe failed to plead breach of treaty as a cause of action and therefore this cause of action is not now open to the Plaintiffs.

[29] In their memorandum, the Plaintiffs submit that their original Statement of Claim "was amended on February 24, 1999 to include s. 35 of the *Constitution Act, 1982* and breach of treaty thereunder at paragraph 7 of the Amended Statement of Claim." That paragraph reads as follows:

> The members of the Blood Tribe have Aboriginal and Treaty rights which are constitutionally protected by section 35 of the *Constitution Act, 1982*.

[30] It is questionable whether the Blood Tribe by amending its pleading as it did, pleaded breach of treaty as a legal cause of action; however, as explained below, I find that there was no requirement that it do so. The original Statement of Claim was sufficient to permit it to make the submission that Canada was in breach of its treaty obligations.

[31] Canada, in my opinion, takes a far too narrow view of the current state of the law of pleadings. One will not find the words "breach of treaty" in the Amended Statement of Claim; however, that does not entail that the claim does not include a claim for breach of treaty, and I find that it does.

[32] The Plaintiffs in 1980 pleaded the treaty and the alleged breach regarding its promised reserve size in the Statement of Claim. These alleged breaches were characterized as constituting a breach of contract on the premise that Treaty 7 is a contract:

> In the alternative, the Plaintiffs claim that the said Treaty Number 7 and the said amendment to Treaty Number 7 entered into on or about the 2nd day of July, A.D. 1883, constitute contracts between the Blood Band and the Defendant. The Plaintiffs claim that the Defendant, its predecessors in title and agents and/or servants for the time being have committed and continue to commit breaches of the said contracts in that they failed to accurately calculate the size

> of the said Reserve Number 148 as per the said contract in that the said size of the Reserve 148 did not correspond to previously existing population figures as shown in the 1881 and 1882 Treaty pay lists and was not substantiated by an official census or other accounting taken at the time of the execution of the said amended Treaty or at the time of the 1883 survey.

[33] Although this pleading characterizes these material facts as constituting a breach of contract, the pleading is relevant because it quite clearly put Canada on notice that the action related to the promised reserve size in Treaty 7, and the allegation that the size of reserve the Blood Tribe was given failed to meet that obligation. If that was not sufficient, at the opening of Phase I, on May 4, 2016, counsel for the Blood Tribe stated:

> This trial is about an unfulfilled treaty promise made by Canada to the Blood Tribe. The treaty promise was made to set aside a reserve in the place according to their desire of a size representing their lawful entitlement. That's what this case is about.

[34] Canada understood that the Blood Tribe's action was grounded on alleged breaches of Treaty 7. This is clear from Canada's written submission at paragraph 58. It wrote, "It is important to note that in the original Statement of Claim, in paragraphs 12 through 14, the Plaintiffs asserted their claim based on treaty obligations."

[35] The Plaintiffs' transition in seeing the matter as a breach of contract to a breach of treaty is unexplained. However, it is noted that in *Henry v R* (1905), 9 Ex CR 417 (Can) [*Henry*], the Exchequer Court found it had jurisdiction to adjudicate on a Petition of Right filed by an Indian Band, alleging that a sum of money granted under a treaty was withheld by Canada and should be credited to its accounts. The Court did so on the basis that the treaty was a contract, observing: "as their right thereto rests upon the treaty or contract between the Crown and them,

and upon The British North America Act, 1867, the court has, I think, jurisdiction so to declare" [emphasis added]. I add that the question of the Court's jurisdiction does not seem to have been raised by Canada in that case.

[36] It has only been more recently that courts have recognized that treaties are not, *per se*, contracts. In *R v Sundown*, [1999] 1 SCR 393, 170 DLR (4th) 385 at paragraph 24, the Supreme Court of Canada stated:

> Treaties may appear to be no more than contracts. Yet they are far more. They are a solemn exchange of promises made by the Crown and various First Nations. They often formed the basis for peace and the expansion of European settlement. In many if not most treaty negotiations, members of the First Nations could not read or write English and relied completely on the oral promises made by the Canadian negotiators. There is a sound historical basis for interpreting treaties in the manner summarized in *Badger*. Anything else would amount to be a denial of fair dealing and justice between the parties. [emphasis added]

[37] Similarly, in *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at paragraph 37, the Supreme Court of Canada stated:

> Paying close attention to the terms of a modern treaty means interpreting the provision at issue in light of the treaty text *as a whole* and the treaty's objectives (*Little Salmon*, at para. 10; *Moses*, at para. 7; ss. 2.6.1, 2.6.6 and 2.6.7 of the Final Agreements; see also the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12). Indeed, a modern treaty will not accomplish its purpose of fostering positive, long-term relationships between Indigenous peoples and the Crown if it is interpreted "in an ungenerous manner or as if it were an everyday commercial contract" (*Little Salmon*, at para. 10; see also D. Newman, "Contractual and Covenantal Conceptions of Modern Treaty Interpretation" (2011), 54 *S.C.L.R.* (2d) 475). Furthermore, while courts must "strive to respect [the] handiwork" of the parties to a modern treaty, this is always "subject to such constitutional limitations as the honour of the Crown" (*Little Salmon*, at para. 54).

[38] Canada in its memorandum notes, "'breach of treaty' is a phrase that is commonly used in more recent jurisprudence." While the phrase "breach of treaty" was not in use when this action commenced in 1980, it was more widely used when the Plaintiffs amended their claim; however, they did not change the allegation of a breach of contract to a breach of treaty. In my view, this is not fatal to the Plaintiffs' position, nor even material to the action as pleaded, because in this Court one need plead only the material facts, not the legal consequences of those facts.

[39] An illustration of this proposition may be found in *Conohan v The Cooperators*, 2002 FCA 60 [*Conohan*] at paragraphs 14 and 15, where the Federal Court of Appeal considered whether the failure to plead a defence was fatal when the defendant later tried to rely upon it. It found that it was not, provided the party opposite was not taken by surprise:

> Moreover, there can be no serious suggestion that because it was not expressly pleaded or listed in the order of the Prothonotary, the appellants were taken by surprise and thereby prejudiced in their introduction of evidence or otherwise in the prosecution of their claims at trial.
>
> Rule 174 requires a party to plead "a concise statement of the material facts on which the party relies", which is a fundamental principle of pleading. In my view, the facts touching on the Clause 16 defence are few and straightforward. The respondent sufficiently pleaded that because Gaudet had not paid anything to the appellant Conohan in respect of his liability arising out of the collision Gaudet was not, by reason of Clause 16, entitled to be paid anything under the policy. Even if it could be said that the respondent did not plead the "pay to be paid" requirement of Clause 16 but only the other defences listed in the Prothonotary's order, in my view this did not prevent the respondent from relying on that requirement. As Lord Denning M.R. explained in *Vandervell's Trusts (No. 2), In re*, [1974] Ch. 269 (C.A.), at pages 321-322:
>
> > It is sufficient for the pleader to state the material facts. He need not state the legal result. If, for

> convenience, he does so, he is not bound by, or limited to, what he has stated. He can present, in argument, any legal consequence of which the facts permit. [emphasis added]

[40] In my view, this reasoning applies when a plaintiff fails to plead a cause of action that it later wishes to rely upon. One must look at the material facts pleaded, not the terminology used.

[41] Prothonotary Tabib recently applied *Conohan* when considering a motion to strike. In *Apotex Inc v Shire LLC*, 2016 FC 1267 at paragraph 6, she comments:

> The parties may, but are not required to raise points of law in their pleadings. Even if they do, neither the parties nor the Court are bound by the legal result or legal label pleaded. The party is free to argue and the Court is free to rule on any legal consequence supported by the facts pleaded (*Conahan v Cooperators*, 2002 FCA 60 at para 15). [emphasis added]

[42] To the same effect is a recent decision of the Federal Court of Appeal in *Paradis Honey Ltd v Canada*, 2015 FCA 89 [*Paradis Honey*], at paragraph 113:

> A statement of claim must contain allegations of material facts sufficient to support a viable cause of action: *Federal Courts Rules*, S.O.R. / 98-106, Rule 174. Plaintiffs need not plead the particular legal label associated with a cause of action: Rule 175; see also *Cahoon v. Franks*, [1967] S.C.R. 455 at pages 458-459. Similarly, plaintiffs who choose to use a particular legal label are not struck out just because they chose the wrong label: *Sivak v. Canada*, 2012 FC 272 (CanLII), 406 F.T.R. 115 at paragraph 20; *J2 Global Communications Inc. v. Protus IP Solutions Inc.*, 2008 FC 759 (CanLII), 330 F.T.R. 176 at paragraphs 33-36; *Johnson & Johnson Inc. v. Boston Scientific Ltd.*, 2004 FC 1672 (CanLII), [2005] 4 F.C.R. 110 at paragraph 54. [emphasis added]
>
> …

> Sometimes the pleading gives rise to more than one cause of action. It all depends on the substance of the pleading, not the labels. As Lord Denning M.R. explained in *In re Vandervell's Trusts (No. 2)*, [1974] Ch. 269 at pages 321-22 (C.A.):
>
> > It is sufficient for the pleader to state the material facts. He need not state the legal result. If, for convenience, he does so, he is not bound by, or limited to what he has stated. He can present, in argument, any legal consequence of which the facts present.

[43] The Federal Court of Appeal in *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at paragraph 16, explained that pleadings are to allow the other side to prepare its defence and prevent prejudice:

> It is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and relief sought. As the judge noted "pleadings play an important role in providing notice and defining the issues to be tried and that the Court and opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action."

[44] In addition to the reference noted previously at paragraph 9 of the Amended Statement of Claim, the Blood Tribe says that it entered into Treaty 7 relying on Canada's representations and promises. These representations and promises include those set out in Treaty 7 itself. They say that Canada breached these representations and promises, and in paragraph 36 provide "some particulars of the said breach or breaches." These facts as pleaded, in my view, are sufficient to support an action for breach of treaty.

[45] Canada is not prejudiced by this cause of action being raised. It led evidence at trial and made submissions that Canada fulfilled all of its treaty obligations.

[46] Canada's further submission on the failure to plead the breach of treaty is that it was taken by surprise by the Plaintiffs' submission that no limitation period runs in an action for breach of treaty until section 35 of the *Constitution Act, 1982*, came into effect on April 17, 1982. The Plaintiffs' submission will be analyzed when discussing Canada's limitations defence.

[47] For present purposes, it is sufficient to note first that the Plaintiffs pleaded that provision in its Amended Statement of Claim, and Canada consented to that amendment. Second, Rule 175 of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*], provides that a party may raise any point of law in a pleading, but it is not required. The bare pleading that "members of the Blood Tribe have Aboriginal and Treaty rights which are constitutionally protected by section 35 of the *Constitution Act, 1982*" might not alert Canada to the consequences now asserted by the Blood Tribe. However, Canada made no inquiries then as to why this amendment was necessary, nor did it apparently seek an explanation as to its impact on this action and Canada's limitation defence before consenting to the amendment.

[48] Any prejudice relating to the intersection of its limitations defence with the claim that it cannot have application to a claim of breach of treaty prior to the *Constitution Act, 1982*, was cured when Canada was permitted to file sur-reply submissions.

[49] Aside from these considerations, where there is no prejudice to Canada, it is my view that a First Nation must be accorded some latitude and its pleadings not read so finely that legitimate complaints and grievances are dismissed by courts without adjudication. In part, this is because

the field of Aboriginal litigation is relatively recent and is constantly evolving. Indeed, the Court's own research has not found a pleading claiming a "breach of treaty" as a unique cause of action prior to the 1990s. An early example of a claim which appears to bring a breach of treaty claim using those words is *Chippewas of Kettle & Stony Point v Canada (Attorney General)*, [1994] 4 CNLR 34, 17 OR (3d) 831 (Ont Gen Div). It involves a motion for a certificate of pending litigation, and the Court mentions the claims for money damages for "breach of fiduciary duty, negligence, breach of Treaty Rights and/or breach of trust."

[50] For these reasons, I reject Canada's submission that the alleged breach of treaty is not properly before the Court.

b. *Raising a New Constitutional Question*

[51] I turn next to Canada's submission that the Blood Tribe has improperly raised in reply a new constitutional question without providing the Attorneys General with notice as required by the *Federal Courts Act*.

[52] The Blood Tribe, in my view, has not raised any new constitutional question in its written reply that would trigger the requirement in section 57 of the *Federal Courts Act* that it serve and file a Notice of Constitutional Question. The "new" submission it makes is that no limitation can run as against a cause of action for breach of treaty until after section 35 of the *Constitution Act, 1982* came into force because the cause of action had not yet arisen. This submission does not raise the "constitutional validity, applicability or operability of an Act of Parliament." Section 57 of the *Federal Courts Act* is not engaged.

c. Addressing the Constitutional Questions Only in Reply

[53] Canada objects to the Court considering the constitutional issues raised by the Blood Tribe because it made its submissions for the first time in reply.

[54] The Notice of Constitutional Question is required in order to put the Attorneys General on notice that the question stated is to be raised and to permit them an opportunity to put whatever evidence they see fit before the Court. Canada had that opportunity.

[55] Moreover, the question of whether the limitation defence pleaded by Canada only applies to a breach of treaty claim after the *Constitution Act, 1982*, because a breach of treaty was not an actionable claim prior to that date, is a question that arises in response to Canada's limitation defence. I see nothing improper in the Blood Tribe waiting to respond to Canada's limitation defence with its submission that these provisions do not apply to it in the case before the Court. In any event, as noted, Canada was permitted to file sur-reply submissions on the issue. The Court therefore has had the benefit of fulsome submissions from both parties on the issue.

C. Key Individuals

[56] As an aid to the reader, I have set out the names and a brief description of some of the key individuals involved in the making of Treaty 7 and the creation of the Blood Reserve.[6]

[6] Names are occasionally spelled differently or incorrectly in the portions of the exhibits recited in these Reasons. I have copied passages verbatim and not made any corrections or indicated where misspellings occur as in all cases, it is obvious who is intended.

James Bird aka Jimmy Jock [Bird]: Bird was of "mixed blood" and was originally employed by the Hudson's Bay Company as a fur-trader and interpreter. He lived among the Blackfoot tribes for many years and was considered proficient in their language. He was an interpreter at the Lame Bull Treaty in the US, and in 1877, he was an interpreter at Treaty 7.

Crowfoot aka Isapo-Muxika [Crowfoot]: Crowfoot was a Blackfoot Chief. He was born into the Blood Tribe but after his father died, his mother married a Blackfoot man, and he was raised in the Blackfoot Tribe. As a chief, he was among the first to welcome the North-West Mounted Police [NWMP] and their efforts to stem the whiskey trade. Crowfoot was the principal First Nation spokesperson at the making of Treaty 7.

Lief Crozier [Crozier]: Crozier was appointed as an officer of the NWMP in 1873. He was promoted and was a Superintendent of the NWMP by 1876. He was a witness to Treaty 7 in 1877.

Sir Cecil Edward Denny [Denny]: Denny was a member of the NWMP until 1881. He was present at Blackfoot Crossing and signed Treaty 7 as a witness and assisted in the initial Treaty annuity payments. He was involved in a scandal that obliged him to resign from the force in June of 1881, having been charged with having "criminal connection" with Victoria Robinson, the wife of Constable Percy Robinson (the same man involved in paying annuities to the Bloods). Edgar Dewdney appointed Denny Indian Agent in October 1881. His authority was throughout the Treaty 7 reserves.

Edgar Dewdney [Dewdney]: Dewdney was a surveyor in the early 1860s. In May 1879, he was appointed by Sir John A. Macdonald as Indian Commissioner of the North-West Territories. In December 1881, he succeeded David Laird as Lieutenant Governor (while also continuing as Indian Commissioner).

Elliott Torrance Galt [Galt]: Galt was the son of Alexander Tilloch Galt, one of the fathers of confederation. He was a businessman and politician. In 1879, he was made secretary and clerk to Dewdney, newly appointed Indian Commissioner of the North-West Territories. He later became Assistant Commissioner to Dewdney. He was said to have recognized the investment potential of southern Alberta, especially the coalfields.

David Laird [Laird]: Laird was Minister of the Interior and Superintendent General of Indian Affairs under Prime Minister Alexander Mackenzie from 1873 to 1876. He then served as the Lieutenant Governor of the North-West Territories from October 1876 to 1881, where he was responsible for Indian Affairs. In 1898, he was appointed Indian Commissioner for Manitoba and the North-West Territories by the Laurier government. Laird played a significant role in the negotiation of Treaties 4 (1874), Treaty 6 adhesions (1877, 1878), Treaty 7 (1877), and Treaty 8 (1899).

Jean L'Heureux [L'Heureux]: L'Heureux attended a seminary in Québec and studied for the priesthood but was expelled, allegedly when it became known that he was homosexual. He travelled west passing himself off as a Jesuit Priest, and joined with the Blackfoot. In 1876 on

behalf of the Blackfoot tribes, he wrote to Canada seeking a treaty. He signed Treaty 7 as a witness.

Sir John Alexander Macdonald [Macdonald]: Macdonald was a prominent Canadian politician. He was Prime Minister from 1867 to 1873 and 1878 to 1891. He also was Minister of the Interior from 1878 to 1883 and Superintendent General of Indian Affairs from 1878 to 1887.

James Farquharson Macleod [Colonel Macleod]: Colonel Macleod accepted a commission as Superintendent and Inspector in the NWMP. Beginning in 1874, he travelled to Fort Macleod to suppress the whiskey trade. He was promoted to Commissioner of the NWMP in June 1876 by Prime Minister Mackenzie. He and Laird were appointed Commissioners to negotiate Treaty 7 in 1877. He resigned from the NWMP in 1880 and continued in a judicial role as a magistrate in the Bow River area.

Norman Thomas Macleod [Agent Macleod]: Agent Macleod was Colonel Macleod's older brother and was Indian Agent from 1880 to 1881.

Alexander Morris [Morris]: Morris was a member of Parliament and cabinet minister in the first Macdonald government. In 1872, he served as the first chief justice of the Court of Queen's Bench in Manitoba for a few months prior to being sworn in as Lieutenant Governor of Manitoba and the North-West Territories in December. He served in that role for five years.

William B. Pocklington [Pocklington]: Pocklington was a member of the NWMP from 1877 to 1880, and Indian Agent from 1884 to 1891.

Jerry Potts [Potts]: Potts was an interpreter. His mother was a member of the Blood Tribe. He was an interpreter when the NWMP and Macleod first met with Crowfoot to discuss the whiskey traders. He was present at the negotiations of Treaty 7. He was known to abuse alcohol throughout his life.

Red Crow aka Mékaisto, Mekasto, Mikasto [Red Crow]: Red Crow was a Chief of the Blood Tribe at the time of signing Treaty 7. Also signing Treaty 7 as a Blood Chief was Rainy Chief. When Rainy Chief died, Red Crow became the sole leader of the Blood Tribe. Hugh Dempsey writes of him in the Dictionary of Canadian Biography: "A warrior at heart, Red Crow had not accepted dependence upon the government and had encouraged farming, ranching, and education as means for his people to become self-sufficient. He instilled within the Bloods an independence and pride which made them subservient to no one, not even the white man."

Lawrence Vankoughnet [Vankoughnet]: Vankoughnet was first employed by the Department of Indian Affairs as an Indian Agent and later was promoted to Deputy Superintendent General, Indian Branch, Department of the Interior, from 1874 to 1893.

II. THE EVIDENCE

[57] The parties entered more than 2,300 exhibits at trial. Most are letters, reports, orders in council, maps, and journal entries dating to the late 1800s.[7] These documents provide Canada's account because representatives of the Crown wrote them. They detail dealings with the Blood Tribe and others. I have tried to keep in mind that in some instances the authors, when writing to their superiors, may have been drafting their reports in a light favourable to themselves. At the relevant time, the Blood Tribe had no written language and wrote no documents that tell their side of the story. The Blood Tribe relies on its oral history to provide its account.

A. Blood Tribe Oral History Evidence

[58] In Phase I, the Court heard from a number of members of the Blood Tribe: Wilton Goodstriker, Pete Standing Alone, David Stripped Wolf, Dennis First Rider, Andrew Black Water, Mary First Rider, Charlie Crow Chief, and Bruce Wolf Child.

[59] Canada at paragraphs 290 to 341 of its written submissions provides a general summary of the evidence each gave. Canada offers submissions on the evidence of events of which these witnesses have no personal knowledge, suggesting but not asserting that the Court when weighing their evidence should consider this. Canada raises no serious issue as to the credibility of these oral history witnesses.

[7] In many of these ancient documents the spelling and wording is inaccurate or questionable. I have the quoted passages transcribed as best as I can based on the testimony of witnesses and the source text, complete with any erroneous, archaic, or otherwise nonstandard spelling. As there are so many instances of this, I have chosen not to employ the Latin word "*sic*" to denote that the quoted passage reflects the written text, trusting that in every instance the reader will recognize this to be the case.

[60] The Court found that each Blood Tribe witness spoke sincerely and to the best of his or her recollection what he or she had been told by or had heard from persons now deceased. I find that each spoke their own truth; none exaggerated or added details of any facts. They recounted only what they recalled. In some instances, I have made findings contrary to the oral history of the Blood Tribe, or have concluded that the oral history evidence alone fails to meet the Plaintiffs' burden of proof. This is not to be interpreted as a finding that the witness offering the evidence was not credible or is untruthful. The Court's role is to weigh all of the evidence before it and arrive at findings of fact on the balance of probabilities. I am reminded of a statement made by Robert Evans in *The Kid Stays in the Picture*:

> There are three sides to every story: your side, my side, and the truth. And no one is lying. Memories shared serve each differently.

[61] The Blood Tribe summarized the oral history evidence of these witnesses at paragraphs 44 to 89 of its memorandum under seven headings, which provide a useful framework to outline this evidence as it relates to the facts and issues to be decided.

a. *Traditional Territory of the Blackfoot Confederacy*

[62] David Stripped Wolf described that the Blackfoot Confederacy, comprised of the tribes of the Blackfoot people got along with each other and were "one people." "The giver of life gave us this land and we never made war among each other."

[63] Andrew Black Water said that the traditional territory of the Confederacy went from the North Saskatchewan River in the north "near Jasper area where the river flows from the

mountains," to near the Manitoba border in the east, to the northern tip of Wyoming and on to the Yellowstone River in the south, and following the Yellowstone River, west to the mountains. He added that the first mountain range was also considered to be within the territory of the Confederacy.

[64] No others could enter the territory of the Confederacy without permission. Andrew Black Water explained:

> [H]istorically we sometimes allow passage for other tribes to go through our territory by way of making treaties with them. With the understanding that they will be allowed passage to go through our territory to wherever destiny not in the territory, but outside of the territory.
>
> Sometimes we enter into treaty arrangements where we will come to an agreement that they can come and harvest some things that perhaps they don't have in their territory, such as game, medicinal roots and other edible, you know, food. And in turn, they will allow us to -- to go into their territory for the same. And those are short-term sort of arrangements that we make.

[65] As the Blood Tribe notes, this evidence is not disputed by Canada, and is affirmed by Dr. Evans in his report where he says, "scholars have long been aware of the Blackfoot tribes' dominance of southern Alberta and adjacent portions of Montana during the first seven decades of the nineteenth century."

b. *Blood Tribe "Home Base"*

[66] Andrew Black Water described the area within the territory of the Confederacy that was the home base of the Blood Tribe, the "Aakainawa, the Tribe of Many Leaders" as being:

> … from the mountains ongoing east to the Sand Hills to the – this side of Sweet Pine Hills, including Writing-on-Stone, the Cypress Hills, and of course to the boundary, the east boundary.
>
> Then we make our way rounds back, kind of to the north. I would say around what we'd refer to as Medicine Hat, north of that area and coming back west to the mountains.

[67] The area so described includes within it the area described by Red Crow to be where he wished the Blood reserve to be located.

c. Clans and Leadership and Decision-Making

[68] Many of the oral history witnesses described that there were many leaders of the Blood Tribe. Indeed, as Andrew Black Water said, the tribe is known as, the "Aakainawa, the Tribe of Many Leaders." Wilton Good Striker said that the term "chief" only came to the Blood Tribe at the time of treaty. There they had two significant leaders, Red Crow representing the southern clans, and Rainy Chief or Thunder Chief, representing the northern clans. Each was a war leader and Wilton Goodstriker says they operated as such, "until the death of Thunder Chief and then we ended up with one leader [Red Crow] representing the tribe."

[69] The Blood Tribe was represented by both Red Crow and Rainy Chief at Treaty 7. Although Crowfoot, the Blackfoot Chief, was the principal First Nation spokesperson at the Treaty, Crowfoot did not speak for the Bloods. His mother was a Blood and he was related to Red Crow, but as Andrew Black Water testified, he "would not have spoken for the Blood Tribe."

d. Traditional Treaty Making Process

[70] The Plaintiffs note that "[t]he Elders testified to the importance of sacred alliances and the strength of such alliances because they were made in front of a pipe." The same happened with Treaty 7. Red Crow was advised to use the pipe, as there were fears that the white men would be deceitful. Wilton Goodstriker explains:

> The pipe was suggested in during the treaty talks by the Elders. In our case, by an Elder who was known as Maanistoko's, a Father of Many Children.
>
> He was sacred teacher, he was sacred adviser to people, like Red Crow, the leaders at the time. Father of Many Children. He was one of the people present at the Lame Bull Treaty on the American side of the border. He was present at the Laramie treaties.
>
> And he cautioned Red Crow and the other leaders, when you come together with the authorities, be careful because they do not speak the truth. Because they will be deceitful in their relationship with you, use a pipe to solidify your alliance with them, your peace alliance with them.

[71] There is evidence from these Elders that the Blackfoot tribes had experience in treaty-making in addition to making agreements with other tribes for trade and alliances. They were present at the negotiation of a treaty in Montana before Treaty 7, and some were present at Treaty 6 negotiations.

e. The Blood Tribe's Understanding of Treaty 7

[72] Andrew Black Water, among others, testified that Treaty 7 was seen by the Blood Tribe as a peace treaty:

> [S]peaking to the Blackfoot treaty, it's based on friendship. It's a treaty to live in peace with the new -- the newcomers, on the --

> upon the land, the surface of the land, but it was more the need to live in peace, you know, with each other.

[73] None of the Blood Tribe members spoke English, and none of those negotiating for Canada spoke Blackfoot. Each side was dependent on translators. The oral history of the Blood Tribe is that Potts was rejected as a translator because he drank heavily and, as Wilton Goodstriker said, "He is not all there." L'Heureux was suggested as well, but the tribal leadership rejected him as they "quickly determined that he didn't know enough Blackfoot to be a representative of our leaders that were there." Father Lacombe was also suggested but rejected because when he was asked to try to speak Blackfoot, he spoke Cree. As Wilton Goodstriker explained: "Cree and Blackfoot are about as different as English and Chinese." Ultimately, the Blackfoot accepted Bird as the translator. This evidence was consistent among many who testified, including Andrew Black Water, David Stripped Wolf, and Bruce Wolf Child. Wilton Goodstriker explained why Bird was selected, the results, and his death-bed confession:

> Bird who was identified as an interpreter, he was married into the Blackfeet Tribe in Montana, knew some Blackfoot and didn't have a good command but knew, I suppose, enough to share what was being discussed and later on, in the stories about the old ladies that I talked to a few years back, namely, Rosie Red Crow and Louise Crop Eared Wolf, they shared a story with me that Bird, on that his death bed in Montana, had confessed to the people that were present with him there that he had not interpreted properly what was being discussed.
>
> In fact, he had misled people and that he was sorry. He didn't want to take, I suppose, a lie to his grave, came clean and so to many of our people, that story quickly spread and that he had not been truthful in the translation of what transpired at Blackfoot Crossing.

[74] David Stripped Wolf's testimony is that towards the end of the negotiations, Red Crow took some grass and some earth and he told Laird to look at him, and he said that this grass is

what we will share but the earth is something that we cannot talk about. "[T]he earth is something we embody. And so that's why we can't -- we can't discuss the earth."

[75] This account echoes that of Wilton Goodstriker:

> Through the translator, the government representative said that he will share the land. Red Crow spoke back and with his left hand, he picked up some earth and with his right -- with his right hand, he picked up some grass.
>
> And he told the -- he told the government representatives, we will share the glass [*sic*], but not the – but not the earth. We embody the earth. We cannot -- it's part of our ceremonies. We cannot do anything about that. We can't share that.

[76] Oral history has it that there was some discussion about reserve location. The Commissioners told the Blood Tribe that their land would be further down the Bow River, to which Red Crow responded:

> Our land is by the Belly Buttes and the Chief Mountain. That's where our land is. And that's where we will live.[8]

f. Land the Blood Tribe Understood to be Reserved After Treaty 7

[77] Immediately after the signing of Treaty 7, Red Crow and the Blood Tribe left Blackfoot Crossing for the area of the Belly Buttes. David Stripped Wolf testified that when they arrived, Red Crow said, "I will never leave this place. I will be buried here." David Stripped Wolf says that this "place" is at the confluence of the Kootenai River and the Belly River

[8] Although the Belly Buttes was often mentioned and is marked on a number of the maps in evidence; the Court heard no evidence as to the location of Chief Mountain, and it was rarely mentioned, save for this one reference.

[78] David Stripped Wolf testified that the next summer (1878) Red Crow was told at Fort "'Kipp or iitapitsikamoa'pi' […] there will be a white man who will come and you will mark the land where you will be given a reserve, where your reserve will be marked."

[79] The area the Blood Tribe understood to have been reserved for it was described by Wilton Goodstriker:

> The story that I shared when Red Crow met with Colonel MacLeod, at that time, they discussed the west boundary of the reserve, which at that time was overlooking the Kootenay River, all the way up to where it comes out of the mountains at the mouth of the Kootenay River. That's at the Waterton Lakes now as we know.
>
> At that time, the lake -- lakes inside the mountains, that's what we call Waterton Lakes.
>
> And on the south, my grandfather said our land was adjacent to our families in the south, the Blackfeet in the south, which would indicate right at the 49th parallel.
>
> And on the east side, from the -- there's a -- the line from Fort Whoop-Up about -- Whoop-Up, then you go straight south, it goes over the Milk River ridge, that's what I understand was the -- that side of the border as far as the allocated land was.

[80] The area so described is the land of the Big Claim.

g. Use by the Blood Tribe of the Big Claim Land After Treaty

[81] There is oral history that members of the Blood Tribe used the land between the Kootenai and Belly Rivers for horse racing, ceremonial purposes including Sun Dance piercing ceremonies, and some lived there. The oral history of the Blood Tribe is that the NWMP told

those living there that they had to move as the area was going to flood. Wilton Goodstriker's evidence was that they told the residents:

> We will protect these lands for you, but you have to move to the east side of the Belly River and we will watch this area.
>
> There is cattle coming that will be used to feed your people in terms of rations. We will situate them between the two rivers. So we will guard and we will place our post between the two rivers and guard that place.

[82] The oral history recounts that those that refused to leave were "forcefully removed and burned out." The Blood Tribe surreptitiously still gather some of the sacred articles needed for their ceremonies from that area.

[83] Bruce Wolf Child provided evidence that the Blood Tribe continued to use the land south of the current Reserve's border:

> The areas south of Cardston were used frequently. We moved camps to follow the buffalo. The buffalo was our source of life. We moved to areas that provided good water, where game was plentiful and where we were going to be in safety.
>
> Those areas south of here provided all those things that we needed to survive.
>
> […]
>
> We continued to use this land, even though we weren't permitted because of the newcomers that settled in that area.

[84] Charlie Crow Chief offered oral history about the displacement of members of the Blood Tribe from the area south of the current Reserve.

> Then the people talk about when they were kicked out of -- hurried out from the -- from the St. Mary's River, upstream towards St.

> Mary's River -- St. Mary's Lake, in that area, and they camp around that area, And there's two camps. One is closer to the border and the one was a little further east by the river, where the shelter and firewood and everything.
>
> So when that thing happened, the North-West Mounted Police went over there on horseback with guns and they herd them out early in the morning. And these guys that talk about it, they were little boys at that time. So they told them, you don't belong to this place anymore. And the other one told them, only 18 years you can come back. Double 9 was 18. So one of them, okay, it's not that long. It's only 18 years. We'll just move out and come back.

[85] The Mormons headed by Charles Ora Card settled in what is now known as Cardston, Alberta, on the southern border of the Blood Tribe Reserve, in 1887. Blood oral history records that when they came to the area, they spoke to Red Crow and explained that their families were sick, and their horses hungry from the long trip from Utah. They asked to stay for a while before proceeding north on their journey. The Bloods believe that they stayed on afterward under the terms of a 99-year lease and that the land would then be returned to the Blood Tribe. Despite their efforts to locate such a document, it has not been found.

B. Assessing Oral History Evidence

[86] The issue raised by Canada regarding this oral history evidence relates to the opinions of the experts as to the Blood Tribe oral history tradition, and the weight the Court ought to give to the testimony of these witnesses.

[87] John Dewhirst, called by the Blood Tribe, is a cultural anthropologist. He was qualified to provide opinion evidence on “the oral history, tradition and practices of the Blood Tribe, the process of the preservation and transmission of Blood Tribe, oral history through their oral

tradition and a continuance of that tradition and its practice as it relates to the present group of elder witnesses."

[88] Mr. Dewhirst's opinion was that because of the customary validation procedure used by the Blood Tribe, its oral tradition produces reliable content. That process, as detailed by Mr. Dewhirst, was summarized by the Blood Tribe in its Written Submission in the following way:

> a. Tell the truth;
>
> b. Tell only what you know. If you do not know, ask someone who knows the correct information;
>
> c. Tell the whole narrative. Never tell just parts or cut the narrative short;
>
> d. Tell the narrative only if you know the whole narrative and that you can tell it properly and completely;
>
> e. Tell only what you heard as the narrative – no more and no less;
>
> f. Tell the narrative exactly in the way that your reliable source told you;
>
> g. Identify the source of your knowledge, your own firsthand experience and/or other reliable narrator(s);
>
> h. If you are the source of the narrative, qualify yourself in relation to your firsthand knowledge;
>
> i. If you learned the narrative from others, identify and qualify them in relation to firsthand knowledge of the event;
>
> j. When the narrative cannot be qualified in relation to firsthand knowledge, the narrative also qualifies as accurate and complete when it matches the same narrative told by reputable knowledge source.

[89] Although Canada agreed that Mr. Dewhirst was qualified as an expert witness in the areas identified, it submits that whether a particular witness providing oral history evidence is a

reliable source of the history provided is a matter for the trial judge. As I stated at the trial, I agree that the weight to be given any witness's testimony is a matter wholly within the purview of the trial judge and it is not something on which an expert may properly opine. Accordingly, the opinions expressed by Mr. Dewhirst as to the reliability of a specific witness's testimony are not of assistance to the Court and are not considered.

[90] Canada says, "little weight should be given to Mr. Dewhirst's opinion, as he limited the scope of the research that underpinned his report." Canada notes that his career centres on the study of seven Aboriginal cultures in British Columbia. It points out that he had not previously worked with the Blackfoot peoples, that he visited the Reserve only twice, and that the majority of the interviews he had lasted less than one day. It notes that the Blood Tribe selected the interviewees, and it submits they were not representative of the demography of the Blood Tribe.

[91] Canada called as an expert on Blood Tribe oral tradition, Dr. Susan Gray. Dr. Gray was qualified as an expert in Aboriginal history with an emphasis on the oral history traditions of the Algonquin peoples, including the Tribes of the Blackfoot Confederacy. She was also qualified to comment on Mr. Dewhirst's report.

[92] Dr. Gray acknowledged that she had not met or interviewed any member of the Blood Tribe. She was critical of Mr. Dewhirst's report for the reasons advanced by Canada as set out above, and because he used a theoretical framework advanced by an Africanist scholar, Jan Vanisa, that "fixes form in time" whereas the Blood were a nomadic people.

[93] The Court has issues with both expert witnesses. Notwithstanding her education and credentials, I give little weight to Dr. Gray's view of Blood Tribe oral history as she has never directly studied it nor met with any of its members. On a theoretical level, her criticism of Mr. Dewhirst's report may be sound; however, he did interview and interact with members of the Blood Tribe and the explanation he offers as to the creation and verification of its oral tradition is supported by others from the Blood Tribe who testified, and most particularly by Wilton Goodstriker.

[94] The challenge a Band has in presenting oral history evidence in matters such as that before the Court is obvious. Those with memory of the Band's history are not first-hand observers; often their stories are third or fourth-hand recitations of events that occurred more than a century earlier. The challenge for the Court is how to assess and assign weight to such evidence. In *R v Van Der Peet*, [1996] 2 SCR 507, Chief Justice Lamar at paragraph 68 recognized these difficulties and instructed courts that these difficulties cannot prevent the acceptance of and reliance on oral history evidence:

> In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.

[95] In *R v Marshall; R v Bernard*, 2005 SCC 43, at paragraphs 68 and 69, Chief Justice McLaughlin directed courts to have a sensitive and generous view of oral history evidence:

> Underlying all these issues is the need for a sensitive and generous approach to the evidence tendered to establish aboriginal rights, be they the right to title or lesser rights to fish, hunt or gather. Aboriginal peoples did not write down events in their pre-sovereignty histories. Therefore, orally transmitted history must be accepted, provided the conditions of usefulness and reasonable reliability set out in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33 (CanLII), are respected. Usefulness asks whether the oral history provides evidence that would not otherwise be available or evidence of the aboriginal perspective on the right claimed. Reasonable reliability ensures that the witness represents a credible source of the particular people's history. In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts.
>
> The evidence, oral and documentary, must be evaluated from the aboriginal perspective. What would a certain practice or event have signified in their world and value system? Having evaluated the evidence, the final step is to translate the facts found and thus interpreted into a modern common law right. The right must be accurately delineated in a way that reflects common law traditions, while respecting the aboriginal perspective.

[96] I have assessed the oral history evidence with these principles front-of-mind. The assessment of the value of the oral history evidence comes down to the weight given it. In assessing that evidence, I am guided by the following. Where oral history evidence is supported by, or is consistent with written records, I give it significant weight. Where the oral history evidence is uncontradicted, I generally give it significant weight. Where the oral history evidence rings true in the context of events at the time, I generally give it significant weight. Where the oral history evidence reflects common sense, I generally give it significant weight.

[97] The value of the oral history of the Blood Tribe is that noted by the Supreme Court of Canada in *R v Sioui*, [1990] 1 SCR 1025 at 1068, 70 DLR (4th) 427:

> The historical context, which has been used to demonstrate the existence of the treaty, may equally assist us in interpreting the extent of the rights contained in it. As MacKinnon J.A. said in *Taylor and Williams*, *supra*, at p. 232:
>
> > Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect.

[98] Although Canada takes issue with the veracity of some of the oral history testimony, I note that Canada also relies on some of it to establish the knowledge of the Blood Tribe regarding its reserve, which it then uses to support its limitations defence.

[99] At the commencement of Phase 2, the Blood Tribe led the evidence of Dorothy First Rider, a representative of the Blood Tribe. She did not provide oral history evidence; rather, her evidence was limited to her personal experience and what the Blood Tribe presently knows.

C. The Expert Evidence

[100] All of the experts who testified at trial produced extensive written reports that were entered as read. In addition to the oral history experts discussed above, the areas of expertise of the other experts included history, archival history, and surveying.

[101] Each party called historians. The Blood Tribe called Dr. Sarah Carter[9] and Canada called Dr. Clint Evans.[10] Each was challenged by the party opposite on the basis of an alleged bias. The initial challenge to Dr. Evans was dismissed after a *voir dire*. However, in closing, the Blood Tribe submitted that his "credibility and independence was undermined significantly at trial" and that where there was any conflict, the evidence of Dr. Carter should be preferred. Canada in its closing submits that the evidence and report of Dr. Carter should be excluded primarily because she "lacked independence and impartiality."

[102] I agree that the wording in parts of Dr. Carter's report may suggest a possible bias in favour of the First Nations. The following from the Introduction to her report serves as an illustration:

> Since the Numbered Treaties were concluded there has been unrelenting pressure in one form or another to alienate First Nations' reserve lands and from the outset government and settler forces worked to grant First Nations less land than the amount to which they were legally entitled. They also cast covetous eyes on land that was reserved for First Nations that they wanted for themselves, particularly where land was valuable for agriculture, cattle, speculation or other profits. Specious arguments were floated to gain access to Indigenous reserve lands. Arguments included that the First Nations did not deserve lands because they did not pay taxes or that their lands were lying idle and were not properly being used to make the land bountiful. Such arguments demonstrated that there was a poor understanding of what the treaties were about.

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[9] Dr. Sarah Carter was qualified as an expert historian to give evidence in the area of the history of relations between the Blood Tribe and the Canadian government for the period of the prelude to the Blackfoot Treaty up to the period when the Mormon community settled in the vicinity of the southern boundary of the reserve, a period from 1875 to 1888, and to also opine on the state of the Blood Tribe for the period of the Blackfoot Treaty until the July 2, 1883 Agreement, and she was further qualified as an expert on historical analysis.

[10] Dr. Clint Evans, following a vigorously contested *voir dire*, was qualified as an expert historian with particular expertise in western Canadian aboriginal history, including the numbered Treaties, federal government policies and practices, historic population estimates and the history of prairie First Nations. He was specifically found not qualified to express any opinion on the population of the Blood Tribe for the purposes of the TLE.

> It was not just settlers who wanted some of the best reserve lands, governments especially under prime ministers J.A. Macdonald and Wilfrid Laurier pursued policies intended to free up land for their supporters as patronage rewards. These governments were involved in using fraudulent tactics and methods to secure illegal surrender votes from reserve residents, finding dubious ways to circumvent the *Indian Act* clauses that stipulated that reserve lands could not be taken from First Nations without the consent of the majority of male members of a band. The Kainai people faced relentless pressure to surrender land, and contended with numerous questionable tactics and methods where ideological, state and racial apparatuses and arguments were used against them. Many people wanted their land or access to the resources of that land. [endnotes omitted]

[103] While her language may suggest a possible bias, I find that Dr. Carter provides historical support for the opinions she expresses regarding the Blood Tribe, Canada, and Treaty 7. In my view, it is not surprising that one who devotes her career to Canadian aboriginal history forms an opinion or point of view about the general treatment of our First Nations by Canada. Canada's position appears to be that the expert evidence of a historian ought to be given weight only if that person recites historical facts, without placing them in the context of the times, and interpreting them based on the knowledge the historian has obtained over her career. There may be merit in that submission where the historian fails to provide the evidentiary basis for the opinions held. That is not the case with Dr. Carter.

[104] I also note that Dr. Carter provides some historical insight into the character and character flaws of some of the principal actors, such as Dewdney, Denny, and others that has been useful in the Court's deliberations. Moreover, she provides evidence not found in Dr. Evans' report.

[105] For these reasons, I give her testimony weight. On the other hand, when she expresses an opinion, rather than stating historical facts, I have kept front of mind, when assessing that opinion, her general assessment of the relationship between Canada and its First Nations.

[106] Dr. Evans' testimony regarding his statements of facts is entitled to weight. However, I agree with the Blood Tribe that the cross-examination, both on the *voir dire* and when his evidence in chief was tested, raised significant concerns relating to his credibility. Specifically, he was shown to have been selective in the data relied upon relating to the population of the tribes of the Blackfoot Confederacy prior to Treaty 7. He was also shown to be unyielding when presented with evidence contrary to that he presented. For example, he unreasonably refused to admit that it is possible that the reference in Nelson's report in 1888 that he "heard Potts tell [Red Crow] that the south boundary of the reserve would run from Lee's Creek to Fish Creek" is a reference to the location of Mountain View, which at that time was called Fish Creek. Instead, he was insistent that it was a reference to Fishing Creek. Fishing Creek and Lee's Creek both run more-less north south. His suggestion that it meant the location where those creeks met the Belly and St. Mary Rivers makes little sense, as that is a point north of the most northerly of the surveyed southern reserve boundary. In fairness, he appears to have conceded as much when cross-examined on this point:

> Q. But the confluence of those two streams, do they connect? They are still above the current boundary, so it makes no sense, does it?
>
> A. Well, I just interpreted what he was saying as -- because the boundaries were fixed by St. Mary's and Belly and he was just saying that it's where the Fishing Creek or Fish Creek joins one and where Lee's Creek joins the other, which would make two points, and it would be something that the Blood would be familiar with.

> […]
>
> Q But the points between the creek is still not the current southern boundary either, that you're trying to say it is?
>
> A Well, I'm -- I'm not trying to say really all that much, other than this is what John Nelson said.
>
> So I would have to look at a map and look at Fish Creek and Lee Creek and see exactly where they intersect the larger rivers and then -- then I could maybe make a call whether it coincides with the '82 or '83 boundary
>
> Q So if Lee's Creek and Fish Creek don't coincide with the other rivers at the '83 boundary, you would agree that that makes no sense?
>
> A Yeah. If I did that, if I looked where they join, the Fish Creek joins the Belly, and Lee Creek joined the St. Mary's, and if it doesn't coordinate or, you know, coordinate with either of the boundaries or only one of them and that, yeah, that would be, I would think, meaningful.

[107] It is difficult, if not impossible to understand how the reference Dr. Evans proposes would permit Red Crow to know where the boundary was located with any degree of certainty. If, as counsel suggested, it were a reference to Mountain View, then the description would appear to be a reference to the 1882 Survey south boundary and not to the 1883 Survey south boundary because, as even Dr. Evans acknowledged, Mountain View appears to be on the 1882 Survey's southern boundary line.

[108] Accordingly, I give his opinions little weight and I have exercised caution when relying on his evidence for facts not otherwise supported.

[109] Each party called an expert in surveying. Canada called Dr. Brian Andrew Ballantyne[11] and the Blood Tribe called Ms. Marie Robidoux.[12] The major divergence in their opinions rested on when the reserve for the Blood Tribe was first created - 1882 or 1883. In the end, that is a question of law to be determined by the Court, and I do not rely on either's opinion on reserve creation. Except for this aspect of their evidence, their reports are given equal weight.

[110] The Blood Tribe also called Ms. Joan Homes as an expert.[13] She described the purpose of her report as follows:

> The purpose of this report is to examine the historical documentation related to the agreement made between Mekasto or Red Crow, Head Chief of the Blood Tribe, and the Government of Canada on September 25, 1880, and to determine "if chief Red Crow's formal application for a reserve in the vicinity of Fort Kipp was completed by Canada on October 12, 1882 when John C. Nelson finished his survey of the Reserve." In order to reply to the question, the report also traces the history of Red Crow's application and the government's handling of that request to July 2, 1883.

[111] Canada submits that her report ought to be accorded very little if any weight:

> Ms. Holmes provided minimal assistance to the Court. Constraints on her independence coloured her report, which was not sufficiently meticulous to be useful. She was also cavalier in her adherence to the rules governing Federal Court expert witnesses.

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[11] Dr. Ballantyne, although not a certified land surveyor, was qualified to provide opinion evidence in the area of surveying and boundary making, including but not limited to boundary principles, the technical aspects of surveying, including the giving of instructions to surveyors, the marking of boundaries, the examining of survey returns, the interpretation of survey plans, maps, sketches, field notes and field books, the procedures and practices of survey work and the practice of surveying in western Canada, including surveys of Indian Reserves and of Dominion Lands.

[12] Ms. Robidoux was qualified as an expert able to give opinion evidence as a Canada Lands Surveyor, on the survey work performed by John C. Nelson and his associates on Blood Reserve.

[13] With the consent of Canada, she was qualified as an expert historical researcher, as an expert historian on historical and archival records relating to the establishment of the Blood Reserve.

[112] The concerns raised by Canada are valid and do concern the Court. Ms. Holmes did not comply with the Court's Code of Conduct for Expert Witnesses, schedule to Rule 52.2 of the *Federal Court Rules*. She failed to list the facts on which she based her opinion, as required by section 3(d) of the Code. She failed to inform the Court and the party opposite that she had been provided by the Blood Tribe with an instruction package that included a Statement of Key Facts, the language of which often finds its way into the wording of her report. She also failed to advise that an assistant reviewed some archival sources for the purposes of her report. This omission alone would not likely have caused the Court concern; however, the similarity of the Key Facts document prepared by the Blood Tribe with her report is indeed troubling.

[113] While some similarity may be explained by the reliance of both on the same documents, it is, as Canada notes, "peculiar how both Ms. Holmes and the drafter of the Statement of Key Facts chose to summarize various historical documents in such a similar manner."

[114] It is also of concern that she chose to omit from her report, and thus her consideration, the document from Nelson that purports to show Red Crow's satisfaction with the reserve the Blood Tribe received following the 1883 Survey. I agree with Canada that in so doing, she may have failed to provide a fully objective opinion.

[115] For these reasons, while I accept her evidence on the historical archival documents, her opinions, unless otherwise supported or based on common sense, are given little weight.

D. Relevant Historical Background

[116] I shall provide an outline of the historical background generally relevant to the issues in dispute. Where a more detailed examination of the facts as found is required, it will be set out in the relevant section below dealing with specific issues.

a. *Prelude to Treaty 7*

[117] The Blood Tribe was historically a part of the Confederacy, with the Blackfoot and Peigan. The traditional territory of the Confederacy was on both sides of the Canada-US border. It included the northern part of Montana to the south, the southern part of Alberta to the north, was bounded by the Rocky Mountains to the west, and the Great Sand Hills of Saskatchewan, to the east. The tribes of the Confederacy were nomadic people who lived in teepees and moved constantly following the buffalo herds.

[118] The Confederacy had made alliances with other First Nations who wished to enter their traditional lands. As Europeans moved into this area to farm and hunt, the tribes of the Confederacy gained experience in treaty-making with white men. Its tribes were parties to the Lame Bull Treaty of 1855 in the US, and had been involved at Fort Benton, Montana, in the 1860s. There is evidence before the Court that the experience of the Confederacy with the Americans failing to honour their treaties made them skeptical when it came to making treaty with Canada.

[119] It is suggested by Dr. Evans that the American experience accounts for the attitude of the Blood at Treaty 7 in arriving late and showing little interest in selecting the location of their reserve prior to the conclusion of the treaty. I doubt that this experience had anything to do with the suggested lack of interest by Red Crow in reserve selection at the time of Treaty 7. As discussed below, I doubt that Red Crow was ever consulted at the time of Treaty 7 about his choice for the location of the Blood reserve. He arrived just prior to the treaty being signed, and in his absence, it is unlikely anyone else from the tribe would have made a selection.

[120] Beginning in the late 1870s, the tribes of the Confederacy in Canada faced a diminishing supply of buffalo, and an increase in the supply of whiskey. Canada sent the NWMP under Colonel Macleod into the area to establish Canadian sovereignty and to end the whiskey trade. The success Colonel Macleod had in stemming the whiskey trade, which was wreaking havoc in the Confederacy, endeared him to the leaders of the First Nations. They respected him. This relationship and his involvement as a treaty commissioner proved useful to Canada when it came to treaty-making with the Confederacy.

[121] The Confederacy learned that Canada was negotiating treaties with First Nations in Western Canada, and in 1875 wrote, through L'Heureux, requesting a meeting with Canada to enter into treaty.

[122] Dr. Evans reports that L'Heureux drafted the document requesting a meeting "at the request & behalf of the Blackfeet Indian Chiefs" and that it was delivered to Morris. It reads as follows:

[A]t a General Council of the Nation held by the respectives tribes of Blackfeet, Bloods & Piegans in the Fall of 1875, it was decided to call the attention of your Excellency and honorable NWT Council to the following facts.

That in the winter of 1871, a message of Leut Governor Archilbal was forwarded into the Saskatchewan by WJ Christie a member of your honourable NWT Council and the contain of said message was duly communicated to all your petitioners.

That yours petitioners understood that a promise was made to them in that document, that the Government or the White men will not take the Indians Lands, without a Council of Her Majesty Indian Commissioner and the respective Indian Chiefs.

That the White men have already taken the best of location and build houses in any place they please into yours petitioners hunting grounds.

That the Half Breed and Cree Indians hunted Buffalo Sumer & Winter in the Center of the hunting grunds of the Blackfeet Nation, since 4 years.

That Americains traders and others are forming large settlement in Belly River, the best Winter hunting quarters of yours petitioners.

That Lieut Gov message to us has not been effected since no Indian Commissioner has been seen by us.

That yours petitioners do pray for an Indian Commissioner to visited us this Sumer at Hand Hills and asked the time of his arrival there, so we could meet him and held a Council for puting a rule to the invasion of our Country, till our treaty be made with the Government.

That we are perfectly wiling the Monted Police and the Missionary remains in our Country for we are indebted to them for important service.

That we have apply to the Honorable Hudson Bay Company for the erection of a trading Post at Belly River, if the removal of Americains traders should be effected.

That your petitioners feel perfectly confident the representative of our Great Mother Her Majesty the Queen will do justice to her Indian Children.

> Praying the Ottawa Government to grant us the Petition, or do in the matter what to you and your honorable NWT Council seem proper.

[123] Canada reasonably interpreted this and a subsequent letter from the Confederacy as a request to treaty. In response, Prime Minister Mackenzie wired Morris authorizing him to promise the Confederacy a treaty the following year.

[124] Minister of Interior David Mills [Minister Mills] sent Laird and Colonel Macleod instructions on the treaty they were to negotiate. They were instructed to hold the treaty negotiation at Fort Macleod, and were given instructions that the location of the reserves should be identified "at an early day." Based on the record, this last instruction was likely given because Canada was interested in knowing at an early date where the railway and settlers could be located.

b. Treaty 7 Negotiations

[125] The location for treaty negotiations changed from Fort Macleod to Blackfoot Crossing in response to requests from Chiefs Crowfoot and Old Sun, both of them Blackfoot, who thought that it would give better access to buffalo, and there would be where fewer US traders there who might cheat them out of their treaty money. Laird reports that the Blood Chiefs were not happy with this change but he told them their annuities would be paid at a place of their choosing.

[126] Treaty negotiations were to begin Monday, September 17, 1877, but very few Blood, Sarcee, and Piegan attended at Blackfoot Crossing, and so the negotiations were postponed.

Negotiations resumed on Wednesday, September 19, 1877. Laird says several Indians arrived on the 18th, and the account in the October 30, 1877 *Globe* says nearly all are there.[14] Laird presented the proposed treaty terms to those assembled. The *Globe* reports that Laird addressed the assembled Indians and said, in part:

> [I]n a very few years the buffalo will probably be all destroyed, and for this reason the Queen wishes to help you to live in the future in some other way. She wishes you to allow her white children to come and live on your land and raise cattle, and should you agree to this she will assist you to raise cattle and grain, and thus give you the means of living when the buffalo are no more. She will also pay you and your children money every year, which you can spend as you please. By being paid in money you cannot be cheated, as with it you can buy what you may think proper.
>
> […]
>
> A reserve of land will be set apart for yourselves and your cattle, upon which none others will be permitted to encroach; for every five persons one square mile will be allotted on this reserve, on which they can cut trees and brush for firewood and other purposes. The Queen's officers will permit no white man or Half-breed to build or cut timber on your reserves.
>
> […]
>
> I have now spoken. I have made you acquainted with the principal terms contained in the treaty which you are asked to sign.
>
> You may wish to talk it over in your council lodges; you may not know what to do before you speak your thoughts in council. Go, therefore, to your council, and I hope that you may be able to give me an answer tomorrow.

[127] Laird[15] and the *Globe* both report that Friday, September 21, 1877, the treaty terms were agreed upon, and the Commissioners advised the First Nations assembled that they "would prepare the treaty and bring it to-morrow for signature."

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[14] *The Globe* was a Toronto newspaper that would later became *The Globe and Mail*.
[15] As recorded in Morris, Alexander, *The Treaties of Canada* (Toronto: Belfords, Clarke & Co., 1880) at page 259.

[128] The *Globe* reports that Red Crow spoke on September 21 indicating that he "entirely" trusted Macleod and "will leave everything to him" and that he would sign the treaty. This runs contrary to Laird's account in which he states that Red Crow arrived on Friday evening, September 21, 1877, or Saturday September 22, the day when he was introduced to the Commissioners.

[129] Laird reports that after noting the agreement of those in attendance on September 21 to the proposed terms, the only outstanding "difficult matter" was that of the reserve locations. The Commissioners decided that it was better not to attempt to do this in an open meeting. Macleod agreed that he would meet separately with the Chiefs to ascertain the reserve locations, while Laird prepared the treaty terms. Laird reports: "He succeeded so well in his mission that we were able to name the places chosen in the treaty." This included a location for the Blood Reserve on the Bow River, next to that of the Blackfoot.

[130] I find it unlikely that any Blood were consulted about the reserve location for the Blood Tribe specified in Treaty 7. I find that it is improbable that Red Crow was consulted on that reserve location for several reasons. First, he was absent on Friday, September 21, 1877, when the terms were being drafted, and was only introduced to the Commissioners on the following day, Saturday, September 22, 1877; the day Treaty 7 was signed.

[131] There is evidence that suggests that Red Crow did express his wishes at the time of treaty. At a meeting on February 2, 1888, with Pocklington and others, Red Crow is reported as saying:

> White man spoke and told us to say where we wanted Reserve. God made the mountains for us and put the timber there and we said at that time we wanted the country where the mountains and the timber were.

[132] It is unclear from this note whether this area was selected by Red Crow at the time of treaty or subsequently when the location of the reserve changed. I think it most probable that it is the latter. If the statement as to his selection in reserve location was made at the time of treaty, then one must conclude that the Commissioners ignored this selection when setting out the reserve location in the treaty. There is no reason to think they would have deliberately ignored the wishes of Red Crow.

[133] Second, as soon as Treaty 7 was signed, Red Crow left for the Belly Buttes. Had he selected the Bow River as the reserve location, one would expect that he would have remained there.

[134] The oral history of the Blood Tribe is that Red Crow made it known quite soon after he signed Treaty 7 that he wanted the Blood Reserve at the Belly Buttes and not on the Bow River with the Blackfoot as the Treaty stated. This further supports that they had little if any role in selecting the reserve set out in Treaty 7. Joe Chief Body, in his interview of November 12, 1973, says the following:

> This man called Tall White Man [Laird] told Crowfoot, right here where we just got through negotiating the Peace Treaty, is where your reserve will be set aside, for it will be surveyed. East and west are satisfied with this land and Crowfoot answered, Yes I am. Then he called on Red Crow, You are next in line. On the east end or the west end of Crowfoot's reservation, pick out which one you want for your reservations. The other end will go to Peigan tribe. When some assistance comes from the government, they will be

> shipped in one place. This is what Tall White Man told Red Crow and Red Crow answered him, "No I am going back to Belly Buttes and Whoop-Up and that's where I am going to stay." Tall White Man answered and said to Red Crow, "You have signed Peace Treaty. You cannot argue with me. What I tell you goes. We will close the meeting till tomorrow. When you hear the first shot of the cannon in the morning, it means you must be prepared to come to the meeting. The second, that means the meeting will start.
>
> The next morning, the first shot came and Red Crow was already prepared with his spiritual powers, the powers he used on his warpaths. The second shot went off and he went over to where the meeting was to be held. He was the last to arrive. Tall White Man and the rest of the high officials and all other Tribal Chiefs were already waiting for him. He just walked straight to where Tall White Man was seated and offered to shake hands with him, which Tall White Man accepted. And right then, he told Tall White Man, "What I am going to tell you is what's going to be, as you are looking at me. This land you see is what I own and all these people who are here also own this land. I will give the command. For you, you were born across the big waters – that's where you can give your command. I signed the Peace Treaty to be brothers as long as we live and for the future, and as you are looking at me, my father, mother, blood relations and relatives are all buried in Belly Buttes and Whoop-Up, and that goes for all the Blood tribe because I know this part of the country for a fact. In winters, there are times when the buffalo freeze to death over at Belly Buttes and Whoop-Up. There is plenty of shelter to camp and the buffalo also spend the winter in that area." When he got through talking to Tall white Man, he just leaned way back on his seat and he answered, "What you have just said is true. You have every right to choose which land you want to keep during the negotiations." On the Peace Treaty, Tall White Man never mentioned land deal when he promised to pay $12.00 every year as long as the sun shines and rivers flow.

[135] The documentary record shows that if not at the time of Treaty 7, then very soon thereafter, Red Crow made it known that he would not take a reserve at the Bow River location, but wanted to be at the Belly Buttes and, as stated previously, as soon as the treaty was done, he left Blackfoot Crossing for the Belly Buttes.

[136] On the selection of reserve locations in Treaty 7, I prefer the view of Dr. Carter who writes:

> It is remarkable that [Colonel] Macleod was able to visit all of the Treaty 7 people (Sikiska, Piikani, Kainai, Tsuu T'ina, Stoney-Nakada) camping at Blackfoot Crossing and secure their agreement to reserve locations in such a short space of time. He would have had to then give the descriptions to Laird, who was preparing the "draft" treaty for the conclusion of the treaty on Saturday September 22nd.

[137] Little turns on the alleged agreement to the location of the Blood reserve at the time of Treaty 7, as it was subsequently changed by agreement. However, the unilateral selection by the white men, or ignoring the wishes of the Blood Tribe, suggests that the Blood were given short shrift by the white men regarding their reserve, and this treatment is a harbinger of future actions.

[138] Originally, Potts, a NWMP interpreter, was providing interpretation but it is agreed that he was not up to the task. There is also evidence, including oral history evidence, that Potts was fond of drink and was intoxicated during most of this time. Dr. Evans states that Bird was married to a Blood woman (an Aunt of Red Crow) and had been the interpreter at the Lame Bull Treaty.

[139] Laird reports that on September 22nd, “the treaty having been interpreted to the Indians” the Chiefs, including Red Crow, agreed to its terms, and “L’Heureux, being familiar with the Blackfoot language, attached the Chief’s names to the document at their request and witnessed their marks.” Indeed Treaty 7 shows L’Heureux as a witness, and recites that it was “Signed by the Chiefs and Councillors in presence of the following witnesses, the same having been explained by James Bird, Interpreter.” It is noted that Laird was of the view that L’Heureux was

"familiar" with the Blackfoot language, whereas the Blackfoot themselves were of the view that he was not proficient enough to act as their interpreter when making Treaty 7. In any event, it appears from Laird's account that all L'Heureux did was write the chiefs' names on the document that had been prepared the night before, and serve as a witness.

[140] With respect to the reserves for the Indians, Treaty 7 provided "that Reserves shall be assigned them of sufficient area to allow one square mile for each family of five persons, or in that proportion for larger and smaller families, and that Reserves shall be located as follows…" What follows are descriptions of three reserves: A single block of land on the north side of the Bow and South Saskatchewan Rivers for the "Blackfeet, Blood and Sarcee Bands of Indians," and separate reserves for the Peigan and Stoney Bands.

[141] After the signing of the treaty, the Commissioners distributed the payments to those assembled. Laird reports that 4,392 were paid. Of note, in his Annual Report for the year ended 30th June 1877, Minister Mills writes that some 14,949 Indians were paid under treaties 4, 6 and 7 and that:

> Besides the Indians who have received payments, there are some in both Treaties Nos. 4 and 6, and a still larger number in Treaty No. 7, concluded last year, who have not yet received any payment. Mr. Laird is of the opinion that (including the paid Indians) the total number of Treaty Indians in his Superintendency may be estimated approximately at 17,000. [emphasis added]

[142] Minister Mills reports that the land surrendered under Treaty 7 was about 50,000 square miles of land. He reports that 4,392 Indians (from the Blackfoot, Blood, Sarcee, Peigan, and Stoney Bands) were paid gratuities at the time of Treaty and "[n]o estimate is given of the

number of Indians not present, but the total number in the Treaty limits will probably not fall short of 5,000."

[143] The Treaty paylist for 1877 shows that at the time of Treaty 7 in 1877, 1,234 Blackfoot were paid, 1,810 Blood were paid, and 589 Peigan were paid. The Treaty paylist for 1878 shows that 2,488 Blood Tribe members were paid. It shows that many of these received the 1877 payment as well, as they had not been present at Blackfoot Crossing. The payments indicated in the annual Treaty annuity paylists for the Blackfoot, Blood, and Peigan, are summarized in Appendix 2 of Dr. Evans' Report, and is attached as Appendix E.

c. Locating the Blood Reserve and the Red Crow Agreement

[144] In September and October 1878, William Ogilvie commenced a survey of the reserves at the Bow River. He never completed this, as it became clear that neither the Blood nor the Sarcee wanted their reserves there.

[145] Both Dr. Carter and Ms. Holmes say that in 1878 during the payment of annuities to the Blood Tribe at Fort Kipp, Red Crow informed the Commissioners that he would take his reserve on the Belly River. Dr. Carter writes:

> Cecil Denny of the NWMP recalled in his memoir [Cecil Denny, *The Riders of the Plains* (Calgary: The Herald Company, 1905), p 106, 112-113] that in 1878 he had to inform Crowfoot that the Bloods "would have a separate reservation given them in the south" and that "surveyors would come up the following year to lay out all the reserves." Denny wrote that "for two days he [Crowfoot] would not hear of, insisting that the Bloods and Blackfeet should have their reserve together as agreed in the treaty of the previous year…It was the most difficult job I ever undertook

> to make him agree to the change, and it was only after two days' steady talk that he finally gave in.

[146] They also rely on a similar statement made by Hugh Dempsey [Dempsey] in his book *The Great Blackfoot Treaties* (Calgary: Heritage House Co. Ltd., 2015) page 130. Dempsey appears to rely on a statement in Denny's memoir for this information. Dr. Evans does not think this statement is correct. It is his view that Red Crow's statement that the Blood wished a separate reserve was made during the 1879 Treaty annuity payments, and not during the 1878 payments.

[147] Dr. Evans points to the lack of contemporaneous notes and reports to conclude that the reserve location was likely not mentioned at that time. He thinks that Denny's recollection in 1905 is likely wrong as it is some time after the event, and he points to the lack of a reference by Dempsey as authority for his statement. Dr. Evans writes that Colonel Macleod met with Chiefs at this time and they did not raise the issue. Lastly, he notes that Denny is not named as someone present during the 1878 Treaty annuity payments. I note that Dr. Evans has no reference in his report to Denny being present at any annuity payment prior to 1883.

[148] Little rests on whether Denny is correct that Red Crow made this statement to the Commissioners at the 1878 annuity payments or not. Even Dr. Evans acknowledges that he did make such a statement to Dewdney in 1879. I note that Denny does not say that the statement was made directly to him; it may have been made to someone else and reported to Denny. In any event, I prefer to accept the recollection of Denny over Dr. Evans whose opinion is based on an assumption that the statement was made directly to Denny. I do so even though the memoir was

written some years later. As I say, nothing really hangs on this point. Red Crow made his wishes clear in 1879, if not earlier in 1877 when, after signing Treaty 7, he left for the Belly Buttes.

[149] In July 1879, Dewdney had Surveyors Allan Patrick [Patrick] and John C. Nelson [Nelson] accompany him "while he selected the location of … the Peigan Reserve." Patrick left Nelson to survey that reserve while he accompanied Dewdney to Calgary "in order that a reserve might be decided upon for the Stony Indians." He reports that he "instructed Mr. Nelson to complete the Peigan Reserve, the survey of which I found on my return had been most satisfactorily made."

[150] In Dewdney's report dated January 2, 1880, he mentions that the Blood Reserve has not yet been determined:

> The Blood Indians, the largest tribe of the Blackfoot nation, have not as yet settled on their reservation; they have, however, expressed, on more than one occasion, their determination to do so.
>
> I have reported fully on their wishes, in respect to their reservation, and I am in hopes that next summer will see a large number of them engaged in agriculture and stock raising. [emphasis added]

[151] Dewdney, in a letter to Vankoughnet, dated December 15, 1879, details the wishes of the Blood Tribe regarding their reserve:

> I have the honor to inform you that the "Blood" Indians are very desirous of having a Reserve apart from the other Indians of the "Blackfeet" nation, & made a formal application to me at an interview I had with them about two months ago. "Mekasto" the Head Chief spoke first, then "Running Rabbit" and all the minor chiefs one after the other followed in the same direction, they said they were all of one mind. They wanted the Reservation in the

neighbourhood of Fort Kipp, where they say these Indians have mostly resided & where the bones of their ancestors lie. Upon my informing them it was out of my power to alter the treaty as agreed upon by them, they then requested that I would make known their wishes to the Government while at Ottawa.

I told them one objection I saw was that after the Treaty was made with them in 1877, several white men had settled in that locality, & had made considerable improvements, & they would have to be got rid of by the Government. They replied that there were only two of them there & that they would not trouble them. I promised to attend to this matter for them as soon as I arrived in Ottawa, & would give them an early reply.

Except at the time the Treaty was made, & this year when it was found more convenient to pay at Fort Macleod, the "Bloods" by agreement have received their Annuity at Fort Kipp.

"Crowfoot" the Chief of another branch of the "Blackfoot" Nation was annoyed at this when "Mekasto" first made application to be paid there, as he (Crowfoot) at the time of the Treaty had taken the foremost part in the negotiations & had been put forward by Mr. Jean L'Heureux as the Head Chief or King of the Blackfoot Nation & he did not like to see his authority diminished by the "Bloods" moving to a separate Reservation.

I found at the Payments this year that there was an unfriendly feeling or rather a cooling between the "Bloods" & "Blackfeet", & when "Three Bulls" a minor chief, Head Soldier & Brother of "Crowfoots", arrived at Fort Macleod from Cyprus (where he had been after Buffalo) for the Payments, the "Bloods" moved to the opposite side of the River as soon as they found the "Blackfeet" intended camping near them, & they did not mix with each other at all.

The "Bloods" represent nearly half the "Blackfeet" Nation and I am of the opinion that it would be desirable that they should be allowed to have their Reservation independently of the others and thus prevent the centralization of so large a number of Indians in one locality.

I should be glad if you would submit this to the Right Honourable the Sup^{n} Genl. of Indian Affairs at an early day, as should it be considered advisable to carry out the wishes of the "Blood" Indians, I propose to notify them, so that some work might be done on the Reservation this spring.

[152] Dr. Evans notes in his report that the "Blood chiefs' comments were consistent with earlier sources which link the Blood and other Blackfoot tribes to the Belly River area at least as far back as the 1830s."

[153] Upon receipt of this request from Dewdney, on December 19, 1879, Vankoughnet writes to Surveyor General Lindsay Russell [Russell] asking whether the Blood Reserve can be put separately near Fort Kipp. This letter is misplaced until March 14, 1880, when Russell responds that he is not aware of any objection in the interests of the Dominion Lands to the request to locate the reserve at Fort Kipp.

[154] On March 16, 1880, Vankoughnet writes to Macdonald, attaching Dewdney's letter and recommends that a separate Blood Reserve be created, as requested. He writes:

> The Blood Indians are said to number at least one-half of the Blackfeet Tribe; consequently, if a Reserve be allotted them elsewhere than first arranged, a corresponding deduction should be made from the Reserve allotted by the Treaty to the Blackfeet Nation ….

[155] Macdonald prepares a report dated March 19, 1880, for the Privy Council about Vankoughnet's recommendations and comments that Dewdney and Colonel Macleod would need to obtain a surrender from the Blood Tribe of its interest in the Treaty 7 reserve. The Report of the Privy Council, approved by the Governor General became Order in Council 565. It provides, in relevant part:

> For the reasons stated in the Report the Minister recommended that authority be given under Section 26, Subsections 1 and 2 of the Indian Act 1876 to C. Dewdney Esquire, Indian Commissioner for the North West Territories and Manitoba, and Lieut. Colonel McLeod, Commissioner of the North West Mounted Police, to

> attend a Council of the Blackfeet Nation interested in the said Reserve, to be summoned by Mr. Dewdney for the purpose and to submit a proposition to them to surrender such portion of the Reserve allotted to them under Treaty stipulations as would be the proper share of the Blood Band, were that Band to settle upon the said Reserve, with a view to a Reserve near Fort Kipp being assigned to the Blood Indians, in accordance with their desire. And should the Indians assent to the proposal, the gentlemen above referred to should take a surrender from them executed in accordance with the provisions of the Indian Act 1876 covering the land in question.

[156] The surrender provisions in sections 36 and 37 of *The Indian Act, 1880* required, among other things, a vote among the adult male members of the Band assenting to the surrender of reserve land. Those provisions read as follows:

> 36. No reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Act, excepting that in cases of aged, sick and infirm Indians and widows or children left without a guardian, the Superintendent-General shall have the power to lease the lands to which they may be entitled for their support or benefit.
>
> 37. No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band or of any individual Indian, shall be valid or binding, except on the following conditions :—
>
> 1. The release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose according to their rules, and held in the presence of the Superintendent-General, or of an officer duly authorized to attend such council by the Governor in Council or by the Superintendent-General : Provided, that no Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near and is interested in the reserve in question:
>
> 2. The fact that such release or surrender has been assented to by the band at such council or meeting, shall be certified on oath before some judge of a superior, county or district court, or Stipendiary Magistrate, by the Superintendent-General, or by the officer authorized by him to attend such council or meeting, and by

> some one of the chiefs or principal men present thereat and entitled to vote, and when so certified as aforesaid shall be submitted to the Governor in Council for acceptance or refusal.

[157] The substance of the Order in Council is transmitted to Dewdney who is asked to execute its terms. By letter dated September 18, 1880, to Vankoughnet, Dewdney advises that on his return he "notified the Bloods I will hold council with them, by this time I am in hope Col. Macleod will be back."

[158] In another letter of the same date, Dewdney describes the situation he finds at Fort Macleod:

> A large number of Bloods are here, some 800, all receiving rations and very little work being done in return. No arrangement has been made about this Reservation. They refuse to go to the Blackfoot Crossing & Crowfoot being across the line and no certainty of when he will return, I do not know how to act.
>
> Micasto the head Chief, and a very good man, is anxious to go on his Reserve to commence work, and is ashamed to hang around the way he does having no place to go to – the Circees a small Band included in the Blackfoot Crossing Reserve are also anxious to settle by themselves, they cannot agree with the Blackfeet and never will and unless separated there will be a row. My impression is that it is most desirable that the Blackfeet, Bloods and Circees should be apart and if Crowfoot does not return before I leave I feel I must take the responsibility of making the arrangements. They are all being fed and we are losing time, another season will be lost if we do not make a start for these Indians this autumn.
>
> Col. Macleod is away but is expected back daily. I will do nothing until I see him – but something must be done – it has come to this that thousands of Indians in this southern country must be fed if they come back from across the line – the country north of the line is barren of game, and I can see that the expenditure is going to be enormous compared to what it has been in the past – for the Indians have the for the last year not only to hunt when over the line but to protect their lives and property – many of the former

> have been lost and when they return they will not go back to the states.

[159] Given the perceived urgency as described above, and the absence of Crowfoot, Dewdney does indeed take matters in his own hands and gets Red Crow to make a "release" to allow the Blood to begin settling near Fort Kipp. This release describes settling "a Reserve on the Belly River in the neighbourhood of the Mouth of the Kootenai River" and it says that the Bloods will give up all the rights, titles and privileges related to their shared reserve, if they are granted a separate reserve. The Agreement is dated September 25, 1880 [the Red Crow Agreement], attached as Appendix F and reads as follows:

> WHEREAS a Treaty was made and concluded on the twenty second day of September in the year of our Lord, one thousand eight hundred and seventy seven between Her Most Gracious Majesty the Queen of Great Britain and Ireland, by her Commissioners, the Honorable David Laird Lieutenant-Governor and Indian Superintendent of the North West Territories, and James Farquharson MacLeod, C.M.G., Commissioner of the North West Mounted Police, of the one part and the Blackfeet, Blood, Peigan, Sarcee, Stoney and other Indians, of the other part.
>
> And where is it was agreed in said Treaty that the reserve of the Blackfeet, Blood and Sarcee Bands of Indians should consist of a belt of land on the north side of the Bow and Saskatchewan Rivers of an average width of four miles along said Rivers downstream, commencing at a point on the Bow River, twenty miles North-Westerly of the Blackfoot Crossing, thereof and extending to the Red Deer River at its junction with the South Saskatchewan, I, "Mekasto" or "Red Crow" Head Chief of the Blood Indians, on behalf and with the consent of the Blood Indians included in said Treaty <u>do hereby give up all our rights, titles, and privileges whatsoever to the lands included in the said Treaty, provided the Government will grant us a Reserve on the Belly River in the neighbourhood of the Mouth of the Kootenai River</u>.
> [emphasis added]

[160] In his report dated December 31, 1880, Dewdney writes that he told Red Crow what would happen upon signing this release:

> I would send an instructor with him and his band to the spot selected by himself, where he could build houses and prepare some ground for the next season, and that I would recommend on my arrival below that a reserve be given to him at that point. This greatly pleased the chief and his Indians who were with him.
>
> In a day or two they all left, accompanied by an instructor, and I have since heard that every family has a house to live in, and some twenty or thirty acres of land have been broke.

[161] A few days after the signing of the Red Crow Agreement, Agent Macleod accompanies Red Crow to select a reservation. Agent Macleod's son, who accompanies them, later writes of his father and he being awakened by Potts who told them that Red Crow wished to speak to him. He writes:

> Curious as usual, I followed to where he was sitting at the edge of the high bank opposite the Belly Buttes. As interpreted by Jerry, this is what he said: "That is where I wish to live the rest of my life and to die there."

[162] They find that at the forks of the Kootenai and Belly Rivers there is a large bottom, and a settler's ranch has already been set up on the top. The rest of the bottom has poor soil and is at risk of flooding. His son later wrote that after breakfast they drove across to Red Crow's choice of site:

> By this time the weather had changed to a steady drizzle, and with the gumbo foundation the disadvantages were clearly apparent and pointed out to him, but with the same reply as before given. So the matter had to rest with his opinion.

[163] His father, Agent Macleod, writes a somewhat different account and given that it was written closer to the event and by an adult at the time, I prefer to accept his version as more likely accurate. He says that he thought the site selected was unfit, so they traveled north to the Whiskey post "Slideout" and they ultimately decided on land east of the Belly River, opposite the Kootenai, and at the foot of the Belly Buttes. He writes in his report of October 15, 1880:

> I have the honor to report for your information that according to your instructions I proceeded to the Belly River on the 29th [not legible] accompanied by "Red Crow" Head Chief of the Blood Indians to select a location for their reservation. I went to the forks of the Kootenai and Belly Rivers where I found a large bottom, the upper portion of which is occupied by Mr. Fredk Watcher's ranch and below him a man of the name of Murray had a small ranch; the remaining portion of the bottom is chiefly gravel and sand with little soil and had been all overflowed during the high waters in Summer; there is no quantity of building timber available.
>
> This is the bottom which "Red Crow" desired to settle upon, but I considered it unfit for a location. Below the mouth of the Kootenai River eastward and along the north side of the Belly River a high bank runs for several miles to the vicinity of "Slideout" leaving little room between it and the River, except that one point where there is a large gravelly bottom cut and up by slews; the country along the top of this bank is gravel and stone. There is some good timber along this side. I then crossed the Belly River to the south side, and from the mouth of the Kootenai eastward and extending from the River to the foot of the Belly Bute there are large level stretches of good clay soil with a large quantity of building and fence timber at the upper end opposite the Kootenai; this I decided upon as being the best location in that part of the Country. I had taken Mr. John MacDougall out with me and a small quantity of supplies and tools and he set to work at once to build a small house for himself and a small Store house.
>
> About 300 Blood Indians have moved over to the Reserve and have gone to work with a good deal of heartiness to build houses for themselves. I hope to get some land broken for them this Fall. I had to yoke of oxen brought over from the Sarcee's Farm for the use of the Reserve. "Red Crow" was quite satisfied with the selection of the location I had made.

[164] Dr. Evans states in his report that by the end of 1880 the Blood Tribe "had 'built forty-five houses' on the flat selected by [Agent] Macleod between Belly Buttes and the Belly River or a few miles north of the modern Blood community of Standoff."

[165] November 13, 1880, Dewdney sends a report attaching the Red Crow Agreement to Ottawa, saying he hopes they approve the conditional release. He explains that some 800 Blood Tribe members are camped at or near Fort Macleod and that although he wanted all Bands of the Confederacy to agree, Crowfoot had been gone for 12 months, and he was of the view that action was needed to settle the Blood Tribe. He writes that he met with Red Crow and some minor chiefs on September 25, 1880, at their request, as they wanted to know what the Government response was to their request for a separate reserve:

> They wished to know whether I had represented to the Government their wishes in respect to the change of their Reserve made to me last winter.
>
> They further stated that they had been drawing rations for some time and had done no work but would not go to the Crossing; that at the time of the Treaty they never agreed to take their Reserve there – that the Belly River was their Country and they were all of the same mind now that they were last fall.
>
> I told them that I had represented to the Government in Ottawa their request to have the Reserve changed, and I had been authorized in conjunction with Col. Macleod to arrange in Council with the Blackfeet (Crowfoot) Bands and themselves for the carrying out of their wishes, but it was thought necessary inasmuch as the Treaty was made with the Blackfeet and Blood that all should be present so that there should be no misunderstanding in the future.
>
> They said that they were very anxious to have the question settled, as they wanted to build houses for themselves for the winter their lodges being almost useless and several families packed into one lodge, they referred me to Mr. MacLeod who had seen the state they were in during the wet weather, they also said Crowfoot had

> been away for 12 months and they did not think he would return this winter.
>
> As I found them very earnest in their appeals and know of no other way of getting work from them for what food they are were receiving, I determined to take a release from MaKasto (Red Crow) on behalf of the Blood Indians of all their right, title, and interest in the Blackfeet Crossing Reserve, that they agreed to most cheerfully, MaKastro stating after signing it he hoped never to see the Crossing again.
>
> [emphasis added]

[166] On January 31, 1881, Dewdney writes to Macdonald that the Sarcee also want their own reserve apart from the Blackfoot. He recommends it and asks to be empowered to take a surrender as he had done in the case of the Bloods, whose position was similar. By letter of February 14, 1881, Dewdney is advised that the Department approves of his suggestion but he is reminded that it is still necessary for a surrender to occur for the Blood's portion of the Treaty 7 reserve. Dewdney on the 18th responds that he shall "make arrangements accordingly."

d. The Land Between the Kootenai and Belly Rivers

[167] In the Spring of 1881, more Blood Tribe members return to Canada from the US and settle in the area identified for their reserve. Agent Macleod writes to Dewdney in his report of December 31, 1881, that during May and June, the tribe began to return across the line (the border) and their number went from 700 to 3,500. While some settled south of the Belly River, it is clear from the record that some settled in the area between the Kootenai and Belly Rivers.

[168] Dempsey writes of them settling between the two rivers:

> In 1880, when Red Crow had gone to the Belly Buttes with Agent Macleod, he had selected the land on the south side of the Belly River for his tribe. In the following year, a delegation of Bloods met the Marquis of Lorne, the governor-general of Canada, during his tour of the West and asked that the reserve be broadened to include Standoff bottom, between the Belly and Waterton Rivers. Whatever answer the vice-regal gave, the Bloods took it as an indication of approval, and many of them began to build cabins and pitch their lodges in that river bottom.
>
> When Agent Denny was appointed, [in 1881] he told the Bloods that they could not claim Standoff bottom and that their reserve was still on the south side of the Belly, "17 miles down and 17 miles up" from the Agency.[16]

[169] Dempsey's source for this is a missive printed in the *Macleod Gazette* on July 8, 1882, entitled *Where is the Blood Reservation*? It reads as follows:

> Sir - Where is the Blood Reservation? I have been trying to find out for the past two years but can find no one to enlighten me. At the Treaty at the Blackfoot Crossing in 1877, the Bloods were assigned a reservation adjoining the Blackfeet, or at all events in that vicinity. In the fall of 1880 Mr. N. Macleod, then Indian agent, Mr. John McDougall, Farm Instructor, and Red Crow, chief of the Bloods, picked on the river bottom below Stand Off, on the Belly river, as a fit and proper place, which seem satisfactory to all concerned at the time. After a year's trial they found it was better adapted to raise bricks than vegetables, after a big outlay at the Government expense. Last year, 81, they the Bloods, went en mass to state their grievances to the Governor General, Lord Lorne. What his Excellency told them, I'm not in a position to say, only from report. The Bloods wanted Stand Off bottom, where they would raise something, and came back with the impression that the Governor General had given it to them, and commenced building in the bottom accordingly. Then Mr. Dewdney, through his agents, told the Indians the reservation was 17 miles down and 17 miles up on the south side of the Belly river, which seemed to be satisfactory, as they all made for the other side of the river and disposed of their buildings on the Stand Off bottom.

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[16] Dempsey, *Red Crow, Warrior Chief* (Saskatoon: Western Produce Prairie Books, 1980), page 135. He footnotes at the end of this passage, *Fort Macleod Gazette*, July 8, 1882.

[170] Dr. Evans notes that the "fact that the Blood families moved across the river as soon as they were informed of their mistake is corroborated by a January 1887 affidavit by NWMP officer Lief Crozier in which he stated that he purchased 'several buildings' from the 'Blood Indians' on 'Stand Off Bottom in 1881.' He says that these were 'erected prior to the Blood Reserve being set apart.'" Crozier subsequently rented these out to the NWMP for its Stand Off detachment.

[171] The Blood oral history concerning the relocation of these families from the area north of the Belly River is at odds with the account that they moved willingly. Wilton Goodstriker testified that they were forcibly removed by the NWMP and that some lost their lives:

> There was a time when the northwest – I can't put a date to it, but the North-West Mounted Police told the people that were living between the two rivers, you need to move. This area is going to flood. We will protect these lands for you, but you need to move to the east side of the Belly River and we will watch this area. There is cattle coming that will be used to feed your people in terms of rations. We will situate them between the two rivers. So we will guard and we will place our post between the two rivers and guard that place. Some of our people refused to move, and again, the stories that they were forcefully removed and burned out, and in fact, some lost their lives because of the order to move them across into this side of the Belly River.

[172] Both Wilton Goodstriker and Mary First Rider testified that the land between the Kootenai and Belly Rivers was special to the Blood Tribe and used for ceremonies, horseracing, and the picking of medicinal and ceremonial herbs and grasses.

[173] Dr. Evans references a confidential memo penned by William Pearce [Pearce], Superintendent of Mines, to his superiors in the Department of the Interior. Dr. Evans writes that

Pearce "accused just about every single current or former civil servant on the Prairies of questionable land dealings" and among them was Crozier. About him, Pearce wrote the following:

> Is said to have a Ranche claim on the Belly River above Slide Out which is held in the name of one Jerry Potts, Interpreter to the Mounted Police and Indian Department at Macleod. It is stated that through the persons interested in the claim and their influence with the Blood Indians their Reservation is considerably changed from that which the Indians asked for and where it would have been in the public interest to locate it.

[174] Indeed, Crozier in his affidavit states that he has such a claim:

> That in the Season of 1881 I took up in what is known as "Stand Off Bottom" immediately north, or below Fred Watcher's Ranche (Dutch Fred) a claim of 320 acres extending north from Fred Watcher's claim towards the junction of the Kootenay & Belly Rivers, said claim fronted however on that latter River.

[175] I agree with Dr. Evans that Pearce has no first-hand knowledge of the facts he recites. However, the fact that Crozier claimed a large ranch in the area between the Kootenai and Belly Rivers in 1881, the very area where the Bloods were building houses and breaking land, and his later purchase of these houses, raises a question as to his motivation in moving them and whether they relocated as voluntarily as is suggested. The land between these rivers was valuable agricultural land, as evidenced by Pearce's statement and by another columnist in the *Macleod Gazette* who writes:

> There are now on the Belly and Kootenay rivers some nine or ten farms that have proved this to be one of the finest farming countries in the Northwest. Their yield in both grain and roots has been the best, take one year with another of any farms in the country.

[176] What is clear from all this is that at some point the Blood Tribe considered that their reserve included the land between the Belly and Kootenai Rivers. What is less clear is whether they "gave up" this land without complaint and whether there was ever an understanding that it was to form a part of their reserve.

e. The 1882 Survey of the Blood Reserve

[177] In December 1881, Dewdney became Lieutenant Governor of the North-West Territories, replacing Laird. On February 28, 1882, he sent the Minister of the Interior a map showing the reserves under Treaty 7. Dr. Evans is of the view that he likely prepared the map himself. Regrettably, it has not survived and there is no way of determining where he placed the southern boundary of the Blood Reserve.

[178] Dr. Evans also expresses his view that Dewdney may also have supplied a copy of this lost map to Nelson prior to his 1882 survey of the reserves. The Blood Tribe submits that Nelson was provided with the layout of the Blood Reserve prior to travelling to southern Alberta in 1882 to do his first survey. I think this is likely the case. The information or instructions Nelson was given does not weigh into this judgment, as Nelson's specific instructions have not survived. Nevertheless, I find it to be probable that his instructions were based either on the map Dewdney prepared, or on information as to the general size of the Blood Tribe. There is no record that the population of the Blood Tribe was provided to Nelson for the purposes of determining reserve size based on the TLE. However, given that government officials including Macdonald were of the opinion that the Blood were one-half of the population of the Blackfoot Confederacy, I find that if he was given information on the population, it would have reflected

that fact. Alternatively, and most likely in my view, he just would have been informed that the Blood reserve should be equal in size to the total of the Blackfoot and Peigan reserves.

[179] I base this, in part, on the fact that the evidence before me is that the 183.4 square mile Peigan reserve was surveyed by Nelson in September 1882, during a break from surveying the Blood reserve. Nelson then finished the Blood reserve and went to start surveying the Bow River Blackfoot reserve in October 1882. He says in his 1882 notes that they would get a tract 120 miles long (along the river) and 4 miles deep. Nelson who surveyed the reserve in 1883, says that it occupied an area of 470 square miles. Together these reserves as surveyed occupy 653.4 square miles, or an area roughly equal to the 650 square mile Blood reserve Nelson surveyed in 1882.

[180] The 1882 Treaty annuities were paid to the Blood Tribe in late September of that year and 3,542 members of the Blood Tribe were paid. If the reserve size were based on that number, then the reserve ought to have been 708.4 square miles in area or some 58.4 square miles more than the 1882 Survey.

[181] Galt on October 5, 1882, issued a report to the Indian Commissioner following his recent visit to the reserves in Treaty 7. He writes:

> I have the honor to submit the following Report on the condition of Indian Affairs in this Treaty, and would preface it by stating that I have visited the Blackfoot Reserve twice, the Sarcee Reserve once, the Piegan Reserve twice, the Blood Reserve once, and the Supply farms at Fish Creek and Picher Creek once each.[17]

[17] Note the reference to the supply farm at Fish Creek. As discussed earlier, this is a reference to the modern town of Mountain View.

[182] Galt reports with respect to the Blood reserve, “the survey of this Reserve was completed last summer.” In his report to the Superintendent of Indian Affairs dated December 29, 1882, Nelson writes that he arrived at Blackfoot Crossing on June 28, 1882, and that after doing the survey of the Sarcee reserve on July 24, 1882, he left for the Blood reserve to commence its survey. He commenced the survey at Whoop-up and made a survey of the St. Mary River to Lee’s Creek, he then did the southern boundary of which he says: “This east and west line lies about nine miles north of the International Boundary.” He appears to have then started the survey of the Belly River but left off for a time to survey the Peigan reserve, returning on September 26, 1882, to complete the survey of the Belly River on October 12, 1882. When Galt said that the survey was completed, he was likely referring to the southern boundary being done. As the other boundaries were rivers, natural geographic features, once the southern boundary was staked, it is fair to say that the reserve was laid out.

[183] Galt also writes in his report with respect to the Blood Reserve that “the number of Indians living on this Reserve is very large, there being no less than 3,600 souls in all.” This is greater than the number in Denny’s year-end report of December 31, 1882, where he records the Blood Tribe as being 3,400. Indian Agency Inspector Thomas P. Wadsworth [Wadsworth] who also visited the reserve in 1882 says that the Blood Tribe population in 1882 is 3,615. Another contemporaneous report has the population at 3,542, the number receiving annuity payments that year.

[184] Galt also reports that "One considerable result in the management of Indian Affairs in this Treaty has been attained, viz: the settlement of all of the Indians on their respective Reserves …" [emphasis in original].

[185] On November 22, 1882, after Nelson's first survey, Vankoughnet writes to Dewdney asking for a statement and sketches of the reserve lands so that their location may be communicated to the Department of the Interior "with a view to the prevention of the complications that might arise if any of the lands so set apart should be sold for settlement."

[186] If Dewdney responded, it is not in the record. Nelson, however, in his December 29, 1882, report to the Superintendent General of Indian Affairs writes: "the surveys are now as well advanced, that any complications likely to arise for a want of knowledge of their location and extent, will be avoided." He states that the Blood Reserve is 650.0 square miles and writes:

> The large reserve occupies a tract of country lying between, and bounded by, the St. Mary's and Belly rivers, from their junction below Whoop-up to an east and west line which forms its south boundary, as shown by the accompanying sketch marked (e). This east and west line lies about nine miles north of the International Boundary.[18]

f. Grazing Leases

[187] It is evident from many documents in the record that the Government was keen to have reserve land and non-reserve land surveyed in order, as Chief Inspector of Surveys E. Deville

[18] The sketch marked (e) in this report has not been found.

says, to know "what parts of the public lands are open for settlement." It was at this time that the Government was entering into grazing leases of public land in southern Alberta.

[188] Grazing leases were approved under Order-in-Council 1882-722 dated April 11, 1882. Three are relevant to this litigation.

[189] Lease No. 13, encompassing some 77,000 acres was granted to the York Grazing Company, being:

> That part west of Lee's Creek of Township two in Range twenty-six, Township two in Range twenty-seven; that part east of Belly River of Township two in Range twenty-eight; the west-half of Township one, Range twenty-seven, and Township one, Range twenty-eight, all west of the fourth meridian.

[190] Lease No. 17, encompassing some 66,000 acres was granted to John H. Parks [Parks], being:

> Township one, and part east of Lee's Creek of Township two, in Range twenty-six; that part West of the St. Mary's River of the northern one-third of Township one; also all west of said River of Township two in Range twenty-five, and the portion west of said River of Township two, Range twenty four, and the east half of Township one in Range twenty-seven, all West of the fourth meridian.

This lease was subsequently assigned to the North-West Land and Grazing Company [NWLGC], of which Parks was the President.

[191] Lease No. 18, encompassing some 100,000 acres was granted to Messrs. Shereton and others, being:

> Townships one and two, in Range twenty-three, and Township one, and the part east of St. Mary's River, of Township two, and of the south half of Township three, in Range twenty-four, and that part of the eastern one-third of Township one, east of said river, all west of the fourth meridian.

[192] The form of lease provided under this Order in Council, excluded from the land described in the lease land of the Hudson's Bay Company, lands set aside for education, trails, public roads, and highways. No specific reference was made to reserve lands; although it might have been suggested that it could be removed from the lease as the form of lease also exempted "such lands as may, under the provisions and conditions of these presents, be or become hereafter withdrawn from the operation thereof."

[193] Appendix G is a map attached to the Order in Council showing the location of two of these leases as identified by Ms. Robidoux, with the location of the 1882 Nelson southern boundary marked by me. As is evident from the map and description of the leases, the northern most boundaries of leases 13 and 17 were 12 miles north of the international border, which is also shown as the southern boundary of the Blood reserve on the map. The leases were authorized prior to any survey of the Blood reserve, and it is unclear how the southern boundary of the reserve on this map was determined, and by whom.

[194] It is also to be noted that lease 18 included "the south half of Township three, in Range twenty-four" which includes the south-east triangular corner of the Blood Tribe reserve as shown on the map, being a small area west of and adjacent to the St. Mary River. In my assessment, this fact becomes relevant when we ask why the southern border of the Blood reserve was moved from where the 1882 survey had it to where it was placed in the 1883 Survey.

[195] The grazing leases and the boundary of the Blood reserve become a significant issue in 1883. On May 1, 1883, Russell writes to Vankoughnet asking him "to inform this Department whether the north halves of Twp. Numbers Two in Ranges 25 and 26 and that portion West of St. Marys river of the North half of Township Two Range 24 all West of the Fourth Meridian in the District of Alberta are within an Indian Reserve." The fact that the 1882 Survey included only the northern halves of these Townships within the reserve appears to have been known to Russell in light of how he words this request. Vankoughnet responds on May 14, 1882, that the areas inquired about "are within an Indian Reserve." Consequently, on June 22, 1883, Russell wrote to the NWLGC informing it that "part of the Ranche leased to Mr. Parks has been included in an Indian Reserve and the land described in the lease will have to be amended." Ultimately, this was not required or done. The reserve's southern boundary was moved north. The reason why will be discussed in detail when exploring the TLE claim.

g. The 1883 Agreement and the 1883 Survey

[196] On June 28, 1883, Nelson reports that he met Dewdney at Fort Macleod "in accordance with previous arrangements" and "received further instructions respecting certain changes in the boundaries of the Blood Reserve" [emphasis added]. This establishes, to my satisfaction, that Dewdney was the person who made the decision that the southern boundary as set out in the 1882 Survey was to be moved to the north. A few days later on July 2, 1883, Dewdney, Nelson and others met with the Blood Tribe to execute an agreement surrendering their interest in the Bow River land described in Treaty 7 in exchange for a reserve near Fort Kipp, as they had requested. Appendix H is a transcript of this agreement [the 1883 Agreement].

[197] A notable feature of the 1883 Agreement is that it defines the southern boundary of the new Blood reserve using the latitudinal description 49º12′16″. I accept that no Blood member and indeed most non-Bloods would have any idea where, in real terms, this line is drawn. The 1883 Agreement indicates that it was signed in the presence of seven witnesses, including Denny, Crozier, and Nelson after "having been first explained" to the Blood by "David Mills, Blackfoot Interpreter." There is no record of how Mills would have understood in geographic terms what this latitudinal description meant, nor how he "explained" this to the Blood Tribe. While the other boundaries of the reserve are natural geographic features (rivers), that is not so with the southern boundary.

[198] Many years later, there is evidence that Mills never explained where that border was to be located. On February 2, 1888, Red Crow, White Calf, and other of the Bloods met with Pocklington and Mr. Springett of the Indian Department in the presence of both Potts and Mills. NWMP Superintendent P.R. Neale [Neale] took notes of the meeting. A wide-range of topics was discussed including the absence of Colonel Macleod, the killing of Indians, the scarcity of rations, and importantly for our purposes, the reserve and timber limit.

[199] Neale writes that Red Crow explained that the Blood had not wanted to make treaty at Blackfoot Crossing in 1877:

> Everyone knows what was said to us at the Blackfoot Crossing when the Treaty was made. We were satisfied. We did not at first want to make treaty. White men spoke and told us to say where we wanted Reserve. God made the mountains for us and put the timber there and we said at that time that we wanted the country where the mountains and the timber were. The Government said they would be good to us. We took what the Government offered us. At one time we owned all the country and kept other Indians

> out. Since the treaty they are all together again. We are all friends and God has taken all the game away.

White Calf then raised the issue of the reserve and timber limit with Pocklington:

> The whites are cutting the reserve off, and we know nothing of it. We claim between the two rivers (Belly and St. Marys) up to the mountains. Now where we get the timber is the white man's ground.

[200] At that, Pocklington asked, "Who interpreted when you were told where the boundaries of your Reserve were to be placed?" Red Crow said "Dave Mills" following which Neale writes that Pocklington spoke to Mills asking, "Did you explain for Mr. Nelson where the line was to run?" Neale writes that Mills then asks this of Red Crow who responds, "I never told him where to mark out the reserve." White Calf interjects saying, "Now we have a small reserve and the whites treat us badly."

[201] Towards the end of this discussion, Neale writes that Pocklington "answered them as to their complaints about the boundaries of the Blood Reserve and rations" but there is nothing written as to what that explanation was. As reproduced below, Pocklington provides his explanation when he writes about this meeting. Prior to leaving, Bull Horn comes back to the reserve, saying to Pocklington:

> We don't like our timber limit on the white man's ground. We want it on the reserve. Where they ran the line it is the same as the prairie, there is not much timber. The truth is that the Surveyors ran the lines without telling the Indians where they were going to put them. We will not cut any more timber on our reserve. If an Indian ran a line on the white man's reserve the white man would be angry. I ask you all three to help us.

[202] As is seen from the map at Appendix A, the Blood's timber limit is on the western bank of the Belly River, just south of the International Border. It lies outside the area of the 1882 Survey and the 1883 Survey, but is within the Big Claim area.

[203] This report strongly suggests that Pocklington, at least, was of the view that the boundaries of the reserve had been selected by Red Crow, who told Nelson. As we know, that boundary was already determined by Dewdney. David Mills does not interject in this discussion to inform Pocklington of this, so one must wonder whether he understood the boundary location. The report also provides evidence from Red Crow that he indicated the Blood wished its reserve to be "the country where the mountains and the timber were" and that this area would include the surveyed timber limit. This view is reflected in Pocklington's report of the same meeting.

[204] Pocklington's report of this meeting is dated February 4, 1888:

> That as regards the reserve, "Red Crow" said he claimed the whole of the country between the St. Marys and Belly rivers from Fort Kipp to the mountains. … As regards his Reserve, he wished to know why, when the survey was being made, he was not asked to go and see it as he would not have accepted any Reserve that did not run back to the mountains.
>
> …
>
> I endeavoured to explain to "Red Crow" that when the Treaty was made with the Indians they were to [illegible] so many acres of land for every family of five and that <u>when the Survey was made the amount of land given them was in accordance with the Treaty</u> however he did not seem satisfied and still said he claimed back to the mountains. I think it was a real pity that when the survey was made "Red Crow" had not been there. [emphasis added]

[205] These reports establish to my satisfaction that Red Crow always expected the reserve to run all the way to the mountains. They also establish that he was never consulted in a

meaningful way as to the location of the southern boundary as set out in the 1883 Agreement and marked by the 1883 Survey.

h. *1888 Tour of the Southern Boundary*

[206] It is evident from the record that the southern boundary was an issue in Ottawa prior to the February 1888 meeting. Nelson, on December 2, 1887, wrote to the Assistant Indian Commissioner Hayter Reed [Reed] responding to his query of December 22, 1886, about the reserve limits. Nelson writes that the Blood have no claim to the land south of the current reserve and he points to the description in the 1883 Agreement as confirmation.

[207] On February 8, 1888, Reed suggested that Nelson, who was soon to be in the area, mark the limits afresh if required and show Red Crow the reserve boundary to "disabuse" him of his notion that the Blood Tribe had a claim to the southern lands.

[208] Nelson writes in his report of November 12, 1888, that the visit to the south boundary was successful and that Red Crow was satisfied having seen the reserve limits. Canada relies heavily on this report to establish that Red Crow accepted the reserve as shown to him. The relevant portions of his report are reproduced below. It, coupled with his diary entries, is worth setting out in some detail. He writes in his report:

> On Monday, 20th [of August 1888] we set out for the South Blood camp to consult Red Crow. We held a council with him and the minor chiefs, at which we explained the object of our visit. Red Crow stated that he had demanded, at the treaty, the country between the Belly and St. Mary's Rivers, from Whoop-up to the mountains; and that he thought this territory had perhaps been given him. He said that Jerry Potts, who acted as interpreter, did not translate correctly; but here I was able to correct him, for I was

> present at the treaty, and heard Potts tell him that the south boundary of the reserve would run from Lee's Creek to Fish Creek. Besides I knew Potts was thoroughly acquainted with the topography of the country, and was competent to describe the boundaries in a manner the Indians could not well misunderstand. I also knew, and told Red Crow, that Potts had, subsequent to the survey, shown the line to Chief "One Spot," who said, at the treaty, that he wished to see it. "One Spot" was shown from the mound on the road near the south-east corner, the southern limit of the reserve, as nearly as could be described from the topographical features of the country; but he did not follow the surveyed line; nor is it likely he would have been much enlightened if he had. I found these Indians had no idea of an artificial boundary, such as a line of mounds, their method of defining a tract of land being by means of natural boundaries, such as rivers, lakes, and mountains; and they seemed unable to understand any other. Red Crow said he would visit the south boundary with us, and after seeing it would know what it was and where it was. Mr. Pocklington explained that the area of land allotted them, is in excess of what their number called for, according to the stipulations of the original treaty at the Blackfoot Crossing; and some of the land claimed by Red-Crow is in the United States. He also stated that, as he himself had never seen the lines, and Red-Crow was anxious to see them; that he, Red Crow, and the "Blackfoot Old Woman," would form the party which would accompany the surveyor. Whereupon Chief White-Calf said "Eagle-Rib (Mr. Pocklington's Indian name), you were not at the treaty, neither was I, and as we both wish to see the lines, it is fitting that we should go together." [emphasis added]

[209] The party consisting of Nelson, Pocklington, Mills, and the Blood Tribe representatives arrived at the "Mormon's colony, Lee's Creek." Nelson writes in his diary that on August 22, 1888, he "placed an iron post at the south east corner of the Blood Reserve" and says he began "to redefine the southern boundary which I pointed out to the chiefs." He continued redefining the southern boundary until Saturday August 25, 1888, when he writes in his diary that he placed an iron post on the south-west corner at the Belly River. Nelson writes that he then visited the Cochrane ranche and they returned to their tents long after dark.

[210] On Monday, August 27, 1888, Nelson writes in his diary: "Piloted by Chief Red Crow we moved campsite to Belly River" and Nelson pointed out the Blood timber limit to the chiefs and then he and Red Crow had a "long talk" at the Hill of the left bank of the Belly River at this Cañon [a canyon] and "Red Crow named the place Council Hill in memory of our visit." He says that the next morning the others left to return home and he went on to "define the boundaries of the timber limit by [unreadable] the northern boundary two miles west from the Cañon. Thence south." He appears to have been engaged in this survey until September 1st when he left for Whoop-up.

[211] It is notable that Nelson does not refer in his contemporaneous diary entries to any response from Red Crow while on the trip to see the southern boundary. However, in his report of November 12, 1888, made nearly three months later, he provides significant detail. He writes:

> On the 25th [of August] we completed the renewal of mounds and placed an iron post at the south-west corner on Belly River. The Indians carefully located the position of every post. Red Crow was asked if he was satisfied, and he answered in the affirmative. [emphasis added]

He describes that the party moved on to the timber limit "near the international boundary" and that they held a long talk:

> Red Crow then named the place Council Hill, and said the boundaries of his reserve as now fixed would never again be questioned. [emphasis added]

[212] Pocklington in a letter of August 30, 1888, reports on the trip and confirms that he explained to Red Crow that the reserve they were given was larger than the Blood Tribe was entitled to under the Treaty and that after being shown the southern boundary Red Crow "was

satisfied." Pocklington would not have had direct knowledge that the size of the reserve as laid out in the 1883 Survey was larger than that to which the Blood Tribe was entitled under the TLE as he only became Indian Agent in 1884.

i. Decision to Move the Southern Boundary

[213] Dr. Evans notes that a feature of the 1883 Agreement that is "poorly explained" is the rationale behind the new location of the southern boundary. The only explanation in the record comes from Nelson who, in his 1883 report writes that it was required "owing to the rapidly decreasing census of this tribe" and that the size of the reserve "required considerable reduction" [emphasis added]. Notwithstanding this explanation, which presumably was provided by Dewdney to Nelson, there is no evidence of the population figure used to determine this new southern boundary.

[214] There is some evidence in the record of a decrease in the population of the Blood Tribe at the end of the 1883 year. The *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1883*, shows the number of Bloods at 2,589 compared to 3,542 in 1882. These numbers reflect paid annuities in those years. However, the 1883 annuities were not paid until after the 1883 Survey, and after the 1883 Agreement. As such, this population information was not available to Dewdney when he instructed where the southern boundary was to be placed.

[215] The most generous interpretation of Dewdney's reduction in the reserve size based on population is that it was a "best guess" as to the population. For the reasons outlined herein, it is my view that there was no guess; rather, Dewdney took steps to ensure that the reserve's

southern boundary did not extend into the land Canada had leased. I find that the location of the southern boundary established by Dewdney was a deliberate decision, and had nothing to do with the TLE of the Blood Tribe under Treaty 7.

[216] The Plaintiffs submit, and I agree, that the grazing leases entered into by Canada had everything to do with the relocation of the southern boundary. The southern boundary established by the 1882 Survey runs through the middle of Range 2, cutting off the northern portion of Leases Nos. 13 and 17. The southern boundary established by the 1883 Agreement and 1883 Survey runs through about the midpoint of Range 3. This puts it north of Leases Nos. 13 and 17 by 2 to 3 miles. If the aim of Dewdney was, as I hold is most probable, to put the reserve beyond those leases, it is fair to ask why he did not locate the reserve's southern boundary as being the northern boundary of those leases. In my view, the answer to that is lease 18.

[217] Neither party addressed Lease No. 18; however, the Court cannot help but observe that it includes a small triangular section being the south-west part of Township 3 in Range 24. Had the southern boundary of the reserve been placed on the northern boundary of Leases Nos. 13 and 17, that small triangle of reserve land would be within the 100,000 acres leased to Messrs. Shereton and others under Lease No. 18. By moving the reserve's southern boundary north by approximately another 2 miles, the overlap between the reserve land and Lease No. 18 is avoided.

[218] I accept that there is no direct evidence that Dewdney had knowledge of the boundaries of Lease No. 18; however, the relocation of the southern boundary of the reserve to a location where it avoids the overlap, appears to me to be so significant, that I conclude that it was not done by mere chance. Dewdney had been a surveyor and with knowledge of the location of these leases, he would know where to locate the boundary. He provided the latitudinal description 49º12'16, in the 1888 Agreement. He would have known that in placing the reserve's southern boundary there, any overlap with the grazing leases would be avoided. Given those facts and that Dewdney had no revised population count to support a reduction in reserve size, the most probable explanation why the southern boundary of the reserve in 1883 was moved, and why it was moved to where it was, is that it was done to avoid interfering with the grazing leases, and I so find.

[219] This finding leaves open the questions of whether a reserve had been created prior to the 1883 Survey and 1883 Agreement, and what size reserve the Blood Tribe were entitled to under the TLE.

III. TREATY LAND ENTITLEMENT [TLE]

[220] I will first examine the claim of the Blood Tribe that its reserve, whether as laid out in 1882 or 1883, failed to comply with the TLE in Treaty 7 because each has less area than that to which the Blood Tribe was entitled to, given its population at the relevant time.

[221] The Plaintiffs submit that Canada's failure to provide the Blood Tribe with the reserve it promised under Treaty 7 constitutes both a breach of treaty and a breach of fiduciary duty, and

that a single set of facts may lead to more than a single cause of action: *Central & Eastern Trust Co v Rafuse*, [1986] 2 SCR 147.

[222] While a breach of treaty action is not the same as a breach of contract action, it is the action bearing the closest resemblance. Breach of fiduciary duty is an equitable claim.

[223] In my view, *Luscar Ltd v Pembina Resources Ltd*, 1994 ABCA 356 [*Luscar*] is instructive. The Alberta Court of Appeal held that there can be concurrent causes of action in equity and contract:

> By analogy, in a situation where contract and equity are applied to the same set of facts, the mere fact that the parties have dealt with the matter expressly in their contract does not necessarily mean they intended to exclude the right to sue in equity, if such an independent right exists. The parties should not be prohibited from seeking the appropriate remedy for the wrong that occurred. Conceptually, there is no reason an obligation could not give rise to an equitable cause of action as well as a contractual one. It depends on the characterization of the wrong. It is essential to determine whether there is an independent equitable obligation.

[224] Similar to the matter before me, *Luscar* involved the getting around a limitation period by arguing breach of trust in addition to breach of contract.

[225] I note that it is not unusual to plead both breach of treaty and breach of fiduciary duty in aboriginal litigation: see *Adam v Canada (Minister of Indian Affairs & Northern Development)*, 2000 ABQB 1017; *Horse Lake First Nation v R*, 2015 FC 1149; *Peepeekisis Band v Canada (Minister of Indian Affairs and Northern Development*), 2012 FC 915.

[226] Under the provisions of Treaty 7, the Blood Tribe was entitled to a reserve the size of which was determined by reference to its population. It was entitled to "one square mile for each family of five persons, or in that proportion for larger and smaller families." This manner of calculating the reserve size remained in effect even though the Blood Tribe surrendered its interest in the original reserve described in Treaty 7, in exchange for a reserve near Fort Kipp.

[227] The evidence before the Court is that the Blood Tribe has a close and reverential connection with its land. There is also evidence that the European concepts of mile and square mile were not know to it at the time Treaty 7 or later agreements were made. It is likely that it is for this reason that surveyors had a practice of taking the First Nations representatives on a tour of the reserve boundaries in order to acquaint them with their reserve. No such tour was conducted with the Blood Tribe until years after Canada says the reserve was created.

[228] Two questions arise relating to the TLE of the Blood Tribe. First, what is the relevant time for determining the population of the Blood Tribe for purposes of the TLE? Second, what was the population of the Blood Tribe at that time?

A. Date for Population Determination

[229] As will be discussed under the second question, the reports of the population of the Blood Tribe from the years before Treaty 7 to 1890 provide widely fluctuating numbers - from a low of 956 to a high of 3560. Each party accuses the other of selecting a time for determining the population that supports its own theory of the case.

[230] The Blood Tribe submits that the Court ought to follow the lead of the Saskatchewan Court of Appeal in *Lac La Ronge Indian Band v Canada*, 2001 SKCA 619 [*Lac La Ronge*] and find that the population is to be determined at the time of first survey or first census taken after the signing of the treaty. On the Plaintiffs' theory, one uses the annuity payments in 1881 (3,560) to determine the size of the reserve to be surveyed in 1882 (being a reserve of 712 square miles), and the annuity payments in 1882 (3,542) to determine the size of the reserve to be surveyed in 1883 (being a reserve of 708.4 square miles). Both result in a reserve larger than either that surveyed in 1882 (650 square miles) or 1883 (547.5 square miles).

[231] Canada submits that the population is to be determined not as of the date of first survey, but as at the date of the making of Treaty 7, i.e. September 22, 1877.

[232] The Blood Tribe submits that Canada cannot take that position because it failed to plead it and failed to put that proposition to any of the witnesses, contrary to the Rule in *Browne v Dunn*, (1893) 6 R 67 (HL). That Rule holds that if counsel intends to present evidence contradictory to a witness's testimony as part of his or her argument, he or she must put this version of events to the witness during cross-examination. It is a fairness rule. In my view, the date of population determination is a question for the Court based on its determination of the shared intentions of the parties at the time Treaty 7 was signed. It is irrelevant, in my view, what a witness may say, or counsel may plead. The Rule in *Browne v Dunn* has no application.

[233] The approach taken by the Saskatchewan Court of Appeal in *Lac La Ronge* is not appropriate. There the Court was considering Treaty 6 and the adhesion to it by the Band some

13 years later. Unlike here, Treaty 6 specifies the date the reserve is set aside as being when the Chief Superintendent of Indian Affairs "shall depute and send a suitable person to determine and set apart the reserves of each Band." No such direction is provided in Treaty 7 respecting the date of reserve creation. Furthermore, in that case, the contest was whether the population count was to be determined based on the population at the date of first survey or later. Here, the contest is between the date of treaty and the date of first survey.

[234] Unlike *Lac La Ronge*, here there is evidence that it was the intention of both Canada and the First Nations that the reserves were to be laid out quite soon after the treaty signing. Indeed, the fact that the reserve location, albeit later changed for the Blood Tribe, was described in Treaty 7 distinguishes the parties' intention from that of the parties to Treaty 6.

[235] Treaty 7 was entered into on September 22, 1877. Dr. Evans details in his report the various surveys of reserves after Treaty 7. William Ogilvie "established the boundaries of a reserve for the Blackfoot during the late summer and early fall of 1878." Dr. Evans describes that this reserve was "quite small at just under 118 square miles." The "final survey" of the Blackfoot Reserve was conducted by Nelson in July 1883 and his crew laid out a reserve of 470 square miles, which Dr. Evans notes is large enough for a Band with a membership of 2,350 people. I note that this is close to the number receiving annuity payments in 1882 (2,255) and 1883 (2,158), but less those receiving payments in 1881 (2,974). Nelson had laid out a reserve for the Peigan in 1882 of 181.4 square miles, being sufficient for a Band of some 905 persons. Again, I note that this is close to the number receiving annuity payments in 1882 (849) and 1883 (893), but again less than the number of those receiving payments in 1881 (1,012).

[236] There is every reason to believe that the Blood Reserve would also have been surveyed in the same period as the Blackfoot reserve surveyed by Ogilvie, had the Blood Tribe been agreeable to it being located at Blackfoot Crossing as stated in the treaty.

[237] At the time of Treaty 7, the buffalo herds were rapidly being depleted and there was an urgency on Canada's part to have land available for settlers who were making their way west. It was thus in both parties' interest to settle the reserve locations as soon as possible.

[238] For these reasons, I agree with Canada that the population of the Blood Tribe is to be determined for TLE purposes as at the date of the signing of Treaty 7. This brings us to the second question.

B. The Population of the Blood Tribe on September 22, 1877

[239] How many members of the Blood Tribe were there at the date of signing Treaty 7 for the purposes of TLE calculation?

[240] The Blood Tribe objects to the use of post July 2, 1883 population counts and paylists to challenge the veracity of the earlier annuity paylist figures. It says that there is a presumption of regularity as regards the earlier counts done by Canadian officials who had a duty to make the payments and to record the information, and to do both accurately. As they note, Canada has led no evidence of any irregularity regarding those payments. Rather, Canada relies on evidence of subsequent payments to suggest that the earlier figures must be wrong.

[241] Having considered the matter, it is my view, as discussed below, that the later population figures Canada wishes the Court to rely upon have limited evidentiary value as to the population of the Blood Tribe at the relevant time. Accordingly, it is unnecessary to rely on the purported doctrine of regularity as the Plaintiffs ask.

[242] As is seen from the preceding discussion, it appears that the population of the Peigan and Blackfoot for TLE purposes was based, or coincided with, the annuity payments made to them in 1882 and 1883.

[243] I agree with the submission of Canada that although the proper crystallization year in law is 1877, "there is no evidence that there was any real change to the Blood Tribe historical populations between the years 1877 and 1883."

[244] The Plaintiffs attempted in oral argument to offer facts (not in evidence) to suggest that the population of the Blood Tribe did go down from 1877 onwards; however, there is no evidence before the Court that supports their submission. There is also no evidence of a real change in the Peigan and Blackfoot tribe populations between the years 1877 and 1883.

[245] There is an abundance of evidence before the Court as to statements of the population of the Blood Tribe. From the making of Treaty 7 onwards, Canada paid annuities to members of each First Nation. Dr. Evans summarizes these payments in his Appendix 2, which (absent his sources and comments, and with the addition of the total column) is as follows:

Year	Blackfoot	Blood	Peigan	Total
1877	1,234	1,810	589	3633
1878	1,946	2,488	750	5184
1879	2,240	3,065	941	6246
1880	272	956	738	1966
1881	2,974	3,560	1,012	7546
1882	2,255	3,542	849	6646
1883	2,158	2,589	893	5640
1884	2,173	2,270	922	5365
1885	2,147	2,329	941	5417
1886	2,046	2,254	929	5229
1887	1,952	2,202	931	5085
1888	1,816	2,135	932	4883
1889	1,827	2,041	924	4792
1890	1,746	1,703	914	4363

[246] The remarkable decrease in the number of persons receiving the annuity in 1880 is explained by Dr. Carter to be the result of a concerted and “devious” action taken by Dewdney. She writes at page 44:

> Beginning in the fall of 1879, Dewdney also strove to save money for his employer by strongly urging the Blackfoot people including the Bloods to hunt buffalo south of the border. The next year the Blackfoot sent a messenger to Dewdney from Montana to ask if they should return to receive their annuity payments, and he advised them to remain with the buffalo. Dewdney boasted in a letter to Macdonald that "I consider their remaining away saved the Gov't $100,000 at least."

[247] As is evident from the chart, the Blood Tribe members did return to Canada from the US after 1880. The savings were thus short lived. On the other hand, this statement by Dewdney reveals that he was keen to save his employer money and even boasted of his accomplishment. This ought to be kept in mind when examining the reduction in numbers in 1883 and later years, which was done under Dewdney's supervision.

[248] Canada submits that the historical evidence shows that "there was a widespread and ongoing problem with fraud [of the Blood Tribe]." This, they submit, accounts for the high population counts in 1881. Both parties agree that the low numbers in 1880 are anomalous as the members of these First Nations were on a buffalo hunt in the US and many did not return for the annuity payments.

[249] In October 1882, Denny conducted the annuity payments for the Blackfoot and Peigan and he reduced the number receiving annuities; claiming he did so by reducing the incidents of fraud.

[250] No such steps were taken with the Blood until the September 1883 annuity payments. It is then that we see the number receiving annuities drop by just less than 30%. This is an extraordinary drop. What is more extraordinary and difficult to understand is that prior to the annuities being paid in September 1883, Nelson, who was present with Dewdney when the 1883 Agreement was signed, says that the southern boundary of the reserve had to be adjusted from the 1882 boundary "owing to the rapidly decreasing census of this tribe." Yet no census based on Treaty annuity payments had been taken or would be taken for another 2 months or more.

[251] As is discussed above, I have concluded that the southern boundary was moved northward by Dewdney to ensure that the grazing leases would not be adversely affected by the location of the Blood Reserve. While Dewdney may have suspected that the population receiving annuities in the fall of 1883 would be less than the previous year, he had no way of knowing what reduction, if any, would occur. Having already reduced the size of the reserve, he had a motive to ensure that annuities paid later that year were paid to a number that resulted in a reserve size he had predetermined.

[252] Canada submits that the Blood Tribe was satisfied with the 1883 annuity payments, as they never complained. However, as counsel for the Blood Tribe pointed out in reply, Calf Shirt of the Blood Tribe assisted Pocklington in this and Pocklington reports "Calf Shirt also deserves to have something done for him, as within the last two years he has secured the ill will of every Indian on the Reserve." There certainly was dissatisfaction in the reduction of those entitled to receive annuities.

[253] Data on those receiving annuities are not the sole evidence from Canada's records. Every year the Department published "Census Return of Resident and Nomadic Indians in the Dominion of Canada, By Provinces." In each of the years from 1877 to 1886, the Census shows more Treaty 7 Indians than the three tribes members who received the annuity. This is presumably because the census total for Treaty 7 includes the Sarcee and Stoney tribes as well at the three Confederacy tribes in Dr. Evans' annuity list. The census figures are as follows:

Year	Total Based on Annuities	Census Total
1877	3633	5050

1878	5184	4928
1879	6246	6159
1880	1966	7549
1881	7546	7789
1882	6646	8642
1883	5640	7681
1884	5365	6673
1885	5417	6415
1886	5229	6495

[254] Dr. Evans states that he does not know where these numbers came from, other than some appear to be grounded on the annuity paylist numbers. He suggests that they therefore are unreliable as a population indicator. Although the source does appear to be uncertain, one thing that is not is that Canada published these numbers in its official reports and would not likely have done so unless it was satisfied at the time that they were accurate. For that reason alone, I am of the view that it is appropriate to consider these figures and I reject Canada's suggestion that they are inaccurate. These figures provide evidence that in 1882 and 1883, when the surveys were done, the population of the Blackfoot Confederacy exceeded 7500 members.

[255] In addition, there is other evidence in the record as to the size of the Blood Tribe prior to the date of the 1883 Survey as follows:

- December 15, 1879, Dewdney writes in his report that since the Bloods are nearly half of the Blackfoot nation, it would be desirous to allow them to have an independent reserve and thus prevent centralization;[19]

- March 16, 1880, Vankoughnet writes that “The Blood Indians are said to number at least one-half of the Blackfeet Tribe”;[20]

- May 12, 1881, Wadsworth says that there are 2917 receiving rations on Blood "ration list" and number will likely increase in a few weeks to 3000;[21]

- May 30, 1881, Wadsworth says that there are 3146 receiving rations on Blood "ration list";[22]

- June 1881, Agent Macleod writes that during May and June the Blood Tribe began to return across the line and number went from 700 to 3500;[23]

- July 28, 1881, Agent Macleod says that the approximate number receiving rations is 3450;[24]

- August 1881, George Mercer Dawson of the Canadian Geological Survey passes through the area exploring for coal, and records the number of Blood as 3,600;[25]

[19] Letter from Dewdney to Vankoughnet Dated December 15, 1879.
[20] Letter from Vankoughnet to Superintendent-General of Indian Affairs dated March 16, 1880.
[21] Wadsworth to Dewdney, Report of May 12 1881.
[22] Wadsworth, May 30 1881 Report and Annual Report of the Department of Indian Affairs for the year ended 31st December 1881.
[23] Report from Indian Agent Macleod to Dewdney, 31 December 1881.
[24] Telegram from the Indian Commissioner’s Office, Winnipeg, to Vankoughnet, 28 July 1881.
[25] George Dawson Field Notebook, August 1881.

- October 31, 1881, Agent Macleod writes in his report that there are 3,640: this same number will appear in a chart in the December 31 Report;[26]

- October 12, 1882, Galt, who visited the reserve in the fall, writes that there are no less than 3,600 souls;[27]

- November 10, 1882, Denny writes that the "Tribe is the largest in the Agency, being over 3,400 Indians";[28]

- December 9, 1882, Wadsworth, who visited during the year, writes a report saying the population is 3,615;[29]

- December 15, 1882, the Annual Report records the population as 3,542 (likely drawn from annuity payments that year);[30]

- December 15, 1882, Dewdney writes that there are "3,500 Indians on the [Blood] Reserve";[31]

- December 31, 1882, Macdonald, Superintendent-General of Indian Affairs states that "The Bloods number 3,400;"[32]

[26] Report of Agent Macleod, 31 Oct 1881.
[27] Report from Assistant Indian Commissioner Galt to the Indian Commissioner, 5 October 1882.
[28] Letter from Denny to the Superintendent-General of Indian Affairs dated November 10, 1882.
[29] Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1882.
[30] Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1882.
[31] Letter from Dewdney to the Superintendent-General of Indian Affairs dated December 15, 1882, included in the Department's 1882 Annual Report.
[32] Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882.

- August 25, 1883, Reverend McLean estimates the Blood population at 3,000 in a letter to Reverend Wigram;[33]

[256] Dr. Evans' opinion is that the annuity numbers are inflated. By the 1888 payment, it's down to 4,883 total for the Confederacy, and the Blood Tribe count is down to 2,135. Dr. Evans thinks 1883 is a step in the right direction but he does not think it is correct:

> Treaty annuity paylists and associated correspondence suggest that the true population of the tribe at the time of the 1883 treaty and surrender was probably somewhere in the neighbourhood of 2,200 to 2,300. This would have entitled the tribe to a reserve of between 440 and 460 square miles or roughly 100 square miles less than the reserve that the tribe actually received because of the 1883 treaty and Dominion Lands Surveyor Nelson's subsequent relocation of the reserve's southern boundary. At 650 square miles, the reserve that Nelson initially laid out in 1882 was nearly fifty percent larger than the tribe's treaty entitlement and, in the author's opinion, the decision to reduce the size of the reserve to 547.5 square miles in 1883 represented a reasonable if, in hindsight, somewhat generous compromise given the state of the government's knowledge regarding the size of the Blood population.

[257] Dr. Evans is of the view that the Blood Tribe population at the time of signing the 1883 Agreement was between 2,200 and 2,300 members. Assuming the Blood Tribe accounted for one-half the Blackfoot Confederacy in Canada, this would entail that the population of the whole was between 4,400 and 4,600 persons. None of the figures of the Department at that time relating to annuity payments or census is nearly as small as that figure.

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[33] McLean to Wigram Letter.

[258] I prefer to rely on the numbers set out in the annuity paylists for two reasons. First, they are consistent with the estimates made by others at the time. This strongly suggests they are not in error as Canada submits and Dr. Evans says. Second, they are generally consistent with the view expressed by many at the time that the Blood Tribe was one-half of the Blackfoot Confederacy population. It is only with the 1883 number and later annuity payments that the percentage of Blood Tribe members falls to 45% or less of the total.

[259] For these reasons, I give Dr. Evans opinion about the "inflated" numbers prior to 1888, little weight.

[260] Dr. Evans also states in his conclusion that "Well-informed population estimates of the Blackfoot tribes dating from the early 1820s to the mid-1870s consistently identify the Peigan as the largest of the three tribes with about 40% of the total population while the remaining 60% was fairly evenly divided between the Blackfoot and the Blood." The evidence adduced at trial consistently placed the Blood Tribe in Canada as the largest of the three tribes and the Peigan as the smallest. Moreover, a number of sources speak to the Blood Tribe in Canada constituting about one-half of the Blackfoot Confederacy. Ultimately, it is the population in Canada that matters.

[261] Notwithstanding Dr. Evans speaking to the "inaccurate" annuity payments to the Blood in 1882 and 1883, in cross-examination he admitted that there were no irregularities in the 1881 paylist. Yet, the 1881 number is greater than either of the numbers in the 1882 and 1883 annuity paylist. Both he and Canada's discovery deponent agreed that the paylists were a *de facto*

census, and Dr. Evans agrees that they were "probably most powerful source for evaluating First Nations populations" for the purposes of TLE.

[262] For these reasons and because Dr. Evans' credibility was so seriously challenged on cross-examination, I give his estimate of Blood Tribe population little weight.

[263] The burden lies on the Blood Tribe to persuade me on the balance of probabilities that on September 22, 1877, its population was greater than 2,438, the TLE number equalling the 1883 Survey area.

[264] The population of the Blood Tribe at the time Treaty 7 was made is best determined based on the evidence of its population in and around that time. I find that the evidence of population based on annuity payments in 1877 and the three years thereafter, (1878-1881), is low and unreliable, as the Blood were changing from a nomadic lifestyle to living on the reserve. Many had not yet returned from the US.

[265] As noted earlier, Canada submits that the accurate population count for the Blood Tribe is reflected in annuity payments made in 1883, and specifically in later years. It submits that the evidence shows that there was widespread double dipping that was only addressed in 1883 and the later years. The evidence at trial is that Denny reduced the number receiving rations and annuity payments. In a letter dated February 27, 1883, he reports to the Acting Superintendent General of Indian Affairs that, "he had made a marked reduction in the number of Blood Indians to whom rations should be issued." Similarly, on July 10, 1883, he reports, "We have also made

a reduction in the number of Indians receiving rations on the Blood reserve, as I found, after much work in taking a correct census, that the number was greatly over estimated."

[266] Just as officials had a motive in reducing the number being paid annuities to accord with the reduction in the reserve, so too do officials have a motive in reducing the number receiving rations. I have concluded that this reduction in rations does not necessarily prove that the previous counts were inaccurate or as inaccurate as Canada submits, for a number of reasons.

[267] First, as Dr. Carter notes, 1883 was the beginning of tough economic times in Canada and the Government was looking to its officials to reduce costs wherever it could. On more than one occasion, report and letter writers note the significant cost to Canada of the rations being provided to the Blood Tribe and others. A similar cost is associated with the annuities to be paid. Every reduction is a saving to Canada. This may explain, in part, the eagerness of Denny to effect a reduction in the number receiving rations and annuities. An eagerness to effect reductions in order to please superiors might result in legitimate persons being cut off.

[268] Second, it is not evident from the record that one can conclude that the number of Blood in Canada equalled the number receiving rations.

[269] Third, it is not evident that all of the Blood remained in Canada at this time. Dr. Evans in his report references Denny, in his July 1883 report saying that the "Bloods were the principal Indians going across the line accompanied by the South Peigans in their raids." The documents indicate that these members south of the border would not be included in government counts.

Again, the record is replete with references to rations and annuities being cut from those who were travelling south of the border. However, just because they were south of Canada does not mean that they are not members of the Blood Tribe entitled to be counted for the purposes of the TLE. The Blood were, it must be remembered, a nomadic people and the evidence of the Elders makes it clear that the Canada/US border had no significance to them then, and has little today.

[270] It is also suggested that the 1882 and 1883 paylist number are inflated because a number of South Peigan Indians came from the United States to receive rations and annuities in Canada with the Blood. However, Pocklington and others note that there were intermarriages between the Blood and South Peigan. It may be that they were entitled to receive those. The numbers in later years were reduced when Pocklington and others gave them "neither grub nor welcome" resulting in them leaving Canada. The fact that people may have left Canada after having being poorly treated by government officials does not mean that these people were not entitled to be in Canada, nor that they were not part of the Blood Tribe at the time of Treaty 7.

[271] I find the population evidence from 1883 onwards to be suspect and not reflective of the true population of the Blood Tribe in 1877, when Treaty 7 was signed. As noted, above, Denny (and others) were keen to reduce numbers receiving rations and annuities. The reason for so doing was partly financial and partly to reflect well on his stewardship for his superiors' approval.

[272] Denny in particular had good reason to seek favour with Dewdney, and reports about him do lead one to question his integrity. Dr. Carter in her report notes that Denny had been

appointed Indian Agent by Dewdney in December 1881, after he was forced out of the NWMP for having an affair with another officer's wife. His conduct in many respects was seen by others to be questionable:

> Dewdney had confidence in Denny when others did not. Wadsworth accused Denny of "arrogance, ignorance, drinking, and womanizing," reporting that "His breath always smells strong enough of spirits to knock a horse down." Inspector Wadsworth had written to Dewdney warning him that: "Mr. Denny's career closed with the N.W. Mounted Police in a manner most discreditable to him, was believed to be caused by the foolishness of his youth". Furthermore he was "untruthful, sneaky, slothful, depraved towards women, tyrannical and without business capacity …". Denny informed Wadsworth that he enjoyed a favourable standing with Dewdney, and did not need to heed the Inspector's criticisms of him.

[273] Dr. Carter also describes Denny's relationship with Red Crow in a manner that suggests that he had reason to not favourably treat the members of the Blood Tribe:

> Denny spent two years as agent. He had a "cool and distant" relationship with Red Crow; according to Hugh Dempsey he "disagreed with the chief's broad powers and set out to undermine of [*sic*] circumvent them" and worked for the two years to "wrest control of the reserve from Red Crow."

[274] While there may well have been some instances of behaviour and conduct Canada and Dr. Evans characterize as "fraud" I am not convinced that it was of the magnitude they suggest. There is no serious reason to question the honesty of the members of the Blood Tribe as a whole; whereas, there are reasons to question the accuracy of the 1883 numbers generated by Denny.

[275] In my view, the best evidence of the population of the Blood Tribe in 1877 is found in the annuity payments made in 1881 and 1882, i.e. 3,560 and 3,542 members, and the reports of those

at the time (Galt, Denny, and Wadsworth), i.e. 3,600, 3,400, and 3,615 . On these figures, the Blood Tribe was entitled under the TLE to a reserve of between 680.0 to 723.0 square miles.

[276] The determination of the actual population of the Blood Tribe at 1877 for the purposes of TLE involves weighing competing factors, exercising judgment and ultimately arriving at a conclusion. I have assessed the often-conflicting evidence of population given over many years, considered the opinions of the experts, and the submissions of the parties.

[277] It is my judgment, based on the evidence, that on a balance of probabilities, there was a population of 3,550 members of the Blood Tribe at the date of Treaty 7 for the purposes of the TLE calculation. As such, under the treaty, the Blood Tribe was entitled to a reserve of 710 square miles.

IV. RESERVE CREATION

[278] The Plaintiffs submit that a reserve was created for them prior to July 2, 1883, the date when Canada and the Blood Tribe entered into the 1883 Agreement that "removed 102.5 square miles from the Blood Reserve." They submit that this land could not be removed from the reserve except in accordance with the surrender provisions of *The Indian Act, 1880*, which are as follows:

> 36. No reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Act, excepting that in cases of aged, sick and infirm Indians and widows or children left without a guardian, the Superintendent-General shall have the power to lease the lands to which they may be entitled for their support or benefit.

> 37. No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band or of any individual Indian, shall be valid or binding, except on the following conditions :—
>
> 1. The release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose according to their rules, and held in the presence of the Superintendent-General, or of an officer duly authorized to attend such council by the Governor in Council or by the Superintendent-General : Provided, that no Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near and is interested in the reserve in question.
>
> 2. The fact that such release or surrender has been assented to by the band at such council or meeting, shall be certified on oath before some judge of a superior, county or district court, or Stipendiary Magistrate, by the Superintendent-General, or by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men present thereat and entitled to vote, and when so certified as aforesaid shall be submitted to the Governor in Council for acceptance or refusal.

[279] There is no question that if a reserve for the Blood Tribe were created prior to July 2, 1883, the reduction in the size of that reserve in 1883 breached the provisions of *The Indian Act, 1880*, as no surrender was obtained.

[280] Additionally, the Plaintiffs submit that Canada breached its fiduciary duty in having them execute the 1883 Agreement, and it submits that it is invalid and not binding on the Blood Tribe. This submission will be addressed later.

[281] Canada, relying on the decision of the Saskatchewan Court of Appeal in *Lac La Ronge* at paragraphs 193 to 194, submits “for a reserve to be selected there must be an unqualified selection of the land as a reserve by the Crown.” Canada’s position appears to be that the 1883

Agreement contained the unqualified selection of the land for the Blood Reserve and it was created at that time and not before.

[282] The term “reserve” is defined in section 2, paragraph 6 of the *Indian Act, 1880*, as follows:

> The term "reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or 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 and other valuables thereon or therein.

This definition does not say anything about how a reserve is created other than that land is set apart by Her Majesty by way of a treaty “or otherwise” for the use of a Band of Indians.

[283] The leading authority on reserve creation, and a decision relied on by both parties, is *Ross River Dena Council Band v Canada*, 2002 SCC 54 [*Ross River*]. No treaty was involved in the *Ross River* case. The matter arose when a store in a small village in the Yukon sought a refund of tobacco tax. It claimed an exemption on the basis that the village was on a reserve. The Yukon Territory Supreme Court, [1998] 3 CNLR 284, agreed with the Band that the village was on a reserve. That finding was overturned on appeal to the Yukon Territory Court of Appeal, .(1999), 182 DLR (4th) 116, 1999 BCCA 750. The appeal to the Supreme Court of Canada was dismissed, the Court finding that although the land was set aside, there was no intention on the part of persons having authority to bind the Crown to create a reserve.

[284] Justice Lebel for the majority discusses the law of reserve creation at paragraph 67:

> Thus, in the Yukon Territory as well as elsewhere in Canada, there appears to be no single procedure for creating reserves, although an Order-in-Council has been the most common and undoubtedly best and clearest procedure used to create reserves. (See: *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654 (S.C.C.), at pp. 674-75; Woodward, *supra*, at pp. 233-37.) Whatever method is employed, the Crown must have had an intention to create a reserve. This intention must be possessed by Crown agents holding sufficient authority to bind the Crown. For example, this intention may be evidenced either by an exercise of executive authority such as an Order in Council, or on the basis of specific statutory provisions creating a particular reserve. Steps must be taken in order to set apart land. The setting apart must occur for the benefit of Indians. And, finally, the band concerned must have accepted the setting apart and must have started to make use of the lands so set apart. Hence, the process remains fact-sensitive. The evaluation of its legal effect turns on a very contextual and fact-driven analysis. Thus, this analysis must be performed on the basis of the record.

[285] Justice Lebel did not intend *Ross River* to be an exhaustive discussion of reserve creation. At paragraph 41, he commented:

> A word of caution is appropriate at the start of this review of the process of reserve creation. Some of the parties or interveners have attempted to broaden the scope of this case. They submit that it offers the opportunity for a definitive and exhaustive pronouncement by this Court on the legal requirements for creating a reserve under the *Indian Act*. Such an attempt, however interesting and challenging it may appear, would be both premature and detrimental to the proper development of the law in this area. Despite its significance, this appeal involves a discussion of the legal position and historical experience of the Yukon, not of historical and legal developments spanning almost four centuries and concerning every region of Canada.

[286] Notwithstanding these words of caution, the *Ross River* "test" has been used and applied without change by the Supreme Court of Canada in *Wewaykum Indian Band v Canada*, 2002 SCC 79 [*Wewaykum*], and *Williams Lake Indian Band v Canada*, 2018 SCC 4 [*Williams Lake*].

[287] Both parties to this action described the reserve creation test laid out by the Supreme Court of Canada in this trilogy of cases as comprising the following four factors:

1. The Crown must have an intention to create a reserve;

2. The intention must be possessed by Crown agents holding sufficient authority to bind the Crown;

3. Steps must be taken to set apart land and the setting apart must be for the benefit of the Indians; and

4. The Band concerned must have accepted the setting apart and must have started to make use of the lands set apart.

[288] The Saskatchewan Court of Appeal in *Lac La Ronge* at paragraph 207, also discussed the factors required to create a reserve:

> The trial judge found that there was no specific procedure or single process which alone can create a reserve. There are four essential elements for the creation of a reserve:
>
> > 1. the Crown must make a deliberate decision to create a reserve;
> >
> > 2. consultation with the Band;
> >
> > 3. there must be a clear demarcation of the land; and
> >
> > 4. there must be some manifestation by the Crown that the lands will constitute a reserve.

[289] The Plaintiffs submit that there is overlap between the tests; however, there are some key differences. The Supreme Court test requires that the Band accept and begin to use the land; a

factor not mentioned in *Lac La Ronge*. *Lac La Ronge* includes a requirement to consult before reserve creation; a factor not mentioned in the Supreme Court trilogy. The Supreme Court refers to *Lac La Ronge* in *Williams Lake* and *Wewaykum* for propositions related to a fiduciary duty, but it does not use its reserve creation discussion. Accordingly, I shall focus on the "test" outlined by the Supreme Court of Canada. Although I have found it unnecessary, if the consultation element referenced in *Lac La Ronge* were a factor that was required to be considered, I would have found that it was fulfilled when Red Crow was taken to the area by Agent Macleod and asked to identify where his tribe wished their reserve to be located.

A. Crown Intention

[290] The first element is whether the Crown has an intention to create a reserve. It is unclear from the jurisprudence whether the intention must be to create a *specific* reserve or whether a general intention is sufficient. Is it sufficient that the Plaintiffs establish that Canada had an intention to create a reserve in the vicinity of Fort Kipp, or must there be a specific intention regarding its borders? The Plaintiffs suggest that intention is met by showing that Canada intended to create a reserve for the Blood of a size that met the TLE formula. Canada submits that intention to create a reserve also requires the specific outline and size of the intended reserve. It says: "In order for the Court to find that Nelson's 1882 fieldwork created a reserve at law, the Plaintiffs must prove, contrary to all official instruments, that the Crown intended *that specific 1882 land outline and size, and no other outline and size*, to represent the boundaries of the Blood reserve." [italics in original]

[291] In *Ross River*, Justice LeBel observed at paragraph 50 that "the setting apart of a tract of land as a reserve implies both an action and an intention." With respect to intention, he observed that some legal acts performed by the Crown "are so definitive or conclusive that it is unnecessary to prove a subjective intent on the part of the Crown to effect a setting apart to create a reserve." Two examples of such legal Crown actions were stated to be the signing of a treaty, and the issuing of an Order-in-Council.

[292] Here, the Crown signed a treaty with the Blood Tribe and others on September 22, 1877. Prior to entering into that treaty, Commissioner Laird, who had been authorized by Canada to enter into the treaty, is reported to have told those assembled at Blackfoot Crossing that "[a] reserve of land will be set apart for yourselves and your cattle, upon which none shall be permitted to encroach; for every five persons one square mile shall be allotted on this reserve, on which they can cut trees and brush for firewood and other purposes." [emphasis added].[34] This statement is evidence of Canada's intention that coincident with the signing of the treaty, a reserve would be established.

[293] Moreover, Treaty 7 itself makes that intention clear as it states, "that Reserves shall be assigned them [i.e. the signatory First Nations] of sufficient area to allow one square mile for each family of five persons, or in that proportion for larger and smaller families, and that said Reserves shall be located as follows…" Although the general location of the Blood, Blackfoot, and Sarcee Reserves were described in Treaty 7, there had been no survey made at the date the treaty was signed. Nevertheless, in keeping with the observations of the Supreme Court of

[34] Morris, Alexander, *The Treaties of Canada with the Indians of Manitoba and The North-West Territories*, (Toronto: Belfords, Clarke & Co., 1880), pages 268-269.

Canada in *Ross River*, Treaty 7 is of such an authoritative nature that the intention of the Crown is implicit or presumed. Canada has led no evidence to suggest otherwise.

[294] In my view, that intention on Canada's part to create a reserve for the Blood Tribe was not extinguished by the subsequent events relating to the geographic relocation of the reserve to the Fort Kipp area. There is no evidence that from the signing of Treaty 7 onwards Canada had any intention other than to create a reserve for the Blood Tribe in keeping with the TLE formula.

[295] What did change was the geographic location where that intention would be fulfilled. In a memorandum to the Privy Council dated March 26, 1880, Macdonald advised that the Blood Tribe requested a separate reserve "in the vicinity of Fort Kipp" which the government viewed favourably. This memorandum resulted in Order in Council 565 dated March 26, 1880, which authorized Colonel Macleod and Dewdney to attend a Council of the Blackfeet Nation for their agreement that the Blood surrender their portion of the reserve location specified in Treaty 7 in exchange for "a Reserve near Fort Kipp being assigned to the Blood Indians, in accordance with their desire."

[296] The Blood Tribe agreed with this exchange of location, as is evidenced by the Red Crow Agreement. Canada admitted that as of the date of this agreement "Canada had reached an agreement with the Blood Tribe to provide them with a reserve on the Belly River in exchange for their agreement to give up their rights to a reserve on the Bow River."

[297] Again, in keeping with the observations of the Supreme Court of Canada in *Ross River*, the Order in Council of March 26, 1880, coupled with the subsequent events, is of such an authoritative nature that the intention of the Crown to create a reserve is implicit or presumed.

[298] To find otherwise would require a finding that Canada was disingenuous both when providing instructions to negotiate with the Blood and in entering into the Red Crow Agreement with the Blood Tribe to provide it with a reserve on the Belly River.

[299] It is my view that the intention to create a reserve need not be an intention to create a *specific* reserve with defined boundaries. The intention can be more general in nature with an understanding that specifics will be subsequently determined. It is sufficient that Canada had an intention to create a reserve near Fort Kipp that met the TLE formula. Canada's intention to create a reserve occurred long before the 1882 Survey.

B. The Intention Must Be Possessed by Authorized Crown Agents

[300] This factor is met. The intention to create the reserve is established by the Order-in-Council issued by the Governor-General on the advice of the Privy Council. Additionally, those who negotiated Treaty 7, and those who entered into the subsequent Red Crow Agreement, were acting on the express instructions of the Privy Council.

C. Steps to Set Apart Land for the Benefit of the Blood Tribe

[301] As with the rest of the reserve creation process, the third element, land being set apart, has been noted by the Supreme Court of Canada in *Ross River* at paragraph 37, to be very fact specific and based on the record.

[302] Canada submits that "the action … of reserve creation must be in relation to a specific tract of land, and not in relation to a general vicinity." I agree that the setting apart of land requires that the land be specified in some manner. The Plaintiffs do not take a contrary position. In this case, the agreement of the Crown and the Blood Tribe that "a Reserve near Fort Kipp [would be] assigned to the Blood Indians, in accordance with their desire" does not meet the degree of specificity required to be able to say that this agreement set apart land for the reserve. That is so because no one; not Canada, the Blood Tribe members, or settlers could determine whether any parcel of land "near Fort Kipp" was part of the reserve or not.

[303] Canada submits that the "setting aside" element of reserve creation requires a survey of the land that is to become the reserve and, relying on the evidence of Dr. Ballantyne, says that a survey is a process and "is not complete until it is approved." I am prepared to accept that surveys are not "official" until all the steps required in terms of validation and approval are met. However, I do not accept that one cannot set apart land without a survey.

[304] The 1883 Agreement, as an example, set apart a very specific parcel of land prior to it being surveyed by Nelson. That Agreement provides the following description of the reserve area:

> All that certain tract of land in the North West Territories, Canada, butted and bounded as follows: that is to say: Commencing on the

> North Bank of the St. Mary's river at a point in north latitude forty-nine degrees twelve minutes and sixteen seconds (49º 12' 16"); thence extending down the said bank of the said river to its junction with the Belly River, thence extending up the South bank of the latter river to a point thereon in the north latitude forty-nine degrees twelve minutes and sixteen seconds (49º 12' 16"), and thence easterly along a straight line to the place of beginning; excepting and reserving from out the same any portion of the North-East quarter of section number three, in Township number Eight, in range twenty-two, west of the fourth principal meridian, that may lie within the above mentioned boundaries; to have and to hold the same unto the use of the said Blood Indians forever.

[305] A less complex example of setting apart land absent a survey is fencing. The fencing in of a parcel of land sets it apart, even without a survey being done. In my opinion, Canada is taking an unreasonably technical approach to the question of how one sets apart land for a reserve. As the Supreme Court of Canada observed at paragraph 67 of *Ross River*, "there appears to be no single procedure for creating reserves."

[306] Canada and its experts characterize the 1882 Survey as "fieldwork" and "preliminary in nature" and thus not a setting apart of land as is required to establish a reserve. Canada was asked whether they could provide examples where a "preliminary" survey was subsequently adjusted by an order of magnitude we see between the 1882 Survey and the 1883 Survey: a reduction of 102.5 square miles or more than 15 percent of the initial area surveyed. Canada pointed to two other surveys done relating to Treaty 7:

> At the time, it was common practice for potential boundaries of future Indian reserves to be shifted after some initial survey fieldwork was done. For example, a preliminary survey containing approximately 118 square miles for a Blackfoot Reserve was done by surveyor William Ogilvie in 1878. A final survey of the Blackfoot Reserve containing an area of 470 square miles was conducted immediately after Chief Crowfoot and other Blackfoot chiefs signed an Amended Treaty on June 20, 1883 and

> surrendered their claim to the original Treaty 7 reserve. Similarly, a preliminary survey for a Peigan Reserve containing approximately 80 square miles was completed by surveyor A.P. Patrick in 1879. In September 1882, Nelson resurveyed the Peigan Reserve to enlarge [it to 181.4 square miles] and reorient it.

[307] There is a significant and material difference between these examples, where the size of the reserve was increased, and that before the Court where it was reduced. In both the Blackfoot and Peigan examples, it is consistent with the evidence to find that the "initial surveys" set apart land for these reserves, thus meeting one of the reserve creation factors. If all of the other conditions were met, their reserves were created at that time. However, there is no legal impediment to Canada later increasing the size of these reserves, and especially if it does so to meet the TLE. There is a significant legal impediment to reducing the size of a reserve that has been created - a surrender of the land to be taken from the reserve must be given by the Band. This is the case even if the reserve initially created, through mistake or inadvertence, was made larger than the TLE required. There is nothing in *The Indian Act, 1880*, that would permit Canada unilaterally to reduce the size of such a reserve once it has been created. One might argue that if the initial reserve was not intended by Canada to be a reserve, then it could unilaterally correct its mistake without engaging *The Indian Act, 1880*; however, even if that were so, I find that Canada did intend to create the reserve that was created by the 1882 Survey.

[308] Another difference between these examples and the case before this Court, is that there is no evidence in the record why the Blackfoot and Peigan reserves were first surveyed as they were, nor why they were later changed. Dr. Evans says, with respect to the Blackfoot reserve, that it appeared to have been essentially "a precautionary measure or a means of reassuring Head Chiefs Crowfoot and Old Sun that their interest in the shared reserve would be protected for the

reserve he established was quite small at just under 118 square miles, and it only covered the westernmost portion of the shared or joint reserve which is where the Blackfoot eventually settled (the area around Blackfoot Crossing and west of there to the western limit of the joint reserve)." He does not cite any contemporaneous document to support this view. Dr. Evans also offers no explanation for the size and configuration of the first surveyed Peigan reserve. Dr. Evans' speculation is not evidence.

[309] In assessing whether there has been a setting apart of the land that is to become the reserve, it is relevant to consider why setting apart is a factor in the first place. In my assessment, it is relevant because it is important that the Band, Canada, and others know where persons other than the members of the Band may settle, and where only Band members may settle. This is consistent with the description of a reserve given by Laird to the First Nation members assembled at Blackfoot Crossing to make treaty.

[310] The record is replete with examples where, following the 1882 Survey, Canadian officials had no difficulty in determining where the Blood Indian Reserve was located. They may not have been able to do so with the precision provided in the 1883 Agreement, but they recognized the Blood reserve created by the 1882 Survey.

[311] Canada submitted that the mere use of the word "reserve" does not entail that a reserve had been created:

> Just because officials referred to the area as a reserve, we can't infer that they intended to be referring to final boundaries, and this is easily shown when we look at the correspondence even before Nelson's 1882 fieldwork.

I agree with Canada that the term "reserve" was used prior to Nelson's fieldwork to refer generally to the Blood Tribe living near Fort Kipp; however, in each of the following examples, the officials in my view are speaking of a reserve that had been created because it had final boundaries and this is evident from the context.

[312] In his report to Dewdney, dated October 5, 1882, Galt states that he has "visited the Blackfoot Reserve twice, The Sarcee Reserve once, the Piegan Reserve twice, the Blood Reserve once, and the Supply Farms at Fish Creek and Pincher Creek once each." I think it relevant that it is only with respect to the Blood Reserve that he mentions a survey having been done. He writes:

> The survey of this Reserve was completed last summer. These Indians have been living on their Reserve pretty steadily since last Fall. [emphasis added]

It is also relevant that he speaks of "the survey" and not of "the preliminary" survey being done in 1882. Further, it is relevant that he speaks of the survey having been "completed." With the survey in hand, Galt was in a position to determine its boundaries and the area over which the Blood Tribe had the full and only right to be occupiers.

[313] In the *Annual Report of the Department of Indian Affairs for the Year ended 31st December 1882*, Dewdney appended to his report the report of Denny who spoke to the surveying of reserves:

> The Bloods and Blackfeet have been anxious to have their reserves laid out. This has now been done as far as the Bloods, Piegans, Sarcees and Stoneys are concerned. The Blackfoot Reserve is as yet unsettled, and the longer it is delayed, the more difficult it will be to settle, as no release has yet been taken from the Blackfoot

> tribe, of the portion of the reserve that would have fallen to the Bloods and Sarcees had the Government not given them reserves elsewhere. [emphasis added]

[314] Like Galt, Denny is here describing a final survey of the Blood and Peigan reserves done in 1882 by Nelson. It is of some interest that he notes that the survey of the Blackfoot reserve following the withdrawal of the Blood and Sarcee from the Treaty 7 location has not yet been done. Again, as in the case of Galt, there is no suggestion that the survey of the Blood Reserve is less than adequate to enable Denny and others to know where its boundaries are.

[315] On June 14, 1883, in a letter to Dewdney, Vankoughnet approved the buy-out from Mr. Cochrane of his land and improvements which were "afterward allotted as a Reserve to the Blood Indians:"

> In reply to your letter of the 29th Ultimo[35], I beg to inform you that the Superintendent General has approved of the recommendation made by the late Assistant Indian Commissioner for the North West Territories, that Mr. Cochrane be paid $850.00 in consideration of the land taken up by him within the tract afterwards allotted as a Reserve to the Blood Indians, as well as for the improvements and buildings made and erected by him thereon, also that $400.00 in addition to the above be paid in consideration of Mr. Cochrane being obliged to break up his home.
>
> The Superintendent General thinks that this act of grace may be extended to Mr. Cochrane inasmuch he went into possession before the tract occupied by him was included in an Indian Reserve.

[316] Again, I note that the boundaries of the Blood reserve had been established with sufficient particularity for two senior Canadian government officials to determine that Mr.

[35] Last month: abbreviation for *ultimo mense*.

Cochrane's ranch was located on the reserve, and to authorize the expenditure of public funds to purchase it.

[317] When asked whether the recently issued grazing leases occupied any part of the Blood reserve, Vankoughnet had no difficulty informing Russell on May 14, 1883, that they did:

> In reply to your letter of the 1st Instant; I have the honor to inform you that the north halves of Townships numbers 2 in Ranges 25 and 26, and the portion West of St. Mary's River of the North half of Township No. 2, Range 24, all west of the 4th principal meridian, in the District of Alberta, are within an Indian Reserve.

[318] Vankoughnet repeated this information in a letter to the Deputy Minister of the Interior dated November 17, 1883, about 3 months after Nelson did the 1883 Survey:

> I have the honor to acknowledge the receipt of your letter of the 12th Ultimo from your Department, asking whether the North halves of Townships No. 2 in Ranges 25 and 26, and that portion West of St. Marys River of the North half of Township No 2, Range 24, all West of the 4th Principal Meridian, are to be included in the Indian Reserve in that locality; and to inform you that Mr. Nelson D.L.S. who surveyed the Reserve stated verbally that the Reserve does contain the land above described, but the Returns of survey of the Reserve referred to have not yet been received.

[319] Even the surveyor, Nelson, following his 1882 Survey was of the view that the land of the Blood reserve set apart was well-defined as he writes in his report dated December 29, 1882:

> I am happy to have the honor of reporting that the surveys are now so well advanced, that any complications likely to arise for a want of knowledge of their location and extent, will be avoided.
>
> The following list shows what has been done:-
>
> | | |
> |---|---|
> | Indian Head Reserves | 220.0 sq. miles. |
> | Muskow-peetung's Band | 58.8 " |
> | Sarcee Reserve | 110.0 " |

Blood	"	650.0	"
Piegan	"	183.4	"
Grazing	"	95.0	"

[320] This report shows that, as at the year-end 1882, Nelson had no idea that the southern boundary of the Blood reserve he surveyed might not be proper.

[321] It is also telling and significant that the government of Canada published at least two maps at this time that clearly delineated the southern boundary of the Blood reserve to be that established by Nelson in the 1882 Survey.[36]

[322] Canada responds, referencing the report of Dr. Ballantyne, that "maps are not authoritative as to the existence and location of boundaries; survey plans are."

[323] Concerning the use and nature of maps versus surveys, Dr. Ballantyne states:

> A map is a good servant but a poor master (for showing parcel boundaries). Rather, survey plans show parcel boundaries. In the 1875-91 period, maps and survey plans served two different purposes. The maps produced in the course of this litigation were typically small-scale images of large areas (e.g. western Canada) whose purpose was to assist settlers, reduce conflict/overlap between Reserve and Township surveyors, illustrate the enormity of Canada, encourage investment and socio-cultural development, and assert sovereignty. Maps were compiled from many sources and contained much information on topography, landforms, locations, distances and proposed uses. They resulted from and

[36] Dr. Carter writes at page 59 of her report: "Two official maps showing this reserve were issued by the federal government subsequent to Nelson's survey. The first was issued by the government in February of 1883 was titled "North-West Territories of the Dominion of Canada Map of the Part of the Districts of Assiniboia and Alberta Shewing Dominion Land Surveys to 31 Dec., 1882. This was published by the authority of Minister of the Interior J.A. Macdonald, and Lindsay Russell. A second map "Dominion of Canada, General Map of Part of the North-West Territories including the Province of Manitoba Shewing Dominion Lands Surveys to 31 Dec., 1882 was published by order of Minister of the Interior John A. Macdonald. The map contained "additions and corrections to 15 March, 1883."

> guided Crown and railway exploration and policy; they were not definitive as to parcels or boundaries.

[324] I accept that no court would resolve litigation concerning an ownership dispute between two neighbours based on a map one drew: it would look at the official registered survey. However, that does not mean the map has no use or value. A map drawn by one neighbour 40 years earlier may be evidence that the other was considered to occupy (own) the land, thus establishing adverse possession. Maps have a value and a map drawn by a party may be used against its interests.

[325] In this case, I find that the two maps in question are evidence of the view of Canada's Department of the Interior, which included Indian Affairs, as to the "rough" border of the Blood reserve.

[326] For these reasons, I find that with the 1882 Survey, the lands contained therein were set apart for the Blood Tribe Reserve.

D. The Band Must Accept the Setting Apart

[327] The Supreme Court of Canada in *Ross River* at paragraph 67 states that "the band concerned must have accepted the setting apart and must have started to make use of the lands so set apart."

[328] The Plaintiffs say that using part of the land set apart is sufficient to have accepted the setting apart. Canada submits that in order to accept the setting apart, the Band would need to be aware of the specifics of the area set apart. In brief, it would have to know the exact boundaries of its reserve.

[329] The Plaintiffs rely on jurisprudence relating to property to support its position. They say that as a matter of property law, possession of any part of a parcel constitutes possession of the entire parcel citing, *Bentley v Peppard Estate* (1903), 33 SCR 444, 1903 CanLII 69 (SCC), at paragraph 4:

> But where a person in good faith under a written instrument from one purporting to be the proprietor, enters into blackacre—a definite territorial area—his actual occupancy of a part—no matter how small—in the absence of actual adverse occupancy by another, gives him a constructive possession of blackacre as a whole. He has it, as the phrase is, under "colour of title."

[330] However, rules that apply to property do not necessarily apply to reserves or land reserved for First Nations. In *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85 at paragraph 43, the Supreme Court commented:

> First, it is clear that traditional principles of the common law relating to property may not be helpful in the context of aboriginal interests in land: *St. Mary's Indian Band*, *supra*. Courts must "go beyond the usual restrictions imposed by the common law", in order to give effect to the true purpose of dealings relating to reserve land: see *Blueberry River Indian Band*, supra, at para. 7, per Gonthier J.

[331] A similar remark is made in *Wewaykum*, at paragraph 43, that when dealing with Indian reserves, form should not trump substance:

> Our Court has on several occasions emphasized that in dealing with the Indian interest in reserves, "we must ensure that form not trump substance" (*St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657, at para. 16) or allow the true intention of the parties to be frustrated by "technical" rules embodied in the common law (*Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, at para. 6).

[332] The challenge for the Plaintiffs in this case is that the Blood Tribe takes the position that it has never accepted the reserve as laid out in either the 1882 Survey or the 1883 Survey. It lays claim to the "Big Claim" as being the area to which it was entitled. They make this assertion in their written memorandum, as follows:

> The Blood Tribe claims that the lands between the St. Mary and Kootenay (Waterton) Rivers, to the mountains and to the International Boundary (the "Big Claim lands") were reserved for them and it was never the Blood Tribe's understanding or intent that the Big Claim lands were given up at the time of Treaty.

In light of this, can it be said that the Blood Tribe has "accepted the setting apart and … started to make use of the lands" as laid down in *Ross River*?

[333] I find that the position advanced by the Blood Tribe that it is and always has been entitled to the Big Claim land, does not mean that it has not accepted and made use of the land set apart in the 1882 Survey. If the advancement of the Big Claim by the Blood Tribe entails that it had not accepted the land set apart in the 1882 Survey, then one would also have to conclude that it equally did not accept the land set aside in the 1883 Survey, or that they have ever accepted <u>any</u> land set aside. This would result in a conclusion that there is no Blood Tribe reserve created at law. That is not a position either party takes, and it is not supported by the evidence.

[334] There is evidence of significant numbers of Blood Tribe members settling on the future reserve following the 1880 Red Crow Agreement as to its general location. Wadsworth in his 1881 year-end report summarizes his visit to the Blood Tribe on May 21, 1881:

> I found a large number of Indians congregated, the ration list showing 3,146 souls, two-thirds of this number being fresh arrivals from across the line where they had followed the buffalo two years ago.

[335] In his year-end report for 1882, Macdonald writes:

> The Bloods number 3,400. They did a large amount of work during the year; planted their own potatoes, fenced their fields, and did some of the ploughing with their own horses. They have been divided into several communities, and live in separate villages. Their lands are well fenced, although wood for the purpose is not abundant. These Indians are beginning to occupy separate locations on the reserves. They raised a large quantity (about 200,000 lbs.) of potatoes, also turnips, oats and some barley.

[336] I agree with the submission of the Plaintiffs that "The extensive occupation and use of the Blood Reserve by the Band members during the relevant time frame from October 1880 to July 2, 1883 is beyond dispute."

[337] I do not accept Canada's submission that a Band has not accepted a setting apart unless it has occupied or used every part of the area. First, the reserve had only just been surveyed and the Blood Tribe members were just settling into their new homes: it would be unreasonable to expect that they would be making use of hundreds of square miles of prairie so soon after surveying, especially considering that they were still learning how to grow crops. Second, the reserve as promised by the TLE in Treaty 7 was intended by Canada to be large enough to accommodate future growth of the Blood Tribe. Morris reports that at Treaty 7, Laird told those

assembled: "[W]e wish to give you as much or more land than you need."[37] Given this, it is not surprising that not all of the land would need to be in use by the current generation. Third, the leadership of the Blood Tribe had not been taken to see the boundaries of the reserve and might not know with certainty where they were. It is not clear what the Blood Tribe knew about the 1882 survey and it is not surprising that their efforts were focused on their existing settlements, which were all farther north of the southern boundary.

[338] What is clear however is that the Blood Tribe was aware of and had accepted the general location of their reserve, which was then set aside by Canada when it did the 1882 Survey. Requiring the Blood Tribe to be aware of the specific boundaries of the reserve or make use of all of the land would be to ignore the Supreme Court's caution and allow form to trump substance.

[339] For these reasons, I find that the Blood Tribe accepted the setting aside of the reserve lands marked by the 1882 Survey.

E. Conclusion

[340] Having found that all of the four *Ross River* factors are met, I find that a reserve for the Blood Tribe was created prior to July 2, 1883. The reserve that was set apart for them is that laid out by the 1882 Survey. It could not be reduced in size without obtaining a surrender from the Blood Tribe.

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[37] Morris, page 205.

[341] There is no suggestion from Canada that the 1883 Agreement constitutes a surrender. It does not. First, it does not state that the Blood Tribe is surrendering any land. Second, there was no process of surrender done as required by *The Indian Act, 1880*. Third, neither the 1883 Agreement nor the account of it records that Canada ever informed the Blood Tribe that its reserve was being reduced. The Blood Tribe at that date had not been taken to see the boundaries established by the 1882 reserve, and there is no evidence that they were informed that the boundaries were being reduced, or what magnitude that reduction was.

[342] The Blood Tribe made a submission that the 1883 Agreement is unconscionable, oppressive, and exploitative and to that extent is a nullity. In light of the findings I make below, this submission does not need to be addressed.

V. THE BIG CLAIM

[343] The Big Claim of the Blood Tribe and its basis is set out in paragraphs 13 to 15 of their Amended Statement of Claim, as follows:

> On or about September 25, 1880 an agreement was reached between the Blood Tribe and the Defendant as to the location and extent of the new Reserve.
>
> The Plaintiffs state, and the fact is, that the agreement was that the new Reserve would be between the Kootenay (now the Waterton) River, and the St. Mary's River to Chief Mountain and the International Border at the 49th parallel. This land is all located in what is now known as the Province of Alberta.
>
> The Plaintiffs state, and the fact is, that a Reserve was lawfully established for the Blood Tribe in 1880 in accordance with the natural boundaries as agreed to on or about September 25, 1880.

[344] In *The Annual Report of the Department of Indian Affairs for the Year ended 31st December 1880*, Dewdney reports that complying with the March 1880 Order in Council authorizing him and Colonel Macleod to meet with the Blood Tribe and "endeavour to make a satisfactory arrangement" regarding a new reserve location, they met at Fort Macleod in September 1880:

> On arriving at Fort Macleod, I found a large portion of the Blood, awaiting my arrival, for the purpose of hearing what determination the Government had come to in regard to that matter …. I informed the Blood Chief that if he would give me a release of all his interest in the reserve situated at the Blackfoot Crossing, provided the Government would give him a reserve at the point he indicated, I would send an instructor with him and his band to the spot selected by himself where he could build houses and prepare some ground for next season and that I would recommend on my arrival below that a reserve would be given to him at that point.

[345] At this meeting between Red Crow and Dewdney, the Red Crow Agreement, witnessed by Agent Macleod and the agency clerk Percy G.H. Robinson, was entered into. It provides that the Blood give up all rights to the land described in Treaty 7, "provided the Government will grant us a Reserve on the Belly River in the neighbourhood of the Mouth of the Kootenai River."

[346] The Blood Tribe submits that the Red Crow Agreement is a treaty, and that it understood, based on Dewdney's assurance, that the Blood Tribe would be given a reserve at the point where Red Crow indicated. That point, as described by the Elders in the oral history evidence above, is the land between the Kootenai and Belly Rivers from Fort Kipp to the mountains.

[347] The Blood Tribe submits that this treaty must be interpreted in a manner most favourable to it and any ambiguity resolved in its favour. Canada submits that the Red Crow Agreement is not a treaty:

> Plaintiffs incorrectly assert that the 1880 agreement was a treaty. The document itself is not called a treaty. The historical documents do not refer to it as a treaty. The document described only the general location that the Blood Tribe desired for their Reserve and did not specify particular boundaries. Further, only Red Crow signed the document. None of the experts, including the Plaintiffs' experts, suggest that the document was a treaty. In fact, Ms. Holmes refers to the document as the "Red Crow Agreement" and Dr. Carter refers to it as "a document."

[348] I agree with Canada that this document has few if any of the indicia of a First Nations Treaty. There is no evidence of the formality or solemnization that we see at Blackfoot Crossing when Treaty 7 was negotiated and concluded. There was no pipe ceremony, something the Elders said was a part of any treaty alliance agreement.

[349] Although the Supreme Court of Canada in *Sioui* at page 1035 observed, "we should adopt a broad and generous interpretation of what constitutes a treaty," it also observed that not every agreement between Canada and a First Nation is a treaty. It noted in particular that one ought to look to the common understanding of the parties as to the nature of the undertaking contained in the document at the time it was executed. In my view, the common understanding was that this was an agreement by the Blood Tribe to forego rights it had in Treaty 7.

[350] Entering into the Red Crow Agreement was authorized by Canada in Order in Council 565, dated March 26, 1880. It provides in relevant part that Dewdney and Colonel Macleod are to attend a council of the Blackfoot nation "for the purposes and to submit a proposition to them

to surrender such portion of the Reserve allotted to them under Treaty stipulations as would be the proper share of the Blood Band, were that Band to settle upon the said Reserve, with a view to a Reserve near Fort Kipp being assigned to the Blood Indians, in accordance with their desire."[38]

[351] The Red Crow Agreement reflects this release and promise:

> I – "MeKasto" or "Red Crow" Head Chief of the Blood Indians, on behalf and with the consent of the Blood Indians included in the said Treaty do hereby give up all our rights, titles, and privileges whatsoever to the lands included in the said Treaty, provided the Government will grant us a Reserve on the Belly River in the neighbourhood of the Mouth of the Kootenai River.

[352] The Red Crow Agreement is not a treaty. It is exactly what it says, a conditional release of treaty land.

[353] Even if I were to find that the Red Crow agreement is a treaty, I would not find that any reserve in the order of the Big Claim was created by it or by subsequent events. Indeed, subsequent events point to there never being any intention on the part of Canada or the Blood Tribe to establish a reserve in the nature of the Big Claim.

[38] The Plaintiffs make much of the phrase "in accordance with their desire" suggesting that this means in accordance with the scope and size of reserve they desire. I do not read it as such. Rather, it means that the reserve, in accordance with their stated desire, will be near Fort Kipp. In my view, it cannot be read to mean that the Blood Tribe is entitled to a reserve of a size it desires ignoring the TLE in Treaty 7.

[354] First, I note that the Big Claim would result in a reserve that would be very much larger than the TLE set out in Treaty 7. There is no evidence or suggestion why Canada would be willing to ignore the TLE that it had put in the treaty only three years earlier.

[355] Second, I am unable to find that sufficient of the four *Lac La Ronge* factors relating to reserve creation have been met with respect to the Big Claim land.

[356] I accept that both Canada and the Blood Tribe intended to create a reserve in the general area of the Big Claim. Canada did create such a reserve, in 1882 as I have found, or in 1883 as Canada admits. I further accept that Dewdney and Colonel Macleod had sufficient authority to bind the Crown.

[357] However, there is no evidence that Canada or the Blood Tribe took any steps to set apart land of an area equal to the Big Claim. Specifically, there is no evidence that Canada ever set apart the land between the Belly River and the Kootenai River and in fact, there is evidence that members of the Blood Tribe were removed from that area in 1881 because Canada said it was not part of their reserve. There is no evidence that Canada ever set apart the land south to the international boundary as a reserve for the Blood Tribe.

[358] I must conclude on the balance of probabilities that the Big Claim is not made out.

VI. BREACH OF FIDUCIARY DUTY

[359] The Plaintiffs submit that they have proved that Canada breached its fiduciary duty to the Blood Tribe. The breaches they allege all occurred after the Red Crow Agreement of September 1880, wherein the parties agreed that the Blood Tribe would have a reserve "near Fort Kipp." The conduct of Canada that they allege constitutes breaches of Canada's duty to the Blood Tribe are the following:

a. Canada failed to *"protect the cognizable interest in the lands 'between the rivers to the mountains' under the TLE in the Red Crow Agreement;"*

b. Canada entered into grazing leases with third parties *"within the lands subject to a cognizable interest;"*

c. Canada set the boundaries of the reserve in the 1883 Agreement contrary to the TLE in Treaty 7, and misled the Blood Tribe about the arrangements made on July 2, 1883;

d. Canada covered up its conduct in (a) to (c) and led the Blood Tribe to believe that it received more land than it was entitled to receive under the TLE; and

e. The Minister of Indian Affairs and Northern Development following the ICC denied that the Blood Tribe has a valid claim.

A. Canada's Duty to First Nations

[360] Aboriginal or Indian title to land is a legal right derived from the fact that they historically occupied and possessed their tribal lands.

[361] As in this instance, many Bands negotiated treaties with the Crown, under which they surrendered their title to their ancestral lands in exchange for the benefits the Crown agreed to provide. When a reserve is created under Treaty for a Band, title in the land does not pass to the Band; rather, the Crown continues to hold the fee simple: *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, 130 DLR (4th) 193 at para 34 [*Blueberry River*]. This does not mean that the Crown can do whatever it wants with reserve land. As Justice Dickson observed in *Guerin v Canada*, [1984] 2 SCR 335 at 376, 13 DLR (4th) [*Guerin*], Canada has an equitable obligation to deal with the land for the benefit of the First Nation:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.

[362] In *Guerin*, the Supreme Court of Canada also observed that even prior to the creation of a reserve, a fiduciary relationship between the Crown and the First Nation may arise. As noted by the Supreme Court in *Wewakyum* at para 86, prior to reserve creation, the Crown's "duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries."

[363] The scope of that fiduciary duty is then enlarged after the creation of a reserve:

> Once a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation.

At paragraph 100, when discussing protection from exploitation, Justice Binnie stated that "ordinary diligence must be used by the Crown to avoid invasion or destruction of a band's quasi-property interest [in a reserve] by an exploitative bargain with third parties or, indeed, exploitation by the Crown itself." [emphasis added]

[364] Justice Binnie also observed at paragraph 86 that the "content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected." In that regard, I note that no Canadian case has been cited by the parties where it has been found that the interest of an aboriginal people in its reserve is other than of the highest importance.

[365] In addition to these duties, this Court has also found that the Crown has a duty to consult with a First Nation in matters involving its land. In *Fairford First Nation v Canada (Attorney General)* (1998), [1999] 2 FC 48, 156 FTR 1 (FCTD) [*Fairford*] at paragraphs 198 to 199, Justice Rothstein considered the Crown's particular fiduciary obligation to consult, citing Chief Justice Lamer in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*] at paragraph 168:

> This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an

> aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands. [emphasis added]

[366] Based on these authorities, I find that Canada had the following fiduciary duties to the Blood Tribe as a consequence of entering into Treaty 7 as amended by the Red Crow Agreement:

a. A duty to provide a reserve for the Blood Tribe in keeping with the provisions of Treaty 7, as amended by the Red Crow Agreement;
b. A duty of loyalty and good faith to the Blood Tribe in the discharge of its mandate;
c. A duty to provide full disclosure and to consult with the Blood Tribe with respect to its reserve lands; and
d. A duty to protect and preserve the Blood Tribe's proprietary interest in the reserve from exploitation.

[367] These are very broad fiduciary duties. The following will discuss whether Canada met its duties in relation to specific conduct. The Plaintiffs raised a number of specific complaints about Canada's conduct. I prefer to address the question of Canada's breach of fiduciary duty with an

eye to the two principal claims of the Blood Tribe: (1) The failure to implement the TLE in the Treaty, and (2) the taking away of the lands included in the 1882 Survey.

[368] The Blood Tribe also alleges a breach of fiduciary duty related to the Big Claim; however, as I have found that the Big Claim has not been proven on the balance of probabilities, it cannot be concluded that Canada breached its duty to the Blood Tribe in that respect.

B. Duty to Implement the Treaty

[369] Canada has a duty to fulfill its treaty promises with honour and integrity. This was recently well put by Justice Hennessy in *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 [*Restoule*] at paragraphs 3 and 538:

> The principle of the honour of the Crown and the doctrine of fiduciary duty impose on the Crown the obligation to diligently implement the Treaties' promise to achieve their purpose (*i.e. of reflecting the value of the territories in the annuities*) and other related justiciable duties.
>
> …
>
> The honour of the Crown requires that the Crown fulfil their treaty promises with honour, diligence, and integrity. The duty of honour also includes a duty to interpret and implement the Treaties purposively and in a liberal or generous manner.

[370] In implementing Treaty 7, as amended by the Red Crow Agreement, as explained in *Delgamuukw*, Canada had a duty to consult with the Blood Tribe regarding the location of its reserve. Canada did so. The record establishes that Canada consulted with the Blood Tribe and the earliest indication that Canada became aware that it might claim an interest in a greater area appears to have been in 1888. I am not persuaded that more detailed consultation with the Band

than was had prior to the laying out of the reserve in the 1882 Survey would have disclosed that the Blood Tribe asserted such an interest. Moreover, it is clear that even if it had, the Big Claim area claimed far exceeds the TLE formula, even on the population count I have found. For these reasons, I find no breach of the duty to consult when implementing the Treaty as amended.

[371] Canada, having promised the Blood Tribe a reserve equal to one square mile for each family of five, first had to ascertain the population of the Blood Tribe. I accept that this was not an easy task as the Blood were a nomadic people at that time and were actively involved in the buffalo hunt.

[372] The challenge of ascertaining population likely accounts for the fact, as testified by the experts, that Canada typically used the count of those receiving Treaty annuities as the *de facto* census of a Band. It probably also accounts, as the experts testified, that usually reserves were laid out slightly larger than required based on that *de facto* count to permit some margin of error.

[373] There is no evidence how Canada arrived at the 650 square mile reserve created by the 1882 Survey. It appears to be based on a Blood Tribe population of 3250. Absent evidence as to how Canada arrived at the population figure it appears to have used, and given my finding that the actual population was 3550, I conclude that Canada failed to fulfill its treaty obligation to provide a reserve equal to the TLE.

C. Canada's Duty to the Blood Tribe After the Reserve Was Created

[374] I have found that the Blood reserve was created by the 1882 Survey. It set apart a 650 square mile area. Canada then had a duty to protect and preserve that reserve. I find that Canada failed in that duty.

[375] First, in April 1882, Canada leased part of the reserve as defined by the 1882 Survey to third parties under grazing leases.

[376] After leasing the land, it was only in May 1883 that Canada made inquiries to ascertain whether there was an overlap between the reserve and the leased land and it then discovered that there was. Canada then took appropriate steps to inform the lessees that the description of the leased lands would have to be amended. However, the descriptions were not amended.

[377] What did happen, as is outlined earlier, is that the Canadian officials from the Indian Department took steps to move the southern boundary of the reserve so that no overlap with the leased land would exist. This was done without ever informing the Blood Tribe - a breach of Canada's duty. This was done without any consultation with the Blood Tribe - a breach of Canada's duty. It was also done without obtaining any surrender from the Band - a breach of Canada's duty. It was also done without replacing the land taken with other land, thus it was also in breach of the TLE formula – a breach of Canada's duty. In short, Canada failed to meet its fiduciary duty to the Blood Tribe and acted dishonourably by putting the interests of the white leaseholders ahead of the Blood Tribe's interests in the land, which it was to preserve and protect.

[378] I further find that Canada breached its duty to the Blood Tribe in 1888 when its officials told Red Crow and the others that the reserve as laid out by the 1883 Survey gave them a larger reserve than they were entitled to under the terms of Treaty 7. First, that statement was wrong based on the population count determined herein. Second, there is no evidence that Pocklington, who made that statement, had made any inquiry to ascertain its truth, or had any direct knowledge that it was accurate. Third, by making the statement, Canada effectively led the Blood Tribe to put aside any thought that it was entitled to more. That, in part, explains the delay in raising the claim that the Blood Reserve is not as large as it should be.

[379] For these reasons, I find that the Blood Tribe, on the balance of probabilities, has proven that Canada breached its fiduciary duty to the Band in implementing Treaty 7, and in dealing with the Band subsequent to the creation of the Blood reserve.

VII. LIMITATIONS DEFENCE

[380] Canada pleads statutory limitations periods and the equitable limitations of laches, acquiescence, election, delay, waiver, and estoppel. I will first analyze Canada's defence based on the Acts incorporated by subsection 39(1) of the *Federal Courts Act*; namely the *Crown Liability Act*, *The Limitation of Actions Act, 1935*, SA 1935, c 8 [*The Limitation of Actions Act, 1935*], *The Limitation of Actions Act,* RSA 1970, c 209 [*The Limitation of Actions Act,* 1970], and the *Limitation of Actions Act,* RSA 1980, c L-15 [*Limitation of Actions Act*, 1980]. I will then consider the equitable defences Canada has raised in its Amended Statement of Defence.

A. Application of the *Crown Liability Act*

[381] Canada submitted in oral argument that the *Crown Liability Act* extinguishes the Plaintiffs' ability to bring a claim against the Crown. Subsection 24(1) of this Act states:

> No proceedings shall be taken against the Crown under this Act in respect to any act, omission, transaction, matter or thing that occurred or existed before the 14th day of May 1953.

[382] Canada submits that because the events relevant to this proceeding occurred prior to 1953, the breach of fiduciary duty, and breach of treaty claims are time-barred. The Blood Tribe submits in reply that the *Crown Liability Act* has no application to this claim because it only creates the right to bring actions against the Crown for tort. The right to bring an action against the Crown for breach of fiduciary duty exists independent of this Act.

[383] I agree with the Blood Tribe that the *Crown Liability Act* has no application to this action. Subsection 24(1) expressly states that the limitations only apply to actions "proceedings taken against the Crown under this Act" [emphasis added]. A review of this Act shows that proceedings may be brought under it with regards to tort, but there is no mention of fiduciary duty, breach of treaty, or any catch-all provision. I agree with the Blood Tribe that the ability to bring an action against the Crown for breach of fiduciary duty arises independent of this statute: see, for example *Guerin* at paragraphs 94 to 105. The same is true of breach of treaty, which is discussed below.

B. Application of Provincial Limitation Acts to Treaty and Aboriginal Rights

[384] The Blood Tribe submits that provincial limitations legislation does not apply to its claim relating to the reserve created by the 1882 Survey, or to its claim that the TLE was not fulfilled, or to the Big Claim.

[385] With respect to the reserve created by the 1882 survey, the Blood Tribe says that "a provincial limitation statute cannot deprive the Bloods of 'lands reserved for Indians' once a reserve is created." With respect to the TLE claim, it says that "a provincial limitation statute cannot extinguish a treaty right" and it says that the TLE is a treaty right.

[386] Its submission is that limiting these claims would affect "Lands reserved for the Indians" which falls under the Federal Government's jurisdiction under subsection 91(24) of the *Constitution Act, 1867*, 30 & 31 Victoria, c 3 (UK).

[387] Provincial limitations laws apply by virtue of subsection 39(1) of the *Federal Courts Act*, RSC 1985, c F-7:

> Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceeding in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

[388] Canada submits that the argument being advanced by the Blood Tribe has previously been considered and rejected by this and higher courts. Justice Russell in *Samson Indian Nation v Canada*, 2015 FC 836 [*Samson*] at paragraphs 111 to 113 recently addressed it. Relying on the decisions of the Supreme Court of Canada in *Wewaykum* and *Canada (Attorney General) v Lameman*, 2008 SCC 14 (*sub nom Papaschase*) [*Lameman*], he held at paragraph 112 that

"limitations legislation as well as the principles of laches and acquiescence, are applicable to claims against Canada where the rights at stake are constitutionally-protected treaty and Aboriginal rights." His judgment was affirmed on appeal[39] and an application for leave to appeal to the Supreme Court of Canada was dismissed.[40]

[389] The Blood Tribe says that its submission is not foreclosed by these previous decisions. They are distinguishable from this action in that they dealt with *in personam* claims and the plaintiffs were not seeking actual land or compensation in lieu. Here, the Blood Tribe says, it is advancing an *in rem* claim to reserve lands.

[390] The Plaintiffs also submit that section 88 of the *Indian Act* supports their position that the land was not intended to be affected by provincial limitations. While it provides that laws of general application in force in a province are applicable to Indians, it contains no reference to such laws applying to reserves or lands reserved for Indians. They say that these subjects are specifically excluded.

[391] Canada submits that the Plaintiffs' claims are actually *in personam* as they are requesting damages. It cites *Blood Band v Canadian Pacific Railway*, 2017 ABQB 292 for the proposition that the difference between *in rem* and *in personam* is a matter of substance, not form. Canada directed the Court to the Amended Statement of Claim where the Plaintiffs ask for compensation and general damages. Moreover, while it concedes that the Blood Tribe also asks for land, it says that the Blood Tribe does not ask for a specific property.

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[39] *Samson Indian Nation and Band v Canada*, 2016 FCA 223.
[40] *Ermineskin Indian Band and Nation v* Canada, 37280 (9 March 2017).

[392] I reject the submission of the Blood Tribe that provincial limitations legislation can have no application to the claims in this action for at least two reasons.

[393] First, as is explained by the Supreme Court of Canada in *Blueberry River* at paragraph 104 and *Wewaykum* at paragraph 108, in raising a limitations defence set out in provincial legislation, a defendant is not applying provincial limitations statutes *per se*. Section 39 of the *Federal Courts Act* operates to incorporate into federal law the provincial limitations period in place in the province where the cause of action arose. Although it may appear to apply provincial law, Canada's defence applies federal law. This is clearly stated by the Supreme Court of Canada in *Wewaykum* at paragraph 116:

> Parliament is entitled to adopt, in the exercise of its exclusive legislative power, the legislation of another jurisdictional body, as it may from time to time exist: *Coughlin v. Ontario Highway Transport Board*, 1968 CanLII 2 (SCC), [1968] S.C.R. 569; *Attorney General for Ontario v. Scott*, 1955 CanLII 16 (SCC), [1956] S.C.R. 137. This is precisely what Parliament did when it enacted what is now s. 39(1) of the *Federal Court Act*.

Consequently, the Blood Tribe's interpretation of Section 88 has no application because it is federal and not provincial law that is acting on the reserves and lands reserved for Indians.

[394] Second, there is a fundamental flaw in the Plaintiffs' submission that the limitations legislation deprives it of reserve land or extinguishes a treaty right. Limitations and prescriptions do no such thing; rather, they provide that a proceeding in respect of a claim to reserve land or a treaty right must be initiated within a certain period after the discovery of the claim. The inability later to pursue the claim is because of the inaction of the plaintiff. A substantial

difference exists between a law that extinguishes a right and one that limits when that right can be enforced against another.

[395] This point was effectively made by Justice Russell in *Samson* at paragraph 129:

> Samson's second argument is that the application of a limitation period effectively expunges or infringes constitutionally-enshrined Aboriginal and treaty rights. In my view, Samson is simply asking the Court to ignore clear authorities that tell us that limitation periods do not expunge rights, they bar remedies based upon those rights. As *Chippewas,* above, makes clear, the seeking of a remedy is not an Aboriginal or treaty right, and limitations periods merely bar the remedy. Samson ignores the line of cases that makes a distinction between substantive and procedural law in the context of limitations and relies upon *Tolofson* , above, a conflict of law case, for the motion now before the Court where we have an established line of authority on point, where the Supreme Court of Canada has told us that limitation periods do apply to this kind of case.

[396] The Blood Tribe also submits that the recent Supreme Court of Canada decision *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 [*Manitoba Métis*] stands for the proposition that the principles of reconciliation can weigh against application of any limitations legislation. I understand its submission to be that a trial judge has a discretion to waive limitation periods in Indigenous law matters to allow for reconciliation.

[397] In response, Canada submits that this action is distinguishable from *Manitoba Métis* because the Blood Tribe is not seeking declaratory relief. Although the pleadings ask for orders declaring that there has been a breach of fiduciary duty, Canada says that "the use of the word 'declaring' does not make the request in this instance a declaration." Canada submits that the pleadings, in substance, are seeking the remedy of compensation.

[398] I do not read *Manitoba Métis* to stand for any general proposition that I have discretion to waive limitations. The Supreme Court of Canada specifically acknowledged at paragraph 138 that its decision did not change the previous law with respect to the application of limitations legislation:

> We agree, as the Court of Appeal held, that the limitation applies to Aboriginal claims for breach of fiduciary duty with respect to the administration of Aboriginal property: *Wewaykum*, at para. 121, and *Papaschase Indian Band No. 136 v. Canada (Attorney General)* , 2008 SCC 14, [2008]1 S.C.R. 372 (S.C.C.), at para. 13.

[399] *Manitoba Métis* dealt with a failure by the government to implement a provision of the *Manitoba Act*, a Constitutional document, and a request for a declaration. As Chief Justice McLachlin and Justice Karakatsanis explained, there was no claim for damages, land, or personal relief: rather, the declaration sought was to assist in extra-judicial negotiations. *Manitoba Métis* dealt with a very different matter than that before this Court in this action. I am of the view it does not stand for the proposition that limitations may be waived by a trial judge in a claim where the plaintiff seeks land, or damages in lieu.

[400] In conclusion, I reject the Plaintiffs submission that it is unconstitutional to incorporate provincial law into federal law using Section 39 of the *Federal Courts Act*.

C. The Relevant Provincial Limitations Laws

[401] At the time when this action was commenced, the place that had the most substantial connection to the causes of action was the Treaty 7 lands of the Blood Tribe. Those lands are

now in the province of Alberta, and Canada says that this action is time-barred by virtue of *The Limitations Act 2000*, and its precursors.

[402] The Plaintiffs submit that one cannot apply Alberta limitations statutes to a claim that arose in the North-West Territories.[41] They submit that *The Alberta Act*, 1905, 4-5 Edw VII, c 3 (Canada) [*Alberta Act*] does not provide Alberta with the authority to pass laws applicable to events prior to the creation of the province on September 5, 1905. They say that section 10 of the *Alberta Act* restricts the law making power to apply to matters "so far as they are capable of being exercised after the coming into force of this Act in relation to the government of the said province" [emphasis is the Plaintiffs']. They say that the *Alberta Act* never provided the province of Alberta with authority to pass laws that would be applicable to events arising prior to September 5, 1905, in the North-West Territories. In their submission, the *Alberta Act* forms part of the *Constitution Act, 1982* via Section 53 and the Schedule, and thus any law that conflicts with it would be unconstitutional and of no force or effect. Because of this, they say that the correct limitations law is that of the present Northwest Territories because this is where the cause of action arose: *Tolofson v Jensen*, [1994] 3 SCR 1022, 120 DLR (4th) 289. The Blood Tribe says that Canada has not pleaded any Northwest Territories limitations statute, and as a result, it cannot rely on a limitations defence.

[403] I agree with Canada's submission on the applicability of the Alberta legislation. When Section 10 of the *Alberta Act* is viewed in its entirety, its purpose is not as suggested by the Plaintiffs; rather, it is to transfer the powers from the Lieutenant Governor of the North-West

[41] The North-West Territories was renamed the Northwest Territories in the Revised Statutes of Canada of 1906.

Territories to the Lieutenant Governor of Alberta. It does not limit Alberta's ability to put in place a limitations statute. That section reads as follows:

> All powers, authorities and functions which under any law were before the coming into force of this Act vested in or exercisable by the Lieutenant Governor of the North-west Territories, with the advice, or with the advice and consent, of the Executive Council thereof, or in conjunction with that Council or with any member or members thereof, or by the said Lieutenant Governor individually, shall, so far as they are capable of being exercised after the coming into force of this Act in relation to the government of the said province, be vested in and shall or may be exercised by the Lieutenant Governor of the said province, with the advice or with the advice and consent of, or in conjunction with, the Executive Council of the said province or any member or members thereof, or by the Lieutenant Governor individually, as the case requires, subject nevertheless to be abolished or altered by the Legislature of the said province.

[404] Canada submits, and I agree, that section 16 of the *Alberta Act* is the relevant provision. It explains that Alberta inherited the laws and courts of the North-West Territory and has the ability to change them:

> All laws and all orders and regulations made thereunder, so far as they are not inconsistent with anything contained in this Act, or as to which this Act contains no provision intended as a substitute therefor, and all courts of civil and criminal jurisdiction, and all commissions, powers, authorities and functions, and all officers and functionaries, judicial, administrative and ministerial, existing immediately before the coming into force of this Act in the territory hereby established as the province of Alberta, shall continue in the said province as this Act and *The Saskatchewan Act* had not been passed; subject, nevertheless, except with respect to such as are enacted by or existing under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the said province, according to the authority of the Parliament, or of the said Legislature: Provided that all powers, authorities and functions which, under any law, order or regulation were, before the coming into force of this Act, vested in or exercisable by any public officer or functionary of the North-west Territories shall be vested in and

> exercisable in and for the said province by like public officers and functionaries of the said province when appointed by competent authority.

[405] The situation here parallels that in *R v Lefebvre*, [1987] 1 WWR 481, 41 DLR (4th) 311, (ABCA), which examined whether a section from the *North-West Territories Act* allowing trials to be held in English or French remained in force. The Alberta Court of Appeal found that Section 16 of the *Alberta Act* kept the existing laws in force, but then the province subsequently altered them. Here, Alberta inherited the laws of the North-West Territories, including the Ordinances relating to limitation of actions[42] and was free to, and did, change them.

[406] This continuity can also be seen from inspecting Alberta's different limitations legislation. In 1922, Alberta passed *The Limitation of Actions Act*, RSA 1922, c-90, which incorporated an English limitations Act related to real property passed in 1874. It had transition provisions in section 3 which explained that it "shall deemed to have been in force in the Province and in the North-West Territories since the passing thereof [1874]." The 1935 Act, *The Limitation of Actions Act, 1935*, specifically repealed and replaced the 1922 Act, which was in turn repealed and replaced, up until *The Limitation of Actions Act*, 1970.

[407] In my view, Section 16 of the *Alberta Act* allowed Alberta's Legislature to alter the law as it was in the North-West Territories by introducing its own limitations legislation. As a result, *The Limitation of Actions Act*, 1970, is not unconstitutional and is applicable to this current matter, which arose within the geographical boundaries outlined in Section 2 of the *Alberta Act*.

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[42] *An Ordinance Respecting Limitations of Actions in Certain Cases*, RSNWT 1898, c 31, *The Trustee Ordinance*, 1903, Sess 2 c 11.

[408] Had I found that Alberta lacked the authority to enact limitations applicable to the North-West Territories, I would have accepted Canada's alternate submission that section 39 of the *Federal Courts Act* applies. The relevant part of section 39 reads that "a proceeding in the Court in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose." As the North-West Territories is not a province, the cause of action arose "otherwise than in a province" and is subject to a six-year limitations period: see *R v Karl Mueller Const Ltd*, [1989] 3 FC 626, 29 FTR 1 (TD) at paragraph 55 which dealt with the predecessor to section 39.

[409] For these reasons, I find that the relevant provincial laws are those of Alberta.

D. Alberta Limitations Act

[410] The Plaintiffs commenced this action on January 10, 1980. At that time, the limitations legislation in force in Alberta was *The Limitation of Actions Act*, 1970. Even though the events giving rise to this action occurred well prior to that Act, and indeed as we have seen prior to the creation of the province of Alberta, that Act applied by virtue of section 3 which provides: "The provisions of this Act apply to all causes of action whenever arising" [emphasis added].

[411] The sections of *The Limitation of Actions Act*, 1970 relevant to this proceeding are paragraphs e and g of subsection 5(1):

> 5 (1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:
>
> […]

> (e) actions grounded on accident, mistake or other equitable ground of relief not hereinbefore specifically dealt with, within six years from the discovery of the cause of action
>
> […]
>
> (g) any other action not in this Act or any other Act specifically provided for, within six years after the cause of action therein arose.

[412] I agree with Canada that all of the causes of action advanced by the Blood Tribe fall within these provisions. Breach of fiduciary duty is an equitable cause of action and could be captured under paragraph 5(1)(e), or in the alternative, the catch-all provision in paragraph 5(1)(g). Breach of treaty is not specifically provided for anywhere in *The Limitation of Actions Act*, 1970, and so would be captured by paragraph 5(1)(g).

[413] Canada also pleaded all of the predecessor limitations statutes to *The Limitation of Actions Act*, 1970, including *The Limitation of Actions Act, 1935*, as well as the corresponding *Exchequer Court Act* RSC 1927, c 34 and the *Exchequer Court Act* RSC 1958 c 98. The history of Alberta limitations periods and those of the North-West territories were capably explained to me by both parties and is also extensively canvased by Justice Slatter in the trial decision in *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2004 ABQB 655. Both parties agree however that if an Alberta limitations statute applies, it would be *The Limitation of Actions Act*, 1970. I note also that the relevant limitations periods are the same between *The Limitation of Actions Act, 1935*, *The Limitation of Actions Act*, 1970, and the *Limitation of Actions Act*, 1980.

E. Trust Exceptions in *The Limitation of Actions Act*, 1970

[414] The Plaintiffs submit that their breach of fiduciary duty claims are exempt from the six-year limitation periods because of the trusts exceptions in sections 40 and 41 of *The Limitation of Actions Act*, 1970. These sections are reproduced here:

> 40. Subject to the other provisions of this Part no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of a breach of the trust, shall be held to be barred by this Act.
>
> 41. (1) In this section, "trustee" includes an executor, an administrator, and a trustee whose trust arises by construction or implication of law as well as an express trustee, and also includes a joint trustee.
>
> (2) In an action against a trustee or a person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained by the trustee, or previously received by the trustee and converted to his use,
>
> (a) rights and privileges conferred by this Act shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in the action if the trustee or person claiming through him had not been a trustee or person claiming through a trustee and
>
> (b) if the action is brought to recover money or other property and is one to which to which no limitation provision of this Act applies, the trustee or person claiming through him is entitled to the benefit of and is at liberty to plead the lapse of time as a bar to the action in the like manner and to the same extent as if the claim had been against him in an action for money and had received.

[415] The Plaintiffs submit that Canada was a trustee of the reserve lands for the benefit of the Blood Tribe, and they claim that Canada committed a breach of trust by failing to properly account for the population of the Blood in the TLE claim.

[416] In the Plaintiffs' reply, they suggest that their breach of trust submissions are based on a constructive trust. However, in their oral submission, they explained that for the purpose of limitations, their claims should be treated as express trusts because they fit into the exception in *Soar v Ashwell*, [1893] 2 QB 390 (CA) because Canada held trust property and dealt with it in a way that was inconsistent with a trust of which it was cognizant.

[417] In oral submission, they also stated that their claims fit into two of the exceptions outlined in subsection 41(2) of *The Limitation of Actions Act*, 1970. As they explained, Canada is a trustee of a trust that arises by construction or implication of law as well as an express trustee. Moreover, they say that the limitations do not apply because the action is founded upon a fraud or fraudulent breach of trust, and because their action is to recover trust property previously received by the trustee and converted to his use.

[418] I agree with Canada's submission that section 40 of *The Limitation of Actions Act*, 1970 does not apply here, as there is no express trust. As explained by Justice Dickson in *Guerin* at page 386, although the relationship is trust-like, reserve land is not held in trust:

> I agree with Le Dain J. that before surrender the Crown does not hold the land in trust for the Indians. I also agree that the Crown's obligation does not somehow crystallize into a trust, express or implied, at the time of surrender. The law of trusts is a highly developed, specialized branch of the law. An express trust requires a settlor, a beneficiary, a trust corpus, words of settlement, certainty of object and certainty of obligation. Not all of these elements are present here.

[419] In order to find an express trust, among other factors, there must be certainty of obligation. I have not been directed to any facts that would demonstrate that there was an

intention to create an express trust during the creation of the Blood reserve by the 1882 Survey. The same is true concerning Treaty 7 and the TLE formula. As a result, this section does not apply.

[420] Section 41of *The Limitation of Actions Act*, 1970 also does not apply because Canada is not a trustee described in subsection 41(1). The test to determine whether one is a trustee for the purposes of subsection 41(1) is commonly referred to as the "rule" from *Soar v Ashwell*. This rule, as explained Viscount Cave in *Taylor v Davies*, [1920] AC 636 (PC), is that the "trust arose before the occurrence of the transaction impeached and not to cases where it arises only by reason of that transaction."

[421] In *Taylor v Davies*, the Privy Council was interpreting an Ontario statute, *The Limitations Act*, RSO 1914, c 75, s 47 with the same wording as in *The Limitation of Actions Act*, 1970. The defendant inspector of a bankrupt had purchased some of the bankrupt's property for himself. The plaintiff attempted to argue that a recent revision to the Ontario Act, which had added the phrase "a trustee whose trust arises by construction or implication of law" meant that all constructive trustees were intended to be included. Viscount Cave explained at page 651 that the term "constructive trustee" refers to two different types of trustees:

> These persons though not originally trustees had taken upon themselves the custody and administration of property on behalf of others; and though sometimes referred to as constructive trustees, they were, in fact, actual trustees, though not so named. It followed that their possession also was treated as the possession of the persons for whom they acted, and they, like express trustees, were disabled from taking advantage of the time bar. But the position in this respect of a constructive trustee in the usual sense of the words — that is to say *of* a person who, though he had taken possession in his own right, was liable to be declared a trustee in a court of

> equity — was widely different, and it had long been settled that time ran in his favour from the moment of his so taking possession.

[422] Viscount Cave went on to explain at page 652 that if *all* constructive trusts were included in this subsection, the purpose of limitations would be defeated as plaintiffs could avoid limitations by seeking a constructive trust:

> As to the pre-existing law, then, there is no question; but it is contended for the appellant [plaintiff] that the recent statute has altered the law in this respect. Sec. 47(1), it is said, defines a trustee as including "a trustee whose trust arises by construction or implication of law," and accordingly the exclusion from sec. 47(2) of a claim to recover "trust property or the proceeds thereof still retained by the trustee" must apply to property in the hands of a constructive trustee or of any person claiming under him otherwise than by purchase for value without notice. If this contention be correct, then the section, which was presumably passed for the relief of trustees, has seriously altered for the worse the position of a constructive trustee, and (to use the words of Sir William Grant in the case above cited) a doctrine has been introduced which may be "fatal to the security of property." It does not appear to their Lordships that the section has this effect.

[423] For a constructive trust to be considered for the purpose of section 41, it must meet the rule in *Soar v Ashwell*, which requires that the "trust arose before the occurrence of the transaction impeached and not to cases where it arises only by reason of that transaction." Put another way, there is no breach of trust if there was no trust at the time of the transaction.

[424] In this matter, the Plaintiffs submit that they fall into the exception in *Soar v Ashwell* because Canada held trust property and dealt with it in a way that was inconsistent with a trust of which it was cognizant. For both the 1882 Survey claim and the Treaty 7 TLE claim, the relevant "transaction" was the 1883 Reserve creation, as this was the action which either

removed land from the 1882 reserve, or created a Reserve smaller than promised by the TLE formula. However, as stated earlier, no trust of any sort existed prior to the "impeached transactions" nor was Canada aware of such a trust.

[425] I am aware that the rule in *Soar v Ashwell* and *Taylor v Davies* has caused difficulty in its application (see, for example, the discussion in Donovan WM Waters, ed, *Waters' Law of Trusts in Canada*, 4th ed (Toronto, Carswell, 2012) at p 1316) and has since been reformed by Alberta and most other provinces (*Limitations Act*, RSA 2000, c L-12). However, I note that similar rulings regarding constructive trusts were made by the Alberta Court of the Queen's Bench prior to reformation in *JLO Ranch Ltd. v Logan*, [1987] AWLD 1244, 81 AR 261 (ACQB) (at paras 36-41) and *Angeletakis v Thymaras* [1989] AWLD 450, 95 AR 81 (ACQB) (at paras 22-32) with regards to the *Limitation of Actions Act*, 1980. As explained by Justice Conrad in *Angeletakis v Thymaras* at paragraph 31:

> The property is not trust property in [the Defendant's] hands at the time he takes it. Indeed, the nature of a constructive trust action is to make something which is not trust property declared to be subject to a trust for equitable reasons. In my opinion, the logic behind the rule of no limitation on trusts is that the trustee would know, expressly or by implications that the property he holds is subject to a trust. That is not so with a constructive trust such as the type here. There is no trust until the court declares one.

[426] This observation applies equally to the case before me. Therefore, neither of these trust exceptions applies.

F. Lulling / Abuse of Process

[427] The Plaintiffs submit that even if the causes of action arose more than six years before the filing of their Statement of Claim, the limitation period could not have run during some period in the 1970s because of lulling. They submit that Canada's 1969 "Statement of the Government of Canada on Indian Policy" (known as the "White Paper") and the 1973 "Statement of Policy Regarding Indian Lands" held out to First Nations that they could not seek remedies in the Courts but were to work with the Canadian government. Because of this lulling, the Plaintiffs participated in the Indian Claims Commission process instead of filing a statement of claim. As I understand the Plaintiffs, the limitations clock would only start again in June of 1978, which is when the Blood's TLE Claim before the Commission was denied. The Plaintiffs submit the case of *Zbryski v Calgary (City of)* (1965), 51 DLR (2d) 54 (AB QB) [*Zbryski*] supports that limitations may not run during lulling. The Plaintiffs also suggested that this lulling might be an abuse of process, which would be reviewable by the Court: *R v Nixon*, 2011 SCC 34.

[428] Canada submits that these allegations are unfounded and that there is no evidence pleaded to support them.

[429] I am not persuaded that lulling extends the limitations in this matter.

[430] First, I am not convinced that lulling actually operates to stop the clock as the Plaintiffs have submitted. *Zbryski* is quite different from the matter at hand. In *Zbryski*, the plaintiffs claimed to have adversely possessed certain lands near Calgary. They had been under the belief that neighbouring lots were part of their lot, and they had been using these neighbouring lots since 1927 and paying taxes on them. The lots were actually registered in the name of a local

municipal district. In 1962, the City Land Department became aware of this arrangement and began negotiating with the Mr. Zybryski. The Land Department told Mr. Zybryski that they would approach the Land Committee at the next meeting about making a transfer to them: however, the Department instead persuaded the Land Titles Office to transfer the title from the municipal district to the city. The Defendant then attempted to rely on the *City Act*, RSA 1955, c 42, s 731, which prevents adverse possession claims from succeeding against a city.

[431] In my view, *Zbryski* does not show that lulling stops the clock for limitations as the Plaintiffs submit. In fact, limitations are not actually considered. Although the *Limitation of Actions Act*, RSA 1955 c 177 is referred to in the decision, it is only because of its connection to the law of adverse possession.

[432] Further, I do not read *The Limitation of Actions Act*, 1970 as allowing a judge to stop the limitations clock even if the judge thinks its application by time-barring the action results in some unfairness to a plaintiff.

[433] Further, I do not accept that *Nixon* or the doctrine of abuse of process discussed in that case have any application on this matter. *Nixon* was focused on plea bargaining in a criminal context and Section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. There is no alleged engagement of Section 7 in this matter and this doctrine does not appear to have any application on the action before me.

[434] In the alternate though, even if *Zbryski* stands for the proposition the Plaintiffs claim and I am free to disregard the 1970 *Limitation of Actions Act*, I would not find that requirements for lulling have been made out. In *Zbryski* there was considerable evidence submitted regarding the discussions between Mr. Zbryski's solicitors and the Land Department. There is almost no similar evidence here.

[435] The Plaintiffs submitted: (a) a 1973 Memorandum which shows that Canada and the Plaintiffs entered into an agreement to research the Blood Tribe's claim regarding the size of the reserve; (b) a 1976 cover letter from the submission of the Plaintiffs' TLE Claim in 1976; and (c) a 1978 letter to the Department of Indian and Northern Affairs from the Plaintiffs' then counsel asking for a response to the TLE Claim.

[436] There is no evidence that Canada informed the Blood Tribe or any First Nation that it could not continue to seek remedies in court but had to deal with Canada directly. Although Plaintiffs' counsel suggests they might have reached these conclusions from reading the government policy, there is no evidence that this policy was considered or these conclusions reached. The Plaintiffs submitted a claim regarding the TLE claim in the 1970s. Their reason for participating in this claim process and for not commencing this action is a matter of conjecture. Based on the record, I cannot find that Canada lulled the Plaintiff.

G. Discovery or Discoverability of the Facts Underlying the Claims

[437] Having found that there is a six-year limitation period applicable to the claims of the Blood Tribe, the question to be addressed is when did the Blood Tribe discover or when ought it have discovered the facts underlying its claims?

[438] As noted earlier, paragraphs 5(e) and (g) of *The Limitation of Actions Act*, 1970 govern the claims asserted in this action: each provides for a six-year limitations period. They read as follows:

> (e) actions grounded on accident, mistake or other equitable ground of relief not hereinbefore specifically dealt with, within six years from the discovery of the cause of action;
>
> …
>
> (g) any other action not in this Act or any other Act specifically provided for, within six years after the cause of action therein arose.

[439] Canada submits, and I agree, that the limitation in paragraph 5(e) relating to the equitable claims in this action, are subject to a six-year limitation beginning when the cause of action is actually discovered. This is unlike the period for claims referenced in paragraph 5(g) which begin when the cause of action is discoverable. This distinction was affirmed by the Supreme Court of Canada in *Lameman* at paragraph 15 where it was interpreting substantially similar provisions in *The Limitation of Actions Act,* 1980.

[440] The date of discoverability has been described by the Supreme Court of Canada in *Central & Eastern Trust Co v Rafuse*, [1986] 2 SCR 147 at 224, 31 DLR (4th) 481 as being "when the material facts on which it [the cause of action] is based … ought to have been discovered by the plaintiff by the exercise of reasonable diligence."

[441] Canada having raised a limitations defence, the onus is on the Blood Tribe to disprove its knowledge or discoverability: *James A Meek Trust v San Juan Resources Inc,* 2005 ABCA 448 at paragraph 28 and *Authorson (Litigation Guardian of) v Canada (Attorney General),* 2007 ONCA 501 at paragraph 137.

[442] The time when the Blood Tribe discovered or by the exercise of reasonable diligence ought to have discovered the material facts underlying the three causes of action may differ. Accordingly, they will be examined separately. Common issue will be dealt with thereafter.

a. *The Big Claim*

[443] As outlined above, the Blood Tribe in its memorandum describes the Big Claim as follows:

> The Blood Tribe claims that the lands between the St. Mary and Kootenay (Waterton) Rivers, to the mountains and to the International Boundary (the "Big Claim lands") were reserved for them and it was never the Blood Tribe's understanding or intent that the Big Claim lands were given up at the time of Treaty.

[444] The evidence before the Court proves that very soon after the creation of the Reserve in 1883, the Blood Tribe was aware that the Big Claim lands had not been reserved for them. The evidence relied on for this finding includes the following:

(i) In 1881, members of the Blood Tribe who settled in the area between the Kootenai and Belly Rivers were removed to land south of the Belly River and told that the land between those rivers was not part of their reserve.

(ii) In 1888, when Red Crow questioned the location of the reserve's southern boundary, he was taken by Nelson and others on a tour of the boundary that was surveyed in 1883. On this trip, he would have discovered or ought reasonably to have discovered that Cardston (which lies within the Big Claim area) was south and outside of the reserve's southern boundary, and the southern boundary of the reserve did not reach to the international boundary.

(iii) Evans recounts that in 1899, Canada decided to fence the southern boundary of the Blood Tribe's reserve "in an effort to curb trespass by settlers' cattle." That was apparently done; however, Red Crow and others objected that it failed to follow the boundary mounds put in place by Nelson in 1883. The construction of this fence and the ensuing discussion with the officials was such that Red Crow discovered or could reasonably have discovered that the southern boundary was not at the international boundary of the reserve as the Big Claim would have it. Moreover, he could reasonably have discovered, if he was not so informed, that there were settlers, on the Big Claim land south of the reserve.

[445] Although there is evidence that Red Crow and the Blood Tribe always thought the Mormon settlement at Cardston was on their reserve, there is little evidence to support that belief. In my view, the most telling contrary evidence is the 1888 tour of the southern boundary undertaken by Nelson and Red Crow. This was done after the Mormons settled in southern Alberta and Red Crow would have seen with his own eyes that the boundary of his reserve was north of Cardston. The Court heard evidence of unfruitful searches conducted in the twentieth century for a lease some believed to have been entered into with the Mormons and the Blood

Tribe but that evidence does not overcome, in my view, the fact that Red Crow discovered by the late 1880s that the reserve's southern boundary did not go to the international boundary, or to the mountains.

[446] For these reasons, I find that this action as regards the Big Claim, even if it had been proven, is well outside the applicable limitation period, and must be dismissed as time-barred.

b. *The 1882 Reserve Claim*

[447] I have found earlier that the 1882 Survey created a reserve for the Blood Tribe. The Blood Tribe, notwithstanding convention, was not taken by Nelson on a tour of the reserve's boundaries, nor is there any evidence that it was told of the 1882 Survey. It was previously told that a surveyor would be sent out by Canada to establish the reserve's borders. That it did not know the exact borders as set out in the 1882 Survey, does not, as discussed above, mean that it did not have a reserve created in 1882.

[448] The evidence we have regarding the Blood Tribe's learning of the 1882 Survey is from Dorothy First Rider. On August 5, 1969, at a meeting of the Blood Tribe council, Leroy Little Bear presented information on the 1882 Survey. The Minutes reflect that:

> Leroy brought in some books, newspapers, amps re: the Indian Law and informed Council that according to these books the Treaty of 1855 [*sic*] never mentioned anything about letting us go: nothing against us. As for the maps, they are our strong points, according to J.C. Nelson's report the map showed that our Reserve was nine miles south of the Boundary. Leroy stated that at this time he hasn't got his written report ready, but this he will present to Council at the end of his contract.

[449] Although the Minutes state that the survey had the reserve at "nine miles south of the Boundary" [emphasis added], I agree with Canada that this is clearly an error and was intended to be a reference to the 1882 Survey which had the reserve nine miles north of the International Boundary. The Blood Tribe confirmed that the map referred to in the Minutes is Exhibit 24 in this trial, "Map of Part of the Districts of Assiniboia and Alberta, Shewing Dominion Land Surveys To 31st December 1882, Published by Authority of the Honorable Minister of the Interior." This map shows the southern border as running below the NWMP station located on the St. Mary River, while the 1883 survey shows the southern border being north of the station.

[450] Leroy Little Bear's report was available to members of the Blood Tribe at least by November 4, 1969.

[451] This evidence shows that the Blood Tribe had knowledge of the 1882 Survey southern line at least by 1969, eleven years before it commenced this action. Accordingly, this claim by the Blood Tribe is time-barred.

c. The TLE Claim

[452] Leroy Little Bear travelled to Ottawa in August 1971, and requested information from the Department of Indian and Northern Affairs as to the "total number of people in the Blood Band for the years 1879 to 1884." The Department responded within a few days providing information that "has been extracted from the annuity paylists." Its summary showed a total population of the Blood Tribe to be 3,521 in 1882, and 2,589 in 1883. Canada submits that as of August 1971, the Blood Tribe knew what its population was when the surveys were conducted,

and thus could determine its TLE, and whether the current Reserve was sufficient to meet that obligation. Based on the number provided in 1971, the reserve size based on the 1882 Treaty Annuity paylist would be 704.2 square miles, and on the 1883 number would be 516 square miles. The current Reserve is 547.5 square miles. Canada's position is that the TLE claim is therefore also time-barred.

[453] The numbers provided by the Department for these two years raise an obvious question: Which year's population number applies to the TLE? The answer leads one to the next obvious question: When were those annuities paid? The answer was easily discoverable by asking the Department the appropriate follow-up questions. It was easily discoverable that the 1883 number was determined after the 1882 Survey and therefore, the Blood Tribe could have discovered in 1971 its population for TLE purposes.

[454] Subject to the following discussion regarding the alleged fraudulent concealment by Canada, and the commencement date for this limitation period, I agree with Canada that the TLE claim is also time-barred.

d. *Fraudulent Concealment*

[455] The Blood Tribe submits that the limitations period does not apply to the claims based on breach of fiduciary duty in implementing the treaty and breach of treaty regarding TLE, because Canada fraudulently concealed the existence of the cause of action. On this theory, the limitation

does not run until the date when that fraud is discovered or when with reasonable diligence it could have discovered the fraud.[43]

[456] Fraudulent concealment is specifically mentioned in section 6 of the 1970 *Limitation of Actions Act*:

> When the existence of a cause of action has been concealed by the fraud of the person setting up this Part or Part 2 as a defence, the cause of action shall be deemed to have arisen when the fraud was first known or discovered.

[457] The Blood Tribe cites the Supreme Court of Canada in *Guerin* at paragraph 115, as authority for the proposition that equitable fraud is sufficient to meet the threshold for fraudulent concealment:

> It is well established that where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it. The fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or common law fraud. Equitable fraud, defined in *Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563, as "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other", is sufficient.

[43] The 1970 *Limitation of Actions Act* actually says: "deemed to have arisen when the fraud was first known or discovered" and does not explicitly reference the matter of being discoverable with reasonable diligence. However, the Supreme Court of Canada in *Guerin* says "It is well established… the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it." In *Guerin*, the concept of reasonable diligence for discovering fraud was actually in the relevant *Statute of Limitations*, RSBC 1960 c 370 at section 38, but this passage has since been cited by numerous courts when describing equitable fraud generally under different limitations acts, notably Alberta (see *Lynch* at para 29, considering the *Limitation of Actions Act*, RSA 1980, c L-15) and the Federal Court (see *Peepeekisis Band v Canada*, 2012 FC 915, aff'd 2013 FCA 191, considering the *Limitations Act*, SS 2004, c L-16.1). In this matter, both parties approvingly quote this passage of *Guerin* and neither argues for the strict wording of the Act.

[458] Justice Wittman in *Huet v Lynch*, 2000 ABCA 97, at paragraph 28 explained the necessary connection between the fraud and the cause of action:

> To overcome a limitation defence under s. 57 of the [*Limitation of Actions Act*], it is not sufficient for a plaintiff to simply prove that there has been some type of fraud, such as equitable fraud, perpetrated by the defendant. The plaintiff must also show that the fraud concealed the existence of the plaintiff's cause of action. That is, the fraud must have concealed some material fact which the plaintiff has to prove to succeed at trial: *Photinopoulos, supra*; *Cooke v. Gill* (1873), L.R. 8 C.P. 107 (Eng. C.P.); and *Shtitz v. Canadian National Railway*, [1927] 1 D.L.R. 951 (Sask. C.A.).

[459] The Blood Tribe asserts that for decades Canada has engaged in unconscionable conduct regarding the size of its reserve as required by the terms of Treaty 7. The first, it says was in 1888, when Nelson and Pocklington "made false representations to the Bloods that the TLE was satisfied" when they represented to Red Crow that, as Pocklington writes in his letter of August 30, 1888: "[A]s a matter of fact, the present Reserve contained far more than they were entitled to."

[460] It is submitted that this deception continued in 1971, when providing a summary of the population based on annuity payments, Canada "fails to disclose the actual dates of the paylist counts from 1882 and 1883." The Blood Tribe notes in particular that it fails to disclose that the 1883 payment was "completed on September 27, 1883, well after the July 1883 Document [the Red Crow Agreement] set out the size of the Reserve."

[461] While I agree with the Blood Tribe that the conduct of Pocklington and Nelson in 1888 regarding the size of the Reserve being greater than its entitlement is unconscionable, given the

facts as found, any delay in the limitation period consequently ends when the Blood Tribe, with reasonable diligence, ought to have discovered it.

[462] The Blood Tribe says that despite "making enquiries of the TLE claim with Canada in the 1960s and 1970, […] Canada failed to disclose critical facts in their exclusive possession" [emphasis added]. The critical facts, apparently, are the dates when the Treaty annuity payments were made.

[463] I have a number of concerns with this submission. First, the Blood Tribe has not tendered any evidence that it did not have knowledge of when the annuities were paid in the relevant years. Nor has it led any evidence that the general timing of annuity payments under the treaty differed then from the timing now. Second, there is no evidence that Leroy Little Bear ever asked Canada in 1971 or subsequently when these payments were made. Given its knowledge as to the date the Red Crow Agreement was signed and the 1883 Survey, and given that in 1971 it was aware that there was an 1882 Survey and a map, the question of timing appears to me to have been an obvious question. Third, there is no evidence that had Canada been asked, it would not have provided a truthful response.

[464] This leads me to the conclusion that with reasonable diligence in 1971, the Blood Tribe would have discovered what it now describes as "fraud" by Canada regarding the TLE. Thus, while I agree that Canada's conduct in 1888 was unconscionable, its conduct could reasonably have been discovered in 1971 or shortly thereafter, and accordingly this claim, subject to the discussion as to whether a breach of treaty is actionable before 1982, is time-barred.

H. Equitable Defences

[465] Canada has pleaded the doctrines of laches, acquiescence, election, delay, waiver and equitable estoppel. The only submission Canada advanced after trial was that "if this Court finds that no limitation statute applies, the doctrines of laches and acquiescence would apply and the claim is barred through their operation."

[466] Having found that a limitations statute does apply, I need not address the alternative submission that Canada has an equitable defence to the claim.

I. Conclusion

[467] I find that the claim of the Blood Tribe that Canada breached its fiduciary duty, and its claim to the reserve established by the 1882 Survey, and its Big Claim, are all time-barred by virtue of the Alberta *Limitations of Actions Act*, 1970. That leaves the claim that Canada breached Treaty 7 by failing to provide the Blood Tribe with the size of reserve to which it was entitled under the TLE.

[468] With respect to that claim, the Blood Tribe asserts that no limitation period runs against it, as a breach of treaty was not actionable until the passage of section 35 of the *Constitution Act, 1982*.

VIII. BREACH OF TREATY AS AN ACTIONABLE CAUSE OF ACTION

[469] The Blood Tribe asserts that no limitation or prescription can run until a plaintiff has a cause of action which he or she can immediately assert in a court, and that is so even if the facts underlying that cause of action occurred and were discovered at an earlier date. The Plaintiffs say that this principle was first asserted by the Court of Appeal in *Musurus Bey v Gadban & Others*, [1894] 2 QB 352. The executor of the estate of Musurus Pacha, attempted to rely on the six-year limitation period in the *Statute of Limitations* as a defence to a claim made against the estate by a party that had loaned the testator money nearly 20 years earlier in 1873. The testator was ambassador in London with diplomatic immunity when the loan was made and he continued to be so until he was recalled by the Sultan of Turkey in 1885. If the limitation period ran from the date of loan, then it was statute-barred. The Court of Appeal held that the party loaning the funds had no cause of action for the repayment of the loan until the debtor's diplomatic immunity ended.

[470] Canadian courts have taken a similar view: See *Méthot c Commission de transport de Montréal* (1971), [1972] SCR 387, 25 DLR (3d) 324 [*Méthot*]. In *Costello v Calgary (City)*, 60 DLR (4th) 732, 1989 ABCA 194 (CanLII), leave to appeal refused (1990) 65 DLR (4th) viii (SCC), at paragraph 21, the Court of Appeal stated, "So time does not run when the chance to sue is inaccessible." To hold otherwise, as observed by Justice Hall in *Méthot*, would result in the right of action being stillborn.

[471] The Blood Tribe submits that prior to April 17, 1982, when section 35 of the *Constitution Act, 1982* came into effect recognizing existing aboriginal and treaty rights, it had no actionable

right to enforce Canada's treaty obligations. Accordingly, the Blood Tribe submits that no limitation can run against a claim for breach of treaty until it became actionable, i.e. on April 17, 1982. Section 35 of the *Constitution Act, 1982*, provides as follows:

> 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.

[472] The Plaintiffs submit that the Supreme Court of Canada has recognized that a cause of action established by the *Constitution Act, 1982* does not arise for the purpose of a limitation period until the relevant constitutional provision comes into force, even though the facts underlying the cause of action were discovered before the provision existed. In *Ravndahl v Saskatchewan*, 2009 SCC 7, the plaintiff brought a civil claim seeking damages for a benefit being cut off in violation of the *Charter* by legislation that came into effect before the *Charter* came into effect. Chief Justice McLachlin, writing for the Court stated that the cause of action arose only when the *Charter* came into effect:

> In order to determine whether the appellant's personal claims are statute-barred, it is necessary to pinpoint when her cause of action arose. In my view, her cause of action arose on April 17, 1985 when s. 15 of the *Charter* came into effect.[44] The appellant was denied benefits pursuant to the operation of s. 68(1) of the 1978 Act. However, she had no cognizable legal right upon which to

[44] In accordance with subsection 32(2), section 15 of the *Charter* did not come into force until three years after the rest of the *Charter*.

> base her claim until s. 15 of the *Charter* came into force.
> [emphasis added]

[473] Canada submits that the position of the Blood Tribe is without merit.

[474] First, Canada says, "aboriginal and treaty rights were acknowledged in 1982, they were not created by section 35." I agree, but I also agree with the Blood Tribe that in making this argument, Canada fails to see the distinction between "rights" and "cognizable legal rights" which are actionable. There is no question, commencing in 1877, the Blood Tribe had the treaty rights set out in Treaty 7. The acknowledgement that they had certain treaty rights does not address the question of whether, prior to 1982, the Blood Tribe could enforce those treaty rights in a court.

[475] Second, Canada says that if the Plaintiffs' submission is accepted, then First Nations will have "a wide exemption from the application of limitation periods" contrary to the "clear policy rationale behind them" and "contrary to binding SCC jurisprudence." Limitations are based on the policy principles of certainty, evidentiary issues, and diligence. While Canada may be correct that all three of these are subverted by the new cause of action of breach of treaty, it fails to recognize that there was previously no cause of action, so this limitation legally did not run. Canada is the one who created the new cause of action when it enshrined existing treaty rights into the Canadian constitution. In short, Canada fails to distinguish between actions that could have been brought earlier but cannot now be pursued due to a limitation period defence, and actions that could not have been brought until recently. In both cases, the limitation period only has application when the claim is actionable, but not before.

[476] Neither Canada nor the Blood Tribe cite any jurisprudence at any level that holds that a First Nation could or could not commence an action to enforce its treaty rights prior to 1982. This appears to be the first time the question has been directly raised.

[477] Canada cites *Weywakem* and *Guerin* for the proposition that the rights referred to in section 35 "derive either from treaty or from Aboriginal peoples' prior occupation and possession of the territory now known as Canada." It follows, Canada says, that "Aboriginal rights existed and could ground a cause of action prior to 1982." As proof of that statement, Canada asserts that "Aboriginal peoples could and did sue based on those pre-existing rights" and it points to *Dreaver v The King* (1935), 5 CNLC 92 (Ex Ct) [*Dreaver*], as one of what Canada says are "many cases in Canadian jurisprudence where Aboriginal groups sued based on treaty rights before section 35 came into force."

[478] In *Dreaver*, the members of the Mistawasis Band of Indians filed a petition of right against Canada. The Plaintiffs' reserve was set aside under a treaty with Canada made in 1876. The Band later surrendered portions of its reserve on the condition that Canada sell the land for the stipulated price and dispose of the funds in the manner set out in the surrender agreements. The land was sold and Canada submitted accounts to the Band showing receipts and disbursements by the Department of Indian Affairs. The Band asserts that certain of the disbursements were improper and sought to have those sums paid back into its funds being held by the Department.

[479] One disputed disbursement was $4,489.95 for "drugs, medical supplies or medicines." It was the Band's position that Canada was obliged to provide drugs free under the following treaty provision:

> That a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent.

Canada responded to the petition, taking the position that this and the other disputed disbursements were "made and charged to the funds of the band as by law authorized."

[480] The Exchequer Court of Canada found that the treaty provision means "that all medicines, drugs or medical supplies which might be required by the Indians of the Mistawasis Band were to be supplied to them free of charge." Accordingly, the Court found that Canada had improperly deducted the cost of these drugs from the sale proceeds. The Band's claim was well founded.

[481] I am not persuaded that *Dreaver* is an example of a First Nation bringing an action to enforce a treaty right. It is not an illustration of a Band enforcing its treaty right to free drugs; rather, it is a suit to recover from Canada funds taken improperly by Canada from the Band's trust account. In order to establish that the taking was illegal, the Band pointed to its treaty and the right thereunder to receive the medicines without charge. There was no question raised in *Dreaver* as to whether Canada was meeting its treaty obligations: instead, the focus was on Canada's improper taking of the trust funds. It was on that basis that the Court ordered Canada to reimburse the funds it took.

[482] Canada has provided other cases it says are examples of a Band enforcing its treaty rights prior to 1982: *Henry; R v Taylor* (1981), 3 CNLR 114, 34 OR (2d) 360 (ON CA) [*Taylor*]; *R v White* (1964), 50 DLR (2d), 1964 BCJ No 212 (CanLII) (BC CA) [*White*]; *R v Moses*; [1970] 5 CCC 356, 13 DLR (3d) 50 [*Moses*] (ON District Ct); and *R v Wesley*, [1932] 2 WWR 337, [1932] 4 DLR 775 (AB SC (AD)) [*Wesley*].

[483] In *Henry* the Mississaugas of the Credit sued by way of Petition of Right, asking that a sum of money granted under a treaty and alleged to be withheld by Canada, be credited to its accounts. Treaty 19, made October 28, 1818, with the former Province of Canada, contained an obligation to pay to the Mississaugas a fixed annuity of $2,090.00. Following Confederation, that obligation rested with Canada.

[484] It was found that the fiscal year 1889-1890 was the last time the Band was credited with the full amount of the annuity. The trial judge found that the annuity ought to have been credited to it each year and "as their right thereto rests upon the treaty or contract between the Crown and them, and upon The British North America Act, 1867, the court has, I think, jurisdiction so to declare" [emphasis added].

[485] There were other claims in the suit aside from the unpaid annuity payments, none of which are germane to the present discussion. It is clear from the judge's reasons that he spent a considerable time assessing whether the Exchequer Court had jurisdiction to hear these various claims. He notes that section 15 of *The Exchequer Court Act*, 50-51 Vict. c 16, provides:

> [T]hat the court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any

> matter which might in England be the subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of contract entered into by or on behalf of the Crown. [emphasis added]

[486] With respect to the claims involved, the trial judge held that there was no case in England where relief was given against the Crown as trustee. He also held that the claims did not relate to money of the Band now in the Crown's possession, as it had not been paid and the Band was seeking to have it paid. He does find, however that the court has jurisdiction under contract:

> With respect, however, to the provision of the section that gives the court jurisdiction in any case in which the claim arises out of a contract entered into by or on behalf of the Crown, it seems to me that the court has jurisdiction so far as the claim set up is supported by the agreement or treaty, or by the surrender, to which reference has been made.

[487] A fair reading of the reasons is that the only basis on which the Court found that it had jurisdiction was under contract with the Crown, and it equated the treaty with the Band as a contract. There is no evidence that either party submitted that the issue was not one of contract or that a treaty is not a contract. As such, the issue before this Court in this action was not before the Court in *Henry*. It does not support Canada's submission as an example where a Band claimed a breach of treaty, as it was looked upon and considered only as a breach of contract.

[488] Moreover, there is reason to believe that the case might be decided differently today. First Nations' Treaties are no longer considered as mere contracts - they have a unique status: see

See *R v Sundown*, [1999] 1 SCR 393, [1999] 2 CNLR 289, at paragraph 24, and *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at paragraph 37.

[489] In the next authority cited by Canada, *Taylor*, some members of the Chippewa were charged and convicted of taking bullfrogs from unoccupied Crown land to feed their families, contrary to *Regulations* made under the Ontario *Game and Fish Act*, RSO 1970, c 186. The area from which the bullfrogs were taken was land covered by a treaty entered into in 1818. It was found that they had not surrendered their traditional right to hunt and fish in the area. The Court of Appeal held that provincial laws of general application dealing with hunting and fishing had no application to Indians because those rights had been preserved by the Royal Proclamation of 1763, independent of the *Indian Act*.

[490] As in *Dreaver*, in *Taylor* the Indians were using treaty rights as a defence to Crown actions. It is not an illustration of them using their treaty rights to advance a claim against the Crown for breach of them. In short, they are using the treaty as a shield to defend against Crown actions, and not as a sword to enforce treaty rights.

[491] *White*, *Moses*, and *Wesley* are also illustrations where treaty rights were used to defend against charges of having violated provincial or federal laws. None is an illustration of a Band or a Band member looking to enforce positive rights given under the treaty.

[492] The Blood Tribe submits its TLE action is a claim for breach of treaty. Although the facts of the underlying cause of action took place in the 1880s, they say that they had no

actionable cause of action for breach of treaty prior to April 17, 1982 when section 35 of the *Constitution Act, 1982*, entrenched treaty rights.

[493] The Plaintiffs point to English jurisprudence dating from before Treaty 7. In *Secretary of State for India v Sahaba*, [1859] UKPC 19, the Judicial Committee of the Privy Council at page 28 stated:

> The general principle of law was not, as indeed it could not, with any colour of reason be dispute. The transactions of independent states between each other are governed by other laws than those which Municipal Courts Administer: such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they made.

[494] The Plaintiffs have also referred the Court to the decision of the Privy Council in *Vajesingji Joravarsingji v Secretary of State for India*, (1924) LR 51 Ind App 357, [1924] UKPC 51 (PC). The plaintiffs, Indian nobles, sued the Indian Government for a declaration that they are proprietors of the lands at issue. On December 12, 1860, Scindia of Gwalior had ceded the territory to the British Government by a treaty.

[495] The Privy Council held at pages 360 and 361 that no court could address the matter as the claim involved the interpretation and application of a treaty:

> But a summary of the matter is this: when a territory is acquired by a sovereign state for the first time that is an Act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the territory can only make good in the municipal Courts established by the new sovereign such rights as the sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of

> cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to these inhabitants to enforce these stipulations in the municipal Courts. The right to enforce remains only with the High Contracting Parties. This is made quite clear by Lord Atkinson [in *Secretary of State for India v. Bai Rajbai* (1916) L.R. 42 I.A. 229] at page 238, when, citing the Pangoland case of *Cook v. Sprigg* [1899] AC 572], he says: "It was held that the annexation of territory was an Act of State, and that <u>any obligation assumed under a treaty either to the ceding sovereign or to individuals is not one which municipal Courts are authorised to enforce</u>." [emphasis added]

[496] The ability to bring a civil action to enforce a treaty right was again considered by the Privy Council in *Hoani Te Heuheu Tukino v Aotea District Maori Land Board*, 1941 AC 308 (PC). This case deals with a treaty an indigenous people entered into when it ceded its land to the Crown and so is a close parallel to the matter before me. In that case, the Maori attempted to enforce treaty rights under Treaty of Waitangi before a court. By way of the Treaty of Waitangi, the Maori of New Zealand ceded their lands to the Crown in exchange for solemn promises. The Privy Council ruled that the Maori of New Zealand had no right to bring actions to enforce their treaty rights before any court, with Viscount Simon stating at pages 324 and 325:

> It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except in so far as they have been incorporated in the municipal law.
>
> ….
>
> So far as the appellant invokes the assistance of the court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that <u>he must refer the court to some statutory recognition of the right claimed by him</u>. [emphasis added]

[497] The Plaintiffs note that appeals to the Privy Council from the Supreme Court of Canada continued until 1949, and thus say that this decision is “highly persuasive, if not binding, in Canada.” More importantly, they say that the Supreme Court of Canada adopted this approach

in *Francis v The Queen*, [1956] SCR 618, 3 DLR (2d) 641. There, the appellant resided on an Indian reserve in the Province of Québec adjoining an Indian reserve in the State of New York. He brought certain articles from the United States into Canada and paid no duties on them. They were seized by the Crown and the appellant, under protest, paid the sum demanded. By his petition of right, he claimed the return of this money and a declaration that no duties or taxes were payable by him with respect to these goods by reason of Article III of the Jay Treaty. The claim was rejected by the Exchequer Court of Canada. In dismissing the appeal, Chief Justice Kerwin of the Supreme Court of Canada stated at page 621 [cited to SCR]:

> […] it is clear that in Canada such rights and privileges as were here advanced of subjects of a contracting party to a treaty are enforceable by the Courts only where the treaty has been implemented or sanctioned by legislation.

[498] The Supreme Court of Canada in *Simon v The Queen*, [1985] 2 SCR 387 at 404, 24 DLR (4th) 390 observed that treaties with First Nations in Canada are not the same as treaties between independent countries. Even so, the Ontario Court of Appeal noted in *R v Agawa* (1988), 65 OR (2d) 505 at 509, 53 DLR (4^{th}) 101 [*Agawa*]:

> Indian treaties are, however, similar in one respect to Canada's international treaties. They are not self-executing and <u>can acquire the force of law in Canada only to the extent that they are protected by the Constitution or by statute</u>. [emphasis added]

[499] Prior to 1982, the only legislation that might apply to the TLE claim is the *Indian Act*. For the reasons offered by the Court in *Agawa* at pages 509 and 510, that Act does not provide these Plaintiffs with any actionable right against Canada to enforce Treaty rights:

> In practical terms, however, the only effective protection of Indian treaty rights until 1982 was provided by the *Indian Act*, R.S.C. 1970, c. I-6, enacted by the Parliament of Canada pursuant to its

power under s. 91(24) of the *Constitution Act, 1867* to make laws in relation to "Indians and lands reserved for Indians". Section 88, which was only inserted in the Act in 1951 (S.C. 1951, c. 29, s. 87), provides:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

The Supreme Court of Canada has established that the phrase "all laws of general application ... in force in any province" in s. 88 refers only to provincial laws and not federal laws. The result is that, in the event of conflict, Indian treaty rights prevail over provincial legislation: *R. v. White and Bob* (1966), 1965 CanLII 643 (SCC), 52 D.L.R. (2d) 481n, [1965] S.C.R. vi (S.C.C.); *Simon v. The Queen*, *supra*. Where, however, treaty rights conflict with federal legislation, the federal law prevails as the Supreme Court of Canada held in *Sikyea v. The Queen*, 1964 CanLII 62 (SCC), [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80, [1964] S.C.R. 642 (S.C.C.), and *R. v. George*, 1966 CanLII 2 (SCC), [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386, [1966] S.C.R. 267 (S.C.C.). Martland J. in *George* said at p. 151 C.C.C., p. 398 D.L.R., p. 281 S.C.R.:

> This section was not intended to be a declaration of the paramountcy of treaties over Federal legislation. The reference to treaties was incorporated in a section the purpose of which was to make provincial laws applicable to Indians, so as to preclude any interference with rights under treaties resulting from the impact of provincial legislation.

[500] Accordingly, First Nations in Canada were denied the ability to make claims against the Crown for breach of treaty outside the statutory scheme of the *Indian Act*: There is nothing in the *Indian Act* permitting a First Nation to bring an action to enforce the TLE under a Treaty.

[501] I am persuaded that the Blood Tribe is correct that prior to 1982, a properly instructed Canadian court could not entertain a claim by it that Canada had breached the TLE treaty promise Accordingly, no limitation can commence to run until the claim became actionable with the passage of section 35 of the *Constitution Act, 1982*.

[502] Canada submits that even if the breach of treaty claim was not actionable before 1982, this claim was not pleaded by the Blood Tribe until it filed its Amended Statement of Claim in 1999, and it was then out of time to raise the cause of action. The paragraph of the Amended Statement of Claim referenced in this submission is paragraph 7:

> The members of the Blood Tribe have Aboriginal and Treaty rights which are constitutionally protected by section 35 of the *Constitution Act, 1982*.

[503] The Plaintiffs respond first by noting that the time for Canada to raise this objection was when the motion to amend was made in 1999. Canada did not do so then, and the Plaintiffs submit it cannot do so now. Second, they point out that the facts described in the original Statement of Claim of 1980 supporting the claim did not change in 1999. The amendment, they say, is therefore effective from the original filing of 1980 for limitation purposes. In support of this proposition the Blood Tribe cites *Fox Lake Indian Band v Reid Crowther & Partners Ltd*, 2002 FCT 630 [*Fox Lake*].

[504] *Fox Lake*, a decision of Prothonotary Hargrave, was rendered on a motion to amend the Statement of Claim to add a claim for reimbursement by way of *quantum meruit* and unjust enrichment. The Crown opposed the amendment on the basis that the new claim was time-barred. The amendment was permitted, the Court stating at paragraph 19 “where a new and

apparently reasonable cause of action arises out of the same or essentially the same facts as already plead, an amendment to institute that cause of action ought to be allowed, even though a limitation has run" [emphasis added]. The Plaintiffs also rely on Rule 77 of the *Federal Courts Rules*, which provides: "The Court may allow an amendment under rule 76 notwithstanding the expiration of a relevant period of limitation that had not expired at the date of commencement of the proceeding."

[505] After careful consideration, I have concluded that the breach of treaty claim is not time-barred. Although the Plaintiffs directed the Court to the 1999 amendment and the additional pleading of section 35 of the *Constitution Act, 1982*, that pleading added nothing to the claims set out in the original Statement of Claim, as I have found above. Accordingly, I find it unnecessary to consider the Plaintiffs' submission based on *Fox Lake*. Indeed, I am of the view, that it was unnecessary to plead the law as was done. Rule 175 provides that in this Court a party "may" raise a point of law in its pleading but need not do so.

[506] The material facts as set out in the original Statement of Claim are: that the Blood Tribe was a party to Treaty 7, that under the Treaty the Blood Tribe was entitled to a reserve of a size to be determined based on the TLE, that Canada provided a reserve, but that the reserve provided was not of the required size under the TLE. The Blood Tribe sought a declaration that it is entitled to additional lands, or in the alternative, damages. These are the material facts that touch on the claim of breach of treaty. They are few and straightforward.

[507] As Lord Denning observed, and as approved by the Federal Court of Appeal in *Conohan* and *Paradis Honey,* the Plaintiffs "can present, in argument, any legal consequence of which the facts present." One of the legal consequences of the facts pleaded is that Canada breached Treaty 7 in regards to the TLE of the Blood Tribe.

[508] Paragraph 5(1)(g) of the *Limitations of Actions Act*, 1970 provides that an action for breach of treaty must be commenced within six years after the cause of action arose. It may seem odd, but here the Blood Tribe commenced this action two years before the cause of action arose. It did so because it pleaded the action as if it were a breach of contract claim. As result of the view of the Supreme Court of Canada that treaties are not contracts, it has turned out that the claim of the Blood Tribe is not one for breach of contract but rather is a claim for breach of treaty.

[509] The Blood Tribe since commencing this action has been the beneficiary of the entrenchment of treaty rights into the Constitution in 1982 and the pronouncements of the Supreme Court of Canada; however, those consequences are what they are and the Plaintiffs cannot be faulted for taking advantage of these changes in the law. Canada has not put forward any arguments on the temporal application of the *Constitution Act, 1982* to suggest that it would not apply to an ongoing action.

[510] For these reasons, the claim of the Blood Tribe for breach of the TLE promise in Treaty 7 is not time-barred.

IX. CONCLUSION

[511] For the reasons above, the claim of the Blood Tribe is allowed, in part. The Court finds that Canada is in breach of the TLE formula in Treaty 7 in regards to the size of the Blood Reserve. The Plaintiffs were entitled under the TLE formula to a reserve of 710 square miles, whereas the current Reserve is 547.5 square miles. Canada is liable to the Blood Tribe for this breach of Treaty. All other claims are dismissed as time-barred.

[512] The Court shall conduct a trial management conference to schedule Phase III of this trial, to address remedy, and to address costs.

JUDGMENT in T-238-80

THIS COURT'S JUDGMENT IS that:

1. Under the Treaty Land Entitlement provisions of Treaty 7, the Blood Tribe was entitled to a reserve equal to 710 square miles in area;

2. Canada, having provided the Blood Tribe with a Reserve of 547.5 square miles in area, is in breach of the Treaty Land Entitlement provisions of Treaty 7;

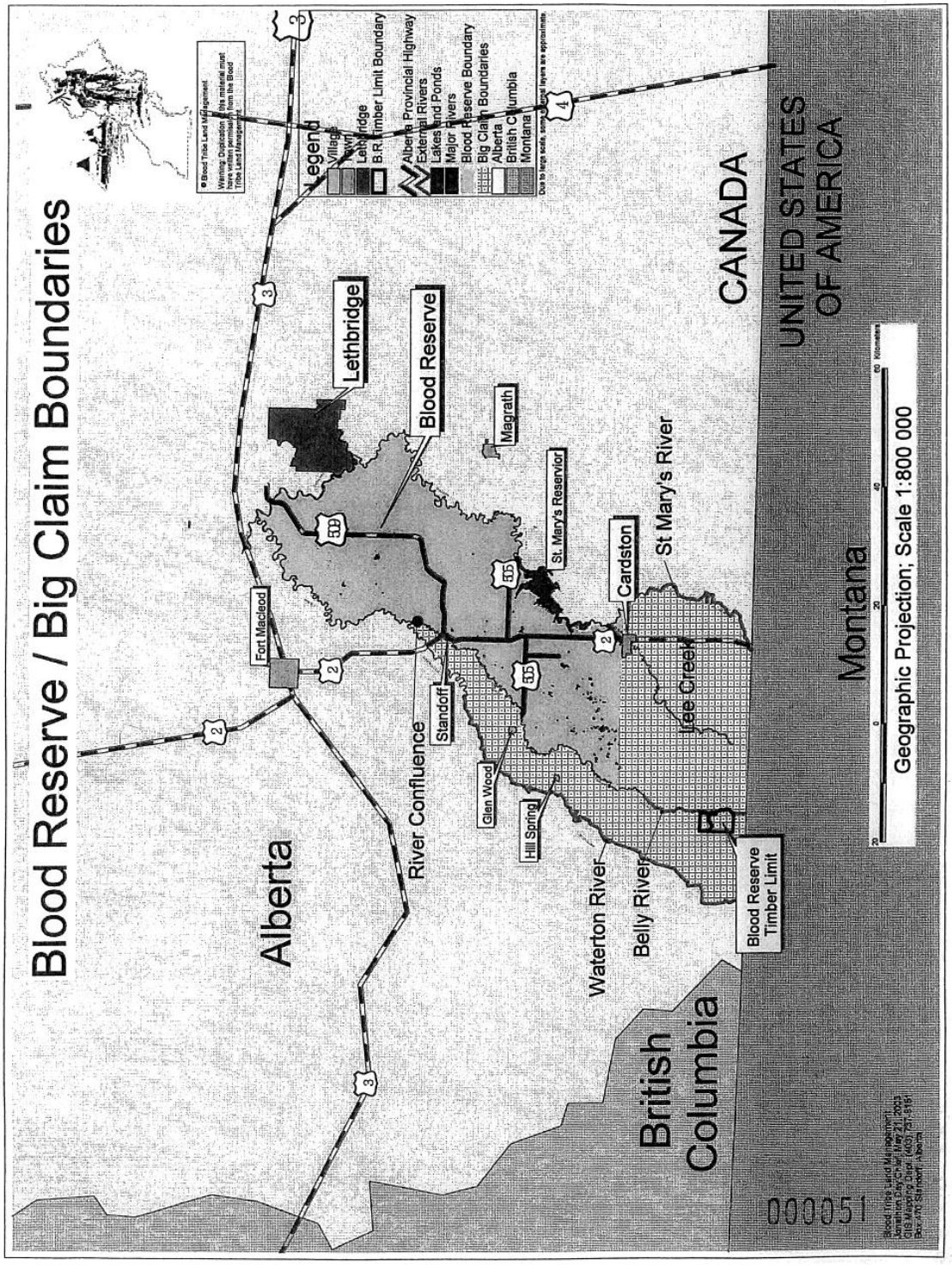
3. All claims of the Blood Tribe, other than the Treaty Land Entitlement claim arising from Canada's breach of Treaty 7, are time-barred by operation of *The Limitation of Actions Act*, RSA 1970, c 209, made applicable to this action by section 38 of the *Federal Courts Act*, RSC 1985 c F-7; and

4. The Court shall arrange for a Trial Management Conference to discuss the scheduling of Phase III, to address remedy, and to address costs.

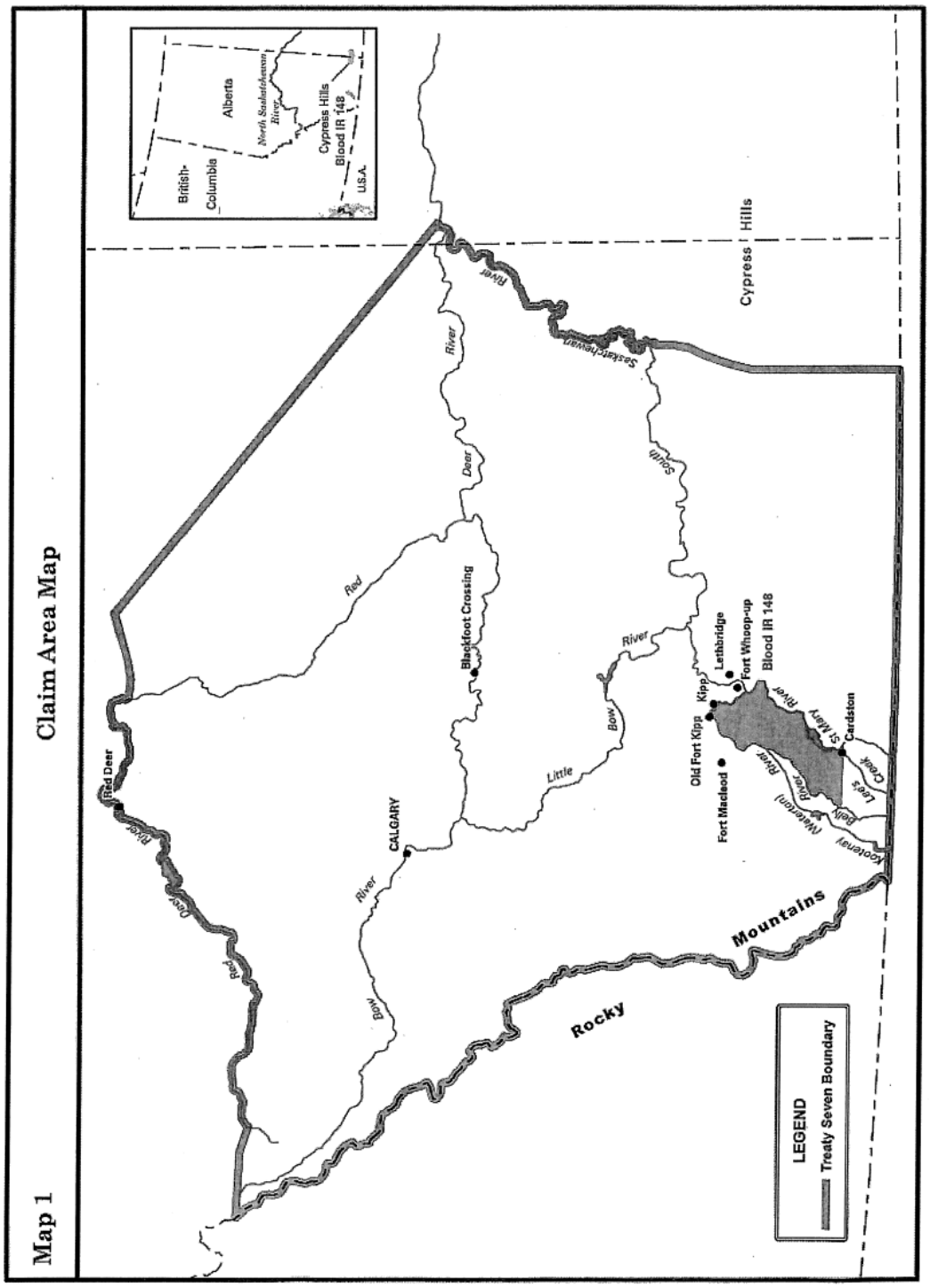
"Russel W. Zinn"
Judge

APPENDICES

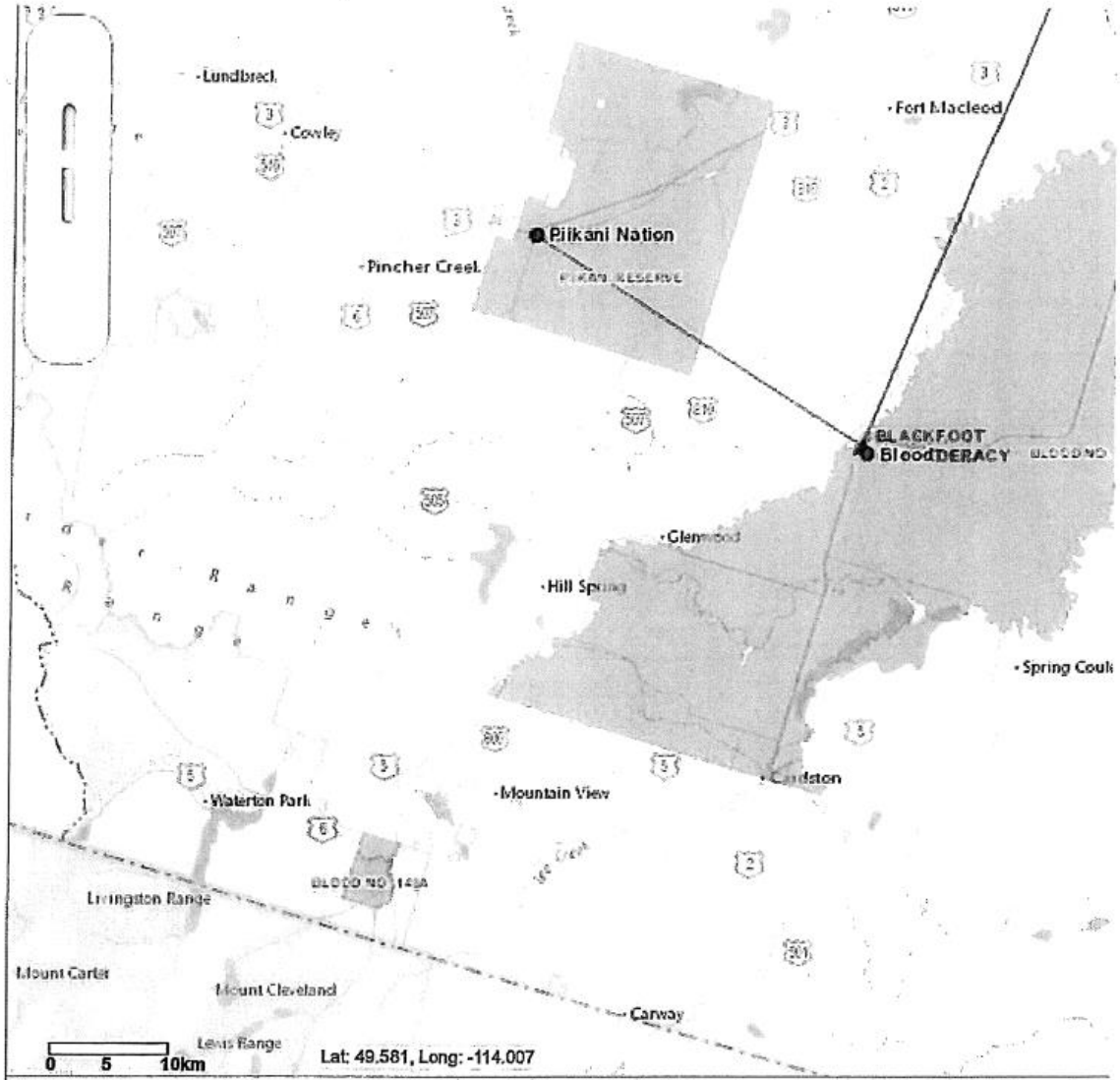
A. Map of the Blood Tribe Reserve and the Big Claim Area



B. Map of the Blood Tribe Reserve and the Treaty 7 Area



C. Map of Area to the South of the Blood Reserve



The information contained in the Community Profiles is extracted from the authoritative source systems used for the ongoing operations inconsistencies are occasionally overlooked. If you spot inaccuracies in the profiles, please contact the Aboriginal Affairs and Northern L

D. Copy of Treaty and Supplementary Treaty 7, September 22 and December 4, 1877 [Treaty 7]

COPY OF TREATY

AND

SUPPLEMENTARY TREATY

No. 7,

MADE 22ND SEPT., AND 4TH DEC, 1877,

BETWEEN

HER MAJESTY THE QUEEN

AND THE

BLACKFEET

AND

OTHER INDIAN TRIBES,

AT THE BLACKFOOT CROSSING OF BOW RIVER AND FORT MACLEOD.

Reprinted from the Edition of 1877 by

Cat. No.: Ci 72-0766
IAND Publication No. QS-0575-000-EE-A

ARTICLES OF A TREATY

Made and concluded this twenty-second day of September, in the year of Our Lord, one thousand eight hundred and seventy-seven, between Her Most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners, the Honorable David Laird, Lieutenant-Governor and Indian Superintendent of the North-West Territories, and James Farquharson MacLeod, C.M.G., Commissioner of the North-West Mounted Police, of the one part, and the Blackfeet, Blood, Piegan, Sarcee, Stony and other Indians, inhabitants of the Territory north of the United States Boundary Line, east of the central range of the Rocky Mountains, and south and west of Treaties numbers six and four, by their Head Chiefs and Minor Chiefs or Councillors, chosen as hereinafter mentioned, of the other part.

WHEREAS the Indians inhabiting the said Territory, have, pursuant to an appointment made by the said Commissioners, been convened at a meeting at the "Blackfool Crossing" of the Bow River, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and the said Indians of the other;

And whereas the said Indians have been informed by Her Majesty's Commissioners that it is the desire of Her Majesty to open up for settlement, and such other purposes as to Her Majesty may seem meet, a tract of country, bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a Treaty, and arrange with them, so that there may be peace and good will between them and Her Majesty, and between them and Her Majesty's other subjects; and that Her Indian people may know and feel assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence;

And whereas the Indians of the said tract, duly convened in Council, and being requested by Her Majesty's Commissioners to present their Head Chiefs and Minor Chiefs, or Councillors, who shall be authorized, on their behalf, to conduct such negotiations and sign any Treaty to be founded thereon, and to become responsible to Her Majesty for the faithful performance, by their respective Bands of such obligations as should be assumed by them, the said Blackfeet, Blood, Piegan and Sarcee Indians have therefore acknowledged for that purpose, the several Head and Minor Chiefs, and the said Stony Indians, the Chiefs and Councillors who have subscribed hereto, that thereupon in open Council the said Commissioners received and acknowledged the Head and Minor-Chiefs and the Chiefs and Councillors presented for the purpose aforesaid;

And whereas the said Commissioners have proceeded to negotiate a Treaty with the said Indians; and the same has been finally agreed upon and concluded as follows, that is to say: the Blackfeet, Blood, Piegan, Sarcee, Stony and other Indians inhabiting the district hereinafter more fully described and defined, do hereby cede, release, surrender, and yield up to the Government of Canada for Her Majesty the Queen and her successors for ever, all their rights, titles, and privileges whatsoever to the lands included within the following limits, that is to say:

Commencing at a point on the International Boundary due south of the western extremity of the Cypress Hills, thence west along the said boundary to the central range of the Rocky Mountains, or to the boundary of the Province of British Columbia, thence north-westerly along the said boundary to a point due

west of the source of the main branch of the Red Deer River, thence south-westerly and southerly following on the boundaries of the Tracts ceded by the Treaties numbered six and four to the place of commencement;

And also all their rights, titles and privileges whatsoever, to all other lands wherever situated in the North-West Territories, or in any other portion of the Dominion of Canada:

To have and to hold the same to Her Majesty the Queen and her successors forever:—

And Her Majesty the Queen hereby agrees with her said Indians, that they shall have right to pursue their vocations of hunting throughout the Tract surrendered as heretofore described, subject to such regulations as may, from time to time, be made by the Government of the country, acting under the authority of Her Majesty and saving and excepting such Tracts as may be required or taken up from time to time lor settlement, mining, trading or other purposes by Her Government of Canada; or by any of Her Majesty's subjects duly authorized therefor by the said Government.

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

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

Secondly—That the Reserve of the Piegan Band of Indians shall be on the Old Man's River, near the foot of the Porcupine Hills, at a place called "Crow's Creek."

And, Thirdly—The Reserve of the Stony Band of Indians shall be in the vicinity of Morleyville.

In view of the satisfaction of Her Majesty with the recent general good conduct of her said Indians, and in extinguishment of all their past claims, she

hereby, through her Commissioners, agrees to make them a present payment of twelve dollars each in cash to each man, woman, and child of the families here represented.

Her Majesty also agrees that next year, and annually afterwards forever, she will cause to be paid to the said Indians, in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief, twenty-five dollars, each minor Chief or Councillor (not exceeding fifteen minor Chiefs to the Blackfeet and Blood Indians, and four to the Piegan and Sarcee Bands, and five Councillors to the Stony Indian Bands), fifteen dollars, and to every other Indian of whatever age, five dollars; the same, unless there be some exceptional reason, to be paid to the heads of families for those belonging thereto.

Further, Her Majesty agrees that the sum of two thousand dollars shall hereafter every year be expended in the purchase of ammunition for distribution among the said Indians; Provided that if at any future time ammunition become comparatively unnecessary for said Indians, Her Government, with the consent of said Indians, or any of the Bands thereof, may expend the proportion due to such Band otherwise for their benefit.

Further, Her Majesty agrees that each Head Chief and Minor Chief, and each Chief and Councillor duly recognized as such, shall, once in every three years, during the term of their office, receive a suitable suit of clothing, and each Head Chief and Stony Chief, in recognition of the closing of the Treaty, a suitable medal and flag, and next year, or as soon as convenient, each Head Chief, and Minor Chief, and Stony Chief shall receive a Winchester rifle.

Further, Her Majesty agrees to pay the salary of such teachers to instruct the children of said Indians as to Her Government of Canada may seem advisable, when said Indians are settled on their Reserves and shall desire teachers.

Further, Her Majesty agrees to supply each Head and Minor Chief, and each Stony Chief, for the use of their Bands, ten axes, five handsaws, five augers, one grindstone, and the necessary files and whetstones.

And further, Her Majesty agrees that the said Indians shall be supplied as soon as convenient, after any Band shall make due application therefor, with the following cattle for raising stock, that is to say: for every family of five persons, and under, two cows; for every family of more than five persons, and less than ten persons, three cows; for every family of over ten persons, four cows; and every Head and Minor Chief, and every Stony Chief, for the use of their Bands, one bull; but if any Band desire to cultivate the soil as well as raise stock, each family of such Band shall receive one cow less than the above mentioned number, and in lieu thereof, when settled on their Reserves and prepared to break up the soil, two hoes, one spade, one scythe, and two hay forks, and for every three families, one plough and one harrow, and for each Band, enough potatoes, barley, oats, and wheat (if such seeds be suited for the locality of their Reserves) to plant the land actually broken up. All the aforesaid articles to be given, once for all, for the encouragement of the practice of agriculture among the Indians.

And the undersigned Blackfeet, Blood, Piegan and Sarcee Head Chiefs and Minor Chiefs, and Stony Chiefs and Councillors on their own behalf and on behalf of all other Indians inhabiting the Tract within ceded do hereby solemnly promise and engage to strictly observe this Treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen. They promise and engage that they will, in all respects, obey and abide by the Law, that they will maintain peace and good order between each other and between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians, Half Breeds or Whites, now inhabiting, or hereafter to inhabit, any part of the said ceded tract; and that they will not molest the person or property of any inhabitant of such ceded tract, or the

property of Her Majesty the Queen, or interfere with or trouble any person, passing or travelling through the said tract or any part thereof, and that they will assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this Treaty, or infringing the laws in force in the country so ceded.

IN WITNESS WHEREOF HER MAJESTY'S said Commissioners, and the said Indian Head and Minor Chiefs, and Stony Chiefs and Councillors, have hereunto subscribed and set their hands, at the "Blackfoot Crossing" of the Bow River, the day and year herein first above written.

Signed by the Chiefs and Councillors within named in presence of the following witnesses, the same having been first explained by James Bird, Interpreter.

A. G. IRVINE, Ass't. Com.,N.W.M.P.
J. MCDOUGALL, Missionary.
JEAN L'HEUREUX.
W. WINDER, Inspector.
T. N. F. CROZIER, Inspector.
E. DALRYMPLE CLARK, Lieut. & Adjutant N.W.M.P.
A. SHURTLIFF, Sub Inspector.
C. E. DENING, Sub Inspector.
W. D. AUTROBUS, Sub Inspector.
FRANK NORMAN, Staff Constable.
MARY J. MACLEOD
JULIA WINDER
JULIA SHURTLIFF
E. HARDISTY
A. MCDOUGALL.
E. A. BARRETT.

CONSTANTINE SCOLLEN, Priest, witness to signatures of Stonixosak and those following.
CHARLES E. CONRAD.
THos J BOGG.

DAVID LAIRD, Lieutenant-Governor of North-West Territories, and Special Indian Commissioner.

JAMES F. MACLEOD, Lieut-Colonel, Com. N.W.M.P., and Special Indian Commissioner.

CHAPO-MEXICO, or Crowfoot, Head Chief of the South Blackfeet. his x mark.

MATOSE-APIW, or Old Sun, Head Chief of the North Blackfeet. his x mark.

STAMISCOTOCAR, or Bull Head. Head Chief of the Sarcccs. his x mark.

MEKASTO, or Red Crow Head Chief of the South Bloods his x mark.

NATOSE-ONISTORS, or Medicine Calf his x mark.

POKAPIW-OTOIAN, or Bad Head his x mark.

SOTENAH, or Rainy Chief, Head Chief of the North Bloods. his x mark.

TAKOYE-STAMIX, or Fiend Bull. his x mark.

AKKA-KITCIPIMIW-OTAS, or many spotted horses. his x mark.

ATTISTAH-MACAN, or Running Rabbit. his x mark.

PITAH-PEKIS, or Eagle Rib. his x mark.

SAKOYE-AOTAN, or Heavy Shield, Head Chief of the Middle Blackfeet. his x mark.

ZOATZE-TAPITAPIW, or Setting on an Eagle Tail. Head Chief of the North Piegans his x mark.

AKKA-MAKKOYE, or Many Swans his x mark.

APENAKO-SAPOP, or Morning Plume his x mark.

Stony Chiefs

MAS-GWA-AH-SID, or Bear's Paw his x mark.

CHE-NK-KA, or John, his x mark.

KI-CHI-PWOT, or Jacob, his x mark.

STAMIX-OSOK, or Bull Backfat, his x mark.

EMITAH-APISKINNE, or White Striped Dog, his x mark.

MATAPI-KOMOTZIW, or the Captive or Stolen Person, his x mark.

APAWAWAKOSOW, or White Antelope, his x mark.

MAKOYE-KIN, or Wolf Collar, his x mark.

AYE-STIPIS-SIMAT, or Heavily Whipped, his x mark.

KISSOUM, or Day Light, his x mark.

PITAH-OTOCAN, or Eagle Head, his x mark.

APAW-STAMIX, or Weasel Bull, his x mark.

OMSTAM-POKAH, or White Calf, his x mark

8

NETAH-KITEI-PI-MEW, or Only Spot, his x mark.

AKAK-OTOS, or Many Horses, his x mark.

STOKIMATIS, or The Drum his x mark.

PITAH-ANNES or Eagle Robe his x mark.

PITAU-OTISKIN, or Eagle Shoe, his x mark.

STAMIXO-TA-KA-PIW, or Bull Turn Round his x mark.

MASTE-PITAH, or Crow Eagle, his x mark.

JAMES DIXON, his x mark.

ABRAHAM KECHEPWOT, his X mark.

PATRICK KECHEPWOT, his X mark.

GEORGE MOY-ANY-MEN, his X mark.

GEORGE CRAWLOR, his X mark.

Stony Councillors

EKAS-KINE, or Low Horn, his x mark.

KAYO-OKOSIS, or Bear Shield, his x mark.

PONOKAH-STAMIX, or Bull Elk, his x mark.

OMAKSI SAPOP, or Big Plume, his x mark.

ONISTAH, or Calf Robe, his x mark.

PITAH-SIKSINUM, or White Eagle, his x mark.

APAW-ONISTAW, or Weasel Calf,	his x mark.
ATTISTA-HAES, or Rabbit Carrier,	his x mark.
PITAH, or Eagle,	his x mark.
PITAH-ONISTAH, or Eagle White Calf,	his x mark.
KAYE-TAPO, or Going to Bear,	his x mark.

We the members of the Blackfoot tribe of Indians having had explained to us the terms of the Treaty made and concluded at the Blackfoot Crossing of the Bow River, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and seventy-seven;

Between Her Majesty the Queen, by Her Commissioners duly appointed to negotiate the said Treaty and the Blackfeet, Blood, Piegan, Sarcee, Stony and other Indian inhabitants of the country within the limits defined in the said Treaty, but not having been present at the Councils at which the articles of the said Treaty were agreed upon, do now hereby, for ourselves and the Bands which we represent, in consideration of the provisions of the said Treaty being extended to us and the Bands which we represent, transfer, surrender and relinquish to Her Majesty the Queen, Her heirs and successors, to and for the use of Her Government of the Dominion of Canada, all our right, title, and interest whatsoever which we and the said Bands which we represent have held or enjoyed of in and to the territory described and fully set out in the said Treaty; also, all our right, title, and interest whatsoever to all other lands wherever situated, whether within the limits of any other Treaty heretofore made or hereafter to be made with Indians, or elsewhere in Her Majesty's territories, to have and to hold the same unto and for the use of Her Majesty the Queen, Her heirs and successors forever;

And we hereby agree to accept the several benefits, payments, and Reserves promised to the Indians under the Chiefs adhering to the said Treaty at the Blackfoot Crossing of the Bow River, and we solemnly engage to abide by, carry out and fulfil all the stipulations, obligations and conditions therein contained on the part of the Chiefs and Indians therein named, to be observed and performed and in all things to conform to the articles of the said Treaty, as if we ourselves and the Bands which we represent had been originally contracting parties thereto and had been present at the Councils held at the Blackfoot Crossing of the Bow River, and had there attached our signatures to the said Treaty.

IN WITNESS WHEREOF, James Farquharson MacLeod, C.M G., one of Her Majesty's Commissioners appointed to negotiate the said Treaty, and the Chief of the Band, hereby giving their adhesion to the said Treaty, have hereunto subscribed and set their hands at Fort MacLeod, this fourth day of December, in the year of our Lord one thousand and eight hundred and seventy-seven.

Signed by the parties hereto in the presence of the undersigned witnesses, the same having been explained to the Indians by the said James Farquharson MacLeod, one of the Commissioners appointed to negotiate the said Treaty, through the interpreter, Jerry Potts, in the presence of

JAMES F. MACLEOD, LIEUT.COL.,
Special Indian Commissioner.

MEANXKISTOMACH his
or Three Bulls x
mark.

A. G. IRVINE,
Assistant Commissioner.

E. DALRMYMLE CLARK,
Lieutenant and Adjutant N.W.M.P.

CHARLES E. CONRAD,
W. WINDER,
Inspector.

E. Blackfoot, Blood, and Peigan Populations According to Treaty Annuity Paylists, 1877-1890

Appendix 2. Blackfoot, Blood, and Peigan Populations According to Treaty Annuity Paylists, 1877–1890

Year	Blackfoot	Blood	Peigan	Source and Comments
1877	1,234	1,810	589	LAC, RG 10, Vol. 9412, Treaty 7 recapitulations, 336 and 352. - Blood payments made at the treaty grounds by NWMP Sub-Inspector W. Antrobus and Staff Constable Frank Norman
1878	1,946	2,488	750	LAC, RG 10, Vol. 9412, Treaty annuity paylists-Treaties 4, 6, and 7, 1874–1878, recapitulations, 1878 payments, 538 and 570–572. - Blood payments made at Fort Kipp by NWMP Inspector J. Winder and Constable S. F. Stone
1879	2,240	3,065	941	LAC, RG 10, Vol. 9413, Blackfoot treaty annuity paylists, paid at Fort Macleod and Blackfoot Crossing, 30 September–14 October 1879, 175–196; Blood treaty annuity paylists, paid at Fort Macleod, 1–6 October 1879 and at Blackfoot Crossing, n.d., 197–222; Peigan treaty annuity paylists, paid at Fort Macleod, 4–5 October 1879, 223–229. - Blood payments made at Fort Macleod by NWMP Superintendent J. Winder and a NWMP sergeant
1880	272	956	738	LAC, RG 10, Vol. 9414, Blackfoot, Blood, and Peigan paylist recapitulations, 162, 178, and 185. - Blood payments made at Fort Macleod by NWMP Inspector J. H. McIllree and a NWMP sergeant
1881	2,974	3,560	1,012	LAC, RG 10, Vol. 9415, Blackfoot, Blood, and Peigan paylist recapitulations and "miscellaneous" paylist (for the Blackfoot), 193–194, 223, and 233. - Blood payments made on the Blood Reserve by Indian Agent Norman Macleod and the agency secretary, Percy Robinson
1882	2,255	3,542	849	LAC, RG 10, Vol. 9415A, Blood, Blackfoot, and Peigan paylist recapitulations, 208, 238, and 262. - Blood payments made on the Blood Reserve by Indian Agent W. Pocklington and agency clerk W. Sherwood
1883	2,158	2,589	893	LAC, RG 10, Vol. 9416, treaty annuity paylist recapitulations for the Blackfoot, Blood, and Peigan, 183, 217, and 228–229. - Blood payments made by Indian Agent C. E. Denny
1884	2,173	2,270	922	LAC, RG 10, Vol. 9417, treaty annuity paylist recapitulations for the Blackfoot, Blood, and Peigan, 220, 270, and 279. - Blood payments made by Indian Agent W. Pocklington
1885	2,147	2,329	941	LAC, RG 10, Vol. 9418, treaty annuity paylist recapitulations for the Blackfoot, Blood, and Peigan, 266, 279, 290, 326, and 356. - Blood payments made by Indian Agent W. Pocklington

Year	Blackfoot	Blood	Peigan	Source and Comments
1886	2,046	2,254	929	LAC, RG 10, Vol. 9419, treaty annuity paylist recapitulations for the Blackfoot, Blood, and Peigan, 354, 384, 418, 437, and 450. - Blood payments made by Indian Agent Pocklington
1887	1,952	2,202	931	LAC, RG 10, Vol. 1920, treaty annuity paylist recapitulations for the Blackfoot, Blood, and Peigan, 358, 388, 408, and 450. - Blood payments made by Indian Agent Pocklington
1888	1,816	2,135	932	LAC, RG 10, Vol. 1921, treaty annuity paylist recapitulations for the Blackfoot, Blood, and Peigan, 337, 369, 421, and 435. - Blood payments made by Indian Agent Pocklington
1889	1,827	2,041	924	LAC, RG 10, Vol. 1922, treaty annuity paylist recapitulations for the Blackfoot, Blood, and Peigan, 475, 508, 572, and 597. - Blood payments made by Indian Agent Pocklington
1890	1,746	1,703	914	LAC, RG 10, Vol. 9423, treaty annuity paylist recapitulations for the Blackfoot, Blood, and Peigan, 593, 657, and 681. - Blood payments made by Indian Agent Pocklington

F. Agreement Releasing Blood Tribe Interest in Treaty 7 Reserve dated September 25, 1880 [Red Crow Agreement]

(67)

24.785

Whereas a Treaty was made and concluded on the twenty second day of September in the year of Our Lord, one thousand eight hundred and seventy seven between Her Most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners, the Honorable David Laird Lieutenant-Governor and Indian Superintendent of the North West Territories, and James Farquharson MacLeod C.M.G., Commissioner of the North West Mounted Police, of the one part and the Blackfeet, Blood, Piegan, Sarcee, Stony and other Indians, of the other part,

And whereas it was agreed in said Treaty that the Reserve of the Blackfeet Blood and Sarcee Bands of Indians should consist of a belt of land on the North side of the Bow and Saskatchewan Rivers of an average width of four miles along said Rivers down stream, commencing at a point on the Bow River, twenty miles North-Westerly of the Blackfoot Crossing thereof and extending to the Red Deer River at its junction with the South Saskatchewan, I — "Mekasto" or "Red Crow" Head Chief of the Blood Indians, on behalf and with the consent of the Blood Indians included in said Treaty do hereby give up all our rights, titles, and privileges whatsoever to the lands included in said

I.D. v. 6620, f. 104A - 1-1 v.1

(601)

Treaty, provided the Government will grant us a Reserve on the Belly River in the neighbourhood of the Mouth of the Kootenai River,

Dated at Fort Macleod in the North West Territories of Canada this twenty fifth day of September in the year of Our Lord 1880

(Sgd) McKaskto his X mark Head chief of Blood Indians

Witnesses
(Sgd) Nor. Thos Macleod
Indian Agent
Percy G.H. Robinson
Asst.

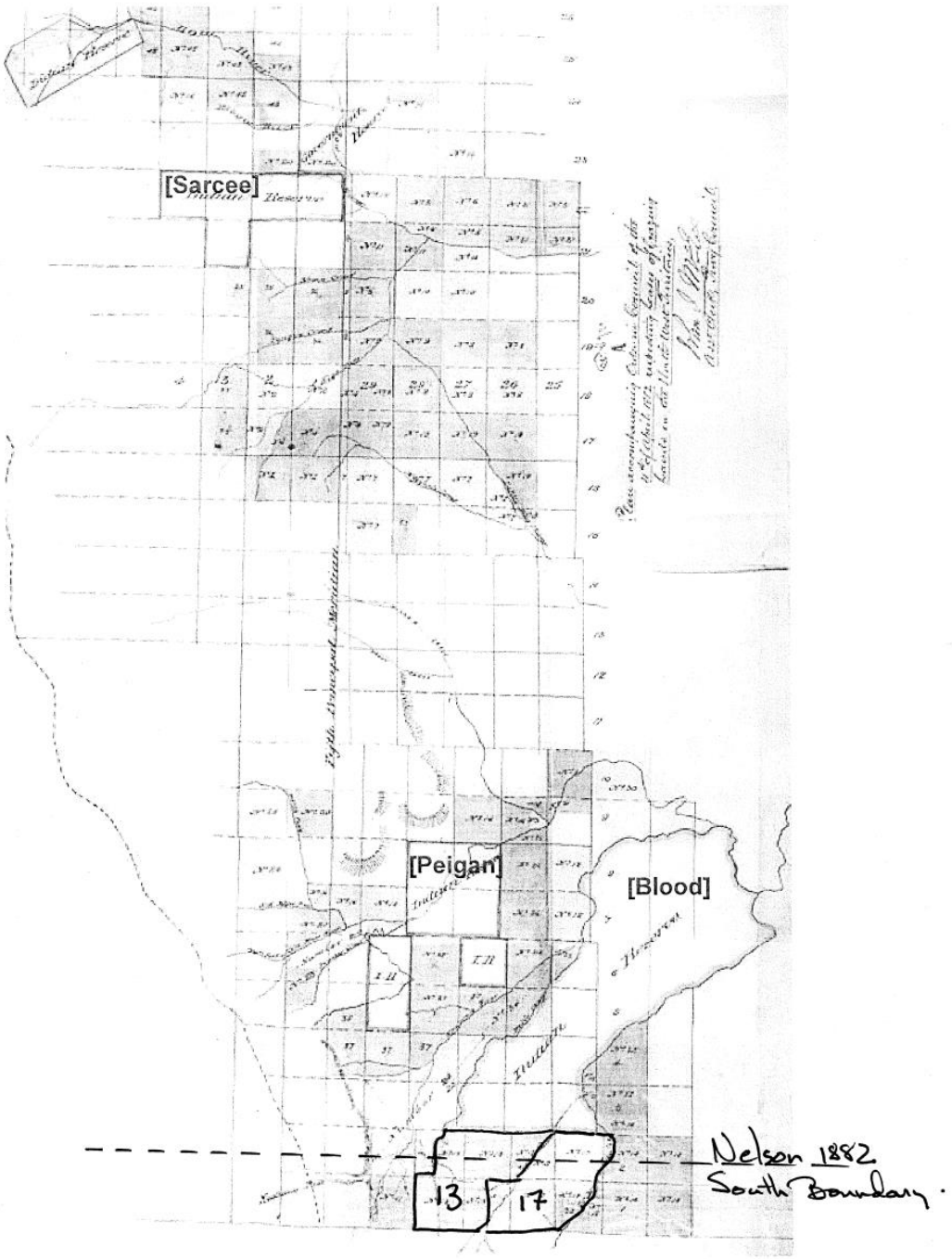
Signed in presence of Edgar Dewdney
Indian Commissioner
N. W. T.

RG 10, v. 6620, f. 104A-1-1 v.1

G. Map of Grazing Leases Showing the Location of Leases 13 and 17 and Nelson's 1882 Southern Boundary as Identified by Ms. Robidoux

Figure 3. Plan Showing Grazing Leases and Indian Reserves in Southern Alberta, April 1882

Source: LAC, RG 2, Vol. 413, OC 1882-0722 [author's additions]



H. July 2, 1883 Agreement Whereby the Blood Tribe Surrenders its Interest in the Land

ARTICLES OF A TREATY made and concluded this second day of July, in the year of Our Lord one thousand eight hundred and eighty-three, between "Her Most Gracious Majesty the Queen" of Great Britain and Ireland, by Her Commissioners the Honourable Edgar Dewdney, Commissioner of Indian Affairs and Lieutenant-Governor of the North-West Territories, and James Farquharson Macleod, C.M.G., Stipendiary Magistrate, of the one part, and the Blood Indians, by their Head and Minor Chiefs in council assembled, of the other part.

Whereas by a treaty made and concluded on the twenty-seventh day of September, in the year of Our Lord 1877, between Her Majesty the Queen, by Her Commissioners the Honourable David Laird and the said James Farquharson Macleod, C.M.G., of the one part, and the said Blood Indians, and the Blackfeet, Piegans, Sarcee and Stoney Indians of the other part, it was amongst other things provided in the words and to the effect following, that is to say:—

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

First, the reserves of the Blackfeet, Bloods and Sarcee Indians shall consist of a belt of land on the north side of the Bow and South Saskatchewan Rivers, of an average of four miles along said rivers, down stream, commencing at a point on the Bow River twenty miles north-westerly of the "Blackfoot Crossing" thereof, and extending to the Red Deer River at its junction with the South Saskatchewan; also for the term of ten years, and no longer, from the date of the concluding of this treaty, when it shall cease to be a portion of said Indian reserves as fully to all intents and purposes as if it had not at any time been included therein, and without any compensation to individual Indians for improvements, of a similar belt of land on the south side of the Bow and Saskatchewan Rivers, of an average width of one mile along said rivers, down stream, commencing at the aforesaid point on the Bow River and extending to a point one mile west of the coal seam on said river, about five miles below the said "Blackfoot Crossing;" beginning again one mile east of the said coal seam and extending to the mouth of Maple Creek at its junction with the South Saskatchewan, and beginning again at the junction of the Bow River with the latter river, and extending on both sides of the South Saskatchewan in an average width on each side thereof of one mile along said river against the stream to the junction of the Little Bow River with the latter river

And whereas the said Blood Indians have requested that a reserve other than and in lieu of that described in the said hereinbefore in part recited treaty should be granted to them, and it hath been agreed, by the parties hereto, that the reserve hereinafter described shall be granted to them as such reserve:

These Articles witness that Her Majesty the Queen, by Her said Commissioners, parties hereto, doth grant unto the said Blood Indians—

All that certain tract of land in the North-West Territories, Canada, butted and bounded as follows, that is to say: Commencing on the north bank of the St. Mary's River at a point in north latitude forty-nine degrees twelve minutes and sixteen seconds (49° 12′ 16″); thence extending down the said bank of the said river to its junction with the Belly River; thence extending up the south bank of the latter river to a point thereon in north latitude forty-nine degrees, twelve minutes and sixteen seconds (49° 12′ 16″), and thence easterly along a straight line to the place of beginning; excepting and reserving from out the same any portion of the north-east quarter of section number three, in township number eight, in range twenty-two, west of the Fourth Principal Meridian, that may lie within the above mentioned boundaries; to have and to hold the same unto the use of the said Blood Indians forever. And in consideration of the premises the said Blood Indians, by their Head and Minor Chiefs, in council assembled, do hereby release to Her Majesty the Queen all the reserve mentioned and described in the said hereinbefore in part recited treaty and all their interests therein.

Canada, Indian Treaties and Surrenders from 1680 to 1890, vol. 2, (Ottawa; Queen's Printer, 1871, reprinted Fifth House Publishers, 1993)

And it is hereby lastly fully understood and agreed by and between the parties hereto that all the stipulations mentioned and rights reserved to Her Majesty the Queen in the said hereinbefore part recited treaty shall apply to the reserve granted to the said Blood Indians by those articles.

IN WITNESS WHEREOF, Her Majesty's said Commissioners and the said Blood Indian Head and Minor Chiefs have hereunto subscribed and set their hands at the Blood Reserve.

Signed by the said Commissioners and the above named Head and Minor Chiefs in presence of the following witnesses, the same having been first explained to them by David Mills, Blackfoot Interpreter.

C. E. DENNY, *Indian Agent.*
L. N. F. CROZIER,
JOHN C. NELSON,
D. MILLS,
W. C. MCCORD,
H. T. BOURNE,
JOS. POTANA HEALY.

E. DEWDNEY,
Indian Com. and Lieut.-Gov.,
JAMES F. MACLEOD,
Commissioner.

his
MEKASTO, x or Red Crow.
mark.

his
PA-KAH-POTAKAU, x or Bad Head.
mark.

his
SAKOOYE STOMAX, x or Hind Bull.
mark.

his
ARKA-KIST-SIPIAMY, x or Many Spotted Horses.
mark.

his
KAYTE-SUM, x or Old Moon.
mark.

his
PAY-IN-NA-QUAIM, x or Captive or Stolen Person.
mark.

his
PAW-WOW-KASI, x or White Antelope.
mark.

his
MA-QUAI-I-QUIM, x or Wolf Collar.
mark.

his
PETE OTOKAN, x or Eagle Head.
mark.

ONISTALE-POKAH, or White Calf (away).

his
NETAH-KIST-SIPENY, x or One Spot.
mark.

his
AKUK-OTAS, x or Many Spotted Horses.
mark.

his
STOMIX-OTRE-KA-PE, x or Bull Turn Round.
mark.

his
KAYE-TAPO, x or Going to the Bear.
mark.

his
STAMIX-AH-OTAN, x or Bull Shield.
mark.

his
SEXEKAH-E-PE-TUKE, x or Blackfoot Old Woman.
mark.

his
APE-SO-NEUGH-KUN, x or Running Wolf.
mark.

Canada, Indian Treaties and Surrenders from 1680 to 1890, vol. 2, (Ottawa; Queen's Printer, 1871, reprinted Fifth House Publishers, 1993)

his
MAQUAI-IS-TU-PISTAU, x or Strangled Wolf.
mark.

Recorded 20th March, 1885.
Lib. 95, Fol. 554.
L. A. CATELLIER,
Dep. Registrar-General of Canada.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-238-80
STYLE OF CAUSE:	JIM SHOT BOTH SIDES ET AL v HER MAJESTY THE QUEEN
PLACES OF HEARING:	STANDOFF AND CALGARY, ALBERTA
DATES OF HEARING:	MAY 4-6, 9-11, 16-19, 20, 24-25, 2016 (STANDOFF, AB); MAY 14-17, 22-25, 28-29; JUNE 4-7, 11-14, 18-20, 25-27, 2018 (CALGARY, AB); and DECEMBER 4, 5, 6, 2018 (CALGARY, AB)
JUDGMENT AND REASONS:	ZINN J.
DATED:	JUNE 12, 2019

APPEARANCES:

Gary Befus Brendan Miller Joanne Crook Paul Reid	FOR THE PLAINTIFFS
Wayne Malcom Schafer, Q.C. Marianne Panenka Bruce Piller Damon Park Amber Elliott Olivia Furlong Nathan Wiebe	FOR THE DEFENDANT

SOLICITORS OF RECORD:

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Attorney General of Canada Department of Justice Canada Edmonton, Alberta	FOR THE DEFENDANT