CITATION: Couchiching FN et al v AG Canada et al, 2014 ONSC 1076
COURT FILE NO.: CV-98-0910
DATE: 2014-02-19

ONTARIO
SUPERIOR COURT OF JUSTICE

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<tr><td>B E T W E E N:</td><td></td></tr>
<tr><td>COUCHICHING FIRST NATION, NAICATCHEWENIN FIRST NATION, NICICKOUSEMENECANING FIRST NATION, and STANJIKOMING FIRST NATION</td><td>D. Colborne, M. Wente, R. Pelletier, B. Edwards, counsel for the Plaintiffs</td></tr>
<tr><td>Plaintiffs</td><td></td></tr>
<tr><td>- and -</td><td></td></tr>
<tr><td>THE ATTORNEY GENERAL OF CANADA and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, and THE CORPORATION OF THE TOWN OF FORT FRANCES</td><td>J. Tyhurst, C. Collins-Williams, counsel for Defendant The Attorney General of Canada. R. Regenstreif, M. Burke, counsel for Defendant Her Majesty The Queen in Right of Ontario. J. Morse, W. Derksen, counsel for Defendant The Corporation of the Town of Fort Frances</td></tr>
<tr><td>Defendants</td><td></td></tr>
<tr><td>- and -</td><td></td></tr>
<tr><td>THE INTERVENERS</td><td>Lawrence Phillips counsel for the Interveners</td></tr>
<tr><td></td><td>HEARD: February 19, 20, 21, 22, 25, 26, 27, 28, March 1, 4, 5, 6, 7, 20, 21, 22, 25, 26, 27, 28, 2013</td></tr>
</table>

Table of Contents

INDEX OF EXPERT WITNESSES 4

BIOGRAPHICAL INDEX 6

GENERAL MAP OF SUBJECT LANDS 7

INTRODUCTION 8

ISSUES 10

THE CENTURY PRIOR TO THE SIGNING OF TREATY #3 12

OJIBWAY USE AND OCCUPANCY OF THE RAINY LAKE/RAINY RIVER WATERSHED INCLUDING THE AGENCY ONE RESERVE SITE 12

THE HISTORY OF THE DAWSON ROUTE THROUGH THE RAINY LAKE/RAINY RIVER REGION 21

THE DEVELOPMENT OF THE FORESTRY INDUSTRY THROUGH THIS AREA 30

DISCUSSION 35

TREATY #3 NEGOTIATIONS AND THE CREATION OF THE AGENCY ONE RESERVE 38

THE INTENTIONS AND EXPECTATIONS OF THE CROWN AND OJIBWAY REGARDING THE AGENCY ONE RESERVE AND THE TWO CHAIN ALLOWANCE 47

THE CADDY SURVEY OF THE AGENCY ONE RESERVE 56

THE EVIDENCE OF THE SURVEY EXPERTS 57

FURTHER SURVEYS SUBSEQUENT TO CADDY'S SURVEY 65

C.C. FORNERI D.L.S. SURVEY OF McIRVINE TOWNSHIP 66

D.J. GILLON O.L.S. SURVEYS 67

THE ONTARIO and MINNESOTA POWER Co. v. THE KING [1925] A.C. 196 (J.C.P.C.) 72

THE TRIAL DECISION 72

APPEAL TO THE SUPREME COURT OF CANADA 82

APPEAL TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL 82

FACTS RELEVANT TO DEFENCE OF LACHES, LIMITATIONS AND DELAY 83

CLAIMS FOR FLOOD DAMAGE 83

KNOWLEDGE OF OMPC DECISION 84

1930'S ROAD EXCHANGE 84

DEVELOPMENT ON TWO CHAIN ALLOWANCE WITHOUT PROTEST BY PLAINTIFFS 85

EVENTS BETWEEN THE 1970'S AND THE START OF THIS LITIGATION 86

DISCUSSION OF THE ISSUES 94

IS THE PLAINTIFFS' CLAIM BARRED ON THE BASIS OF RES JUDICATA, ISSUE ESTOPPEL, ABUSE OF PROCESS AND ONTARIO AND MINNESOTA POWER CO. v. THE KING [1925] A.C. 196? 94

WAS THE TWO CHAIN ALLOWANCE SET ASIDE AS PART OF THE AGENCY ONE RESERVE OR WAS IT EXCLUDED FROM THE RESERVE?...102

WAS IT INTENDED, PURSUANT TO TREATY #3 OR THE RESERVE SELECTION NEGOTIATIONS, THAT TWO CHAIN ALLOWANCE WAS TO BE PART OF THE AGENCY ONE RESERVE SUCH THAT THE FAILURE TO INCLUDE IT WITHIN THE RESERVE AS SURVEYED WAS A BREACH OF AGREEMENT, A BREACH OF THE CROWN'S FIDUCIARY DUTY OR A BREACH OF THE HONOUR OF THE CROWN?.......................121

IS THE PLAINTIFFS' CLAIM BARRED ON THE BASIS OF LACHES, LIMITATIONS OR DELAY 129

IF THE TWO CHAIN ALLOWANCE IS INCLUDED IN THE AGENCY ONE RESERVE DID TITLE TO IT VEST IN THE TOWN OF FORT FRANCES PRIOR TO PROVINCIAL CONFIRMATION OF THE RESERVE 129

CONCLUSION...130

COSTS 130

INDEX OF EXPERT WITNESSES

FOR THE PLAINTIFFS

A. **Dr. C. Miller**. Scope of Expertise for Dr. Cary Miller:

Historian and ethnohistorian specializing in the use of written documentation, ethnographic documentation, and oral evidence to reconstruct the past cultures of Aboriginal peoples, as well as the history of contact between Aboriginal peoples and the European newcomers throughout the western Great Lakes regions of the United States and Canada, with a specialization in Anishinaabeg societies**.** **Report Exhibit #37**

B. **Dr. B. White**. Scope of Expertise for Dr. Bruce White:

Historian and anthropologist specializing in the use of written documents, oral tradition, and archaeological evidence to reconstruct the past cultures of Aboriginal peoples, as well as the patterns of interaction between Aboriginal peoples and the European newcomers, throughout the western Great Lakes regions of the United States and Canada. **Report Exhibit #37**

C. **Mr. R. J. Stewart**, B.Sc., O.L.S., C.L.S. Scope of Expertise for Mr. R.J. Stewart:

- Surveying practice, principles and procedures including interpretation of survey-related historical records such as instructions, descriptions, plans, field notes, reports, diaries, and related correspondence, Ontario lands and Canada lands.
- Surveying practice, principles and procedures employed in the application of legal principles in surveyor opinions on boundaries and related title questions; including historical evidence interpretation and the effect of relevant common law principles, statutes and regulations, executive government orders, etc.
- Interpretation of plans of survey and legal descriptions for parcels of land. **Report Exhibit #10.**

FOR CANADA

A. **Dr. A. von Gernet**. Scope of Expertise for Dr. Alexander von Gernet:

Dr. von Gernet is an anthropologist and ethnohistorian qualified to give expert opinion evidence on the use of archaeological data, written documentation and oral evidence to reconstruct the past cultures of Aboriginal peoples, as well as the history of contact between Aboriginal peoples and European newcomers throughout Canada and parts of the United States. **Report Exhibit #55**

B. **Dr. V. Lytwyn.** Scope of Expertise for Dr. Victor Lytwyn:

Qualified as an historian and historical geographer to give expert opinion evidence on historical records research, the interpretation of historical records including maps, and

Canadian history including the historical facts relating to Treaty 3, the setting aside and administration of reserves pursuant to such Treaty, and the development of westward transportation routes in Canada in the 19th century. **Report Exhibit #65**

FOR THE CORPORATION OF THE TOWN OF FORT FRANCES

A. **Dr. J. Williams**. Scope of Expertise for Dr. Jeremy Williams:

Registered Professional Forester in Ontario with knowledge and expertise concerning the matters of the forests in Northwest Ontario, the history of the woodshed (and watershed as it relates to forestry) associated with Fort Frances, including forestry history, management, and operations, and more particularly with regard to:

- The development of the forest industry in the 1870's, context, how it was managed and operations conducted, including reference to seasonality and use of water;

- The beginnings of the forest industry in the Rainy Lake, Lake of the Woods, and related area/region (the "Area");

- Progression of the forestry industry generally and in the Area in the time period into the 1900's, context, its importance, management, operations and changes in operations;

- Other aspects and components of the forest industry generally and with reference to the Area, including mills, dams, roads, and other infrastructure; and

- The importance of lakes, rivers and river banks and lake shores, and lands adjacent, generally and in the Area, in reference to the forestry industry. **Report Exhibit #48**.

B. **Mr. I. de Rijcke** B.Sc., O.L.S., LL.B., LLM. Scope of Expertise for Mr. Izaak de Rijcke:

- Surveying practice, principles and procedures including interpretation of survey related historical records such as instructions, descriptions, plans, field notes, reports, diaries, and related correspondence, Ontario lands and Canada lands.

- Surveying practice, principles and procedures employed in the application of legal principles in surveyor opinions on boundaries and related title questions; including historical evidence interpretation and the effect of relevant common law principles, statutes and regulations, executive government orders, etc.

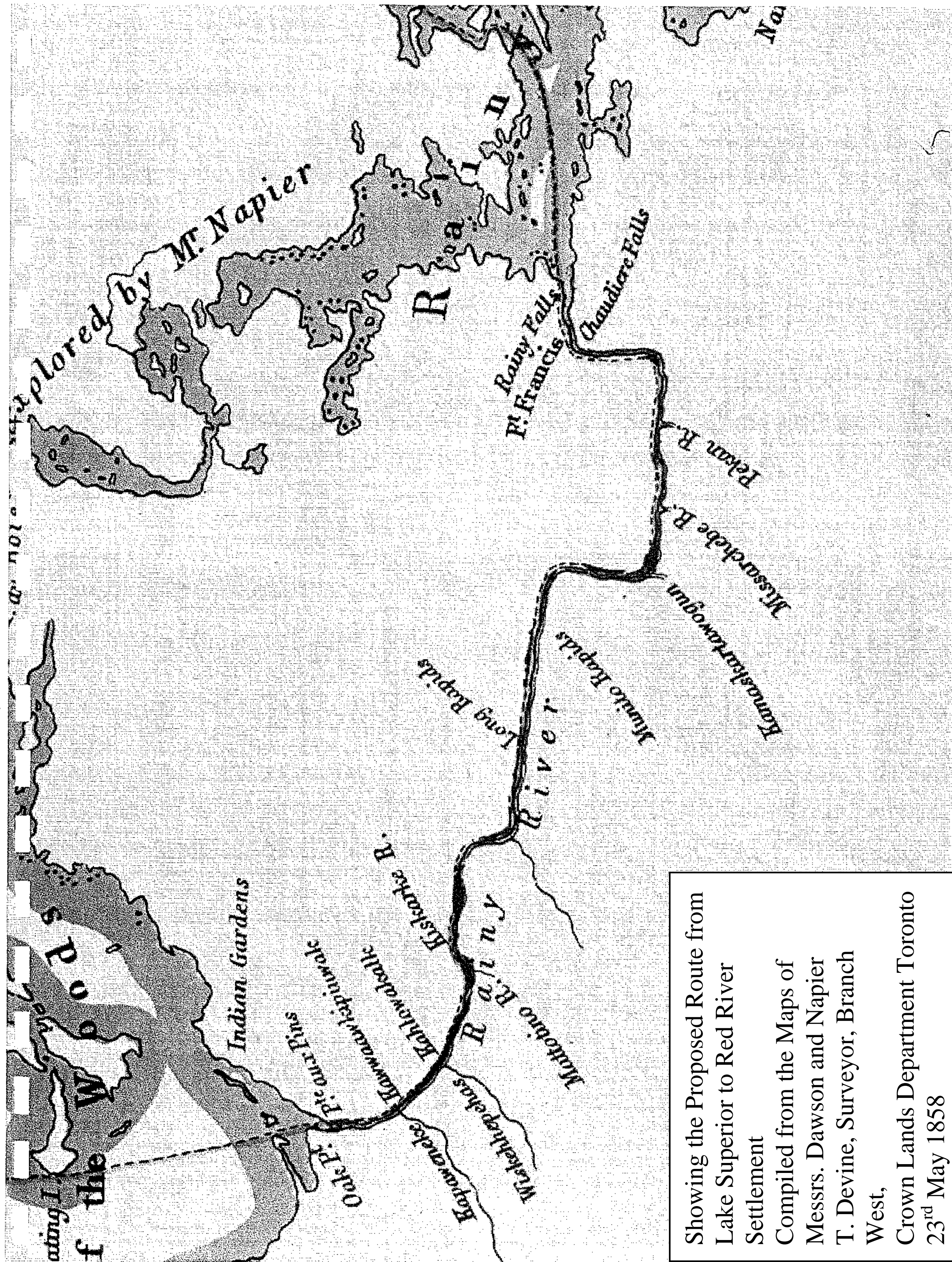
- Interpretation of plans of survey and legal descriptions for parcels of land and their boundaries on the ground.

- Title conveyancing and the effect of survey plans, deeds, bylaws, legislation, and Orders in Council, as they affect the legal ownership or title to land. **Report Exhibit #68.**

BIOGRAPHICAL INDEX

NAME	TITLE	ORGANIZATION	DATES (Approx.)
BRAY, Samuel	Chief Surveyor	Department of Indian Affairs	1889-1920
CADDY, Edward Christopher	Dominion Land Surveyor	Department of the Interior	1875-1876
DAWSON, Simon James	Superintendent and Engineer	Department of Public Works	Circa 1870
	Indian Commissioner	Department of the Interior	1873-1875
FORNERI, C.C.	Dominion Land Surveyor	Department of the Interior	1874-1876
FOWLER, Stephen Humbert	Sawmill owner at Fort Frances (builder of Pither's dwelling)	N/A	1873
GILLON, D.J.	Ontario Land Surveyor	N/A	1898-1930
LAIRD, David	Minister	Department of the Interior	1874-1876
	Lieutenant-Governor of North West Territories	N/A	1876-1881
MEREDITH, E.A.	Deputy Minister	Department of the Interior	1872-1878
MILES, Charles F.	Dominion Land Surveyor	Department of the Interior	1874-1875
MORRIS, Alexander	Lieutenant-Governor of Manitoba and the North West Territories	N/A	1872-1878
PITHER, Robert John Nicholson	Indian Agent, Fort Frances	Department of the Interior/Indian Affairs	1871-1888
	Indian Reserve Commissioner	Department of the Interior	1874
PROVENCHER, J.A.N.	Indian Commissioner, Manitoba and North West Territories	Department of the Interior	1873-1876
	Treaty Commissioner	Department of the Interior	1873
SIMPSON, Wemyss	Indian Commissioner	Department of the Interior	1871-1872
SINCLAIR, Duncan	Dominion Land Surveyor	N/A	1874-1875
VANKOUGHNET, Lawrence	Deputy Superintendent General of Indian Affairs	Department of Indian Affairs	1880-1893

GENERAL MAP OF SUBJECT LANDS



Mr. Justice J.S. Fregeau

Judgment

INTRODUCTION

[1] Canada came into being on July 1, 1867 as a result of Upper Canada (Ontario), Lower Canada (Quebec), Nova Scotia and New Brunswick uniting under the *British North America Act, 1867,* now the *Constitution Act, 1867.*

[2] Beyond the western boundary of Ontario, the location of which was a matter of federal-provincial dispute until 1889, lay a rich and vast geographical area encompassing the North West Territories, Rupert's Land and the Colony of British Columbia.

[3] The first Canadian government, led by Sir John A. MacDonald, pursued a policy of westward expansion aimed at bringing all territories between Ontario and the Pacific Ocean into Confederation.

[4] In 1869, the territory of Rupert's Land, encompassing the entire Hudson's Bay watershed, was relinquished to the Dominion government by England and incorporated into the North West Territories. On July 15, 1870, the North West Territories and the Province of Manitoba joined Confederation. On July 20, 1871, the Colony of British Columbia entered Confederation and became the Province of British Columbia.

[5] With Sir John A. MacDonald's goal of westward expansion partially accomplished, the Dominion government was confronted with the difficult task of establishing a secure, stable foundation and national identity for the new country.

[6] Canada now extending to the Pacific Ocean, the Dominion government actively promoted European settlement and development in the territory between central Canada and British Columbia. To enable settlement and to facilitate development, a national transportation route was required. This route would join central Canada with the vibrant Red River community of Fort Garry in the newly created Province of Manitoba, providing settlers with a debarkation point on the eastern edge of the Canadian prairies. From there, the route would span western Canada, linking British Columbia with eastern Canada.

[7] However, among the myriad issues and impediments confronting the Dominion government in accomplishing its goals of European settlement, development and a national transportation system, one was fundamental – what was now Canada encompassed the traditional homelands of Canada's Aboriginal peoples.

[8] Cognizant of the concept of Aboriginal "Indian title" or "Indian interest" in their traditional lands, the Dominion government understood that it was necessary to the national interest to secure title from the Aboriginal peoples. In a series of post-Confederation treaties, the Dominion government, representing the Crown and acting pursuant to the authority granted to it by s. 91(24) of the *British North America Act,* secured the surrender of huge tracts of land in what is now northern and northwestern Ontario, Manitoba, the prairie provinces, British Columbia and the North West Territories.

[9] The numbered treaties were intended by the Dominion government to secure this land from the Aboriginal peoples to allow the Canadian west and northwest to be opened up for transportation, settlement and development. Each of the treaties delineates a tract of land understood to be the traditional territory of the Aboriginal signatories.

[10] Treaty #3, signed on October 3, 1873, is a post-Confederation treaty. The Agency One Reserve, the subject matter of this case, is one of the reserves created pursuant to the Crown's reserve creation obligation in Treaty #3.

[11] The plaintiff First Nations in this action are the First Nations for whom the Agency One Reserve was set aside, as determined by Smith J. in *Canada (Attorney General) v. Anishnabe of Wauzhushk Onigum Band* [2002] O.J. No. 3741, affirmed [2003] O.J. No. 4655 (Ont. C.A.). The residential reserves of the plaintiff First Nations are located along the north shore of Rainy Lake, in close proximity to the Agency One Reserve.[1]

[12] The Agency One Reserve, having an area of between 170 and 200 acres, is located on a parcel of land fronting on both Rainy River and Rainy Lake at the western outlet of Rainy Lake in northwestern Ontario. The Agency One Reserve includes "Pither's Point", a geographical bottleneck at the headwaters of Rainy River named after a former Indian Agent stationed at Fort Frances. From Pither's Point, Rainy River flows west-northwest approximately 85 miles, discharging into the southern end of Lake of the Woods.

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[1] See Exhibit #12, Reserves A, B, C and D.

[13] The 1874 written description of the Agency One Reserve is as follows:

> *No. 1 At the foot of Rainy Lake, to be laid off as nearly as may be in the manner indicated on the plan –* ***two chains in depth along the shore of Rainy Lake and the bank of Rainy River , to be reserved for roads, right of way to lumber-men, booms, wharves, and other public purposes.***[2] (emphasis added)

[14] The site of this reserve will hereinafter be referred to as either the Agency One Reserve or Pither's Point, depending on the context.

ISSUES

[15] The plaintiffs seek two declarations in this action:

1. A declaration that the strip of land, two chains in width from the 1876 high water mark of Rainy River and Rainy Lake and immediately adjacent to the Agency One Reserve forms part of the Agency One Reserve; and

2. If any part of the two chain strip was included in an October 1, 1908 surrender of part of the Agency One Reserve, a declaration that any such part was within the reserve immediately prior to that surrender.

[16] These claims give rise to the following issues:

A. Is the plaintiffs' claim barred by the doctrines of *res judicata* and issue estoppel based on the 1925 decision of the Judicial Committee of the Privy Council in *Ontario and Minnesota Power Co. v. The King* [1925] A.C. 196?

B. If the answer to A is no, was the two chain strip of land set aside as part of the Agency One Reserve or was it excluded from the reserve?

C. Even if the plaintiffs' claim is barred by *res judicata* or issue estoppel and it is found that the two chain strip of land was not set aside as part of the Agency One Reserve, was it intended pursuant to Treaty #3 and the reserve selection negotiations, that this two chain strip above the 1876 high water mark of Rainy Lake was to be part of the reserve such

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[2] A chain is a surveying term referring to a jointed measuring line 66 feet in length.

that the failure to include it within the reserve represents a breach of agreement, a breach of the Crown's fiduciary duty or a breach of the honour of the Crown?

D. If the plaintiffs are successful in regard to issues A, B and/or C, should their claim be dismissed on the basis of laches, limitations and delay?

E. If the two chain strip is found to be included in the Agency One Reserve as set aside, did title to it vest in the Corporation of the Town of Fort Frances prior to provincial confirmation of the Reserve?

[17] The validity of the 1908 surrender is not before this court.

[18] The salient issue in this case is the reserve creation process pursuant to Treaty #3 as it pertains to the Agency One Reserve. The analysis of this issue requires findings of fact on all elements relevant to that issue and to related issues as set out above. The relevant elements include, but are not limited to, the intentions of the Crown and Ojibway and the actions of and practical steps taken by the parties to realize their intentions.

[19] An assessment of the Crown's discharge of its various obligations and the expectations of the Crown and Ojibway at the reserve creation stage must have regard to the context of the times.[3] The evidence as to the intentions and actions of the Crown at the reserve creation stage must also be reviewed bearing in mind that "…the Crown was … obliged to have regard to the interest of all affected parties, not just the Indian interest." The Crown "…wears many hats and represents many interests, some of which cannot help but be conflicting".[4]

[20] As concisely as possible, I will review the facts necessary to understand the historical and geographical context within which Treaty #3 came into being and how the parties suggest this context informed the reserve creation process.

[21] Other issues raised require a further detailed review of events which occurred, or are alleged to have occurred, in the years following the creation of the Agency One Reserve.

[3] Wewaykum Indian Band v. Canada, [2002] 4 S.C.R. 245, para. 97.
[4] Wewaykum, para. 96.

THE CENTURY PRIOR TO THE SIGNING OF TREATY #3

OJIBWAY USE AND OCCUPANCY OF THE RAINY LAKE/RAINY RIVER WATERSHED INCLUDING THE AGENCY ONE RESERVE SITE

[22] The plaintiffs called Dr. C. Miller and Dr. B. White to provide evidence on Ojibway use and occupancy of the Rainy Lake/Rainy River watershed and the Agency One Reserve site in the century prior to the signing of Treaty #3. The defendant, The Attorney General of Canada ("Canada") called Dr. A. von Gernet to provide evidence on this issue.

[23] Canada requested that Dr. von Gernet also provide his opinion on "…the likely expectations of any of the aboriginal predecessors of the plaintiff Bands in respect of a shoreline allowance relating to the reserve, and the expectations and intentions, if any, of the Crown officials in respect of such a shore allowance at or about the time the reserve was created."

[24] Dr. Miller was qualified as an expert historian and ethnohistorian, specializing in Anishinaabeg societies. Drs. White and von Gernet were qualified as expert ethnohistorians and archaeologists. All three experts were held to have expertise regarding Aboriginal and Ojibway societies in the Treaty #3 area.

[25] Dr. von Gernet's report, exhibit #55, is dated April 13, 2012. Drs. Miller and White were co-authors of their report dated July 31, 2012. It is exhibit #37. Dr. von Gernet prepared a reply report dated September 20, 2012. These three reports were submitted into evidence at trial, on the consent of all parties, as truth of their contents. These experts also testified at trial.

[26] Drs. Miller and White testified prior to Dr. von Gernet. Their report was expressly responsive to the conclusions reached by Dr. von Gernet. I find it appropriate to first review Dr. von Gernet's evidence and conclusions, followed by a review of the evidence and conclusions of Drs. Miller and White. I will then address the oral tradition evidence called by the plaintiffs.

[27] Dr. von Gernet's review of the "considerable archaeological research" conducted between Lake Superior and Lake Winnipeg, including on the Agency One Reserve site itself, led him to conclude that "… there is no question that, by the 19th century, Rainy Lake and Rainy River were frequented by an Aboriginal people known …as Ojibwa". However, Drs. von Gernet and White were in agreement that there is no archaeological evidence of any probative value relating to Ojibway occupation of the Agency One Reserve site.

[28] Dr. von Gernet further testified that he had not been able to locate any oral tradition evidence regarding the Ojibway use and occupancy of the Agency One Reserve site prior to the date of Treaty #3. Nor was he able to locate any such evidence pertaining to the Treaty #3 negotiations themselves or the reserve selection process. Dr. von Gernet concluded in his report:

> *"Unlike with other numbered treaties, there do not appear to be modern oral traditions about Treaty #3 and none relevant to the aboriginal use and occupancy of the subject reserve prior to its creation."*

[29] A review of both expert reports and their sources confirm the suggestion contained in Dr. von Gernet's report that there is an unusually comprehensive written record of human use and occupancy of the Rainy Lake/Rainy River region throughout much of the century prior to 1875.

[30] French fur traders and explorers first visited this region in the late 17th century. Fort St. Pierre, the area's original trading post, was built on Pither's Point by the La Verendrye expedition in 1731. It was active until 1760.

[31] Pursuant to the Treaty of Paris in 1763, French possessions in North America were ceded to Great Britain. Fur traders in Montreal formed the North West Company ("NWC") in 1783. Fort William, on the western shores of Lake Superior, was built as a major supply depot for trading posts further west.

[32] Chaudiere Falls, historically a significant waterfall, was located on the Rainy River approximately two miles downstream from Pither's Point. At Chaudiere Falls, canoes carrying trade goods from Montreal met canoes from the western territories loaded with furs. The NWC post of Fort Lac la Pluie, built on Rainy River approximately one mile downstream from Chaudiere Falls was soon added to the supply chain.

[33] In order to compete with the NWC, the HBC also built inland trading posts, one being Lac la Pluie House, overlooking Chaudiere Falls on the north shore of the Rainy River approximately one mile upstream from Fort Lac la Pluie.

[34] In 1821, the NWC and the HBC merged and continued to operate as the HBC. This resulted in significant changes in the North American fur trade. The focus changed from the Fort William-Rainy River-Fort Garry supply route to one connecting Fort Garry with York Factory on Hudson Bay. The posts on the Rainy River faded. Fort Lac la Pluie was abandoned. The

newer HBC post, Lac la Pluie House, overlooking Chaudiere Falls, was renamed Fort Frances in 1830.

[35] Interest in, and travel through, the region continued despite the local decline in the fur trade. In 1847, Sir George Simpson, Governor of the HBC, wrote of the rich natural resources in the region and promoted future settlement. In the 1850's, Britain and the colonial government began to explore the potential for settlement in the region west of Fort William and into the western prairies. In 1857, two expeditions, the Palliser and Hind expeditions, set forth for this purpose.

[36] Simon Dawson ("Dawson") was appointed as a surveyor to the Hind expedition. Dawson's 1858 report endorsed a policy of settlement in the Rainy River/Rainy Lake region and the use of the historic fur trade route as the Fort William - Fort Garry link in a national transportation route which would later become known as the Dawson Route.

[37] The interest in the area as a result of the fur trade and its settlement, resource and transportation potential contributed to the comprehensive written record utilized by Drs. Miller, White and von Gernet in forming their opinions and conclusions as to Ojibway use and occupancy of the Agency One Reserve site in the century prior to Treaty #3.

[38] Dr. von Gernet's report and evidence as to Ojibway use and occupancy of the site prior to 1875, based primarily on his review of written sources, was vigorously discounted by the plaintiffs' experts. Dr. von Gernet, conceding that "an occasional pre-1874 use and occupation of Pither's Point by Ojibwa people cannot be ruled out…" concluded that there "…is no solid evidence that the subject reserve was used or occupied by any Aboriginal group in the century prior to its creation or at the time it was set aside".

[39] Appendix A to Dr. von Gernet's report contains his summary of portions of the written record of eyewitness descriptions of Ojibway activity in the Rainy Lake/Rainy River region between 1775 and 1875. Dr. von Gernet was struck by the "…voluminous nature of this record…" generated both by individuals living in the region for extended periods with lengthy exposure to Aboriginals and by other "…literate travellers…" who made valuable observations.

[40] Dr. von Gernet stated that these eyewitnesses encountered and recorded in detail Ojibway activities and campgrounds at numerous locations east and west of Pither's Point. Dr. von

Gernet noted, correctly in my opinion, the strategic geographical location of Pither's Point on this travel route. Individuals travelling both east and west by water through the region (water being the predominant mode of travel at the time), necessarily passed Pither's Point at a proximity that easily allowed for observation of any significant activity or occupation on the land.

[41] Dr. von Gernet was of the opinion, due to the foregoing, that if there had been any significant Ojibway use or occupation of Pither's Point in the century prior to 1875, it would have been observed and recorded in some fashion.

[42] Appendix A of Dr. von Gernet's report cites 34 sources, including fur traders, HBC and NWC employees, expedition members, military personnel, surveyors, etc., who were either in or travelled through the region between 1775 and 1874. None of these sources, according to Dr. von Gernet, noted an Ojibway presence on the site during this time frame.

[43] While conceding that "occasional" Ojibway use and occupancy of Pither's Point pre-1874 "…could not be ruled out…" on cross examination Dr. von Gernet testified that this did not change his position that the historical sources he analyzed did not support a conclusion of *significant* use of Pither's Point by the Ojibway prior to Treaty #3.

[44] Dr. von Gernet was clear, both in his report and in his evidence, that he was not suggesting a lack of Ojibway presence in the immediate region. To the contrary, he acknowledged that there was a great deal of evidence of Ojibway use and occupancy throughout the area. Germane to this case, Dr. von Gernet testified that the evidence indicated significant Ojibway activity, including camping, fishing, annual gatherings and ceremonies adjacent to or near Fort Frances, Chaudiere Falls, the portage around the falls and at numerous locations downriver from the falls, including Big Fork and Little Fork Rivers, Manitou Rapids, Long Sault Rapids and others.

[45] Given the Ojibway presence in the immediate region and the recording of it at locations other than Pither's Point, Dr. von Gernet was of the opinion that if a similar level of activity had occurred at the Point, it would have been both observed and recorded. It was not and he therefore inferred that such use and occupation did not occur.

[46] Drs. Miller and White, in their retainer letter, were asked to provide their opinion regarding any "weaknesses, omissions, and/or misrepresentations" in Dr. von Gernet's report, with consideration of his sources and "any further materials you deem relevant".

[47] The report of Drs. Miller and White was a joint effort. Dr. Miller wrote the portion of the report, and testified on, Ojibway land use and occupancy in a broader, cultural context; Dr. White dealt with the narrower issue of Ojibway use and occupancy of the Agency One Reserve site based on his review of the sources used by Dr. von Gernet as well as his review of fur trade journals.

[48] In essence, Drs. Miller and White suggest Dr. von Gernet's conclusion on Ojibway use and occupancy of this location, based as it was on a comparison or ranking in relation to other locations in the region, illustrates a lack of understanding of Ojibway use of land and resources according to Ojibway cultural understanding of these concepts. Drs. Miller and White conclude that there is sufficient evidence of camping and fishing at the site to demonstrate that there was regular Ojibway use and occupancy of the Agency One Reserve site pre-treaty.

[49] Dr. Miller stressed that a general understanding of how the Ojibway used and maintained lands within a wider region is critical to assessing the use of a single site within that region. Dr. Miller testified that Ojibway seasonal movements represent a sophisticated and regular use of subsistence resources within a region. Similar to farmers, the Ojibway may generally "reside" (as that term applies to a semi-nomadic society) at one location yet utilize resources within the entire region to varying degrees of intensity, determined by where and when various natural resources are available. To suggest that the Ojibway did not use or occupy one location within that region simply because it was used only "occasionally" during their seasonal rounds is contrary to Ojibway cultural understanding of the concept, according to Dr. Miller.

[50] Dr. White reviewed Dr. von Gernet's report and sources and accessed other written sources from the 1730's to the mid-1830's. Dr. White was critical of Dr. von Gernet for not having utilized the journals of fur traders, particularly those of the HBC traders.

[51] Dr. White suggests that the written sources first note Ojibway presence at Pither's Point during the tenure of Fort St. Pierre between 1730 and 1750. Ojibway from Rainy Lake and points east, north and south of the lake are reported to have come to the fort for the purpose of trading with the occupants. It was from this time that a pattern of use of this general area as a

campground for the region's Ojibway travelling to and from the fur trade forts is said to have begun.

[52] Dr. White's sources, primarily the fur trade journals, satisfy him as to regular use of the Agency One Reserve site by the Ojibway to camp, fish and interact with fur traders through the early 1700's and into the 1830's. Drs. Miller and White both testified that there was no reason to suspect that this pattern changed in any significant way between this time and the 1870's. Of note, however, is that Drs. Miller and White did not access any sources beyond the 1830's in addressing Ojibway use and occupancy of Pither's Point prior to the reserve creation process in the mid 1870's.

[53] Dr. White conceded that the record does not support a suggestion that Pither's Point was a continuous Ojibway campsite in the century prior to Treaty #3. However, he strongly disagreed with Dr. von Gernet's characterization of its use as only "occasional". Dr. White further acknowledges that the record indicates a more intensive Ojibway use of sites either adjacent or close to the HBC post on Rainy River and near the portage around Chaudiere Falls. Dr. White suggests that this does not preclude a finding that the Ojibway also camped at the point on a regular basis, as part of their seasonal rounds.

[54] The plaintiffs called three First Nations elders to provide oral history evidence as to Ojibway use and occupancy of the Agency One Reserve site prior to the creation of the reserve in the 1870's.

[55] Ms. Nancy Jones was born May 1, 1939 and is a member of the plaintiff band Nicickousemenecaning First Nation. Mr. Gilbert Smith was born on September 14, 1947 and is a member of the plaintiff band Naicatchewenin First Nation. Both testified for the plaintiffs. Neither provided any evidence as to either the Ojibway use and occupancy of the Agency One Reserve site prior to Treaty #3 or the creation of the Agency One Reserve.

[56] Mr. Fred Major testified for the plaintiffs. Mr. Major is a self-identified elder and keeper of oral history in his community of Stanjikoming First Nation, one of the plaintiff bands.

[57] Mr. Major was born in 1934 and until age four lived on Manitou Rapids First Nation on the Rainy River. At age 4, Mr. Major moved with his mother and family to Stanjikoming First

Nation on Rainy Lake. At this time, Mr. Major became acquainted with his grandfather, Mr. Mike McDonald, also a keeper of oral history.

[58] Mr. Major testified that his grandfather died in the early 1940's when he was in his early 80's. Mr. Major also testified that he was removed from his community to attend residential school in approximately 1940 when he was about six years old. The relevant evidence provided by Mr. Major which the plaintiffs seek to have admitted at this trial was relayed to him by his grandfather.

[59] It was agreed by all parties that the evidence of Mr. Major would be put on the record with the defendants reserving the right to argue against its admissibility in closing submissions.

[60] The defendants submit that the evidence of Mr. Major is not reliable and should not be admitted. The defendants submit that Mr. Major and his grandfather lived in the same community for only two to three years when Mr. Major was between four and six or seven years of age.

[61] The defendants submit that, in light of the witness' age when receiving information from his grandfather, it is objectively unlikely that Mr. Major could recollect with any degree of precision the details he provided in his evidence.

[62] Further, the defendants submit that Mr. Major was simply presented to the court as a self-identified elder, with no evidence being provided as to the objective reliability of the context within which the oral history was passed on.

[63] The defendants also submit that Mr. Major's oral history evidence was not provided to the plaintiffs' expert ethnohistorian witnesses. The failure to have their own expert witnesses provide input on the evidence is suggested to weigh against its admissibility.

[64] In *Mitchell v. Canada* (Minister of National Revenue – M.N.R.), [2001] 1 S.C.R. 911, Chief Justice McLachlin provided a concise and useful review of the general principles set out in *R. v. Van der Peet* [1996] 2 S.C.R. 507 and *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 regarding the assessment of oral history evidence in aboriginal claims cases. McLachlin C.J. also felt it necessary to clarify the application of those principles.

[65] McLachlin C.J. reiterated that the general guideline set out in *Van der Peet*, namely that "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 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" applies to both admissibility of evidence and weighing of aboriginal oral history. See para. 28.

[66] Noting that *Van der Peet* and *Delgamuukw* affirm the continued applicability of the rules of evidence to aboriginal claims and also caution that the rules must be applied flexibly in an aboriginal context, McLachlin C.J. added that these rules "are animated by broad, flexible principles, applied purposively to promote truth-finding and fairness". Three "simple ideas" provide the foundation for the diverse rules on the admissibility of evidence generally: See para. 30.

[67] The evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case;

1. The evidence must be reasonably reliable;

2. Even useful and reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.

[68] Bearing in mind these basic principles, the rules of evidence are to be adapted to accommodate oral histories, with admissibility being determined on a case-by-case basis.

[69] McLachlin C.J. explained how the tests of usefulness and reasonable reliability are so adapted in aboriginal claims cases. Usefulness may be established if the evidence illustrates ancestral practices and their significance that would not otherwise be available. Usefulness may also be established if the oral history provides an otherwise absent aboriginal perspective on the claim in issue. See para. 32.

[70] The second factor, reasonable reliability, requires that the trial judge determine if the witness represents a reasonably reliable source of the particular people's history. A special guarantee of reliability is not required. What may be appropriate, both in regard to admissibility and weight if the evidence is admitted, is an inquiry into the witness's ability to know and testify to orally transmitted aboriginal traditions and history. See para 33.

[71] McLachlin C.J. went on to emphasize that common sense must be applied to achieve the appropriate balance in each case such that "…a consciousness of the special nature of aboriginal claims does not negate the operation of general evidentiary principles". See para. 38. McLachlin C.J. cautioned that there is a boundary between a sensitive application and a complete abandonment of the rules of evidence that must not be crossed. Care must be taken not to undervalue evidence presented by aboriginal claimants. At the same time however, McLachlin C.J. stressed that oral history evidence should not be "…artificially strained to carry more weight than it can reasonably support". See para. 39.

[72] Applying these principles to the evidence of Mr. Major, I note that Dr. von Gernet was of the opinion that oral history evidence does not exist in regard to any aspect of Treaty #3 or the historical Ojibway occupation of the Agency One Reserve site. The evidence of Mr. Major does provide some insight, albeit limited, into the Ojibway perspective of their use and occupation of this site pre-treaty. This is obviously relevant to the issues and would otherwise be absent from the fact finding process. In this regard, the evidence of Mr. Major is useful.

[73] The reliability of Mr. Major's evidence has to be assessed in the context of the actual testimony given by him and the level or absence of detail contained therein. Mr. Major testified to several basic and rather general facts about Ojibway presence on the reserve site pre-treaty. I accept that his ability to know and testify to detailed aspects of his society's history would be questionable. This is as a result of his young age when interacting with his grandfather as well as the limited duration of that interaction.

[74] However, I find that these limitations do not deprive him of the ability to recall and testify to the general facts as he did. I find that he is a reasonably reliable source of the actual evidence provided by him.

[75] I see no reason to exercise my general discretion to exclude the evidence of Mr. Major. The evidence of Mr. Major is, for the reasons provided, held admissible.

[76] Mr. Major was shown exhibit #32, an aerial photograph of the Agency One Reserve site as it now is. Mr. Major testified that this area was known as "*Gaamitigomishkaag"* (spelled phonetically in the transcript) to his ancestors, translated as "*Point of Oak".* Mr. Major testified that "our people" were "living there" before the "Europeans" arrived.

[77] According to Mr. Major, Ojibway fished in the rapids off Pither's Point with a fish weir and spears. This fishing area was accessed by canoe from the point. Mr. Major described how his ancestors were drawn to this location because of the very extensive sand beach on the north side of the point, in what was known as "*Sand Bay"*. This is how the Ojibway "picked where to camp" according to Mr. Major, explaining that the sand beach was amenable to landing fragile birch bark canoes.

[78] Mr. Major also testified that the beach was a site used by the Ojibway, including his grandfather, for the construction of birch bark canoes. The Ojibway would hollow out a canoe form in the soft sand and shape the canoes using this form. Mr. Major further testified that the beach and point area were also used for smoking meat and fish as well as for "Indian games", including lacrosse.

[79] Mr. Major was able to indicate on exhibit #32 the point of land nearest to where the fish weir was located, the portion of the beach where canoes were built and landed as well as the location of an ancient, non-Ojibway burial mound on the point.

[80] Mr. Major's credibility on these points was not challenged, but for a qualification in regard to his evidence of Ojibway "living" at the point pre-treaty. This was clarified later in his evidence to meaning camping for periods of time, as opposed to more permanent residency.

[81] Mr. Major is elderly. English is not his first language. He was in obvious physical and emotional discomfort while testifying at this trial. Despite these challenges, I observed him to be a witness who believed in the truth of what he was saying. I find that Mr. Major was doing his best to recall accurately what he knew as his peoples' history in relation to the Agency One Reserve site prior to Treaty #3. I found his evidence persuasive. It is entitled to equal and due treatment and will be assessed together with the evidence of Drs. Miller, White and von Gernet in determining the intensity, frequency and nature of Ojibway use and occupation of the Agency One Reserve site prior to Treaty #3.

THE HISTORY OF THE DAWSON ROUTE THROUGH THE RAINY LAKE/RAINY RIVER REGION

[82] Dr. V. Lytwyn was called as a witness by Canada. Dr. Lytwyn was qualified as an expert historian and historical geographer in relation to historical records research, the interpretation of

historical records relating to Treaty #3, the setting aside and administration of reserves pursuant to Treaty #3 and the development of westward transportation routes in Canada in the 19th century. Dr. Lytwyn`s report, exhibit #65, dated January 19, 2012, was filed in evidence on consent as truth of its contents.

[83] In preparing his report, Dr. Lytwyn reviewed the pleadings, documents and interrogatories exchanged by the parties. He also reviewed the historical context surrounding the use of the Agency One Reserve site lands and the facts surrounding the creation of that reserve, in particular the two chain shore allowance referred to in Dawson's 1874 original description of the reserve. Dr. Lytwyn was specifically asked by Canada to provide an opinion on "the purpose and intentions of Crown officials in respect of the creation of the shoreline allowance at the water`s edge of the reserve."

[84] The plaintiffs, while not adopting Dr. Lytwyn's interpretations of facts or opinions, indicated in their closing submissions that they considered his report "a reliable source of facts" except where qualified or corrected in his oral evidence. I will summarize his evidence with this concession in mind.

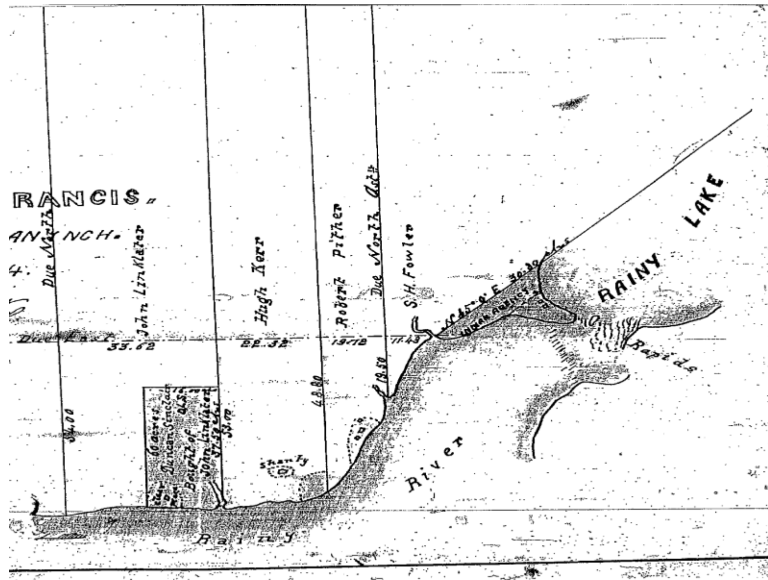
[85] In the introduction to his report, Dr. Lytwyn indicated that it focused on the purpose and intentions of Crown officials in respect to the creation of the Dawson Route and its connection to the description of the boundaries of Agency One Reserve, which included a two chain reservation along the shore of Pither`s Point.

[86] Dr. Lytwyn described the route between Fort William and Fort Garry as the "main transport artery" for the NWC until its merger with the HBC in 1821. Dr. Lytwyn reviewed the natural impediments to travel on the Rainy River itself. He noted there were several rapids and a waterfall that hampered navigation. At the headwaters of the Rainy River, a set of rapids off Pither's Point separated the river from Rainy Lake. Dr. Lytwyn noted the existence of the more significant Chaudiere Falls, downstream of Pither's Point at Fort Frances. Two sets of rapids, Manitou Rapids and Long Sault Rapids, are found further downstream.

[87] Focusing on Pither's Point, at page three and four of his report Dr Lytwyn referred to a November 25, 1874 *Plan of Claims Between Rainy Lake and Ft. Francis,* Duncan Sinclair DLS[5] At this point, a small island separates two sets of rapids. The southern rapids, adjacent to the

[5] Exhibit #2, tab 98

southern bank of the river, were more extensive than the rapids off Pither's Point. Immediately downstream of this twin set of rapids, another smaller set of rapids spanned the breadth of the river. As a result, at this point in their journey, travellers going east or west had to either portage across the point or run a narrow channel punctuated by two sets of rapids.



Plan of Claims Between Rainy Lake and Fort Frances, Duncan Sinclair DLS, November 25, 1874

[88] After the merger of the NWC and HBC in 1821, the fur trade route through the Rainy Lake/Rainy River region was abandoned. The route continued to be used as a line of transportation between Fort William and Fort Garry.

[89] Dr. Lytwyn testified that the concept of developing this route as the primary transportation route from Lake Superior to Fort Garry emerged after the Robinson Treaties of 1850 added the Lake Superior watershed to the territory of the British Colony. Dr. Lytwyn noted Sir George Simpson's glowing endorsement of the area and its future potential in Simpson's 1857 book, *Narrative of a Journey Round the World during the Years 1841 and 1842.* Dr. Lytwyn also discussed the Hind and Palliser expeditions of 1857. These expeditions were mandated to explore the region west of Fort William and into the prairies to assess the region's potential for future settlement.

[90] The report of Henry Hind, largely based on the views of Dawson, a surveyor to the expedition, endorsed the future viability of the route as a method of transporting settlers west.

[91] From this point in time, Dawson emerged as a pivotal figure in the development of this transportation route through Rainy Lake and the Rainy River. In 1871, he was also appointed a Treaty #3 Commissioner. In 1874, Dawson was appointed a Treaty Commissioner to select reserves promised in Treaty #3.

[92] Dr. Lytwyn's report set out Dawson's background, which is relevant. Simon Dawson was born in Scotland in 1818. He received training in surveying and civil engineering before emigrating to Canada in 1840. Dawson worked in the timber industry in the Ottawa valley and did survey work for a timber company in the Peterborough area in 1848. In 1851, he was hired by the Department of Public Works in Trois Rivieres and placed in charge of building a road in that area in 1855. In 1857, Dawson was appointed surveyor to the Hind Expedition, sponsored by the Dominion Department of Public Works.

[93] Dawson's 1858 Hind Expedition report endorsed the use of the historic fur trade route as a combined water/land immigrant transportation route. He also noted the considerable quantity of arable land and valuable timber in the Rainy Lake/Rainy River region.

[94] For various reasons, the colonial government did not immediately act on recommendations to build a transportation route from Lake Superior to the Red River valley. It was not until Confederation in 1867, combined with fears of American annexation, loss of settlers to the American mid-west and plans for the new Dominion government to acquire Rupert's Land from the HBC that interest in the route was rekindled.

[95] In 1867, the Dominion government approved the project by Order in Council. Dawson was placed in charge of it, together with a temporary Ontario appointee. After 1867, the route was financed entirely by the Dominion government. The endeavour hereafter became known as the Dawson Route.

[96] On May 1, 1869, Dawson reported to the Minister of Public Works on the operations of the summer of 1868.[6] After detailing the numerous locks, dams, bridges and other aids to

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[6] Exhibit #2, tab 23

navigation that would be required, Dawson included a section, at page 25, entitled *RESERVES OF LAND*. Dawson suggested:

> *Wherever public works are likely to be required it will be necessary to* ***reserve*** *a certain quantity of land, not very extensive, but enough to cover the works and the approaches thereto, as for example, at all localities where locks or dams have to be constructed.*
>
> *It would be well, also, to* ***reserve*** *an ample area at every point where villages or cities were likely to arise, so as to prevent the land from falling into the hands of individuals, who are always ready to purchase in such situations for purposes of speculation.* (emphasis added)

[97] Dawson suggested that Fort Frances, the site of the HBC post, was one locality likely to become a significant settlement. He described the energy potential of Chaudiere Falls, the flat, arable land along Rainy River and the timber and mining potential of the region, "…*Fort Frances must soon become a place of importance. Land should in consequence be* ***reserved****, not only for the public works necessary to surmount the falls, but also for the site of a town".* (emphasis added)

[98] Political vacillation between the Dawson Route and a transcontinental railway continued until the Riel Rebellion in the Red River in 1870 forced the hand of the Dominion government. The Dawson Route was used to transport 700 troops and voyageurs west from Fort William to the Red River valley in 1870. Known as the Wolseley expedition, the troops were able to run the rapids at Pither's Point while travelling downstream.

[99] Dr. Lytwyn used the history of the Wolseley expedition's travel through the subject region to illustrate the navigational difficulties on the route in 1870. The seventeen large boats of the Wolseley expedition ran the rapids at Pither's Point, confirming it was possible for skilled boatsmen to do so, even fully loaded. Dr. Lytwyn also noted that these same rapids were run by the Hind expedition.

[100] Travelling upstream around the point was a different matter. Canoes had to be either poled up and through the rapids or pulled up by a rope (lining or tracking). This latter technique required the use of a relatively unobstructed shoreline. Portaging across the point may have been required if the water was either too low or the current too strong. The boats and equipment of

the Wolseley expedition had to be portaged around Chaudiere Falls when travelling upstream or downstream.

[101] The successful passage of the Wolsoley expedition from Fort William to Fort Garry, despite these difficulties, resulted in renewed efforts toward construction on the Dawson Route. In addition to works of permanent construction, the Dominion government proceeded with the provision of steamboats on the longer stretches of water travel, including Rainy Lake, Rainy River and Lake of the Woods. They were to be built at Fort Frances. It was expected that they would be used to carry heavy and bulky freight between Lake Superior and Fort Garry. This would require more extensive, permanent infrastructure to aid navigation.

[102] In the cover letter to a memorandum to the Minister of Public Works dated December 19, 1870, Dawson first raised the issue of the Ojibway in the region:

> *I have the honour to enclose herewith, a memorandum in reference to the tribe of Saulteau Indians which inhabits the country on the line of route now being opened, between Lake Superior and the Red River Settlement, in the hope that the suggestions therein contained may be of use to the Government in negotiating a treaty with that powerful Indian Community for the cession of its Territorial rights.*[7]

[103] In this very detailed memo to the Minister, Dawson suggested, among other things,

> *That certain areas which they have long occupied, and which are necessary to them in carrying on their fishing and gardening operations, such as the Islands in the Lake of the Woods and their clearings at the Rapids on Rainy River, should be set aside for their sole and exclusive use, with the reservation that such sections as might be required for Public Works may, at any time, be appropriated by the Government.*

[104] Dr. von Gernet, in reference to this portion of Dawson's memo, assumed Dawson's reference to "…Rapids on Rainy River…" was to the Manitou and Long Sault Rapids downstream from the HBC post. I agree with this assumption.

[105] Dr. von Gernet suggested that this correspondence represents the initial provision for reserves in the region. He was of the opinion that it illustrates Dawson's recognition that

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[7] Exhibit #2, tab 34

protecting the Ojibway traditional subsistence lifestyle had to be balanced with the requirements of the Dominion government in building a transportation route through their territory.

[106] In 1871, the Dominion government established the Emigrant Transport Service from eastern Canada on the Dawson Route through Fort William and on to Fort Garry. In the 1871 season, 604 people used the service. In 1872, emigrant barges towed by steamboats traversed Rainy Lake. The steamboats were able to run the rapids at Pither's Point, but the barges were not. The Emigrant Transport Service along the Dawson Route continued to be advertised to prospective emigrants in 1872, but its use declined.

[107] The General Report of the Minister of Public Works for the fiscal year ending June 30, 1873 contains Dawson's reports to the Minister dated July 1, 1873 and November 1, 1873.[8] These reports indicated that "…three new steam launches or tugs…" built in Collingwood were "…run up through Lakes Huron and Superior…" and hauled over the "…Thunder Bay road…" and placed into service on the route east of Rainy Lake. Further, "…the two large steamers…" built at Fort Frances both began service in the summer of 1872, one on Rainy River and one on Lake of the Woods.

[108] Dawson further reported that "… a greater amount of actual work was effected during the summer of 1872 than in any previous season". Dawson noted that "…buildings are still much needed at Fort Frances…but the construction of these will be more cheaply effected when boards can be obtained from a saw mill about to be put in operation by some enterprising lumber men at Fort Frances". Dawson also reported that wharves on inland waters were "… numerous though small…" He suggested that "…larger wharves are now required for the steamers about to be run, and a commencement has been made in preparing material for them at Fort Frances…"

[109] Dawson's report to the Minister of Public Works for the fiscal year ending June 30, 1874 reflected government policy of the day, which was to promote the Dawson route as the only westward route for settlers within Canada,

> *The line of communication between Fort Garry and Prince Arthur Landing is now generally recognized as the summer route to the Province of Manitoba. Although its capabilities have been developed to a limited degree, it has, nevertheless, extended*

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[8] Exhibit #2, tab 54

considerable facilities for the transportation of freight, and to immigrants proceeding to the Red River country.

[110] During the 1874 season, both Dawson and W.H. Carpenter, the contractor responsible for the operation of the route, advised the Department of Public Works of infrastructure needed at Pither's Point. In a memo to the Department dated June 2, 1874, Dawson recommended the following improvements at Pither's Point:

At the upper rapids, above Fort Frances, that is, at the outlet of Rainy Lake a facing of crib work is, also, required so as to admit of the Rainy Lake steamer being run with facility.

[111] In the same memo, Dawson advised that wharves were also needed at Fort Frances and at the foot of Rainy Lake.

[112] Carpenter's September 18, 1874 letter to the Department in reference to the future site of the Agency One Reserve, advised:

At a point about 2 ½ miles from Fort Frances we are obliged to unload all passengers and freight into small boats and row them down the river to Fort Francis…

At a point 2 ½ miles above Fort Frances the water is so rapid the steamer is not powerful enough to content with it and therefore it will further be necessary to build a tramway 2 ½ miles or to erect a side dam or wharf along the edge of the rapid to allow the steamer to wharp herself up alongside. Either plan can be used to advantage.[9]

[113] The term "wharp" refers to the use of a rope or line to pull a boat up alongside and then past a wharf.

[114] Dr. Lytwyn's report confirmed the tramway was never built. Dr. Lytwyn was of the opinion that if it had been built, it likely would have "… cut across Pither's Point and then along the bank of Rainy River to Fort Frances". In support of this opinion, Dr. Lytwyn referred to two maps. The first, the November 25, 1874 plan of Duncan Sinclair referred to earlier, depicts what Dr. Lytwyn felt was a path or portage across the point, depicted by a dashed line. The second is

[9] Exhibit #2, tab 93

a map appended to Stephen Fowler's 1875 application for timber licenses on Rainy Lake. This map noted a steamboat landing at or near Pither's Point at the outlet of Rainy Lake[10].

[115] Dr. Lytwyn inferred that the wharf for the steamboat landing would have logically been built where a path or portage was already in existence. On cross examination, Dr. Lytwyn conceded that he could not confirm that a path or portage actually did exist in this location in 1874 or 1875.

[116] Dawson's July 1, 1875 annual report advised that the crib work at Pither's Point had proceeded in 1874:

> *In order to facilitate the passage of the Rainy Lake steamer to and from the landing at Fort Frances, a contract was given to Messrs. W.H. Carpenter & Co. last winter, to construct certain crib-work in the channel of the River immediately above the falls. So much of the work has been completed as to produce the desired effect, and the steamer now runs up and down the rapids at the outlet of Rainy Lake.*
>
> *A line of cribwork has been constructed in the proximity of the falls so that a steamer can run up and down the rapids at the outlet of Rainy Lake.*[11]

[117] In cross examination, Dr. Lytwyn acknowledged that this work had more likely than not proceeded over the 1874/1875 period.

[118] Dr. Lytwyn's report, at page 29, suggests that the term "cribwork" referred to a wooden structure designed to aid navigation, likely a wharf used by men when pulling boats up through the rapids into Rainy Lake.

[119] As of 1874, no construction had yet begun on a national railway. Dawson resigned as Engineer in charge of the Dawson route in 1875. His final report continued to recommend improvements on the route, including a very significant lock and canal at Fort Frances, intended to facilitate steamboat traffic between Rainy Lake and Lake of the Woods. This work proceeded in 1875 and 1876, but it was not completed. The General Report of the Minister of Public Works for the fiscal year ending June 30, 1876 recommended additional work at Pither's Point to improve navigation.

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[10] See pages 3, 4, 27 and 28 of Exhibit #65.
[11] Exhibit #2, tab 115

[120] By 1876, the political opponents of the Dawson Route had gained the upper hand. The Canadian government cancelled funding for the route on April 29, 1876. The decision had been made to proceed with a transcontinental railway, the line of which would bypass Fort Frances in favour of Rat Portage on the northern shores of Lake of the Woods.

[121] In his conclusion at page 37 of his report, Dr. Lytwyn described the Dawson Route as "…a short-term solution to the long term problem of providing transportation to the western part of Canada". He notes, however, that it was initially touted as a possible permanent transportation link with western Canada. Dr. Lytwyn identified Dawson as the driving force behind the route, seeing the potential for future development of lumbering, farming and mining in the Rainy Lake/Rainy River region.

[122] Dr. Lytwyn noted, as will be discussed in more detail below, that during the period when Dawson was Chief Engineer in charge of construction of the Dawson Route, he was also a commissioner engaged in the negotiation of Treaty #3 in 1871, 1872 and 1873. In 1874, when Dawson negotiated the location of Treaty #3 reserves, including the Agency One Reserve at Pither's Point in 1874, the construction of infrastructure at the point had already begun.

[123] Dr. Lytwyn concludes that when Dawson described the Agency One Reserve as having "*… two chains in depth along the shore of Rainy Lake and bank of Rainy River, to be reserved for roads, right of way to lumber-men, booms, wharves and other public purposes*", Dawson's "…purpose and intention was clearly to improve transportation and to promote future development and settlement in the region." It is the opinion of Dr. Lytwyn that the "…two chain allowance around the shore of Agency One Reserve was seen at the time to be necessary for the operation of the Dawson Route."

THE DEVELOPMENT OF THE FORESTRY INDUSTRY THROUGH THIS AREA

[124] Dr. J. Williams was called as a witness by The Corporation of the Town of Fort Frances ("Fort Frances"). Dr. Williams was qualified as an expert professional Ontario forester in relation to the beginnings of the forest industry in the Rainy Lake/Rainy River/Lake of the Woods watershed and the development and management of the industry in the 1870's regarding seasonality and the use of watercourses. Dr. Williams was also qualified to provide opinion evidence on the importance of lakes, lakeshores, rivers and river banks and adjacent land to the

establishment and operation of the forest industry. Dr. Williams' report, exhibit #48, dated April 16, 2012, was also filed in evidence on consent as truth of its contents.

[125] In preparing his report, Dr. Williams reviewed the pleadings, productions and interrogatories exchanged by the parties. Dr. Williams also viewed relevant archival documents and sessional papers produced during the subject time period.

[126] Dr. Williams' report detailed the development and progression of the industry in the area beginning with a general description of the extent of commercial forests present in the region in the mid-1800's. This was followed by a discussion of early timber licences granted in the area and a general description of logging activities in the time period with an emphasis on the transportation, storage and processing of logs.

[127] Dr. Williams was specifically asked by Fort Frances to provide his opinion on the importance of lakes, lake shores, rivers, river banks and adjacent lands to the forest industry in the area during the relevant time period.

[128] Dr. Williams noted that white and red pine were the most important timber species in Canada up until the beginning of World War 1. By the 1870's, when the commercial forest industry took hold in northwestern Ontario, virtually all timber harvested was used to produce dimensional lumber.

[129] Northwestern Ontario contained very large areas of pine forest, concentrated in the southern part of this region, around Lake of the Woods and the Rainy Lake/Rainy River watersheds. In the area around present day Fort Frances, early explorers and surveyors, including Dawson, were unanimous in their descriptions of the extent and potential value of this resource.

[130] As the American mid-west developed, immigration to western Canada began. Concurrently, the lumber industry in Ontario expanded westward. Wherever there were sufficient quantities of white and red pine, interest in harvesting it followed. As early as 1872, there was interest in accessing the pine forests of the Lake of the Woods/Rainy Lake/Rainy River watersheds. In 1873, S.H. Fowler ("Fowler") selected three timber blocks totalling 100 square miles in the vicinity of Rainy Lake and on the Seine and Manitou watersheds. These

applications were approved by Order in Council in the fall of 1873 and the lease was issued to Fowler on August 19, 1875.

[131] Dr. Williams was of the opinion that Fowler had been in the Fort Frances area as early as 1873, "…if not earlier." Dawson, in the General Report of the Minister of Public Works for the fiscal year ending June 30, 1873, and in reference to the Fowler mill, wrote that a new sawmill was "about to be put in operation by some enterprising lumbermen, at Fort Frances." A Town Plot of Alberton, part of present day Fort Frances, surveyed by E.C. Caddy ("Caddy") and dated November 20, 1875[12], and a map titled "Plan Shewing Government Reserve at Fort Frances" dated October 2, 1874[13] both show Fowler's mill on a point of land directly ashore from Chaudiere Falls on Rainy River, approximately two miles downstream from Pither's Point.

[132] Figure 1, page 19 of Dr. Williams report illustrates both Fowler's mill and a wing dam which, according to Dr. Williams was used to create a log–holding area between the dam, the point and the main shore.

[133] On the basis of this information and documentation, together with his assumption of the time which would have been required to construct the sawmill and wing dam, Dr. Williams felt that it was reasonable to conclude that Fowler's mill "…was certainly in operation in 1873, and likely as early as 1872." Dr. Williams opined, correctly in my opinion, that prior to obtaining his timber limits in 1875, Fowler may have run his mill on wood cut from lands being cleared by settlers, wood obtained from the United States, and/or wood cut without license from the Rainy Lake area. Dr. Williams was clearly of the opinion that, in any event, at the time when Dawson first wrote the description of the Agency One Reserve in December 1874, "…Fowler's mill was a going concern" two miles downstream.

[134] Dr. Williams was further of the opinion that Fowler may have made even more extensive use of the shoreline between Pither's Point and his mill. Timber from his harvest blocks on Rainy Lake would have had to pass through the rapids at Pither's Point to get to his mill down river. In order to do so, Dr. Williams concluded that there would have had to be lumbermen moving up and down the shoreline around Pither's Point and downstream toward the mill controlling the logs. Dr. Williams offered the opinion that the two chain description recognized an existing use of the shoreline.

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[12] Exhibit #3, tab 119
[13] Exhibit #1, tab 46

[135] A large portion of Dr. Williams report and his evidence at trial focused on logging and log transport methods in the Rainy Lake/Rainy River region in the 1870's. At this time, in the absence of roads and railways, rivers and lakes were the exclusive method of moving logs from a harvest location to the mills for processing. As a result, the harvest of the timber was primarily done close to navigable waterways and virtually all of it in winter, utilizing the spring runoff to move the logs.

[136] Ice roads were built and horses were used to bring logs to lakeshores and river banks. Here the logs were stored, sometimes on the ice itself, until spring break up when they were driven or boomed to the mill. The seasonality of the timber harvest also required that a year's worth of timber had to be transported to mills each spring and summer, necessitating the construction of log storage facilities at each mill.

[137] Dr. Williams stated that shoreline allowances were essential to the forestry industry at this point in time. The activities that were required to be undertaken on river banks and lakeshores included:

-river and lake improvements prior to a drive (booms, cribbing, removing obstacles dams to regulate water levels;

-crossing river banks and lakeshores with horses and tank sleighs to obtain water for ice road construction;

-use of banks and shores for log storage prior to drives;

-skidding and winching logs over portages between lakes, rivers and streams;

-establishing camps for loggers and drivers;

-log drivers used riverbanks and lakeshores to prevent and break up log jams;

-at mill sites, virtually always located beside water for obvious reasons, holding booms were constructed to store logs prior to processing.

[138] Dr. Williams' conclusions are summarized on pages 32 and 33 of his report. The essence of these conclusions is that an individual such as Dawson, described by Dr. Lytwyn as a surveyor and civil engineer with prior experience in the Ontario timber industry in both the

Ottawa Valley and Peterborough, would have been abundantly aware of the extent of the resource immediately available, the current use of the resource in the immediate area, the future potential of it and the physical and practical requirements of moving wood from harvest locations to existing mill locations.

[139] Dr. Williams concludes that, in the 1800's, without access to water and the shorelines, the forest industry simply could not have functioned. There was no feasible alternative means of moving harvested timber (the harvesting itself relying very heavily on water bodies) to mills to be processed.

[140] The first sawmill in the area was operational by 1873. It was located about two miles downstream from Pither's Point. The mill operation included a wing dam that was "…almost certainly…" for the purpose of creating a storage area for the mill's logs, which "…may have…" extended up to Pither's Point. The timber to be harvested was primarily located on the Rainy Lake watershed. It had to be moved, by water, from east to west across Rainy Lake, past Pither's Point and west downstream on the Rainy River to the mill site.

[141] Dr. Williams concluded that the 1874 description of the Agency One Reserve, and the provision for the two chain allowance adjacent to the water's edge in that description, accommodated both current and anticipated future uses of the site by the forest industry, which he suggests would have been known to anyone familiar with the development of the forest industry in the area at the time when the reserve was described.

[142] The plaintiffs, while not taking issue with the factual content of Dr. Williams report, suggest his evidence contributes little to the issues before the court. The plaintiff's accept that the Fowler mill, on Rainy River at Fort Frances, was operational as early as 1873. They further accept that this mill expanded rapidly and that Fort Frances became a major regional forest centre by 1900.

[143] However, the plaintiffs submit that the evidence establishes that Fowler did not have a license to cut timber on Rainy Lake until 1875 and that there is no direct evidence that he did so without a license. Without such evidence, the plaintiffs submit that Dr. Williams is unable to state with any degree of certainty that log drives were actually taking place around Pither's Point and onto Fowler's mill when Dawson wrote the Two Chain description in December 1874.

[144] The plaintiffs also do not take issue with the suggestion that Dawson, given his background, would have appreciated the very significant potential of the timber harvest in the area and the practical requirements of bringing it to market. However, the plaintiffs submit that because there is insufficient evidence from which to infer any log drives had occurred past the rapids as of the fall of 1874, Dr. Williams' evidence as to the need of shoreline access for such drives is not something that could have been in Dawson's mind from actual observation of the site prior to writing the two chain description.

DISCUSSION

[145] A discussion of what the evidence establishes on the issue of Ojibway use and occupancy of the future Agency One Reserve site in the century prior to Treaty #3 must, in my opinion, be prefaced by a consideration of the *nature and intensity* of the use and occupancy we are concerned with.

[146] Drs. Miller and White described in detail Ojibway use and occupancy of land within their traditional land use area according to the Ojibway cultural understanding of the concept. I accept this evidence without hesitation. However, I reject Dr. White's criticism of Dr. von Gernet, wherein Dr. White rejected Dr. von Gernet's "ranking" of sites used by the Ojibway within a region based on intensity and frequency of use, which according to Dr. White, led von Gernet to "suggest a rigid line between Anishinaabe and trader use of the resources of the Rainy Lake region."

[147] In my opinion, the traditional Ojibway use of land within a region leads one to the conclusion that there must have been a significant number of sites within the traditional territory of the Rainy River/Rainy Lake Ojibway that were used regularly, but only occasionally, for camping, fishing and other subsistence activities as part of their "seasonal rounds" by individual or small groups of Ojibway. Common sense suggests that many locations were used for a variety of purposes and at different levels of intensity.

[148] For the purposes of this case, this regular but occasional use must, in my opinion, be considered in light of different and more intense use of other sites for regular and/or annual political, social or cultural gatherings of large groups of Ojibway bands within the region, such as near the HBC post of Fort Frances at Chaudiere Falls. This is particularly so when the

question being considered is the Ojibway expectation as to reserves to be set aside as part of the treaty process.

[149] Dr. von Gernet concedes that occasional pre-1874 use of Pither's Point by the Ojibway cannot be ruled out. Drs. Miller and White concede that the historical record does not demonstrate "continuous camping" on the Agency One Reserve site pre-1874, but insist there is ample evidence to suggest there was regular use and occupany of the site by the Ojibway which would necessarily include use of the shoreline for ingress and egress and fishing.

[150] All experts who testified on the issue accepted the long term, significant use of areas near the HBC post of Fort Frances for annual gatherings of significant social, political and cultural purposes of the Ojibway. I accept that the future site of the Agency One Reserve, two and one/half miles upstream, on a picturesque point directly on the line of travel and with a beautiful sand beach was used on an occasional, yet regular basis, by individual or small groups of Ojibway as part of their seasonal rounds. This is consistent with the evidence of Mr. Major.

[151] Considering all of the evidence before me, including that of Mr. Major, I am not persuaded that the Ojibway use of this site in the century prior to Treaty #3 was of any more significance to the Ojibway than the use of similar, comfortable and conveniently located camping areas within the region.

[152] I am not persuaded, based on the evidence before me, that this site was of any special significance to the Ojibway for social, political or cultural reasons during this period of time. I accept the conclusion of Dr. von Gernet that, if Ojibway use and occupancy of the site had been more significant during this time period, in all likelihood it would have been observed and documented. I also accept his conclusion that if the site had held any special status for the Ojibway, it would be reasonable to assume that records would exist that it was sought after by them during Treaty or reserve location negotiations. There is no evidence to suggest that this occurred.

[153] Prior to the start of negotiations for Treaty #3, Dawson had been appointed to supervise the development and construction of the Dawson Route, a land and water based transcontinental transportation route which passed Pither's Point and proceeded west down Rainy River. Until this project was abandoned in favour of a transcontinental railway in the late 1870's, it was the

only national transportation route available for immigration to western Canada. It was funded and promoted by the Dominion government.

[154] Early on in the project, Dawson recognized the need to reserve land for the project's infrastructure, public works and town sites, including at Fort Frances. After the use of the Dawson Route to transport troops to the Riel Rebellion in 1870, the Dominion government expended significant resources on the development and construction of the project. Dawson was the person in charge, making recommendations on improvements needed.

[155] The Dawson Route had to pass by Pither's Point and significant impediments to travel had to be overcome. The need for, and the construction of, infrastructure at or near Pither's Point is well documented. This included wharves at the outlet of Rainy Lake and cribwork at the point itself.

[156] I find that Dawson was also aware of the significance of the timber resource in the immediate area, primarily on Rainy Lake and the rivers flowing into it. The harvested timber had to pass Pither's Point to reach Fowler's mill downstream. Dawson would have been aware of the potential future growth of the forestry industry and of the practical difficulties presented in moving the timber from harvest areas, through the narrows at the point and to the mill.

[157] I accept what I find to be are the reasonable conclusions of Dr. Lytwyn, as to the Dawson Route, and of Dr. Williams, as to the forestry industry, as they pertain to Dawson's 1874 description of the Agency One Reserve with "two chains in depth along the shore of Rainy Lake and bank of Rainy River, to be reserved for roads, right of way to lumbermen, booms, wharves, and other public purposes."

[158] Dr. Lytwyn concluded that the two chain allowance around the shore of Agency One Reserve was seen at the time to be necessary for the operation of the Dawson route. Dr. Lytwyn's opinion was that Dawson's intention and purpose was clearly to improve transportation and to promote future development. I accept and agree with this conclusion.

[159] Dr. Williams was of the opinion that anyone with familiarity of the operation of the forestry industry in northern Ontario in the 1870's, such as Dawson, would recognize the need for the industry to have unimpeded access to the shoreline of waterbodies for the purpose of harvest and transportation of timber. This need was particularly acute at Pither's Point and the

immediate approaches thereto, due to the unique geography of the immediate area. Dr. Williams was of the opinion that the reservation of a two chain allowance above the high water mark at Pither's Point was intended to accommodate current and future uses of the immediate area. I accept and agree with this opinion.

TREATY #3 NEGOTIATIONS AND THE CREATION OF THE AGENCY ONE RESERVE

[160] It was within the foregoing historical and geographical context that Treaty #3 was negotiated and that Treaty #3 reserves were created. Dawson, a treaty commissioner, a reserve selection commissioner and the Crown Engineer in charge of developing a national transportation system routed past Pither's Point, most certainly wore "…many hats and represented many interests, some of which cannot help but be conflicting."[14]

[161] Further to Dawson's December 19, 1870 memorandum to the Minister of Public Works (para. 102), by Order in Council dated April 25, 1871, Dawson, Robert Pither, a HBC employee at the time ("Pither") and Wemyss Simpson, Indian Commissioner, Department of the Interior, were appointed as Treaty Commissioners "… to deal…" with the Indians "… who occupy the country from the water shed of Lake Superior to the north west angle of Lake of the Woods and from the American border to the height of land from which the streams flow towards Hudson's Bay."

[162] On July 11, 1871, the commissioners first reported to Joseph Howe, Secretary of State for the Provinces ("Howe")[15]. The commissioners advised that they had met with the Ojibway and explained to them that the government intended to obtain a surrender of their territorial rights. The Ojibway deferred this particular discussion, but agreement was reached "…in regard to promises which had heretofore been made to them, for "right of way" through their country." Gifts were accepted by them as payment "… for all past claims whatsoever."

[163] While a treaty had not been concluded, the commissioners were of the opinion that discussions had been satisfactory nonetheless. They stated that "…the Indians fully comprehend the altered position in which they are placed by the opening of the communication." It was agreed that the parties would meet early the following summer by which point in time the

[14] Wewaykum, para. 96.
[15] Exhibit #2, tab 44.

commissioners anticipated the Ojibway would be prepared "… to point out the land which they desired as reserves…"

[164] A second attempt to negotiate a treaty took place between July 1 and 17, 1872 at Fort Frances. This was also unsuccessful. These discussions appear to have been somewhat more acrimonious than in 1871.

[165] The commissioners reported to Howe on July 17, 1872.[16] The commissioners reported that "…the Indians…have advanced the most extravagant demands for roads made on their lands and wood taken for steamers and buildings." Howe was further advised that the Ojibway are "…well informed as to the discovery of Gold and Silver to the west of the watershed and have not been slow to give us their views as to the value of that discovery."

[166] The commissioners also noted that "…jealousy and mistrust between the different bands have had no small share in preventing an arrangement from being arrived at." Finally, the commissioners felt the presence of "…a number of Indians from the United States side who had apparently received "…presents and payments more considerable than it was in our power to offer…" negatively affected negotiations.

[167] The report ended on a negative note. The commissioners recommended that a military force should be maintained at Fort Frances "…for the forbearance of untutored savages could not be relied upon…" with the advance of settlement, public works and mining activity. The commissioners concluded their report by indicating that, despite parting on amicable terms, "…we do not believe that under existing circumstances any good could arise from further councils."

[168] During the early 1870's, while Treaty #3 negotiations were underway, Dominion government officials anticipated the need for a permanent Indian Agency and buildings in the vicinity of Fort Frances.

[169] The Ojibway of the region had traditionally gathered in areas adjacent to the HBC reserve, at Chaudiere Falls, to hold large annual meetings and feasts. The traditional importance of these gatherings to the Ojibway of the region must not be understated. It was commented on by Dawson as early as 1869 and 1870:

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[16] Exhibit #2, tabs 49 and 50.

In spring, however, as soon as navigation opens, the Indians begin to assemble from all directions at Rainy River and Fort Frances (HBC Fort), and fish being then abundant, there is no lack of food, so that they can congregate and remain together in considerable numbers. In spring, too, the Chiefs and leading men of the tribe assemble at Fort Frances to hold, there, their annual festivities and deliberate on the affairs of the community.[17]

In spring as soon as navigation opens, the Indians leave their hunting grounds and betake themselves to the Lakes and Rivers and, as the fish literally swarm in these inland waters, in the early part of Summer, they have then no difficulty in obtaining food, and the means of communication being easy to their light canoes, they can congregate in considerable numbers. Rainy River is their chief resort and it is there that their Councils are held and their feasts celebrated.[18]

[170] Despite the Ojibway having expressed an initial interest in the area around the HBC reserve as a site for a permanent reserve, it was generally understood by all parties that this was not going to occur. Expectations for settlement and public works in this immediate area, coupled with the HBC claims to the lands around its forts "…likely explain why the traditional Ojibway campground in the immediate vicinity of Fort Frances was never seriously entertained by the Crown as a possible site for an Indian reserve."[19]

[171] Thus, a site for an Indian Agency and buildings was required and the Rainy Lake and Rainy River Ojibway needed a site for future annual gatherings and feasts. Dr. von Gernet was of the opinion that Pither's Point had been selected by the Crown for these purposes as early as 1872.[20]

[172] On September 30, 1873, Pither, now the Indian Agent at Fort Frances and a Treaty #3 Commissioner, wrote Joseph Provencher, Indian Commissioner, Manitoba and North West Territories and Treaty #3 Commissioner ("Provencher"), advising that while the government had issued instructions for the construction of a dwelling for the Indian agent and storehouse for provisions for the Indians at "…Fort Frances…" "…two years ago…" nothing had occurred.

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[17] Exhibit #1 tab 12, pp. 2,3, Dawson memorandum December 17, 1869.
[18] Exhibit #1, tab 15, p. 2, Dawson memorandum December 19, 1870
[19] Von Gernet report, Exhibit #55 p. 32.
[20] See Exhibit #55, p. 36.

[173] In 1874, Pither received approval to proceed with construction, having reached agreement with the government that he would pay for the construction and that the government would rent the buildings from him. Pither's Point thus became the location for the Fort Frances Indian Agency shortly prior to the site being selected as an Agency reserve.

[174] Dr. von Gernet's opinion as to the conception of the Agency One Reserve initially as an Indian Agency is found at pp. 69-70 of his report:

> *The weight of the evidence suggests that by 1871 plans were afoot to erect Indian agency buildings. By 1872 government officials had decided to set aside the subject reserve for the purpose of erecting those buildings and also to allow the Ojibwa to camp nearby. This was an alternative to the site at or near the Hudson's Bay Company buildings which would no longer be available for either an agency or a campground. However, the need to erect the buildings did not become urgent until the following year, and the precise metes and bounds of the subject reserve, as well as the locations of other reserves, would not be finalized until years after that.*

[175] Treaty #3 negotiations recommenced in October 1873. On October 3, 1873, at the North West Angle of Lake of the Woods, the Crown and the Saulteaux Tribe of the Ojibway Indians, by their representative Chiefs, entered into Treaty #3. The Crown was represented by three treaty commissioners appointed by the Dominion government, Dawson, Provencher and Alexander Morris, Lieutenant-Governor of Manitoba and the North West Territories ("Morris"). The treaty was approved by Order in Council October 31, 1873.[21]

[176] Pursuant to the terms of this treaty, approximately 55,000 square miles of traditional Ojibway territory situated in what is now northwestern Ontario and eastern Manitoba was surrendered by the Ojibway. In exchange, the Crown promised reserves and other benefits, in part as follows:

> *And her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and also to lay aside and reserve for the benefit of said Indians to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, in such a manner as shall seem best, other reserves of land in the said territory hereby ceded, which said reserves*

[21] Treaty #3 is found at Exhibit #1, tab 27 of the record.

shall be selected and set aside where it shall be deemed most convenient and advantageous for each band of bands on Indians by the officers of the said Government appointed for that purpose, and such selection shall be so made after conference with the Indians…

It is further agreed between her Majesty and Her said Indians that such sections of the reserves above indicated as may at any time be required for Public Works of buildings of what nature soever may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made for the value of any improvements thereon.

[177] Treaty #3 created a process whereby the Crown, subsequent to signing the Treaty, was obligated to "conference" with the Indians and create reserves "where most convenient and advantageous" to each band.

[178] In his final report submitted on October 14, 1873, Morris provided the rationale for deferral of the reserve selection process:

I have further to add, that it was found impossible, owing to the extent of the country treated for, and the want of knowledge of the circumstances of each band, to define the reserves to be granted to the Indians. It was therefore agreed that the reserves should be hereafter selected by officers of the Government, who should confer with the several bands, and pay due respect to the lands actually cultivated by them. A provision was also introduced to the effect that any of the reserves, or any interest in them, might hereafter be sold for the benefit of the Indians by the Government, with their consent. I would suggest that instructions should be given to Mr. Dawson to select the reserves with all convenient speed; and, to prevent complication, I would further suggest that no patents should be issued, or licences granted, for mineral or timber lands, or other lands, until the question of the reserves has first been adjusted.[22]

[179] In a report to the Governor General in Council dated October 30, 1873, Mr. D. Laird, Minister of the Interior, recommended approval of Treaty #3. This report notes that the 55,000 square miles embraced by Treaty #3 includes the "Dawson Route, the Route of the Canada

[22] Alexander Morris (1880) The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on Which They Were Based exhibit #2, tab 147, p. 52

Pacific Railway and an extensive Lumber and Mineral Region". Treaty #3 was approved by Order in Council dated October 31, 1873.

[180] Within the catchment area of Treaty #3 lie the Fort William-Fort Garry section of the Dawson Route. This route would remain the primary transportation route between Fort William and Fort Garry until 1885, when the Canadian Pacific Railway first joined these two communities, passing through Rat Portage at the northern outlet of Lake of the Woods rather than Fort Frances.

[181] On October 11, 1873, Dawson was instructed by E.A. Meredith, Deputy Minister of the Interior to "…consult Bands and select Reserves under Treaty, submit Report & Schedule describing in each case the Boundaries and contents approximately."[23]

[182] Dawson provided an initial report to David Laird, Minister of the Interior ("Laird") on March 2, 1874.[24] This report provided, in part, as follows:

> *In regard to Reserves the Treaty provides that they shall be selected and set aside after conference with the Indians and it will, therefore, be necessary that Commissioners should meet the Indians as early as possible, next summer, and, in concert with them, proceed to lay off the Reserves.*
>
> *Rainy River is the only place where extensive Reserves of the first class – that is farming lands – could interfere with the progress of settlement and I would propose limiting them, on that River, to an aggregate area of six square miles. It is already partly understood with the Indians where these Reserves are to be. And, in order that your department may be informed as to the locations desired by them and which it would, at the same time, be advisable to give them, I enclose a Map of Rainy River showing the proposed Reserves.*
>
> *The Treaty provides for the maintenance of schools of instruction in the Reserves whenever the Indians shall desire it, and the localities of where they are to be placed must form a subject of deliberation between the Indians and the Commissioners of the Government. In*

[23] Exhibit #1, tab 28.
[24] Exhibit #2, tab 68.

the meantime, I think the preliminary steps should be taken to have a school for secular instruction and agricultural training established on the Reserve to be laid off in the vicinity of Fort Frances, the principal rendezvous of the Tribe.

[183] On June 24, 1874, Laird recommended an Order in Council appointing Dawson and Pither to select the reserves. Laird indicated in his recommendation that:

Both these gentlemen seem specially qualified for the important and difficult task which it is proposed to entrust to them…By their intimate knowledge of the Indian Bands affected by the Treaty…By their knowledge of the country in which the Reserves are to be selected; and…By their possessing in a peculiar degree the confidence of the Indian Tribes for whom the Reserves are to be selected.[25]

[184] Noting that Morris had already delegated the duty of provisionally selecting the Treaty Reserves to Dawson and that Dawson had submitted a map indicating the localities selected by him on Rainy River for the two classes of Reserves provided by the Treaty, Laird further recommended that this map should be provided to the parties chosen to select the Reserves and used by them "…as the basis of their operations."

[185] Exhibit #14, tendered by the plaintiffs, is an unsigned and undated map of the Rainy River and several proposed reserves, including a "Proposed Indian Reserve" at the outlet of Rainy Lake.[26]

[186] The plaintiffs submit that the map referred to in Dawson's March 2, 1874 letter to Laird is "probably" related to exhibit #14. The plaintiffs submit that, although unsigned and undated, this map is the "…only surviving map from the 1874-1875 period before reserves were surveyed, and Simon Dawson would seem to be the only candidate to be its author."

[187] Canada submits that exhibit #14 is neither the map referred to in Dawson's March 2, 1874 report to Laird nor the "map with descriptions" referred to in Dawson's December 31, 1874 report to Meredith, referred to on the following page. Canada submits that exhibit #14 is significantly at odds with the written descriptions contained in the December 31, 1874 Dawson letter. In any event, the plaintiffs' evidence on discovery, read into the record at trial, confirms

[25] Exhibit #1, tab 39.
[26] Also found at Exhibit #1, Tab 31, CLSR 163. Exhibit #15 is an enlarged version of exhibit #14 at Pither's Point.

that the plaintiffs have no information to directly link exhibit #14 with Dawson's March 2, 1874 report.

[188] By Order in Council dated July 8, 1874, Dawson and Pither were formally appointed Treaty Commissioners for the purpose of selecting reserves promised by the Crown in Treaty #3:

> "*…such selection to be made as provided by the Treaty after conference with the Indians and subject to the other conditions set forth in the Treaty".*

[189] This Order in Council further provided that:

> "*the selections of the reserves made by the Commissioners should not be final until confirmed by the Governor General in Council, and it should be the duty of the Commissioners as soon as possible after setting aside and selecting the Reserves as above directed to report their proceedings to the Minister of the Interior, and to send with their Reports a map indicating approximately the locality of the Reserves as selected for submission to council".*

[190] On December 31, 1874, Dawson provided an interim report to the Ministry of the Interior stating that "…the maps intended to accompany my report on the Indian negotiations are not quite ready…" Dawson provided "…a map with descriptions, shewing the Indian Reserves on Rainy River, as arranged with the Chiefs of the various bands, last fall…" Dawson advised that there was some urgency in establishing these specific reserves:

> *These reserves, being on the high road and liable to be entered on by squatters at any time should be laid off as soon as possible. The reserves in other localities are, in general, not so close to the line of route, and the lands less valuable.*

[191] The "map with descriptions" referred to in this letter has not been located. Dawson's descriptions were attached as a schedule to his letter. Under the heading "RAINY RIVER", eight reserves are described, including the subject reserve, first described by Dawson in 1874 as follows:

> *No. 1 At the foot of Rainy Lake, to be laid off as nearly as may be in the manner indicated on the plan -* ***two chains in depth along the shore of Rainy Lake and the bank***

> ***of Rainy River, to be reserved for roads, right of way to lumber-men, booms, wharves, and other public purposes.*** (emphasis added)
>
> *This Indian Reserve, not to be for any particular Chief or Band, but for the Saulteux Tribe, generally, and for the purpose of maintaining thereon an Indian Agency with the necessary grounds and buildings.*[27]

[192] This reserve has come to be known as the Agency One Reserve. It is not in dispute that this reserve was originally laid out with the intention of reserving a tract of land where buildings required by the government to administer the affairs of the Ojibway could be built and to provide a camping ground to be used by the Ojibway when visiting the Agency and for annual feasts and meetings. It was not a reserve in the usual sense of a parcel of land set aside for a particular band under a per capita formula. It was never intended that the Agency One Reserve have a permanent resident population and it never did. It was used as an agency reserve only until 1882.

[193] On January 28, 1875, Dawson submitted his complete report, detailing the reserve selection meetings which had occurred in 1874 and his selection of reserves from the eastern boundary of Treaty #3 through to Lake of the Woods. This report included a schedule of reserve descriptions inclusive of the eight described in his December 31, 1874 interim report. The description of the Agency One Reserve in this report is virtually identical to the earlier description.[28]

[194] In this report, Dawson stated, “in reference to the foregoing, the Reserves numbered from 1 to 8 are described with sufficient precision to admit of their being laid off at any time and these are the only ones immediately on the line of route”.

[195] Dawson prepared a Schedule “A” dated February 17, 1875 which was submitted with other material to Cabinet in support of the Order in Council setting aside certain Treaty #3 reserves. This schedule contained descriptions for numerous Treaty #3 Reserves, including the Agency One Reserve. Again, there was no material difference in this description of the Agency One Reserve.[29]

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[27] Exhibit #1, tab 51
[28] Exhibit #2, tab 65, incorrectly dated 1874
[29] Exhibit #7, p. 20 and following.

[196] The recommendation to the Governor General in Council was dated February 11, 1875 and approved by Order in Council dated February 27, 1875. The recommendation stated:

> *…the time has not yet arrived for confirming absolutely the Reserves selected by the Commissioners, but he, the minister, recommended that…the Reserves, so far as they have been selected by the commissioners, laid down on the accompanying map signed by Mr. Dawson and marked Indian Branch No. 2790, and described in the annexed document marked A, be provisionally approved subject however, to such further surveys as may be necessary as indicated by the Commissioners and subject to final confirmation by the Governor General in Council on completion of such surveys.*

[197] This is the only Order in Council confirming the Agency One Reserve.[30]

THE INTENTIONS AND EXPECTATIONS OF THE CROWN AND OJIBWAY REGARDING THE AGENCY ONE RESERVE AND THE TWO CHAIN ALLOWANCE

[198] The negotiations preceding the signing of Treaty #3 have been thoroughly documented. Any specific negotiations and discussions which may have occurred regarding the Agency One Reserve and the two chain shore allowance set out in Dawson's description were not.

[199] Dr. von Gernet, Canada's expert, discusses this issue at pages 31 to 54 of his report.[31] Von Gernet concluded that there is no evidence "…that the subject reserve was among those selected by any particular Ojibwa band or by treaty signatories as a whole" during the Treaty #3 negotiations in 1873 or during any reserve selection meetings in 1874. In Dr. von Gernet's opinion, the site had already been chosen by the Crown as the location for the Fort Frances Indian Agency[32].

[200] Dr. von Gernet's evidence is that there was only a single specific recorded discussion of a reserve within Treaty #3 during the treaty negotiations, that being a claim by Mawedopenais, the Chief of Fort Frances, to the HBC reserve. This claim was resolved by providing Mawedopenias a reserve downriver from the HBC reserve.

[30] Exhibit #2, tab 104.
[31] Exhibit #55.
[32] Exhibit #55, pp. 69-71.

[201] Morris' report[33] discusses this claim and suggests to me that von Gernet's conclusion is not entirely accurate. Morris states, at page 50, that on October 3, 1873, in the midst of final negotiations, the Ojibway "…asked what reserves would be given them, and were informed by Mr. Provencher that reserves of farming and other lands would be given them as previously stated, and that any land actually in cultivation by them would be respected."

[202] Morris included in his report passages from the *Manitoban* newspaper of October 18, 1873, published in Winnipeg, prepared by a shorthand reporter present at the negotiations, which he suggests presents "…an accurate view of the course of the discussions…" The following exchange between Mawewdopenais, the Chief of Fort Frances and Provencher was recorded:

> *Chief – "It will be as well while we are here that everything should be understood properly between us. All of us – those behind us – wish to have their reserves marked out, which they will point out when the time comes. There is not one tribe here who has not laid it out."*
>
> *Commissioner Provencher – "As soon as it is convenient to the Government to send surveyors to lay out the reserves they will do so, and they will try to suit every particular band in this respect."*
>
> *Chief – "We do not want anybody to mark out our reserves, we have already marked them out."*
>
> *Commissioner – "There will be another undertaking between the officers of the Government and the Indians among themselves for the selection of the land; they will have enough of good farming land, they may be sure of that."*
>
> *Chief – "Of course, if there is any particular part wanted by the public works they can shift us. I understand that; but if we have any gardens through the country, do you wish that the poor man should throw it right away?"*
>
> *Commissioner – "Of course not."*

[203] In commenting on the Crown's intention as to the Agency One Reserve, von Gernet suggests that "…irrespective of whether it formed the subject of discussion with the Ojibwa in

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[33] Exhibit #2, tab 147.

1874, it is apparent that Dawson…understood two things in relation to the subject reserve." Firstly, that this was to be "agency reserve" containing government buildings and which also required sufficient area for the Ojibway to camp during annual political, social and cultural gatherings. Secondly, von Gernet suggests that Dawson was aware that the public interest had to be protected with a shoreline allowance "…as the subject reserve was comprised of a point (surrounded on three sides by water) that was located at an important transition between a major lake and river – a transition that had navigational impediments sufficient to require disembarkation and possible future improvements."[34]

[204] In discussing the Ojibway understanding of the provision for a two chain shoreline allowance separating the Agency One Reserve from the shores of Rainy Lake and Rainy River, von Gernet acknowledges that "…the record is silent on the Ojibwa understanding or even whether the provision had been communicated to them." Von Gernet goes on to comment on "…whether and to what extent the Ojibwa would have had an interest in the shorelines of the subject reserve in the first place."[35]

[205] Von Gernet concludes that Pither's Point was not a location of significant political, social or cultural significance to the Ojibway in the years leading up the creation of the Agency One Reserve. This witness suggests that there is no "…evidence that the subject reserve was among those selected by any particular Ojibwa band or by the treaty signatories as a whole. On the contrary, the evidence suggests it was selected by government officials as an alternative to an unavailable site."

[206] Assuming the Ojibway interest in the Agency One Reserve was limited to that of a site for the Indian agency and an adjacent campground, von Gernet further suggests that the provision of a shoreline allowance would not have caused "any concern" to the Ojibway because it would not "…have been seen to impact the Ojibwa capacity to camp on Pither's Point for their annual assemblies." Von Gernet concludes that there is no evidence that this reserve was discussed in 1874, "let alone that the shoreline allowance provision was an issue."[36]

[207] Dr. White does not address the issue of the Crown's expectations in regard to the shoreline allowance at the Agency One Reserve. Dr. White concludes that whatever this

[34] Exhibit #55, pp. 51 to 53.
[35] Exhibit #55, pp. 53 to 54.
[36] Exhibit #55, p. 54.

expectation may have been, it was not communicated to the Ojibway. In this context, Dr. White takes exception to Dr. von Gernet's conclusion that the record does not support Ojibway use of the shoreline at this location for any purpose.

[208] Dr. White suggests that the historical record clearly establishes Ojibway use of the shoreline at the Agency One Reserve site for a number of purposes in the century prior to 1873. These uses included access to and from the waters of Rainy Lake and Rainy River and, most importantly, fishing. Fishing was vital to the existence of the Ojibway and the unimpeded use of the shoreline was vital to the Ojibway's fisheries. Dr. White suggests that future unrestricted use of their fisheries was an inducement to the Ojibway to sign Treaty #3 and was in fact promised to them in the Treaty. Dr. White concludes, in reference to the issue of a shoreline allowance adjacent to the Agency One Reserve, that the Ojibway "…would have expected and would need a shoreline allowance to continue using their fisheries as promised."[37]

THE PITHER CLAIM 1879-1888

[209] In addition to the limited contemporaneous evidence as to the selection of the site of the Agency One Reserve and the expectations of the parties, a body of evidence was tendered relating to a claim by Pither to title of the Agency One Reserve site for himself.

[210] In 1879 Pither, after building a personal residence on the Agency One Reserve site and treating the property as his own for years, applied for a patent of 240 acres of land "…at Pither's Point…" which included the Agency One Reserve site. Pither went so far as to assert that there had never been an Indian Reserve at this location. He claimed the property as his own in compensation for the cost of the construction of the Indian Agency buildings, as approved by the Crown in 1874.

[211] The following review of correspondence relating to Pither's claim and Dawson's resistance to it must be analyzed bearing in mind its context – Pither advancing what can only be described as a fraudulent claim and Dawson strenuously opposing it.

[212] In a series of letters between June and November 1888, Dawson addressed the validity of Pither's claim. None explicitly addressed the issue of whether or not the two chain allowance

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[37] Exhibit #37, pp. 35 and 36.

as set out in Dawson's 1874 description was or was not part of the reserve. His letters did include numerous comments about the Agency One Reserve generally.

[213] The parties suggest that this evidence is relevant to a determination of Dawson's intention as to the two chain shore allowance when he wrote the description and also to the issue of the expectations of the Crown and Ojibway during the reserve selection process. All relevant correspondence is part of the record. I will review the salient portions only.

[214] Dawson's initial reaction to Pither's claim, contained in a letter to Pither dated December 31, 1885, was supportive:

> *"I had a long conversation with the people of the Indian Department the other day at Ottawa, explaining that you had been in occupation, before the Indian Treaty, was made, and long before the Indian Reserve was laid off. I have no doubt you will eventually get your patent…"*[38]

[215] On June 18, 1888, Dawson wrote to Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs ("Vankoughnet") to clarify the contents of a letter Dawson had sent to Pither from which Pither had extracted a passage which Pither in turn sent to Vankoughnet in support of his claim:

> *Subsequently…I looked into the matter somewhat and found a map on which the Fort Frances Reserve was marked out, showing very clearly that the ground Mr. Pither wanted was within the Reserve which the Indians were informed they were to get in 1872 and which was actually marked off for them in 1873 and 1874.*
>
> *…I conceived it to be just possible that the one in question might have been altered, and in order to be fully informed on this point looked over the plan of reserve surveys in your Department. The surveys show that, while the Reserve was curtailed and does not come so far down the river as at first marked off it still covered the ground occupied by Mr. Pither.*
>
> *The facts relating to the rights of the Indians to this Reserve are perfectly clear. It was promised to them in 1872 by the Indian Commissioners of whom, I was one, and it was confirmed to them in 1873. Subsequently it was surveyed and laid off for their use.*

[38] Exhibit #2, tab 222.

Mr. Pither should be compensated for his improvements, beyond that he has no claim. I shall write him pointing out to him the mistake he led us into.[39]

[216] On June 18, 1888, Dawson wrote to Pither advising that he had looked into the matter of the reserve at Fort Frances further and found:

1st - That the Reserve at Fort Frances was promised and virtually (not legible). The Commissioners then engaged in negotiating with them at that place and was theirs from that time forward.

2nd - That, in 1873, the Treaty negotiations commenced at Fort Frances in 1871 and 1872 were completed at the North West angle of the Lake of the Woods, and the reserve in question confirmed to the Indians for all time.

3rd - That in conformity with the understanding then arrived at descriptions and maps of the reserves throughout the vast territory ceded, including the one at Fort Frances, were in due course sent to the Department of the Interior.

4th - That the reserve at Fort Frances was subsequently, as many of the others were, surveyed under official instruction but by the survey the Fort Frances reserve was, from some cause unknown to me curtailed in its extent on Rainy River.

5th - That Mr. Pither's agency house on the portion of the reserve remaining to the Indians.

These are unimpeachable facts and they do away with any claim on the ground of priority of occupation for there was none when the reserve in question was first accorded to the Indians by the commissioners…[40]

[217] On June 19, 1888, Dawson again wrote to Vankoughnet:

In 1871 and 1872, more especially in the latter year the Reserve was practically given to the Indians while the negotiations between them and the treaty commissioners were in

[39] Exhibit #1, tab 95.
[40] Exhibit #1, tab 94.

progress in Fort Frances, and their rights thereto, arising from occupation from time immemorial, were fully admitted and acknowledged.[41]

[218] On July 4, 1888, Dawson again wrote to Vankoughnet:

That during the negotiations then in progress, to all of which Mr. Pither was a party, it was held out to the Indians, that the land in question was to be laid out, as a reserve, for the general benefit of all the bands on Rainy River and that the agency would be thereon established, Mr. Pither was at that time careful to point out that it would be to the advantage of the Indians to have this Reserve as an agency residence and camping ground, as they would thus be removed to a convenient distance from the Hudson Bay Company ground and buildings. This Reserve, more especially the portion of it which Mr. Pither wants, was an old camping ground of theirs (Indians) which they and their ancestors had occupied long before he came into the world.

The reason why the land was not included in any Reserve, to a particular band was because it had been understood and agreed upon with the Indians that it should be apportioned to no particular band but to the tribe at large, for the purpose of an Indian agency and camping ground for their sole use and benefit forever.

Mr. Simpson, Mr. Pither, and myself were then the commissioners, and what we did at that time was ratified the following year at the North-west angle of the Lake of the Woods, where Leut. Governor Morris, myself, and Mr. Provencher were the commissioners and as regards the Reserve under consideration, finally and practically confirmed by the Deputy Minister of the Interior having the reserve surveyed and laid out in conformity with the Treaty and the understanding had with the Indians.

Col Dennis, at this time Deputy Minister of the Interior, went up in 1875 to arrange the Reserves and took as his guide the plan and description of them which, I had with Mr. Pither's assistance, made out and sent in, and, as the fact proves, employed a surveyor, to lay off this very reserve. In laying it off it was curtailed in the distance I had projected it in Rainy River, but I now see that the lower portion was made a half breed Reserve but the upper portion was left intact to the Indians.

[41] Exhibit #1, tab 96

…in the year last mentioned (1874) I ceased to have anything to do with the apportioning of the Indian Reserves, Col Dennis, then took the matter in hand and he and Mr. Pither, between them, had the Indian Agency Reserve at Fort Frances laid off for the benefit of the Tribe but not for any particular band.

…it is practically…the whole Reserve that Mr. Pither wants extending from the point at the outlet of Rainy Lake…clear down to the half breed Reserve; were he to be allowed this, the Indians would be entirely excluded from the Banks of Rainy River.[42]

[219] Pither next submitted affidavits in support of his claim, dated July, August and September 1888, from George McPherson, interpreter and Indian agent, Fowler, who built the agency buildings in 1874, A.R. Lillie, an HBC officer in charge of the Rainy River District 1866-1879, and "Chiefs and Councillors of the Indians of the Coutchechuy and Stanjecoming Reserves".

[220] In response, Dawson said the following in a letter to Vankoughnet dated September 27, 1888:

The affidavits do not amount to much, and I can easily show the purpose for which they have been prepared and the little value they can be of in sustaining Mr. Pither's absurd claim.

The statement which he has made the poor Indians under his influence sign is inexcusable.[43]

[221] In a letter to Vankoughnet dated October 29, 1888 Dawson further refuted Pither's claim and provided more information about this reserve:

The Indians were in the habit from time immemorial of holding their annual meetings at Fort Frances, and the Reserve in question, instead of being apportioned to any particular band, as other Reserves were, was made a general one for the use of the tribe at large. It was also considered by the commissioners, of which the undersigned was one, that it would be very desirable that ground sufficient for the purposes of an Indian agency as well as a general reserve should be retained…

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[42] Exhibit #1, tab 98

[43] Exhibit #1, tab 100.

The undersigned, with Mr. Pither's assistance, apportioned Reserves to the different bands and, at the same time set aside the Reserve under consideration for the general use of all the bands, as a summer camping ground where they could hold their accustomed meetings and transact their business at the then proposed Indian Agency residence.

Next in order is the affidavit of "the Chiefs, Councillors and Indians of the Coutchiching and Stangecoming Reserves".

These people…are made to say "that we neither at the time of our negotiations with the Queen for the surrender of our lands at the North West Angle in the year 1873, nor at any subsequent date asked or claimed the homestead, then claimed and since occupied by Mr. Pither…

The statement that they neither asked nor claimed the land, for their particular bands, is correct, however they well know that it was to be set aside as a general reserve for the use of the tribe at large of which their bands formed but a small fraction…[44]

[222] Dawson next wrote to fellow Treaty Commissioner Morris on November 3, 1888:

This Fort Frances Reserve was set aside for the Indians as explained to them at the North West angle of the Lake of the Woods…as a general reserve – not for any particular band but for the whole tribe – where they could assemble and hold their usual annual meetings. It has now become very valuable from the advance of settlement and still more so from the fact that the Americans have projected a railway to the rapids at Fort Frances, with a view to the development of the lumber trade on their side, and when this railway is completed the Reserve will, without doubt become the site of a town, Hence Mr. Pither's intense desire to keep it for himself, but he has no valid claim and it would be a pity that through his tricking the Indians should be deprived of this, the most valuable of all their reserves.[45]

[223] Dawson also submitted affidavits to bolster his repudiation of Pither's claim, one from "Captain Louis", a "Canoeman and Voyageur Guide of Fort William", dated November 26,

[44] Exhibit #1, tab 102.
[45] Exhibit #1, tab 103.

1888[46], and another from John Parmessi of the Fort William Reserve in the District of Thunder Bay, also dated November 26, 1888[47].

[224] Captain Louis deposed that he was "frequently at Fort Frances on Rainy River" between 1870 and 1874. Prior to the summer of 1874 when Pither began building a house on "…this Indian Reserve, there was no improvement of any kind at the lower end of Rainy Lake or at the rapids at the outlet thereof, excepting clearings made by the Indians for their wigwams."

[225] Parmessi also deposed that he was frequently at Fort Frances between 1870 and 1874 while "in command of Boatmen and Canoemen, engaged in conveying passengers and material over the Dawson Route." Parmessi deposed that Pither started building "…his agency house…" in the summer of 1874 and that prior to that "…there was no house, or buildings of any kind at or near the Rapids at the outlet of Rainy Lake…" or any "…improvements whatsoever beyond what had been made by the Indians of Old Time in clearing off the underwood to an extent sufficient for their wigwams."

[226] In a letter to Vankoughnet dated November 20, 1888, Pither withdrew his claim subsequent to reviewing Caddy's 1875 survey instructions for the Agency One Reserve.

THE CADDY SURVEY OF THE AGENCY ONE RESERVE

[227] On June 15, 1875, J.S. Dennis ("Dennis"), Surveyor General of Canada, wrote to E.C. Caddy ("Caddy"), Dominion Land Surveyor and instructed him to survey "certain Indian Reserves, set apart under the treaty made at the North West Angle, in 1873. These several reserves are set forth, numbered 1, 2, 3, 4, 5 and 6; also lettered F and G on the tracing enclosed".[48] The Agency One Reserve is subsequently referred to as Reserve No. 1 by Caddy.

[228] The "tracing" referred to in the instructions to Caddy has not been located. No further details were provided to Caddy as to the location or acreage of the Agency One Reserve beyond that found in the descriptions in the "Dawson" schedule attached to the Order in Council, which were provided to Caddy as part of his instructions.

[229] The instructions included the following direction:

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[46] Exhibit #2, tab 216.
[47] Exhibit #2, tab 217.
[48] Exhibit #2, tab 112.

Wherever the reserve fronts, or is bounded on any side by a Natural Boundary, such as a river or water, you will traverse the same, in order that accurate plans may be made thereof, and…calculate the areas according to your traverse adjusting the outlines in such a manner as to include, as nearly as possible, the quantity of land laid down, in each case, on the tracing, and in the Descriptions corresponding therewith now sent to you.

[230] Caddy was also advised that "…the Indian Agent, Mr. Pither, who resides at the foot of Rainy Lake, near Fort Frances, will, no doubt, assist to indicate the starting points of the several reserves."

[231] Caddy surveyed the Agency One Reserve between August 3rd and 9th, 1875. Caddy's diary for the period July 19, 1875 to July 3, 1876[49], his field notes[50], and his July 14, 1876 report to Dennis[51] were all put into evidence.

[232] Caddy's diary indicates that he performed field work on Reserve No. 1 between August 4 and 7, 1875. There is no reference in the diary to a two chain allowance.

[233] Caddy's field notes indicate that posts were planted two chains in from the water's edge on the northeast and southwest corners of Reserve No. 1. The field notes also make reference to "Allowance for Landing & c", "Allowance for landing" and "Allowance for Landing purposes 2.00 chs" … "to water's edge".

[234] Caddy's report of July 14, 1876 states that "…the area of the Reserves given do not include the two chains, for landing purposes." Caddy's "Plan of Indian and Half Breed Reserves on Rainy Lake, NW Territory" is dated July 14, 1876. Two copies of this plan were entered in evidence at trial. Exhibit #12 is a colour copy held by the National Archives; exhibit #25 is a black and white copy held by National Resources Canada.

[235] Caddy's July 14, 1876 plan of the Agency One Reserve depicts a black line two chains inland from the high water mark of Rainy River and Rainy Lake, as it then was. Exhibit #12 states the area of the Agency One Reserve to be 170 acres.

THE EVIDENCE OF THE SURVEY EXPERTS

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[49] Exhibit #2, tab 116.
[50] Exhibit #3, tab 140
[51] Exhibit #2, tab 137

[236] The plaintiffs and Fort Frances each called surveyors who were qualified as experts to provide evidence on the Caddy survey of the Agency One Reserve as well as subsequent surveys in the immediate area.

[237] The plaintiffs' survey witness was Mr. R.J. Stewart, B.Sc., O.L.S. C.L.S. ("Stewart"). The surveyor called by Fort Frances, also a practising lawyer certified as a specialist in real estate law by the LSUC, was Mr. I. de Rijcke, B.Sc., O.L.S., LL.B., LL.M. ("de Rijcke").

[238] Stewart was qualified as an expert witness allowed to provide opinion evidence on surveying practice, principles and procedures including interpretation of survey-related historical documents. Exhibit #9 sets out the scope of Stewart's qualification. Stewart's "*Expert Report*, *1875 E.C. Caddy Survey*, November 14, 2011" was filed on consent as exhibit #10.

[239] De Rijcke was also qualified as an expert witness. The scope of his expert qualification was the same as Stewart's, with the addition of being qualified to provide opinion evidence as to real property boundaries on the ground, title conveyancing and the effect of survey plans, deeds, bylaws, legislation, and Orders in Council, as they affect the legal ownership or title to land. Exhibit #75 sets out the complete scope of de Rijcke's expert qualification. De Rijcke's report, dated April 27, 2012 and his reply report, dated July 19, 2012, were filed on consent as exhibit #68.

[240] References to the evidence of Stewart and de Rijcke will be to the evidence contained in their reports unless specifically stated to be in reference to their testimony at trial.

[241] Counsel's retainer letter to Stewart included Caddy's July 14, 1876 plan, his instructions, field diary, field notes, report and Dawson's 1874 description of the Agency One Reserve. Stewart was asked to address the following questions:

1. What was Caddy intending to show with respect to the 2 chain allowance?

2. Did Caddy intend that the 2 chain allowance was a part of the Indian reserve, or did he intend that the boundary of the Indian reserve lay 2 chains inland from the shoreline?

3. Did Caddy survey a line 2 chains inland from the shoreline?

[242] Stewart indicates that in preparing his report he used the materials provided by counsel, together with Plan 163 CLSR, exhibit #14. He did no additional research, suggesting there

"…may be further documentation relevant to the analysis. Opinions expressed herein are qualified accordingly."

[243] By way of overview, Stewart reviewed the December 31, 1874 description of the Agency One Reserve provided by Dawson in his report of that date. The reference to "plan" in this description and the reference to a "map with descriptions" in the body of the report are thought by Stewart to refer to the same drawing, which he opines "…was a revised or marked up version of Plan 163 CLSR".[52] Exhibit #15 is an enlargement of exhibit #14 in the immediate area of Fort Frances.

[244] Stewart implies that Dawson was the source of exhibit #14. The plaintiffs, in their closing submissions, go further suggesting that "…in the opinion of expert witness R. Stewart…" the "tracing enclosed" with Caddy's June 15, 1875 instructions was probably "…a variation of a map of Rainy River showing proposed reserves that originated in 1874, and originated from Dawson." The plaintiffs submit, based on this evidence of Stewart, that exhibit #14 "…is the best evidence available that shows what Dawson and Pither had in their possession, and would have shown the Indians, in their meetings at Fort Frances in October 1874." The plaintiffs also suggest, in part because the fact that the map which accompanied the February 27, 1875 Order in Council has been lost, that exhibits #14 and #15 are the "best map evidence available" as to what Caddy was instructed to survey.

[245] Stewart goes on to suggest that exhibit #14 "…demonstrates that the proposed Agency 1 Reserve was supposed to adjoin the "Government Reserve" that was surveyed by DLS Caddy in 1875…" He notes that exhibit #12 depicts a much smaller area for Agency 1, the western boundary having being "shifted" to a location about 58 chains east of the Town Plot (Proposed Government Reserve).

[246] In discussing why this change occurred, and in doing so assuming that such a change did in fact occur, Stewart referred to a "*Plan of Claims Between Rainy Lake and Ft. Francis*, dated 25 November 1874 and signed by Duncan Sinclair, DLS[53]. Acknowledging that Caddy obviously did not survey the Agency One Reserve in accordance with exhibit #14, Stewart is of the opinion that "it is clear" that Caddy ran the western boundary of the Agency One reserve "in a location that acknowledged the claims made by the settlers…" as depicted on exhibit #2, tab 98

[52] Exhibit #14
[53] Exhibit #2, tab 98; also at pg. 23 herein.

– “There is no doubt in my mind, however, that the “settlers’ claims” were the reason for the area reduction.”

[247] Stewart suggests that the “Proposed Indian Reserve” shown on exhibit #14 is the original drawing of the Agency One Reserve. Exhibit #14 does not show a two chain reservation from the banks of Rainy Lake and Rainy River. The Proposed Indian Reserve shown on exhibit #14, which encompasses Pither’s Point, is also substantially larger than the Agency One Reserve as subsequently surveyed.

[248] Stewart confirmed that Caddy’s plan, exhibit #12, does depict a two chain reservation along the shore of the Agency One Reserve. He also noted that Caddy traversed the shore of the Agency One Reserve and noted the two chain “allowance for landing” in his field notes.

[249] Stewart also commented on the fact that, on exhibit #12, the sidelines of the reserves affected by the two chain strip are, to his eye, drawn across the strip, terminating at the edge of the water. To Stewart this was an indication that Caddy understood that the north-south and east-west boundaries of the Agency One Reserve extended to the water with the two chain strip therefore included as part of the reserve.

[250] Stewart’s evidence on this point was challenged on cross examination. It was pointed out to him that paragraph 15 of his report qualified the above, suggesting that Caddy may have extended these sidelines to the water’s edge simply to have a starting point from which to measure two chains in to set survey posts. Stewart acknowledged this as being correct. During cross examination Stewart also agreed that the extension of the sidelines across the two chain reserve was not conclusive evidence of an intention to include the two chain allowance within the reserve.

[251] In his review of Caddy’s field notes, Stewart confirmed that they indicated that posts were planted two chains from the shore only on the north and west boundaries and that no other posts were planted to mark the two chain reservation. Stewart suggests that the field notes “do not indicate the upper limit of the “Allowance for Landing” anywhere except at the north and west boundaries where the two posts were planted.

[252] Stewart also noted that Caddy’s plan showed the area of the reserve to be 170 acres and that Caddy’s July 14, 1876 report “specifically stated” that the area of the reserves given did not

include the two chains for landing purposes. Stewart found this to be "ambiguous", suggesting to him that the two chain strip was excepted from the reserve or that Caddy may have only been reporting the area to which the bands would have exclusive rights.

[253] Stewart's "Summary Comments" at page 8 of his report include the following:

> 32. In historical context, it is clear that the purpose of the 2-chain reservation was to ensure access from the lake for "lumbermen" in order to facilitate booms, wharves, and other logging activities that needed to be tied to shore.
>
> 33. It is my opinion that DLS Caddy was not absolutely certain in his mind whether the 2-chain reservation was intended to be part of the Agency One Reserve or not. There is no indication of such intention in the instructions, and all of his returns are equivocal on the point. To him it didn't matter; he had no authority to make that decision. He just drew the line on the plan, leaving it for others with competent jurisdiction to determine or exercise the intention.

[254] De Rijcke reviewed the pleadings and documentary productions of all parties. As was the case with Stewart, he did not conduct any other search as to the existence of additional survey records, field notes, plans or other information other than what had been provided to him.

[255] De Rijcke began his analysis of the status of the two chain strip with a consideration of the historical framework and documentation relating to it. Much of this has already been reviewed earlier in these reasons. It will only briefly be touched on in this section.

[256] De Rijcke noted that the push for a national transportation route began well prior to Confederation in 1867. In reviewing the history of the Dawson Route, de Rijcke suggests that "…of singular importance are Dawson's observations, views, and philosophy …" as to "Reserves of Land", as exhibited in his 1869 Report "*The Line of Route Between Lake Superior and the Red River Settlement*". This is discussed at page 6 of the de Rijcke report, exhibit #68; Dawson's 1869 report is exhibit #2, tab 23:

> *With a vast district covered with groves of pine timber to the east, a large tract of the finest conceivable land to the west, and a region likely to prove rich in minerals in close proximity, Fort Frances must soon become a place of importance. Land should in*

consequence be reserved, not only for the public works necessary to surmount the falls, but also for the site of a town.

[257] At page 7 of his report, de Rijcke cites this passage as a "…perfectly clear example of how the word "reserve" is actually a specific reference to an exception." In de Rijcke's opinion, land "…reserved for purposes of public works, settlement, etc, is in fact excluded from any grant of land by patent, other setting aside or similar treatment that would result in *conflicting* ownership, use, or other interests. This is, no doubt, in my opinion, a precursor to Dawson's description…" of the Agency One Reserve – "…two chains in depth along the shore of Rainy Lake and the bank of Rainy River, to be reserved for roads, right of way to lumber-men, booms, wharves, and other public purposes…"

[258] In de Rijcke's opinion, it is generally understood by surveyors and the legal profession that an exception is something that is distinct from, and not part of, something else, either by virtue of having been "…left out of, taken out of, or never having been a part of, that something else." A reservation is something that limits or qualifies the "…thing of which it is or remains a part; and the thing so affected by the reservation is subject to the limitation…placed upon it by the…language of the reservation."

[259] De Rijcke was further of the opinion that the result of an exception can be found in wording framed in the language of a reservation and *vice versa,* such that land reserved is excepted from a grant, notwithstanding being expressed as a reservation. At page 7, para. 6.16 of his report, de Rijcke states:

"Accordingly, whether something is meant to be an "exception" or a "reservation" cannot necessarily be resolved by looking simply to the words "exception" or "reservation" in every instance. The surrounding circumstances and the substantive effect of the qualifying clause need to be carefully considered in the context of what is being reserved or excepted, where it is located, and what is the consequence of a reservation or exception being found to apply."

[260] De Rijcke refers to 1874 plans or sketches of the immediate area, which include "reserves", to illustrate his point. Exhibit #2, tab 94, an October 2, 1874 plan prepared by C. Miles, Land Surveyor, identifies the HBC "Reserve" and the "Government Reserve at Fort Frances". The use of the word "reserve" in contemporaneous plans and documents suggested to

de Rijcke that a *reserve* "…could be any parcel of land that the government of the day was prepared to set aside, grant, convey (even patent), for a designated purpose." The use of the term "reserve" at this point in time in the 19th century "…operated as a *de facto* exception, rather than as a reservation."

[261] Moving on to the actual survey work of Caddy in relation to the Agency One Reserve and his plan of July 14, 1876 (exhibit #12), de Rijcke notes that the work done by Caddy on this plan is the culmination of work which began with instructions sent to him June 15, 1875.

[262] In de Rijcke's opinion, Caddy's field notes show the two chain strip surveyed out as a distinct parcel from the reserve. He also makes note of specific entries found throughout Caddy's field notes and his report which "…variously describe the two chain as an "allowance for landing purposes", "allowance for landing &c." or "allowance for landing". De Rijcke also noted that Caddy's field notes show him placing posts two chains in from the water's edge, which he suggests represents a "…delineation of the boundary of the two chain strip on the ground".

[263] Responding to Stewart's comments that Caddy placed only two posts two chains from the shore, on the north and west boundaries and that no other posts were planted to mark the upper limit of the two chain "Allowance for Landing", de Rijcke, in his reply report, said this was "of no consequence". De Rijcke stated that surveyors would not arbitrarily place a post on the inner limit of a two chain wide shore road allowance if it was not related to a specific feature or other reason that would justify it being planted. De Rijcke said that he would not have expected any more than the two posts planted, given the fact that there are only two surveyed boundary lines (one north-south, the other east-west) for the Agency One Reserve.

[264] De Rijcke concludes his review of Caddy's field notes with the following opinion:

> *These field notes…document Caddy's activity and practice in excepting from the reserve a dry land strip having a width of two chains. He measures, monuments, and describes in his notes the boundary of the reserve as being located two chains inland from the water's edge…all of this is consistent with Dawson's description. In my opinion, this expression excludes the two chain strip from the reserve.*

[265] De Rijcke finds this conclusion to be consistent with Caddy's July 14, 1876 report to Dennis on the Agency One Reserve, wherein Caddy stated, "…the area of the Reserves given do not include the two chains, for landing purposes…" De Rijcke opines "…in general, a report which states that an area of a reserve, or other entity being surveyed, does not include a parcel or strip, then it means that such parcel or strip does not form part of such reserve."

[266] In commenting on his review of the Caddy plan of July 14, 1876, exhibit #12, de Rijcke points out the separation of the mainland reserves from the waters of Rainy Lake by a dry land strip surrounding all of the bodies of water. De Rijcke states that this is the two chain strip referred to in Caddy's field notes and report.

[267] In summarizing, de Rijcke provided the following opinion:

> *From my review of Caddy's field notes, report, and plans, a two chain strip of dry land was excluded from all of the reserves. From the notation on one plan "Road", and instructions given to Caddy, the Dawson description, and other documentation, the purpose of this strip was to respect a road that already existed on the ground or establish by survey a strip laid/to be laid out as a road with a width of two chains, or both. In all cases, it served as an allowance for a public road.*
>
> *In my opinion, the two chain strip exists as a separate and distinct parcel as surveyed which does not form part of the Agency 1 lands, and it would be understood by the language of its origin that it is an exception, not a reservation.*

[268] In his Reply Report[54] de Rijcke comments on Stewart's references to "plan" 163 CLSR[55]. In de Rijcke's opinion, this document is simply an undated, rough diagram as to proposed reserves without author identification. He goes on to state, "In my opinion, any conclusion as expressed by Mr. Stewart that "a revised or marked-up version" of that sketch was what accompanied Dawson's December 31, 1874 report is at best highly speculative. There is even less to connect that sketch with Surveyor Caddy. There is nothing I have seen which would indicate that Caddy was even aware of 163 CLSR."

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[54] Exhibit #68, tab 3.
[55] Exhibit #14.

[269] De Rijcke, in pointing out that this all took place in the 1870's without modern equipment or communication, states that until surveys are located on the ground, any tracing, sketch, map or plan of reserves or proposed reserves, such as that included in the June 15, 1875 instructions to Caddy, would simply be an illustration of a concept. The purpose of the diagram, in de Rijcke's opinion, was to instruct Caddy on the survey itself which had yet to take place.

[270] In addressing the missing "tracing" referred to in Dennis' June 15, 1875 instructions to Caddy, de Rijcke says it is clear that there is a missing rough diagram document which accompanied the instructions. However, implicit in this is that it is Caddy's survey that ultimately shapes the reserves and their location.

FURTHER SURVEYS SUBSEQUENT TO CADDY'S SURVEY

[271] A significant amount of trial time and documentary evidence was directed toward subsequent surveys conducted in the immediate vicinity of the Agency One Reserve. The common feature of this body of evidence is that inconsistent reference is made to the two chain strip adjacent to the subject reserve.

[272] De Rijcke, at page 5 of his reply report, states as follows:

> *"Generally speaking the first survey of a parcel operates to set out its boundaries and configuration. In the case of the reserves and the two chain strip this is the Caddy survey. Accordingly, work that follows by other surveyors is generally seen or considered by others as a retracement of that first work. When the expression "resurvey" is used, it is either a result of misunderstanding this principle or, there is a specific intention and instruction to "resurvey" for purposes of consciously changing the location of boundaries and the configuration of a parcel from what is known to already exist."*

[273] The plaintiffs rely upon subsequent surveys and their inconsistent treatment of the two chain strip in support of their position that the strip was a reservation within the reserve that had "special status".

[274] The defendants submit that this subsequent survey work was not connected with the 1875 Crown intention surrounding the creation of the Agency One Reserve. Given same, the defendants submit that it is not helpful in the interpretation of the wording of 1875 Order in Council or the instructions to Caddy.

[275] I accept the above comments of de Rijcke in regard to the first survey of a parcel, in this case being the Caddy survey of the Agency Reserve. However, these comments were expressly stated to be a generalization. I will therefore briefly review the evidence of subsequent surveys in the immediate area of the Agency One Reserve which I find to be relevant to the issues.

C.C. FORNERI D.L.S. SURVEY OF McIRVINE TOWNSHIP

[276] C.C. Forneri, D.L.S. ("Forneri") was employed by Canada in 1875 to survey the Township of McIrvine and the Rainy River reserves. He began this work in September 1875 and completed it in March 1876. The Township of McIrvine, later to be incorporated into the Town of Fort Frances, was adjacent to, and west of the Agency One Reserve and north of the town plot of Alberton, which also became part of Fort Frances.

[277] Exhibit #18, a colour version of the McIrvine plan dated October 18, 1875 and tendered by the plaintiffs, was not confirmed by Stewart, the plaintiffs' expert, to be Forneri's original plan nor have the defendants agreed that it is. Exhibit #3, tab 116 contains two plans of McIrvine Township filed by Fort Frances and obtained from the Fort Frances Land Registry Office. One appears to be a black and white version of exhibit #18; the other is unsigned and undated. Yet another version of this plan is found at exhibit #3, tab 117. This version is undated and is indicated to be a "Copy of Plan of Township of McIrvine".

[278] Forneri was instructed by Dennis in a letter dated October 2, 1875, found at exhibit #1, tab 72. These instructions included the following:

> *Respecting the question of a public road along the river, I think it would be well that you should survey and lay down a route on the ground and retain the same in your notes and in your plans, and the land therein should be reserved in the Patent. This road considering the quality of the land on the river front will be sufficiently wide at one chain, and need not necessarily be along the edge of the river bank, indeed, as a rule, I think a better line will be found a short distance back.*

[279] According to Stewart, exhibit #18 shows a double dotted line that parallels the banks of Rainy Lake and Rainy River. While Stewart states that this appears to indicate a road along the shoreline in that location, similar to "bush roads" drawn elsewhere on the plan, he suggests that there is no evidence that a "shore road actually existed at that time." Noting that Forneri's field

notes and report confirm that he tied in other physical features, Stewart states that he did not identify a physical road along the shore in his field notes and report.

[280] Forneri traversed the shore of the Agency One Reserve and utilized Caddy's monuments in the McIrvine survey, but did not survey the reserve. He measured to the two posts that Caddy had planted two chains in from the shore, at the south-west and north-east corners of Agency One. On the plan found at exhibit #18, Forneri reported the area of the reserve to be 204.12 acres with the lands shown to extend to the water's edge.

[281] De Rijcke, in reference to Dennis' statement, "respecting the question of a public road along the river…" states the road "…already existed." Ontario submits that Forneri's McIrvine plan shows a dashed line corresponding to the inner limit of the road/road allowance surveyed by Forneri along the Rainy River to the west of the Agency One Reserve. This dashed line is continued on the Forneri plan in the position of the two chain allowance surveyed by Caddy from the southwest corner of the Agency One Reserve, around the point of the reserve and north, beyond the reserve's northeast corner.

[282] De Rijcke, at paragraphs 13.8 and 13.9 of his report, found the road to be clear on the plan and agreed with the following description of the road shown on the McIrvine plan along the shore of Agency One:

> *…a bush road or trail in dotted lines, extending along the River Bank from south and west of Fort Frances, thence up along the river around Pither's Point and for a considerable distance northerly from the point, within approximately two chains of the shore line.*

D.J. GILLON O.L.S. SURVEYS

[283] D.J. Gillon ("Gillon") was an Ontario Land Surveyor working in the Fort Frances area between the late 1890's and the early 1930's.

[284] Stewart addressed Gillon surveys in a separate report.[56] They were addressed by de Rijcke at pages 29 to 40 of his report.[57]

[56] Exhibit #19.
[57] Exhibit #68.

[285] In 1898, Gillon surveyed two islands off the southeasterly end of Pither's Point. The "*Plan of Location G431 A & B*", dated September 9, 1898 is exhibit #3, tab 320. The letters "I" and "R" and the words "Indian Agency" appear on the plan. This plan depicts a continuous "Road Allowance" of uniform, non-specified width following the shoreline of Rainy River from the Township of McIrvine in the southwest around the point and continuing north. The plan also shows a township section-line "Road Allowance" running east – west through Agency One Reserve.

[286] Stewart was of the opinion that Gillon, in preparing this survey, did not have Caddy's 1875 plan of the reserve, his instructions, field notes, report, or a copy of the plan of McIrvine Township.

[287] Stewart, noting Gillon's errors in his treatment of the road allowance around the point and the section-line road allowances into the reserve, was of the opinion that Gillon mistakenly understood, when drafting this plan in 1898, that the Agency One Reserve was set out as part of the DLS Township of McIrvine.

[288] On December 4, 1900, the Department of Indian Affairs consented to McIrvine's request that the township be allowed to build a road across Pither's Point.[58] As the Agency One Reserve had not yet been confirmed by the Ontario government, Indian Affairs explicitly stated that such consent did not "…imply any conveyance or dedication of the Right of Way for the road."

[289] A plan of survey of the road was prepared by Gillon – "*Plan of Rainy River Colonization Road Through Reserve No. 1*". It is dated January 5, 1901 and is exhibit #1, tab 159.

[290] This plan shows a "Rainy River Colonization Road" with a width of one chain along the shore of Rainy River and then across Pither's Point and "Indian Reserve No. 1". A dotted line is also shown around the point and north along the shore of Rainy Lake. Again, Gillon mistakenly ran the township section-line road allowances through the reserve.

[291] Neither Stewart nor de Rijcke can explain Gillon's use of the dotted line around Pither's Point. Stewart suggests that Gillon must have understood the reserve shore allowance to be an

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[58] Exhibit #1, tab 156.

allowance for road purposes; de Rijcke is uncertain as to whether this was intended to show an existing road not part of Colonization Road or whether it was Gillon's way of showing the two chain strip.

[292] In a letter dated November 28, 1907, Gillon was asked by the Secretary of the Department of Indian Affairs to retrace the north and west boundaries of the Agency One Reserve.[59] The resultant plan is Plan 811 CLSR, dated February 12, 1908, exhibit #21.

[293] Gillon's instructions included the following:

> *...plant iron posts two chains from the shore of Rainy Lake and River on the said boundaries, and another iron post where the West boundary intersects the boundary of Reserve A, "or 16A"...*
>
> *It is also desired that you should traverse the Lake shore. Special care should be taken in making the traverse of that portion known as Pither's Point. Please show the location of the road...*

[294] Caddy's 1876 plan of the Agency One Reserve was supplied to Gillon with these instructions. Gillon also noted in his report that he now had a copy of the Plan of McIrvine Township.

[295] At the same time, Gillon was asked by the Secretary of Indian Affairs to do some survey work on reserve "C" or 18C, one of the other reserves on the 1876 Caddy plan. Gillon requested clarification as to the status of the two chain strip in a letter to the secretary dated December 26, 1907:

> *Is the road allowance of 2chs.00 shewn on the (Caddy) plan included in the acreage or not?*[60]

[296] On January 3, 1907, Gillon was advised by the secretary as follows:

> *...I beg to inform you that the area of the several reserves at the Western end of Rainy Lake (16A, 16D, 18B, 18C and the Agency Reserve) are estimated exclusive of the allowance for road along the lake shore two chains wide.*

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[59] Exhibit #1, tab 208.
[60] Exhibit #3, tab 471.

[297] De Rijcke reviewed Gillon's field book and notes for this 1908 survey of Agency One[61] and found that "…a review of those field notes clearly establish the labeling, the physical monumentation, and the measurement of a two chain road allowance along Rainy River and Rainy Lake."[62]

[298] De Rijcke further states that Gillon's February 12, 1908 plan[63] shows the road allowance along Rainy Lake and Rainy River. In commenting on the fact that exhibit #21 shows a "road allowance 2c00 wide", but not around Pither's Point, de Rijcke says that this "… is inconsistent with Gillon's field notes, which clearly show the road allowance along the Rainy River. The plan, to the extent it does not show the two chain road allowance around the point, has either been altered or is in error."

[299] Stewart agreed that Gillon, on exhibit #21, drew the reserve shore allowance as being two chains wide, which he labelled as a "Road Allowance". In addressing the fact that the two chain "road allowance" was not continued around Pither's Point, Stewart states that "…the shore allowance appears to have been drawn on Plan 811 CLSR[64] in that location, but then erased. While the remainder of the 2-chain wide allowance was, in OLS Gillon's mind, excluded from the reserve (as indicated by the red colouring), the portion around Pither's Point was not. The reason for that is uncertain."[65]

[300] Both Stewart and de Rijcke observed that Gillon, at the northeast corner of the Agency One Reserve, found Caddy's original post only 0.6 of a chain from the water's edge, meaning the water's edge had moved/risen 1.4 chains west from its 1875/1876 location. Gillon did not move the post. He showed on the plan "…the full road allowance of 2c 00…" adopting a position for the upland side of the shore allowance 1.4 chains westerly of the original location.

[301] Gillon prepared another plan of survey dated August 10, 1908, entitled "Plan of Road Through IR18B, IR16A & IR No.1"[66] This plan provides for a one-chain wide road to the L. Christie Lumber Co., starting at the two chain allowance in the Agency One Reserve (labelled "Road Reserve") and diverting around a cemetery in the northeast corner of the reserve. A

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[61] Exhibit #2, tab 352.
[62] Exhibit #68, page 33, para. 18.22.
[63] Exhibit #21.
[64] Exhibit #21.
[65] Exhibit #19, page 3, para. 11.
[66] Exhibit #2, tab 366.

portion of the Agency One two chain allowance is shown in front of the cemetery, although narrower. The two chain is not shown at all on the other two reserves.

[302] Stewart opines that Gillon was of the view that the road to the mill "…replaced the original two chain shore allowance by way of exchange and, further, there was no further need to acknowledge the exchanged portion of the 2-chain shore allowance."

[303] Gillon next prepared a plan of survey for the Canadian Northern Railway, signed by the Chief Engineer June 4, 1910. Gillon signed the plan but his signature is undated. This "*Revised Plan and Profile showing Right of Way as constructed across INDIAN RESERVE No. 1*" is exhibit #22.

[304] A "Public Road" is shown along Rainy River from the Township of McIrvine and then across "I.R.No.1". A narrower "Road to Agency" then is continued southeast toward Pither's Point. The Two chain allowance is not shown around Pither's Point on this plan.

[305] Stewart suggests that "…it appears OLS Gillon was of the view that the "Public Road" was opened in exchange for the portion of the 2-chain allowance located south of the 1-chain wide road that crossed the peninsula and, as a result, the exchanged portion of the 2-chain shore allowance was extinguished."

[306] Gillon prepared another plan for the Canadian Northern Railway, dated February 1, 1912[67] showing land to be acquired for a right of way on Indian Reserve No. 18 B. This plan, certified correct by Gillon, shows the railway crossing Rainy Lake from this reserve and crossing a strip marked "Road 132' wide along shore".

[307] Several years later, by letter dated September 22, 1916, from the Assistant Deputy and Secretary, Department of Indian Affairs, Gillon was instructed to "…make a sub-division of lots in the Agency Reserve at Fort Frances as shown on the plan herewith."[68] These instructions from the Department of Indian Affairs stated, "…please understand that the road allowance two chains wide marked on the plan is abandoned from the front of lot 1 to the north lot inclusive."

[67] Exhibit #2, tab 425.
[68] Exhibit #2, tab 506.

[308] Gillon prepared a “Plan of Subdivision of Part of Indian Reserve No.1” dated November 24, 1916.[69] Due to erosion along the shore of Rainy Lake, a new road was established along the westerly limit of the Agency One Reserve. The new road appears on the plan of subdivision as the “Mill Road.” It appears on the plan as extending from the “Colonization Road” on the shore of Rainy River northerly into Reserve No. 16A.

[309] On the subdivision plan, Gillon drew the two chain shore allowance north of Colonization Road along Rainy Lake, interrupted at the south limit of the subdivision, recommencing at the north limit of the subdivision and narrowed at the cemetery.

[310] Stewart suggests that this plan of subdivision clearly shows that Gillon continued the practice of treating the two chain shore allowance as “…being extinguished wherever it was replaced by a new inland road.”

[311] A “*Plan of Proposed Extension of ‘The Avenue’ across part of Pither’s Point*” was prepared by Gillon and dated May 19, 1922.[70] This plan does not show the two chain allowance along the shore of Rainy Lake, north of Colonization Road and south of the southerly limit of the subdivision, as shown on the 1916 plan of subdivision.[71] Stewart suggests that this is “…consistent with other plans by OLS Gillon from 1908 on, the 2-chain shore allowance was extinguished wherever it was replaced by a new inland road.”

THE ONTARIO and MINNESOTA POWER Co. v. THE KING [1925] A.C. 196 (J.C.P.C.)

THE TRIAL DECISION

[312] In or about 1909, the Ontario and Minnesota Power Co. (the “OMPC”), with approval from Canada, Ontario and the United States, built a dam across the Rainy River at Fort Frances. The OMPC, as a condition of Canada’s approval, was responsible for damage to lands caused by the increase in the level of Rainy Lake and Rainy River.

[313] Flooding of a portion of the Agency One Reserve was anticipated. On April 19, 1906, J.D.McLean, Secretary, Department of Indian Affairs, wrote to J.P. Wright (“Wright”), the Indian Agent responsible for the Agency One Reserve at the time, enclosing a “plan” showing

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[69] Exhibit #23.
[70] Exhibit #1, tab 332.
[71] Exhibit #23.

the land "…in the Agency reserve, near Fort Frances, which the (OMPC) propose to flood. The area is shown to be approximately 18 acres…" Wright was asked to consider the matter and to advise what he felt would be reasonable to demand as compensation for damages sustained.[72]

[314] Over the next several years, higher water levels created by the OMPC dam caused erosion within the Agency One Reserve and the adjacent Couchiching Reserve (Reserve 16A). Indian Affairs indicated to OMPC that unless they took action, Canada would act and look to OMPC to recover their costs. OMPC did nothing. By 1916, there had been significant flooding. When the issue of damages could not be resolved between Indian Affairs and OMPC, the government initiated an Exchequer Court action seeking damages.

[315] In May 1918, counsel was retained. Efforts were made to properly assess damages on the Agency One Reserve.[73] Fort Frances, which had leased a portion of the Agency One Reserve for a municipal park ("Pither's Point Park") subsequent to the 1908 surrender, quit claimed their interest to permit Canada to bring the action on its behalf. On September 24, 1918, Indian Affairs informed counsel that the four plaintiff bands in this action were the Bands "…interested in the Reserve in question."

[316] Couchiching Chief and Council and individual band members complained to the Department of Indian Affairs about flood damage. A plan prepared by Gillon, dated August 24, 1918, "to accompany statement of claim for flooding" showed flood damage to Couchching Reserve and to the "Reserve for Road, Landing etc. & c. 2 ch. Wide."[74] An estimate of this damage was prepared by Wright and these damages formed part of Canada's claim.

[317] The Statement of Claim ("Information") dated October 9, 1918 claimed damages of $3,153.50 "to compensate the Indians for damages to their property." Ten individual Couchiching band members were named and particulars of damages were expressed by reference to the named individuals.

[318] Damages in the amount of $19,360.00 were also claimed for "damages to Pither's Point Park." This portion of the claim was not expressed to be on behalf of individual Indians or bands of Indians. Paragraph 1 of the claim pleads:

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[72] Exhibit #1, tab 193.
[73] Exhibit #2, tab 541, damage assessment prepared by Gillon.
[74] Exhibit #3, tab 723.

The lands referred to in Paragraphs 2 (the Couchiching Reserve) and 10 (Pither's Point Park) hereof are vested in His Majesty as an Indian Reserve and subject to the administration of the Superintendent General of Indian Affairs, under the powers conferred by the Indian Act, in trust for the use and benefit of the Indians.[75]

[319] The OMPC Answer, dated February 1, 1919, states:

It (the Defendant) admits that in 1915 certain lands belonging to the Province of Ontario in the Rainy Lake District became vested in His Majesty as an Indian Reserve, but the lands referred to in paragraphs 1, 2 and 3 of the Information were not part thereof. The lands last referred to still belong to the Province of Ontario and portions thereof are public highways.[76]

[320] The trial took place in Fort Frances before the Honourable Mr. Justice Audette, beginning October 5, 1920. Among the 12 witnesses called by Canada were Samuel Bray, Chief Surveyor, Indian Affairs ("Bray"), Gillon, Wright and Alfred Bruyere, as an individual member of the Couchiching Band.

[321] Bray testified on the issue of reserve creation (pp. 29-30 of transcript). He was shown a "…blue-print, certified to be a true copy of the original on file in the Department of Lands, Forest and Mines in Toronto – it is a plan of the Indian and half breed reserves at Rainy Lake, Northwest Territory." He was asked to identify Pither's Point, which he did. When asked about the "setting apart of Pither's Point", Bray quoted Dawson's original description of the Agency One Reserve. The blue-print was marked as Exhibit #21, dated July 14th, 1876.[77] Bray identified Exhibit #21 as being"…a copy or practically a copy of the original which is a record in the Department of Indian lands."

[322] Bray was later recalled (beginning at page 211 of the transcript) and testified further on the reserve creation issue, the 1875 Order in Council and the original Caddy plan. Bray was shown a copy of Exhibit #21, which he recalled. He was asked to "…show us the original plan." He replied that he did not have the original plan, but "…I have a certified copy of it." This plan,

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[75] The Statement of Claim is found at exhibit #2, tab 544 as part of the Supreme Court of Canada record. The index to the record is found at exhibit #2, tab 595. This record also contains the trial transcript, also found at exhibit #1, tab 335.
[76] The Answer is found at page eight of the record, exhibit #2, tab 544.
[77] See Exhibit #2, tab 246.

identified by Bray as a "certified copy" of the original plan, was marked as Exhibit Q. It is found at exhibit #3, tab 131 of the record in this case.

[323] When asked to provide a description of the Indian reserve, Bray provided a "certified copy" of the description together with a copy of the 1875 Order in Council approving it. This document was marked as Exhibit R.[78]

[324] Canada filed three versions of the 1876 Caddy plan at the OMPC trial:

1. Exhibit 21, OMPC trial, exhibit #2, tab 246 in this action;

2. Exhibit 70, OMPC trial, exhibit #2, tab 138 in this action;

3. Exhibit Q, OMPC trial, exhibit #3, tab 131 in this action, identified by Bray as a "certified copy" of the original plan.

[325] An examination of Exhibit Q shows the word "road" written numerous times on the shore allowance. Exhibit Q in the OMPC case is obviously not a true copy of the Caddy July 14, 1876 plan.

[326] The only Indian witness called was Alfred Bruyere who testified as to the loss of his house and furniture. Neither he nor any other witness was asked about the two chain shore allowance. All evidence as to damages was given on the presumption that reserve extended to the water's edge.

[327] Toward the end of the trial, counsel for OMPC argued that the reserve ended two chains from the water's edge and did not include the two chain allowance. This argument was advanced in an attempt to minimize damages – the flooded lands did not extend beyond two chains from the original shore line. The trial was adjourned to allow the parties to further research the issue of the two chain allowance and to allow Canada to call further evidence.

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[78] Trial transcript, p. 211, lines 16-35, exhibit #1, tab 335

[328] In an October 14, 1920 reporting letter, Crown counsel explained how the shore allowance issue had arisen at trial and requested the Department of Indian Affairs conduct a further search for documents:

> *When the trial was nearing its completion Counsel for the Defendant Company produced evidence to show that the description of the Agency Reserve, (which comprises Pither's Point) to be set aside under Treaty Number Three, was in part as follows;*
>
> *RAINY RIVER*
>
> > *"No. 1 – At the foot of Rainy Lake. To be laid off as nearly as may be as indicated on the plan – Two chains in depth along the shore of the Rainy Lake and Bank of Rainy River, to be reserved for roads, right of way to lumbermen, booms, wharves and other public purposes."*
>
> *He argued that, in view of the above two chain reservation the reserve did not extend to the water's edge but merely to within two chains thereof, and that accordingly the reserve was not damaged, maintaining that the lands inundated did not extend further than two chains from the original shore line. While this is not correct in its entirety, practically all of the lands submerged are within two chains of the original shore line.*
>
> *Without admitting that there was a reservation of two chains allowance we argued that in any event it was to be within the limits of the reserve; that this was a description of the reserve with which the Province of Ontario had nothing to do and that there was no such reservation in 5 Geo. V. Chap. 12, Ontario, by which Act the title to the Indian Lands was transferred to and confirmed in the Dominion, and that in fact there neither is nor has been any road or road allowance around Pither's Point. The Judge however seemed to consider that a point which went to the root of matters and we accordingly applied to leave to give further evidence to meet this unexpected situation.*
>
> *While not granting same, largely we think because we were not able to tell him what our evidence would be, he has given us until the 28th instant to apply for leave to submit further evidence on this point…*

We think that every source of information should be exhausted in clearing up the matter of the two chain reservation, so that if possible we can bring further evidence on this point…[79]

[329] Crown counsel were briefed on the two chain shore allowance issue by Bray in an October 9, 1920 memo[80] and Gillon, in an October 11, 1920 memo.[81]

[330] Bray's memo reads as follows:

"The reservation of two chains in width along the shores of the Indian Reserves at the west end of Rainy Lake mentioned in the "Minute of Decision: of Commissioner Dawson, did not detach this strip from the Indian Reserves. It simply gave the right to the Crown to grant booming and the other privileges mentioned, when required, without a surrender from the Indians as provided in the Indian Act, and it did not deprive them of the use of the said strip or of any compensation for their improvements or for loss or damage to their reserves when required for the said other purposes.

The said reserves were confirmed by the Province as shown on the plan furnished which plan shows that the said strip is a part of the reserves. This may be especially observed by noting that the boundary lines of the Reserves are in every case drawn down to the water's edge. (I have sent for a certified copy of the plan furnished the Province: from memory I may say that the two chain strip is not shown thereon.)

No reference whatever was made to the Province of any reservation of the said two chains. The Dominion could not have accepted confirmation of these reserves with the proviso that the said two chains along the water front was the property of the Province as this would have been a bad breach of faith with the Indians as they had been rightfully in continuous ownership and occupation of the said strip. If the Indians had been informed that they did not own the land in their Reserves up to the water's edge there would have been a rebellion.

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[79] Exhibit #1, tab 320.
[80] Exhibit #1, tab 318.
[81] Exhibit #1, tab 319.

Their improvements always being at the water's edge; it is absurd to suppose that there was any intention that they should leave a wide strip of wood land between their houses and the water.

Mr. Pither, who was one of the Commissioners who was appointed to allot these Indian Reserves, built his house on Pither's Point within the limit of the said strip. He would have been guilty of an act of great folly if he knew or had supposed that the land was not a part of the Reserve."

[331] Gillon's memo reads as follows:

Mr. E. C. Caddy D.L.S. who surveyed these Reserves, in his report on the survey refers to the so called road as "the two chains for landing purposes. Also in his field notes, of which I have a copy the two chains is designated as "Allowance for landing.

Mr. Caddy did not complete the survey of Reserve C. This Reserve was not surveyed until 1907.8 when I made the survey. My instructions re posts are as follows: "You will please plant iron posts at the shores of the Bay or Lake, or rather, at a distance of two chains from the said shores.

The area of Indian Reserve No. 1 is given on a copy of the Plan of Township of McIrvine, supplied to me by the Department of Lands Mines and Forests of Ontario as 204 acres, i.e. area includes the Reserve of two chains.

[332] The Department of Justice requested the Department of Indian Affairs obtain "…all possible information…" as to the present status of the two chain allowance. Indian Affairs replied to the Deputy Minister of Justice on October 20, 1920 noting:

1. *Positively no full descriptions of the reserves has ever been made, and the so called description referred to in the trial at Fort Frances, is the Minute of Decision of the Reserve Commissioner, Mr. S.J. Dawson. Mr. Dawson was a federal officer. His powers extended to the setting apart of Indian Reserves only, he had no power to set apart a strip of land for the use of the public as indicated in his Minute of Decision.*

2. *The surveyor, Mr. E.C. Caddy, D.L.S., who made the surveys of the reserves in question…refers in his field notes to the two chains allowance along the shore as an allowance for landing purposes and has indicated this allowance on his original plan.*

3. *…in the copy of the report of the surveyor, Mr. E.C. Caddy… in the case of the reserves at the west end of Rainy Lake, the area of the strip of two chains along the lake was not included in the area of the reserves as he indicated them*

4. *When permission was given to the Province of Ontario to open a road known as the colonization road across the northerly end of Pither's Point, the road or trail in use by the public which crosses the point south of the said colonization road was closed as far as the general public was concerned. This was a legitimate action of the Department, as no action had ever been taken to establish the road or trail as a public highway…The portion of the said colonization road located along the lake front was practically all washed away on account of the waters of the lake having been raised. As this action continued, it was found advisable to change the location of the road to the West limit of the reserve.*

5. *The two chains allowance for landing is shown on the plans of the surveys of the reserves at the West end of Rainy Lake made by the surveyor above mentioned…*

6. *…the position of the Department is that the two chains strip always formed a part of the reserves, has been in continuous possession and has been administered by this Department. Especial care was taken at the time of the confirmation of the reserves by Ontario to show on the plan that the two chains strip formed a part of the reserve. No descriptions whatever were furnished the Province; plans only govern.*[82]

[333] Bray further responded to Crown counsel's request for information on the two chain allowance. In a letter dated October 28, 1920 Bray stated, among other things, that the Order in Council of July 5, 1874 (appointing Dawson and Pither as Reserve Selection Commissioners) gave no authority to the Commissioners to make any reservations of two chains along the shores of any Indian reserves. Bray also provided his position on the issue in general terms:

[82] Exhibit #2, tab 569.

…when any piece of land being a part of an Indian reserve has been used with or without the consent of the Superintendent General for the purpose of a school, church, cemetery or road and if the said piece of land has not been regularly surrendered by the Indians for that purpose, when it ceases to be used for the purpose of a school, church etc. it reverts to the reserve.[83]

[334] On November 10, 1920, Crown counsel wrote to the Department of Indian Affairs outlining their proposed strategy for dealing with the two chain issue when the trial resumed:

That the two chain allowance in Caddy's Field notes was merely a reservation for the purpose of convenience, so that roads or wharves could be erected thereon without obtaining the consent and surrender of the Indians and that the object of this was not in any way to impair the Indians' right or title thereto or deprive them of deriving benefit therefrom, if it was taken from them.[84]

[335] As Canada pointed out in their submissions, this is one of the arguments put forth by the plaintiffs in this action.

[336] The trial recommenced on November 12, 1920. The trial transcript for this date is found at page 216 of exhibit #2, tab 544, beginning with the evidence of James Hutcheson, Inspector of Surveys, Interior Department of Lands, Forests and Mines, Ontario ("Hutcheson"). Through Hutcheson, Canada entered a copy of the Caddy plan sent by Canada to Ontario in 1890, described as bearing the date December 23, 1889. This was put in as Exhibit #70.

[337] At page 217 of the transcript, Hutcheson confirms that this version of the Caddy plan contains extracts from Caddy's field notes dated July 15, 1876, examined and compared with the original by Bray. Hutcheson confirmed that Exhibit #70 did not show a two chain allowance.

[338] In cross-examination, Exhibit "V" (actually "Q") was put to Hutcheson, described by OMPC counsel as "…also according to the same survey of Mr. Caddy, July 14, 1876, certified to

[83] Exhibit #2, tab 573.
[84] Exhibit #2, tab 576.

be a correct copy of plan No. 91, by S. Bray…" Hutcheson was asked, "Q. That shows that roadway around?" He responded, "A. It is marked road". Counsel for OMPC pressed further - "Q. You don't know anything about this, except in your department you found this plan you produce…and that is all you know about it? A. Yes."

[339] Canada next called Mr. D.C. Scott, Deputy Superintendent General of Indian Affairs ("Scott"). In the course of his direct examination, the 1875 Dawson reserve description was put to the witness (transcript, page 225, line 15). At this point, the trial judge interjected, attempting to clarify the issue of the two chain and expressing frustration as to the lack of evidence on this issue.

[340] Scott was then cross-examined by OMPC counsel on the February 17, 1875 Dawson reserve description, the accompanying Order in Council, Dawson's December 31, 1874 reporting letter on the reserves and his report of January 28, 1875.

[341] Scott was also questioned as to the file from which Bray had earlier extracted Exhibit R (copy of the reserve description and the Order in Council approving it). Scott confirmed that Exhibit R was from a file "…full of correspondence relating to the adjustments of these reserves with the Indians back about the time the surrender was taken in 1873." The trial judge asked Crown counsel why the complete file should not be put in to evidence. Counsel agreed to do so. It was to be marked as Exhibit R/B. The trial concluded and Indian Department File Number 2790 was sent to the court on December 3, 1920.[85]

[342] The Honourable Mr. Justice Audette's trial decision was released December 22, 1920. In *Canada (Attorney-General) v. Ontario & Minnesota Power Co.* (1920) 20 Ex. C. R. 279 (Ex. Ct.), Audette J. held that:

1. The Dominion Government properly accepted surrender, on behalf of the Crown, of Treaty #3 lands from the Indians. The title to or beneficial interest in the surrendered lands which were within Ontario passed to Ontario pursuant to s. 109 of the B.N.A. Act, 1867. This entire beneficial interest was held by Ontario until the conveyance of a part for Indian Reserves to the Dominion Government in 1915.

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[85] The direct and cross examination of Scott is found at p.p. 225-230 of the trial transcript, exhibit #2, tab 544.

2. A reserve for roads, etc. along the shores of Rainy Lake and Rainy River was contained in the description of the Indian Reserves surrendered by the province to the Dominion and did not form part of the Indian Reserves.

[343] In coming to the latter conclusion, Audette J. referred to and relied upon the evidence of Bray, Exhibit 21 and Exhibit "Q", together with the original description of the reserve, as found in Exhibit R. Reading the description together with "…the two plans filed by Mr. Bray…" Audette J. found that "…they conjointly agree." Audette J. found that the "two chains in depth along the shore of Rainy Lake and& bank of Rainy River…appear on the one plan in the shaded space, and on the other in the road allowance plainly shown and marked thereon…The only conclusion to arrive at is that the 132 feet do not form part of the reserve…"

APPEAL TO THE SUPREME COURT OF CANADA

[344] Canada appealed the trial decision and OMPC cross-appealed. The Judgment of the Supreme Court was released on May 1, 1923. It is unreported. The court did not agree with the learned Trial Judge's decision that the two chain allowance was not part of the reserve. The court held that Canada was entitled to recover damages as a result of flooding of lands "… in the Indian Reserves whose boundaries extend in all cases to the water's edge as shown on the plan marked Exhibit 70 at the trial of this action…"

APPEAL TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

[345] OMPC appealed to the Judicial Committee of the Privy Council ("JCPC"). The decision was released on October 23, 1924. In *Ontario and Minnesota Power Co. v. the King* [1925] A.C. 196 (J.C.P.C.), the Judgement of the Supreme Court was affirmed, subject to variations.

[346] The JCPC did not agree with the Supreme Court in holding that the reserves in question extended to the water's edge. The JCPC noted that "…the evidence as to the setting aside of the reserves in 1875 is incomplete…" The JCPC found that Dawson had recommended that "two chains in depth along the shore of Rainy Lake and the bank of Rainy River to be reserved for roads, right of way to lumber-men, booms, wharves and other public purposes" and that this recommendation was accepted and approved by Order in Council. It was also found that "…a map (exhibit Q) dated in July, 1876, and produced by the Indian Department, shows this road as having been excepted out of all the reserves abutting on the lake."

[347] In reference to exhibit 70, identified by the JCPC as a plan provided to Ontario by the Department of Indian Affairs in answer to Ontario's 1890 request for a tracing of the reserves, the JCPC agreed that "…this appears to have been the plan which was referred to in the Act of 1915" and that it did not show "the roadway". However, the JCPC held that the reserves transferred by the Act of 1915 "…were the reserves as laid out in 1875; and if on the laying out of the reserves the road was excepted, as appears to have been the case, the Act of 1915 would not have the effect of adding it to the reserves. The plan exhibit 70 must therefore be rejected as *falsa demonstratio*. On the whole their Lordships are satisfied that the two chains in depth were not included in the reserves and accordingly did not pass to the Dominion by the Act of 1915."

FACTS RELEVANT TO DEFENCE OF LACHES, LIMITATIONS AND DELAY

[348] The defendants collectively submit that the plaintiff First Nations were aware for years prior to the present action being commenced that the two chain allowance was excluded from the Agency One Reserve. It is further submitted that the plaintiffs accepted the exclusion and did not pursue a remedy in a timely fashion such that their claim in this action is barred.

[349] The plaintiffs submit that the requisite elements of these defences are not established by the facts of this case, there having been no delay or acquiescence as those terms are understood in the context of this defence.

[350] A brief review of the salient facts in the decades prior to the initiation of the present action is necessary to assess this issue.

CLAIMS FOR FLOOD DAMAGE

[351] Canada submits that the plaintiffs were aware, soon after construction of the dam in 1909, of flood damage to the shoreline of Agency One Reserve, yet failed to collectively advance a claim for these damages. By comparison, the Chief of neighbouring Couchiching First Nation, as well as individual Couchiching band members, advanced claims for damages to the shoreline of the reservation and personal property respectively. The failure of the plaintiffs to make similar claims in respect of damage to the Agency One shoreline is submitted as confirmation that they were aware, as of this date, that the reserve did not include the two chain allowance.

KNOWLEDGE OF OMPC DECISION

[352] Canada submits that the plaintiffs were aware of the JCPC's ruling that the two chain allowance did not form part of the Agency One Reserve soon after it was made. This submission appears to be premised on the manner in which damages as a result of flooding were calculated. Correspondence between the Department and the local Indian Agent confirmed that individual members of the Couchiching band would not receive compensation for flood damage to any property within the two chain allowance.[86]

1930'S ROAD EXCHANGE

[353] In 1931, Ontario wanted to extend the "Mill Road" eastward, through the Couchiching Reserve.[87] Canada proposed that Ontario convey to Canada the two chain shore allowance around the Agency One and Couchiching Reserves in exchange for lands on the Agency One and Couchiching Reserves needed by Ontario for the road extension.[88]

[354] Ontario replied, saying that the plans of these reserves on file with Ontario showed no shore allowance as referred to by Canada and asking for further information.[89]

[355] Canada responded, informing Ontario of the OMPC decision and indicating that, until the time of that decision, it was Canada's position that "…the Indian reserves in all cases extended to the water's edge…" Suggesting that this was also the view of Ontario, Canada sought the conveyance of the two chain allowance in exchange for the property Ontario wanted for the road.[90]

[356] During the construction of the road, the Couchiching band opposed the location of a portion of it. In the course of negotiations, the band requested transfer to them of "…the 132 ft. road allowance around res. 18B (Couchiching) be given them…"[91] Canada submits that this establishes that the Couchiching band knew, in 1932, that the two chain allowance was excluded from the reserve.

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[86] See Exhibit #2, tabs 635, 667 and 669.
[87] Exhibit #23.
[88] Exhibit #1, tab 358.
[89] Exhibit #1, tab 359.
[90] See Exhibit #1, tabs 360 and 362.
[91] Exhibit #2, tab 716.

[357] Eventually, Ontario transferred to Canada the portion of two chain allowance adjacent to Couchiching reserve, but not the portion adjacent to the Agency One Reserve. Canada proceeded to pass an Order in Council transferring to Ontario the property for the roads both on the Agency One Reserve and the Couchiching Reserve.

[358] Left outstanding was the issue of Ontario's transfer to Canada of the portion of the two chain allowance adjacent to the Agency One Reserve.

DEVELOPMENT ON TWO CHAIN ALLOWANCE WITHOUT PROTEST BY PLAINTIFFS

[359] Canada and Fort Frances suggest that there are numerous examples of visible development having occurred within the shore allowance area without opposition by the plaintiffs.

[360] In the 1930's, Fort Frances installed two 12 inch water mains across Pither's Point Park and a pumping station within the two chain allowance. The Department of Indian Affairs granted approval for Fort Frances to proceed with the installation of the water mains across the leased Agency One land, but deferred the issue of the pumping station on the two chain allowance to the province, consistent with the OMPC decision. Ontario did not oppose the town's plans, the project proceeded and the pumping station was built within the allowance.

[361] This pumping station was a visible fixture on the Agency One waterfront. Mr. Major, a witness for the plaintiffs, identified its location on exhibit #32 and confirmed that it had been there for as long as he could remember.

[362] In 1964, Couchiching Band Council granted Fort Frances an easement to install a new water main across Agency One. The sketch attached to the Band Council Resolution shows the pumping station squarely within the two chain allowance.[92]

[363] In 1936, Ontario conveyed a water lot in Rainy Lake adjoining the Agency One Reserve to Canada in response to a request from the Department of Public works for the construction of a public wharf. Mr. Major also identified the "Town dock" on exhibit #32.

[92] Exhibit #2, tab 812.

[364] Exhibits #23 and #32 illustrate the 1916 subdivision of part of the Agency One Reserve and the current physical layout of the site respectively. Improvements on virtually all of these lots encroach upon the two chain allowance. The two chain allowance appears to include some of the property on several of these lots. However, as pointed out during the cross-examination of Mr. Frank Meyers, owner of Lot 26, Idylwyld Drive, the original patents excepted from his lot and others in the subdivision "…those portions of the said lot which lie within the two-chain allowance along the shore of Rainy Lake as the shore existed in 1876…"[93]

EVENTS BETWEEN THE 1970'S AND THE START OF THIS LITIGATION

[365] On November 13, 1973, a meeting was held between Fort Frances Town council and representatives of three of the four First Nations plaintiffs, namely Chief Gordon Bruyere from Couchiching First Nation, David Henderson from Stanjikoming First Nation and Ted Perrault from Nicickousemenecaning First Nation. The minutes of this meeting indicate that Mr. Ralph Bruyere was also present, having been appointed spokesperson by the four band negotiating committee to "…consider the future of this land", referring to the Agency One Reserve. During this meeting, a report dated March 14, 1973 was read into the record:

> *Several roads in I.R. No. 1 were transferred to Ontario's jurisdiction in 1936.*[94] *The Province in turn was to transfer to Canada title to a 2-chain road allowance in the Reserve along Rainy Lake. There is no record of this transaction ever being done. However, most of this portion is now submerged as a result of erosion and of the rising water level of Rainy Lake caused by the construction of a dam. The Indians that owned the land that was flooded beyond the 2-chain road allowance were compensated, as the judgement from the Exchequer Court prescribed, for damages incurred, by the Company that built the dam.*[95]

[366] The defendants submit that it was clear to the plaintiffs, at least as of the date of this meeting, that the two-chain allowance was not part of Agency One Reserve and that it had not been transferred to Canada by Ontario as previously agreed.

[93] See Exhibit #62.
[94] the road exchange discussed at pp. 134,135
[95] Exhibit #2, tab 822.

[367] In 1976, each of the plaintiff bands agreed to surrender a 9.8 acre parcel of the Agency One Reserve. The description of the land to be surrendered as set out in the Notice of Intent issued by each band included the following:

> *…to the easterly boundary of said parcel, being the westerly limit of the two chain road allowance adjoining the ordinary high water mark on Rainy Lake…*[96]

[368] The map used for the surrender process was a copy of the 1916 Plan of Subdivision of Part of Indian Reserve No. 1, exhibit #23.[97]

[369] The 1979 Department of Indian Affairs instructions for the survey of this surrendered parcel include the following:

> *The "School Road", "The Avenue", the "Mill Road"…the chain shore road allowance along Rainy Lake and Lots 1 to 26 as shown on C.L.S.R. Plan 1634 do not form part of the Reserve.*[98]

[370] The surveyed plan, dated July 23, 1979, shows a "Road Allowance" extending two chains in from the July 1979 ordinary high water mark. The plan legend states that "…the two chain shore road allowance along Rainy Lake (does) not form part of Agency Indian Reserve No. 1."[99]

[371] The surrender of this property as described is suggested by the defendants to confirm that each of the plaintiff band councils was aware of the existence of the two chain allowance and that they did not have authority to surrender any land within it, impliedly acknowledging that it did not form part of the Agency One Reserve.

[372] The plaintiffs suggest that there is nothing in these surrender documents which expressly indicate that the two chain allowance was not part of the Agency One Reserve.

[373] An October 9, 1980 memo from J.K. Cleaveley, District Manager, Fort Frances District, Ontario Ministry of Natural Resources to the Regional Lands Co-ordinator, Northwest Region outlined a discussion Cleaveley had recently had with Mr. Ted Berry, the local Indian Land and

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[96] Exhibit #2, tab 826.
[97] Included with plaintiffs' copy of surrender documents found at exhibit #1, tab 435.
[98] Exhibit #1, tab 438.
[99] Exhibit #1, tab 439.

Estate officer "…concerning the unsettled ownership of the unflooded portion of…" the two chain shore allowance, Indian Agency #1. Berry, on behalf of the First Nations, expressed concern that the "…original promise to trade these lands for certain provincial and municipal road allowance on the reserve has never been completed…"[100]

[374] Canada suggests that this memo also confirms that the plaintiffs were aware, as of 1980, that the two chain allowance did not form part of the Agency One Reserve and that they had not been compensated for the unfulfilled highway exchange promise in 1931.

[375] In early 1981, the federal department of Energy Mines and Resources retained Mr. John Goltz O.L.S. to provide yet another report on the two chain issue. This report is dated February 9, 1981 and is found at exhibit #1, tab 443. Among other things, Goltz was of the opinion that the two chain reserve was originally a multipurpose general reservation, not a road allowance or highway within the meaning of the Municipal Act.

[376] In a letter from the Minister of Indian Affairs to the local M.P. dated February 22, 1981, the Minister advised:

> *The question of the status and jurisdiction for the two-chain strip in Agency No. 1 has been raised on several occasions. The Ontario Regional Office of the Legal Surveys Division of the Department of Energy, Mines and Resources has issued a contract to determine the location of the two-chain allowance. Additional research will be undertaken to determine the status of the lands and their legal ownership. I understand that the office of Indian Resource Policy, Ministry of Natural Resources, is also investigating the ownership of the two-chain reserves.*[101]

[377] In a letter dated March 13, 1981, from D.H. Browne, O.L.S., C.L.S., Regional Surveyor, Ontario, Legal Surveys Division, Department of Energy Mines and Resources to the Director of Lands, Membership and Estates, Department of Indian Affairs, Browne summarized his review of the Goltz report. Browne suggested that it appeared to him that the title to the "…two chain reservation along Agency Indian Reserve No. 1 was and possibly remains vested in the Province of Ontario." Browne also questioned the legal status of the allowance, suggesting any "…re-

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[100] Exhibit #2, tab 838.
[101] Exhibit #1, tab 444, para. 7.

designation to road allowance" may be unjustified, given that the original intention was to establish a multipurpose reservation:

> *Although roads is one of the intended purposes, that alone does not justify the re-designation to road allowance. The designation of road allowance appears in numerous documents for the purpose of identifying the two chain reservation, however there appears to be no information that verifies the re-designation to road allowance. The original reservation included purposes for roads, however this type of reservation (allowance) is quite different to the road allowances as layed out in the original surveys for the purposes of roads. If the original intention was to have a road allowance then it would have been surveyed as such and properly identified at that time.*
>
> *The matter regarding designation should be discussed as soon as conveniently possible with the Justice Department. If the two chain reservation is considered a reservation in accordance with the Provincial Procedural Directive then the title is vested in the Province of Ontario and they should make every effort to fulfill their previous obligation to transfer the title to the Government of Canada in compliance with the agreement made in 1936.*
>
> *Contrarily, if the two chain allowance was re-designated as a road allowance and is regarded as such, then the title is vested in the Municipality. If this is the case then your Department should take appropriate action to rectify the matter with the Municipality.*

[378] Browne strongly advised the Department of Indian Affairs to "…rectify the matter of title and extent of title as soon as conveniently possible so that we may proceed with pending projects."[102]

[379] A multi-party meeting was arranged for May 12, 1981 at the Nanicost Building on the Agency One Reserve. In a letter from Ms. Kathi Avery, a researcher with Grand Council Treaty No. 3 to Mr. Jim Wells, Lands Division, Department of Indian Affairs, the meeting was expressed to be for the purpose of bringing "…all members of the four band councils up to date on the pressing issues (ie. two chain road allowance, overpass, marina development, park lease to town…) and to discuss possible action to be taken."[103]

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[102] Exhibit #1, tab 445.
[103] Exhibit #2, tab 852.

[380] Present at the May 12, 1981 meeting were the Chiefs of the four plaintiff bands, Ted Berry on behalf of the Department of Indian Affairs and Ms. Avery. Mr. Berry outlined the history of the two chain shore allowance and the substance of the Goltz survey report. The Minutes state:

> *Justice is now reviewing Goltz report and the matter of whether the 2 chain allowance is a road allowance or a shore allowance. If the former, it is possible the Town may have an interest today. If it is a shore allowance, then the Province would own it and would be obligated to pass on its interest to Agency One because of the 1936 quit claim to return the shore allowance in return for the highway crossing the reserve. Justice lawyer Chislow in Toronto is reviewing this question and DINA Regional Lands officer Jim Wells is requesting that this opinion be available to the Chiefs and legal counsel, Don Colborne* (plaintiffs' lead counsel in this action), *before the first week in June.*[104]

[381] In a letter to Mr. Berry from the Chiefs of the four plaintiff bands, dated May 12, 1981, the Chiefs expressed concern about the actions of Fort Frances "…*with regard to our interest in Agency One*." The Chiefs requested that the Department of Indian Affairs advise Fort Frances that the four plaintiff bands "…*have a very direct interest in Agency One Reserve*…" and that these four Bands "…*have an interest in the two chain allowance surrounding Agency One Reserve*." The Chiefs further requested that the Department of Indian Affairs advise Fort Frances that until "…*the ownership of this two chain allowance has been decided and completed, no action can be taken by the Town or any party*."[105] The Department of Indian Affairs did so in a letter to Fort Frances, dated May 21, 1981.

[382] A further "Agency One Meeting" was held on June 4, 1981. In attendance were the Chiefs of the four plaintiff bands and representatives from the Department of Indian and Northern affairs and the Department of Energy, Mines and Resources.

[383] The minutes of this meeting indicate that, following a review of the Goltz report, Energy, Mines and Resources had decided to proceed with an in-house survey to "…*locate original high water mark, shoreline of original survey and two chain shore allowance*." The Department of Justice was requested to file an opinion as a result of conflicting evidence presented in the Goltz report and DINA Lands Research on the two chain allowance. Canada

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[104] Exhibit #2, tab 854.
[105] Exhibit #2, tab 853.

undertook to "…*press Province to honour their 1932 commitment to make quit claim for 2 chain shore allowance*." It was also agreed, as between Canada and the Agency One Chiefs, that "…*DIA and Agency 1 Chiefs would continue to proceed on the basis that Agency 1 has a greater interest than the Town in the 2 chain allowance*."[106]

[384] Shortly thereafter, Mr. Eugene Harrigan, Regional Director General, Ontario Region, Indian and Northern Affairs Canada wrote to Mr. E.G. Wilson, Director, Office of Indian Resource Policy, Ontario. In this letter, dated June 10, 1981, Canada advised Ontario that the Department of Justice had now reviewed the Goltz report and "…other related material…" Canada's position was that the two chain allowance was not a "road allowance" and that Fort Frances did not acquire title to it when the Municipality was created. Canada requested that, "…*by virtue of the 1932 Agreement for an exchange of land, Ontario should proceed with a transfer of Quit Claim of the two chain allowance to Her Majesty the Queen in Right of Canada in order that it may be added to Agency Indian Reserve #1*."[107]

[385] On September 3, 1981, the Department of Indian and Northern Affairs Canada pressed Ontario to fulfill Ontario's "…outstanding obligation to the Federal Crown."[108] Ontario replied by letter of February 15, 1982, taking the position that the two chain allowance was a "road" and "right of way" for various purposes and was therefore "… *vested in the Municipality when it was incorporated in 1903 by the predecessors of Section 258 of the Municipal Act R.S.O. 1980, Ch. 302*."[109]

[386] A further meeting between the Agency One Chiefs and department officials was held on September 8, 1981. The minutes of this meeting are dated September 22, 1981. It was reported that the Campbell survey of the two chain shore allowance on Agency One and Couchiching was now complete, that the Fort Frances pump house was "…10% on chain allowance…" and that the "… Idylwyld Dr. properties have some of the chain allowance on dry land." The minutes also confirm that "…Harrigan, RDG of DIA, has written the Province regarding the need for exchange of lands (ie. rtn. Chain allowance to Bands because of hwy rt of way.)" The minutes confirm that Mr. Colborne, current counsel for the plaintiffs, was present at the meeting.[110]

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[106] Exhibit #2, tab 859.
[107] Exhibit #1, tab 448.
[108] Exhibit #2, tab 450.
[109] Exhibit #1, tab 453.
[110] Exhibit #2, tab 864.

[387] On June 29, 1984, Mr. D. Shanks, plaintiffs' legal counsel, sent a letter to the Department of Indian and Northern Affairs confirming discussions which occurred during a June 14, 1984 meeting between Mr. Berry and representatives of each of the plaintiff bands regarding the two chain allowance. In response to an apparent request from the Department of Indian Affairs that the "Bands of Agency One" clarify their position as to the two chain allowance, counsel advised:

> *Firstly, with regard to the two chain allowance, it is the Bands position that this is, in its entirety land that was agreed to be exchanged for the old mill road. This is an agreement by the Department of Indian Affairs with the Province of Ontario and as such is land that the Queen in right of Canada holds in trust for the Bands of the Agency #1 Reserve. The Bands do not consent to the sale of this land unless they are involved in the negotiations of the sale, have consented to the value of the property prior to its sale, and are allowed an opportunity to obtain their own appraisals and evaluations of the land…opinions (were) obtained which clearly indicate the bands have a claim to the two chain allowance…it is imperative that the Bands have the opportunity to make their claim to ownership."*[111]

[388] By Statement of Claim filed April 25, 1985, the plaintiffs commenced action against Canada in the Federal Court, Court File No. T-818-85. In this action, the plaintiffs took the position that the two chain allowance was not part of Agency One Reserve, that the Agency One portion of the two chain allowance was to be transferred to Canada as part of the 1930's road exchange and that Canada had never obtained that transfer:

> 9. In or about the year of 1931, the Defendant, Her Majesty the Queen in Right of Canada entered into a written agreement for the exchange of certain lands contained in the Agency No. 1 Indian Reserve, to Her Majesty the Queen in Right of Ontario, for use as a Highway, in return for a conveyance to the Defendant, Her Majesty the Queen in Right of Canada, of a two chain shore allowance surrounding the Agency No. 1 Indian Reserve, Reserve No. 16, and Reserve No. 18. The necessary road requested by Her Majesty the Queen in Right of Ontario was constructed on or in the year of 1931, and the necessary land for such construction transferred to Her Majesty the Queen in Right of Ontario by the Defendant, Her Majesty the Queen in Right of Canada. The said land exchange aforementioned was to be for the benefit and use of the Plaintiffs herein and their forebearers, but the Defendant

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[111] Exhibit #2, tab 879.

herein failed to consult, confer or otherwise inform the Plaintiffs of the said exchange of lands or the consideration therefore.

11. In or about the year 1936, Her Majesty the Queen in Right of Ontario transferred to the Defendant, Her Majesty the Queen in Right of Canada, only the unflooded portion of the two chain shore allowance above a four hundred and ninety-nine foot (499') datum level surrounding Reserve No. 16 and Reserve No. 18, but did not obtain the remainder of the two chain allowance in those two aforementioned reserves and received none of the two chain allowance surrounding the Agency No. 1 Indian Reserve.

13. Her Majesty the Queen in Right of Canada has never obtained the transfer of the two chain shore allowance around Agency No. 1 Indian Reserve and the remainder of the two chain shore allowance around Reserve No. 16 and Reserve No. 18, and has otherwise received no consideration for the land transferred to Her Majesty the Queen in Right of Ontario, pursuant to the Land Exchange Agreement of 1931.

14. The Plaintiffs therefore claim against the Defendant, Her Majesty the Queen in Right of Canada:

a) Damages for breach of fiduciary obligation and duty in an amount equal to $1,000,000.00;

b) Costs;

c) Interest pursuant to the provisions of the Judicature Act, R.S.O. 1980, both before and after judgment;

d) Such further and other relief as this Honourable Court may deem just.

[389] In a complimentary action in the Supreme Court of Ontario, the plaintiffs named Ontario as defendant in action # 392-86, issued January 14, 1986. In this action, the plaintiffs sought a declaration that the two chain shore allowance surrounding Agency One Indian Reserve was held by her Majesty the Queen for the use and benefit of the plaintiffs. The plaintiffs also sought damages for the uncompleted 1930's road exchange.[112]

[112] Exhibit #2, tab 884.

[390] The present action was commenced on October 14, 1998 by which time the plaintiffs could name both Canada and Ontario as defendants in the provincial Superior Court.

[391] On December 22, 1998, the Federal Court action was dismissed for delay.

DISCUSSION OF THE ISSUES

IS THE PLAINTIFFS' CLAIM BARRED ON THE BASIS OF RES JUDICATA, ISSUE ESTOPPEL, ABUSE OF PROCESS AND ONTARIO AND MINNESOTA POWER CO. v. THE KING [1925] A.C. 196?

The Law

[392] Issue estoppel is a branch of *res judicata* which precludes the re-litigation of issues previously decided by a court in another proceeding. Issue estoppel developed at common law to balance judicial finality and economy and other considerations of fairness to the parties. It holds that a party may not re-litigate an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place. Even if these elements are present, the court retains discretion to decline to apply issue estoppel when its application would work an injustice.[113]

[393] The test to be satisfied by a party seeking to rely on issue estoppel is well established and was not in dispute before me:

> *The preconditions to the operation of issue estoppel were set out by Dickson J. in Angle, supra, at p. 254:*
>
> 1. *That the same question has been decided;*
> 2. *That the judicial decision which is said to create the estoppel was final; and,*
> 3. *That the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.*[114]

[113] Penner v. Niagara (Regional Police Services Board) 2013 SCC 19.
[114] Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460 at para. 25

[394] If the moving party has established the preconditions to the operation of issue estoppel as set out above, the court must go on to determine whether, as a matter of discretion, issue estoppel ought to apply.[115] The principle underpinning this discretion is that "a judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice."[116]

[395] The common law doctrine of abuse of process by re-litigation engages "the inherent power of the court to prevent the misuse of its procedure in a way that would bring the administration of justice into disrepute."[117] Canadian courts have applied the doctrine of abuse of process to preclude re-litigation in circumstances where the strict requirements of issue estoppel are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.[118]

[396] In *Toronto*, the Supreme Court stated that, in all of its various applications, "the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts." In exercising discretion in the application of abuse of process, the Supreme Court directed that the focus must be more on "the integrity of judicial decision making as a branch of the administration of justice" than on the interests of the parties.[119]

[397] In *Toronto*, the Supreme Court observed that there may be instances where re-litigation will enhance, rather than impeach the integrity of the judicial system, citing as an example a situation where "fairness dictates that the original result should not be binding in the new context."[120] The Supreme Court also noted that the discretionary factors that apply to prevent issue estoppel from operating in an unjust or unfair way are equally available to prevent the

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[115] Danyluk, supra. Para. 33.
[116] Penner, para. 30, quoting from Danyluk, at para. 1
[117] Toronto (City) v. C.U.P.E. Local 79, [2003] 3 S.C.R. 77, para. 37.
[118] Toronto, para. 37.
[119] Toronto, para. 43.
[120] Toronto, para. 52.

doctrine of abuse of process from achieving a similar undesirable result.[121] This was prior to the court's decision in *Penner*.

Analysis

[398] In addressing the three part test for the application of issue estoppel, none of the parties dispute the finality of the decision of the Judicial Committee of the Privy Council in the OMPC case.

[399] The plaintiffs submit the following:

1. That the issue to be determined in this case is different than the issue decided in OMPC;

2. That the parties in OMPC were not the same as the parties in the present case or their privies;

3. That if this court finds that the three required elements of the first branch of the test for issue estoppel have been established, the court should nonetheless exercise its discretion and refuse to apply issue estoppel in the circumstances of this case; and,

4. That the doctrine of abuse of process is not applicable in this case.

[400] The defendants submit the following:

1. That the question of whether or not the two chain shore allowance formed part of the Agency One Reserve was fundamental and central in the trial of the OMPC action in 1920. Thus, the same question has been decided;

2. That Canada and the four plaintiff bands in this action were privies in title and interest in the OMPC litigation;

3. That if the court finds that the three required elements of the test are met, the court should not exercise its discretion and refuse to apply issue estoppel in this case; and,

4. That even if the requirements of issue estoppel are not met, the court should exercise its discretion and dismiss the action as an abuse of process.

[121] Toronto, para. 53.

[401] In the present case the plaintiffs are seeking a declaration that the two chain allowance adjacent to the Agency One Reserve forms part of the reserve. In order to determine if that declaration should issue, this court has to resolve two primary questions. First, whether the two chain allowance was in fact set aside as part of the reserve creation process in 1875/1876. If not, the next question is whether it was nevertheless *intended* pursuant to Treaty #3 and the reserve selection negotiations that the two chain allowance was to form part of the Agency One Reserve.

[402] In OMPC, the court was being asked to determine liability for flooding, and if liability was found, to assess damages caused by the flooding. The issue of whether or not the two chain allowance was part of the reserve was indirectly raised by the defendant in the pleadings. It was thereafter raised as a distinct issue by OMPC during the trial in an attempt by OMPC to limit their damages.

[403] Once the issue was brought into play in OMPC, a significant volume of evidence and testimony was directed to its determination. Substantial documentation was filed relating both to the reserve creation issue and the survey of the reserve. Scott, the Surveyor General of Indian Affairs, was examined and cross examined on Dawson's December 31, 1874 report and reserve description, his report of January 28, 1875, the February 27, 1875 Order in Council and the reserve description contained therein. Caddy's field notes were in evidence and Scott testified on the process of surveying the Agency One Reserve. Eventually, at the suggestion of the trial judge, Indian Affairs' entire file on the creation of the Agency One Reserve was put before the court.

[404] The trial judge and the JCPC held that the reserve did not include the two chain allowance and found liability only for damages incurred beyond the two chain allowance.

[405] In my opinion, the question before this court is different than the question before the court in OMPC. The court in OMPC found as they did on the basis of Dawson's 1874 description, the 1875 Order in Council, Caddy's records, various plans and other evidence. I agree with the submissions of the plaintiffs that the issue before this court is both broader than and distinct from the issue in OMPC. The court in OMPC, in my opinion, dealt with only one of the two primary questions which I must resolve in order to determine if the declaration sought by the plaintiffs in this case should be granted.

[406] The first issue for this court to decide is whether the two chain allowance was in fact set aside as part of the Agency One Reserve. This issue became fundamental in the OMPC case and was unequivocally decided by the JCPC. However, even if I find that the two chain allowance was not set aside as part of the Agency One Reserve, I must still decide whether it was *intended* pursuant to Treaty #3 and the reserve selection negotiations that it should have been. If I so find, other issues flow from that unfulfilled intention.

[407] The intention of the parties involved in the reserve creation process in relation to the two chain allowance is a fundamental issue in this proceeding. This necessarily involves the wider issue of the Crown's reserve creation obligation flowing from Treaty #3 and the intentions of both the Crown and the Indians throughout the process. The issue of the intentions of the parties was not before the court in the OMPC case. The same question was not decided in OMPC and the first requirement for the application of issue estoppel is not satisfied.

[408] In the event that this conclusion is found to be incorrect, I will next consider whether or not the parties in OMPC or their privies were the same persons as the parties in this case or their privies, the third requirement of the issue estoppel test.

[409] Issue estoppel only applies where both parties to the new action were also parties to the old action said to create issue estoppel. The exception was for privies of parties.[122] In *Danyluk,* the Supreme Court held that the concept of privity "is somewhat elastic." The Supreme Court adopted the following from *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1088:

> *It is impossible to be categorical about the degree of interest which will create privity…determinations must be made on a case-by-case basis.*

[410] The Ontario Court of Appeal has accepted that a person may be a privy of another by blood, title or interest.[123] In *Monteiro*, the Ontario Court of Appeal adopted the following explanation of privity of interest from *Gleeson v. J. Wippell & Co. Ltd.* , [1977] 3 All E.R. 54 (Ch):

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[122] *Medicine Hat (City of) v. Wilson*, 2000 ABCA 247 para. 41.
[123] Monteiro v. TD *Bank,* 2008 ONCA 137, at para. 45.

The doctrine of privity for these purposes is somewhat narrow, and has to be considered in relation to the fundamental principle (No one ought to be twice troubled or harassed for one and the same cause)

I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject-matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in this sense that I would regard the phrase privity of interest.

[411] Canada submits that they and the plaintiffs were privies in both title and interest in the OMPC litigation. It is submitted that the Crown brought the claim in the OMPC action to obtain damages on behalf of the beneficiary Bands and their members, as well as on its own behalf as holder of the title. It is submitted that the Bands were beneficiaries of the title asserted by the Crown, sharing a common interest in the damages sought. This relationship is said to give rise to privity in the context of issue estoppel.

[412] I do not accept the defendants' submissions that the third requirement of the issue estoppel test is met. In OMPC, the federal Crown was the plaintiff and OMPC was the defendant. The parties in the present case are the four plaintiff First Nation bands and Canada, Ontario and Fort Frances. The parties are not the same.

[413] Nor, in my opinion, were the plaintiffs privies to Canada in OMPC or privies to the individual Indians represented by Canada in OMPC.

[414] The issue, as I see it, is whether there is in the present case a sufficient degree of identification in title and/or interest, between Canada and the four First Nations bands which are the plaintiffs in this action, such that it is just that the plaintiffs be bound by OMPC because Canada was a party in that case. I am not persuaded that there is.

[415] It was individual Indians who were represented by Canada in OMPC, as authorized by the Indian Act, not the four First Nation bands who are plaintiffs in this case. The plaintiff bands in this case were also not privies to the individual Indians for whom damages were sought in OMPC. This related to the personal property of those individual Indians. No privity existed between the plaintiffs and the individuals who were awarded damages in OMPC.

[416] In any event, even if all three elements of the test for the application of issue estoppel were found to be satisfied, I would nevertheless exercise my discretion and refuse to apply issue estoppel in the present case.

[417] The Supreme Court of Canada recently reviewed the discretionary application of issue estoppel in *Penner*. The Supreme Court stated that the list of factors that has developed in the jurisprudence relevant to the discretionary analysis of whether or not it is fair to apply issue estoppel "…is not exhaustive. It is neither a checklist nor an invitation to engage in a mechanical analysis."[124]

[418] The court held that the factors previously identified illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive:

> *First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even when the prior proceedings were conducted fairly and properly having regard to their purpose, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.*[125]

[419] In addressing the second point, the court explained that unfairness may arise from using the results of the prior proceedings to preclude the subsequent claim where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. In order to establish unfairness in this second sense, such differences must be significant and assessed in light of the recognized objective of finality.[126]

[420] In my opinion, the present case falls squarely within the second branch of the Supreme Court's suggested analysis – it would be unfair to use the results of OMPC to bar the plaintiffs' claim in this action.

[421] There are significant differences between the purposes, processes and the stakes involved in this proceeding and in OMPC, particularly for the plaintiffs.

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[124] Penner, para. 38.
[125] Penner, para. 39.
[126] Penner, supra para. 42.

[422] OMPC was a damages case where a determination of title to the two chain allowance was necessary to properly assess damages. The purposes of the present case are obviously wider and different.

[423] More to the point, I see the processes and stakes involved in the two as starkly different. The plaintiff First Nations were not involved in any meaningful way in the OMPC litigation. They had no input into how the case was framed, prepared or presented. They provided no evidence other than one individual member of the Couchiching band, and then only as to damages. In my opinion, the plaintiff First Nations had no idea that OMPC was about anything other than how much some individual band members would be compensated for the flooding. It follows that that there was little or nothing at stake for the First Nation bands in OMPC and that they therefore had little or no incentive to participate in the case.

[424] The issue of whether or not the two chain allowance was, or was intended to be, part of the Agency One Reserve has been outstanding since the Agency One Reserve was created more than 135 years ago. The events which have occurred in the 85 years since OMPC indicate to me that the issue remains unresolved. In my opinion, it would be unfair and unjust to use the results of OMPC to bar the plaintiffs' claim in this proceeding and I would decline to do so.

[425] Finally, I am not persuaded that allowing this litigation to proceed is an abuse of process. To the extent that there is any element of re-litigation in the present case, I am of the opinion that it will serve to enhance, rather than impugn, the integrity of judicial decision making and the administration of justice.

[426] The issue of the two chain will be determined in the case at bar with the assistance of expert evidence as to the following:

1. The Ojibway use and occupancy of the reserve site in the century prior to the signing of Treaty #3;

2. The expectations and intentions of the Ojibway and Crown officials during Treaty #3 negotiations and during the reserve creation process; and,

3. The original survey of the Agency One Reserve and the treatment of the two chain allowance in subsequent surveys.

[427] This court has the benefit of a more comprehensive evidentiary record than did the trial court in OMPC, the paucity of evidence on the two chain allowance being commented on by both the trial court and the JCPC.

[428] As stated by the Supreme Court in *Toronto,* at para. 53:

> *If…the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision.*

[429] In all the circumstances, allowing this case to proceed is not an abuse of process.

WAS THE TWO CHAIN ALLOWANCE SET ASIDE AS PART OF THE AGENCY ONE RESERVE OR WAS IT EXCLUDED FROM THE RESERVE?

[430] Treaty #3, signed October 3, 1873 and approved by Order in Council October 31, 1873 provided that "reserves shall be selected and set aside where it shall be deemed the most convenient and advantageous for each band or band of Indians…after conference with the Indians…" By Order in Council dated July 8, 1874, Dawson and Pither were appointed as Commissioners to set aside reserves pursuant to Treaty #3. Their selections would not be final until confirmed by the Governor General in Council.

[431] On December 31, 1874, Dawson provided an interim report to the Deputy Minister of the Interior recommending the immediate survey of eight reserves, including the Agency One Reserve which Dawson described as follows:

> *At the foot of Rainy Lake, to be laid off as nearly as may be in the manner indicated on the plan – two chains in depth along the shore of Rainy Lake and bank of Rainy River, to be reserved for roads, right of way to lumber-men, booms, wharves, and other public purposes.*

> *This Indian Reserve, not to be for any particular chief or band, but for the Saulteux Tribe, generally, and for the purpose of maintaining thereon an Indian agency and the necessary grounds and buildings.*

[432] Dawson's reserve list was provided to the Governor in Council together with a recommendation from the Minister of the Interior that the reserves be provisionally approved for surveying. On February 27, 1875, the Governor in Council approved the recommendation and issued the operative Order in Council provisionally approving, subject to survey, the Agency One Reserve. Dawson's description of the Agency One Reserve is found as the first entry on Schedule A attached to the February 27, 1875 Order in Council.[127]

The Law

[433] In *Canada (Attorney General) v. Anishnabe of Wauzhushk Onigum Band* [2002] O.J. No. 3741, Smith J., at para. 43 held that the February 27, 1875 Order in Council created the Agency One Reserve, notwithstanding its provisional nature. The parties are in agreement that the interpretation of the description of the Agency One Reserve found in this Order in Council is the starting point in the analysis of whether the two chain allowance formed part of the reserve.

Interpretation of Statutory Provisions Impacting Aboriginal Rights

[434] In *R. v. Badger*, [1996] 1 S.C.R. 771, a case concerning the hunting rights of status Indians under Treaty #8, the Supreme Court of Canada discussed the interpretive principles applicable to treaties. In this case, the source of the Indians' rights to hunt and fish for sustenance was the Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930), not Treaty #8 per se. Sopinka J. found that this did not alter the analysis that has previously been employed in the interpretation of treaty rights:

> *The key interpretive principles which apply to treaties are first, that any ambiguity in the treaty will be resolved in favour of the Indians and, second, that treaties should be interpreted in a manner that maintains the integrity of the Crown, particularly the Crown's fiduciary obligation toward aboriginal peoples. These principles apply equally to the rights protected by the NRTA; the principles arise out of the nature of the relationship between the Crown and aboriginal peoples with the result that, whatever the document in*

[127] Exhibit #7, p. 20

which that relationship has been articulated, the principles should apply to the interpretation of that document.[128]

[435] These principles were somewhat amplified in the majority judgement of Cory J:

First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. Second, the honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed the Crown intends to fulfill its promises. No appearance of "sharp dealing" will be sanctioned. Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians must be narrowly construed….[129]

[436] Pursuant to this authority, I find that the key interpretive principles which apply to treaties also apply to the interpretation of the February 27, 1875 Order in Council describing and approving the Agency One Reserve. However, the Ontario Court of Appeal recently suggested caution be employed in applying these interpretive rules.

[437] In *Keewatin v. Ontario (Minister of Natural Resources)* 2013 ONCA 158, the court, citing *R. v. Marshall*, [1999] 3 S.C.R. 456 and *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1069, stated that "generous rules of interpretation should not be confused with a vague sense of after-the-fact largesse" and that "even a generous interpretation must be realistic, and reflect the intention of both parties and reconcile their interests."

[438] The principle of the honour of the Crown was recently reviewed by the Supreme Court of Canada in *Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14. The phrase "honour of the Crown" refers to the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign.[130] The honour of the Crown arises from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control

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[128] Badger para. 9
[129] Badger para. 41
[130] Manitoba Metis para. 65

of land and resources that were formerly in control of Aboriginals. Quoting Professor Brian Slattery, "*Understanding Aboriginal Rights*" (1987) 66 *Can. Bar Rev*. 727, McLachlin J. stressed that the honour of the Crown was not a paternalistic concept concerned with protecting Aboriginal peoples. Rather, it was a recognition of their strength and of the fact that the Crown had historically persuaded native peoples that their interests would be better protected by reliance on the Crown.[131]

[439] McLachlin J. endorsed Professor Slattery's explanation as to the origin of the honour of the Crown:

> *…when the Crown claimed sovereignty over Canadian territories and ultimately gained factual control over them, it did so in the face of pre-existing Aboriginal sovereignty and territorial rights. The tension between these conflicting claims gave rise to a special relationship between the Crown and Aboriginal peoples, which requires the Crown to deal honourably with Aboriginal peoples.*[132]

[440] Of interest in this context is Dawson's personal recognition, in 1870 and 1872, of the strength of the Ojibway of the Treaty #3 catchment area, as noted in paragraphs 102 and 167 respectively.

[441] McLachlin reiterated that the honour of the Crown is engaged when interpreting treaties, their implementation and other statutory provisions which have an impact upon treaty or aboriginal rights, leading to requirements such as honourable negotiation and the avoidance of sharp dealing. The duty that flows from the honour of the Crown varies with the situation in which it is engaged.[133]

[442] Further and more specific guidance as to the interpretation of the February 27, 1875 Order in Council is found in *Wauzhushk Onigum*. In this case, Smith J. was required to decide for which specific Indian Bands the Agency One Reserve was set aside. In order to do so, Smith J. had to interpret the same Order in Council at issue in this case, specifically the phrase "*…not to be for any particular Chief or Band, but for the Saulteaux Tribe, generally, and for the purpose of maintaining thereon an Indian agency and the necessary grounds and buildings."*

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[131] Manitoba Metis para. 66
[132] Manitoba Metis para. 67
[133] Manitoba Metis para. 73 and 74

[443] Smith J. reviewed the Supreme Court of Canada's decision in *Ross River Dena Council Band v. Canada*, [2002] 2 S.C.R. 119 as to the reserve creation process, specifically page 18 where LeBel J. stated that "…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."

[444] Smith J. stated that he found it "helpful" in deciding the issues before him to look at the time period from three general perspectives:

1. The language of the Order in Council;
2. The broad historical context including the contemporaneous circumstances under which the Reserve was set aside; and
3. The conduct and actions of the parties subsequently.[134]

[445] In addressing the language of the Order in Council, Smith J. accepted that Orders in Council are legislative in nature and are to be interpreted in accordance with conventional methods of statutory interpretation:

> *The general approach to statutory interpretation was succinctly expressed by Dickson J. who stated the following in Jodrey's Estate v. Province of N.S.*
>
> *The correct approach, applicable to statutory interpretation generally, is to construe the legislation with reasonable regard to its object and purpose and to give it such interpretation as best ensures the attainment of such object and purpose.*[135]

[446] Smith J. goes on to consider the text *Sullivan on the Construction of Statutes* and Driedger's Modern Principle or Approach, repeatedly cited by the Supreme Court of Canada as "the preferred approach to statutory interpretation across a wide range of interpretive settings."

> *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the*

[134] Wauzhushk Onigum para. 45
[135] Wauzhushk Onigum para. 60

scheme of the act, the object of the Act, and the intention of Parliament.[136]

Reserve Creation

[447] In *Ross River*, the Supreme Court considered the issue of how Indian Act reserves were created in the Yukon Territory, in a non-treaty context where the federal government had set aside lands for the benefit of the Ross River Band. The dispute at issue arose following a claim for the refund of taxes paid on tobacco sold in an Indian village which had developed on the land set aside for the band.

[448] At paragraph 50, the court stated as follows:

> *Under the Indian Act, the setting apart of a tract of land as a reserve implies both an action and an intention. In other words, the Crown must do certain things to set apart the land, but it must also have an intention in doing those acts to accomplish the end of creating a reserve.*

[449] At paragraph 67, the Supreme Court summarized the principles governing the creation of reserves in the following words:

> *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. 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…this intention may be evidenced either by an exercise of executive authority such as an Order in Council…steps must be taken in order to set apart the land…*

[450] Reserve creation, by Order in Council or otherwise, therefore involves two elements – an intention on the part of the Crown agent and actions or "steps… taken in order to set apart land."

Reservation vs. Exception

[451] The plaintiffs submit that the two chain allowance set out in Dawson's description of the Agency One Reserve, carried through in the February 27, 1875 Order in Council which

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[136] Bell Express Vu Limited Partnership v. Rex [2002] 2 S.C.R. 559 at para. 26

confirmed the reserve, was intended to be a reservation in the nature of an easement over the two chain, rather than an exception from the reserve land.

[452] The plaintiffs urge this court to bear in mind, when considering all parties submissions on this issue, that the *sui generis* nature of aboriginal interests in land renders a strict application of common law property law inappropriate in this context. The authority provided for this proposition is *Osoyoos Indian Band v. Oliver (Town),* [2001] 3 S.C.R. 746 at para. 43:

> *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. 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. This is as true of the Crown's purpose in making a grant of an interest in reserve land to a third party as it is of an Indian band's intentions in surrendering land to the Crown.*

[453] I do not accept the plaintiffs' submission that this authority supports their proposition. This case dealt with the "taking" of a strip of reserve land that had the effect of bisecting the Osoyoos Band's reserve. It did not deal with the interpretation of an Order in Council setting aside land which was to become a reserve, as in the present case.

[454] In *Gibbs v. Grand Bend (Village),* (1995), 26 O.R. (3d) 644 (C.A.), the Ontario Court of Appeal was required to interpret an 1836 Crown patent, the issue being whether a beach in the Village of Grand Bend was included in the original Crown patent or whether it was excluded from that patent and reserved to the Crown under a reservation or exception in the patent of the "beds and banks of navigable waters". The Crown patent stated:

> *…saving reserving and excepting to Us, Our Heirs and Successors to and for the use, as well, of Us, Our Heirs and Successors, as of all of Our loving subjects all navigable streams, waters and water courses, with the beds and banks thereof, running, flowing or passing in, over, upon, by, through, or along any of the said parcels or tracts of land hereinbefore given and granted to the said Canada Company…*

[455] The Ontario Court of Appeal was critical of the trial proceedings because the trial judge had not been asked to consider, and did not consider, the fundamental nature of the reservation

provision in the original grant and whether it acted as a reservation to the grant rather than as an exception.[137]

[456] After a review of relevant sources, the Ontario Court of Appeal in *Gibbs* found "…that a reservation, unlike an exception, confers only a limited right to use the lands to which it applies. It does not purport to retain title to the subject land. In contrast, an exception has the effect of retaining title to the excepted lands in the grantor."[138]

[457] The court held that language in the patent in issue indicated that it was creating a reservation rather than an exception:

> *The Crown patent provides that the grant includes "woods and waters laying and being under the reservations, limitations, and conditions hereinafter expressed. Also consistent with a finding of reservation is the fact that the provision purported to retain in the Crown only the* **use** *of the lands and waters…It does not purport to withhold the waters, beds and banks from the grantee, it only purports to retain the* **use** *thereof for the Crown.*[139] (emphasis added)

[458] In *Lanty v. Ontario (Minister of Natural Resources)* [2006] O.J. No. 239, affirmed [2007] O.J. No. 4289 (C.A.) the Ontario Court of Appeal distinguished *Gibbs* on this issue. In *Lanty,* the court considered an 1866 Crown patent concerning a beach and the shore of Lake Huron in Wasaga Beach Provincial Park. The patent contained the following clause: "*Reserving the beach and free access to the shore of Lake Huron for all vessels, boats and persons"*. The trial judge had concluded that by this "reservation" clause, the provincial Crown retained title to the beach property.

[459] The appellant submitted that the trial judge misapplied *Gibbs* in coming to this conclusion. The Ontario Court of Appeal disagreed:

> *The trial judge carefully considered this court's judgement in Gibbs and distinguished the wording of the Crown patent in that case from the wording of the patent in this case. He held that though the clause uses the word "reserving", its specific language showed that the Crown retained title. We think it was open to the trial judge to so hold. In Gibbs itself,*

[137] Gibbs p. 653
[138] Gibbs p. 655
[139] Gibbs p. 656

> *though Finlayson J.A. distinguished between Crown patents using the word "reserving" and those using the word "excepting", he also made the important point that whether the Crown did or did not retain title depended on the wording and the context of the entire clause.*[140]

[460] The trial judge in *Lanty* also distinguished the Court of Appeal's interpretation of the patent in *Gibbs* from the patent in that case:

> *I find that Finalyson JA.'s interpretation of the patent in Gibbs can be distinguished from the patent in this case. The patent in the present case includes additional explicit handwritten language that reserves "the beach" not just "use of the beach".*[141]

Analysis

[461] Before addressing the wording of the February 27, 1875 Order in Council describing the Agency One Reserve, I will briefly review and make further findings as to the historical context and contemporaneous circumstances under which the reserve was set aside, as suggested by Smith J. in *Wauzhushk Onigum*. This is necessary in order to determine the objects and purposes of Crown officials involved in the reserve creation process as my interpretation of the Order in Council must be consistent with the attainment of these objects and purposes. This process will also assist in determining whether there is in fact any ambiguity in the wording of the Order in Council and whether my interpretation is consistent with the honour and integrity of the Crown.

[462] As discussed at pages 35 and following, I am not persuaded that the site of the Agency One Reserve held any special significance to the Ojibway of the region in the century prior to the setting aside of the reserve. While I am satisfied that the site was used by individual or small groups of Ojibway as a camping site when travelling through the area or when trading with European fur traders, the evidence does not establish that it was used by the large groups of Ojibway on a regular or significant basis for social, political or cultural purposes.

[463] Where the evidence of Drs. Miller, White and von Gernet conflict on this issue, I prefer the evidence of Dr. von Gernet. Dr. White was critical of Dr. von Gernet's analysis of Ojibway use and occupancy of land in the region because it was based on a ranking of various sites based

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[140] Lanty para. 7
[141] Lanty trial decision para. 42

on frequency and intensity of Ojibway use. It was suggested that this represented a fundamental misunderstanding of the nature of Ojibway use of land within a geographical region in the course of their "seasonal rounds". I disagree. In my opinion, these experts were addressing the issue from somewhat different perspectives – Dr. Miller from a more general, Ojibway land use perspective and Dr. von Gernet from a more focussed reserve creation perspective based partly on the Ojibway's expectations.

[464] I prefer and accept the approach of Dr. von Gernet on this issue. In my opinion, the nature, frequency and intensity of Ojibway use of this site as compared to the nature, frequency and intensity of their use of other sites within the region is relevant in determining what, if any, their expectations would have been when this reserve was set aside. The evidence, including that of Fred Major, fails to establish, on a balance of probabilities, that the site of the Agency One Reserve held any special significance to the Ojibway of the region in the historical period prior to the signing of Treaty #3. I agree with Dr. von Gernet's opinion that, if it had, some form of record would exist confirming that it was sought after by them during treaty or reserve selection negotiations. There is no evidence of such records before this court.

[465] I am also troubled by the fact that the evidence and report of Drs. Miller and White does not include any sources after the mid-1830's. When each of them was questioned by the court on this omission, their response was simply to suggest that they had no reason to suspect that the nature of Ojibway use and occupancy of land in the region would have changed. In light of the fact that increased European encroachment and settlement in the area would have occurred in the 45 years prior to the signing of Treaty #3 I found these comments puzzling and non-persuasive.

[466] Dawson was the author of the December 31, 1874 description of the Agency One Reserve that was incorporated verbatim into the February 27, 1875 Order in Council. Dawson had formal training in surveying and civil engineering, experience in the timber industry in the Ottawa Valley, did survey work for a timber company in Peterborough and had experience in road building. He was also the surveyor appointed to the Hind Expedition in 1857. In 1867, Dawson was placed in charge of the construction of the Dawson route. He was involved in both the negotiations for Treaty #3 and the reserve selection process. I find that Dawson was intimately familiar with local geography and the immediate and future needs of the Dawson Route and the forest industry in the region. He was also described as an honourable man, sensitive to the needs of the Ojibway.

[467] At the point in time when he authored the description of the Agency One Reserve, I find that both Dawson and other Crown officials were sensitive to two basic facts. For the purpose of this finding, I accept the opinion of Dr. von Gernet as set out in paragraph 203. First, this reserve was unique in that it was an agency reserve, as opposed to a permanent residential settlement. Second, it was being set aside in a unique and critical geographical location – squarely on the "line of route" of the only national transportation route in existence at the time, at a point on the route where there were serious impediments to travel and on a point of land a short distance upstream from the area's only sawmill.

[468] In his May 1, 1869 report to the Minister of Public Works on the 1868 operations on the Dawson Route, Dawson anticipated the necessity to reserve land for public works, the approaches thereto and for villages and cities.[142] Dawson's use of the word "reserve" in 1869 in regard to land for public works and town sites is most certainly a reference to an exclusion, rather than a form of easement. He is recommending that where land is required for public works or towns, that it be held back or excluded from Crown land granted or patented.

[469] Securing the surrender of "Indian title" or "Indian interest" to land on the line of route was one of the original and primary Crown objectives in the negotiation of Treaty #3. Dawson, as early as December 19, 1870 was advising the Crown as to the "…tribe of Saulteau Indians which inhabits the country on the line of route now being opened, between Lake Superior and the Red River Settlement…" In this same communication, Dawson recognized the strength of this group of Aboriginals. His memo was written "…in the hope that the suggestions therein contained may be of use to the Government in negotiating a treaty with that powerful Indian Community for the cession of its territorial rights."[143]

[470] In this same correspondence, Dawson conceptualized the setting aside of areas for the Ojibway's "sole and exclusive use, with the reservation that such sections as might be required for Public Works may, at any time, be appropriated by the Government."

[471] The 1872 report of the treaty commissioners on the failed 1872 Treaty #3 negotiations also alluded to the strength of the Crown's future treaty partners, recommending that a military

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[142] Exhibit #2, tab 23; pges 24 and 25 herein.
[143] Exhibit #2, tab 34

force should be maintained at Fort Frances "… for the forbearance of untutored savages could not be relied upon…" with the advance of settlement and public works.[144]

[472] Treaty #3 itself reflects the terms of Dawson's 1870 memo:

> *It is further agreed between Her Majesty and Her said Indians that such sections of the reserves above indicated as may at any time be required for Public Works of buildings of what nature soever may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made for the value of any improvements thereon.*

[473] I agree with the submissions of the plaintiffs that the wording of Dawson's 1870 memo and that of Treaty #3 itself, by the use of the word "appropriate", generally contemplates a future exercise of control over property or a future taking of possession of property from reserve land which has already been set aside.

[474] However, by 1874 and during the actual reserve selection process, Dawson, in my opinion, was more focussed on securing and preserving Crown title to and control over the property along the shore of Pither's Point and the approaches to the point. This property was directly on the line of the Dawson Route, the construction of which he was responsible for. His December 31, 1874 report, which included his description of the Agency One Reserve, in advising of the urgency in setting aside the reserves described, included the following:

> *These reserves, being on the high road and liable to be entered on by squatters at any time should be laid off as soon as possible. The reserves in other locations are, in general, not so close to the line of route, and the lands less valuable.*

[475] It was the description of the Agency One Reserve in this report that *reserved* a two chain strip of land along the shores of Rainy River and Rainy Lake from the reserve, accommodating present and future public works at Pither's Point and maintaining Crown control of "*the approaches thereto*." Again, in his January 28, 1875 report, Dawson alludes to the urgency of establishing the reserves "immediately on the line of route."[145]

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[144] Exhibit #2, tabs 49 and 50

[145] Exhibit #26, tab 65, incorrectly dated 1874.

[476] Dr. Lytwyn's opinion, based on the fact that the Dawson Route was already in operation in 1874, with major infrastructure either built, under construction or contemplated at or near Pither's Point, was that Dawson's "purpose and intention" in "reserving" two chains along the shores of Rainy Lake and Rainy River "was clearly to improve transportation and to promote future development and settlement in the region." This conclusion was not challenged. I find this conclusion to be logical and fully supported by the evidence and I accept it.

[477] Dr. Williams' evidence was that the use of waterways and access to and the use of shorelines were critical to the operation of the forest industry in the 1870's generally. He was adamant that the future potential of the forest industry in the region and the industry's transportation needs would have been obvious to anyone with knowledge of the industry. At Pither's Point, where Rainy Lake flowed into Rainy River, access to and the use of the shoreline of the Agency One Reserve site was even more critical. Harvested wood had to travel across Rainy Lake, through the narrows at Pither's Point and downstream to the Fowler's sawmill, operational since 1873. Dr. Williams was of the opinion that logging activity could be very disruptive to, and by inference incompatible with, shoreline occupation and development.

[478] Dr. Williams' concluded that the two chain reservation accommodated "both current and anticipated future uses" of the forest industry in and around Fort Frances. The conclusions of Dr. Williams were not challenged by the plaintiffs. I find his conclusions to be reasonable, logical and supported by the evidence and I accept them.

[479] Drs. von Gernet, Lytwyn and Williams did not expressly opine that the two chain allowance contained in Dawson's description of the Agency One Reserve was an exclusion of that land from the reserve as laid out, as opposed to a reservation within the reserve. However, it can be inferred from their conclusions that the concept of the two chain allowance as only a reservation in the nature of an easement, as suggested by the plaintiffs, is incompatible with the very reasons for having set it apart in the first place. The defendants submit that Dawson's thinking and decision making process when he drafted the description would have been similarly informed. I find this submission logical, reasonable and supported by the evidence.

[480] The two chain allowance was unique to the description of the Agency One Reserve of the reserves described by Dawson. It was at this location that major transportation infrastructure was being built or planned. It was at this location where it was most critical to the forest industry to have unimpeded shoreline access. It was this reserve that was a general agency reserve, as

opposed to a residential reserve. While Caddy appears to have surveyed a two chain allowance along the shores of the other reserves of the plaintiffs, no two chain allowance was set out in Dawson's descriptions of those reserves. Why Caddy did so is unknown. That issue is not before this court.

[481] The Crown officials, primarily Dawson, were required to have regard to the interest of all affected parties when the Agency One Reserve was laid out by Order in Council dated February 27, 1875. When interpreting the relevant words of the Order in Council, I am required to consider the plain and ordinary meaning of the words used, bearing in mind the object, intent and purposes of the Order in Council.

[482] I am satisfied, on a balance of probabilities, that it was the intention of the Crown that the two chain allowance adjacent to the Agency One Reserve was to be excluded from and not form part of this reserve. I find that this is consistent with the intention of the Crown to secure and maintain the line of route for the Dawson Route. I find that this is consistent with the intention of the Crown to facilitate the growth of the forest industry in the immediate area. These were reasonable objectives for Crown officials of the day. These are logical purposes for why the two chain allowance was intended to be excluded from the reserve.

[483] I also find that such an exclusion was not inconsistent with the objects and intentions of the Crown in establishing a general agency reserve at this location. Conversely, I am of the opinion that the alternate conclusion – that the two chain allowance forms part of the reserve and is a reservation in the nature of an easement – is inconsistent with the objects and intentions of the Crown officials in setting aside an Indian reserve, agency or residential.

[484] The express purposes of the two chain allowance – roads, right of way to lumber-men, booms, wharves, and other public purposes – contemplated significant infrastructure and incursion onto the land within the two chain allowance. Some of the transportation infrastructure was already under construction at Pither's Point by the end of 1874. Providing for this on a reservation within the reserve would have been contrary to both the letter and spirit of the Indian Act of the day and would have invited incompatible and conflicting use of the property.

[485] In my opinion, Dawson recognized this when contemplating the configuration of the agency reserve to be set aside at Pither's Point. Dawson, having earlier expressly acknowledged the strength of the "powerful Indian Community" the Crown was dealing with in negotiating

Treaty #3 and in laying out Treaty #3 reserves for their benefit, would not logically have set the stage for future conflict.

[486] I accept that some of Dawson's earlier writings employed the word "appropriation" in reference to future required public works on reserve land, as did the text of Treaty #3 itself. However, when specifically describing the general agency reserve at Pither's Point, and faced with future conflicting and incompatible uses of land, I find that Dawson chose instead to exclude from the Agency One Reserve a two chain strip of land along the shore.

[487] I also find that this conclusion is supported by the plain and ordinary meaning of the wording used – *two chains in depth along the shore of Rainy Lake and the bank of Rainy River*, *to be reserved*. The plain and ordinary meaning of these words is that the first two chains upland from the shore are to be held back and excluded from the grant.

[488] I find that this interpretation is consistent with the Ontario Court of Appeal's decisions in *Gibbs* and *Lanty*. In *Gibbs*, the court found that a reservation confers only a limited right to use the lands to which it applies; an exception has the effect of retaining title to the excepted lands in the grantor. The Crown officials, in 1874 and 1875, in laying out a general agency reserve directly at a critical location on a developing national transportation line of route cannot have intended to retain only a limited right to use the two chain within the reserve lands. I am satisfied that the Crown intention was to retain title to the excepted lands in the Crown.

[489] I accept the submissions of Canada, based on the *Lanty* decision, that the words "reserved" or "reserving" operate as an exception where they reserve or set aside an area of land as opposed to mere uses of land. The operative words in the February 27, 1875 Order in Council refer to an area of land – "two chains in depth…to be reserved". I find this to be a reference to a specific parcel or area of land and not to the mere use of land, reflecting an intent to create an exception from the reserve.

[490] In my opinion, this interpretation of the February 27, 1875 Order in Council is consistent with the interpretive principles applicable to treaties laid down by the Supreme Court of Canada in *Badger*. First, I have found, after considering the broad historical context which informed the intent and objectives of Crown officials, that there is neither ambiguity or "doubtful expressions" contained in the Order in Council creating the Agency One Reserve. Second, I do

not find that an interpretation which excludes the two chain allowance from the reserve is contrary to the honour of the Crown or could in any way be described as "sharp dealing".

[491] There is no evidence that this particular reserve was discussed during the negotiations of Treaty #3. There is no cogent evidence that this reserve was discussed during the reserve selection process. I find, on a balance of probabilities, that it was generally understood by all parties as of the early 1870's that Pither's Point would be set aside as a general agency reserve to be used for agency purposes and for the Ojibway's annual gatherings, in substitution for the areas adjacent or close to the HBC Fort Frances.

[492] Dawson obviously would have been aware of this when describing the reserve. I find that he attempted to balance the interests of all parties by following through with the setting aside of the agency reserve as promised, while excluding from the reserve the first two chains from the water's edge and retaining title to that land in the Crown. There is no evidence before this court that this exclusion had any negative or detrimental impact on the Ojibway while the reserve was used as an agency reserve up until 1882. In all of the circumstances, I see no evidence of unfulfilled promises or of "sharp dealing" on the part of the Crown in interpreting the Order in Council as I have.

[493] *Ross River*, in addressing the concept of reserve creation, identified two elements to the process – an action and an intention. I have concluded that the February 27, 1875 Order in Council did not evidence a Crown intention that the two chain allowance was to be part of the Agency One Reserve. For the sake of completeness, I will review the original Caddy survey of this reserve and the evidence of the survey experts in regard to that survey to determine what steps were taken, contemporaneously and on the ground, to either include or exclude the two chain allowance from the reserve.[146]

[494] At page 5 of de Rijcke's reply report[147], the witness generalized that the first survey of a parcel operates to set out its boundaries and configuration. Stewart and de Rijcke agreed that a review of survey plans, reports and field notes *assists in ascertaining* the intention of the grantor after the fact, but that ultimately it is that intention that is relevant.

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[146] See paragraphs 236-270 herein for a more complete review of this evidence.
[147] Exhibit #68, tab 3

[495] Stewart and de Rijcke were in agreement that Caddy's field notes document a two chain allowance adjacent to the Agency One Reserve throughout his shore traverse. They also agree that the planting of two posts two chains upland from the shore at the north and west corners of the reserve is set out in the notes. Both witnesses also noted that Caddy's plan[148] expressly states the area of the reserve to be 170 acres and has drawn on it a line two chains in from the water's edge. They further agree that Caddy's report stated that the stated area of the reserve did not include the two chain allowance.

[496] Predictably, these experts diverge in the conclusions to be drawn from the evidence. It was de Rijcke's opinion that Caddy's field notes and plans "clearly and unambiguously" demonstrate that the two chain allowance was surveyed as a distinct parcel, separate and excluded from the reserve. Stewart did not expressly disagree, his opinion being that "DLS Caddy was not absolutely certain in his mind whether the 2-chain was intended to be part of the Agency One Reserve or not".[149] Stewart also suggested that all of Caddy's "returns are equivocal on the point".

[497] I accept the expert opinion of de Rijcke over that of Stewart on this issue. In my opinion, it is clear from Caddy's field notes, plan and report that he surveyed the two chain allowance as a separate physical entity from the body of the Agency One Reserve. This was monumented on the ground by Caddy planting posts at each of the north and west corners of the reserve, delineating the inland boundary of the two chain strip. This evidence is consistent with my finding that it was the Crown's intention that the two chain was not to be part of the reserve.

[498] My perception, in listening to the evidence of Stewart and in reading his reports on the Caddy and Gillon surveys, is that his uncertainty on the issue arose primarily from three sources:

1. Plan 163 CLSR, exhibit #14;

2. His perception that on Caddy's plan, exhibit #12, sidelines of the reserves affected by the two chain strip are drawn across the strip terminating at the water's edge;[150]

3. His opinion that the two chain allowance had "special status", able to be extinguished when no longer required.

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[148] Exhibit #12
[149] Exhibit #11, para. 33
[150] Exhibit #11, para. 13.

[499] Stewart was of the opinion that Dawson was the source of Plan 163 CLSR and that it, or a "revised or marked up version" of it, was the missing map or plan referred to by Dawson in his December 31, 1874 description of the Agency One Reserve and also the missing "tracing enclosed" with Caddy's June 15, 1875 instructions for the survey of the Agency One Reserve.

[500] Stewart was of the opinion that the "Proposed Indian Reserve" at the outlet of Rainy Lake as shown on exhibit #14 is Dawson's original drawing of the Agency One Reserve. Exhibit #14 does not show a two chain allowance along the shores of Rainy Lake and Rainy River adjacent to the Agency One Reserve. The proposed reserve shown on exhibit #14 is also much larger than the Agency One Reserve surveyed by Caddy.

[501] I have not been directed to any evidence which would elevate Stewart's opinions on this issue above that of speculation. Plan 163 CLSR/exhibit #14 is neither dated nor signed. There is no evidence to link this "plan" and Dawson's December 31, 1874 report or Caddy's June 15, 1875 survey instructions. The plaintiffs' submission that exhibits #14 and #15 represent the "best map evidence available" as to what Caddy was instructed to survey has no evidentiary basis and I reject it. To the extent that Plan 163 CLSR informed Stewart's opinion on the issue of the two chain allowance being part of the Agency One Reserve, I find that Stewart misguided himself.

[502] Stewart noted, at page 3, paragraph 13 of his report, that on Caddy's plan the sidelines of the Agency One Reserve are drawn across the strip, terminating at the water's edge. It was Stewart's opinion that "this is an indication that DLS Caddy understood that the north and west boundaries of the Agency 1 reserve extended to the water, with the implication that the 2-chain strip was included as part of the reserve".

[503] Stewart was challenged on this point on cross examination. He conceded that Caddy may have, in his drafting of exhibit #12, used graph or construction lines in pencil which crossed both the shore allowance and other features on the plan and which were intended to be a grid for drafting purposes rather than an indication of a boundary. He also acknowledged that paragraph 15 of his report provided an equally plausible alternative explanation for the lines apparently extending to the water's edge. De Rijcke, in his direct examination, was of the opinion that the pencil lines crossing the two chain allowance were of no significance, being a mechanism used by Caddy in drafting the plan. I prefer and accept the evidence of de Rijcke on this point.

[504] Finally, in his evidence and in his expert report on the D.J. Gillon surveys[151] Stewart advanced the theory that "the 2-chain allowance was a strip of land that had special status". This theory appears to have emanated from the inconsistent fashion in which Gillon treated the two chain allowance in subsequent surveys. Stewart states that from 1908 on, whenever a portion of the two chain allowance was required for road purposes, Gillon treated the allowance as public land or land that was not part of the Agency One Reserve. Whenever the shore allowance was no longer required for road purposes, Stewart suggests that Gillon showed the allowance as part of the reserve.

[505] This led Stewart to the following conclusion:

> *…this means that Gillon – and those that gave him instructions and received his returns -* (Dep't of Indian Affairs) *understood that the 2-chain allowance was a strip of land that had special status…from the time of the creation of the Agency One reserve, the strip was available for public use as a road allowance, but when no longer required for that purpose, the strip transformed into full reserve lands."*

[506] Further, Stewart concluded that it was Gillon's understanding that the two chain allowance had not been "excepted from the reserve", but was part of the reserve that was set aside for public road purposes as long as it was needed for that purpose.

[507] I am unable to place any weight on these summary comments of Stewart. In my reading of exhibit #19, page 6, Stewart does not expressly endorse or adopt the hypothesis which he developed in an attempt to explain Gillon's inconsistent treatment of the two chain allowance. Stewart acknowledged, both in his report and in his evidence, that he had not seen any documentation, legislative or otherwise to support his "road exchange" theory.

[508] In my opinion, the predominant characteristic of Gillon's survey work in the 1890's and early 1900's, as it pertains to the issues before this court, is his inconsistent treatment of the two chain allowance. Stewart's hypothesis fails to address Gillon's authority to treat the two chain allowance as either part of, or not part of the reserve, depending on who was instructing him and for what purpose.

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[151] Exhibit #19, page 6, para. 32 and 33.

[509] To the extent that Stewart's explanation of Gillon's treatment of the two chain allowance assumes the Department of Indian Affairs had jurisdiction, when instructing Gillon, to decide whether the two chain allowance was to be part of the Agency One reserve or not, I simply reject it.

[510] Not only do I find this evidence of Stewart to be of no assistance to me in resolving the issues before the court, I find that it diminishes his overall credibility on the survey evidence in general.

[511] I do not find it necessary, in order to decide this issue, to refer to any further evidence of subsequent survey work involving the Agency One Reserve. In summary on this issue, I find that the two chain allowance referred to in the February 27, 1875 Order in Council did not form part of the Agency One Reserve.

WAS IT INTENDED, PURSUANT TO TREATY #3 OR THE RESERVE SELECTION NEGOTIATIONS, THAT TWO CHAIN ALLOWANCE WAS TO BE PART OF THE AGENCY ONE RESERVE SUCH THAT THE FAILURE TO INCLUDE IT WITHIN THE RESERVE AS SURVEYED WAS A BREACH OF AGREEMENT, A BREACH OF THE CROWN'S FIDUCIARY DUTY OR A BREACH OF THE HONOUR OF THE CROWN?

[512] Paragraph 35 of the Amended Statement of Claim pleads as follows:

> *In the alternative, the plaintiffs say that the agreement which was made in the year 1874 between the plaintiffs and the Crown concerning the location of Agency Reserve #1 did not include any term that a shore allowance was or could be excepted out of the reserve. The plaintiffs therefore say that the Crown was and is under a fiduciary duty to carry out the terms of the agreement, and, if it has not yet been carried out…to set apart the reserve as agreed…the plaintiffs further say that the said duty falls upon the Crown in its integrity…*

The Law

Burden and Standard of Proof and Evidence Advanced in Support of Aboriginal Claims

[513] In *Benoit v. Canada*, [2003] F.C.J. No. 923, Nadon J. on behalf of the Federal Court of Appeal, cited *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at page 1112, as authority for the proposition that in Aboriginal and treaty rights cases, the onus is on the party asserting an Aboriginal or treaty right to prove its existence on a civil standard.

[514] In *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, McLachlin C.J. commented on both the quality of evidence and the standard of proof in Aboriginal cases. At paragraph 39, the Chief Justice stated:

> *There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rulers of evidence…In particular, the Van der Peet, [1996] 2 S.C.R. 507, approach does not operate to amplify the cogency of evidence adduced in support of an aboriginal claim. Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities.*

[515] Further, at paragraph 51 of *Mitchell,* McLachlin stated:

> *…claims must be proven on the basis of cogent evidence establishing their validity on the balance of probabilities. Sparse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim.*

The Crown's Fiduciary Duty to Aboriginal People

[516] In *Manitoba Metis,* the Supreme Court of Canada summarized the concept of a fiduciary duty in the context of aboriginal claims. McLachlin C.J. reminded us that a fiduciary duty is an equitable doctrine originating in trust. At paragraph 47, the Chief Justice stated:

> *Generally speaking, a fiduciary is required to act in the best interests of the person on whose behalf he is acting, to avoid all conflicts of interests, and to strictly account for all property held or administered on behalf of that person.*

[517] In the Aboriginal context, a fiduciary duty may arise as a result of the Crown assuming discretionary control over specific Aboriginal interests, including a situation where the Crown administers lands or property in which Aboriginal peoples have an interest. The focus is on the particular interest that is the subject matter of the dispute. The duty will arise if there is a specific or "cognizable" Aboriginal interest and a Crown undertaking of discretionary control over that interest.[152]

[518] An Aboriginal interest in land giving rise to a fiduciary duty is "…predicated on historic use and occupation." McLachlin adopted the following from Dickson J. in *Guerin,* in reference to Aboriginals' interest in their lands:

> *The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the Indian Act, or by any other executive or legislative provision.*[153]

[519] In *Wewaykum,* the Supreme Court held:

1. *The content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity.*

2. *Prior to reserve creation…a fiduciary relationship may…arise but, in that respect, 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.*[154]

The Honour of the Crown

[520] The principle of the honour of the Crown, as reviewed by McLachlin C.J. in *Manitoba Metis*, has already been discussed at paragraphs 438-441 of this judgement. It is well established that the principle is invoked in the context of treaty making, interpretation and the reserve creation process. The principle speaks to how obligations that attract it must be fulfilled.

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[152] Manitoba Metis para. 51.
[153] Manitoba Metis para. 58
[154] Wewaykum para. 86

[521] In the context of setting aside the Agency One Reserve, the honour of the Crown required the Crown to act honourably and with integrity to fulfill any solemn promises made or obligations incurred in regard to the predecessors of the plaintiffs for whose benefit the reserve was set aside.

Analysis

[522] Applying the relevant evidentiary principles discussed above, I am not persuaded on a balance of probabilities that the evidence before me establishes an express promise or agreement on the part of the Crown that the Agency One Reserve would extend to the waters' edge of Rainy Lake and Rainy River. I am not persuaded that any particular area, boundaries or configuration of the Agency One Reserve was discussed between the Crown and the Ojibway, including any discussion of the strip of land two chains upland from the waters' edge.

[523] I find that the evidence discussed within the section entitled "The Pither Claim 1879-1888" at page 51 herein does not support the plaintiffs' submission that the Crown had expressly agreed or promised to include the shoreline within the reserve when surveyed.

[524] This body of evidence was years removed from the processes of the early 1870's. The correspondence, primarily written by Dawson, was written in order to refute a fraudulent claim for title to the reserve being advanced by Pither. In none of the correspondence was the issue of a shoreline allowance mentioned, either as being included within or excluded from the reserve.

[525] While Dawson did at one point state that "this reserve…was an old camping ground of theirs", the statement was not substantiated in any fashion. In the same letter,[155] Dawson confirmed that "…it had been understood and agreed upon with the Indians that (the agency reserve) should be apportioned to no particular band but to the tribe at large, for the purpose of an Indian agency and camping ground for their sole use and benefit forever." Dawson further stated in the same letter that this reserve was "…surveyed and laid out in conformity with the Treaty and the understanding had with the Indians." I feel it is reasonable to infer that Dawson would have reviewed Caddy's plan of the Agency One Reserve prior to drafting this letter. This plan clearly showed the two chain allowance adjacent to the reserve.

[155] Dawson letter to VanKoughnet, June 4, 1888, Exhibit #1, tab 98.

[526] Further, in a October 29, 1888 letter Dawson wrote to Vankoughnet, Dawson stated the following:

> *The statement that* (the Ojibway) *neither asked nor claimed the land, for their particular bands, is correct, however they well know it was to be a general reserve for the use of the tribe at large…*[156]

[527] The inescapable inference I draw, based on my review of all of the evidence, is that there was no discussion between the Crown and Ojibway, either during the Treaty #3 negotiations or the reserve creation process, as to whether this general agency reserve would or would not include the two chain shoreline allowance. I accept the conclusions of Dr. von Gernet that it had generally been agreed as of 1872 that this site would become a general agency reserve, intended to house the agency buildings and serve as an Indian campground available for annual meetings and feasts. Beyond that, there is no evidence it was discussed in any further detail.

[528] Based on the evidence before me, it is also reasonable to infer that Dawson, when drafting the description of the Agency One Reserve in 1874 for the purpose of approval by the Governor General in Council and for later survey, chose to exclude the two chain allowance from the land to be set aside for the agreed upon agency reserve. Dawson set aside 170 acres at Pither's Point as an agency reserve, as the Crown had promised to do. Concurrently, he reserved the adjacent shoreline to the Crown.

[529] Dawson did so to accommodate present and future public works at Pithers' Point and on the approaches to the point, along the shore of Sand Bay. To have done so was logical and reasonable from the Crown's perspective. To have done so arguably placed the interests of the Crown before the interests of the Ojibway for whom the reserve was set aside, without prior discussion or disclosure.

[530] While I have concluded that the Crown did not expressly promise to include the shoreline with this agency reserve, I do not accept Dr. von Gernet's conclusion, found at pages 53 and 54 of his report, that "none of the voluminous records reviewed suggest the shorelines at this location were used by (the Ojibway) for any purpose." I find this statement to be contrary to the evidence. It also defies common sense.

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[156] Exhibit #1, tab 102.

[531] The record establishes that this reserve site had been used historically by the Ojibway, on an occasional basis, as a camping ground utilized by them during their "seasonal rounds". In the course of doing so, it is obvious the Ojibway would have required the use of the shoreline at this site, just as they would have required the use of the shoreline at countless other locations where they camped within the region.

[532] The Ojibway travelled exclusively by water for at least six months of the year. Fishing was critical to their existence. I fail to see how they could effectively travel by water from one location to another, camp and fish without access to and use of the shoreline. This finding is consistent with the oral history evidence of Fred Major, found at paragraghs 76 to 79.

[533] Consistent with this, it is reasonable to infer that the Ojibway would have simply and reasonably *assumed*, in the absence of being advised to the contrary, that any reserve set aside for their use, including this agency reserve, would include the shoreline, or at the very least, access to and use of the shoreline. The retention of their right to hunt and fish on all surrendered territory was a critical aspect of Treaty #3. Access to and use of shorelines was integral to their existence.

[534] In reviewing the evidence of Dr. Miller, I find that this was essentially his point. Ojibway land use practices consistently made use of shorelines. Their continued right to hunt and fish throughout the surrendered territory was an inducement to them to enter into Treaty #3. To be able to continue with their traditional lifestyle required the use of shorelines. The concept of being denied the use of shorelines on reserve land would have been inexplicable to them. Therefore, they reasonably assumed any reserve, including an agency reserve, would include the adjacent shorelines.

[535] Generally speaking, a reserve selection process which denied Aboriginals the use of or access to the shoreline of a reserve could, in certain circumstances, be found to be a breach of the Crown's fiduciary duty to Aboriginals or a breach of the honour of the Crown. I find that the Treaty #3 reserve selection process engaged the honour of the Crown, requiring Crown officials to act honourably and with integrity to fulfill the Crown's promises and obligations to the Ojibway. I also find that the Crown was under a fiduciary duty towards the plaintiff First Nations in regard to the creation of the Agency One Reserve, which was being set aside from surrendered territory for their collective benefit. In this particular context, the Crown's discharge of their fiduciary duty required the Crown to act with loyalty and 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 interests of the plaintiffs.

[536] In *Wewaykum,* the Supreme Court cautions 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. The Crown's fiduciary duty does not provide a general indemnity. Similarly, the duty that flows from the honour of the Crown varies with the situation in which it is engaged. What constitutes honourable conduct will vary with the circumstances.[157] Put simply, both principles are fact specific in their application.

[537] The findings of fact underlying the analysis of whether the Crown breached the honour of the Crown or their fiduciary duty in the creation of the Agency One Reserve include the following:

1. The Agency One Reserve was not a permanent residential reserve. It was a general agency reserve, set aside for the use and benefit of the plaintiffs and intended to house agency buildings and to provide a campground for the Ojibway when visiting the agency and during annual assemblies;

2. There was no express promise, agreement or obligation on the part of the Crown that this agency reserve would include the adjacent shoreline;

3. It was reasonably assumed by the aboriginal predecessors of the plaintiff First Nations that this agency reserve would include the adjacent shoreline;

4. The four plaintiff First Nations for whose benefit this agency reserve was set aside each received their own permanent residential reserves laid out along the north shore of Rainy Lake in relatively close proximity to the Agency One Reserve, consistent with the Crown's Treaty #3 obligations;[158]

5. The two chain allowance adjacent to the agency reserve and between the reserve and the shores of Rainy Lake and Rainy River remained Crown land for a multipurpose shoreline allowance, including but not limited to the purposes expressed in Dawson's description;

[157] Manitoba Metis para. 74
[158] See Exhibit #12

6. There is no evidence that the predecessors of the plaintiffs ever had their access to or across the two chain allowance impeded or denied while this reserve served as an agency reserve until 1882 or at any time thereafter.

[538] I find that the exclusion of the shoreline from the Agency One Reserve in the manner in which it occurred in this case did not have the effect of denying the Ojibway the use of or access to that same shore. Title to the two chain allowance was retained by the Crown and did not form part of the reserve. It was a public allowance. The Ojibway would have had unimpeded access across the shore allowance to the agency reserve from the water. They would have had access to the water, across the shore allowance, from the reserve. It was not part of the reserve, but there is no evidence before me that they were denied the use of this property or the right of passage over it.

[539] In all the circumstances of this case, I am not satisfied, on a balance of probabilities, that the Crown has breached either their fiduciary duty to the plaintiffs or the honour of the Crown by excluding the two chain allowance from the Agency One Reserve.

[540] Simon Dawson has been described by all parties as an honourable man. The record discloses that he was sensitive to the traditional Ojibway way of life. It is reasonable to infer that he would have been aware of the Ojibway's need for access to and use of shorelines adjacent to camping areas. He was also well aware of the requirements of the Crown at the location of the Agency One Reserve. Dawson was setting aside permanent residential reserves for all the Ojibway of Treaty #3 at the same time as he was describing the Agency One Reserve. His descriptions of the other reserves did not exclude the shoreline. Given the nature of the agency reserve and the fact that it was located on a critical point of land relative to both a national transportation route and the developing community of Fort Frances, Dawson chose to exclude a two chain strip of shoreline from the geographical area of the reserve.

[541] In doing so, Dawson would have been aware that the Ojibway would be utilizing the reserve on a limited basis and that the shoreline would remain available for their use despite its exclusion from the reserve. He would also have been aware that the plaintiffs' permanent residential reserves were located close by, along the north shore of Rainy Lake.

[542] I find that Dawson's actions were not dishonourable or contrary to the integrity of the Crown, nor can they, in my opinion, be described as "sharp dealing". I am not satisfied that the

evidence before me establishes, on a balance of probabilities, that the Crown breached their fiduciary duty or acted contrary to the honour of the Crown in excluding the two chain allowance from the Agency One Reserve.

[543] To find the Crown's conduct in excluding the two chain allowance from the reserve on these facts to be a breach of the honour of the Crown or a breach of a fiduciary duty owed to the plaintiffs would, in my opinion, be providing the plaintiffs with the "general indemnity" cautioned against in *Wewaykum.*

IS THE PLAINTIFFS' CLAIM BARRED ON THE BASIS OF LACHES, LIMITATIONS OR DELAY

[544] The plaintiffs have been unsuccessful on the second and third issues in this action; issues B and C as set in paragraph 16. It is therefore unnecessary for me to address the defences raised by the defendants.

IF THE TWO CHAIN ALLOWANCE IS INCLUDED IN THE AGENCY ONE RESERVE DID TITLE TO IT VEST IN THE TOWN OF FORT FRANCES PRIOR TO PROVINCIAL CONFIRMATION OF THE RESERVE

[545] The two chain allowance adjacent to the Agency One Reserve was land surrendered to the Crown by the Ojibway in 1873 pursuant to the terms of Treaty #3. I have found that this land did not form part of the Agency One Reserve when that reserve was set aside and surveyed in 1874/1875. I have also found that it was not intended that the two chain allowance be included in the Agency One Reserve.

[546] As a result of the Ojibway surrender of territory in Treaty #3 and the constitutional assignment of proprietary jurisdiction of lands within the provinces to the provinces under s. 109 of the Constitution Act, 1867, Ontario received beneficial ownership of Treaty #3 lands within its borders.

[547] However, in 1873 and until 1888/1889, the western boundary of Ontario was subject to a federal-provincial dispute. The federal government took the position that a large portion of the territory surrendered by the Ojibway pursuant to Treaty #3, including the area of the two chain allowance, had not been within the boundaries of the province of Canada prior to confederation. The federal government position was that these same lands therefore did not become part of the

Province of Ontario by virtue of s. 109 of the Constitution Act, 1867. Ontario's position was that its western boundary was significantly west of its then present boundary, taking in much of what became Treaty #3 lands.

[548] This boundary dispute, eventually resolved in favour of Ontario, is concisely summarized by the Ontario Court of Appeal at paragraphs 55 to 71 of *Keewatin v. Ontario (Minister of Natural Resources)* 2013 ONCA 158. Ontario's position was accepted by an arbitration panel in 1878, resulting in most of the Treaty #3 area being in Ontario.

[549] The Ontario boundary dispute case was heard by the Judicial Committee of the Privy Council in 1884 and the 1878 arbitrator's ruling was endorsed. Ontario's boundaries, as determined by the Privy Council in 1884, were confirmed by Imperial legislation in 1889: Canada (Ontario Boundary) Act, 1889 (U.K.), 52-53 Vict., c. 28.

[550] The lands within the two chain allowance were therefore lands within Ontario and subject to provincial jurisdiction from 1867 forward. Pursuant to the exercise of provincial legislative authority, title to this property passed to and remains in the name of the Corporation of the Municipality of Fort Frances.

CONCLUSION

[551] The plaintiffs' claim for a declaration that the strip of land two chains in width from the 1876 high water mark of Rainy River and Rainy Lake and immediately adjacent to the Agency One Reserve forms part of that reserve is dismissed.

[552] The plaintiffs' claim for a declaration that any portion of the two chain strip included in the October 1, 1908 surrender was within this reserve prior to the surrender is also dismissed.

COSTS

[553] If the parties cannot agree on the issue of costs, they may arrange an appointment with the assistant trial coordinator in Kenora to make submissions on the issue.

“original signed by Justice J. S. Fregeau”

The Hon. Mr. Justice J.S. Fregeau

Released: February 19, 2014

CITATION: Couchiching FN et al v. AG Canada et al, 2014 ONSC 1076
COURT FILE NO.: CV-98-0910
DATE: 2014-02-19

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

COUCHICHING FIRST NATION,
NAICATCHEWENIN FIRST NATION,
NICICKOUSEMENECANING FIRST NATION,
and STANJIKOMING FIRST NATION

Applicant

- and –

THE ATTORNEY GENERAL OF CANADA and
HER MAJESTY THE QUEEN IN RIGHT OF
ONTARIO, and THE CORPORTATION OF THE
TOWN OF FORT FRANCES

Respondent

- and –

THE INTERVENERS

JUDGMENT

Fregeau J.

Released: February 19, 2014