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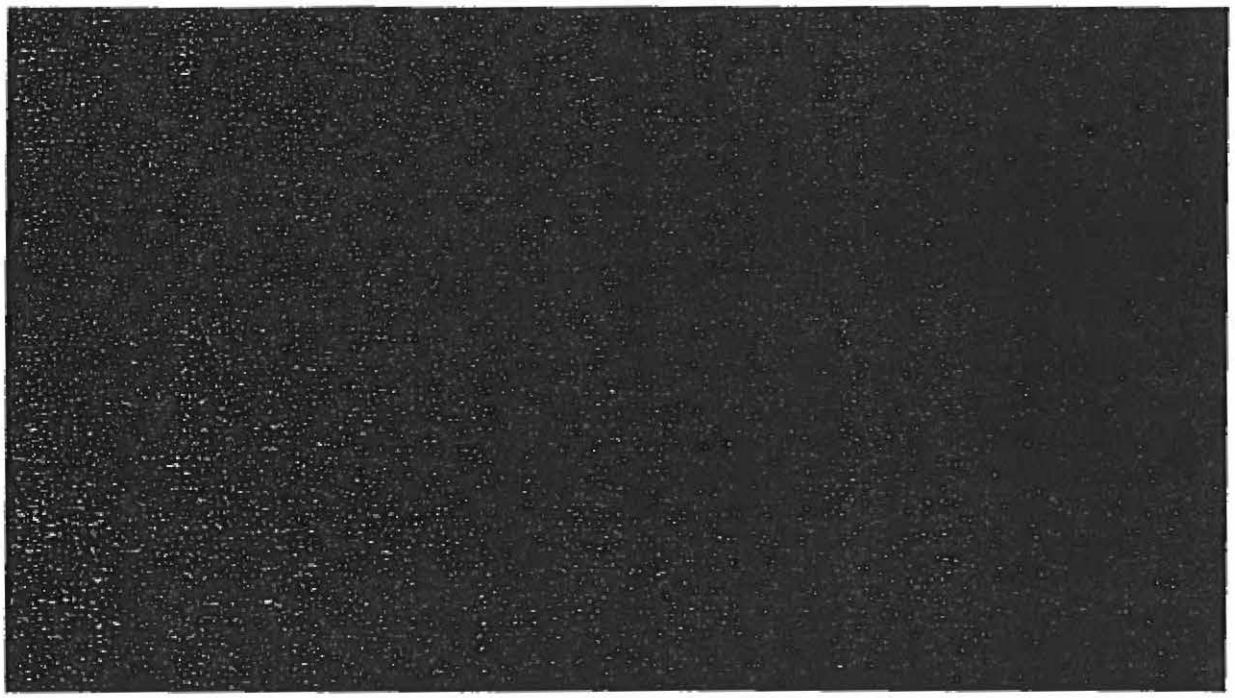

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF an Application by Chief Francois Paulette et al to lodge a certain Caveat with the Registrar of Titles of the Land Titles Office for the Northwest Territories

REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE W.G. MORROW (No.2)

On April 3, 1973, this matter came before me as a result of a reference under Section 154 (1) (b) of the *Land Titles Act*, R.S.C. 1970, c. L-4. The reference resulted from a purported caveat being presented for registration under Section 132 of the *Act* which claimed an interest in an area comprising some 400,000 square miles of land located in the western portion of the Northwest Territories. The caveat was based on a claim for aboriginal rights and was signed by sixteen Indian Chiefs representing the various Indian bands resident in the area covered by the lands referred to in the caveat.

The Caveat document follows the form provided for in the *Act*. The pertinent portion of the Caveat is as follows:

"

CAVEAT

TO THE REGISTRAR, Land Titles Office, Yellowknife, Northwest Territories,

TAKE NOTICE that we Chief Francois Paulette (Fort Smith, ... (there follows the names of the remaining 15 Chiefs) ... being residents of the Northwest Territories and members of the Indian bands in the Northwest Territories by virtue of Aboriginal Rights in all land in that tract of land in the Northwest Territories within the limits of the land described in Treaties 8 and 11 of 1899 and 1921, respectively, with adhesions of 1900 and 1922, between Her Most Gracious Majesty Queen Victoria and His Most Gracious Majesty King George V, respectively, and the Indian inhabitants of the land described in the said Treaties; which said tract of land may be more particularly described as land included within the following limits:

> **(Then follows a metes and bounds description covering the lands shown on a map, copy of which was attached to the document, and now reproduced as Appendix "A" to my judgment).**

"but, SAVING AND EXCEPTING THERE FROM all lands for which a Certificate of Title in Fee Simple has been issued; FORBID the registration of any transfer affecting such land or the granting of a certificate of title thereto except subject to the claim set forth.

Our address is:
C. Gerald Sutton
Box 2521
Yellowknife, N.W.T.

Dated this 24th day of March, 1973.

(Then follows the signatures of the sixteen chiefs)."

Each of the signing chiefs swore the supporting affidavit required by the Form to the effect "that the allegations in the said caveat are true in substance and in fact ...".
The Reference to me, dated April 3, 1973, contained two basic paragraphs:

"The Registrar under the provisions of the Land Titles Act, subsection 154 (1) hereby refers the following matter to the Judge, to wit:

> **A question has arisen as to the legal validity, and the extent right and interest of the persons making application, to forbid the registration of any transfer, and whether the Registrar has 'a duty' conferred or imposed upon him, by the Land Titles Act, to lodge such a document, and enter same in the day book."**

Crown Counsel was not ready to proceed on April 3, so the reference was put over to May 15th for argument. Counsel for the Indian Chiefs (hereinafter called "Caveators") requested some

form of protection as a condition of the adjournment and I made the following direction:

> **"3) That as from the hour of ten o'clock in the forenoon, April 3, 1973, the Registrar is restrained from accepting for registration or filing any instrument with respect to the land purported to be affected by the caveat herein unless the person presenting such instrument for registration of filing executes a covenant consenting to and preserving whatever priority such caveat may have over such instrument."**

The above direction is still in effect although an appeal has been filed by the Federal Government (hereinafter called the "Crown"). Up to this date a great many applications have been made to me to waive the above condition in respect to urgent land development plans and exceptions have always been made, some on terms.

On May 15th and 16th the argument was heard at Yellowknife restricted to two questions raised by Crown counsel.

1. **That this Court has no jurisdiction to enter into the merits where the Crown is affected:**

   (a) **The effect of the *Land Titles Act* is that this Court should order the caveat to be filed and then this Court is *functus*.**

   (b) **If the *Land Titles Act* does contemplate that the merits of the claim by the caveators should be gone into then it should be resolved in the Federal Court of Canada.**

   © **The caveators would require a fiat to sue for their rights in the Supreme Court of the Northwest Territories.**

(2) **The *Land Titles Act* has no application to lands for which no certificate of title has been issued or where no application to register under the *Act* has been made.**

At the conclusion of the argument under the above heads I reserved judgment and directed the proceedings to continue. July 9th was fixed for the resumption of the proceedings at which time it was anticipated that evidence would be heard.

Not satisfied with my disposition of May 16th the Crown counsel launched an application in the Federal Court of Canada against me, requesting a *Writ of Prohibition* to prohibit me from proceeding with any question as to the validity of the proposed caveat. Upon hearing of this application I prepared and released a judgment restricted to the question of my jurisdiction alone, leaving the second point that had been argued reserved, and contemplating the continuation of my hearing on July 9th. My Reasons for Judgment are dated June 14th, 1973, and I do not propose reviewing the question of my jurisdiction to hear the matter other than to observe that on July 6,

1973, The Honourable Mr. Justice Frank U. Collier of the Federal Court of Canada, after hearing the above motion at Yellowknife on July 5th and 6th, dismissed the Crown's application and indicated that he thought I had "properly and accurately stated" my functions under Section 154 (1). My judgment of June 14th is also presently under appeal by the Crown.

The proceedings resumed on July 9th but without Crown counsel they having withdrawn at that time "until such time as your Lordship is ready to pronounce judgment". Faced with this most unusual, and in my opinion almost contemptuous action by Crown counsel, I felt constrained to appoint Mr. D. Brand, a Yellowknife lawyer, to assist the Court to maintain objectivity in these proceedings. He has acted throughout and has been most helpful to me and I am satisfied he has ensured that the Crown's interests have been as well protected and presented as if Crown counsel had themselves been present.

Throughout the entire proceedings counsel for the Government of the Northwest Territories (hereinafter called "the Territorial Government") have been in attendance and have been very helpful, particularly in assisting with the production of documents evidence in respect to the practices followed in the Territorial Land Titles Office.

Counsel for the Caveators called expert evidence directed towards the practice followed in both the Land Titles Offices in Yellowknife and in Alberta, to give the Court the observations and opinions of anthropologists with actual experience in the area, and to introduce through another witness who has been engaged in researching Treaties 8 and 11 certain documents and opinions from various archives. In addition, oral evidence from many of the chiefs who had actually signed the caveat as well as testimony from Indians and others still living who remembered the treaty-making negotiations, was also brought forward. This entailed taking the Court to each of the Indian settlements within the area comprised to record the evidence of some of these old people. In three instances because of the age and illness of the witnesses the Court actually attended at the home of the witness and took the evidence there.

While it may not be pertinent to this Judgment, I would like to observe that I found this part of the case most interesting and intriguing. I think almost every member of the Court party felt that for a short moment the pages of history were being turned back and we were privileged to relive the treaty-negotiating days in the actual setting. The interest shown by today's inhabitants in each settlement helped to recreate some of the atmosphere. These witnesses, for the most part very old men and women, one of them 101 years old, were dignified and showed that they were and had been persons of strong character and leaders in their respective communities. One cannot but be reminded of the words of Thomas Gray:

"Full many a gem of purest joy serene
The dark unfathomed caves of ocean bear;
Full many a flower is born to blush unseen,
And waste its sweetness on the desert air."

There is no doubt in my mind that their testimony was the truth and represented their best memory of what to them at the time must have been an important event. It is fortunate indeed that

their stories are now preserved.

Because of the nature of these proceedings I do not consider it necessary to consider the evidence in depth. As I see my function, I am to look for a prima facie situation or a situation which may promise a possibility of a claim, at such point if reached, I must then stop. It will be for some other tribunal to make the in depth analysis of the evidence, to rework the same ground, and to make the final assessment. My findings and my conclusions, as also my remarks here, are therefore to be taken as only binding to the extent of settling the issues presently before me, and should these matters or issues arising out of them eventually come before a different court in a different type of proceeding, I want to make it clear that I am not trying in any way to bind that court to my views, it will and must feel free to reach its own conclusions its own way.

Walter A. Gryba, Regional representative for Indian Affairs was called to confirm that the caveators were in fact chiefs of the bands as recognized under the *Indian Act*, R.S.C. 1970, c. I-6, as of the date of the caveat. He described how such chiefs may be chosen in accordance with Indian custom or by the formal method set forth in the statute, either method being acceptable. This witness confirmed that there were no Indian reserves in the Northwest Territories.

Chief Baptiste Cazon, Chief of the Fort Simpson Band for some 20 years explained how the members of the present band at Fort Simpson were all descendants from his great-grandfather and that while his people had no written history, as far back as their memories down through each generation could go, his people had made their homes in the general area of Fort Simpson and that such lands had always been considered to be theirs.
According to him, for thousands of years, his people had used the land for hunting and fishing, to obtain food and clothing. They roamed all over the country in pursuit of game. He explained that in his capacity as Chief that he considered he had a responsibility to his people to take the place of their and his ancestors who had signed the treaty. There are still quite a few of his people even at this time who earn their living from the land in the time honoured way. This witness further explained that before each of the caveators signed the caveat they obtained approval from their people. This witness explained how members from other bands could enter the area normally used by his people. Chief Cazon was a member of the 1959 commission known as the Nelson commission.

Alexie Arrowmaker, Chief at Fort Rae, agreed that in following their traditional way of life the Indians while always working on the land, don't try to extract minerals for money. This Chief, as did many others, described how his people have always, and still do, migrated to the east of the area encompassed by the proposed caveat, during certain seasons for the purpose of seeking game, particularly the caribou. Chief Arrowmaker stated that his people, the Dogribs, had never sold their land to anyone. This witness described how in old times his people in living off the land would as a rule only come to settlements such as Fort Rae for the purpose of exchanging furs for ammunition and supplies but that now, because their children are in schools, the people have for the most part taken up living in the settlement, going out from there during the hunting, fishing and trapping seasons. It is not customary for people of his band to interfere with members of some different band who might come in to their lands to hunt. He agreed that his people did not consider that each of them owned small parcels of land to the exclusion of others.

The Chief of the Loucheux Band at Aklavik, Andrew Stewart, described pretty much the same state of affairs in respect of the Indians of his area as has been set forth above. About 12 years old at the time of the treaty he explained he had never heard any of the old people say they had given up their land to the Government.

One or two of the Indians called still lived in the traditional way, away from the settlements. One of these men was Chief Hyacinthe Andre, Chief of the Arctic Red River Band. He lives some 45 miles up the Mackenzie River from Arctic Red River, coming in to the settlement for Easter and Christmas. He described how some of his people, like him, live off the land scattered throughout the area.

The Chief of the Hay River Band, Chief Daniel Sonfrere, explained how in general the people of each band respected the areas of others..

Louis Norwegian, 64 years of age, was present at Fort Simpson in 1921 when "old" Norwegian as he describes his grandfather, was leader of the Fort Simpson Band and when treaty was first "paid". He overheard some of the exchange of words between his grandfather and the Government representatives. According to this witness the Commissioner promised a letter on fishing and trapping. When his grandfather, the recognized leader, went home to eat, an Indian by the name of Antoine was left. He took the treaty and became the chief -- the whitemen made him the chief. This man's evidence was to the effect that his grandfather "did not want to take the money for no reason at all." The promises made that their hunting and fishing would be left to them as long as the sun shall rise and the rivers shall flow. He heard no mention of reserves but he did hear mention that once they took treaty the Government would receive the land. His memory was that the purpose of the treaty was to help the Indians live in peace with the whites and that the Indians would receive a grubstake each treaty payment. Once Antoine took the money, this witness testified the Commissioner said everybody had to take the treaty after that. Antoine was given a medal, the people took the money, and the people being "kind of scared" felt they had to keep Antoine on as Chief after that.

Chief Vital Bonnetrouge, Chief of the Fort Providence Band not only confirmed the general evidence in respect to how the Indian bands had traditionally lived off the land but added a little more to the attitude of the people at the time the treaty was signed. As he states: "the land was not mentioned at the treaty. The old chief said 'if this five dollars would be for my land, I am not taking it'" This witness, by his testimony, left one with the same impression that came from the stories told by so many, namely, it was a deal to look after the people and nothing else.

Almost all of the Indian witnesses described how, in carrying on their traditional way of life, hunting, trapping, and fishing, they circulated within the proper seasons, the total areas considered by each band to be their area, with freedom to cross into the next band's area if felt necessary, as well as outside the area embraced by the caveat to the west to the Yukon, north in the Anderson River area, and east past Contwoyto Lake.

Certain factual situations seemed to be agreed upon by all or certainly most of the Indian witnesses: that before the introduction of schools the Indian people moved about their own general

area but in a fairly predictable area, governed by availability of game, fish and furs; that other groups were free to come in and hunt or fish; that the necessity of schooling for the children had come along in recent years to alter the above pattern to the extent that most of the Indian people made more or less permanent homes where the schools were, still going out seasonally to hunt and fish; that they did not extract metals or minerals but merely hunted and fished for furs and food; and that each Indian shared the land with the other Indians in his band.

Those Indians who had either taken part in the treaty negotiations or who had been present while the negotiations were under way and heard parts or all of the conversation, seemed to be in general agreement that their leaders were concerned about what they were giving up, if anything, in exchange for the treaty money, i.e. they were suspicious of something for nothing; that up to the time of treaty the concept of chief was unknown to them, only that of leader, but the Government man was the one who introduced them to the concept of Chief when he placed the medal over the Indian's head after he had signed for his people; that they understood that by signing the treaty they would get a grubstake, money, and the promised protection of the Government from the expected intrusion of white settlers. It is clear also that the Indians for the most part did not understand English and certainly there is no evidence of any of the signatories to the treaties understanding English. Some signatures purport be what one would call a signature, some are in syllabic form, but most are by mark in the form of an "X". The similarity of the "X"'s is suggestive that perhaps the Government party didn't even take care to have each Indian make his own "X". Most witnesses were firm in their recollection that land was not rot surrendered, reserves were not mentioned, and the main concern and chief thrust of the discussions centered around the fear of losing their hunting and fishing rights, the Government officials always re-assuring them with variations of the phrase that so long as the sun shall rise in the east and set in the west, and rivers shall flow, their free right to hunt and fish would not be interfered with.

It seems also that very little if any reference to a map was made at any of the settlements. In several cases, also, it is apparent that fairly large segments of the first treaty and that the recognized leaders of the respective bands were not always there either.

Father Amourous, called to testify at Fort Rae, gave a very helpful description of how the Indians had their own names for lakes, rivers and physical features and how that even today some of the place names shown on modern maps of the area bear the Indian names -- indicating the extent to which these people made constant use of the area. This aspect was confirmed by the evidence of the anthropologists and by their references to the names set forth on some of the explorers' maps filed as exhibits in these proceedings.

The two anthropologists called to testify, Mrs. Beryl Gillespie and Dr. June Helm, admitted as experts in their field and as persons who had made on the spot investigations of the very areas that are encompassed by the proposed caveat, affirmed that as far back as their historical examinations could take them, and as far back before that, that reliable archaeological finds could take them, confirmed the continuous use and occupation of this land by the ancestors of the present Indian bands. The finds of old camp sites up through historical times to the present show that the present style or way of life, called the traditional way of life, hunting and fishing, has not changed nor the areas and places favoured. Their evidence makes it clear that these people have in their separate

groups exploited specific areas throughout the whole period gong back to several hundred years before Christ, up to the present with very little in the way of intrusion from other native groups such as the Eskimos to the north and Algonquins from the south-east. The explanation given was that the general uniformity of language and the geographical similarity of the area -- the same general boreal forest, caribou and moose, the same fish -- were the main contributing factors. As to full exploitation of the area these witnesses made it clear that down through the years it would be doubtful if any area had not been used at all except for a few mountain tops and muskeg areas that could be termed unusable. In general one is left with the picture that each of the population groups (Indian Bands as reflected by the present situation) have for all these years reached a balance with nature, with their environment, each group exploiting its own area for the most part and finding that area sufficient to support its own members. As in the case of the Indian witnesses, the testimony of these two obviously well-informed scientists was both fascinating and helpful in the present case.

Samples of caveats that had been accepted for registration against unpatented Crown lands were produced as exhibits through Emil Gamache, the Registrar of the Northern Alberta Land Registration District with office at Edmonton. This witness, experienced in the law and practice of the Alberta Land Titles System, based on the same Torens system as the system in the Territories, was very helpful in explaining how his office handled caveats. Perhaps the most interesting aspect of his testimony was his description of how upon receipt of a caveat for registration when there is no duplicate title in existence the act of registration is recorded by an entry in a card index specially set up for this type of title -- it being to all intents and purposes the daybook or book as referred to in the *Land Titles Act*, Alberta Section 141, our Section 134. When asked the hypothetical question of whether his office system would be able to handle registration of a caveat such as the one under review in the present proceedings he seems to think that while it would present problems, they would not be insurmountable, but he would not have to be assured it covered an interest in land and that his surveyor's department could with certainty plot the area of land covered.

Gordon R. Carter, Registrar, Land Titles Office, Yellowknife, was also called and outlined the practice his office had been following in respect to caveats. His practice was not unlike the Alberta practice which of course was not surprising when it is remembered that the Alberta statute came historically from the land Acts of the Northwest Territories before Alberta was carved out as a province. Perhaps the most interesting aspect of Mr. Carter's evidence was that already there had been caveats accepted for filing against "untitled" lands, one of them in respect to a claim for aboriginal rights against a small parcel of land near Fort Rae.

The last witness called was Father R. Fumoleau, who, as a Roman Catholic priest presently living Yellowknife, has been engaged for some time in researching material in respect to Treaties 8 and 11 for the purpose of writing a book on the treaties. His research has carried him through material in the Public Archives of Canada, the Provincial Archives, Edmonton, as well as the various Mission Archives located at Ottawa and in Western Canada. Several documents of historical interest and which help to throw light on events both immediately before and shortly after the signing of each treaty were forthcoming through this witness. It is unnecessary here to review his testimony in detail. Suffice to say that requests by Church officials to extend treaty privileges down the Mackenzie to alleviate the poverty and distress of the Indians in that area appeared to arouse no interest in Ottawa until oil was found where Norman Wells is now located. One cannot help but

gather that once this event took place the negotiation of a treaty then seemed to acquire a top priority. The urgency to obtain a treaty, the pressure that seemed to be placed on the Indians to enter into a treaty, as the Treaty party moved from settlement to settlement is more easily understood when the above evidence is examined.

The Territorial Lands Officer of the Government of the Northwest Territories, John King, was called to explain the practice followed by his government when lands are moved over from the Federal Government to the Territorial Government.

This concludes my general discussion of the facts but it is to be understood that some examination in detail will be necessary as each of the various legal issues involved receive separate treatment.

In respect to allowing in the evidence of such witnesses as the anthropologists and Father R. Fumoleau I have been mindful of the remarks of Hall, J. in *Calder et al v. Attorney General of B.C*, 1973 4 W.W.R. 1 where at page 25 he states:

> " **Consideration of the issues involves the study of many historical documents and enactments received in evidence, particularly Exs. 8 to 18 inclusive and Exs. 25 and 35. The Court may take judicial notice of the facts of history whether past or contemporaneous (*Monarch SS Co. v. A/B Karlshamns Oljefabriker*, [1949] A.C. 196 at 234 [1949] 1 All E.R. 1), and the Court is entitled to rely on its own historical knowledge and researches: *Read v. Lincoln (Bishop)*, [1892] A.C. 644, Lord Halsbury at pp. 652-4."**

Similarly in my treatment of the sometimes repetitious statements of the many Indian witnesses as to what their ancestors did I have considered them as coming within the exception to the hearsay rule relating to declarations of deceased persons about matters of public and general rights: *Milirrpum et al v. Nabalco Pty. Ltd. et al*, 1971 F.L.R. 141.

Finally the evidence of the two Registrars has been allowed in to show administrative practice, not with the view that because a certain practice has been followed it may by that very fact alone change or reverse the law, but merely that such administrative practice should be accorded great weight and deference in the interpretation of the provisions of the particular statutes under which the practice has operated: *Commissioners v. Penisel.* 1891 A.C. 531, at pages 546-547.

Counsel for the caveators presented their submissions under six separate headings so for convenience I propose considering them in the same order.

1. THE CAVEAT AREA HAS BEEN USED AND OCCUPIED BY AN INDIGENOUS PEOPLE, ATHAPASCAN SPEAKING INDIANS, FROM TIME IMMEMORIAL

2. FROM THE TIME OF THE FIRST NON-INDIAN ENTRY INTO THE CAVEAT AREA, THE LAND HAS BEEN OCCUPIED BY DISTINCT GROUPS OF INDIANS, ORGANIZED IN SOCIETIES AND USING THE LAND AS THEIR FORE- FATHERS HAD DONE FOR CENTURIES

Reference has already been made to the fact that aboriginal occupancy can be verified and established from archeological discoveries in this area. As far back as history goes, the journals of such explorers as Samuel Hearne and Alexander Mackenzie, 1769 - 1771 and 1789, the descriptions of the peoples living in this area, their language, their customs and their living and hunting habits remains consistent and indicates an unbroken occupancy down to modern times.

Chief Baptiste Cazon has this to say:

"Q. Where did your grandfather come from?

A. My great grandfather -- I realize that my grandfather -- all the Fort Simpson band are descended from the one grandfather about two hundred years ago, or something like that, and various different names.

Q. To your knowledge and belief how long have the Slavey people lived in the region of Fort Simpson?

A. I would say -- I don't know the exact date, but thousands and thousands of years ago, I know."

There were many similar statements. One more from Chief Edward Sayine bears quoting:

"My mother is alive; she is 80 now, and she told me she had been there -- that she was born there (Fort Resolution) and that they were there already, his dad was there and his grandfather was there, so I will say a thousand years already."

It is clear from the evidence that all of the Indian peoples in the area concerned speak the common language -- the Athapascan tongue -- and this combined with the geographic similarity of the area has been a major factor in keeping them within the general region for as far back as we can go.

Within this common group, speaking variations in the Athapascan language or dialects, there are to be found different peoples that correspond to the present bands created under the Indian Act. These distinct groups or peoples are: Chipewyan (including Yellowknifes), Dogrib, Slavey, Mountain, Bear Lake, Hare, Loucheux (also called Kutchen). Over the years there have been overlappings or fusions within some of these groups which may have resulted in new groupings and

some variation in names, but there has at no time been any population replacement. These overlappings have all been what might be called minor adjustments. Some of the bands are single bands like the Bear Lake Indians while others like the Dogrib have as many as five regional bands. The regional band is normally expected to be found living in relation to a particular resource area, which area may encompass drainage areas, and this regional band would know at what point on the perimeter of this area Indians of a different regional group might be encountered.

While each regional band feel free to enter into another's region, and there did not appear to be any concept of trespass, such intrusions were always looked upon and treated as temporary.

Dr. Helm in her testimony states:

"Q. **Doctor Helm, in the last series of questions, we have dealt with the formation of the Bear Lake Indians by a fusion of population, the ending of the Yellowknifes as a distinct, named group by a fusion of population. We have discussed the alteration of use by Dogribs of the territory in the most easterly portion of the area designated on the map as Dogrib, and we have dealt with the question of the extension of eastward exploitation by the Kuchin Indians. Leaving aside those matters, in any other way has there been an alteration of the territories indicated on this map as being those of particular tribal groups during the period for which data exists on these questions?**

A. **No, there is, I would say, a continuing occupation by peoples who today are known by these particular names, as Doctor Gillespes pointed out, for instance, as Beaver Indians who were formally slaves at the junction of the Mackenzie and Liard Rivers you know, peoples who are currently known by these names such as the Beaver Indians, and Doctor Gillespie pointed out that the peolples at the Forks of the Liard and Mackenzie Rivers were indeed at that time formerly Slaves, but not population replacements or thrusts or anything of more than minor adjustments of which we may never know.**

Q. **During the period for which data exists, have there been any warfare or hostilities which have resulted in any significant alteration of territories used by particular bands or tribes?**

A. **The only reliably documented case is that temporary retreat of the Dogribs from the eastern reaches of their zone due to the stimulation of the fur trade to the Yellowknifes to bully the Dogribs. The only other one which is very inadequately and not properly assessed are accounts from whites not in the area that Chipewyans were attacking people that were designated as Slaves and the Crees were from outside the territorial region, and whether at some earlier period that resulted in adjustment of Slave boundaries, I don't think we can ever say."**

" The significant divisions are those which we have termed regional bands or regional groups, They are significant because a regional group by defacto definition exploits in the course of a year a region which contains sufficient resources to sustain it year after year and is also a group of sufficient size to sustain itself generation by generation by substantial inter-marriage with other members of the same group, given incest restrictions and restrictions of other kinds, so that it has, first of all, economic and ecological bases. They are people who, except in times of stress, can survive year after year and "generation after generation, season through season, within that zone in which they have stations to which they may move by season, either as a large group or probably as smaller groups, and then your other question was their relations to other like groups."

Chief Daniel Sonfrere in his testimony says:

"Before even the white people came or even since the white people came, when people were making their living trapping and hunting, although the boundaries are not written on maps and not drawn out on maps, the people from each community realizes and respects other people's areas; although they are not written, although they are not drawn on the maps, they have respect for each other's areas, and he realizes how much the people from Fort Smith use it as well as the people from Fort Providence, but when it comes to helping each other it does not matter, they help each other."

And finally Dr. Helm again:

"Q. Would you say that this habit of hospitality or hunter ethic, the term you used, absence of a notion of exclusion or concept of trespass, would you say that this means that there are no real definable territories for the regional bands in the Northwest Territories?

A. No, I couldn't say that, because any really knowledgeable Indian could tell you by the thousands of place names which places were in his territory, in his group, and which ones are in the range of the neighbouring group. So, adult informed persons would know by this welter of knowledge of the land. So, "we go here, we go there, we go some other place," and "that is where the so-and-so people go." "That is their country." And by that, of course, there are territories, recognized by the peoples themselves.

Q. I want to put a quote to you and I want you to tell me if this would be an accurate statement in relation to the Indians of the Northwest Territories whom you have been describing. Would it be accurate to say that when the non-Indians came, the Indians were here, organized in society and occupying the land as their forefathers have done for centuries? Would you say that that is an accurate statement? Is that an accurate statement in relation to the

Indian people of the Northwest Territories?

A. Oh yes."

On the evidence before me I have no difficulty finding as fact that the area embraced by the caveat has been used and occupied by an indigenous people, Athapascan speaking Indians, from time immemorial, that this land has been occupied by distinct groups of these same Indians, organized in societies and using the land as their forefathers had done for centuries, and that those persons who signed the caveat are chiefs representing the present-day descendants of these distinct Indian groups.

3. AN INDIGENOUS POPULATION HAVE A LEGAL TITLE TO LAND IF THEY WERE IN OCCUPATION OF THAT LAND PRIOR TO COLONIAL ENTRY INTO THE AREA

In addressing the standing Committee on Indian Affairs and Northern Development on July 5, 1973, Kenneth M. Lysyk, Deputy Attorney General of the Province of Saskatchewan and a recognized student of Indian law discussed "Aboriginal Title" or "Indian Title". His opening remarks contain as clear cut a definition of legal Indian title as can be found and bears repeating (page 2315):

> **"In many parts of this country, the United States and the Commonwealth a native interest in the land has been said to exist and to remain in existence until cession or surrender or some other means of extinguishment of the native interest has been effected. Presumably it was this native interest in the land that this Committee was interested in when it decided to look into aboriginal rights, and this same interest is variously described as 'Indian Title', 'Aboriginal Title', 'Original Title', 'Native Title', 'Right of Occupancy', 'Right of Possession' and so on. These terms have been used more or less interchangeably. I will speak of Indian Title simply because that is the most common form of reference in Canadian enactments and official usage.**
>
> **As to defining Indian Title ... . For present purposes, I might simply refer "to the reasons of Mr. Justice Judson in the *Calder* decision handed down on January 31 of this year. He said, and two other members of the court concurred with him:"**
>
> > **'Although I think it is clear that Indian Title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian Title means ...'**

That is not a bad working definition of Indian Title. It identifies the claim of an unorganized community -- whether it be called a tribe, a nation, a band, or whatever -- which occupied a defined territory at the time of the coming of the Europeans, and which had occupied that territory into the indefinite past or, if you like that terminology, since time immemorial."

I do not think that the nature of this application before me makes it necessary for me to make a complete review of the case law, historical authorities and other discussions of Indian Title or Aboriginal Rights. These are all carefully discussed in the more recent decisions dealing with this subject. The *Milirrpum* case (supra) contains such a review. In particular the *Calder* case (supra) carries a full and complete examination of such authorities. I propose only to examine here such of these authorities as may have a more direct bearing on the particular circumstances of the present inquiry.

What has been referred to by counsel in the present hearings as the "first land freeze" is the *Royal Proclamation of 1763*. Of particular interest here is the phrase:

"We do, with the advice of our Privy Council strictly enjoin and require, that no private person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for the Purpose by the Governor or Commander in Chief of our Colony... ."

Of particular interest to the present area is that portion of the *Royal Proclamation* stating:

"And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under "our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our Said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid;

And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for the Purpose first obtained."

Examination of the source material before me during this inquiry leads me to believe that the area covered by the proposed caveat was known to the framers of the Proclamation and could easily

have been those "Lands and Territories lying to the Westward of the Sources of the Rivers" referred to above. I am not however unmindful of the remarks of Johnson, J. at pages 66-67 of *R. v. Sikyea* (1964) 46 W.W.R. 65 wherein he holds these same lands to be terra incognita. I would observe here that Mr. Justice Johnson did not have as full information before him in the *Sikyea* case as appears to have been before the court in the *Calder Case* and as is now before me.

Perhaps on of the most important expressions of how common law courts should and have treated the subject of aboriginal rights is that of Chief Justice Marshall of the United States Supreme Court in *Johnson v. McIntosh* (1823) 8 Wheaton 543: To quote from pages 572 to 574 in part:

> **"On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.**
> **"But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.**
>
> **"The exclusion of all other Europeans, necessarily gave to the nation making the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.**
>
> **"Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.**
> **In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery**

gave exclusive title to those who made it.

> "While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees subject only to the Indian right of occupancy."

One of the earliest decisions in respect to Indian Title is the that of the Judicial Committee of the Privy Council in *St. Catherines Milling v. Queen* (1888) 14 A.C. 46 where at pages 54 - 55 Lord Watson stated:

> "The territory in dispute has been in Indian occupation from the date of the proclamation until 1873. During that interval of time Indian affairs have been administered successively by the Crown, by the Provincial Governments, and (since the passing of the British North America Act, 1867), by the Government of the Dominion. The Policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract, duly ratified in a meeting of their chiefs or head men convened for the purpose. Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that in as much as the proclamation recites that the territories thereby reserved for the Indians had never 'been ceded to or purchased by' the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be 'parts of Our dominions and territories;' and it is declared to be the will and pleasure of the sovereign that, 'for the present,' they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominion

whenever that title was surrendered or otherwise extinguished."

In the *Calder case* it would appear that both Mr. Justice Judson and Mr. Justice Hall in writing the two opposing judgments agree that even without the *Royal Proclamation* there can be such a legal concept as Indian Title or Aboriginal Rights in Canadian law.

Justice Judson's remarks have already been set forth in the quotation from Kenneth M. Lysyk. While Justice Judson went on in his judgment to find that general land legislation in the colony constituted a termination of the Indian title, his remarks can still be taken as authoritative on the question of title.

One reference only is necessary from the judgment of Justice Hall, although I would observe that the full judgment is a most comprehensive review and consideration of the authorities. At page 49 he states: (referring to possession as proof of ownership):

> **"*Prima facie*, therefore, the Nishgas are the owners of the lands that have been in their possession from time immemorial and therefore the burden of establishing that their right has been extinguished rests squarely on the respondent."**

Among the many other reported decisions read under this heading are: *R. v. Sikyea*, (1964) 46 W.W.R 65, 49 W.W.R. 306 (S.C.); *Worcester v. Georgia* (1832) 6 Peters 512; *Queen v. Symonds* (1847) N.Z. P.C.C. 387; *In re. Southern Rhodesia* 1919 A.C. 211; *Amodu Tijani v. Secretary, Southern Nigeria* 1921 2 A.C. 399; *U.S. v. Santa Fe Pacific* (1941) 314 U.S. 339; *Lipan Apache v. United States* Ct. Cl. 487; *U.S. v. Klamath Indians* (1937) 304 U.S. 119; *Shoshone Indians v. U.S.* (1944) 324 U.S. 335; *U.S. v. Alcea Band of Tillamooks* (1946) 329 U.S. 40; *U.S. v. Alcea Band of Tillamooks* (No.2) (1950) 341 U.S. 48; *Tee-Hit-Ton Indians v. U.S.* (1954) 348 U.S. 272; *Tlingit and Haida Indians of Alaska v. U.S.* (1959) 147 Ct. Cls. 315.

From these authorities I conclude that there are certain well established characteristics of Indian legal title if the Indians or aborigines were in occupation of the land prior to colonial entry. These are:

(1) **Possessory right -- right to use and exploit the land.**

(2) **It is a communal right.**

(3) **There is a Crown interest underlying this title -- it being an estate held of the Crown.**

(4) **It is inalienable -- cannot be transferred but can only be terminated by reversion to the Crown.**

I am satisfied on my view of the facts that the indigenous people who have been occupying the area covered by the proposed caveat come fully within these criteria and that in the terms of the

language of Justice Hall in the *Calder Case* may therefore be *"prima facie* the owners of the lands."

4. THE LAND RIGHTS OF THE CAVEATORS HAVE BEEN CONFIRMED OR RECOGNIZED BY THE ROYAL PROCLAMATION OF 1763, THE IMPERIAL ORDER IN COUNCIL OF 1870 TRANSFERRING THE NORTHWESTERN TERRITORY TO CANADA, THE EARLY DOMINION LANDS ACT AND BY THE GOVERNMENT ACTIONS RELATING TO

Once it is established as concluded under heading 3 above that the Indians may be owners of their lands it is perhaps unnecessary to examine as to whether this *prima facie* ownership has enjoyed acceptance from the various levels of Government down through the years. Nonetheless such an examination may be reassuring especially when the question of whether such ownership has been extinguished or not has to be looked into as well.

It has been suggested that the *Royal Proclamation* of 1763 provides some confirmation of these rights. I do not propose adding to my remarks already set forth in respect to the *Proclamation* under heading 3 other than to point out that in any event this famous document would at the least, according to Justice Hall, (*Calder Case* p. 67) be declaratory of Imperial Policy. This policy as far back as 1763 was not one to deny Indians title but rather recognized its existence and laid down the procedures for extinguishment which appear to have been adopted and followed down through the years by the Canadian Government at least up to the signing of Treaties No. 8 and 11.

In 1821 there is a reference to "Indian Territories" in an enactment relating to the regulating of the Fur Trade and establishing a Criminal and Civil jurisdiction: *1 & 2 Geo. IV* c. 66. It is interesting to note that the statute includes the caveat area as "Indian Territories" and provides for the law applicable to be the law of England.

Following Confederation and the passing of the *British North America Act, 1867* arrangements for the transfer of Rupert's Land and the North-Western Territories of Canada, already contemplated by Section 146 of that Act, became finalized.

In an address to the Queen by the Senate and House of Commons of Canada made in December 1867, praying for the transfer of these two land areas it was stated that upon transference of the territories the "claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealing with the Aborigines." (Schedule A, Order in Council of 1870).

Essentially the same assurance is made in 1870. See Schedule B to the Order in Council of 1870. The burden of how such claims for compensation are to be met is assumed by the Canadian Government under Section 8 of the actual agreement between Canada and the Hudson's Bay Company.

The latter part of Section 146 of the *British North America Act*, 1867 contains the language:

" and the provisions of any Order in Council in that behalf shall have effect as if they were enacted by the Parliament of the United Kingdom of Great Britain and Ireland."

It would seem to me from the above that the assurances made by the Canadian Government to pay compensation and the recognition of Indian claims in respect thereto did by virtue of Section 146 above, become part of the Canadian Constitution and could not be removed or altered except by Imperial Statute. To the extent, therefore, that the above assurances represent a recognition of Indian title or aboriginal rights it may be that the Indians living within that part of Canada covered by the proposed caveat may have a constitutional guarantee that no other Canadian Indians have.

While the memory of parliamentarians still retained the above matters freshly in their minds, presumably, the legislation more closely following Confederation and the executive acts as well appear to show a greater appreciation of Indian rights and title than perhaps has been the case in more recent times.

It is not necessary to examine this aspect in depth but in passing it is to be noted, for example, that the *Dominion Lands Act*, 1872, contains a protection to the effect:

"42. None of the provisions of this Act respecting the settlement of agriculture lands, or the lease of timber lands, or the purchase and sale of mineral lands, shall be held to apply to territory the Indian title which shall not at the time have been extinguished."

An Order in Council of January 26, 1891 (never acted upon apparently according to Father Fumoleau's evidence) contained the following paragraph:

"On a Report dated 7th of January 1891, from the Superintendent General of Indian Affairs stating that the discovery in the District of Athabaska and in the Mackenzie River Country that immense quantities of petroleum exists within certain areas of those regions as well as the belief that other mineral and substances of economic value, such as sulphur on the South Coast of Great Slave Lake and Salt on the Mackenzie and Slave Rivers, are to be found therein, the development of which may add materially to the public weal, and the further consideration that several Railway projects in connection with this portion of the Dominion may be given effect to at no such remote date as might be supposed, appear to render it advisable that a treaty or treaties should be made with the Indians who claim those regions as their hunting grounds, with a view to the extinguishment of the Indian title in such portions of the same as it may be considered in the interest is the public to open up for settlement."

A second Order in Council enacted June 27, 1898 contains pretty much the same language

in respect to "aboriginal title" and as to how the inhabitants "should be treated with for the relinquishment of their claim to territorial ownership."

The above language is repeated in the Order in Council of December 6, 1898, which deals with the extension of Treaty 8 into British Columbia. Finally on March 3, 1921, the Order in Council which authorized the negotiation of Treaty 11 contains the paragraph:

> **"The early development of this territory is anticipated and it is advisable to follow the usual policy and obtain from the Indians cession of their aboriginal title and thereby bring them into closer relation with the Government and establish securely their legal position."**

Unless, therefore, the negotiation of Treaty No. 8 and Treaty No. 11 legally terminated or extinguished the Indian land rights or aboriginal rights, it would appear that there was a clear constitutional obligation to protect the legal rights of the indigenous people in the area covered by the proposed caveat; and a clear recognition of such rights.

5. TREATY 8 AND TREATY 11 COULD NOT LEGALLY TERMINATE INDIAN LAND RIGHTS. THE INDIAN PEOPLE DID NOT UNDERSTAND OR AGREE TO THE TERMS APPEARING IN THE WRITTEN VERSION OF THE TREATIES, ONLY THE MUTUALLY UNDERSTOOD PROMISES RELATING TO WILD LIFE, ANNUITIES, RELIEF AND FRIENDSHIP BECAME LEGALLY EFFECTIVE COMMITMENTS.

Treaty No. 8 contains several recitals of particular significance to the issues under the present heading:

> " **AND WHEREAS, the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering, and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty, and arrange with them so that there may be peace and good will between them and Her Majesty's other subjects, and that Her Indian people may know and be assured of what allowances they are to count upon and receive from Her Majesty's bounty and benevolence;**
>
> " **AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described , and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians DO HEREBY CEDE, RELEASE,**

SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say:-

AND ALSO the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia, or in any other portion of the Dominion of Canada.

TO HAVE AND TO HOLD the same to Her Majesty the Queen and Her successors for ever.

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

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves; Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in everalty, to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as She may see fit; and also that the aforesaid reserves of any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained."

" And the undersigned Cree, Beaver Chipewyan and other Indian

Chiefs and Headsmen, on their own behalf and on behalf of all the Indians whom they represent, DO HEREBY SOLEMNLY PROMISE and engage to strictly observe this Treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty and Queen.

THEY PROMISE AND ENGAGE that they will, in all respects, obey and abide by the law; that they will maintain peace between each other, and between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians, half-breeds or whites, this year inhabiting and hereafter to inhabit any part of the said ceded territory; and that they will not molest the person or property of any inhabitant of such ceded tract, or of any other district or country, or interfere with or trouble any person passing or travelling through the said tract or any part thereof, and that they will assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this Treaty or infringing the law in force in the country so ceded."

It is not necessary to repeat the equivalent paragraphs contained in Treaty No.11. It is to be observed that this Treaty, which covered all that part of the caveat area not covered by Treaty No. 8 by far the larger part, contained language almost identical in wording.

Treaty No. 8 was negotiated by a Commission made up of three, Treaty No. 11 by Commission of one.

In the light of the evidence which was adduced during the present hearing it is perhaps of interest to quote H.A. Conroy, the Treaty No. 11 Commissioner, where in his report to his Deputy Superintendent General, Department of Indian Affairs, he states:

"They were very apt in asking questions, and here, as in all the other posts where the treaty was signed, the questions asked and the difficulties encountered were much the same. The Indians seemed afraid, for one thing, that their liberty to hunt, trap and fish would be taken away or curtailed, but were assured by me that this would not be the case."

While the important phrase in respect to surrender of the land is in each case camouflaged to some extent by being included in one of the preambles, nonetheless the clear intention would seem to be to obtain from the Indians "all their rights, titles and privileges whatsoever, to the lands ... ". The actual words are: "the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP". Read in conjunction with "all their rights, titles privileges" it is about as complete and all-embracing language as can be imagined. If one was to stop there of course the Indians were left nothing.

It seems to me that there are two possible qualifications:

(1) **That really all the Government did was confirm its paramount title and by assuring the Indians that "their liberty to hunt, trap and fish" was not to be taken away or curtailed was in effect a form of declaration by the Government of continuing aboriginal rights in the Indians.**

In the present proceedings, I do not have to go so far as to decide whether this is the case or not. In my role as "inquirer" under the *Land Titles Act*, as I see it, I merely have to ascertain if there is some chance of success by the Caveators in this respect.

I am satisfied here that the caveators have an arguable case under this heading and have at least the possibility of persuading the Federal Court or whichever other Court may be called upon to rule, that the two treaties are not effective instruments to terminate their aboriginal rights for the above reason. In other words the Federal Government sought these treaties to reassure their dominant title only.

(2) **That, unlike perhaps the previous treaties, the manner of negotiation, the "ultimatum" effect of the discussions between the parties in the Northwest Territories was such as to make it possible for the caveators to succeed in persuading a court exercising the final say on these matters that there was either a failure in the meeting of the minds or that the treaties were mere "peace" treaties and did not effectively terminate Indian title -- certainly normally referred to as surface rights -- the use of the land for hunting, trapping and fishing.**

Under this sub-heading it is necessary to examine the evidence in somewhat closer detail that has been done heretofore in the judgment.

Throughout the hearings before me there was a common thread in the testimony -- that the Indians were repeatedly assured they were not to be deprived of their hunting, fishing and trapping rights. To me, hearing the witnesses at first hand as I did, many of whom were there at the signing, some of them having been directly involved in the treaty making, it is almost unbelievable that the Government party could have ever returned from their efforts with any impression but that they had given an assurance in perpetuity to the Indians in the territories that their traditional use of the lands was not affected.

Ted Trindle, present at the signing of Treaty No. 11 at Fort Simpson said: "Well, they talked about land and the Indians were scared that by taking Treaty would lose all of their rights but the Indians were told not, but if they were taking treaty they would get protection.

They were told it was not to get the land but they would still be free to hunt and roam as usual, no interference."

At Fort Wrigley, Phillip Moses remembers that the Commissioner "said nothing would be changed, everything would be the same as way back, and everything would be the same in the future

...".

Pretty much the same assurance came at Fort Resolution. When Chief Snuff appeared to be holding out, according to Johnny Jean-Marie Beaulieu, who was there, he was told by the Treaty Party: "we will pay out the Treaty to you here and it has no binding on your land or country at all. It has nothing to do with this land."

Almost each Indian witness affirmed how the Indians representatives only signed after being re-assured that as one expressed it "If you don't change anything, we will take treaty."

As if the above was not enough, further examination of the evidence, including the material from the archives put in through Father Fumoleau, certainly leaves an impression of haste, almost an "ultimatum" as Bishop Breynat later reported. The uneasy feeling that the negotiations were not all as above board as one would have hoped for is enhanced by statements like that of Pierre Michel who reported that at Fort Providence the Commissioner said:

> **" ... if didn't take money, there going to be some sort of trouble for the Indian people."**

The comments of Mr. Harris in his report in 1925 for the Simpson Agency lends some credence to the anxiety. He reports:

> **"I believe it to be my duty to inform you that I know that certain promises were made these Indians at the first Treaty which in my opinion never should have been made. The Indians at Fort Simpson did not wish to accept the Treaty at first, and I think the wisest course would have been to let them alone till they asked for it themselves, though I do not in any way wish to criticise the action of my superiors in the Department."**

Confirmation of haste and perhaps irregularities is easy to find from the suggestion put forth during the hearing that at Fort Simpson when the Indians led by Old Norwegian (their recognized spokesman) refused to sign and left, the Treaty Party then appointed Antoine as chief and Treaty was signed. Again there is the testimony of Chief Yendo, who is shown as having signed for Fort Wrigley, but who has no memory of having signed and swears he cannot read or write.

The impracticability of expecting the indigenous peoples with whom the treaties were concerned here to be able to sustain themselves on the area of land each was to receive when reserves came to be allocated and set aside offers one more reason to suspect the *bona fides* of the negotiations. Perhaps the extreme south-western area might permit a bare subsistence living to be grubbed from the soil, but most of the area embraced by the treaties is as already described -- rock, lake and tundra -- with hunting, trapping and fishing offering the only viable method of maintaining life.

In examining agreements such as treaties where as in the present case one side, the Indians, were in such an inferior bargaining position, it is perhaps well to remember the cautioning words of

Mr. Justice Matthews *Choctaw Nation v. United States* (1886) 119 U.S. 314 where at page 315 he said:

> " **The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws."**

Justice Hall at page 73 of the report in the *Calder Case* in discussing onus states:

> " **It would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be "clear and plain". There is no such proof in the case at bar; no legislation to that effect."**

With the above principle in mind I conclude under this heading that there is enough doubt as to whether the full aboriginal title had been extinguished, certainly in the minds of the Indians, to justify the caveators attempting to protect the Indian position until a final adjudication can be obtained.

(6) **THE CAVEATORS HAVE A LEGAL TITLE AND INTEREST IN THE LANDS DESCRIBED IN THE CAVEAT, WHICH TITLE AND INTEREST CAN BE PROTECTED BY THE FILING OF THE CAVEAT IN THE LAND TITLES REGISTRY OF THE NORTHWEST TERRITORIES.**

This heading of argument was mentioned in my June 14 Judgment (supra) but reserved until now. There are two heads of argument here:

(a) **Are aboriginal rights an interest in land that can be protected by caveat?**

(b) **Can the *Land Titles Act* have application to lands for which no certificate of title has been issued or where no application to register under the Act has been made?**

Provision for lodging or registration of a caveat is made in Section 132 of the *Land Titles Act:*

> "Any person claiming to be interested in any land under any will, settlement or trust deed, or under any instrument of transfer or transmission, or under any unregistered instrument, or under an execution, where the execution creditor seeks to affect land in which the execution debtor is interested beneficially but the title to which is registered in the name of some other person, or otherwise, may lodge a caveat with the registrar to the effect that no registration of any transfer or other instrument affecting the said land shall be made, and that no certificate of title therefor shall be granted, until such caveat has been withdrawn or has lapsed as hereinafter provided, unless such instrument or certificate of title is expressed to be subject to the claim of the caveator as stated in such caveat."

It seems clear to me that aboriginal rights are an interest in land: cf. *St. Catherines Milling* and *Calder* cases referred to above. The phrase "or otherwise" is certainly broad enough to include such an interest as aboriginal rights or Indian tile. See *Re. MacCullough and Graham* (1912) 2 W.W.R. 311.

It was submitted on behalf of the Crown under this heading, (b), that the *Land Titles Act* cannot have any application to lands for which neither a Certificate of Title has issued nor an application to have his title registered has been made. S. 54(1).

The argument was presented on the basis that four types of title, only, form the basis for title in the Northwest Territories vis a vis the *Land Titles Act.*

(a) **Crown grants prior to 1887 for which no application to register has yet been made;**

(b) **Land to which Crown grants have been issued and where application has been made under Section 54 (1) and a certificate of title has already issued;**

© **Ungranted Crown lands for which no certificate of title has issued;**

(d) **Transfer or Notification in respect of Territorial lands.**

Before examining the question in its broader sense I should mention that the evidence before me in respect to the Territorial Lands under type (d) above convinces me that a caveat can be clearly registered against these lands. See Sections 3 and 5 of the *Territorial Lands Act,* R.S.C. 1970, c. T-6 where a notification has the same effect as a grant of land made by letters patent under the Great Seal.

The practice followed in the Land Titles Office located at Yellowknife from the testimony that came out before me belies the position here taken by the Crown lawyers in the initial hearings. As I have already mentioned, however, while such practice may be persuasive it is not conclusive.

Counsel for the Crown under this heading proceeded to examine the 1886, the 1894 and the present *Land Titles Acts.* His submission briefly is that, referring to the 1886 statute first, Section 44 provides for issuing a certificate of title upon receipt of a grant, Section 45 permits the holder of any letters patent already issued to make application to have his title registered, Section 100 lays down the procedure to follow in filing a caveat and that Section 38 provides for a register (made up of duplicates of all certificates of titles issued). With particular reference to Section 100(3) wherein the registrar is required to enter a memorandum of the details of the caveat in the register, it is argued that reading these sections together it can lead only to one conclusion, namely that there must be a certificate of title before a caveat can be filed.

Again turning to the 1894 statute reference is made to Section 33(1) which provides for a "day-book) to be kept by the registrar in which "shall be entered by a short description every instrument relating to lands for which a certificate of title has issued or been applied for which is given in for registration ..."; Section 34 provides for the 'register' as in Section 44 of the 1886 statute, and to Section 99, which like Section 100 of the 1886 statute refers to caveats. This section has one addition, namely: "but in the case of a caveat before registration of a title under this Act the registrar shall on receipt thereof enter the same in the "day-book". It is argued here that reading the requirement to enter the caveat in the day-book which in turn is to contain a short description of every instrument relating to lands for which a certificate of title has been issued or been applied for makes it clear that failing a certificate of title or application therefore there can be no filling of the caveat.

The same arguments are brought forward and to the same effect with respect to the present statute, the relevant sections being Sections 134 and 35.

Sections 134 and 35 are as follows:

"134. (1)Upon the receipt of a caveat, the registrar shall enter the caveat in the day-book, and shall make a memorandum thereof upon the certificate of title of the land affected by such caveat and shall forthwith send a notice of the caveat through the post office or otherwise to the person against whose title the caveat has been lodged.

(2) In the case of a caveat before registration of a title under this Act the registrar shall on receipt thereof enter the caveat in the day-book."

"35. The registrar shall keep a book called a day-boo, in which shall be entered by a short description every instrument given in for registration relating to lands for which a certificate of title has issued or been applied for, with the day, hour and minute of its so being given in."

It is argued that these two sections when read in conjunction with sections 48, 49 and 50, contain the same requirement as is argued was the case in respect to the two previous statutes and as already set forth. Reliance is placed on the reasoning contained in *Brotherhoods of Railway Employees, et al v. The New York Central Railroad Company et al*, 1958 S.C.R. 519. It is argued here also that the *Land Titles Act* is what might be considered a complete statute and that the registrar's functions and duties are meticulously set out, and that it should not be presumed that Parliament has forgotten anything, hence if a certificate of title is required as a condition of entering an instrument that must be respected. Particular emphasis is made here to section 45 which specifically recognizes the right to file "in the office of the registrar any mortgage or other encumbrance created by any person rightfully in possession of land prior to the issue of the grant from the Crown ...".

I agree with the proposition that the *Land Titles Act* is a complete statute. It is my opinion, however, that its provisions are clearly broad enough to permit the lodging or filing of a caveat in situations such as the present where no certificate of title has yet been issued or where no application for issuance of certificate of title has yet been made.

Subsection (2) of section 134 stands separately in the present statute and clearly refers to "a caveat before registration of a title under this Act ...".

It seems clear to me also that Section 95 in its reference to "mortgage or other encumbrance" contemplates a situation such as the present one where the caveators claim they hold an encumbrance on the land referred to in the proposed caveat, namely an encumbrance arising out of what they refer to as aboriginal rights or alternatively by virtue of the declaration in their favour in the Order in Council already referred to. By Section 2 of the Act "'encumbrance' means any charge on land, created or effected for any purpose whatever, inclusive of mortgages, mechanics liens ... unless expressly distinguished." I can find nothing in the statue which prohibits using a caveat to serve notice to the effect that the caveator claims to have a charge on the land of the nature set forth

in the caveat.

Under this heading therefore, I am satisfied that the provisions of the *Land Titles Act* do permit the filing or registering of a caveat such as is proposed here, and that this applies even in the case of unpatented Crown land.

It should be remembered here that the caveat is not being registered or in any way placed on the Crown title, where as here there is no title, but is under Section 134(2) being entered in the day book where it will remain as notice of the claim only, to take effect only in the event some person or persons makes application to have his title registered under the Act. (Sec. 54). After all the derivation of the word "caveat" is "to beware" and this is really all it serves to do, to warn persons who might in the future deal with the land involved. The manner in which, for example, the Alberta Registrar uses a card index system is illuminating here.

Under this heading the following cases were considered carefully: *A.G. of Canada v. Registrar of Titles of Vancouver Land Registration District*, 1934 4 D.L.R. 764; *In re. Interprovincial Pipe Line Company* (1951) 1 W.W.R. (NS) 479; *Prudential Trust Co. Ltd. v. The Registrar, The Humboldt L.R.D.* 1957 S.C.R. 658; *Balzer v. Registrar of Moosomin L.R.D. et al* 1955 S.C.R. 82; *Molner v. Stanolind Oil & Gas Co. et al* 1959 S.C.R. 592; and *Graham's Case* 1918 2 W.W.R. 943.

CONCLUSIONS

To sum up my conclusions under the reference:

(1) **I am satisfied that those who signed the caveat are present-day descendants of those distinct Indian groups who, organized in societies and using the land as their forefathers had done for centuries, have since time immemorial used the land embraced by the caveat as theirs.**

(2) **I am satisfied that those same indigenous people as mentioned in (1) above are *prima facie* owners of the lands covered by the caveat -- that they have what is known as aboriginal rights.**

(3) **That there exists a clear constitutional obligation on the part of the Canadian Government to protect the legal rights of the indigenous peoples in the area covered by the caveat.**

(4) **That notwithstanding the language of the two Treaties there is sufficient doubt on the facts that aboriginal title was extinguished that such claim for title should be permitted to be put forward by the caveators.**

(5) **That the above purported claim for aboriginal rights constitutes an**

interest in land which can be protected by caveat under the *Land Titles Act*.

(6) **That the provisions of the *Land Titles Act* permit the filing or registering of a caveat such as is presented here even in the case of unpatented land.**

In answer to the reference to me by the Registrar I would answer that in my opinion he has a duty to lodge the caveat presented to him and enter same in the day book.

There will be an order directing the Government of Canada to pay the costs of the caveators to be taxed on one and one-half column 5, to include second counsel fee, and a special fee of $500.00 to cover written argument.

The Federal Government will be required to pay the costs of D. Brand, *amicus curiae* on a solicitor and client basis.

There will direction that following the final appeal from this judgment, if any, that all tapes taken of the evidence by the Court reporters be turned over to the Public Archives of Canada because of their possible historic value and interest.

The restraint on registration ordered by me on April 3, 1973, and referred to above, shall be removed and vacated as of this date, but all monies deposited or bonds posted for possible damages shall be retained pending final appeal, with the right to any person affected to apply to me for relief or further directions as that person may be advised.

By virtue of the provisions of the *Land Titles Act* any person or persons wrongfully and without reasonable cause filing or registering a caveat can be made responsible for any damages caused by such filing. I am not unaware of the vast area encompassed by the present caveat and by the possible damages which may or may not result from its filing. I am also not unmindful of the fact that the caveators and those for whom they act here, are probably unable to provide bonds of indemnity or pay damages if awarded against them. Accordingly, subject to whatever a higher court may say, I direct that until all possible appeals from this my judgment have been completed or the time for launching same has expired, the Registrar shall be stayed from filing or registering the caveat. The registrar will be required however to keep a record of all transactions that may be registered or otherwise recorded in his office and in respect to unpatented Crown lands both Federal and Territorial, during the period of this stay, so as to provide the caveators with a record of what damages they may have suffered during the stay, this record to be turned over to them in the event this judgment is sustained.

I wish to conclude by thanking counsel for the caveators for their cooperation in enabling the hearing to be concluded so speedily and for their legal brief which has been most helpful. Counsel for the Territorial Government has assisted throughout and been most helpful in the furtherance of these proceedings. Finally I should observe that Mr. Brand in his role as *amicus curiae* with his ever penetrating mind has made my task much easier.

W.G. Morrow.
Yellowknife, N.W.T.
September 6, 1977

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