No. 30890

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF MANITOBA)

BETWEEN:

GOD'S LAKE FIRST NATION a.k.a. GOD'S LAKE BAND

APPELLANT
(RESPONDENT)

- and -

MCDIARMID LUMBER LTD.

RESPONDENT
(APPELLANT)

- and -

THE MANITOBA KEEWATINOOK ININEW OKIMOWIN

INTERVENER

- and -

THE ASSEMBLY OF FIRST NATIONS

INTERVENER

- and -

THE ATTORNEY GENERAL OF CANADA

INTERVENER

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PART I: THE FACTS

1. The Manitoba Keewatinook Ininew Okimowin (the "MKIO") adopts the Statement of Facts presented by the Appellant God's Lake First Nation.

PART II: POINTS IN ISSUE

2. The intervener would like to address the following issues as raised by this Appeal:

- what is the historical context to the types of funding that the Crown is obligated to protect?;
- do the *Indian Act* protections extend to all funds received from the Crown or only those pertaining to treaty obligations?;
- are modern funding arrangements paid pursuant to treaty and/or constitutional and other obligations of the Crown?;
- are funds received from the Crown otherwise exempt as being necessary transfers for the provision of essential public services?

PART III: ARGUMENT

3. In support of its position the Intervener, where necessary, relies on the arguments made by the Appellants, in their Factum. In addition, the Intervener makes the following submissions.

A. Position of the Intervener

4. It is the position of the intervener that the Crown (hereinafter both federal and provincial) have a fiduciary duty and constitutional obligation to act in the best interests of First Nations for the protection of First Nations' property and their entitlements necessary for their provision of essential public services necessary for the lives of their citizens.

5. In this case, the treaties and sections 89 and 90(1)(b) of the *Indian Act* are to be interpreted liberally and in favour of First Nations in the case of any ambiguity. The MKIO takes the position that the Government of Canada has undertaken a fiduciary and constitutional obligation to protect the benefits and entitlements received by First Nations from the Crown by way of comprehensive

funding agreements ("CFAs") and all other similar agreements and sources, and has acted upon those obligations by enacting the Indian Act language of "treaty or agreement" found in section 90(1)(b). Therefore funds that are paid by agreements with First Nations pursuant to either treaty obligations or constitutional and other obligations of the Crown are deemed to be situated on reserve and exempt from attachment. The language of section 90(1)(b) must be read consistent with the Crown's historical obligations to protect the funds received pursuant to treaty and other sources from attachment benefits and entitlements necessary for providing essential public services, and the Crown's apparent intention of always situating these funds on reserve within the meaning of section 89.

6. The intervener submits that the roots of the Crown's obligation to protect funds provided by the Crown from attachment can be found in the following: the *Royal Proclamation of 1763*, section 91(24) of *the Constitution Act, 1867*, *The Rupert's Land Order of 1870*, the treaties between First Nations and the Crown, pre-confederation statutes of the Province of Canada, and the history of agreements and dealings with the Hudson's Bay Company and the Imperial Crown. By these instruments and dealings the Crown has assumed two parallel constitutionally protected obligations: a constitutional obligation to provide for the human rights of First Nations in times of their need in equity with other Canadians; and, an obligation to take adequate steps to protect the entitlements and benefits howsoever provided to First Nations from the Crown from attachment by non-First Nations creditors.

7. It is the intervener's further position that the modern equivalent of the Crown's obligations to protect First Nations' property from attachment is similar in analogy to the Crown's exemption from attachment at common law. It is inconsistent to treat First Nations governments providing essential public services for basic human rights as private parties, with their funds intended for the provision of these services subject to attachment, and not extend to First Nations the common law exemptions from attachment that apply to the Crown.

B. The Constitutional and Historical Context

8. The intervener's arguments will begin with a review of the historical context within which the

Crown's constitutional and treaty obligations can be understood. Reference will be made to the history of Crown - First Nations relations with the Imperial Crown's representative government in Rupert's Land, the Hudson's Bay Company, and later with the Province of Canada and the Dominion of Canada, followed by the history of benefits provided since the fur trade and their evolution into modern funding arrangements. This historical context is critical background to the intervener's arguments regarding the Crown's treaty and constitutional obligations, the various protective statutory provisions, and the treatment by this Honourable Court in *Mitchell v. Peguis Indian Band.*

9. The Imperial Crown recognized and affirmed its obligations to protect the interests of First Nations from the encroachment by non-First Nations by the *Royal Proclamation of 1763:*

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories, not having been ceded to or Purchased by Us . . .

The protection of First Nations is concomitant with the undertaking and assumed obligation to protect First Nations lands from being alienated other than to the Crown.

> -*The Royal Proclamation of 1763*, in Leonard I.Rotman, Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada, Appendix 7 at 321, at 42 [**Intervener's Tab 1**].

10. The admission of Rupert's Land (Manitoba and the North-Western Territory) into the Dominion of Canada transferred the Imperial Crown's obligations to First Nations to the Dominion of Canada. By the June 23, 1870 Order of Her Majesty in Council Admitting Rupert's Land and North-Western Territory into the Union (the "Rupert's Land Order"), passed one day following the June 22, 1870, and the admission of Manitoba into Confederation by the *Manitoba Act, 1870*, the Imperial Crown permitted the purported transfer of Rupert's Land to the Dominion of Canada on the condition that the Dominion of Canada assume the Imperial Crown's obligations to protect the First Nations of Rupert's Land.

> -As their Natural Resources Fail: Native Peoples and the Economic History of Northern Manitoba, 1870-1930, Frank Tough, figure at 46, and at 8 to 13 [**Intervener's Tab 2**].
> -*Order of Her Majesty in Council Admitting Rupert's Land and North-Western Territory into the Union*, June 23, 1870 ("*Rupert's Land Order of 1870*") in The Canadian North-West: Its Early Development and Legislative Records Vol 2, Prof. E.H. Oliver (ed.), (1914, Ottawa) at

939-964 **[Intervener's Tab 3]**.
-"Fiduciary Obligations and Federal Responsibility for the Aboriginal Peoples", Kent McNeil in Emerging Justice?: Essays on Indigenous Rights in Canada and Australia (Native Law Center: University of Saskatoon, 2001) at 309-315, 322-332, 352-355 **[Intervener's Tab 4]**.

11. While it has been held that the purported grant of Rupert's Land by the Imperial Crown's purported grant of Rupert's Land in 1670 by King Charles II to the Hudson's Bay Company (the "Company") did not displace First Nations laws, it is generally regarded that this arrangement did provide for the Company to govern in respect of the Imperial Crown's obligations.

-*Connolly v Woolrich and Johnson et al* (1867) 17 R.J.R.Q. 75 in Canadian Native Law Cases, Brian Slattery et al 1763-1869, at 87 to 90 **[Intervener's Tab 5]**.
-*Re: Eskimos* [1939] S.C.R. 104 in Canadian Native Law Cases, Brian Slattery et al Vol. 1931-1959, at 125 **Intervener Tab 6]**.

12. The conditions imposed on the Dominion of Canada by the Imperial Crown in the Rupert's Land Order became part of the Canadian constitution by virtue of section 146 of the *Constitution Act, 1867* and section 34 of the *Manitoba Act* of 1870. As a result Parliament's authority in section 91(24) not only conveyed law-making power exclusively to the Dominion of Canada but also "empowered the federal government to honour the existing treaty obligations of the Imperial Crown and to negotiate new ones", subject to its positive obligations for the protection of the First Nations in Rupert's Land, including the Appellant.

-Constitution Act, 1867 s. 91(24), s. 146 **[Intervener's Tab 7]**.
-Manitoba Act, 1870, s. 34 **[Intervener's Tab 8]**
-Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People, Vol. I, Associate Chief Justice A.C. Hamilton and Associate Chief Judge C. Murray Sinclair, (1991) Province of Manitoba, at 60 **[Intervener's Tab 9]**.

13. The Imperial Crown forced the Dominion of Canada to negotiate the Deed of Surrender (attached as Schedule C to the Rupert's Land Order) with the Hudson's Bay Company by passing the Rupert's Land Act. The March 22nd, 1869 Memorandum of Agreement between the Imperial Government and the Directors of the Hudson's Bay Company (the "Company") (attached as Schedule B of the Rupert's Land Order) set out in section 8 the Crown's agreement that "Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibilities in respect of them".

-*Rupert's Land Act*, 31st July 1868, 31 and 32 Vict., C. 104, 105 An Act for enabling Her Majesty to accept a Surrender upon Terms of the Lands, Privileges, and Rights of The Governor and Company of Adventurers of England trading into Hudson's Bay and for admitting same into the Dominion of Canada in Oliver, supra at 937-939 **[Intervener's Tab 10]**.

14. The Dominion of Canada specifically affirmed its constitutional obligations for the welfare of First Nations by its representations in the December 16th and 17th, 1867 Address to the Queen (attached as Schedule A) in reliance on the Imperial Crown issued the Rupert's Land Order:

> That upon the transference of the territories in question to the Canadian Government it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer, and we authorize and empower the Governor in Council to arrange any details that maybe necessary to carry out the terms and conditions of the above agreement.

In the Deed of Surrender the Company retained its posts in the territories of the First Nations of the Manitoba Keewatinook Ininew Okimowin at Lac Brochet, York Factory, Shamattawa, Split Lake, Norway House, Cross Lake, Island Lake, God's Lake, Oxford House, Grand Rapids, Moose Lake, Cedar Lake, The Pas, and Nelson River (Nelson House), and South Indian Lake.

-*Rupert's Land Act*, supra **[Intervener's Tab 10]**
-*Address to the Queen*, December 16 and 17, 1867 Schedule A to the *Rupert's Land Order of 1870*, in Oliver, supra **[Intervener's Tab 3]**.
-Frank Tough, supra, at 8 - 13 **[Intervener's Tab 2]**
-*Rupert's Land Order of 1870*, June 23, 1870 in Oliver, supra **[Intervener's Tab 3]**.
-Bounty and Benevolence: A History of Saskatchewan Treaties, Arthur J. Ray, (2000) McGill University Press, at 49-54 **[Intervener's Tab 11]**

15. Following the issuance of the Rupert's Land Order of 1870, representatives of the Imperial Crown confirmed their expectations with the Dominion of Canada that the beneficial relationship between the Hudson's Bay Company and First Nations be preserved. The expectations of the Imperial Crown in passing the Rupert's Land Order are better understood from the language used by then Colonial Secretary Lord Granville writing on April 10, 1869 to the Dominion of Canada, which can be interpreted as a Crown obligation to maintain and protect the livelihood of First Nations:

> That Government has never sought to evade its obligations . . . I am sure that they will not do so in the present case, but that the old inhabitants of the Country will be treated with such forethought and consideration as may preserve them from the dangers of the approaching change. . .

> I am sure that your Government will not forget the care which is due to those who must soon be exposed to new dangers, and in the course of settlement be dispossessed of the lands which they are used to enjoy as their own, or be confined within unwontedly narrow limits.
>
> -Arthur J. Ray, Bounty and Benevolence, at 51-52 **[Intervener's Tab 11]**

16. The Dominion of Canada assumed the obligations that accompanied the Imperial government administered by the prior to 1870 by the Dominion's assumption of the obligations to First Nations that the Company had undertaken as the Imperial Crown's local government. The relationship of care and protection was not solely a matter of concern to the Imperial Crown prior to the transfer, but was an important matter of the relationship between the Company and First Nations. The legal advisers of the Company had advised during the negotiations of the transfer that "there were a great many Indians under the care of the Company and it was necessary that provision be made in the surrender for the compensation of the claims of the Indians to the lands required for settlement", connecting the Company's responsibilities pre-1870 for the livelihood of First Nations to the compensation for Aboriginal title.

-Arthur J. Ray, Bounty and Benevolence, at 53 **[Intervener's Tab 11]**.

C. Treaties and Securing a Future Livelihood

17. By the numbered treaties, and particularly Treaty No. 5 to which the Appellant is signatory, the Crown sought to open up the North-West Territories (which then comprised what is now Manitoba and western Canada) west from the Lake of the Woods to the Rocky Mountains for European settlement. To do so, the Crown undertook to assure the First Nations of "peace and goodwill" and of Her Majesty's "bounty and benevolence", based on the Crown's view that its pre-Confederation policies adopted in negotiations and dealings with First Nations were established for the care and well-being of the livelihood of First Nations:

> It is called the North West Angle Treaty, No. 3 . . . The liberal treatment of the Indians, and the solicitude for their well-being everywhere manifested throughout this treaty, are the outgrowth of that benevolent policy which before Confederation attained its highest excellence in Upper Canada . . It is a matter of gratulation that a policy so liberal as that adopted in Ontario is being pursued in the North-West territories, and that the Indians there, provided they turn to the cultivation of their extensive resources, or the raising of stock, may become prosperous and contented.
>
> -*R. v. St. Catherines Milling Co.* (1885) 10 O.R. 196 Ontario Chancery in Canadian Native

Law Cases, Brian Slattery et al 1870-1890, at 393-394 **Intervener's Tab 12]**.

18. Instructions were provided to the Rupert's Land Lieutenant Governor W. McDougall on September 28, 1869 to report to the Dominion of Canada on the system used by the Company in dealing with First Nations, continuing the relationship that the Company had with First Nations in western Canada.

-Frank Tough, supra, at 76 to 78 **Intervener's Tab 2]**.

19. The foundation for the Dominion of Canada entering into the numbered or western treaties and their adhesions is found in the *Royal Proclamation of 1763* and the *Rupert's Land Order* of 1870, which required compensation for the alienation of Aboriginal title to the Crown. It is recorded that a driving force for the entering into of Treaties from the position of the First Nations negotiators was the destruction of the resource base due to the over-exploitation that occurred due to the fur trade competition between 1760 and 1870.

-Indians in the fur Trade: their role as trappers, hunters and middlemen in the lands southwest of Hudson Bay 1660-1870, Arthur J. Ray (1974) University of Toronto Press, at 117, 228 **[Intervener's Tab 13]**.

20. The numbered treaties included the promise that the government would look after the welfare of First Nations and help in adjusting to changing economic conditions rooted in part to the obsolete specialization that occurred during the fur trade. Further, in response to queries from First Nations in the negotiation of Treaty No. 4 regarding the lack of consent for the transfer of Rupert's Land, and their request that the debt of First Nations people at the Company stores be eliminated, Lieutenant Governor of Manitoba and Treaty Commissioner Alexander Morris confirmed the obligations of the Crown to provide funds to First Nations and provide assistance in time of need:

> All we can do is put money in your hands and promise to put money in the hands of those who are away, and give you money every year afterwards, and help you to make a living when the food is scarce.

-Arthur J. Ray, Bounty and Benevolence, at 111 **[Intervener's Tab 11]**

21. There is some evidence that the Cree First Nation at Norway House wished to enter into treaty with the Crown in order to alleviate the impacts of the land no longer being able to provide for a livelihood as "the country is becoming too thickly peopled to find a sufficiency of the necessities of

life to prevent much suffering among them in the future" since the York Boat trips to York Factory were to cease operating from which the Norway House Cree earned a living, clothing and food from the Company.

-Arthur J. Ray, Bounty and Benevolence, supra at 121-129 **[Intervener's Tab 11]**.

22. Alexander Morris determined that a treaty should be entered into at Norway House as they wished to relocate to the western shore of Lake Winnipeg at Fisher River for the purposes of pursuing a farming livelihood. The Chief of the Oxford House First Nation had made a similar request to Treaty Commissioner Reid in 1876 that they wished to be treated with because they wished to pursue agriculture, due to the difficulty they were having in "procuring a livelihood". Treaty No. 5 was signed at Berens River (September 20, 1875), Norway House (September 24, 1875) despite the declarations of Alexander Morris, then Lieutenant Governor of the North-Western Territory and Treaty Commissioner for the negotiation of Treaties No. 1 through 6, recommended in 1873 and 1874 that it was not necessary to negotiate a treaty in the areas around Lake Winnipeg as the lands were not required for settlement.

-Frank Tough, supra, 78 to 81, Figure 4.1 at 77 **[Intervener's Tab 2]**.
-The Treaties of Canada with the Indians of Manitoba and the North-Western Territories including The Negotiations on which they were based, Alexander Morris, Toronto, 1880 at 143-152, 167 **[Intervener's Tab 14]**.

22. The Crown's written version of Treaty No. 5 reveals several areas which are that the Crown assured First Nations "of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence", to "lay aside reserves for farming lands", schools for instruction, "a present of five dollars for ea current subject matter of current funding arrangements between the Department of Indian Affairs and First Nations. Treaty No. 5 included treaty obligations to provide an annuity to every man, woman and child, "the sum of five hundred dollars per annum shall be yearly and every year expended by Her Majesty in the purchase of ammunition, and twine for nets", various extensive agricultural implements, a school whenever the Indians shall desire it, the salary of Chief and other officers, and "each Chief shall receive, in recognition of the closing of the treaty, a suitable flag and medal." At Grand Rapids, an outside promise is reflected in the agreement of the Treaty Commissioners to provide aid and assistance for the relocation and construction of housing, which is now part of the current funding arrangements with the Crown. These funding of these treaty

promises are reflected in the current funding arrangements with First Nations.

> -Articles of a Treaty made and concluded at Berens River the 20th day of September, and at Norway House the 24th day of September, 1875, between Mer Most Gracious Majesty the Queen of Great Britain and Ireland, and the Saulteaux and Swampy Cree Tribes of Indians ("Treaty No. 5") **[Intervener's Tab 15]**.
> -Alexander Morris, supra, at 145 **[Intervener's Tab 14]**.

23. The promises in the treaties were consistent with constitutional obligations undertaken by the Dominion of Canada to non-treaty First Nations, which may explain the reason for the inclusion of varying terms between the different numbered treaties.

> -Treaty No. 5 **[Intervener's Tab 15]**
> -Kent McNeil, at 346 **[Intervener's Tab 4]**.
> -Indian Treaty Making Policy in the United States and Canada, 1867-1877, Jill St. Germain (University of Toronto: 2001) at 51 - 53, 58, 117-118, 123-124 **[Intervener's Tab 16]**.

24. Both the First Nations and the Crown proceeded to implement the treaty promises as early as 1875 regarding the terms pertaining to earning a livelihood. In Treaty No. 4 the disputes arising regarding the problems interpreting the agricultural provisions of the written text confirmed that the agricultural provisions of the treaties were acted upon, despite the nonsensical limitations and interpretations placed on the provisions by the Crown which required First Nations to be cultivating the lands prior to receiving assistance from the Crown in the form of the tools and implements to do the cultivating. Evidence that the Crown and First Nations proceeded to implement the education terms of Treaty No. 5, in order to assist First Nations with pursuing the livelihoods of the Europeans, among other things, was affirmed by Treaty Commissioner Alexander Morris writing to the Minister of the Interior:

> The Grand Rapids, Pas and Cumberland, are in a position to receive at once from the Government the grant allowed for the maintenance of schools of instruction; at the Grand Rapids a large schoolhouse is by this time entirely completed; and at the Pas and Cumberland, schools, under the charge of the Church Missionary Society, have been in existence for some years. The Indians belonging to the bands I have named desired that the assistance promised should be given as soon as possible.

> -Alexander Morris, supra, at 163 **[Intervener's Tab 14]**.
> -Vic Savino "Whenever the Indians of the Reserve Should Desire It": An Analysis of the First Nation Treaty Right to Education Man. L.J. 476 at 486-487 **[Intervener's Tab 17]**.
> -Kent McNeil, supra, at 346 **[Intervener's Tab 4]**.

25. The adhesions signed between 1908 and 1910 were made at the request of First Nations, some of which had been requesting treaty since 1876 due to poor economic conditions, the declining fur trade, and the encroachment in their territory of surveyors and the impending railroad to Churchill, and in some cases destitution and starvation. Those adhesions were signed from 1908 to 1910 with the First Nations of northern Manitoba, including the adhesion signed by the God's Lake First Nation on August 6, 1909.

-Frank Tough, supra, 99 to 106, figure 5.1 at 107 **[Intervener's Tab 2]**.

D. The Protections in the Statutory Regime

26. The pre- and post-confederation statutes protecting First Nations property were extensive and broad in their scope and protected the presents and annuities received by First Nations as well as the property purchased with those annuities, under or by virtue of any process whatsoever.

27. The first enactment in 1850 regarding the protection from seizure the property "to the common use and benefit" of First Nations was enacted prior to the numbered treaties, in the third session of the third Provincial Parliament of Canada. The protections afforded in this act were very broad in scope and protected funds received by First Nations from attachment without regard to location or how the benefits were received. This statute is one of the first assumptions of the Dominion of Canada of it fiduciary and trust responsibility towards First Nations.

> And whereas certain tribes of Indians in Upper Canada receive annuities and presents, which annuities, or portions thereof, are expended for and applied to the common use and benefit of the said Tribes, more especially for the encouragement of agriculture and other civilizing pursuits among them, although the articles so required or purchased out of such annuities, may be and often necessarily are, in the possession or control of some particular Indian or Indians of such Tribes, and it is important with a view to the progress and welfare of such Tribes, that the property thus acquired or purchased should be protected from seizure, distress or sale, under or by virtue of any process whatsoever: Be it therefore enacted, That none of such presents or of any property purchased or acquired with or by means of such annuities, or any part thereof, or otherwise howsoever, and in the possession of any of the Tribes or any of the Indians of such Tribes, shall be liable to be taken, seized, or distrained for any matter or cause whatsoever.

-*An Act for the protection of the Indians in upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury* (the "1850 Act"), 14 Vict Cap. 74 at 1409 [10th August 1850] **Intervener's Tab 18]**.

-Leonard I. Rotman, supra, at 69 **Intervener's Tab 1**].

28. In the enactment of the 1876 Indian Act it was contemplated by Parliament that there First Nations in the Dominion of Canada who were not signatory to treaty but which were subject to the Crown's obligations and responsibility under section 91(24) of the *Constitution Act, 1867*. Similar to many First Nations in other parts of Canada today, First Nations in northern Manitoba received the benefits of federal responsibility without the signing of a treaty.

-*Indian Act*, 1876, s. 10 **[Appellant's Tab 6]**

E. Assistance and Presents

29. The meaning of the annual presents and gifts as a bounty from the Imperial Crown can be understood in the context of pre-Confederation and pre-treaty history, as a provision for the basic human rights of First Nations in equity with the Queen's other subjects. The correspondence of the Committee of the Executive Council of Lower Canada, looking into the workings of the Indian Department in 1837, indicated that it "forbid the discontinuance of the presents until the Indians shall be raised to a capacity of maintaining themselves on an equality with the rest of the population of the Province" except in rare cases of First Nations "independent of such aid".

-Canada: An Encyclopedia of the Century, J. Castel Hopkins, Vol. 1, 1898 (Toronto) at 277-279 **[Intervener's Tab 19]**.

30. It is noted that in 1870, prior to the numbered treaties, the Company had observed the importance to the Cree of benefits being provided to the Lakota (Sioux) Nation. At or around the time when Manitoba was being created as a province and the sale of Rupert's Land being finalized, it was observed by the Governor of the Hudson's Bay Company Sir Stafford Northcote that the

> Sioux were mustering between the Portage and the Turtle Mountains, and they had only been kept in good humour by considerable presents. The Crees on the other side, were exasperated at the idea of advantages being given to other tribes than themselves.

Despite this being a distinctly Euro-centric account of the usefulness of presents in Manitoba, as it then was, it reflects the significance of presents in Crown - First Nations relations where no treaty had been signed.

-The Ottawa Diary of Sir Stafford Northcote in Manitoba: The Birth of a Province, W.L. Morton (ed.) University of Manitoba (1965), at 94 **[Intervener's Tab 20]**.

31. The exchange of presents, as distinct from the provision of aid and benefits, had a number of features:

- it was an adoption of Aboriginal practices at the signing of the numbered treaties where gift giving was a required obligation as a sign of good faith and trust in the bargaining process;
- Gift giving was an important component of the customary acts of maintaining the trading relationship at York Factory;
- a trading captain may be provided with a captain's outfit prior to trading beginning, medicine man's gifts if appropriate, and parting gifts;
- Company factors also regarded generosity and aid as important virtues of the First Nations society they were trading with to be considered in their Company trading strategies, as a means of securing a continuing trading relationship;
- the Treaty Medal, which also is the logo of the Manitoba Keewatinook Ininew Okimowin, shows the handshake of the Chief and the Treaty Commissioner;
- gifts were a normal part of concluding important communications, regarding promising or postponing treaty negotiations;
- presents were a form of obligation in deal-making with First Nations, as evidenced from representatives of Lord Selkirk (purportedly granted portions of Rupert's Land from the Company on June 12th, 1811) who were instructed in 1811 to be prepared to use presents and gifts as a form of treaty in order to obtain the friendliness of First Nations and if necessary, for the purchase of land by the payment of annuities rather than lump sum.

-Arthur J. Ray, Bounty and Benevolence, supra, at 135 **[Intervener's Tab 11]**.
-Jill St. Germain, supra, at 58 **[Intervener's Tab 16]**
-Grant of the District of Assiniboia by the Hudson's Bay Company to Lord Selkirk, June 12th, 1811 in The Canadian North-West: Its Early Development and Legislative Records Vol. 1, Prof. E.H. Oliver (ed.), (1914, Ottawa) at 154 **[Intervener's Tab 21]**.
-Instructions to Miles MacDonell, 1811 (Dominion Archives, Selkirk Papers, in Prof. E.H. Oliver, Ibid, at 168-174 **[Intervener's Tab 22]**.

F. Evolution of Aid and Assistance from the Crown

32. The benefits and entitlements in the current funding arrangements between First Nations and the Crown have evolved from the original Crown treaty promises, and other obligations of the Company as the Imperial Crown's representative in Rupert's Land and First Nations. When the governance of Rupert's Land transferred from the Imperial Crown to the Dominion of Canada in 1870, the Dominion of Canada had undertaken to continue to its obligations to provide for the benefit of First Nations in the North-Western Territory.

33. The transformation of aid and assistance from the days of governance by the Company and its use of relief such as food to ensure hunters and trappers were obtaining furs for trade, created a "pattern of trade dependency and credit advances was probably the strongest influence on federal

government attitudes towards Indian relief". An example of Company relief included a practice used in the late 1800's whereby the Company is noted to have provided benefits and forms of aid to First Nations in the form of a reduced First Nations debt of 100 *made beaver rate* or "MB" to 75 MB, and written off bad debts to First Nations after one year in order to secure trade with the First Nations.

> -"Give Us Good Measure": an economic analysis of relations between the Indians and the Hudson's Bay Company before 1763, Arthur J. Ray et al (1978) University of Toronto, at 58-62, 63-69, 226-228, 241-243 **[Intervener's Tab 23]**.
> -*"Periodic Shortages, Native Welfare, and the Hudson's Bay Company, 1670 - 1930"*, Arthur J. Ray in Out of the Background: Readings on Canadian Native History (2nd ed.), Ken S. Coates et al (eds.)(1998) Irwin Publishing, at 85 and 92 **[Intervener's Tab 24]**.
> -"Enough to Keep Them Alive": Indian Welfare in Canada, 1873-1965 Hugh Shewell (2004) University of Toronto Press, at 25 to 35, 39 - 46, 63 - 65, 89 - 92 **[Intervener's Tab 25]**.

34. Since aid and assistance as a Crown and Company obligation predated the signing of the numbered treaties in western Canada, the protections provided by the Crown from the seizure of presents and annuities cannot be interpreted solely as a reference to treaty terms. The fact that aid and assistance similar to modern welfare aid was not the accepted function of state especially in North America during the middle of the 1800's, the promises made to First Nations by the treaties and other obligations in the 1800's affirms that these were distinct and *sui generis* to the Crown - First Nations relationship.

35. As the use of annuities and monies as benefits and entitlements were often paid to First Nations from their own funds from the sale of their land and resources, and administered by the Indian agent in the Crown's trustee obligation, it is clear that the terms annuities and presents were not terms employed solely to describe treaty relations but also described the assumption by the Crown of both control over and the obligation for administering support to First Nations. These terms are remarkably similar to the obligations undertaken in modern financial agreements between First Nations and the Crown.

36. In exercise of the Crown's trustee obligations, the Dominion of Canada imposed on First Nations's use of money the controls in the Indian Act and the employ of Indian agents as "guardians of the Indians entrusted to their immediate care". Much of the assistance provided by the Department

of Indian Affairs evolved to a purpose of economy in distribution of its treaty and Indian Act obligations, reserving aid for the "actual necessaries of life". The Department and Indian agents were generally swayed by the liberalism of the 20th century that promoted self-sufficiency and fought against providing aid and assistance for fear of fostering dependence.

-A Fatherly Eye: Indian Agents, Government Power, and Aboriginal Resistance in Ontario, Robin Jarvis Brownlie, 1918-1939, Oxford University Press (2003), at 34-45, 104-110, 122-123 **[Intervener's Tab 26]**.

37. The Crown had full control over the use and payment of all expenditures of First Nations from the First Nation's own funds earned by the First Nation from the sale or lease of their reserve lands, timber sales, or other resources. When the assimilation goals of the Department were failing in the 1920's, the interim goal of the Crown became "making the Indians self-supporting" which was sought by the support of First Nations band projects from annuities and monies paid from their own funds held in trust in Ottawa. The source of the trust funds included a portion of the funds received from treaty annuities, land settlements and other sales, while the Crown appropriated portions for its own costs. These funds were also expended for a system of rationing to assist the destitute and the use of an Indian Trust Fund from the sale of reserve lands for the distribution of cash, for agricultural operations, the erection of houses and other material advantages.

-Canada and Its Provinces, Vol. V, (Toronto: 1913)Adam Shortt et al (Eds.) at 334-336 **[Intervener's Tab 27]**
-Shortt, Ibid, Vol. VII, at 600-609 **[Intervener's Tab 28]**.
-Robin Jarvis Brownlie, supra, at 34-41 **[Intervener's Tab 26]**.

38. The types of benefits received by First Nations in the numbered treaties were also provided to non-treaty First Nations, confirming that the source of such annuities also originated from the Crown's other obligations to First Nations. A trust account system for the payment of annuities to the First Nation from its own funds was used in the Lower Canada Indian Fund established in 1872 for providing the non-Treaty Montagnais with funds appropriated by Parliament for the purchase of seed grain and agricultural implements, relief of aged and destitute, medical attendance, aid to missionaries, and salaries for schools teachers and aid to school buildings.

-Shewell, supra, at 41- 46, 63 - 65 **[Intervener's Tab 25]**.

39. The modern history of the transformation of aid and assistance from the time of the signing of the treaties to the entering of funding arrangements with First Nations defeats the assumption of

ethnologists that aid and assistance to First Nations began in the 1940's after the decline of the fur trade. Such an assumption does not adequately appreciate the history of First Nations - European economic transformations rooted in the practices of the fur trade during the time period of 1670 - 1930, during which the Crown's obligations for the provision of "bounty and benevolence" continued while the forms of aid and assistance evolved:

- aid and assistance did not form part of formal Departmental policy during the Depression of the 1930's;
- by the 1940's the Government of Canada had assumed most of the direct responsibility and obligations for health, education and welfare needs of First Nations, similar to the subject matter of current funding agreements;
- the transformation of the form of assistance, from annual treaty annuities, food relief and housing to the new family allowance program of the 1940's, transformed the nature of aid and assistance and affected the relocation of Cree and Dene to reserve lands in order to receive monthly payments;
- In the 1950's The Pas Agency administering Treaty No. 5 benefits set up trust accounts at banks off-reserve in downtown Winnipeg;
- by the 1960's First Nations were administering the aid provided by government programs and services on a budget and grant process, including housing, education and water and sewer installations
- correspondence from the Superintendent of the Norway House Agency to Norway House and Cross Lake First Nations in 1968 evidences that First Nations were taking over program and services;
- health contribution agreements between the Crown and First Nations were designed mechanism to assist First Nations in greater control over program delivery in the 1970's;
- The origin of the comprehensive funding agreement was in 1984 and multi-year funding agreements in 1986;

-Arthur J. Ray, "Periodic Shortages", supra, at 97 **Intervener's Tab 24]**.
-Shewell, supra, at 84 **[Intervener's Tab 25]**.
-The Canadian Fur Trade in the Industrial Age, Arthur J. Ray at 220 **[Intervener Tab 29]**.
-Frank Tough, supra note 8, at 308 **[Intervener's Tab 2]**.
-From Wooden Ploughs to Welfare: Why Indian Policy Failed in the Prairie Provinces, Helen Buckley (1992) McGill-Queen's University Press, at 69, 77, 101 **[Intervener's Tab 30]**.
-Letter dated April 26, 1968 from S. Killen, Norway House Agency Superintendent to Norway House and Cross Lake Chiefs and Councillors **Intervener's Tab 31]**.
-Letter dated December 2, 1957 from Superintendent Island Lake Agency to Regional Supervisor and Letter dated December 10, 1957 from Regional Supervisor to Indian Affairs Branch, Ottawa **[Intervener's Tab 32]**
-Annabelle Dionne, Historic Context of Agreements, Department of Indian Affairs website

[Intervener's Tab 33.
-Funding Agreements, Department of Indian Affairs website **[Intervener's Tab 34]**.
-Contribution Agreement, Health Canada website **[Intervener's Tab 35]**.

G. The Meaning of the Mitchell Decision

40. In *Mitchell v. Peguis Indian Band*, the primary issue the Court was asked to decide was whether section 90 applied to the provincial Crown or the federal Crown and not the history and purposes of the phrase "treaty or agreement". Nonetheless, LaForest J. for the Court found that the very types of funding of treaty obligations in current CFAs for assistance in spheres such as", were found to be protected by section 90(1)(b).

41. In finding that only treaties and ancillary agreements fall within section 90(1)(b), LaForest J. based this conclusion on the assumption that all monies provided by the Crown for "education, housing, and health and welfare" were paid pursuant to treaty obligations such that

> the protection against attachment ensures that the enforcement of civil judgments by non-natives will not be allowed to hinder Indians in the untrammelled enjoyment of such advantages as they had retained or might acquire pursuant to the fulfilment by the Crown of its treaty obligations . . . albeit through an indirect route, to the alienation of the Indian land base.

His intention was to protect all monies paid from the federal Crown, without an exhaustive analysis of the treaty versus other obligations owed by the Crown, and without an historical analsysis, concluding:

> I am aware of no historical evidence that would suggest that Indians ever expected that their ability to derive the full benefit of this property could be placed in jeopardy because of the ability of non-natives to impose liens or taxes on it every time it was necessary to remove this property from the reserve.
> -*Mitchell v. Peguis Indian Band*, 2 S.C.R. 85 at para 86, 96 ("*Mitchell*") **[Appellant's Tab 8]**

42. In *Mitchell* LaForest J. did not engage in the discussion engaged in by Dickson C.J. (writing for himself only) in finding that the ejusdem rule of statutory interpretation should not prevail over principles of liberal construction in "favour of the Indians". Regarding the reading of "treaty" and "agreement" ejusdem, Dickson C. J. noted that this argument was "not argued explicitly before this Court" and that each of the cases prior to *Mitchell* that have found to be within section 90(1)(b) have "indeed involved agreements with the federal government".

-*Mitchell*, supra, at paragraph 42 **[Appellant's Tab 8]**.
-*Nowegijick v. Canada*, [1983] 1 S.C.R. 29 **[Respondent's Tab 7]**

43. In considering section 90(1)(b) in *R. v. Williams*, the judgment of the Tax Court (as referred to in *Mitchell*, not overturned on this point on appeal by this Court in the appeal in *R. v. Williams*), found that the benefits paid pursuant to the unemployment insurance agreement and were "paid in accordance with an agreement between the Band and Her Majesty". The Tax Court found for the purposes of section 90(1)(b) that there is no reason to distinguish an agreement for the payment of unemployment insurance from the funding of education as a treaty right (based on the agreed statement of facts in *Greyeyes v. The Queen*).

-*R. v. Williams* [1989] 1 C.N.L.R. 185 ("*Williams (Tax Court)*") **[Intervener's Tab 36]**
-*R. v. Williams* [1992] 1 S.C.R. 877 ("*Williams*") **[Appellant's Tab 17]**
-*Greyeyes v. The Queen* [1978] 2 F.C. 385 **[Appellant's Tab 5]**

H. The Crown's Constitutional and Treaty Obligations

44. Courts have in the past recognized the importance of treaty rights including taking judicial notice of the Crown's written version of the treaties, including for the purpose of resolving disputes over the jurisdiction of the court. Courts have also resolved matters of financial obligations by resorting to the Crown's written version of the treaties.

-*Wuskwi Sipihk Cree Nation v. Canada*, [1999] F.C.J. No 82 ("*Wuskwi Sipihk*") **[Intervener's Tab 37]**
-*Dreaver v. The King* (1935) in Slattery and Stelck *Canadian Native Law Cases*, Vol. 5 at 92 (previously unreported) Exchequer Court of Canada ("*Dreaver*") **[Intervener's Tab 38]**

45. In the case at bar this Court can take judicial notice of the historical context which connects benefits and entitlements paid pursuant to modern CFAs and other forms of agreements with the Crown's constitutional responsibility and obligations originating in the *Royal Proclamation of 1763*, section 91(24) of the *Constitution Act, 1867*, the *Rupert's Land Order of 1870* and Treaty No. 5 and the numbered treaties, recognized and affirmed by section 35 of the Constitution Act, 1982.

-*Sioui*, **[Appellant's Tab 14]**
-Treaty No. 5 **[Appellant's Tab 15]**

46. A finding that the implementation of the Crown's state obligations through funding arrangements would not be protected by sections 89 and 90(1)(b) from encroachment would be

inconsistent with the fiduciary relationship, section 35, and the trust and honour of the Crown owed to First Nations.

47. The withdrawal or erosion of the Crown's funding obligations to the Crown to First Nations may in certain circumstances constitute an infringement of section 35 of the *Constitution Act, 1982*:

> If withdrawal of an entitlement threatened the ability of an Aboriginal community to maintain culturally distinct ways of life, it might in some circumstances constitute an infringement of section 35.

The Crown further has a trust and fiduciary obligation, in keeping with the honour of the Crown, to protect First Nations lands and the ability of First Nations for the enjoyment of those lands, with constitutional protections from encroachment, arising in part from the constitutional obligations of the Crown on the admission of Rupert's Land into the Dominion of Canada.

> -Indigenous Difference and the Constitution of Canada, Patrick Macklem (2001) University of Toronto Press, at 249 **Intervener's Tab 39**].
> -Kent McNeil, supra, at 309 **[Intervener Tab 4]**.
> -Leonard Rotman, supra, 258-60 **[Intervener Tab 1]**.
> -*Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 **[Intervener Tab 40]**.

48. The courts in Canada found a treaty obligation of the Crown to funds modern medical benefits in the case of Treaty No. 6, and the treaty right to education has been fleshed out In Treaty No. 11. This Court has been clear that it will resolve the nature of existing constitutional obligations of the Crown protected by section 35 of *The Constitution Act, 1982* by interpreting the understanding of the parties to the treaty in its historical context.

> -Treaty No. 6, *Between Her Majesty The Queen and The Plains and Wood Cree Indian and other Indians at Fort Carlton, Fort Pitt and Battle River* ("Treaty No. 6") **[Intervener Tab 41]**
> -*Dreaver*, supra, **[Intervener Tab 38]**
> -*Beattie v. Canada* [1998] 1 F.C. 104 **[Intervener Tab 42]**
> -*R. v. Marshall; R. v. Bernard* 2005 SCC 43 **[Intervener Tab 43]**

49. Recognizing that treaty terms are often framed in very general terms, the Respondent's interpretation of sections 89 and 90(1)(b) makes it virtually impossible for a First Nation to argue and substantiate a treaty obligation in each and every garnishment application before the courts pertaining to CFA funds, exacerbated by the limited availability of treaty rights and oral history evidence.

I. Continuation of Life *qua* "Indian" on Reserve

50. The findings of the Manitoba Court of Appeal that the Appellant pledged its CFA funds to its bank as collateral reminds of the necessity First Nations face in providing essential public services with insufficient funds, in order to continue to exist on their reserve land base. Scholars have observed that "the situs of a debt is not obviously relevant to the location of a statutory obligation of a federal agency to pay social benefits".

> -*McDiarmid Lumber Ltd. v. God's Lake First Nation* 2005 MBCA 22
> -Martha O'Brien, 1577 to 1580, 1588-91 **[Respondent's Tab 8]**.

51. Situating CFA funds off reserve because the Appellant's bank does not have a branch in the remote community of God's Lake or on reserve in Manitoba renders an absurd result.

> -*McDiarmid Lumber Ltd. v. God's Lake First Nation* 2004 MBQB 156, at para 73
> -*Williams,* SCC supra, **[Appellant's Tab 17]**
> -Peace Hills Trust website **[Intervener Tab 44]**

CONCLUSION

52. The Crown has a fiduciary and treaty obligation to protect the property of First Nations and to protect the benefits and entitlements of First Nations received through Crown constitutional and treaty obligations. These obligations are of a solemn nature at the core of the First Nations - Crown relationship. The Crown's treaty promises and its constitutional obligations are honoured by the Crown through various funding arrangements with First Nations, including comprehensive funding arrangements.

53. Either "education, housing and health and welfare" payments from the Crown are treaty obligations, or they are paid pursuant to the Crown's constitutional obligations to First Nations. The Crown intended in the enactment of the present section 90(1)(b) as it first was in 1850 to protect the entitlements of First Nations for the communal welfare and progress of the First Nation. Based on the history of Crown - First Nations relations and the constitutional obligations adopted by the Crown from the Company and the Imperial Crown with the transfer of Rupert's Land, all funds from the Crown intended for the welfare and human rights of its people are to be protected from attachment from non-aboriginal creditors. Funds provided in the treaties for education are treaty obligations of the Crown which are protected from attachment regardless of whether a liberal or narrow

interpretation of "treaty or agreement" in section 90(1)(b) is taken. If a more liberal approach is taken to the interpretation of sections 90(1)(b) and 89, then it is proper to interpret all funds received from the Crown pursuant to its constitutional obligations to be exempt from attachment.

54. Allowing the Appellant's appeal and finding all funds provided by the Crown to First Nations for the provision of essential public services would be consistent with the Crown's fiduciary, treaty and constitutional obligations to First Nations and the tenor of this Honourable Court's decision in *Mitchell* and the honour of the Crown. *This finding would also be consistent with* intergovernmental transfers of public funds for essential public services and human rights on reserve being treated as exempt from attachment as they would be in the hands of any other government in Canada. ,

PART IV - SUBMISSIONS CONCERNING COSTS

55. None.

PART V - ORDER REQUESTED

56. It is respectfully submitted that the appeal be allowed.

ALL OF WHICH IS RESPECTIVELY SUBMITTED.

P. MICHAEL JERCH
Counsel for the Manitoba Keewatinook Ininew Okimowin

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