Date: 20090424

Docket: T-108-07

Citation: 2009 FC 391

Montreal, Quebec, April 24, 2009

PRESENT: The Honourable James K. Hugessen

BETWEEN:

THE ROSS RIVER DENA COUNCIL
a "band" within the meaning of the *Indian Act*,
with offices located in Ross River, Yukon

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

I. Introduction

[1] The plaintiff has seized the Court with a motion for partial summary judgment seeking a declaration that the lands set aside by notation in the land records of the Northern Affairs Program of the Department of Indian and Northern Affairs in the claimed traditional territory of Ross River are "Lands reserved for the Indians" under subsection 91(24) of the *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3. The action as framed seeks a number of other conclusions and it is not evident that the granting of partial judgment would necessarily shorten or obviate the need for a trial.

II. Background

[2] The plaintiff, the Ross River Dena Council is recognized as a "band" within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5. It is now located at Ross River, Yukon Territory, on lands which it claims are located on "Lands reserved for the Indians" within the meaning of the second part of subsection 91(24) of the *Constitution Act*.

[3] The Government of Canada takes the position that the Band is located on "lands set aside" for Indians but that those lands not only do not have the status of a "reserve" under the *Indian Act* but also do not fall within the different but less clearly defined category of "Lands reserved for the Indians".

[4] In the 1950s, members of the Band were allowed to settle on the site of what is now their village, there being no treaty governing the lands. Various administrative discussions and actions with respect to the status of the community took place between 1953 and 1965. In subsequent litigation, in which the band sought a judicial finding that the land in issue was a "reserve" within the meaning of the *Indian Act* but was ultimately unsuccessful in the Supreme Court of Canada, (see *Ross River Dena Council Band v. Canada*, [2002] S.C.R. 816, 2002 SCC 54), that history was summarized as follows:

> **14** After a long history of being shifted or pushed from place to place since the predecessors of the Department of Indian Affairs and Northern Development ("DIAND") took them under its wing, in the 1950s, at long last, the members of the Ross River First Nation were allowed to settle down on the site of what is now their village, located at the junction of the Pelly

and Ross Rivers. The lands in dispute in this case are not governed by treaty, as the Yukon Territory belongs to those regions of Canada where the treaty-making process with First Nations had very little practical impact, particularly in respect of the creation of reserves. (See *Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 2, *Restructuring the Relationship*, Part 2, at pp. 479-84.)

15 Despite the absence of a treaty, the agents of the Department in the 1950s knew that the Band was living on the shores of the Ross River. The acknowledgement of this fact triggered a process of administrative discussion and action which led or not to the creation of a reserve on this site. By letter dated October 21, 1953, the Superintendent of the Yukon Agency sought the permission of the Indian Commissioner for British Columbia to establish an Indian reserve for the use of the Ross River Indians. By letter dated November 10, 1953, the Indian Commissioner for British Columbia supported the recommendation. On April 1, 1954, the Superintendent of the Yukon Agency wrote to the Dominion Lands Agent in Whitehorse to advise that tentative arrangements had been made to apply for a tract of land for an Indian reserve at Ross River; Ottawa did not act on the request.

16 On May 4, 1955, the federal Cabinet issued a procedural directive entitled Circular No. 27 which set out an internal government procedure for reserving lands in the territories for the use of a government department or agency. In 1957, the federal government decided to dismiss the recommendation to establish 10 reserves. On November 27, 1962, the Superintendent of the Yukon Agency applied to the Indian Affairs Branch (then in the Department of Citizenship and Immigration) to reserve approximately 66 acres of land under s. 18 of the *Territorial Lands Act*, R.S.C. 1952, c. 263, to be used for the Ross River Indian Band Village site. Correspondence was then exchanged over the following three years with respect to the proposed size and location of the site. On January 26, 1965, the Chief of the Resources Division in the Department of Northern Affairs and National Resources advised the Indian Affairs Branch that the site had been reserved for the Indian Affairs Branch. The letter was entered in the Reserve Land Register pursuant to s. 21 of the *Indian Act*, R.S.C. 1952, c. 149. It was also recorded in the Yukon Territory Land Registry of the Lands Division of the former

Department of Northern Affairs and National Resources.

17 The Band takes the view that this administrative process, combined with the actual setting aside of land for its benefit, created a reserve within the meaning of the *Indian Act*. It appears that this opinion was not shared either by the Yukon territorial government or the Indian Affairs Branch. The dispute may have remained dormant for a while. It broke into the open and reached the courts on the occasion of a problem concerning the applicability of tobacco taxes.

18 The respondent Government of Yukon had imposed taxes on the Band under the *Tobacco Tax Act*, R.S.Y. 1986, c. 170. The Band claimed an exemption and asked for a refund of taxes already paid on tobacco sold in the village. It asserted that the Government of Yukon was taxing personal property of an Indian or of a band on a reserve, which was exempt pursuant to s. 87(1) of the *Indian Act*. The Government of Yukon refused to make the refund because it did not recognize that the Band occupied a reserve. According to the Yukon government, the Band was merely located on lands which had been "set aside" for its benefit by the Crown in right of Canada. The federal government gave full support to this position and subsequently fought the claim of the appellants as to the existence of a reserve.

19 In the meantime, negotiations were taking place in the Yukon with respect to the land claims and rights of First Nations. An agreement known as the "Umbrella Final Agreement" was entered into by the Council for Yukon Indians, the Government of Yukon and the Government of Canada in 1993. It is a framework agreement which provides for its terms to be incorporated into subsequent agreements with individual First Nations. According to the Yukon government, seven of these agreements are now in force, dealing, among other topics, with land "set aside" and not part of a reserve. The Band chose to remain outside this process of treaty negotiation pending a decision from the courts regarding whether a reserve was created pursuant to the *Indian Act*.

[5] The plaintiff has now seized the Court with this motion for summary judgment seeking a declaration that the lands set aside by notation in the land records of the Northern Affairs Program

of Department of Indian and Northern Affairs in the claimed traditional territory of Ross River are "Lands Reserved for the Indians" under subsection 91(24) of the *Constitution Act*. The evidence produced by the plaintiff on the present motion does not, however, in my view, add anything of substance to the facts as summarized above by the Supreme Court of Canada. I do not view the expressions of opinion argued by both sides during the hearing of this motion as to the reach and legal effect of certain acts and deeds as having any weight as evidence which might vary the conclusions reached by that Court.

[6] As indicated, the plaintiff Band's initial claim to have the subject land treated as a reserve within the meaning of the *Indian Act* was conclusively determined against them in the Supreme Court. Such a reserve would of course clearly and unambiguously fall within exclusive federal jurisdiction under subsection 91(24) of the *Constitution Act*. It is common ground, however, that that head of federal power also includes lands which, while not constituting reserves within the meaning of the *Indian Act*, have none the less been reserved for the Indians in such a way as to bring them within federal jurisdiction. It is that second category of federal Indian lands which underlies the plaintiff's present claim.

[7] While there was some disagreement in the Supreme Court as to whether the power to create reserves under the *Indian Act* derived entirely from the royal prerogative or had in part been displaced by either that statute or the then applicable provisions of the *Territorial Lands Act*, the Court was unanimous in finding that, on either view, there was insufficient evidence to show that, in

setting aside the lands in question, there had been an authoritative intention to create a reserve. The majority of the Court concluded as follows:

> **55** The appellants submit that statute has long since displaced the royal prerogative in the area of reserve creation. The first post-Confederation statute which dealt with Indians, *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, gave the Secretary of State authority to control and manage the lands and property of Indians and, in s. 3(6) of the *Indian Act, 1876*, defined a reserve to include any land "set apart by treaty or otherwise", implying that there were several ways by which a reserve could be created. The essential element then, and which continues today, is that the lands be set apart.
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> **56** Further, s. 18(d) of the 1952 *Territorial Lands Act*, the successor to the *Dominion Lands Act*, R.S.C. 1927, c. 113, repealed S.C. 1950, c. 22, s. 26, states that the Governor in Council may "set apart and appropriate such areas or lands as may be necessary to enable the Government of Canada to fulfil its obligations under treaties with the Indians and to make free grants or leases for such purposes, and for any other purpose that he may consider to be conducive to the welfare of the Indians". The appellants submit that this provision, in combination with the provisions discussed above in the *Indian Act*, has supplanted the royal prerogative.
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> **57** The respondents counter that s. 18(d) provides for the creation of a land bank from which the Crown may create reserves, but that it does not provide for the actual creation of reserves themselves. The respondents rely upon *Town of Hay River v. The Queen*, [1980] 1 F.C. 262 (T.D.), in which Mahoney J. stated in *obiter*, at p. 265, that "the authority to set apart Crown lands for an Indian reserve in the Northwest Territories appears to remain based entirely on the Royal Prerogative, not subject to any statutory limitation".
>
> **58** In my view, the statutory framework described by the appellants has limited to some degree but not entirely ousted,

the royal prerogative in respect of the creation of reserves within the meaning of the *Indian Act* in the Yukon. Whenever the Crown decides to set up a reserve under the *Indian Act*, at a minimum, s. 2(1) puts limits on the effects of the decision of the Crown in the sense that the definition of a "reserve" in the *Act* means (1) that the title to reserve lands remains with the Crown, and (2) that the reserve must consist of lands "set apart" for the use and benefit of a band of Indians. If the royal prerogative were completely unlimited by statute, the Crown would essentially be able to create reserves, in any manner it wished, including the transfer of title by sale, grant or gift to a First Nation or some of its members. However, in the Yukon, so long as the Crown intends to create a reserve as defined by the *Indian Act*, Parliament has put limits on the scope and effects of the power to create reserves at whim, through the application of the statutory definition of a reserve in s. 2(1). If the Crown intended to transfer land to a First Nation outside the scope of the *Indian Act*, the role and effects of the prerogative would not be constrained by this Act and would have to be examined in a different legal environment.

59 Section 18(*d*) of the 1952 *Territorial Lands Act* has similarly placed limits on the royal prerogative with respect to the creation of reserves by establishing a new and different source of authority whose exercise may trigger the process of reserve creation. It indicates that at least some of the lands used to fulfill treaty requirements, which include the creation of reserves for signatory First Nations, are to be drawn from lands set apart and appropriated for that purpose by the Governor in Council under the terms of the 1952 *Territorial Lands Act*.

60 That said, it would not be accurate to state that the royal prerogative has been completely ousted from the field by the 1952 *Territorial Lands Act*. Section 18(*d*) does, on its face, seem to bestow a power on the Governor in Council to set apart lands for the creation of reserves. However, as the respondent Government of Canada points out, this does not necessarily mean that this section grants authority to actually create the reserve and that the prerogative no longer plays any part in the process. The setting apart and appropriating of land is not the entire matter; the Crown must also manifest an intent to make the land so set apart a reserve. The use of the words "as may be necessary" implies a separation in time between the appropriation of the lands and the fulfilment of the treaty

obligations. In other words, once the land is appropriated, it does not yet have the legal status of a reserve; something more is required to accomplish that end. This requirement reflects the nature of a process which is political, at least in part. Given the consequences of the creation of a reserve for government authorities, for the bands concerned and for other non-native communities, the process will often call for some political assessment of the effect, circumstances and opportunity of setting up a reserve, as defined in the *Indian Act*, in a particular location or territory.

61 The appellants have not pointed to any other statutory provision which identifies the process by which the Crown takes lands set apart and appropriated under s. 18(*d*) and turns them into a reserve. Indeed, the Act remains entirely silent in this respect. Rather, the appellants seem to rely on a logical leap from the fact of setting apart and appropriating the land to the creation of a reserve. As I have said, the language of s. 18(*d*) does not make that leap. If Parliament had meant in s. 18(*d*) to grant the Governor in Council the power to both appropriate lands for the purpose of meeting treaty obligations to create reserves and to create the reserves from the lands appropriated, it would have used more specific language to effect such a grant of authority.

62 Even if I were to find that s. 18(*d*) has occupied the field with respect to the creation of Indian reserves, it is nevertheless clear from the language of the section that the Governor in Council has been given the power to create reserves from lands set apart. The Governor in Council is given discretion (indicated by the use of the word "may") to decide whether to set apart lands and whether to designate said lands as the reserve of any particular First Nation. Further, the Governor in Council is under no obligation to set apart particular lands for the use and benefit of a band, unless that has been provided for under treaty or some other land settlement agreement. Otherwise, the Governor in Council is free to designate any Crown land the Crown chooses as a reserve for a particular band. Although this is not at stake in the present appeal, it should not be forgotten that the exercise of this particular power remains subject to the fiduciary obligations of the Crown as well as to the constitutional rights and obligations which arise under s. 35 of the *Constitution Act, 1982*.

63 It is worth noting that, in either situation, it is the Governor in Council who exercises the authority granted. The royal prerogative in Canada is exercised by the Governor General under the letters patent granted by His Majesty King George VI in 1947 (see *Letters Patent constituting the office of Governor General of Canada* (1947), in *Canada Gazette*, Part I, vol. 81, p. 3014 (reproduced in R.S.C. 1985, App. II, No. 31)). In the usual course of things, the Governor General exercises these powers for the Queen in right of Canada, acting on the advice of a Committee of the Privy Council (which consists of the Prime Minister and Cabinet of the government of the day). Thus, if the power to create reserves is derived from the royal prerogative, the Governor General, or Governor in Council, would normally exercise that power. On the other hand, s. 18(*d*) of the 1952 *Territorial Lands Act* specifically designates the Governor in Council as the holder of the power to set apart and appropriate lands for the fulfilment of treaty obligations. In effect, the holder of the power is the same person in both cases.

64 The question arises in both cases as to whether the powers of the Governor in Council must be exercised personally or if those powers may be delegated to a government official. As the intervener Coalition submits, one must look both at the Crown and Aboriginal perspectives to determine on the facts of a given case whether the party alleged to have exercised the power to create a reserve could reasonably have been seen to have the authority to bind the Crown to act to appropriate or set apart the lands and then to designate them as a reserve. In my view, the correct test of this is to be found in this Court's judgment in *R. v. Sioui*, [1990] 1 S.C.R 1025, at p. 1040:

> To arrive at the conclusion that a person had the capacity to enter into a treaty with the Indians, he or she must thus have represented the British Crown in very important, authoritative functions. It is then necessary to take the Indians' point of view and to ask whether it was reasonable for them to believe, in light of the circumstances and the position occupied by the party they were dealing with directly, that they had before them a person capable of binding the British Crown by treaty.

65 While these words were said in the context of treaty creation, they seem relevant in principle to the creation of a reserve. In

both cases, an agent of the Crown, duly authorized, acts in the exercise of a delegated authority to establish or further elaborate upon the relationship that exists between a First Nation and the Crown. The Crown agent makes representations to the First Nation with respect to the Crown's intentions. And, in both cases, the honour of the Crown rests on the Governor in Council's willingness to live up to those representations made to the First Nation in an effort to induce it to enter into some obligation or to accept settlement on a particular parcel of land.

66 However, from the passage from *Sioui*, it is also clear that not just any Crown agent will do. Many minor officials who are Crown agents could hardly be said to act to bind the Crown in this case or any other, in a process which involves significant political considerations or concerns about the Crown's duties and obligations towards First Nations. The Crown agent must "have represented [the Crown] in very important, authoritative functions" (*Sioui, supra*, at p. 1040). Similarly, where reserves have been created by means of an Order-in-Council, there is no question that it is the Governor in Council who is making the representations and who is exercising the power to create the reserve. On the other hand, in the circumstances of this case, the registration in the Yukon Territory Land Registry of the setting aside of land for the Indian Affairs Branch is not sufficient to show intent to create a reserve given the widely varying types of interests in land recorded in that Register.

E. *Summary of Principles Governing the Creation of Reserves Applicable to this Case*

67 Thus, in the Yukon Territory as well as elsewhere in Canada, there appears to be no single procedure for creating reserves, although an Order-in-Council has been the most common and undoubtedly best and clearest procedure used to create reserves. (See: *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at pp. 674-75; Woodward, *supra*, at pp. 233-37.) Whatever method is employed, the Crown must have had an intention to create a reserve. This intention must be possessed by Crown agents holding sufficient authority to bind the Crown. For example, this intention may be evidenced either by an exercise of executive authority such as an Order-in-Council, or on the basis of specific statutory provisions creating a particular reserve. Steps must be taken in order to set apart land. The setting apart must occur for the benefit of Indians.

And, finally, the band concerned must have accepted the setting apart and must have started to make use of the lands so set apart. Hence, the process remains fact-sensitive. The evaluation of its legal effect turns on a very contextual and fact-driven analysis. Thus, this analysis must be performed on the basis of the record.

68 It should be noted that the parties did not raise, in the course of this appeal, the impact of the fiduciary obligations of the Crown. It must be kept in mind that the process of reserve creation, like other aspects of its relationship with First Nations, requires that the Crown remain mindful of its fiduciary duties and of their impact on this procedure, and taking into consideration the *sui generis* nature of native land rights: see the comments of Lamer C.J. in *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657, at paras. 14-16.

F. *The Evidence Relating to the Creation of a Reserve at Ross River*

69 To succeed, the appellants in this case have to show at least that land had been set apart for them. No real dispute arises with respect to the setting aside of land, nor with respect to the absence of an Order-in-Council, which latter issue, in my view, is not determinative of the issue. The key question remains whether there was an intention to create a reserve on the part of persons having the authority to bind the Crown. In other words, what is critical is whether the particular Crown official, on the facts of a given case, had authority to bind the Crown or was reasonably so seen by the First Nation, whether the official made representations to the First Nation that he was binding the Crown to create a reserve, and whether the official had the authority to set apart lands for the creation of the reserve or was reasonably so seen.

70 The appellants pointed to parts of the evidence which, in their opinion, indicated that such an intention had existed and had led to the setting apart of the lands where the Band had been living for many years. The appellants point to a number of individuals involved in the management of native affairs in the Yukon who recommended to the Minister of Citizenship and Immigration, Indian Affairs Branch, and/or the Supervisor of Lands and Mining, Department of Northern Affairs and National Resources, that a reserve be created for the Band.

They placed strong emphasis on their recommendations as well as on the fact that a village was established at Ross River, as had also been recommended.

71 In my view, the critical flaw in the appellants' reliance on the authority of these Crown officials to bind the Crown appears when one asks whether these agents either (1) made representations to the Ross River Band that they had authority to create reserves; or (2) both made the representations and set apart the lands by legal act. On this appeal, the appellants have made no attempt to show that in fact these Crown agents ever made representations to the members of the Ross River Band that the Crown had decided to create a reserve for them. Nowhere in the appellants' lengthy review of the facts is there any reference to such evidence. Nor did Maddison J., in his reasons for judgment at trial, make any such reference. The evidence presented by the appellants all relates to recommendations made by Crown officials to other Crown officials, which recommendations were generally ignored or rejected. There appears to have been a long-lasting and deep-seated tension, even disagreement, as to the opportunity of creating new reserves between the civil servants working directly with native groups in the Yukon and their superiors in Ottawa. The evidence shows that no person having the authority to bind the Crown ever agreed to the setting up of a reserve at Ross River. Every representation made by those Crown officials actually in a position to set apart the lands was to the effect that no reserves existed in the Yukon Territory and that it was contrary to government policy to create reserves there. There is simply no evidence provided by the appellants which suggests that any Crown agents with the authority to set apart lands went to the members of the Band and in effect said: “The Crown is now creating a reserve for you, a reserve of the type contemplated under the *Indian Act* and which will be subject to all of the terms of that Act”. Conversely, those Crown officials who did advocate the creation of a reserve, whether or not they made representations to the Band, never had the authority to set apart the lands and create a reserve.

72 Some specific facts are particularly telling in this respect. They confirm that the appellants failed to demonstrate the existence of the intentional component of the reserve-creation process. At most, as indicated above, they proved that there had been a long-standing disagreement between the local agents of

DIAND and its predecessors and its central administration in Ottawa. This conflict originated in the 1950s. For example, the Indian Commissioner for British Columbia, who was also in charge of native affairs in the Yukon, recommended that a number of new reserves, including one at Ross River, be created in the territory. The Deputy Minister of the Department of Citizenship and Immigration, Indian Affairs Branch, advised the Acting Minister against such a move and no action was taken.

73 A few years later, in 1957, the Deputy Minister recommended against the creation of new reserves. As a result, the Government of Canada decided not to implement a recommendation to set up 10 new reserves including one at Ross River. In 1958, the Deputy Minister received new recommendations against the creation of reserves.

74 In 1962, the Yukon Agency of the Indian Affairs Branch of the Department of Citizenship and Immigration applied to the Department of Northern Affairs and National Resources and asked that land be set aside for the Ross River Indian Village site, presumably pursuant to the *Territorial Lands Act*. After a series of correspondence about the location and size of the site, the Department of Northern Affairs and National Resources informed the Indian Affairs Branch that land had been set aside "for [the] Indian Affairs Branch", but not specifically for the Ross River Band.

75 After the village was established and the land was set aside, the Department constantly maintained the position that it had not intended to create a reserve. In 1972, a published list of reserves restated the official position that no reserve had been created in the Yukon, within the meaning of the *Indian Act*. In 1973, the Department reversed in part its previous stance. It acknowledged that six reserves had been created by Orders-in-Council, between 1900 and 1941. The Ross River site was not among them.

76 After 1965, the reality of these set-asides which do not constitute reserves seems to have been well established. There was an early illustration of this fact. In 1966, the Government of Yukon took back control of a lot on the site of the Ross River Indian Village and leased it to a private citizen. There was consultation with the Band, but no authorization or consent

> was requested from it. No suggestion was made at the time that the Band's consent would be required. Finally, as we shall see, the existence of these lands set aside, while not having the status of reserves, was recognized during the negotiations leading to the conclusion of the Umbrella Final Agreement.
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> G. *The Effect of the Setting Aside*
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> **77** As argued by the respondent, the Government of Canada, what happened in this case was the setting aside of lands for the use of the Band. No reserve was legally created. This procedure may raise concerns because it may amount to a bureaucratic attempt to sidestep the process of reserve creation and establish communities which remain in legal limbo. The use of this procedure may leave considerable uncertainty as to the rights of the Band and its members in relation to the lands they are allowed to use in such a manner. Nevertheless, it must not be forgotten that the actions of the Crown with respect to the lands occupied by the Band will be governed by the fiduciary relationship which exists between the Crown and the Band. It would certainly be in the interests of fairness for the Crown to take into consideration in any future negotiations the fact that the Ross River Band has occupied these lands for almost half a century.
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> **78** The Umbrella Final Agreement acknowledges that these set asides were common practice in the Yukon. Indeed, as pointed out in the factum of the Government of Yukon, the Umbrella Final Agreement provides for rules and procedures designed to deal with the status of lands set aside, which set-aside lands are clearly distinguished from *Indian Act* reserves. Under this agreement, lands set aside must become settlement land under a Yukon First Nation Final Agreement. Such settlement land is specifically identified as not being reserve land. Thus, it may well be thought that the alleged claim of the appellants should have been pursued through the negotiation process, given the absence of intention to create a reserve on the part of the Crown.

[8] In my view these findings are conclusive against the band’s position on the present motion.

While there is no definitive or authoritative list of the means where by land may be “reserved”

within the meaning of subsection 91(24) of the *Constitution Act* but where no "reserve" within the meaning of the *Indian Act* is created, I know of no instance, and none has been suggested, where this has happened other than through a very formal expression of the will of the sovereign such as a Royal Proclamation (see e.g. the case of *St. Catharines Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577) a formal treaty (see e.g. *Chingee v. Canada (Attorney General)* (2005), 261 D.L.R. (4th) 54 (B.C.C.A.) leave to appeal to S.C.C. refused, 31206 (March 30, 2006)) or an Order-in-Council. With respect, it seems to me that the foregoing analysis by the Supreme Court of the formal requirements for reserve creation, and the analogy with the treaty making power, are equally applicable to the requirements for reserving "land ... for the Indians" within the meaning of the second branch of subsection 91(24) of the *Constitution Act*. Although there are some parts of the passages quoted which appear to leave the door open to the band to adduce further evidence as to the authority of the officials with whom it had dealings in the relevant period, it has not, in my view, done so and, even if it had, the question is so particularly fact-sensitive as to render it wholly unsuitable for determination in a summary way on a motion of this sort without a trial. If the matter has not been definitively settled by the decision of the Supreme Court, any remaining issues of fact, notably such as whether the land was set aside for the band or for the Indian Affairs Branch, those issues remain genuine issues for trial.

[9] I shall dismiss the motion.

ORDER

THIS COURT ORDERS that

The motion is dismissed with costs.

"James K. Hugessen"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-108-07
STYLE OF CAUSE:	THE ROSS RIVER DENA COUNCIL a "band" within the meaning of the *Indian Act*, with offices located in Ross River, Yukon v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	WHITEHORSE, YT
DATE OF HEARING:	March 17, 2009
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DATED:	April 24, 2009

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