Dockets: 2004-3561(IT)G
2004-3567(IT)G
2004-4573(IT)G

BETWEEN:

RONALD ROBERTSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

AND BETWEEN:

ROGER SAUNDERS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence on
March 3, 4, 5, 8 and 9, 2010 and May 10, 2010 at Winnipeg, Manitoba

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Appellants:	J. R. Norman Boudreau
Counsel for the Respondent:	Gérald L. Chartier Melissa Danish

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JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 1999, 2000, 2001, 2002 and 2003 taxation years, as they pertain to each of the Appellants, are allowed, with costs, and the assessments are referred back to the

Minister of National Revenue for reconsideration and reassessment, in accordance with and for the reasons set out in the attached Reasons for Judgment.

Signed at Winnipeg, Manitoba this 29th day of October 2010.

"J.E. Hershfield"

Hershfield J.

Citation: 2010 TCC 552
Date: 20101029
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REASONS FOR JUDGMENT

Hershfield J.

Part 1: Introduction

[1] The Appellants, Ronald Robertson and Roger Saunders are Indians as defined in section 2 of the *Indian Act* and are members of the Norway House First Nation. The Norway House First Nation is a signatory to Treaty Number 5 signed in 1875.

[2] The Appellants derive income from fishing during the summer months and collect employment insurance during the winter months. The Minister of National Revenue (the "*Minister*") has assessed such incomes as taxable as follows:

Taxpayers	1999	2000	2001	2002	2003
Robert Robertson					
Income from a Business	$24,995	$25,990	$13,282	$17,970	
EI Benefits	$10,690	$ 9,285	$12,580	$10,325	
Roger Saunders					
Income from a Business				$11,811	$19,452
EI Benefits				$9,615	$ 9,912

[3] The Appellants appeal the subject assessments on the basis that:

1. The subject incomes (benefits) are exempt from taxation by virtue of section 81 of the *Income Tax Act (*the "*Act*") and section 87 of the *Indian Act* and or the provisions of Treaty Number 5.

2. The Application of the *Act* is an infringement or interference with an existing aboriginal right contrary to subsection 35(1) of the *Constitution Act* 1982.

[4] A Partial Agreed Statement of Facts (the "Agreed Facts") was submitted to the Court and is appended to these Reasons as Schedule 1. A summary of the counsels' submissions is appended as Schedule 2.

[5] The factual circumstances pertaining to each of the Appellants is, for the most part, the same. Indeed the parties have, in general terms at least, acknowledged that the outcome of these Appeals will not depend on any factual differences that might exist between the Appellants. I do note, however, that one potential difference of significance is that the Appellant, Roger Saunders, during the years under appeal, 2002 and 2003, resided off-reserve. At the end of these Reasons, I will make a brief comment in respect of this difference as it impacts on these Appeals.

[6] The Appeals were heard on common evidence although only Mr. Robertson testified at the hearing. Mr. Roger Saunders could not appear for medical reasons. Both parties called two witnesses, including one expert each. A brief overview of their respective reports, testimony and qualifications is attached to these Reasons as Schedule 3.

[7] I will, however, make a few general observations concerning the expert evidence. To do so requires a very brief summary of how the Appeals were framed. That summary in turn requires an understanding of the structure of fishing operations at Norway House.

[8] The Appellants are members of the Norway House Fishermen's Co-operative (the "Co-op") which, pursuant to a contractual arrangement with the Freshwater Fish Marketing Corporation ("Freshwater"), handles the dealings between the Co-op members who fish and Freshwater that acquires the fish for distribution in its world wide market. It is admitted that the Co-op acts as the agent for Freshwater in the purchase of fish from the Appellants.

[9] Given this structure, admissions in the Agreed Facts and the testimony of Mr. Robertson, it can be said that the Appellants fished commercially, for commercial purposes. That is not to say, however, that they accept that their fishing activities were in the commercial mainstream. Further, even accepting that the Appellants were in business or self-employed and fishing commercially, for commercial purposes, does not suggest that the personal property at issue, the income from fishing, was other than personal property held *qua* Indian on the reserve.

[10] Given this framework, the expert evidence was directed primarily at providing opinions as to whether the fishing activities of the aboriginal people on the reserve at the time of entering the Treaty were "commercial". The objective appears to relate to some extent to the constitutional issue which asks whether the Appellants have a protected right under the *Constitution Act*[1] to fish in the manner they fished. However, a determination of such right requires examination of the nature of the activity pre-contact and the sufficiency of its continuity to the present. As I will point out later in these Reasons, the expert reports have little value in resolving such issues.

[11] Further, a determination that a constitutional right to fish commercially exists would only beg the question of whether the taxation of the income from that protected activity would constitute an unjustified infringement of that right. This aspect of the Constitutional analysis overlaps, to some extent, with the analysis required under section 87 of the *Indian Act*. Indeed, evidence that the Appellants' fishing practices form part of an ancestral custom will, in my analysis, be a

[1] *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c11 (*Constitution Act*).

important factor in the determining the application of the section 87 exemption. Its importance lies in identifying the income from fishing as property earned *qua* Indian and, as well, fuels the Appellants' argument that the commerciality of the activity today, even if in the commercial mainstream, cannot be a disconnecting factor where the income earned is part of the customary way of life of the Norway House Cree First Nation. That is, the debate as to the extent of the activity's attachment to life on the reserve, as a commercial activity now, compared to the extent its attachment to the economic life on the reserve at the time of and preceding entering into the Treaty, has become an important adjunct to the section 87 analysis in this case. It is in this context that the expert reports and testimony have value.

[12] This aspect of the analysis, has led me to conclude that the property in question, income from fishing, was as integral to life at Norway House at the time of the Treaty, as it is today, in the lives of the people on the reserve. As such, when considered in light of the other factors that connect the income to the reserve, that conclusion favours a finding that it is property earned *qua* Indian on the reserve. In coming to that conclusion, the expert evidence of the Appellants' expert, Dr. Lytwyn, was particularly helpful. It supports a finding that, in fact, the aboriginal people of Norway House derived a livelihood and had an income source from fishing that was material to the Native community at Norway House at the time of the Treaty.

[13] Indeed, given the expert evidence, I have been faced with the challenge of dealing with the "commercial mainstream" test in a new light. As these Reasons will suggest, such evidence has persuaded me to find that the Appellants cannot be said to be engaged in an activity that should, in the context of the application of section 87, be swept into the commercial mainstream because a third party, Freshwater, has come to their reserve to acquire fish, and made a traditional livelihood and income source appear to be linked to the external market that Freshwater has developed. Further, even if that linkage tends to prejudice a claim for section 87 protection, it is only one factor to be considered and as these Reasons will also conclude, it is not a factor that I would give much weight in this case. In part, I come to that conclusion based on evidence of sufficient commerciality at the time of the Treaty to the fishing activities of the aboriginal people of Norway House to defuse the relevance of its connection to global markets today.

[14] It is in this context then that I offer a few general observations concerning the expert evidence which have been muddied by different views of what

constitutes a commercial activity. Indeed, the Respondent's expert has come up with her own definition that would condemn any chance of finding a degree of similarity between the activity now and that of the Norway House aboriginal people at the time of and preceding entering into the Treaty. Needless to say, I do not feel bound by any such definitions.

[15] In any event, the Appellants' expert provided his opinion that the fishing activities of the ancestors of the Appellants, that he referred to as Upland Cree, at the time of the Treaty, were commercial activities. He ultimately relied on a very broad definition of "commercial". It included not only trading fish for goods but a wider notion of bartering where there was a mutual expectation of consideration being given for fish provided by Upland Cree in the Norway House district to the non-aboriginal community operating (commercially) at Norway House as a Hudson's Bay Company trading post.

[16] The Respondent's expert witness report was a rebuttal report. Although she did conclude that the fishing activities of the ancestors of the Appellants at the time of the Treaty were not commercial activities, which she narrowly defined to exclude trade and barter transactions, her report, as a rebuttal, was in many respects devoted to argumentatively pointing out the absence of absolute proofs of who caught what fish, where they were caught, how they were exchanged and for what consideration. For example, by pointing out that the Appellants' expert could not say for sure that a particular transaction, relied on in his report, was engaged in by an aboriginal person who was actually a resident of Norway House or that fish traded were from a particular area or that the compensation received by the aboriginal person was not from employment (which went beyond her narrow definition of a "commercial" transaction), some of his detailing of factual transactions and conclusions were attacked. However, the attacks were based on her putting a burden of proof on the Appellants' expert that was well beyond that which was necessary given the nature of the analysis I was undertaking.

[17] On balance then, I prefer the evidence of the Appellant's expert witness. His expertise is not in issue. That some of his report might be said to have presented some records as factual proofs when it may have been presumptuous to do so, does not persuade me to disregard much of his report and testimony. I believe his report and testimony as a whole demonstrated a much better appreciation of what I needed to know in the context of my analysis. His evidence in that regard was frank, open-minded and on balance much more credible than that of the Respondent's witness who stayed true to her adversarial role in the defence of her

rigid definition of “commercial” which, given the context in which I needed to consider its relevance, was unhelpful.

[18] In addition to those general observations, there is one finding relating to Dr. Lytwyn’s report that warrants particular recognition. I accept his evidence that at the time of entering into the Treaty the trade in isinglass, a product made from the bladder lining of sturgeon, was being carried on by the aboriginal people of Norway House, or at least the Upland Cree in the Norway House district, from sturgeon harvested in the Norway House district. I find as well that such trade was part of what was the commercial mainstream of trade carried on by the Hudson’s Bay Company at Norway House at that time. While this finding alone could result in my allowing the Appeals, given the way in which the parties have directed the issue before me, it is not the main thrust of these Reasons or my conclusion.

[19] With that background in mind, I will now divide these Reasons into 4 further parts:

Part 2: Historical Overview

1. Pre-Treaty: The interaction of the Norway House Cree and the Hudson’s Bay Company;

2. Treaty Number 5;

3. Post-Treaty: The demise of the Hudson’s Bay post and the introduction of commercial fisheries;

4. More recent developments: Agreements and Enactments affecting the Norway House First Nation.

Part 3: Current Fishing Practises

1. The evidence of L. Saunders, President of the Co-op;

2. The evidence of Ronald Robertson, Appellant;

3. The evidence of David Bergunder, Director, Field Operations for Freshwater.

Part 4: Analysis

1. The Natural Resource Transfer Agreement;

2. Section 87; The Erosion of the Entitlement of the Appellants *qua* Indians; The Connecting Factors

    i) the location of the activities;
    ii) the engager of the services and debtor; and
    iii) the commercial mainstream.

3. Distinguishing authorities relied on by the Respondent

    i) *Southwind v. Canada*;
    ii) *Bell v. Canada*;
    iii) *Ballantyne v. Canada* .

4. Subsection 87(2);

5. Section 35.

Part 5: Conclusions

Part 2: Historical Overview

1. Pre-Treaty; The interaction of the Norway House Cree and the Hudson's Bay Company

[20] Unlike what I presume to be the case of other reserves, Norway House grew from a non-aboriginal trading post settlement, namely a Hudson's Bay Company post. It served as a major transhipment post moving goods northeast to York Factory where they were shipped by sea to England. Similarly, supplies from England destined for Hudson's Bay posts in central Canada and west arrived at York Factory and made their way by waterway to Norway House located on the northern end of Lake Winnipeg near the mouth of a waterway system that allowed for the shipment of goods to and from the southeast and west, as well as north, to and from York Factory.

[21] Distinct from the post itself, a relatively small area, there are vast tracks of land to the north, east and west that were the hunting and fishing grounds of what

are known as the Upland Cree. These aboriginal people hunted and fished for their subsistence throughout this larger area referred to by Dr. Lytwyn as the Norway House district. Such district has more recently been identified by the Government of Manitoba as the Norway House Resource Management Area.[2] It encompasses the boundaries of the Upland Cree trap lines and includes the traditional ancestral fishing areas of the Nation of aboriginal people who became the Norway House Band.

[22] Given its role as a major transhipment post, there was considerable coming and going by Upland Cree at Norway House since its inception in about 1796.[3] Indeed, the movement of aboriginal people generally tends to blur, to some extent, distinctions sought to be made among different First Nations. It is difficult to pinpoint the identity of the aboriginal people that hunted and fished in the Norway House district. Dr. Lytwyn described the movement of the Native people, the non-sedentary nature of their lifestyle prior to the treaties and the mixing that blurs distinctions. Still, any such movement and mixing does not distract from the conclusion that the ancestral practices of the Upland Cree, as I will refer to them, mixed or otherwise, involved a certain interaction with the Hudson's Bay Company. That interaction is pivotal to the part of my analysis that focuses on the commercial nature of the fishing activities of the Native people of Norway House at the time of and before entering into the Treaty.

[23] While the Hudson's Bay Company journals and account books are a treasure of historical records and information it was impossible for even the learned and expert witnesses, who testified at the hearing of these Appeals, to say with certainty, how much trade was taking place between the Company and the Upland Cree residing at Norway House and the Upland Cree who lived and sought out their way of life within the Norway House district but did not reside at Norway House, versus the trade that was taking place with other First Nations people from the northeast, southeast and west, who were known to trade at Norway House, given its role as a major transhipment post.

[2] This area which will be identified later in these Reasons arises from an agreement that included the Government of Canada as a party as well as the Province and the Band.

[3] The post historically was moved at least twice but the exact previous locations were not definitively pinpointed. None of the likely locations of previous posts would seem to have relevance to my analysis. Norway House was established at its present location in 1826.

[24] At this point, suffice it to say that Dr. Lytwyn was adamant and earnest in his testimony that at least the Upland Cree hunting and fishing in the larger Norway House district, which as I have said I take to be essentially the same as the Norway House Resource Management Area, were trading fish at Norway House in a commercial sense in significant quantities. They were also trading fish by-products such as fish oil and more particularly isinglass that had a market in Europe in the manufacture of other products such as glue.

[25] Dr. Lovisek, the Respondent's expert witness, who was retained as a rebuttal witness, expressed her opinion that the Native residents of Norway House would have only assisted the Hudson's Bay's employed non-Native fishers. She maintained, as well, that such resident aboriginal people were "employed" by the Hudson's Bay Company and as such they could not be considered as having been engaged in trade in a commercial sense as she narrowly defined that activity. As to trade in isinglass, in the commercial quantities uncovered by Dr. Lytwyn, she maintained that there was no evidence that it was produced by residents of Norway House. According to her, the quantities reported in Hudson's Bay accounts could have come through Norway House in transit from the southeast, from the Rainy River and Lake of the Woods areas, where records of isinglass production were associated with a different First Nation.

[26] I touch again on this difference in the approaches of the two experts as it gives some context to this historical overview. It is not disputed that Norway House, when it operated as a post, was never largely dependent on fish for food acquired by barter or otherwise from aboriginal people. Nor does the evidence suggest that fish *per se* was being marketed by the Company as food for other destinations. The food supply at the post was for the most part provided by non-aboriginal fishers employed by the Company. They were sufficiently accomplished in performing their role as to suggest that the post was not, for the most part, dependant on a fish trade with the Native residents at Norway House or elsewhere. Dr. Lovisek went so far as to suggest that the non-aboriginal employees would not have relied on the local aboriginal people for assistance in locating local fisheries. There is no evidence of that suggestion being reliable or not, but regardless, I accept, as I have said and as I believe Dr. Lytwyn ultimately admitted, it is likely that the Hudson's Bay Company did not rely to a major extent on trade with the aboriginal residents of Norway House for fish, for food or export. That is not to say it did not trade with the aboriginal residents of Norway House or the Upland Cree of the Norway House district to obtain fish.

[27] Indeed, it must be acknowledged that the dependency of the Hudson's Bay Company on the Upland Cree is not the heart of the question before me. More important to my mind is seeing how the ancestral tradition of fishing of the Upland Cree, which is not denied, impacted the lives of this nation of people prior to the Treaty. From *their* perspective, was it an integral part of their livelihood? [4]

[28] Consider first, the number of aboriginal people that lived at Norway House. The evidence suggests that in the 1820s it was 5 families. There is no evidence before me that suggests how much it grew by 1875 but it seems to be acknowledged that it was a small group of families.[5] I also accept Dr. Lytwyn's evidence that the Hudson's Bay Company first began to employ the aboriginal people of Norway House in 1847 to assist the non-aboriginal fishers. Regardless of the nature of the engagement and the nature of the assistance provided, we have a number of employed aboriginal people living in a very small Native community on a non-aboriginal post deriving some part, a good part, of their livelihood from fishing. Indeed the scale of support from fishing that the Norway House Native people depended on in the 1800s might well have exceeded the extent of such dependency today. Regardless, it is irrefutable that from their perspective, being involved in the fishing activities that kept the post at Norway House fed, was an integral part of their livelihood.

[29] As well, I accept Dr. Lytwyn's general thesis that there would inevitably have been trading of one sort or another, small barter transactions with some expected consideration for fish brought to the post, between Upland Cree, hunting and fishing in the Norway House district, and the Company. In this sense there were commercial transactions occurring as an integral part of the life and livelihood of the ancestors of the Norway House Band members today.

[30] That is not to suggest however, that even in today's terms, large scale fishing was not being engaged in by Upland Cree in the Norway House district. Indeed, there is a report in 1828 of aboriginal people bringing in thousands of fish from a nearby fishing weir. It is accepted that such weirs were traditionally constructed

[4] In *R. v. Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 at paragraph 49, Chief Justice Lamer, in the context of aboriginal rights, talks about the need to take into account the perspective of the aboriginal people claiming that right.

[5] At the time of the Treaty, 30 or more families left to form a different reserve. See footnote 5 to Schedule 3 to these Reasons. As noted there, this underlines that placing emphasis or relevance to the inability to trace the exact aboriginal people that hunted and fished and traded at Norway House, as Dr. Lovisek did, is not practical – they were not a sedentary people.

and fished by aboriginal people and could produce catches in quantities of commercial significance even in today's terms. Such catches would have value to the post.

[31] Further, in accepting this evidence, I have considered some outside sources referred to by Dr. Lytwyn. Of some influence are historical reports of vast fisheries existing in Playgreen Lake, one of the very lakes a short distance from the reserve where the Appellants fish today. Of the fish documented to be plentiful are sturgeon, a fish used not only for food but also for oil and isinglass both of which were by-products traded commercially by the aboriginal people of the area. Indeed, in respect of the trade in isinglass, Dr. Lytwyn noted recorded trade accounts at Norway House from 1813 to 1819 and then again from 1831 to 1876 when it appears the demand for the product made it worthwhile again for the aboriginal people to produce it for trade. The records sourced the trades from various posts. Accounts between 1870 and 1873 record almost 600 pounds of isinglass acquired at Norway House. At an estimate of 10 sturgeon to produce 1 pound of isinglass, that equates to 6000 sturgeon harvested as part of this local economy.[6]

2. Treaty Number 5

[32] The Norway House First Nation was a signatory to Treaty Number 5 with the Crown. This Treaty evidences that certain fishing practices of the Norway House Cree Nation were recognized by the Crown as being an entitlement that required protection. The relevant portion states:

> Her Majesty further agrees with Her said Indians, that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes, by Her said Government of the

[6] Needless to say, the experts did not agree on the number of fish it took to make one pound of isinglass. Nor did Dr. Lovisek accept that the isinglass bought at Norway House, was necessarily produced by local aboriginal people from fish caught by them. Again, I accept the evidence of Dr. Lytwyn. There is no question that the Upland Cree had an ancestral history of making isinglass from sturgeon that were plentiful in the lakes around Norway House. Any theory that suggested that sturgeon were transported from other areas such as Rainy River or Fort Francis is just not probable. Other posts existed in these other areas where large volumes of isinglass production and trade were recorded.

> Dominion of Canada, or by any of the subjects thereof duly authorized therefore by the said Government. [7] [Emphasis added.]

[33] Dr. Lovisek's Rebuttal Report includes documents that explain that the intention of Treaty Number 5 was to provide suitable settlements as a means for the Native people to adapt to new economic and social conditions. These conditions included a significant decline in the fisheries causing a major disruption in the Native people's lives; people who held themselves to be fishermen by trade and culture.[8]

[34] The Treaty and Dr. Lovisek's observation appear to shape a view that reflects the perspective of the members of the Norway House Band today, a view that surfaces again and again, as will be noted below, in my discussion of post-Treaty events. That view is that at the time of entering into the Treaty, it was and continues to be unequivocally recognized that the Norway House Cree fished as an avocation and as a trade.[9]

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[7] The reference in the Treaty to the "avocations" of the Indians including fishing, as well as hunting, is one that the parties did not explore. There are references in some cases that recognize aboriginal fishing as an historical "vocation". The relevance of the difference is unclear. In *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85, [1990] 3 CNLR 46, Justice La Forest in paragraph 86 talks about "traditional vocations of hunting, fishing and trapping" under the "numbered treaties" even though, for example, Treaties 5 and 6 use the term "avocation", while Treaties 8 and 10 refer to "vocation." See also *R. v. Eninew* and *R. v. Bear*, [1984] 2 CNLR 126, 10 DLR (4th) 137 (Sask CA), *R. v. Jacko*, [1998] AJ No. 538, 221 AR 312 (Alta Prov Ct (Crim Div)), *Daniels v. White*, [1968] SCR 517, 2 DLR (3d) 1 for examples of cases where judges interchangeably used the terms "avocation" and "vocation". As well, in the case at bar, there are references in some documents that recognize that the Norway House Cree fished as an avocation *and* as a trade and that fishing and bartering was part of the historical culture of aboriginal people. There is little doubt the meaning of words evolve and change over time and that context changes meanings as well. While the word "avocation" today generally means a sideline, hobby or diversion, there is evidence in the first and second editions of the Oxford English Dictionary that it was a calling of a spiritual nature like a calling to prayer. In the early 1900s Robert Frost wrote in the last verse of Two Tramps in Mud Time: "My object in living is to unite my avocation and my vocation as my two eyes make one in sight." That unity seems to be reflected in the use of the word "avocation" in the Treaty although, admittedly, it would be preferable to have an expert opine on that view as I can hardly say I am able to take judicial notice of it even in light of so many authorities that have used the words interchangeably in the context of the historical culture of the aboriginal people of Canada. I have, nonetheless, frequently used the term "vocation" in these Reasons in recognition of what appears to be a common understanding of its meaning in the context of the fishing and hunting traditions of the aboriginal people of Canada.

[8] Lovisek Rebuttal Report Documents, TAB 2, *Treaty Research Report: Treaty Five (1875).* The notion of "fishermen by trade and culture" again seems to unite avocation and vocation.

[9] This is not to say that efforts to adopt to new conditions were not being pursued at the time of entering into the Treaty. Attempts to obtain arable lands are documented in Dr. Lovisek's report. Still, there is no evidence that much actually changed. In fact, within a short time after the Treaty,

3. Post-Treaty: The demise of the Hudson's Bay post and the introduction of commercial fisheries

[35] While the evidence does not pinpoint the exact details and time of the demise of the Hudson's Bay Company's post at Norway House, in approximate terms it seems to pretty much coincide with the signing of Treaty Number 5. By this time or within a short time after this event, Norway House ceased to be of importance to the Hudson's Bay Company. The aboriginal people at the post, who historically had made no formal claim of ownership of lands on which the post was, or was previously, located, or of their traditional hunting and fishing grounds, were granted the small track of land where they lived as a reserve. In spite of the fact that negotiations included demands for arable lands, the track granted was limited to what appears to be lands where the post was located and from which they could pursue their acknowledged avocations of hunting and fishing.[10]

[36] That restricted grant of reserve status had promises of further grants which have since been revisited. Pursuant to an agreement with the federal and provincial governments that I will expound on shortly, such promises are now being acted upon and reserve status is in the process of being extended to include much of the lands that are relevant to these Appeals.

[37] Before dealing with the expansion of reserve lands more than a century after the Treaty, a brief comment on the conditions at the time of the Treaty is warranted.

[38] Although there is evidence of a significant decline in the fisheries at around the time of the Treaty, within a short time thereafter, in the mid 1880s, the residents of Norway House found they could trade with the commercial fishers from the south who had begun to exploit northern Lake Winnipeg and its nearby lakes to satisfy markets south of the lake. There was no structured relationship between aboriginal fishers and these commercial enterprises but even the Crown's expert, Dr. Lovisek, acknowledged that that relationship was one that engaged Norway House fishers in commercial fishing by her definition. That the Norway House fishers might be seen, from their own perspective, as using their existent and historical fishing know-how and the knowledge of their traditional fisheries

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commercial fishing, even under Dr. Lovisek's narrow definition, became an important factor in the livelihood of the members of the Norway House Band as described at page 8 of her Rebuttal.

[10] See Dr. Lovisek's Rebuttal regarding arable land demands on page 8 and Dr. Lytwyn's testimony regarding no claim of ownership on page 404 of the transcript.

once again as a means of pursuing a livelihood, did not impress her as relevant. It was not what the aboriginal people did that mattered to her but rather it was the commercial context brought to the picture by the buyers of their catches and the nature of their relationship with those buyers. They were now paid as independent contractors for fish caught and sold to commercial enterprises that in turn marketed them in the commercial mainstream. That is, in her view, it not until a short time after the Treaty, that the aboriginal people of Norway House began a commercial activity.

4. More recent developments: Agreements and Enactments affecting the Norway House First Nation

[39] The next series of events that lead up to the present, involve the flooding of traditional lands of the Norway House people for which compensation was sought and given (Compensation Lands) and, as well, the settlement of land entitlement claims (Treaty Land Entitlement or TLE Lands). As a result of these claims, agreements were entered into that led to, amongst other things, the promise of new reserve lands and the recognition of the Norway House Resource Management Area referred to earlier in these Reasons (the Resource Management Area).

[40] These agreements deal with areas that are relevant to the question of whether the Appellants' fishing activities take place on the reserve or are sufficiently connected to the reserve to be of relevance to the required analysis. In this case, fishing activities that do not take place on the reserve are undertaken within the Resource Management Area and more particularly, primarily on lands and waters adjacent to lands that are either Compensation Lands or TLE Lands earmarked for reserve status.

[41] The best overview of these areas can be seen on Exhibit A-4. The Resource Management Area encompasses the Compensation Lands and the TLE Lands and is defined and set out in what is labeled “The Master Implementation Agreement” (the “MIA”). It is an agreement between Canada, the province of Manitoba, the Norway House Cree Nation and Manitoba Hydro-Electric Board (“Hydro”). [11]

[42] The purpose of the MIA was to resolve issues that remained outstanding from the Northern Flood Agreement (“NFA”) signed in 1977.[12] In doing so, it incorporates

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[11] A-3, MIA.

[12] A-3, TAB 2, *Backgrounder: Norway House Cree Nation Flooded Land.*

the transfer of provincial lands to Canada to enable the creation of reserves; that is, it identifies specific parcels of land set aside as part of the compensation package to be a part of the Norway House reserve. Although not dealt with in the MIA, the Resource Management Area is acknowledged to encompass the specific additional parcels of land, as shown on Exhibit A-4, that are also set aside to be part of the Norway House reserve in recognition of the federal Crown's obligations arising from entitlements under the Treaty, as acknowledged by a document called the Treaty Land Entitlement Framework.[13]

[43] Schedule 5.1 of the MIA provides a map of this resource area. It includes the rivers and lakes and the new "reserve lands".[14] Under section 5.5.3 of the MIA, Manitoba agrees to grant priority right to Norway House Cree over wildlife resources that constitute a source of food supply, income-in-kind and income that fall within the Resource Management Area. The resources covered by the agreement include the fish.[15] The circumstances surrounding the development of the MIA support the view that historical fishing entitlements were critical issues to the Norway House community in negotiating the agreement.[16]

[44] The selection process for Compensation Lands and TLE Lands is relevant to note.

[45] Areas to be designated as Compensation Lands were proposed by the province in consultation with Hydro and required acceptance by Norway House Cree Nation as suitable Compensation Lands.[17] The community was then required to request the

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[13] See the community consultation reports, A-3, MIA, TAB 13, pages 12-14. The Treaty Land Framework was an agreement entered into with the First Nations that have outstanding per capita provision claims arising out of the numbered treaties. The Federal and Provincial Crowns set out a protocol for land selection and for further negotiations to resolve these issues. The agreement was not put in evidence.

[14] A-3, MIA, TAB 1, pages 11- 12.

[15] A-3, MIA, TAB 1, page 12.

[16] See the community consultation reports, A-3, MIA, TAB 13, pages 12-14.

[17] These areas are marked with a blue dashed line on Exhibit A-4. The TLE Land selections are marked in yellow on Exhibit A-4.

lands be set aside as reserve lands. Canada was obliged to make reasonable efforts to fulfill the request within 12 months. In anticipation of the transfer of lands, Manitoba is required not to dispose of lands that comprise the Compensation Lands and must grant a Land Use Permit to the Norway House Cree Nation on terms agreeable to the community.

[46] Areas designated as TLE Lands totaled 106,434 acres and were, according to the evidence of Mr. L. Saunders, a witness called by the Appellants who I will introduce momentarily, areas considered to be within the communities' traditional territory. He described the process, in which he was personally involved, by which the Norway House community participated in selecting these lands. His uncontradicted testimony was to the effect that the land selections were made with the purpose of fulfilling economic, social and community development needs and were selected on the basis that they were lands of historical significance to the Norway House Cree Nation, including lands traditionally used for fishing.[18]

[47] The *Manitoba Claims Settlement Implementation Act* (the "*Claims Act*")[19] that received Royal Assent in 2000, recognizes the foregoing understandings. Part I of the *Claims Act* relates to the MIA and ensures that the Norway House Cree will have control over the funds and lands that are granted to them under the MIA. Part II of the *Claims Act* addresses the expansion of the reserve land base as was intended under the Treaty Land Entitlement Framework.

[48] The last government involvement that needs mention is The Natural Resource Transfer Agreement Manitoba.[20]

[49] The Natural Resource Transfer Agreement Manitoba ("NRTA") was enacted to transfer certain rights over resource management from the Federal Crown to the province of Manitoba. The provision of the NRTA that relates to Norway House Cree fishing rights is stated in paragraph 13 as follows:

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[18] Appellant's Book of Documents, TAB 4, *Norway House Cree Nation TLE Land Capability, Use and Selection Study* and testimony of Mr. L. Saunders on page 183 of the transcript.

[19] *Manitoba Claims Settlement Implementation Act*, SC 2000, c 33 (*Claims Act*). A-3, MIA, TAB 1, page 12.

[20] Natural Resource Transfer Agreement, being a schedule to the *Constitution Act*, 1930 (UK), 20 & 21 Geo V, c 26 (NRTA).

> **13.** In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence. Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

Part 3: Current Fishing Practises

1. The evidence Mr. L. Saunders, President of the of Co-op

[50] Both the testimony of the Appellant and Mr. L. Saunders reflect the sense of pride and respect that the community has for its fishers and for the vocation they pursue.

[51] The pride it seems derives from the community's own conviction that it is rooted in their heritage, a heritage that they want so earnestly to preserve and which they seem to have so much need to protect.

[52] It seems clear from the evidence and authorities that this need is fostered by Canada; indeed the honour of the Crown appears to require recognition of this same heritage.

[53] It is clear that the fishers of this community support their families through the pursuit of their vocations as their ancestors did even 140 years ago when the small community of Norway House fishers assisted the Hudson's Bay Company and the non-aboriginal fishers employed by that company.

[54] As well, the pursuit of that vocation today is still a significant part of the community of Norway House. While the community consists of some 5,000 people[21] and only 52 are members of the Co-op and fish for a living, there are another 160 or so Co-op employees who are Band members and live on the reserve working in various capacities in this local enterprise, including staffing the packing stations.[22] While the packing stations are situated off-reserve, short distances from the fishing camps and the reserve, they are both on lands designated as future reserves.

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[21] Agreed Facts paragraph 3.

[22] Testimony of Mr. L. Saunders on page 214 of the transcript.

[55] As to the importance of this enterprise, I found Mr. L. Saunders to be a knowledgeable and credible witness. He is the president of the Co-op and has been since January 2009. Prior to 2002, he had served in that office as well, for two and a half terms of three years each. He resigned in 2002 to become a Band counselor for the Norway House Cree Nation. He held portfolios that included the Environmental portfolio which had some responsibility over the land selections under the Treaty Lands Entitlement process.

[56] Although he was not an expert on the history of the people of Norway House, he did convey what I believe to be an accurate sense of what this community believes and understands to be a true reflection of their history and that is that Norway House is a community rich in traditional culture that included fishing. Further, his testimony clearly reflected the economic significance of fishing to the local economy today.

[57] Indeed, he was quick to observe that fishing was the largest, if not the only, economy of the reserve other than federal funds and trusts that had been established to support schools and other programs. Hunting has not stood up as a viable economic alternative.

[58] He described the Co-op as the Band's fishers' representative, giving the reserve a place in the industry. The Co-op represents the fishers, ensuring that they are dealt with honestly and fairly. I accept this evidence. The Co-op certainly plays a roll well beyond that as acting as an agent or intermediary between the fishers and Freshwater. Indeed, its main role was to represent the fishers of the community. It extended the fishers credit for everything from financing boats and fishing supplies to personal and home shopping needs. It obtained fishing quotas and was responsible to divide those quotas up amongst its members. On this point, his testimony was clear: the Co-op was created to help the fishermen. He said, "We treat our fishermen well."

[59] As noted above, he also testified as to his community's understanding of the framework of the Treaty Land Entitlement negotiations. They were to address unfulfilled Treaty promises for further treaty lands. New reserve areas were mapped out and agreed upon on the basis that, like the Resource Management Area, they were wildlife and fish areas that had been traditionally available to and used by the Norway House Cree Nation as a source of food and income. This is also reflected by Article 5 of the MIA in respect of the Compensation Lands.

[60] Mr. L. Saunders testified that the locations of the new reserve areas include traditional camp sites that are still the camps used today by the Co-op members

and include the areas where the Co-op's fish packing stations are located.[23] All such areas are within the Resource Management Area which he described as an area that was intended to encompass the trap lines on traditional hunting grounds and also contained or circumscribed traditional ancestral fishing grounds.[24] Furthermore, he testified that all things required to be done by the Band in terms of identifying future reserve lands under both the Northern Flood Agreement and the Treaty Lands Entitlement had been finished. He said that they were reserve lands in principle and that the only reason for delays in finalizing their status as reserves related to transmission line easements and right-of-way easements required by Hydro. The Crown took no issue with this uncorroborated testimony except to point out that these designated areas were not yet reserves and that there was no recognized status in respect of these areas that would suggest that they be treated as reserves in principle.

[61] Still, Mr. L. Saunders maintained that treating these areas and locations as reserves is supported in the Northern Flood Agreement in Article 15.1 where Manitoba agreed, as a matter of policy, to grant Norway House Cree Nation first priority rights to the wildlife resources in the Norway House area traditionally available to and used by Norway House Cree Nation as a source of food supply, income-in-kind and income. That Article provides as follows

> 15.1 Manitoba agrees to grant to the residents of the Reserves first priority to all the wildlife resources within their Trapline Zones, and in the rivers and lakes

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[23] Mr. Robertson fished in 4 areas. In 3 of these areas he used camps that are future reserve sites. Two of these areas were on Lake Winnipeg. When Mr. L. Saunders was questioned on his knowledge of whether all fishing on Lake Winnipeg was within the Resource Management Area, his testimony was that there were no obvious lines on such a big lake. But given the weather conditions on Lake Winnipeg, for safety reasons it was unlikely that much, if any, fishing would have been done beyond the Resource Management Area. Mr. R. Saunders fished 3 areas near the reserve as noted in the Agreed Facts, however, since he did not testify I have no clear evidence of whether his camps were located on future reserve sites although at least one, a camp at Grassy Lake, would appear to be so located. They would all be in the Resource Management Area.

[24] While not objecting to this testimony, the Crown's position, relying on the Respondent's expert witness report, was that a sufficient ancestral link to commercial fishing at any of these locations by ancestors of today's Norway House Band members had not been established. However, as noted in these Reasons, I have not given Dr. Lovisek's evidence and opinions on such points sufficient weight to offset the balance of probability suggested by other evidence, including, in particular, that of Dr. Lytwyn and external supporting references such as in Article 15.1 of the Northern Flood Agreement which was affirmed under Article 5.5.3 of the MIA.

> which were traditionally available to and used by them as a source of food supply, income-in-kind and income ("the Resource Area").[25]

[62] While Mr. L. Saunders would acknowledge that the lands designated as future reserves require an official act of government to constitute them as reserves, I sensed that there was a genuine frustration with the officious and legalistic nature of the analysis and that it was seen as a betrayal of the spirit of the undertakings that gave rise to the designation of these future reserve lands. The undertaking was to bring back to the community, whether by virtue of treaty entitlement or as compensation for damages, lands that were part of the traditional heritage of the Norway House people and they should be accepted as such, at least in principle, and treated accordingly. If the Canada Revenue Agency did that, it seems unlikely, to me at least, that the assessments at issue would even have been made.

[63] That is, if most of the camps and the two packing stations were on reserve, then aside from the historical significance to these sites in respect of traditional fishing activities, the connection between such expanded reserve area and the income activity would be such as to obviate any concern over the proper application of section 87 of the *Indian Act*.

2. The evidence of Ronald Robertson, Appellant

[64] The Appellant, Mr. Robertson acknowledges that he fishes commercially and that he is aware that he is linked to a commercial chain that markets his catch in what we have called the commercial mainstream. Nonetheless, he does not think of himself as a business person conducting business. It is interesting that I might describe my sense of what he does for a living as both his vocation and avocation.

[65] Although the Agreed Facts set out this Appellant's fishing activities, I will review his testimony as to his practices.

[66] As stated, although it was agreed in the Agreed Facts that the Appellant conducts a business, my view of his testimony taken as a whole, is that he does not see himself as a businessman. He is assigned a fishing quota by the Co-op, he fishes, delivers his catch and he receives a cheque from the Co-op for the fish delivered.

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[25] The Trapline Zones and "Resource Area" to my understanding would parallel the Resource Management Area in the MIA which also recognized it as the area traditionally available to and used by the aboriginal people of Norway House as a source of food supply, income-in-kind and income. See Article 5.5.3.

[67] The only connections he sees with Freshwater is that he knows that they set the price for the fish, set certain preparation or dressing standards for the fish and make a final payment to him directly at the end of the year representing his share of something extra. He knew nothing of the basis for this payment or the nature of the arrangement that the Co-op has with Freshwater.

[68] From his perspective, his connection to the Co-op on the reserve was an integral part of the activity in which he was engaged. Indeed, it was the beginning and end of his commercial world. It not only provided his quota and his pay, but provided his supplies for fishing such as nets and the like and ice, which was made available at the packing stations, and other equipment from tubs to pack fish to gloves. Indeed, as noted earlier, the supplies offered by the Co-op were not limited to supplies related to his fishing activities.

[69] Indeed, from the evidence of Mr. Robertson, it is apparent that the Co-op manages the personal financial affairs of its fishers based on the projected income that the fisher would earn. It provided pretty much everything including a credit line for the purchase of a boat and purchase orders to buy food at grocery stores. Earnings would be applied against the obligations of the particular fisher in respect of supplies, purchase orders at grocery stores, loans, credit lines and the like.

[70] Looking more at Mr. Robertson's fishing activities *per se*, the connections to the reserve are manifest. His home base or his dock is on the reserve beside his residence. He maintains and stores his equipment there. He is some ten minutes away by boat to the Co-op, which is also on the reserve and another 40 minutes or so to his campsites by boat which are off the reserve. He stays at his main camps four or five days at a time or longer and except when the weather prohibits it, he travels by boat at least once a day to a packing station which is another 20 minutes away, all in a very small circumference around the reserve; all well within the Resource Management Area. All but one of the land portions of the areas he works from are either reserve or on sites that have been earmarked as reserve lands.

[71] I also note that Mr. Robertson, as in the case of each Co-op fisher, selected his own helpers from time to time. They were paid by the Co-op on the reserve and amounts so paid were deducted from his earnings. This is simply another example of how integral the Co-op was to the fishing activities of the fishers that go way beyond being an agent for Freshwater.

3. The evidence of David Bergunder, Director, Field Operations for Freshwater

[72] The Respondent called Mr. Bergunder to testify as to Freshwater's view of the arrangement with the Co-op and the Appellants. He has been with Freshwater for a little over 30 years and is currently the Director of Field Operation for Lake Winnipeg. He is a liaison between Freshwater, its agents, such as the Co-op, and the fishermen.

[73] Mr. Bergunder explained that under the *Freshwater Fish Marketing Act*,[26] Freshwater, a Crown Corporation, has to buy all legally caught fish offered for sale to it in its area of operation. However, a licensed commercial fisherman may sell his fish to anybody in the province. The purpose of Freshwater is to ensure that fishermen can fish and have an income.

[74] Freshwater operates through formal contractual arrangements with a number of agents. In the case of Norway House, there is a contract between Freshwater and the Co-op.

[75] Under the contract, the Co-op receives a fee for buying fish on behalf of Freshwater. The fee covers services provided by the Co-op such as packing and administration. The price of fish is set in the beginning of the year at 85% of what Freshwater anticipates to be the market price. If at the end of a fiscal year, there is money left over, it is distributed among the fishers in a final payment.

[76] There are a number of services the Co-op provides ostensibly to Freshwater. When fishermen bring fish to a packing station, Co-op staff grade and sort it according to species and size. They also make sure the fish corresponds to the quality standard set by Freshwater.

[77] Usually fish is delivered to Winnipeg within 24-48 hours of it coming out of the water. It gets loaded onto a barge at a packing station and then trucked from Norway House south. A truckload, which might include other catches picked up on route south, can consist of 25-30 containers containing about 1,200 kilograms of fish worth around $80,000.

[78] Each fisherman who brings fish gets a receipt at the packing station (a DCR) which indicates the quantity and the type of fish he brought in on that particular day.

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[26] *Freshwater Fish Marketing Act*, RSC c F-13.

Once a week, the station sends their DCR copies to the Co-op office in Norway House. The office then takes two or three days to enter this information in its fish purchase software system and email it to Freshwater. In return, Freshwater emails the Co-op a Fish Purchase Ticket (FPTs) which show the total amount each fisherman will get paid for fish for that week.

[79] Freshwater checks 5% of all deliveries for quality. If the fish does not conform to the standard, the Co-op gets charged a chargeback. Freshwater also checks if there is greater than 1% discrepancy in the quantity recorded on the shipping invoice and the quantity actually received. Freshwater pays the Co-op only for the fish it actually receives.[27] Freshwater sees that as a reduction in the service fee payable to the Co-op. The non-payment could also suggest that the Co-op is not Freshwater's receiving agent in the sense that the Co-op is not paid for the fish it received from the fishers for its principal. Any slippage that occurred is not passed on to the fishermen. That is, the fishermen are paid according to the DCR receipts they received at the packing stations.[28]

[80] Each week Freshwater sends one payment to the Co-op and from that payment the Co-op takes its portion and distributes the rest to the fishermen.

[81] Freshwater could advance the Co-op a line of credit of up to a maximum of $50,000, as part of the Corporation's mandate to supply fishermen with necessary credit. It is up to the Co-op to distribute amounts among the fishers as it sees fit.[29] Freshwater and the Co-op would then agree on a repayment plan. Freshwater subtracts whatever amount the Co-op owes Freshwater, while still ensuring that the Co-op has enough cash to operate.

[82] Mr. Bergunder monitors the Co-op's general ledger (GL), which is a summary of all transactions that occurred at the Co-op that week. The GL indicates all the

[27] Section 3.03 of the Agency Agreement says it is the responsibility of an agent to provide Freshwater with the FPT. However, the testimony of Mr. Bergunder was to the effect that they were generated by Freshwater. This would enable the FPTs to reflect any slippage that Freshwater was not obligated to pay for.

[28] This would be true even if the reduction in payment to the Co-op exceeded the service fee. Section 3.05 of the Agency Agreement prohibits an agent to recover financial penalties from fishers, unless authorized.

[29] Subsection 3.17(i) of the Agency Agreement says that an agent has to comply with Freshwater policies regarding providing seasonal operational credit for fishers.

purchases from the fishermen, as well as the amounts that have to be paid for the fish. Freshwater uses it for cash-monitoring purposes, making sure that the Co-op always has enough cash to pay the fishers.

[83] Freshwater only deals with one account of the Co-op. It makes direct transfer payments into that account. Once a year, as part of an annual review, the Co-op provides Freshwater with an audited statement of its account.[30]

[84] Mr. Bergunder admitted although money sent to the Co-op, net of fees payable to it, were intended only for the fishermen, money was commingled in one account.

[85] When asked if the fishers could make another agreement with the Co-op concerning their pay, Mr. Bergunder relied on the agency agreement to insist that weekly pay was one of the terms of the contract. However, he acknowledged that since the fishermen owned the Co-op, this was a different type of agency. That seems to be a concession that the Co-op could make payments as it deemed necessary for the well-being of its members.

Part 4: Analysis

1. The Natural Resource Transfer Agreement

[86] The Respondent argues that the NRTA is evidence that the commercial fishing rights of the Norway House Cree Nation have been extinguished so that the Appellants no longer have any basis for claiming to be exempt on the basis of such rights.[31] However, the rights granted or diminished by the NRTA are of little significance to the present analysis for two reasons: firstly, the tax exemption at issue is not being claimed pursuant to entitlements under Treaty Number 5; and secondly, the NRTA is an agreement between the Crown and the province of Manitoba that is of little import to the section 87 analysis.

[87] The jurisprudence is clear that the constriction imposed by the NRTA relates entirely to commercial hunting and fishing practices that were once promised under the Treaty. However, the protection being sought in the present Appeals are for properties that are held Indian *qua* Indian on a reserve to preserve the traditional way

[30] Section 3.11 of the Agency Agreement says that an agent has to allow a person authorized by Freshwater to perform audits.

[31] Respondent's Written Submissions, page 37.

of life of the Norway House Cree Nation. This protection is not limited to activities that are protected by Treaty Number 5. That is, there is a basis for claiming an exemption from taxation for fishing activities whether or not such a right has been granted under the Treaty and whether or not such a right has been subsequently extinguished.

[88] Further, although the NRTA may give rise to certain restrictions on Native practices, the agreement was made between the federal Crown and the province of Manitoba. The NRTA has been held to impose obligations and restrictions on the Province that are not to reflect or encumber the duties of the federal Crown. In *Daniels v. White*,[32] the Supreme Court of Canada confirmed this point at page 542:

> It must also be considered that an agreement is not to be construed as applying to anything beyond its stated scope unless the intention to do so is unmistakable. Here the purpose of the agreement is stated in its preamble to be that the Province be placed in a position of equality with the other provinces with respect to the administration and control of its natural resources. It is quite consistent with this declared object to provide that provincial laws respecting the use of some resources, namely fish and game, shall apply to Indians subject to a restriction the effect of which is to carry out Canada's treaty obligations towards the Indians in that respect. …

[89] The NRTA deals with resource management arrangements between the federal Crown and the provincial government. It cannot be construed as reflecting dealings between the Crown and Norway House Cree Nation that relate to entitlements Indian *qua* Indian for the purposes of a tax exemption. The NRTA should not be given much weight in the present case.

2. Section 87; The Erosion of the Entitlement of the Appellants *qua* Indians; The Connecting Factors

[90] Section 87 of the *Indian Act* provides as follows:

> (1) Notwithstanding any other federal or provincial law but subject to section 83 and section 5 of the *First Nations Fiscal and Statistical Management Act*, the following property is exempt from taxation:
>
> *(a)* the right of an Indian or a band in reserve or surrendered lands;
> *(b)* the personal property of an Indian or a band situated on a reserve.

[32] [1968] SCR 517, 2 DLR (3d) 1.

> (2) No Indian or band is subject to taxation on the ownership, occupation, possession or use of any property mentioned in paragraph (1)*(a)* or (*b*) or is otherwise subject to taxation in respect of any such property.

[91] To determine under paragraph 87(1)(b) whether the Norway House Cree fishermen are entitled to a tax exemption on fishing income requires consideration of the factors that weigh into a determination of whether or not that income, being the personal property in question, is found to be held *qua* Indian on the reserve. While this might be seen as two tests, the analysis that drives the determination is the one that focuses on the factors that connect the property to the reserve in a meaningful way. The connecting factors test was discussed by the Supreme Court of Canada in *Williams v. Canada*[33] as follows at paragraph 37:

> … The first step is to identify the various connecting factors which are potentially relevant. These factors should then be analyzed to determine what weight they should be given in identifying the location of the property, in light of three considerations: (1) the purpose of the exemption under the *Indian Act*; (2) the type of property in question; and (3) the nature of the taxation of that property. The question with regard to each connecting factor is therefore what weight should be given that factor in answering the question whether to tax that form of property in that manner would amount to the erosion of the entitlement of the Indian *qua* Indian on a reserve. [Emphasis added].

[92] The question to be answered then is whether a tax on fishing income of Norway House Cree fishermen would amount to the erosion of the entitlement to that income earned by the Appellants as Indians *qua* Indians on the reserve. This is the starting point of a purposive approach to applying section 87 which the Supreme Court in *Williams* directed in paragraph 35:

> … it would be dangerous to balance connecting factors in an abstract manner, divorced from the purpose of the exemption under the *Indian Act*. A connecting factor is only relevant in so much as it identifies the location of the property in question for the purposes of the *Indian Act.*

[93] Superimposed on this starting point, is another purposive factor in answering the question posed that relates to the traditional way of life of a people on a reserve. In *Recalma v. Canada*[34], the Federal Court of Appeal described this part of analysis:

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[33] [1992] 1 SCR 877, [1992] 1 CTC 225 (*Williams*).

[34] [1998] 2 CTC 403, 98 DTC 6238 (FCA), leave to appeal to SCC refused, [1998] SCCA No. 250 (*Recalma*) at paragraph 9.

> **9** In evaluating the various factors the Court must decide where it "makes the most sense" to locate the personal property in issue in order to avoid the "erosion of property held by Indians *qua* Indians" so as to protect the traditional Native way of life. It is also important in assessing the different factors to consider whether the activity generating the income was "intimately connected to" the Reserve, that is, an "integral part" of Reserve life, or whether it was more appropriate to consider it a part of "commercial mainstream".

[94] Similarly, the Federal Court of Appeal explained in *Clarke v. The Minister of National Revenue*[35] that a *situs* test under section 87 is rendered arbitrary without sufficient and meaningful consideration of the traditional way of life as it pertains to the entitlements of Indian *qua* Indian. At paragraph 12 Justice Linden stated:

> **12** … Unless the purpose of the legislative provision which imposes the *situs* requirement drives the selection of the criteria used to determine the *situs* of the property, there is simply no principled basis for selecting one criterion over another. The analysis must therefore begin by examining Parliament's intention in enacting section 87 of the *Indian Act*.[36]

[95] The ultimate question to be answered in these Appeals then is whether a tax on fishing income of Norway House Cree fishermen would amount to the erosion of the entitlement to that income earned by the Appellants as Indians *qua* Indian on the reserve so as to undermine the fiscal protection afforded by section 87 to a traditional way of life that is an integral part of reserve life.

[96] The requirement to consider, and weigh-in, a traditional way of life allows for a meaningful consideration of whether the property or entitlement pertains to an entitlement of an Indian *qua* Indian. The requirement to consider whether the property or entitlement is an integral part of reserve life allows for a meaningful consideration of both whether the property or entitlement pertains to an entitlement of an Indian *qua* Indian and whether a property or entitlement that is off a reserve should be considered to be on the reserve for the purposes of section 87.

[97] This analytical approach will ultimately drive the judicial perspective of the connecting factors that are relevant to determining the *situs* of the income. Since *Williams*, the list of connecting factors that have been considered, has grown as required by the facts of the variety of cases that have come before the Courts.

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[35] (1997), 148 DLR (4th) 314, (*sub nom Canada v. Folster*), [1997] 3 CTC 157 (FCA) (*Clarke*).

[36] *Clarke* at paragraph 12.

However, the factors to be considered and the weight to be given to each, cannot be rigidly formulated. They have to be applied so as to best answer whether taxing the subject property amounts to an erosion of an entitlement of the Indian *qua* Indian on a reserve.

[98] The Supreme Court in *Southwind v. Canada*[37] (in the context of employment) suggested a fairly long list of factors that might be considered. I have adapted the expression of the factors to suit the present case which does not involve employment.

i) The location of the business activities;
ii) The location of the customers (debtors) of the business;
iii) Where the decisions affecting the business are made;
iv) The type of business and the nature of work;
v) The place where the payment is made;
vi) The degree to which the business is in the commercial mainstream;
vii) The location of a fixed place of business and the location of the books and records; and
viii) The residence of the business owner.

[99] The factors upon which the Respondent relies relate primarily to the fishing activities taking place off-reserve; the engager of the work or customer of the business being Freshwater, an off-reserve non-aboriginal enterprise that pays the Appellants for fish delivered; and, the degree to which the activity is in the commercial mainstream.

[100] While I will deal primarily with these factors as if they may well be determinative of the issue, I must say that even if the impact of those particular factors, taken alone, favoured a finding that section 87 did not protect the Appellants from taxation, that would not necessarily dissuade me from applying the protection of the section's exemption based on other relevant factors that beg to be recognized and applied in this case.

[101] Those other factors include the relationship between the Appellants and the Co-op, a *bona fide* reserve enterprise, which bears to how the work was carried on by the Appellants, and the activities' historical, cultural and economic connection

[37] [1998] 1 CTC 265, 98 DTC 6084 (FCA) (*Southwind*).

to the reserve which bears to the nature of the work being carried on. These factors alone create a compelling connection to the reserve.

[102] Still, the best starting point of my analysis is, as indicated, consideration of relevant connecting factors most relied on by the Respondent. I will consider them under three subheadings:

i) the location of the activities;
ii) the engager of the services and debtor; and
iii) the commercial mainstream;

i) the location of the activities

[103] The fact that much of the work is performed at locations away from the reserve is not of itself determinative of anything. In *Nowegijick v. R.*[38] income earned by a member of the Gull Bay (Ontario) Indian Band from work done 10 miles away from the reserve in a logging operation of a corporation all the directors, members and employees of which lived on the reserve and were status Indians, was found to be exempt. That the logs may have been sold in markets beyond the reserve was never an issue. Neither was the fact that there was no apparent historical connection of the logging site to life on the reserve. In *Clarke* the work was done near but not on the reserve, at a hospital which had a significant historical and cultural connection to the reserve and to the Band. The Federal Court of Appeal found the precise location of the hospital to be a less important factor than the historic significance of the hospital in the life of the Band. In that case the activity, not the site, had historic significance to the Band (although not historic in the sense of a traditional activity at the time of a treaty).

[104] In those cases, the economic and social connection of these off-reserve locations to the existing reserve and to the lives of a broader group of Band members and to the reserve community as a whole were the important connecting factors. That is true of the present Appeals as well. The further connection of the historic significance of the activity to the reserve and the historic connection of the off-reserve locations to the reserve (evidenced by their inclusion as future reserves and by the reasons for being included) give additional support in the present Appeals to a finding that the income rights derived from those activities are held *qua* Indian on the reserve.

[38] [1983] 1 SCR 29, [1983] CTC 20 (*Nowegijick*).

[105] Further, considering the future reserve sites as being off-reserve for the purposes of section 87 in this case, seems overly restrictive in the first place. It is the obligation of the Crown to ensure the untrammeled enjoyment of such advantages as they had retained or *might acquire* pursuant to the fulfillment by the Crown of its treaty obligations.

> … 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 fulfillment by the Crown of its treaty obligations.[39]
> [Emphasis added.]

[106] In this case, advantages are being acquired pursuant to the fulfillment by the Crown of its treaty obligations. These are the TLE lands. To ignore or trivialize this virtually crystallized obligation is not warranted, in my view. It focuses on entitlements existent at the time of the Treaty which gives support to the approach of giving a current activity relating to such lands on-reserve recognition.[40]

[107] As well, it must be recognized that much of the work in the present Appeals could only be done away from the reserve because that is where the fish were. Waterways are not part of reserves. The reserve itself is a residential community that affords nothing more than a connection by river to fishing locations off-reserve, the same way it would have to have done 140 years ago. Unquestionably, the assessment of the connection of a fishery to a reserve should include consideration of its proximity and historical usage. The off-reserve locations, even without recognition of their being future reserve sites, have been recognized as part of the Resource Management Area which connects those locations as closely to being on the reserve, without actually being on the reserve, as one could imagine

[39] *Mitchell* at paragraph 86.

[40] *Clarke* at paragraph 24 places some reliance on the potential for an off-reserve location to become part of the reserve. “In addition, it has been pointed out by the appellant that the federal government is currently engaged in preparing a proposal to designate the land upon which the hospital is built as reserve land. While such a future possibility cannot, as the respondent points out, affect the current status of the land on which the hospital is located, it further demonstrates that the circumstances surrounding the location of the Norway House Indian Hospital are such that its utility in determining the *situs* of the appellant's employment income is substantially diminished.” In the case as bar, we are well past the stage of “preparing a proposal”. Still, such factor is not determinative. Nonetheless, it can diminish the utility of using the off-reserve aspects of the activities here as a disconnecting factor.

for the purposes of the connecting factors analysis. The fishing camps and packing stations in question are short commutes from the on-reserve docks of both Appellants. Co-op employees at the packing stations are status Indians living on the reserve as are the Appellants' helpers. The activity is administered on the reserve, supplies are stored and acquired there, while boats, motors, nets and other tools of the trade are kept and maintained there, as well.

[108] Similarly, books and records are largely maintained by the Co-op on behalf of its members, again centering a relevant aspect of the activity on the reserve in a genuine and material way.

[109] As well, I note my impression that the few business decisions left to the fishers likely take place as much, if not more on-reserve than off; decisions such as, for example, buying new equipment. Even every day decisions, such as when and where to fish, appear to be made as much on reserve as off, in the sense of when a fisher starts out the morning from his on-reserve dock, he has pretty much made up his mind as to which camp he is heading.

[110] These connections to the reserve tend to favour, in my view, a finding that the income earned was earned *qua* Indian on the reserve and warrants protection from diminution by taxation. That is, advancing the protection sought is not to give the Appellants an advantage in the world beyond the reserve. It is an advantage that exits on the reserve that has to be considered as extending to the nearby waterways traditionally used for fishing as a source of income and income-in-kind.

ii) the engager of the services and debtor

[111] The pure contractual arrangements, whereby Freshwater via its agency arrangement with the Co-op is the engager of the Appellants' contractor services and the debtor in relation to the income in question, supports a finding that such property is not on the reserve. This narrow legalistic approach, however, is not warranted, in my view, in this case. Freshwater appears to have no ability or right to deal with the members of the Co-op, which hardly seems typical of a principal. Nor does the Co-op having to suffer the cost of substandard fish or delivery shortages seem typical of an agent.[41] Further, there is no fisher/creditor owed money by Freshwater in relation to any Co-op member except to the extent that the Co-op, an

[41] Section 3 of the Freshwater Fish Marketing Corporation Agreement prohibits the Co-op from recovering payment reductions from the fishermen.

on-reserve institution managing and administering a reserve activity through quotas held by it, creates that relationship. Controlling the quotas controls the income. That is, it controls the property in question from inception and in that sense can readily be seen as controlling the location of the property in question for the purposes of the *Indian Act*.

[112] The Co-op is not there to deal with Freshwater's contractors on Freshwater's behalf. It is there to represent its members *qua* Indian and, in effect, it negotiates on behalf of its members with Freshwater as to who Freshwater deals with, to what extent and on what terms.[42] That is, in the context of determining the *situs* of such intangible property as the income from the subject fishing activity for the purposes of the *Indian Act*, this perspective of the arrangement is far more compelling, in my view, than a pure legalistic approach of who the debtor might be.

[113] Indeed, there are two pure legalistic aspects to the Respondent's position that are argued to drive the analysis away from the application of the section 87 exemption. Neither is helpful in terms of identifying how the activity itself should be treated given the purpose of the exemption. This can readily be seen by looking at how changing the legal structure impacts the analysis. One legalistic aspect is that the Co-op is the agent of Freshwater. If the contract had been structured differently so the Co-op bought the fish from its members and then sold them to Freshwater, the case would take on a different complexion. What if the Co-op employed its fishers? These legal notions that exist only in the fictional world of law cannot drive the determination of the fishers' right to have a traditional source of reserve income undiminished by taxation. The second legalistic aspect of the Respondents' position, in identifying a traditional way of life, or the commerciality of an activity, is the reliance on the designation of "employed" fishers between 1847 and 1875. If the consideration aboriginal fishers received as employees had been paid under a contract for services as opposed to a contract of service would there be more commerciality to the historical assistance provided?[43] At some point it is nonsense to

[42] In suggesting that the Co-op negotiates on behalf of its members, I am not ignoring that Freshwater is a Crown corporation that has designed the agency agreement with a view to protect the fishermen. Still, there is an admission that the agreement being with a Co-op, owned by the fishermen, results in some of its protective provisions, such as weekly pay requirements, being essentially honoured in the breach. The Co-op can also go elsewhere if the terms of the agreement are not to its liking.

[43] Employment is simply a means of making a living. It is a means of earning money by performing work. Recognizing employment opportunities recognizes a livelihood. It is the fruit of the livelihood that needs to be considered as protected by section 87. As Professor Prince remarked in speaking of

try to draw useful conclusions about a traditional source of income in another time and in another world from legalistic distinctions that are themselves, even today, being litigated on a regular basis. As stated in *Clarke*, legal fictions become arbitrary and misdirect the analysis. They take the analysis of the purpose of the exemption away from Parliament's intentions which cannot be found to be satisfied in the legalistic formulations of relationships.

[114] In *Clarke*, at paragraph 12 Justice Linden stated:

> **12** Underlying Gonthier J.'s criticism of the residence of the debtor test is the recognition that attributing a *situs* to a chose in action such as the right to employment income is, by definition, a notional exercise. It is a legal fiction which, in the context of section 87, is designed to limit the breadth of the tax exemption provision. To recognize it as a legal fiction is not to criticize it; legal fictions often serve useful purposes in our law. However, once the fictional nature of the exercise is rendered explicit, it can be seen that reliance on a test for *situs* which is unconnected to the purpose for the tax exemption provision -- whether it be the residence of the debtor or the place where the wages are received -- inevitably becomes arbitrary in its application. The solution, as will be seen, lies in an approach to the interpretation and application of the phrase "situated on the reserve" which is founded on the purpose of the exemption provision in the *Indian Act*. Unless the purpose of the legislative provision which imposes the *situs* requirement drives the selection of the criteria used to determine the *situs* of the property, there is simply no principled basis for selecting one criterion over another. The analysis must therefore begin by examining Parliament's intention in enacting section 87 of the *Indian Act*.

[115] Ignoring the legalistic formulations here, the better view of the activity, guided by the purpose of the section 87, is that the engager of the fishing services and the debtor in respect of those services is the Co-op.

[116] More weight supporting this finding is the fact that the place at which the employees are paid is on reserve. The money received by the Appellants are Co-op cheques from commingled funds managed on their behalf for their benefit. A legal formality that suggests funds are held and applied by the Co-op as an agent of Freshwater pales to the practical realities here. These are not artificial or superficial

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the need to protect the means of earning a living: "The Fisheries Department in Ottawa would be in a better position to resist the greed of outsiders, who wish to clean out the sturgeon and make money fast in these northern waters, by taking into account the just claims of the Indians, and their future, both as regards food and appropriate employment". See Dr. Lytwyn's Report at page 25. I tend to believe employment here means nothing more than having the means to earn a living as do the Appellants today.

connections arranged as supporting tax planned indicia of on-reserve *situs*. The economic lives of the Appellants on-reserve is administered on the reserve in a very real and genuine sense by the Co-op based on the income produced by the subject activity. This helps answer the underlying question of whether taxation of this income would adversely affect the property interest of the Appellants *qua* Indian on the reserve. The heart of this arrangement is not to confer an economic benefit not available to others. It is to protect and administer the property interest of the Appellants earned and held *qua* Indian on the reserve.[44]

iii) the commercial mainstream

[117] As a preliminary comment, I share the discomfort expressed by counsel for the Appellants and for the Crown that all businesses run by aboriginal people should be found to be outside Canada's "commercial mainstream" simply because of some attachments to a reserve. On the other hand, in seeking clarification of the proper interpretation of this term, I am guided by the words of Linden, J.A. in *Recalma v. R.* where he confirmed that the section 87 analysis should not overemphasize the "commercial mainstream" test. At paragraph 9 he noted:

> … We should indicate that the concept of "commercial mainstream" is not a test for determining whether property is situated on a reserve; it is merely an aid to be used in evaluating the various factors being considered. It is by no means determinative. The primary reasoning exercise is to decide, looking at all the connecting factors and keeping in mind the purpose of the section, where the property is situated, that is, whether the income earned was "integral to the life of the Reserve", whether it was "intimately connected" to that life, and whether it should be protected to prevent the erosion of the property held by Natives *qua* Natives.

[118] In another part of the judgment he expressed the same view slightly differently:

[44] At paragraph 25 in *Clarke*, reference is also made to the place of payment where the debtor is a Crown agency. Citing *Williams*, the residence of the debtor might be discarded as a significant connecting factor on the ground that conceptual difficulties arise in establishing the *situs* of a Crown agency at any particular place within Canada. While I do not place much emphasis on this, I do note that in that paragraph in *Clarke*, again referring to *Williams*, the significance of the Crown being the source of the payments was said to lie more in the special nature of the public policy behind the payments. If Freshwater's policy as a Crown corporation allowed for the Co-op to commingle funds and pay its members according to its own practices and mandates, then that stands as yet another reason to accept that the debtor in this case is the Co-op for the purposes of section 87.

> **9** … It is also important in assessing the different factors to consider whether the activity generating the income was "intimately connected to" the Reserve, that is, an "integral part" of Reserve life, or whether it was more appropriate to consider it a part of "commercial mainstream" activity.[45] [Emphasis added.]

[119] The first passage looks at the connection of the activity to the life on the reserve as if that could prevail as a governing factor even if the activity is in the commercial mainstream. The second passage introduces an "or" which suggests that an activity cannot be both an integral part of life on the reserve and be in the commercial mainstream. I cannot accept that these two aspects were meant to be mutually exclusive in all cases. The test is to find whether the activity being part of the commercial mainstream is the dominant aspect of its being undertaken with its contribution to community life being incidental or contrived. Viewing the test in this way permits the historical significance of the activity to life on the reserve to weigh-in as a relevant factor in helping to assess the dominant aspect of the activity.

[120] I do not understand how it can be said, in this case, that it is anything other than external forces that have appeared to elevate fishing at the time of the Treaty from a means of providing a livelihood to a commercial mainstream business in less than 10 years. What difference is there between the Hudson's Bay Company engaging a community of Native fishers to help meet *its* demands for fish, small as their contribution might be, and Freshwater engaging the services of the same community of fishers, whether its 10 years or 140 years later, to meet *its* demands, large as they may be? The degree of commerciality introduced by a purchaser such as Freshwater is fortuitous but irrelevant.

[121] As well, I note fluctuations in market demands or in the scale or relative scale of demands on a community, which are external, cannot be determinative of a finding of commerciality for the purposes of section 87. I do not see that relative contributions to a commercial market should be a factor in assessing the connection of an activity to a reserve but if it were, how would that apply here? It might be said that the ability of the Native fishers at Norway House today to meet the world market needs of their commercial purchaser, Freshwater, are as limited as they were in the 1800s to meet the needs of its commercial purchaser, the Hudson's Bay Company. The evidence has not satisfied me that anything has changed.

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[45] *Recalma* at paragraph 9.

[122] Such a reasoning exercise allows for a finding that an historical tradition of fishing, in traditional waters, around a reserve, as a means of earning a livelihood could suffer a significant degree of commerciality in today's world without being found to be a disconnecting factor of any importance relative to other factors. In any event as I have noted, in the case at bar, the commercial aspect of the Appellants' fishing activity arises incidentally and fortuitously out of circumstances that do not vitiate the connection to the reserve that arises from a traditional pursuit that historically has been, and presently is, an integral part of reserve life.

[123] Before moving on, it seems necessary for me to comment further on the relevance of historical differences as to the degree of commerciality of an activity compared to today. The way these Appeals have been approached has added a different dimension to the purposive application of section 87. It has, in my view, put more emphasis on the existence of a similar historical activity as a means determining what is intimately connected to a reserve today "*qua* Indian". The more distant the activity from a traditional one, the more integral to present day life on the reserve it has to be otherwise it cannot be "*qua* Indian". The question then becomes comparative: "how similar" does the current activity have to be to that carried on at the time of entering into a treaty? That ultimately was the question the experts were engaged to answer in an adversarial context as if it was determinative of the issue before me.

[124] However, having said that, as must be clear by now, I am not of the view that this needs to form the basis for my decision to allow the Appeals. I do not believe the spirit and purpose of section 87 is well-served by examining an activity under a microscope so as to find arguably relevant differences between degrees of commerciality over time. That the world has grown so global markets are now available for fish for food should not prejudice or diminish the importance of fishing to aboriginal life on the reserve compared to when fish were used to feed Hudson's Bay Company workers. The pursuit of one's avocation/vocation for hunting and fishing that allowed for a synergistic existence, an economic co-existence, with the Hudson's Bay Company was integral to life on the post *qua* Indian. That the Appellants can pursue such traditional income source in the same waters around the reserve and derive economic benefit in a setting that is integral to life on the reserve today is more than sufficient in this case. Where the connecting factors, uninfluenced by commercial mainstream considerations, support a finding that the income earned was intimately connected to reserve life, those considerations should not be frustrated by the fact that the outside world has a commercial use for the activity that generated the income. The income derived

from those activities is property deeply linked to the life on the reserve and has been earned *qua* Indian for the purposes of section 87.

[125] Thus far, I have focused on the view that the connection to the commercial mainstream is these Appeals is not determinative or even harmful to the Appellants' right to section 87 protection. That may suggest that I am satisfied that they are working in the commercial mainstream. In fact, I am not satisfied of that at all.

[126] That the Co-op has entered the commercial mainstream does not necessarily mean its members have done so. Indeed, I believe the evidence supports a finding that the Co-op has insulated its members from being viewed as a part of that mainstream. The Appellants made no conscious decision to be engaged by Freshwater. They fished for a local enterprise that paid them and had only a vague notion of, or little interest in, the market beyond other than it was there as a market for the Co-op.

[127] In *Williams*, the Supreme Court said in paragraph 18:

> **18** Therefore, under the *Indian Act*, an Indian has a choice with regard to his personal property. The Indian may situate this property on the reserve, in which case it is within the protected area and free from seizure and taxation, or the Indian may situate this property off the reserve, in which case it is outside the protected area, and more fully available for ordinary commercial purposes in society. Whether the Indian wishes to remain within the protected reserve system or integrate more fully into the larger commercial world is a choice left to the Indian.

[128] The Federal Court of Appeal reiterated the choice aspect of the commercial mainstream as it applies to employment income in *Clarke* in paragraph 14 by saying:

> Where, therefore, an aboriginal person chooses to enter Canada's so-called "commercial mainstream", there is no legislative basis for exempting that person from income tax on his or her employment income. [Emphasis added.]

[129] In the present case, the Appellants did not choose to enter the commercial mainstream. They know little of this outside connection that Freshwater brings. A legal hook that snared them as parties to a contract with Freshwater cannot be relied on without the government of Canada turning a very blind eye to its obligation to protect a traditional income source from diminution carried out by innocent fishers doing what their traditional lands and waters have always allowed their people to do.

That rings especially true given that they are fishing from camps and delivering catches at locations designated for reserve status in recognition of their historical connection to their traditional livelihoods. That does not persuade me to find that the Appellants chose to be in the commercial mainstream at all. They chose to pursue a traditional livelihood at the same locations such livelihoods were pursued by the aboriginal people of Norway House 140 years ago.

[130] In broader terms, aside from the influences of the new reserve entitlements, I come to this conclusion on the basis that the income is sufficiently connected in so many respects to the reserve to be treated as property "on the reserve". If the income is "on the reserve", it is not property "outside lands reserved for their use" and therefore it cannot be regarded, again in the context of the required legal analysis, as part of the commercial mainstream to be treated as it is treated for others. Indeed, as property held on the reserve it cannot be dealt with on the same basis as applicable to others. As said in *Mitchell v. Peguis Indian Band*[46] at paragraph 88:

> … that Indians who acquire and deal in property *outside lands reserved for their use*, deal with it on the same basis as all other Canadians. [Emphasis added.]

That is, advancing the protection sought does not require property, which is sufficiently connected to the reserve to be considered on the reserve, to be dealt with on the same basis as all other Canadians.

[131] As well, in *Southwind*, Linden, J. of the Federal Court of Appeal noted:

> **14** According to the Supreme Court in Mitchell, where an Indian enters into the "commercial mainstream", he must do so on the same terms as other Canadians with whom he competes. Although the precise meaning of this phrase is far from clear, it is clear that it seeks to differentiate those Native business activities that deal with people mainly off the Reserve, not on it. It seeks to isolate those business activities that benefit the individual Native rather than his community as a whole, recognizing, of course, as Mr. Nadjiwan says, that a person benefits his or her community by earning a living for his family.[47]

[46] [1990] 2 SCR 85, [1990] 3 CNLR 46 *(Mitchell*).

[47] *Southwind* at paragraph 14.

[132] In the present Appeals the activities do not deal mainly with people off the reserve. The activities deal mainly with the Co-op on the reserve benefiting the community as a whole.

[133] All this is to say, I give no weight to the commercial mainstream arguments advanced by the Respondent.

3. Distinguishing authorities relied on by the Respondent

[134] I need not review all the cases relied on by the Respondent. However, I cannot ignore the three that are on their facts most damaging to the Appellants' position in the present Appeals. These are *Southwind, Bell v. R.* [48] and *Ballantyne v. Canada*.[49]

i) *Southwind*

[135] The appellant in that case resided on the Sagamok Indian reserve. He was the sole proprietor of a logging business which provided exclusive logging services to a non-aboriginal business which is not situated on a reserve. The appellant was paid for the logging work which he performed at off-reserve cutting locations. During the time when he was logging, the appellant would often remain at the cutting location, returning home to the reserve on the weekends. Administrative work connected to the business, including answering and making telephone calls, what bookkeeping was needed, and storage of business receipts occurred at the appellant's home on the Sagamok reserve. The appellant owned his own equipment which, when it is not being used at a logging site, was stored at his home on the Sagamok reserve. Finally, the appellant was paid by cheque drawn on the off-reserve bank account of the debtor.

[136] Clearly, there are strong similarities between that case and the present Appeals. However, the following distinguishes that case from the present appeals: the role of the Co-op in the present appeal; the historical connection of the activity to life on the reserve; and the part the activity played in community life on the reserve in the years in question.

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[48] [1998] 4 CTC 2526, 98 DTC 1857 (TCC), aff'd [2000] 3 CTC 181, 2000 DTC 6365 (FCA), leave to appeal to SCC refused, [2000] SCCA No. 372.

[49] 2009 TCC 325, [2010] 1 CTC 2317 (*Ballantyne*).

[137] At paragraph 16 a comparison is made between *Southwind* and *Nowegijick*. *Nowegijick* was different because the employer in that case was a corporation based on the reserve, while in *Southwind* the appellant was an unincorporated sole proprietor of his own business who sold his services exclusively to a customer that was off the reserve. In the case at bar, ignoring the legal fictions of who the Co-op represented, the Appellants provided their services under the exclusive umbrella of an enterprise administering them as an integral part of an on-reserve activity for the benefit of a much larger part of that community.

ii*) Bell*

[138] Unlike a case like *Bell*, there is evidentiary basis in the Appeals at bar for finding that there is a sound basis for protecting the income derived from that activity from taxation.

[139] In *Bell* the nature of the employment, which I will refer to as the activity, and the manner in which it was carried out, were found to be the most important factors bearing upon the result. It had notable similarities with the case at bar. It was considered relevant that business was not carried on in a way that was different from fishing companies that were owned and operated by non-aboriginal interests. The fishing activity was a commercial activity, pure and simple. The catch was sold to a processor which was a subsidiary of a large national food processing firm and thereby entered directly into the mainstream of commerce, indistinguishable from the catches of any of the other fishing companies, aboriginal-owned or non-aboriginal-owned, which became a part of the Canadian food supply.

[140] However, even in that case, the historical connection of the activity to the reserve may have sufficed to obviate the concern for its competitive commerciality had the evidentiary burden to establish it been met. At paragraph 38, Justice Bowie of the Tax Court of Canada remarked:

> … The food fishery no doubt has its roots in the traditions of the coastal Indian people, although there is scant evidence of that before me in this case. If income were to derive from this food fishery, then perhaps a sound argument could be made for the exemption of that income pursuant to paragraph 87(1)(b), provided that a proper evidentiary base were laid. That is not the case here, however. It is clear from the evidence that none of the income to which these appeals relate, nor any income whatsoever, is derived by the Appellants or the company from their food fishing activities. …

[141] In the case at bar, there is no question that the subject income derives from fishing activities and fisheries that have their roots in the traditions of the Upland Cree. The evidentiary base for this distinction has been well laid. That non-aboriginal activities might be indistinguishable should not be a bar to continuing to protect aboriginal people from the erosion of income traditionally earned *qua* Indian.

iii) *Ballantyne*

[142] As in the case at bar, this case dealt with Treaty 5 and with personal property that was income from fishing. It concerned a different Band but the structure of the activity was not dissimilar. The fishers were members of an on- reserve co-operative and fished in waters outside of the reserve. The fish were bought by Freshwater. Justice Webb found the latter fact, which brought the fishers into the economic mainstream, of such relevance, that together with other factors that did not sufficiently connect the income source to the reserve, reason to conclude that the section 87 exemption did not apply.

[143] Perhaps the easiest and fairest way to distinguish this case from the Appeals at bar, is simply to point out that we were faced with two very different cases in terms of the evidence presented and the arguments made. Judges and litigants are, perhaps too often, at the mercy of what is brought to Court. For example, the expert evidence might have been given or received in a different light. As well, it is unclear in *Ballantyne* what interaction there was with the Hudson's Bay Company. If the reserve in that case were a trading post, which I do not understand it to have been, the evidence and arguments as to the significance of the relationships that would flow from that historical fact would not have been before the Court to consider. I had such evidence to consider. While I am not suggesting, nor am I convinced, that these differences alone should distinguish the cases, they are worthy of note.

[144] There is however one point that deserves comment. At paragraph 14 Justice Webb remarked:

> As well, since "'commercial mainstream' is to be contrasted with 'integral to the life of a Reserve'", it seems to me that an activity, for the purposes of section 87 of the *Indian Act*, cannot, at the same time, be both in the "commercial mainstream" and "integral to the life of a Reserve".

[145] With respect, I have a different view based on the evidence and arguments presented in the Appeals before me. As I have already stated, the two factual scenarios posed need not be mutually exclusive in all cases. For example, immersion in the commercial mainstream can be fortuitous and incidental to what is integral to life on a reserve. Both scenarios exist in that example. The integral to life on a reserve finding might prevail in such a case. In another example, it might be possible to disconnect an activity from the commercial mainstream. That an external market comes to the reserve and buys the fruit of an activity (commercial in nature or not) that has existed traditionally, independently of that particular market at that particular time, does not mean the activity is "in" that external commercial mainstream. In that sense, the two scenarios might not be viewed as mutually exclusive. In any event, external factors should not prejudice the right to have a property interest undiminished by taxation when earned *qua* Indian as part of the customary way of life on the reserve.

4. Subsection 87(2)

[146] Subsection 87(2) provides as follows:

> (2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(*a*) or (*b*) or is otherwise subject to taxation in respect of any such property.

[147] The parties have not referred me to this subsection. Indeed there appears to be little reference to it in the authorities. Without asking for further submissions on it, it would be inappropriate for me to inflate its significance in deciding the Appeals. Still, it can be noted that 87(2) can be read to say: no Indian shall be taxed *in the respect of* the use of his boats and nets *or otherwise* be subject to tax *in respect of* any such property. The lesson learned in *Nowegijick* is that the words "in respect of" must be given a broad interpretation. With that in mind, if inserting the property in question here as being the boats and nets used by the Appellants in deriving their income, then the Appellants have yet another basis to claim the exemption under section 87.

[148] The question then comes down to whether the boats and nets are the personal property of an aboriginal person situated on a reserve as per paragraph 87(1)(b). Putting the question this way, does not expressly invite an enquiry as to where the boats and nets are used. However, its relevancy returns in making the determination in the first instance as to whether or not the boats are "situated" on a reserve.

[149] Locating a property on a reserve does not require that it be used exclusively on the reserve. Instead, one needs to look at the "paramount location" of the property. Justice La Forest in *Mitchell* said:

> … [W]hen considering whether tangible personal property owned by Indians can benefit from the exemption from taxation provided for in s. 87, it will be appropriate to examine the pattern of use and safekeeping of the property in order to determine if the paramount location of the property is indeed situated on the reserve. … But I would reiterate that in the absence of a discernible nexus between the property concerned and the occupancy of reserve lands by the owner of that property, the protections and privileges of ss. 87 and 89 have no application.[50]

[150] A clear case can be made that there is a discernible nexus between the boats and nets and the occupancy of reserve lands and the income they enable by their use off the reserve. However, that would not be sufficient in determining the location of their paramount use.

[151] The paramount location test was applied in *Kingsclear Indian Band v. J.E. Brooks and Associates Ltd*:[51]

> As I understand the evidence, the bus was used to transport Indian children from the Kingsclear Reserve to schools outside the reserve and to return them at the end of the school day. Although not precisely established by the evidence, I would infer that the school bus was parked on the reserve lands overnight and when not employed in transporting children. Even without the latter inference, the evidence as to the pattern of use of the school bus together with the discernible nexus between the bus and the Kingsclear Reserve in the provision of education to Indian children residing on the reserve, in my opinion establishes that the "paramount location" of the school bus was on the Kingsclear Reserve.[52]

[152] Keeping in mind, as well, that the use of the boats and nets is off-reserve only because that is the only place they could be used, being where the fish were, the decision in *Kingsclear* gives some strength to an approach that encourages an exemption under subsection 87(2).

5. Section 35

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[50] *Mitchell* at paragraph 91.

[51] [1992] 2 CNLR 46, 118 NBR (2d) 290 (NBCA) (*Kingsclear*).

[52] *Kingsclear* at paragraph 25.

[153] It is not necessary for me to deal with this part of the Appellants' Appeals. However, I should note that I acknowledge that the evidence of Dr. Lytwyn was in some measure aimed at satisfying the tests in *R. v. Sparrow*,[53] and *R. v. Van der Peet*.[54] Such evidence of a pre-contact tradition of fishing that would likely have gone beyond mere sustenance, was evidence of a culture that necessitated a reciprocal trade tradition amongst aboriginal people in the Norway House and York Factory areas (consisting of aboriginal people of Ojibwa and Cree ancestry). This evidence was not accepted by Dr. Lovisek as sufficient. Even though she acknowledged the use of weirs and nets pre-contact, which speak to some aspects of the tests in *Sparrow* and *Van der Peet* she expressed the need for anthropological research which she herself did not undertake. She stated: "An aboriginal rights claim to commercial fishing requires detailed archeological, genealogical, historical and anthropological research and supporting documentation to ascertain that the activity, in this case, commercial fishing was integral to the distinctive culture of the specific aboriginal people prior to contract with Europeans." In this regard she might well be correct. The evidence supporting a section 35 right is quite meager. Even documentary referrals to the historical right to fish for income-in-kind are not pre-contact specific.

[154] Still, I am sympathetic to the argument urged on me by the Appellants. The authorities, however, are less sympathetic. Further, even if I were to accept that there is room in these Appeals to conclude that there was sufficient evidence to allow a finding that the activity in question was part of a tradition that was integral to the distinctive pre-contract culture of the Norway House Cree, there is the issue of continuity. Also, precious little has been said as to why I should accept taxation as constituting an unjustified infringement of such protected right if it exited. In any event, it is not necessary for me make a finding as to the application of section 35.

Part 5. Conclusions

[155] In the introduction to these Reasons, I noted the importance of the historical evidence in my analysis of the application of the section 87 exemption. It deserves repeating that its importance was two fold. Both concern the application of the connecting factors test. It is necessary when applying that test to consider historical factors to determine the need to apply the exemption to prevent "the erosion of

[53] [1990] 1 SCR 1075, 70 DLR (4th) 385 (*Sparrow*).

[54] [1996] 2 SCR 507, 137 DLR (4th) 289 (*Van der Peet*).

property held by Indians *qua* Indians so as to protect the traditional native way of life".[55] Historical factors can also defuse the argument that when the activity enters the commercial mainstream, it should not be treated differently than in the case of non-aboriginal competitors. The historical evidence establishes that the livelihood derived from the pursuit of their vocations/avocations, which include fishing, have always been a part of the traditional way of life of the aboriginal people of Norway House. The fact that the outside world rewards such pursuits in a modern commercial context, is no reason to diminish the fruit of that tradition by taxation.

[156] There is no slippery slope here that should cause concern over allowing this enterprise to enjoy the benefit of section 87. Enjoying the benefit of a market for a local resource, particularly a resource that has a historical tradition of providing a livelihood for the aboriginal persons concerned, has little potential for abuse.

[157] It seems almost trite to say that the nature of the endeavour in these Appeals is not a newly contrived strategy employed to seize a modern world economic opportunity on a tax advantaged playing field. What advantage over competitors is gained by affording the Appellants protection from taxation under section 87? Quotas and prices are controlled. Even if there were an advantage, the right to protection from taxation would still derive, in this case, from the pursuit of a recognized trade, the nature of which attaches to the Appellants as aboriginal people on the reserve. Such attachment has been overwhelmingly established by the connecting factor analysis set out in these Reasons.

[158] As well as the connecting factors expressly listed and covered earlier in these Reasons, that analysis inherently included consideration of the manner in which activity was carried out. It was administered and controlled by the Co-op, a *bona-fide* enterprise set up so that the fishers are able to earn a living by traditional means. The Co-op is a genuine reserve enterprise, serving and benefiting the reserve community. Indeed, as already mentioned, its business is the largest economic contributor to the life on the reserve besides funds provided by the federal government. Evaluating the activity's impact on the community is of considerable importance and weighs heavily in the analysis. The Appellants fall under the umbrella of this enterprise for the purposes of the application of section 87.

[159] As well, that analysis, the connecting factors analysis, inherently included consideration of the nature of the work done by the Appellants. The nature of the work, fishing, was recognized by Treaty 5 as being important to the livelihood of

[55] *Recalma* at paragraph 9.

the Norway House Cree Nation at the time of the creation of the reserve. What more need be said? Coupled with the manner it is administered and controlled to benefit the community, this becomes part of an abundance of compelling connecting factors that have eclipsed any concerns that may have arisen in the face of the commercial mainstream factor relied on so heavily by the Respondent.

[160] Further still, that analysis has relied on recognizing that protecting the economic base of life on a reserve is one of the main goals of the section 87 tax exemption. In *Shilling v. The Minister of National Revenue*,[56] the Federal Court of Appeal relied on the Supreme Court decision of *Mitchell* to confirm that section 87 was "designed to protect Indians in various ways from the erosion of their economic base, namely reserve lands and personal property there belonging to an Indian".[57]

[161] It has been established on the evidence, that taxing the Appellants would be an erosion of an important economic base that goes far beyond the emergence of an income source brought to the reserve by the outside world of commerce. It is a source that was always there and its present connections are not trappings. The connections to the reserve are genuine and historically based. As such, the subject income warrants protection from diminution by taxation.

[162] When I stress the importance of genuine historical connections to the reserve, I cannot help but comment on my reaction that to apply the commercial mainstream test too rigorously, would be to exaggerate its importance in this case. Its true value is best revealed in cases such as *Recalma* where efforts to avail a reserve community of an economic mainstream that existed essentially only beyond the reserve in a financial world that had no connection to the heritage of the people of the reserve, was doomed to fail. It is a step backward, in my view, to apply that analysis to the fishermen of Norway House who earn income in respect of a local ancestral economy.

[163] Balancing the connecting factors will inevitably require assessing the weight to be given to each factor. To the extent that it can be said that the balance of the factors that I have found favour locating the income in question on the reserve do not tip the scale as much as I have suggested, I can only add that in such a case I would err in favour of the Appellants. Section 87 should be given a broad

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[56] 2001 FCA 178, 2001 DTC 5420, leave to appeal to SCC refused, [2001] SCCA No. 434 (*Shilling*).

[57] *Shilling* at paragraph 27.

construction where, in a case such as this, to do so avoids the risk that government will appear to be using legalistic formulations to erode protected pursuits of the aboriginal people of Canada. In *Nowegijick* the Supreme Court said at paragraph 25:

> It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption.

[164] Lastly, I note that I find that the connecting factors here of the most importance do not allow for a distinction to be made in respect of any Band member, such as Roger Saunders, who chooses to live in the Norway House community, who is a member of the Co-op, whose fishing base is on the reserve and whose fishing activities are virtually the same as Mr. Robertson's, simply because he chooses to reside in a home in the community that is not on the reserve *per se*. Residing on the reserve is only one connecting factor.[58] In the case at bar, the absence of such connection is of no consequence.

[165] Accordingly, and for all these Reasons, the appeals are allowed with costs.

Signed at Winnipeg, Manitoba this 29th day of October 2010.

"J.E. Hershfield"

Hershfield J.

[58] *Clarke* at paragraph 16.

Schedule 1

2004-3561(IT)G
2004-3567(IT)G
2004-4573(IT)G

TAX COURT OF CANADA

BETWEEN:

RONALD ROBERTSON and ROGER SAUNDERS

Appellants

- and -

HER MAJESTY THE QUEEN

Respondent

PARTIAL AGREED STATEMENT OF FACTS

The parties, through their respective solicitors, agree, for the purpose of this appeal only, and any appeal therefrom, that the following facts are true. The parties are free to make submissions with respect to, and are not to be taken as agreeing to, the degree of relevance or weight to be attributed to these facts.

The parties are free to seek to introduce additional facts in evidence at trial, however, such facts may not be inconsistent with the facts herein, unless the parties agree.

This agreement shall not bind the parties in any other action; may not be used against either party on any other occasion; and may not be used by any other party:

1. The Appellant, Ronald Robertson, is an Indian as defined in section 2 of the *Indian Act* and a member of the Norway House First Nation. The Norway House First Nation is a signatory to Treaty Number 5.

2. Norway House was a signatory to Treaty #5 between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House.

3. The Norway House Reserve is located on the south shore of Playgreen Lake adjacent to the non-treaty community of Norway House. At December 2000, the Norway House Reserve included approximately 4,069 members living on reserve with an off-reserve population of approximately 1,454.

4. The Appellant has resided on the Norway House Reserve continuously since he was born in 1967. During the taxation years at issue, the Appellant resided on the Norway House Reserve on Papanaguis Point Road (The Appellant's residence is marked with an "X" on Exhibit 1, and red dot and "X1" on another version of Exhibit "1") He has lived at this location for ten years.

5. The Appellant was a self-employed fisherman during the taxation years. The Appellant started his own fishing business in 1992.

6. The Appellant fished in Little Playgreen Lake and Lake Winnipeg, both situated off reserve.

7. The Appellant fished during the summer and fall fishing seasons. The summer fishing season begins June 1st and ends the first week of July. The Appellant fishes for 3 or 4 weeks in the summer season. The fall fishing season lasts for a three or four-week period, beginning the first week of September. The Appellant did not fish during the winter fishing season in the taxation years at issue.

8. The Appellant has two fishing camps, one at Spider Lake and one at the south basin of Playgreen Point. During the fishing season, the Appellant

spent approximately fifty percent of his time or 15 days at a fishing camp. The Appellant overnighted at the fishing camps. The Appellant's camp at Spider Lake is marked on Exhibit 6 as X1 with a dot and a line through it. The Appellant's camp at Playgreen Point is marked on Exhibit 6 as X2.

9. The Appellant has indicated with dots on Exhibit 6 the areas in the Spider Lake area ("X1" on Exhibit 6) where he places his fishing nets in the water. The Appellant places his fishing nets approximately 50 feet or 20 yards from the shore. The Appellant also fishes in an area located approximately 500 yards from shore.

10. The Appellant has indicated with X4 on Exhibit 6 the three areas where he fishes in Mossy Bay.

11. The Appellant has indicated with X5 on Exhibit 6 the areas where he fishes in south Playgreen Lake.

12. The Appellant has indicated with X6 on Exhibit 6 the areas where he fishes in north Playgreen Lake.

13. The Appellant has marked with X7 two other fishing camps he uses but does not personally own, where he overnights in tents.

14. When the Appellant is fishing in Mossy Bay he camps at Flett Island, also known as Sandy Islands.

15. When the Appellant fishes on Playgreen lake north basin he sometimes drives from his house to Whiskey Jack station, where his boat would be docked.

16. The Appellant has marked Grassy Lake as X99 on Exhibit 6.

17. The Appellant brings his fish catch to the packing stations on a daily basis, weather permitting.

18. The Appellant catches whitefish, jackfish, pickerel, perch and sucker.

19. The preparation and maintenance of the Appellant's business related equipment, such as nets, boats and motors was done on-reserve in the off season. The fishing equipment and supplies of the Appellant were stored on-reserve during the off season.

20. During the off-season the Appellant docks his boat at his residence. During the taxation years in issue he had his boat repaired at Winnipeg Boat Works in Gimli, Manitoba. The Appellant also maintains his own equipment on a regular basis.

21. The business books and records of the Appellant were maintained on reserve in the Appellant's residence.

22. During the taxation years, the Appellant employed helpers.

23. On a typical fishing day, when the season starts, the Appellant first picks up his helpers by truck and then leaves to go fishing from his residence. He stops at the Norway House Fisherman's Co-operative ("the Norway House Co-op") for fuel and he then stops at Playgreen Point to pick up ice. The Appellant then goes to one of his camps to get ready. He drops his ice off at the fishing camp and then prepares his gear and food. He gets his nets ready to put in the water. The Appellant then puts his nets in the water. He usually puts his nets in the water around 3:00 pm, but it varies. About 50% of the time the Appellant then goes out to check his nets at around 4:00 or 6:00 pm, and the other 50% he leaves the nets in the water overnight and checks them in the morning.

24. If the Appellant leaves the nets in the water overnight he checks them in the early morning, around 5:00 or 6:00 am. It takes the Appellant approximately three or four hours to lift his nets. The Appellant then throws the nets back in the water around 9:00 or 10:00 am. The Appellant then goes to the shore to dress his fish. The Appellant also does some dressing of the fish at his fishing camp at Playgreen Point and at his fishing camp on Flett Island/Sandy Islands. The Appellant spends approximately two to three hours dressing the fish. The Appellant does about 50% of his dressing on his boat and the other 50% on the dock. For the most part all of the fish dressing is done in the fishing camps or on the boat.

25. It takes the Appellant approximately an hour to travel from his house to Playgreen Point by boat. It takes the Appellant about an hour to travel from Playgreen Point to Spider Lake. Spider Lake is located approximately 50-70 miles from the Norway House reserve.

26. A barge is used to transport fish from Playgreen Point to the Norway House Co-op. There are packing stations located at Playgreen Point and at Whiskey Jack Point. The Appellant uses both of these packing stations. The Playgreen Point packing station is marked as X3 on Exhibit 6. The Whiskey Jack Point station is reachable by road. The Appellant delivers his fish there when he is fishing in the northern basin of Playgreen Lake. When the Appellant is fishing in the south basin of Playgreen Lake or on Lake Winnipeg (at Mossy Bay or Spider Island) he uses the packing station at Playgreen Point. The Playgreen Point packing station is not reachable by road but by barge. The Appellant brings his fish mostly to the Playgreen Point packing station, but also sometimes to the Whiskey Jack packing station (marked as X on Exhibit 6). Neither of the two packing stations are located on reserve.

27. While the Appellant's fish is being graded at the packing stations he puts gas in his boat while his helpers clean out the fish trays.

28. There are four basic areas where the Appellant fishes: 1) near Spider Island, 2) Mossy Bay (Two-Mile Channel), and 3) and 4) the north and south basins of Playgreen Lake. In the fall the Appellant fishes in the north basin of Playgreen Lake. The Appellant fishes in each of these four areas approximately 25% of the time. The Appellant remains in any one of these spots for one to two weeks at a time to fish.

29. The Appellant makes his business decisions wherever he happens to be located.

30. During the taxation years, the Appellant was a member of the Norway House Co-op and sold his catch to the Norway House Co-op. The Norway House Co-op acts as agent for The Freshwater Fish Marketing Corporation ("FFMC").

31. The Norway House Co-op had two packing stations, both of which are situated off the reserve.

32. The Norway House Co-op had an administration office located on-reserve and employed its own employees on the reserve, including a book-keeper and manager. The Norway House Co-op office is marked with a red dot and "X2" on Exhibit 1.

33. Not all of the members of the Norway House Co-op are members of the Norway House First Nation. During the taxation years in issue, there were approximately 52 members of the Norway House Co-op; 48 status Indians who resided on-reserve and four non-status Indians who resided off-reserve.

34. The Appellant had two fishing licences.

35. All of the Appellant's fish catch was purchased by the Norway House Co-op as an agent for The FFMC. None of the Appellant's fish catch was sold to or used by the residents of the Norway House Reserve.

36. The Norway House Co-op provides gas, oil and nets to the fishers on a credit / debit basis.

37. Employees of the Norway House Co-op are paid by the Co-op.

38. FFMC has no employees at the Norway House Co-op.

39. The grading process involves going through each fish separately and labelling them as either "good" or "bad". The bad fish are discarded and the good fish are then sorted by size and species and daily catch records are prepared.

40. The grading, weighing, ice packing, categorizing species, and accounting of the fish is done at the packing stations.

41. A daily catch record is an official receipt, prepared at the packing stations, detailing the amount of fish sold as well as the species and the price paid.

42. The Norway House Co-op was incorporated 1962-06-12, prior to the creation of FFMC in 1969.

43. The fishing quotas are owned by the Norway House Fishermen's Cooperative which is located on reserve.

44. During the taxation years, the Appellant reported net business income of:

	1999	2000	2001	2002
Business Income	$24,995.00	$25,990.00	$13,282.00	$17,970.00
Employment Insurance Benefits	10,690.00	9,285.00	12,580.00	10,325.00
TOTAL	**$35,685.00**	**$35,275.00**	**$25,862.00**	**$28,295.00**

45. The business income and employment insurance benefits of the Appellant for the taxation years all resulted from his fishing activities.

46. The Appellant was paid by cheque from the Norway House Co-op from monies sent to the Co-op in trust from FFMC.

47. During the taxation years, the Appellant banked at the Royal Bank of Canada located in the Rossville Mall on reserve. The Bank is located at X3 on Exhibit 1.

FFMC

48. The FFMC was established in 1969 by the *Freshwater Fish Marketing Act*, R.S., 1985, c. F-13 for the purpose of marketing and trading in fish, fish products, and fish by-products in and outside of Canada. The FFMC's objectives are to purchase all fish legally caught and offered for sale to FFMC and to stabilize the prices for fish on behalf of fishers.

49. FFMC is a non-profit and self-sustaining agent Crown corporation.

50. FFMC is the buyer, processor and marketer of freshwater fish from Manitoba, Saskatchewan, Alberta, Northwest Territories and part of Northwestern Ontario.

51. The purpose and powers of FFMC are as set out in sections 7 and 8 of the *Freshwater Fish Marketing Act*.

52. The *Freshwater Fish Marketing Act* mandates FFMC to purchase all commercially caught fish in Manitoba, Saskatchewan, Alberta, the Northwest Territories and part of Northwestern Ontario that is offered to it for sale. However, fishers may also sell to final consumers if they so chose.

53. FFMC's mandate also extends to creating an orderly market, promoting international markets and increasing fish trade and returns to fishers (ss. 22(1) of the *Freshwater Fish Marketing Act*).

54. FFMC purchases fish caught on Lake Winnipeg through a number of private agents and co-operatives located along Lake Winnipeg.

55. The relationships between private agents and co-operatives and the FFMC are governed by written agency agreements.

56. The Norway House Co-op is an association or co-operative of fishers located on the Norway House Reserve.

57. The relationship between the Norway House Co-op and FFMC is governed by an agency agreement. This agreement between the Norway House Co-op and FFMC is the only instrument that governs the relationship between the parties.

58. The Norway House Co-op acts as agent for FFMC in purchasing fish at Norway House under the agency agreement. It does not act as agent for any other purchasers of fish. FFMC purchases all of the fish that are sold at the Norway House Co-op.

59. The *Freshwater Fish Marketing Act* entitles FFMC to establish a payment structure that provides initial and final payments to the fishers under a "pool" system where receipts and costs are allocated or "pooled" by fish species to determine final payments.

60. Generally, initial prices are set for each species by estimating its market value, subtracting its projected processing and operating costs and withholding a contingency amount. The fishers receive initial payments by cheque from the Co-op, from money that is sent in trust from FFMC to the Co-op's bank account.

61. At the beginning of each fiscal year, FFMC estimates the market price for fish for the coming year.

62. During the fishing season, as the fishers deliver their catches, FFMC pays 85% of the estimated market price to the Co-op in trust for the fishers.

63. At the end of the fiscal year, after which the actual market price for fish is known, the fishers are paid the difference, if any, between 85% of the estimated market price and the actual market price.

64. The year end payments, if any, are made to the fishers in November of each year, by way of cheques printed at FFMC in Winnipeg.

65. In the years in issue, the final payments were made from the FFMC to the fishers directly.

66. After the final payments are established, any remaining income for the year is recorded by FFMC as retained earnings.

67. FFMC pays the Co-op $.33 per kilogram of fish that is delivered to FFMC. This amount is inclusive of employee salaries for the packing, weighing, grading and administration services used to run the Co-op.

68. FFMC pays for the fish based on the size and species.

69. A trucking company, Gardewine North, hauls all the fish from the Norway House Co-op to the FFMC in Winnipeg.

70. When the fish arrives at FFMC in Winnipeg it is filleted, frozen whole or ground up.

71. At FFMC all fish species are divided up into different pools for marketing purposes.

72. FFMC markets fish both inter-provincially and internationally.

73. Approximately 80% of the fish from FFMC is sold outside of Canada.

74. FFMC markets most of its fish into the United States.

75. FFMC is the largest supplier of whitefish in Finland, whitefish caviar in Sweden and Finland and northern pike in France.

76. FFMC has an internal sales and marketing department.

77. There are two different ways FFMC markets its fish. The first is through direct sale to a major chain (i.e. Costco). The second is through the use of brokers.

78. In the United States, FFMC has brokers in Chicago, New York, Michigan, Ohio, Minnesota, North Dakota and Wisconsin.

79. FFMC competes in the international markets against other fish suppliers. It competes against other fresh water fish, seafood and protein products. Major Canadian market competition is from the Great Lakes Region in Canada, such as Presteve Fish Company and the Great Lakes Fishing Company. It also competes against seafood products as Norwegian Salmon and Icelandic Cod suppliers and other protein products such as beef and chicken.

80. FFMC's head office is located in Winnipeg, Manitoba pursuant to section 13 of the *Freshwater Fish Marketing Act*.

81. FFMC is governed by a Board of Directors, consisting of 11 Directors, including the President and the Chief Executive Officer.

82. The Board of Directors meets six times during its fiscal year in Winnipeg, Manitoba.

Quota Entitlements

83. The quantity and species of fish that can be commercially fished is managed by a quota system.

84. In Lake Winnipeg, each licensed fisher can obtain up to a maximum of four to six individual quota entitlements (depending upon the residence of the fisher). The Norway House Co-op has access to quota on Kiskittogisu, Playgreen and Lake Winnipeg and under government policy access to those fisheries is limited to the 52 members of the Norway House Co-op. All 52 members of the Co-op share equal rights to be licensed for these areas. The Norway House Co-op also owns seventeen whitefish quota entitlements.

85. The Provincial Department of Manitoba Water Stewardship is responsible for managing the quota system.

86. Lake Winnipeg is divided into fishing zones. Zones are demarcated by lines connecting geographical features, and these zones are labelled by letters (example A, B, C etc.). A commercial fisher residing in Norway House can fish in Areas M and G on Lake Winnipeg.

87. No person engaged in commercial fishing shall, unless authorized by license, fish by means of a net in any lake within 1.5 kilometres of the location where a stream or river enters the lake.

Facts pertaining to Roger Saunders:

88. The Appellant was a member of the Norway House Cree Nation during the years under appeal.

89. During 2002 and 2003, the years under appeal, the Appellant resided off-reserve on West Island Route.

90. In 2002 and 2003 the Appellant was a self employed fishermen.

91. The Appellant obtained his own commercial fishing license in 1973 and started fishing commercially in that same year. In 1973 the Appellant became a member of the Norway House Co-op.

92. The Appellant fishes in Playgreen Lake, Lake Winnipeg and Grassy Lake. He has marked the places where he fishes on a copy of Exhibit 6.

93. The Appellant spends approximately an equal amount of time in the areas in which he fishes.

94. The Appellant has two fishing camps. One is located in Grassy Lake near Whiskey Jack landing and the other is at Playgreen Lake, but close to Sandy Island. The Appellant spent approximately 10 to 15 days overnighting at these camps during the fishing season.

95. During the 2002 and 2003 taxation years the Appellant employed two helpers.

96. The Appellant has a home office. It includes a telephone and a filing cabinet. The Appellant retains his fishing records in this office.

97. The Appellant docks his boat at Omand's Point at his parents' house on the Norway House reserve during the fishing and off-seasons.

98. The Appellant maintained his fishing equipment at his home and his parents' home.

99. The Appellant fished for pickerel, whitefish, jackfish and mullets.

100. The Appellant buys his fishing gear from the Norway House Co-op.

101. The Appellant banks at the Royal Bank, which is located on the Norway House reserve.

102. The Appellant works as a trapper during the off-season.

103. The Appellant owns his fishing licenses. However, the Appellant's fishing quotas are owned by the Norway House Co-op. The quota is an open quota which is collectively owned by 52 fishermen. The Co-op provides the fishers with their quota.

104. Roger Saunders confirms that unless specified above, the facts set out herein which are applicable to Ronald Robertson are similarly applicable to him.

ORIGINALLY DATED at the City of Winnipeg, in the Province of Manitoba, on the 15th day of July, 2009.

AMENDED AND DATED at the City of Winnipeg, in the Province of Manitoba, this 4th day of March, 2010.

Per: _____
Gérald L. Chartier
Department of Justice Canada
Prairie Region, Winnipeg Office
301 – 310 Broadway
Winnipeg, Manitoba R3C 0S6
Counsel for the Respondent

AMENDED AND DATED at the City of Winnipeg, in the Province of Manitoba, this 4th day of March, 2010.

Per: _____
Norman Boudreau
Booth Dennehy LLP
387 Broadway
Winnipeg, Manitoba R3C 0V5
Counsel for the Appellant

Schedule 2

Submissions

1. Appellants' Submissions

[1] The Appellants provided written submissions as well as presenting oral arguments.

[2] They assert that the fishing activities in question took place within an area traditionally available to and used by the Norway House Cree Nation as a source of food and income. That area, including the rivers and lakes therein, is within the Resource Management Area where the Norway House Cree Nation have priority rights to harvest fish based on their rights recognized and affirmed by section 35 of the *Constitution Act*, 1982. This is confirmed in Article 5.5.3 of the MIA that states:

> Norway House Cree Nation and Manitoba recognize that aboriginal people, including Norway House Cree Nation, have, at law, priority rights to the harvesting of Fish and wildlife resources within the Norway House Resource Management Area, based on their rights recognized and affirmed by Section 35 of the Constitution Act, 1982. In section 15.1 of the NFA, Manitoba agreed as a matter of policy, subject to certain limitations, to grant to Norway House Cree Nation first priority rights to the wildlife resources in the Norway House Resource Management Area traditionally available to and used by Norway house Cree nation as a source of food supply, income-in-kind and income. [Emphasis added.]

[3] Based on expert testimony, it is also asserted that the Norway House Cree Nation fished commercially before Treaty Number 5 was entered into so that the designation of the Appellants' activities as commercial fishing did not constitute a change in the nature of the activity pursued over 140 years ago. In support of such assertions, the Appellants relied in part on Dr. Lytwyn's adoption of Dr. Frank Tough's conclusion:

> … An examination of Norway House journals between 1872 and 1876 reveals that there was a distinct fishing cycle: jackfish were sought in the early spring; in the early summer the focus shifted to sturgeon; more fishing went on in the late summer; the crucial fall fishery centered on the whitefish; and whitefish were again intensively exploited after freeze-up. Posts also purchase sizable quantities

> of sturgeon from Indians in the late winter. In this sense, Indians engaged in fishing for commercial exchange prior to treaties. …

[4] With regard to the Respondent's expert witness, the Appellants argue that Dr. Lovisek did not undertake an independent study of the fishing patterns of the Norway House Cree prior to 1875. Instead, she was retained to look for weaknesses in Dr. Lytwyn's report. The Appellants suggest that methodology that did not include an independent study of the fishing patterns of the Norway House Cree prior to 1875, did not help the Court get a complete historical picture. Further, her rejection of fishing for barter, trade or debt from the Hudson's Bay Company as evidence of commercial fishing was unacceptable as was her conclusion that scale played a role in the definition of commercial fishing.

[5] The income from fishing is personal property protected from taxation under Section 87(1) of the *Indian Act* if it is situated on the reserve. It is asserted that the income rights the Appellants hold that arise from the fishing activities were derived by them in a traditional way that is sufficiently linked to the reserve to meet the requirements of this provision.

[6] The Appellants rely on authorities such as *Mitchell* and *Williams* to stress that section 87 is there to shield aboriginal people from any efforts to dispossess them of property they hold *qua* Indians. The purpose of the "on a reserve" requirement is to help determine whether an aboriginal person holds the property in question as part of the entitlement of an Indian *qua* Indian on the reserve. The qualification that property employed by aboriginal people in the commercial mainstream is not protected, has no application in respect of an activity that has been and still is carried on as part of their traditional ways on the same lands and waterways as carried on pre-contact.

[7] The Appellants argued that taking into account the purpose of the connecting factors test developed in *Williams* points to the conclusion that the *situs* of the debt in question, which arises from fishing, must be considered as being on the reserve. To find otherwise, by putting too much weight on geography and other dislocating factors, would be an erosion of property held by an Indian *qua* Indian on a reserve. Such an emphasis is as wrong here as it would have been in *Clarke* but for the decision of the Federal Court of Appeal in that case. There Linden, J. in that case found that a worker employed off-reserve earned her income on-reserve considering the circumstances around her employment and the history of the enterprise in which she worked.

[8] As to the approach taken in *Southwind* that conducting business off-reserve more readily places an aboriginal person in the commercial mainstream so as to disentitle him from the protection of the tax exemption, the Appellants argue that such an approach cannot apply to income earned as part of the customary way of life of the Norway House Cree Nation. It was argued that the decision in *Recalma* makes it clear that the test is whether the income generating activity is intimately connected to – "an integral" part of – reserve life as opposed to being a commercial mainstream activity.

[9] If it is determined that the *situs* of the debtor is relevant, it is argued that if the debtor is Freshwater, then as a Crown agency, its location in Winnipeg is not determinative since it can be sued anywhere.[1] The better view, according to the Appellant is that the debtor is the Co-op which is located on the reserve.

[10] The Appellants relied on several cases where the fact that the income-generating activity was carried on off-reserve did not adversely affect a finding that the income was "on a reserve".[2]

[11] The Appellants also sought to distinguish the decision in *Bell* where income earned by the aboriginal people, employed by a fishing company that paid them on reserve, was found to be taxable.

[12] The Appellants underline that beyond the expert evidence, the Treaty itself recognizes and guarantees fishing as part of the tradition, culture and lifestyle of the Norway House Cree. Modern day applications of that tradition cannot be seen as requiring diminished protection or less than full measure of the benefits recognized under the Treaty and under section 87 of the *Indian Act*.

[13] The Appellants seek a finding that observes and maintains the spirit of the obligations recognized by section 87, in spite of the fact that modern day realities appear to impose a different circumstantial picture of the fishing activities being carried on today. They argue that life as evolved does not vitiate historical obligations.

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[1] *Williams* at paragraph 41.

[2] *Clarke;* Nowegijick; *Boubard v. The Queen*, 2008 TCC 133, 2008 DTC 3015; *McNabb (B) v. Canada*, [1992] 2 CTC 2547, [1992] 4 CNLR 52 (TCC); *Amos v. Canada*, [1999] 4 CTC 1, 99 DTC 5333 (FCA).

[14] The Appellants assert that they hold the property in question as part of the entitlement of an Indian *qua* Indian on the reserve. The tax exemption is consistent with ensuring that their traditional way of life cannot be jeopardized.

[15] The Appellants emphasize that they fish in waters directly accessible from the reserve and are part of the Resource Management Area. Their land base connections that are not on the reserve are on lands that are reserves "in principle" and, further, they deal with the Co-op that is located, in every sense, on the reserve on a day-to-day basis.

[16] The Appellants' work is as much a part of the essence of community on the reserve as it has been historically.

[17] The Appellants lastly assert that the Respondent's claim that Section 13 of the NRTA bars the Appellants from claiming the tax exemption cannot hold up if it is found that they possess an aboriginal and/or Treaty right to fish for income. The scope and purpose of the agreement is to clarify the jurisdiction of the Province and effect provincial controls over its resources. There is nothing in that agreement that leads to the conclusion asserted by the Respondent. In any event, even if the agreement purported to bar exemption, it would be ineffective as contrary to the *Constitution Act*.

2. Respondent's Submissions

[18] The Respondent submits the business income derived by the Appellants from the fishing activities for the subject years is not situated on a reserve as required by paragraph 87(1)(b) of the *Indian Act*. According to the Respondent, the application of the connecting factors for business income, as outlined in *Southwind* points to an off-reserve *situs*.

[19] The Respondent finds that the Appellants are running purely commercial operations with employed helpers who assist them in such operations conducted primarily off the reserve. It is asserted that they spent one to two weeks in fishing camps that are off the reserve, fish in waters that are not part of the reserve and that they deliver their fish to the two packing stations located off the reserve.[3]

[20] In response to the Appellants' argument that most of these activities take place within the Resource Management Area, the Respondent submits that there is

[3] The Agreed Facts essentially confirm these latter assertions.

no evidence that any land described as compensation lands under the MIA had acquired reserve status in the years in issue or have reserve status now.

[21] Further, the Respondent argues that the Appellants have one customer – Freshwater. This is a Crown Corporation, located in Winnipeg which processes and sells fish in the inter-provincial and international open markets. The Co-op is an agent for Freshwater that buys fish from the Appellants pursuant to an agency agreement. It pays the fishers from money sent to it by Freshwater in trust. As an agent, the Co-op cannot be considered to be the debtor of the Appellants.

[22] None of the Appellants' catch is sold on the reserve. Instead, it enters directly into the mainstream of commerce indistinguishable from the catches of other fishers and various companies. This means that the Appellants have chosen to enter Canada's commercial mainstream and therefore they must be treated the same as all other Canadians. There is no legislative basis for exempting them from the income tax on their business income.

[23] The Respondent asks this Court to follow the Federal Court of Appeal decision in *Bell* and find that the fishing income was derived from a commercial activity and not situated on the reserve since the facts of the present Appeals are virtually indistinguishable from *Bell*.

[24] In regards to the historical evidence, the Respondent argues that it is insufficient to situate the Appellants' incomes on the reserve. It does not connect the present day business income to the reserve from an historical perspective. Nor does it provide an evidentiary basis for the existence of an aboriginal right to fish commercially.

[25] The Respondent takes issue with the fact that Dr. Lytwyn omitted in his report that aboriginal people mentioned in a number of journal entries relied on by him in concluding that the aboriginal people participated in commercial fishing with the Hudson's Bay Company before 1872, were in fact the company's employees who were bringing in the fish. Further, the Respondent points out that Dr. Lytwyn is said to have admitted that it is likely that the aboriginal people mentioned in post journal excerpts were assisting the Hudson's Bay Company employees. He also could not identify the aboriginal people who were bringing the fish to the post and whether they were actually the ancestors of the Norway House Band. The Respondent maintains that Dr. Lytwyn failed to provide examples of aboriginal people engaged in bartering or trading fish to the Company, except for a

few isolated transactions. Rather he only demonstrated that aboriginal people played an important role while employed by the Hudson's Bay Company.

[26] Similarly, the Respondent asserts that there is virtually no evidence that the trade and isinglass was derived from trade with the ancestral aboriginal people of Norway House Cree Nation.

[27] The Respondent submits that any claim by the Appellants as to having aboriginal and treaty rights to fish commercially free from taxation is unfounded and is not supported by the evidence adduced at trial. Even if any such rights exist, the Respondent argues, they were extinguished by way of NRTA, an amendment to the *Constitution Act* in 1930. The NRTA has been held by the Supreme Court of Canada in *R. v. Horseman*[4] to have extinguished the treaty right to hunt commercially. While the agreement being litigated in that case was not the Transfer Agreement entered into in Manitoba it was, nonetheless, identical to the one applicable to these Appeals. Therefore, according to the Respondent, the Appellants cannot argue that their constitutional right to fish free of taxation has been violated.

[28] Furthermore, the Respondent agues that Treaty Number 5 did not provide for a commercial right to fish. In any event, even if it did, that right was modified by the provisions of the NRTA and the fact that the Treaty was subject to such regulations as may, from time to time, be made by the Government of Canada.

[4] [1990] 1 SCR 901, [1990] 3 CNLR 95.

Schedule 3

Expert Reports

A. Dr Lytwyn's report entitled "Report on the Aboriginal Commercial Fishery in the Norway House District Before Treaty #5 (1875)" was filed by the Appellants' counsel.

Curriculum Vitae (C.V. in brief)

1. Dr. Lytwyn completed his Masters Degree (1981) and his Ph.D (1993) at the University of Manitoba. His Doctoral dissertation was "The Hudson Bay Lowland Cree in the Fur Trade to 1821: A Study in Historical Geography."

2. He has published 2 books and contributed, as author or co-author, to 15 chapters in other academic publications on various historical aspects of aboriginal life at various times and various locations.

3. His works clearly incorporated research into various aspects of aboriginal life including hunting and fishing. His published research relating to fishing activities are not specific to the fishing activities of the Upland Cree, the ancestors of the people of the Norway House Band today, but includes research in the Rainy River area (Ojibway fisheries southeast of Norway House in Manitoba and Ontario) and aboriginal fishing in the Great Lakes Region, including the Saugeen Nation's fishing islands in Lake Huron.

4. Needless to say, this does not do justice to his 10 page C.V. that included 44 conference papers, 10 of which were delivered within the last 5 years and many of which focused on the place of the Hudson's Bay Company in the history of aboriginal people in northwestern Ontario and Manitoba.

Qualifying Dr. Lytwyn as an Expert

1. Counsel for the Appellants proposed to qualify Dr. Lytwyn as "an historical geographer expert involving treaty and aboriginal fishing rights and fur trade history of aboriginal people, including the historical sources and in particular the Hudson's Bay archives".

2. Respondent's counsel objected to qualifying Dr. Lytwyn as an expert on Hudson's Bay Company's archives and on aboriginal fishing rights.

3. I am satisfied with Dr. Lytwyn's credentials to qualify him as requested by the Appellants, except that I would not agree that he should be described as an expert on aboriginal fishing "rights", historical or otherwise. I do qualify him as requested except then to replace "aboriginal fishing rights" with "historical aboriginal fishing practises". His Doctoral work alone qualifies him for that acceptance in respect of his ability to draw meaningful and reliable opinions from Hudson's Bay Company records to which he has impressive ready access. That he has authored academic works on aboriginal fishing only reflects his ability to do such work and supports my qualifying him as being able to give an expert opinion on that subject, even in areas other than the ones he has written on. Admittedly, areas he has written on no doubt reflect more peer reviewable research than might be evident in the opinions expressed in his report, but that alone does not devalue his expertise to provide a reliable expert opinion.

The Report

1. The Hudson's Bay Company (sometimes referred to in this Schedule as "HBC") trading post at Norway House was located at its present location in 1826 as it was well suited as a transhipment post for goods moving to and from York Factory on Hudson's Bay and because it was near a fishery which was the main source of its food supply. Prior locations, the first being built in 1796, were not pinpointed exactly.

2. The importance of Norway House as a transportation hub or trans-shipment post made it one of the principal establishments of the HBC. It served as an inland depot for European goods arriving at York Factory and goods destined for Europe leaving from York Factory.

3. The HBC depended on fish to feed its employees at Norway House, as well as the incoming and outgoing boat brigades. The HBC employed full-time non-aboriginal fishermen as well as local aboriginal people. Non-employed aboriginal people also fished in the area and often sold their catch to the HBC at the post. This was a necessary supplement to the operation of the post. The sturgeon fishery was especially important as a commercial enterprise to the aboriginal people in the area. Sturgeon flesh, whether fresh or dry, provided a trade item that was purchased by the HBC. Sturgeon oil

was purchased as a fuel for lamps and as a seasoning for dried fish. Sturgeon swim bladders were processed by the aboriginal people into a substance called isinglass that was purchased by the HBC.

4. Even prior to the establishment of the post at Norway House there is evidence that there were significant purchases by York Factory traders of sturgeon from Upland Indians which included the Upland Cree of the Norway House district. While the location of the fisheries that produced the sturgeon that were sold at York Factory in the 18th century cannot be precisely determined from available records, Dr. Lytwyn suggested that it was likely that some were obtained in the Northern Lake Winnipeg area around Norway House. Early HBC explorers who visited the Norway House area made note of the sturgeon fishery there.

5. The abundance of fisheries in the lakes near Norway House prior to the entry into the Treaty is very well documented. For example, Robert Hood, who accompanied John Franklin on his artic expedition, wrote from Norway House in 1819, "The Playgreen Lake is stalked with fine fish particularly Sturgeon which are not found in the rivers to the eastward of the painted stone nor in those to the northward of the frog portage."

6. Dr. Lytwyn's Report cites many examples of HBC journal entries evidencing commercial exchanges of fish at Norway House with aboriginal people. Dr. Lytwyn expresses the opinion that the HBC, in addition to having fish supplies from its employed fishermen, also would have had to have purchased fish from aboriginal people to supplement the food required to operate the post and provision the boat brigades. He also noted trades in sturgeon oil, sturgeon flesh and isinglass.

7. Isinglass was in demand in Europe in the 19th century. It had been used traditionally by the Cree as glue and as a binding agent for paint. The HBC valued isinglass because it could be resold on the European markets for profit. In Europe, it was used in manufacturing a wide range of products before the advent of synthetic compounds derived from petrochemicals.

8. Reported isinglass trade at Norway House began in 1812 and purchase records are detailed in Dr. Lytwyn's Report. Although there were gaps in isinglass trade at Norway House, they are apparently due to price depressions making it unattractive for the aboriginal people to produce. However, trade restarted many years before 1875. Norway House district returns show a

steady and relatively large trade in isinglass during the period leading up to the Treaty, with the highest trade occurring in 1873-1874 when 582 pounds of isinglass was purchased by the HBC. To produce this quantity required almost 6000 average size sturgeon.

9. Adding to this picture, I note the HBC records for the years 1870-1871 and 1872-1873 provide a breakdown of where, within the Norway House district, isinglass was being traded. These records show that the Norway House post was the main procurer of isinglass for the district accounting for 334 pounds in the 1870-1871 period and 259 pounds in the 1872-1873 period out of totals in those periods of 394 and 404 respectively that were contributed to by 3 other posts in the district.

10. Further, Dr. Lytwyn notes commercial trade in fish products such as isinglass continuing after Treaty Number 5 was signed in 1875 as did the trade in fish oil which was also made for trade prior to 1875.

11. In 1882, Ebenezer McColl, Inspector of Indian Agencies for the Manitoba Superintendency, bemoaned the destruction of fish by aboriginal people who sold fish oil. His Report in 1882 noted that it was only within the last 10 years that aboriginal people commenced to make fish oil for traffic and then only in limited quantities until 1879 when about 1000 gallons where manufactured and sold to traders.

12. Dr. Lytwyn concludes his report with a quote from Frank Tough's work: "As Their Natural Resources Fail": Native Peoples and the Economic History of Northern Manitoba 1870-1930"[1]:

> An examination of Norway House Journals between 1872 and 1876 reveals that there was a distinct fishing cycle: jackfish were sought in the early spring; in the early summer the focus shifted to sturgeon; more fishing went on in the late summer; the crucial fall fishery centered on whitefish; and whitefish were again intensively exploited after freeze-up. Posts also purchased sizeable quantities of sturgeon from Indians in the late winter. In this sense, Indians engaged in fishing for commercial exchange prior to the treaties.

[1] Vancouver: University of British Columbia Press (1996), PT20. Frank Tough is a professor of Native Studies at the University of Alberta and the Associate Dean (Research) of the Faculty. According to a biography available on the internet he specialized in post-1870 historical geographies of aboriginal peoples. Both experts referred to his work, although Dr. Lovisek was critical of the conclusion reflected in the quoted passage.

Rejoinder to Dr. Lovisek's Rebuttal Report

1. Dr. Lytwyn was afforded the opportunity to respond to Dr. Lovisek's Rebuttal Report. In response to the Rebuttal Report, Dr. Lytwyn did additional research in the HBC archives in order to reply to a number of Dr. Lovisek's specific rebuttal points. He concluded that such additional research only confirmed his conclusion that an aboriginal commercial fishery existed in the Norway House district before Treaty Number 5.

2. In Dr. Lytwyn's first report he acknowledged reviewing, primarily, HBC post journals for Norway House and district reports and only a sample of Norway House account books. In his Rejoinder, he examined an additional 261 Norway House account books and an entire series of miscellaneous records relating to Norway House up to 1875. Reading Norway House post journals in association with other such HBC records, was suggested to provide a more comprehensive understanding of the commerce with the aboriginal people in Norway House district. Indeed, Dr. Lytwyn criticized Dr. Lovisek's rebuttal on the basis that Dr. Lovisek's Report depended almost entirely on HBC post journals from which very little can be gleamed when examined alone since they tended to focus more on the fur trade.

3. Dr. Lytwyn does not disagree with Dr. Lovisek's stressing that many examples of aboriginal trade are simply examples of aboriginal people assisting or accompanying HBC personnel. But he continued to ascribe to the view that the need for fish and fish products by the HBC was such as to require both employed fishermen (aboriginal and non-aboriginal), as well as aboriginal fishermen who, although not employed by the HBC, accompanied employed fishermen and assisted them.[2] Such others would have received unrecorded consideration for their efforts and, in any event, the acknowledgment of employed aboriginal fishermen and aboriginal assistants would not distract from HBC records that indicate that local aboriginal people were also independently trading fish at the post. Looking beyond his report, even on rigorous cross-examination, he stressed his opinion that assisting HBC personnel, without payment, would be a provision of assistance in the commercial context since no such assistance, considering the traditions and culture of the people, would be provided without

[2] The Rejoinder also notes historical references indicating that aboriginal people were used to guide traders to their fishing stations and to assist them in catching fish.

expectation of consideration of one form or another from the post. For example, the provision of food and shelter during hard times would be expected consideration for assistance provided. I accept this evidence as a form of income-in-kind.

4. Dr. Lytwyn is critical of Dr. Lovisek using the uncertainty of the nature of the relationship between the HBC and aboriginal fishermen to undermine his opinions without offering any clarification of the situation on her own. Dr. Lytwyn simply offered his view that there was a reciprocal relationship between the HBC and the aboriginal people of the Norway House district. Whether they needed food or shelter, the use of HBC storage facilities for fish for the winter or the provision of such products as fish oil or canoe bark; they were all offered in return for the assistance they provided the Company in respect of its fishing activities. The commerce of the post was reciprocal and commercial in that sense.

5. That reciprocity would not preclude the post providing fish to the aboriginal people at times when they were starving and dependent on the HBC for survival. That Dr. Lovisek cites examples of this cannot, in Dr. Lytwyn's opinion, distract from a commerce of interdependency that supports a finding that there was sufficient commercial activity in relation to aboriginal fishing and fisheries to support the view that the aboriginal people of the Norway House district were engaged in commercial fishing at the time of the Treaty.

6. Dr. Lytwyn in his Rejoinder cites other writings that describe the reciprocal relationship between traders and aboriginal people as trade in a very real sense. While not appearing to be economic, they were in the pursuit of self-interest. Sharing a catch was trade in both a material and cultural context.

7. The Rejoinder also refers again to the detailed records of Norway House district isinglass returns available in respect of most years before 1875.

8. Dr. Lytwyn condemns Dr. Lovisek's definition of a commercial fishery as too narrow and outdated.

9. Other historical geographers reporting on nearby territories have concluded that: "There is no question that fur trading would not have been a profitable venture for Euro Canadians had aboriginal people refused to sell them food or to work for them at very modest wages as fishers, hunters and collectors."[3]

10. While such works, and others are cited as well, relate to other territories, Dr. Lytwyn writes convincingly that aboriginal people throughout Canada relied on fishing for both food and trade.

11. Dr. Lytwyn is also critical of certain of Dr. Lovisek's observations or assumptions such as there being no standard unit of exchange for commodity barters, when in fact there was a very clear standard of exchange employed by the HBC.

12. Dr. Lytwyn is critical of Dr. Lovisek's use of one particular source throughout her report. That source is from an unpublished work. It was a booklet compiled as a resource guide for grade school Social Studies classes. It was not intended or written as a scholarly, peer-reviewed publication.

13. Twenty-nine pages of critical commentary of Dr. Lovisek's Rebuttal Report need not be reviewed further for the purposes of these Reasons.

14. Neither of Dr. Lytwyn's two reports are flawless. Nonetheless, on balance, I accept his opinions. His knowledge and understanding of aboriginal life and the extent of his research concerning fishing at and around Norway House at relevant times reflect an informed opinion. His views were not arguments in the guise of an expert opinion. They were objective, for the most part, and provided me with sufficient confidence in their earnest formulation to gain my acceptance.

Dr. Lytwyn's Testimony

[3] Arthur J. Ray, "'Ould Betsy and Her Daughter': Fur Trade Fisheries in Northern Ontario," pp. 80-96, in: *Fishing Places, Fishing People: Traditions and Issues in Canadian Small-Scale Fisheries,* Dianne Newell and Rosemary E. Ohmmer, ed., Toronto: University of Toronto Press. (1999), extract at page 83. As quoted in Dr. Lytwyn's Rejoinder on page 10.

1. I noted at the outset that in addition to his report, I have listened to Dr. Lytwyn's testimony and observed him during the hearing and accept much of his evidence, including his conclusion that the Upland Cree in the Norway House district fished commercially in the sense he ascribed to that notion.

2. His testimony largely re-iterated his report emphasizing the importance of fishing to the post. Without fish, the post could not survive and employed fishermen would not have replaced the need to purchase fish from aboriginal people to supplement the food required to operate the post and provision the boat brigades. More than one generation of aboriginal people preceding the Treaty had participated in the commercial exchange of isinglass, sturgeon and whitefish at the post.

3. Like the fur trade, there was a complex system of exchanging goods, including fish and fish by-products, and services, including fishing, based on a standard of trade (such as equivalency in value to one beaver pelt) or on reciprocal obligations.

4. He acknowledged that Dr. Lovisek's definition of commercial trade makes it impossible to include aboriginal commerce but he rejected her definitions as do I.

5. He also rejected her localized definition of who the aboriginal people were that had to be identified as being engaged in commercial fishing at the time of the Treaty. He insisted that the ancestors of aboriginal people that comprised today's Band, followed a traditional way of life covering large areas, 50-100 kilometres around Norway House. They congregated at the Norway House post at certain times including celebrations or when food was scarce or they were sick. The aboriginal community at the post was not sedentary but there was still in both a strict and looser sense, a community attached to it that became the Norway House Cree Nation that entered into the Treaty. Examining the traditions and lifestyles of those people before and at the time of entering into the Treaty requires including the lifestyles and practices of that Nation as its people actually lived throughout the district.

6. Dr. Lytwyn's frustration with Dr. Lovisek's constant criticism of his report by in effect saying "prove it" is demonstrated in his response to her suggestion that it was HBC employees who might have made isinglass. "If they were preparing isinglass, I can almost guarantee you that it would have

been itemized in the post journals" (page 454 of the transcript of the proceedings). In general, I am not convinced that any matter of history can ever be "proven". The burden, however, should reflect a wide berth of deference to probability, and common sense, and place little or no weight given to legal jargon such as "employment". Recognizing our aboriginal people's own sense of their history in this case, includes recognition of a pre-contact practise of making isinglass which later proved to have value in Europe. Without "proof", but taking into account Dr. Lytwyn's opinion, I have little doubt that the commerce between the post and the aboriginal people of the Norway House district included the trade in isinglass.

7. Dr. Lytwyn confirmed his opinion that more than two generations of ancestors of the people who entered into the Treaty sold sturgeon, isinglass, fish oil and fish flesh to the HBC in what must be understood and accepted, in terms of the economy of those people, as part of a commercial operation. Recognizing our aboriginal people's own sense of their history of fishing for income or income-in-kind gives such opinion an even better sense of correctness.

B. Dr. Lovisek's report entitled "Rebuttal" filed by Respondent's counsel is a rebuttal of Dr. Lytwyn's report.

Curriculum Vitae (C.V. in brief)

1. Dr. Lovisek has a Bachelor of Arts in anthropology from York University. She supplemented it with two years of archaeological studies at the University of Toronto before commencing work on her Masters Degree in environmental studies also at York University. Dr. Lovisek completed her Ph.D. in anthropology and ethnohistory at McMaster University. Her dissertation thesis was "Ethnohistory of the Algonkian Speaking People of Georgian Bay - Pre contact to 1850".

2. Dr. Lovisek has testified as an expert witness in six cases (not including this one). She gave expert evidence in *Ballantyne*. In the majority of the cases, she provided historical background of the fishing practices of various aboriginal groups.

3. Dr. Lovisek has almost twenty years of experience conducting research and preparing reports for various government departments, as well as a different

First Nations on questions of historical uses and practices, as related to aboriginal litigation claims.

4. During her career, Dr. Lovisek has contributed to a variety of publications primarily on the topic of Ojibwa people in the Treaty 3 area. She has authored over twenty conference papers and book reviews, as well as over sixty reports and manuscripts, many of them related to fishing as a part of aboriginal culture.

5. Needless to say, this far too brief snapshot of her C.V. does not do justice to Dr. Lovisek's credentials that qualify her as an expert on the subject to which her reports are addressed.

Qualifying Dr. Lovisek as an expert

1. The Respondent's counsel sought to have Dr. Lovisek qualified as an expert, anthropologist specializing in ethnohistory which includes the use of ethnographic, archeological, oral histories and historical sources concerning the First Nations people of Canada.

2. Appellant's counsel challenged her specific expertise in the Norway House area under consideration in these Appeals and her perspective as an anthropologist. Under questioning she acknowledged, for example, that the term Upland Cree had no meaning in anthropological terms because it would not lump people together by geographical terms.

3. On questioning, she admitted that she had not done any anthropological or ethnological fieldwork in the Norway House area or in respect of the northern Cree community. Nor did she rely on any anthropological or ethnological literature regarding the Norway House Cree.

4. While I accept that the value of her reports might be diminished by the fact Dr. Lovisek has not used some of the tools of her trade in preparing her opinion, she emphasized that within the qualification of ethnohistory she relies on historical sources as a principle methodology in her work. I accept that through those historical sources, which her reports confirm she relied on, she is capable of offering an expert opinion on the subject to which her reports are addressed. Any concern over the relative weight I might give her opinion and evidence relative to that of Dr. Lytwyn, is more affected by my concerns over definitions she imposed in framing her opinions and her hired-

gun attack on micro-flaws in Dr. Lytwyn's reports which have relied on sources that are clearly wholly within his area of expertise. It is these concerns that have diminished the value of her opinions and evidence, given my need to consider a broader picture than the one she was trying to paint.

The Rebuttal

1. The first part of the Rebuttal sets out definitions. In addition to defining a "commercial fishery" as a fishery in which fish are caught almost exclusively for sale and excludes fish caught for consumption of an employer, she, by definition, distinguishes "commercial" fishing from other fishing activities that involve bartering, trade or creation of a debt. In excluding this type of trade from her definition of a "commercial" transaction, she relies, in part at least, on the notion that there is no standard unit of exchange for a commodity bartered. That is, her definition of commercial precludes a vague reciprocal economy or culture from being "commercial".[4]

2. At the outset, it is important that I note that I do not accept this narrow concept of commercial fishing. Indeed, the whole idea of needing to define fishing activities of the ancestors of the Norway House Cree as "commercial" or not was regrettably imposed by the terms of reference of the opinions sought in the first place. Nonetheless, to the extent that it was important for me to determine the degree of commerce or commerciality that fishing had before 1875 to the people of Norway House, that determination cannot be based on such limiting and narrow definitions as prescribed by Dr. Lovisek. The question that might have been asked: "Was fishing an important part of life on the reserve pre-1875? Was it part of the economy of the reserve that was engaged in by Indians *qua* Indians?" If these are the questions that are at the heart of the legal question before me, Dr. Lovisek's rebuttal offers little assistance. Still, I will not ignore her report entirely.

3. The first part of Dr. Lovisek's Report is an orientation to Norway House. It confirms the migration of the Cree and ways in which they have been classified. One such classification is noted in her reference to Dr. Tough's publication. The quotation referred to describes Village Indians which was the group that ultimately in 1875 came to be the Norway House Band (as

[4] She acknowledges the standard of exchange employed by the HBC for furs but Dr. Lytwyn in his Rejoinder points out that that very same standard of exchange was used in relation to other commodities such as fish.

opposed to the Wood Indians who in 1875 were given a separate reserve on the Southwestern part of Lake Winnipeg) as having an economic basis that stressed fishing and wage labour, as well as potato gardening. Dr. Tough notes that year-round habitation at the village was not possible due to the need for food and villagers left for fishing places away from the reserve. This confirms Dr. Lytwyn's opinion that these Village Indians would have knowledge and experience in relation to fishing and in assisting the non-aboriginal fishers employed by the HBC and would, in all probability, have shared that knowledge and experience as part of their economic co-existence when they were residing at the post. That Dr. Lovisek sees this as labour and not trade or commerce does not deny the overwhelming historical evidence that she herself does not deny which is that fishing was a significant part of the economic existence of the Upland Cree in the Norway House district.[5]

4. Dr. Lovisek states that it was not until the mid-1880s that commercial fishing was introduced into Lake Winnipeg. These were white fishermen from the south encroaching on aboriginal food fisheries. It was again Dr. Tough who commented on this intrusion and the aboriginal people's initial opposition to it. In this context, Dr. Tough did describe Norway House as an Indian reserve having little or no involvement in that *industry* until it emerged in the 1880s. The commercial fishing that is being referred to is clearly of a different sort than that which was engaged in by the Norway House Cree prior to this intrusion. However, that does not distract from his acknowledgement in the same work that in a sense, but in a different sense, they were involved in "fishing for commercial exchange prior to the treaties". They just were not involved yet in this commercial fishing "industry". I would note, however, that the evidence of Mr. L. Saunders, albeit hearsay, was that the Co-op was necessary to protect aboriginal fishers from being treated poorly, not even being paid by weighing the fish when sold along side the commercial boats from the South. This would detract

[5] The separation of two Lowland Cree groups in the Norway House district is contained in the official text of the Treaty Number 5 negotiations which text is referred to in Dr. Lovisek's Rebuttal. That text indicates that approximately 90 families wished to migrate to Fisher River on the southwestern shore of Lake Winnipeg, whereas the Norway House post journal records indicate that it was only 30 families that started for Fisher River. None of the records that I was referred to indicate the number of families that remained part of the Norway House Band at the time of the Treaty. Nonetheless, the departure of so many families underlines that placing emphasis or relevance to the inability to trace the exact aboriginal people that hunted and fished and traded at Norway House, as Dr. Lovisek did, is not practical – they were not a sedentary people. That cannot cause them to lose rights under the *Indian Act*.

from any notion that these aboriginal fishers were involved in this so-called industry. Regardless of the accuracy of this sort of "oral history", there is clearly acknowledgment in the historical records that the aboriginal people of the Norway House reserve valued their fisheries and saw the non-aboriginal fisherman as intruding on a valuable resource.

5. Indeed, exploitation of the fisheries resulted quickly in government regulation and Dr. Lovisek reports that as early as 1900 the residents of Norway House applied for and received licenses to fish in Lake Winnipeg. She goes on to report that in 1904 members of the Norway House Band were fishing for various commercial companies. Again, the import of Dr. Lytwyn's rebuttal is that by her definition of commercial fishing, it would not have started until a decade or more after the signing of the Treaty.

6. The next part of Dr. Lovisek's Report is the very critical analysis of Dr. Lytwyn's Report. Here she makes it clear that the Lytwyn Report appears to accept that any and all potential transactions of what may be barter, trade or debt payment provides evidence of fishing for commercial purposes. She then goes on to try to establish that a number of references made by Dr. Lytwyn to what might appear to be isolated commercial transactions, were not proof of what they purported to be simply because there was no proof that a number of the trades that he was referring to, were trades by "Indians" or were trades by aboriginal people who lived on the post or that the fish traded were caught in fisheries near the post. Indeed, there seems to be little about Dr. Lytwyn's Report that Dr. Lovisek does not criticize on the basis that it does not prove the existence of commercial fishing by the ancestors of the Norway House Band.

7. She also refers to the lack of evidence of pre-contact trading practices of the ancestors of the people of Norway House and refers to the need for anthropological research which she herself did not undertake. She states: "An aboriginal rights claim to commercial fishing requires detailed archeological, genealogical, historical and anthropological research and supporting documentation to ascertain that the activity, in this case, commercial fishing was integral to the distinctive culture of the specific aboriginal people prior to contact with Europeans. There is no indication, for example, that in the early HBC post reports at Norway House aboriginal people in the vicinity of Norway House posts bartered or traded fish or fish products with other

aboriginal peoples."[6] This perhaps speaks to the Section 35 argument but again offers nothing constructive to the section 87 analysis.

8. Her report then goes on for 40 plus pages picking at Dr. Lytwyn's Report in an attempt to discredit it. The first and most revealing criticism is Dr. Lytwyn's acceptance that "any and all potential transactions of what may be barter, trade, or debt payment provide evidence of fishing for commercial purposes." She does not understand or want to acknowledge in her adversarial role that bartering is a commercial activity. She is bent on distinguishing the degree of commerciality that is reflected by the commerce that emerged late in the 1880s and early 1900s by the non-aboriginal fishing enterprises from the south that Dr. Tough described in his work as the establishment of a commercial fishing *industry*. I am not concerned with the emergence of an "industry" even 10 years after the Treaty was signed. I am concerned, in my analysis, with the pursuit of a traditional activity that supported the people of Norway House by providing income or income-in-kind prior to the Treaty. That would include all the things Dr. Lovisek wants to exclude including wages for fishing for the HBC or assisting its employed fishers.

9. I do not find it to be a particularly productive exercise to review any part of that critical rebuttal.

[6] Dr. Lovisek's Report page 54.

Surrebuttal to Dr. Lovisek' Rebuttal Report

1. This report defends her use of Hudson's Bay post journals and states that Dr. Lytwyn has not undertaken the required research in the Norway House area to support his conclusions that the aboriginal people participated in commercial isinglass production in the Norway House area. Dr. Lovisek imposes a burden of proof on Dr. Lytwyn that does not exist in law. Further, research might prove that there was definitely commercial trade in isinglass at about the time of the entering into the Treaty but short of such proof, I am still satisfied that the evidence upon which Dr. Lytwyn relies establishes a probability that isinglass, made from fish caught in local sturgeon fisheries, was being traded at Norway House by the aboriginal people of Norway House in the quantities suggested by Dr. Lovisek as evidenced by specific documentation in the Hudson's Bay Company account books.

2. The Surrebuttal goes on again to criticize Dr. Lytwyn for not defining commercial fishing as she would define it and again picks on some asserted inconsistencies, errors and omissions in Dr. Lytwyn's Report.

Dr. Lovisek's Testimony

1. Dr. Lovisek's view of the aboriginal people of Norway House before the signing of the Treaty stems somewhat from her view that in the 1860s the importance of the post had declined due to Red River traffic to Minnesota. This caused a decline of York Factory as a major depot as well. There was increased movement of aboriginal people that had links to the activities of the HBC posts. New economic resources were being sought as well as new locations. Identifying who did what and where was difficult. Although she stressed employment links and menial assistance tasks such as hauling fish caught by employed non-aboriginal fishermen to deflate any notion of commerce being engaged in by the aboriginal population of Norway House, her suggestion was also that there is no evidence that these were the people who stayed behind at the time the Treaty was signed.

2. She attempted to focus attention just to the residents of the post and not to the Upland Cree of the district.

3. She criticized Dr. Lytwyn's over-use of HBC account books in his Rejoinder, and as noted above, she took issue with the conclusions he drew from Dr. Tough's work.

4. Dr. Lovisek confirmed her opinion that the aboriginal people of Norway House before and at the time of entering into the Treaty did not engage in a commercial fishing operation.

5. While I have accepted her qualification to express an opinion, that does not suspend my need to evaluate its importance and the weight I should give it. Unlike the evidence of Dr. Lytwyn, I find her opinions too much in the nature of argument based on reasoning bent on upsetting a position as opposed to constructively building one. In large part, she undermined Dr. Lytwyn's opinions by attacking his proofs as loosely based while presenting no well substantiated evidence that would show he was wrong or she was right. Her definitions and standards of proof went beyond what I found helpful.

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