Middle River option

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April 29, 1974

Ottawa, Ontario K1A OH4

TRANSLATION

FRENCH TEXT PREVAILS

Mr. Jacques Roy,

Director,

Legal Services.

MIDDLE RIVER RESERVE

Dear colleague,

Further to the meeting which was held in your office on March 5, 1974, I am forwarding to you a memorandum which contains a summary of the facts, as well as an outline of the points of law raised by the Middle River Reserve situation.

Would you be so kind as to inform us of the opinion of the Deputy Minister of Justice, with respect to the questions formulated in section D of my memorandum.

Thanking you kindly in advance for your co-operation, I remain,

Yours sincerely,

(signed) Alice Desjardins,

Policy, Planning and

Reserach Branch

Encl.

c.c. Mrs. Marla Bryant

April 29, 1974

Ottawa, Ontario K1A 0H4

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FRENCH TEXT PREVAILS

MEMORANDUM FOR THE DIRECTOR

OF LEGAL SERVICES

FROM: Alice Desjardins

Policy, Planning and

Research Branch

MIDDLE RIVER RESERVE

A. Events prior to Confederation

1. Nova Scotia colonial policy

During the entire colonial period, Governors who had jurisdiction over Nova Scotia(1) as well as all the Governors of North American colonies(2) received instructions to allow no white man to take possession of lands, which as a result of a treaty or agreement, were reserved for Indians, unless they had received authorization from the Sovereign power. The Governors were even asked to evict persons occupying such lands without authorization.

In conformity with these instructions, received on December 9, 1761, Jonathan Belcher, the Governor of Halifax, announced on May 4, 1762, that His Majesty the King of England had taken notice of the misgivings of the Indians who protested against the fact that white men were taking possession of their lands. He enjoined all persons who had taken possession of these lands without his authorization to leave the said lands. He also enjoined all persons to cease molesting the Indians in certain hunting and fishing territories.

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(1) The colony of Nova Scotia became British territory as a result of the Utrecht Treaty in 1713. New Brunswick was separated from Nova Scotia in 1784.

(2) Warman V. Francis (1960) 20 D.L.R. (2d) 627, on page 632.

The main object of the Governor's proclamation was to render inviolable the treaties and agreements signed between the Crown and the Indians. The precise nature of the treaties and agreements was not indicated in the 1762 Proclamation, but nowhere is it mentioned that a formal surrender of land by the Indians was required before the Sovereign granted authorization to purchase their land. It was clearly indicated, however, that no British subject could purchase these lands directly from the Indians. Only the Crown could do so and at its own discretion.

The following year, with the 1763 Royal Proclamation, the British Crown took formal possession of the colonies of Quebec, Grenada, Western Florida and Eastern Florida. Although we do not wish, at this moment, to decide whether the Proclamation applied or not to Nova Scotia's Indians, it nevertheless appears essential to mention that the 1763 Proclamation distinguished itself from the policy implemented until then in Nova Scotia in that it mentioned that the purchasing of land from Indians was to take place in the presence of Indians during a public meeting "if at any time any of the said Indians should be inclined to dispose of the said Lands".(1)

2. Creation of the Middle River Reserve

According to historians, the situation of the Micmac Indians deteriorated throughout the years. Their nomadic way of life did not enable them to provide for their own needs. As a result of

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(1) In Warman V. Francis, (1960) 20 D.L.R. (2d) 627, on page 638, Mr. Justice Anglin stated that the Royal Proclamation applied to New Brunswick. He stressed the fact that an Imperial Order in Council of September 3, 1844 abolished the Indian Title in that province, in conformity, in his opinion, to the Royal Proclamation, but he does not take into account the section of the Proclamation which deals with a public assembly.

poverty and famine, they began to depend more and more on government authorities. Towards 1807, and then in 1819 [2] the Nova Scotia Council recommended the establishment of reserves for Indians. The Assembly ratified the proposal and stated that the lands would be kept in trust for the benefit of Indians; within each reserve, each Indian family was to receive farming implements and seeds in order to encourage it to live on agriculture.

In 1834, following a Council Decreee, Nova Scotia set aside 4,500 acres of land for the use of Indians in a reserve known as Wagamatkook River [3] (Middle River). White settlers took possession of certain lands on this reserve, however.

In 1842[1], 1859[2], and 1864[3], the Nova Scotia legislature passed laws governing Indian reserves. All three laws were of the same type.

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(2) See Elizabeth Ann Hutton, "Indian Affairs in Nova Scotia", 1760-1834, Vol. 34, Collections of the Nova Scotia Historical Society, p. 33.

(3) We were unable to trace the Act underlying the decree. Let us mention, however, that an 1841 act entitled An Act relative to the Crown Land Department 1841, R.S.N.S. c. 4, authorized the Governor in Council to create Indian reserves and to divide those already in existence. Furthermore, the Crown Lands Commissioner was given legal title to these lands and had to protect the natives who had settled on them.

(1) 5 Victoria, c. 16, An Act to provide for the Instruction and Permanent Settlement of the Indians. This law is somewhat different from the other two in that it does not provide for any sanction in the case where no agreement is reached with the white settlers.

(2) 1859, S. of Nova Scotia, 22, Victoria, c. 14 An Act concerning Indian Reserves.

(3) 1864 R.S.N.S. c. 57 Of Indians.

They authorized the Governor in Council to appoint commissioners who were responsible for the protection of Indian and Indian reserves. The commissioners had the right, subject to approval by the Governor in Council, to negotiate, with the settlers already living on the reserves, either a lease or a bill of sale. If the Governor in Council's authorization was obtained, the Crown Land's Commissioner could then carry out the terms of the agreement, and the money was to be put in a special fund, the interests of which were applicable to the Indians. The Commissioners could act on their own discretion to sign agreements with white men, but in cases where intrusions by the latter were judged to be unjustified, or case no agreement was reached, it was the duty of the Commissioners to evict the white men and to assign the land to Indians. The Act clearly specified that no title was to be issued by the Crown Land Commissioner as long as the Receiver General had not issued a receipt attesting payment. Acting in conformity with the provisions of the 1859 Act, the Commissioner suggested in his report of March 3, 1862, entitled "Report of the Commissioners for the year 1861", that the lands occupied by white men on the East Shore of the Middle River, in the County of Victoria, be evaluated and that the amount be paid to the settlers, or that the latter be evicted from the territory. He then added;

> "On the west side of Middle River there is a block of about 700 acres which includes the Indian village, the burying ground, and sugar maple grove. All interference with this land should be strictly prevented, and such arrangement or division made as would be considered most favorable for inducing Indian settlement"(4).

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(4) See Department of Indian Affairs file 1/3-11-27 Vol. 1, entitled "Claims and Disputes, Middle River Band, Headquarters".

On December 31, 1866, when the colony was planning its entrance into Confederation, Commissioner Fairbanks stated that settlers had encroached on the Indian reserves and that the legislature had taken action. He added:

> "This law has been acted upon; the lots occupied were sold at a fair valuation, and the proceeds are at the credit of the Indians for the above purpose; being one branch of the Provincial liabilities. As regards the remainder of the lands, the title is by-law vested in the Commissioner of Crown Lands, in trust for the Indians. They have been, with scarcely an exception, surveyed, although some of the lots may require the lines to be renewed. No further sale is contemplated. Strict orders have been given to the Deputy Surveyors throughout the Province to protect these lands from intruders and trespassers". (1)

In his last report, that of December 31, 1867, Commissioner Fairbanks described the Middle River Reserve as follows:

> VICTORIA COUNTY
>
> "A tract of land containing Four thousand five hundred acres, extending both sides of Middle River, which empties into Indian Bay, St. Patrick Channel. This Lot with the exception of about Six hundred acres, was subdivided with the approval of the Legislature into various sized Lots, a large portion of which has been sold: the proceeds paid in part into the Treasury. A large sum is still due. No title given until consideration money is paid. The Six hundred acres are occupied as an Indian settlement". (2)

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(1) See Department of Indian Affairs file 1/3-11-27 Vol. 1, entitled "Claims and Disputes, Middle River Band, Headquarters".

(2) See Department of Indian Affairs file 1/3-11-27 Vol. 1, entitled "Claims and Disputes, Middle River Band, Headquarters".

B. Events following Confederation

On July 1st, 1867, Nova Scotia became a Canadian province. The Canadian Parliament thus obtained jusisdiction over the Indians and the lands reserved for Indians.(1)

The laws in force at the time in the various provinces remained as such until they were changed by the proper authorites.(2) The Canadian Parliament abrogated the Nova Scotia Law on May 22, 1868(3). Afterwards, the lands which had been opened to settlement in the Middle River reserve were disposed of in seven (7) different manners:(4)

1. Agreement to sell, monies collected and patents issued by the Province before 1867.
2. Agreement to sell, monies collected before 1867 no patent issued.
3. Agreement to sell and monies collected before Confederation. However, the Federal Crown issued the patent after 1867.
4. Agreement to sell, some monies collected pre-Confederation but the sales were cancelled(5) for an undetermined-reason after 1867.
5. Agreement to sell after 1867, the monies collected, and pattents issued.
6. Agreement to sell after Confederation, the monies collected but no patent issued.
7. Lands for which we have no record of sale, but that are claimed and occupied by non-Indians today.

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(1) Section 91 (24) BNA Act "Indians and Lands reserved for Indians".

(2) Section 129 BNA Act.

(3) 1868, S. of C. c.42, Law entitled Act providing for the organization of the Department of the Secretary of State of Canada, and for the Administration of Indian and Ordinance of Lands.

(4) See letter from Mr. Vergette to Mrs. C.J. Pepper dated March 29, 1973. Department of Indian Affairs file 1/3-11-27, vol. 1, entitled "Claims and Disputes, Middle River Band, Headquarters".

(5) We have no more evidence which could indicate if the purchasers were informed of the cancellations.

Categories 1 and 2 probably include lots 3, 5, 6, 21, 25, 28 and 34 of the Middle River reserve.

Category 3 includes lots 1, 11, 13, 19, and 20.

Category 4 includes lots 2, 4, 9[a)], 12, 15, 30, 31, and 35.

Category 5 includes lots 17, 27, 29, and 32. It would seem that lot 29 was purchased by a Mr. McDonald in 1892 or 93, from an Indian.

Category 6 includes lots 16 and 33.

Category 7 includes lots 7[a)] - 8[a)] - 10 - 14 and 22.

Lots 18, 23, 24, and 26 were purchased from the Crown before 1867 and then sold back to the Crown before Confederation.

C. Legal issues to be discussed

1. Status of lands

Section 6 of the 1868 Federal Law stipulates:

> 6. All lands reserved for Indians or for any tribe, band or body of Indians, or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as before the passing of this Act, but subject to its provisions; and no such lands shall be sold, alienated or leased until they have been released or surrendered to the Crown for the purposes of this Act.

The French Text of the same law reads as follows:

> 6. Toutes les terres réservées pour les Sauvages, ou pour toute nation, tribu ou peuplade de Sauvages ou possédées en leur nom (held in trust) pour leur bénéfice, seront censées être réservées et possédées pour les mêmes fins qu'avant la passation du présent acte, tout en restant assujéties à ses dispositions; et ces terres ne pourront être vendues, aliénées ou affermées, avant d'avoir été cédées àla couronne pour les objets prévus au présent acte.

The new law probably had no effect whatsoever on the lots of categories 1, 2, and 3. The reasons which led the Federal Government to issue the letters patent for the lots of category 3 after 1868 should be determined.

The fate of the lots in categories 4, 5, and 6 is a lot more difficult to determine. At least two types of arguments can be established: the first confirms the federal government's attitude at the time and the other is in favour of the Indian thesis.

1st thesis

At the time of Confederation, the 600 or 700 acres of the Middle River reserve became reserved lands. The words "lands... held in trust for their benefits" cannot apply to the lots of categories 4, 5, and 6, since these lands were opened for settlement.(1) Only the products of the sale could be deposited in an Indian fund. This money was in fact due by the Nova Scotia colony to the Federal authorities.

The cancellation of the sale of lots 4, 5, and 6 delayed the settling of matters pending from the old regime. It became more difficult to settle these matters once Confederation was established, as a result of the creation of a federal system which lead two governments to become interested in the same matter, one because of its rights of ownership and the other because of its legislative jurisdiction. As a result, there was great confusion which persisted until 1888, at which time the Judicial Committee of the Privy Council decided the St. Catherine Milling and Lumber V. The Queen(1) case.

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(1) These words could apply, for example, to lands surrendered to charitable organizations for the benefit of Indians.

(1) (1888) 14 A.C. 46. Section 91 of the federal Act of 1868 is an indication of this confusion, as was stated by Mr. Justice Anglin in Warman V. Francis (1960) 20 D.L.R. (2d) 627, on page 640.

When the sales were cancelled after Confederation, the Federal authorities simply maintained the policy implemented by the Nova Scotia government and maintained the lands for settlement, in order to obtain the only thing to which the Indians were entitled: the product of the sales of these lands.

We now know that it would have been better if the province had sold the lands after Confederation and given the money to the Federal Government. Any error made by the Federal government, without legislative authorization(2), does not concern the Indians, but the Provincial Crown only. The Indian's rights were in no way encroached upon, since the products of the sale of these lots were paid to them.

This thesis, if it is valid, obviously assumes that the lots in 1868, were not lands "reserved...or held in trust for their benefit", since they had been validly opened to settlement(3). It also supposes that there was a distinction between "lands...held in trust" of section 6 of the 1868 Act and money held in trust.

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(2) The Federal authorities cannot take advantage of section 31 of the federal Act of 1868, since the latter applies to reserved lands only. (And furthermore, we know for a fact that since 1888, this section is incorrect, since the Federal Government acquired no title as a result of its legislative jurisdiction over the Indians and lands reserved for Indians, 91, (24). It is possible that the Federal authorities at that time regarded those lands as being surrendered Indian land. Why, then, did they persist in issuing letters patent after 1888?

(3) For an excellent historic compilation of texts, refer to a document prepared by the Lands Division, Department of Indian and Northern Affairs, entitled "Report on Nova Scotia's Pre-Confederation Land Polciy with Particular Reference to Middle River Indian Reserves Number One", Ref.: 274-30-13-1 (DLT 42) March 13, 1974.

2nd thesis

The Nova Scotia colony had planned its policy, however, in case no agreements were reached with the white settlers.

Sections 3 and 11 of the Acts of 1859 and 1864 respectively, stipulated:

> ".....in cases when an agreement cannot be entered into with them, it shall be the duty of the commissioners to take prompt measures for the removal of the intruders or occupants and applying the lands for the benefit of the Indians".

According to this second thesis, the cancellation of a sale of land, after Confederation, proves that there had been no agreement between the parties, in which case, if the Federal Government wanted to respect the obligations of the old regime, it had to apply the sanction(1) which was madatory, instead of persisting in offering the lands for settlement.

Certain historic facts could be referred to in support of this thesis. The Commissioners of Indian Affairs of the government of Nova Scotia (Messrs. Edm'd M. Dood, H.W. Crawley, Hendry and Fairbanks) were tolerant with the settlers, for they were convinced that the Middle River Indians were on the verge of extinction(2)

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(1) It is understood that section 3 of the Act of 1859 was abrogated in 1864 and that section 11 of the Act of 1864 was abrogated in 1868. To accept the above reasoning, one must take for granted that the cancellation of a sale could have a retroactive effect and that the new government intended to settle the matters of the old regime, according to the same policies as those which had been stated in the last Nova Scotia legislation passed before Confederation.

(2) See Report of the Commissioners for the year 1861, A.W. Hendry, Indian Affairs, Appendix 30, Halifax February 8, 1862.

and also because they knew from experience that it was more difficult to evict the white men than to try and reach an agreement with them:

> "On the Reserve at Wagamtkook, especially which is one of the oldest Indian settlements, large encroachments, have been made, and are persisted in, notwithstanding that the Government had repeatedly commanded the offenders to desist, and altho' they have been more than once actually served with a writ by the Sheriff, at considerable expense to the Government: Their impunity will no doubt encourage similar invasions on the other Reserves.(1)

They did not sympathize with them, however. Quite often, the settlers knew for a fact that the lands on which they were settling were part of the reserve, as granted in 1834. They nevertheless took possession of these lands, because they were fertile and because the Indians were not cultivating them.

The same settlers obtained terms of payment around 1862, because money was rare. After Confederation, however, several among them neglected to pay their debts, although they should have done so, thus depriving the Indians of the interests to which they were entitled.(2)

Around 1881, therefore, after Confederation, the situation of the Middle River Indians changed. They needed their lands and asked the Department to hand them over to them. Furthermore, according to a letter signed by Mr. McEntyre, dated September 1, 1881, their version of the facts would have been as follows:

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(1) Appendix #16, Sydney, C.B., 16th January, 1845, 1845 Edm'd M. Dood.

(2) See letter from Mr. A.J. Boyd, Indian Superintendent, Nova Scotia, to the Secretary, Department of Indian Affairs, Ottawa, February 4, 1908.

"I have consulted the Head Chief on this matter, as directed, and he says none of those settlers[3] ever got grants for the lands they occupy - that they were only allowed to retain those lands until the Indians became sufficiently numerous to settle upon them".

All sale cancellations were made in December 1882.[4] It had therefore become obvious at that time, that the motive which had led the Nova Scotia colony to offer the lands for settlement (i.e. the extinction of the Indian race and the possibiltiy of reaching an agreement with the settleres) no longer counted. The mandatory sanction should have been applied.

If this reasoning is valid, do the words "applying the lands for the benefit of the Indians" mean that the Commissioner was to return these lots to the Middle River reserve? It should be mentioned that both the Acts of 1859 and 1864 use the words "applying the lands" and not applying the money resulting from the sale of the land. There is also an astonishing similarity between the words "applying the lands for the benefit of the Indians" of section 11 of the 1864 Act (and of section 3 of the 1859 Act) and the words "lands reserved...or held in trust for their benefit" of section 8 of the federal Act of 1868.

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(3) In this letter, certain settlers are mentioned by name. The number of their lots is not given.

(4) According to the book of sales of the Department of Indian Affairs, only three of these lots were resold in 1883. The other lots were perhaps simply occupied, in which case the product of the sale was never paid to the Indian fund.

2. The acquisitive prescription

Whatever the legal status of these lands may have been, the situation was as follows: the lands were either sold to third parties, or occupied by them (category 7). What legal remedies do the Indians have in 1974? Can they take action against the Federal Government if their thesis is valid? Do they also have a action against third parties? Has their tranquil possession of their lands for a period of more than sixty years erased the vices of title inherent to their lots?(1)

3. The Royal Proclamation

Cape Breton was a French colony which has been annexed to Nova Scotia by the Royal Proclamation, in 1763. It is important to know if the section of the Royal Proclamation which concerns Indians also applies to those of Cape Breton and of Nova Scotia.(2)

If this proclamation does apply, we must make sure that the title has not been annuled by a law or Imperial Order In Council(3) or by a statute of Nova Scotia.

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(1) I read over Mrs. Carol Pepper's memorandum dated June 8, 1973 and entitled "Memorandum to file, our file 1.18.2.515," but I would like this question to be re-opened. I am thinking of the difficulty raised by Section 20 of the "Limitation of Actions Act" R.S.N.S. 1967 c. 168.

(2) Does Mr. Justice Paterson's judgement in Rex. V. Syliboy (1929) 1 D.L.R. 307, on page 310, in which he states that the Royal Proclamation does not apply to Cape Breton still have some value? Is the reasoning invoked by the Judicial Committee of the Privy Council to prevent the Royal Proclamation from applying to Newfoundland also valid for Cape Breton? See Re Labrador Boundary (1927) 2 D.L.R. 401.

(3) See, for example, the way in which this matter was dealt with in Warman V. Francis (1960) 20 D.L.R. 627, on page 638, where Mr. Justice Anglin states that the Royal Proclamation applied to New Brunswick but that an Imperial Order in Council of September 3, 1844 abolished the Indian Title.

If the Indian Title has not been abolished, it will be necessary to study the implications.

D. Questions asked to the Department of Justice

As agreed during the meeting of March 5, 1974, would you be so kind as to give us the opinion of the Deputy Minister of Justice with respect to the four following questions:

1 - What was the legal status of the lots in categories 3, 4, 5, and 7?

2 - What legal remedies do the Indians of the Middle River Reserve have, in 1974:

a) against the Government of Canada?

b) against third parties who now have possession of lots in categories 3, 4, 5, 6 and 7?

3 - Does the section of the Royal Proclamation concerning the Indians apply to those of Cape Breton and of Nova Scotia? If it does, has the Indian Title been validly abolished in that province?

If it applies and if the Indian Title has not been validly abolished in this province, what are the implications?

4 - Have the Indians been treated adequately legally speaking?

Were they treated fairly?

Were they treated according to the principles of natural justice?

Have they acquired rights which we neglected to take into account?