Date: 20030611

Docket: A-47-02

Citation: 2003 FCA 236

CORAM: **STONE J.A.**
NADON J.A.
EVANS J.A.

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Appellant

and

CHARLES JOHN GORDON BENOIT, ATHABASCA TRIBAL CORPORATION, LESSER SLAVE LAKE INDIAN REGIONAL COUNCIL, KEE TAS KEE NOW TRIBAL COUNCIL

Respondents

and

THE ATTORNEY GENERAL OF THE PROVINCE OF ALBERTA

Pursuant to s. 57 of the *Federal Court Act*

Heard at Ottawa, Ontario, on November 19, 20 and 21, 2002

Judgment delivered at Ottawa, Ontario, on June 11, 2003

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: STONE J.A.
EVANS J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal of a decision of the Trial Division, 2002 FCTD 243, dated March 7, 2002, which held that Treaty Number 8 (the "Treaty") signed between the Crown and the Cree

and Dene peoples (the "Aboriginal signatories") in 1899 included a promise to the Aboriginal signatories that they would not have any tax imposed upon them at any time for any reason. The learned judge's judgment reads as follows:

> For the reasons provided, I declare that:
>
> > (a) the Plaintiffs are entitled to claim the benefits of Treaty No. 8, including the Treaty Right not to have any tax imposed upon them at any time for any reason;
> >
> > (b) the Treaty Right was not extinguished prior to April 17, 1982; and is now protected from extinguishment by the *Constitution Act, 1982* and is binding on Canada to honour and uphold;
> >
> > (c) the imposition of any tax by Canada on the Plaintiffs is an unjustified breach of the Treaty Right.
>
> I also declare that:
>
> > The application of Federal taxation provisions to Indian beneficiaries of Treaty 8 is inconsistent with s.35 of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (U.K.),* and is therefore, to the extent of the inconsistency, of no force and effect.

[2] At issue in this appeal is Treaty Number 8, one of eleven treaties concluded between 1871 and 1923 between the Crown and various Aboriginal peoples as a means of facilitating settlement of Western Canada. The Treaty, made on June 21, 1899, at Lesser Slave Lake, and the Adhesions thereto taken subsequently at other locations, involved the surrender of vast districts of land in what is now Alberta, Saskatchewan, British Columbia and the Northwest Territories. As a *quid pro quo* for the surrender of the land, the federal Crown made a number of commitments to the Aboriginal signatories, namely to provide the bands with reserves, schools, annuities, farm equipment, ammunition and relief in times of famine or pestilence. Further, the federal Crown guaranteed to the Aboriginal signatories their rights of hunting, trapping and fishing. In that regard, the relevant part of the Treaty provides as follows:

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

[3] The Treaty also provides that each Aboriginal can elect to receive a separate 160-acre parcel of land instead of being part of a group reserve allotment:

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

[4] There is no mention in the Treaty of a promise exempting the Aboriginal signatories from taxation.

[5] Notwithstanding that the Treaty is silent with respect to the Aboriginal signatories' right to be exempted from taxation and his findings that the Treaty Commissioners had no intention of making a promise to exempt them from taxation, and that no such promise had been made, the Trial Judge concluded that the Treaty had to be construed as containing such a promise.

[6] That conclusion is the subject matter of this appeal.

THE FACTS

[7] At trial, the parties filed an Agreed Statement of Facts, which the Trial Judge sets out at paragraph 22 of his Reasons:

> [22] [...]
>
> In 1870, the Hudson's Bay Company surrendered its rights to the North West to the Dominion of Canada. On June 27, 1898 the Privy Council by Order in Council appointed A.E. Forget ("Forget"), J.A.J. McKenna ("McKenna") and another to be appointed later, as commissioners to treat with the Indians north of Treaty Number six for the extinguishment of their title to the land (the Treaty 8 area). On October 4, 1898 the Privy Council by Order in Council advised that David Laird be appointed Indian Commissioner of Manitoba, Keewatin and the North West Territories.
>
> On December 6, 1898, the Privy Council by Order in Council authorized notification to the province of British Columbia of the intention to negotiate a treaty.
>
> On February 3, 1899, David Laird sent a circular letter into the Treaty 8 area by means of the Northwest Mounted Police and the Hudson's Bay Company.
>
> On March 2, 1899, the Privy Council by Order in Council appointed J.H. Ross as the third Commissioner and replaced Mr. Forget with David Laird as Treaty Commissioner. P.C. 1703 is stamped "amended by PC 330.
>
> On May 3, 1899, the Privy Council by Order in Council appointed Father A. Lacombe to accompany the Commissioners.
>
> On May 6, 1899, the Privy Council by Order in Council approved that the claims of the Half-Breeds (Metis) be investigated and dealt with concurrently with the treaty negotiations.
>
> On May 12, 1899, Clifford Sifton, the Superintendent General of Indian Affairs, sent a letter to the Commissioners handing them the Commission and providing the instructions of the Government.
>
> On May 29, 1899, the Commission party left Edmonton, expecting to arrive at Lesser Slave Lake by June 8, 1899. Mr. Laird and Mr. McKenna and their party traveled to Athabasca Landing and then to Lesser Slave Lake, arriving there late on June 19, 1899, because of unfavorable traveling conditions. Mr. Ross and his party, traveled over the Assiniboine trail to Lesser Slave Lake arriving at Lesser Slave Lake on approximately June 5, 1899.

On June 20, 1899, the Commissioners met the Cree of Lesser Slave Lake. On that day the terms of treaty that the Government offered were conveyed in a meeting with the Cree of Lesser Slave Lake.

Treaty Number 8 was drafted and put in written form at Lesser Slave Lake following the meeting with the Cree on June 20, 1899.

On June 21, 1899, Treaty Number 8 was signed by the Commissioners and by representatives of the Cree of Lesser Slave Lake and adjacent territory authorised by their people to agree to the treaty.

The Commission Party then divided to offset the earlier delay in reaching Lesser Slave Lake by Mr. Laird and Mr. McKenna.

Mr. Laird traveled to Peace River Crossing and on July 1, 1899, the Cree of Peace River Crossing and adjacent territory adhered to Treaty Number 8 through their authorised representative.

Mr. Laird then traveled to Vermilion and on July 8, 1899 the Beaver and Cree of Vermilion and adjacent territory adhered to Treaty Number 8 through their authorised representatives.

Mr. Laird then traveled to Fond du Lac (Lake Athabasca) and on July 25 and 27, 1899 the Chipewyan, Fond du Lac and adjacent territory adhered to Treaty Number 8 through their authorised representatives.

Mr. Ross and Mr. McKenna traveled from Lesser Slave Lake to Dunvegan and on July 6, 1899 the Beaver and Dunvegan adhered to Treaty Number 8 through their authorised representative.

Mr. Ross and Mr. McKenna then traveled to Little Red River Post, arriving on July 10, 1899.

Mr. Ross traveled to Wapiscow (also know as Wabasca) and on August 14, 1899, the Indian of Wapiscow and the Country thereabouts adhered to Treaty Number 8 through their authorised representatives.

By way of a report dated September 22, 1899, the Treaty Commissioners, Messrs Laird, Ross and McKenna reported to the Honourable Clifford Sifton, Superintendent General of Indian Affairs.

Treaty 8 was ratified by the Privy Council on February 20, 1900.

On March 2, 1900, the Privy Council by Order in Council appointed J.A. Macrae to take further adhesions to Treaty Number 8.

> On May 30, 1900, at Fort St. John, the Beaver of Upper Peace River and the Country thereabouts adhered to Treaty Number 8 through their authorised representatives.
>
> On June 8, 1900, at Lesser Slave Lake, the Cree of Sturgeon Lake and the Country thereabouts adhered to Treaty Number 8 through their authorised representatives.
>
> On June 23, 1900 at Vermilion, the Slave of Hay River and the Country thereabouts adhered to Treaty Number 8 through their authorised representatives.
>
> On July 25, 1900, at Fort Resolution, the Indians inhabiting the south shore of Great Slave Lake, between the mouth of Hay River and old Fort Reliance, near the mouth of Lockhearts river and adjacent territory adhered to Treaty Number 8 through their authorised representatives.
>
> By way of a report dated December 11, 1900, Commissioner Macrae reported to The Honourable Superintendent General of Indian Affairs.
>
> The Adhesions to Treaty 8 made in 1900 were ratified on January 3, 1901. (Exhibit 2)
>
> [Emphasis added]

[8] The dispute between the parties stems from the Report dated September 22, 1899 (the "Commissioners' Report"), made by Treaty Commissioners Laird, Ross and McKenna to the Superintendent General of Indian Affairs, the Honourable Clifford Sifton. This document is the only written account by the persons who participated in or witnessed the treaty-making process, which makes mention of taxation in regard to Treaty 8. In their Report, the Commissioners relate and explain the negotiations and the discussions with the Aboriginal signatories which led to the conclusion of the Treaty and the various Adhesions thereto. The relevant part of the Commissioners' Report, which the Trial Judge reproduced at paragraph 23 of his Reasons, reads as follows:

[...]

As the discussions at the different points followed on much the same lines, we shall confine ourselves to a general statement of their import. There was a marked absence of the old Indian style of oratory. Only among the Wood Crees were any formal speeches made, and these were brief. The Beaver Indians are taciturn. The Chipewyans confined themselves to asking questions and making brief arguments. They appeared to be more adept at cross-examination than at speech-making, and the Chief at Fort Chipewyan displayed considerable keenness of intellect and much practical sense in pressing the claims of his band. They all wanted as liberal, if not more liberal terms, than were granted to the Indians of the plains. Some expected to be fed by the Government after the making of treaty, and all asked for assistance in seasons of distress and urged that the old and indigent who were no longer able to hunt and trap and were consequently often in distress should be cared for by the Government. They requested that medicines be furnished. At Vermilion, Chipewyan and Smith's Landing, and earnest appeal was made for the services of a medical man. There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges, and **many were impressed with the notion that the treaty would lead to taxation** and enforced military service. They seemed desirous of securing educational advantages for their children, but stipulated that in the matter of schools there should be no interference with their religious beliefs.

We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them. We told them that the Government was always ready to give relief in cases of actual destitution, and that in seasons of distress they would without any special stipulation in the treaty receive such assistance as it was usual to give in order to prevent starvation among Indians in any part of Canada; and we stated that the attention of the Government would be called to the need of some special provision being made for assisting the old and indigent who were unable to work and dependent on charity for the means of sustaining life. We promised that supplies of medicines would be put in the charge of persons selected by the Government at different points, and would be distributed free to those of the Indians who might require them. We explained that it would be practically impossible for the Government to arrange for regular medical attendance upon Indians so widely scattered over such an extensive territory. We assured them, however, that the Government would always be ready to avail itself of any opportunity of affording medical service just as it provided that the physician attached to the Commission should give free attendance to all Indians whom he might find in need of treatment as he passed through the country.

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.

> **We assured them that the treaty would not lead to any forced interference with their mode of life, that it did not open the way to the imposition of any tax, and there was no fear of enforced military service.** We showed them that, whether treaty was made or not, they were subject to the law, bound to obey it, and liable to punishment for any infringements of it. We pointed out that the law was designed for the protection of all, and must be respected by all the inhabitants of the country, irrespective of colour or origin; and that, in requiring them to live at peace with white men who came into the country, and not to molest them in person or in property, it only required them to do what white men were required to do as to the Indians.
>
> As to education, the Indians were assured that there was no need of any special stipulation, as it was the policy of the Government to provide in every part of the country, as far as circumstances would permit, for the education of Indian children, and that the law, which was as strong as a treaty, provided for non-interference with the religion of the Indians in schools maintained or assisted by the Government.
>
> [Emphasis added]]

[9] It is clear from the evidence, and the learned Trial Judge so found, that the Treaty Commissioners intended to act within their authority and the parameters of existing legislation and policy. They did not intend to create rights under Treaty 8 which were contrary to law, their instructions or the terms contained in the other numbered treaties, which did not provide for a tax exemption. As the Trial Judge points out in paragraphs 75 and 141 of his Reasons, the Superintendent General of Indian Affairs had instructed the Commissioners that they were not to go beyond the terms of previously-negotiated treaties.

[10] The respondents say that one of the commitments made to them by the federal Crown is the right not to have any tax imposed upon them at any time for any reason[1]. For this contention, they rely on those words of the Commissioners' Report which I have emphasized. The appellant's position and that of the intervenors[2] is simply that the Commissioners never made such a promise to the Aboriginal signatories and, consequently, such a promise could not

be construed as a term of the Treaty. They also argue that, in any event, the Aboriginal signatories never understood that a tax promise had been made. Hence, as a result, they seek the dismissal of the respondents' action.

THE JUDGMENT OF THE TRIAL JUDGE

[11] In concluding that the Treaty included a promise exempting the Aboriginal signatories from taxation, the Trial Judge made a number of findings which I will now set out. Firstly, he found that the words used by the Commissioners in their Report concerning taxation, which he characterized as a tax assurance, constituted a treaty promise and thus a term of the Treaty, regardless of the meaning of the words used by the Commissioners.

[12] Secondly, after reviewing the legal and expert opinions, which he found inconclusive, the Trial Judge held that the parties had failed to prove the meaning of the tax assurance and, as a result, proof had not been made of a common understanding or intention between the signatories of the Treaty.

[13] In arriving at this conclusion, the Trial Judge found that the Commissioners had not been authorized to exceed the terms of previous numbered treaties, which did not contain a tax promise. He also found that the Commissioners had not stated nor represented to the Aboriginal signatories that in signing the Treaty, they would be exempted from taxation. At paragraphs 181 and 273 of his Reasons, the Trial Judge makes the following statements:

> [181] As will be further discussed below, I put weight on Dr. Irwin's opinion that the Commissioners would not have told the Aboriginal People that they would never

> pay tax, **and find as a fact that there was no common intention with respect to a promise of a tax exemption.** In fact, Dr. Irwin's evidence supports the conclusion that there was a fundamental misunderstanding between the Commissioners and the Aboriginal People.
>
> [...]
>
> [273] Both Canada and Alberta argue that there is insufficient evidence to prove on a balance of probabilities that the Commissioners made a tax exemption promise. **On the basis of proof that the Commissioners did not intend to make such a promise by the words they spoke, I have found that such a promise was, in fact, not made.** [...]
>
> [Emphasis added]

[14] Thirdly, the Trial Judge concluded that although the Commissioners did not intend to make a tax exemption promise, nor had they made such a promise, the Aboriginal signatories understood the words spoken by the Commissioners as a promise that they would not be taxed if they entered into the Treaty. At paragraph 319 of his Reasons, the Trial Judge states:

> [319] I find that, whatever meaning the Commissioners attached to the tax assurance they gave, which has not been proved, it is different from that which the Aboriginal People understood; on a balance of probabilities, the Dene and Cree People believed that the Commissioners promised a tax exemption.

[15] Fourthly, relying on the concept of the honour of the Crown, the Trial Judge concluded that the federal Crown had to take responsibility for the misunderstanding. At paragraphs 333 and 334, the Trial Judge sets forth his conclusion:

> [333] On the evidence, there is clearly an unintended breach in the trust relationship between Canada and the Aboriginal People of Treaty 8. Thus, both have a common interest in ensuring that their special relationship is made whole. I find that the responsibility to achieve this result lies with Canada. There is nothing more that the Plaintiffs can do than prove their just claim as they have.
>
> [334] In my opinion, according to law and in its own interests and those of Treaty 8 Aboriginal People, Canada is required to recognize and fulfill the tax assurance as it was understood by the Aboriginal People in 1899. Accordingly, as claimed by the Plaintiffs, I find that the Treaty term found must be interpreted to provide to

> Aboriginal People who are entitled to the benefits of Treaty 8, a treaty right not to have any tax imposed upon them at any time for any reason.

[16] Lastly, the Trial Judge considered whether the Aboriginal signatories' Treaty right to be exempted from taxation had been extinguished prior to 1982, and whether federal income tax legislation could constitute a justified infringement of that right. His answer to both questions was a "No".

THE ISSUES

[17] This appeal gives rise to the following issues:

i) whether the Trial Judge erred in finding that a Treaty term could be established on the basis of a unilateral, mistaken understanding;

ii) whether the Trial Judge erred in finding a Treaty right to exemption from tax where there was no common intention to create such a right;

iii) whether the Trial Judge erred in finding that the Aboriginal signatories had misunderstood what the Treaty Commissioners told them;

iv) whether the Trial Judge erred in finding that the Treaty right to exemption from tax had not been extinguished; and

v) whether the Trial Judge erred in finding that federal income tax legislation could not constitute a justified infringement of the Treaty right.

ANALYSIS

[18] My analysis will be limited to the third issue which, in my view, is sufficient to dispose of this appeal. The appellants' submission is that the Trial Judge erred in finding that the

Aboriginal signatories misunderstood what the Commissioners told them. Specifically, they argue that the Trial Judge erred in law by ignoring all evidence contrary to his finding that the oral historical evidence established that the Aboriginal signatories believed that the federal Crown had promised tax immunity as part of the Treaty. They also say that the Trial Judge made a palpable and overriding error in reaching his conclusion solely on the basis of the *viva voce* evidence of three witnesses, namely, Joseph Willier, Céleste Randhile and François Paulette, and the TARR[3] transcript of one of the two interviews of Jean-Marie Mustus. The appellants submit that the Trial Judge should have given no weight to the respondents' oral evidence.

[19] In *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, Lamer C.J. underlined the Supreme Court's reluctance to interfere with findings of fact made by a trial judge. However, he made it clear that where the Judge had made a "palpable and overriding error", an appellate court could substitute its own findings of fact. In this regard, the Chief Justice, at paragraph 78 of his Reasons, referred to the Court's decision in *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, where Ritchie J., at page 808, made the following remarks:

> These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial.

[20] At paragraph 80 of his Reasons in *Delgamuukw, supra*, Chief Justice Lamer went on to point out that appellate courts could interfere with the findings of fact made by the trial judge "where the courts below have misapprehended or overlooked material evidence". Similar remarks were made by La Forest J. in *Schwartz v. Canada*, [1996] 1 S.C.R. 254 at 281, where he

stated that "[a]n appellate court will be justified in interfering with the trial judge's findings of fact if certain relevant evidence was not considered." More recently, in *Housen v. Nikolaisen*, 2002 SCC 33, the Supreme Court examined in great detail the role of an appellate court in reviewing findings of fact and inferences of fact made by trial judges. At paragraph 1 of their Reasons, Iacobucci and Major J.J., for the majority, state the governing principle in the following terms:

> 1. A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. The same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion.

[21] After stating that the standard of review on a question of law was that of correctness, the majority, relying on *Stein v. The Ship "Kathy K", supra*, reaffirmed the principle that findings of fact are not to be reversed unless the reviewing court is satisfied that the trial judge made a "palpable and overriding error". With respect to inferences of fact, the majority opined that where no palpable and overriding error could be found with respect to the facts underlying the inference made by the trial judge, an appellate court could interfere only where the inference-drawing process itself was palpably in error. At paragraphs 22 and 23 of their Reasons, the majority explained their rationale in the following terms:

> 22. [...] Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.
>
> 23. We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be

> assigned to the underlying facts. As we discuss below, it is our respectful view that our colleague's finding that the trial judge erred by imputing knowledge of the hazard to the municipality in this case is an example of this type of impermissible interference with the factual inference drawn by the trial judge.

[22] As to what constitutes a palpable error, the majority in *Housen, supra*, defined it as an error that could be plainly seen. In other words, an obvious error. In my view, for the reasons that follow, that test has been met in the present instance.

[23] I have come to the conclusion that the appellants are correct in their submission, since the evidence adduced at trial cannot reasonably support the conclusion reached by the Trial Judge. In my view, in his desire to be sensitive to the oral history adduced by the respondents, the Trial Judge crossed the boundary which McLachlin C.J. warned against in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, when she stated at paragraph 39:

> 39. **There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, "[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse" (*R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14).** In particular, the *Van der Peet* approach does not operate to amplify the cogency of evidence adduced in support of an aboriginal claim. Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. **Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities.** Placing "due weight" on the aboriginal perspective, or ensuring its supporting evidence an "equal footing" with more familiar forms of evidence, means precisely what these phrases suggest: equal and due treatment. **While the evidence presented by aboriginal claimants should not be undervalued** "simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case" (*Van der Peet*, supra, at para. 68), **neither should it be artificially strained to carry more weight than it can reasonably support**. If this is an obvious proposition, it must nonetheless be stated.
> [Underlining in original omitted – Emphasis added]

[24] In *Mitchell, supra*, at paragraph 51 of her Reasons, McLachlin C.J. concluded that the Trial Judge had made a palpable and overriding error in finding that the Mohawk Canadians of Akwesasne had an Aboriginal right to bring goods into Canada from the United States for

collective use and trade with other First Nations without paying customs duties, which right ousted Canadian customs law. In reaching that conclusion, McLachlin C.J. stated that the Trial Judge had made his finding on the basis of "sparse, doubtful and equivocal evidence":

> 51. As discussed in the previous section, claims must be proven on the basis of cogent evidence establishing their validity on the balance of probabilities. **Sparse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim.** With respect, this is exactly what has occurred in the present case. The contradiction between McKeown J.'s statement that little direct evidence supports a cross-river trading right and his conclusion that such a right exists suggests the application of a very relaxed standard of proof **(or, perhaps more accurately, an unreasonably generous weighing of tenuous evidence)**. The Van der Peet approach, while mandating the equal and due treatment of evidence supporting aboriginal claims, does not bolster or enhance the cogency of this evidence. The relevant evidence in this case -- a single knife, treaties that make no reference to pre-existing trade, and the mere fact of Mohawk involvement in the fur trade -- can only support the conclusion reached by the trial judge if strained beyond the weight they can reasonably hold. Such a result is not contemplated by Van der Peet or s. 35(1). While appellate courts grant considerable deference to findings of fact made by trial judges, I am satisfied that the findings in the present case represent a "palpable and overriding error" warranting the substitution of a different result (Delgamuukw, supra, at paras. 78-80). I conclude that the claimant has not established an ancestral practice of transporting goods across the St. Lawrence River for the purposes of trade. [Emphasis added]

[25] The burden of proving that the Aboriginal signatories had misunderstood what the Commissioners had told them was that of the respondents. In *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at page 1112, the Supreme Court made it clear that in Aboriginal and treaty rights cases, the onus was on those asserting an Aboriginal or treaty right to prove its existence on a civil standard. As to the degree of probability required to satisfy the burden of proof in a civil case, I make mine the remarks of Cartwright J. in *Smith v. Smith*, [1952] 2 S.C.R. 312, where at pages 331 and 332, he advanced the following proposition:

> It is usual to say that civil cases may be proved by a preponderance of evidence or that a finding in such cases may be made upon the basis of a preponderance of probability and I do not propose to attempt a more precise statement of the rule. **I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be satisfied must depend upon the totality of the circumstances on which its judgment is formed including the gravity of the consequences of the finding.**
>
> I would like to adopt the following passage from the judgment of Dixon J. In *Briginshaw v. Briginshaw* [(1938) 60 C.L.R. 336]:
>
> > The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of

> certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. **But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.** In such matters, "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.

And the following from the judgment of Roach J.A. in *George v. George and Logie* [[1951] 1 D.L.R. 278]:

> The judicial mind must be "satisfied" that the alleged act of adultery was in fact committed, but it need not be satisfied to the extent of a moral certainty as in a criminal case. **Evidence that creates only suspicion, surmise or conjecture is, of course, insufficient.** It is necessary that the quality and quantity of the evidence must be such as leads the tribunal – be it judge or jury – acting with care and caution, to the fair and reasonable conclusion that the act was committed.

[Emphasis added]

[26] The respondents have taken the position that the Aboriginal signatories are not obliged to pay taxes at any time for any reason. The seriousness of this allegation and the gravity of the consequences flowing from a finding to that effect were such that it was incumbent upon the Trial Judge to carefully assess all of the evidence adduced before reaching his conclusion. His failure to do so constitutes a serious error that warrants the intervention of this Court. The evidence on which the Trial Judge relied was, in the words of McLachlin C.J. in *Mitchell, supra*, "sparse, doubtful and equivocal."

[27] I now turn to the evidence which the appellants say the Trial Judge ignored. They say that had the Trial Judge properly considered all of the relevant evidence before him, he could

not have concluded that the Aboriginal signatories had understood that a tax promise had been made. Specifically, they say that the following evidence was not considered and, hence, was not given any weight: (a) TARR interviews; (b) oral history interviews conducted in 1991 and in 1999; (c) the Breynat affidavits from the 1930s; (d) the Fumoleau research from the early 1970s, and; (e) the proceedings of the Joint Senate and House of Committee created in 1946 to review the *Indian Act*. I begin with this part of the evidence, which can be characterized as the historical evidence, because, in my view, the reliability and accuracy of the *viva voce* evidence on which the Trial Judge relied for his conclusion must be viewed against the background of the historical evidence.

TARR Interviews:

[28] At the trial, the parties attempted to adduce in evidence transcripts of interviews of Aboriginal elders that were conducted in the 1970s as part of the TARR project, the purpose of which was to develop Aboriginal understanding of the Alberta treaties. Approximately 200 interviews concerning Treaty 8 were conducted. The plaintiffs attempted to introduce the transcripts of 14 interviews and the intervenor Alberta attempted to introduce 103 transcripts of interviews which, in its view, supported the appellants' position.

[29] At paragraphs 253 to 267 of his Reasons, the Trial Judge deals with the admissibility of the TARR transcripts. Recognizing that the transcripts constituted hearsay evidence, he was nonetheless prepared to admit them into evidence as an exception to the hearsay evidence rule because, in his opinion, the transcripts were a hybrid of Aboriginal and

anglo-Canadian methods of recording history. Confronted with objections by the appellants regarding the reliability of the transcripts, the Trial Judge excluded all of the TARR transcripts from evidence, except for the transcript of one of the two interviews of Jean-Marie Mustus[4], a Cree elder, which, in his view, was the only relevant transcript. At paragraph 267 and 272 of his Reasons, the Trial Judge disposes of the objections in the following way:

> [267] These objections raised by Canada and Alberta can be satisfied by a finding of relevance. I find that the only TARR transcript relevant to the plaintiffs' claim of a tax exemption promised is that of Mr. Jean-Marie Mustus.
>
> [...]
>
> [272] However, to satisfy Canada's concern, I will consider only Ms. L'Hirondelle's translation as admissible and reliable evidence of oral history coming from Mr. Mustus.

[30] I agree with the appellants that the Trial Judge's conclusion in this regard is incorrect. As counsel for the intervenor Saskatchewan submits, all of the transcripts were admissible or none were. The Judge appears to have concluded that the Mustus transcript was the only one that was relevant because taxation was neither raised nor discussed in the other transcripts. This, with respect, cannot be right. The fact that the other transcripts are silent with respect to taxation does not render them irrelevant. On the contrary, the fact that over 100 elders made no mention of taxation is an indication, a clear one in my view, that those interviewed may not have understood that a tax promise had been made. Since the stated purpose of the TARR interviews was to record Aboriginal understanding of the Treaty promises, the interviews which did not mention or refer to taxation could not be discounted on the grounds of relevance and, consequently, ought to have been considered by the Trial Judge.

[31] At paragraph 260 of his Reasons, the Trial Judge emphasized the fact that the TARR interviews, and hence "the transcripts were gathered **specifically** with the goal of recording elders' remembrances of Treaty negotiations" [Emphasis added]. With that statement in mind, it is difficult to understand how the Trial Judge could disregard the fact that none of the elders interviewed, save Mr. Mustus, spoke of a tax promise made in 1899 when the Treaty was concluded.

[32] I am therefore of the view that the Trial Judge erred in law in excluding all of the TARR transcripts except for the transcript of one of the Mustus interviews. The interviews which the Trial Judge excluded were no doubt relevant and he could not exclude them unless there were serious reasons for doing so. At paragraphs 299 and 300 of his Reasons, the Trial Judge appears to have directed his mind to the fact that Mr. Mustus was the only interviewee who had said anything about taxation:

> [299] With respect to the singularity of Mr. Mustus' transcript, there are many unproved conjectural possibilities, some being: none of the elders were asked about tax since the interviews were conducted to gain information about resources; the elders interviewed did not consider the tax promise important enough to mention, even though they knew of it; the elders interviewed did not know of the tax assurance, even though it was made; and, in fact, there is no oral tradition of a tax exemption promise and, somehow, a few elders wrongly came to believe that there is.
>
> [300] I find there is really no point in pondering conjecture and theorizing about the amount of evidence of oral tradition available in the trial record; it exists, and its accuracy must be evaluated. If found to be accurate, it proves the belief in issue.

[33] Paragraphs 299 and 300 of the Trial Judge's Reasons are an indication that the Trial Judge did not want to deal with what the appellants urged upon us, i.e. the fact that most of the TARR transcripts are silent with respect to a tax exemption leads to the inescapable inference that not only was such a promise not made, but that the Aboriginal signatories did not understand

such a promise to have been made. The Judge, invoking conjecture, refused to consider the implications of the singularity of the Mustus interview.

Oral History Interviews Conducted in 1991 and in 1999:

[34] In concluding that the Aboriginal signatories had understood that a tax promise had been made, the Trial Judge relied, *inter alia*, on a 1991 unsworn affidavit of Mr. Joe Willier, a Cree elder, drafted by Delia Opekokew, a Saskatchewan lawyer, who had been asked by the Grand Council of Treaty 8 to interview Aboriginal elders with regard to their understanding of the terms and conditions of Treaty 8 and, in particular, with regard to the release of title to lands, hunting, fishing and trapping rights.

[35] As the Trial Judge indicates at paragraph 224 of his Reasons, Ms. Opekokew conducted 30 interviews with elders identified by the leaders of the Grand Council of Treaty 8. One of the elders so identified was Mr. Joe Willier, who was interviewed by Ms. Opekokew in the Cree language at his home in Sucker Creek on August 13, 1991. Later on in these Reasons, I will be dealing more fully with Mr. Willier's evidence. However, for the purpose of the present discussion, it is important to note that the 29 other elders interviewed by Ms. Opekokew did not mention nor refer to an unfulfilled tax promise as one of the Treaty 8 promises and this fact was ignored by the Trial Judge.

[36] Another group of elders was interviewed in February 1999 in the course of the respondents' preparation for the trial. Counsel for the respondents, accompanied by Wendy

Aasen, an anthropologist called by the respondents to give expert evidence, travelled to Sucker Creek (Lesser Slave Lake) and Fort Chipewyan. Ten elders, including Mr. Willier, were interviewed by Ms. Aasen. Except for Mr. Willier, none of the elders raised the issue of taxation. This important consideration appears to have been ignored by the Trial Judge.

[37] I agree entirely with the appellants that the Trial Judge ought to have considered, in determining whether the Aboriginal signatories had understood that a tax promise had been made, the fact that most of the elders, except for Joe Willier, interviewed in 1991 and in 1999, made no mention of an unfulfilled tax promise. In my view, the Trial Judge erred in not taking this evidence into consideration.

The Breynat Affidavits:

[38] In the 1930s, Bishop Gabriel Breynat, the Vicar Apostolic of MacKenzie, a resident of Fort Smith, who witnessed the signing of the Treaty at Fort Chipewyan and Fond du Lac, launched a campaign to protest the Government of Canada's failure to honour the promises made to the Aboriginal signatories.

[39] During the course of his campaign, Bishop Breynat obtained the signature of 49 affidavits, including his own and that of James Kennedy Cornwall, a resident of Edmonton, who was present when the Treaty was adhered to at Lesser Slave Lake and Peace River Crossing. Both Bishop Breynat and Mr. Cornwall state in their affidavits ("paragraph 6 of Bishop Breynat

and paragraph 5 of Mr. Cornwall) that the following promises were made to the Aboriginal signatories:

1. They were promised that nothing would be done to interfere or allowed to interfere with their way of living.
2. The old and destitute would always be taken care of, their future existence would be carefully studied and provided for, and every effort would be made to improve their living conditions.

3. They were guaranteed that they would be protected in their way of living as hunters and trappers from white competition, and they would not be prevented from hunting and fishing, as they had always done, so as to enable them to earn their own living and maintain their existence.

No mention is made of a tax promise in either affidavit.

[40] The appellants argue, correctly in my view, that the Trial Judge ought to have considered these affidavits and, in particular, that he ought to have considered that these affidavits were silent with respect to the tax promise allegedly made to the Aboriginal signatories. It is clear that the Trial Judge failed to consider the affidavits of Bishop Breynat and James Cornwall. Like the TARR interviews, these affidavits, or rather their silence concerning a tax promise, support the proposition that the Aboriginal signatories did not understand that a tax promise had been made.

[41] The respondents argue that in the 1930s, taxation was not an issue of great importance to the Aboriginal signatories and, thus, silence in regard to a promise exempting them from taxes in the Breynat Affidavits or in other documents of that period, is meaningless. I cannot subscribe to that point of view since, as I will show shortly, the Aboriginal signatories who presented extensive submissions to the Joint Committee of the Senate and House of Commons in 1946 had quite a lot to say about taxation.

The Fumoleau Research from the Early 1970s:

[42] In the course of giving their evidence, a number of experts made reference to a book written by Father René Fumoleau, entitled *As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (Toronto; McLellan & Stewart, 1973). The book includes detailed research outlining the Indian understanding of the promises made to the Aboriginal peoples under Treaties No. 8 and No. 11. In *R. v. Badger* [1996], 1 S.C.R. 771, the Supreme Court of Canada, at pages 801 (paragraph 55), referred to Father Fumoleau's book with respect to issues arising under Treaty No. 8.

[43] During the course of his testimony, Dr. Robert Irwin, an historian called by the respondents to give expert testimony, indicated that there was no reference to a tax promise in Father Fumoleau's book, nor in any other of the comprehensive research sources which he had reviewed in preparing to give his expert evidence. During his cross-examination by counsel for Alberta, Dr. Irwin confirmed that the Commissioners' Report was the only document which referred to taxation in regard to Treaty No. 8 and that its receipt in Ottawa did not cause any

controversy or raise any objections. At pages 803 and 804 of the transcript (Transcript of Trial Proceedings, Vol. 3, Evidence of Dr. Robert Irwin, May 14, 2001), Dr. Irwin gives the following answers:

> Q. For all of that effort on your behalf, covering, what, the span of almost three-quarters of a century, you didn't find any reference to a tax promise, other than the commissioners' report, a tax exemption promise having been given by the commissioners.
>
> A. The commissioners' report is the only source that I was aware of of that promise; that is correct.
>
> Q. In fact, the commissioners, themselves, never reiterated the statement about tax that is found in the report?
>
> A. That is correct.
>
> Q. Not one of the three of them?
>
> A. That is correct.
>
> Q. Moreover, I gather that from what you could tell, no one who was receiving that report as a superior office within the bureaucracy of the government of Canada took Mr. Laird and his colleagues to task for having exceeded their instructions?
>
> A. No. They did not take them to task for that purpose; that is correct.
>
> Q. So, there was no controversy about that report?
>
> A. To, there was no controversy; that is correct.

[44] Dr. Irwin testified that he would have expected to find some evidence in the documentary record supporting the view that the Aboriginal signatories had understood that a tax promise had been made. Although his research covered a period of three quarters of a century (1870 to 1945), his only source for the proposition that a treaty promise had been made was the Commissioners' Report.

[45] The evidence of Dr. Patricia McCormack, an anthropologist called by the respondents to give evidence, also supports the position taken by the appellants. Dr.

McCormack's 1984 doctoral thesis on economic development in Fort Chipewyan for the period 1870 to 1970 makes no mention of a tax exemption promise, although she had had occasion to interview many of the elders of the Fort Chipewyan community. It is also of interest to note that in her thesis, Dr. McCormack refers to work similar to hers performed by anthropologist David R. Smith at Fort Resolution, in the Northwest Territories, which is also silent with respect to a tax promise having been made to the Aboriginal signatories.

[46] The appellants argue that the Trial Judge erred in failing to consider this evidence which was relevant to the respondents' understanding of the Treaty and, in particular, whether they understood that a promise exempting them from taxation had been made. I can only agree.

Special Joint Committee Hearing, 1946-1948:

[47] In 1946, a Joint Committee of the Senate and House of Commons was created to review the *Indian Act*. In the performance of its task, the Joint Committee heard and considered Aboriginal submissions with regard to a number of issues, one of which was the issue of Aboriginal taxation.

[48] It is significant, in my view, that none of the submissions made to that Committee by Treaty 8 Aboriginals, including the written and oral submissions of the Indian Association of Alberta, make any reference to an unfulfilled promise of tax exemption. Although many of the submissions discuss the issue of taxation, they do not do so in the context of an unfulfilled Treaty promise. In his oral submissions on behalf of the Indian Association of Alberta, John

Callihoo, a Cree and its President, made the following representations with regard to the issue of taxation (See Appeal Book, Vol. 20, Tab 97, page 7170):

> Treaty Indians should continue to be exempt from taxation either direct or indirect as long **as they are working on their reserve**. There can be and must be no land taxes **upon the reserve**. There must be no form of income tax or produce tax or sales tax imposed upon produce or earnings **within the reserve**. Excise and sales taxes, such as those upon tobacco and matches, are regularly paid by treaty Indians now. We believe that the revenue obtained in this way is a very large one. In return for this revenue all treaty Indians should be eligible for such social benefits as old age pensions, mothers' and widows' allowances, aid to the blind. [...]
>
> [Emphasis added]

[49] The above submissions were made on behalf of the Lesser Slave Lake Bands, to which both Joe Willier and Jean-Marie Mustus belong. Their evidence, which the Trial Judge accepted, is crucial to his finding that the Aboriginal signatories understood that a promise exempting them from taxation had been made. I will shortly be discussing that evidence.

[50] As I have just indicated, none of the submissions made to the Joint Committee suggested that a general tax exemption had been promised by the Commissioners during the 1899 treaty negotiations. A few examples will suffice to demonstrate the point. My first example is the written submissions of April 21, 1947 of the Indian Association of Alberta which deal with taxation at paragraph 70 thereof, entitled "Liability to Taxation", in the following terms (See Appeal Book, Vol. 20, Tab 97, p. 7225):

> **Although the Indians of Canada have no desire to avoid their responsibility as citizens, it is the opinion of this Organization that until equality of economic opportunity and of status is achieved, and becomes a reality, the Indian population should be subject to no form of taxation whatsoever, either direct or indirect.** The difficulties inherent in granting exemption from indirect taxation to Indians are appreciated, but it is recommended that all reasonable efforts be made by the Government fo Canada, to relieve Indians of the liability for payment of taxes of any nature whatsoever. [Emphasis added]

[51] Another example is the submissions of the Fort Vermilion Band, dated November 8, 1946 (See Appeal Book, Vol. 2, Tab 32, p. 460), to the effect that Treaty Indians who own land outside the reserve should not be obliged to pay taxes, "as our reserves are too small." This issue, as appears clearly from the submissions, was not raised in the context of unfulfilled treaty rights, but as a separate issue for discussion. Paragraphs 1 and 3 of the submissions read as follows:

> (1) *Treaty Rights*
>
> We request that the rights guaranteed by the Treaty made between the Government of Canada and the Indians be safeguarded in all points and at all times.
>
> [...]
>
> (3) *Liability of Indians to Pay Taxes*
>
> The Treaty Indians who are owners of land outside of the reserves should not pay taxes, as our reserves are too small.

[52] A third example is the submissions of the Beaver Indians of Boyer River Band, dated November 18, 1946 (See Appeal Book, Vol. 2, Tab 32, p. 461). Paragraph 3 thereof reads as follows:

> **3 – We do not figure that the Indians should be taxed for anything on their Reserve or trap-line, but only on such property as they may own outside the Reserve.** [Emphasis added]

[53] One final example. In their submissions dated April 2, 1947, the Fort Smith Indians, at paragraphs 1 and 3 thereof (See Appeal Book, Vol. 2, Tab 32, p. 495), deal in the following terms with their treaty rights and their liability to pay taxes:

> 1. *Treaty rights and obligations.*
>
> We desire that our rights, as recognized by the Treaty, be maintained in their integrity, and that the obligations assumed by the Government with regard to Indians, be more strictly adhered to and accomplished.

> We wish to enjoy that fulness of freedom in hunting and fishing which was guaranteed by the Treaty. If, for grave reasons, the Government should judge necessary any amendment limiting our rights, we demand that we be informed of such change before the publication of the ordinance, in order that we may be able to voice our opinions, either for or against. Realizing the necessity, from time to time, of placing a restriction upon the number of fur-bearing animals which may be taken, as well as such animals as furnish meat, we demand in return that the Government come to our assistance at such periods and care for those among us who are in actual need of held.
>
> [...]
>
> 3. *Liability of Indian to pay Taxes.*
>
> We are directly opposed to the payment of any tax that might be levied either against our property or against such land as has been set aside for schools, whether on our reserves, or outside the reserves.

[54] No submissions or representations alleging that the Government failed to fulfill its promise to exempt the Aboriginal signatories from tax can be found anywhere in the extensive submissions made by Treaty 8 Aboriginals to the Joint Committee. The Trial Judge, in concluding that the Aboriginal signatories understood that they would be exempted from taxation, failed to consider what, in my view, can only be characterized as highly relevant evidence. His failure to consider this evidence constitutes, in my view, an error.

[55] I now turn to the appellants' arguments concerning the evidence which they say should not have been given any weight. Specifically, these submissions are directed at the oral evidence of Jean-Marie Mustus, Joe Willier, François Paulette and Céleste Randhile. I begin with the evidence of Mr. Mustus.

Mustus Interviews:

[56] The Trial Judge accepted in evidence the transcript of one TARR interview of Jean-Marie Mustus, a Cree elder, who was interviewed on November 19, 1972 and again on

March 26, 1975. As I indicated earlier, the Trial Judge, at paragraph 272 of his Reasons, held that he would only consider the transcript of the March 26, 1975 interview, as translated by Ms. L'Hirondelle. The Mustus evidence on which the Trial Judge relied to reach his conclusion appears at paragraph 251 of his Reasons:

> [251] During the course of the hearing, counsel for the Plaintiffs filed electronic copies of the interviews in the form of tapes and compact disks containing the 13 interviews submitted as Exhibit 34. Counsel for Canada had the second Mustus interview retranslated by Ms. L'Hirondelle, resulting in the following somewhat more expansive interpretation:
>
> Richard Lightning: Did he ever tell you about any promises about education of medicine or anything like that?
>
> Mr. Mustus: Medicine—that is medicine, while in the hospital, we did not pay for, I never paid for that. I myself never paid for that.
>
> Richard Lightning: But your grandfather, did he ever relate anything to you about these things?
>
> Mr. Mustus **Yes, he spoke of these. There are still two things about that. And the land – land. A person was never made to pay for anything concerning the hospital. "And that which was being paid," he use to say, "should not be paid."**
>
> **That is tax. "Nor should you pay tax for land." They still don't pay that for the land. The hospital and school, they should not pay for our children there. They still don't pay for that where they go to school. Nothing is said of that, when they go to school. In terms of food stuff, and for all that you buy, where there is an additional charge – or tax, that you pay, that is the same for the Indian. They don't have to think nothing of this as they are Indian as they are given. That is, women are given Family allowance. They receive those checks frequently. "For those Indians who are to be provided for," he said, "as they get older will receive more money. This is being account for** (Exhibit 98).
>
> [Emphasis is that of the Trial Judge]

[57] At paragraph 250 of his Reasons, the Trial Judge reproduces the original translation of the relevant questions and answers of the March 26, 1975 interview of Mr. Mustus. The answer given by Mr. Mustus with regard to the issue of taxation is not identical to the one which the Trial Judge accepted and which he reproduced at paragraph 251 of his Reasons. Paragraph 250 reads as follows:

> [250] In a second interview conducted on March 26, 1975**,** the question and answer exchange between Mr. Mustus and Mr. Lightning, the interviewer, went as follows:
>
> Richard Lightning:
>
> Did you hear of what was promised in education and medical care for the Indians?
>
> Jean Marie Mustus:
>
> We don't pay for medicines in the hospital. I don't pay for anything.
>
> Richard Lightning:
>
> But did your grandfather ever talk of such a thing?
>
> Jean Marie Mustus:
>
> He told me that hospitalization was not to be paid by Indians and also taxes, including land taxes. They still don't pay for these, the children still don't pay for education and hospitalization. The only thing we pay in taxes is on food but the Indians shouldn't mind that because the women receive Family Allowance and the old people receive Pension (Exhibit 34, Tab 9a).

[58] There is also another translation of Mr. Mustus' March 26, 1975 interview (Appeal Book, Vol. 15, pages 5082 to 5097). In that translation, the relevant question and answer (at page 5095) are the following:

> Richard Lightning: Did you hear of what was promised in education and medical care for the Indians?
>
> Jean-Marie Musts: We don't pay for medicines in the hospital. He told me that hospitalization was not to be paid by Indians and also taxes, including land taxes. The children still don't pay for education and hospitalization. The only thing we pay in taxes is on food but the Indians shouldn't mind that because the women receive family allowance and the old people receive pension.

[59] It is striking that the Trial Judge makes no attempt to ascertain the meaning of what Mr. Mustus said during the course of his interview. Since he was of the view that this evidence was useful and reliable, he gave it weight and found that it corroborated the evidence of

Mr. Willier, also a Cree elder. On the basis of the Mustus and Willier evidence, the Trial Judge found that the Cree people believed that a promise had been made to exempt them from taxation.

[60] The appellants argue that Mr. Mustus' evidence was "rambling, repetitive and far, far from definitive." After a careful review of the transcript of the Mustus interview, I can only agree. Mr. Mustus said many things about taxes, but he did not say, with respect, that the Aboriginal signatories were given a blanket exemption from taxation, nor can his evidence be construed to that effect. To do so requires crossing the boundary which McLachlin C.J. warned against in *Mitchell, supra*.

[61] Rather, what Mr. Mustus clearly said was that Indians should not pay taxes on land, which is consistent with what the *Indian Act* provided in 1899 and today with respect to reserve land. He also stated that Indians should not pay for hospitals and schools and, hence, for treaty entitlements. He then stated that "in terms of food stuff, and for all that you buy, where there is an additional charge – or tax – that you pay, that is the same for the Indian." I agree with the view put forward by the appellants that Mr. Mustus' evidence was consistent with a tax exemption on treaty entitlements, including reserve lands or lands in severalty.

[62] Notwithstanding that Mr. Mustus' interview was the only one during which the issue of taxation was raised and the fact that his statement is, at best, ambiguous, the Trial Judge, at paragraph 318 of his Reasons, found it useful and reliable and held that it corroborated the

evidence of Mr. Willier and was proof that the Cree believed that they had been exempted from taxation. With respect, it was unreasonable, in my view, to come to such a conclusion.

Evidence of Mrs. Céleste Randhile:

[63] I now turn to the evidence of Céleste Randhile, a Dene elder from Fond du Lac, Saskatchewan, where an adhesion was taken. At the time of her testimony, Mrs. Randhile was 73 years old and testified that she had been informed about the Treaty by her father, who learned about it from his father, Laurent Dzieddin, one of the head men who signed the Treaty at Fond du Lac. At paragraph 232 of his Reasons, the Trial Judge sets out Mrs. Randhile's evidence on which the respondents were relying and which he accepted as proof that the "Dene people believed that the Commissioners promised a tax exemption" (paragraph 316 of the Reasons):

> And I just see -- not the other side, the government's side, has basically reneged on their promises and have tried to change a lot of the promises, but the information that we share with you, as well as we share amongst each other is the same information that our grandparents shared with us on the treaty.
>
> Q What changes are you referring to, Mrs. Randhile, that the government has brought to treaty?
>
> A Main things in terms of what was promised to us. A lot of the things they have changed already and -- so it is just like living in two worlds, the southern world as well as we live in the north. The information that is shared with the southern governments and so forth is different than what we were being told about. **Some of the things that I have seen changed with our people have to do with paying things on top of what we have already bought, taxation, these types of things. We now have to start -- we now have to pay more for things because we are being taxed on different things, and these are changes that I see -- I've seen in my lifetime that are broken promises** (Transcript, 22 May 2001, pp.1514-1515)
>
> ...
>
> But in our language, the Dene language, **we have no comparable words for taxation in terms of what it means and so forth. It is basically an interpretation in terms of a statement basically meaning that the government takes that bit of money for themselves that we have to pay, and so we pay a little more.** That's the way I understand taxation to mean (Transcript, 22 May 2001, p.1526).
>
> ...
>
> MS. BUSS: My question was going to be, What was told to Mrs. Randhile about paying money to the government in the way that she described tax.

> THE WITNESS: **What I was told in this case here was that -- that we would not have to pay for anything,** and that the government would basically provide the Dene with a better way of life than they enjoyed before treaty, and that the treaty promise was basically to ensure that they would be able to live their way of life, but to do it in a more comfortable way, and that they would not have to pay for anything. That the promise was that -- that all of these would be provided for the Dene at no extra cost to them (Transcript, 22 May 2001, pp.1528-1529). [Emphasis is that of the Trial Judge]

[64] Prior to giving the above answer, Mrs. Randhile had testified, on two occasions, that she could not recall any discussions concerning the payment of money or taxes by the Dene people to the Government:

> Q. Do you know if at the first treaty, if there was any discussion about the Dene people paying money to the government?
>
> A. **I don't recall any information about that.** All I know is that the government is supposed to help us.
>
> (Transcripts of Trial Proceedings, Vol. 4, p. 1524)
>
> _____
>
> Q. MISS BUSS: What is your understanding, Mrs. Randhile, about whether paying money to the government in the way that you describe the tax was discussed at the first treaty?
>
> A. **I don't recall anyone ever mentioning that in terms of – in that context**, and just basically what I said too, that I can share information with you today on that. **So if these types of things were told to us in terms of taxation and so forth, it would have been documented.**
>
> [Emphasis added]
>
> (Transcripts of Trial Proceedings, Vol. 4, p. 1528)

[65] It was only in response to a third question, an obviously leading question, that Mrs. Randhile stated that her people had been told that they "would not have to pay anything":

> MS. BUSS: My question was going to be, What was told to Mrs. Randhile about paying money to the government in the way that she described tax.
>
> THE WITNESS: What I was told in this case here was that – that we would not have to pay anything, ...
>
> (Transcript of Proceedings, Vol. 4, p. 1528-29)

[66] The Trial Judge obviously did not consider the two answers given by Mrs. Randhile to the effect that she could not recall anything concerning the payment of money or taxes by her people to the Government. Had he considered these answers, he could only have concluded that Mrs. Randhile's evidence was unreliable. I also wish to point out that in answering for the second time that she could not recall any discussions regarding taxation, Mrs. Randhile stated that she would have expected the matter to have been documented had such a promise been made.

[67] During the course of her testimony, Mrs. Randhile identified, on a photograph shown to her, her grandfather, Laurent Dzieddin, and Germain Datsan, both of whom had negotiated the Treaty on behalf of their people. Mrs. Randhile also identified Pierre Laban, whom she described as "one of the individuals who – my father was a Chief and Pierre was next to my father" (Transcripts of Trial Proceedings, Vol. 4, p. 1532). Both Germain Datsan and Pierre Laban signed with their Chief, Joseph Dzieddin, the written submissions dated January 22, 1947, made by the Maurice Band, of Fond du Lac, Saskatchewan, to the Joint Committee. In these submissions, the Maurice Band did not argue nor submit that the government had breached its promise to exempt them from taxation (Appeal Book, Vol. 2, pp. 496-497). I am satisfied that the Trial Judge failed to consider this evidence in making his findings.

[68] In my view, the Trial Judge ought to have considered Mrs. Randhile's two negative answers in deciding whether or not the answer which he ultimately relied on was reliable. He also ought to have considered the fact that the 1947 written submissions of the

Maurice Band were silent with respect to a tax promise. Further, the Trial Judge made no attempt to assess the meaning of Mrs. Randhile's evidence. He simply accepted, at paragraph 316 of his Reasons, that her evidence proved that the Dene people wrongly understood that a tax promise had been made.

[69] Although there was some evidence that in the Dene language, the same word may have been used for "tax" and for "pay", I agree with the appellants that the most reasonable interpretation of Mrs. Randhile's evidence is that her people would not have to pay for the benefits they received under the Treaty. I cannot see how her testimony can be taken any further and I am entirely satisfied that it cannot support the Trial Judge's conclusion. Finally, in view of the contradictory nature of Mrs. Randhile's testimony, which can only be characterized as "sparse, doubtful and equivocal", her evidence was not deserving of any weight.

Evidence of Mr. François Paulette:

[70] The next witness on whose evidence the Trial Judge relied for his conclusion concerning Aboriginal misunderstanding is François Paulette, a former Chief of the Smith Landing First Nation (formerly the Fort Fitzgerald/Fort Smith Band). Mr. Paulette purported to testify with respect to the understanding of the Dene people. At the time of his testimony, Mr. Paulette was in his early 50s, but was not an elder and had no mandate from his community to give evidence on its behalf.

[71] Before dealing with the appellants' objections to Mr. Paulette's evidence, I should reproduce that part of Mr. Paulette's evidence on which the Trial Judge relied for his conclusion. This evidence is reproduced at paragraph 233 of the Trial Reasons:

> [233] In written argument (Appendix D, pp.40-43), the Plaintiffs draw from the trial record with respect to the evidence of oral tradition offered by Mr. Paulette as follows:
>
> > Mr. Paulette is a member of the Smith's Landing First Nation. He served as chief in the 1970's. He was also vice chief of the Dene Nation. His band members lived primarily in Fort Smith. They were moved there by Indian Affairs in the 1950's and 60's. Living conditions were poor. The level of education was low - possibly between grades 4 and 6 in the 1970's.
> >
> > There are only two reserves in the Northwest Territories; Mr. Paulette's indicated that the Federal government had a policy against reserve creation north of the 60th parallel. Thus, the majority of the Indian people of Treaty 8 in what is now the Northwest Territories with whom the Commissioners treated have not received reserves.
> >
> > Mr. Paulette's grandfather Johnny Paulette was at the signing of treaty in Fort Smith in 1899, although he did not take treaty that year. Mr. Paulette learned about the treaty from his father.
> >
> > On the question of taxation, he described his father as saying:
> >
> > > And there was -- because we trap in the Wood Buffalo National Park, the parks had this policy, I do not know if it was a written policy, but it had a policy if the Indians took fur from their trap line in Wood Buffalo National Park, you would establish a royalty, a 5 percent of -- it would take -- if your fur was $100, then they would take $5 from that. I remember my father, I think that is where the anger came from because he didn't care for that.
> > >
> > > He said (Dene spoken)
> > >
> > > Q You are going to have to translate that into English.
> > >
> > > A **Meaning when we first made treaty, he said they would not take back the money. They would not take back the money.**
> > > **His expression was he was describing this royalty, and that is an expression that we have today for tax.**
> > > So "beke nani" – (phonetic) -- they shall take back the money. So, he would be very angry about that (Transcript, May 17, 2001, pp.1388-1389).
> >
> > Francois Paulette testified about the meaning of tax in Dene. He said:
> >
> > > Q You mentioned that the concept of tax is communicated in Chipewyan language by a literal translation of "taking money back." Is there any other way that it can be communicated in the Chipewyan language?

> A The way it is described in our language -- (Dene spoken) -- when you take something back. And when you take something, in this instance, samba -- (Dene spoken) (phonetic) -- which means money. **But in traditional form -- (Dene spoken) -- when you take something back, that is unspoken of, you don't take something back. When you give something, you don't take it back.** So, when we say -- (Dene spoken) -- when you take the money back, and they say you give it to "Tsekuitakoldher" meaning the Queen.**We will give the money to the Queen. And my father and other people describing this, it is kind of, Why did the Queen give us money, and then she takes it back?** (Transcript, 17 May 2001, pp.1398-1399).

> Mr Paulette also received information about the treaty from Suzie King, grandchild of the King family who acted as translators at Fort Resolution in 1900, and from Joe Charlo - a descendant of Suzie Drygeese who was also at the 1900 adhesion.

[Emphasis is that of the Trial Judge]

[72] The appellants argue that Mr. Paulette's testimony was vague and equivocal, and that it was anything but conclusive regarding the alleged tax promise. After a careful review of Mr. Paulette's evidence, I must agree. The Trial Judge appears to have made no attempt whatsoever to ascertain the meaning of what the witness testified to. At paragraph 317 of his Reasons, the Trial Judge states:

> [317] I have no reason not to accept Mr. Paulette's evidence **at face value**, and, thus, find that it corroborates Mrs. Randhile's, and is further proof that Dene People believed that the Commissioners promised a tax exemption.[Emphasis added]

[73] I must confess that I have difficulty with the Trial Judge's statement that he accepts Mr. Paulette's evidence at face value, since Mr. Paulette did not testify that his people had understood, when adhering to the Treaty, that they would be exempted from taxation. His evidence is, at best, equivocal and inconclusive.

[74] I have already indicated that Mrs. Randhile's evidence cannot support the Trial Judge's conclusion and I express the same view with respect to Mr. Paulette's evidence. It is difficult to understand how the Trial Judge can assert that Mr. Paulette's evidence corroborates that of Mrs. Randhile. He appears to have taken for granted, on the basis that Mr. Paulette referred to taxation, that he was testifying that his people understood that they had been exempted from taxation at any time for any reason.

[75] The only conclusion that can be reached on the basis of Mr. Paulette's testimony is that he was concerned about the imposition of royalties on furs and the taxing back ofTtreaty benefits. Mr. Paulette's testimony does not support the view that his people believed that they had been promised a full exemption from taxation. To so conclude was, in my view, clearly wrong.

[76] Further, as I indicated earlier, Mr. Paulette's Band is the Smith's Landing First Nation, formerly the Fort Fitzgerald/Fort Smith Band. This Band, although not present at Lesser Slave Lake when the Treaty was signed on June 21, 1899, adhered to the Treaty in the following months. Mr. Paulette's First Nation, like many of the other First Nations, made written submissions in 1946 to the Joint Committee. These submissions, which I have reproduced in part in paragraph 53 of these Reasons, are silent with respect to a promise made to exempt the Aboriginal signatories from taxation. In my view, the Trial Judge ought to have considered this evidence in assessing the reliability of Mr. Paulette's evidence.

[77] One final point regarding Mr. Paulette's evidence. At paragraph 238 of his Reasons, the Trial Judge sets out a "community standard" test as a basis of determination for the admissibility of the oral history evidence adduced before him. In the following paragraph, he clearly states that Mr. Paulette does not meet that standard. Paragraphs 238 and 239 read as follows:

> [238] Usefulness and reliability are findings of fact to be made on the basis of evidence presented. As just cited, certain people are identified by the Aboriginal community as meeting essentially this same standard. Barring any evidence to the contrary, I think it is reasonable to find that, if Aboriginal People believe that the community standard has been met by a certain person, the legal test for the admission of the evidence of oral tradition by that person is also met.
>
> [239] In the case of Mr. Paulette as a potential giver of evidence of oral tradition, the evidence is that he does not meet his own community's standard because he is not senior enough to be considered an elder. Nevertheless, in my opinion, Mr. Paulette's evidence of oral tradition may still be admitted if the legal test is met on other evidence presented at trial. In the present case, Mr. Paulette himself presents the evidence for the admission of his evidence.

[78] Notwithstanding that Mr. Paulette did not meet his community's standard, the Trial Judge readily accepted his evidence because he met "the test of a reasonably reliable source of Dene oral tradition". The Judge came to that view on the basis of Mr. Paulette's credible conduct at trial and the rich content of his evidence. Further, there was evidence before the Trial Judge that elders from Mr. Paulette's community were available to testify in regard to Treaty No. 8. On the premise that the "community standard" test was a proper test, these elders should have been called, in preference to Mr. Paulette.

[79] When assessing Mr. Paulette's evidence, the Trial Judge ought to have considered the 1946 submissions of Mr. Paulette's First Nation; he ought to have also considered the fact that Mr. Paulette was not an elder and had not been mandated by his community, and he ought to have considered the fact that the evidence given by Mr. Paulette was far from clear as to whether

a promise had been made to exempt his people from taxation. Had the Judge properly considered this evidence and had he applied his own standard to Mr. Paulette's evidence, he could not have accepted it at face value.

[80] I am therefore of the view that Mr. Paulette's evidence, either on its own or in conjunction with that of Mrs. Randhile, cannot reasonably support the Trial Judge's conclusion that the Dene people had understood that they would be exempted from taxation.

Evidence of Mr. Joe Willier:

[81] The last witness whose evidence the Trial Judge found to be supportive of his conclusion that the Aboriginal signatories had understood that a tax promise had been made was Joe Willier, a Cree elder who, at the time of the trial, was 92 years old. I now turn to Mr. Willier's evidence.

[82] The evidence which the Trial Judge accepted consisted not only of Mr. Willier's trial testimony, but statements that he gave in 1991 and in 1999. The Trial Judge was of the view that these statements, read with his trial testimony, "provided a rich, detailed account of what was understood by some Aboriginal people at the time of the Treaty negotiations" (paragraph 313 of his Reasons).

[83] The appellants criticize the Trial Judge's finding and argue that Mr. Willier's evidence does not prove that the Cree understood that a tax promise had been made. Further, the appellants say that Mr. Willier's evidence was unsound and should not have been given any

weight. I have already dealt briefly with the context in which Mr. Willier's 1991 and 1999 statements were given at paragraphs 34 to 37 of these Reasons. In this part, I will deal specifically with Mr. Willier's evidence and the criticism directed thereat by the appellants.

[84] Mr. Willier's 1991 statement took the form of an unsworn affidavit. The interview which led to this statement was conducted, as I have already indicated, by Delia Opekokew. Mr. Willier's statement was recorded on videotape and, in addition, it was typewritten in English by Ms. Opekokew. In due course, the statement was prepared in affidavit form and sent, with the videotape, to her client, the Grand Council of Treaty 8. The affidavit, as it was filed at the trial, remained unsworn. It is reproduced by the Trial Judge at paragraph 227 of his Reasons.

[85] In my view, Mr. Willier's 1991 statement was clearly not deserving of any weight. Firstly, the affidavit was never sworn to by Mr. Willier and was not put to him when he testified. Bearing in mind that Mr. Willier testified at trial on the same issues as those discussed in his unsworn affidavit, I am uncertain as to the legal basis on which the statement was admitted. I note, from the trial Reasons, that the Trial Judge was of the view that the statement was admissible on the basis that it was proved by the testimony of Ms. Opekokew. However, as Mr. Willier was a witness at the trial, I fail to understand the Trial Judge's reasoning. Given that Mr. Willier was available to testify, there was no necessity for the introduction into evidence of his 1991 statement. Secondly, the affidavit was prepared from notes taken by Ms. Opekokew

during her interview of Mr. Willier. It is readily apparent that the unsworn affidavit and the words contained therein are those of Ms. Opekokew, not those of Mr. Willier.

[86] Mr. Willier's 1999 statement, as I indicated at paragraph 36 of these Reasons, results from interviews conducted in February 1999 by counsel for the respondents and Wendy Aasen, an expert witness called by the respondents. The interviews were conducted in English by Ms. Aasen and videotaped by counsel. At trial, the videotape was shown and the transcript of the interview was introduced into evidence. At paragraph 228 of his Reasons, the Trial Judge sets forth those portions of the statement upon which the respondents relied and which he found were supportive of his conclusion. Again, as Mr. Willier was available at the trial, I fail to see the necessity and admissibility of his 1999 statement. Although he had to recognize that Mr. Willier's trial evidence was not as expansive as that contained in his 1991 and 1999 statements, the Trial Judge was nonetheless of the view that this evidence was "consistent throughout." At paragraphs 312 and 313, the Trial Judge states:

> [312] While Mr. Willier's trial statement is not nearly as full, or as well delivered as those given in 1991 or even 1999, I find that his evidence is consistent throughout. The theme that is constant in all three of his statements is that, according to the Cree understanding of the word "tax", after the Treaty was signed and the Aboriginal People paid in land for the peace and friendship the Treaty offered, they would not have to pay more, ever.
>
> [313] Read together, Mr. Willier's three statements provide a rich, detailed account of what was understood by some Aboriginal People at the time of the Treaty negotiation. I do not have a reason not to accept what he has said at face value. To my satisfaction, Mr. Willier's evidence proves that Cree People believed that the Commissioners promised a tax exemption.

[87] With respect, Mr. Willier's evidence may perhaps be qualified as consistent because he referred to taxation in his two statements and during his trial testimony, but such consistency does not alter the substance of the testimony given by the witness. Mr. Willier's trial testimony was given in Cree and translated into English by Ms. Hazel Dion Decorby.

However, as the quality of the translator's work became an issue, a second translation of Mr. Willier's evidence, made from a tape-recorded copy of his trial testimony, was produced by Ms. Pauline L'Hirondelle, and that translation was adduced in evidence. At paragraph 230 of his Reasons, the Trial Judge sets forth that part of Mr. Willier's trial evidence (See Transcript of Trial Proceedings, Appeal Book, Vol. 4, Testimony of Joe Willier, May 22, 2001 – pp. 1573-1593) on which the respondents relied:

> [230] In their written argument (Appendix D, pp.29-32), the Plaintiffs generally rely upon the following passages from pp.1598-1603 of the re-translation:
>
> MS. BUSS: Mr. Willier were you told anything about tax.
>
> **HAZEL DION DECORBY: (Cree spoken) Were you ever told that you would pay something.**
>
> **THE WITNESS: (Cree spoken) Never. Nothing.**
>
> HAZEL DION DECORBY: (English spoken) No. Nothing, ever.
> THE WITNESS: (Cree spoken) This is something I still want to speak to.
>
> HAZEL DION DECORBY: (English spoken) And this is the thing that I want to talk to about later.
>
> THE WITNESS: (Cree spoken) At no time, will an Indian pay for anything that has been taxed.
>
> HAZEL DION DECORBY: (English spoken) An Indian should never pay anything that is monetary.
>
> **THE WITNESS: (Cree spoken) Land - any land outside the community - where an Indian already owns land to which one must pay (English spoken) land taxes, (Cree spoken) the Indian shall not pay.**
>
> HAZEL DION DECORBY: (English spoken) The land that an Indian owns outside the reserve. They should never have to pay tax for it.
>
> THE WITNESS: (Cree spoken) And that lot that he (the Indian) stays on, should be counted as Indian land.
>
> HAZEL DION DECORBY: (English spoken) And the - the land that he owns should be crown land.
>
> THE WITNESS: (English spoken) The lot, one lot.
>
> HAZEL DION DECORBY: (English spoken) One lot.
>
> THE WITNESS: (Cree spoken) This should be deemed as Indian land, therefore he (the Indian) will never have to pay for anything of it.

HAZEL DION DECORBY: (English spoken) That lot should never have to be paid taxes on it.

THE WITNESS: (Cree spoken) Many people have spent much money living on land off the reserve. Not only (English spoken) my family. (Cree spoken) They have to stay here.

(END OF TAPE)

THE COURT: (Inaudible) that extra place here.

HAZEL DION DECORBY: (English spoken) Any place in it - or. Now it's a (inaudible). Okay. The land that the Indian people owns off the reserve they should not have to pay taxes on. Even my family. The people that spent a lot of money on - on land off the reserve.

THE WITNESS: (Cree spoken) That land, more than anything else, should be deemed Indian land.

HAZEL DION DECORBY: (English spoken) It should be crown land, the lot.

THE WITNESS: (English spoken) Reserve - reserve. Some type of reserve (Cree spoken) it should be deemed as such.

HAZEL DION DECORBY: (English spoken) There should, maybe it should be counted as a little reserve.

THE WITNESS: (Cree spoken) So that the Indian should not have to pay (English spoken) taxes.

HAZEL DION DECORBY: (English spoken) That he should not have pay taxes.

THE WITNESS: (English spoken) Land taxes.

HAZEL DION DECORBY: (English spoken): Land taxes for that.

THE WITNESS: (Cree spoken) There are those people here right now today in (English spoken) in court (Cree spoken) who also pay (English spoken) taxes.

HAZEL DION DECORBY: (English spoken) And there are some Indian people in this court room right now that pay taxes.

...

HAZEL DION DECORBY: (Cree spoken) Is there anything else also that you want to say in regard to (English spoken) taxes. On this subject (Cree spoken) just like this (English spoken) taxes (Cree spoken) that are being discussed right now?

THE WITNESS: (Cree spoken) Yes, I have already spoken about everything in regard to (English spoken) about taxes that a person should not have to ever pay.

HAZEL DION DECORBY: (English spoken) This, what I'm talking about the taxes and that Indian people should not be paying taxes on anything.

THE WITNESS: (Cree spoken) I would like to add more in regard to that. (English spoken) One more....

MS. BUSS: Mr. Willier were you ever told anything by your elders about tax?

HAZEL DION DECORBY: (Cree spoken) Did your elders, your relatives, ever tell you that you had to pay anything like this (English spoken) tax?

THE WITNESS: (Cree spoken) Never. They did not mentioned it ever and as I said my mother also never mentioned it.

HAZEL DION DECORBY: (English spoken) No one ever mentioned that, and my mother never mentioned it. Talked about it.

MS. BUSS: I don't know if I should be asking as question for a follow up question. Were you told anything about paying money to the government? (inaudible) the word.

THE COURT: That's - that's the question you propose. (Inaudible)

(inaudible)

THE COURT: Okay. Go ahead.

MS. BUSS: Were you told anything about paying money to the government Mr. Willier?

HAZEL DION DECORBY: (Cree spoken) Did they ever tell you - all of you - if you all would all have to pay the leader at the time?

THE COURT: By any of your elders? Is that what you mean? Miss Buss.

MS. BUSS: Yes, sorry. Were you told anything about your elders, about paying money to

HAZEL DION DECORBY: (Cree spoken) Were you ever..

MS BUSS: To the government.

HAZEL DION DECORBY: (Cree spoken) Told by your elders what they (the elders) had to pay to these...?

THE WITNESS: (Cree spoken) I don't believe so. I don't believe so. **I had not ever heard an Elder state, every time one spoke with me, that an Indian should have to make payment for anything.**

HAZEL DION DECORBY: (English spoken) No. He had never heard anything to - to statement that they would have to pay money into that or - to pay money.

> **THE WITNESS (Cree spoken) These were words of the (English spoken) Minister: This is what he (minister) told the chiefs that they would never have to pay for anything until the end of time.**
>
> HAZEL DION DECORBY: (English spoken) In the minister's words, that he had said that there would never be any monies - the Indian had to pay. [Emphasis added]

[88] The Judge accepted at face value Mr. Willier's 1991 and 1999 statements and his trial testimony. With respect to his trial testimony, the Trial Judge was of the view that "some reasonable accommodation" had to be made in assessing Mr. Willier's testimony. Paragraphs 309 and 310 of his Reasons explain what the Trial Judge meant by "reasonable accommodation":

> [309] I find that, in evaluating Mr. Willier's trial statement, some reasonable accommodation must be given for his manner of expression; in particular, with respect to the following key passage:
>
> > **MS. BUSS: Mr. Willier were you ever told anything by your elders about tax?**
> >
> > **HAZEL DION DECORBY: (Cree spoken) Did your elders, your relatives, ever tell you that you had to pay anything like this (English spoken) tax?**
> >
> > **THE WITNESS: (Cree spoken) Never. They did not mentioned it ever and as I said my mother also never mentioned it.**
> >
> > HAZEL DION DECORBY: (English spoken) No one ever mentioned that, and my mother never mentioned it. Talked about it.
> >
> > MS. BUSS: I don't know if I should be asking as question for a follow up question. Were you told anything about paying money to the government? (inaudible) the word.
> >
> > THE COURT: That's - that's the question you propose. (Inaudible)
> >
> > (inaudible)
> >
> > THE COURT: Okay. Go ahead.
> >
> > MS. BUSS: Were you told anything about paying money to the government Mr. Willier?
> >
> > HAZEL DION DECORBY: (Cree spoken) Did they ever tell you - all of you - if you all would all have to pay the leader at the time?
> >
> > THE COURT: By any of your elders? Is that what you mean? Miss Buss.
> >
> > MS. BUSS: Yes, sorry. Were you told anything about your elders, about paying money to
> >
> > HAZEL DION DECORBY: (Cree spoken) Were you ever..

> MS. BUSS: To the government.
>
> HAZEL DION DECORBY: (Cree spoken) Told by your elders what they (the elders) had to pay to these...?
>
> THE WITNESS: (Cree spoken) I don't believe so. I don't believe so. I had not ever heard an Elder state, every time one spoke with me, that an Indian should have to make payment for anything.
>
> HAZEL DION DECORBY: (English spoken) No. He had never heard anything to - to statement that they would have to pay money into that or - to pay money.
>
> **THE WITNESS (Cree spoken) These were words of the (English spoken) Minister: This is what he (minister) told the chiefs that they would never have to pay for anything until the end of time.**
>
> HAZEL DION DECORBY: (English spoken) In the minister's words, that he had said that there would never be any monies - the Indian had to pay (Exhibit 63, pp. 1602-1603).

[310] Alberta argues that the meaning to be put to the first emphasized passage is that Mr. Willier was never told anything by his elders about tax. In my opinion, a fair reading in context of his statement does not support this interpretation. The question posed called for a response as to whether he was ever told that he had to pay tax; I find a reasonable interpretation of his answer is that he was never told he had to pay tax; that is, he did not have to pay tax as a result of a treaty promise.

[Emphasis is that of the Trial Judge]

[89] At paragraph 310 of his Reasons, the Trial Judge deals with an argument put forward by Alberta in regard to the first answer given by Mr. Willier which the Trial Judge reproduced at paragraph 309 of his Reasons:

> MS. BUSS: Mr. Willier were you ever told anything by your elders about tax?
>
> HAZEL DION DECORBY: (Cree spoken) Did your elders, your relatives, ever tell you that you had to pay anything like this (English spoken) tax?
>
> THE WITNESS: (Cree spoken) Never. They did not mentioned it ever and as I said my mother also never mentioned it.

[90] Mr. Willier's answer is that he was never told that he had to pay tax. Alberta argued that this answer did not prove that Mr. Willier's people understood that they had been exempted from taxation. At paragraph 310 of his Reasons, the Trial Judge disposes of Alberta's

argument by stating that a fair contextual reading does not support Alberta's point of view. The Judge then says that "a reasonable interpretation of his answer is that he was never told he had to pay tax; that is, he did not have to pay tax as a result of a treaty promise."

[91] With respect, I fail to see how Mr. Willier's answer that he had not been told that he had to pay tax can be transformed into an answer that his people had received a treaty promise exempting them from taxation. In my view, this is exactly what McLachlin C.J. had in mind when she stated in *Mitchell, supra*, that oral history evidence should not be artificially strained to carry more weight that it can reasonably support. Whatever Mr. Willier had in mind in giving his answer, he certainly did not say, nor can he be taken to have said, that he had been told that his people understood that they had been exempted from taxation.

[92] A fair reading of Mr. Willier's trial testimony cannot, with respect, lead to the conclusion reached by the Trial Judge. In my view, the following emerges from Mr. Willier's evidence:

1. He believed that his people should not have to pay tax because he was never told about it and because his elders never mentioned it.
2. He associated tax with land held by Indians outside their communal reserves.
3. He believed that his people were promised that they would never have to pay anything, a promise that may have had nothing to do with taxes.

The Trial Judge appears to have focussed only on the first theme, which led him to hold that Mr. Willier's testimony supported the view that the Aboriginal signatories had received a promise exempting them from taxation.

[93] Further, during the course of his testimony, Mr. Willier made a number of statements linking tax and land held by Indians, namely: (a) Indians should not pay taxes on any land outside the community; (b) "that lot that he (the Indian) stays on should be counted as Indian land"; (c) land outside of the community should be deemed as Indian land, and; (d) such land should be deemed Indian land or some type of reserve so that the Indians should not have to pay land taxes.

[94] Land was, no doubt, a central theme of Mr. Willier's evidence. Therefore, his connection between tax and land can easily be reconciled with the Treaty which gave Indians the option between communal reserves or individual severalty allotments, both of which would be exempt from taxation. However, his evidence cannot, in my view, support the Trial Judge's far-reaching conclusion.

[95] With respect to Mr. Willier's 1991 and 1999 statements, and his trial testimony, the Trial Judge was of the view that they had to be read together. Although the appellants argued that there were differences between Mr. Willier's two statements and his trial testimony with regard to the sources of his knowledge, the Trial Judge held that there was no discrepancy. At paragraph 85 of its Memorandum, Alberta sets out Mr. Willier's various sources of

information from the 1991 affidavit to his testimony of May 22, 2001 before the Trial Judge I hereby reproduce a portion of that paragraph:

J. Willier's Unsworn Affidavit Exhibit 34	J. Willier's 1999 Transcript Interview, Exhibit 53	J. Willier's evidence in Benoit Trail[sic], May 22, 2001
Father, mother, uncles and other elders	Gouthier, and some Gladues and some Bottles	Johnny Goah, Joe Guadula, Chiki Gladue, Sam Ekaduro
Gasmer Cardinal, Alex Moostoos	Gothiers, and Bottles and Chalifoux, and Gladues	His mother and George Okemow, Joe Bottle, Simon Cattlehook, and His brother Scotty Willier
George Okemow, William Okemow and Cheeki	His brother Scottie Willier, Frank Cardinal and Isadore and George Okeymah and Alex Mustus	

[96] Although Mr. Willier's sources vary from the 1991 statement to the 1999 statement and to his trial evidence, George Okeymow appears as a source in all three of his accounts, and Scotty Willier, his brother, appears as a source in two of his accounts. As elders, both George Okeymow and Scotty Willier were interviewed in the 1970's as part of the TARR project. However, neither of them raised nor made any reference to a tax promise during their interviews. This, in my view, was a material fact, since George Okeymow and Scotty Willier supposedly informed Joe Willier with respect to the alleged tax promise made by the Commissioners. Another source of information for Joe Willier was William Okeymow (in the 1991 statement). During the course of his TARR interview, William Okeymow, like George Okeymow and Scotty Willier said nothing about taxation. The Trial Judge ought to have considered the fact that Mr. Willier's sources had not, when given the opportunity, raised the issue of an unfulfilled tax promise. Instead, he simply accepted at face value everything that Mr. Willier said. This was an error on his part.

[97] I should also point out another area of concern in regard to Mr. Willier's evidence which the Trial Judge ought to have considered in determining the reliability of that evidence. During the course of his 1999 interview, Mr. Willier produced a statement, handwritten by his son, which contained a list of 19 Treaty promises (Appeal Book, Vol. XVIII, p. 6151 and 6152), none of which concerned the issue of taxation. However, later on during his interview, he produced another list, this one typewritten by his grandson, which included an extra promise, i.e. a tax exemption.

[98] I therefore come to the conclusion that Mr. Willier's evidence is "sparse, doubtful and equivocal" and, as a result, it should have been approached by the Trial Judge with a great amount of caution. In my respectful view, had the Trial Judge proceeded in this way, he could only have concluded that Mr. Willier's evidence could not support the conclusion which he ultimately reached.

[99] One final comment concerning the specific testimonies of Mr. Paulette, Mr. Willier and Mrs. Randhile, and the interview of Mr. Mustus. I have carefully read this evidence in its entirety, on a number of occasions, including the Willier interviews of 1991 and 1999, and have come to the conclusion that it is very difficult, more often than not, to draw the line between the witness' opinion and his or her recital of oral history. This, in my view, is another important reason why the Trial Judge ought to have been very careful in assessing the reliability of this evidence.

[100] I now turn to the hearsay nature of the *viva voce* oral history evidence of the three witnesses and that of the Mustus interview. In assessing the *viva voce* oral evidence of Mr. Paulette, Mr. Willier and Mrs. Randhile and the interview of Mr. Mustus, , the Trial Judge ought to have had in mind the hearsay nature of the evidence on which he was relying for his conclusion and, specifically, whether that evidence met the reliability test enunciated by the Supreme Court of Canada in *Mitchell, supra*, where McLachlin C.J. made it clear that the principles enunciated in *Delgamuukw v. British Columbia, supra*, did not call for the blanket admissibility of oral history evidence or mandate the weight that it should be given by the Trial Judge. McLachlin C.J. pointed out that oral history was admissible as evidence where it was both useful and reasonably reliable, always subject to the exclusionary discretion of the Trial Judge. She also pointed out that placing "due weight" on oral history meant that this evidence was entitled to "equal and due treatment." By that statement, McLachlin C.J. meant that oral history evidence should not be "undervalued", nor should it be artificially strained to carry more weight than it could reasonably support. With respect to the test of usefulness and reliability, McLachlin C.J., in *Mitchell, supra*, made the following remarks at paragraphs 32, 33, 34 and 35:

> 32. Aboriginal oral histories may meet the test of usefulness on two grounds. First, they may offer evidence of ancestral practices and their significance that would not otherwise be available. No other means of obtaining the same evidence may exist, given the absence of contemporaneous records. Second, oral histories may provide the aboriginal perspective on the right claimed. Without such evidence, it might be impossible to gain a true picture of the aboriginal practice relied on or its significance to the society in question. Determining what practices existed, and distinguishing central, defining features of a culture from traits that are marginal or peripheral, is no easy task at a remove of 400 years. Cultural identity is a subjective matter and not easily discerned: [References omitted]
>
> 33. **The second factor that must be considered in determining the admissibility of evidence in aboriginal cases is reliability: does the witness represent a reasonably reliable source of the particular people's history? The trial judge need not go so far as to find a special guarantee of reliability. However, inquiries as to the witness's ability to know and testify to orally transmitted aboriginal traditions and history may be appropriate both on the**

> **question of admissibility and the weight to be assigned the evidence if admitted.** [Emphasis added]
>
> 34. In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions. Oral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective. Thus, Delgamuukw cautions against facilely rejecting oral histories simply because they do not convey "historical" truth, contain elements that may be classified as mythology, lack precise detail, embody material tangential to the judicial process, or are confined to the community whose history is being recounted.
>
> 35. In this case, the parties presented evidence from historians and archaeologists. **The aboriginal perspective was supplied by oral histories of elders such as Grand Chief Mitchell. Grand Chief Mitchell's testimony, confirmed by archaeological and historical evidence**, was especially useful because he was trained from an early age in the history of his community. The trial judge found his evidence credible and relied on it. He did not err in doing so and we may do the same. [Emphasis added]

[101] In the present matter, the Trial Judge's approach with respect to the usefulness and reliability of the oral history evidence is set out at paragraph 238 of his Reasons, which I again reproduce for purposes of clarity and ease of reference:

> [238] Usefulness and reliability are findings of fact to be made on the basis of evidence presented. As just cited, certain people are identified by the Aboriginal community as meeting essentially the same standard. Barring any evidence to the contrary, I think it is reasonable to find that, if Aboriginal People believe that its community standard has been met by a certain person, the legal test for the admission of the evidence of oral tradition by that person is also met.

[102] In my view, the "community standard" test adopted by the Trial Judge does not meet the test enunciated by McLachlin C.J. in *Mitchell, supra*, i.e. an objective standard for determining whether the hearsay evidence at issue is useful and reliable. At paragraph 33 of her Reasons in *Mitchell, supra*, McLachlin C.J. stated that it was necessary to inquire into a witness' ability to know and to testify with respect to the tradition and history orally transmitted. She

stated that this inquiry was appropriate in respect of both the admissibility and the weight to be given to the witness' evidence, if admitted.

[103] I agree entirely with the appellants that the Trial Judge could not defer his consideration of this issue to "the community." The perspective of the community may well be relevant, but it cannot be determinative of the issue. Some objective standard must be applied by the Trial Judge. For example, in the case of Mr. Paulette, the Trial Judge, as I have already indicated, did not apply the "community standard" test which he adopted, but a less stringent test.

[104] At paragraph 294 of his Reasons, the Trial Judge dealt with the appellants' challenge to the oral history evidence by way of expert evidence:

> [294] As an alternate strategy to challenging the evidence of oral tradition through cross examination, Canada and Alberta rely on other evidence to diminish its weight. In particular, Alberta relies on the evidence of Dr. von Gernet as quoted above. For Dr. von Gernet's general concerns about the accuracy of evidence of oral tradition to diminish the weight to be given to it as presented in the present case, **I find that the concerns must be made specific to the individuals giving the evidence. That is, some proof must be found that, in some way, a witness to the oral tradition has failed to recount it accurately**. I find that this has not been accomplished.

[105] I find the Trial Judge's approach puzzling. His adoption of a rule that limits concerns regarding the reliability of oral history to concerns directed solely at individual witnesses had the effect of excluding all concerns directed at the nature of the oral history evidence, i.e. hearsay evidence. In my opinion, the Trial Judge treated, for all intents and purposes, the oral history evidence of Mr.Paulette, Mr. Willier, Mr. Mustus and Mrs. Randhile,

as if their evidence resulted from personal knowledge of the relevant events. His comments, found at paragraphs 283, 294 and 285 of his Reasons, are revealing:

> [283] I accept Dr. von Gernet's opinion that the memory of all witnesses might not accurately recall what was actually heard or seen. I agree that there should not be a double standard invoked in evaluating evidence of oral tradition; that is, according to the concept mentioned in *Mitchell*, evidence of oral tradition should be placed on an "equal footing" with other forms of evidence.
>
> [284] However, I caution that, in a trial, a witness is not to be judged by a sceptic, but by a person willing to believe that a witness is telling the truth, and to maintain this belief until some important definable reason is found for not doing so. This legal principle is enunciated in *Maldonado* v. *Minister of Employment and Immigration* [1980] 2 F.C. 302 at paragraph 5:
>
> > It is my opinion that the Board acted arbitrarily in choosing without valid reasons, to doubt the applicant's credibility concerning the sworn statements made by him ...When an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness.
>
> [285] Thus, I find that, if an Aboriginal person is considered qualified to give evidence of oral tradition, that person is entitled to have weight accorded to his or her evidence unless some certain reason exists for not doing so. In the present case this finding applies to Mr. Willier, Mrs. Randhile, Mr. Paulette, and Mr. Mustus.

[106] The Judge's reference to the decision of this Court in *Maldonado, supra*, shows, in my view, confusion on his part. In *Maldonado, supra*, this Court was concerned with an application for judicial review of a decision of the Immigration Appeal Board. It is important to point out that at the relevant time, para. 65(2)*(c)* of the *Immigration Act, 1976* provided that the Board could base its decision on any evidence considered credible and trustworthy in the circumstances of the case[5]. Thus, the Board was not bound by legal or technical rules of evidence and could accept hearsay evidence, which evidence was not subject to the test of usefulness and reliability adopted by the Supreme Court in *Delgamuukw, supra*, and *Mitchell, supra*. Consequently, I fail to see the relevance of *Maldonado, supra*, in the present matter.

[107] In my respectful view, paragraph 284 of the Trial Judge's Reasons highlights the fact that he seemed unmindful of the hearsay nature of the evidence adduced by way of the testimony of Mr. Paulette, Mr. Willier, Mr. Mustus and Mrs. Randhile, none of whom were present when the Treaty was signed in 1899. These witnesses, it is worth repeating, were testifying with respect to information and knowledge which they claimed to have received from certain individuals. The fact that a witness was telling the truth, i.e. that he or she truly believed what he or she was relating to the Court, did not, *per se*, prove that the information was accurate. The Judge's misunderstanding is further highlighted by his remarks concerning Mr. Willier's testimony. At paragraphs 305 and 306, the Trial Judge states:

> [305] With respect to Mr. Willier's 1999 statement, Alberta argues that Ms. Aasen used leading questions to elicit the evidence respecting the tax exemption promise. The law with respect to a leading question is well known and concisely stated as follows:
>
> > A leading question is one which either suggests an answer or assumes the existence of disputed facts....It should never be forgotten that "leading" is a relative, not an absolute term.... Leading questions are objectionable because of the danger of collusion between the person asking them and the witness, or the impropriety of suggesting the existence of facts which are not in evidence (*Cross on Evidence*, 3rd ed., p.188).
>
> [306] I find that, in the context of having a respected elder give an account of the oral tradition which he knows, it is not leading to direct the elder's attention to a certain topic. I do not accept for a moment that a man of Mr. Willier's calibre would concoct his statement respecting a tax exemption promise, let alone concoct it merely as a result of being directed to the topic by Ms. Aasen.

[108] The issue which the Trial Judge had to deal with was not whether Mr. Willier intended to concoct his evidence concerning the alleged tax promise. Rather, the issue was whether his testimony was reliable. The Judge, as I have just indicated, treated Mr. Willier's evidence and that of the other witnesses as if they had personal knowledge of the relevant events. Consequently, in those circumstances, unless the appellants could successfully challenge the oral history evidence by way of cross-examination, the Trial Judge was prepared to accept, and indeed did accept, this evidence at face value. I also note from paragraphs 305 and 306 of the

Trial Judge's Reasons that he was of the view that leading questions were legitimate when elders were called to give their testimony. With respect, I cannot subscribe to this point of view. In *Mitchell, supra*, McLachlin C.J. made it clear that oral history should not be given preferential treatment. More particularly, she made the following remarks at paragraph 38:

> 38. Again, however, it must be emphasized that a consciousness of the special nature of aboriginal claims does not negate the operation of general evidentiary principles. While evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law, which, as they relate to the valuing of evidence, are often synonymous with the "general principles of common sense". [...]

[109] It is also important to point out that the nature of the oral history evidence in this case is quite different to that presented, for example, in *Delgamuukw, supra*. In that case, the oral history of the Gitksan and Wet'suwet'en, known as the addawk and kungax respectively, was considered as "sacred 'official' litany, or history, or recital of the most important laws, history, traditions and traditional territory of a House". Only specially-appointed people at certain important community events were entitled to repeat these stories and the authenticity of the stories was ensured, because anyone who objected to any details of the stories had the opportunity to raise his or her objections at the events. Thus, the oral history was formal and regimented. In the present case, however, it is of a substantially different nature in that it was passed on from individual to individual in an informal manner. The types of "checks and balances" which ensured authenticity in the adaawk and kungax were not present. Consequently, the oral history evidence adduced in this case could not be considered as reliable as that presented in *Delgamuukw, supra*.

[110] I agree with the appellants that the Trial Judge's failure to understand the nature of the evidence before him constitutes a reversable error. This error is what led him, in my view, to accept at face value the evidence of Mr. Paulette, Mr. Willier, Mr. Mustus and Mrs. Randhile. As I have indicated on a number of occasions, it does not appear that the Trial Judge made any attempt whatsoever to assess critically the evidence presented by these witnesses. The end result is that he gave preferential treatment to the oral history evidence, contrary to the caution given by McLachlin C.J. in *Mitchell, supra*. What the Trial Judge had before him were hearsay statements, the reliability of which had to be clearly demonstrated. This required the Trial Judge to take a hard look at the evidence being adduced and to determine whether that evidence was indeed reliable. In so doing, the Trial Judge would necessarily have had to examine the oral history evidence in the light of all the evidence before him, including the TARR interviews and the 1946 submissions to the Joint Committee. He would also have had to consider the fact that researchers like Dr. Irwin and Dr. McCormack failed to discover any support whatsoever for the view that the Aboriginal signatories had understood that a tax promise had been made. This, with the greatest of respect, the Trial Judge manifestly failed to do.

[111] I would like to conclude my remarks by quoting those passages from the Report of Dr. Alexander von Gernet, an anthropologist called by Alberta to give expert evidence regarding the weight of the oral history evidence, which the Trial Judge reproduced in part at paragraph 282 of his Reasons:

> [282] Dr. von Gernet views the subject of evidence of oral tradition with an exceedingly critical eye. The following passages from his report demonstrate the standard which he believes should be adopted when evaluating evidence of oral tradition:

In my opinion, the most useful approach recognizes the legitimacy of self-representation and acknowledges that what people believe about their own past must be respected and receive serious historical consideration. At the same time, it assumes that there was a real past independent of what people presently believe it to be, and that valuable information about that past may be derived from various sources including oral histories and oral traditions. It accepts that both non-Aboriginal and Aboriginal scholars can be biased, that various pasts can be invented or used for political reasons, and that a completely value-free history is an impossible ideal. Nevertheless, it postulates that the past constrains the way in which modern interpreters can manipulate it for various purposes. While the actual past is beyond retrieval, this must remain the aim. The reconstruction that results may not have a privileged claim on universal "truth," but it will have the advantage of being rigorous. The approach rejects the fashionable notion that, because Aboriginal oral documents are not Western, they cannot be assessed using Western methods and should be allowed to escape the type of scrutiny given to other forms of evidence. Ultimately, the perspective is in accord with the belief of the highly-regarded anthropologist Bruce Trigger: public wrongs cannot be atoned by abandoning scientific standards in the historical study of relations between Aboriginal and non-Aboriginal peoples. **Those who marshal Aboriginal oral histories and traditions and submit them as evidence about past events have at least one major hurdle to overcome--how to convince skeptics that documents generated in the present contain accurate information about the past** (p.6).

…

In other words, the value of orally communicated history does not always lie in its factual accuracy. What people believe to be true is just as important as what actually happened since it can provide valuable insights into the significance of history. Even erroneous, misguided or deliberately misleading accounts may in their very errors provoke understanding. Furthermore, it is important to understand why people in the past acted as they did. Since people usually act in accordance with what they believe, scholars must try to understand each culture on its own terms and see what its members imagine reality to be. **Nevertheless, when it comes to historical inquiry in Aboriginal litigations, it is important to at least try to distinguish between what people *believe* might have happened and what on the weight of combined evidence may *actually* have happened** (pp. 9-10).

...

The question is, perhaps, not so much whether an oral document is accurate about an actual past, but whether it is in accord with independent evidence. Some have suggested a distinction between reliability and validity, with the former referring to internal consistency and the latter referring to the degree of conformity between an oral account and other primary sources such as written documents or archaeological evidence. Irrespective of how the question is formulated, debates about the facticity, historicity, accuracy, reliability or validity of oral documents mirror the tension between historical objectivism and postmodernism, reflect divergent views about whether such documents are about the past or the present, and sometimes pit members of different scholarly disciplines against one another. In other words, the numerous opinions fall along a continuum (p.11).

...

All memory is selective and its structure is related to perception which itself is rooted in culture and social relations. It has become clear that memories are reconstructions coloured by succeeding events and that humans reshape, omit, distort, combine and reorganize details about the past. As people change the way they think about the world, they

> automatically update memories to reflect their new thinking. New inputs force reappraisals and gaps are unconsciously smoothed over or filled with inferences about what must have happened. In this way, remembered facts are supplemented with constructed facts to produce a version of the past. ...**There is, however, nothing inherent in orality that fosters accurate transmission of information and no evidence to suggest that Aboriginal people are blessed with a genetic or cultural immunity from the forgetfulness that plagues the rest of the human species. ...All evidence points to the fact that Aboriginal people, like all other humans, are susceptible to a phenomenon well known in memory research: *retroactive interference*** (pp.13-14).
>
> ...
>
> It is clear that for many Aboriginal people preserving history involves not only passing information orally to one another, but also temporarily freezing oral documents by writing them down so that they can be used to advance alternative pasts in contemporary political discourse and in courtrooms across the nation. **Once reduced to writing and tendered as evidence, there is no compelling reason why the traditions should not be subjected to the same type of scrutiny as is commonplace in the study of any other written document....Once the oral traditions are tendered as evidence in support of a reconstruction of what actually happened in the past, not subjecting them to rigorous analysis will only lead to an unacceptable double standard** (pp.21-22).

[Emphasis is that of the Trial Judge]

[112] In my view, the approach suggested by Dr. von Gernet to oral history evidence is undeniably a proper approach and is entirely in line with the remarks made by McLachlin C.J. at paragraph 38 of *Mitchell, supra*, where she indicated that evidence adduced to support Aboriginal claims should not be weighed in a manner that "fundamentally contravenes the principles of evidence law ...".

[113] I agree with Dr. von Gernet that oral history evidence cannot be accepted, *per se*, as factual, unless it has undergone the critical scrutiny that courts and experts, whether they be historians, archeologists, social scientists, apply to the various types of evidence which they have to deal with. My specific purpose in referring to Dr. von Gernet's Report is to emphasize the fact that the Trial Judge ought to have approached the oral history evidence with caution. In *Mitchell, supra*, for example, the Trial Judge and the Supreme Court of Canada accepted the oral

history evidence of Grand Chief Mitchell which, McLachlin C.J. points out at paragraph 35 of her Reasons, was confirmed by archeological and historical evidence. In other words, depending on the nature of the oral history at issue, corroboration may well be necessary to render it reliable.

[114] In *Mitchell, supra*, at paragraph 27 of her Reasons, McLachlin C.J. provided a rationale for not imposing an impossible burden of proof on Aboriginal claimants:

> 27. Aboriginal right claims give rise to unique and inherent evidentiary difficulties. Claimants are called upon to demonstrate features of their pre-contact society, across a gulf of centuries and without the aid of written records. Recognizing these difficulties, this Court has cautioned that the rights protected under s. 35(1) should not be rendered illusory by imposing an impossible burden of proof on those claiming this protection (*Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 408). Thus in *Van der Peet, supra*, the majority of this Court stated that "a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in" (para. 68).

It is important to carefully read the words of McLachlin C.J. Her rationale is premised on the difficulty of demonstrating "a right which originates in times where there were no written records of the practices, customs and traditions engaged in". Further, her comments must be read in the light of paragraph 38 of her Reasons, which I again reproduce:

> 38. Again, however, it must be emphasized that a consciousness of the special nature of aboriginal claims does not negate the operation of general evidentiary principles. While evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law, which, as they relate to the valuing of evidence, are often synonymous with the "general principles of common sense". [...]

[115] In the present matter, what is at issue is not "a right which originates in times where there were no written records of the practices, customs and traditions engaged in", but whether the Aboriginal signatories understood that a promise exempting them from tax at any time for any reason was made. As appears from these Reasons, there exists a voluminous

documentary record concerning Treaty 8 and that record does not give rise to the view advanced by the respondents and accepted by the Trial Judge.

[116] In summary, when the evidence adduced before the Trial Judge is examined in its entirety and in its proper context, the only possible conclusion, in my view, is that there is insufficient evidence to support the view that the Aboriginal signatories understood that they would be exempted from taxation at any time and for any reason. I reach this conclusion for the following reasons:

1. The Treaty is silent with respect to a promise exempting the Aboriginal signatories from taxation.
2. The documentary evidence relating to the Treaty, save for the Commissioners' Report, is also silent with respect to such a promise.
3. The Treaty Commissioners did not make such a promise and were not so authorized by the Canadian Government.
4. The Commissioners' Report, when received in Ottawa, did not give rise to any complaints or objections on the part of the Government, whose instructions to the Commissioners were that they should not go beyond the previous treaties.
5. The previous numbered treaties did not contain any promise of a tax exemption.
6. Drs. Irwin and McCormack, experts called by the respondents, both testified that their historical and anthropological research did not lead

them to any written source which would support the view that the Aboriginal signatories understood that they had been exempted from tax.

7. The extensive 1946 submissions to the Joint Committee by the various Treaty 8 bands did not raise the issue of an unfulfilled tax promise.

8. Defenders of the Aboriginal signatories, such as Bishop Breynat and Father Fumoleau, did not voice any complaints with regard to an unfulfilled tax promise.

9. The TARR interviews do not support the view that a promise was made exempting the Aboriginal signatories from taxation.

10. The *viva voce* evidence of Mr. Paulette, Mr. Willier and Mrs. Randhile, and the transcript of the Mustus interview do not support the conclusion reached by the Trial Judge. This evidence is, at best, ambiguous and inconclusive, and, in my view, can only be described as "sparse, doubtful and equivocal". The hearsay nature of the evidence of these witnesses and the substance of their testimony were such that the Trial Judge should have been very cautious, bearing in mind that the Treaty and the documentary evidence are silent with respect to an alleged tax promise and with respect to the Aboriginal signatories' understanding.

11. When reading the *viva voce* evidence of the three witnesses and the transcript of Mr. Mustus' interview, it is more often than not very difficult to know whether the witness is relating oral history or is simply giving his or her opinion on the issues being discussed. This, in itself, is an added

reason why the Trial Judge ought to have been very careful in assessing this evidence.

CONCLUSION

[117] Since there is nothing in the record which can reasonably support the conclusion reached by the Trial Judge, I am compelled to find that he made a palpable and overriding error. The Trial Judge appears to have failed to consider a sizeable portion of the evidence and to have misapprehended material evidence. Had he not made these errors, he could only have come to the conclusion that the evidence adduced by the respondents was not sufficient to allow him to reach the conclusion that he did.

[118] Consequently, I conclude that the respondents did not establish that the Aboriginal signatories of Treaty 8 understood that the Treaty Commissioners had made a promise exempting them from taxation at any time for any reason.

[119] For all of these reasons, I would allow the appeal, set aside the judgment of the Trial Division, dated March 7, 2002, and dismiss the respondents' action, with costs herein and below, save for the costs of preparation of the Appeal Books, which the appellant Canada undertook to assume.

"M. Nadon"

.

J.A.

“I agree.
A.J. Stone J.A.”

“I agree.
John M. Evans J.A.”

ENDNOTES

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-47-02

APPEAL FROM A JUDGMENT OF THE TRIAL DIVISION DATED MARCH 7, 2002, TRIAL DIVISION FILE NO. T-2288-92

STYLE OF CAUSE: HER MAJESTY THE QUEEN IN RIGHT OF CANADA v. CHARLES JOHN GORDON BENOIT ET. AL.

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: November 19, 20 & 21, 2002

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: STONE J.A.
EVANS J.A.

DATED: June 11, 2003

APPEARANCES:

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1. In June 1899, s. 77 of the *Indian Act*, R.S.C. 1886, c. 43, exempted Indians from taxation unless they owned private property in their individual capacity. Further, territorial legislation exempted from taxation "all property held by or in trust for the use of any tribe of Indians or the property of the Indian Department". (Northwest Municipal Ordinance No. 4 of 1884; See Appeal Book, Vol. 8, p. 2529).

2. The intervenors who, pursuant to ss. 57(5) of the *Federal Court Act*, are responding to a notice of a constitutional question, are the Attorneys General of the Provinces of Alberta, Saskatchewan, British Columbia and the Canadian Taxpayers' Federation. Although there are differences between the appellant and the intervenors in the approach they take in challenging the conclusions reached by the Trial Judge, I will nonetheless simply refer to the appellant and the intervenors as the "appellants".

3. The Indian Association of Alberta's Treaty and Aboriginal Rights Research ("TARR").

4. Jean-Marie Mustus was interviewed on November 19, 1972 and on March 26, 1975.

5. Para. 65(2)*c)* of the *Immigration Act, 1976* read as follows:

> **65.** (2) The Board has, as regards the attendance, swearing and examination of witnesses, the production and inspection fo documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record and, without limiting the generality of the foregoing, may *(c)* during a hearing, receive such additional evidence as it may consider credible or trustworthy and necessary for dealing with the subject-matter before it.

At page 310 of his dissenting Reasons, Ryan J. commented as follows on the nature of the proceedings before the Board:

> The proceedings in respect of refugees are in the nature of an inquiry, not a trial, and the rules of evidence applicable to trials do not apply in proceedings before the Board. This is made abundantly clear by the provisions of section 65(2)*(c)* of the *Immigration Act, 1976* which is as follows: [...]
>
> If the rules as to the admission of evidence applicable to trials had been applicable in this case, the claimant could not have put in the letter from his wife.
>
> It was hearsay; the writer was not available for cross-examination and it was selfserving. The weight, if any, to be given to the statement in the letter was a matter for the Board to determine.