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Treaty & Aboriginal Rights Research Centre of Manitoba Inc.
Research Office - Winnipeg
520 - 167 Lombard Avenue
Winnipeg, Manitoba
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Attention: Ralph Abramson / Patricia Myran

Dear Ralph / Patricia:

Re: Land Entitlement - Dakota First Nations of Manitoba
Our File No. 11653-52

Further to the letter from Mr. Abramson dated October 31, 2001, and the letter from Ms. Myran dated August 16, 2006, I have now had an opportunity to review the Report and Historical Documents relating to a potential claim to be advanced on behalf of the Dakota First Nations of Manitoba. The claim would seek a Declaration that the Dakota First Nations are presently entitled to additional Reserve lands based upon the premise that when the Dakota Sioux were being provided Reserves by Canada in the 1870s, an Order-in-Council, dated January 4, 1873, contained the recommendation "that a Reserve be set apart for them to contain about 12,000 acres with the understanding that an additional quantity will be reserved should their actual numbers require it."

The potential claim would argue that an interpretation be attributed to these words which would entitle each of the Dakota First Nations in Manitoba to additional Reserve lands based on current populations which have grown through the generations since their respective dates of first survey.

If these words were to be found written expressly in a Treaty or in documented oral promises associated with the making of a Treaty, then, given the respect and legal effect which is afforded to a Treaty, by which First Nations have given up lands and territorial rights, a stronger argument could be made for an outstanding Treaty Land Entitlement based upon current populations reflecting increased membership.

However, as noted in Mr. Abramson's letter, and in the Report itself, the facts are that the Dakota did not enter into Treaties with Canada, and that Canada and at least some of the Dakota being dealt with at that time appear to be operating upon the

premise that the Dakota had no claim of right to lands and that any lands granted to them by Canada as Reserves would be based upon the good will and favour of Canada.

The question then becomes whether the words found in the Order-in-Council can support the existence of an outstanding obligation upon Canada, otherwise than by Treaty, entitling the Dakota to have additional Reserve lands set apart for them in the future should their numbers increase in population. This could arguably arise if there could be established an enforceable bilateral agreement made between the Dakota and Canada, whereby, for valuable consideration to be provided by the Dakota, Canada expressly or impliedly agreed to provide to them additional Reserves when warranted by an increase in their population through future generations.

Alternatively, short of finding such a bilateral agreement between Canada and the Dakota, could it be argued that Canada unilaterally developed and represented to the Dakota a "policy" which, by conduct over time, induced the Dakota to believe and expect that the granting of Reserves to them would be subject to an obligation upon Canada, and a respective entitlement to the First Nations, to provide to them additional Reserves when warranted by an increase in their population through future generations?

In order to analyze the interpretation and significance to be attached to the words found in the Order-in-Council, it is helpful to examine their context, both within the Order-in-Council itself and in terms of the manner by which they came to be contained in the Order-in-Council.

The words themselves would appear to be the creation of William Spragge, described in the Report as being a Deputy Superintendent-General of Indian Affairs for the North West Territories, who prepared a lengthy Report, dated February 6, 1872, entitled: "Report from the Indian Office relative to setting apart land for occupation of a Band of Sioux Indians, now living on the Assiniboine River in the North West Territories."

The Report, addressed to Joseph Howe, Secretary of State for the Provinces, at the Indian Branch in Ottawa, appeared to have arisen as a result of Lt. Gov. Archibald's having been applied to personally by the Chiefs of this Band with a view to obtaining from the government some lands on which to settle.

Attached to your Historical Report as Document No. 1 is what appears to be a handwritten copy of Spragge's Report dated February 6, 1872. The handwriting is clearly not that of Spragge whose handwriting is evidenced in several other documents. In due course, we would recommend that the transcription of this Report be included in the body of the Historical Report in its entirety in order to give context to words which are focused upon in the potential claim which words we will see are found in a later writing by Mr. Spragge.

In the February 6, 1872 Report, Spragge describes the Band as consisting of "about 600 persons, including women and children", and states:

"Having no territorial rights appertaining to that territory it is to the good will of the Government towards them that they must look for such appropriations of land as may be set apart for their benefit".

Spragge states that the Report "relates to a certain Band of Sioux Indians" and notes that "this Band, although a foreign one, had localized itself previously to the North West being brought within the Dominion...".

Spragge further states:

"The Head's of families may be computed at about eighty and at 100 acres for each family would require 12,000 acres. The Reserve should however include at least 9,600 acres so as to have a small surplus...after allowing for some indifferent land."

Spragge also pointed out that under Treaties 1 and 2, Indians received 160 acres for each Head of family, as well as additional benefits, but that he did not propose to give "to this Sioux Band referred to any advantages or privileges additional to the small appropriation of land proposed for their occupation".

The Report from Spragge, as noted on the copy transcribed as Document No. 1, would appear to have received the approval of Joseph Howe, on February 6, 1872.

At about this time several other groups or Bands of Dakota Sioux from various locales also petitioned the government for lands.

In December 1872, Mr. Spragge was asked to prepare a Briefing Report for submission to the Minister with respect to his recommendations, in anticipation of a pending Order-in-Council. By letter dated December 31, 1872, Spragge wrote a Report as requested. While this letter is not currently amongst the documents attached to your Historical Report, we have obtained a copy and it should be included and quoted in its entirety.

In his Briefing Note, Spragge writes:

"... The case of these Sioux was the subject of a Report dated 7th February from this Indian Office which in it, it was proposed to allot to each family 80 acres of farm land. This Band was computed to be comprised of about 80 families and consequently to allocate them 6,400 acres would suffice. But due allowance for inferior land not adapted for Agriculture and provision likewise for some excess over 80 families should be

made. And it is accordingly recommended that a Reserve be set apart for them to contain about 12,000 acres with the understanding that an additional quantity will be reserved should their actual numbers require it."

After commenting negatively on the suggested location of the Reserve on the Souris River, Spragge concludes his Report by stating:

"It is therefore proposed that the precise locality, West of Manitoba, should be left open for future arrangements."

As you may have noted, there is some confusion introduced to the Report by Spragge's reference to the "Report dated 7th February from this Indian Office" purporting to allocate 80 acres per family. Clearly, Spragge's Report of February 6, 1872, recommended 100 acres per family. Was there a further Report dated February 7, 1872, which passed on Spragge's letter but proposed 80 acres per family instead? Or, was he referring to the original letter of February 6, 1872 and merely changing his recommendation? Regardless, the recommendation made by him in his Report of December 31, 1872, was premised on 80 acres per family.

The Briefing Note of December 31, 1872, then became the expressed basis for the content of the Order-in-Council dated January 1, 1873, which is presently found as Document No. 8. The content of the Order-in-Council, as presently set out at paragraph 4 of the Historical Report, duplicates, almost in its entirety, the Report of December 31, 1872, including the paragraph as follows:

"... That the Band was computed to be comprised of about 80 families and consequently to locate them 6,400 acres would suffice. But that due allowance for inferior land not adapted for Agriculture and provision likewise for some excess over 80 families, should be made. And recommending that a Reserve be set apart for them, to contain about 12,000 acres with the understanding that an additional quantity will be reserved should their actual numbers require it..."

As recommended by Spragge, the Order-in-Council left the precise locality of the Reserve for future arrangement.

I would suggest that in the context of dealing with the granting of a Reserve for these Dakota Sioux, a strong argument can be made that the underlined words, in their plain, ordinary meaning, do not speak to increased population growth through future generations, but rather speak to the possibility that at the time when proposed Reserve lands were to be first surveyed, the actual numbers of the Dakota proposed to occupy same may have increased beyond initial estimates. The phrase "should their actual numbers require it" suggests a comparison between estimated numbers and actual numbers. Had Mr. Spragge, or those relying on his words, really

intended to speak to future population growth, this could have easily been accomplished by choice of words. For instance, the use of the word "future" instead of the word "actual" would have supported an alternate interpretation.

By Order-in-Council, dated April 24, 1873, the Lt. Gov. of Manitoba was authorized "to place the Band (of Sioux) in a proper locality in the vicinity of Lake Manitoba".

By Order-in-Council, dated August 13, 1873, Lt. Gov. Morris was authorized to supply agricultural implements to the "Sioux Indians, who have for some time past been living in the vicinity of Portage La Prairie and who are shortly to remove to a Reserve set apart for them on the west shore of Lake Manitoba".

The Dakota Sioux rejected the location on the shores of Lake Manitoba because it was within Ojibway territory and threatened a peace agreement which had been made between the Dakota and the Ojibway.

By letter dated January 10, 1874, Lt. Gov. Morris informed the Minister of the Interior that the Sioux, which now numbered "250 tents, equal to about 1,000 persons in all"... "desire to be placed at the junction of the Little Saskatchewan and Assiniboine Rivers."

An Order-in-Council, dated April 27, 1874 (currently Document No. 16), dealt with establishing the Reserve at this new location. The Order-in-Council firstly made express reference to the Order-in-Council of January 4, 1873, as follows:

"... by the provisions of an Order-in-Council, under date 4th January, 1873, a Reserve sufficient to afford at least eighty acres of farming land to each family was authorized to be set apart for a Band of Sioux Indians now settled in the Province of Manitoba, such Band having come to the province some years previously from the United States.

"That the precise locality was, by the said Order, left open for future arrangement.... That the Council of the North West... recommends that... the Reserve for the Sioux should be located on the West Bank of the Little Saskatchewan where that River falls into the Assiniboine and along the North Bank of the Assiniboine...embracing a sufficient quantity of land to give eighty acres of land to each family.

"That the precise locality of the Reserve is shown on a diagram...

"The Committee submit the above recommendation for your Excellency's approval, leaving it however optional with the Lieut. Governor of Manitoba to locate the Band on the Reserve originally proposed, as suggested in his telegram of the 25th April, instant".

I note that there is no mention found in this document, either in the reference to the earlier Order-in-Council or in the current Order-in-Council, with respect to the underlined words referring to the "additional quantity".

A letter dated July 7, 1874 (currently Document No. 17), from Lt. Gov. Morris to the Minister of the Interior described his dealings with two groups of Sioux, numbering about 150, residing near Turtle Mountain, who were seeking information concerning the Reserve set apart for them by the Dominion Government. This letter is relevant in terms of what "policy of the Government" existed in the circumstances. Lt. Gov. Morris stated:

"At first they wanted to select a Reserve for themselves. This I informed them they could not do, and after I had explained the policy of the Government respecting that portion of the Sioux Nation now in British territory, the two chiefs signed an agreement on behalf of themselves and their bands to settle and live peacefully upon the land to be allotted to them by the Government near the confluence of the Little Saskatchewan and Assiniboine rivers.

"The chiefs of all the Sioux bands settled on British soil of whom I have any knowledge, have now signed the agreement...and I see no reason why all the bands should not be settled on the Reserve by the approaching autumn...

"In view of the difficulties existing among our American neighbours and the Sioux race, I think it is a very fortunate circumstance that I have been enabled to induce these people to agree to settle here at a place far removed from the frontier and our own white settlements. I enclose a copy of the agreement to which I refer."

The agreement to which he refers is attached and reads as follows:

"On behalf of the Sioux who have for 12 years been resident in the N.W. Territories, we ask for a Reserve of Land to be granted between the rivers Little Saskatchewan and Assiniboine at their junctions. This we ask as a matter of favour and good will from the Queen.

"In asking this we agree to settle on the Reserve and pledge ourselves that we will live at peace with Her Majesty's white subjects and the other Indian tribes and will obey all the commands and laws of Her Majesty...

"We agree that the same Reserve be granted as asked for".

As with the Order-in-Council, this letter and agreement do not suggest that there is any element contained in the policy of the government relating to future population growth. Clearly this letter, along with other correspondence being exchanged

at this time, indicates that the intention of the government was to locate all of the various "Bands" of Sioux on the Reserve which was likely now to be located at the junction of the Little Saskatchewan and Assiniboine rivers. Correspondence also indicated that information was being sought by the surveyor assigned to survey the Reserve as to how many Sioux would be settling upon the Reserve lands. All of these exchanges support the view that the underlined words found in the January Order-in-Council were intended to refer to "actual numbers" in existence at the time when it was proposed to firstly survey the Dakota Reserve.

Document No. 20 includes minutes of a meeting which Lt. Gov. Morris had with a group of Dakota Sioux which he estimated to represent "some six hundred souls". He is noted to have stated:

"I have told the Sioux in Red River that I have power to give eighty acres of land to each family of five so they can have little farms to live on. I have agreed with the Sioux at the Portage to go to a Reserve of land that I have selected for them....The place I have chosen is at the point where the Little Saskatchewan and Assiniboine meet. Before I left Red River I told a man to lay off land enough to give eighty acres to each family of five."

The Reserve referred to in the April 27, 1874 Order-in-Council, was surveyed in the fall of 1874 by William Wagner. The Reserve was seemingly intended for all of the Sioux in Manitoba and comprised approximately 16,000 acres. Surveyor Wagner, noted a lack of wood on the surveyed Reserve and, as he anticipated in his correspondence, the surveyed Reserve was rejected by the Sioux and never occupied as a Dakota Reserve. In the end result Canada considered setting apart several Reserves instead of the one which had been created, noting that the Sioux had shown a disposition to settle in different localities.

On November 12, 1874, an Order-in-Council was passed, cancelling the Order-in-Council of April 27, 1874, and recommending that the Dakota Sioux be allowed to select two or three smaller Reserves instead of locating on the larger Reserve on the Assiniboine River. The Order-in-Council also suggested that there be a surrender obtained from the Sioux in respect of the Reserve which had been surveyed. In due course a document purporting to effect a surrender was executed by certain of the "Sioux at Fort Ellice" under date June 26, 1875. The "surrender" did not likely comply with the formalities required of a surrender, but, arguably, no formal surrender would have been required since the Reserve had not actually been accepted as such by the Dakota intended to utilize same.

The Order-in-Council provided that "the size of each Reserve to be based upon the estimate of eighty acres to each family of five persons settling upon it". There was no reference in the Order-in-Council to "additional quantities", nor was there any suggestion made of future population growth.

The Historical Report documents the establishment of three "Dakota" Reserves pursuant to the Order-in-Council of November 12, 1874, namely:

- a) Oak River Indian Reserve (now Sioux Valley Reserve) surveyed at 7,936 acres in 1875;
- b) Birdtail Indian Reserve surveyed at 6,880 acres in 1875; and
- c) Oak Lake Indian Reserve surveyed at 2,560 acres in 1876.

In all of the documented correspondence and discussions relating to the survey of these Reserves, and consultations with the Dakota in respect of same, there is no suggestion of any entitlement to additional quantities of Reserve land in relation to future population growth.

There was some expression of doubt as to the actual number of families that might settle on a particular Reserve from amongst the various groups of Dakota. For example, in Document 35, Surveyor Wagner's Field Notes, in respect of the Oak River Reserve surveyed, he noted that the amount surveyed at 6,936 acres exceeded the amount originally stipulated at 6,400 acres. He stated:

"...since my return I was informed that White Eagle by his friend Mr. James McKay has complained of the smallness of the Reserve - White Eagle himself in my hearing stated that his band would not exceed 60 to 70 families. Mr. Commissioner Provencher ordered a survey for 80 families and now they have an area enough for nearly 100 families, which amount I do not think they will ever reach. Most of the Sioux will go to the Birdtail Creek or try to remain at the Portage."

The Reserve at Oak Lake was the subject of a specific Order-in-Council dated November 9, 1877, which recommended that a Reserve at Oak Lake be granted to about 20 families of Dakota living in the vicinity of Turtle Mountain and Oak Lake. It read, in part:

"That it would appear advisable to give these Indians the opportunity of settling quietly down on a Reserve as was done in the case of the Sioux of Manitoba above referred to, by authority of an Order-in-Council of the 12th November, 1874....allowing them the same quantity of land as was assigned the Manitoba Sioux, namely, eighty acres to each family of 5 Indians or, in the same proportion for a greater or smaller number of persons. The exact position of the Reserve to be determined by the surveyor at an interview with the chiefs".

In respect of his survey for Oak Lake, Wagner noted in Document No. 51 that the Dakota for whom the Reserve had been surveyed consisted of 25 families. He accordingly laid out 2,560 acres, enough for 7 families more, stating, "but taking the woodland from it and due allowance made for increase and to receive some straggling families it would not be excess to the amount of eighty acres per family granted."

The Historical Report also documents the establishment of the Turtle Mountain Reserve consisting of the 640 acres comprised by Section 31, Township 1, Range 22W at Turtle Mountain.

Reference is also made to the later setting apart of Reserve lands for Dakota Tipi and Dakota Plains First Nations. In respect of all of these Reserve lands there is nothing which, in my opinion, supports consideration being given to an entitlement for additional lands based upon future population growth.

I do not see in any of the documentation which postdates the Order-in-Council of January 4, 1873, any evidence supporting the existence of an existing and enforceable agreement or policy which would give rise to an obligation on the part of Canada to provide additional Reserve lands to Dakota First Nations based upon current populations which have grown through the generations since the date of first survey. I believe that the words underlined in the first Order-in-Council can most reasonably be interpreted as applying to "actual numbers" upon which the Dakota Reserves were first surveyed.

Enclosed with Mr. Abramson's letter of October 31, 2001, was an excerpt of a section from Peter Douglas Elias' book, The Dakota of the Canadian Northwest: Lessons in Survival, concerning the establishment of the first Reserves for the Dakota. Mr. Elias covers a good portion of the same ground covered by the Historical Report. Some of the documents which he footnotes are already documents within the Historical Report. Other documents which he has footnoted are not.

We note that the position sought to be advanced in respect of this potential claim seems to have been "protected" by the author Elias. At pages 38 and following Mr. Elias notes the reports of Mr. Spragge and the underlined words incorporated into the Order-in-Council of January 4, 1873. At page 40, Mr. Elias states:

"Joseph Howe submitted the whole of Spragge's report to the Privy Council, and on January 4, 1873, it was approved by the governor general. This order in council incorporated three points that would later form the basis of policy for dealing with Dakota land matters: eighty acres of land would be allowed for each family, the reserve was subject to increase if warranted, and Dakota reserves would be located well away from the international boundary."

At page 51 of his book, Mr. Elias states:

"At this point, when all of the Dakota in the North West had identified themselves and their land needs to the government, the land and economic concerns of each band began to diverge more sharply. From this time on, the bands became firmly connected to particular lands, and it is best to consider their histories separately. The Dakota selected their lands with careful planning, and since the bands did not all share a single vision of the future, they needed various environments in which to continue and develop their differing lifestyles. By this time, however, policy for the establishment of Dakota reserves in Canada had been established with the allocation of the Oak River and Birdtail reserves. The future setting aside of land was guided by the experiences of 1874 and 1875 - the Dakota would be allowed to select their own reserve sites; they would receive lands on the basis of eighty acres per family of five; all land allotments would be as a benefit from the Crown, not as a matter of right; and the reserves could later be increased in size, as requirements demanded."

With due respect, if it was the intention of Mr. Elias to suggest that this later increase would amount to an entitlement to additional Reserve lands based on future population growth, then we believe that he has overstated the significance of the words found in the initial Order-in-Council. If, on the other hand, Mr. Elias was stating that after the Order-in-Council of 1873, but before the Dakota Reserves were initially surveyed, the quantities of Reserve land could be increased as requirements demanded, we take no exception to his comment.

Bear in mind, that the Order-in-Council of January 4, 1873, proposed a Reserve for the Dakota in the amount of 12,000 acres. When the initial Reserves for the Dakotas were eventually surveyed the three principle reserves, Birdtail, Oak River (Sioux Valley) and Oak Lake, comprised Reserve lands set aside in the amount of 17,376 acres on the basis of 80 acres per family of five. This is consistent with what we perceive to have been the intention of the underlined words found in the Order-in-Council.

Any argument suggesting an obligation upon Canada to provide additional Reserve lands based upon increased current populations, will be met with significant resistance by Canada. Even in situations where there exists a Treaty, combined with allegations of oral promises of additional Reserve lands as populations grow, Canada has steadfastly refused to acknowledge an obligation in this respect. When the Treaty Land Entitlement Framework Agreement of 1997 was negotiated, while more recent populations were considered to some extent in the formula for calculating compensation and restitution, Canada's admitted legal obligation was limited to the per capita entitlements based on a Date of First Survey (DOFS) Shortfall. The Framework Agreement expressly excluded from its Release provisions the right of any TLE First Nation to advance a claim based upon future population growth. So far as we are aware,

no such claims have been successfully advanced, either through the specific claims process or by court litigation.

Even when, following the Fort McKay decision by the Indian Claims Commission, the basis for calculating the DOFS Shortfall was expanded to include late additions and landless transfers, no such extension was granted or acknowledged by Canada based solely upon future increases in population.

If required, we will make a review of recent cases to update this position in respect of Treaty Land Entitlement. However, do not forget that there is no Treaty relating to the Dakota in the present circumstances.

While not the primary focus of my review, we must bear in mind that under the New Specific Claims Tribunal Act, the definition of a claimant has been modified somewhat. Those "Dakota First Nations" who have had Reserves set apart such as to have been recognized as "Bands" and "Indians" under the Indian Act, should arguably qualify as claimants in respect of the potential "Land Entitlement", although the Land Entitlement will have arisen prior to their having attained Indian Act status by having Reserves set apart and occupied by them.

Once you have had an opportunity to consider our comments and opinions, we should get together to discuss same and to determine how you wish to proceed as we move into the future on this particular matter. In the event that the claim is going to be advanced, there are some changes which we would suggest be implemented in the early pages of same.

Yours truly,

TAYLOR McCAFFREY LLP

Per:

PAUL B. FORSYTH

PBF/pef

