

# INDIAN CLAIMS COMMISSION PROCEEDINGS



(1996) 5 ICCP

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## **Special Issue on Treaty Land Entitlement**

### **Reports**

Fort McKay First Nation  
Treaty Land Entitlement Inquiry

Kawacatoose First Nation  
Treaty Land Entitlement Inquiry

Lac La Ronge Indian Band  
Treaty Land Entitlement Inquiry

### **Related Material**

Donna Gordon  
Treaty Land Entitlement: A History

### **Responses**

Canada's Response to the Fort McKay First Nation  
Treaty Land Entitlement Inquiry

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**SPECIAL ISSUE ON  
TREATY LAND ENTITLEMENT**

A PUBLICATION OF  
**THE INDIAN CLAIMS COMMISSION**



(1996) 5 ICCP

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**CO-CHAIRS**

Daniel J. Bellegarde  
P.E. James Prentice, QC

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## FROM THE CO-CHAIRS

On behalf of the Commissioners and staff of the Indian Claims Commission, we are pleased to present this fifth volume of the *Indian Claims Commission Proceedings*. The volume is devoted to treaty land entitlement and the complex issues that arise in claims of this type. Included in this volume are three reports of the Commission into treaty land entitlement claims, a background paper on treaty land entitlement prepared by Donna Gordon for the Commission, and a response from the Hon. Ronald A. Irwin, Minister of Indian Affairs and Northern Development, to one of the treaty land entitlement reports.

Treaty land entitlement claims, or TLE claims as they are commonly known, are a particular type of specific claim involving an assertion by a First Nation that the Crown has failed to provide it with sufficient reserve lands under the terms of treaty. For instance, the numbered treaties signed in western Canada during the 1870s provided for the surrender of large tracts of Indian land in exchange for a promise from Canada to set aside reserves and to provide other forms of assistance and training to help Indians in their transition from a subsistence-based economy to one based on agriculture.

Rather than identifying the tract of land to be set aside for the band within the treaty itself, the numbered treaties used an acreage formula, usually one square mile, or 640 acres, of reserve land for every family of five (for Treaties 1, 2, and 5, the formula provided for 160 acres). In most cases the treaty signatories intended to survey these reserves within a year or two of signing, after consulting the Indians about the location of their reserves. However, the treaties are completely silent on the date on which the band's population should be counted to determine the amount of land to be set aside as reserve.

Furthermore, there are a host of complications associated with entitlement claims as a result of fluctuating band populations during the late nineteenth century, incomplete or inaccurate census figures for bands, new bands and individuals adhering to treaty many years after the original treaties were signed, and the various methods put forward by Indians and governments to calculate treaty land entitlement when a band did not receive the full amount of land it was entitled to. To further complicate matters, after 1930 the federal government required the consent of the provinces to transfer Crown lands to Indian bands to fulfil outstanding treaty entitlements. This consent was often not forthcoming because of philosophical opposition to the crea-

tion of reserves or because of conflicting priorities over the use of provincial Crown lands.

The practical result is that these treaty obligations have not been completely fulfilled. Moreover, the resolution of these longstanding issues is elusive because First Nations and the provincial and federal governments have taken radically different positions on the interpretation of treaty obligations and the principles and approaches used to determine the nature and extent of these treaty obligations. While recent settlement approaches demonstrate that common ground can be found, there is a need for ongoing discussion among the parties to develop consistent principles that can be applied in a fair and equitable manner to outstanding claims. The Indian Claims Commission presents this special volume on treaty land entitlement as a timely and independent contribution to assist in these discussions.

Contained in this volume are three final reports on the treaty land entitlement claims of the Fort McKay, Kawacatoose, and Lac La Ronge First Nations. The Fort McKay First Nation Inquiry Report was issued in December 1995. It examines whether this northern Alberta First Nation should be considered to have an outstanding entitlement to land under Treaty 8. In the course of our inquiry, we examined the nature and extent of the right to reserve land and of Canada's obligation to provide reserve land under the treaty. In addition to specific findings on the validity of this claim, the report summarizes a number of general findings with respect to the interpretation of treaty land entitlement.

Since the publication of volume 4 of the ICCP, we have received a preliminary response from the Minister of Indian Affairs and Northern Development to the report on the Fort McKay inquiry. A summary of that response is provided here.

The Kawacatoose First Nation Inquiry Report was issued in March 1996; it dealt similarly with whether there was any outstanding treaty land entitlement for this Saskatchewan First Nation under the terms of Treaty 4. In addition to specific findings in relation to that claim, we built upon and clarified the general findings with respect to the nature and extent of treaty land entitlement made in the Fort McKay Report.

The third report included in this volume is the Lac La Ronge Indian Band Inquiry Report, also issued in March 1996. The issues in this inquiry centred on the interpretation of Treaty 6 and whether the Lac La Ronge Indian Band had an outstanding entitlement to land in Saskatchewan. In particular, the Commission made specific findings with respect to the formula to be used to



calculate treaty entitlement for Indian bands that do not receive their full entitlement to land on the initial survey.

The final item in the *Proceedings* is a paper prepared by Donna Gordon for the Commission, entitled *Treaty Land Entitlement: A History*, which was released in December 1995. Ms Gordon, a research analyst with the Commission, was asked to provide an overview of the historical background to treaty land entitlement to assist Canada and First Nations in the resolution of those claims. The paper includes a glossary of terms and a bibliography, and it appends a number of the historical documents related to the issues of treaty land entitlement.

It is the hope of the Indian Claims Commission that the Government of Canada and First Nations will proceed with negotiations in good faith and reconcile their competing interests. It is of vital importance that the unfinished business of previous administrations be completed by fulfilling the terms of the solemn agreements signed with First Nations in the last century. The resolution of these outstanding issues is necessary before aboriginal and non-aboriginal Canadians can put the past behind them and move forward into a new era of harmony and coexistence.

Daniel J. Bellegarde  
Co-Chair

P.E. James Prentice, QC  
Co-Chair



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# ABBREVIATIONS

ADOFS	adjusted date of first survey
AFN	Assembly of First Nations
BCCA	British Columbia Court of Appeal
BCR	Band Council Resolution
BCSC	British Columbia Supreme Court
CA	Court of Appeal
CNLC	Canadian Native Law Cases
CNLR	Canadian Native Law Reporter
DIAND	Department of Indian Affairs and Northern Development
DINA	Department of Indian and Northern Affairs
DLR	Dominion Law Report
DOFS	date of first survey
FCA	Federal Court Appeal Division
FCTD	Federal Court Trial Division
FSI	Federation of Saskatchewan Indians
FSIN	Federation of Saskatchewan Indian Nations
IAA	Indian Association of Alberta
ICC	Indian Claims Commission
ICCP	Indian Claims Commission Proceedings
IR	Indian Reserve
MIB	Manitoba Indian Brotherhood
NA	National Archives of Canada
NRTA	National Resources Transfer Agreements
ONC	Office of Native Claims
OR	Ontario Reports
OTC	Office of the Treaty Commissioner

## ABBREVIATIONS

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PAM	Public Archives of Manitoba
QB	Court of Queen's Bench
RSC	Revised Statutes of Canada
SCB	Specific Claims Branch
SCC	Supreme Court of Canada
SCR	Canada Supreme Court Reports
TARR	Treaty and Aboriginal Rights Research Centre
TLE	treaty land entitlement
WWR	Western Weekly Reports

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# **INDIAN CLAIMS COMMISSION**

## **INQUIRY INTO THE TREATY LAND ENTITLEMENT CLAIM OF THE FORT MCKAY FIRST NATION**

### **PANEL**

Commissioner Carole T. Corcoran  
Commission Co-Chair P.E. James Prentice, QC

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To the Indian Claims Commission  
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Diana Belevsky / Grant Christoff

**DECEMBER 1995**





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# PREFACE

In 1896 gold was discovered in the Yukon along the rugged Klondike River. The gold rush that followed and the disruption it entailed for the Indians of what is now northern Alberta, northeastern British Columbia, and the southern Northwest Territories necessitated the negotiation of Treaty 8 in 1899. The great waterways of the north – the Peace, the Athabasca, and the Mackenzie Rivers – afforded passage to the Yukon, and after 1896 the potential for conflict between the aboriginal peoples of the north and itinerant prospectors, traders, and other travellers increased dramatically. At the same time the gold rush heralded a new interest on the part of Canada in the resources of the north.

In the winter of 1897, the Commissioner of the North-West Mounted Police wrote to the Superintendent of Indian Affairs recommending the establishment of a Commission to negotiate a treaty with the Indians along these great inland waterways. Foremost among his concerns was the possibility of confrontation between travellers going north and the aboriginal people. The Government of Canada evidently shared his concern and, in anticipation of the unknown mineral wealth of the area, had in any event been actively considering a treaty initiative encompassing the District of Athabasca and the Mackenzie River country.

Thus the Treaty 8 Commission was struck in June 1898, and the three Commissioners, David Laird, J.H. Ross, and J.A.J. McKenna, were entrusted with the responsibility of negotiating a treaty with the Cree and Dene people of this enormous area. Commissioner Laird, who was then also the Lieutenant Governor of the North-West Territories, served as Chair.

The Treaty Commissioners arrived at Lesser Slave Lake on June 19, 1899, following delays caused by weather and a shortage of able boatmen. On the following morning they met with the Cree Chief Kinosayoo and four Cree headmen, Moostoos, Felix Giroux, Weecheewaysis, and Charles Neesuetasis. A single headman from the Sturgeon Lake Band, known as the "Captain," also



**Courtesy Glenbow Archives, Calgary, Alberta**

File No. NA-2617-49

Subject: Treaty payment, treaty no. eight.

Date: c. 1903-06

Source: Mr. Christopher West, 764 W69th St.,  
Vancouver, British Columbia

Remarks: Possibly Chipewyan Indians.

attended as an observer. The deliberations that day were of historic significance and the assemblage of personalities was an impressive one by the standards of the time. The Cree leaders and the three Treaty Commissioners were accompanied by Inspector Snyder of the North-West Mounted Police, Father Lacombe and Bishop Grouard of the Roman Catholic Church, together with a number of Anglican missionaries. We have today the benefit of an extensive record of these meetings, both written and oral. Indeed, even a reporter from the *Edmonton Bulletin* was present to record the treaty execution for readers to the south.

The Cree Indians at Lesser Slave Lake were at this time familiar with the ways of the white settlers and their government and, while the meeting at Lesser Slave Lake was not marked by great oratory, the Indians spoke about their concerns clearly and succinctly and with great practicality. They emphasized repeatedly, some more strenuously than others, that they did not wish to be confined to reserves and they sought assurances that their traditional livelihood of hunting, fishing, and trapping would not be destroyed.

It was at Lesser Slave Lake, on that June morning, that Commissioner Laird first spoke and outlined the general scheme of the treaty. The formal document itself was prepared that evening and executed the following morning, June 21, 1899. The treaty specified the intention of the Crown to open up the lands in the north for settlement, and the Indians agreed to “cede, release, surrender and yield up” their interest in those lands to the Dominion Government. The Indians were assured that their right to pursue their usual vocations of hunting, trapping, and fishing would continue and that they would receive agricultural and educational assistance. Beyond that, the Indians received little of tangible value: a \$12 per person signing bonus, a commitment to an annual treaty payment of \$5 per person, a new suit for the Chief every three years, as well as one for his councillors (although of lesser cloth), a silver medal, and a flag. In return the Indians surrendered their interest in an area of 324,900 square miles. It would be fair to say that the only consideration of lasting benefit accorded to the Indians – and the consideration at issue in these proceedings today – was the assurance that reserves of land would be laid aside for each Band at a later juncture by the Superintendent General of Indian Affairs. The treaty prescribed a formula to determine the reserve size – one square mile (640 acres) for each family of five who elected to reside on the reserves. An innovation was that those Indians who chose not to live as Band members were entitled to take 160 acres individually.

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Throughout the summer of 1899, the Treaty Commissioners travelled the northern river system and extended the same treaty invitation to the Indians of the Cree, Chipewyan, Beaver, Slave, Dogrib, and Yellowknife bands. They gathered variously at Peace River Landing, Vermilion, Fond du Lac, Dunvegan, Fort Chipewyan, Smith's Landing, Wapiscow Lake, and Fort McMurray. At each of these locations, following deliberation, the Chief and headmen neatly affixed their "X," often in the form of a Christian cross, on the addenda or "adhesions" to Treaty 8.

We are concerned in these proceedings with the adhesion signed on August 4, 1899, by the Chipewyan and Cree Indians of Fort McMurray, in the presence of Commissioner McKenna and Father Lacombe. On that day Adam Boucher attached his "X" as the Chipewyan headman and Seapotakinum as the Cree headman.

Our Commission was asked to review this matter in 1994 because the Government of Canada and the Fort McKay First Nation (the descendants of the Chipewyan Indians of Fort McMurray) have been unable to agree, in the intervening 100 years, as to how to interpret the formula for calculating the First Nation's entitlement to land under the treaty. Such disputes are known as "treaty land entitlement" claims.

In the years that followed the signing of the treaty in 1899, life changed little for the aboriginal people of the Treaty 8 area. Each summer, Treaty Commissioners or Indian agents plied the waters between Fort McMurray and Fort Chipewyan to tender the annual \$5 treaty payment, recording each recipient as a member of one band or another, generally with superficial knowledge of or regard to the community with which that person was associated. For some of the Indian people, how and where they would meet the Treaty Commissioners to receive their \$5 payment was simply a matter of convenience. Fort Chipewyan was convenient to some and Fort McMurray to others. Since these people did not, for the most part, live as members of a "band," but rather as members of extended and scattered hunting families, it seemed of little concern to many of them on which "paylist" the Crown's representatives placed them.

However, in 1915 a diligent surveyor by the name of Robertson arrived to lay out for the Fort McKay people the reserves that had been promised in 1899. He set aside enough land for 105 individuals, and the Government of Canada today says that this land is all that this Band is entitled to receive.

In the years between 1915 and 1963, an additional 54 people were "transferred" into the Fort McKay Band. Apparently nine of these individuals were

attracted to Fort McKay by marriage and a few others moved there for different reasons. However, the vast majority continued to reside where they and their forefathers had always lived – at or near Fort McKay. Their “transfer” was nothing more than a recognition by Canada that the residence and “band” affiliation of these Indians had been incorrectly recorded by the Indian agent at the turn of the century. In effect, with the best of intentions, Canada had recorded most of these people on the wrong band payroll in the first place. Such people are described today in the impersonal parlance of land claims as “landless transfers.” Canada now denies any obligation to provide land to the Fort McKay Band for such people – even though it is clear that neither Fort McKay nor any other Band ever received treaty land on their account.

There is a second category of individuals, known in the land claims field as “late adherents.” These people, being of independent spirit, gravitated to Fort McKay as their reliance upon a traditional way of life diminished between 1915 and 1949, their presence being unknown or at least unrecorded by Canada prior to that time. In effect, these people “adhered” to the Treaty and joined the Band quite late, well after the reserve had been surveyed. Canada also denies any obligation to provide land to the Fort McKay First Nation on account of these people – even though it is clear that neither the Fort McKay First Nation or any other band has ever received land on their account.

Canada and the Fort McKay First Nation were unable to agree upon these matters in the 90 years which followed the execution of Treaty 8, although, in fairness, it is only in the past 25 years that the First Nation has become fully aware of its legal entitlement and been in a position to pursue seriously its rights. The claim was filed with Canada in 1987 and in the five years that followed the parties were able to make considerable progress. That progress was based upon the Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims prepared in May 1983 by Canada, which offered a reasonable basis upon which to achieve closure to such claims. Fort McKay appears, in fact, to have been well on its way to satisfying those Guidelines when, in 1993, the Government of Canada abruptly revoked them and adopted a new, more restrictive interpretation of its obligation to the descendants of Indians who signed the numbered treaties.

We think that Canada is wrong in its current position. We believe that Canada is in breach of its obligation under Treaty 8 to provide land in accordance with the formula specified in the treaty and, further, that it is in viola-

tion of the assurances given by the Treaty Commissioners in 1899. Certainly, in our view, Canada's actions are at variance with what the Indians would have understood in the summer of 1899 when Treaty 8 was signed. We have concluded that Canada owes a lawful obligation to the Fort McKay First Nation to provide treaty land for 135 people in total or, in other words, for an additional 30 people. Our reasons are set forth in the pages that follow.



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# PART I

## THE INQUIRY

### BACKGROUND TO THIS INQUIRY

The Fort McKay First Nation wrote to the Indian Claims Commission (ICC) on February 14, 1994, to request its assistance.<sup>1</sup> On May 17, 1994, the Government of Canada and the Chief and Council of the Fort McKay First Nation were advised that this Commission would conduct an inquiry into the Government's rejection of the specific claim of this band.<sup>2</sup> Details of the inquiry process and the formal record are set out in Appendices A and B to this report.

The Fort McKay First Nation first filed a specific claim with the Office of Native Claims (ONC) in May 1987. The claimant contended that Canada has not fulfilled its obligation under Treaty 8 to provide treaty land to the Fort McKay First Nation. Such claims are known as "treaty land entitlement" claims. This particular case is based upon an alleged entitlement resulting from the addition to the First Nation of certain individuals, described as "landless transfers" and "late adherents." The Specific Claims Policy, published in 1982, provides that any claim disclosing an outstanding lawful obligation on the part of the government will be accepted for negotiation.<sup>3</sup> Furthermore, the government had established various criteria over time to determine how to calculate the reserve land entitlement of a band under the treaties. In May 1983, the Office of Native Claims of the Department of Indian Affairs and Northern Development (DIAND) produced a document titled the "Office of Native Claims Historical Research Guidelines for Treaty Land Enti-

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1 Jerome Slavik, Counsel for the Fort McKay First Nation, to Harry LaForme, Chief Commissioner of the Indian Claims Commission, February 14, 1994.

2 Co-Chairs Daniel J. Bellegarde and P.E. James Prentice, Indian Claims Commission, to Chief and Council of the Fort McKay First Nation and to the Ministers of Justice and Indian Affairs and Northern Development, May 17, 1994.

3 Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy - Specific Claims* (Ottawa: DIAND, 1982) [hereinafter *Outstanding Business*], 20.

tlement Claims.”<sup>4</sup> These guidelines state that every treaty Indian is entitled to be included in a treaty land entitlement (TLE) calculation, and therefore that additions who have never been included in a TLE calculation give rise to a land entitlement. The 1983 ONC Guidelines were widely distributed to researchers, Indian organizations, and First Nations. As could be expected, the Fort McKay First Nation relied on the guidelines in the preparation of its TLE claim.

In 1993, however, the Fort McKay First Nation was informed that the government had changed its policy and would no longer count additions for TLE purposes. Canada now views TLE as a collective right of the band that crystallizes at the date of first survey (DOFS) of the reserve or reserves. If a band received full land entitlement at the date of first survey, any subsequent increases in band membership are irrelevant.<sup>5</sup> What this means is that the threshold for establishing a valid TLE claim, as of 1993, is a date-of-first-survey shortfall. On this reasoning, in January 1994 the Minister of Indian Affairs confirmed that the Fort McKay First Nation’s TLE claim had been rejected.<sup>6</sup>

In response to Canada’s policy change, the Fort McKay First Nation undertook further research on the membership of the Fort McKay group as it stood in 1915. Based on this new research, the Fort McKay First Nation now argues that there was in fact a date-of-first-survey shortfall, that it received insufficient reserve land based on its population in 1915.<sup>7</sup> Canada rejects this proposition and maintains that it has no outstanding lawful obligation towards the Fort McKay First Nation.

The Indian Claims Commission of Canada derives its authority from Order in Council PC 1992-1730. The Commission is empowered under that Order in Council to inquire into and report upon specific claims which have been rejected by the government. Specifically, the Commission is authorized as follows:

AND WE DO HEREBY advise that our Commissioners on the basis of Canada’s Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development (hereinafter “the Minister”), by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:

4 The ONC Guidelines are set out in full in Appendix C.

5 Bruce Hilchey, DIAND, Specific Claims West, to Jerome Slavik, April 15, 1993 (ICC Exhibit 1, tab 14).

6 See Jerome Slavik to Ron Irwin, Minister of Indian Affairs, February 8, 1994 (ICC Exhibit 1, tab 14).

7 This point is argued in the alternative. The Fort McKay First Nation maintains that, under the treaty, late additions give rise to an additional entitlement.

- a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister . . .<sup>8</sup>

The function of this Commission is to inquire into and report on whether the claimant has a valid claim for negotiation under the Specific Claims Policy. A claim is valid under the Policy if it discloses an outstanding lawful obligation on the part of the Government of Canada. This report sets out our findings on this issue and our recommendations to the claimant First Nation and to the government.

### **Fort McKay First Nation**

The home territory of the Fort McKay First Nation is in northeastern Alberta between Lake Athabasca and Lesser Slave Lake (see the map of the claim area on page 17). The Fort McKay Indian Settlement is about 60 kilometres or 37 miles north of Fort McMurray in the heart of the tar sands.<sup>9</sup> Across from Fort McKay, on the Athabasca River and opposite the mouth of the Mackay River, is the low-lying Fort McKay Indian Reserve (IR) 174 where few members of the Fort McKay First Nation have ever lived. Namur River IR 174A and Namur Lake IR 174B, both roughly 64 kilometres or 40 miles northwest of the McKay Indian Settlement, are the First Nation's other two reserves. As of December 31, 1994, the status Indian population of the Fort McKay First Nation was 439, of which 217 were living on reserve and 27 were living on Crown land.<sup>10</sup>

### **Historical Background to Treaty 8 Area**

Treaty 8 encompasses 324,900 square miles of northern Canada in what is now the northern half of Alberta, the northeast quarter of British Columbia, a small part of the Northwest Territories south of Hay River and Great Slave Lake, and the extreme northwestern corner of Saskatchewan. The Treaty 8 area coincides roughly with the southern half of the Mackenzie River basin, drained by the Athabasca, Peace, and Hay Rivers.

- 8 Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730 (July 27, 1992), amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1992, pursuant to Order in Council PC 1991-1329 (July 15, 1991).
- 9 The various spellings of "MacKay" and "McKay" can be confusing: Fort MacKay was named after Dr. William Morrison MacKay, a surgeon and chief trader with the Hudson's Bay Company from 1864 to 1898. The settlement on the west bank of the Athabasca River and the river that runs into it from the west at the same point are properly named "MacKay." For reasons unknown, however, Indian Reserve 174 (on the east bank of the Athabasca River) and the band for which it was reserved are named "McKay"; even the Indian settlement is usually referred to as "Fort McKay." Neil Reddekopp, "The First Survey of Reserves for the Cree Chipewyan Band of Fort McMurray," January 1995, p. 7 n. 16 (ICG Exhibit 17).
- 10 DIAND, Indian Register. On November 9, 1992, the Fort McKay Indian Band changed its name to Fort McKay First Nation by means of a Band Council Resolution. The term "Band" will be used here when referring to circumstances prior to November 1992.

In 1899, the year in which the treaty was negotiated, the boreal forest of this part of Canada was inhabited by two major linguistic groups, the Crees and the Athapaskans or Dene. The latter group included the Chipewyans, Beavers, Slaveys, Dogribs, and the Yellowknives. The central portion of the Treaty 8 area appears to have included a heterogeneous mixture of Cree-speaking people, together with Chipewyans who inhabited the area along the Athabasca River, north to Lake Athabasca, and beyond into what is now the Northwest Territories.

The history of the Cree and Chipewyan people in this area and the interrelationship between those people and the fur trade economy of which they were a part has been summarized by others.<sup>11</sup> By 1899 the Indians of this area pursued an economy which consisted in the main of traditional hunting, fishing, and gathering, augmented by trapping and, in the case of the Crees, by other trading and transportation activities ancillary to the fur trade. As they had before the arrival of the Europeans, the Chipewyan and Cree people between Lake Athabasca and Lesser Slave Lake continued to survive by hunting, fishing, and trapping in family groups. Although significant social and economic change had begun to occur in this region as of 1899, it is clear that the Cree and Chipewyan people of northern Alberta were, at the close of the 19th century, dependent upon unrestricted access to the resource base of the boreal forest, without regard to western property concepts such as ownership, exclusivity of possession, or surrender.<sup>12</sup>

Families and small groups hunted, fished, and trapped within an area of at least 518 square kilometres or 200 square miles, loosely bounded by Fort Chipewyan to the north, Janvier to the east, Lac La Biche to the south, and Wabasca to the west.<sup>13</sup> They moved within that territory as necessary and shared it with others who depended from time to time upon those same natural resources. There is little doubt, based upon traplines, grave sites, cabins, and the evidence of the community elders, that most of the Fort McKay group traditionally used and occupied the area west of Fort McKay around Namur, Spruce, and Chipewyan Lakes.<sup>14</sup>

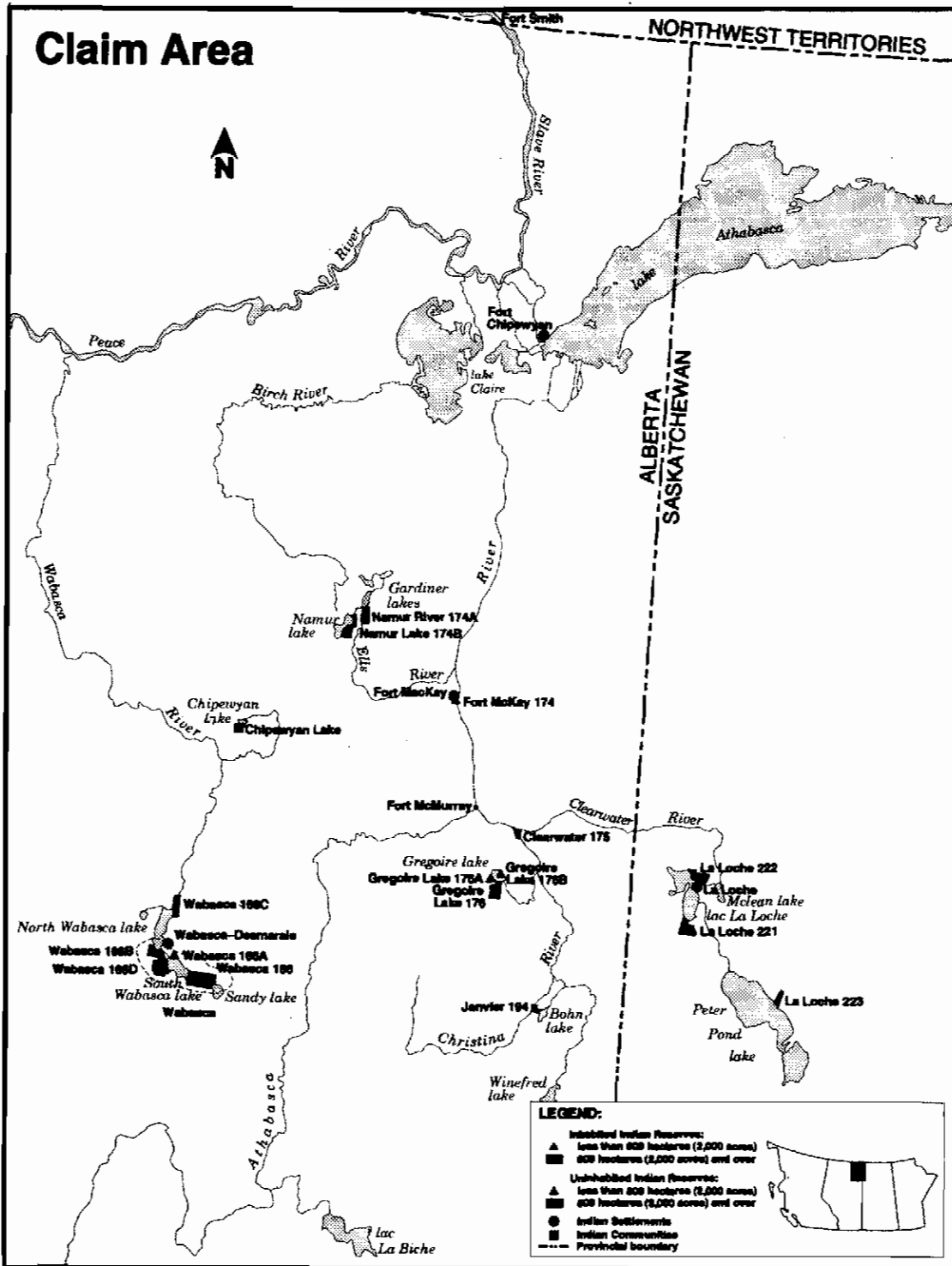
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11 See, for example, Richard Price, ed., *The Spirit of the Alberta Indian Treaties* (Montreal: Institute for Research on Public Policy, 1979), 48-55.

12 Reddekopp, "First Survey of Reserves," note 9 above, p. 11 (ICC Exhibit 17).

13 J. Slavik, Final Submission and Legal Argument to the Indian Claims Commission Inquiry Re: The Fort McKay First Nation Treaty Land Entitlement, May 1995, p. 15.

14 In October 1994, Fort McKay First Nation produced a traditional land use and occupancy study entitled *There Is Still Survival Out There*. It is based on information gathered from 56 elders and Band members. The locations of their hunting, fishing, and gathering areas, traplines, cabins, and grave sites were thus documented (ICC Exhibit 19).



## Treaty 8

By the end of the 19th century, the Government of Canada was convinced of the need to establish treaty relations with the Indians in the vast area stretching from the Lake Athabasca region southwest to the Rockies. The discovery of gold and other minerals in the north had prompted hundreds of prospectors, traders, and settlers to venture north via the Athabasca, Peace, Slave, and Mackenzie Rivers.<sup>15</sup> This influx of newcomers generated Treaty 8 in 1899, just as the westward movement of agricultural settlers had produced the first seven "numbered" treaties.<sup>16</sup>

The Order in Council creating the Treaty 8 Commission was passed by the Government of Canada on December 6, 1898, and in the spring of 1899 Commissioner Laird, the Lieutenant Governor of the North-West Territories, together with Commissioners McKenna and Ross, set off for northern Alberta.<sup>17</sup> The three Commissioners travelled first to a site near present-day Grouard on Lesser Slave Lake and met there on June 20-21, 1899, with the Cree Chief Kinodayoo and the headmen of Lesser Slave Lake, Moostoos, Felix Giroux, Weecheewaysis, and Charles Neesuetasis. A single headman from Sturgeon Lake, described as the "Captain," attended as an observer and also signed the treaty, even though his Band was not present and did not execute a formal adhesion until the following year. The Treaty Commissioners carried on from Grouard, proceeding northward by river and circumscribing the great Treaty 8 area.

Throughout the summer of 1899 negotiations continued with other Cree, Beaver, and Chipewyan groups at Peace River Landing, Vermilion, Fond du Lac, Dunvegan, Fort Chipewyan, and Smith's Landing, bringing the Treaty Commissioners to Fort McMurray on August 4, 1899. During the summer of 1899, adhesions brought some 12 or 13 bands under Treaty 8.<sup>18</sup>

After treating with the Indians at points north such as Fort Chipewyan and Fort Smith, Commissioner McKenna and Ross split up, the former travelling up the Athabasca River (past Fort McKay) to Fort McMurray and the latter carrying on to Wabasca. If the Treaty 8 Commissioners did stop at Fort McKay in 1899 on their way to Fort McMurray, no official meeting was held

15 Dennis Madill, *Treaty Research Report: Treaty Eight* (Ottawa: DIAND, 1986), vii.

16 By 1877, Treaties 1 to 7 covered the southern half of Alberta, Saskatchewan, Manitoba, and Ontario (west of Lake Superior).

17 Madill, *Treaty Research Report: Treaty Eight*, note 15 above, 25, 34.

18 By 1914 subsequent adhesions brought approximately 32 Indian bands under Treaty 8 (Madill, *Treaty Research Report: Treaty Eight*, note 15 above, i, vii, 147-49). See also *Treaty No. 8, 21 June 1899 and Adhesions, Reports, etc.*, IAND Publication No. QS-0576-000-EE-A-16 (Ottawa: Queen's Printer, 1966), 10-11. Treaty 8 is reprinted in [1995] 3 Indian Claims Commission Proceedings (ICCP) at 87.



**Courtesy Glenbow Archives, Calgary, Alberta**

File No. NA-949-53  
Subject: Chipewyan tipis at Fort Chipewyan  
Date: c. 1899  
Source: Supt. H.C. Forbes, R.C.M.P., Regina

there. The reason for this is unclear, although it seems that the Commissioners, faced with the prospect of covering such an enormous area in a single summer season, elected to sign treaty at central locations which were accessible by river.<sup>19</sup>

Thus the Fort McKay people entered Treaty 8 at the meeting at Fort McMurray with Treaty Commissioner McKenna on August 4, 1899. That adhesion reads as follows:

The Chipewyan and Cree Indians of Fort McMurray and the country thereabouts having met at Fort McMurray on this fourth day of August, in this present year 1899, Her Majesty's Commissioner, James Andrew Joseph McKenna, Esquire, and having had explained to them the terms of the Treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year herein first above written, do join in the cession made by the said Treaty and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In Witness whereof Her Majesty's said Commissioner and the Headmen of the said Chipewyan and Cree Indians have hereunto set their hands at Fort McMurray, on this fourth day of August, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses after the same had been read and explained to the Indians by the Rev. Father Lacombe and T. M. Clarke, Interpreters

J. A. J. MCKENNA, *Treaty* [Commissioner,  
his  
ADAM X BOUCHER, *Chipewyan* [Headman,  
mark  
his  
SEAPOTAKINUM X CREE, Cree [Headman,  
mark

A. LACOMBE, *O.M.I.*  
ARTHUR J. WARWICK,  
T. M. CLARKE,  
J. W. MARTIN,  
F. J. FITZGERALD,  
M. J. H. VERNON.

It was not entirely clear which communities or bands of Indians were represented at the proceedings in Fort McMurray. Adam Boucher executed the adhesion as "Chipewyan headman" and Seapotakinum as the "Cree headman." In anticipation of the signing, the North-West Mounted Police had carried out a family-by-family census in the area which, for Fort McKay and Fort McMurray together, indicated a population of 106 in 1899.<sup>20</sup>

<sup>19</sup> Madill, *Treaty Research Report: Treaty Eight*, note 15 above, 109.

<sup>20</sup> Reddekopp, "First Survey of Reserves," note 9 above, pp. 6-17 (ICC Exhibit 17); Reddekopp's testimony on March 16, 1994, ICC Transcript, pp. 80-81. In both, Reddekopp argues that the NWMP's 1899 combined figure of 106 for Fort McKay and Fort McMurray is "artificially low"; "we have an estimated population of 106 by the Mounties, yet the Treaty Commissioners, the scrip Commissioners show up and find 150" (Transcript, p. 81).



The groups represented at the Fort McMurray signing were arbitrarily placed on a single payroll, giving rise to "The Cree-Chipewyan Band of Fort McMurray."<sup>21</sup> The creation of an entity known as the Fort McMurray Cree-Chipewyan Band was administratively convenient in 1899, even though no such "band" actually existed at that time. Mr. Neil Reddekopp, a respected lawyer, historian, and genealogist who testified before the Commission, pointed out during his testimony that "bands" were the fundamental administrative unit under both the *Indian Act* and the treaty itself. As Mr. Reddekopp explained, the very concept of a band did not accord with the 1899 demographic realities of the Treaty 8 area. In noting that a band in this sense was unknown to the Cree and Chipewyan people of Treaty 8 in 1899, particularly to those north of Lesser Slave Lake, he summarized the conclusions of Dr. James G.E. Smith, Curator of North American Ethnology for the Museum of the American Indian in New York:

the fundamental unit of social organization was the local or hunting band, which consisted of several (two to five) related families which normally comprised ten to thirty individuals. These groups existed separate and apart from other entities as hunting groups through the fall, winter and spring of each year. For a period in the summer of each year, several hunting bands would congregate on the shores of lakes that would allow subsistence through fishing and local hunting. The regional bands which resulted from this congregation, which could number from one hundred persons to a group two to three times that size, represented the largest co-operative unit in the area. Membership among both hunting or regional bands was flexible, with individuals and families being free to leave one group and join another, either temporarily or permanently.<sup>22</sup>

The creation of a "Cree-Chipewyan" band was further complicated by the fact that many of the Cree and Chipewyan people did not speak the same language. The evidence is clear that despite their amalgamation as a single "band," the Chipewyans at Fort McKay and the Crees at Fort McMurray remained distinct in terms of language, ancestry, residence, traditional hunting lands, and contacts with other centres.

In the final analysis, many of the Chipewyan Indians who resided in and about Fort McKay were arbitrarily assigned to the Cree-Chipewyan Band of Fort McMurray, even though they were not Cree and did not reside in or near

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<sup>21</sup> ICC Exhibit 1, tab 17, p. 1.

<sup>22</sup> Mr. Reddekopp's testimony before the Commission on this issue was a recap of this more formal excerpt from his December 1994 report, "Post 1915 Additions to the Membership of the Fort McKay Band" (ICC Exhibit 18), pp. 3-4, where he discusses Dr. Smith's conclusions.

Fort McMurray. Others appear to have been assigned to the Fort Chipewyan Cree Band or the Bigstone Band, equally arbitrarily. Still others were not assigned to any band, their existence being unknown to the Treaty Commissioners or, for some time, to those of authority who followed. To almost all these Indian people, their assignment to any band seemed of little importance (other than as a prerequisite to receiving annual treaty payment). Following the departure of the Treaty Commissioners, the Indians appear to have returned to their family groupings, resuming their traditional way of life unaware, for the most part, of the immense significance that would later attach to their assignment to a particular band payroll.

The observations of the Treaty Commissioners themselves support such a conclusion. For example, in their September 1899 report to the Superintendent General of Indian Affairs and Minister of Interior, Commissioners Laird, Ross, and McKenna wrote that

None of the tribes appear to have any very definite organization. They are held together mainly by the language bond. The chiefs and headmen are simply the most efficient hunters and trappers. They are not law-makers and leaders in the sense that the chiefs and headmen of the plains and of old Canada were. The tribes have no very distinctive characteristics, and as far as we could learn no traditions of any import.<sup>23</sup>

They observed that hunting in the wooded country of the north meant moving "individually or in family groups." The Commissioners knew that the social organization of the "bands" of Treaty 8 did not resemble that of the signatories to the earlier numbered treaties. Their approach to treating with the Indians of the North-West resulted in bands that were largely artificial constructs.<sup>24</sup> Moreover, their decision to stop only at the major posts meant that many people were missed and could reasonably be expected to adhere to the treaty at some later date. It was apparent, from the time Treaty 8 was signed, that the process of gaining the adhesion of all Indians in the area was incomplete.<sup>25</sup>

As a postscript, although the Commissioner's "journey from point to point was so hurried" that they could not "give any description of the country ceded," they did note that "[t]he country along the Athabasca River is well wooded and there are miles of tar-saturated banks."<sup>26</sup>

23 Madill, *Treaty Research Report: Treaty Eight*, note 15 above, 124.

24 ICC Exhibit 17, p. 10.

25 Neil Reddekopp, "Post 1915 Additions to the Membership of the Fort McKay Band," December 1994, p. 6 (ICC Exhibit 18).

26 Madill, *Treaty Research Report: Treaty Eight*, note 15 above, 124-25.

### Treaty Land Entitlement under Treaty 8

The post-Confederation treaties concluded between Canada and First Nations across the Prairie provinces and in parts of Ontario, British Columbia, and the Northwest Territories all stipulated the reservation of land for the benefit of Indian bands. The map on page 25 illustrates the extent of these treaties. In all cases, the size of reserve allotments was to be determined according to a formula of a certain area (between 160 and 640 acres) for each family of five persons, "or in that proportion for larger or smaller families."

Although the government relied heavily on previous treaties when deciding on the terms of Treaty 8, the nature of the land and the social organization of the Indians in the area necessitated some modification of the reserve provisions. Federal officials debated whether reserves were even appropriate for people who had a predominantly atomistic social organization:

From the information which has come to hand it would appear that the Indians who we are to meet fear the making of a treaty will lead to their being grouped on reserves. Of course, grouping is not now contemplated; but there is the view that reserves for future use should be provided for in the treaty. I do not think this is necessary . . . it would appear that the Indians there act rather as individuals than as a nation . . . They are averse to living on reserves; and as that country is not one that will be settled extensively for agricultural purposes it is questionable whether it would be good policy to even suggest grouping them in the future. The reserve idea is inconsistent with the life of a hunter, and is only applicable to an agricultural country.<sup>27</sup>

In his article, "The Spirit and Terms of Treaty Eight," Richard Daniel offers the observation that the final draft of Treaty 8 was prepared by the Treaty Commissioners in Lesser Slave Lake and that it was based, at least in part, upon the terms of Treaty 7.<sup>28</sup> It seems plausible that the wording of this draft was based on the wording of Treaty 7 (1877), which was the previous Indian treaty and one which Laird had been involved in negotiating. However, there are several differences between the written terms of Treaty 7 and Treaty 8, and these differences appear to reflect in part a recognition that the Indians of the north might wish to continue traditional economic activities, such as hunting, fishing, and trapping, and to resist being restricted to reserve land.

27 James McKenna to Superintendent General of Indian Affairs, April 17, 1899, National Archives of Canada [hereinafter NA], RG 10, vol. 3848, file 75236-1.

28 Price, *Spirit of the Alberta Indian Treaties*, note 11 above, 80-81.

Whereas Treaty 7 even refers to the protection of the Indians' "vocations of hunting" and other Prairie treaties refer to "hunting and fishing," Treaty 8 refers to the

*right to pursue their usual vocation 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. [Emphasis added.]

Treaty 8 also incorporated an entirely new concept as an alternative to land entitlement, namely, "reserves in severalty." The entire treaty land entitlement clause in Treaty 8 is as follows:

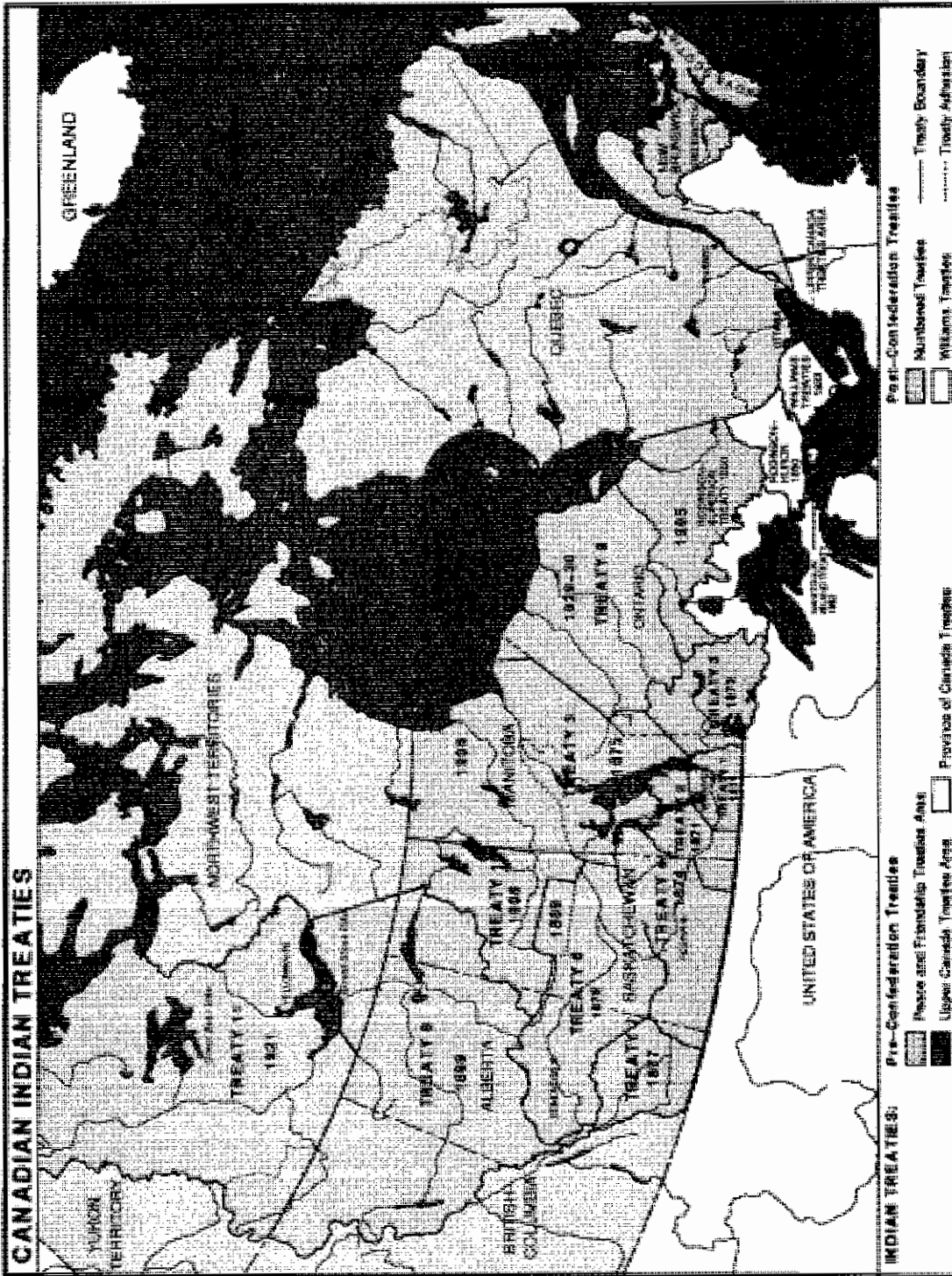
. . . reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five [128 acres per person] for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians 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.<sup>29</sup>

In September 1899 the Treaty Commissioners elaborated on their intentions with respect to this clause:

As the extent of the country treated for made it impossible to define reserves or holdings, and as the Indians were not prepared to make selections, we confined ourselves to an undertaking to have reserves and holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required. There is no immediate necessity for the general laying out of reserves or the allotting of land. It will be quite time enough to do this as advancing settlement makes necessary the surveying of the land. Indeed, the Indians were generally averse to being placed on reserves. It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves. We had to very clearly explain to them that the provision for reserves and allotments of land were made for their protection, and to secure to them in perpetuity a fair portion of the land ceded, in the event of settlement advancing.<sup>30</sup>

<sup>29</sup> Treaty No. 8, note 18 above, 12-13.

<sup>30</sup> Ibid., 7.



### Post-Treaty Administration in the Athabasca Region of Treaty 8

After the treaty-signing exercise, the affairs of the northern Indians came to be administered by a small and mostly distant federal bureaucracy.<sup>31</sup> The "Cree-Chipewyan Band of Fort McMurray," including those people residing at or near Fort McKay, was administered from Fort McMurray for some time after 1924. The population of the "Cree and Chipewyan Bands" at Fort McMurray in 1899, based upon the government's band administration payroll, appears to have consisted of 132 people.<sup>32</sup> The next year an additional 25 or 30 persons were admitted to treaty and placed on the "Cree-Chipewyan" list.<sup>33</sup> Seventeen others appeared in 1900 on a new list entitled "Stragglers at Ft. McMurray," to which 13 more were added in 1901.<sup>34</sup>

The Lesser Slave Lake Indian Agency was set up in 1908, but its territory did not include Fort McKay. Fort McKay eventually fell under the Fort Smith Agency, established in 1911 some 300 kilometres or 185 miles north of Fort McKay in the Northwest Territories.<sup>35</sup> As a result the Fort McKay group had little contact with Indian Affairs' field staff. Yearly visits to each major post supposedly enabled the Indian agent to carry out his duties of paying annuities, admitting Indians to treaty, and hearing complaints.<sup>36</sup> No annuities were paid at Fort McKay before 1916. Until then at least, whether they were living at Fort McKay or elsewhere in the group's traditional territory, Fort McKay people had to travel to either Fort Chipewyan or Fort McMurray to receive treaty payments or to adhere to Treaty 8.<sup>37</sup> This they did in increasing numbers.

Indian agents were not in the habit of visiting the Fort McKay group's hunting, fishing, and trapping areas, such as Chipewyan Lake. Treaty Indians in these areas either had to go to centres where payments were being made or else get paid by the agent when he was in transit between centres. For example, at the November 8, 1994, Commission hearing in Fort McKay, Mr. Francis Orr explained that his grandfather, Moise, had lived at Chipewyan Lakes all his life but that no Indian agent ever went there. Francis Orr's

31 Madill, *Treaty Research Report: Treaty Eight*, note 15 above, 80.

32 *Treaty No. 8*, 11.

33 ICC Exhibit 1, tab 17, p. 1 (25); ICC Exhibit 18, p. 8 (30).

34 ICC Exhibit 1, tab 17, p. 1.

35 Madill, *Treaty Research Report: Treaty Eight*, note 15 above, 80-81; René Fumoleau, *As Long As This Land Shall Last* (Toronto: McClelland and Stewart, 1975), 139-40. In 1911, when Gerald Card arrived in Fort Smith with farm stock and equipment to open an Indian Agency, the Indians there were suspicious and unwelcoming. By 1920, in addition to being Indian Agent, Card was agent of the Canadian National Parks Branch, mining recorder for Mining, Lands and Yukon Branch, recorder of vital statistics, coroner, justice of the peace, and issuer of marriage licences.

36 Madill, *Treaty Research Report: Treaty Eight*, note 15 above, 81.

37 ICC Transcript, pp. 46-47, March 16, 1995 (N. Reddekopp).

father, who had built a cabin at Spruce Lake halfway between Fort McKay and Chipewyan Lakes, complained about having to go about 100 miles overland to Wabasca “to get the treaty money.”<sup>38</sup>

Clarence Boucher, of Fort McKay First Nation, recalled that his grandparents were born at Fort Chipewyan and Birch River but lived in Fort McKay “all their life.” His grandfather, Michel Boucher, trapped at Namur and Gardiner Lakes all his life and sold his fur and got groceries at Fort McKay. Before there was any trading post at Fort McKay his grandfather travelled, with difficulty, to Fort Chipewyan. Sometimes his grandparents would spend the summer in Fort McMurray with their children. According to Clarence, his father, Emile, was not clear on which band he belonged to. The Indian Agent, Jack Stewart, “used to come down to Fort McKay from Fort Chip. . . . He used to give – every payment of 5 bucks apiece. Otherwise I don’t know which band [Emile] belongs to. He never mentioned where did he come from or were the payments made at Fort Chip, Fort McMurray, which area.”<sup>39</sup>

Annuity payments were sometimes made while the Indian agent travelled down the river: “You come by yourself when the tugboat is around here, and start all day long – from Fort McMurray you start off, people down on the river banks here and wherever; people, he pay them off there.”<sup>40</sup> Clara Shott, whose grandfather was also Michel Boucher, spoke about her father, Jean Herman Boucher:

[H]e used to get his treaty money out of the – the boat was travelling back and forth by – a guy named Jack Stewart was [Indian Agent]. . . . And some other ones, they used to stop your boat, he said, and they get their money there. . . . they could get him, like, sometimes in the middle of the river – sometimes down the river, he said.<sup>41</sup>

After 1925 it became necessary to break up the Indian groupings that had been aggregated as the Cree-Chipewyan Band of Fort McMurray in 1899. The groups “lumped” together on the original payroll of the Fort McMurray Cree-Chipewyan Band included the Fort McKay, Gregoire Lake, Paul Cree (possibly incorporating the Cheechum group), Janvier, and Portage La Loche groups.<sup>42</sup> The Portage La Loche group gained its own payroll in 1925 and the Janvier group was paid on its own list in 1941.<sup>43</sup>

38 ICC Transcript, pp. 109-10.

39 ICC Community Session Transcript, pp. 119-21.

40 ICC Community Session Transcript, p. 121.

41 ICC Community Session Transcript, p. 128.

42 ICC Exhibit 1, tab 17, p. 3.

43 ICC Exhibit 1, tab 17, p. 2.

Most significantly for our purposes, the remaining group was neatly divided into two in the early 1950s, creating the modern-day Fort McKay and Fort McMurray Bands. The following remarks, from a letter "Re: Cree-Chipewyan Band, Fort McKay" to Indian Agent/Superintendent J.W. Stewart at Fort Chipewyan from Indian Affairs headquarters, suggest the division was initiated in the field:

This office concurs in your [December 13, 1950] recommendation that steps should be taken to divide this Band, consisting of 96 individuals, into two groups, each to constitute officially, as they now do physically, separate Bands. As a necessary preliminary to the formal action required in this connection, it is requested that you obtain, in writing, from each head of the family or ticket holder, a declaration as to his desire to belong to the respective proposed new Bands. . . . When we are in receipt of this information further action will be taken in the matter here.<sup>44</sup>

An Order in Council dated May 6, 1954, finalized the establishment of two separate bands.<sup>45</sup> The longstanding reality that mostly Chipewyan people lived at and northwest of Fort McKay and mostly Cree people lived south and east of Fort McMurray was finally acknowledged.<sup>46</sup>

### Survey of Reserves

The only survey of reserves that could be construed as being for the Fort McKay Band was conducted for the Fort McMurray Cree-Chipewyan Band in 1915. Settlement pressure had Indian Affairs encouraging the Fort McMurray Cree-Chipewyan Band to select reserve land before then, but consensus on the selection of land was lacking. By 1914 the possibility of confrontations between Indians and settlers made reserve selection a necessity from the government's perspective.<sup>47</sup>

In April 1915 Dominion Land Surveyor Donald F. Robertson was assigned the task of laying out the reserves. Of course, there was no Indian agent residing anywhere near Fort McKay, or Fort McMurray, with whom Robertson could consult. The closest one, and the one technically responsible for Fort McKay in 1915, was A.J. Bell at Fort Smith.<sup>48</sup> Since the Indians had been

44 A.G. Leslie, Trusts and Annuities, March 19, 1951 (ICC Exhibit 1, tab 20 [appended to ICC Exhibit 17]).

45 Order in Council 1954-660/661/662; see ICC Exhibit 1, tab 17, p. 13.

46 ICC Exhibit 17, pp. 44-45.

47 ICC Exhibit 1, tab 17, p. 4.

48 *The Canadian Almanac and Miscellaneous Directory for the year 1915* (Toronto: Copp Clark Co., 1914). In 1915 there were 10 Indian Agencies in all of Alberta. After A.J. Bell's at Fort Smith, the next closest Agency was at the west end of Lesser Slave Lake at Grouard, where the physician W.B. Donald was agent and Harold Laird was assistant agent. Indian Affairs' Alberta Inspectorate, headed by J.A. Markle, was south of Edmonton at Red Deer.





**Courtesy Glenbow Archives, Calgary, Alberta**

File No. NA-2760-7

Subject: Treaty No. 8 payment, Northern Alberta

Date: c. 1899

Source: Mrs. Catherine Peace Hudson,  
Maple Bridge, British Columbia

Remarks: Possibly Chipewyan Indians and Metis.  
Note wild flowers in painted vase, foreground.

advised that treaty would be paid at Fort McMurray on June 10, 1915, Robertson planned to be in Fort McMurray several days ahead so that he “could discuss the location of the reserves with the Indians themselves when they were all assembled for treaty.” Arriving on June 5, 1915, Robertson discovered treaty had already been paid and that he had lost the “opportunity of discussing the location of the reserves for the Fort McKay band with this band as a whole.”<sup>49</sup>

It is reasonable to assume that this original calculation of the treaty land entitlement of the Fort McKay group of Chipewyan Indians was based upon Adam Boucher’s advice to Robertson that 106 people resided at or near Fort McKay. Robertson could not have relied on the Fort McKay treaty payroll because no such list existed in 1915. Moreover, he had had no contact with the Treaty Commissioner in 1915. We should note that Robertson was known as a courteous and meticulous surveyor. In the final analysis we do not know who Robertson counted to arrive at a Band membership of 106.

It is worth noting that Mr. Reddekopp, in his evidence, estimated the 1915 population of the Fort McKay Band as follows:

Individuals recorded on the first treaty annuity paylists made at Fort McKay in 1916	63
Individuals who were absent in 1916 but are agreed to be Fort McKay residents	7
Persons resident in Fort McKay in 1916 but recorded on paylists of other bands, [ie: Mikisew Cree or Athabasca Chipewyan Band] <u>and paid at Fort McKay after 1916</u>	44
	114

Mr. Reddekopp’s evidence was based upon a review of paylists, church records, Hudson’s Bay Company records, RCMP records, birth and marriage certificates, and elders’ interviews.

Robertson’s report, dated January 7, 1916, explained how he had to proceed with the surveys for the “Fort McKay Band”:

...I located their reserves according to the information I received from Chief Boucher, who accompanied me on this survey and who, Mr. Conroy [the Inspector for Treaty 8] informed me, was appointed by the band to show me the land they wished to have included in their reserve. I should have much preferred to meet all

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<sup>49</sup> Survey Report of Donald F. Robertson, in Canada, Parliament, *Sessional Papers*, 1917, Department of Indian Affairs Annual Report for 1915-1916, Part II, 82; ICC Exhibit 17, p. 24.



**Courtesy Glenbow Archives, Calgary, Alberta**

File No. NA-949-76  
Subject: Scrip Commission boat leaving  
Fort McMurray to ascend Athabasca.  
Date: 1899  
Source: Supt. H.C. Forbes, R.C.M.P., Regina  
Remarks: Pierre Cry (or Sawyer), steerman.

these Indians as a band myself, as the method by which this reserve was selected, i.e., by the chief alone representing the wishes of the band, gives them too much opportunity to complain that their wishes have not been met.<sup>50</sup>

From Fort McMurray, Robertson travelled down the Athabasca River to Fort McKay on June 6, 1915. He first surveyed a 257-acre parcel on the east bank of the river, described in his survey plan as being for "The Indians of the Chipewyan Band."<sup>51</sup> On January 20, 1917, it was confirmed as Indian Reserve (IR) 174 for "the Indians."<sup>52</sup>

After his visit to Fort McKay, Robertson travelled to where his briefing in Ottawa had suggested he would be surveying for the Fort McKay group:

I then proceeded west by pack train about 45 miles to the Namur River, where this band (106 in number) desired part of their reserve and there surveyed 5495 acres . . . and also at Namur Lake a reserve of 7710 acres was surveyed. . . .<sup>53</sup>

Robertson's survey plans indicated that both the Namur reserves were for the "Fort McKay Band of Chipewyan Indians."<sup>54</sup> Namur Lake IR 174B, measuring 7715 acres, was confirmed for the "Fort McKay Band of Chipewyan Indians" in 1925, and Namur River IR 174A, measuring 5493 acres, was confirmed for "the Indians" in 1930.<sup>55</sup> Once all three reserves were confirmed by Order in Council the total acreage for Indian Reserves 174, 174A, and 174B amounted to 13,465 acres. Divided by 128 acres per person, 13,465 acres amounts to land for 105.195 persons.<sup>56</sup>

Robertson also surveyed other reserves for the Cree-Chipewyan Band of Fort McMurray. He surveyed the Clearwater Reserve southeast of Fort McMurray on the Clearwater River; in May 1921 IR 175, measuring 2261.8 acres, was confirmed for the "Paul Cree Band," a subset of the Fort McMur-

50 Survey Report, note 49 above, 82. It seems Robertson did see Conroy before making the surveys, but there was no indication that Conroy shared the payroll names or population figures with Robertson.

51 D. Robertson, Indian Affairs Survey Plan 1602, Fort McKay I.R. No. 174, 1915.

52 Order in Council PC 166, January 20, 1917 (ICC Exhibit 1, tab 25); ICC Exhibit 17, pp. 25-35.

53 Donald F. Robertson, "General Report of Surveys, Season 1915," January 5, 1916, p. 1 (ICC Exhibit 1, tab 20).

54 D. Robertson, Indian Affairs Survey Plan 1577, Namur River I.R. No. 174A, 1915; and Indian Affairs Survey Plan 1576, Namur Lake I.R. 174 B, 1915.

55 Order in Council PC 1422, August 29, 1925 (ICC Exhibit 1, tab 26); also Order in Council PC 650, March 26, 1930 (at tab 27); ICC Exhibit 17, pp. 36-37. There is a slight discrepancy in acreage mentioned for Namur River: the 1930 Order in Council shows 5493 acres; Robertson's January 7, 1916, letter indicates 5490 acres. This three acres is the difference between a total of 13,205 and 13,208 acres for 174A plus 174B. The correct figure is the larger one since it is confirmed by the Order in Council.

56 (13,465/128 = 105.195). If Robertson had surveyed for 106 persons the resulting total acreage for the Fort McKay band should have been 13,568 acres (106 x 128 = 13,568). However, the combined confirmed acreage for Indian reserves 174, 174A, and 174B is 13,465 acres.

ray Cree-Chipewyan Band.<sup>57</sup> For the group living at Gregoire Lake, Robertson surveyed three reserves (IR 176, IR 176A, and IR 176B) totalling 5515 acres.<sup>58</sup> When the Cree-Chipewyan Band of Fort McMurray was divided, these four reserves went to the Fort McMurray Band.

### **Post-1915 Membership Additions to the Fort McKay Band<sup>59</sup>**

Between 1915 and 1949, many individuals and families who were affiliated by marriage or family relations with the Fort McKay group, or who had long resided in the Fort McKay or Namur Lake or Spruce Lake area, were added to the Fort McKay membership list (keeping in mind that the Fort McKay Band was not officially created until 1954). These included the two Ahyasou families and the Orr, Grandejamb, and Boucher families and many other individuals who married into or otherwise transferred to the Fort McKay group. The following information comes from a letter from Neil Reddekopp to Kim Fullerton (Commission counsel) dated March 22, 1995.<sup>60</sup>

There were 11 late adherents to Fort McKay: the Sylvestre Ahyasou family from Chipewyan Lake in 1928 (9 persons) and the Christine family (2 persons) from Fort Chipewyan. There were 20 landless transfers prior to 1949: Sammy Rolland (1 person) from Fort Chipewyan Chipewyan Band; the families of Gabriel Oar (6 persons) and Joseph Ahyasou (10 persons), Chipewyan Lake residents who transferred from Bigstone Band; and the family of Michel Boucher (3 persons), who transferred from Fort Chipewyan Cree Band in 1940. There were 9 marriages in, who were all landless transfers in their own right: 5 from Fort Chipewyan Chipewyan Band; 2 from Fort Chipewyan Cree Band; and 2 from Chipewyan Lake who transferred from the Bigstone Band. There were 25 landless transfers in 1963 from the Fort Chipewyan Cree Band: the Boucher family (3 persons); and the Grandjamb (22 persons). This information is summarized in Table 1.

57 ICC Exhibit 17, pp. 37-41; Robertson's January 7, 1916, letter in Department of Indian Affairs Annual Report for 1915-1916, note 49 above, describes the reserve at the confluence of the Clearwater and Christina Rivers as being "2,275 acres."

58 ICC Exhibit 17, pp. 41-44. Robertson's January 7, 1916, letter in Department of Indian Affairs Annual Report for 1915-1916, note 49 above, describes the Gregoire Lake reserves as being "5,710 acres," whereas the actual acreage is 5709 (5515 + 152 + 42 = 5709).

59 This section is based on the evidence of Neil Reddekopp, which we accept. Mr. Reddekopp is very experienced, serving as he does as the Senior Manager, Policy, Indian Land Claims, Aboriginal Affairs, for the Government of Alberta.

60 ICC Exhibit 25, Tables A and B.

**TABLE 1**  
**Fort McKay First Nation TLE Population**

DOFS population (1915)	70
Late adherents	11
Landless transfers	
pre-1949	20
marriage	09
1963 transfer	25
<b>Total</b>	<b>135</b>

It is important to note that this last “transfer” in 1963 was tantamount to a bookkeeping entry only. The individuals in question were simply reassigned from one administrative list to another, and they continued to live, for the most part, precisely where they had always lived – in the vicinity of Fort McKay. Mr. Reddekopp put it this way:

The most significant transfers into the Cree-Chipewyan Band of Fort McMurray and the Fort McKay Band came from the Fort Chipewyan Cree Band. Three persons transferred into the Cree-Chipewyan Band in 1940 and later joined the Fort McKay Band, while 28 persons transferred from the Fort Chipewyan-Cree Band to the Fort McKay Band in 1963. At first glance, these transfers seem to differ from the Bigstone Band transfers in that they do not involve late adherents, but rather the families of original or long-time members of the Fort Chipewyan Cree Band. However, upon a closer look, the similarity emerges in that, like the Bigstone transfers, the transfers from the Fort Chipewyan Cree Band corrected an anomaly by placing longstanding (or even lifelong) residents of Fort McKay on the membership list of the Band affiliated with their home.<sup>61</sup>

These people came to be recorded as members of the Fort McMurray Cree-Chipewyan Band between 1915 and 1949, and after 1949 as members of the Fort McKay Band. We agree that the additions and transfers corrected an anomaly by placing longstanding (even lifelong) residents of Fort McKay on the membership list of the Band affiliated with their home. Mr. Slavik, counsel for the Band, summarizes the situation in the following way:

All the late adherents and landless transferees to Fort McKay have extensive residential, kinship, family, economic, cultural, linguistic, and in some cases religious ties to

<sup>61</sup> N. Reddekopp, “Post 1915 Additions to the Membership of the Fort McKay Band,” December 1994 (ICC Exhibit 18, pp. 8-9).

Fort McKay. These families have intermarried, share adjacent traplines, speak a common language (most Cree-speaking families, such as the Bouchers and Grandjambes, are bilingual). Moreover, for at least the last 60-70 years (or as long as the "living memory" of elders), all these families have resided at least part of the year in and around the community of Fort McKay. When the school was built in Fort McKay in 1949, most of the families residing north and west of Fort McKay and in the vicinity of the Namur Lake Indian Reserves elected to reside in Fort McKay in order that their children could attend school. Since 1949 these persons have had permanent residence in the community.<sup>62</sup>

It is important to note that many of these people described as "landless transferees" and "late adherents" were never included in an entitlement calculation because their existence was unknown in 1915, or because they adhered to Treaty 8 after the 1915 survey of reserves. Others transferred from landless bands. For example, the 25 people who were transferred from the Fort Chipewyan Cree Band list to the Fort McKay Band list in 1963 were, under the Department of Indian Affairs' own classification scheme from the 1983 ONC Guidelines, considered to be "landless transfers."<sup>63</sup>

As noted earlier, the Fort McKay First Nation received no additional reserve land after the date of first survey (DOFS) in 1915 based on this increase in membership. The Fort McKay First Nation has absorbed some 65 new members since its reserves were first surveyed in 1915. None of these treaty Indians had ever had land set aside for them in a treaty land entitlement calculation for a band. If they are not counted for the entitlement of Fort McKay First Nation, then they will never be counted anywhere, ever.

### **CLAIM OF THE FORT MCKAY FIRST NATION**

In 1987 the Fort McKay First Nation filed a TLE claim based on 28 landless transfers from the Cree Band of Fort Chipewyan.<sup>64</sup> At that time, Canada's position appeared to be that such a claim would be accepted for negotiation, based on the 1983 ONC Guidelines.

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<sup>62</sup> J. Slavik, Final Submission and Legal Argument to the Indian Claims Commission Inquiry Re: The Fort McKay First Nation Treaty Land Entitlement, May 1995, p. 23.

<sup>63</sup> Donna Gordon, "Treaty Land Entitlement -- A History," prepared for ICC, Ottawa, December 1995, Schedule of Validated Claims to 1990, and published in this issue, see p. 423 below.

<sup>64</sup> These transfers were effected in 1963.

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### 1983 ONC Guidelines

The ONC Guidelines, dated May 1983, set out principles and validation criteria for TLE claims (see Appendix C). In the introduction, the criteria are stated to be

intended as guidelines in the research and validation process for treaty land entitlement claims. They have evolved from historical research done by the Office of Native claims (ONC) in consultation with the Federal Department of Justice, and in consultation with the research representatives of the claimant bands. Each claim is reviewed on its own merits, keeping in mind these guidelines. However, as experience has taught, new and different circumstances have arisen with each claim. Therefore the review process is not intended to be restricted to these guidelines.

The Guidelines begin with the following statement of general principle:

The general principle which applies in all categories of land entitlement claims is that each Treaty Indian Band is entitled to a certain amount of land based on the number of members. Conversely, each treaty Indian is entitled to be included in an entitlement calculation as a member of an Indian Band.

With regard to the determination of base population figures on which to calculate the quantum of land owed, the guidelines are very specific:

An outstanding treaty land entitlement exists when the amount of land which a band has received in fulfillment of its entitlement is less than what the band was entitled to receive under the terms of the treaty which the band adhered or signed. This is referred to as a shortfall of land. There are two situations where a shortfall may exist. The first is when the land surveys fail to provide enough land to fulfill the entitlement. The second is when new members who have never been included in a land survey for a band, join a band that has had its entitlement fulfilled. The objective is to obtain as accurate a population of the band as is possible on the date that the reserve was first surveyed. . . .

. . . Where a claim depends solely on new adherents or transfers from landless bands, the band memberships may be traced through to the present day.

The Guidelines specify that the following persons are included for entitlement purposes:

- 1) Those names on the payroll in the year of survey.
- 2) Absentees who are paid arrears. These are band members who are absent for the year of survey but who return and are paid arrears for that year.



Absentees who return and who are not paid arrears. These people must be traceable to: when they became band members and how long they remained as members during say, a ten to fifteen year period around the date of survey. Generally, continuity in band memberships is required. Also it must be shown that they were not included in the population base of another band for treaty land entitlement purposes, while absent from the band.

- 3) New Adherents to treaty. These are Indians, who had never previously signed or adhered to treaty and consequently have never been included in an entitlement calculation.
- 4) Transfers from Landless Bands. These are Indians who have taken treaty as members of one band, then transferred to another band without having been included in the entitlement calculation of the original band, or of the band to which they have transferred. The parent band may not have received land, whereas the host band may have already had its entitlement fulfilled. These Indians are acceptable, as long as they have never been included in a land quantum calculation with another band.
- 5) Non-Treaty Indians who marry into a Treaty Band. This marriage, in effect, makes them new adherents to Treaty.

These guidelines were widely distributed to researchers, Indian organizations, and First Nations, sometimes with suggestions that previous research be reviewed. Mr. Sean Kennedy, a former analyst and negotiator with the Specific Claims Branch, gave clear testimony before the Commission to the effect that, in his experience, these guidelines were the basis on which claims were validated. In other words, if a shortfall based on late adherents or landless transfers was made, a claim would be accepted.<sup>65</sup> Furthermore, in 1983 and 1984, the Office of Native Claims itself actively initiated reviews of previously rejected claims and recalculated entitlement on the basis of these new criteria.<sup>66</sup> It is also the case that at least eight TLE claims have been validated on the basis of late adherents and landless transfers.<sup>67</sup>

### **1993 Reversal of Policy**

In 1993, however, the Fort McKay First Nation was informed that Canada would not accept as valid a TLE claim based on late adherents and landless

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<sup>65</sup> ICC Transcript, pp. 43-47, November 18, 1994 (Sean Kennedy).

<sup>66</sup> R.R. Connelly to Chief, Ochapowace Band, October 28, 1983 (ICC file 2000-18, Memorandum from Stewart Raby to Wilma Jackknife, June 12, 1994, doc. 18).

<sup>67</sup> Gordon, "Treaty Land Entitlement," note 62 above.

transfers alone.<sup>68</sup> This striking reversal of policy was based on a new interpretation by Canada of the nature and extent of its lawful obligation:

While treaty land entitlement is a benefit to a collectivity, the quantum of land is calculated on the number of individuals belonging to the collectivity at the time of first survey. This occurred in the year 1915 for this band. At that time, treaty paylists had been prepared, and those who knew the Indian people in the various bands assisted the treaty officials. Those efforts to locate and keep track of the band members at the date of first survey would have fulfilled the standard of care in a 1915 context. Canada's current practice is thus to use the paylist for the year of first survey and add absentees and arrears. Unless there was a shortfall of land set aside for the band in 1915, landless transferees are not counted since they were not band members at that date.<sup>69</sup>

Canada's position as of 1993 is that its TLE obligation to a band is fulfilled if sufficient land under the per capita provision of the treaty was provided based on the population at date of first survey (DOFS). Late adherents and landless transfers *may* be taken into account if a DOFS shortfall is made out. This new policy was explained by Al Gross, the Director of Treaty Land Entitlement, as follows:

In the course of researching the band's history we have, in the past, also identified individuals who have joined the band after the date of first survey up to the present day. The categories of persons to be identified in the research report are set out in the 1983 Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims. We will continue this research practice. If bands have claims based upon a date of first survey shortfall, depending on all the circumstances surrounding the claim, we may then take into account these other categories in negotiating settlements to these claims.

We must be clear with claimant bands, however, that our lawful obligation extends only to the strict date of first survey population. That number is the threshold which claimant bands must reach before a treaty land entitlement claim will be accepted.<sup>70</sup>

This interpretation rejects what was thought to be the established principle that every treaty Indian is entitled to be included in an entitlement calculation.

68 Al Gross to Federation of Saskatchewan Indian Nations (FSIN), November 30, 1993 (ICC, Fort McKay First Nation Information Kit, tab 10).

69 Bruce Hilchey, DIAND, Specific Claims West, to Jerome Slavik, April 15, 1993 (ICC Exhibit 1, tab 14).

70 Al Gross to FSIN, November 30, 1993 (ICC, Fort McKay First Nation Information Kit, tab 10).

On December 16, 1994, Rem Westland, appeared before the Indian Claims Commission to explain the Department's policy on such TLE cases. Mr. Westland was Director, Specific Claims Branch, from 1987 to 1989, and was Director General, Specific Claims Branch, from 1991 to 1995. In these capacities, he was directly involved in developing and implementing TLE policy on the part of the government.<sup>71</sup>

Mr. Westland appeared before the Commission at the Commission's request. We note that Canada did not volunteer any witnesses to assist the Commission in the course of this inquiry. Canada's failure to provide the Commission with information that could have been helpful is disappointing. We believe that Canada has an obligation to bring forward the best available information to this Commission.

Mr. Westland assisted the Commission in our understanding of the basis of the government's TLE policy and the remarkable 1993 reversal of policy – for which he appears to have been at least partially responsible.

Mr. Westland explained that the fundamental guiding principle is that TLE is a collective right:

one thing that impressed itself on me as I became familiar with treaty land entitlement is that treaty land entitlement is a collective right. It is not an individual right. And with that understanding, as I learned about treaty land entitlement, and from time to time through looking at particular claims would delve into the remarkable dissecting of numbers that goes on in the research business, I was struck by the illogical points that individuals who did not have this right could reopen or constitute a collective right.<sup>72</sup>

In other words, Canada now rejects the proposition that late adherents and landless transfers *per se* give rise to an entitlement. The new policy is that, unless there is a DOFS shortfall, the collective right of the band was satisfied at DOFS, and an individual cannot reopen that collective right. Mr. Westland told the Commission that Canada no longer considers the principle from the 1983 ONC Guidelines – that every treaty Indian is entitled to be included in an entitlement calculation – to be valid.<sup>73</sup>

71 IGC Transcript, p. 6, December 16, 1994 (Rem Westland).

72 *Ibid.*, 84.

73 *Ibid.*, 84 and 86.

### Reconstruction Model

Mr. Westland also testified as to how the DOFS population was to be determined. He stated that the proper approach is to determine "in all reasonableness, at the date of first survey, the number of people who were there . . ." <sup>74</sup> or to "reconstruct who really was there." <sup>75</sup> This suggests a "residency" approach as an alternative to the established practice of relying on paylists. In response to this testimony, Neil Reddekopp did further research to reconstruct which persons on the three paylists applicable to the region constituted the 106 population base used by Surveyor Robertson.

On March 16, 1995, Mr. Reddekopp presented to the Commission an analysis in support of the view that, in terms of the "historical reality," the 1915 Fort McKay population was not merely 70 persons as suggested by the payroll <sup>76</sup> but rather 114 individuals. He bases his total of 114 on the population given by Robertson of 106 plus the addition of 8 arrears. Robertson had reported the population in 1915 as follows: Fort McKay Band, 106; Paul Cree's Band, 17; and Gregoire Lake Band, 45. <sup>77</sup> With the figure of 114 Reddekopp suggests that there could be a shortfall in the acreage allotted the Fort McKay Band in 1915. <sup>78</sup> Only 13,462 acres were actually surveyed, and if one accepts that the population in 1915 was 114, then the acreage should have been 14,592 ( $114 \times 128 = 14,592$ ) – or 1130 acres more.

74 Ibid., 36.

75 Ibid., 116.

76 Because there was no payroll for the Fort McKay group until 1916, establishing the 1915 population poses definite challenges. Based on a joint analysis of the available paylists by the claimant and DIAND, the estimated number of persons on the 1915 Cree-Chipewyan Band of Fort McMurray payroll who were affiliated with the Fort McKay group is 63, with 7 absentees, for a total of 70.

77 ICC Exhibit 1, tab 17, pp. 7-8; Donald F. Robertson, "General Report of Surveys, Season 1915," January 5, 1916, p. 1 (appendix is source of the "106" figure) (ICC Exhibit 1, tab 20).

78 Neil Reddekopp to Kim Fullerton, March 22, 1995, Table A (ICC Exhibit 25).

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## PART II

### ISSUES

The purpose of this inquiry is to determine whether the Fort McKay First Nation has a valid claim for negotiation under the Government of Canada's 1982 Specific Claims Policy, as outlined in *Outstanding Business*. To reiterate, that Policy states that the government will recognize claims that disclose an outstanding "lawful obligation" on the part of the federal government. It is clear, under the Policy, that the non-fulfilment of a treaty promise constitutes an outstanding lawful obligation.<sup>79</sup>

The question of whether the Fort McKay First Nation has an outstanding treaty land entitlement is complex, and gives rise to a number of difficult legal issues. The parties themselves were unable to agree as to what the relevant legal issues were. Their formulations are set out later in this section.

In our view, it is necessary to approach the issue of outstanding lawful obligation carefully, with full regard to the legal principles which govern the interpretation of treaties and the legal relationship between aboriginal Canadians and the federal Crown. In our view, the relevant issues are the following:

- Issue 1 What is the nature and extent of the right to reserve land, and Canada's correlative obligation to provide reserve land, under Treaty 8?
- a Is every treaty Indian to be included in an entitlement calculation?
  - b Is treaty land entitlement a collective or an individual right?

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<sup>79</sup> The concept of lawful obligation is explained on page 20 of *Outstanding Business*. A lawful obligation may arise in any of the following circumstances:

(i) The non-fulfilment of a treaty or agreement between Indians and the Crown.

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Issue 2 Has Canada satisfied its treaty obligation to provide reserve land to the Fort McKay First Nation?

This list of issues is limited to fundamental questions on which the resolution of this claim turns. Canada defined the relevant issues somewhat differently and submitted that, to determine the nature of the right to reserve land under the treaty, it was necessary to answer three questions:

- 1 Is the nature of the Fort McKay First Nation's right to land under Treaty 8 collective or individual?
- 2 At what time is the right of the Fort McKay First Nation assessed for the purposes of applying the Treaty 8 formula of 640 acres per family of five?
- 3 How many members of the Fort McKay First Nation were there at this point in time, and was the land provided sufficient to satisfy the treaty formula based upon the number of members?

This framework is succinct, but it predetermines the issues of who should be counted and when they should be counted in that there is an underlying presumption of a single date and a single population count to determine treaty land entitlement.

Counsel for the Fort McKay First Nation set out a list of seven issues:

- 1 What is the nature and extent of the Treaty right to reserve land and Canada's corresponding obligation to provide reserve land to Indian First Nations under Treaty 8?
- 2 Has Canada properly and forever extinguished the Treaty right of the Fort McKay First Nation to reserve land by providing the Cree/Chipewyan Band of Fort McMurray reserves in 1915 whose area was determined based only on the population of the Band at the date of the first survey of the reserves?
- 3 Is each Treaty Indian entitled to be included in an entitlement calculation as a member of an Indian Band?
- 4 Does an outstanding TLE shortfall exist when new members, who have never been included in a survey for a Band, join a Band that has had its entitlement fulfilled?

- 5 Do the additions to the membership of the Fort McKay First Nation by the Department of Indian and Northern Development (DIAND) in the period 1915-1994 of Indian persons (hereinafter "landless transferees"), for whom Canada has not provided either reserve land to another band, scrip, or land in severalty create a legal or fiduciary obligation on Canada to provide additional reserve land to the Fort McKay First Nation?
- 6 In light of the historical, cultural, economic, and linguistic history of Indians in the Fort McKay, Spruce Lake, and Namur Lake areas; the manner and circumstances of making treaty in this region in 1899; and the principle [sic] of treaty interpretation and implementation as set out by the courts, does Canada now have a fiduciary or equitable obligation to provide the Fort McKay First Nation additional reserve land for landless transferees?
- 7 If Canada does have a legal, fiduciary, or equitable obligation to provide additional reserve land to the Fort McKay First Nation, how should the quantum of the land be determined? Specifically, should the quantum be based on the number of descendants of landless transferees who are members at the time of the survey of this additional reserve land?

Although this list of issues has the advantage of being comprehensive, and we do address some of them directly in this Report, we prefer to take one step back and to approach the issue of outstanding lawful obligation from first principles, by addressing the two issues identified above.

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## PART III

### ANALYSIS

#### ISSUE 1

What is the nature and extent of the right to reserve land, and Canada's correlative obligation to provide reserve land, under Treaty 8?

a Is every treaty Indian to be included in an entitlement calculation?

What then is the very nature of Canada's obligation to provide reserve land under Treaty 8? Canada and the Fort McKay First Nation diverge in their response to this basic question. Canada says that treaty land entitlement is a right that inheres in a band at a particular point in time; thus, only those treaty Indians who comprise the population of a particular First Nation at that time – namely, the date of the first survey (DOFS) – are entitled to be included in an entitlement. According to Canada, post-DOFS additions, whether the result of natural increase, late additions, or landless transfers, are irrelevant to the determination of land entitlement. The claimant says that treaty land entitlement is, at its core, the right of every treaty Indian to be included in an entitlement calculation for a band. Therefore, late adherents and landless transfers, as Indians who have never previously been included in an entitlement calculation, generate an additional land entitlement.

Our task, then, is to determine the full and proper meaning of the treaty as to who should be counted and when they should be counted. The relevant section of Treaty 8 is reproduced here:

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 . . . the selection of such reserves . . . 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, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection. [Emphasis added.]

The treaty seems remarkably clear on two points. First, it stipulates a reserve land entitlement formula of one square mile per family of five “*or in that proportion for larger or smaller families*” to be set aside for a band. Thus, a band’s land entitlement under the treaty is calculated on a per capita basis. Secondly, the reserve area is to be “determined and set apart” by the surveyor in the field. This suggests that the date under the treaty for establishing the quantum of reserve land is the time of selection by the bands and survey by Canada.

At first blush, then, the text of the treaty seems to support Canada’s argument. If all Indians across the treaty territory had ordered themselves into cohesive bands by the date of survey, the surveyor could simply have gone out into the field, determined the population of each band, and carried out the calculations for all of the bands in the treaty area (128 acres per member). The issue of whether every treaty Indian would be entitled to be included in a TLE calculation would not arise, because, if the count was accurate and the land for every band was surveyed shortly after the date of treaty, then every Indian would *by necessity* have been included in such a calculation.

The problem is that this very neat explanation of treaty land entitlement fails to reflect the reality of the lives of the First Nations people in Canada in the late 19th or early 20th century, nowhere more so than in the northern forests of Treaty 8. As Neil Reddekopp notes, although Treaty 8 presumed the existence of bands, “it took several decades before Treaty 8 Bands were organized to an extent that they resembled the theoretical version of themselves.”<sup>80</sup>

The fact that the Treaty 8 Indians had not fallen into an organization consistent with the needs of the government administration by the time that the treaty was signed gives rise to ambiguity as to how the object of the treaty was to be achieved. It is not clear from the text of the treaty how to deal with late adherents, landless transfers, or the descendants of such individuals. That is why we must ask the underlying question: Was it intended, under Treaty 8, that every treaty Indian be included in an entitlement calculation?

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<sup>80</sup> ICC Exhibit 18, p. 6.

The position taken by the Fort McKay First Nation, that every treaty Indian must be counted, is supported by *R. v. Blackfoot Band of Indians*.<sup>81</sup> The *Blackfoot* case concerned the interpretation of the ammunition clause in Treaty 7.<sup>82</sup> By the 1970s, ammunition was no longer a necessity and five bands had agreed to take money instead. At issue was whether, under the terms of the treaty, the money was to be distributed on a per capita basis (each band receiving a share based on its proportionate population) or per stirpes basis (each band receiving an equal one-fifth share).

To answer this question, Mahoney J. read the clause in the context of the entire treaty, with emphasis on the preamble.<sup>83</sup> In concluding in favour of a per capita distribution, he made the following findings about the nature of the treaty:

It is clear from the preamble that the intention was to make an agreement between Her Majesty and all Indian inhabitants of the particular geographic area, whether those Indians were members of the five bands or not. The chiefs and counsellors of the five bands were represented and recognized as having authority to treat for all those individual Indians. The treaty was made with Indians, not with bands. It was made with people, not organizations.<sup>84</sup>

This conclusion was further supported by an analysis of the substantive provisions of the treaty:

It was Indians, not bands, who ceded the territory to Her Majesty and it was to Indians, not bands, that the ongoing right to hunt was extended. The cash settlement and treaty money were payable to individual Indians, not to bands. The reserves were established for bands, and the agricultural assistance envisaged band action, but its population determined the size of its reserve and the amount of assistance.<sup>85</sup> [Paragraph references omitted.]

81 [1982] 3 CNLR 53, 4 WWR 230 (FCTD).

82 The clause read: "Further, Her Majesty agrees that the sum of two thousand dollars shall hereafter every year be expended in the purchase of ammunition for distribution among the said Indians; Provided that if at any future time ammunition becomes comparatively unnecessary for said Indians, Her Government, with the consent of said Indians, or any of the Bands thereof, may expend the proportion due to such Band otherwise for their benefit."

83 The preamble to Treaty 7 provides, in part, as follows: "And whereas, the said Indians have been informed by Her Majesty's Commissioners that it is the desire of Her Majesty to open up for settlement and such other purposes as to Her Majesty may seem meet a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty and arrange with them, so that there may be peace and good-will between them and Her Majesty; and between them and Her Majesty's other subjects; and that Her Indian people may know and feel assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence." The parallel provision in the preamble to Treaty 8 is practically identical.

84 [1982] 3 CNLR 53 at 61.

85 Ibid.

Treaty 8 is not different from Treaty 7 in any material respect, and the wording of the preamble to each is practically identical. It follows that these findings are properly applied in the interpretation of Treaty 8.

The central point from the *Blackfoot* case is that it was the intention of the Crown to enter into an agreement with all Indians inhabiting the treaty area, *whether or not they were members of a band at the time the treaty was signed*. It follows in our view that the obligation of the Crown, as stipulated in the treaty, is to provide land for all Indians in the Treaty 8 area when they become members of a band.

This conclusion is bolstered by the particular historical context of Treaty 8. An established principle of treaty interpretation is that one must consider the circumstances surrounding the treaty signing. In *R. v. Taylor and Williams*, the Ontario Court of Appeal stated:

Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect.<sup>86</sup>

The Treaty 8 Commissioners reported that “[n]one of the tribes appear to have any very definite organization.”<sup>87</sup> Moreover, the Commissioners stated categorically that the Indians would not have signed the treaty if one of its terms was that they would then be confined to reserves; they had to assure the Indians that reserves would be set apart “when required.”<sup>88</sup> This statement suggests that the Crown intended to provide reserve land to Treaty 8 Indians as advancing settlement put pressure on the loose social organization, and as new bands formed or existing bands took in new members. Implicit in this intention is the possibility of multiple surveys.

Mahoney J. made another important point in *Blackfoot*, that it was Indians, not bands, who ceded territory to the Crown. In our view, it is unreasonable to believe that the Indians would have been prepared to sign a treaty that would give some of them no land in return for ceding their aboriginal rights to the treaty territory. It is true that reserve land would be held as a communal right so that no member of a band would really be landless. At the same

<sup>86</sup> *R. v. Taylor and Williams*, [1981] 3 CNLR 114 (Ont. CA) at 120. This case was cited with approval by the Supreme Court of Canada in *R. v. Sparrow*, [1990] 3 CNLR 160 at 179-80.

<sup>87</sup> *Treaty No. 8*, note 18 above, 8.

<sup>88</sup> *Ibid.*, 7.

time, however, land was extremely valuable to the First Nations people, both culturally and economically.

Moreover, it is clear that one of the objectives of the treaty process was to provide the Indians with an adequate resource base. Presumably, an entitlement formula based on numbers of individuals was used to determine a "fair portion of the land ceded"<sup>89</sup> because a certain amount of land is required to support each person. It is unlikely that the Indians would have accepted the treaty if they understood that the Crown's intention was to exclude some members of the community – namely, those who joined the band after the date of the survey or were simply absent at that time, but who would nonetheless be drawing on the land base – from the determination of a fair reserve land entitlement.

Nor is it reasonable to believe that the Indians would have signed the treaty if it had been explained to them that, unless they became members of a band by the date of first survey, they would not be included in an entitlement calculation, *ever*. Such a proposition cannot be reconciled with the social facts apparent at the time the treaty was signed. The Indians in the Treaty 8 area were scattered throughout inaccessible territory, hunting in small family groups, and many had no interest in the treaty or in joining a band; therefore, it would have been impossible to require all Indians to adhere to treaty and join a band by the date of the first survey.<sup>90</sup> We are thus persuaded that obligatory membership in a band by DOFS would have been unacceptable to the Indians.

In the light of all of these considerations, and given that the treaty does not specify that a single date-of-first-survey count will take place, we find that the Indian signatories to the treaty could not have understood that treaty land entitlement was to be based on a one-time population count, as of the date of arrival of a surveyor from Canada. This finding is significant. In *Nowegijick v. R.*, the Supreme Court of Canada approved the principle that Indian treaties must be construed "not according to the technical meaning of their

<sup>89</sup> This is a reference to assurances of the Treaty Commissioners as recorded on page 7 of *Treaty No. 8*.

<sup>90</sup> This fact is reflected in the actual statistics on adhesions, from Reddekopp (ICC Exhibit 18, p. 6): "In 1899, a total of 1838 persons were paid annuity in Alberta. The next year, an additional 575 persons from Alberta were admitted to Treaty, an increase of 31 per cent. To a certain extent, this represented the adhesion of new Bands (Sturgeon Lake and Dene Tha), but even among Bands who signed Treaty 8 in 1899, 299 persons were admitted to Treaty in 1900, an increase of 16 per cent. Even then, the Treaty Commissioner estimated that about 500 persons living north of Lesser Slave Lake had not been admitted to Treaty."

words . . . but in the sense in which they would naturally be understood by the Indians.”<sup>91</sup>

There are other established principles of treaty interpretation which point in this same direction. In *Taylor and Williams*, the court held that ambiguous language in a treaty should be interpreted against the government as the party that drafted the treaty.<sup>92</sup> We agree with the claimant that the government could have specified that treaty land entitlement would be determined once, based on band populations at DOFS, if that was indeed its intention at the time. This argument is particularly compelling in the context of Treaty 8; given the unstructured social and economic organization of the Indians in the territory, the agents of the Crown fully expected that there would be new adherents for some time after the treaty was signed. Neil Reddekopp notes in his study of post-1915 additions that the incompleteness of the process of gaining the adhesion of all persons eligible for treaty benefits was evident from the time that Treaty 8 was signed.<sup>93</sup> Thus, we are not dealing here with some unanticipated future event which could not have been addressed in advance. The government had full opportunity to address this matter, in specific terms, in the treaty.

Treaties must also be interpreted to uphold the honour of the Crown.<sup>94</sup> The Crown’s commitment to honourable dealing with the Indians is evident in the Treaty Commissioners’ assurances that the purpose of setting aside reserves was “to secure to them in perpetuity a fair portion of the land ceded.”<sup>95</sup> A restrictive interpretation of what is fair may give effect to “sharp dealing,” particularly if, as in this case, the Indians were not informed that they would have to become members of a band by DOFS in order to be included in an entitlement calculation. Such an interpretation is to be avoided.

Finally, we would observe that the effect of Treaty 8 was to “cede, release and surrender” the aboriginal interest in an enormous area of Alberta, and lesser parts of Saskatchewan, British Columbia, and the Northwest Territories. Any reasonable construction of Treaty 8 leads to the conclusion that, in return, each and every aboriginal person who accepted treaty secured an entitlement to land, calculated with reference to the number of individuals

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91 [1983] 1 SCR 29 at 36. This passage was relied on by the Supreme Court of Canada again in *Simon v. R.*, [1985] 2 SCR 387 at 402.

92 Note 86 above, at 123.

93 ICC Exhibit 18, p. 6.

94 *Claxton v. Saanichton Marina Ltd.*, [1989] 3 CNLR 46 at 50 (BCCA), citing inter alia *Nowegjick v. R.*, [1983] 1 SCR 29, 2 CNLR 89, and *Simon v. R.*, [1985] 2 SCR 387, [1986] 1 CNLR 153.

95 *Treaty No. 8*, note 18 above, 7.

who so accepted. This seems to us a fair and reasonable reading of the treaty.

Thus the answer to Issue 1(a) is yes, every treaty Indian is to be included in an entitlement calculation.

### Issue 1

b Is treaty land entitlement a collective or an individual right?

Canada argues that the analysis set out above with respect to Issue 1(a) is flawed because it fails to recognize that the treaty right to reserve land is a collective right held by the members of a band as a whole and not by band members individually. According to Canada, this conclusion follows from the text of the treaty: "Her Majesty hereby agrees and undertakes to lay aside reserves *for such bands* as desire reserves . . ." In addition, there are a number of cases stating categorically that the right to reserve land is a collective right of a band, and that treaty and aboriginal rights are collective rights.<sup>96</sup> We agree that the right to the use and benefit of reserves is a collective right held in common by band members, *after the reserve has been surveyed and set aside*. But this statement, in itself, does not assist us in determining the quantum of land to which a band is entitled under the treaty. Even if late adherents and landless transfers are counted, the right to the use and benefit of the reserve land will still be a collective right. The real issue concerns how the collectivity (that is, the band) is to be defined for the purpose of calculating treaty land entitlement.

Canada urges us to define the collectivity by a one-time count which equals the population at date of first survey. This approach, Canada maintains, is mandated by the terms of the treaty – namely, the provision for a surveyor to be sent out to determine and set apart reserves. The treaty "clearly indicates that the population of the Band as at the time of this exercise should be used as the basis for the treaty formula. . . . This [the date of the survey] was the time when, according to the Treaty, the population of the Band crystallized in order to allow a determination of the reserve acreage."<sup>97</sup> Furthermore, evidence of the subsequent conduct of the parties, from documents dated around the time of the treaty, indicates that Crown officials

<sup>96</sup> *Joe et al. v. Ftndlay and Canada* (AG), [1981] 3 CNLR 58, 3 WWR 60; *Oregon Jack Creek Indian Band v. Canadian National Railway Co.* (1989), 34 BCLR (2d) 344, [1990] 2 CNLR 85 (CA); *R. v. Jones and Nadjiwon*, [1993] 14 OR (3d) 421, 3 CNLR 182; *R. v. Little*, [1993] 3 CNLR 214 (BCSC).

<sup>97</sup> Submissions on Behalf of the Government of Canada, p. 23.

understood the treaty land entitlement obligation to be fixed at a particular point in time.<sup>98</sup> Canada's position is summed up as follows: "Nothing in the terms of the Treaty supports the view that the obligation of the Crown goes beyond the allocation of reserve land based on the population at the time it was assessed by the surveyor."<sup>99</sup>

We do not agree. On the contrary, we see nothing in the terms of the treaty to support the rigid DOFS approach proposed by Canada. The treaty does not specify that a single survey will be undertaken; rather, it specifies a *process* of selection and survey. Canada is right in suggesting that the surveyor would base the reserve acreage on the population at the time of survey. This was a fair and reasonable approach to the problem at hand. This cannot lead, however, to the conclusion that the government's obligation was thus exhausted. We do not accept Canada's contention that this conclusion is implicit in the manner in which the treaty covenant to provide land was to be fulfilled. We also disagree with Canada's argument that the population of a band crystallizes at date of first survey. This might be a reasonable interpretation of the treaty if all the Indians inhabiting land within the treaty boundaries were organized in stable bands by DOFS, and if all the reserves were surveyed simultaneously. Given the actual historical context, however, the theory of crystallization at DOFS does not square with social fact. It is so unrelated to the actual world of the Fort McKay people that it cannot be seen as a tenable basis for Canada's adopting a restrictive approach to its legal obligation.

Furthermore, the communal right to reserve land is defined under the treaty as an aggregation of individual entitlement. That is not to say that the right to reserve land is an individual right; instead, each person holds a non-individualized right to participate in the resource. But we must refer back to the individual to calculate the entitlement, which is why membership is a critical issue.

In this case we therefore have a collectivity whose membership was not closed and whose boundaries were not fixed by DOFS. It is in this context that we apply a treaty which does not specify anything more than a process of survey and selection of reserves at some time in the future. As to the evidence of subsequent conduct, we do not consider the opinion of one departmental official writing between 1887 and 1890 (to the effect that the reserve entitle-

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98 Memorandum from L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to John A. Macdonald, Superintendent General of Indian Affairs, March 8, 1887 (Davies, doc. 2), quoted in *Submissions on Behalf of the Government of Canada*, p. 24.

99 *Submissions on Behalf of the Government of Canada*, p. 25.

ment was to be fixed at DOFS, see footnote 98) capable of delineating the nature and scope of the treaty right to reserve land. In the light of all of these factors, we must reject Canada's argument.

Thus the answer to Issue 2(b) is that treaty land entitlement is a collective right of a First Nation that must be determined utilizing the number of treaty Indians who are or become members of that First Nation, recalling the answer to Issue 1(a) that every treaty Indian is to be included, once, in an entitlement calculation.

### Findings

There are well-defined principles with respect to the interpretation of Indian treaties. Those principles that are relevant to the issues before us can fairly be summarized as follows:

- Treaties should be given a fair and liberal construction in favour of the Indians and treaties should be construed not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians.<sup>100</sup>
- Since the honour of the Crown is involved, no appearance of "sharp dealing" should be sanctioned.<sup>101</sup>
- If there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible.<sup>102</sup>
- Regard may be had to the subsequent conduct of the parties to ascertain how the parties understood the terms of the treaty.<sup>103</sup>

Our analysis of the treaty, based on the above interpretive principles, gives rise to the following findings about the nature and extent of treaty land entitlement under Treaty 8:

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<sup>100</sup> See *Nowegijick v. The Queen*, [1983] 2 CNLR 89 (SCC) at 94, as followed in *Simon v. The Queen*, [1986] CNLR 153 (SCC) at 167.

<sup>101</sup> See *R v. Taylor and Williams*, note 86 above, at 123.

<sup>102</sup> See *Taylor and Williams*, note 86 above, at 123, applying *R v. White and Bob* [1965], 50 DLR (2d) 613 at 652 affirmed [1965], 52 DLR (2d) 481 (SCC).

<sup>103</sup> See *Taylor and Williams*, note 86 above, at 123; *R v. Sioui*, [1990] 3 CNLR 127 at 140-41; and *R v. Ireland*, [1991] 2 CNLR 120 (OCJGD) at 128 and 129.



- 1 The purpose, meaning, and intent of the treaty is that each Indian band is entitled to a certain amount of land based on the number of members, and each treaty Indian is entitled to be included in an entitlement calculation as a member of an Indian band (or in the alternative to lands in severalty).
- 2 The treaty conferred upon every Indian an entitlement to land exercisable either as a member of a band or individually by taking land in severalty. In the case of Indians who were members of a band, that entitlement crystallized at the time of the first survey of the reserve. The quantum of land to which the band was entitled in that first survey is a question of fact, determined on the basis of the actual band membership – including band members who were absent on the date of first survey. This later group of individuals is generally referred to as “absentees.”
- 3 The treaty conferred upon every band the entitlement to receive additional reserve land for every Indian who adhered to the treaty and joined that band subsequent to the date of first survey. The quantum of additional land to which the band is entitled as a result of such late adherents is a question of fact, determined on the basis that the entitlement crystallized when those Indians joined the band. These individuals are generally referred to as “late adherents.”
- 4 The treaty conferred upon every band the entitlement to receive additional reserve land for every Indian who transferred from one band to another, provided that the band from which that Indian transferred had never received land on his or her account. These individuals are generally referred to as “landless transfers” and sometimes as “landless transferees.”
- 5 After the date of first survey, natural increases or decreases in the population of the band do not affect treaty land entitlement. Thereafter it is only late adherents or landless transfers in respect of whom treaty land has never been allocated who will affect treaty land entitlement.
- 6 Treaty Indian women from the same treaty who marry into a band do not give rise to an additional land entitlement, unless those women are either landless transfers or late adherents in their own right. Non-treaty Indian women who marry into a band do not give rise to an additional land entitlement under any circumstances.

- 7 The population of the band at the date the treaty is signed is not relevant to the determination of the quantum of the band's land entitlement.
- 8 The current population of a band is not relevant to the determination of the quantum of the band's land entitlement, and natural increases in the population of a band do not give rise to treaty land entitlement.
- 9 If a band receives a surplus of land at date of first survey, Canada is entitled to credit those surplus lands against subsequent landless transfers or late adherents.
- 10 Establishing a date-of-first-survey shortfall is not a prerequisite for a valid treaty land entitlement claim.

### **Other Considerations Raised by the Parties**

Before moving on to the application of these principles to the Fort McKay claim, it is necessary to address some other matters. Canada raised concerns as to the consequences of allowing post-DOFS additions to band membership to be considered in determining treaty land entitlement. Canada's main objection is that this approach adopts "a type of selective, floating treaty land entitlement"<sup>104</sup> (that is, population increases are considered but decreases are ignored) which is unacceptable and completely unworkable. Moreover, Canada argues that this kind of "asymmetrical" approach is conceptually unsound.

Canada argues that since reserve land is not taken away if the population of a band goes below DOFS population, additional land should not be forthcoming when the population increases. The flaw in this argument is that it lumps additions to band population through late adherents and landless transfers together with natural population increases. It confuses demographic change with lawful entitlement under treaty. Although both phenomena will result in an increase in population, their relevance to treaty land entitlement is entirely different. If a band's treaty land entitlement was satisfied at DOFS, increases due to natural population growth or transfers in are irrelevant, because the new band members are already "included" in the count through their ancestors. Thus, the principle that every treaty Indian is entitled to be included in a land entitlement calculation has been met. In contrast, late adherents and transfers from landless bands have never been included in an entitlement calculation. That is the distinction. And if population *additions*

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<sup>104</sup> Submissions on Behalf of the Government of Canada, p. 31.

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(late adherents and landless transfers) are distinguished from population *increases*, there is no asymmetry.

Canada also argues that the post-DOFS additions approach “artificially creates the impression of a DOFS shortfall, when in fact none exists,” because it “deems late additions<sup>105</sup> to have been members of the DOFS population of the Band, even though it is clear that many such individuals were not even alive on that date.”<sup>106</sup> Including people who were not even alive at DOFS means that any natural increase in the population of late additions is counted. Again, Canada argues, this amounts to a very selective approach to population change, because natural decreases in DOFS population are not taken into account.

We are not persuaded by Canada’s argument. Post-DOFS additions have been “deemed” members of the DOFS population only because the 1983 ONC Guidelines used the concept that has come to be known as adjusted date of first survey (ADOFS), which in turn was based on Canada’s view that its obligation was based solely on DOFS population. According to this reasoning, if additions were to be counted, they had to be notionally placed in the band at DOFS. In our opinion, there is no need to engage in the fiction of ADOFS. Late adherents and landless transfers are counted not because they notionally should have been counted at DOFS, but because they have never been included in an entitlement calculation. Therefore, whether a post-DOFS addition was alive at DOFS is irrelevant.

In terms of counting natural increases in the population of post-DOFS additions, it seems to us that this too is not a valid objection. First, *both* natural increases and *decreases* in the population of post-DOFS additions are factored into the equation, in that many treaty Indians will have died without having been included in a treaty land calculation, whether they were late adherents or landless transfers. This is precisely the approach that has always been utilized between the date of treaty and the date of first survey. Secondly, the suggestion that decreases in the DOFS population should be counted follows from the idea of a fully floating treaty land entitlement obligation (that is, an obligation fully responsive to population fluctuations), which is how Canada characterizes the post-DOFS approach. It is convenient for Canada to characterize it in this manner, because the approach is then highly inconsistent, arbitrary, and selective; the obligation floats only if it favours a First

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<sup>105</sup> Canada appears to be using the term “late addition” to include late adherents, landless transfers, and marriages-in who become band members following DOFS.

<sup>106</sup> Submissions on Behalf of the Government of Canada, p. 40.

Nation. But that is not what is suggested. Rather, all that is suggested is fidelity to the principle that every treaty Indian be included in an entitlement calculation.

Another of Canada's objections to the proposed approach is that it generates confusion. For example, since an individual will not be considered as a late addition if his or her ancestors have been counted, what happens if one parent was counted and one was not? Is she or he counted, disqualified totally as a double count, or counted as some fraction of 128 acres?

As another example, Canada offers the following hypothetical situation: What if a late adherent joins his first band, stays there for four years, and then leaves to join another band (as a landless transfer) where he stays for 30 years? This gives rise to the problem of apportioning late additions between bands, and the possibility of two or more bands staking a claim to that person's right to be counted. According to Canada, these are just a few examples of the potential for overwhelming complexity and lack of closure.

As noted by both Mr. Reddekopp and Mr. Kennedy, these kinds of problems have not proved insurmountable in practice. For instance, when an individual has transferred between bands and it is unclear where that person should be counted, the practice has been to assess the strength of the individual's connection to each band, usually in terms of continuity of association. As well, the question of whether or not a "new adherent" has been included in a treaty land entitlement calculation has been determined by choosing one genealogical line, usually paternal, and using it consistently. We would suggest that from our perspective it would be better to trace the line on a matrilineal basis, as it would be less difficult. Moreover, we would note that this type of determination can be done, as there have been a number of major treaty land entitlement settlements achieved in Alberta, Saskatchewan, and Manitoba.

We appreciate that these practical solutions may not completely solve the conceptual puzzle. At the same time, however, we cannot countenance the government's throwing up its hands and saying "this is just too complex," when much of the complexity has been caused by that government's failure to meet its solemn treaty obligations in a timely manner. As Canada itself notes, "the issue magnifies with each passing generation."<sup>107</sup>

Finally, we recognize that Canada has a legitimate concern over certainty and finality in the satisfaction of treaty land entitlement obligations. It is

<sup>107</sup> Ibid., 44.

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important, however, not to overstate the problem. Under the principles outlined above, a band would be entitled to a resurvey of additional lands if qualifying new members were added to the membership of the band. The survey would be based on the actual number of new members added. This process would continue until all treaty Indians had been included in an entitlement calculation and all treaty bands had their full treaty land entitlement calculated. Although the possibility of multiple surveys is envisaged, the process cannot lead to a never-ending obligation, simply because there are a finite number of treaty Indians entitled to be counted and, by and large, we have exceptionally detailed genealogical information available with respect to them. Thus, the matter of treaty land entitlement obligation is closed when all treaty Indians have been included in an entitlement calculation according to the terms of the treaty.

Two other points are raised by the claimant that we must address. Counsel for the Fort McKay First Nation has argued that Canada's departure from the 1983 ONC Guidelines, and its "choice" to rely on the 1993 version of lawful obligation instead, is a "fundamental and blatant" breach of fiduciary duty. The allegation of breach of fiduciary duty has two main aspects. First, Canada accepted treaty land entitlement claims based on late adherents and landless transfers until 1993. In adopting the new policy, Canada is treating the Fort McKay First Nation differently from other First Nations that entered the same treaty. Secondly, the choice of the 1993 version adversely affects Indian entitlement under the treaty.

We begin with the proposition that treaty and fiduciary obligations overlap, in that the Crown has a fiduciary duty to live up to its treaty obligations.<sup>108</sup> It seems to us, however, that the question of breach of treaty comes first, and that it subsumes these further questions. In other words, the issue is not whether Canada "chose" to interpret the treaty in a manner that restricts the entitlement of First Nations and thus improperly exercised its "discretion," or whether Canada is treating First Nations signatories to the treaty unequally, but whether Canada's interpretation of the treaty is correct. If it is not, and the treaty land entitlement has not been met, then the conclusion of this inquiry will be that Canada has an outstanding lawful obligation towards the Fort McKay First Nation.

Counsel for the Fort McKay First Nation also argued that the 1993 interpretation retroactively extinguished an existing treaty right contrary to section

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<sup>108</sup> *Ontario (AG) v. Bear Island Foundation*, [1991] 2 SCR 570, 3 CNLR 79 at 81.

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35(1) of the *Constitution Act, 1982*. We doubt that the adoption of a policy meets the test, outlined in *Sparrow*, of a clear and plain intention to extinguish. (In *Sparrow*, the Supreme Court of Canada held that legislation regulating fishing could not extinguish or even define the aboriginal right to fish.) Furthermore, it is incorrect, in our opinion, to talk about extinguishing the treaty right to reserve land in the context of this claim. This right is not analogous to, for example, an aboriginal or treaty right to hunt or fish, which is intended to be an ongoing right. It was intended that the treaty land entitlement would be satisfied at a certain point, at which point the obligation is at an end. The right is not extinguished; rather, the entitlement is satisfied. And the question of whether Canada has satisfied the entitlement is, again, properly a question of treaty interpretation.

Finally, there was also considerable debate between the parties about the relevance of the 1983 ONC Guidelines. Canada says that the guidelines are irrelevant to the interpretation of the treaty, and the Fort McKay First Nation says that the guidelines are relevant as evidence of subsequent conduct. From *Taylor and Williams* it is clear that we may take notice of how, historically, the parties acted under the treaty after its execution.<sup>109</sup>

Our approach in this inquiry has been to step back and ask the fundamental question, What does the treaty say about treaty land entitlement? In our view, this is the correct approach to the issue of lawful obligation. We have considered the 1983 ONC Guidelines as one possible interpretation of the treaty, and have evaluated that interpretation on its merits rather than on the basis of its status. Therefore, there is no need for us to settle the issues raised about the status of those guidelines.

Furthermore, although subsequent conduct is relevant to the interpretation of the treaty, we agree with Canada that, in the light of the entire historical record, it is difficult to discern a consistent pattern of subsequent government conduct with respect to treaty land entitlement. Indeed, the government has altered the ground rules many times. At the end of the day, therefore, the government's reliance on the ONC Guidelines for over 10 years is relevant only in so far as it illustrates that even the government considered the post-DOFS additions approach to be a reasonable interpretation of the treaty for approximately a decade.

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<sup>109</sup> Note 86 above, at 120.

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## ISSUE 2

Has Canada satisfied its treaty obligation to provide reserve land to the Fort McKay First Nation?

The Fort McKay First Nation argues that it has a valid treaty land entitlement claim based on either late adherents and landless transfers or, alternatively, upon a DOFS shortfall. The details are set out as follows:

- The DOFS population based on the joint payroll analysis is 63 persons plus 7 absentees. To this it is necessary to add 11 late adherents, 20 landless transfers pre-1949, 9 landless transfers through marriage, as well as 25 landless transfers in 1963, for a final count of 135. Since enough reserve land for approximately 106 people was surveyed in 1915, the Fort McKay First Nation is owed reserve land under the treaty.
- Alternatively, there is a DOFS shortfall based on Neil Reddekopp's reconstruction of who made up the population base of 106 used by surveyor Robertson. Recall that this "residency approach" was pursued in response to Rem Westland's testimony that this was the proper way to determine DOFS population.<sup>110</sup> Mr. Reddekopp concluded that the number of people actually present at Fort McKay in 1915, plus absentees, totalled 114 (70 from the payroll analysis plus 44 others who meet a residency test). Therefore, since 114 people ought to have been counted but only 106 were, there is a DOFS shortfall. In addition, there are 34 late adherents and landless transfers for whom land is owed.

Although the "residency approach" is very interesting, we are unwilling to depart from the established practice of relying on the payroll as a starting point in treaty land entitlement analysis. We recognize that a payroll has its own shortcomings, that it is not a band list, and that there was no payroll for the Fort McKay group in 1915. Furthermore, although the payroll is a relevant historical reference in the identification of band membership, it is not determinative. Membership is a factual question, established on the basis of all relevant evidence, including the oral testimony of elders. In this case, however, we are satisfied with the DOFS population figure of 70 persons, which

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<sup>110</sup> See IGC Transcript, p. 116, December 16, 1994 (Rem Westland).

was arrived at on the basis of a joint analysis by Canada and the claimant First Nation.

It is our opinion that the Fort McKay First Nation has a valid treaty land entitlement claim based on late adherents and landless transfers in accordance with the findings as set out above. We respect Mr. Reddekopp's work and are satisfied that the estimate of late additions he provided is as accurate as possible. Therefore, we accept, on the basis of the evidence put before us, that the claimant is entitled to enough reserve land for 135 people (17,280 acres) and that there is an outstanding obligation to provide additional reserve land (3815 acres).



## PART IV

### CONCLUSIONS AND RECOMMENDATIONS

#### CONCLUSIONS

We have been asked to examine and report on whether the Government of Canada properly rejected the specific claim submitted by the Fort McKay First Nation. To determine whether this claim is valid, we have had to consider the following specific legal issues:

Issue 1 What is the nature and extent of the right to reserve land, and Canada's correlative obligation to provide reserve land, under Treaty 8?

a Is every treaty Indian to be included in an entitlement calculation?

b Is treaty land entitlement a collective or an individual right?

Issue 2 Has Canada satisfied its treaty obligation to provide reserve land to the Fort McKay First Nation?

Our findings on each question are summarized as follows:

#### **Issue 1(a)**

Every treaty Indian is entitled to be included in an entitlement calculation. Based on the text of the treaty, and the authority of *R. v. Blackfoot Band of Indians*, we conclude that it was the intention of the Crown to enter into an agreement with all Indians inhabiting the treaty area, whether or not they were members of a band at the time the treaty was signed. Thus, the obligation of the Crown is to provide a land entitlement for all Indians in the Treaty 8 area, based on the formula stipulated in the treaty, when they adhere to the treaty and join a band. Inherent in this concept is the possibility of multiple surveys.

**Issue 1(b)**

It is clear that the right to the use and benefit of reserve lands is a collective right held in common by the members of a band. But this conclusion does not solve the issue before us, which is how to determine the quantum of land to which that ultimately collective right attaches. Under the treaty, a band will receive an amount of land based on its per capita membership. Thus, the real issue is how the collectivity is to be defined for treaty land entitlement purposes.

In our view, there is nothing in the treaty to support Canada's theory that the collectivity "crystallizes" at date of first survey for the purposes of treaty land entitlement. The treaty does not specify that a single survey will be undertaken; rather, it specifies a *process* of selection and survey. Moreover, given that the Treaty 8 Indians were not organized into stable bands by DOFS, the notion of crystallization at DOFS is at odds with the actual historical context. In light of all these considerations, we reject Canada's argument that its treaty land entitlement obligation is limited to DOFS population.

We have also made the following general findings with respect to the interpretation of treaty land entitlement:

- 1 The purpose, meaning, and intent of the treaty is that each Indian band is entitled to a certain amount of land based on the number of members, and each treaty Indian is entitled to be included in an entitlement calculation as a member of an Indian band (or in the alternative to lands in severalty).
- 2 The treaty conferred upon every Indian an entitlement to land exercisable either as a member of a band or individually by taking land in severalty. In the case of Indians who were members of a band that entitlement crystallized at the time of the first survey of the reserve. The quantum of land to which the band was entitled in that first survey is a question of fact, determined on the basis of the actual band membership, including band members who were absent, on the date of first survey. This later group of individuals is generally referred to as "absentees."
- 3 The treaty conferred upon every band the entitlement to receive additional reserve land for every Indian who adhered to the treaty and joined that band subsequent to the date of first survey. The quantum of additional land to which the band is entitled as a result of such late adherents is a question of fact, determined on the basis that the entitlement crystal-

lized when those Indians joined the band. These individuals are generally referred to as "late adherents."

- 4 The treaty conferred upon every band the entitlement to receive additional reserve land for every Indian who transferred from one band to another, provided that the band from which that Indian transferred had never received land on his or her account. These individuals are generally referred to as "landless transfers" and sometimes as "landless transferees."
- 5 After the date of first survey, natural increases or decreases in the population of the band do not affect treaty land entitlement. Thereafter it is only late adherents or landless transfers in respect of whom treaty land has never been allocated who will affect treaty land entitlement.
- 6 Treaty Indian women from the same treaty who marry into a band do not give rise to an additional land entitlement, unless those women are either landless transfers or late adherents in their own right. Non-treaty Indian women who marry into a band do not give rise to an additional land entitlement under any circumstances.
- 7 The population of the band at the date the treaty is signed is not relevant to the determination of the quantum of the band's land entitlement.
- 8 The current population of a band is not relevant to the determination of the quantum of the band's land entitlement, and natural increases in the population of a band do not give rise to treaty land entitlement..
- 9 If a band receives a surplus of land at date of first survey, Canada is entitled to credit those surplus lands against subsequent landless transfers or late adherents.
- 10 Establishing a date-of-first-survey shortfall is not a prerequisite for a valid treaty land entitlement claim.

## **Issue 2**

Canada has not satisfied its treaty obligation to provide reserve land to the Fort McKay First Nation. The treaty conferred upon every Indian an entitlement to land exercisable either as a member of a band or individually by taking land in severalty. In the case of Indians who were members of the Band at that time, entitlement crystallized at the time of the first survey of the reserve in 1915. The quantum of land which the Band was entitled to in that

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first survey is a question of fact, determined on the basis of the actual Band membership, including Band members who were absent, on the date of first survey. The DOFS population based on the joint paylist analysis is 63 persons plus 7 absentees.

The treaty also conferred upon every band the entitlement to receive additional reserve land for every Indian who adhered to the treaty and joined that band subsequent to the DOFS. The quantum of additional land to which the Fort McKay First Nation is entitled as a result of such late adherents is a question of fact, determined on the basis that the entitlement crystallized when those Indians joined the Band. The Fort McKay First Nation had 11 late adherents between 1915 and 1949.

In addition, the treaty conferred upon the band the entitlement to receive additional reserve land for every Indian who transferred from one band to another, where the band from which that Indian transferred had never received land on his or her account. Prior to 1949 there were 20 landless transfers to the Fort McKay First Nation. As a result of marriages, 9 women – landless transfers in their own right – became members. The Fort McKay First Nation also received an additional 25 landless transfers in 1963. The total of landless transfers is then 54 persons.

The total population for treaty land entitlement purposes, including those on the paylist, absentees, late adherents, and landless transfers identified in the historical research, is 135, which gives a treaty land entitlement of 17,280 acres. The Fort McKay First Nation has been given 13,465 acres, enough reserve land for approximately 105 people. It is, therefore, owed a further 3815 acres.

**RECOMMENDATION**

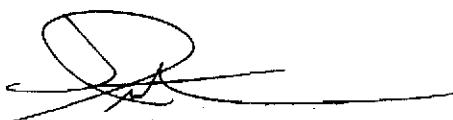
Having found that the Treaty 8 land entitlement of the Fort McKay First Nation has not been fully satisfied, we therefore recommend:

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**That the treaty land entitlement claim of the Fort McKay First Nation be accepted for negotiation under Canada's Specific Claims Policy.**

---

For the Indian Claims Commission



P.E. James Prentice, QC  
Commission Co-Chair



Carole T. Corcoran  
Commissioner

December 1995

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# APPENDIX A

## THE FORT MCKAY FIRST NATION TREATY LAND ENTITLEMENT INQUIRY

- |          |                                    |                  |
|----------|------------------------------------|------------------|
| <b>1</b> | <b>Decision to conduct inquiry</b> | May 17, 1994     |
| <b>2</b> | <b>Notices sent to parties</b>     | May 17, 1994     |
| <b>3</b> | <b>Planning conference</b>         | August 31, 1994  |
| <b>4</b> | <b>Community session</b>           | November 8, 1994 |

The Commission heard from the following witnesses: Chief Mel Grandjamb, Dawn Waquan, Neil Reddekopp, Clarence Boucher, Clara Shott, Julie Lindstrom, Francis Orr, Flora Grandjamb, Willie Grandjamb, Isabelle Ahyasou, Clara Wilson. The session was held at Fort McKay First Nation.

**5 Expert evidence sessions**

*November 18, 1994* *Calgary*

The Commission heard from the following witness: Sean Kennedy.

*December 16, 1994* *Ottawa*

The Commission heard from the following witness: Rem Westland, Director General, Specific Claims Branch, DIAND.

*March 16, 1995* *Edmonton*

The Commission heard from the following witness: Neil Reddekopp.

<b>6</b>	<b>Legal argument</b>	May 8 and 9, 1995
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Legal argument was heard at Fort McKay First Nation.

## APPENDIX B

### THE RECORD OF THE INQUIRY

The formal record for this inquiry is comprised of the following:

- Documentary record (2 volumes of documents, vol. 1, tabs 1-19, and vol. 2, tabs 20-27)
- Exhibits
- Transcripts (5 volumes, including the transcript of legal submissions)

The report of the Commission and letters of transmittal to the parties will complete the record for this inquiry.

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# APPENDIX C

## OFFICE OF NATIVE CLAIMS HISTORICAL RESEARCH GUIDELINES FOR TREATY LAND ENTITLEMENT CLAIMS

The general principle which applies in all categories of land entitlement claims is that each Treaty Indian Band is entitled to a certain amount of land based on the number of members. Conversely, each treaty Indian is entitled to be included in an entitlement calculation as a member of an Indian Band.

The following criteria are intended as guidelines in the research and validation process for treaty land entitlement claims. They have evolved from historical research done by the Office of Native claims (ONC) in consultation with the Federal Department of Justice, and in consultation with the research representatives of the claimant bands. Each claim is reviewed on its own merits keeping in mind these guidelines. However, as experience has taught, new and different circumstances have arisen with each claim. Therefore, the review process is not intended to be restricted to these guidelines.

Determining a Band's treaty land entitlement involves five basic steps:

- 1) Identification of the band and the applicable Treaty.
- 2) Determination of the relevant survey date.
- 3) Determination of the total lands received by the band.
- 4) Determination of the population base.
- 5) Overall entitlement calculations.

### **A Identification of Claimant Band**

The claimant Band may be known by its original name or a new name. The present day band is traced to the ancestral [sic] band which originally signed or adhered to treaty. Depending on which of the eleven numbered treaties the band signed or adhered to, the band is entitled to a reserve acreage based on a per capita allotment of 32 acres per member or 128 acres per member.

### **B Date for Entitlement Calculation**

The date to be used in the land quantum calculations is seldom clearly spelled out in any of the treaties. Some of the treaties refer to the laying aside [sic] or assignment of a reserve,



others mention the selection of land. Legal advice from the Department of Justice suggests that, although the treaties do not clearly identify the data for which a band's population base is to be determined for the land quantum calculations, the most reasonable date is not later than the date of first survey of land. It is Canada's general view that this is the date to be used to determine whether it has met its obligation under the treaties, to provide a quantum of land to an Indian Band based on the population of that Band at date of first survey.

Generally the date to be used is taken from the plan of survey of the first reserve set aside for the use and benefit of an Indian Band. This is the date which is noted by the surveyor as the date which he carried out the survey. Other indicators that ought to be noted include the date on which the surveyor signed the plan and the date noted in the surveyor's field book.

In some cases, the date which is chosen for entitlement purposes is not the date of the first actual survey for a band's reserve. A reserve may have been surveyed for the band, but it was never administered as a reserve. Furthermore, if the band rejects the survey and abandons the reserve after the survey, another reserve may be surveyed elsewhere at a later date and confirmed by Order-in-Council. Depending on the facts in each case, this could be considered as the date of first survey. The later survey date could be used as date of first survey because this is when the first reserve, officially recognized by Order-in-Council, was set aside for the band.

### **C Lands Received**

The amount of land received by a Band is determined by totalling the acreages of all Reserve lands set aside for the use and benefit of the Band in fulfillment of treaty land entitlement.

The acreage figure is taken from the Order in Council setting aside the reserve. Subsequent surveys are also relevant and ought to be considered. In cases where an Order-in-Council confirming the reserve did not state the acreage of the reserve it was taken from the plan of survey of the reserve.

In determining the total amount of land received by a Band, only those lands received as treaty entitlement were included. Lands received for the following reasons were not included in the total unless the historical record warranted it:

- i) Lands received in exchange for land surrendered for sale.
- ii) Lands received in compensation for lands taken for public purposes.
- iii) Lands purchased with Band funds.

### **D Population Base for the Determination of an Outstanding Land Entitlement**

An outstanding treaty land entitlement exists when the amount of land which a band has received in fulfillment of its entitlement is less than what the band was entitled to receive under the terms of the treaty which the band adhered or signed. This is referred to as a shortfall of land. There are two situations where a shortfall may exist. The first is when the land surveys fail to provide enough land to fulfill the entitlement. The second is when new

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members who have never been included in a land survey for a band, join a band that has had its entitlement fulfilled. The objective is to obtain as accurate a population of the band as is possible on the date that the reserve was first surveyed. The only records which recorded membership of Indians in the bands prior to 1951 were the annuity payroll and the occasional census. The annuity paylists are what is generally relied upon in order to discover the population at the date of first survey. This is done by doing an annuity payroll analysis.

In payroll analysis, all individuals being claimed for entitlement purposes are traced. This includes a review of all band paylists in a treaty area for the years that an individual is absent, if necessary. All agent's notations are investigated regarding the movements, transfers, payment of arrears, or any other event that affects the status of a band member. A ten to fifteen year period is usually covered depending on the individual case. This period would generally begin at the time the treaty was first signed, through the date of first survey and a number of years afterwards. Where a claim depends solely on new adherents or transfers from landless bands, the band memberships may be traced through to the present day.

The following principles are generally observed in an annuity payroll analysis:

***Persons included for entitlement purposes***

- 1) Those names on the payroll in the year of survey.
- 2) Absentees who are paid arrears. These are band members who are absent for the year of survey but who return and are paid arrears for that year.

Absentees who return and who are not paid arrears. These people must be traceable to: when they became band members and how long they remained as members during say, a ten to fifteen year period around the date of survey. Generally, continuity in band membership is required. Also it must be shown that they were not included in the population base of another band for treaty land entitlement purposes, while absent from the band.
- 3) New Adherents to treaty. These are Indians, who had never previously signed or adhered to treaty and consequently have never been included in an entitlement calculation.
- 4) Transfers from Landless Bands. These are Indians who have taken treaty as members of one band, then transferred to another band without having been included in the entitlement calculation of the original band, or of the band to which they have transferred. The parent band may not have received land, whereas the host band may have already had its entitlement fulfilled. These Indians are acceptable, as long as they have never been included in a land quantum calculation with another band.
- 5) Non-Treaty Indians who marry into a Treaty Band. This marriage, in effect, makes them new adherents to treaty.

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***Persons not included***

- 1) Absentees, new adherents and transfers from landless bands, who do not retain a reasonable continuity of membership in the band i.e: they are away most of the time. However, these are dealt with on a case by case basis and there may be circumstances which warrant the inclusion of a band member even though he may be absent for an extended period of time.
- 2) Where the agent's notes in the payroll simply states "married to non-treaty", those people are not included. They could be non native or métis and therefore ineligible.
- 3) Where the agents notation simply reads "admitted" (which often meant admitted to band and not to treaty) and no letter of admission to treaty can be found, these persons are excluded.
- 4) Persons who are not readily traceable i.e.: they seem to appear from nowhere and disappear in a similar fashion.
- 5) Persons who were included in the population base of another band for treaty land entitlement purposes.
- 6) Person names which are discovered to be fraudulent.

***Land Entitlement Claims Arising from Band Amalgamation***

There are cases where a present day band was formed as a result of the amalgamation of two or more bands. An outstanding land entitlement will occur when one or more of the component bands has a shortfall of land before amalgamation with the other band or bands, and that shortfall causes a shortfall to exist for the amalgamated band. The payroll analysis is done for the component band or bands which have a shortfall, employing the same principles previously described.

In cases where one or more of the component bands has a surplus of land, and this surplus is greater than the deficit of the other component band(s), then the entitlement of the amalgamated band has been fulfilled. The Department of Justice concurs with this view. The deficit component bands would have had full use of the surplus land as full members of the amalgamated band.

**E Calculation of a Shortfall**

This is a simple calculation where the most accurate population figure obtained from the payroll analysis, is multiplied by the per capita allotment of the appropriate treaty. Where the amount of land received is less than the calculated entitlement, a shortfall is said to exist and therefore an outstanding land entitlement is owed to the band. Where the land quantum received is equal to or exceeds this calculation, the entitlement has been fulfilled.

MAY 1983



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# **INDIAN CLAIMS COMMISSION**

## **INQUIRY INTO THE TREATY LAND ENTITLEMENT CLAIM OF THE KAWACATOOSE FIRST NATION**

### **PANEL**

Commission Co-Chair P.E. James Prentice, QC  
Commissioner Roger Augustine

### **COUNSEL**

For the Kawacatoose First Nation  
Stephen Pillipow

For the Government of Canada  
Bruce Becker

To the Indian Claims Commission  
Kim Fullerton  
Kathleen Lickers / Tom Gould

**MARCH 1996**



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## EXECUTIVE SUMMARY

The Commission has been asked to examine and report on whether the Government of Canada properly rejected the specific claim submitted by the Kawacatoose First Nation. The Kawacatoose First Nation adhered to Treaty 4 on September 15, 1874. Its reserve, Indian Reserve 88, located in the Touchwood Hills approximately 100 kilometres north of Regina, was surveyed in 1876. According to the formula contained in Treaty 4 of 128 acres per person, enough land was surveyed for 212 people: 27,200 acres. For a number of reasons, Kawacatoose argues that it is entitled to more land under the terms of Treaty 4 than it has received. The Kawacatoose claim therefore falls into the category of treaty land entitlement (TLE) claims.

This claim is both very simple and extraordinarily complex. The calculation to determine how much land an Indian band is entitled to under treaty is theoretically straightforward: (number of band members) x (acres per person) = TLE. This simple calculation is complicated by a number of problems: when is the calculation to be done; how many times is it to be done; who should be included as a member of the band; what happens if treaty Indians join the band after the reserve has been surveyed; what happens if insufficient land is surveyed in the first instance; what happens if the band's population *increases* after the reserve is surveyed; and what happens if the band's population *decreases* after the reserve is surveyed? Add to this list the fact that we are dealing with a problem that, in 1996, is 120 years old, and that the past practices of both Canada and First Nations towards resolving these problems have been inconsistent at best, and the complexity of the problem becomes clear. As will be evident from Part III of this Report, the history of treaty land entitlement in Saskatchewan is particularly complex.

This claim is further complicated because there is no agreement between Canada and the First Nation as to either the facts or the law. We must then make findings with respect to both. The parties did at least agree on the three issues before the Commission in this claim, and they are set out in full in Part II.

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**ISSUE 1: KAWACATOOSE'S DATE-OF-FIRST-SURVEY POPULATION**

The first issue is a factual one relating to the question of who were members of the Kawacatoose Band in the year of survey and thereby entitled to be included in the TLE equation. Two of the families that were paid treaty money or annuities at Fort Walsh in 1876 had the names of Long Hair (Paahoska) and Man That Runs (Wui Chas te too tabe). At that time, there were two bands with a similar name, Kawacatoose ("Poor Man Band") and the Lean Man ("Poor Man"). Kawacatoose is a Cree First Nation, and Lean Man is Assiniboine. It is reasonably clear that these two families were stragglers from one of these bands, but which one? Thirteen individuals were paid as members of these two families and, if they were in fact members of the claimant Kawacatoose, they ought to have been included in its TLE calculation. They were not.

The documentary evidence on this first issue was unclear, but the elders from Kawacatoose were very clear; they presented a compelling case that Long Hair and Man That Runs were members of Kawacatoose. After a close analysis of the evidence, we accept the evidence of the elders and find that the 13 members of the two families paid at Fort Walsh in 1876 under the heading "Poor Man" were members of Kawacatoose, and not the Assiniboine Poor Man Band. This is a key finding to the submission of Kawacatoose because, other considerations aside, it would mean that the First Nation has what is known as a "date-of-first-survey (DOFS) shortfall": that insufficient land had been surveyed for the number of band members at the time of survey, thereby making a valid claim based on Canada's present policy considerations. This point is dealt with under Issue 2.

However, we also find that five individuals in the Contourier family, who in 1883 were paid arrears for 1876 with Kawacatoose, had already been included in the TLE calculation for Gordon's Band and could not be counted a second time with Kawacatoose. After examining all the evidence that was presented about band membership, we have concluded that the DOFS population for Kawacatoose is 210, subject to further research that may be undertaken. Since sufficient land was surveyed for 212 people, we find that there was no DOFS shortfall in the calculation of the reserve for Kawacatoose.

**ISSUE 2: NATURE AND EXTENT OF TREATY LAND ENTITLEMENT**

The second issue relates to treaty interpretation and to matters of law. Simply put, the issue is whether certain treaty Indians who became members of Kawacatoose *after* the date of first survey give rise to an additional obligation

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on the part of Canada to set aside more reserve land on their account. The people in question fall into two groups: treaty Indians who adhered to treaty after 1876 and then became members of Kawacatoose, and treaty Indians who transferred into Kawacatoose from another band that had never had a TLE calculation and survey done at the time of the transfer. The first group are known as late adherents; the second as landless transfers. Women who marry into the band can also be included in these groups, but only if they are also either late adherents or landless transfers in their own right.

Since 1993 it has been Canada's position that a DOFS shortfall is an absolute prerequisite to a valid TLE claim and that no number of late adherents or landless transfers alone can open up the issue for recalculation. Canada will provide land for landless transfers and/or late adherents, but only if there was also a shortfall at date of first survey. The importance of the membership of the two families paid at Fort Walsh now becomes very clear: but for the problem with the Contourier family, the inclusion of those 13 band members would have resulted in a DOFS population of 215 members and a shortfall of land for three persons - resulting in a valid claim by Canada's method of calculation. In addition, Canada would have provided compensation for more than 70 members, since, by Canada's admission, there were 67 landless transfers and late adherents added to Kawacatoose after the reserve was surveyed in 1876.

However, as we found in the *Report on the Treaty Land Entitlement Claim of the Fort McKay First Nation* in Alberta, released in December 1995, we do not agree with Canada's assertion that treaty land entitlement must be based on a date-of-first-survey shortfall.

We find that the relevant provisions of Treaty 4 are very similar to the terms of Treaty 8, the treaty in question in the Fort McKay report. Although the factual circumstances of the Kawacatoose and Fort McKay First Nations differ somewhat, we conclude that they were alike in certain key respects: at the time of treaty, neither band had become a stable, self-contained unit, and it was recognized that many Indians, for some time to come, would not adhere to treaty, give up the traditional hunting way of life, move onto reserves, and become farmers.

Canada's interpretation of treaty means that those Treaty Indians who join a band after the date of first survey would never have any land set aside for them under the treaty unless there had been a miscalculation when the survey was done and there was a DOFS shortfall. Then, and only then, would late adherents and landless transfers have land surveyed on their behalf. We can-

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not believe that this outcome was understood, let alone agreed to, by the First Nation signatories to the treaty. For these reasons, we cannot reasonably conclude that the members of Kawacatoose, or any of the signatories of Treaty 4, would have been prepared to cede their rights to the huge area of land covered by the treaty on the basis of the rigid DOFS population approach that Canada has argued represents the full extent of its lawful obligation. We make the following central finding, as we did in the Fort McKay report:

The purpose, meaning, and intent of the treaty is that each Indian band is entitled to a certain amount of land based on the number of members, and each treaty Indian is entitled to be included in an entitlement calculation as a member of an Indian band.

As a result, Canada has not satisfied its treaty obligation to provide the requisite amount of reserve land to the Kawacatoose First Nation. Although Canada did survey sufficient land for the membership of Kawacatoose in 1876 when the reserve was first surveyed, the treaty also entitled the band to receive additional reserve land for every treaty Indian who adhered to the treaty and joined Kawacatoose subsequent to the date of first survey. The amount of additional land that Kawacatoose is entitled to as a result of new adherents is a question of fact, determined on the basis that the entitlement crystallized when those Indians joined the band. We find that a total of 43 individuals joined Kawacatoose as new adherents to treaty following the date of first survey, but, since neither party has expressed complete confidence in the numbers submitted by it or researched on its behalf, this figure is subject to such further research as the parties may agree to.

In addition, the treaty entitled Kawacatoose to receive additional reserve land for every Indian who transferred from one band to another, where the band from which that Indian transferred had not yet had a TLE calculation and survey done. There were 19 landless transfers to Kawacatoose, although this number is again subject to further research as agreed by the parties.

Finally, as a result of marriages, five women who were either new adherents or landless transfers in their own right became members of Kawacatoose. As with the preceding figures for new adherents and landless transfers, this number is also subject to further research.

As a result, we have concluded on a preliminary basis that the First Nation's treaty land entitlement claim, including individuals on the base payroll, absentees and arrears, new adherents, and landless transfers, should be as follows:

1876 base payroll	146
Fort Walsh families	13
Contourier family	0
Absentees and arrears	51
New adherents	43
Landless transfers	19
Eligible in-marrying women	5
<b>Total</b>	<b>277</b>

This figure gives rise to a treaty land entitlement of 35,456 acres. When the first survey area of 27,200 acres is set off against this treaty land entitlement, the Kawacatoose First Nation is owed an additional 8526 acres, or 13.32 square miles.

### ISSUE 3: SASKATCHEWAN FRAMEWORK AGREEMENT

The third issue has to do with the 1992 Saskatchewan Framework Agreement and whether that agreement gives rise to a separate legal right for Kawacatoose to have its treaty land entitlement claim validated. Part III and Part IV of this Report outline the complex details of the history of this agreement and its contents. The Framework Agreement emerged from: (a) the failure of the 1976 Saskatchewan Agreement; (b) the subsequent court action brought on behalf of the Saskatchewan First Nations that had been accepted for negotiation of treaty land entitlement claims pursuant to that agreement; and (c) the 1990 report and recommendations of the Office of the Treaty Commissioner for Saskatchewan. That Office had developed the "equity formula" as a fair and equitable means of resolving the outstanding treaty land entitlement claims of the Entitlement Bands.

The Framework Agreement was executed by Canada and the Province of Saskatchewan on September 22, 1992. The 26 Entitlement Bands, the Saskatchewan First Nations whose TLE claims had been validated by Canada, are also signatories to the agreement. Under the terms of the agreement, Canada and Saskatchewan agreed to pay on a cost-shared basis the sum of \$503 million over a period of 12 years, to enable the Entitlement Bands to acquire

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up to 1.7 million acres of land with reserve status, and to compensate rural municipalities and school divisions for tax losses.

In determining the area of land owed to each Entitlement Band under the terms of the Framework Agreement, the band's adjusted-date-of-first-survey (ADOFS) population forms the basis of the calculation. The final ADOFS population for each Entitlement Band was negotiated and agreed upon by Canada and the band. Mr. Rem Westland, then Director General of Specific Claims for Canada, confirmed to the Commission that the ADOFS population in the context of the Saskatchewan Framework Agreement comprises the DOFS population, new adherents to treaty, transfers from landless bands, and in-marrying treaty Indian women.

Issue 3 has been brought before this Commission because of an abrupt policy reversal that occurred in 1993. For at least a decade, from 1983 to 1993, TLE claims were researched, submitted, validated, and negotiated on the basis of the "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims" (the ONC Guidelines), prepared in May 1983 by Canada. Those guidelines offered a reasonable basis on which to achieve closure to TLE claims and included late adherents, landless transfers, and in-marrying women for validation purposes. In 1993 the Government of Canada revoked the guidelines and adopted a more restrictive interpretation of its obligation to the descendants of the Indians who signed the numbered treaties – the DOFS shortfall approach mentioned above.

Kawacatoose had begun to research its TLE claim in 1991, and had been provided with a copy of the ONC Guidelines by Canada to assist in preparing its claim submission. In April 1992 Kawacatoose wrote to Canada claiming an outstanding TLE obligation for additional reserve land, based on the ONC Guidelines. In September 1992 the Framework Agreement was signed, with Kawacatoose still not having received word from Canada on its TLE claim. In January 1994 Canada advised counsel for Kawacatoose of the preliminary federal position that there was no DOFS shortfall in the land surveyed for the First Nation.

Since the payroll analysis prepared for Kawacatoose had been based on the ONC Guidelines, the preliminary rejection of the claim came as a surprise to the First Nation. Meetings were quickly convened between representatives of the First Nation and the Department of Indian Affairs and Northern Development's (DIAND) Treaty Land Entitlement Branch on February 1, 1994, and between Chief Richard Poorman and the Minister of Indian Affairs and Northern Development, the Honourable Ron Irwin, on February 9, 1994.

In these meetings it was explained to the First Nation that, since 1993, the treaty land entitlement process involves two steps. The first step is the validation of a First Nation's claim based on the DOFS population shortfall, which included the base payroll figures together with absentees and arrears but excluded late adherents, landless transfers, and in-marrying women. Once the First Nation has satisfied DIAND that there was a DOFS population shortfall, the second step is DIAND's acceptance of the claim for negotiation and settlement. Only in the second, settlement phase is DIAND prepared to consider the three additional categories of people so as to arrive at a mutually agreeable settlement of the claim. On February 15, 1994, Canada's rejection of its TLE claim was conveyed in writing to Kawacatoose.

In the course of this inquiry, Canada's own officials admitted that if Kawacatoose had submitted its claim earlier, it would have been validated pursuant to the ONC Guidelines and would most likely be an Entitlement Band today. In addition, we find that a number of Entitlement Bands had their TLE claims *validated* solely on the basis of post-DOFS additions alone to band membership, meaning there was no DOFS shortfall involved in those TLE claims. In contrast, the 1993 reversal of policy has left Kawacatoose with a rejected claim and an inquiry before our Commission.

What Kawacatoose is claiming in Issue 3 is that Canada is obliged by the terms of the Framework Agreement itself to validate its TLE claim, despite the reversal of policy, because other bands had their claims validated on similar facts to those of Kawacatoose. The First Nation is also arguing that Canada is obliged to provide the same levels of compensation as are afforded pursuant to the Framework Agreement.

In our Report we find that the Framework Agreement itself does not give non-Entitlement Bands an independent basis for validation. We do not agree with the First Nation's submissions that the terms of section 17.03 of the Framework Agreement impose a fiduciary or contractual obligation on Canada to accept the Kawacatoose claim for negotiation, or that Canada is estopped from denying an obligation to validate that claim.

Under Issue 2 we concluded that Kawacatoose has substantiated its claim for outstanding treaty land entitlement on the same basis as the Entitlement Bands – that is, in accordance with the terms of Treaty 4. Once validation of the claim of a non-Entitlement Band has occurred, as we recommend Canada do in the present case, section 17.03 would apply. This section stipulates that Canada and Saskatchewan will support the extension of the principles of settlement contained in the Framework Agreement to bands whose

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claims have been validated. This obligation was acknowledged by both the solicitor who negotiated the Framework Agreement on Canada's behalf and present counsel for Canada.

Although Kawacatoose is not a party to the Framework Agreement and is not in a position to enforce the obligations of Canada and Saskatchewan under section 17.03, we take from Canada's submissions regarding the high degree of importance it attaches to its obligations under the Framework Agreement that it will consider itself honour bound to fulfil the obligations to non-Entitlement Bands set forth in section 17.03. Should Canada fail to live up to its obligations in that section, we expect that the Entitlement Bands, as the parties who sought and obtained that contractual term, would be able to enforce the provision, and we note that those bands have already endorsed a resolution in support of Kawacatoose and other First Nations with outstanding treaty land entitlement claims.

### **RECOMMENDATIONS**

Having found that the land entitlement of the Kawacatoose First Nation has not been fully satisfied in accordance with the terms of Treaty 4, we therefore make the following recommendations:

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#### **RECOMMENDATION 1**

**That the treaty land entitlement claim of the Kawacatoose First Nation be accepted for negotiation under Canada's Specific Claims Policy.**

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#### **RECOMMENDATION 2**

**In accordance with section 17.03 of the Saskatchewan Framework Agreement, that Canada and Saskatchewan support the extension of the principles of settlement contained in that agreement to the Kawacatoose First Nation in order to fulfil the outstanding treaty land entitlement obligations to the First Nation.**

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# PART I

## THE COMMISSION MANDATE AND SPECIFIC CLAIMS POLICY

### THE MANDATE OF THE INDIAN CLAIMS COMMISSION

The mandate of this Commission to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued under the Great Seal to the Commissioners on September 1, 1992. It directs:

that our Commissioners on the basis of Canada's Specific Claims Policy . . . by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:

- (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
- (b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.<sup>1</sup>

This is an inquiry into a claim which was rejected by the Minister of Indian Affairs. The claimant is the Kawacatoose First Nation ("Kawacatoose" or the "First Nation"), which, at the time it adhered to Treaty 4 on September 15, 1874, was also referred to as the "Poor Man" Band. Indian Reserve (IR) 88, comprising an area of 42.5 square miles (27,200 acres)<sup>2</sup> located in the

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1 Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991 (Consolidated Terms of Reference, ICC Exhibit 5, Tab 3).

2 Surveyor William Wagner's field book states that the reserve measured "27,040 acres," which translates to 42.25 square miles (c. September 1, 1876, in DIAND, Land Registry, Field Book #684, microbook 1247, ICC Documents, p. 53). This is the acreage on which the Kawacatoose claim submission was based in April 1992 (Stephen Phillipow, Phillipow & Company, Saskatoon, to Al Gross, Treaty Land Entitlement, Dept. of Indian Affairs, April 15, 1992, ICC Documents, pp. 240-41). The actual survey plan (c. September 1, 1876, ICC Documents, p. 54) shows the area as 27,040 acres, whereas the Order in Council confirming the reserve (May 17, 1889, ICC Documents, p. 161) gives the acreage as "42.5 square miles," which translates into 27,200 acres. In February 1994 Canada undertook to review the evidence relating to reserve size and on May 18, 1994, wrote that "further research has confirmed that the band received 27,200 acres of reserve land" (A.J. Gross, Director, Treaty Land Entitlement, DIAND, to Chief Richard Poorman, Kawacatoose Band, May 18, 1994, ICC Documents, p. 407). At the ICC Planning Conference in July 1994, counsel for Kawacatoose "stated that he was not in a position to comment on whether Canada's research was correct but that for the present purposes we could proceed on the presumption that it was" (Planning Conference Summary, July 8, 1994, ICC file 2107-15-1).

Touchwood Hills approximately 100 kilometres north of Regina, was surveyed for the First Nation in September 1876. This reserve was confirmed by Order in Council on May 15, 1889.<sup>3</sup>

The claim came before the Commission in the following manner. In response to a request from Kawacatoose for information to assist the First Nation in developing a claim for outstanding treaty land entitlement, Janine Dunlop of the Department of Indian Affairs and Northern Development (DIAND) provided the First Nation on May 13, 1991, with two key documents before the Commission in this inquiry: Kawacatoose's treaty annuity paylists for 1875 and 1876, and a paper produced by DIAND's Office of Native Claims (ONC) in May 1983 entitled "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims" (1983 ONC Guidelines).<sup>4</sup> The First Nation was also encouraged to contact the Federation of Saskatchewan Indian Nations (FSIN) for additional information and assistance in developing the claim.<sup>5</sup>

On April 15, 1992, counsel for Kawacatoose wrote to Al Gross, DIAND's Director of Treaty Land Entitlement, enclosing a summary of paysheet analysis for the First Nation, an authorizing Band Council Resolution, and a report dated March 1992 by Steven Sliwa regarding the date of first survey (DOFS) for Kawacatoose.<sup>6</sup> Counsel contended that, based on these materials, the First Nation had been allocated less land than it was entitled to receive under the terms of Treaty 4, and therefore had an outstanding treaty land entitlement. Mr. Gross was requested to review the information regarding its accuracy and, upon confirmation, to commence negotiations immediately to settle the outstanding claim.

This letter was forwarded to Mr. Gross in the context of the ongoing negotiations which ultimately led to the execution on September 22, 1992, of the Saskatchewan Treaty Land Entitlement Framework Agreement. The parties to the Framework Agreement were Canada, the Province of Saskatchewan, and those 26 Saskatchewan First Nations (known as Entitlement Bands) whose claims for outstanding treaty land entitlement (TLE) under the terms of Treaties 4, 6, or 10 Canada had, prior to the date of the Framework Agreement,

3 Order in Council PC, May 17, 1889 (ICC Documents, pp. 157-61).

4 DIAND, "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims," May 1983 (ICC Documents, pp. 213-17).

5 Janine Dunlop, Claims Analyst, Specific Claims Branch, DIAND, to Bill Strongarm, Kawacatoose Band, May 13, 1991 (ICC Exhibit 34).

6 The letter dated April 15, 1992, and its enclosures are found at ICC Documents, pp. 232-48. The report by Steven Sliwa is entitled "Kawacatoose Band #88 Date of First Survey" (Federation of Saskatchewan Indians, March 1992).

“accepted for negotiation” or “validated.”<sup>7</sup> Kawacatoose sought to have its claim accepted for negotiation so that it too could qualify as an Entitlement Band under the Framework Agreement. However, its claim for outstanding TLE was not accepted for negotiation prior to the execution of the Framework Agreement and, today, Kawacatoose remains without status as an Entitlement Band.

Based on the analysis in the Sliwa report, counsel for Kawacatoose identified the year 1876 as the First Nation’s date of first survey and the 1876 treaty annuity payroll as the appropriate “base payroll” upon which the initial survey had likely been based. Using these dates and the 1983 ONC Guidelines as the foundation, the First Nation’s subsequent payroll analysis concluded that the DOFS population was 243 people, as follows:

Number Paid Annuities [in] 1876	160
Absentees who were paid arrears	55
New Adherants [sic] and Landless Transfers	26
Marriages to Non-Treaty Women	2
<b>TOTAL</b>	<b>243</b>

This analysis of individuals with treaty land entitlement in Kawacatoose’s payroll used the categories outlined in the 1983 ONC Guidelines:

Persons included for entitlement purposes:

- 1) Those names on the payroll in the year of survey.
- 2) Absentees who are paid arrears. These are band members who are absent for the year of survey but who return and are paid arrears for that year.  
Absentees who return and who are not paid arrears. These people must be traceable to: when they became band members and how long they remained as members during say, a ten to fifteen year period around the date of survey. Generally, continuity in band memberships is required. Also it must be shown that they were not included in the population base of another band for treaty land entitlement purposes, while absent from the band.
- 3) New Adherents to treaty. These are Indians, who had never previously signed or adhered to treaty and consequently have never been included in an entitlement calculation.

7 The 26 original Entitlement Bands were the Keeseekoose, Muskowekwan, Ochapowace, Okanese, Piapot, Star Blanket, Yellowquill, Beardy’s & Okemasis, Flying Dust, Joseph Bighead, Little Pine, Moosomin, Mosquito/Grizzly Bear’s Head, Muskeg Lake, One Arrow, Onion Lake, Pelican Lake, Peter Ballantyne, Poundmaker, Red Pheasant, Saulteaux, Sweetgrass, Thunderchild, Witcheakan Lake, Canoe Lake, and English River Bands.

- 4) Transfers from Landless Bands. These are Indians who have taken treaty as members of one band, then transferred to another band without having been included in the entitlement calculation of the original band, or of the band to which they have transferred. The parent band may not have received land, whereas the host band may have already had its entitlement fulfilled. These Indians are acceptable, as long as they have never been included in a land quantum calculation with another band.
- 5) Non-Treaty Indians who marry into a Treaty Band. This marriage, in effect, makes them new adherents to treaty.<sup>8</sup>

Based on the Treaty 4 formula of 128 acres per person, Kawacatoose claimed that it was entitled to 31,104 acres but had received enough land for only 211 people – 27,040 acres – resulting in a DOFS shortfall of 4064 acres.

In response to the First Nation's request, DIAND's Specific Claims West Branch commissioned researcher Theresa Ferguson to prepare a report dealing with the Kawacatoose DOFS population. This report, completed on July 31, 1992, arrived at a total population of 289 in the following categories:

Recommended Count [i.e., members present and paid at DOFS]	146
Questionable	13
Arrears/Absentees	56
Questionable	7
New Adherents	43
Landless Band Transfers	19
Eligible In-marrying Non-Treaty Women	5
<b>TOTAL</b>	<b>289<sup>9</sup></b>

Following this report, further research was undertaken by Canada to clarify the status of the 13 "questionable" members of Kawacatoose at date of first survey. Eventually, Canada confirmed that it was appropriate to use the 1876 paylists for determining the DOFS population, but it concluded that the 13 questionable individuals – from two Assiniboine families named Man That Runs and Long Hair – had been members of the similarly named Assiniboine Poor Man (or Lean Man) Band and not of the Kawacatoose (Poor Man) Band. As a result, Canada advised counsel for Kawacatoose that the prelimi-

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<sup>8</sup> DIAND, "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims," May 1983 (ICC Documents, pp. 215-16).

<sup>9</sup> Theresa A. Ferguson, "Report on the Kawacatoose Band Date of First Survey Population," July 31, 1992 (ICC Documents, p. 251). The report is marked "Without Prejudice" and includes a disclaimer on its front cover that it "does not necessarily represent the views of the Government of Canada."

nary federal position was that there was no DOFS shortfall in the land surveyed for the First Nation.<sup>10</sup>

Since the payroll analysis prepared for Kawacatoose had been based on the 1983 ONC Guidelines and had indicated a DOFS shortfall of land for some 32 people, the preliminary rejection of the claim on the basis of the exclusion of the 13 members of the Man That Runs and Long Hair families came as a surprise to the First Nation. Meetings were quickly convened between representatives of the First Nation and DIAND's Treaty Land Entitlement Branch on February 1, 1994, and between Chief Richard Poorman and the Minister of Indian Affairs and Northern Development, the Honourable Ron Irwin, on February 9, 1994.

In these meetings it was explained to the First Nation that the treaty land entitlement process involved two steps. The first step was the validation of a First Nation's claim based on the DOFS population, which included the base payroll figures together with absentees and arrears but excluded late adherents, landless transfers, and in-marrying women. Once the First Nation had satisfied DIAND that the DOFS population surpassed the threshold figure represented by the number of people for whom land had actually been surveyed – in this case, 212 – the second step was DIAND's acceptance of the claim for negotiation and settlement. In the settlement phase, DIAND was prepared to consider the three additional categories of people in order to arrive at a mutually agreeable compromise.<sup>11</sup> This position, together with undertakings to review certain matters, was conveyed in writing to Kawacatoose on February 15, 1994:

Canada's position in regard to the Kawacatoose Treaty Land Entitlement is that the Date of First Survey population is confirmed as 202 and that sufficient land was set apart as reserve for this population. It was agreed, however, at the Saskatoon meeting that Specific Claims West and Justice would review the evidence in the following areas:

- (1) the paylists used in Cypress Hills in 1876;
- (2) a further analysis of the two families who appear on paylists prior to 1876 with one family again appearing after 1876;
- (3) confirmation as to whether or not the reserve that was set aside was actually 42.5 square miles; and

<sup>10</sup> Jane-Anne Manson, Assistant Negotiator, Specific Claims West, DIAND, to Stephen Pillipow, Pillipow & Company, Saskatoon, January 28, 1994 (ICC Documents, pp. 400-01).

<sup>11</sup> Ian D. Gray, Counsel, DIAND Legal Services, Specific Claims West, to Lorne Koback, Director, Treaty Land Entitlement, Saskatchewan Region, DIAND, February 11, 1994 (ICC Documents, pp. 403-04).

- (4) a review of other files to determine whether any other bands were validated based on an Adjusted Date of First Survey population.

Once this evidence is reviewed and compiled, Jane Anne Manson of Specific Claims West and Ian Gray of Justice will meet with the Band to establish a final position.<sup>12</sup>

On March 28, 1994, counsel for Kawacatoose wrote to the Indian Claims Commission to request that the Commission review Canada's rejection of the First Nation's claim.<sup>13</sup> Counsel noted that, although Kawacatoose had not received a formal rejection of its claim, "the Band has been advised on a number of occasions that the federal preliminary position is that the Band's Claim to outstanding Treaty Land Entitlement will not be accepted for negotiation." Counsel's request was eventually ratified and authorized by way of a Band Council Resolution which was subsequently provided to the Commission.<sup>14</sup>

Formal rejection of the Kawacatoose claim was ultimately delivered to Chief Poorman on May 18, 1994, in a letter from Al Gross, Director, Treaty Land Entitlement, DIAND:

This letter is to formally advise you that the Kawacatoose Indian Band's TLE claim does not meet our acceptance criteria, and is, therefore, rejected.

The federal government and the band agree on the Date of First Survey as 1876, and further research has confirmed that the band received 27,200 acres of reserve land, (sufficient land for 212 persons). It is the federal view that the preponderance of evidence indicates that the band received a TLE surplus rather than a shortfall and therefore does not have a TLE shortfall.<sup>15</sup>

The Commissioners reviewed the Kawacatoose claim on May 6 and 7, 1994, and agreed to conduct the inquiry requested by the First Nation. Formal notice of this decision was conveyed to the parties on May 17, 1994.<sup>16</sup>

The Commission is conducting this inquiry to inquire into and report on whether, on the basis of Canada's Specific Claims Policy, the Kawacatoose First Nation has a valid claim for negotiation.

12 Jack Donegani, Associate Regional Director General, Saskatchewan Region, DIAND, to Chief Richard Poorman, February 15, 1994 (ICC Documents, pp. 405-06).

13 Stephen Pillipow, Pillipow & Company, Saskatoon, to Indian Claims Commission, Ottawa, March 28, 1994 (ICC Exhibit 5, tab 11).

14 Chief Richard Poorman to Indian Claims Commission, April 28, 1994 (ICC file 2107-15-1).

15 A.J. Gross, Director, Treaty Land Entitlement, to Chief Richard Poorman, Kawacatoose Band, May 18, 1994 (ICC Documents, pp. 407-08).

16 Dan Bellegarde and James Prentice, Co-chairs, Indian Claims Commission, Ottawa, to Chief and Council, Kawacatoose First Nation, Ron Irwin, Minister of Indian Affairs, and Allan Rock, Minister of Justice, May 17, 1994 (ICC Exhibit 5, tab 7).

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## THE SPECIFIC CLAIMS POLICY

Under the terms of the Commission's mandate issued September 1, 1992, this Commission is directed to report on the validity of rejected claims such as that submitted to it by the Kawacatoose First Nation "on the basis of Canada's Specific Claims Policy." That policy is set forth in a 1982 booklet published by DIAND entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.<sup>17</sup>

In this inquiry, much of the debate has focused on differences in the opinions held by Canada and the First Nation with respect to Canada's "lawful obligation" to provide land to the First Nation in fulfilment of its entitlement to land under the terms of Treaty 4. Although the term "lawful obligation" is used in *Outstanding Business*, it is not defined and remains undefined by Canada or the courts. However, it is worth quoting from the discussion of "lawful obligation" in *Outstanding Business* with a view to considering Kawacatoose's claim in its proper context:

The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.

A lawful obligation may arise in any of the following circumstances:

- i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
- ii) A breach of obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.
- iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
- iv) An illegal disposition of Indian land.

...

In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:

- i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.

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<sup>17</sup> DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted in [1994] 1 ICCP 171-85.

- ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.<sup>18</sup>

As we have noted previously, the list of examples enumerated in *Outstanding Business* is not intended, in our view, to be exhaustive.

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<sup>18</sup> DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20.



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## PART II

### ISSUES

Counsel for the parties to this inquiry are to be commended for their efforts prior to the inquiry to define clearly the scope of the issues to be considered by the Commission. The Commission is to identify whether Canada owes an outstanding lawful obligation to Kawacatoose, but this task has been focused by the following three questions placed before the Commission by agreement of the parties:

- 1 Are the two families who appear on the 1876 treaty payroll for Fort Walsh (Paahoska/Long Hair and Wui Chas te too tabe/Man That Runs) members of the Kawacatoose (Poor Man Band) First Nation or the Lean Man (Poor Man) First Nation?
- 2 Assuming, for the purposes of this inquiry, that the date-of-first-survey formula for determining outstanding treaty land entitlement is the appropriate formula to be applied and without prejudice to the position that other formulas are applicable under the terms of Treaty 4, does the First Nation have an outstanding treaty land entitlement on the basis that the additions (new adherents, landless transfers, and marriages to non-treaty women) to the First Nation after the First Nation's date of first survey:
  - (a) are entitled to land under the terms of Treaty 4; and/or
  - (b) are to be counted in establishing the First Nation's date-of-first-survey population to determine if the First Nation has an outstanding treaty land entitlement?
- 3 Has the First Nation established, pursuant to Article 17 of the Saskatchewan Treaty Land Entitlement Framework Agreement, an outstanding treaty land entitlement on the same or substantially the same basis as the Entitlement Bands which are party to the Framework Agreement?

During the course of these proceedings, counsel for Canada objected to having the third issue considered by the Commission on the basis that an allegation that Canada would ignore its obligations under the Framework Agreement so soon after that document was signed would prejudice Canada's ability to have a fair hearing before the Commission. Counsel also contended that the issue was clearly without foundation and that it could be dealt with on a preliminary basis, thereby saving the time and expense of calling witnesses and documentary evidence to address it.<sup>19</sup>

It was our view, however, that counsel for the First Nation should be given full scope to develop this third issue, particularly in light of the interest expressed by other First Nations. It also appeared to us that evidence on the second and third issues might overlap to a significant degree. For these reasons we ruled that we would entertain evidence and argument relating to the third issue. This decision was communicated to the parties on March 8, 1995.<sup>20</sup>

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<sup>19</sup> Ian D. Gray, Counsel, DIAND Legal Services, to Indian Claims Commission, September 12, 1994; and Gray to Indian Claims Commission, October 5, 1994 (ICC file 2107-15-1).

<sup>20</sup> Grant Christoff, Associate Legal Counsel, Indian Claims Commission, to Stephen Pillipow, Pillipow & Company, and Ian Gray, Department of Justice, Specific Claims West, March 8, 1995 (ICC file 2107-15-1).

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## PART III

### THE INQUIRY

In this part of the report, we will review the relevant historical evidence. The Commission has reviewed a large volume of documentary evidence, as well as evidence from community members and experts. At the community session on the Kawacatoose Reserve in Raymore, Saskatchewan, on November 15, 1994, the Commission heard from Kawacatoose elders Elsie Machiskinic, Pat Machiskinic, Fred Poorman, John Kay, and Alec Kay, as well as a panel of experts from the Office of the Treaty Commissioner (OTC). The panel, Howard McMaster, Peggy Brizinski, Jayme Benson, and Marion Dinwoodie, presented the results of their research into the two families whose membership in the First Nation forms the substance of the first issue in this inquiry.

In a subsequent joint session with the Fort McKay First Nation held on November 18, 1994, in Calgary, Alberta, the Commission heard evidence from Sean Kennedy, currently a private consultant to Indian organizations and bands and formerly a member of the Specific Claims Branch, DIAND. Mr. Kennedy was also one of the drafters of the 1983 ONC Guidelines.

The Commission held a second joint session with Fort McKay on December 16, 1994, in Ottawa, during which the evidence of Rem Westland, Director General, Specific Claims Branch, DIAND, was heard. Mr. Westland testified in relation to Specific Claims Policy and the criteria and process for accepting treaty land entitlement claims for negotiation.

Two additional joint sessions were conducted in Saskatoon, Saskatchewan, on May 24 and 25, 1995, with representatives from the Kahkewistahaw and Ocean Man First Nations in attendance. Testifying were Kenneth Tyler, at present counsel with the Constitutional Law Branch of Manitoba's Department of Justice and formerly in a similar position with the Government of Saskatchewan as well as a researcher and consultant on land claims issues; Dr. Lloyd Barber, the chief negotiator for the FSIN on the Saskatchewan Framework Agreement; David Knoll, counsel for the FSIN during the Framework Agreement negotiations; James Gallo, at present the Manager of Treaty Land Enti-

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tlement and Claims, Lands and Trusts Services, for DIAND, Manitoba Region, and formerly a researcher on treaty land entitlement for the Manitoba Indian Brotherhood who had assisted in the preparation of the Report of the Treaty Commissioner which was entered as Exhibit 4 in this inquiry; and James Kerby, counsel to Canada during the Saskatchewan Framework Agreement negotiations. The Commission also heard evidence from Peggy Brizinski and Jayme Benson of the OTC with respect to additional research on the two Fort Walsh families and general treaty land entitlement issues.

Counsel for Canada and Kawacatoose each submitted written arguments to the Commission in October 1995 prior to making oral submissions at the final session in Saskatoon on October 24, 1995. A list of the written submissions, together with all documentary evidence, transcripts of the foregoing sessions, the balance of the record of this inquiry, and details of the inquiry process, can be found in Appendix A of this report.

## HISTORICAL BACKGROUND

### Treaty 4

The early 1870s represent a period of great transition among the Indian nations that resided within the 75,000 square mile area of Treaty 4. The disappearance of the buffalo had been foreseen, white settlers were moving into the area, and some bands were taking steps to convert from the life of "plains buffalo hunters to reserve agriculturalists."<sup>21</sup> Other bands were becoming more nomadic, moving freely back and forth across the U.S. border in pursuit of buffalo – a staple of the aboriginal diet and way of life. However, the increasing scarcity of buffalo led to periods of hardship and starvation, as well as greater competition and, ultimately, intertribal warfare over the remaining animals. As noted in the report prepared for this inquiry by the OTC:

Conflict between Assiniboine, Blackfoot, Gros Ventre, Crow and Sioux was common in the nineteenth century as well as conflict between Indians and non-Indians. The white settlers were not sympathetic to the plight of the Indians and often ignored their rights. The Indian practice of horse stealing, which was common between tribes, angered whites. The illicit whisky trade in which traders sold whisky to the Indians in exchange for buffalo robes or other commodities further exacerbated the violence.

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21 Steven Sliwa, "Kawacatoose Band #88 Date of First Survey" (Federation of Saskatchewan Indians, March 1992), p. 2 (ICC Documents, p. 233)

The Cypress Hills massacre was an example of the type of violence that occurred in this period.<sup>22</sup>

Moreover, the survey operations of the Boundary Commission and the steps associated with erecting a proposed telegraph line west of Fort Garry were starting to affect this territory, "all which proceedings are calculated to further unsettle and excite the Indian mind, already in a disturbed condition. . . ."<sup>23</sup>

Alexander Morris was Lieutenant Governor of the area which then comprised Manitoba and the North-West Territories, including present-day Saskatchewan. Together with David Laird, the federal Minister of the Interior, and W.J. Christie, a retired factor with the Hudson's Bay Company, Morris was commissioned by the Government of Canada to make treaties with Indian nations in the southern "Fertile Belt."

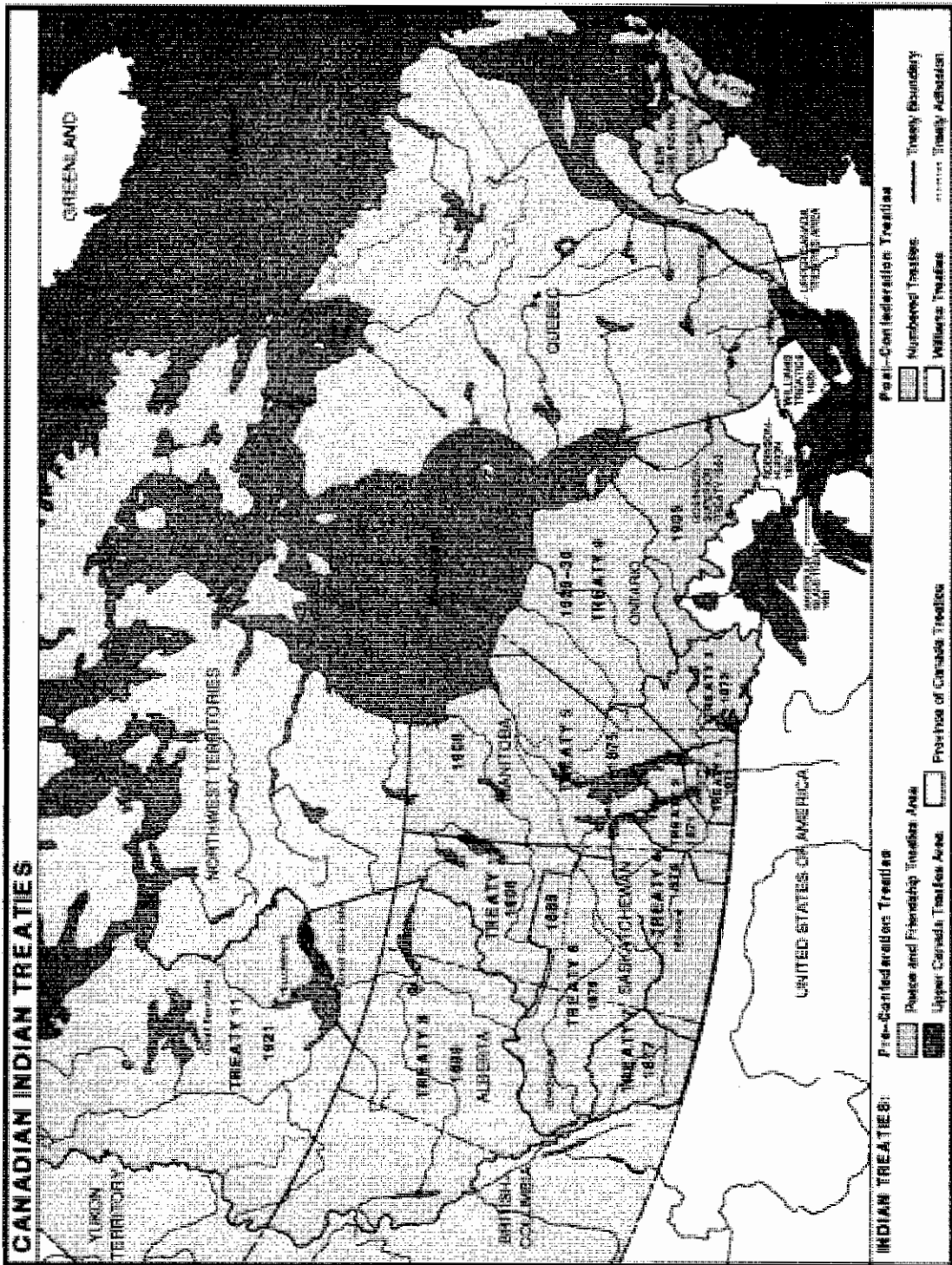
At Lake Qu'Appelle in September 1874, the three Commissioners negotiated with the assembled Chiefs for six days to encourage the initially reluctant Indian leaders to accept the benefits of treaty in exchange for ceding Indian rights in the lands encompassed by Treaty 4. Morris reported the concerns expressed by the Chiefs at these meetings, particularly over what was perceived by the Indians to be the unfairly advantageous position of the Hudson's Bay Company at that time, but also over the rights of present and future generations of the aboriginal peoples. On September 11, 1874, the third day of the conference, Morris gave the Chiefs the following assurances:

The Queen cares for you and for your children, and she cares for the children that are yet to be born. She would like to take you by the hand and do as I did for her at the Lake of the Woods last year. We promised them and we are ready to promise now to give five dollars to every man, woman and child, as long as the sun shines and water flows. We are ready to promise to give \$1,000 every year, for twenty years, to buy powder and shot and twine, by the end of which time I hope you will have your little farms. If you will settle down we would lay off land for you, a square mile for every family of five. . . .<sup>24</sup>

22 Office of the Treaty Commissioner, Draft Research Report, "Status of Two Assiniboine Families, North Assiniboine History and Demographics" (November, 1994) (ICC Exhibit 2, vol. 1, tab A-4, p. 3).

23 Order in Council PC No. 944, July 23, 1874, in *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), p. 3 (ICC Exhibit 28).

24 Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint, Toronto: Coles, 1971), 92-93 (ICC Documents, p. 12).



The next day Morris stated:

The Queen has to think of what will come long after to-day. Therefore, the promises we have to make to you are not for to-day only but for to-morrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the oceans. When you are ready to plant seed the Queen's men will lay off Reserves so as to give a square mile to every family of five persons. . . .<sup>25</sup>

On September 15, 1874 – the final day of the conferences – the Commissioners convinced the Indians to sign Treaty 4, with Morris reported to have said:

I know you are not all here. We never could get you all together, but you know what is good for you and for your children. When I met the Saulteaux last year we had not 4,000 there, but there were men like you who knew what was good for themselves, for their wives, for their children, and those not born. I gave to those who were there, and they took my hand and took what was in it, and I sent to those who were away, and I did for them just as I did for those who were present. It is the same to-day. What we are ready to give you will be given to those who are not here.<sup>26</sup>

Thirteen Indian Chiefs, including Kawacatoose, signed Treaty 4 that day. The key provisions of the treaty to be considered by the Indian Claims Commission are as follows:

And whereas the Indians of the said tract, duly convened in Council as aforesaid, and being requested by Her Majesty's said Commissioners to name certain Chiefs and Headmen, who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for their faithful performance by their respective bands of such obligations as shall be assumed by them the said Indians, have thereupon named the following persons for that purpose, that is to say: . . . Ka-wa-ca-toose, "The Poor Man" (Touchwood Hills and Qu'Appelle Lakes). . . .

And whereas the said Commissioners have proceeded to negotiate a treaty with the said Indians, and the same has been finally agreed upon and concluded as follows, that is to say:—

The Cree and Saulteaux Tribes of Indians, and all other the [sic] Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the

25 Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint, Toronto: Coles, 1971), 96 (ICC Documents, p. 14).

26 Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint, Toronto: Coles, 1971), 117 (ICC Documents, p. 24).

Queen, and her successors forever, all their rights, titles and privileges whatsoever to the lands included within the following limits. . . .

And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families. . . .

As soon as possible after the execution of this treaty Her Majesty shall cause a census to be taken of all the Indians inhabiting the tract hereinbefore described, and shall, next year, and annually afterwards for ever, cause to be paid in cash at some suitable season to be duly notified to the Indians, and at a place or places to be appointed for that purpose, within the territory ceded, each Chief twenty-five dollars; each Headman, not exceeding four to a band, fifteen dollars; and to every other Indian man, woman and child, five dollars per head; such payment to be made to the heads of families for those belonging thereto, unless for some special reason it be found objectionable.<sup>27</sup>

The treaty also provided that members of signatory bands would be entitled to receive cash annuities, a yearly allotment of ammunition and twine, and material aid in the form of farm implements and livestock. The farm implements and livestock, together with a band's allocation of reserve land, were important to enable the band to develop a new economy based on agriculture,<sup>28</sup> but were not to be distributed without appropriate steps being taken towards actually implementing the new economy. As Indian Agent Angus McKay subsequently advised one band, which did not want its reserve surveyed in the absence of one of the band's headmen, "they would receive no cattle nor anything else except their rations, ammunition, twine and tobacco as the treaty provided that until they had their reserves marked out and had stables and hay for the cattle they were not to get any."<sup>29</sup>

### **Survey of Indian Reserve 88**

Some bands were already incorporating agriculture into their economy and federal authorities took this into consideration. In July 1875 W.J. Christie was "appointed Indian Commissioner to pay Annuities & locate Reserves for Indians, according to the Terms and conditions of Treaty No. 4, made by Her Majesty's Commissioners with the Indians at Qu'Appelle Lakes in September

27 *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 5-7 (ICC Exhibit 28).

28 Steven Sliwa, "Kawacatoose Band #88 Date of First Survey" (Federation of Saskatchewan Indians, March 1992), p. 5 (ICC Documents, p. 236).

29 Angus McKay, Indian Agent, Department of Indian Affairs, to Superintendent General of Indian Affairs, October 14, 1876, National Archives of Canada [hereinafter NA], RG 10, vol. 3642, file 7581 (ICC Documents, p. 82).



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last.”<sup>30</sup> Kawacatoose was one of the Chiefs who indicated his readiness to settle down to farming. Early in July 1875 he sent a messenger to the Lieutenant Governor at Fort Garry:

an Indian messenger had been sent down by the Chief “Poor Man” from the Touchwood Hills to Governor Morris, wanting cattle & agricultural implements, as they had (or wished) to commence to cultivate the soil, on their intended Reservation. . . . [H]e was told, that according to the Terms of the Treaty, cattle and agricultural implements were only to be given, when they were actually located on their Reserves.<sup>31</sup>

While making annuity payments in 1875, Commissioner Christie spoke with the various Chiefs about reserves. He reported:

Many of the bands have no desire to settle and commence farming and will not turn their attention to agriculture until they are forced to do so on account of the failure of their present means of subsistence by the extermination of the Buffalo. Others have commenced to farm already, although to a very slight extent, and wish to have their Reserves set apart as soon as possible.

Instructions have been given to Mr. Wagner D.L.S. to survey Reserves for the following bands . . .

2. Kawacatoose’s, or the Poor Man’s, (33 families) at the Big Touchwood Hills close to the Round plain north east of the Old Fort.<sup>32</sup>

Although Wagner began surveying in the Touchwood Hills area in 1875, he was interrupted by the onset of harsh winter weather on October 24, having made some progress on the survey of the reserve for Gordon’s Band but none on the Kawacatoose reserve.<sup>33</sup>

Wagner and his party returned to the Touchwood Hills in 1876. On July 27, after completing his work on Gordon’s reserve, Wagner intended to proceed immediately to survey Kawacatoose’s reserve. The Chief, however, refused to accompany him.

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30 W.J. Christie, Indian Commissioner, to David Laird, Minister of Interior, July 16, 1875, NA, RG 10, vol. 3622, file 5007 (ICC Documents, p. 30).

31 W.J. Christie, Indian Commissioner, to David Laird, Minister of Interior, July 16, 1875, NA, RG 10, vol. 3622, file 5007 (ICC Documents, p. 32).

32 M.G. Dickieson, Indian Commissioner, to Minister of Indian Affairs, October 7, 1875, NA, RG 10, vol. 3625, file 5489 (ICC Documents, p. 43).

33 William Wagner, Dominion Land Surveyor, to Minister of the Interior, January 1876, NA, RG 88, vol. 300, file 0644.

In this time I met Cawacatoose – the Lean or poor man – to whose Reserve I now intended to go, but notwithstanding all my exertions I could not move him – (he said his child was dying) –<sup>34</sup>

The treaty specifically stipulated that reserves were to be selected “after conference with each band of the Indians.” The Chief’s presence was important not only to identify the preferred location to the survey party, but also to ensure that the Band would know precisely the lines demarcating the reserve boundaries.

Wagner returned to Touchwood Hills at the end of August 1876 when the Commissioners arrived to pay annuities. The subject of the reserve was discussed at this time. According to Wagner, it was not the Chief who caused the delay:

At Touchwood Hills I met the Commissioners and when paying was done, the head man of Cawacatoose (the real trouble) after an hour’s speech was answered by Mr. Angus McKay so effectually that the Indian speaker appeared down-hearted and asked if I would go with him next day to see where they wished to have their reserve. Accordingly I went out with the Indian and before returning established the south East corner of the Reserve on the Bearing of the East boundary by an observation to Polaris. This done I joined the Commissioners on their journey to Qu’Appelle. In the meantime my party coming up towards Big Touchwood Hills I gave my assistant the necessary orders how to proceed.<sup>35</sup>

This passage demonstrates that the annuity payments for 1876 were made to Kawacatoose and his people concurrently with the survey of their reserve. The Indian Agent, Angus McKay, confirmed Wagner’s account, alluding to the difficulties being faced by the Indians at that time as they awaited the arrival of Commissioner Dickieson with their annuity payments:

Mr. McBeath, the [Hudson’s Bay Company] officer at Touchwood Hills deserves great credit for having supplied the Indians at that place with provisions so as to keep them from going away before Mr. Dickieson’s arrival. In fact had it not been for him many of them would have been obliged to leave as they had no food.

On the 28th [August] accompanied by Mr. Wagner, I met George Gordon and Kawah-ka-toos or “Lean Man” and decided upon the reserve for the latter and I supplied the former with some more farming implements and tools. I then sent Kawah-

<sup>34</sup> William Wagner, Dominion Land Surveyor, to Minister of the Interior, February 19, 1877 (ICC Documents, p. 107).

<sup>35</sup> William Wagner, Dominion Land Surveyor, to Minister of the Interior, February 19, 1877 (ICC Documents, pp. 108-09).

ka-toos with Mr. Wagner to mark out his reserve which is at the old H.B.C. fort on the South Side of the Big Touchwood Hills.<sup>36</sup>

McKay described the new reserve and the band's intentions for it in these terms:

I will now proceed to deal with the subject of Bands & their Reserves.

...  
3rd. Chief Ka-wah-ka-toos or "Lean Man." This chief has a band of 39 families all of the Cree tribe who have always made their living by hunting and trapping. A reserve has been laid out and surveyed for them by Mr. Wagner on the south side of the Big Touchwood Hills at a place commonly called "The Old Fort." This is a very good farming country well supplied with smaller timber and numerous small lakes and grass meadows. The timber although small is fit for building purposes for the Indians and in the course of a few years it will improve greatly as it is of a rapid growth. There as in all the country lying N.N.W. & W. of this point is devoid of hard timber of any kind with the exception of Birch if that can be called hard wood. The country is of a rolling nature and good soil in parts rather light but very easily worked. None of the Band have as yet made any improvements on their reserve and have gone out on the prairie hunt. They have however expressed a desire to live on the reserve in the spring for the purpose of breaking land and building houses so as to be able to remain on their reserve next winter.<sup>37</sup>

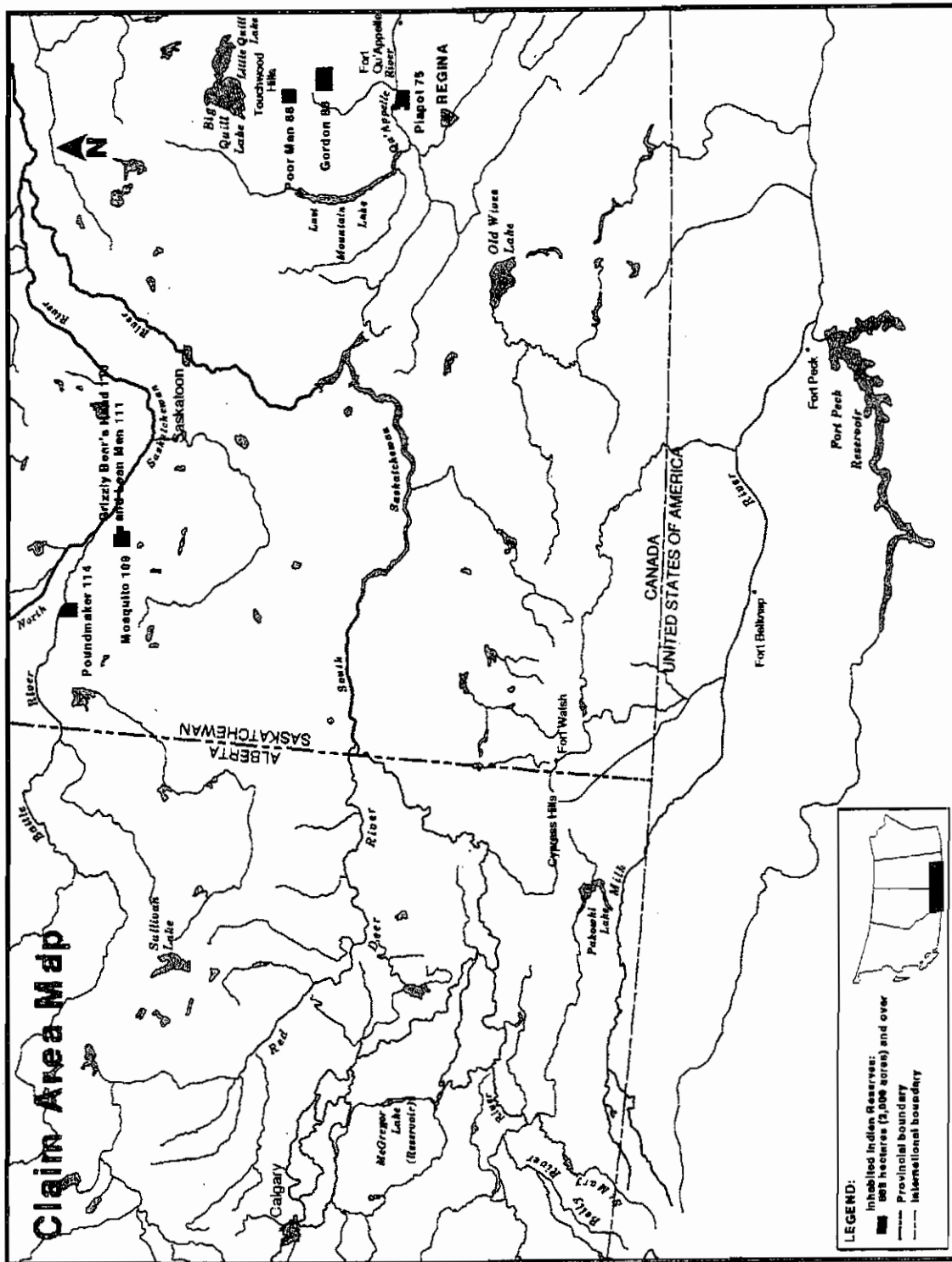
Indian Reserve 88, surveyed by Wagner and his assistant in August-September, was shown on the survey plan dated September 1876 as containing 27,040 acres (42.25 square miles).<sup>38</sup> The boundaries were later altered by Dominion Land Surveyor John C. Nelson in 1889 upon confirmation of the survey by Order in Council, at which time the area of the reserve was stated to be 42.5 square miles (27,200 acres). The notes accompanying the Order in Council state that this step was effected "on account of a serious error in the original survey – the northern and southern boundaries were found to be nearly forty chains shorter than they are certified to be by the plan and field-notes."<sup>39</sup>

36 Angus McKay, Indian Agent, to Superintendent General of Indian Affairs, October 14, 1876, NA, RG 10, vol. 3642, file 7581 (ICC Documents, p. 90).

37 Angus McKay, Indian Agent, to Superintendent General of Indian Affairs, October 14, 1876, NA, RG 10, vol. 3642, file 7581 (ICC Documents, pp. 102-03).

38 Survey Plan, "Indian Reserve Treaty No. 4, Kawahk-atoos, Lean Man's Band, Big Touchwood Hill, September 1876," DIAND, Land Registry, Microplan 847 (ICC Documents, p. 54). Wagner's field notes: "The Reserve contains 27040 Acres of which about 1/3 is wood. . . ." (ICC Documents, p. 53).

39 Order in Council PC, May 17, 1889 (ICC Documents, pp. 157-61).



Based on the Treaty 4 allocation of one square mile per family of five (or 128 acres per person), the reserve laid out for Kawacatoose in 1876 was large enough to fulfil the treaty requirements for 212 people. We are satisfied that the foregoing evidence also establishes that 1876 represents the date of first survey, as well as the base payroll year for the First Nation.

We also note from the preceding references that during this period Kawacatoose was also referred to by Canada's representatives as the "Poor Man" and the "Lean Man."

### **Treaty Annuity Payments to Families at Fort Walsh, 1876**

The accounts of William Wagner and Angus McKay from late August and early September 1876 show that Kawacatoose and his people were paid that year at or near the Touchwood Hills in central Saskatchewan.<sup>40</sup> However, the paylists from Fort Walsh showed two families (13 people in total) paid in 1876 under the heading "Poor Man": the first family (one man, one woman, and five children) had the name Paahoska or Long Hair, and the second (one man, two women, and three children) were named Wui chas te oo ta be or Man That Runs.<sup>41</sup>

Both families were paid arrears for 1874 and 1875 but were not paid for 1876 – it was government policy to make no more than two years' payments at any one time so as to reduce the potential for fraud. Neither family appears at any other time on the paylists for either Kawacatoose (Poor Man) or the Assiniboine Lean Man (Poor Man), although other members of Kawacatoose were paid at Fort Walsh in 1879.<sup>42</sup> The Assiniboine Poor Man Band adhered to Treaty 4 at Fort Walsh in 1877; at that time the Chief was elected and those of his people who were recognized as British Indians were paid for 1877 and given arrears for 1876.<sup>43</sup> Whether the Assiniboine Poor Man Band was in Fort Walsh in 1876 is unknown, but it was there from 1877 until 1882, when it migrated from the Cypress Hills to the Eagle Hills. It then was referred to more consistently as the Lean Man Band.<sup>44</sup>

The Kawacatoose Band was primarily Cree, but Kawacatoose himself was reportedly an Assiniboine, and the two names at Fort Walsh were listed in Assiniboine.<sup>45</sup> In fact, 11 of the 18 bands paid at Fort Walsh in 1876 were

40 See also ICC Transcript, November 15, 1994, p. 28 (Peggy Brizinski).

41 Paylist, 1876 (ICC Documents, p. 364); ICC Transcript, November 15, 1994, p. 27 (Peggy Brizinski).

42 ICC Transcript, November 15, 1994, pp. 113-14 (Marion Dinwoodie and Jayme Benson).

43 ICC Transcript, November 15, 1994, p. 29 (Peggy Brizinski).

44 ICC Transcript, November 15, 1994, pp. 101-02 and 105 (Peggy Brizinski).

45 ICC Transcript, November 15, 1994, p. 94 (Peggy Brizinski).

either Assiniboine or bands whose memberships, although mixed, were predominantly Assiniboine.<sup>46</sup> However, it was quite common for the Cree and Assiniboine to be allied and their populations intermingled:

From a very early period the Assiniboine were allied with the Cree. . . . The alliance was military and commercial in nature. Both sides were able to take advantage of the alliance to battle traditional enemies such as the Blackfoot, Gros Ventre, Crow and Sioux. The relationship was also built on mutually beneficial trade. The Assiniboine obtained horses and firearms before the Cree, and the Cree then obtained these items from the Assiniboine. These two peoples hunted and trapped together.

The close association of the two peoples meant that Crees and Assiniboines intermarried and mixed Assiniboine/Cree offspring were produced. Their offspring would often be identified as either Cree or Assiniboine or as a separate group. . . .

Many Cree and Assiniboine also spoke both languages. . . .<sup>47</sup>

With the exception of the Little Mountain Band and possibly the Long Hair and Man That Runs families (depending on whether they were members of Kawacatoose or the Assiniboine Poor Man), all the bands paid at Fort Walsh in 1876 had adhered to Treaty 4 by that time.<sup>48</sup>

The first issue in this inquiry is to determine which of the two bands then referred to as the Poor Man can now properly claim these families as members. In the absence of definitive documentary evidence on the point, it is instructive to review the journal entries of Major Walsh, who was responsible for administering the payment of annuities at Fort Walsh in 1876 and 1877.

In relation to the 1876 payments, Walsh reported on a number of demands made by the various Indian bands:

They further demanded that . . . the Assiniboines who had never attended a treaty should be taken in and be paid as they were and for the two preceding years, using as a reason for this that they might possibly die between now and the time of next payment and [illegible] this year's payment. . . .

In regard to the Assiniboines I told them that if there were any Indians present who had not heretofore been admitted to a treaty, and could prove to my satisfaction that they were British Indians, they would probably receive the first and second payment this year, and the 3rd and 4th payment next year, that the Government would not allow more than two years payment at one time. In conclusion I told them the payment would be made at the post and commence immediately on my arrival there,

46 Jodi R. Cassady, "Report No. 2 on the Assiniboine Families of Long Hair/Pa a Hoo Ka and Man That Runs/Wui chas te oo ta be of the Treaty 4 Area of Saskatchewan," September 30, 1993 (ICC Documents, p. 350).

47 Office of the Treaty Commissioner, Draft Research Report, "Status of Two Assiniboine Families, North Assiniboine History and Demographics," November, 1994 (ICC Exhibit 2, vol. 1, tab A-4, pp. 2-3).

48 ICC Transcript, November 15, 1994, p. 91 (Peggy Brizinski).

the bands would be paid separately. I gave the names of the bands I wanted first and the names of chiefs and bands designated would follow in rotation, the payment commenced on Friday, Sept. 1st and concluded on Monday. . . . I was informed at this juncture that forty (40) lodges more had arrived and that fifty (50) additional lodges were on the way. I immediately stopped payment and informed the Chief that as the number coming in was greatly in excess of what the Government supposed there were who had not heretofore attended any treaty and that I could not pay any more as it would require more money than I felt authorized to expend, and must defer further payment until I had communicated with the Hon. Supt. Genl. Ind. Affairs. The chiefs then informed me that these ninety (90) lodges were really British Indians from the Assiniboine and Belly rivers and had been obliged to cross the Missouri river as the Buffalo became scarce in their own country and had been living as much on this side of the line as the other, and were surely as much entitled to all the provisions of the treaty as the Indians who are living further north. . . . I then told them that argument was useless as I could not make further payment to non-treaty Indians. . . .

I find that in admitting the Assiniboines we must be very careful in questioning the heads of families as to their families, some of them taken children of Sioux Indians to whom they are closely allied. . . .<sup>49</sup>

Walsh also reported on the practice of issuing metal checks to the Indians for identification purposes:

I find that many of the Indians have pawned their checks to traders, and others, in case of the death of a head of a family have buried the check with him, and others have lost them. I told them it was [wrong] to pawn their checks and they must be careful and not loose [sic] them as they were given that they might be presented when payment was due and receive their money. I further found that many of the checks had been exchanged among themselves causing no little confusion and in making payment I was compelled in many cases to be guided entirely by the name in the book corresponding with the number of the check and by this means restore the check to its proper owner. To those whom it was proven had lost their checks I replaced by giving one of Zinc with a number corresponding to the one lost. As the checks to be issued to the Indians who were admitted into the treaty did not arrive, I issued checks made of Zinc marked W. V. X. in case of a chief bringing in Indians not before at a treaty I presented one of the W. V. X. checks, and added the additional letter V. W. or X. to the chief's band as the case might be. Several of the bands were divided part of whom had gone to Qu'appelle[.] [T]his was brought about by interested persons at Qu'appelle who had sent runners out on the prairie to tell the Indians, there was no payment to be made at Cypress Mountains and whoever told them as were trying to deceive them, the Indians were afraid they were not to receive any pay and part went to Qu'appelle and the rest came here. . . .<sup>50</sup>

49 J.M. Walsh, Inspector, North-West Mounted Police, to Minister of the Interior, September 12, 1876 (ICC Documents, pp. 57, 60-63).

50 J.M. Walsh, Inspector, North-West Mounted Police, to Minister of the Interior, September 12, 1876 (ICC Documents, pp. 63-65).

On July 29, 1877, Walsh corresponded with E.A. Meredith, Deputy Minister of the Interior:

There are between here [Fort Walsh] and Belly River about 90 Lodges of North Assiniboines who have never taken annuities from the Americans [and] crossed the line only when following the Buffalo. In fact all North Assiniboines are British Indians and will be present for payment this summer. . . .

In the mean time I will proceed to Fort Peck and procure a copy of Books and have census completed before payment. These Books no doubt will contain the names of many Indians who do not belong to the Americans but who were entered to the Agency by the Agent so that they might appear on his Books and draw Annuities for them. . . .

No doubt you will think it strange that an Indian Agent will coax Indians to their Agency. I don't mean to say they are anxious to issue Annuities to them, but to register as many Indians as possible on their Books whereby the appropriation for each Agency is regulated.<sup>51</sup>

Walsh wrote to Meredith again on October 28, 1877:

In my letter to you of the 27th Sept. I had the honor to report that the Indians had assembled here for payment on or about the 19th Sept.; on the 22nd Sept. I requested Mr. Allen to take the census of the different camps assembled, which duty he performed and completed same on the 23rd Sept. There were forty-seven (47) lodges of Crees, sixty (60) lodges of Saulteaux and forty-four (44) lodges of Assiniboines who had been paid last year, and about one hundred and forty-five (145) lodges of Assiniboines who had never given adhesion to any previous treaty nor received payment. There is no doubt as to the legitimacy of the Assiniboines (admitted to treaty) being British Indians and entitled to receive annuities. . . .

Two years ago when "Long Lodge," "Little Mountain," and the "Poor Man" refused to go to the Agency to receive annuities, both "Little Chief" and "Shell" went. "Little Chief," "Shell" and King number from eighty (80) to ninety (90) Lodges all originally British Indians. I carried out your instructions to procure a copy of Belknap Agency Books and sent Mr. Allen to Wolf Point for that purpose on the 2nd August, when he obtained said copy from the Assiniboine Agent of all Indians who were claimed by the American Government, less "Little Chief's" band whom the Agent stated he had sent for, but had refused to go in. I kept this book before me as a guide when an Indian presented himself for payment whom I had not seen before I would refer to said book by which precaution I am positive there are no Indians other than ones taken in Treaty. There are two or three names of North Assiniboines whose names are the same as some who appear on the U.S. Books, they are certainly not the same individuals, for instance two persons of the same name are often found in the same band as

51 J.M. Walsh, Inspector, North-West Mounted Police, to E.A. Meredith, Deputy Minister of the Interior, July 29, 1877, NA, RG 10, vol. 3649, file 8280 (ICC Documents, pp. 115-17).



you will see in enclosed U.S. Agency books. After Mr. Allen had completed taking the census I found that non treaty Indians were divided into three Bands, sixty-nine (69) lodges under the "Man who took the Coat," forty-two (42) lodges under "Long Lodge," and thirty-four (34) lodges under the "Poor Man" . . .

The "Poor Man" much the same as "Long Lodge's" camp, is very much reduced owing to the objection that many of his followers were American Indians; he has at present thirty-four (34) lodges; he is a good man and very friendly to the Whites; his people said they would not join any other Chief, and if I could not admit him as such, to pay them by themselves. As the Act states that every Band composed of thirty (30) Indians was entitled to a Chief, I allowed them to elect him as such. . . .

I only took the English names of the Indians this year, as I have found the Indian names to be very often misspelled [sic] and mispronounced, no two persons giving it the same sound. Indians will very often have two names as they frequently change them, and when asked what his name is will invariably give the last one. When the name is taken in English and an Indian asked if he had another name (at the same time mentioning it) it is almost sure to be found out. . . .

I would recommend that a place for the payment of each band or tribe be settled on; that said bands be notified as to their place of payment the coming spring, so that they can offer no excuse for being absent; that no Indian be paid other than at the place for his Band. You must see that when Bands divide, one half going to one place and the balance to another place, it must end with a loss to either the Government or Indian.

By having an established place for the payment of each Band a much better account and roll can be kept from year to year of the different Bands or tribes. If an Indian be absent from payment one year it would be readily seen upon payment the following year, and payment could be made to him without any danger of loss to the public. To guard against loss under the present system, a copy of the books of payment made at this post would have to be sent to each and every place where payment is made, and the same sent from other places to this post. The time occupied in looking over the several books when persons present themselves for arrears would consume a great deal of time and delay payment which, as you are aware, is a serious matter when there is a large camp to feed. . . .<sup>52</sup>

From these passages it can be seen that Walsh was careful to ensure that payments were made only to British Indians, and that he was prepared to pay Indians who had not yet adhered to treaty. He was also aware that some bands were divided, with some members receiving payment at one location and other members at another. This was confirmed by Peggy Brizinski, who noted that several bands had been paid in part at Qu'Appelle and in part at Fort Walsh. According to the research panel from the OTC, Walsh would have had to accept on faith that certain factions belonged to particular bands,

52 J.M. Walsh, Inspector, North-West Mounted Police, to E.A. Meredith, Deputy Minister of the Interior, October 28, 1877, NA, RG 10, vol. 3649, file 8280 (ICC Documents, pp. 119, 121-25, 128-29, 136).

since the remainder of those bands were often paid at about the same time in a different location and Walsh would have been unable to confirm membership in a given band prior to making payment.<sup>53</sup>

Walsh elaborated on his allocation of zinc checks bearing the letters "W," "V," and "X" to new adherents to treaty or transfers from other bands, and it can be seen on the 1876 paylists that the two "Poor Man" families paid at Fort Walsh in 1876 were designated with the letter "V."<sup>54</sup> The OTC Research Report notes that check letters were assigned to bands on the paylists, with "B" recorded as the letter assigned to Kawacatoose in 1874, 1875, 1876, and 1878.<sup>55</sup> On this point, Peggy Brizinski observed:

The letter V beside the two names is interesting. It does not seem to correspond with any band designation for 1875 or 1876, but I have noted that some people paid at Fort Walsh with other bands have this same designation, and that some of them appear to be Assiniboine. Perhaps this was a special designation used by the agent which does not necessarily refer to any particular band.<sup>56</sup>

In the course of its research, the OTC investigated the Montana State Historical Society Archives, the Glenbow Institute in Calgary, the Hudson's Bay Company Archives in Winnipeg, the Saskatchewan Archives in Regina, Parliament's Sessional Papers, DIAND records from 1870 to 1920, records of the North-West Mounted Police and Royal Canadian Mounted Police, and archives of the Church Missionary Society. The OTC's researchers found a number of references to people named Long Hair and Man That Runs or variations on those names, with both being "fairly common" to Cree and to Assiniboine bands, but no conclusive evidence was unearthed either to link those names to Kawacatoose or the Assiniboine Poor Man Band or to contradict the evidence of the elders at the community session.<sup>57</sup> Similarly, although

53 Peggy Brizinski, Special Advisor, OTC, to Jane-Anne Manson, Assistant Negotiator, Treaty Land Entitlement, Specific Claims West, DIAND, November 1, 1993 (ICC Documents, pp. 393-94).

54 Paylist, 1876 (ICC Documents, p. 364).

55 Office of the Treaty Commissioner, Draft Research Report, "Status of Two Assiniboine Families, North Assiniboine History and Demographics," November, 1994 (ICC Exhibit 2, vol. 1, tab A-3, p. 2).

56 Peggy Brizinski, Special Advisor, OTC, to Jane-Anne Manson, Assistant Negotiator, Treaty Land Entitlement, Specific Claims West, DIAND, April 29, 1993 (ICC Documents, pp. 296-97).

57 ICC Transcript, November 15, 1994, pp. 37, 40, 50, 110-11 (Jayme Benson, Marion Dinwoodie, and Peggy Brizinski); ICC Transcript, May 25, 1995, pp. 278-79 (Jayme Benson). A similar conclusion was reached by Jodi Cassady in her investigations into the two families: "The Annuity Paylist review was successful in that a 'Long Hair' was found after 1876 listed successively in the Bands of Father of All Children, Lucky Man, Piapot, and Bear's Head between 1878 and 1883. The name 'Man That Runs,' and a few of its variations, were found not only in 1876 but after that year as well listed in the Bands of Poor Man (Assiniboine), Piapot, Red Eagle, Lucky Man, Little Pine, and Man Who Took The Coat between 1876 and 1882. I did not find either one of these names, or their variations, in the Kawacatoose/Poor Man Treaty Annuity Paylists for 1874 to 1884, inclusive" (Jodi R. Cassady, "Report No. 2 on the Assiniboine Families of Long Hair/Pa a Hoo Ka and Man That Runs/Wui chas te oo ta be of the Treaty 4 Area of Saskatchewan," September 30, 1993, ICC Documents, p. 349).

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the names Long Hair and Man That Runs were located in the Fort Peck and Fort Belknap records now situated in Seattle, Washington, no definitive connection could be established with the two Fort Walsh families or either Poor Man band.<sup>58</sup>

### **Evidence of the Elders**

Elders of the Kawacatoose First Nation spoke before the Commission during the community session on November 15, 1994, with regard to the heritage of the two families paid at Fort Walsh in 1876. Elder Elsie Machiskinic stated:

I used to hear my late husband, who died in the spring of '94, and he had a statutory declaration on file with his evidence. And then I heard him tell the stories about the Man That Runs, he ran so fast that he was an honoured person in the community, so that's plain to see he belongs here. Also Long Hair that was relative to him.<sup>59</sup>

Elder Pat Machiskinic, through interpreter Beatrice Assoon, stated:

The Man With Long Hair, the Long Hair and the Man Who Runs were brothers, they belonged here. They ran all over together. Their families belonged here. That's what he said, they came from here.<sup>60</sup>

On questioning by counsel for the Commission, Pat Machiskinic continued:

MR. CHRISTOFF: Okay. Now were the Man That Runs and Long Hair, were they Cree or Assiniboine?

PAT MACHISKINIC: They were Cree. That's a Cree name. His Cree name was Wui chas teo, Fast Runner, and the one that had long hair, they ran together, but one was faster.

MR. CHRISTOFF: You mention that they ran together, does this mean that they travelled together?

PAT MACHISKINIC: They travelled all over, they go any place. Overnight they could get to Piapot from here. They ran, they went all over, but they belonged to here.

MR. CHRISTOFF: Following up on that question, do you know why the Man That Runs or Long Hair would have been in the Fort Walsh area around the time of the treaty, which is 1876?

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58 Terry Ann Young, "Report on the Research Undertaken at the National Archives and Records Administration, Seattle, Washington, related to the Presence of the Families 'Long Hair' and 'Man That Runs' at Fort Peck and Fort Belknap, Montana, U.S.A.," September 1994 (ICC Documents, pp. 489-721).

59 ICC Transcript, November 15, 1994, p. 116 (Elsie Machiskinic).

60 ICC Transcript, November 15, 1994, p. 117 (Pat Machiskinic).

PAT MACHISKINIC: That's what I just finished telling you. They went all over together. They were brothers, you couldn't part one and another. It was nothing for them to go any place they wanted to go overnight, running.<sup>61</sup>

Mr. Machiskinic also testified that Man That Runs was the grandfather of Paul Acoose, who formerly lived on the reserve but had subsequently married a woman from the Sakimay Reserve and moved there.<sup>62</sup>

In Statutory Declarations dated August 13, 1993, and September 10, 1993, elders Alec Poorman and Pat Machiskinic also declared that previous elders of the First Nation had informed them that Kawacatoose was an Assiniboine who became a member of the band when he married the former Chief's daughter and became Chief himself. Alec Poorman continued that his father and other elders told him of Man That Runs, who hunted with the band and could outrun a horse.<sup>63</sup>

Elder Fred Poorman confirmed that Man That Runs and Long Hair were brothers and that they belonged to Kawacatoose.<sup>64</sup> In addition to singing a song he knew about the two men, elder John Kay gave a similar account through the interpreter:

He elaborates on the Man With Long Hair, he was a very good runner, a very good hunter and when he would run his hair would flare at the back of him, he ran so fast. He done all his hunting by running. And the Man Who Runs Fast was also a good runner, they were related. . . .

Mr. Kay, he knows where the burial of these two men are, it's in the northern – north in his fields, it's all bush now, but that's where these two are buried on top of a hill. He still calls it the graveyard.<sup>65</sup>

Elder Alec Kay agreed that the two men belonged to Kawacatoose and that they have relatives in the band.<sup>66</sup>

The OTC researchers also provided an appendix to their main report detailing interviews with elders of the Mosquito/Grizzly Bear's Head/Lean Man Band to determine whether those elders could recall if the families of Long Hair and Man That Runs had connections with that Band. Because the elders from that Band felt more comfortable meeting with people who could

61 ICC Transcript, November 15, 1994, p. 122 (Pat Machiskinic).

62 ICC Transcript, November 15, 1994, pp. 122-23 (Pat Machiskinic).

63 Alec Poorman, Kawacatoose Band, Statutory Declaration, August 13, 1993, and Pat Machiskinic, Kawacatoose Band, Statutory Declaration, September 10, 1993 (ICC Documents, pp. 298-99).

64 ICC Transcript, November 15, 1994, pp. 118 and 121 (Fred Poorman).

65 ICC Transcript, November 15, 1994, pp. 119, 123-24 (John Kay).

66 ICC Transcript, November 15, 1994, p. 120 (Alec Kay).

speaking Assiniboine, the interviews were conducted at the reserve on February 8, 1995, by Clifford Spyglass and his father, William Starchief, both members of the Mosquito/Grizzly Bear's Head/Lean Man Band, who asked questions previously formulated by the OTC. The OTC researchers did not attend these interviews and their report merely discusses the contents of Mr. Spyglass's letter on the subject.<sup>67</sup> With respect to Long Hair, Mr. Spyglass reported:

All of the Elders we have spoken to or visited cannot recall ever hearing about this person, so we do not have any information regarding Long Hair. Although we tried to say his name in Assiniboine, and also in Cree, no real information was gathered and we are sure that they never heard about him.<sup>68</sup>

The elders did, however, recall Man That Runs:

The information that we have gathered, some Elders say that they recall hearing about this individual way back in the 40's. . . . Although they never did actually see or meet the person, I have the impression that this person was a popular person, because of the extensive travelling he did as well as the talent he had, as a very good runner.

The Elders believe that this person is from a different band, because he was not on the Mosquito treaty paylists and there are no direct descendants from this person living on the Mosquito Reserve presently. And there is no knowledge from anyone to confirm that he resided or settled down around here.

Irene Spyglass is an 80 year old woman from Mosquito Reserve and she says that her Grandfather from her mother's [sic] side was one of the two brothers Man that Runs had, and he was called by the Assiniboine name, Be-yah-gahn. She gave a clear indication that this individual, Man That Runs was never a Mosquito Band member and she does not recall ever hearing of this individual as a Mosquito Band member.

Of all the visits we conducted, the Elders were quite sure that this man was never a Mosquito resident which would conclude that this individual was from elsewhere, but Mosquito. When I mention Mosquito, I am including Mosquito, Grizzly Bears Head and the Lean Man reserves as one.<sup>69</sup>

## TREATY LAND ENTITLEMENT PROCESS IN SASKATCHEWAN

The second issue in this inquiry deals generally with the question of which Indians are entitled to be "counted" for treaty land entitlement purposes. In simple terms, Canada's position is that its lawful obligation is to count only

67 ICC Transcript, May 25, 1995, pp. 280-81 (Jayme Benson).

68 Clifford Spyglass, Land Manager, Mosquito Band, to Howard McMaster, Executive Director, Office of the Treaty Commissioner for Saskatchewan, May 1, 1995 (ICC Exhibit 24).

69 Clifford Spyglass, Land Manager, Mosquito Band, to Howard McMaster, Executive Director, Office of the Treaty Commissioner for Saskatchewan, May 1, 1995 (ICC Exhibit 24).

those Indians who were members of the band at the date of first survey, using the best evidence available to establish those numbers, including consideration of absentees and arrears but excluding additions to the population after date of first survey, such as late adherents to treaty and landless transfers. The Kawacatoose position is that, subject to the exclusion of those individuals whose ancestors have already been counted, each treaty Indian is entitled to be counted for treaty land entitlement, meaning that late adherents and landless transfers should be part of the count. The First Nation views the 1983 ONC Guidelines as the written expression of its position and as evidence of Canada's earlier recognition of those guidelines as its lawful obligation.

These positions will be given fuller expression later in this report. The present section of the report deals with the development of the treaty land entitlement process in Saskatchewan.

### Historical Developments

Perhaps the earliest expression of Canada's view of treaty land entitlement – and the closest to being contemporary with the signing of Treaty 4 and the survey of IR 88 – was set forth in a letter dated November 27, 1882, from Commissioner Edgar Dewdney of the Department of Indian Affairs to Chief Poundmaker of the Poundmaker Band:

Now about your Reserve. The land you now hold was the quantity you were entitled to under the Treaty at the time it was surveyed.

If your numbers have increased and should do so next spring, I will authorize your Reserve to be increased in size and if no white people settle opposite you on the Battle River I will ask the Government to extend it in that direction, but you must understand *I can only do this if your number of Indians increase otherwise than by births.*<sup>70</sup>

Dewdney's comments found practical expression in a number of instances detailed in a report prepared by the Department's Heather Flynn in October 1974.<sup>71</sup> Manitoba's Lake St. Martin, Little Saskatchewan, and Chemahawin Bands, as well as Alberta's Stony, Beaver, Little Red River, Sucker Creek, and Bigstone (Wabasca) Bands, all received additional treaty lands notwithstanding having received sufficient land at date of first survey to satisfy treaty

70 Commissioner Edgar Dewdney, Department of Indian Affairs, Regina, to Chief Poundmaker, November 27, 1882, Archives of Manitoba, MG-1, A3, No. 577 (ICC Documents, p. 149). Emphasis added.

71 Heather Flynn, Indian Lands Division, "Residual Land Entitlement Under Treaty," October 1974, attached to a memorandum from G.A. Poupore, Manager, Indian Lands Division, to W. Fox, Operations Branch, February 6, 1975 (ICC Exhibit 27).

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requirements. In each case, the calculation of the acreage of these additional lands was predicated on the band's current population figures rather than the DOFS population. Further justifications of providing these additional lands included:

- social and economic reasons;
- inadequate treaty formulas for the provision of land (32 acres per person under the terms of Treaties 2 and 5 as opposed to 128 acres per person under Treaty 4); and
- in the cases of the Stony and Bigstone (Wabasca) Bands, late adherence by "roving Indians" or "non-treaty Indians."

These reserve additions or creations took place over a period spanning from 1911 to 1965.

The OTC research panel added that Saskatchewan's Cowessess Band also received additional land in 1883 or 1884 to account for additions to the Band's population after DOFS. Similarly, the Thunderchild Band had land added to its reserve to accommodate the affiliation of Young Chipewyan and Napahase Band members after the original survey of the Thunderchild reserve in 1881.<sup>72</sup> In the words of Kenneth Tyler:

Well in my view the historical record indicated that starting as early as 1883 with Cowessess, right up into the 1950s, the Department of Indian Affairs had accepted the idea that land entitlement should be calculated on the basis of current populations at the time of particular surveys and that if entitlement wasn't fulfilled at the date of the first survey, then a new calculation based on current population was done at the date of subsequent surveys and the historical record, in my view, was replete with many examples where this was actually done, or it was acknowledged in the correspondence that this was what should be done.

The historical record is not entirely unambiguous, there are a few examples which you could cite that cite other factors in addition to that, but certainly the overwhelming evidence, in my view, was that the current population was used. . . .<sup>73</sup>

Sean Kennedy explained Canada's historical practices in these terms:

Prior to 1974 though, and this is what I was referring to, the government did use multiple surveys to go and fulfill. If they knew or were aware that there was a shortfall

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<sup>72</sup> ICC Transcript, May 25, 1995, pp. 298-300 (Peggy Brizinski).

<sup>73</sup> ICC Transcript, May 24, 1995, pp. 48-49 (Kenneth Tyler).

for a band – like I was saying in Bigstone, they acknowledged in 1915 that they were going to have to survey more land for this band at some point in the future as more Indians joined treaty. . . .

But it was the government's historical practice that if a band was short land and needed more, they would give it to them. Because land was quite available. Certainly before 1930 when the Natural Resources Transfer Agreements came into practise and even up to 1960, you still had quite a bit of land available to do this. So people thought nothing of it. Then as it became scarce then you get the restrictions.<sup>74</sup>

In response to a question of whether the historical record supports Canada's assertion that its lawful obligation is limited to providing land for a band's population at date of first survey as indicated in the annuity paylists, Peggy Brizinski of the OTC testified:

Actually, I don't believe in the early years that that was contemplated. This is a very retroactive opinion, but there was a lot of concern at that time about the accuracy of the numbers, there was some correspondence about the difficulty of dealing with the issue of payment, for example, people were going back and forth between posts. They certainly were aware that there were problems in using that type of accounting as a way of getting at the issue of band membership. . . . So I don't believe at that point, when the first surveys were happening that there was an attempt to limit it. I think they were actually fairly reasonable in trying to accommodate the population as best they could at that time. I think it was really somewhat later that we began to see discussion about whether or not it should be fixed. But in the early days they were being as flexible as they could be in response to band fluctuations. And this has been stated many times, there was a fairly fluctuating band membership.<sup>75</sup>

The same question was put to James Gallo, who responded:

The historical records wouldn't speak to Canada's view of its legal obligation as of 1995. If the question is, was entitlement considered to be, in the past, based solely on date of first survey shortfall, then the answer is – what period of time are we looking at? . . .

Other cases, like in the 1920s and 1930s in Northern Alberta they're looking at, okay, how many people have come into treaty since the reserve was surveyed, maybe we should be surveying additional land on that basis. In other instances, when you get into the later 1950s, early 1960s, you get situations like the Lac La Ronge Formula being applied. So the answer to your question is, depending on what period of time you're talking, because you're going to get different answers.<sup>76</sup>

74 ICC Transcript, November 8, 1994, pp. 37-38 (Sean Kennedy).

75 ICC Transcript, May 25, 1995, pp. 295-96 (Peggy Brizinski).

76 ICC Transcript, May 24, 1995, pp. 206-08 (James Gallo).



On questioning regarding multiple surveys, Mr. Gallo continued:

Q. So then are there instances where a surveyor was sent out to add land to a reserve as a result of additions to a band after the date of first survey?

A. Oh yeah, in Treaty 8, in particular. If you take a look at the files relative to Northern Alberta from about 1908 on through to about 1939, 1940, you will find a number of instances where that occurred. White Fish Lake, Little Red River, and there's one or two other bands around that period in the Treaty 8 area where there were a number of people that are taking treaty and joining one of those bands and the government is aware that the population is going up and ultimately additional land is surveyed on account of those numbers.<sup>77</sup>

The gist of all the foregoing evidence is that, historically, as a basic premise, Canada used a band's population at date of first survey as the foundation for establishing treaty land entitlement. However, Canada was also prepared to reconsider a band's treaty land entitlement in the light of factors such as late adherents and landless transfers.

A report entitled "Treaty Land Entitlement – Development of Policy: 1886 to 1975" dated November 15, 1994, by Elaine M. Davies, a research consultant for DIAND, was entered in this inquiry as Exhibit 31. It references a number of documents on which the author bases the conclusion that "the idea of counting a band's membership once, and from that number determining the amount of reserve lands owed to it under treaty, was the policy of the Department of Indian Affairs at least from 1886 onwards."<sup>78</sup> One such document is a letter dated March 8, 1887, from L. Vankoughnet, the Deputy Superintendent of Indian Affairs, to the Superintendent of Indian Affairs addressing the idea of removing land from the St. Peter's Band reserve to account for half-breeds defecting from the band to accept scrip:

[T]he undersigned begs very respectfully to state that the reserve in question was allotted to the St. Peter's Band of Indians, in so far as the area thereof is concerned, proportionately to the number of souls in the Band at the time that the Treaty was negotiated with those Indians, and that it there and then became the property in common of the Band, and that without reference to future increases or decreases of number, and that the mere fact of certain Half-breed members of the Band having in the exercise of their rights accorded them by law, withdrawn from the Treaty and accepted Half-breed scrip, would not in the opinion of the undersigned justify the

<sup>77</sup> ICC Transcript, May 25, 1995, pp. 246-47 (James Gallo).

<sup>78</sup> Elaine M. Davies, Research Consultant, Litigation Support, "Treaty Land Entitlement – Development of Policy: 1886 to 1975," November 15, 1994, p. 7 (ICC Exhibit 31).

Government in curtailing to any extent the Reserve of the Band aforesaid. The land is held as common property by the Band, and it might be asked if, instead of members withdrawing from the Treaty an equal number were to be added to it, would the Government be prepared to augment the area of the Reserve beyond the extent of the Territory granted the Indians as a Reserve when the Treaty was made with them, and it is a poor rule that will not work both ways. Moreover, the Indians regard this Reserve as the property of the Band without reference to the numbers in the Band, and were any attempt made to curtail the same by making free grants, as proposed, to parties who profess to have obtained possession of the lands after the date of the Treaty, it would lead to very serious consequences. . . .<sup>79</sup>

Nine years later, dealing with the same issue, Hayter Reed, the Deputy Superintendent General of Indian Affairs, advised A.M. Burgess, the Deputy Minister of the Interior:

This Department, however, has always held that the Reserve was allotted to the Band of an area proportionate to the number of souls therein at the time when the Treaty was negotiated, and there and then became the property of the Band in common, without reference to future augmentation or decrease of number, and such view was so generally understood by officials in the west to be the correct one that the Indians were always given to believe that they would be compensated for any lands of which they might be deprived.<sup>80</sup>

Reed also quoted from an opinion of the Department of Justice that the size of a reserve could not be reduced to reflect a shrinking population without the approval of the remaining members of the band in question.

In the same time frame, in response to a query from surveyor A.W. Ponton regarding the band population to be used in surveying reserves, R. Sinclair, on behalf of the Deputy Superintendent General of Indian Affairs, wrote to E. McColl, the Inspector of Indian Agencies:

a Band of Indians is in every case entitled to an amount of land corresponding to the census taken immediately subsequent to the treaty, notwithstanding any subsequent defection or increase in the number of members in the Bands.<sup>81</sup>

79 L. Vankoughnet, Deputy Superintendent General of Indian Affairs, Ottawa, to Superintendent General of Indian Affairs, March 8, 1887, NA, RG 15, vol. 497, file 139441-1 (ICC Exhibit 31, tab 2, p. 4).

80 Hayter Reed, Deputy Superintendent General of Indian Affairs, to A.M. Burgess, Minister of the Interior, May 11, 1896 (ICC Exhibit 31, tab 5, pp. 1-2).

81 R. Sinclair, for the Deputy Superintendent General of Indian Affairs, to E. McColl, Inspector of Indian Agencies, Winnipeg, October 11, 1890, NA, RG 10, vol. 1918, file 2790 (ICC Exhibit 31, tab 4, p. 1).

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Later, in the negotiations leading to the transfer of responsibility for natural resources to the Prairie Provinces in 1930, Canada was asked by Manitoba to limit the areas of land to be selected to fulfil treaty obligations with the Indians. Duncan Campbell Scott, the Deputy Superintendent General for Indian Affairs, responded to the Deputy Minister of Justice:

The various treaties provide for so many acres per capita and the practice of the Department has been to take the census of the band at the time that the survey of the required acreage is made. The acreage as hereinafter stated will be varied at the time of survey to meet the decrease or increase of the membership at such time. I do not think accordingly that it would be proper to insert any limitation of acres in the Agreement.<sup>82</sup>

While these letters in the Davies report address the date on which the population of a band should be determined to establish treaty land entitlement – and may even suggest that the acreage of a band’s reserve be based on a one-time count of the band’s population – none deal with the specific issue of whether Canada has historically provided bands with additional land to account for new adherents to treaty or transfers from landless bands. Even if it was Canada’s intention that treaty land entitlement in all cases was to be based on the number of people present at the time of treaty or a census immediately following treaty, with no consideration given to subsequent increases or decreases, it is evident that nobody followed that instruction, with surveyor Ponton himself surveying land that took into account a shortfall “plus a bit extra.”<sup>83</sup>

Later letters in the Davies report demonstrate a government grappling with the problem of how to deal with additions to band populations after date of first survey. In 1939, Surveyor General F.H. Peters advised D.J. Allen, Superintendent, Reserves and Trusts, Indian Affairs Branch:

In making a final settlement with these Indians (Utikuma Lake and Lubicon) with regard to land due them, it is our opinion that the additional area should be based on present population instead of upon the number of Indians who have joined the band since the survey of the reserves at Utikuma Lake for the Utikuma Lake band. In this connection our reasons are based on the following points:

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82 Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs, to Deputy Minister of Justice, September 4, 1929 (ICC Exhibit 31, tab 6, p. 2).

83 ICC Transcript, May 24, 1995, pp. 206-07 (James Gallo).

- (1) If the additional lands were to be based wholly on the number of non-treaty Indians who have joined the band since date of survey of their reserves in 1908-1909, this would leave out of consideration all descendants of these non-treaty Indians.
- (2) It is possible that some of the non-treaty Indians who joined are now dead and that others have left the band, – some commuted and transferred, – and consequently they should not be considered in the matter of additional lands for these bands. . . .

A definite policy as to the basis of population which is to be used in the calculation of the areas to be requested to be set aside as reserves should be agreed upon by your branch as soon as possible.<sup>84</sup>

The struggle to define the policy had not been resolved by 1954:

The problem is, basically, what date is to be selected for the purposes of determining the area of a Reserve for a Band, having in mind that under the Treaty the area is based on one square mile for each family of five.

The problem arises in this way. Some of our records clearly disclose that at the date a Reserve was set aside for a Band, in this type of case usually within a year or two after the Treaty, the Reserve was of a sufficient size to fulfil the Treaty obligation for the population of the Band at that date. However, there are a number of cases, probably more than we suspect, in which the Reserve or Reserves allotted to the Indians soon after the Treaty did not take up the entire land credit based on the population at the date of the Treaty. There are also a large number of cases, this applies throughout the Northwest Territories, where no Reserves have ever been established and hence the Treaty credit has not been used at all.

The obvious answer to the question of the date would seem to be the date of the Treaty, but it is doubtful if that can be accepted in most cases, for it is only in rare instances that we have any record of the population of the Band at the actual date of the Treaty. True, we usually have a figure showing the number of Indians for a particular Band at that date, but our records reveal in a great many cases dozens of names were added within the next few years on advice that small groups, usually stragglers from the main group, had been overlooked. In other cases it was not until several years after the Treaty that any accurate list of the Indians in a particular Band was compiled, because it was usually some years after the Treaty before the Reserve for the Band was established and the Indians settled thereon.

It has been suggested that in the case of a Band which has taken only part of its land credit, the date for determining the population for land credit be the date on which the Reserve or Reserves were first selected. On this same theory it would follow if, as in the case of the Northwest Territories, a Band had never taken up any part of its land credit and was now intending to do so, that the population as of the present

<sup>84</sup> F.H. Peters, Surveyor General, to D.J. Allan, Superintendent, Reserves and Trusts, October 19, 1939, NA, RG 10, vol. 7777, file 27131-1 (ICC Exhibit 31, tab 7, pp. 3-5).

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would form the basis. There may be a good argument to support this theory. At first glance it would seem that Bands falling into these two categories would benefit to a greater extent than Bands who had taken their full land credit shortly after the Treaty, in the sense that the Band populations have generally increased over the last 75 years and that Bands now taking Reserves would receive a larger acreage. However, it must not be overlooked that these Bands have not derived any benefit from the lands they were entitled to over the past 75 years, whereas in many cases Bands that took their land credits have derived great benefit and in many instances built up substantial trust funds. I believe it is safe to say that in the majority of cases where a Band did take up its land credit, that Band is in a more advanced position today than a Band that did not and the Indians of the first Band certainly enjoy a more comfortable and, for the most part, economical existence. . . .

I believe you will agree that this problem appears difficult of solution and has many ramifications, not the least of which will be the fact that it may be essential to reach agreement with each of the Provinces affected. In our view it is a problem which should have been met and solved years ago and it is strange that it has not been raised by one of the Provinces, for in recent years we have been asking the Province for land for Reserves and up to this date they have given us what we asked for without questioning the right of the Indians to receive the land under the terms of the Treaty. It is inevitable that one of these days we will be questioned as to the land credit to which a Band is entitled and if so, will be in the embarrassing position of having to advise that we cannot answer the inquiry.<sup>85</sup>

Twelve years later, the Department appeared to be no closer to establishing a policy, as reflected in virtually identical letters from H.T. Vergette to Alberta's Regional Director of Indian Affairs and to R.F. Connelly, Regional Director of Indian Agencies in Manitoba:

This subject has been a matter of concern to both the Department and the Indians for a number of years. The most difficult problem we face is to determine the exact areas of land to which bands with unfulfilled credits are entitled. Where partial entitlement has been met, the calculations become increasingly difficult.

To date, there has been no firm statement of policy as regards satisfying land entitlement under the terms of the various treaties. I have examined correspondence on file at Headquarters and have been able to identify a number of precedents and principles which have governed negotiations with Provincial Governments over the years. Simply stated, these are as follows:

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85 L.L. Brown, Superintendent, Reserves and Trusts, to W.M. Cory, Legal Advisor, April 9, 1954 (ICC Exhibit 31, tab 8, pp. 2-4).

- 2) Acreage is calculated on the basis of band population at the time the reserves are selected. Where a band has received some of its entitlement, the area is reduced by the acreage already received. . . .

The Legal Advisor reviewed this matter in 1954 and stated that there did not appear to be any possible way to give a firm legal opinion as to the rights of the Federal Crown to arbitrarily set the selection date for purposes of determining the reserve areas under the terms of the various Treaties. . . .

If you will refer to the Treaty 8 Commissioner's Report, page 5, you will note that at the time of the Treaty, Indians were "generally averse to being placed on reserves" and were "satisfied with the promise that this would be done when required." This seems to confirm the view that the establishment of reserves was to take place some time in the future and should be based on the population at the time of selection. . . .

We are unable, except in a few rare cases, to determine the population at the time the Treaty was signed. However, the changes in band membership for a number of reasons, particularly nomadic habits, transfers or movement between bands, divisions etc., have created a very complex problem. It is not simply a matter of selecting the figure from a payroll or census representing the total membership and using this as the basis for requesting a free grant of land from the Province, although this has been the method used most frequently. To be scrupulously fair, we should carefully examine the history of band organization and development from the signing of the Treaty until the present date to determine:

- 1) If there are any abnormal fluctuations in membership over the years.
- 2) If so, what are the reasons?
- 3) If the records reflect substantial increases in membership resulting from an influx of Indians from other bands which may have received their land entitlement.
- 4) In the case of new reserves, did these Indians once belong to a group for which lands have already been set apart?
- 5) Any other significant information having a bearing on land entitlement.<sup>86</sup>

Rem Westland, Director General of DIAND's Specific Claims Branch, confirmed that, in the 1960s and 1970s, the Department did not have a written or confirmed policy with regard to determining the amount of reserve land owed under treaty.<sup>87</sup>

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<sup>86</sup> H.T. Vergette, Head, Land Surveys and Titles, Indian Affairs Branch, to Regional Director of Indian Affairs, Alberta, October 14, 1966 (ICC Exhibit 31, tab 10, pp. 1-3), and Vergette to R.F. Connelly, Regional Director of Indian Affairs, Manitoba, December 27, 1969, DIAND, file 574/30-4-22 (ICC Exhibit 31, tab 11, pp. 1-3).

<sup>87</sup> ICC Transcript, December 16, 1994, p. 123 (Rem Westland).

### Saskatchewan Formula

Although the Specific Claims Policy and the treaty land entitlement process are national in scope, these programs have taken on a distinctive flavour in Saskatchewan.

In the mid-1970s, Canada undertook a comprehensive review of potential outstanding treaty land entitlement claims in Saskatchewan. This process identified 12 bands as having valid entitlements,<sup>88</sup> which prompted Judd Buchanan, the Minister of Indian Affairs, to solicit the cooperation of Saskatchewan Premier Allan Blakeney in fulfilling these entitlements under the terms of the *Saskatchewan Natural Resources Act*.<sup>89</sup> In response to this request, the efforts of the Federation of Saskatchewan Indians Nations (FSIN) focused on determining the appropriate formula for settling land entitlements rather than on identifying additional bands with such entitlements.<sup>90</sup> Their efforts culminated in the letter from Saskatchewan dated August 23, 1976, agreeing to settle claims on the basis of what became known as the Saskatchewan formula:

This formula would take "present population" x 128 (acres per person) less land already received. "Present population" means that the population is permanently fixed as at December 31, 1976.<sup>91</sup>

The Saskatchewan formula as proposed by the province was accepted by the federal Cabinet, and the Minister of Indian Affairs, Warren Allmand, confirmed this in writing to his provincial counterpart, Ted Bowerman, on April 14, 1977. Mr. Allmand and FSI Chief Ahenakew subsequently issued a press release in August 1977 to announce that the Saskatchewan formula represented "official agreement" on the means of fulfilling the outstanding treaty land entitlements of Saskatchewan First Nations.<sup>92</sup>

88 The 12 bands were the Keeseekoose, Muskowekwan, Piapot, One Arrow, Red Pheasant, Witchehan Lake, Canoe Lake, English River, Lac La Hache, Peter Ballantyne, Fond du Lac, and Stony Rapids First Nations, subject to the subsequent removal of Lac La Hache by Canada as having received its current reserve as full and final settlement of its treaty land entitlement. See Kenneth Tyler, "Report Concerning the Calculation of the Outstanding Treaty Land Entitlement in Saskatchewan, 1978-1980" (ICC Exhibit 16, p. 3).

89 Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990) (ICC Exhibit 4, p. 6).

90 Kenneth Tyler, "Report Concerning the Calculation of the Outstanding Treaty Land Entitlement in Saskatchewan, 1978-1980" (ICC Exhibit 16, p. 4).

91 Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990) (ICC Exhibit 4, p. 6).

92 Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990) (ICC Exhibit 4, pp. 7-8).

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The beauty of the Saskatchewan formula was the simplicity of its operation, which involved two steps. The first was to determine whether a band had a land shortfall as of date of first survey; if so, it had an outstanding entitlement. As explained by Sean Kennedy:

Once you cleared that magic number, meaning you had more people in your band than you got land for, and even if it was one or two people, and even if preliminary research indicated that that was the case, you automatically got into the Saskatchewan formula.<sup>93</sup>

The second step determined the additional land that the band would receive by multiplying the band's population as of December 31, 1976, by 128, and subtracting the land already received. Because a defined "current" population was used to establish the quantum of entitlement, it became unnecessary to conduct extensive historical research to establish the precise shortfall forming the basis of the entitlement.<sup>94</sup>

Despite the apparent clarity of its concept, the Saskatchewan agreement proved to have complex and far-reaching implications which made it difficult to implement. First, settlements with many bands were constrained by a shortage of suitable unoccupied Crown land adjacent to or in the vicinity of existing reserves. This problem was magnified as the number of entitlement bands doubled between 1978 and 1984, resulting in the land due under the formula increasing from about 950,000 acres to 1.3 million acres.<sup>95</sup>

Purchasing privately owned land was one possible solution, but the federal and provincial governments disagreed on which level should bear the cost. The federal government claimed that it had provided sufficient land to the province in 1930 to satisfy the outstanding entitlements, but the province countered that the quantity of land was meaningless if that land was inappropriate in terms of location and quality. Moreover, providing occupied Crown land for settlement purposes also had drawbacks. Much of this land was used as community pasture under leases which had become, by virtue of custom and administrative policy, subject to virtually automatic renewal for the benefit of the lessees. As a result, these community pastures had become integral

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93 ICC Transcript, November 18, 1994, pp. 29-30 (Sean Kennedy).

94 Kenneth Tyler, "Report Concerning the Calculation of the Outstanding Treaty Land Entitlement in Saskatchewan, 1978-1980" (ICC Exhibit 16, p. 12).

95 Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990) (ICC Exhibit 4, p. 10).



to the lessees' operations, and the lessees were understandably reluctant to give up their interests in these lands.<sup>96</sup>

Opponents of the Saskatchewan agreement found additional allies among Saskatchewan's rural municipalities and the Saskatchewan Wildlife Federation. The rural municipalities feared the erosion of their property tax bases if treaty land entitlement selections were made from lands within their boundaries. For its part, the Saskatchewan Wildlife Federation was concerned that increasing the size of reserves would extend treaty hunting rights and result in the destruction of wildlife habitat.<sup>97</sup>

Changes in the governments at the federal and provincial levels sealed the fate of the Saskatchewan formula. The province disowned it, and the federal government moved towards a position based on shortfall at date of first survey, reasoning that the Saskatchewan formula was simply too generous and created unfair windfalls for bands with outstanding entitlements based on very small shortfalls. At the same time, the bands grew increasingly frustrated with a process which, in their view, inappropriately put the third-party interests of Crown lessees and others first. Protracted dealings with these third-party interests resulted in delays which, with the continued growth of the Indian population, led to the fixed December 31, 1976, date of settlement population being perceived as an increasingly significant and onerous compromise by the bands. The increasing tensions eventually came to a head with the commencement of litigation in the Federal Court on March 16, 1989, by the FSIN and two First Nations.<sup>98</sup>

### **Claims Process, 1977-83**

Although the Saskatchewan formula did not solve Saskatchewan's treaty land entitlement woes, work on treaty land entitlement claims nevertheless accelerated during its existence. As Kenneth Tyler testified, before records were readily available on microfilm and computers in the 1970s, it was difficult for a band to research a treaty land entitlement case. Most of the records were available only in Ottawa, and, with funding difficult to obtain, the expense of research made the cost of developing a claim prohibitive.<sup>99</sup>

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96 Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990) (ICC Exhibit 4, pp. 12-14).

97 Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990) (ICC Exhibit 4, p. 15).

98 Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990) (ICC Exhibit 4, pp. 18-20).

99 ICC Transcript, May 24, 1995, pp. 64-65 (Kenneth Tyler).

These barriers to claim development started to come down in the early 1970s, particularly following Canada's confirmation in the 1973 *Statement on Claims of Indian and Inuit People* that it "recognized two broad classes of native claims – 'comprehensive claims': those claims which are based on the notion of aboriginal title; and 'specific claims': those claims which are based on lawful obligations."<sup>100</sup> The commitment of funds by government and, in some cases, by non-government organizations and band councils further enhanced claim activity.<sup>101</sup>

DIAND's Office of Native Claims, established in July 1974 "to review claims and represent the Minister and the Government of Canada in claims assessment and negotiation,"<sup>102</sup> found it necessary to modify the previous research criteria so that the claims submitted for review would comply with certain standards. The resulting guidelines, entitled "Criteria Used in Determining Bands with Outstanding Entitlements," appeared in August 1977 and provided as follows:

Research to determine those Bands in Saskatchewan with outstanding treaty land entitlements was commenced in December, 1975. At this time an attempt was made to establish a series of *basic criteria* to be used in calculating entitlements. Basically, the approach taken was that entitlement would be calculated by multiplying the per capita entitlement set out in the appropriate Treaty by the total Band population at the date of first survey of Indian Reserve lands. The total amount of Reserve land received by a Band would be compared with this entitlement to determine whether it had been fulfilled or whether the Band was entitled to more land. As research progressed, it was often found necessary to modify the criteria to accommodate unique circumstances affecting individual Bands. However, such modifications were made only when absolutely necessary and in all other cases consistent application of the established criteria was maintained.

The following is a detailed outline of each of the criteria established, together with an explanation of any modifications found to be necessary during the course of research:

...

## 2. Date of First Survey

In most cases entitlement was calculated according to the population of a Band at the date of first survey. . . .

100 DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 13.

101 DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 13.

102 DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 13.

### 3. Population

Once the date at which entitlement was to be calculated had been established, the most accurate record of the Band population at that date was sought.

For any cases from 1965 onwards, the certified population figures published by the Indian Inuit Program Statistics Division were used. Statistics did not publish population figures prior to 1965 and, therefore, from 1951 onwards the membership rolls held by the Registrar provided the most accurate record of population. Prior to 1951, membership rolls were not kept and population figures were therefore taken from the treaty annuity paylists.

In determining the population from the treaty paylists, the figure used was that shown as "Total Paid" for the year in question. It should be noted that in using this figure, the following factors were not accounted for:

- i) Band members absent at the time of treaty payment;
- ii) New members subsequently adhering to treaty.

Although the above factors were not accounted for in our basic criteria and entitlement calculations, it was recognized that they might constitute a basis for future negotiation.<sup>103</sup>

As these criteria suggest, Canada's initial position was that its treaty obligation was fixed as of the date of first survey of any land for a band, and did not increase thereafter with increases in population. However, this approach was viewed by the FSIN and the bands as having certain inherent weaknesses. First, the approach did not permit entitlement to increase whether a band's population rose as a result of either natural increase or subsequent additions,<sup>104</sup> although the bands accepted that no new entitlement should arise where the only addition to population was by means of natural increase.<sup>105</sup>

Second, while paylists were accepted as a reasonable starting point for determining treaty land entitlement, it was considered that they did not always paint a true picture of band membership owing to absentees, members who elected not to adhere to treaty, and the general instability of band populations in the late 1800s.<sup>106</sup> The paylists had been designed to record the payment of annuities and, although in the absence of other evidence they constituted as accurate a record of band membership as was available at the

103 DIAND, Office of Native Claims, "Criteria Used in Determining Bands with Outstanding Entitlements" (August 1977), 32-35 (ICC Exhibit 14).

104 ICC Transcript, May 24, 1995, p. 41 (Kenneth Tyler).

105 ICC Transcript, May 24, 1995, p. 39 (Kenneth Tyler).

106 ICC Transcript, May 24, 1995, pp. 44-45 (Kenneth Tyler); ICC Transcript, May 25, 1995, pp. 293-94 (Peggy Brizinski).

time of survey,<sup>107</sup> they were “rather inadequate” for the purposes of a census record.<sup>108</sup>

Third, Canada originally considered the “base payroll” for treaty land entitlement purposes to be a band’s payroll for the year in which the first survey for that band was prepared, regardless of whether the survey preceded or followed the payment of annuities in that year.<sup>109</sup> In circumstances where the first survey preceded the annuity payments in a calendar year, the bands were of the view that the surveyor would have had to rely on the payroll from the preceding calendar year to establish a band’s population, with the result that a payroll from the same calendar year as the survey might have no realistic connection with the DOFS population used by the surveyor. Canada’s policy would have worked a particularly harsh result in the case of the Thunderchild Band; following the initial survey in 1881, only six people showed up for annuity payments later that year. The Band’s population had been substantially larger (although still not large enough to support an entitlement case) in 1880, and was larger yet in later years as a result of an influx of members from other bands, notably Thunder Companion, Napahase, and Young Chipewyan.<sup>110</sup>

Through ongoing consultation and negotiations between Canada and the First Nations, Canada began to make accommodations to recognize situations that did not fall neatly into the original DOFS position set forth in the 1977 criteria. For example, DIAND reopened the Thunderchild case and agreed to consider the 1880 and 1882 populations in establishing outstanding treaty land entitlement.

Another departure from the strict implementation of the 1977 criteria arose as a result of the claim of the Nut Lake Band, which involved a new band formed after a band split. The initial payroll review had concluded that the Band’s treaty land entitlement based on its 1881 DOFS population had been fulfilled, and therefore no outstanding obligation appeared to be owing. However, closer scrutiny of the paylists showed that, in making annuity payments, the Indian agents had, in applying the “two-year rule,” paid two instalments of arrears to certain individuals on the base payroll but did not include them in the numbers paid for the current year. Thus the administrative convenience of the “two-year rule” resulted in an inaccurate reflection of the Band’s population as of date of first survey, and thereafter DIAND became

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107 ICC Transcript, May 24, 1995, p. 195 (James Gallo).

108 ICC Transcript, May 25, 1995, p. 292 (Peggy Brizinski).

109 ICC Transcript, May 24, 1995, p. 16 (Kenneth Tyler).

110 ICC Transcript, May 24, 1995, pp. 36-38 (Kenneth Tyler).

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prepared to consider absentees in establishing DOFS population. As Kenneth Tyler commented in his report, the Nut Lake case “may have contributed to the Department’s change of policy, and its adoption of the principle . . . that the population figures employed in entitlement calculations should be based upon the best evidence of the true population of the Band on the actual date in question.”<sup>111</sup>

Canada also accommodated the Saulteaux Band, for which reserve lands reflecting a population of some 75 people had been surveyed in 1909. The members of that Band refused to adhere to treaty until 1954, when 69 members of the Band did so. Further adhesions began to take place in 1956. The formal adhesion document provided that, in consideration for the Band members agreeing to abide by and carry out the terms of the treaty, Canada agreed that “all the payments and provisions named in the said treaty to be made to each Chief and his Band shall be faithfully made and fulfilled to the aforesaid Indians.”<sup>112</sup> The unique aspect of these adhesions was that they were by individual band members and not the band, as had been the case with previous adhesions to treaties. Subsequently, in the 1970s, based at least in part on the solemn promises contained in the formal adhesion documents, Canada assumed responsibility for fulfilling unsatisfied obligations, including treaty land entitlement.<sup>113</sup>

As a result of the Saulteaux case, Canada re-examined its criteria for dealing with treaty land entitlement. This process led G.A. Wyman, the Director of the Specific Claims Group, DIAND, to advise Anita Gordon, the Director of Research for the Federation of Saskatchewan Indian Nations, on April 23, 1979, of the basis on which the Department had approved consideration of late adherents as “additional criteria for validating entitlements”:

The department has agreed in principle that bands are entitled to additional reserve land on account of late adherents to treaty, both formal (i.e., those who were party to a formal adhesion to treaty) and informal (in other words, those who were simply added to a band’s payroll by the Indian Agent without a formal adhesion being taken). The term “late adherents” is used here to mean a native person who takes treaty for the first time, none of whose forebears had ever previously taken either treaty or scrip. . . .

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111 Kenneth Tyler, “Report Concerning the Calculation of the Outstanding Treaty Land Entitlement in Saskatchewan, 1978-1980” (ICC Exhibit 16, p. 17).

112 *Copy of Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians* (Ottawa: Queen’s Printer, 1964), 29 (ICC Exhibit 15).

113 ICC Transcript, May 24, 1995, pp. 16-21, 53 (Kenneth Tyler).

In calculating the entitlement due to a band on account of its taking late adherents into membership, the department is prepared to proceed as follows. As a first step, the band's original entitlement, according to its population at the date of first survey, would be determined. To this would be added the per capita treaty allotment (usually 128 acres) for each late adherent (excluding descendants) to arrive at a "total entitlement" for the band. If this "total entitlement" has been met, then the band would not be deemed to have an outstanding entitlement today. If, on the other hand, the band has not received enough land to meet this "total entitlement," then an outstanding entitlement would be recognized.<sup>114</sup>

Although this statement of the Department's position represented a significant breakthrough for bands seeking to establish outstanding treaty land entitlement, the "proposed calculation procedure was still not acceptable to the Federation or to entitlement bands, because it still insisted on deeming new adherents to Treaty to have entered at a time when they did not enter, and deeming lands to have been received when they had not been received."<sup>115</sup>

Nevertheless, in light of the policy set forth in Ms. Wyman's letter, there was, according to Mr. Tyler, no doubt that the subsequent claim of the Pelican Lake Band (previously known as the Chitek Lake Band) would be accepted for negotiation, even though the claim was based entirely on new adherents to treaty. The real question was the basis on which the claim would be approved. In 1921, a reserve of approximately 8630 acres, enough land for 68 people, was selected at a time when the number of members of the band who had adhered to treaty was 42. Consequently, the band's treaty land entitlement appeared to have been fulfilled. However, a significant number of band members had not adhered to treaty. In 1949 and 1950 a total of 58 band members started receiving treaty annuities and, although they had been members all their lives, the Department admitted them as new members of the band rather than as, in Ms. Wyman's terms, informal late adhesions to treaty.

Under the terms of the Saskatchewan formula, the Band would have been entitled to land on the basis of its December 31, 1976, population, less land already received. However, the Band chose to take a "principled" approach to its land entitlement, even though this resulted in a smaller claim. The position of the Band and the Federation of Saskatchewan Indian Nations was that, once sufficient land had been set aside for a band, the question of treaty

114 G.A. Wyman, Director, Specific Claims Group, Office of Native Claims, to Anita Gordon, Director of Research, FSI, April 23, 1979 (ICC Documents, pp. 163-64).

115 Kenneth Tyler, "Report Concerning the Calculation of the Outstanding Treaty Land Entitlement in Saskatchewan, 1978-1980" (ICC Exhibit 16, pp. 11-12).

land entitlement "could not be re-opened on the basis of natural increase, but only as a result of the addition of new members who had never been provided for elsewhere."<sup>116</sup> Mr. Tyler discussed this issue in his letter of March 24, 1980, to Graham Swan of DIAND's Office of Native Claims in reference to a report prepared by Brendan Hawley setting forth a proposed basis of settlement:

Mr. Hawley's report concludes that the Saskatchewan Formula ought to be applied to the entire population of the band, and that land ought to be provided on the basis of the 31 December, 1976 total membership. In my opinion this goes considerably beyond the Governments [sic] obligation under the [Saskatchewan] formula. This would become quite apparent if one were to consider the not at all unlikely possibility that a band may have had its Treaty land entitlement exactly fulfilled fifty or one hundred years ago, with only a very few surplus acres provided. If one person were to have adhered to Treaty with such a band in the early 1970's, by the logic of the conclusion in Mr. Hawley's report, the Government of Canada would be obligated to provide sufficient land to the band to accommodate this new adherent and the total population increase of the entire band from the date of survey until 31 December, 1976. Such an interpretation of the Saskatchewan Formula would have made a non-Treaty Indian an extremely valuable asset indeed to a great many bands.<sup>117</sup>

Ultimately, the settlement with Pelican Lake used a modified form of the Saskatchewan formula, which took the percentage represented by the number of new adherents divided by the total population (obtained by combining the new adherents with the DOFS population), and applied that percentage to the Band's land entitlement based on its population at December 31, 1976. This approach was detailed in the June 25, 1980, reply to Mr. Tyler from J.R. Goudie, Acting Director, Office of Native Claims:

As an alternative I would suggest that the entitlement of the Chitek Lake Band be calculated on the basis of the percentage by which the band's original entitlement (at the date of first survey – or in this case selection) was increased as the result of the influx of new adherents. This percentage would then be applied to the band's December 31, 1976 population, as per the Saskatchewan formula. Under this proposal, the entitlement of the Chitek Lake Band would be calculated as follows:

116 Kenneth Tyler, "Report Concerning the Calculation of the Outstanding Treaty Land Entitlement in Saskatchewan, 1978-1980" (ICC Exhibit 16, p. 14).

117 Kenneth J. Tyler, Tyler, Wright & Daniel Limited, to Graham Swan, Office of Native Claims, March 24, 1980 (ICC Documents, pp. 175-76).

(i) Population at date of selection/survey (1921)	42
(ii) New adherents	<u>57</u>
(iii) Total	99
(iv) Adherents as % of total population $57/99 \times 100$	57.5%
(v) 57.5% of December 31, 1976 entitlement	21,915 ac
(vi) less surplus lands provided 1921	<u>3,254 ac</u>
(vii) outstanding entitlement	8,661 ac <sup>118</sup>

As Mr. Kennedy testified, the result in Pelican Lake used the same validation process as the Saskatchewan formula, although the quantum was different:

Well the lands they would get under the Saskatchewan formula, the quantum was different, yes, but the actual validation was not different. There was no distinction. What you did is look at everybody. There was no distinction. We didn't stop at shortfall and then go beyond. We just looked at everybody. And if there was "X" number of people, times the acreage in the treaty, then you looked at how much the land the shortfall amount was, if there was indeed a shortfall. Then you looked at the formula. And if they were one of these bands that had a specific situation, then you modified the formula. That was actually a political decision.<sup>119</sup>

The novelty of the Pelican Lake settlement was confirmed by Member of Parliament Bernard Loiselle, the Minister of Indian Affairs' special representative for entitlements, to Saskatchewan Minister Ted Bowerman:

I am enclosing a copy of a letter which I have sent to Chief Leo Thomas of the Pelican Lake Band. It confirms that the federal government recognizes that the band has a valid claim to additional land under treaty.

There is one unique aspect to this entitlement, namely that the entitlement pertains to late adherents only. The entitlement of the original members of the Pelican Lake Band was met when their reserve was selected in 1921. However, in 1949 some 57 non-treaty Indians adhered to treaty and became members of the band, but no additional reserve land was ever provided on their account. Consequently, the entitlement due to the band today is on account of these adherents only. The band and the federal government have agreed that a modified version of the Saskatchewan formula would be appropriate in this case.<sup>120</sup>

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<sup>118</sup> J.R. Goudie, Acting Executive Director, Office of Native Claims, to Kenneth J. Tyler, Tyler, Wright & Daniel Limited, June 25, 1980 (ICC Documents, p. 179).

<sup>119</sup> ICC Transcript, November 18, 1994, p. 89 (Sean Kennedy).

<sup>120</sup> Bernard Loiselle to the Honourable Ted Bowerman, Minister of Environment, Province of Saskatchewan, September 22, 1980 (ICC Documents, p. 183).



Government policy at the time was enunciated even more clearly in another letter from Mr. Loiselle, this one sent to Chief Gordon Oakes of the Nikaneet Band on October 3, 1980. After confirming that the Band's claim to treaty land entitlement had been approved, Mr. Loiselle continued:

I would like to set out for you the basis for this decision. Firstly, every treaty Indian has a right to be included in the allotment of reserve land for some band. As the ancestors of the Nikaneet Band members could not be shown to have been included in the reserve allotment of other bands it was possible to recognize an entitlement for the Nikaneet Band. Consequently acting on behalf of the Minister I have determined and here confirm for you, that the Nikaneet Band is recognized as having an outstanding treaty land entitlement.<sup>121</sup>

Earlier in 1980, as a result of an agreement between Mr. Loiselle and FSI Chief Sol Sanderson,<sup>122</sup> a joint committee of the Federation of Saskatchewan Indians and the Department of Indian and Northern Affairs was struck "to come to a quick but common set of findings on each entitlement case and to avoid duplication of work."<sup>123</sup> The committee researched and evaluated each claim under the supervision of the Office of Native Claims using the validation criteria established by the Department of Justice.<sup>124</sup> The committee's joint reports set forth recommendations which were then presented to the ONC for review of the claims.<sup>125</sup>

In 1982 the joint committee recommended that Canada accept the claims of the Poundmaker, Moosomin, Onion Lake, and Sweetgrass Bands for negotiation. These claims represented another new precedent in the validation process since they were based on "landless transfers," which were distinguished by the committee from ordinary interband transfers:

### **C. Transfers from Landless Bands**

Indians who transfer from one band to another are not taken into account in determining a band's population for entitlement purposes. To do so would involve a great deal of research, and would present considerable practical difficulty. If it is argued that a band is entitled to receive land for an Indian who transfers into it from another

121 Bernard Loiselle, Member of Parliament, to Chief Gordon Oakes, Nikaneet Band, October 3, 1980 (ICC Exhibit 18, tab 28, p. 1).

122 ICC Transcript, May 24, 1995, pp. 72-73 (Kenneth Tyler).

123 M.A. Inch, Acting Director, Specific Claims, Office of Native Claims, to Marla Bryant, January 18, 1982 (ICC Documents, p. 184).

124 M.A. Inch, Acting Director, Specific Claims, Office of Native Claims, to Marla Bryant, January 18, 1982 (ICC Documents, p. 184).

125 ICC Transcript, November 18, 1994, p. 87 (Sean Kennedy); ICC Transcript, May 24, 1995, pp. 72-73 (Kenneth Tyler).

band, then by the same token the band he left should lose that individual's entitlement. This latter result, of course, is not feasible. In consequence, neither transfers into, nor out of, a band are considered for entitlement purposes.

There are, however, cases where an Indian has transferred from a band which had not received land to one which had already had its reserve surveyed. Under the present policy this Indian would not be counted in either band and would thus never receive his per capital land entitlement.

We believe that consideration should be given to taking transfers *from landless bands* into account for entitlement purposes, as long as the transferee was not counted for entitlement purposes with any other band.<sup>126</sup>

When asked whether the joint committee's recommendations with respect to landless transfers and band amalgamations should be referred to the Saskatchewan government to confirm its concurrence, J.D. Leask, Director General of Reserves and Trusts, considered it unnecessary:

It is proposed to seek the Province's agreement to include two new validation criteria (transfers from landless Bands and Band amalgamations) in the Saskatchewan Formula. . . .

To my mind the 1976/77 agreement with the Province and the FSI already deals with this. The agreement states that Bands with a valid entitlement may use the Formula (i.e. their 1976 population) to calculate their entitlement. Neither the agreement nor the Formula deals with validation criteria at all; hence, new criteria do not have to be "included in the Formula." If Justice advises that landless transfers and Band amalgamations are valid grounds for an entitlement, then the Saskatchewan Formula automatically applies under the terms of the 1976/77 agreement. The only question is whether Bands validated on this basis should receive the full benefit of the Formula, since their original entitlements at date of first survey were satisfied. We have already established precedents for the use of a percentage formula in such cases at Chitek Lake and Beardy's/Okemasis. This was done with the concurrence of the Province and the FSI. I suggest that we have no choice but to stand by these precedents . . . which, to my mind, constitute a ready-made mandate for the federal negotiator. His job should be to confirm that the new provincial government accepts this approach. Since the effect of the percentage formula is to reduce the amount of land owed to a Band, I cannot imagine Saskatchewan will object, unless they intend to renege on the whole Saskatchewan formula.<sup>127</sup>

126 Joint FSI/DINA Committee on Entitlement, "Report No. 7 - Poundmaker Band #114" [1982] (ICC Documents, pp. 187-88). See also "Report No. 8 - Onion Lake Band #119/#120," "Report No. 9 - Moosomin Band #112," and "Report No. 13 - Sweetgrass Band #113," all within ICC Documents Addendum, vol. 2, tab G.

127 J.D. Leask, Director General, Reserves and Trusts, to R.M. Connelly, Director, Specific Claims Branch, Office of Native Claims, November 15, 1982 (ICC Documents, pp. 197-98).

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Mr. Leask also provided a basis for distinguishing between the claims of new adherents and landless transfers:

[R]eference is made to the Nikaneet situation in the context of the Chitek Lake entitlement. I do not believe there is a strong connection between the two. Chitek Lake involved new adherents to treaty who, Justice advised, have a legal right to the same treaty benefits accorded to the original signatories of the treaty, including reserve land. The Nikaneet claim established the principle that all treaty Indians are entitled to be counted in some Band or other for entitlement purposes. This relates much more directly to the transfers from landless Bands criteria. . . .<sup>128</sup>

It is worth highlighting the context in which developments in treaty land entitlement at that time were occurring. In 1982 the federal government issued *Outstanding Business*, which reiterated the concept of “lawful obligation” as the basis of Specific Claims Policy:

The government has clearly established that its primary objective with respect to specific claims is to discharge its lawful obligation as determined by the courts if necessary. Negotiation, however, remains the preferred means of settlement by the government, just as it has been generally preferred by Indian claimants. In order to make this process easier, the government has now adopted a more liberal approach eliminating some of the existing barriers to negotiations.<sup>129</sup>

In particular, the government indicated its willingness in the negotiation process to forgo the legal and equitable defences of limitations and laches, although it retained the right to rely on those defences for claims ending up in court. The policy also clearly established the process for dealing with specific claims, including the format for presentation of claims, the review of claims by the ONC, the determination of the acceptability of claims based on legal advice from the Department of Justice, and, ultimately, resolution of claims through negotiation. The impact of the policy was that, whereas the Department of Justice had previously been involved in the validation process only as its input was required on specific issues, it subsequently reviewed all claims to determine whether a lawful obligation was owed by Canada to the claimant bands.<sup>130</sup>

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<sup>128</sup> J.D. Leask, Director General, Reserves and Trusts, to R.M. Connelly, Director, Specific Claims Branch, Office of Native Claims, November 15, 1982 (ICC Documents, p. 198).

<sup>129</sup> DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 19.

<sup>130</sup> ICC Transcript, November 18, 1994, pp. 32-33 (Sean Kennedy).

On December 1, 1982, the claims of the Joseph Bighead, Poundmaker, Sweetgrass, and Mosquito/Grizzly Bear's Head Bands were accepted for negotiation, and the bands and the Saskatchewan government were duly informed.<sup>131</sup> The Joseph Bighead Band was considered eligible for full application of the Saskatchewan formula because it had established a date-of-first-survey shortfall. On the other hand, Poundmaker, Sweetgrass, and Mosquito/Grizzly Bear's Head, like Pelican Lake before them, obtained approval for a percentage application of the formula since, in the first two cases, the claims were based solely on late adherents and, in the third case, the claim arose from a band amalgamation. With respect to the Poundmaker and Sweetgrass claims, W.J. Zaharoff, a senior claims analyst with the Specific Claims Branch, ONC, advised Graham Powell, Executive Director of Saskatchewan's Department of Intergovernmental Affairs (and in the process demonstrated the involvement of the Department of Justice in the validation process):

The Poundmaker and Sweetgrass Bands were provided with enough land to satisfy their treaty land entitlements based on the band's population at date of first survey. However, people later transferred into these bands which had not yet received treaty lands. Our research has indicated that none of these transferees were ever counted in the treaty land entitlement calculation for any other band. Our legal counsel advises us that each Indian is entitled, under the terms of Treaty 6, to be counted in the population base used to calculate the Crown's overall liability, provided that he or she has not been included in an entitlement calculation elsewhere. The Department of Justice has taken the position that, since the Indians who transferred to the Poundmaker and Sweetgrass Bands had never been included in such a calculation, the two Bands have an outstanding treaty land entitlement.<sup>132</sup>

Mr. Zaharoff also explained the basis of employing a percentage application of the Saskatchewan formula:

<sup>131</sup> John C. Munro, Minister of Indian Affairs, to Chief Ernest Sundown, Joseph Bighead Band, December 1, 1982 (ICC Exhibit 18, tab 5); Munro to Chief Henry Favel, Poundmaker Band, December 1, 1982 (ICC Exhibit 18, tab 20); Munro to Chief Gordon Albert, Sweetgrass Band, December 1, 1982 (ICC Exhibit 18, tab 24); Munro to Chief Douglas Moosomin, Mosquito/Grizzly Bear's Head Band, December 1, 1982 (ICC Exhibit 18, tab 9); Munro to J. Gary Lane, Minister of Intergovernmental Affairs, Province of Saskatchewan, December 1, 1982 (ICC Documents, p. 203). The appendices (showing treaty land entitlement calculations) attached to the letters to the Chiefs of the Poundmaker and Sweetgrass Bands clearly show that those Bands were considered to have received a DOFS surplus.

<sup>132</sup> W.J. Zaharoff, Senior Claims Analyst, Specific Claims Branch, Office of Native Claims, to Graham Powell, Executive Director, Intergovernmental Affairs, Province of Saskatchewan, December 13, 1982 (ICC Documents, p. 207).

There are several reasons why it is both logical and consistent to use a percentage calculation in applying the Saskatchewan Formula to claims of these two general types [i.e., landless transfers and band amalgamations]. Basically, where the original entitlement to a band was met at date of first survey, it does not seem reasonable to re-open the entire claim of the band when only a certain group of individuals are responsible for the outstanding entitlement. It seems more appropriate that the land quantum calculations should be relative to that portion of the band which has not been included in the population base used to determine the treaty land entitlement.

It was also important to ensure that these claims were dealt with fairly within the spirit of the 1977 Agreement. A percentage formula was developed based upon those individuals who had not been included in the calculations providing treaty lands, using the band's December 31, 1976 population. All three parties have agreed to this percentage calculation in previous cases, and it is now an integral part of the 1977 Saskatchewan Agreement.<sup>133</sup>

Similar letters confirming the acceptance of the treaty land entitlement claims of the Moosomin and Onion Lake Bands were forwarded to the respective Chiefs of those bands in 1983.<sup>134</sup> Moreover, although the claim of the Ochapowace Band was rejected in the first instance on the basis of preliminary research showing that the band had received sufficient land at the date of first survey to satisfy its treaty land entitlement, R.M. Connelly, Director of the Specific Claims Branch, ONC, informed Chief Morley Watson on October 28, 1983, that the claim might yet be resurrected on the basis of further research confirming possible "late additions" to the band's population:

"Late additions" are persons who join a band after a reserve has been set aside, and who have never been included in a population base for a reserve survey for any other band. This includes late adherents to treaty and persons who have transferred from another band but had not been included in a reserve survey. Each treaty Indian is entitled to be included once in the population base for a reserve survey as a member of a specific band, therefore, these "late additions" are entitled to be included in the population base of the band of which they become members. . . .

133 W.J. Zaharoff, Senior Claims Analyst, Specific Claims Branch, Office of Native Claims, to Graham Powell, Executive Director, Intergovernmental Affairs, Province of Saskatchewan, December 13, 1982 (ICC Documents, pp. 208-09).

134 John C. Munro, Minister of Indian Affairs, to Chief Ernest Kahpeaysewat, Moosomin Band, March 25, 1983 (ICC Exhibit 18, tab 8); Munro to Chief Leo Paul, Onion Lake Band, October 12, 1983 (ICC Exhibit 18, tab 16). As with the letters to the Chiefs of the Poundmaker and Sweetgrass Bands, the appendices (showing treaty land entitlement calculations) attached to the letters to the Chiefs of the Moosomin and Onion Lake Bands also show that those bands were considered to have received a DOFS surplus.

Should this research identify at least 8 persons as bonafide late additions to the Ochapowace Band and they be acceptable to the Department of Justice as members, then your band will have a valid claim to outstanding treaty land entitlement.<sup>135</sup>

Ultimately, after further research, the Band's claim was accepted for negotiation on April 19, 1984,<sup>136</sup> not on the basis of late additions but "on the strength of its two component Bands' populations at 'the date of first survey' itself; enough acceptable 'temporary absentees' in 1881 were identified to satisfy the federal government."<sup>137</sup>

### 1983 ONC GUIDELINES

The 1983 ONC Guidelines were produced in May of that year through the joint efforts of Sean Kennedy of the ONC and lawyer Stuart Archibald of the Department of Justice. The purpose of the Guidelines was not only to assist Canada's claims analysts with their review of future claims originating in Saskatchewan and other provinces, but also to let Indian organizations and bands researching claims know what the Department expected of them.<sup>138</sup> For this reason, the Guidelines were widely distributed until at least mid-1991 as the federal practice on the validation of entitlements.<sup>139</sup>

The Guidelines have been referred to extensively in the submissions of the Kawacatoose First Nation in the present inquiry and we will therefore set out the relevant provisions in some detail:

*The general principle which applies in all categories of land entitlement claims is that each Treaty Indian Band is entitled to a certain amount of land based on the number of members. Conversely, each treaty Indian is entitled to be included in an entitlement calculation as a member of an Indian Band.*

The following criteria are intended as guidelines in the research and validation process for treaty land entitlement claims. They have evolved from historical research done by the Office of Native Claims (ONC) in consultation with the Federal Department of Justice, and in consultation with the research representatives of the claimant bands. Each claim is reviewed on its own merits keeping in mind these guidelines.

135 R.M. Connelly, Director, Specific Claims Branch, Office of Native Claims, to Chief Morley A. Watson, Ochapowace Band, October 28, 1983 (ICC Documents, p. 222).

136 John C. Munro, Minister of Indian Affairs, to Chief Morley A. Watson, Ochapowace Band, April 19, 1984 (ICC Exhibit 18, tab 13).

137 Stewart Raby, Federation of Saskatchewan Indian Nations, to Wilma Jackknife for Indian Claims Commission, June 12, 1994 (ICC Documents, p. 410).

138 ICC Transcript, November 18, 1994, pp. 44-45 (Sean Kennedy).

139 Stewart Raby, Federation of Saskatchewan Indian Nations, to Wilma Jackknife for Indian Claims Commission, June 12, 1994 (ICC Documents, p. 410).

However, as experience has taught, new and different circumstances have arisen with each claim. Therefore, the review process is not intended to be restricted to these guidelines.

Determining a Band's treaty land entitlement involves five basic steps:

- 1) Identification of the band and the applicable treaty.
- 2) Determination of the relevant survey date.
- 3) Determination of the total lands received by the band.
- 4) Determination of the population base.
- 5) Overall entitlement calculations.

#### **D Population Base for the Determination of an Outstanding Land Entitlement**

An outstanding treaty land entitlement exists when the amount of land which a band has received in fulfillment of its entitlement is less [than] what the band was entitled to receive under the terms of the treaty which the band adhered [to] or signed. This is referred to as a shortfall of land. *There are two situations where a shortfall may exist. The first is when the land surveys fail to provide enough land to fulfill the entitlement. The second is when new members who have never been included in a land survey for a band, join a band that has had its entitlement fulfilled.* The objective is to obtain as accurate a population of the band as is possible on the date that the reserve was first surveyed. The only records which recorded membership of Indians in the bands prior to 1951 were the annuity payroll and the occasional census. The annuity paylists are what is generally relied upon in order to discover the population at the date of first survey. This is done by doing an annuity payroll analysis.

In payroll analysis, all individuals being claimed for entitlement purposes are traced. This includes a review of all band paylists in a treaty area for the years that an individual is absent, if necessary. All agent's notations are investigated regarding the movements, transfers, payment of arrears, or any other event that affects the status of a band member. A ten to fifteen year period is usually [sic] covered depending on the individual case. This period would generally begin at the time the treaty was signed, through the date of first survey and a number of years afterwards. Where a claim depends solely on new adherents or transfers from landless bands, the band memberships may be traced through to the present day.

The following principles are generally observed in an annuity payroll analysis:

#### ***Persons included for entitlement purposes:***

- 1) Those names on the payroll in the year of survey.
- 2) Absentees who are paid arrears. These are band members who are absent for the year of survey but who return and are paid arrears for that year.

Absentees who return and who are not paid arrears. These people must be traceable to: when they became band members and how long they remained as members during say, a ten to fifteen year period around the date of survey. Gener-

ally, continuity in band memberships is required. Also it must be shown that they were not included in the population base of another band for treaty land entitlement purposes, while absent from the band.

- 3) New Adherents to treaty. These are Indians, who had never previously signed or adhered to treaty and consequently have never been included in an entitlement calculation.
- 4) Transfers from Landless Bands. These are Indians who have taken treaty as members of one band, then transferred to another band without having been included in the entitlement calculation of the original band, or of the band to which they have transferred. The parent band may not have received land, whereas the host band may have already had its entitlement fulfilled. These Indians are acceptable, as long as they have never been included in a land quantum calculation with another band.
- 5) Non-Treaty Indians who marry into a Treaty Band. This marriage, in effect, makes them new adherents to Treaty.

***Persons not included***

- 1) Absentees, new adherents and transfers from landless bands, who do not retain a reasonable continuity of membership in the band i.e.: they are away most of the time. However, these are dealt with on a case by case basis and there may be circumstances which warrant the inclusion of a band member even though he may be absent for an extended period of time.
- 2) Where the agent's notes in the payroll simply states "married to non-treaty," those people are not included. They could be non-native or métis and therefore ineligible.
- 3) Where the agent's notation simply reads "admitted" (which often meant admitted to band and not to treaty) and no letter of admission to treaty can be found, these persons are excluded.
- 4) Persons who are not readily traceable . . .
- 5) Persons who were included in the population base of another band for treaty land entitlement purposes.
- 6) Persons names which are discovered to be fraudulent.<sup>140</sup>

Mr. Kennedy testified at length before the Commission with regard to the 1983 ONC Guidelines. He did not view them as a radical departure from the previous process for dealing with treaty land entitlement claims. "We just put on paper what we did."<sup>141</sup> Mr. Westland, on the other hand, contended that

140 DIAND, "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims," May 1983 (ICG Documents, pp. 213 and 215-16). Emphasis added.

141 ICG Transcript, November 18, 1994, p. 88 (Sean Kennedy).



the Guidelines were not “speaking to a consistent way to do business” or there would have been no need for them in the first place.<sup>142</sup>

Mr. Kennedy considered that the Guidelines were used by the Department for both claims research and validation. Although an important aspect of substantiating a claim at that time was to establish a lawful obligation owed by Canada to a band, that meant more than just a DOFS shortfall:

The government’s position at the time was that you had to determine the extent of lawful obligation which meant shortfall.

Now as I say, we’re all hearing this shortfall date of first survey. All the date of first survey ever was was a starting point. You started with that payroll, and you worked everything else afterwards. It wasn’t just the shortfall at the date of first survey, even in the earlier claims.<sup>143</sup>

According to Mr. Kennedy, Canada viewed its lawful obligation as including not just individuals on the base payroll, but also later additions. Even if a band’s treaty land entitlement was fulfilled at DOFS, the quantum could be reconsidered if later additions to the band’s population created a shortfall. It was only if a band had received enough land to satisfy its DOFS population together with later additions that its claim would be rejected.<sup>144</sup>

Mr. Westland disagreed. He viewed the Guidelines’ second basis for a shortfall – “when new members who have never been included in a land survey for a band join a band that has had its entitlement fulfilled” – as flawed and illogical in the context of treaty land entitlement understood as a collective right of a band and not a right of individual Indians.<sup>145</sup> For the same reason, he considered the Guidelines’ opening statement of principles – that each band is entitled to a certain amount of land based on the number of its members, and that each treaty Indian is entitled to be included in an entitlement calculation as a member of a band – to be in error. Nevertheless, he acknowledged that claims had been accepted for negotiation on the basis of those principles, but without a lawful obligation to do so:<sup>146</sup>

I don’t think that it would [be] because anyone was misled. I think that there was an understanding at that time. These guidelines created a certain kind of mind set. There were acceptances to claims that were recommended to the Minister. I don’t think any

142 ICC Transcript, December 16, 1994, p. 79 (Rem Westland).

143 ICC Transcript, November 18, 1994, p. 42 (Sean Kennedy).

144 ICC Transcript, November 18, 1994, pp. 49-51 (Sean Kennedy).

145 ICC Transcript, December 16, 1994, pp. 91-92 (Rem Westland).

146 ICC Transcript, December 16, 1994, pp. 77 and 84 (Rem Westland).

minister would have been aware of those guidelines, for example. And the Minister acted on recommendations from officials as is proper in the system. I think the times were different. The attention being paid to the fundamentals of policy was a little different<sup>147</sup>

Mr. Kennedy considered it to be government policy in 1983 that each Indian was entitled to be counted for treaty land entitlement purposes, provided that he or she had not been counted with another band or taken scrip. Therefore, a band's entitlement was deemed to increase if its membership was increased by the addition of individuals who had not received land elsewhere.<sup>148</sup> Late adherents would be treated like a separate band that had never adhered to treaty: until adhesion, their right to receive land under treaty would grow (or, presumably, diminish) with the growth (or decline) in population of the late adherent group. That right would not be reduced, however, as a result of reductions in the population of the band to which they were adhering, since the treaties provided land on the basis of 128 acres per person.<sup>149</sup> There was, however, no obligation to provide additional land to descendants of individuals who had already been counted for treaty land entitlement.<sup>150</sup> Where individuals had been members of more than one band for periods of time, it became necessary for the ONC to exercise its judgment by performing a "fairness assessment" to determine the band with which those individuals should be counted.<sup>151</sup>

In Mr. Kennedy's opinion, a claim like that of the Kawacatoose First Nation probably would have been accepted for negotiation if it had been submitted to the ONC in 1982 or 1983, when the Guidelines were being applied.<sup>152</sup>

### REPORT OF THE OFFICE OF THE TREATY COMMISSIONER

While several Saskatchewan bands managed to have their claims accepted for negotiation in the context of the Saskatchewan formula, few claims were settled. As discussed previously, mounting frustration with the process eventually led the FSIN and the Chiefs of the two representative bands to commence litigation on March 16, 1989, in Federal Court.

147 ICC Transcript, December 16, 1994, pp. 77-78 (Rem Westland).

148 ICC Transcript, November 18, 1994, p. 93 (Sean Kennedy).

149 ICC Transcript, November 18, 1994, pp. 109-110 (Sean Kennedy).

150 ICC Transcript, November 18, 1994, pp. 112 and 115-116 (Sean Kennedy).

151 ICC Transcript, November 18, 1994, p. 120 (Sean Kennedy).

152 ICC Transcript, November 18, 1994, pp. 52-53 (Sean Kennedy).

However, the parties quickly recognized that the courts were not the best forum for the resolution of treaty land entitlement,<sup>153</sup> and, on June 8, 1989, the Office of the Treaty Commissioner was created by agreement of the FSIN and the Minister of Indian Affairs and Northern Development. The OTC was to direct the resolution process and to make recommendations to permit a negotiated settlement. This entailed devising solutions acceptable to both parties, which meant recognizing that Canada would not agree to a proposal based on current population settlements, the bands would not deal on the basis of DOFS shortfall, and neither side would accept a solution reminiscent of the Saskatchewan formula since that was the reason for the litigation in the first place.<sup>154</sup>

After considering contemporary judicial authorities on treaty interpretation, the OTC formulated six principles to guide its examination of the treaty land entitlement issue:

1. The treaty should be given a fair, large and liberal construction in favour of the Indians.
2. Treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians.
3. As the honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned.
4. Any ambiguity in wording should be interpreted as against the drafters and should not be interpreted to the prejudice of the Indians if another construction is reasonably possible.
5. Evidence by conduct or otherwise as to how the parties understood the treaty is of assistance in giving it content.
6. The treaty was made with Indians not bands, and an examination of the treaty as a whole indicates that most terms are intended to treat individual Indians equally, and bands in proportion to their populations.<sup>155</sup>

The product of the OTC's deliberations was the "equity formula," which, according to its architects, effectively reconciled the divergent positions of the parties based on date-of-first-survey shortfall on the one hand and current population on the other. The formula multiplied a band's current population by the treaty formula of 128 acres per person, and in turn multiplied that

153 Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 22 (ICC Exhibit 4).

154 ICC Transcript, May 24, 1995, pp. 200-01 (James Gallo).

155 Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 24 (ICC Exhibit 4).

figure by the band's shortfall of land expressed in percentage terms. From the ensuing acreage would be subtracted the number of acres already received, leaving the band's residual treaty land entitlement. As the OTC Report comments in relation to the formula:

[I]t is "shortfall" in the sense that the descendants of those families which were never counted in the first survey are now accounted for – a "first survey," if you will, for these people whose numbers are expressed as a percentage of the band population as a whole. It is also "contemporary population" in the sense that the percentage of land originally owing to a band is applied to the present day population of that band and multiplied by 128 acres per person to arrive at the land quantum now due.<sup>156</sup>

Other aspects of the OTC's suggested solution included adoption of the payroll immediately preceding a band's initial survey as the band's base payroll,<sup>157</sup> and the recommendation of a "a very large purchase policy" to overcome the problems which plagued the 1976 Saskatchewan agreement.<sup>158</sup>

The OTC concluded that the equity formula was to be preferred to proposals based on current population, which, despite having historical precedents, skewed settlements in favour of the Indians. Formulae based on date of first survey were also rejected because they did not account for absentees and late additions, and were not supported by any legal or historical precedents, notwithstanding DIAND's assertion that they amounted to Canada's lawful obligation under treaty. The equity formula, in contrast, was considered to be equitable among bands, consistent with the six principles of treaty interpretation, and in accordance with the historical precedents established in the percentage applications of the Saskatchewan formula to bands such as Pelican Lake, Poundmaker, Sweetgrass, Moosomin, and Onion Lake.<sup>159</sup>

Unlike the Saskatchewan formula, which based settlements on a current population fixed at December 31, 1976, the equity formula placed a much greater emphasis on historical figures and research because each band's shortfall had to be converted to a percentage of its DOFS population. Preliminary shortfall numbers had been obtained from the Specific Claims Branch of DIAND prior to the OTC Report being tabled in May 1990, but by that July it was recognized that the approach to deriving the figures was not consistent

156 Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 46 (ICC Exhibit 4).

157 ICC Transcript, November 18, 1994, pp. 60-61 (Sean Kennedy).

158 ICC Transcript, May 24, 1995, pp. 202-03 (James Gallo).

159 Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 40-41 and 44-47 (ICC Exhibit 4).

from band to band.<sup>160</sup> However, in the fall of 1990 as new research was being undertaken to review the historical figures, Manfred Klein, Director of Specific Claims, forwarded his submission to the federal Cabinet recommending acceptance of the OTC Report based on the original research. Cabinet accepted the recommendation, following which the revised research was completed. The difference between the cost estimates based on the original research and those based on the revised research was substantial, and Mr. Klein asked Mr. Kennedy to review all outstanding claims to determine whether the categories in the 1983 ONC Guidelines could be used to reduce Canada's obligations to levels that would "fit" the expenditures already approved by Cabinet.<sup>161</sup> In Mr. Kennedy's view, it was possible that the reason that the DOFS threshold policy had resurfaced was that the cost of settlement would be too high if additional categories of people were to be included in the determination of a band's shortfall.<sup>162</sup>

### **"LAWFUL OBLIGATION" AND THE SASKATCHEWAN FRAMEWORK AGREEMENT**

In the aftermath of Cabinet's approval of the OTC Report, there was little immediate evidence to suggest that Canada's interpretation of its lawful obligation to Indian bands in relation to treaty land entitlement was being reconsidered. Indeed, the claim of the Cowessess Band was being reviewed having regard for the new principles which had been developed by Canada since its previous rejection of the claim in the 1970s. As Al Gross, then a negotiator with Specific Claims West, informed Chief Lionel Sparvier on July 23, 1991:

So that there is no misunderstanding regarding the reassessment of the Cowessess Band's treaty land entitlement claim, let me explain the usual process which all treaty land entitlement claims go through before they can be validated. First, the band or an Indian organization on behalf of the band, submits a thoroughly researched claim to Specific Claims Branch (SCB). SCB then reviews and confirms the band's submission. After that research is completed, SCB usually meets with the band to go over the findings and, with the band's concurrence, the claim is then sent to the Department of Justice for legal review.

When a claim is sent to the Department of Justice it is complete; that is, all of the necessary research has been done. This means that a complete treaty annuity payroll analysis has been completed to determine an "adjusted date of first survey (DOFS)

<sup>160</sup> ICC Transcript, May 25, 1995, pp. 262-64 (James Gallo).

<sup>161</sup> ICC Transcript, November 18, 1994, p. 56 (Sean Kennedy).

<sup>162</sup> ICC Transcript, November 18, 1994, pp. 77-78 (Sean Kennedy).

population." This population includes absentees, late adherents to treaty, and landless transfers, as well as women of Indian descent marrying into the band. This is done for all treaty land entitlement claims. The Department of Justice then recommends to the Minister of Indian Affairs and Northern Development whether the claim should be accepted or not. Negotiations can then begin if the claim is accepted.

When you requested that the federal government look into your treaty land entitlement claim, it was agreed to because the Department had done previous research on your claim in the mid-1970's and it was found that no claim existed using the principles of research in place at that time (no research was done concerning late adherents to treaty, landless transfers, women marrying into the band, and even absentees). Now that we do much more comprehensive research we have agreed to review your claim based on our current research principles.<sup>163</sup>

Clearly, validation of claims was still being undertaken on the basis of the broader criteria which had evolved since the late 1970s, or else it would not have been necessary to reopen the claim. The references to new validation principles in Mr. Gross's letter were not limited to absentees, but also included "late adherents to treaty, landless transfers, [and] women marrying into the band." In testimony before the Commission, Mr. Gallo described the evolution of the criteria in these terms:

Q. What about the research criteria employed by the Office of the Treaty Commissioner, was it, again, an evolution from say the '83 guidelines?

A. Yes. Yes, definitely. . . . For example, the first 15 Treaty Land Entitlement validations in Saskatchewan, all what happened was, is that people took the annuity pay list in the calendar year, flipped to the back page, looked at the bottom total paid, took that number, multiplied it by the per capita treaty provision, compared it with the land received and confirmed by order-in-council, did a comparison and if there was a shortfall then there was a Treaty Land Entitlement. There was absolutely no analysis, no looking for new adherents, no double counts, no anything. I mean that's how the first 15 got validated, and things are very, very different today.<sup>164</sup>

By January 20, 1992, with DIAND and the FSIN still some eight months from completing the two-year negotiation which culminated in the Saskatchewan Framework Agreement, Canada was still outwardly relying on the criteria in the 1983 Guidelines. But its position was at best ambiguously stated in a letter from Mr. Gross, by then Director of Treaty Land Entitlement, to Stewart Raby of the FSIN:

<sup>163</sup> A.J. Gross, Negotiator, Specific Claims West, to Chief Lionel Sparvier, Cowessess Band, July 23, 1991 (ICC Exhibit 10, pp. 1-2).

<sup>164</sup> ICC Transcript, May 25, 1995, pp. 266-67 (James Gallo).

We have received inquiries as to our approach for determining the eligible population of a band for treaty land entitlement purposes. *The federal policy paper dated May 1983, titled Office of Native Claims Historical Research Guidelines for TLE Claims, continues to be the foundation for developing prospective band claims to outstanding TLE.* In response to a band submission outlining the basis for a claim to additional land, the government assesses the claim in accordance with the guidelines and, as part of the process, meets with bands to exchange information uncovered from research activity carried out in accordance with the guidelines.

After a band has indicated its acceptance of the conclusions of the research, the department then consults with the Department of Justice to determine if a lawful obligation exists for additional lands. If an obligation does exist, the next phase would normally include negotiations leading to settlement on a Date of First Survey shortfall.

In the case of TLE claims in Saskatchewan the Treaty Commissioner's Office proposed an alternate means of determining the eligible population for the bands negotiating settlements with the government. This proposal was intended as part of the overall formula for determining compensation in that particular negotiation. When agreed to in negotiations, the formula will be applied only to those bands which first qualify for entitlement based on the 1983 policy. In other words, Saskatchewan treaty land entitlement claims are accepted for negotiation on the basis of research conducted pursuant to the 1983 guidelines.

*The so-called "Adjusted Date of First Survey Population Count Proposed" ["ADOFS"] in Saskatchewan must be understood as part of the overall settlement approach. It does not affect the criteria for determining validation in the first instance.*

This clarification is being provided to confirm that the government's policy on the acceptance of the TLE claims has not been changed.<sup>165</sup>

It is interesting to note that the Kawacatoose First Nation has relied on this letter in support of its position that the criteria for validation of treaty land entitlement claims had not changed from the 1983 ONC Guidelines which, in its view, contemplate later additions to a band's population. At the same time, counsel for Canada submit that this letter demonstrates that Canada was relying on its interpretation of lawful obligation as the basis for validation, and that the criteria in the Guidelines related more specifically to settlement once a band had established a lawful obligation based on DOFS shortfall.<sup>166</sup>

Three months later, on April 15, 1992, Kawacatoose submitted its claim based on the 1983 ONC Guidelines.

On September 22, 1992, Canada, Saskatchewan, the FSIN, and the 26 Entitlement Bands finally executed the Saskatchewan Framework Agreement, with

<sup>165</sup> A.J. Gross, Director, Treaty Land Entitlement, to Stewart Raby, Federation of Saskatchewan Indian Nations, January 20, 1992 (ICC Documents, pp. 230-31). Emphasis added.

<sup>166</sup> ICC Transcript, December 16, 1994, p. 66 (Rem Westland).

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the two governments also signing the companion Amended Cost Sharing Agreement. Although the witnesses before the Commission had very different interpretations of Article 17 and other provisions of the Framework Agreement and the Amended Cost Sharing Agreement, they nevertheless concurred that these documents represent a major accomplishment in resolving treaty land entitlement questions in Saskatchewan, particularly in light of the number of parties involved and the quantity and complexity of the issues addressed.

As discussed previously in this report, the Framework Agreement emerged from the legal context of the lawsuit commenced in a representative capacity on behalf of the 26 bands whose claims had been accepted for negotiation, and from the political context of the Office of the Treaty Commissioner and its recommendations. Moreover, there were concurrent developments in the validation context as negotiations with the Nikaneet and Cowessess First Nations proceeded. With respect to Nikaneet, David Knoll testified:

Nikaneet was a band whose entitlement claim had been accepted for negotiation. They anticipated that they could proceed independently of the Framework negotiations and conclude their agreement separate and apart much more rapidly than the Framework Agreement would be negotiated. As it turned out, I suppose there was some reluctance on the part of the Federal and Provincial Governments to conclude the Nikaneet Framework Agreement or Treaty Land Entitlement Agreement until the similar issues that were being dealt with in the Framework Agreement were addressed on a comprehensive basis. So what actually turned out was that Nikaneet and the Framework Agreement negotiations almost proceeded simultaneously and we were in contact with legal counsel for Nikaneet and they had their representatives present at the negotiations.

So the Assembly of Entitlement Chiefs were aware of the Nikaneet Band out there that weren't really part of the Framework Agreement but they were in the process of negotiating their settlement on a similar basis as the Framework Agreement on many of the issues.<sup>167</sup>

Mr. Knoll noted that, as negotiations proceeded on the Saskatchewan Framework Agreement, the negotiators for the FSIN and the Entitlement Bands became more aware of and concerned with how that agreement might also impact on Cowessess and other First Nations who might subsequently bring forward treaty land entitlement claims:

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<sup>167</sup> ICC Transcript, May 24, 1995, pp. 106-07 (David Knoll).



The Cowessess Band had submitted a claim for Treaty Land Entitlement. Their claim had not been accepted yet but we were made aware that it was imminent and that Cowessess would be validated in very short order and we thought perhaps during the course of the negotiations they would have their claim accepted and they would then become the 27th entitlement band. As it turned out, they weren't validated or accepted for negotiation as an entitlement band during that two-year period but the chiefs were made aware of the concerns of Cowessess and they should be able to participate in whatever the benefits were derived from the Framework Agreement. . . .

As well it was evident during the course of the negotiations and the application of the adjusted date of first survey criteria for determining the quantum, that if these criteria were applied consistently for existing entitlement bands – and these were the criteria that would be applied in a comprehensive way for the 26 bands – we looked at those criteria and it was brought to our attention by the technicians working with the F.S.I.N. that this may give rise to entitlement claims by other Indian bands who were not recognized as entitlement bands under the Framework Agreement process. So we were aware that there would be potentially five to seven other entitlement bands if the criteria for determining the population figures at the date of first survey were applied consistently.<sup>168</sup>

While the Framework Agreement represented a crowning achievement in the process of settling the claims of the Entitlement Bands, other Saskatchewan bands were not having the same success. In late 1992, the Ocean Man First Nation submitted a claim based on its base paylist and subsequent additions to the Band's population.<sup>169</sup> The response from Juliet Balfour of Treaty Land Entitlement to the Chief and Council on November 5, 1993, was succinct:

At this stage, without the benefit of a review by the Department of Justice, the research discloses no date of first survey shortfall, which we calculate as follows:

Band Base Paylist (July 16, 1880) + Arrears/Absentees –  
Double Counts – Scrip = Date of First Survey Population.

$167 + 16 - 0 - 0 = 183$

$183 \times 128 \text{ acres} = 23,424 \text{ acres Land Owed}$   
 $185 \times 128 \text{ acres} = 23,680 \text{ acres Land Received}$

ESTIMATED LAND SURPLUS = 256 ACRES

<sup>168</sup> ICC Transcript, May 24, 1995, pp. 107-08 (David Knoll).

<sup>169</sup> Stewart Raby, Federation of Saskatchewan Indian Nations, to Wilma Jackknife for Indian Claims Commission, June 12, 1994 (ICC Documents, p. 411).

By policy we do not accept treaty land entitlement claims if the land entitlement based on the date of first survey population has been received. Only if there is a shortfall in land based on the date of first survey population does the category of late adherents to treaty get consideration within the context of an entitlement negotiation.<sup>170</sup>

Upon receipt of this preliminary rejection of the Ocean Man claim on policy grounds, Stewart Raby of the FSIN wrote to the Department to request a copy of the policy. Mr. Gross replied:

Further to your request of November 9, 1993, I write to clarify federal policy with regard to the acceptance of treaty land entitlement claims under the Specific Claims Policy.

As a first premise, our ability to accept and negotiate treaty land entitlement claims derives from the Specific Claims Policy as set out in the booklet "Outstanding Business" . . .

In treaty land entitlement claims, Canada's position is that our lawful obligation to a band is fulfilled when sufficient land under the per capita land provision of the treaty is provided to the band as of the date of first survey. This position is based on legal advice. All individuals who can be identified as members of a given band as of the date of first survey are eligible to be counted for purposes of land allotment. In researching these claims all tools available to us which can facilitate reconstruction of the band membership in that year are used. We rely not just on what the surveyor knew to be the band population, but on what the present day, best evidence shows to constitute that membership.

The categories we generally use to determine the date of first survey population include:

- 1) people on the payroll in the year of first survey or on the payroll to which the surveyor would have had access when carrying out the survey;
- 2) people paid treaty annuities after the date of first survey as absentees from the band membership at the date of first survey; and
- 3) people paid treaty annuity arrears after the date of first survey for that year.

In the absence of evidence to the contrary, individuals from these three categories collectively represent the population which we construe as constituting the date of first survey membership. Because this is an exercise which embraces the benefits of hindsight, we take into account those band members whom the surveyor cannot be expected to have known existed at the date of first survey, but who may in fact have existed. We also deduct from the number those who present day research shows were counted elsewhere for land (double counts) or those who took scrip, even though the surveyor may not have known this at the time.

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<sup>170</sup> Juliet Balfour, Treaty Land Entitlement, to Chief and Council, Ocean Man First Nation, November 5, 1993 (ICC Documents, pp. 395-96).

It is, therefore, this reconstructed population based on the best evidence available to the researchers which forms the membership on which our lawful obligation is based.

In the course of researching the band's history we have, in the past, also identified individuals who have joined the band after the date of first survey up to the present day. The categories of persons to be identified in the research report are set out in the 1983 Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims. We will continue this research practice. If bands have claims based upon a date of first survey shortfall, depending on all the circumstances surrounding the claim, we may then take into account these other categories in negotiating settlements to these claims.

We must be clear with claimant bands, however, that our lawful obligation extends only to the strict date of first survey population. That number is the threshold which claimant bands must reach before a treaty land entitlement claim will be accepted.

Therefore, if a band does not establish a land shortfall based on the date of first survey population, it has no TLE claim. If however this shortfall exists, we are then able to consider the addition into the claim of those additional persons identified as having joined the band after the date of first survey. This is known as the adjusted date of first survey population which is only used to determine compensation, not claim validation.

In light of the fact that bands are submitting TLE claims which do not disclose date of first survey land shortfalls, this clarification of our policy is needed.<sup>171</sup>

Mr. Gross subsequently confirmed on January 28, 1994 – the same date on which Jane-Anne Manson of DIAND advised counsel for Kawacatoose of the preliminary rejection of that First Nation's claim – that the Ocean Man claim did not disclose a DOFS shortfall. Accordingly, the claim was rejected on the basis of the principles set forth in the letters of November 5 and 30, 1993, and the Specific Claims Policy.<sup>172</sup> According to Mr. Kennedy, the policy set forth in Mr. Gross's letter of November 30, 1993, which limited the entitlement population to the DOFS population plus absentees and arrears, represented a departure from the 1983 ONC Guidelines.<sup>173</sup>

Canada's reliance on the DOFS population as the threshold for treaty land entitlement claims was reiterated in a letter dated October 25, 1994, from Mr. Gross to Chief James O'Watch of the Carry the Kettle First Nation, which had a "true" date-of-first-survey shortfall (based on the DOFS population plus absentees and arrears only) and not merely an adjusted-date-of-first-survey

171 A.J. Gross, Director, Treaty Land Entitlement, to Stewart Raby, Federation of Saskatchewan Indians, November 30, 1993 (ICC Documents, pp. 397-99).

172 A.J. Gross, Director, Treaty Land Entitlement, to Chief Laura Big Eagle, Ocean Man Band, January 28, 1994 (ICC Documents, p. 402).

173 ICC Transcript, November 18, 1994, pp. 98-99 (Sean Kennedy).

(ADOFS) shortfall (based on new adherents to treaty, landless transfers, and women of Indian descent marrying into the band, in addition to the DOFS population, absentees, and arrears).<sup>174</sup> Mr. Gross indicated that Canada was prepared to accept the First Nation's claim for negotiation on the basis of certain fixed DOFS and ADOFS populations, and in a fashion consistent with the principles of the Saskatchewan Framework Agreement and the Amended Cost Sharing Agreement. If Carry the Kettle was not prepared to accept the fixed DOFS and ADOFS populations, it was entitled to consider requesting an inquiry before the Indian Claims Commission. With regard to Canada's lawful obligation, Mr. Gross stated:

[T]he extent of Canada's lawful obligation with respect to treaty land entitlement is limited to the DOFS population only. Notwithstanding this, in keeping with the Saskatchewan Framework Agreement, we are prepared to enter negotiations based on the ADOFS population but this is not our legal obligation.<sup>175</sup>

### CURRENT PROCESS OF VALIDATION

Rem Westland, Director General of DIAND's Specific Claims Branch, testified in great detail before the Commission with respect to Canada's present philosophy and practices in accepting bands' claims for negotiation. He also corresponded directly with Co-Chairs Prentice and Bellegarde of the Indian Claims Commission to clarify Canada's position in relation to its lawful obligation to fulfil treaty land entitlement. It is worth setting out the terms of that letter at some length since it elaborates on the basis for Canada's current stance:

I want to restate what the understanding and approach of the Specific Claims Branch is to treaty land entitlement (TLE) review, negotiation, and settlement. I will do this with an eye to what the Commission is hearing in the various TLE related claims coming to the Commissioners for consideration.

I want to begin by noting that one of the purposes of the Specific Claims Policy was to respond to historical grievances which upset the relationship between Canada and the First Nations of this country. TLE claims relate, for the most part, to allegations of inadequate fulfilment of certain land provisions of treaties as far back as the late 1800s.

In short, this branch researches TLE claims to determine whether there was a land shortfall owing to a First Nation at the time that its reserve under treaty was first

<sup>174</sup> ICC Transcript, December 16, 1994, p. 161 (Rem Westland).

<sup>175</sup> A.J. Gross, Director, Treaty Land Entitlement, to Chief O'Watch and Council, Carry the Kettle First Nation, October 25, 1994 (ICC Exhibit 11, pp. 1-2).

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created (the Date of First Survey, or DOFS). If there was a shortfall, based on the people who were members at that time we recommend the acceptance of the claim.

Over the many years that TLE claims have been reviewed by this branch, we have learned that numerous other considerations can potentially figure in the ultimate settlement of a TLE claim, such as the categories of individuals labelled "landless transfers," "late adherents," and so on. Over the last 20 years or so we have developed research methodologies to get a fix on those other numbers, and indeed have used those numbers to settle some claims that would not meet the acceptance criteria we rely on today, the DOFS population.

But at no time, since 1982 and before, has the general rule under the policy changed. A claim can be accepted for negotiation by Canada only if there is a lawful obligation established pursuant to the Specific Claims Policy. The assessment of this is the responsibility of the Department of Justice (DOJ). This is just as true for TLE claims as it is for all other types of specific claims. Whereas there will be examples where the general rule has been extended to accommodate particular circumstances and times, it is part of my set of responsibilities as Director General of the branch to insist upon the fundamentals of the policy if changing times require this.

With regard to the fundamentals regarding TLE claims, one of the fundamentals is that the collective right to treaty land was intended as a general rule to be filled at the DOFS. If a First Nation did not receive its full treaty entitlement to land at that time there might remain a continuing outstanding collective right to land under the relevant provision of the treaty.

It is no secret that federal and provincial governments are challenged by a difficult deficit situation. It is also no secret that TLE settlements are very costly and that the number of claims are [sic] already well over twice the number of claims foreseen even as recently as 1982. Indeed, there are still a significant number of "historical" TLE claims before the government which have only come to anyone's attention within the last few years, and more are being researched every day. To insist upon the fundamentals with regard to TLE claims is a reasonable position to take. However, we do not use cost as a criterion to accept or reject a TLE claim. The principal [sic] we use is legal obligation based on DOFS population.

If there is an agreed outstanding collective right to land it becomes the burden of this branch to develop, in negotiations with First Nation(s), an agreed settlement of the claim to more land. As a general rule First Nations take the position that, since the collective right is still outstanding today, the claim must be settled by using current population figures. Canada's position is that the historical shortfall amount is all that is owed. The outcome of successful negotiations is to achieve a settlement which is reasonably in the range between these two positions.

Data such as "landless transfers," "late adherents," and so on are really just variables which help to guide negotiations to a settlement amount somewhere between the DOFS shortfall and the current population quantum. In some settlement models, such as the Saskatchewan Framework of 1992 these data figure prominently. In other settlements, such as some of the early Alberta settlements these data are largely irrelevant.

What has happened to some extent is that some folk, understandably perhaps, have come to equate those variables with lawful obligation. I was candid in my meet-

ings with you and the Commission that this includes some federal officials over the years.

Indeed, some participants in the TLE process equate settlement outcomes in any one case with a lawful obligation applicable to themselves. As I said at our meeting the record will show that virtually every TLE settlement differs one from the other. Some are closer to the current population end of the settlement range in terms of value. Others are closer to the middle of the range. Even in Saskatchewan, where one settlement model was used for over 20 First Nations the real benefit, in terms of acquiring the treaty land shortfall and having financial resources left over, is greater for the First Nations in the northern part of the province than in the south. The reason for this is that the formula uses an average land value and southern land is far more expensive than [sic] northern land.

Interestingly, as I said, there are now some folk who believe that because average land values were used in the Saskatchewan Framework Agreement, or because tax loss compensation was paid at 22.5 times previous year's tax loss, those provisions (and others) must now be considered imperative inclusions in all future settlements. Again, this is to mistake a settlement approach with an assessment of lawful obligation.

My point at our meeting, and my point here, is that the fundamentals of the policy have not changed. Settlement approaches varied considerably over the years, and on occasion those settlement approaches have been confused with the assessment of lawful obligation. On any one claim, at any one time, DOJ can reply to your questions about Canada's assessment of lawful obligation.

My purpose here is to assure you that Canada has never done less than settle accepted TLE claims fairly, and has actually done far better than that. I view the relatively few First Nations which benefitted from TLE acceptance on a basis broader than Canada's lawful obligation as exceptions to the rule. A previous minister of this department said very clearly to some First Nations that exceptions to the rule do not create new lawful obligations. In this same way, a settlement with one First Nation does not establish a "marker" which becomes an obligation upon Canada to now offer nothing less and nothing different in any other set of negotiations.<sup>176</sup>

In his testimony before the Commission, Mr. Westland stated that the policy managed by DIAND is Specific Claims Policy rather than treaty land entitlement policy, with his task being to ensure the fair application of Specific Claims Policy to treaty land entitlement matters. Under that policy, it is the role of the Department of Justice to determine whether a lawful obligation exists.<sup>177</sup> If the Department of Justice concludes that a lawful obligation does exist, the Minister of Indian Affairs and Northern Development has the discretion whether to proceed with the negotiation of a particular claim; where no

<sup>176</sup> Rem Westland, Director General, Specific Claims Branch, to Jim Prentice and Dan Bellegarde, Co-Chairs, Indian Specific Claims Commission, November 30, 1994 (ICC Exhibit 8, pp. 1-3).

<sup>177</sup> ICC Transcript, December 16, 1994, pp. 8-9 (Rem Westland).

lawful obligation is found to exist, the Minister does not have any discretion and cannot accept the claim for negotiation.<sup>178</sup> In particular, a case involving a “met” collective right cannot be reopened since the lawful obligation has already been satisfied.<sup>179</sup>

While raising an objection during Mr. Westland’s cross-examination, counsel for Canada acknowledged that the review of lawful obligation by the Department of Justice includes deciding “whether there is a lawful obligation, that is whether there is an obligation to treat all bands the same, [and] whether a practice that occurred in the past, there is a lawful obligation to continue it.”<sup>180</sup> While the Department of Justice does not advise DIAND on matters of morality or fair play, counsel conceded that equitable considerations are factors in the determination of Canada’s lawful obligation.<sup>181</sup> According to Mr. Westland, if, upon review, the different treatment of one band constitutes on grounds of equity a lawful obligation, then the matter may fall back within the jurisdiction of Specific Claims.<sup>182</sup> However, where a claim does not fit within the jurisdiction of the Specific Claims Branch or involves equitable considerations, it might be referred to and dealt with by another branch of government such as Special Claims.<sup>183</sup> Only if these equitable considerations are compelling will DIAND proceed to negotiations, but this decision is beyond Mr. Westland’s purview.<sup>184</sup>

According to Mr. Westland, Canada’s lawful obligation for the purpose of treaty land entitlement requires it to assess a band’s population as of the date of first survey of the reserve, and to count only those Indians who were alive and members of the band at that time. The quantum of land to which the band is entitled is based on this DOFS population.<sup>185</sup> If the band received a DOFS surplus of land, it will not be entitled to another survey,<sup>186</sup> only when DIAND discovers people who were entitled to be counted at the time of first survey but were missed are multiple surveys possible.<sup>187</sup> Mr. Westland admitted that the difference of one person over or under the DOFS threshold can make a large difference in terms of land and money: a band with a date-of-first-survey shortfall can negotiate a settlement based on its ADOFS popula-

178 ICC Transcript, December 16, 1994, pp. 8-9, 162 (Rem Westland).

179 ICC Transcript, December 16, 1994, pp. 186-88 (Rem Westland).

180 ICC Transcript, December 16, 1994, p. 39 (Bruce Becker).

181 ICC Transcript, December 16, 1994, pp. 40-41 (Bruce Becker).

182 ICC Transcript, December 16, 1994, p. 42 (Rem Westland).

183 ICC Transcript, December 16, 1994, pp. 28-29, 31 (Rem Westland).

184 ICC Transcript, December 16, 1994, pp. 43-44, 46 (Rem Westland).

185 ICC Transcript, December 16, 1994, pp. 24-25 (Rem Westland).

186 ICC Transcript, December 16, 1994, p. 20 (Rem Westland).

187 ICC Transcript, December 16, 1994, pp. 21-22 (Rem Westland).

tion (including new adherents, landless transfers, and women of Indian descent marrying into the band), whereas a band with no DOFS shortfall but similar numbers of late additions has no right to negotiate at all.<sup>188</sup>

The reason for excluding claims based solely on late additions is that First Nations with no sense of being historically wronged were submitting “research-driven” claims originating in the late 1980s, with the result that the number of claims in Saskatchewan quickly escalated. Since Specific Claims Policy was intended to address historical grievances and not simply to provide “an alternative way to get discretionary funds for economic development . . . [or] to acquire additions to reserves,” DIAND considered it necessary to return to the “fundamentals” of Specific Claims Policy based on date-of-first-survey shortfall.<sup>189</sup>

This return to fundamentals meant that only those Indians who were members of a band at its date of first survey were entitled to be included in an entitlement calculation.<sup>190</sup> In making that count, officials at DIAND “bend over backwards” to “reconstruct who really was there.”<sup>191</sup> In the spirit of the treaty and in recognition of the difficult circumstances and nomadic way of life of the Indians at the time of survey, Canada has, once the DOFS threshold has been surpassed, entered into settlements that range, in Mr. Westland’s opinion, far beyond what it views as its lawful obligation.<sup>192</sup>

Mr. Westland acknowledged that the manner in which DIAND implements the Specific Claims Policy is “always changing,” and that landless transfers and other late additions were treated differently five to ten years ago than they are today.<sup>193</sup> He viewed the “relatively few First Nations which benefitted from TLE acceptance on a basis broader than Canada’s lawful obligation as exceptions to the rule.” These exceptions resulted from “misinterpretation of how the policy works by the federal officials who administer it” or “guidelines which are seriously flawed and way out of date.”<sup>194</sup> He also conceded that the government’s perception of policy can change as its legal advisers change and as the amount of money at stake increases and attracts greater attention:

But certainly it happens that legal advisers on files along the way have had changing views on how these things should be done. And recommendations have gone up, have

188 ICC Transcript, December 16, 1994, pp. 134-35 (Rem Westland).

189 ICC Transcript, December 16, 1994, pp. 98-99 (Rem Westland).

190 ICC Transcript, December 16, 1994, p. 85 (Rem Westland).

191 ICC Transcript, December 16, 1994, pp. 88, 116-17 (Rem Westland).

192 ICC Transcript, December 16, 1994, p. 117 (Rem Westland).

193 ICC Transcript, December 16, 1994, pp. 26-27 (Rem Westland).

194 ICC Transcript, December 16, 1994, p. 168 (Rem Westland).



been properly put forward on the basis of recommendations. But when you talk to Department of Justice, it's like every department in government: it's quite big. And at a certain point, when a transaction is fairly big, the attention of government is just a little different than it might have been.<sup>195</sup>

In these circumstances, Mr. Westland admitted that, had Kawacatoose brought forward its claim prior to 1983, it likely would have had its claim accepted for negotiation and settled under the terms of the Saskatchewan Framework Agreement by now.<sup>196</sup> However, he also stated that the “exceptions to the rule” which were validated by his predecessors would not be accepted for negotiation were they to be reviewed by him today.<sup>197</sup>

Nevertheless, Mr. Westland considered DIAND's position to be that “the difference in treatment that comes through different implementation approaches over the years has not created a lawful obligation.”<sup>198</sup> He agreed that the three categories of people set forth in Mr. Gross's letter of November 30, 1993 – the base payroll population plus absentees and arrears – collectively represent the population constituting the date-of-first-survey membership,<sup>199</sup> and that, if a band has received its full treaty land entitlement at DOFS, no land will be set aside for late additions to the band's population.<sup>200</sup> Upon counsel for Kawacatoose challenging Mr. Westland on his testimony that DIAND takes a “generous approach” to the three categories and considers other “realities” and “factors,”<sup>201</sup> counsel for Canada acknowledged:

I think that what Mr. Westland is getting at is that we don't close our minds to other factors, but these [three categories] obviously are the one[s] that have proven reliable on a day-to-day, year-to-year basis in terms of [giving] one an indication of who was reasonably a member of the band.<sup>202</sup>

Mr. Westland viewed the “flawed” 1983 ONC Guidelines as still useful in terms of the criteria to be researched and considered in *settling* claims,<sup>203</sup> but said that validation is currently assessed not on the guidelines but on the basis of lawful obligation.<sup>204</sup>

195 ICC Transcript, December 16, 1994, p. 106 (Rem Westland).

196 ICC Transcript, December 16, 1994, p. 149 (Rem Westland).

197 ICC Transcript, December 16, 1994, p. 169 (Rem Westland).

198 ICC Transcript, December 16, 1994, p. 42 (Rem Westland).

199 ICC Transcript, December 16, 1994, p. 89 (Rem Westland).

200 ICC Transcript, December 16, 1994, p. 93 (Rem Westland).

201 ICC Transcript, December 16, 1994, pp. 151-52 (Rem Westland).

202 ICC Transcript, December 16, 1994, p. 154 (Bruce Becker).

203 ICC Transcript, December 16, 1994, p. 80 (Rem Westland).

204 ICC Transcript, December 16, 1994, p. 61 (Rem Westland).

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## PART IV

### ANALYSIS

#### **ISSUE 1: KAWACATOOSE'S DATE-OF-FIRST-SURVEY POPULATION**

Are the two families who appear on the 1876 treaty payroll for Fort Walsh (Paahoska/Long Hair and Wui Chas te too tabe/Man That Runs) members of the Kawacatoose (Poor Man Band) First Nation or the Lean Man (Poor Man) First Nation?

Late in the inquiry, Canada tendered additional evidence to suggest that the Angelique Contourier family, which in 1883 was paid arrears for 1876 with Kawacatoose, should also be excluded from the count for the First Nation's DOFS population. According to counsel for Canada, this family appeared on the base payroll – the 1875 payroll – for the George Gordon Band; the survey for that band, although completed in 1876, was begun in 1875 following the Band's receipt of its treaty annuity payments. Based on the “first in time, first in right” principle, counsel for Canada contended that the five members of the Contourier family should be counted with the George Gordon Band and not with Kawacatoose, thereby reducing the Kawacatoose DOFS population, in Canada's view, to 197 from 202.<sup>205</sup>

Like the issue dealing with the two Fort Walsh families, the questions relating to the Contourier family require the Commission to make a determination of Kawacatoose's population to establish whether, in the first instance, the First Nation has any outstanding treaty land entitlement, and, if so, the residual acreage owed by Canada to the First Nation. If the date-of-first-survey threshold approach, which Canada submits is its lawful obligation, is applied and the Contourier family or either of the Fort Walsh families is excluded, Kawacatoose's DOFS population would drop from the figure of 215 put forward by the First Nation to a level below the threshold of 212 for whom land

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<sup>205</sup> Jane-Anne Manson, Assistant Negotiator, Treaty Land Entitlement, to Stephen Pillipow, Pillipow & Company, April 21, 1995 (ICC Exhibit 25); Submissions on Behalf of the Government of Canada, October 16, 1995, p. 6.

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was provided in the First Nation's 1876 survey. For this reason, this part of the report will address both of these factual questions together.

### **The Fort Walsh Families**

Canada's primary position is that the evidence discloses that the families of Paahoska (Long Hair) and Wui Chas te too tabe (Man That Runs) were members of the Assiniboine Poor Man or Lean Man Band when they were paid treaty annuities at Fort Walsh in 1876. In the alternative, Canada argues that, because the evidence regarding membership of the two families is at best evenly balanced and not decisive one way or another, and since the onus lies with Kawacatoose to establish on a balance of probabilities that the Fort Walsh families were members of that First Nation, then Kawacatoose has failed to prove its case. Conversely, the First Nation contends that the two families belonged to its membership, and claims that it had accepted and met the onus of proving that point.

With regard to Canada's position that the two families could be shown to belong to the Assiniboine Poor Man Band, counsel for Canada noted that the Kawacatoose First Nation is predominantly Cree in origin, whereas the names of the two families were written in Assiniboine. In making this submission, counsel referred to the comments of Indian Agent Angus McKay, who referred to Kawacatoose as a chief having "a band of 39 families all of the Cree tribe who have always made their living by hunting and trapping."<sup>206</sup> Since the names of Long Hair and Man That Runs were listed in Assiniboine, whereas the names of other families at Fort Walsh in 1876 were recorded in Cree, this, Canada contends, is "powerful evidence" that the two families were of Assiniboine descent and were therefore more likely members of the Assiniboine Poor Man Band.<sup>207</sup> Moreover, the 1876 payroll for Kawacatoose specifically refers to "Pierre Peltier (Assiniboine)," highlighting the "novelty" of Assiniboine membership in the band at that time.<sup>208</sup> Counsel also emphasized the manner in which the 1876 payroll from Fort Walsh groups Poor Man on the same page with the Assiniboine Little Mountain Band, and the fact that the Assiniboine Poor Man and Grizzly Bear's Head (formerly Little Chief) Bands ultimately "ended up today on the same reserve (along with Mosquito)."<sup>209</sup>

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<sup>206</sup> Angus McKay, Indian Agent, Winnipeg, to Superintendent General of Indian Affairs, October 14, 1879 (ICC Documents, p. 102).

<sup>207</sup> Submissions on Behalf of the Government of Canada, October 16, 1995, p. 11.

<sup>208</sup> Submissions on Behalf of the Government of Canada, October 16, 1995, p. 11.

<sup>209</sup> Submissions on Behalf of the Government of Canada, October 16, 1995, p. 11.

In the closing oral submissions, counsel for Canada acknowledged that, had the names of Long Hair and Man That Runs been recorded in the Cree tongue, those families would likely have been accepted and counted by Canada as members of Kawacatoose. Counsel referred to Canada's policy of requiring an individual or a family to appear on more than one payroll for a First Nation before that individual or family is accepted by Canada as a member of that First Nation, but added that Canada has made an exception to this policy where the sole payroll on which the individual or family appears is the base payroll. The two families were recorded at Fort Walsh in 1876, which is the base payroll year for Kawacatoose, and never again appear on a payroll for any band. Nevertheless, it is Canada's position that, given that the base payroll is arguably divided and that the connection between Kawacatoose and the two families is tenuous, Canada is not willing to extend the benefit of the doubt, as it might have done had the two families made their only appearance on the reserve's payroll for 1876 rather than at Fort Walsh.<sup>210</sup>

Counsel for the First Nation countered that, although the names of the two families were listed in Assiniboine, that fact does not necessarily imply that the two families were of Assiniboine ancestry. The language used in the Fort Walsh payroll may have had more to do with the individual who was translating for Major Walsh than the nationality of the two families. Noting that it was not uncommon to find Cree bands with Assiniboine members and Assiniboine bands with Cree members, counsel submitted that, even if the two families were Assiniboine, that alone would not prove that they were not members of Kawacatoose, since Kawacatoose himself and other members of the band were Assiniboine.<sup>211</sup>

With regard to Canada's concerns regarding the divided payroll in 1876, counsel for the First Nation emphasized that Kawacatoose members were also paid at Fort Walsh in 1879.<sup>212</sup> Counsel contended that, once the two Fort Walsh families had received annuities in 1876 as members of Kawacatoose, then, under Canada's policy, the First Nation was entitled to count them in its DOFS population notwithstanding the fact that 1876 represented their only appearance on any payroll.

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<sup>210</sup> ICC Transcript, October 24, 1995, p. 149 (Ian Gray).

<sup>211</sup> Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, pp. 19-20.

<sup>212</sup> Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 19, referring to Office of the Treaty Commissioner, Draft Research Report, "Status of Two Assiniboine Families, North Assiniboine History and Demographics," November 1994 (ICC Exhibit 2, vol. 1, tab A-2, p. 2), and to ICC Transcript, November 15, 1994, pp. 113-14 (Jayme Benson).

Counsel for Kawacatoose also noted that, with the exception of the Little Mountain Band (and depending on whether Long Hair and Man That Runs were members of Kawacatoose or the Assiniboine Poor Man Band), all the bands paid at Fort Walsh in 1876 had already adhered to treaty. Major Walsh used the checks marked "W," "V," and "X" to denote new adherents to treaty, which Peggy Brizinski of the OTC interpreted to mean new adherents to "existing bands" – that is, bands which had already adhered to treaty.<sup>213</sup> Because the names of the two families were designated with the letter "V" on the Fort Walsh payroll for 1876, counsel submitted that the two families must have been members of a band that had already adhered to treaty by 1876. As Kawacatoose adhered to Treaty 4 in 1874, but the Assiniboine Poor Man did not adhere until 1877, this meant that the reference to "Poor Man" in the 1876 payroll at Fort Walsh must have related to Kawacatoose.<sup>214</sup>

In addition, noting the question raised by Ms. Brizinski of the OTC in her letter of November 1, 1993, counsel for Kawacatoose submitted that Major Walsh, who was careful to establish eligibility before paying annuities, would not have been likely to pay two families in 1876 in the absence of the Chief and without paying the remainder of the band when, first, the status of the band as British or American had not been determined and, second, the Chief had not yet been elected and recognized as Chief by the Department of Indian Affairs.<sup>215</sup> According to counsel, the Assiniboine Poor Man was not recognized as a band until 1877, when the Chief was elected in accordance with the terms of the *Indian Act*. Conversely, the members of Little Mountain, who were all designated with an "X" on the Fort Walsh payroll and clearly had not adhered to treaty, may have constituted an exception if Major Walsh knew or was convinced that the Band was British.<sup>216</sup>

Counsel for Canada pointed to the payment of Little Mountain Band members as evidence that adherence to treaty was not a prerequisite to receiving annuities. Rather, "it appears the prerequisite for getting paid was being British Indians (which Poor Man Assiniboine was), not that the individual be a member of a Band that had already adhered."<sup>217</sup> The wording of the 1877 adhesion to treaty further demonstrated that Indians just then adhering to treaty had nevertheless already received annuity payments:

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<sup>213</sup> Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, pp. 13-14.

<sup>214</sup> Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 15.

<sup>215</sup> Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 18.

<sup>216</sup> Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 16.

<sup>217</sup> Submissions on Behalf of the Government of Canada, October 16, 1995, p. 10.

And we hereby agree to accept the several provisions and the payment in the following inanner, viz.: That those who have not already received payment receive this year the sums of twelve dollars for the year 1876, which shall be considered their first year of payment, and five dollars for the year 1877, making together the sum of seventeen dollars apiece to those who have never been paid, and five dollars per annum for every subsequent year. . . .<sup>218</sup>

Counsel further argued that the Assiniboine Poor Man was the Chief of his band regardless of whether he was recognized as such by Canada. In the absence of evidence indicating that Major Walsh was speaking on some basis other than his personal knowledge, counsel noted that Major Walsh in 1877 recounted the Assiniboine Poor Man's actions as a Chief in 1875 when, like Long Lodge and Little Mountain, Poor Man had refused to go to Fort Belknap in the United States to receive annuities from the Americans.<sup>219</sup> Counsel stated that, although this showed that Major Walsh knew by 1876 that the Assiniboine Poor Man was a Chief, the evidence also illustrated that members of other bands had been paid in the absence of their Chiefs.<sup>220</sup>

The First Nation also relied on the evidence of its own elders and those of the Mosquito/Grizzly Bear's Head/Lean Man First Nation to support its position regarding the two Fort Walsh families. That evidence can be summarized as follows:

- Long Hair and Man That Runs were brothers or at least related in some way.
- Long Hair and Man That Runs were both excellent runners and regularly travelled great distances together.
- The two families at one time lived on the Kawacatoose Reserve and both Long Hair and Man That Runs are buried on the Kawacatoose Reserve.
- Man That Runs was the grandfather of Paul Acoose, who formerly lived on the Kawacatoose Reserve but had married a woman from the Sakimay Reserve and moved there.

<sup>218</sup> Submissions on Behalf of the Government of Canada, October 16, 1995, pp. 10-11; *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 13 (ICC Exhibit 28).

<sup>219</sup> Submissions on Behalf of the Government of Canada, October 16, 1995, p. 9; J.M. Walsh, Inspector, North-West Mounted Police, to E.A. Meredith, Deputy Minister of the Interior, October 28, 1877, NA, RG 10, vol. 3649, file 8280 (ICC Documents, p. 121).

<sup>220</sup> ICC Transcript, October 24, 1995, p. 147 (Ian Gray).

- There are relatives of the two families among current members of the First Nation.
- None of the Mosquito/Grizzly Bear's Head/Lean Man elders could recall ever hearing about Long Hair. They were, however, familiar with Man That Runs and his talent for running, but he was not known to have ever been a member of that First Nation or to have descendants among its members.
- Chief Kawacatoose himself was Assiniboine.

Counsel for the First Nation added that a review of the historical paylists for the Sakimay Reserve corroborates the evidence with regard to Paul Acoose.<sup>221</sup> Moreover, because the two brothers travelled together so extensively and for such great distances, counsel contended that it was likely that they had stopped in Fort Walsh in 1876 to receive their annuities.<sup>222</sup>

Counsel for Canada contended that the evidence of elder Irene Spyglass of the Mosquito/Grizzly Bear's Head/Lean Man First Nation was to be preferred over that of the other elders. She was reported to have stated that her grandfather on her mother's side was a brother of Man That Runs, and in counsel's view this established a closer family link with the Mosquito/Grizzly Bear's Head/Lean Man First Nation than with Kawacatoose.<sup>223</sup> It must also be recalled, however, that Irene Spyglass also gave a "clear indication that this individual, Man That Runs, was never a Mosquito Band member and she [did] not recall ever hearing of this individual as a Mosquito Band member."<sup>224</sup>

Counsel for Canada conceded that the elders' evidence, taken as a whole, generally supported the First Nation's position regarding the two Fort Walsh families, and further granted that such evidence was properly admitted under Specific Claims Policy which does not bind this Commission to strict rules of evidence. Nevertheless, Canada sought to refute the evidence on technical legal grounds.

Despite acknowledging that bands may be at a disadvantage because the historical documentary evidence has typically been prepared by agents of the federal government, counsel submitted that the courts and this Commission cannot simply allow such evidence to be admitted without considering the

221 ICC Transcript, October 24, 1995, p. 26 (Stephen Pillipow).

222 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 21.

223 Submissions on Behalf of the Government of Canada, October 16, 1995, pp. 17-18.

224 Clifford Spyglass, Land Manager, Mosquito Band, to Howard McMaster, Executive Director, Office of the Treaty Commissioner for Saskatchewan, May 1, 1995 (ICC Exhibit 24).

weight to be attached to it. Counsel referred to the reasons of McEachern JBC at trial in *Delgamuukw v. British Columbia*:

When I come to consider events long past, I am driven to conclude, on all the evidence, that much of the plaintiffs' historical evidence is not literally true. For example, I do not accept the proposition that these peoples have been present on this land from the beginning of time. Serious questions arise about many of the matters about which the witnesses have testified and I must assess the totality of the evidence in accordance with legal, not cultural principles.

I am satisfied that the lay witnesses honestly believed everything they said was true and accurate. It was obvious to me, however, that very often they were recounting matters of faith which have become fact to them. If I do not accept their evidence it will seldom be because I think they were untruthful, but rather because I have a different view of what is fact and what is belief.<sup>225</sup>

Counsel further referred to the Court's comments regarding genealogical evidence:

There are obvious difficulties with this evidence, which, even when confirmed by witnesses, is in one sense just a collection of hearsay statements organized by Ms. Harris to demonstrate matrilinear organization of Houses. No verification of her conclusions is possible because there are no records. Even headstones do not disclose House membership. The reputation upon which she relies, if any, is limited to the Gitskan community which has an obvious interest in the outcome of the case for which these charts were prepared. Also, the genealogical charts furnish very little evidence about Gitskan populations or organization beyond the late years of the last century. In addition, it is generally held to be difficult, even with records, to have much understanding beyond three generations.<sup>226</sup>

Counsel further relied on the recent unreported judgment in *Twinn v. The Queen*, in which Muldoon J held:

Until the Treaty of Wetaskiwin, long after the assertion of British (and latterly Canadian) sovereignty when the Cree, Blackfoot and Sarcees ended hostilities, this evidence discloses on a balance of probabilities that, aside from myth, no one knew why there were hostilities; and without any means of keeping a written record the probabilities lead to the conclusion that myth or oral history would not yield any objectively reliable reason or knowledge of the beginning of hostilities. That surely is the trouble with oral history. It just does not lie easily in the mouth of the folk who transmit oral history to relate that *their* ancestors were ever venal, criminal, cruel,

<sup>225</sup> *Delgamuukw v. British Columbia*, [1991] 5 CNLR 1 at 41 (BCSC).

<sup>226</sup> *Delgamuukw v. British Columbia*, [1991] 5 CNLR 1 at 58 (BCSC).



mean-spirited, unjust, cowardly, perfidious, bigoted or indeed, aught but noble, brave, fair and generous, etc. etc.

In no time at all historical stories, if ever accurate, soon become mortally skewed propaganda, without objective verity. Since the above mentioned pejorative characteristics, and more, are alas common to humanity they must have been verily evinced by everybody's ancestors, as they are by the present day descendants, but no one, including oral historians wants to admit that. Each tribe or ethnicity in the whole human species raises its young to believe that they are "better" than everyone else. Hence, the wars which have blighted human history. So ancestor advocacy or ancestor worship is one of the most counter-productive, racist, hateful and backward-looking of all human characteristics, or religion, or what passes for thought. People are of course free to indulge in it – perhaps it is an aspect of human nature – but it is that aspect which renders oral history highly unreliable.<sup>227</sup>

On the basis of these authorities, counsel for Canada set forth a number of propositions on which it submits that the weight to be given to oral history should be assessed:

Firstly, elders' statements should be considered by the Commission without concerns about admissibility but the relative weight such statements should be given does need to be taken into account. We would submit that such testimony should be treated very carefully where it is not corroborated in the written record.

Secondly, if the statements are made by elders who are band members where such band is party to the claim, the weight given the evidence should be weighted accordingly.

Thirdly, the timeframe [which] the evidence is describing is also important. If the evidence goes to events which occurred over 100 years, or three generations ago, the weight given the evidence should be discounted accordingly.

Fourthly, the evidence should generally be internally consistent, though minor inconsistencies, particularly in voluminous evidence, may perhaps be ignored.

Fifthly, testimony that can be called mythology (i.e. records impossible or improbable occurrences as fact) should be rejected and may in fact call into doubt the rest of the evidence given.<sup>228</sup>

Counsel for Canada invited the Commission to conclude that the evidence of the elders should be accorded little weight since the events of 1876 are almost 120 years in the past and have taken on a "sense of mythology," each of which factors undermines the credibility of that evidence. Counsel added

<sup>227</sup> *Twinn v. The Queen* (July 6, 1995), (FCTD) [unreported] at 82-83.

<sup>228</sup> Submissions on Behalf of the Government of Canada, October 16, 1995, p. 15.

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that, “without questioning the *bona fides* of the elders,” Kawacatoose stands to benefit from a settlement “in the millions of dollars” should the First Nation’s position prevail.<sup>229</sup>

Finally, and as an alternative to Canada’s position that the evidence discloses that the two Fort Walsh families were members of the Assiniboine Poor Man Band, counsel for Canada contended that the evidence before the Commission is evenly balanced and does not definitively prove that the two families belonged to either Kawacatoose or the Assiniboine Poor Man. If the Commission simply cannot decide on the First Nation to which the two families belonged, then the Commission should decide in Canada’s favour. The foundation of this argument is that the onus of proving the membership of the two families rests with the First Nation, as can be seen in the reasons of Jessup JA of the Ontario Court of Appeal in *Saillant v. Smith*:

If one does not have regard to the principle of *res ipsa loquitur*, in my view, there is not a preponderance of probability as to what caused the accident in question. There are two competing suggestions as to the cause; one, that the saddle was not adequately secured and secondly, it turned on the body of the horse for the reason suggested by the defendant’s son, as I have referred to. As between these two competing theories, in my view, the evidence is at best evenly balanced and, accordingly, the plaintiff has not proved his case.<sup>230</sup>

Counsel continued that, if the evidence of the Mosquito/Grizzly Bear’s Head/Lean Man elders disqualifies the two families from membership in the Assiniboine Poor Man Band, it equally disqualifies them from Kawacatoose: they were not on any paylists after 1876, there are no direct descendants living on the reserve, and there is no evidence to confirm that they resided or settled on the reserve.<sup>231</sup> This statement by counsel ignores elder Alec Kay’s statement that Long Hair and Man That Runs have relatives in the Kawacatoose First Nation, although, in fairness to counsel, the Commissioners recognize that Mr. Kay’s evidence did not include the names of any such relatives. However, counsel’s submission also overlooks the testimony of elder Pat Machiskinic which identified former Kawacatoose member Paul Acoose as the grandson of Man That Runs.

In response to these submissions by Canada, counsel for Kawacatoose agreed that the First Nation bears the burden of proof with regard to the

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229 Submissions on Behalf of the Government of Canada, October 16, 1995, pp. 15-16.

230 *Saillant v. Smith* (1973), 33 D.L.R. (3d) 61 at 63.

231 Submissions on Behalf of the Government of Canada, October 16, 1995, pp. 17-18.

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membership status of the two Fort Walsh families. However, counsel submitted that the oral histories imparted by the elders should not be dismissed as lightly as counsel for Canada suggests, and that indeed a less stringent standard of proof must be employed in cases lacking a written history. In adopting this position, the First Nation relied on the reasons of former Chief Justice Dickson of the Supreme Court of Canada in *Simon v. R.*:

This evidence alone, in my view, is sufficient to prove the appellant's connection to the tribe originally covered by the treaty. True, this evidence is not conclusive proof that the appellant is a *direct* descendant of the Micmac Indians covered by the Treaty of 1752. It must, however, be sufficient, for otherwise no Micmac Indian would be able to establish descendancy. The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present-day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this treaty.<sup>232</sup>

Counsel for Kawacatoose also referred the Commission to the reasons in dissent on the appeal from the decision of McEachern CJBC in *Delgamuukw*, in which Lambert JA, after setting forth the foregoing passage from *Simon*, stated:

It is important to examine evidence given orally, where the memory of the community is an oral memory, in the context of the fact that other forms of evidence are unlikely to be available. The oral evidence should be weighed, like all evidence, against the weight of countervailing evidence and not against an absolute standard, so long as it is enough to support an air of reality.<sup>233</sup>

Having considered and weighed all the foregoing documentary and oral evidence, this Commission has concluded that the families of Long Hair and Man That Runs were in fact members of Kawacatoose and not the Assiniboine Poor Man Band when they were paid at Fort Walsh in 1876. Although we must confess that, in our view and in the view of the research panel from the OTC, the documentary evidence before this inquiry is at best inconclusive and contradictory, it must also be noted that there is nothing in that evidence which clearly contradicts the First Nation's contention that the two families belonged to it. The documentary evidence is primarily circumstantial in nature and does not resolve the issue at hand.

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<sup>232</sup> *Simon v. R.*, [1986] 1 CNLR 153 at 171-72.

<sup>233</sup> *Delgamuukw v. British Columbia*, [1991] 5 CNLR 1 at 213 (BCSC).

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At the same time, as counsel for Canada has admitted, the evidence of the Kawacatoose and Mosquito/Grizzly Bear's Head/Lean Man elders has demonstrated more than the simple fact that the two families did not belong to the Assiniboine Poor Man. That evidence has also demonstrated that Long Hair and Man That Runs held a place of honour, which was in fact immortalized in song, in the oral history of Kawacatoose. There is no countervailing evidence in the face of this oral history.

Moreover, the position taken by the First Nation is more tangible than a mere "air of reality." The membership of these two families is an "either/or" proposition. Their names appear on the 1876 Fort Walsh payroll under the heading "Poor Man," and in this context it must be considered that they were definitely members of one of the two bands commonly referred to as Poor Man at that time. There is no basis for speculation that these families did not belong to either of these bands. It is in light of this fact and the evidence of the elders that we have reached our conclusion that the families were members of Kawacatoose. We find comfort in reaching this conclusion in the reasons of O'Halloran JA of the British Columbia Court of Appeal in *R. v. Findlay*:

In a civil action, the plaintiff is said to have made out a *prima facie* case when he has adduced evidence which is capable of showing a greater probability that what he alleges is more correct than the contrary. . . . In a civil case, one side may win a decision by the narrowest of margins upon reasons which seem preponderating, although they are not in themselves decisive. The Court's decision may rest on the balance of probabilities. . . .<sup>234</sup>

In the result, we have determined, on a balance of probabilities, that the two families paid at Fort Walsh in 1876 under the heading "Poor Man" were members of Kawacatoose, and not the Assiniboine Poor Man Band. We therefore recommend that these two families should be included in determining the DOFS population for the Kawacatoose First Nation.

### **Angelique Contourier Family**

The matter of the Angelique Contourier family first arose in this inquiry when counsel for Kawacatoose was advised in writing by Jane-Anne Manson of Specific Claims West on April 21, 1995, that the family – one woman, two boys, and two girls – should be deducted as "double counts" from the Kawa-

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<sup>234</sup> *Rex v. Findlay*, [1944] 2 DLR 773 at 776 (BCCA).

catoose base payroll.<sup>235</sup> The family appeared only once on Kawacatoose paylists in 1883, when it was also paid arrears for 1876.

However, payroll analysis prepared for Canada by research consultant Dorothy Sipko disclosed that Angelique Contourier and two children had been paid on the base payroll for the Gordon Band in 1875. According to Ms. Sipko:

It is true that in 1875 Angelique was paid for herself and only two children. One of these children was found to have been born in 1876, after DOFS at Gordon's and as a descendant would not be entitled to be included in the calculations with Kawacatoose. It is not known for certainty [sic] that the other child had also been born after Gordon's DOFS, but it was common for agents to pay arrears for the total number of persons present at the later date, irregardless [sic] of their age. If these people were to be included they would be "Double Counts."<sup>236</sup>

Ms. Sipko found that, after receiving "first-time" treaty money of \$12 apiece with the Gordon Band in 1875, the family was paid with Kawacatoose in 1883 before finally settling with the Cowessess Band in 1884. It was there that the family received arrears payments for all the years between 1877 and 1883 except 1878 and 1879.<sup>237</sup>

The significance of Ms. Sipko's findings was clearly spelled out for the First Nation by Ms. Manson:

As you know in TLE research, the principle of "first in time, first in right" has been followed in such circumstances. This means that if a person or family appears on the base payroll for a number of bands, the band with the base payroll earliest in time has the right to claim the individuals for TLE purposes.

One other question which arose on these facts was the appropriate DOFS and base payroll for the Gordon's Band. Wagner began the Gordon survey in September 1875 but due to bad weather did not complete the survey until July 1876. Annuity payments were not made until late August and September 1876 so Wagner would [have] had to rely on the paylists of 1875.

235 Jane-Anne Manson, Assistant Negotiator, Treaty Land Entitlement, DIAND, to Stephen Pillipow, Pillipow & Company, April 21, 1995 (ICC Exhibit 25).

236 Ian D. Gray, Counsel, Legal Services, Specific Claims West, to Kim Fullerton, Indian Claims Commission, June 14, 1995, enclosing letters dated May 8, 1995, and June 7, 1995, from Dorothy A. Sipko, Research Consultant, to Jane-Anne Manson, Assistant Negotiator, Specific Claims West, together with payroll analysis and copies of relevant paylists. The passage quoted is from the June 7, 1995, letter (ICC file 2107-15-1).

237 Jane-Anne Manson, Assistant Negotiator, Treaty Land Entitlement, DIAND, to Stephen Pillipow, Pillipow & Company, April 21, 1995 (ICC Exhibit 25).

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The Gordon's base payroll thus precedes the Kawacatoose payroll by one year. On this basis the Contouriers would not [be] eligible to be counted as absentees with Kawacatoose.<sup>238</sup>

The foregoing passage succinctly states Canada's position on this issue.

Counsel for Kawacatoose countered that there is not sufficient evidence or information before the Commission on which to base a decision on the question of whether the members of the Contourier family constitute "double counts." In the view of counsel, the date of first survey and base payroll for the Gordon Band must first be determined, but this determination should not be done without the involvement of that band. Counsel noted that the only research currently available is that undertaken on behalf of Canada, since the Gordon Band has been unable to obtain funding and therefore has not conducted any research of its own.<sup>239</sup>

As noted previously, three members of the Contourier family were counted on the Gordon payroll for 1875, whereas five people were paid arrears with Kawacatoose for 1876. Counsel for the First Nation seized upon this discrepancy to urge the Commission to consider counting the two additional people with Kawacatoose, noting that it was possible the two may still be eligible depending on whether they were born before or after 1875. If they were born before 1875, they would be eligible to be counted with Kawacatoose, since they were not on the Gordon base payroll; if born after 1875, they would be descendants of individuals on the 1875 base payroll for the Gordon Band and thus would be ineligible to be counted with Kawacatoose. By employing this reasoning, together with some innovative mathematics which will be set out in greater detail in the next section of this report, counsel for the First Nation submitted that a final DOFS population of 213 can be achieved for Kawacatoose. As stated at the outset of this report, 213 is the threshold figure which Canada claims must be met before Canada will recognize that it has an outstanding lawful obligation to the First Nation with regard to treaty land entitlement.

While we feel some sympathy towards the Kawacatoose First Nation and its counsel, given the fact that they were surprised by the revelations regarding the Contourier family, we must nevertheless conclude that the evidence on this issue is quite clear. The documents reviewed by us disclose that the

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<sup>238</sup> Jane-Anne Manson, Assistant Negotiator, Treaty Land Entitlement, DIAND, to Stephen Pillipow, Pillipow & Company, April 21, 1995 (ICC Exhibit 25).

<sup>239</sup> Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 25; ICC Transcript, October 24, 1995, pp. 212-13 (Stephen Pillipow).

Gordon survey was in fact begun in 1875 and completed in 1876, prior to the payment of the 1876 annuities. On this basis, it would seem appropriate to consider the 1875 payroll as the base payroll for the Gordon Band. In this conclusion we draw support from the work of the OTC in "Research Methodology for Treaty Land Entitlement (TLE)," which also concluded that the base payroll year for the Gordon Band was 1875.<sup>240</sup>

In the absence of any other evidence on the point, we are also driven to agree with Ms. Sipko's conclusions regarding the three members of the Contourier family counted with the Gordon Band in 1875 and the additional member who was born in 1876. This latter individual must be regarded as the descendant of a person counted on the base payroll for the Gordon Band and is therefore ineligible to be included in the calculations for Kawacatoose. As for the fifth member of the family counted in 1876 with Kawacatoose, there is insufficient information on which to determine whether this individual was born before or after 1875. It seems quite clear, however, that this individual was a member of the family and should be counted with the rest of the family as a member of the Gordon Band's base payroll. Therefore, we conclude that all five members of the Contourier family should be excluded from the DOFS population for Kawacatoose.

### Conclusions Regarding the DOFS Population

The positions of the parties regarding the date-of-first-survey population of the Kawacatoose First Nation (excluding late additions) are summarized as follows:

	Canada	Kawacatoose
1876 base payroll	146	146
Fort Walsh families	—	13
Contourier family	—	2
Absentees and arrears	51	52
<b>Total</b>	<b>197</b>	<b>213</b>

The foundations of the base payroll figure of 146 and of the membership of the two Fort Walsh families and the Contourier family have been dealt with at length previously in this report and should require no further elaboration. For present purposes, we are proceeding on the basis that the First Nation's

<sup>240</sup> Office of the Treaty Commissioner, "Research Methodology for Treaty Land Entitlement" (Saskatchewan, 1994), p. 79 (ICC Exhibit 29).

final position is that only two members of the Contourier family should continue to be included in the DOFS population count.

It will be noted that the parties have differing views of the number of absentees and arrears to be added to the base payroll population. In addition to these differences, the figure of 54 relied upon by Kawacatoose in its closing submissions (including two members of the Contourier family) represents a decrease of only one from the 55 included in the First Nation's original claim for outstanding treaty land entitlement on April 15, 1992, even though three members of the Contourier family have been excluded from the final count. Similarly, the 51 absentees and arrears in Canada's closing position vary from the total of 56 set forth in the report prepared on Canada's behalf by Theresa Ferguson on July 31, 1992.

The difference in Canada's final figure is readily explained by the exclusion of all five members of the Contourier family. The Kawacatoose count involves the "innovative mathematics" referred to in the preceding section of this report, which are more fully described in the First Nation's closing submissions:

In the Kawacatoose Analysis [of April 15, 1992] it shows 55 arrears and absentees were paid with Kawacatoose. Canada's Analysis [of 56 by Theresa Ferguson] includes all of these individuals except for one, #15/9 Keeahkeewaypew. Canada counts only three for this family being paid arrears and not four as was counted in Kawacatoose Analysis. However, Canada counts two additional people as absentees under #12 Nesookamisk. These two people were not counted by Kawacatoose in their Analysis. If these two people are counted with Kawacatoose then this will increase the Arrears and Absentees to 57 less the three Gordon's Double Counts [the three excluded members of the Contourier family] for a total of 54.<sup>241</sup>

It can be seen from the foregoing passage that the parties are in agreement with respect to 54 of the arrears and absentees described in the Kawacatoose analysis, and the First Nation is willingly prepared to accede to Canada's position with regard to the two members of the Nesookamisk family. The only individual in dispute is the fourth member of the Keeahkeewaypew family, and we have scant evidence and no argument before us to assist us in making a determination in relation to this person.

In light of our conclusion regarding the Contourier family, however, the membership of this individual in the Keeahkeewaypew family is a moot point in the context of the threshold DOFS population of 213 urged by Canada. We

<sup>241</sup> Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 27.



recommend that the final count be 210, comprising a base population of 146, the 13 members of the Fort Walsh families, and 51 absentees and arrears. The inclusion of the fourth member of the Keeahkeewaypew family can serve only to bring the possible total to a maximum of 211. We are therefore satisfied that Kawacatoose has not established a DOFS shortfall, since the First Nation has received enough land for 212 individuals. Nevertheless, having regard for our conclusions with respect to the second issue before the Commission, we recommend that the parties undertake such additional research as may be required or justified to clarify the status of the fourth member of the Keeahkeewaypew family and to confirm whether the number of absentees should be 51 or 52.

## **ISSUE 2: NATURE AND EXTENT OF TREATY LAND ENTITLEMENT**

The second issue before the Commission in this inquiry is virtually identical to the issue addressed by us in our recent Fort McKay First Nation Inquiry Report.<sup>242</sup> Although the parties in the Fort McKay inquiry were unable to agree on the formulation of this issue, the parties to this inquiry have agreed to word the issue in this fashion:

Assuming, for the purposes of this inquiry, that the date-of-first-survey formula for determining outstanding treaty land entitlement is the appropriate formula to be applied and without prejudice to the position that other formulas are applicable under the terms of Treaty 4, does the First Nation have an outstanding treaty land entitlement on the basis that the additions (new adherents, landless transfers, and marriages to non-treaty women) to the First Nation after the First Nation's date of first survey:

- (a) are entitled to land under the terms of Treaty 4; and/or
- (b) are to be counted in establishing the First Nation's date-of-first-survey population to determine if the First Nation has an outstanding treaty land entitlement?

The principles established by us in the Fort McKay inquiry have now been made public and we see nothing in the facts of the present case or the submissions of counsel that would cause us to alter those principles in general

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<sup>242</sup> Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995).

terms or to apply them differently to the Kawacatoose claim. We hereby adopt and incorporate by reference our reasons in the Fort McKay report, subject to our comments herein. There are certain minor factual differences in the cases which should be addressed, as well as a number of key findings and principles which bear emphasizing.

As in the Fort McKay inquiry, our task is to determine the full and proper meaning of the treaty as to who should be counted and when they should be counted. The relevant section of Treaty 4 is reproduced here:

And Her Majesty the Queen hereby agrees, through the said Commissioners, *to assign reserves for said Indians*, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada, appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families. . . .<sup>243</sup>

Just as Treaty 8 did in relation to the Fort McKay First Nation, Treaty 4 stipulates a reserve land entitlement formula of one square mile per family of five "*or in that proportion for larger or smaller families*" to be set aside. It should also be noted that, whereas in Treaty 8 Canada undertook "to lay aside reserves *for such bands* as desire reserves,"<sup>244</sup> in Treaty 4 the undertaking was "to assign reserves *for said Indians*," with the selection to be made following a conference with the band. In our view, Canada's obligation to calculate a band's land entitlement on a per capita basis is even clearer under Treaty 4 than it is under Treaty 8. However, Treaty 4 is very similar to Treaty 8 in stating that the reserve area is to be "selected" by the surveyor in the field, suggesting that the date for establishing the quantum of reserve land is the time of selection by the bands and survey by Canada.

In dealing with the Indians of Treaty 8 in the Fort McKay report, we concluded that those northern First Nations had not yet ordered themselves into cohesive bands by the date of first survey, meaning that it was not possible for a surveyor simply to go out into the field, to determine the population of each band, and to calculate reserve entitlement for each band in the treaty area. Counsel for Canada submitted that this sort of conclusion would be less applicable to First Nations under Treaty 4:

First, if I might just go back to the point about groups of people coming in, you know, a family at a time or groups of families at a time. I would submit that that is more

<sup>243</sup> Treaty No. 4 (ICC Exhibit 28, p. 6). Emphasis added.

<sup>244</sup> Treaty No. 8, June 21, 1899 (Ottawa: Queen's Printer, 1966), 12.

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appropriate to the Treaty 8 sort of northern analysis [than] it is here. The indications here are that the great bulk of the members of the band were there on the Date of First Survey and of course there is a great deal of flexibility and fluidity among membership in these bands, but the people who joined subsequently, they are nowhere near as significant a factor as they may be in some of the northern communities in Alberta for example.<sup>245</sup>

As we stated at the time, counsel's point is well taken, but it was nevertheless the case that even bands under Treaty 4 had not become the neat, self-contained units that would have better suited Canada's administrative convenience. At the meetings leading up to the signing of Treaty 4, it was evident that the government party thought that settlement would not advance into the area in the near future, and that, therefore, the need for reserves was not urgent:

We have come through the country for many days and we have seen hills and but little wood and in many places little water, and it may be a long time before there are many white men settled upon this land, and you will have the right of hunting and fishing just as you have now until the land is actually taken up.<sup>246</sup>

Throughout the negotiations, references to reserve surveys implied a non-specific future date within the next couple of decades:

We are ready to promise to give \$1,000 every year, for twenty years, to buy powder and shot and twine, by the end of which time I hope you will have your little farms. If you will settle down we would lay off land for you, a square mile for every family of five. . . .

When you are ready to plant the Queen's men will lay off Reserves so as to give a square mile to every family of five persons. . . .<sup>247</sup>

These statements suggest that the Crown intended to provide reserve land to Treaty 4 Indians as advancing settlement and the dwindling supply of buffalo forced the Indians to settle and convert to an agrarian-based economy, and as new bands formed or existing bands took in new members. Implicit in this intention is the possibility of multiple surveys.

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245 ICC Transcript, October 24, 1995, pp. 181-82 (Bruce Becker).

246 Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint, Toronto: Coles, 1971), 96 (ICC Documents, p. 14).

247 Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint, Toronto: Coles, 1971), 93 and 96 (ICC Documents, pp. 12 and 14).

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In considering Canada's lawful obligation under Treaty 4, we are faced with the same ambiguities in dealing with late adherents, landless transfers, or the descendants of such individuals as those that arose in dealing with Treaty 8 in the Fort McKay inquiry. For the reasons set forth in our Fort McKay report, we are again driven to the conclusion that the intention under Treaty 4 was that every treaty Indian is to be included in an entitlement calculation. As Mahoney J stated in *R. v. Blackfoot Band of Indians*<sup>248</sup> in relation to the nature of Treaty 7:

It is clear from the preamble that the intention was to make an agreement between Her Majesty and all Indian inhabitants of the particular geographic area, whether those Indians were members of the five bands or not. The chiefs and counsellors of the five bands were represented and recognized as having authority to treat for all those individual Indians. The treaty was made with Indians, not with bands. It was made with people, not organizations. . . .

It was Indians, not bands, who ceded the territory to Her Majesty and it was to Indians, not bands, that the ongoing right to hunt was extended. The cash settlement and treaty money were payable to individual Indians, not to bands. The reserves were established for bands, and the agricultural assistance envisaged band action, but its population determined the size of its reserve and amount of assistance.<sup>249</sup>

As we concluded in the Fort McKay inquiry:

Treaty 8 is not different from Treaty 7 in any material respect, and the wording of the preamble to each is practically identical. It follows that these findings are properly applied in the interpretation of Treaty 8.

The central point from the *Blackfoot* case is that it was the intention of the Crown to enter into an agreement with all Indians inhabiting the treaty area, *whether or not they were members of a band at the time the treaty was signed*. It follows, in our view, that the obligation of the Crown, as stipulated in the treaty, is to provide land for all Indians in the Treaty 8 area when they become members of a band.<sup>250</sup>

Subject to the references to the treaty numbers, these conclusions apply, word for word, to the terms of Treaty 4. We would also reiterate the following conclusions from the Fort McKay report:

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<sup>248</sup> *The Queen v. Blackfoot Band of Indians*, [1982] 3 CNLR 53, at 61.

<sup>249</sup> *The Queen v. Blackfoot Band of Indians*, [1982] 3 CNLR 53, at 61.

<sup>250</sup> Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), 55-56.

- 1 It is unreasonable to believe that the Indians would have been prepared to sign a treaty that would give some of them no land in return for ceding their aboriginal rights to the treaty territory, since land was extremely valuable to First Nations people, both culturally and economically.
- 2 It is unlikely that the Indians would have accepted the treaty if they had understood that the Crown's intention was to exclude some members of the community – namely, those who joined the band after the date of the survey or were simply absent at that time, but who would nonetheless be drawing on the land base – from the determination of a fair reserve land entitlement.
- 3 We found as a fact that the Indians of Treaty 8 were “scattered throughout inaccessible territory, hunting in small family groups, and many had no interest in the treaty or joining a band.”<sup>251</sup> For that reason, we concluded that “it would have been impossible to require all Indians [under Treaty 8] to adhere to treaty and join a band by the date of first survey.”<sup>252</sup> Although the circumstances were different for the Indians of Treaty 4, the conclusion is the same. The Indians in the Treaty 4 area were in a period of great transition. The destitution, hardship, and starvation associated with the time of treaty meant that, while many Indians were attempting to assure their daily needs by settling, many others sought to sustain themselves by extending the hunt over an increasingly large territory and, like the Indians of Treaty 8, had no interest in Treaty 4 or in permanently joining a band. As with Treaty 8, obligatory membership in a band by date of first survey would have been unacceptable to the Indians of Treaty 4.
- 4 The Indian signatories to the treaty could not have understood that treaty land entitlement was to be based on a one-time population count as of the date of arrival of a surveyor from Canada. As we discussed in the Fort McKay report, in *Nowegijick v. R.*, the Supreme Court of Canada approved the principle that Indian treaties must be construed “not according to the technical meaning of [their] words . . . but in the sense in which they would naturally be understood by the Indians.”<sup>253</sup>

251 Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), 58.

252 Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), 58.

253 *Nowegijick v. The Queen*, [1983] 1 SCR 29 at 36, 2 CNLR 89 at 94. This passage was relied on again by the Supreme Court of Canada in *Simon v. The Queen*, [1985] 2 SCR 387 at 402.

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- 5 A fair and reasonable reading of Treaty 4 leads to the conclusion that, in return for ceding their aboriginal interest in the large area of southern Saskatchewan and lesser parts of Manitoba and Alberta contemplated by the treaty, each and every aboriginal person who accepted treaty secured an entitlement to land, calculated with reference to the number of individuals who so accepted.
- 6 We see nothing in the terms of the treaty to support the rigid DOFS approach proposed by Canada. The treaty does not specify that a single survey will be undertaken; rather, it specifies a *process* of selection and survey. As to Canada's submission that the evidence of subsequent conduct demonstrates that the treaties were meant to provide for a one-time survey based on the DOFS population, we have concluded, upon review of the various documents before the Commission and, in particular, Elaine Davies's Report,<sup>254</sup> that the evidence speaks more to Canada's attempts to identify and to justify its treaty land entitlement policy than to the meaning suggested by counsel for Canada.
- 7 Treaty land entitlement is a collective right of a First Nation that must be determined utilizing the number of treaty Indians who are or become members of that First Nation, subject to the principle that every treaty Indian is to be included – once – in an entitlement calculation.

In the course of our reasons in the Fort McKay inquiry, we referred to certain well-defined principles with respect to the interpretation of Indian treaties.<sup>255</sup>

- Treaties should be given a fair and liberal construction in favour of the Indians, and treaties should be construed not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians.<sup>256</sup>
- Since the honour of the Crown is involved, no appearance of "sharp dealing" should be sanctioned.<sup>257</sup>

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<sup>254</sup> Elaine M. Davies, Research Consultant, Litigation Support, "Treaty Land Entitlement – Development of Policy: 1886 to 1975," November 15, 1994 (ICC Exhibit 31).

<sup>255</sup> Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), 63-64.

<sup>256</sup> See *Nowegijick v. The Queen*, [1983] 1 SCR 29 at 36, 2 CNLR 89 at 94, as followed in *Simon v. The Queen*, [1985] 2 SCR 387 at 402, [1986] CNLR 153 at 167.

<sup>257</sup> See *R. v. Taylor and Williams*, [1981] 3 CNLR 114 at 123.

- If there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible.<sup>258</sup>
- Regard may be had to the subsequent conduct of the parties to ascertain how the parties understood the terms of the treaty.<sup>259</sup>

Applying these interpretive principles to Treaty 4 leads again to the following findings about the nature and extent of treaty land entitlement which arose in our analysis of Treaty 8 in the Fort McKay inquiry:

- 1 The purpose, meaning, and intent of the treaty is that each Indian band is entitled to a certain amount of land based on the number of members, and each treaty Indian is entitled to be included in an entitlement calculation as a member of an Indian band (or, in the alternative, to lands in severalty).
- 2 The treaty conferred upon every Indian an entitlement to land exercisable either as a member of a band or individually by taking land in severalty. In the case of Indians who were members of a band, that entitlement crystallized at the time of the first survey of the reserve. The quantum of land to which the band was entitled in that first survey is a question of fact, determined on the basis of the actual band membership – including band members who were absent on the date of first survey. This later group of individuals is generally referred to as “absentees.”
- 3 The treaty conferred upon every band the entitlement to receive additional reserve land for every Indian who adhered to the treaty and joined that band subsequent to the date of first survey. The quantum of additional land to which the band is entitled as a result of such late adherents is a question of fact, determined on the basis that the entitlement crystallized when those Indians joined the band. These individuals are generally referred to as “late adherents.”

<sup>258</sup> *R. v. Taylor and Williams*, [1981] 3 CNLR 114 at 123, applying *R. v. White and Bob*, [1965] 50 DLR (2d) 613 at 652 (BCCA), affirmed, [1965] 52 DLR (2d) 481 (SCC).

<sup>259</sup> *R. v. Taylor and Williams*, [1981] 3 CNLR 114 at 123; *R. v. Sioui*, [1990] 3 CNLR 127 at 140-41; and *R. v. Ireland*, [1991] 2 CNLR 120 (OCJGD) at 128 and 129.

- 4 The treaty conferred upon every band the entitlement to receive additional reserve land for every Indian who transferred from one band to another, provided that the band from which that Indian transferred had never received land on his or her account. These individuals are generally referred to as "landless transfers" and sometimes as "landless transferees."
- 5 After the date of first survey, natural increases or decreases in the population of the band do not affect treaty land entitlement. Thereafter it is only late adherents or landless transfers in respect of whom treaty land has never been allocated who will affect treaty land entitlement.
- 6 Treaty Indian women from the same treaty who marry into a band do not give rise to an additional land entitlement, unless those women are either landless transfers or late adherents in their own right. Non-treaty Indian women who marry into a band do not give rise to an additional land entitlement under any circumstances.
- 7 The population of the band at the date the treaty is signed is not relevant to the determination of the quantum of the band's land entitlement.
- 8 The current population of a band is not relevant to the determination of the quantum of the band's land entitlement, and natural increases in the population of a band do not give rise to treaty land entitlement.
- 9 If a band receives a surplus of land at date of first survey, Canada is entitled to credit those surplus lands against subsequent landless transfers or late adherents.
- 10 Establishing a date-of-first-survey shortfall is not a prerequisite for a valid treaty land entitlement claim.<sup>260</sup>

We are satisfied that all the foregoing principles and findings are just as applicable to Kawacatoose in the present case as they were to the Fort McKay First Nation in the previous inquiry before the Commission. A couple of points, however, are worthy of elaboration.

In our first finding above, we noted that "each treaty Indian is entitled to be included in an entitlement calculation as a member of an Indian band

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<sup>260</sup> Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), 64-65.



(or, in the alternative, to lands in severalty).” The reference to severalty arises from the particular terms of Treaty 8, which states:

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 following manner, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.<sup>261</sup>

There is no parallel severalty clause in Treaty 4. In applying those findings to Kawacatoose, this difference does not cause us to change the findings we made with regard to treaty land entitlement in the Fort McKay inquiry.

Our fourth finding above deals with landless transfers and states that “[t]he treaty conferred upon every band the entitlement to receive additional reserve land for every Indian who transferred from one band to another, provided that the band from which that Indian transferred had never received land on his or her account.” Having regard for the additional submissions which were made before us in the present inquiry, we now wish to take the opportunity to clarify its meaning. We recognize that treaty land entitlement, if endlessly portable on the backs of landless transferees who migrate from band to band, can quickly become very complicated and confused, giving rise to the possibility of competing claims to the transferee’s membership from two or more bands. For this reason, we recommend that a landless transferee’s right to be counted should remain with that individual until he or she joins a band which has received some or all of its reserve land under treaty. Until the individual joins a band that has had a treaty land entitlement calculation done, he or she should retain the right to be counted with any band for which such a calculation has not yet been undertaken. This in fact takes the meaning closer to the original term, which was “transfer from a landless band.”

<sup>261</sup> *Treaty No. 8, June 21, 1899* (Ottawa: Queen’s Printer, 1966), 12-13.

However, once the individual joins a band which has received treaty land to some extent, the right to be counted should then crystallize and become part of the collective right of that band. In this fashion, much of the "chaos" envisioned by counsel for Canada as arising from individuals becoming members of several bands for varying periods of time should be avoided, even though, as noted in the Fort McKay report, in any event these issues have not proven to be insurmountable in practice.

### **Other Considerations Raised by the Parties**

The submissions before the Commission with regard to this issue are remarkably similar to those which were before us in the Fort McKay inquiry. In our report on that inquiry, we have already dealt with the following issues which, in our opinion, do not warrant additional discussion at this time:

- 1 Canada's objection that allowing post-DOFS additions to band membership in determining treaty land entitlement results in a type of selective, "asymmetrical," floating treaty land entitlement,<sup>262</sup> in which population increases are considered but decreases are ignored, is met by recognizing that additions to band populations through new adherents and landless transfers are distinct from natural population increases.
- 2 Canada cannot object to the "artificiality" of deeming late additions to have been members of a band's DOFS population, even if many of those individuals were not even alive at that date, since that artifice has arisen from Canada's own 1983 ONC Guidelines to mesh with Canada's view that its lawful obligation was based solely on DOFS population. As we stated in Fort McKay:

Late adherents and landless transfers are counted not because they notionally should have been counted at DOFS, but because they have never been included in an entitlement calculation. Therefore, whether a post-DOFS addition was alive at DOFS is irrelevant.<sup>263</sup>

- 3 Our recommended approach factors in both natural increases and decreases in the population of a band's post-DOFS additions.

<sup>262</sup> Submissions on Behalf of the Government of Canada, October 16, 1995, pp. 36-38.

<sup>263</sup> Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), 67.

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- 4 The possibility of multiple surveys, which continues until all treaty Indians have been included in an entitlement calculation and all treaty bands have had their full treaty land entitlement calculated, nevertheless cannot lead to a never-ending obligation simply because the number of treaty Indians to be counted is finite and detailed genealogical information is generally available with respect to them.
  - 5 Although the Crown has a fiduciary duty to live up to its treaty obligations, this issue is subsumed in determining whether Canada's interpretation of the treaty is correct. The issue is not whether Canada "chose" to interpret the treaty in a manner that restricts the entitlement of First Nations and thus improperly exercised its "discretion," or whether Canada is treating First Nation signatories to the treaty unequally.
  - 6 We view the 1983 ONC Guidelines as one possible interpretation of the treaty, but the more fundamental concern in establishing Canada's lawful obligation to First Nations is to determine what the treaty says about treaty land entitlement. As we stated in Fort McKay:

Furthermore, although subsequent conduct is relevant to the interpretation of the treaty, we agree with Canada that, in the light of the entire historical record, it is difficult to discern a consistent pattern of subsequent government conduct with respect to treaty land entitlement. Indeed, the government has altered the ground rules many times. At the end of the day, therefore, the government's reliance on the [1983] ONC Guidelines for over 10 years is relevant only in so far as it illustrates that even the government considered the post-DOFS additions approach to be a reasonable interpretation of the treaty for approximately a decade.<sup>264</sup>

### **Estoppel by Representation**

Counsel for Kawacatoose raised estoppel by representation as an alternative basis for establishing Canada's lawful obligation to provide additional land to satisfy the First Nation's claim for outstanding treaty land entitlement. In essence, the submission is that, if the Commission does not agree that late additions such as new adherents and landless transfers are entitled to be included in the First Nation's DOFS population, Canada is nevertheless estopped from relying on its strict legal rights under the doctrine of estoppel by representation because:

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<sup>264</sup> Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), 72.

- 1 through the 1983 Guidelines, the previous validation of some seven Saskatchewan First Nations on the basis of late additions, and the specific treaty land entitlement research instructions provided to Kawacatoose on May 13, 1991, Canada has represented to the Federation of Saskatchewan Indian Nations and directly to Kawacatoose that validations based on late additions would be forthcoming;
- 2 it was reasonable for Kawacatoose to act on those representations, and it did so; and
- 3 as a result of the First Nation's reliance on Canada's representations and Canada's unilateral and unexpected changing of the rules, Kawacatoose has suffered detriment or prejudice in the form of thrown-away research and legal costs, loss of expectation, and the loss of the opportunity to have a validated claim since the First Nation did not know that there was a limited time frame within which Canada was prepared to accept claims for negotiation on the basis of late additions.

The result, according to Kawacatoose, is that "Canada cannot now state that Additions to Kawacatoose after its Date of First Survey are not entitled to land under Treaty No. 4 or will not be included in determining Kawacatoose's Date of First Survey Population."<sup>265</sup> Canada's response is that it is not bound by its previous statements and actions, which represent little more than mistake of law by Canada's representatives or without prejudice statements in furtherance of settlement of earlier claims.

In light of our earlier conclusions regarding the nature and extent of treaty land entitlement, we do not find it necessary to address the issue of estoppel by representation in the present case.

### **Satisfaction of the Treaty Obligation to Provide Reserve Land**

Kawacatoose argues that it has a valid treaty land entitlement claim based on either late adherents and landless transfers or, alternatively, upon a DOFS shortfall. Canada has denied any outstanding treaty land entitlement, and, as a result, has not addressed in its submission the number of late additions to be included with the base payroll population (plus absentees and arrears) to arrive at the appropriate population to satisfy the First Nation's outstanding treaty land entitlement. The only information generated at Canada's request is

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<sup>265</sup> Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 76.

the report by Theresa Ferguson, which states: "This report is prepared at the request of the Specific Claims Branch West and does not necessarily represent the views of the Government of Canada."<sup>266</sup> With this caveat in mind, we will nevertheless employ the figures in Ms. Ferguson's report as a preliminary statement of Canada's position. It should also be noted that the numbers for both Canada and Kawacatoose have been amended to reflect our findings in relation to the two Fort Walsh families and the Contourier family.

The positions of the parties, then, are set out as follows:

	<b>Canada</b>	<b>Kawacatoose</b>
1876 base paylist	146	146
Fort Walsh families		13
Contourier family		2
Absentees and arrears	51	52
New adherents	43	
Landless transfers	19	
New adherents and landless transfers		26
Eligible in-marrying non-treaty women	5	2
<b>Total</b>	<b>264</b>	<b>241</b>

While at first glance it may appear unusual that the number put forward by Canada exceeds the figure advanced by Kawacatoose, counsel for the First Nation explained the discrepancy in this manner:

It is not surprising that Canada's Analysis shows more Additions than Kawacatoose's Analysis as Kawacatoose's Analysis was done in great haste to get this submission into Canada's hands prior to the finalization of the Framework Agreement negotiations. When it was submitted to Canada, it was obvious, considering Al Gross's letter of January 20, 1992, and by using the 1983 Guidelines that Kawacatoose had an outstanding Treaty land entitlement. There was no need to look any further at that time for further Additions to Kawacatoose.<sup>267</sup>

Clearly, counsel for Kawacatoose does not believe that the figures contained in the initial request by the First Nation in April 1992 have been fully researched or that they represent any true reflection of the number of post-DOFS additions. Indeed, counsel submits that "Kawacatoose agrees that the 67 Additions listed in Canada's Analysis should be counted as Additions for

<sup>266</sup> Theresa A. Ferguson, "Report on the Kawacatoose Band Date of First Survey Population", July 31, 1992, p. 1 (ICC Documents, p. 249).

<sup>267</sup> Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 69.

Kawacatoose.”<sup>268</sup> However, in fairness to Canada, it must also be remembered that, in light of its position in relation to treaty land entitlement generally, Canada has not made any representations with respect to whether any of the foregoing figures can be considered accurate. With these considerations in mind, we recommend that the parties meet to review the population analyses presented before the Commission and to undertake such further research as may be required to substantiate the numbers set forth in the Ferguson report. In the meantime, we have concluded, on a preliminary basis, that the First Nation’s treaty land entitlement claim should be based on the following figures:

1876 base paylist	146
Fort Walsh families	13
Contourier family	0
Absentees and arrears	51
New adherents	43
Landless transfers	19
Eligible in-marrying non-treaty women	5
<b>Total</b>	<b>277</b>

It is our opinion that Kawacatoose has a valid treaty land entitlement claim based on late adherents and landless transfers in accordance with the findings as set out above. Therefore, we accept, on the basis of the evidence put before us, that the First Nation is entitled to the following acreage of additional reserve land:

Treaty land entitlement (277 x 128 acres per person)	35,456
Land provided in September 1876 survey	27,200
Outstanding treaty land entitlement	8,526

Alternatively, 8526 acres may be expressed as an additional entitlement of approximately 13.32 square miles.

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<sup>268</sup> Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, pp. 69-70.

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**ISSUE 3: THE SASKATCHEWAN FRAMEWORK AGREEMENT<sup>269</sup>**

The parties have stated the third issue in this inquiry in these terms:

Has the First Nation established, pursuant to Article 17 of the Saskatchewan Treaty Land Entitlement Framework Agreement, an outstanding treaty land entitlement on the same or substantially the same basis as the Entitlement Bands which are party to the Framework Agreement?

This issue requires a review of the relevant terms of the Framework Agreement and an assessment of the substantive rights, if any, which that agreement confers upon First Nations such as Kawacatoose that are not parties to it.

It will be recalled that the Framework Agreement came about in large part as a result of the failure of the Saskatchewan agreement and the subsequent commencement of litigation on behalf of the Saskatchewan First Nations that had been accepted for negotiation of treaty land entitlement claims pursuant to that agreement. The Framework Agreement grew out of the report and recommendations of the Office of the Treaty Commissioner for Saskatchewan, which developed the “equity formula” as a fair and reasonable means of resolving the outstanding treaty land entitlement claims of the Entitlement Bands.

The Framework Agreement was executed by Canada and the Province of Saskatchewan as of September 22, 1992, and at once came into force between those parties. At the same time, as a result of the negotiations leading to the Framework Agreement, it became necessary to replace the original Cost Sharing Agreement, which had been entered into on September 13, 1991, between Canada and Saskatchewan in anticipation of the Framework Agreement, with the Amended Cost Sharing Agreement.

Although the Cost Sharing Agreement and the Amended Cost Sharing Agreement were between Canada and Saskatchewan only, the Framework Agreement included the 26 Entitlement Bands as parties. The Entitlement Bands had the option of signing the Framework Agreement immediately or adhering to it on or before March 1, 1993, but the Framework Agreement itself did not come into force between an Entitlement Band and the two levels of government until a Band Specific Agreement between the Entitlement Band

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<sup>269</sup> Indian Government of Saskatchewan, *Treaty Land Entitlement Framework Agreement* (Saskatchewan, 1992).

and Canada was concluded. A Band Specific Agreement had to be concluded within three years after the September 22, 1992, execution of the Framework Agreement by Canada and Saskatchewan, failing which the financial obligations of the two governments to the Entitlement Band under the Framework Agreement would terminate.

Within the terms of the Framework Agreement, Canada, Saskatchewan, and the Entitlement Bands "agreed to disagree" with regard to the extent of the treaty land entitlement obligations owed by the two governments to the Entitlement Bands, although all the parties concurred that such obligations did exist. As stated in the recitals to the Framework Agreement:

- P. Canada recognizes that it has unfulfilled obligations in respect of Treaty land entitlement in respect of the Entitlement Bands and is desirous of ensuring that such obligations are fulfilled;
- Q. Canada is of the opinion that its outstanding Treaty land entitlement obligation to the Entitlement Bands is, at most, limited to the respective Shortfall Acres (including Minerals) of each Entitlement Band;
- R. Saskatchewan is also of the opinion that the outstanding Treaty land entitlement obligation of Canada to the Entitlement Bands is limited to Shortfall Acres as aforesaid;
- S. The Entitlement Bands are of the opinion that the outstanding Treaty land entitlement obligation of Canada to such Entitlement Bands is determined by multiplying the current population of an Entitlement Band by one hundred and twenty-eight (128) acres and subtracting therefrom the area of such Entitlement Band's existing Reserve Land which was set apart by Canada for the use and benefit of such Entitlement Band for Entitlement Purposes. . . .

Nevertheless, the parties agreed that Canada's outstanding treaty land entitlement obligations would be fulfilled in accordance with the terms and conditions set out in the Framework Agreement. Moreover, in consideration of the financial and other contributions to be made by Saskatchewan pursuant to the Framework Agreement and the Amended Cost Sharing Agreement, Saskatchewan's obligations to provide unoccupied Crown land and minerals to Canada under the Natural Resources Transfer Agreement of 1930 would also be considered to be fulfilled. Releases and indemnities were included to ensure that no claims would be made against Canada or Saskatchewan for proceeding on the basis of the Framework Agreement, and that existing litigation would be held in abeyance and, upon fulfilment of the terms of the Framework Agreement, discontinued. The releases apply only to land entitle-



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ment and not to other treaty rights, or to surrender or other claims under Canada's Specific Claims Policy, or to rights that might relate to traditional lands.

Under the terms of the Framework Agreement, Canada and Saskatchewan agreed to pay on a cost-shared basis the sum of \$503 million over a period of 12 years, with those funds to be applied to enable the Entitlement Bands to acquire up to 1.7 million acres of land with reserve status, and to compensate rural municipalities and school divisions for tax losses. The maximum available to the rural municipalities was \$25 million, with the same ceiling for the school divisions. Under the terms of the Amended Cost Sharing Agreement, Canada and Saskatchewan are to split the foregoing costs on a 70–30 basis, with Canada being able to recoup up to 19 per cent of the costs, resulting in a possible 51–49 split. Saskatchewan is to reimburse Canada based on the anticipated savings Saskatchewan will realize from Canada's assumption of financial responsibility for costs attributable to persons residing on land which becomes reserve land as a result of the implementation of the Framework Agreement and the Band Specific Agreements.

Each Entitlement Band is to use its best efforts within the 12-year period to acquire the number of "shortfall acres," including minerals, identified for the Band in Schedule 1 of the Framework Agreement, to convert those acres to reserve status, and to transfer unencumbered title to Canada. Once an Entitlement Band has completed these steps, it can then use the balance of its settlement funds (a) to acquire additional land with reserve status up to the greater of the acreage determined using the equity formula or the Saskatchewan formula (both of these amounts also being defined in Schedule 1), or (b) for other Band development purposes. Recognition of and compensation for a higher quantum under the Saskatchewan formula is referred to in the Framework Agreement as the "Honour Payment."

In determining the area of land owed to each Entitlement Band under the terms of the Framework Agreement, the Band's adjusted-date-of-first-survey (ADOFS) population forms the basis of the calculation. The final ADOFS population for each Entitlement Band was, according to section 1.01(5) of the Framework Agreement, negotiated and agreed upon between Canada and the Band and set forth in Schedule 1, but the Framework Agreement does not clearly illustrate the precise criteria contemplated in the ADOFS population. However, Mr. Westland testified that the ADOFS population in the context of the Saskatchewan Framework Agreement includes – in addition to the DOFS population composed of the base payroll population plus absentees and

arrears – new adherents to treaty, transfers from landless bands, and in-marrying treaty Indian women.<sup>270</sup>

### **Article 17: Other Indian Bands**

The key provision of the Framework Agreement for the purposes of this inquiry is Article 17, which states:

#### **17.01 No Prejudice:**

Nothing in this Agreement shall be interpreted in a manner so as to prejudice:

- (a) the rights or obligations of Canada in respect of any Indian band not a party to this Agreement; or
- (b) the rights of any Indian band not party to this Agreement;

including, without limitation, any Indian band in respect of which Canada may hereafter accept for negotiation a claim for treaty land entitlement.

#### **17.02 No Creation of Rights:**

Nothing in this Agreement shall be interpreted in a manner so as to create or expand upon rights or confer any rights upon, or to the benefit of, any Indian band not a party to this Agreement.

#### **17.03 Applicability of This Agreement and the Amended Cost Sharing Agreement to Other Bands:**

Canada and Saskatchewan acknowledge that, pursuant to the Amended Cost Sharing Agreement, in the event that it is hereafter determined by Canada that other Bands (other than any Entitlement Band) have substantiated an outstanding treaty land entitlement, on the same or substantially the same basis as the Entitlement Bands, Canada and Saskatchewan shall support an extension of the principles of this Agreement and the Amended Cost Sharing Agreement in order to fulfil the outstanding Treaty land entitlement obligations in respect of such Bands, and, without limitation, acknowledge that they will negotiate any amendments to this Agreement and the Amended Cost Sharing Agreement to ensure that the amounts referred to in Article 5, section 6.2 and section 7.2 thereof are adjusted to ensure that the interests of Canada, Saskatchewan, such Bands and affected local governments are dealt with in a fair and equitable manner.

#### **17.04 Other Negotiations:**

Canada and Saskatchewan agree that nothing in this Agreement shall prejudice the ability of other Bands whose claim has been accepted for negotiation from concluding separate arrangements with Canada to settle their outstanding land entitlement.

<sup>270</sup> ICC Transcript, December 16, 1994, p. 157 (Rem Westland).

**Position of the Kawacatoose First Nation**

Kawacatoose maintains that there are three bases for its assertion that section 17.03 of the Framework Agreement imposes a legally binding obligation on Canada to validate the First Nation's claim for outstanding treaty land entitlement once Kawacatoose has established entitlement on "the same or substantially the same basis" as the Entitlement Bands. These bases are (1) the fiduciary obligation owed by Canada to Kawacatoose; (2) the contractual relationships between, first, Canada and the Entitlement Bands and, second, Canada and Kawacatoose; and (3) the doctrine of estoppel by representation.

*Fiduciary Obligation Owed by Canada to Kawacatoose*

Counsel for Kawacatoose submits that, although the First Nation is not a party to the Framework Agreement, it is a member of the FSIN, which played a "crucial and active role in the negotiation of the Framework Agreement and, in particular, Article 17.03." As stated in the First Nation's written submissions:

Clearly, Kawacatoose was one of the "Other Bands" with a possible outstanding Treaty land entitlement that all the parties to the negotiations were painfully aware of. It is within this context that Canada's promises must be examined. This context is important because it shows that Canada's promises were not made in a vacuum. The F.S.I.N., the Entitlement Bands and Kawacatoose were there to request those promises. The F.S.I.N., the Entitlement Bands and Kawacatoose [were] there to receive those promises. Kawacatoose relied and acted upon those promises.<sup>271</sup>

In light of the fiduciary obligation owed by Canada to Kawacatoose in respect of treaty rights, counsel contends that Canada's undertakings and representations in section 17.03 amount to specific promises to non-Entitlement Bands in Saskatchewan, including Kawacatoose. Once these promises were given, Canada's fiduciary duty to exercise its discretion regarding validation and settlement in a manner that is fair and in the best interests of the non-Entitlement Bands became narrowed, and in fact crystallized into specific obligations from which Canada cannot depart without first obtaining the First Nation's consent. Those obligations are to accept Kawacatoose's outstanding treaty land entitlement claim for negotiation on the basis of the criteria set forth in the 1983 ONC Guidelines, and, once validated, to settle the

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271 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 99.

claim on terms similar to those enumerated in the Framework Agreement and the Amended Cost Sharing Agreement.

*Contractual Obligation Owed by Canada to Kawacatoose*

Counsel for Kawacatoose asserts that the First Nation's claim is also rooted in two contracts: the Framework Agreement between Canada and the Entitlement Bands, and the "unilateral contract" between Canada and Kawacatoose.

In relation to the Framework Agreement, counsel submits that, since parties to an agreement can agree to benefit a third party who is not party to that agreement, it is open to one of those parties to enforce the benefit on behalf of that third party. The representations and undertakings given by Canada in section 17.03, which benefit Kawacatoose and other non-Entitlement Bands, can be enforced by the Entitlement Bands, which, through a resolution of the Assembly of Entitlement Chiefs dated April 18, 1994,<sup>272</sup> have expressed their support of the treaty land entitlement claims of the Kawacatoose, Kahkewistahaw, and Sakimay First Nations.

With regard to the question of unilateral contract, counsel for Kawacatoose tendered *Carlill v. Carbolic Smoke Ball Company*<sup>273</sup> and the following excerpt from *The Law of Contracts* (2d ed.) by S.M. Waddams in support of the contention that Canada and Kawacatoose are contractually bound:

### UNILATERAL CONTRACTS

The usual case of a bargain involves an exchange of promises. It is not uncommon, however, for a promise to be made in return for the performance of an act. If A promises to pay \$1,000 to B if B paints A's house, B might assent to the arrangement (and this would ordinarily operate as a promise by B to paint the house), or he might simply paint the house without communication with A. In the latter case there is no promise by B to do the work (unless commencing the work, as might be argued, operates as a promise to complete it). But B, when he has done the work, is entitled to enforce A's promise. In *Calgary Hardwood & Veneer Ltd. v. Canadian National Ry. Co.*<sup>274</sup> it was held that where the vendor of land said that he would "agree to sell" if the purchaser could obtain the approval of the municipality to the sale, the obtaining of the approval amounted to acceptance of the offer.

272 Federation of Saskatchewan Indian Nations, Assembly of Entitlement Chiefs Resolution No. 42, "Support to Other Bands regarding Validation of TLE Claims," April 18, 1994 (ICC Exhibit 30).

273 *Carlill v. Carbolic Smoke Ball Company*, [1893] 1 QB 256, 9 TCR 124 (UKCA).

274 *Calgary Hardwood & Veneer Ltd. v. Canadian National Ry. Co.* (1979), 100 DLR (3d) 302 (Alta, SC App. Div.).

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It has been said that courts will tend to treat offers as calling for bilateral rather than unilateral acceptance. However, in some cases, the only reasonable interpretation of the facts is that the offeror bargained only for a completed act.<sup>275</sup>

On behalf of Kawacatoose, it is submitted that Canada has offered to extend a settlement based on the Framework Agreement to all non-Entitlement Bands that fulfil the condition of substantiating an outstanding treaty land entitlement claim on “the same or substantially the same basis as the Entitlement Bands.” Counsel contends that Kawacatoose has substantiated its claim on this basis and, in so doing, has accepted Canada’s offer, thereby giving rise to binding contractual obligations owed by Canada to Kawacatoose. Again, those obligations are to accept Kawacatoose’s outstanding treaty land entitlement claim for negotiation on the basis of the criteria set forth in the 1983 ONC Guidelines, and, once validated, to settle the claim on terms similar to those enumerated in the Framework Agreement and the Amended Cost Sharing Agreement.

#### *Estoppel by Representation*

The First Nation contends that, even if the Commission should conclude that the legal effect of section 17.03 does not create substantive rights for Kawacatoose, Canada should nevertheless be prevented from relying on its strict legal rights by virtue of the doctrine of estoppel by representation. Although the doctrine was not fully delineated by counsel in relation to its applicability to section 17.03 of the Framework Agreement, the Commission understands the First Nation’s position to be essentially the following:

- 1 Canada by its prior conduct and representations, as fully detailed in Part II of this report dealing with the development and evolution of Canada’s Specific Claims Policy relating to treaty land entitlement, and culminating in section 17.03 of the Framework Agreement, has represented that non-Entitlement Bands would be entitled to validation on the basis of their DOFS populations, including absentees and arrears, together with late additions such as new adherents to treaty, transfers from landless bands, and in-marrying treaty Indian women – in essence, the criteria set forth in the 1983 Guidelines. Counsel alleges that Canada made these representa-

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<sup>275</sup> S.M. Waddams, *The Law of Contract*, 2d ed. (Toronto: Canada Law Book Inc., 1984), 122. The second paragraph of the excerpt was added by the Commission.

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tions with the intention that they be acted upon or such that a reasonable person would assume that they were intended to be acted upon.

- 2 Kawacatoose has acted upon these representations by undertaking investigations and research which, according to counsel, has substantiated its claim on the same or substantially the same basis as several of the Entitlement Bands.
- 3 Kawacatoose by so acting has suffered prejudice or detriment in terms of thrown-away legal and research costs, unfulfilled expectations, and the inability to make a timely claim within the "window of opportunity" through which, prior to that window being unilaterally and unexpectedly closed, at least seven Entitlement Bands were validated.

Assuming that the Commission does not agree that Kawacatoose is owed fiduciary or contractual obligations by Canada in the present context, the strict legal right on which counsel contends that Canada should be estopped from relying is that late additions to the First Nation's DOFS population (new adherents to treaty, transfers from landless bands, and in-marrying treaty Indian women) are not entitled to land under Treaty 4 or will not be included in calculating the DOFS population. Nor should Canada be able to deny that it owes a lawful obligation to Kawacatoose with regard to these late additions under the Specific Claims Policy.

*Section 17.03 of the Framework Agreement*

Even to be able to consider the foregoing bases for claiming that Canada has a binding legal obligation under section 17.03 of the Framework Agreement, the words of that section and the other provisions of Article 17 must be closely scrutinized to determine whether they support that conclusion. In the course of such scrutiny, counsel for Kawacatoose submits that Article 17 must be interpreted in the context of principles of interpretation applicable to treaties and treaty rights in addition to the more basic principles of contractual interpretation. Within this line of reasoning, the Framework Agreement is a "land claims agreement" in the sense contemplated by section 35 of the *Constitution Act, 1982*, which states:

- 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. . . .
- (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Assuming that the Framework Agreement is a land claims agreement conferring treaty rights on Kawacatoose, counsel submits that the applicable principles of treaty interpretation are as follows:

- 1 Treaties and treaty rights must be given a fair, large and liberal construction in favour of the Indians, based on *R. v. Sparrow*,<sup>276</sup> *Nowegijick v. The Queen*,<sup>277</sup> *Simon v. The Queen*<sup>278</sup> and *R. v. Sioui*.<sup>279</sup>
- 2 Since the interpretation of Indian treaties involves the honour of the Crown, fairness to the Indians is a governing consideration: *R. v. Agawa*<sup>280</sup> and *R. v. Sparrow*.<sup>281</sup>
- 3 Section 35(1) and treaty rights must be construed in a purposive way with a generous and liberal interpretation in favour of the Indians: *R. v. Sparrow*,<sup>282</sup> *R. v. Bombay*<sup>283</sup> and *Eastmain Band v. Canada (Federal Administrator)*.<sup>284</sup>

In addition to these principles of treaty interpretation are the more conventional rules of contractual interpretation on which Kawacatoose relies:

1. Where there is no ambiguity in the language, it must be given its ordinary or natural meaning. . . .
2. If there are two possible interpretations, one of which is absurd or unjust, the other of which is rational, the latter must be taken as the correct one. . . .
3. The intention of the parties is the paramount test of the meaning of the words in a contract. Although words normally mean what the ordinary person would take them to mean, this is only as long as the parties understand and interpret them in the same way. . . .
4. The provision should be construed as a whole giving effect to everything in it, if possible. No word should be superfluous. . . .<sup>285</sup>

276 *R. v. Sparrow*, [1990] 3 CNLR 160 (SCC).

277 *Nowegijick v. The Queen*, [1983] 2 CNLR 89 (SCC).

278 *Simon v. The Queen*, [1986] 1 CNLR 153 (SCC).

279 *R. v. Sioui*, [1990] 3 CNLR 127 (SCC).

280 *R. v. Agawa*, [1988] 3 CNLR 73 (Ont. CA).

281 *R. v. Sparrow*, [1990] 3 CNLR 160 (SCC).

282 *R. v. Sparrow*, [1990] 3 CNLR 160 (SCC).

283 *R. Bombay*, [1993] 1 CNLR 92 (Ont. CA).

284 *Eastmain Band v. Canada (Federal Administrator)*, [1993] 3 CNLR 55 (FCA).

285 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, pp. 80-81.

In the view of the First Nation, the clear language of section 17.03 of the Framework Agreement, interpreted in a “generous” and “liberal” manner, must be read to say:

If Canada determines that a “Band,” other than an “Entitlement Band,” has substantiated an outstanding treaty land entitlement, on the same or substantially the same basis as the “Entitlement Bands,” then Canada and Saskatchewan both undertake that they “shall” support an extension of the Framework Agreement and the Amended Cost Sharing Agreement with any necessary amendments “to ensure that the interests” of the parties “are dealt with in a fair and equitable manner.”<sup>286</sup>

According to counsel, if Canada is not required to validate the Kawacatoose claim on the same or substantially the same basis as the Entitlement Bands, or if Canada substitutes a different method for validating claims, the key words “on the same or substantially the same basis as the Entitlement Bands” are rendered superfluous and without meaning. Moreover, to allow Canada not to validate claims on the same or substantially the same basis, or alternatively to allow Canada to validate claims on a different basis, would permit an absurd or unjust interpretation of section 17.03 rather than the rational alternative proposed by Kawacatoose. The words “same or substantially the same” speak to the question of validation and the circumstances under which the Entitlement Bands were accepted for negotiation. According to counsel, at least seven Entitlement Bands were validated on the basis of additions to their DOFS populations in the same manner now being asserted by Kawacatoose. The foundation of these additions must be the 1983 Guidelines which, if applied to each of the Entitlement Bands, results in a validation in each case.<sup>287</sup>

Counsel emphasized that the January 20, 1992, letter from Al Gross, Director of Treaty Land Entitlement, to Stewart Raby of the FSIN, which stated that “Saskatchewan treaty land entitlement claims are accepted for negotiation on the basis of research conducted pursuant to the 1983 guidelines,” was written in the heat of the negotiations leading up to the Framework Agreement. Accordingly, when they were drafting section 17.03, the parties to the negotiations were likely aware of Canada’s position as set forth in Mr. Gross’s letter “that validation of an outstanding treaty land entitlement was and would continue to be based on the 1983 Guidelines or ‘policy.’”<sup>288</sup>

286 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, pp. 81-82.

287 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, pp. 95-96.

288 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, p. 96.



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Counsel further relied on the evidence of the three witnesses called to testify with regard to the Framework Agreement – David Knoll, Dr. Lloyd Barber, and James Kerby – as being of assistance in understanding the positions of the parties at the time and the circumstances within which the Framework Agreement was concluded. Counsel contended that, based on the following excerpt from the *Canadian Encyclopedic Digest (Western)* (3d ed.), such evidence if probative can properly be considered in interpreting section 17.03:

### 3. SURROUNDING CIRCUMSTANCES

506 In order that the court may know the object of the parties and those considerations that must have been present to the minds of the parties at the time of the making of the contract, it is permissible for the court to consider the position of the parties at that time and the surrounding circumstances forming the context within which they made their agreement. The genesis and aim of the transaction may be considered as part of the context of the agreement.<sup>289</sup>

Excerpts from Mr. Knoll's testimony were reproduced in the Kawacatoose submissions to show that FSIN negotiators sought to protect the interests of the Nikaneeet, Cowessess, and other non-Entitlement Bands by giving them the opportunity to take advantage of the Framework Agreement as the basis for validating and settling their claims. Alternatively, if some other approach was perceived by a non-Entitlement Band to be more advantageous, that band would have the option to use the alternative approach instead. Article 17 was inserted at the insistence of the Entitlement Bands and was considered by the FSIN negotiators to be more than the simple bilateral understanding between Canada and Saskatchewan suggested by Canada.<sup>290</sup>

Dr. Barber was similarly quoted to show that the Entitlement Bands did not want other bands to be prejudiced by being left out if they were able to justify their claims to be validated. At the same time, in recognition of the sovereignty of each First Nation, the Entitlement Bands did not want to be seen as binding non-Entitlement Bands. Dr. Barber concurred with Mr. Knoll that the Entitlement Bands insisted on the inclusion of Article 17 and that section 17.03 was not simply an agreement between Canada and Saskatchewan. He testified that there was a clear understanding by all parties that the

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289 Vol. 7, p. 447, para. 506.

290 Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, pp. 84-86.

Framework Agreement should apply to any band which might have a validated treaty land entitlement.<sup>291</sup>

Although Mr. Kerby was called to present Canada's perspective on the Framework Agreement negotiations, and testified that Canada sought to maintain the "status quo" with respect to non-Entitlement Bands, counsel for Kawacatoose highlighted certain portions of his testimony to show that even Canada hoped that all the work which went into the Framework Agreement would not be disregarded and could be applied to other bands in future. Under cross-examination, Mr. Kerby also testified:

- A. "Other bands" is intended to refer to other than the entitlement bands.
- Q. Other than the entitlement bands?
- A. "Entitlement band" being a defined term.
- Q. And so Kawacatoose, Kahkewistahaw and Ocean Man, they're not entitlement bands?
- A. Correct.
- Q. So they would be considered "another band"?
- A. For purposes of 17.03?
- Q. Yes.
- A. Yes, I guess today, but I would like to add a clarification. They would fall into 17.03 by reference providing they had substantiated an outstanding Treaty Land Entitlement claim on the same or substantially the same basis, that's how they fall into 17.03. So they had to get over the hurdle of substantiating their claim, but then, yes, 17.03 would apply.<sup>292</sup>

*Sections 17.01, 17.02, and 17.04*

With regard to the remaining sections of Article 17, Mr. Knoll gave evidence that, as the negotiation and terms of the Framework Agreement became more complex, the Entitlement Chiefs became concerned that the manner in which certain issues had been addressed could prejudice the future dealings of non-Entitlement Bands.<sup>293</sup> As a result, Mr. Knoll testified and counsel submits that section 17.01 was included to ensure that the Framework Agreement

<sup>291</sup> Submissions on Behalf of the Kawacatoose First Nation, October 16, 1995, pp. 86-87.

<sup>292</sup> ICC Transcript, May 25, 1995, pp. 229-30 (James Kerby).

<sup>293</sup> ICC Transcript, May 24, 1995, pp. 101-02 (David Knoll).

would not operate in a manner prejudicial to those bands if they chose not to be so prejudiced.<sup>294</sup>

Similarly, section 17.04 and the closing words of section 17.01 were incorporated in the Framework Agreement in recognition that, although the equity formula was the chosen means of settlement within that agreement, not all bands would necessarily want to use that approach.<sup>295</sup> Those choosing not to use the equity formula would therefore retain the freedom to settle their claims on a different basis.

Section 17.02 of the Framework Agreement is entitled “No Creation of Rights.” Counsel sought to limit the scope of section 17.02 by relying on the following testimony of Mr. Knoll to explain the rationale for that provision:

It was my understanding, also, that the Crown, the Federal and Provincial Governments, had some concerns about the extent to which they were making concessions to conclude this agreement for the entitlement bands and they wanted to make sure that other Indian bands would not be able to use the Framework Agreement necessarily to assert that they had similar rights. And the focus there, it was my understanding, was more on issues like the riparian rights, it was a concession on the part of Canada that they would be prepared to recognize – and the Province – that they would be prepared to recognize riparian rights adjacent to – of entitlement lands adjacent to – or reserve lands adjacent to water bodies, and for that reason 17.02 was inserted. At least that’s what I understood at the time to be the approach that was taken, they wanted to make sure that an Indian band who had a regular reserve would not be able to say, “Look at the Framework Agreement, you recognized that a reserve adjacent to a water body had riparian rights and, therefore, we claim the same rights.” They wanted that riparian right to be asserted independent of a reference to the Framework Agreement.<sup>296</sup>

Mr. Knoll’s “will say” also deals with section 17.02:

3. Because Canada and Saskatchewan were concerned about the unique way in which minerals, water, third party and other process issues were dealt with, they wanted to ensure that this Agreement did not create similar rights for other Indian Bands. For that reason Article 17.02 was inserted. In particular, the recognition of riparian rights, sale of minerals, transfer of undisposed minerals, co-management arrangements dealing with water and the freeze on the disposition of lands selected, were of some concern if these were extended to other Indian Bands as a right of benefit.<sup>297</sup>

<sup>294</sup> ICC Transcript, October 24, 1995, p. 135 (Lesia Ostertag).

<sup>295</sup> ICC Transcript, October 24, 1995, p. 136 (Lesia Ostertag).

<sup>296</sup> ICC Transcript, May 24, 1995, pp. 103-04 (David Knoll).

<sup>297</sup> ICC Exhibit 20, pp. 1-2.

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Recognizing that section 17.03 appears “out of step” with the remaining provisions of Article 17, counsel contended that, whereas those other provisions are general in nature, section 17.03 was included in the Framework Agreement for the very specific purpose of allowing non-Entitlement Bands, if they so chose, the opportunity to be treated in the same manner as Entitlement Bands with respect to both validation and settlement. Arguing that section 17.03 is “much more specific” than the remaining parts of Article 17, and relying on Supreme Court of Canada authority in the *Fort Frances v. Boise Cascade Canada Ltd.*<sup>298</sup> and *BG Checo v. B.C. Hydro*<sup>299</sup> cases, counsel urged that the Commission apply the common law principle that, where there is an inherent conflict between general language employed in one paragraph of an agreement and specific language employed in another paragraph of that agreement, the specific language must prevail. In short, counsel submitted that sections 17.01 and 17.02 of the Framework Agreement must be read as if they include the words “subject to section 17.03,” with section 17.03 thereby being given precedence over those other provisions.

### **Canada’s Position**

From the outset, Canada has maintained that Kawacatoose has no basis for making a claim pursuant to Article 17 of the Framework Agreement. In taking that position, Canada has relied on common law contractual principles, as well as the particular terms of the Framework Agreement.

### *Privity of Contract*

Counsel for Canada submits that the Framework Agreement is an agreement among Canada, Saskatchewan, and the 26 Entitlement Bands. Since Kawacatoose is not an Entitlement Band and is therefore not a party to the Framework Agreement, it is not in a position to claim that Canada owes it a lawful obligation pursuant to that agreement. Counsel referred to the evidence of David Knoll as an admission that the issue of privity represents a “big problem” for Kawacatoose.<sup>300</sup>

- Q. Now how is it that these bands are supposed to take advantage of this, they’re not parties to this agreement, if it was the intention to benefit all the other bands in Saskatchewan wouldn’t there have been some special provision to be engaged in?

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<sup>298</sup> *Fort Frances v. Boise Cascade Canada Ltd.*, [1983] 1 SCR 171.

<sup>299</sup> *BG Checo International Ltd. v. B.C. Hydro and Power Authority*, [1993] 1 SCR 12.

<sup>300</sup> Submissions on Behalf of the Government of Canada, October 16, 1995, p. 48.

- A. And that's a good point, you know. You know, in the flurry of the negotiations and preparation of this, there wasn't much time to decide, you know, what would be the approach for other entitlement bands to take advantage of this. I mean we didn't even address, you know, how Cowessess – we knew that they were imminent – how they would be addressed. The focus was on the existing ones and we just didn't have the time to address how other Indian bands would be brought into this, whether they could sue as separate parties to enforce it, or what. I don't think any of the parties sat down and really addressed that, because it wasn't just Assembly of Entitlement and the F.S.I.N. negotiating team that was there, it was Canada and Saskatchewan. I don't believe any of us really addressed how that could be taken advantage of.<sup>301</sup>

In the closing oral submissions, counsel noted that privity of contract is a concept which protects not only parties to an agreement from having non-parties “opt in” to take advantage of those contractual terms, but also protects non-parties from having contractual terms imposed on them.

Counsel also referred the Commission to Article 10 and section 22.01 of the Framework Agreement, which state:

## ARTICLE 10

### SUBSEQUENT ADHERENCE AND RATIFICATION OF BAND SPECIFIC AGREEMENTS. . . .

#### 10.02 Adherence:

Any Entitlement Band whose Chief is not, as of the Execution Date [September 22, 1992], a signatory to this Agreement, may thereafter adhere to this Agreement and enter into a Band Specific Agreement in the manner contemplated by section 10.01, provided such Entitlement Band:

- (a) has obtained, by means of a Band Council Resolution, approval for execution and delivery of the Agreement by its Chief;
- (b) has caused its Chief to execute an Adherence Agreement in the form annexed as Appendix 2, and has delivered to Canada and Saskatchewan an original copy of such Adherence Agreement and the Band Council Resolution approving its execution and delivery, on or before March 1, 1993; and
- (c) has acknowledged, pursuant to its Band Council Resolution, that the Entitlement Monies to be received by the Entitlement Band do not exceed the amount set forth in column 16 of Schedule 1, except as may otherwise have been agreed to in writing between such Entitlement Band, Canada and Saskatchewan. . . .

301 ICC Transcript, May 24, 1995, pp. 124-25 (David Knoll).

**10.04 Time Frame for Ratification, Execution and Delivery of Band Specific Agreements:**

- (a) The Entitlement Bands shall have three (3) years from the Execution Date to ratify, execute and deliver to Canada a Band Specific Agreement and Trust Agreement in accordance with the procedures herein contemplated, failing which all financial obligations hereunder, or between Saskatchewan and Canada, *inter se*, to continue to make payments in respect of any such Entitlement Band to the Treaty Land Entitlement (Saskatchewan) Fund shall immediately terminate.
- (b) In such an event Canada and Saskatchewan shall be entitled to the return, of any funds which they have, respectively, paid to the Treaty Land Entitlement (Saskatchewan) Fund plus accrued interest thereon.

**ARTICLE 22****COMING INTO FORCE****22.01 Coming into Force:**

This Agreement shall come into force:

- (a) as between an Entitlement Band, Saskatchewan and Canada, when a Band Specific Agreement respecting such Entitlement Band has been ratified, executed and delivered by an Entitlement Band, and executed by Canada, within the time frames and in accordance with the provisions of Article 10; and
- (b) as between Saskatchewan and Canada, on the Execution Date.

Article 10 and section 22.01 require even Entitlement Bands to adhere to the Framework Agreement and to ratify, execute, and deliver Band Specific Agreements before the Framework Agreement comes into force with respect to those bands. Noting that one Entitlement Band did not adhere to the Framework Agreement and two more never negotiated and executed Band Specific Agreements, counsel contended that those Entitlement Bands cannot claim any substantive rights against Canada and Saskatchewan unless those steps occur, and that non-Entitlement Bands should not be placed in a better position than Entitlement Bands, which are actually parties to the Framework Agreement.<sup>302</sup>

Counsel also considered that the Framework Agreement's enurement clause gives contractual expression to the concept of privity by limiting the

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<sup>302</sup> Ian D. Gray, Counsel, Legal Services, Specific Claims West, to Ron Maurice, Indian Claims Commission, September 12, 1994, p. 2 (ICC file 2107-15-1).

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benefit and binding effect of the agreement to the parties. That provision states:

**20.01 Enurement:**

This Agreement shall enure to the benefit of and be binding upon Canada and Saskatchewan, and their respective heirs, successors and assigns and, subject to the provisions of Article 22, upon the Entitlement Bands, their respective Members, and each of their respective heirs, successors, legal representatives and permitted assigns. . . .

*Sections 17.01 and 17.02 of the Framework Agreement*

Counsel for Canada contended that the parties to the Framework Agreement did not merely rely on basic legal principles, such as privity of contract, to confirm that only Entitlement Bands could benefit from the Framework Agreement. They were also explicit in dealing with the rights of other First Nations in sections 17.01 and 17.02 of the Framework Agreement. For ease of reference, those provisions are reproduced below:

**17.01 No Prejudice:**

Nothing in this Agreement shall be interpreted in a manner so as to prejudice:

- (a) the rights or obligations of Canada in respect of any Indian band not a party to this Agreement; or
- (b) the rights of any Indian band not party to this Agreement;

including, without limitation, any Indian band in respect of which Canada may hereafter accept for negotiation a claim for treaty land entitlement.

**17.02 No Creation of Rights:**

Nothing in this Agreement shall be interpreted in a manner so as to create or expand upon rights or confer any rights upon, or to the benefit of, any Indian band not a party to this Agreement.

Counsel submits that section 17.02 clearly applies to Kawacatoose because Kawacatoose is not a party to the Framework Agreement. In addition, counsel underscored the testimony of David Knoll, who was forced to concede that section 17.02 contains nothing that limits its applicability to riparian or other specific rights.<sup>303</sup> Counsel concluded:

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<sup>303</sup> ICC Transcript, May 24, 1995, p. 128 (David Knoll).

The parties to the Framework Agreement were not content to merely state [in section 17.02] that other First Nations do not gain any rights by the agreement, they went further and stated the reverse of the same idea [in section 17.01]. . . .

Obviously, if signing the Framework Agreement mandated how Canada must proceed in accepting for negotiation the claims of other First Nations, then the Framework Agreement would prejudice Canada's rights vis-a-vis an "Indian band not party to this Agreement." This is contrary to the intentions of Canada, Saskatchewan and the signatory First Nations as clearly expressed in section 17.01.<sup>304</sup>

James Kerby testified that the intention behind these provisions was to ensure that the relationship of Canada with non-Entitlement Bands would not change:

. . . 17.01 in my opinion is intended to indicate that nothing in the remainder of the Framework Agreement is intended to prejudice either the [213] rights or obligations that Canada has to anyone – any band that is not a party to this agreement, and also the remainder of the agreement was not intended to prejudice the rights of any Indian band who was not a party to this agreement. And it went on to indicate "including, without limitation, a band in respect of which there was an acceptance for negotiation of Treaty Land Entitlement." So that clause, when coupled with 17.02, which is there to state there was no creation of rights for other bands, was in my mind intended to maintain the status quo. No more than the parties could, for example, no more than the parties could have entered into an agreement here that would have said other Indian bands in Saskatchewan had to settle on the same basis as this agreement, they were confirming that, in fact, there was no effect on either Canada or Saskatchewan or other Indian bands as a result of this agreement having been entered into with these parties.<sup>305</sup>

In the course of oral submissions, counsel also relied on certain of the principles of contractual interpretation raised in the submissions of counsel for Kawacatoose. Arguing that an average person would consider the natural and ordinary meaning of the words in sections 17.01 and 17.02 to convey that the Framework Agreement is to confer no rights on non-Entitlement Bands, counsel submitted that giving section 17.03 the meaning urged by Kawacatoose would result in the words "Nothing in this Agreement" in sections 17.01 and 17.02 being rendered superfluous.

304 Submissions on Behalf of the Government of Canada, October 16, 1995, p. 49.

305 ICC Transcript, May 25, 1995, pp. 212-13 (James Kerby).



*Section 17.03 of the Framework Agreement*

Canada's position with regard to section 17.03 of the Framework Agreement is that, since it states that "Canada and Saskatchewan acknowledge" and "Canada and Saskatchewan shall support," it is merely intended to create rights between the two levels of government. As Mr. Kerby noted, several provisions of the Framework Agreement represent agreements between just two of the parties, some being between Canada and Saskatchewan, and others between one of those levels of government and the Entitlement Bands.<sup>306</sup> He testified:

Well if you will recall that my view is that the clause has been put in as an agreement between Canada and Saskatchewan and that, by implication, then, Canada and Saskatchewan were indicating that they were prepared, as between each other, to extend the principles in a way which would ensure that everyone involved, Canada and Saskatchewan, the local governments, that the other bands would be dealt with in a fair and equitable manner. But knowing full well that the parties may or may not agree to proceed down that road.<sup>307</sup>

Counsel further contends that the parties did not intend section 17.03 to take precedence over sections 17.01 and 17.02 or they would have inserted wording like "Notwithstanding sections 17.01 and 17.02" in section 17.03. The more appropriate conclusion, says counsel, is that sections 17.01 and 17.02 should be given precedence over section 17.03.

With respect to the interpretation to be given to section 17.03, Canada's submissions emphasize that the language employed in that section amounts to something less than a strict contractual promise to act:

It [section 17.03] says acknowledge, and that doesn't mean agree. Acknowledge is something less [than] agree. Acknowledge is something that governments would do, would say to each [other]. They would – it's something a little less formal than agree, because that's how governments would do business. It's more of a political sort of arrangement that we can use on Saskatchewan, and Saskatchewan can use on us. It's acknowledge. . . .

And then going down to the fifth line in 17.03 it says Canada – Canada and Saskatchewan shall support an extension of. That doesn't mean Canada is indelibly bound to extend the principle. . . . We mean shall support an extension, that's – it's something less than will extend.<sup>308</sup>

306 ICC Transcript, May 25, 1995, pp. 225-26 (James Kerby).

307 ICC Transcript, May 25, 1995, p. 231 (James Kerby).

308 ICC Transcript, October 24, 1995, pp. 198-200 (Ian Gray).

Similarly, Mr. Kerby commented on the phrase “Canada and Saskatchewan will support an extension of the principles of this Agreement”:

Well as I indicated, I believe that that is – from a legal perspective is a softer statement than you might find if it were to say the parties have “agreed” that they will do “X.” So there’s been an acknowledgement, the parties will support an extension of the principles. You’ll note it doesn’t say that the parties will enter into a duplicate version of this agreement; it could have said that but it doesn’t say that, it says they will support an extension of the principles of this agreement and the Amended Cost Sharing Agreement. . . .

I think if you take it from the premise that I start from here, that this is primarily intended as an obligation as between Canada and Saskatchewan and not other parties or – certainly not other parties and not even the entitlement bands. That there was some recognition that depending on when resolution of outstanding Treaty Land Entitlement might occur that a number of the provisions of this agreement and, in particular, the Amended Cost Sharing Agreement, might not fit anymore. . . .

So the parties, I think were saying, were trying to hook each other as best they could but knowing that you could not expect to simply take those two agreements and two or three or four or five or seven years down the road and superimpose them on a new situation verbatim, it wouldn’t work.<sup>309</sup>

Counsel argues that section 17.03 does not require Canada to substantiate a claim on the same or substantially the same basis as the Entitlement Bands; rather, it states that, in the event that such a claim is substantiated, Canada and Saskatchewan will support an extension of the Framework Agreement and the Amended Cost Sharing Agreement to the First Nation whose claim is substantiated. Whether substantiation has taken place or not is to be determined by Canada:

The second line [of section 17.03] uses the word determined by Canada, determined by Canada [sic]. What would the average person understand. What’s the ordinary natural meaning. It’s up to Canada to accept or reject a claim that a band comes forward with. We have rejected this claim. We have determined that there is no TLE claim here.<sup>310</sup>

Counsel submits that section 17.03 speaks only to settlement following validation, and not to the standards to be used in substantiating a claim from a non-Entitlement Band, since the parties did not intend the section to be used in the manner asserted by counsel for Kawacatoose. Dr. Lloyd Barber,

309 ICC Transcript, May 25, 1995, pp. 223-25 (James Kerby).

310 ICC Transcript, October 24, 1995, p. 199 (Ian Gray).

as lead negotiator of the Framework Agreement on behalf of the FSIN and Entitlement Bands, believed that, since the Entitlement Bands had already been validated, the agreement “was not about the process of validation.” Moreover, he was unaware of the criteria that had been used to validate the claims of the Entitlement Bands. In counsel’s view, his testimony is good evidence that the parties were not intending to establish criteria for future validations in section 17.03.

With regard to the phrase “the same or substantially the same basis,” counsel for Canada maintains that there is no common set of criteria on which the Entitlement Bands were validated, contrary to what was alleged by counsel for Kawacatoose. The 1983 ONC Guidelines represent just one possible set of criteria in the evolutionary development of the treaty land entitlement process, and indeed were not even in existence when most of the 26 Entitlement Bands were validated. “Accordingly,” says counsel, “even if Canada were obliged to accept the TLE claim of the [Kawacatoose First Nation] on the ‘same or substantially the same’ basis as those of the other Framework Bands, the [Kawacatoose First Nation] has not shown what that criteria [sic] would be, much less that it would necessarily result in a TLE claim that would be accepted for negotiation.”<sup>311</sup>

## Analysis

### *Validation*

Based on our review of the foregoing submissions by counsel for both parties to this inquiry, we have come to the conclusion that Canada does not owe a lawful obligation arising from section 17.03 of the Framework Agreement to validate the Kawacatoose claim.

Counsel for Kawacatoose submitted that Canada owes a fiduciary obligation to Kawacatoose, based on the following passage from the Supreme Court of Canada decision in *Sparrow*:

In our opinion, *Guerin [v. The Queen]*, [1984] 2 S.C.R. 335, 55 N.R. 161, 13 D.L.R. (4th) 321, [1985] 1 C.N.L.R. 120], together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, [1981] 3 C.N.L.R. 114, ground a general guiding principle for s. 35(1) [of the *Constitution Act, 1982*]. That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and

311 Submissions on Behalf of the Government of Canada, October 16, 1995, p. 53.

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contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.<sup>312</sup>

Counsel then contended that the nature of Canada's fiduciary duty in the present case, and the manner in which it crystallized into specific obligations to Kawacatoose, are given shape by the reasons of Dickson J (Beetz, Chouinard, and Lamer JJ concurring) and Wilson J (Ritchie and McIntyre JJ concurring) in the *Guerin* case. In *Guerin* the Musqueam Band surrendered 162 acres of reserve land to the Crown in 1957 for lease to a golf club on the understanding that the lease would contain the terms and conditions that were presented to and agreed upon by the Band Council. The surrender document, which was subsequently executed, gave the land to the Crown "in trust to lease the same" upon such terms as it deemed most conducive to the welfare of the Band. In fact, the terms of the lease obtained by the Crown were significantly different from what the Band had agreed to and were less favourable.

All eight members of the Court sitting on the decision found that Canada had breached its duty to the Band. Dickson J stated:

Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.

This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest J. Weinrib maintains in his article "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1, at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." Earlier, at p. 4, he puts the point in the following way:

[Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.

I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus

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312 *R. v. Sparrow*, [1990] 2 CNLR 160 at 180.

empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct. . . .

The trial judge found that the Crown's agents promised the band to lease the land in question on certain specified terms and then, after surrender, obtained a lease on different terms. The lease obtained was much less valuable. As already mentioned, the surrender document did not make reference to the "oral" terms. I would not wish to say that those terms had nonetheless somehow been incorporated as conditions into the surrender. They were not formally assented to by a majority of the electors of the band, nor were they accepted by the Governor in Council, as required by s. 39(1)(b) and (c). . . .

Nonetheless, the Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms. When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the band to explain what had occurred and seek the band's counsel on how to proceed. The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.<sup>313</sup>

While Dickson J concluded that the fiduciary obligation owed by Canada to the Musqueam Band, although trustlike, did not actually constitute a trust, Wilson J held that the fiduciary duty owed to the band prior to the surrender being given was transformed by the surrender into a specific trust duty to lease the land to the golf club on the terms approved by the band:

It was submitted on behalf of the Crown that even if the surrender gave rise to a trust between the Crown and the band, the terms of the trust must be found in the surrender document and it was silent both as to the lessee and the terms of the lease. Indeed, it expressly gave the government complete discretion both as to the lessee and the terms of the lease and contained a ratification by the band of any lease the government might enter into.

I cannot accept the Crown's submission. The Crown was well aware that the terms of the lease were important to the band. Indeed, we have the trial judge's finding that the band would not have surrendered the land for the purposes of a lease on the terms obtained by the Crown. It ill becomes the Crown, therefore, to obtain a surrender of the band's interest for lease on terms voted on and approved by the band

313 *Guerin v. The Queen*, [1984] 2 SCR 335 at 383-84 and 388-89, 55 NR 161, 13 DLR (4th) 321, [1985] 1 CNLR 120, per Dickson J, at 136-37 and 140 (CNLR).

members at a meeting specially called for the purpose and then assert an overriding discretion to ignore those terms at will: see *Robertson v. Min. of Pensions*, [1949] 1 K.B. 227, [1948] 2 All E.R. 767; *Lever Fin. Ltd. v. Westminster (City) London Borough Council*, [1971] 1 Q.B. 222, [1970] 3 W.L.R. 732, [1970] 3 All E.R. 496 (C.A.). It makes a mockery of the band's participation. The Crown well knew that the lease it made with the golf club was not the lease the band had surrendered its interest to get. Equity will not permit the Crown in such circumstances to hide behind the language of its own document.

I return to s. 18. What effect does the surrender of the 162 acres to the Crown in trust for lease on specific terms have on the Crown's fiduciary duty under the section? It seems to me that s. 18 presents no barrier to a finding that the Crown became a full-blown trustee by virtue of the surrender. The surrender prevails over the s. 18 duty but in this case there is no incompatibility between them. Rather the fiduciary duty which existed at large under the section to hold the land in the reserve for the use and benefit of the band crystallized upon the surrender into an express trust of specific land for a specific purpose. . . .

What then should the Crown have done when the golf club refused to enter into a lease on the approved terms? It seems to me that it should have returned to the band and told them. It was certainly not open to it at that point of time to go ahead with the less favourable lease on the basis that the Governor in Council considered it for the benefit of the band. The Governor in Council's discretion in that regard was pre-empted by the surrender. I think the learned trial judge was right in finding that the Crown acted in breach of trust when it barrelled ahead with a lease on terms which, according to the learned trial judge, were wholly unacceptable to its *cestui que trust*.<sup>314</sup>

The facts before the Commission in this inquiry do not reveal the same sort of proximity that gave rise to the breach of fiduciary obligation in the *Guerin* case. Whereas the Crown in *Guerin* obtained a surrender of the Musqueam Band's land based on certain understandings and undertakings given specifically and directly to that Band by Canada's representatives, we find that the same cannot be said of the relationship and representations, if any, between Canada and Kawacatoose as embodied in the Framework Agreement. There appears to have been no intention on the part of Canada to contract with, or indeed to make representations to, any First Nations except the Entitlement Bands, nor has there been any act by Kawacatoose in reliance upon undertakings or representations which parallels the surrender given by the Musqueam Band. Subject to certain reservations, which we will discuss below, we view the general intent of the Framework Agreement to be the settlement of outstanding treaty land entitlement claims between the two

314 *Guerin v. The Queen*, [1984] 2 SCR 335 at 354-55, [1985] 1 CNLR 120 at 155-56.

levels of government and the Entitlement Bands, without impacting the relationship of Canada and the remaining Saskatchewan First Nations. We have no doubt that the relationship between Canada and Kawacatoose is fiduciary in nature, as set forth in *Sparrow*, but we do not see how the act of contracting with the Entitlement Bands has elevated or “crystallized” that fiduciary relationship into a trust or trustlike obligation.

For similar reasons, we cannot conclude that the “representations” in section 17.03 of the Framework Agreement amount to a contractual offer which is open for acceptance by Kawacatoose within the terms of the classic unilateral contract formula. We do not view section 17.03 as comprising representations to the non-Entitlement Bands regarding validation at all, much less an offer which can be accepted by the act of substantiating an outstanding treaty land entitlement claim on “the same or substantially the same basis as the Entitlement Bands.” Nor do we consider the facts of this case to support a claim that Canada should be estopped from denying that the First Nation’s treaty land entitlement claim should be validated. We simply do not find in the words of section 17.03 the requisite intention that Canada should be bound in this fashion. We view validation as triggering the operation of section 17.03, with that provision then focusing on the terms of settlement to be extended to non-Entitlement Bands *following* validation.

### *Settlement*

In assessing the effect of section 17.03 on non-Entitlement Bands like Kawacatoose, the first question we must resolve is how section 17.03 is to be interpreted within the context of the remainder of Article 17 and the Framework Agreement. We will then address the issue of whether section 17.03 imposes an enforceable obligation upon Canada once a non-Entitlement Band has substantiated a treaty land entitlement claim on the same or substantially the same basis as an Entitlement Band.

We agree with the principles of treaty and contractual interpretation set forth in the First Nation’s submission, and we also agree that the Framework Agreement constitutes a “land claims agreement” within the meaning given that term in section 35(3) of the *Constitution Act, 1982*. Nevertheless, we find that the “treaty rights” within the Framework Agreement which are recognized and affirmed by section 35(1) of the *Constitution Act, 1982*, are the rights reserved to the Entitlement Bands by that agreement. Moreover, while the Commission might be prepared in ordinary circumstances involving treaty interpretation to extend to terms which are ambiguous or at least difficult to

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interpret a “fair, large and liberal construction in favour of the Indians,” in accordance with the various authorities proffered by counsel for Kawacatoose, we find that our scope for doing so in the context of the Framework Agreement is limited. Unlike Treaty 4, the Framework Agreement is not a document that was presented in the form of an ultimatum to Indians who were unable to read it, let alone to seek independent advice regarding its effects and impact on them. All three of the witnesses presented before the Commission to give evidence in relation to the genesis of the Framework Agreement testified that the agreement was the product of two years of intense and hard-fought bargaining by parties supported by well-trained and skilled representatives. Concessions were sought and won by all sides in those negotiations; in light of these circumstances, it is impossible to conclude that the difference in the relative negotiating strengths of the parties led to one of those parties being forced into an improvident bargain. We find support in this conclusion in the terms of section 20.15 of the Framework Agreement, which was noted by James Kerby in his testimony:

**20.15 Ambiguities:**

There shall be no presumption that any ambiguity in this Agreement should be interpreted in favour of or against the interests of any of the parties.

Having regard for the principles of treaty interpretation raised by counsel for Kawacatoose, we view section 20.15 as a significant concession obtained on behalf of Canada and Saskatchewan. Although Kawacatoose is not a party to the Framework Agreement and is arguably not bound by section 20.15, we have nevertheless concluded that, in light of the context in which the Framework Agreement was negotiated, that agreement must be construed in accordance with the usual principles of contractual interpretation, but without reliance on any rules of treaty interpretation which would otherwise bestow the “benefit of the doubt” in favour of a First Nation.

Counsel for Canada argued that, because Kawacatoose is not a party to the Framework Agreement, section 17.02 applies to the First Nation because that provision relates to “any Indian band not a party to this Agreement.” There is a difference, however, between saying that section 17.02 *applies* to Kawacatoose and saying that it *binds* Kawacatoose. In the view of the Commission, Kawacatoose clearly is not bound by section 17.02, although it might be said that section 17.02 applies to it. For Canada to say that section 17.02 is binding upon Kawacatoose would be to deny the privity of contract arguments so carefully crafted by Canada’s own counsel. But, while Canada is precluded by



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principles of privity from claiming that Kawacatoose is bound by section 17.02, Kawacatoose is likewise prevented by those same principles from claiming that it is bound by and can claim any benefit from section 17.03.

Nevertheless, can it be argued by the First Nation that section 17.03 applies to it? The answer to this question lies to a certain extent in the meaning of section 17.02. That section states that nothing in the Framework Agreement “shall be interpreted in a manner so as to create or expand upon rights or confer any rights upon, or to the benefit of, any Indian band not a party to this Agreement.” The question, then, is whether section 17.03 creates or expands upon rights or confers any rights upon, or to the benefit of, Kawacatoose, or, more particularly, whether the rights being claimed by Kawacatoose pursuant to section 17.03 represent new rights or an expansion of existing rights which it already possesses. If so, then, unless section 17.03 is considered to take precedence over section 17.02, section 17.02 would render section 17.03 inapplicable to a non-Entitlement Band. On the other hand, if section 17.03 does not create or expand rights or confer rights upon or to the benefit of Kawacatoose, then it can be said that section 17.03 applies to the First Nation since, in the words of section 17.01, Canada's rights and obligations vis-à-vis Kawacatoose would not be prejudiced by the operation of section 17.03.

Does section 17.03 create or expand upon rights or confer any rights upon, or to the benefit of, Kawacatoose? Moreover, what is the application of section 17.03 to Kawacatoose as a non-Entitlement Band? To answer these questions, we turn now to a closer scrutiny of section 17.03.

We must say at the outset that we disagree with the characterization of section 17.03 by Mr. Kerby and counsel for Canada as merely an agreement between Canada and Saskatchewan. It is true that section 17.03 commences with the words “Canada and Saskatchewan acknowledge,” but it is not necessarily to be inferred that those words mean that Canada and Saskatchewan acknowledge to each other alone. While we agree with Mr. Kerby that certain provisions of the Framework Agreement constitute bilateral agreements between two of the parties to the agreement, we do not agree that section 17.03 is one of those provisions. For example, section 14.01 and subsections 14.02(a) and (b) state that “Canada agrees *with* the Entitlement Bands” or “[t]he Entitlement Bands agree *with* Canada,” whereas section 17.03 states that “Canada and Saskatchewan acknowledge.” Their acknowledgment is undoubtedly to each other, but there is nothing in these words to suggest that

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the acknowledgment does not also extend to the Entitlement Bands. By way of parallel, we note the wording of section 16.02 of the Framework Agreement:

**16.02 Release by Canada and Entitlement Bands:**

- (a) Canada and each of the Entitlement Bands hereby agree that, after ratification, execution and delivery of a Band Specific Agreement, as long as Saskatchewan is paying to Canada and the Treaty Land Entitlement (Saskatchewan) Fund the amounts required to be paid by Saskatchewan in respect of each of the said Entitlement Bands in accordance with this Agreement, and Saskatchewan has not failed, in any material way, to comply with its other obligations hereunder:
- (i) the Superintendent General of Indian Affairs shall not request Saskatchewan to set aside any land pursuant to paragraph 10 of the *Natural Resources Transfer Agreement* to fulfil Canada's obligations under the Treaties in respect of that Entitlement Band; and
  - (ii) the Entitlement Band shall not make any claim whatsoever that Saskatchewan has any obligation to provide land pursuant to paragraph 10 of the *Natural Resources Transfer Agreement*.

Section 16.02 begins with the words "Canada and each of the Entitlement Bands agree," but we would find it difficult to suggest that that provision, which purports to release Saskatchewan from certain obligations under the Natural Resources Transfer Agreement of 1930, would not be enforceable by Saskatchewan. Nevertheless, this still does not make section 17.03 enforceable by Kawacatoose. Kawacatoose is not a party to the Framework Agreement and cannot be considered to be an intended "recipient" of the acknowledgment given by Canada and Saskatchewan. We will return to the question of enforceability later in this report. At this point, the principle to be derived from the analysis is that section 17.03 is not simply a bilateral agreement between Canada and Saskatchewan.

The next key words of the section are "in the event that it is hereafter determined by Canada." Counsel for Canada contends that the ordinary, natural meaning of the words "determined by Canada" is that "[i]t's up to Canada to accept or reject a claim that a band comes forward with." This construction imports an element of discretion to be exercised by Canada, which it is not obvious to us the words were intended to bear. We do not view the words "determined by Canada" as giving Canada the freedom to arbitrarily decide whether a claim is to be accepted or rejected. We prefer the more objective interpretation of "determines" in the sense that, once Canada "discovers" or "understands" rather than "decides" that a

non-Entitlement Band has substantiated a claim, then the remaining provisions of section 17.03 become operative.

Alternatively, if “determines” means “decides” in the subjective sense suggested by counsel for Canada, we believe that Canada’s fiduciary obligation to Indians in general and to Kawacatoose in particular would still preclude it from making such a decision arbitrarily or capriciously. Instead, the decision would have to be made in a manner that is fair and in the best interests of the First Nation involved. This is not to say that we endorse the submission by counsel for Kawacatoose that section 17.03 embodies promises to the First Nation which, once given, narrow Canada’s discretion and crystallize into specific obligations from which Canada cannot depart without the First Nation’s consent. We do not. Rather, what we are saying is merely that Canada’s decision-making process in relation to the determination required by section 17.03 must be exercised fairly and in good faith.

The subsequent words in section 17.03 are “that other Bands (other than any Entitlement Band) have substantiated an outstanding treaty land entitlement, on the same or substantially the same basis as the Entitlement Bands.” The parties agree, and we concur, that Kawacatoose is an “other Band” within the meaning of this phrase. The real issue is whether Kawacatoose has substantiated an outstanding treaty land entitlement on the same or substantially the same basis as the Entitlement Bands. Counsel for Kawacatoose says yes and relies on the 1983 ONC Guidelines as comprising the criteria which, if applied to each of the Entitlement Bands, would result in a validation in every case. Counsel for Canada says no because there is no single set of criteria to which Kawacatoose can point as forming the sole standard pursuant to which all of the Entitlement Bands were validated; validation for most of the 26 Entitlement Bands predated the 1983 ONC Guidelines.

We find that there is a standard in section 17.03 and that standard is, quite simply, “the same or substantially the same basis as the Entitlement Bands.” It is not necessary to have a document such as the 1983 ONC Guidelines in existence to establish that the Kawacatoose claim has been made on exactly the same basis as bands such as Poundmaker, Sweetgrass, Pelican Lake, and Onion Lake. All those First Nations were validated on the basis of late additions, notwithstanding the fact that they received sufficient land to account for their entire populations at the time their reserves were first surveyed. That Dr. Barber was unaware of the criteria under which the 26 Entitlement Bands had been validated when he was negotiating the Framework Agreement does not impute a conclusion that the FSIN and the Entitlement

Bands were not concerned with standards of validation. Section 17.03 has been clearly worded to state that the same or substantially the same standards will apply.

At the same time, we believe that the significance of the 1983 ONC Guidelines to the Kawacatoose claim has been overstated by counsel for Kawacatoose. We agree with Mr. Westland's view that the 1983 ONC Guidelines are less important than establishing the true extent of Canada's lawful obligation, and that the lawful obligation stems from Treaty 4. Where we part company with Mr. Westland is in his opinion that the "fundamentals" of Canada's lawful obligation do not extend beyond a First Nation's date-of-first-survey population plus absentees and arrears. Our conclusion in relation to the second issue in this inquiry is that Canada's lawful obligation also includes "late additions" such as new adherents to treaty, transfers from landless bands, and, to the extent that they are new adherents or landless transfers in their own right, in-marrying treaty Indian women. On this basis, we decided that, although the size of the reserve originally surveyed for Kawacatoose satisfied its date-of-first-survey population plus absentees and arrears, Canada still owes a lawful obligation to Kawacatoose for outstanding treaty land entitlement as a result of these late additions to the First Nation's DOFS population. We also consider that several of the Entitlement Bands established their claims to outstanding treaty land entitlement on the basis of late additions, and that claims established on this basis fall within the scope of Treaty 4. We therefore conclude that Kawacatoose has substantiated its claim for treaty land entitlement on the same or substantially the same basis as the Entitlement Bands, which is the basis prescribed by treaty.

We do not view Canada's obligation in this regard as having been conferred upon Kawacatoose or created or expanded by the operation of any provision of the Framework Agreement. These rights have existed since the execution of Treaty 4 by Kawacatoose in 1874. Where the First Nation's rights could be said to have been created or expanded is if Kawacatoose had substantiated a claim on the same or substantially the same basis as an Entitlement Band, which may have been validated for reasons other than those arising pursuant to Treaty 4. In that event, Kawacatoose would have to be viewed as having substantiated a claim for outstanding treaty land entitlement by virtue of the Framework Agreement alone, and not by virtue of its pre-existing rights under treaty. In such circumstances, Kawacatoose's claim would be precluded by the operation of section 17.02.

For example, had we concluded that Canada's position with regard to the "fundamentals" of lawful obligation was correct and that Treaty 4 confers treaty land entitlement rights on a First Nation's DOFS population plus absentees and arrears only, then a claim by Kawacatoose based entirely on late additions could only be justified on the basis that there are, by the First Nation's count, seven bands that were likewise validated on the basis of late additions. Kawacatoose could assert substantiation of its claim on the same or substantially the same basis as those seven bands, but it could not show that it had a pre-existing right pursuant to Treaty 4. We would have been forced in those circumstances to conclude that substantiation on this contractual basis would have constituted the creation or expansion of rights to the benefit of Kawacatoose.

In summary, we wish to emphasize that a First Nation's substantiation of its treaty land entitlement claim on the same or substantially the same basis as the Entitlement Bands does not impose on Canada – by fiduciary, contractual, or other means – a lawful obligation to validate a non-Entitlement Band if that basis goes beyond Canada's lawful obligation under Treaty 4. We do not view the suggestion that Canada has gone beyond its lawful obligation in previous validations or settlements as creating new "high water marks" to which, as a minimum, all future validations and settlements must conform, failing which Canada is in breach of its fiduciary obligations to non-Entitlement Bands. The proper basis for validation contemplated by section 17.03 is the basis required by Treaty 4.

The next important phrase in section 17.03 of the Framework Agreement is "Canada and Saskatchewan shall support an extension of the principles of this Agreement and the Amended Cost Sharing Agreement in order to fulfill the outstanding Treaty land entitlement obligations in respect of such Bands." We note the use of the word "shall" in this phrase, which normally implies a mandatory obligation on the part of the party or parties to whom it applies. However, when used in connection with the word "support," we see the obligation imposed on Canada and Saskatchewan as amounting to no more than what is referred to in common law contractual terms as an agreement to agree or perhaps a mere obligation to negotiate. In most contractual circumstances, such an obligation would be viewed as unenforceable by the parties to the agreement, let alone a non-Entitlement Band such as Kawacatoose. Even in the present case, assuming validation of a non-Entitlement Band has occurred on the same or substantially the same basis as the Entitlement Bands, there is no binding obligation on Canada and Saskatchewan to actu-

ally enter into an agreement with a non-Entitlement Band on precisely the same terms as those set forth in the Framework Agreement in relation to the Entitlement Bands. Nevertheless, once validation has occurred, we read section 17.03 to mean that Canada and Saskatchewan will at least negotiate towards a settlement of the non-Entitlement Band's outstanding treaty land entitlement on the basis of the Framework Agreement. We agree with the following statement by Mr. Knoll:

I think the entitlement bands having included it [section 17.03] in there, anticipated that this would be a benefit to the other Indian bands who may be able to benefit from this, even though they weren't a party to the Framework Agreement. They would be the only ones that could benefit, I gather, from this particular clause.<sup>315</sup>

The obligation in section 17.03, coupled with Canada's fiduciary obligation to act fairly and in the best interests of all bands, and assuming that section 17.02 does not dictate otherwise, would compel Canada to negotiate in good faith and to insist upon Saskatchewan doing the same. Provided that the parties were to negotiate in good faith, the obligations of Canada and Saskatchewan pursuant to section 17.03 would be satisfied, even if the parties were ultimately to fail to arrive at a negotiated settlement.

We now return to the question of whether the parties intended section 17.03 to be operative in relation to non-Entitlement Bands, notwithstanding the fact that those bands were not made parties to the Framework Agreement. In considering this point, we have had close regard for certain statements made by Mr. Kerby and counsel for Canada. As referred to earlier, Mr. Kerby (who, it will be recalled, acted as Canada's solicitor in the negotiation of the Framework Agreement) stated with respect to the non-Entitlement Bands:

They would fall into 17.03 by reference providing they had substantiated an outstanding Treaty Land Entitlement claim on the same or substantially the same basis, that's how they fall into 17.03. So they had to get over the hurdle of substantiating their claim, but then, yes, 17.03 would apply.<sup>316</sup>

In making this statement, Mr. Kerby acknowledged that section 17.03 should be regarded as applying to non-Entitlement Bands, such as Kawacatoose, once those bands have established a claim on the same or substantially the same basis as an Entitlement Band.

<sup>315</sup> ICC Transcript, May 24, 1994, p. 111 (David Knoll).

<sup>316</sup> ICC Transcript, May 25, 1995, p. 230 (James Kerby).

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Similarly, during the first day of the inquiry at the community session, in the course of objecting to the Commission's consideration of the Framework Agreement in these proceedings, counsel for Canada entered into the following exchange with Commissioner Prentice:

COMMISSIONER PRENTICE: Are you saying it doesn't mean that if another T.L.E. is validated that Canada and Saskatchewan would or would not have to give that band the same deal that these bands received?

MR. GRAY: If Canada validates a claim based on the [DOFS] theory and the pay lists analysis, then Saskatchewan is bound to apply the same Framework Agreement and Amended Cost Sharing Agreements as they have done with the other Framework Bands.

COMMISSIONER PRENTICE: So that the band would be entitled to the same level of compensation?

MR. GRAY: Yeah, but – yeah, once that's happened then it's really so Canada can go after Saskatchewan to make sure that they don't back out of their commitment once we've gone through the process of validating the claim.

For example, if we were to validate Kawacatoose after the inquiry, say, okay, yes, okay, now we validate your claim; we don't want to go to Saskatchewan and have them say, sorry, we're not – we're not prepared to proceed on the 70–30 cost share, for example, and we're not prepared to extend other benefits of the Framework Agreement. We can then go after them with 17.03 and say, listen, you've promised us that you would, once we've validated on the same basis, you promised us you would extend the same benefits. It's for Canada to go after Saskatchewan to ensure that they live up to their obligations should we validate future claims. In any event, that's what we say 17.03 is there for, but there's still no privity for another band to use that clause and 17.02 makes that clear, as does 17.01.

COMMISSIONER PRENTICE: But it must surely create an expectation on the part of a band that they are going to receive the same treatment, equitable treatment as compared to these 26 Framework Agreement Bands?

MR. GRAY: Yes, once it's been validated by Canada and the claim hasn't been rejected, but validated, I think they could then come to Canada and say, well listen, Canada, you got that promise from Saskatchewan, now let's see you live up to that and let's see you go after Saskatchewan to make sure that they come to the table at the end of the day.<sup>317</sup>

Assuming that the band referred to by counsel for Canada would be able to require Canada to ensure that Saskatchewan lived up to its promises, we find it difficult to understand why that same band could not require Saskatchewan

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<sup>317</sup> ICC Transcript, November 15, 1994, pp. 162-63 (Ian Gray).

to do the same in relation to promises made by Canada, or alternatively why the band could not use the identical mechanism to ask Canada directly to “live up to” its own promises under the Framework Agreement.

To date, Canada has not acknowledged that it owes any sort of lawful obligation to validate Kawacatoose at all, much less that, following validation, settlement should be predicated on the formula established by the Framework Agreement. We expect that, assuming Canada will now be satisfied that the Kawacatoose claim has been substantiated on the same or substantially the same basis as the Entitlement Bands, Canada will consider itself honour-bound to extend the Framework Agreement’s principles of settlement to Kawacatoose. We draw this conclusion from the tone of the preliminary objection by Canada to the Commission’s consideration of the third issue in this inquiry:

If it was just a matter of the niceties of contract law, we would probably have no objections to having this matter looked at by the Commission. *However, Canada views allegations that it is not living up to its Framework Agreement obligations very seriously. We view the Framework Agreement as a major achievement for Canada, Entitlement Bands and Saskatchewan. Canada is spending a great amount of resources in implementing the agreement. Canada has attempted to scrupulously live up to its obligations to date under the Framework Agreement and cannot passively allow these types of allegations to be carried forward before the Commission.*

We believe that if the Commission were to focus on this allegation, it would tend to prejudice Canada’s ability to have a fair hearing before the Commission. *The mere allegation that Canada would ignore the Framework Agreement so soon after its signing would cast Canada in an unfavourable light at the inquiry – even if the allegation itself is baseless. In other words, the prejudicial nature of this allegation far outweighs its relevance to the question at hand, namely whether Canada owes a lawful obligation to the Kawacatoose First Nation with respect to treaty land entitlement.*<sup>318</sup>

In conclusion, we find that the signatories to the Framework Agreement intended section 17.03 to apply to the settlement of treaty land entitlement claims of non-Entitlement Bands subsequently validated on the same or substantially the same basis as the Entitlement Bands. Kawacatoose is one such band, and we believe that section 17.03 should apply to it.

Still, having established the meaning of section 17.03 and its applicability to non-Entitlement Bands like Kawacatoose, two questions remain: whether

<sup>318</sup> Ian D. Gray, Counsel, Legal Services, Specific Claims West, to Ron Maurice, Indian Claims Commission, September 12, 1994 (ICC file 2107-15-1). Emphasis added.



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that provision is overridden by section 17.02 and, if not, whether section 17.03 is enforceable by Kawacatoose.

Counsel for Kawacatoose submits that to apply section 17.02 in a fashion that prevents section 17.03 from imposing a substantive obligation on Canada and Saskatchewan would render the validation of Kawacatoose “on the same or substantially the same basis as the Entitlement Bands” meaningless. In contrast, counsel for Canada urges the Commission to find that giving section 17.03 the meaning requested by Kawacatoose would likewise preclude any significance being given to the words “Nothing in this Agreement” at the outset of each of sections 17.01 and 17.02. If only one of these submissions can be correct, we are left with the difficult task of establishing whether section 17.03 or alternatively section 17.02 takes precedence.

As a preliminary point, we believe that, instead of (or perhaps in addition to) the words “on the same or substantially the same basis as the Entitlement Bands,” the provision in section 17.03 which conflicts with section 17.02 is the phrase “Canada and Saskatchewan shall support an extension of the principles of this Agreement and the Amended Cost Sharing Agreement in order to fulfill the outstanding Treaty land entitlement obligations in respect of such Bands.” This latter phrase relates to the terms of settlement rather than the question of validation, which arises out of the treaty rather than the Framework Agreement, as we have already canvassed. If it can be shown that the Framework Agreement affords new or expanded settlement rights and benefits to validated non-Entitlement Bands, then at first blush section 17.02 would appear to prevent those bands from receiving and enjoying those rights and benefits.

In reconciling these clauses, we have had regard for the following reasons of La Forest and McLachlin JJ in *BG Checo International Limited v. British Columbia Hydro and Power Authority*:

It is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole: K. Lewison, *The Interpretation of Contracts* (1989), at p. 124; *Chitty on Contracts* (26th ed. 1989), vol. 1, at p. 520. Where there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective: *Chitty on Contracts, supra*, at p. 526; Lewison, *supra*, at p. 206; *Git v. Forbes* (1921), 62 S.C.R. 1, *per* Duff J. (as he then was), dissenting, at p. 10, *rev'd* [1922] 1 A.C. 256; *Hassard v. Peace River Co-operative Seed Growers Association Ltd.*,

[1954] 2 D.L.R. 50 (S.C.C.), at p. 54. In this process, the terms will, if reasonably possible, be reconciled by construing one term as a qualification of the other term: *Forbes v. Git*, [1922] 1 A.C. 256; *Cotter v. General Petroleum Ltd.*, [1951] S.C.R. 154. A frequent result of this kind of analysis will be that general terms of a contract will be seen to be qualified by specific terms – or, to put it another way, where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term.<sup>319</sup>

Given the close context within which sections 17.02 and 17.03 are found in the Framework Agreement, we find it difficult to conceive that such apparently inconsistent provisions were included through inadvertence, as might have been understandable had these sections been in different parts of the agreement. We would have expected that the parties must have been aware of both provisions at the time they were included in the Framework Agreement and considered them to be complementary, or at least not in conflict.

For this reason, as directed in the *BG Checo* case, we have sought to find an interpretation that can reasonably give meaning to each of the terms in question. In respect of validation, we were able to do so by reading down section 17.03 to apply only in circumstances in which it would not create or expand rights in favour of the First Nation – that is, where the First Nation's validation could be said to have been conferred independently by treaty and not solely on the basis of rights created or expanded by the Framework Agreement. In this context, we were able to conclude that section 17.03 could apply in some circumstances and not in others. However, in relation to settlement, we have been unable to find such an interpretation that would allow us to reach a similar conclusion, and we have therefore determined that we must find one of these sections to be ineffective.

By stipulating the extension of the principles of settlement as set out in the Framework Agreement, section 17.03 clearly creates new rights for non-Entitlement Bands or extends their existing rights, which contravenes section 17.02. While we recognize that settlement is a product of negotiation, and that non-Entitlement Bands could conceivably achieve greater concessions than those won by the Entitlement Bands in the Framework Agreement, we must also acknowledge that the Framework Agreement itself represents a significant “head start” in the negotiation process that would not be enjoyed by a non-Entitlement Band in the absence of section 17.03.

<sup>319</sup> *BG Checo International Ltd. v. B.C. Hydro and Power Authority*, [1993] 1 SCR 12 at 23-24.

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Nevertheless, we consider that the only possible application of section 17.03 is to circumstances such as those in the present case, whereas section 17.02 appears to have the potential to apply to a broader range of situations than those at present before the Commission. We therefore view section 17.02 as the more general of the two provisions and have accordingly determined that the scope of section 17.02 does not extend to section 17.03.

The foregoing analysis speaks more to the question of the meaning to be given to section 17.03 than to the ability of a non-Entitlement Band like Kawacatoose to enforce that provision. The fact remains that Kawacatoose is not a party to the Framework Agreement and is not in a position to be able to require Canada and Saskatchewan to fulfil the terms of the section. We agree with Canada's submission that common law principles of privity of contract preclude the First Nation from enforcing section 17.03 directly as a matter of right.

We recognize that the parties to the Framework Agreement viewed it as a significant achievement in the settlement of treaty land entitlement issues in Saskatchewan and hoped that it would form the framework for the settlement of the subsequently validated claims of non-Entitlement Bands. In this regard, we note the following evidence of Dr. Lloyd Barber relating to the purpose behind section 17.03:

- Q. The Article 17, particularly Article 17, you've indicated in your letter that it was inserted in the Framework Agreement at the entitlement bands' insistence; is that correct?
- A. Yeah. The politics of the Federation of Saskatchewan Indian Nations and the politics of the bands – I mean this in the small “P” sense, in the best sense of the term – is such that there is a very strong degree of collectivity. Now there's also some differences from time to time that erupt but essentially, deep down, there's a very powerful collectivity. And these guys didn't want to see some other bands left out if, in fact, they came along and got validated, they should, therefore, be part of this, nothing in this Framework Agreement should prejudice their position in any way. Likewise, there's a strong recognition of the sovereignty of each individual band and, therefore, an unwillingness on the part of the bands to bind each other. . . .
- Q. Was it – during the negotiations of the Framework Agreement was it being contemplated, especially towards the end, that this was going to be a Framework for the settlement of Treaty Land Entitlement in Saskatchewan?
- A. I think that's a fair characterization, but with the realization that you can't bind people who aren't signatories. But certainly, I think all parties thought that this was a pretty good agreement and that it should be clear that it can be applicable to those who come later.

Q. Was that the intention of the parties by Article 17, to have the Framework Agreement apply to other bands?

A. I think so.

Q. If they chose to?

A. If they chose, yeah. As I said in that letter, I can't look into the minds of the negotiators for the government, but I think that they saw this as a kind of set of limiting parameters that they could always turn to and say, "Look, you can't come along and get more than the other guys got because look at the can of worms we have had to open this up." So in that general sense I think there was a suggestion in that, that here it is and this is the road that anyone who comes along subsequently should follow, because we've built a pretty good road here.

Q. So then was it the purpose and intent of Article 17.03, in particular, to ensure that all bands in Saskatchewan were dealt with in the same way?

A. I think it was, to the extent that that can be made to happen. I mean, I repeat, these are sovereign nations, if you like, first nations and so if one of them chooses not to be bound I guess he [sic] doesn't have to be, but there was an intention, as I say, to get people to recognize that this was a pretty good road and they should follow it.<sup>320</sup>

Mr. Kerby's evidence, although stemming from the initial assumption that section 17.03 is merely a bilateral agreement between Canada and Saskatchewan, is remarkably similar in its characterization of the objective behind that section:

But in my view, 17.03 was there because Canada and Saskatchewan were acknowledging as between themselves, after a hard – I can attest to this – a hard-fought cost sharing agreement, that *they both wanted to ensure that if there was a substantiation of Treaty Land Entitlement with another Indian band on basically the same basis that was utilized for these 26 bands, that they, as between themselves, would support an extension of that cost sharing agreement and this agreement*, because there were benefits for both of them involved in this agreement and the cost sharing agreement.<sup>321</sup>

The evidence of Dr. Barber and Mr. Knoll that section 17.03 was inserted in the Framework Agreement on the motion of the Entitlement Bands was not challenged at this inquiry. We have no difficulty in concluding, therefore, that section 17.03 should be viewed as a benefit which was negotiated and won

<sup>320</sup> ICC Transcript, May 24, 1995, pp. 142-45 (Lloyd Barber).

<sup>321</sup> ICC Transcript, May 25, 1995, p. 214 (James Kerby). Emphasis added.

by the Entitlement Bands as a means of protecting the interests of non-Entitlement Bands in the settlement of future treaty land entitlement claims. In conclusion, we find that, although Kawacatoose is not a party to the Framework Agreement and is not entitled to enforce it directly, the Entitlement Bands as parties to that agreement would presumably be able to do so.

We do not agree with counsel for Canada that to apply section 17.03 of the Framework Agreement in the manner described above places non-Entitlement Bands in a superior position to Entitlement Bands that have not adhered to the Framework Agreement or executed Band Specific Agreements. We view the status of the non-Entitlement Bands prior to validation as being significantly inferior to the Entitlement Bands, since non-Entitlement Bands must still validate their treaty land entitlement claims – that is, they must still bring themselves within the Framework Agreement. Conversely, the Entitlement Bands are already within the ambit of the Framework Agreement and need merely to adhere to that agreement and to execute a Band Specific Agreement to bring their rights and obligations under the Framework Agreement into force. Entitlement Bands are also able to directly enforce the obligations of the other parties to the Framework Agreement.

Once a non-Entitlement Band has been validated – and assuming that it has elected under section 17.04 to seek a settlement within the context of the Framework Agreement rather than on some alternative basis – the band would presumably still be required to adhere to the Framework Agreement and execute a Band Specific Agreement, with the time frames and other provisions of the Framework Agreement to apply, subject to such consequential amendments as may be required. We are not prepared to say that a non-Entitlement Band, upon validation, would automatically become an Entitlement Band, since, under section 17.04, it might not choose to follow that road to settlement. But should a validated non-Entitlement Band elect to bring itself within the Framework Agreement, we view section 17.03 as obliging Canada and Saskatchewan – even if that obligation is not directly enforceable by the non-Entitlement Band – to support the extension of the principles of that agreement and the Amended Cost Sharing Agreement to any subsequent settlement negotiations. As stated above, this means that Canada must negotiate in good faith and must insist upon Saskatchewan doing likewise. Even if a satisfactory settlement is not achieved following such good faith negotiations, the obligations of Canada and Saskatchewan pursuant to section 17.03 would nonetheless be satisfied.

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# PART V

## CONCLUSIONS AND RECOMMENDATIONS

### CONCLUSIONS

The Commission has been asked to examine and report on whether the Government of Canada properly rejected the specific claim submitted by the Kawacatoose First Nation. To determine whether the claim is valid, we have had to consider the following issues:

- 1 Are the two families who appear on the 1876 treaty payroll for Fort Walsh (Paahoska/Long Hair and Wui Chas te too tabe/Man That Runs) members of the Kawacatoose (Poor Man Band) First Nation or the Lean Man (Poor Man) First Nation?
- 2 Assuming, for the purposes of this inquiry, that the date-of-first-survey formula for determining outstanding treaty land entitlement is the appropriate formula to be applied and without prejudice to the position that other formulas are applicable under the terms of Treaty 4, does the First Nation have an outstanding treaty land entitlement on the basis that the additions (new adherents, landless transfers, and marriages to non-treaty women) to the First Nation after the First Nation's date of first survey:
  - (a) are entitled to land under the terms of Treaty 4; and/or
  - (b) are to be counted in establishing the First Nation's date-of-first-survey population to determine if the First Nation has an outstanding treaty land entitlement?
- 3 Has the First Nation established, pursuant to Article 17 of the Saskatchewan Treaty Land Entitlement Framework Agreement, an outstanding treaty land entitlement on the same or substantially the same basis as the Entitlement Bands which are party to the Framework Agreement?

Our findings with regard to each issue are summarized as follows:

**Issue 1: Kawacatoose's Date-of-First-Survey Population**

The 13 members of the two families paid at Fort Walsh in 1876 under the heading "Poor Man" were members of Kawacatoose and not the Assiniboine Poor Man Band. However, all five individuals in the Contourier family who in 1883 were paid arrears for 1876 with Kawacatoose, must be treated as members of the Gordon Band, since three members of the family were listed on the Gordon Band's 1875 base payroll, and at least one of the other two appears to be a descendant born in 1876. As a result, we have concluded that the DOFS population for Kawacatoose should be 210, subject to further research that may be undertaken to confirm the membership in the First Nation of the fourth member of the Keeahkeewaypew family.

**Issue 2: Nature and Extent of Treaty Land Entitlement**

The Commission generally affirms and adopts by reference its conclusions and recommendations from the Fort McKay Report. However, we also clarified two of the findings made in that report:

- Although Treaty 8 refers to the option of an Indian receiving land in severalty whereas Treaty 4 does not, we do not view this difference as affecting our general conclusions regarding treaty land entitlement.
- With respect to landless transfers, once the individual joins a band that has received treaty land to some extent, the right to be counted should then crystallize and become part of the collective right of that band. Until that time, the treaty land entitlement remains with the individual pending his or her being counted with a band that has never received treaty land entitlement or joining a band that has received such entitlement. A landless transfer must then be a transfer from a landless band.

We found that the material provisions of Treaty 4 are very similar in intent to the parallel terms of Treaty 8. Although the factual circumstances of the Kawacatoose and the Fort McKay First Nations differed somewhat, we nevertheless concluded that they were very much alike in certain respects: bands under both Treaty 4 and Treaty 8 had not become stable, self-contained units, and it was recognized at the time of treaty that many Indians would not settle onto reserves and convert to an agrarian-based economy for some time to come. For these reasons, we cannot reasonably conclude that the members of Kawacatoose, any more than the other signatories of Treaty 4, would have been prepared to cede their rights to the vast areas of land contem-

plated by the treaty on the basis of the rigid DOFS population approach which Canada has argued represents its lawful obligation.

Based on the principles outlined in the Fort McKay inquiry, Canada has not satisfied its treaty obligation to provide reserve land to the Kawacatoose First Nation. The treaty conferred upon each Indian an entitlement to land as a member of a band, with entitlement crystallizing at the date of first survey in 1876 for those individuals who were members of the band at that time. The quantum of land to which Kawacatoose was entitled in that first survey is a question of fact, determined on the basis of the actual band membership, including band members who were absent or received arrears, on the date of first survey. The DOFS population was 159 – including the 13 members of the two Fort Walsh families, but excluding the five members of the Contourier family – plus 51 absentees and arrears, for a total of 210.

The treaty also conferred upon every band the entitlement to receive additional reserve land for every Indian who adhered to the treaty and joined that band subsequent to the date of first survey. The quantum of additional land to which Kawacatoose is entitled as a result of such new adherents is likewise a question of fact, determined on the basis that the entitlement crystallized when those Indians joined the band. We conclude that a total of 43 individuals joined Kawacatoose as new adherents to treaty following the date of first survey, but, since neither party has expressed complete confidence in the numbers submitted by them or researched on their behalf, this figure is subject to such further research as the parties may agree to undertake to confirm or amend it.

In addition, the treaty conferred upon the First Nation the entitlement to receive additional reserve land for every Indian who transferred from one band to another, where the band from which that Indian transferred had never received land. There were 19 landless transfers to Kawacatoose, although this number is again subject to further research for confirmation or amendment.

Finally, as a result of marriages, five women who were new adherents or landless transfers in their own right became members of Kawacatoose. As with the preceding two figures for new adherents and landless transfers, this number is also subject to review if the parties should agree to do so.

As a result, we have concluded on a preliminary basis that the First Nation's treaty land entitlement claim, including individuals on the base



paylist, absentees and arrears, new adherents, and landless transfers, should be as follows:

1876 base paylist	146
Fort Walsh families	13
Contourier family	0
Absentees and arrears	51
New adherents	43
Landless transfers	19
Eligible in-marrying non-treaty women	5
<b>Total</b>	<b>277</b>

This figure gives rise to a treaty land entitlement of 35,456 acres. When the first survey area of 27,200 acres is set off against this treaty land entitlement, the result is that the Kawacatoose First Nation is owed an additional 8526 acres, or 13.32 square miles.

### **Issue 3: Saskatchewan Framework Agreement**

While the Commission has determined that the Framework Agreement does not give non-Entitlement Bands an independent basis for validation, we nevertheless conclude that Kawacatoose has substantiated its claim for outstanding treaty land entitlement on the same basis as the Entitlement Bands – that is, in accordance with the terms of Treaty 4. We did not agree with the First Nation's submissions that the terms of section 17.03 of the Framework Agreement impose a fiduciary or contractual obligation upon Canada to accept the Kawacatoose claim for negotiation, or that Canada is estopped from denying an obligation to validate that claim.

Even so, once substantiation of the claim of a non-Entitlement Band has occurred, as in the present case, section 17.03 applies, stipulating that Canada and Saskatchewan will support the extension of the principles of settlement contained in the Framework Agreement to that band. This was acknowledged by both the solicitor who negotiated the Framework Agreement on Canada's behalf and present counsel for Canada. Although Kawacatoose is not a party to the Framework Agreement and is not in a position to enforce the obligations of Canada and Saskatchewan under section 17.03, we take from Canada's submissions regarding the high degree of importance it attaches to its obligations under the Framework Agreement that it will consider itself honour-bound to fulfil the obligations to non-Entitlement Bands set forth in section 17.03. Should Canada fail to live up to its obligations in

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that section, we expect that the Entitlement Bands, as the parties who sought and obtained that contractual term, would be able to enforce the provision, and we note that those bands have already endorsed a resolution in support of Kawacatoose and other First Nations with outstanding treaty land entitlement claims.

We recognize that section 17.03 of the Framework Agreement appears to be inconsistent with section 17.02, but we have concluded that, since section 17.02 is the more general of the two provisions, its scope should be interpreted as not extending to the subject matter of section 17.03.

### **RECOMMENDATIONS**

Having found that the land entitlement of the Kawacatoose First Nation has not been fully satisfied in accordance with the terms of Treaty 4, we therefore make the following recommendations:

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#### **RECOMMENDATION 1**

**That the treaty land entitlement claim of the Kawacatoose First Nation be accepted for negotiation under Canada's Specific Claims Policy.**

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#### **RECOMMENDATION 2**

**In accordance with section 17.03 of the Saskatchewan Framework Agreement, that Canada and Saskatchewan support the extension of the principles of settlement contained in that agreement to the Kawacatoose First Nation in order to fulfil the outstanding treaty land entitlement obligations to the First Nation.**

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FOR THE INDIAN CLAIMS COMMISSION



P.E. James Prentice, QC  
Commission Co-Chair

March 1996



Roger J. Augustine  
Commissioner

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# APPENDIX A

## KAWACATOOSE FIRST NATION TREATY LAND ENTITLEMENT INQUIRY

- |  |                         |
|--|-------------------------|
| 1 <b>Decision to conduct inquiry</b>   | May 6 and 7, 1994       |
| 2 <b>Notices sent to parties</b>       | May 17, 1994            |
| 3 <b>Planning conference</b>           | Saskatoon, July 8, 1994 |
| 4 <b>Community and expert sessions</b> |                         |

The panel held the following community and expert sessions:

*November 15, 1994:* The panel held a community session at Raymore, Saskatchewan, hearing from the Chief and five Elders of the Kawacatoose First Nation and four additional witnesses as follows:

- Chief Richard Poorman
- Elders Elsie Machiskinic (Poorman), Pat Machiskinic, Fred Poorman, John Kay, and Alec Kay
- Panel of research experts from the Office of the Treaty Commissioner: Howard McMaster, Peggy Brizinski, Jamie Benson, and Marion Dinwoodie

*November 18, 1994:* In a joint session in Calgary, Alberta, which included representatives from the Fort McKay First Nation, the panel heard from Sean Kennedy, private consultant to Indian organizations and bands and formerly a member of the Specific Claims Branch, Department of Indian Affairs and Northern Development.

*December 16, 1994:* In a joint session in Ottawa, Ontario, which again included representatives from the Fort McKay First Nation, the panel

heard from Rem Westland, Director General, Specific Claims Branch, Department of Indian Affairs and Northern Development.

*May 24-25, 1995:* The panel held joint sessions in Saskatoon, Saskatchewan, with representatives from the Kahkewistahaw and Ocean Man First Nations, hearing from the following witnesses:

- Kenneth Tyler, Counsel, Constitutional Law Branch, Manitoba Department of Justice
- David Knoll, Counsel, Federation of Saskatchewan Indian Nations
- Dr. Lloyd Barber, chief negotiator for Federation of Saskatchewan Indian Nations for the purpose of negotiating the Saskatchewan Framework Agreement
- James Gallo, Manager, Treaty Land Entitlement and Claims, Lands and Trusts Services, Department of Indian Affairs and Northern Development
- James Kerby, legal counsel to Canada for the purpose of negotiating the Saskatchewan Framework Agreement
- Panel of research experts from the Office of the Treaty Commissioner: Jamie Benson and Peggy Brizinski

## **5 Oral submissions**

October 24, 1995  
Saskatoon, Saskatchewan

## **6 Content of formal record**

The formal record for the Kawacatoose First Nation Inquiry consists of the following materials:

- 34 exhibits tendered during the Inquiry, including the documentary record (3 volumes of documents with annotated index, and a 2-volume addendum with index)
- Transcripts from community sessions (5 volumes)
- Written submissions of counsel for Canada and the claimants

- Transcripts of oral submissions (1 volume)
- Authorities and supplemental authorities submitted by counsel with their written submissions
- Correspondence among the parties and the Commission

The report of the Commission and letters of transmittal to the parties will complete the formal record of this Inquiry.

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# **INDIAN CLAIMS COMMISSION**

## **INQUIRY INTO THE TREATY LAND ENTITLEMENT CLAIM OF THE LAC LA RONGE INDIAN BAND**

### **PANEL**

Commission Co-Chair P.E. James Prentice, QC  
Commissioner Carole T. Corcoran

### **COUNSEL**

For the Lac La Ronge Indian Band  
Douglas Kovatch / James Jodouin

For the Government of Canada  
Bruce Becker / Bruce Hilchey

To the Indian Claims Commission  
Kim Fullerton / Ron S. Maurice

**MARCH 1996**





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# PART I

## INTRODUCTION

### BACKGROUND TO THIS INQUIRY

On August 19, 1992, Chief Harry Cook of the Lac La Ronge Indian Band (the Band) requested that the Indian Claims Commission (ICC) conduct an inquiry into the Band's entitlement claim.<sup>1</sup> On March 8, 1993, the Government of Canada and the Chief and Council of the Band were advised that this Commission would conduct an inquiry into the government's rejection of this claim.<sup>2</sup>

The Lac La Ronge Band claims that Canada has not fulfilled its obligations under Treaty 6 to set aside sufficient reserve land for the use and benefit of the Band. These types of claims are commonly referred to as "treaty land entitlement" or "TLE" claims. In 1982, the Joint Entitlement Committee of the Federation of Saskatchewan Indians (FSI) and the Department of Indian Affairs and Northern Development (DIAND) prepared a joint report which outlined the nature of the Band's claim and the committee's position on treaty land entitlement. The dispute between Canada and the Band centres on the interpretation of the reserve formula in Treaty 6, which states that each band is to receive one square mile of reserve land for every family of five. The difficulty is that the treaty does not state when band members should be counted to determine the band's entitlement. The Lac La Ronge Band's position was stated as follows:

[1] . . . if the amount of land set aside for a band at the date of the first survey was not equal to, or greater than, the total population of the band at that time, multiplied

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- 1 D. Kovatch, Legal Counsel, to A. Deranger, Indian Claims Commission, August 26, 1992 (ICC file 2107-04-03, vol. 1, letter 941402). In January 1993, it was agreed that the Band's related claims into lands at Candle Lake and the La Ronge School Lands would be dealt with as separate inquiries after completing the inquiry into the entitlement claim (D. Kovatch to Indian Claims Commission, January 25, 1993, ICC file 2107-04-03, vol. 1, letter 930185). Inquiries into those claims have subsequently been suspended at the request of the Band.
  - 2 H. LaForme, Chief Commissioner, Indian Claims Commission, to Tom Siddon, Minister of Indian Affairs, and Pierre Blais, Minister of Justice, March 8, 1993 (ICC file 2107-04-03, vol. 1, letter 930600).

by the treaty formula relating the band population to the reserve size, then the band had outstanding treaty land entitlement. . . .

[2] . . . outstanding treaty land entitlement could only be extinguished by a further grant of land at a later date, based on the population of the band at that later date. In other words, the outstanding entitlement of the band grew (or fell) as the population of the band grew (or fell) and was only satisfied when enough land was set aside to account for the entitlement of the later population. If a second survey failed to provide enough land for the population at the time of that survey, then the band would still have had an outstanding treaty land entitlement. The same principle would apply to the third survey, and so on. . . .<sup>3</sup>

The Lac La Ronge Band received multiple surveys of reserve lands between 1897 and 1973, but contends that the Band's entitlement to land was never fulfilled by Canada. Furthermore, the Band contends that it is not bound by a 1964 Band Council Resolution which states that the Band agreed to settle its land entitlement on a compromise basis. The Band submits that the Resolution is not binding because the Band membership did not consent to the compromise settlement.

On June 22, 1984, Indian Affairs Minister John Munro informed Chief Tom McKenzie of the Lac La Ronge Band that the Band's claim had been rejected:

As the evidence clearly demonstrates, Canada made several attempts to live up to its treaty commitment to provide land to the Lac la Ronge Band, because it recognized that the initial survey had failed to provide a sufficient quantity. The 1964 agreement was a negotiated agreement which intended to fulfil the outstanding amount once and for all. The evidence also demonstrates that the amount of land provided to the band by this agreement did fulfil, in fact greatly exceeded, the amount left outstanding at the time of first survey. Whether the strength of the agreement is questionable or not has no bearing on the fact that the Band has received more land than it was entitled to under the terms of Treaty 6. Canada has fulfilled its treaty land entitlement to the Lac La Ronge Band and, therefore, no additional treaty land is owed.<sup>4</sup>

The Band filed legal actions against both Canada and Saskatchewan in Federal Court on October 8, 1986, and the following year in Saskatchewan's Court of Queen's Bench. In 1990, the Office of the Treaty Commissioner agreed to assist the parties, but attempts to resolve this dispute ultimately

3 Joint FSI/DINA Committee on Entitlement, "Report No. 10 - Lac La Ronge Band #156," c. 1982 (ICC Documents, p. 3468).

4 John C. Munro, Minister of Indian Affairs, to Tom J. McKenzie, Chief, Lac La Ronge Indian Band, July 22, 1984 (ICC Documents, p. 3744).

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broke down. On April 29, 1992, the Senior Assistant Deputy Minister of Indian Affairs, Richard Van Loon, reiterated the federal government's position:

our position has been and continues to be that the Band's treaty land entitlement (TLE) was fulfilled by 1968 at which point the band had received 61,952 acres being the amount due at the date of first survey (DOFS). In any event we consider that the May 8, 1964 Band Council Resolution (BCR) in which the Council accepted 63,330 acres as "full and final entitlement" precludes any further claim. Since the government does not consider your Band to have an outstanding TLE, the government considers your Band to be eligible only for correction of any mistake(s) made in the application of the formula accepted by BCR in 1964.<sup>5</sup>

### **THE MANDATE OF THE INDIAN CLAIMS COMMISSION**

The Indian Claims Commission of Canada derives its authority from Order in Council PC 1992-1730. The Commission is empowered under that Order in Council to inquire into and report on specific claims that have been rejected by the Government of Canada. Specifically, the Commission is authorized as follows:

AND WE DO HEREBY advise that our Commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development (hereinafter "the Minister") by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:

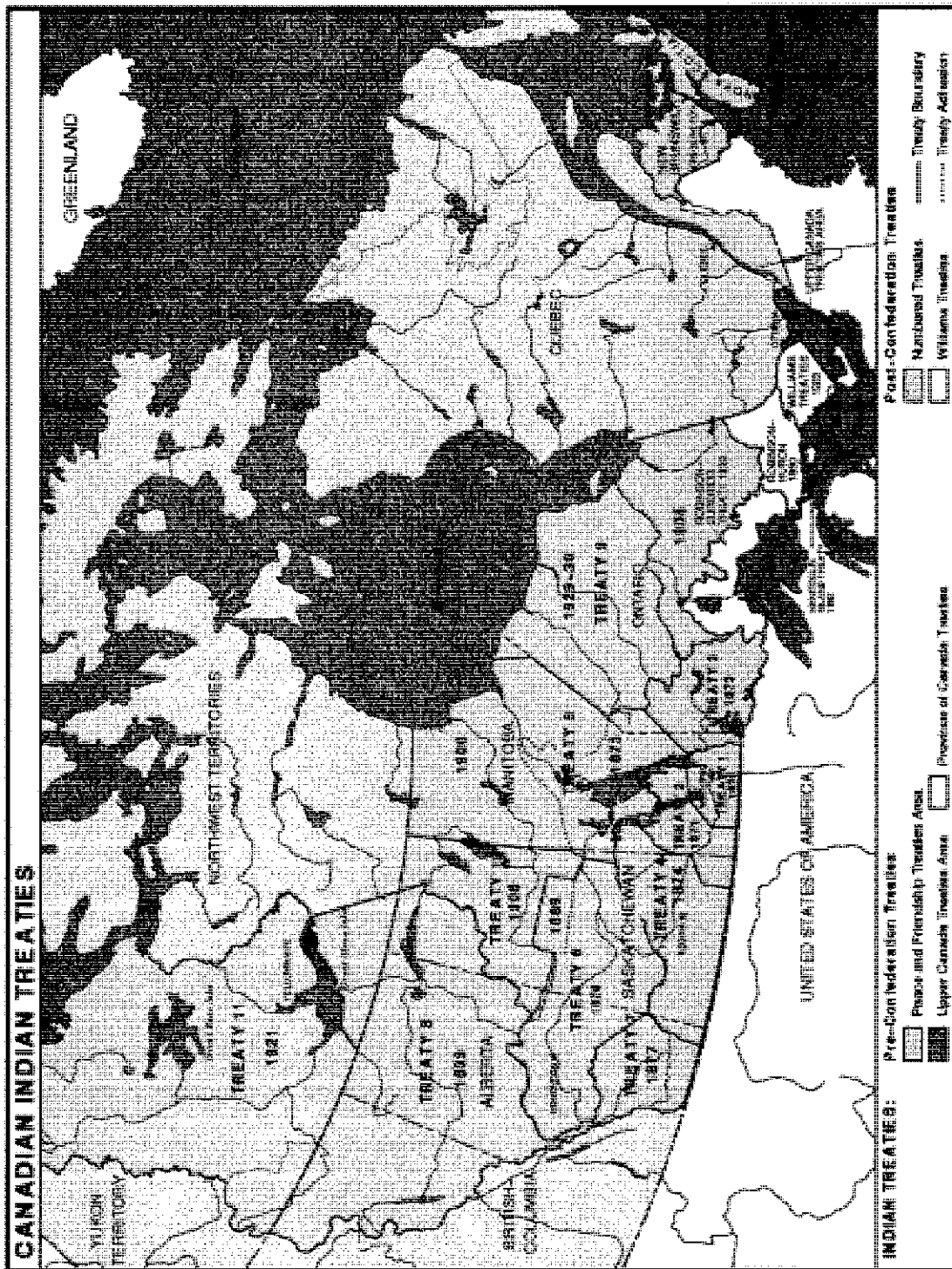
- a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister . . .<sup>6</sup>

The function of this Commission therefore is to inquire into and report on whether the claimant has a valid claim for negotiation under the Specific Claims Policy. A claim is valid under the Policy if it discloses an outstanding lawful obligation on the part of the Government of Canada. This report sets out our findings and recommendations on this issue.

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5 Richard Van Loon, Senior Assistant Deputy Minister of Indian Affairs, to Harry Cook, Chief, Lac La Ronge Indian Band, April 29, 1992 (ICC Documents, p. 4481).

6 Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1992, pursuant to Order in Council PC 1991-1329, July 15, 1991.



## PART II

### THE INQUIRY

#### HISTORICAL BACKGROUND

During the course of this inquiry, the Commission reviewed hundreds of historical documents relating to the Lac La Ronge Band in particular and to treaty land entitlement in general. In addition to reviewing approximately 15,000 pages of historical documentation, the Commission was assisted in this inquiry by the Cree elders who provided oral testimony at a community session in January 1994. Appendices A and B to this report set out the details of the inquiry process and the documents that constitute the formal record in this matter.

In the following pages we will summarize the factual history of this complex claim.

#### **The Lac La Ronge Indian Reserves**

From 1897 to 1973, approximately 20 surveys were carried out and a total of 107,146.99 acres of reserve land were set aside for the exclusive use and benefit of the Lac La Ronge Indian Band and its members. (The map on page 259 shows the various reserves set aside for the Lac La Ronge Band during this period.) While most of the reserves are located near Lac La Ronge, there are several parcels which extend as far as 180 kilometres to the south near Emma Lake and Prince Albert, Saskatchewan.

#### **The Lac La Ronge Indian Band**

The Lac La Ronge Indian Band consists of Wood Cree Indians who are descendants of the 278 members of the James Roberts Band, which adhered to Treaty 6 on February 11, 1889, at Montreal Lake in northern Saskatchewan. At that same time and place, the William Charles Band – now the Montreal Lake Band – also adhered to Treaty 6. Although these two groups shared an interest in one reserve for a number of years, and Department of

Indian Affairs officials sometimes referred to them as one, it is clear that the James Roberts or Lac La Ronge people and the William Charles or Montreal Lake people have always been two distinct bands.

At the time of their adhesion to treaty, the Lac La Ronge people were described as "a very intelligent, respectable and religious class of Indians." While they did not then know English, they could, under the instruction of the Church of England at Stanley Mission, read and write in their own language using Cree syllabic characters. Chief Roberts had, in fact, received instruction at Emmanuel College in Prince Albert.<sup>7</sup>

The people of the James Roberts Band made their living hunting, fishing, and trapping in the area around Lac La Ronge. Members of the Band established various camps around the lake where they built houses and planted small gardens with potatoes and other root crops. There were, in fact, two distinct groups: one living near Lac La Ronge and the other along the Churchill River at Stanley Mission and to the north.<sup>8</sup>

In 1900, the families living north of Lac La Ronge at Stanley Mission asked to be paid where they lived but not constituted as a new band.<sup>9</sup> The locations near Stanley Mission were not, in fact, within the Treaty 6 boundaries. This fact was noted in 1906, when plans were being made to negotiate Treaty 10:

the band consists of two rather distinct sections, the one having their abodes around Lac la Ronge, and the other having their dwellings or hunting grounds, or both, along the Churchill River and to the north of it, and hence outside present treaty limits. In case of the formation of a band in the neighbourhood of Stanley Mission, on the conclusion of a new treaty in those regions, or the extension of the present treaty limits, it is apparent that about one-third of James Roberts' band would apply for membership in the new band.<sup>10</sup>

In 1910, Inspector W.J. Chisholm was instructed to go to Lac La Ronge to arrange the division of the Lac La Ronge Band into the James Roberts Band, consisting of those families residing at Lac La Ronge, and the Amos Charles Band, consisting of those living at Stanley Mission. Chief Amos Charles and the newly formed council signed a document consenting to the division.

7 Order in Council PC 293, April 20, 1889 (ICC Documents, p. 133), and J.A. Mackay, Archdeacon, Prince Albert, notes regarding Stanley Mission, March 2, 1889 (ICC Documents, p. 116).

8 Inspector W.J. Chisholm, Prince Albert, to Secretary, Department of Indian Affairs, October 25, 1906 (ICC Documents, p. 342).

9 W.J. Chisholm, Inspector of Indian Agencies, to Department of Indian Affairs, September 25, 1900 (ICC Documents, p. 324).

10 W.J. Chisholm, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, October 25, 1906 (ICC Documents, p. 342).



According to the annuity payroll for 1910, some 232 members followed Amos Charles and were sometimes referred to as the Stanley Band, while the remaining 197 members remained at Lac La Ronge with James Roberts.<sup>11</sup> Separate trust funds and annuity paylists were established, but the reserve lands were not formally divided between the two Bands.

By 1949, Department of Indian Affairs officials were contending that the administration of the affairs of the two Bands, including the allocation of reserve land, could be simplified if the Bands were amalgamated. When this proposition was presented to the two Bands in June 1949, they “voted unanimously in favour of the amalgamation, but they added the stipulation that the present chiefs and headmen remain in office to have jurisdiction over the geographic division of their reserves.”<sup>12</sup> On March 27, 1950, the Minister advised the Governor General in Council that “the James Roberts and Amos Charles Bands of Indians, at their own request, have been amalgamated into one Band to be known as the Lac La Ronge Band.”<sup>13</sup>

### **Treaty 6: Fort Carlton and Fort Pitt, 1876**

In 1876 Canada appointed three Treaty Commissioners – Alexander Morris, then the Lieutenant Governor for the North-West Territories, together with James McKay and W.J. Christie – to negotiate the terms of Treaty 6 with the Indians of central Alberta and Saskatchewan. Chiefs of the Plains Cree and Wood Cree people signed Treaty 6 at or near Fort Carlton on August 23 and 28, 1876, and near Fort Pitt on September 9, 1876. Under the terms of Treaty 6, the Indians surrendered and ceded their title and interest to 121,000 square miles of fertile agricultural land in what is now central Alberta and Saskatchewan. In return, the Crown promised to set aside reserve lands and provide other treaty benefits to the Bands. The treaty contains this provision relating to reserves:

Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to land at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, *all such reserves shall not exceed in all one square mile for each family of five, or in that*

<sup>11</sup> J. Raichman, memorandum to file, May 4, 1947, in DIAND file 672/30-12, vol. 1 (ICC Documents, pp. 836-38).

<sup>12</sup> J.P.B. Ostrander, Regional Supervisor of Indian Agencies, Regina, to Indian Affairs Branch, Ottawa, July 15, 1949, in DIAND file 672/30-6-106B, vol. 1 (ICC Documents, p. 858); Chief and Council, James Roberts and Amos Charles Bands, to Indian Affairs Branch, June 27, 1949 (ICC Documents, p. 856).

<sup>13</sup> Minister of Citizenship and Immigration, draft submission to Governor General in Council, March 27, 1950 (ICC Documents, p. 867).

*proportion for larger or smaller families*, in manner following, that is to say: that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each Band, after consulting with the Indians thereof as to the locality which may be found most suitable to them. Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as She shall deem fit. . . .<sup>14</sup>

According to these provisions of the treaty, each band was entitled to receive one square mile, or 640 acres, of reserve land for each family of five. Calculated on a per capita basis, a band was entitled to receive 128 acres for each member of the band. It is important to observe that the treaty is silent on the appropriate date to be used to count the population of a band for land entitlement purposes. Moreover, the treaty does not offer any guidance on the respective rights and obligations of the parties when a band receives only a portion of the land to which it was entitled under the treaty.

The James Roberts Band did not sign Treaty 6 in 1876 or participate in the negotiations because it lived around the Lac La Ronge area, a considerable distance north of the original Treaty 6 boundaries.

### **Lac La Ronge Adhesion to Treaty 6, 1889**

Between 1877 and 1882, there were eight adhesions to Treaty 6 involving bands whose territories were included within the boundaries of the original treaty negotiated in 1876.<sup>15</sup> In 1888, however, the Deputy Superintendent General of Indian Affairs recommended that the government negotiate a treaty with the Indians in the *unceded* area north of Treaty 6:

very much uneasiness exists among the Indians in the unceded part of the Territories at parties making explorations into their country in connection with railroads, etc., without any Treaty being made with them, and . . . they are most anxious to enter into Treaty relations with the Government and that it is in the interests of humanity very desirable that the Government should render them assistance as their condition at many points is very wretched. The Indians in the unceded portions of the Territories are not numerous; but at the same time they could of course do great injury to any

<sup>14</sup> *Copy of Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians*, 23 August 1876, IAND Publication No. QS-0574-000-EE-A-1 (Ottawa: Queen's Printer, 1964), p. 3. Emphasis added.

<sup>15</sup> Adhesions to Treaty Six – August 9, 1877 (Fort Pitt); August 21, 1877 (Edmonton); September 25, 1877 (Bobtail's Band at Blackfoot Crossing); August 19, 1878; August 29, 1878 (Stony Indians at Battleford); September 3, 1878 (Carlton); September 18, 1878; July 2, 1879 (Little Pine and Lucky Man at Fort Walsh); December 8, 1882 (Big Bear at Fort Walsh): see *Copy of Treaty No. 6*, 10-16.

railway or other public work which might be constructed in their country, unless the Government had a previous understanding with them relative to the same.<sup>16</sup>

By Order in Council dated November 29, 1888, Lieutenant-Colonel A.C. Irvine and Roger Goulet were appointed Commissioners to negotiate with the "Green Lake" Indians whose hunting grounds occupied the 11,066 square miles "between the Northern boundary of Treaty No. 6 and the Northern boundary of the Provisional District of Saskatchewan and bounded by the East and West by the limits of the timber and land district of Prince Albert."<sup>17</sup> The Commissioners were instructed not to negotiate a new treaty, but rather to ask these Indians to sign adhesions to Treaty 6 and agree to be bound by all the terms of that document.<sup>18</sup>

When Lieutenant-Colonel Irvine and Mr. Goulet arrived at Prince Albert in January 1889, they learned that there were no Indians at Green Lake who had not adhered to treaty and that the interested Indians were all in the neighbourhood of Montreal Lake and Lac La Ronge.<sup>19</sup> After sending out messengers to notify the Indians, Commissioners Irvine and Goulet, accompanied by Archdeacon John Mackay, who was to serve as interpreter, arrived at the north end of Montreal Lake on February 8, 1889. Reverend Mackay took a "special interest"<sup>20</sup> in these negotiations because he had worked as a missionary at Stanley Mission from 1864 to 1876.

On the afternoon of February 11, 1889, the Indians met with the Commissioners and presented William Charles and James Roberts as their Chiefs. The treaty was read to them in Cree and they were asked for their comments. James Roberts began by saying that they had heard of the treaties and were anxious to be included, but, since their previous requests to join treaty had been ignored, they wanted to be paid arrears of annuity from the date when Treaty 6 was first signed in 1876. Commissioner Irvine told him that he was not authorized to consent to this request, but that he would forward it to Ottawa for consideration.<sup>21</sup>

16 L. Vankoughnet, Deputy Superintendent General of Indian Affairs, Ottawa, to Sir John A. Macdonald, Superintendent General of Indian Affairs, November 5, 1888 (ICC Documents, pp. 89-90).

17 Order in Council PC 2554, November 29, 1888 (ICC Documents, pp. 91-93). A more detailed description of the limits of the area to be ceded is included in the Order in Council, as well as in the adhesion document itself.

18 Order in Council PC 2554, November 29, 1888 (ICC Documents, pp. 91-93).

19 Commissioner A.G. Irvine to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, April 6, 1889, points 6 and 7 (ICC Documents, p. 118); A.J. McNeill, Clerk, Special Indian Commission, to [A.G. Irvine], January 21, 1889 (ICC Documents, pp. 102-03).

20 J.A. Mackay, Church Missionary Society, to Indian Commissioner, Regina, April 9, 1889, National Archives of Canada [hereinafter NA], RG 10, vol. 3601, file 1754.

21 The claim for arrears was denied "inasmuch as the country covered by the Treaty now submitted for acceptance was not ceded at the date of Treaty No. 6, but that the Indians have remained in possession of the same up to the date of this Treaty," in Order in Council PC 893, dated April 20, 1889 (ICC Documents, p. 133).

Chief Roberts then proceeded to make a number of requests for substitutions for some of the agricultural implements promised to the Indians in the south on the basis that such implements would be of little or no use to his people. Whereas the original treaty had specified that each band would receive four oxen, one bull, six cows, one boar, and two sows, the Lac La Ronge Indians requested only one ox, one bull, three cows, and the pigs. The treaty allowed for an allotment of tools and implements, including one plough for every three families; Chief Roberts stated that they wanted only three ploughs for the whole band and they were to be "small light ones that can be carried in canoes." The horses, harness, and wagon promised to each Chief would have been completely useless in the north, as all transportation was by canoe in summer and by dog team in winter. Chief Roberts asked that he receive instead one tent, one stove, and four sets of dog harnesses. The value of the articles in the original treaty, which they would not receive, was to be made up in ammunition and twine for nets.

The Commissioners' report and the notes kept by clerk A.J. McNeil of the Department of Indian Affairs comprise the only written accounts of the treaty negotiations at Montreal Lake. Neither records any discussion about the *size* of the proposed reserves. Lieutenant-Colonel Irvine "explained to them that a Reserve would be given to each Band and a Surveyor would be sent to lay it out,"<sup>22</sup> but "the Indians were not decided yet where they want them."<sup>23</sup>

At the conclusion of the negotiations on February 11, 1889, William Charles and his headmen, representing the Indians living around Montreal Lake, and James Roberts and his headmen (Amos Charles, Joseph Charles, Elias Roberts, and John Cook), representing the Indians whose homes and hunting grounds were near Lac La Ronge, signed an adhesion to Treaty 6. In so doing, they agreed to "transfer, surrender and relinquish to Her Majesty the Queen, her heirs and successors, to and for the use of the Government of Canada, all our right, title and interest whatsoever" in the 11,066 square miles of the northern part of the Prince Albert Land District and to "all other lands wherever situated, whether within the limits of any other treaty heretofore made, or hereafter to be made with Indians, and whether the said lands are situated in the North-West Territories or elsewhere in Her Majesty's

22 Lt. Col. Irvine, Treaty Commissioner, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, April 6, 1889, item 19 (ICC Documents, p. 121), and A.J. McNeil, Notes, February 11, 1889 (ICC Documents, p. 110).

23 A.J. McNeil, Notes, February 11, 1889 (ICC Documents, p. 112), and Lt. Col. Irvine, Treaty Commissioner, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, April 6, 1889, item 19 (ICC Documents, p. 121). Note that McNeil's notes recorded this item *after* the treaty was signed, whereas Irvine included it in the pre-signing portion of his report.

Dominion.”<sup>24</sup> In exchange, the two bands would receive “the several benefits, payments and reserves promised to the Indians adhering to the said Treaty [6] at Fort Pitt or Carlton.”<sup>25</sup>

### **First Survey of Reserve, 1889-97**

In July 1889, Indian Commissioner Hayter Reed informed the Minister of the Interior that the Department of Indian Affairs intended to send a surveyor to define the reserves for the Indians of Montreal Lake and Lac La Ronge, “numbering altogether two chiefs, eight headmen and three hundred and sixty seven Indians.”<sup>26</sup> At that time, Reed could indicate only general locations for the proposed reserves – at the south end of Lac La Ronge and the northern or southern extremity of Montreal Lake – but “a decision will doubtless be arrived at when the treaty payment is made, proposed in September next, and unless there is any objection to our doing so, our surveyor will then proceed to lay off the reserves selected.”<sup>27</sup>

Consequently, Surveyor A.W. Ponton was instructed to accompany Assistant Commissioner Forget when he visited Montreal Lake and Lac La Ronge to pay annuities that fall. Annuities were paid to 101 members of the William Charles Band at Montreal Lake on September 17, 1889, and the location of their reserve was settled at that time. The survey of Montreal Lake Indian Reserve (IR) 106 was completed on October 19, 1889.<sup>28</sup> The reserve measured 23 square miles – enough land for 115 people under the Treaty 6 formula.

After leaving Montreal Lake, Messrs. Forget and Ponton proceeded to Little Hills Lake, where they paid 334 members of the James Roberts Band on September 27, 1889. Although the Band members identified an area they wanted as a reserve, several problems were encountered which caused the survey to be postponed. The surveyor noted that there were physical considerations relating to the nature of the territory which made it necessary to postpone the survey: “it was at once found that the survey could not be made this fall, and would have to be delayed until the ice on the lakes had formed and sufficient snow had fallen to travel with dogs.”<sup>29</sup>

24 Adhesion to Treaty No. 6, February 11, 1889 (ICC Documents, pp. 104-05).

25 Adhesion to Treaty No. 6, February 11, 1889 (ICC Documents, pp. 104-05).

26 Hayter Reed, Indian Commissioner, Regina, to Minister of the Interior, July 4, 1889, NA, RG 10, vol. 3815, file 56622 (ICC Documents, p. 135).

27 Hayter Reed, Indian Commissioner, Regina, to Minister of the Interior, July 4, 1889, NA, RG 10, vol. 3815, file 56622 (ICC Documents, pp. 135-36).

28 A.W. Ponton, Surveyor, to Superintendent General of Indian Affairs, November 25, 1889 (ICC Documents, p. 145).

29 A.W. Ponton, Surveyor, to Superintendent General of Indian Affairs, November 25, 1889 (ICC Documents, p. 145).

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Assistant Commissioner Forget indicated, however, that there were problems with the Band's selection, and questions to be considered before settling the issue. Included within the boundaries of the land selected were about 10 acres of the Hudson's Bay Company post, as well as a squatter's homestead. Since the Department of the Interior had recently cautioned Indian Affairs officials to take care to protect the interests of squatters when establishing new reserves,<sup>30</sup> Mr. Forget convinced the Indians to alter their choice to exclude those areas:

After several interviews and considerable discussion, the matter was decided as I suggested with the understanding that two small islands in Lake La Ronge where they had gardens would form part of the reserve. The sketch attached to this report will give a clear idea of the various interests involved and enable you to determine whether the agreement should be carried out. The parts colored red have been agreed to be set apart for the proposed reserve. . . . The yellow-colored portion covers the land they desired in lieu of the lower portion opposite and which for the reasons above stated, was agreed to be left out.<sup>31</sup>

It is clear that Mr. Forget intended by this survey to allocate to the Band its full land entitlement under Treaty 6:

The Islands are first to be surveyed *and the balance of the land they may be entitled to according to their number* is to be taken south of the Lake and East of Big Stone River and Big Stone Lake, as shown on the sketch.<sup>32</sup>

Mr. Forget nevertheless had some reservations about the proposed selections. Within the Hudson's Bay Company claim, there were about 15 Indian houses, some gardens, and a combined schoolhouse and church built by the Church Missionary Society to serve the Indians, and "it seems hard that they should be asked to remove elsewhere on account of these two claims":

. . . I am therefore inclined to think it would be better to authorize the survey of a reserve in accordance with the wishes of the Indians. The satisfaction that the adoption of this course would produce on the band will highly compensate for any trouble that might arise from the adjustment of the above claims. But if it is thought advisable

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30 Assistant Commissioner A.E. Forget to Indian Commissioner, Regina, November 3, 1889, NA, RG 10, vol. 3601, file 1754 (ICC Documents, p. 138).

31 Assistant Commissioner A.E. Forget to Indian Commissioner, Regina, November 3, 1889, NA, RG 10, vol. 3601, file 1754 (ICC Documents, pp. 138-39).

32 Assistant Commissioner A.E. Forget to Indian Commissioner, Regina, November 3, 1889, NA, RG 10, vol. 3601, file 1754 (ICC Documents, p. 139). Emphasis added.

to take advantage of the location, as shown on the sketch, with the consent of the Indians I feel confident that the latter will raise no further objections.<sup>33</sup>

A further problem identified by Forget related to the fact that this band had not historically lived together in one community:

whichever area was set apart for the reserve, there will remain a number of cases of Indians, members of the band, owning a house or occupying a plot of land for gardening purposes, which owing to their being widely separated from one another cannot be included in the proposed reserve. I explained the law regarding such cases as laid down in clause 126 of the "Indian Act,"<sup>34</sup> impressing upon them, at the same time, the importance of giving up such places and settling on the Reserve after it shall have been surveyed. But the question arises whether it would not be better, especially in cases where the improvements are not too far remote from the reserve, to grant individual holdings of land and to decrease the area of the Reserve in proportion to the extent of such grants. The adoption of such a course, if not incompatible with any policy of the Department would be highly satisfactory to the parties concerned.<sup>35</sup>

At the same time, the Superintendent General of Indian Affairs was promoting the idea of setting aside "land in severalty" as an alternative to the allocation of reserve lands. Ultimately, both Commissioner Reed and the Deputy Superintendent General wrote in favour of the proposal for the Lac La Ronge Indians, and by March 1890 the decision had been made to delay the survey:

Having given the matter further consideration and greatly requiring the services of our Surveyor in other quarters where no delay could take place, it has been decided to defer Mr. Ponton's visit to Lac la Ronge. When he goes up there it is proposed instead of having one large Reserve to allow the Indians where they request it to take their

33 Assistant Commissioner A.E. Forget to Indian Commissioner, Regina, November 3, 1889, NA, RG 10, vol. 3601, file 1754 (ICC Documents, pp. 140-41).

34 *Indian Act*, RSC 1886, c. 43, s. 126: "No Indian or non-treaty Indian, resident in the Province of Manitoba, the North-West Territories or the District of Keewatin, shall be held capable of having acquired or of acquiring a homestead or pre-emption right to a quarter section, or any portion of land in any surveyed or unsurveyed land in the Province of Manitoba, the North-West Territories or in the District of Keewatin, or the right to share in the distribution of any lands allotted to halfbreeds, subject to the following exceptions: —

- (a) He shall not be disturbed in the occupation of any plot on which he has permanent improvements prior to his becoming a party to any treaty with the Crown;
- (b) Nothing in this section shall prevent the Superintendent General, if found desirable, from compensating any Indian for his improvements on such a plot of land, without obtaining a formal surrender thereof from the band;
- (c) Nothing in this section shall apply to any person who withdrew from any Indian treaty prior to the first day of October in the year one thousand eight hundred and seventy-four."

35 Assistant Commissioner A.E. Forget to Indian Commissioner, Regina, November 3, 1889, NA, RG 10, vol. 3601, file 1754 (ICC Documents, pp. 141-42).

allotments where they now have them around the Lake and locating a small reservation (where it was decided to place the large one) for mission purposes and such Indians as really desire to be at that part. By surveying when the snow is off the ground better selections can be made for the Indians.<sup>36</sup>

Almost immediately, the James Roberts Band requested another variation in reserve location. In April 1890, Archdeacon Mackay wrote to Commissioner Reed:

James Roberts, the Lac la Ronge chief, has asked me to communicate with you regarding the desire of himself and his people to have a part of their reserve allotted to them, if it could be so arranged, somewhere towards the Saskatchewan, where they could farm . . . [The] idea is that although at present they can make a living at Lac la Ronge, the time is not very far distant when the fishing and hunting resources of the country will not offer them a sufficient means of subsistence, and then they will have nothing else to fall back upon, as there is very little land around Lac la Ronge fit for cultivation. The part of the country where they would like such a reservation made is somewhere north of Sturgeon Lake.<sup>37</sup>

This request for land to the south, in addition to the Band's various existing locations, was repeated at the annuity payments in September 1890 and was supported by the paying officer:

This appears to be a most prudent request for indeed it seems difficult to see that beyond the little plots cultivated, and a Fishing Reserve, the country where they are now will ever be of any use to them, beyond for hunting furs, while they last.<sup>38</sup>

Again, Indian Affairs officials approved of this suggestion, and Surveyor Ponton was instructed to locate land on the Saskatchewan River, near the Sturgeon Lake Reserve.<sup>39</sup> Mr. Ponton duly set out in December 1890 to select a suitable site. He consulted with Archdeacon Mackay and a Mr. Finlayson at the Snake Plain Agency (but not the Chief or any member of the Lac La Ronge Band) and reported that there were 20 square miles or more north of and adjoining the Sturgeon Lake Reserve which had most of the features

36 Indian Commissioner Hayter Reed to Archdeacon J. Mackay, March 1, 1890, NA, RG 10, vol. 3601, file 1754 (ICC Documents, pp. 153-54).

37 Archdeacon J. Mackay to Indian Commissioner Hayter Reed, April 20, 1890 (ICC Documents, pp. 155-56).

38 [J.J. Campbell], Office of the Indian Commissioner, Regina, to Superintendent General of Indian Affairs, October 13, 1890 (ICC Documents, pp. 162-64).

39 Pending approval by the Department of the Interior, Deputy Superintendent Vankoughnet requested that "no promises, however, should be made to the Indians that the land selected will be given to them until it has been ascertained whether it will be available or not": L. Vankoughnet to Indian Commissioner, Regina, NA, RG 10, vol. 3601, file 1754 1/2 (ICC Documents, p. 167).



required for a farming reserve for the Lac La Ronge Indians.<sup>40</sup> Indian Commissioner Reed concurred and reported that “if the Department can get the land described reserved, and when the locations at Lac La Ronge are surveyed, a corresponding deduction from the quantity to which the Band would be otherwise entitled, will be made.”<sup>41</sup> The Department of the Interior, however, found that the whole area under consideration was not available because of an existing timber licence.<sup>42</sup>

Surveyor Ponton proposed a second site immediately east of Snake Plain Reserve 103,<sup>43</sup> but a decision was made that no southern reserves were to be surveyed for the Lac La Ronge or James Roberts Bands, and reserve selection was to be confined to Montreal Lake and Lac La Ronge.<sup>44</sup> The survey of individual reserves at Lac La Ronge was to proceed, but on the basis that those surveys would be delayed because “work of a more pressing nature in connection with Reserves in proximity to Settlers had to be attended to first.”<sup>45</sup>

In the years that followed, there were repeated requests for farm land near the Saskatchewan River – by the William Charles Band at Montreal Lake, by the James Roberts Band at Lac La Ronge, and by missionaries and other people living in the area. The idea of a southern reserve was thus reconsidered. In November 1895, Surveyor Ponton and Commissioner Forget again recommended the lands near the Sturgeon Lake Reserve, which had become available. The Department of the Interior confirmed that, with the exception of some small areas that were licensed as timber berths, the area could be reserved for the Indians. It was not until April 1897, however, that Ponton was given instructions to conduct the survey of these lands:

The area of the Reserve is to be not less than 50 nor more than 60 square miles and the selection of the lands to be embraced should be carefully made, with an eye,

40 A.W. Ponton, Surveyor, to Indian Commissioner, Regina, January 6, 1891 (ICC Documents, pp. 170-71).

41 Indian Commissioner Hayter Reed to Deputy Superintendent General of Indian Affairs, June 4, 1891, NA, RG 10, vol. 7766, file 27107-4, pt. 2 (ICC Documents, p. 174). In the same letter, he recommended that an additional 9 square miles of this area be set aside for the Montreal Lake Band, whose reserve did not contain sufficiently good soil for agriculture, to be exchanged for the same amount of land on their present reserve.

42 A. Sinclair, for the Deputy Superintendent General, to Indian Commissioner, Regina, July 21, 1891, NA, RG 10, vol. 2601, file 1754 1/2.

43 Surveyor A.W. Ponton to Indian Commissioner, Regina, September 19, 1891, NA, RG 10, vol. 3601, file 1754 1/2 (ICC Documents, p. 178).

44 Hayter Reed, Memo, October 17, 1891, NA, RG 10, vol. 3601, file 1754 1/2 (referred to in undated, unsigned memo in ICC Documents, p. 205).

45 J.J. Campbell, report of Annuity Payments, October 1, 1891, NA, RG 10, vol. 3601, file 1754 (ICC Documents, p. 193).

chiefly, to the value of the same for stock-raising, with sufficient timber for building purposes and permanent water supply, and secondarily, for agricultural pursuits.<sup>46</sup>

In addition, the local Indian Agent was told that Mr. Ponton alone would select the reserve location, without input from the Indians at Montreal Lake or Lac La Ronge:

Surveyor Ponton will leave here about the 8th Proximo for the purpose of surveying, near the Sturgeon Lake Reserve, the Reserve for those of the Montreal Lake and Lac La Ronge Indians who may come south to engage in farming and the selection of the necessary lands will be made by him.

If Chief William Charles or any of the Headmen of this band or that of the Lac La Ronge are among the party who came down with Mr. Clarke to put in some crop of the new Reserve, they will probably evince a desire to have some voice in the selection of the lands and it will therefore be as well that you at once inform them that the Reserve will not be the sole property of either Band, but will be held for the joint use of such members of both bands as may decide to leave their present homes and take up stock-raising and farming on the new location and that therefore the Department reserves to itself the right to select the site.<sup>47</sup>

When the Montreal Lake Indians complained that they had not been consulted, Commissioner Forget justified the Department's decision as follows:

as they now have all the land they are entitled to at Montreal Lake, the new Reserve is being set apart for their use and that of the Indians from Lac la Ronge entirely as a voluntary action of the Department and that it therefore reserves the right to select such lands as it considers to be most suited for the purpose which it has in view for the Indians and that in doing this no rights which they are entitled to claim under the Treaty are being disregarded.<sup>48</sup>

Finally, in June and July 1897, Indian Affairs sent Mr. Ponton to survey a reserve for the joint use and benefit of the Lac La Ronge and Montreal Lake

46 Commissioner A.E. Forget to A.W. Ponton, Surveyor, April 29, 1897, NA, RG 10, vol. 3601, file 1754 1/2 (ICC Documents, p. 238).

47 Commissioner A.E. Forget to Indian Agent, Carlton Agency, April 30, 1897, NA, RG 10, vol. 3601, file 1754 1/2 (ICC Documents, p. 239).

48 Commissioner A.E. Forget to Indian Agent, Carlton Agency, June 11, 1897, NA, RG 10, vol. 3601, file 1754 1/2. In a letter to the Secretary of Indian Affairs on December 21, 1897, Commissioner Forget suggested that the Stoney Lake, Big River, and Fish Lake Indians could also be located on this reserve: "all that is required for the above named Indians [is] 20 square miles, leaving therefore, 30 for the Montreal Lake and Lac La Ronge Indians which, in view of the fact that the latter have already been given reservations in accordance with their number at Montreal Lake and Lac la Ronge respectively, should prove ample for such of them as desire to come down and settle near Sturgeon Lake for farming purposes, this being the purpose for which the new reserve was surveyed": NA, RG 10, vol. 7766, file 27107-4, pt. 2 (ICC Documents, p. 254). Mr. Forget was, of course, in error – the Lac La Ronge Indians had not yet had any other land surveyed for them.

Indians in the Sturgeon Lake area. On August 13 of that year, Mr. Ponton submitted his report confirming that 56.5 square miles of land had been surveyed and set aside as Little Red River Indian Reserve 106A.<sup>49</sup> In his report, Ponton described the reserve at Little Red River as

generally undulating, and densely wooded with small poplar from 2 to 6 inches in diameter. Considerable open country occurs along both sides of the Little Red River, which will provide grazing for cattle, and small hay meadows are scattered throughout. The Little Red River . . . furnishes good water, and fish no doubt can be taken at certain seasons.<sup>50</sup>

Seven additional sections of the reserve were described by Mr. Ponton as

admirably adapted for a reserve, Sections 25, 35 and 36 being especially valuable as partially open grazing country and sections 13, 14, 23 and 24 containing magnificent and very accessible hay lands, and also timber, which although covering no large area, is of the finest spruce, is also very accessible.<sup>51</sup>

Neither the survey plan itself nor the related correspondence provides any indication as to the proportion of land in IR 106A that was intended for each of the two bands, and the land was simply set aside for their joint use and benefit. However, according to an earlier 1895 memorandum from the Deputy Superintendent General, the Montreal Lake Band was to get about 9 square miles of land in the new survey, on the condition that the Band would surrender an equal portion from its reserve at Montreal Lake.<sup>52</sup> In 1910, when the question of the distribution next came up, it was this 9-square-mile figure which the Department chose as the Montreal Lake share of IR 106A, leaving 47.5 square miles (or 30,400 acres) for the James Roberts Band.<sup>53</sup>

In his report on the survey, Mr. Ponton indicated that he treated the Montreal Lake and Lac La Ronge Indians as one band for entitlement purposes,

49 A.W. Ponton, Surveyor, to A.E. Forget, Indian Commissioner, August 13, 1897, NA, RG 10, vol. 3568, file 84, pt.1 (ICC Documents, p 250). Little Red River Reserve 106A was confirmed by Order in Council PC 2710 dated January 6, 1900 (ICC Documents, p. 316).

50 A.W. Ponton, Surveyor, to Department of Indian Affairs, Ottawa, April 14, 1899, NA, RG 10, vol. 7766, file 27107-4 (ICC Documents, pp. 296-98). See also Survey sketch (ICC Documents, pp. 241-42), and Ponton to Commissioner A.E. Forget, July 14, 1897, NA, RG 10, vol. 3601, file 1754 1/2 (ICC Documents, pp. 247-49).

51 A.W. Ponton, Surveyor, to Department of Indian Affairs, Ottawa, April 14, 1899, NA, RG 10, vol. 7766, file 27107-4 (ICC Documents, pp. 296-98).

52 Hayter Reed, Deputy Superintendent General, to Superintendent General of Indian Affairs, February 23, 1895, NA, RG 10, vol. 7766, file 27107-4, pt. 2 (ICC Documents, pp. 210-11).

53 David Laird, Indian Commissioner, to Accountant, Department of Indian Affairs, October 14, 1910, NA, RG 10, vol. 7766, file 27107-4, pt. 1 (ICC Documents, pp. 440-43).

using their combined population for the year in which Montreal Lake Reserve 106 was surveyed and subtracting that area to determine the extent of land still to be allotted. As stated previously, however, Montreal Lake and Lac La Ronge were at that time separate and distinct bands, so Ponton erred in calculating entitlement for the combined numbers as he did.

In any event, the population of the Lac La Ronge Band in 1897 was 484,<sup>54</sup> which, according to the reserve provisions of Treaty 6, entitled it to 61,952 acres ( $484 \times 128 = 61,952$ ). There was, therefore, a net shortfall at the date of first survey of some 31,552 acres ( $61,952 - 30,400 = 31,552$ ).

### **Second Survey of Reserves, 1909**

In October 1906, the Chief of the Lac La Ronge Band made another request for reserve land at Lac La Ronge, but no action was taken at that time. In 1908, Indian Agencies Inspector Chisholm wrote to headquarters, explaining the Band's desire for several small reserves:

The fertile land around Lac La Ronge consists of but small areas between ridges of rock, and although they have no present intention of cultivating the land beyond the extent of small garden plots, and are anxious mainly to secure sites for permanent places of abode convenient for the purposes of their present occupation, yet they fully realize that someday the small tracts of arable land in the locality may be much prized and may contribute substantially to their support; and they therefore desire to include as much of it as possible in the area that is to be assigned to them. Apart from these plots of fertile land they wish to secure as much good spruce and tamarac timber as possible . . .<sup>55</sup>

In July 1909, Surveyor J. Lestock Reid was instructed to go immediately to Lac La Ronge "in order that the Indian Reserves may be selected and surveyed as much in advance of the taking up of mining claims as may be possible."<sup>56</sup> He was accompanied throughout the survey by a Band Councillor, David Mirasty, and reported that the Indians seemed "quite satisfied"<sup>57</sup> with the 13 small reserves that he surveyed in the Lac La Ronge area (see

54 According to the treaty annuity paylists of Indian Affairs, 484 members of the James Roberts Band were paid annuities at Lac La Ronge on September 4, 1897. While the Commission relies on this figure as the Band's date-of-first-survey population in 1897, it would be necessary to conduct a thorough research study of treaty annuity paylists to determine the precise date-of-first-survey population, taking into account new adherents, landless transfers, absentees, and double counts.

55 W.J. Chisholm, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, December 27, 1908, NA, RG 10, vol. 7537, file 27,132-1, pt. 1 (ICC Documents, pp. 421-24).

56 Chief Surveyor S. Bray to Minister of Indian Affairs, July 5, 1909, NA, RG 10, vol. 7537, file 27,132-1, pt. 1.

57 J. Lestock Reid, memorandum, February 25, 1910, NA, RG 10, vol. 7537, file 27,132-1, pt. 1 (ICC Documents, p. 434).

table 1). Confirmation of these reserves was delayed because the Department of the Interior wanted to wait until the Dominion Land Survey System was extended to this area. The reserves were finally confirmed in a series of Orders in Council dated January 23, February 3, and April 30, 1930.<sup>58</sup>

### **The Candle Lake Lands, 1925-39<sup>59</sup>**

The long delay between the 1897 and 1909 surveys and the allocation of small additional areas of land in 1935 and 1948 can perhaps be explained by the events that transpired between 1925 and 1939. Although it appears that Indian Affairs expected to settle the Band's outstanding entitlement by an allocation of reserve lands in the Candle Lake area approximately 70 miles south of Lac La Ronge, the Band's entitlement was not satisfied because of a dispute between Canada and Saskatchewan over which of the two governments owned and controlled the lands in question.

In February 1925, growing interest in the mineral potential of lands in the vicinity of Lac La Ronge prompted Saskatchewan Premier Charles Dunning to write to the federal Minister of the Interior, Charles Stewart (who also served as the Superintendent General of Indian Affairs), to request that the federal government delay the survey of Indian reserves around Lac La Ronge until a geological survey of the area could be done. According to Premier Dunning, the Lac La Ronge Band had selected lands in the area only because it wished to prevent mineral development in that vicinity. He suggested that lands with mineral potential should not be set aside as reserve for the Lac La Ronge Band because "the placing of [such lands] within the borders of the Reserves would hamper development very materially."<sup>60</sup> There is no record of a response from the Minister of the Interior, but subsequent events revealed that the economic potential of mineral claims in the Lac La Ronge area served to impede finalization of the Band's outstanding land entitlement.

<sup>58</sup> See ICC Documents, pp. 595-601 and 623-26.

<sup>59</sup> The Lac La Ronge Band's claim to the Candle Lake lands raises questions about whether the federal government created a reserve interest in favour of the Band at Candle Lake or whether these lands had been transferred to provincial administration and control under the *Natural Resources Transfer Agreement*, thereby requiring the consent of the provincial government. These issues will be addressed in the context of the Band's legal action against the governments of Canada and Saskatchewan. It was agreed by the parties at the outset of this inquiry that these issues would not be addressed in this report.

<sup>60</sup> Chas A. Dunning, Premier of Saskatchewan, Regina, to Chas Stewart, Minister of the Interior, Ottawa, February 18, 1925, NA, RG 10, vol. 7537, file 27132-1 (ICC Documents, pp. 521-22).

TABLE 1

## Indian Reserves in the Lac La Ronge Area

Reserve Name	Reserve Number	Acres
Lac La Ronge	IR 156	1,586.80
Potato River	IR 156A	1,011.60
Kitsakie	IR 156B	204.34
Sucker River	IR 156C	55.40
Stanley	IR 157	621.00
Stanley	IR 157A	9.40
Old Fort	IR 157B	13.40
Four Portages	IR 157C	5.00
Fox Point	IR 157D	140.20
Fox Point	IR 157E	10.30
Little Hills	IR 158	1,278.00
Little Hills	IR 158A	94.65
Little Hills	IR 158B	324.00
<b>Total</b>		<b>5,354.09</b>

Nearly one year later, in 1926, Commissioner Graham reminded Deputy Superintendent General Scott that lands still had to be set aside for the Lac La Ronge and Montreal Lake Bands. Graham advised that the Bands were

becoming anxious to know if any provision has been made for providing this land for them. As the country is settling up, the request is made that the amount of land due these bands be added to the New Reserve [i.e., Little Red River Reserve 106A] where they claim there is still land open. They state that the reserves they have at Montreal Lake, Lac La Ronge and Stanley are not at all adopted to make a living from, and when they are deprived of hunting as a means of support, these people will have to take to farming as a means of making a livelihood.<sup>61</sup>

Over the next couple of years, Graham continued to push to have the Little Red River Reserve enlarged to fulfil the entitlement of the Lac La Ronge and Montreal Lake Bands. At the same time, other federal officials were advocating that Montreal Lake Reserve 106, which was very close to the proposed Prince Albert National Park, be surrendered in exchange for lands adjacent

<sup>61</sup> W.M. Graham, Indian Commissioner, Regina, to D.C. Scott, Deputy Superintendent General of Indian Affairs, Ottawa, December 2, 1926, NA, RG 10, vol. 7766, file 27107-4, pt. 1 (ICC Documents, pp. 532-33).



to Little Red River Reserve 106A at Sturgeon Lake, just a short distance west of Candle Lake.<sup>62</sup>

In 1930, the *Natural Resources Transfer Agreement* (NRTA) further complicated matters. Until that year, the federal government owned the beneficial interest in lands and resources in Alberta, Saskatchewan, and Manitoba, and enjoyed full authority to set aside reserves for Indians out of federal Crown lands. However, in order to place the three Prairie provinces in the same position as the original confederating provinces,<sup>63</sup> the federal government entered into the NRTA with the three provinces to transfer ownership and control over dominion lands to those provinces, subject to certain existing reservations and interests in land in favour of the federal government and third parties.<sup>64</sup>

To ensure that Canada would be able to fulfil its treaty obligations after the transfer of federal Crown lands to Saskatchewan, section 10 of the NRTA set out the respective obligations of the two governments vis-à-vis Indian reserves:

10. All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and *the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof. . . .*<sup>65</sup>

62 On February 8, 1928, the Commissioner for Canadian National Parks Branch wrote to Duncan Campbell Scott, Deputy Superintendent General for Indian Affairs: "A suggestion which has been made is to set aside any areas available contiguous to the Little Red River Reserve and to add them to that Reserve and in addition to obtain a reserve on the shores of Candle Lake. This suggestion appears to me to be a good one as those Indians who wish to farm could do so on the Little Red River Reserve and those Indians who wish to live in an area providing good hunting, trapping and fishing could take up their abode on the Candle Lake Reserve. I understand that Candle Lake provides excellent fishing and it is situated in one of the best hunting and trapping districts in Northern Saskatchewan." J.B. Harkin, Commissioner, Canadian National Parks Branch, Department of the Interior, Ottawa, to D.C. Scott, Deputy Superintendent General of Indian Affairs, February 8, 1928 (ICC Documents, pp. 549-50).

63 Section 109 of the *Constitution Act, 1867*, states that the provinces of Ontario, Quebec, Nova Scotia, and New Brunswick have beneficial ownership of "All Lands, Mines, Minerals, and Royalties" situated within their respective boundaries.

64 *Natural Resources Transfer Agreement*, March 20, 1930 [Ottawa: King's Printer, 1930] (ICC Documents, p. 607).

65 *Natural Resources Transfer Agreement*, March 20, 1930 (ICC Documents, p. 607). Emphasis added.



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Although the NRTA described the process for selecting and setting aside reserve lands out of provincial Crown lands, the agreements did not attempt to clarify the ambiguities in the treaties as to the manner in which a band's entitlement would be calculated. In fact, when the federal and provincial governments were negotiating the wording of section 10 of the NRTA in 1929, the Superintendent General of Indian Affairs wrote to the Deputy Minister of Justice to clarify the Department's position on the fulfilment of treaty land entitlement:

I note the request of the Province of Manitoba to have the Agreement stipulate some limitation in respect of the areas of land to be selected in fulfilment of Treaty obligations with the Indians. The various treaties provide for so many acres per capita and the practice of the Department has been to take the census of the band at the time the survey of the required acreage is made. The acreage as hereinafter stated will be varied at the time of survey to meet the decrease or increase of the membership at such time. I do not think accordingly that it would be proper to include any limitation of acres in the Agreement. . . .<sup>66</sup>

Before the NRTA came into effect, Indian Affairs officials worked to ensure that reserves surveyed and set aside some years previously were confirmed by federal Orders in Council, and that lands currently under consideration for reserves were formally identified. For example, the 13 small reserves surveyed for the Lac La Ronge Band in 1909 were confirmed in 1929 and the early months of 1930. With specific regard to the Candle Lake area, Indian Affairs took steps to protect a block of land at Candle Lake to satisfy the outstanding entitlements of the Lac La Ronge and Montreal Lake Bands. On March 30, 1928, the Secretary for Indian Affairs, A.F. MacKenzie, requested that the federal Department of the Interior set aside a specific block of lands in the Candle Lake area to be "reserved from sale or settlement with a view to having them constituted as an addition to the Montreal Lake Indian reserve No. 106A."<sup>67</sup> When the Department of the Interior did not respond to this request, MacKenzie wrote to the Commissioner of Dominion Lands at the Department of the Interior on January 9, 1930, to reiterate his request to

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<sup>66</sup> Deputy Superintendent General of Indian Affairs, Ottawa, to Deputy Minister of Justice, Ottawa, September 4, 1929, NA, RG 10, vol. 6820, file 492-4-2 (ICC Documents, p. 575).

<sup>67</sup> A.F. MacKenzie for the Assistant Deputy and Secretary of Indian Affairs, Ottawa, to Secretary, Department of the Interior, March 20, 1928 (ICC Documents, p. 558).

have “all those lands not already disposed of” within certain identified townships withdrawn from the operation of the *Dominion Lands Act*.<sup>68</sup>

On March 8, 1930 – the same day on which the governments of Canada and Saskatchewan formally executed the NRTA – the Commissioner for the Dominion Lands Branch confirmed that a “reservation” had been placed in favour of the Department of Indian Affairs with respect to the various townships and sections requested by Indian Affairs in the Candle Lake area.<sup>69</sup> The term “reservation” was not intended to mean that an Indian reserve had been created, but, rather, that the lands were temporarily reserved in favour of Indian Affairs to use as a land bank from which Indian reserves could later be set aside by the federal government without the concurrence of the province under section 10 of the NRTA. The total acreage in the selected townships was approximately 70,000 acres.<sup>70</sup>

Two months later, on May 12, 1930, the Department of the Interior advised Indian Affairs that it was prepared to “proceed with the confirmation by Order in Council of the Candle Lake Indian Reserve,” but noted that there were several mineral claims in the area that would have to be dealt with first.<sup>71</sup> Nearly a year later, on January 4, 1931, Commissioner Graham wrote to headquarters to determine whether the Department had taken steps to ensure that the lands were secured as reserve lands because “[t]he matter is one of great importance and, in my opinion, the Department should press for a settlement of the question at as early a date as possible.”<sup>72</sup> In light of the interest taken in these lands by non-Indians, who had requested that the lands be made available for homesteading and cottage purposes,<sup>73</sup> the Department of the Interior asked Indian Affairs to advise whether the lands

68 A.F. MacKenzie, Acting Assistant Deputy and Secretary of Indian Affairs, to Commissioner of Dominion Lands, Department of the Interior, January 9, 1930 (ICC Documents, p. 592). The lands requested by Indian Affairs were identified as all the lands within Township 55, Ranges 22, 23, and 24, Township 56, Ranges 23 and 24, the south ½ of Township 57, Ranges 22 and 23, and unsurveyed Township 56, Range 22, all west of the 2nd meridian.

69 J.W. Martin, Commissioner of Dominion Lands, Department of the Interior, Ottawa, to Agent, Dominion Lands Branch, Prince Albert, Saskatchewan, March 20, 1930 (ICC Documents, p. 621), and H.B. Perrin, Director, Dominion Lands Branch, Ottawa, to W.S. Gidden, Director, Land Patents Branch, Ottawa, March 20, 1930 (ICC Documents, p. 622).

70 W. Murison, Inspector of Indian Agencies, Regina, to Secretary, Department of Indian Affairs, Ottawa, May 2, 1936 (ICC Documents, p. 720), and A.F. MacKenzie, Secretary, Department of Indian Affairs, to W. Murison, Inspector of Indian Agencies, Regina, May 19, 1936 (ICC Documents, p. 721).

71 J.S. Elliot, Land Patents Branch, Ottawa, to Mr. Caldwell, Department of the Interior, Ottawa, May 12, 1930 (ICC Documents, p. 628), and W.S. Gidden, Director, Lands Patent Branch, Ottawa, to J.W. Martin, Commissioner of Dominion Lands, Ottawa, May 13, 1930 (ICC Documents, p. 629).

72 W.M. Graham, Indian Commissioner, Regina, to Secretary, Department of Indian Affairs, Ottawa, January 4, 1931, NA, RG 10, vol. 7768, file 27107-12 (ICC Documents, p. 644).

73 J.W. Gale, Barrister, Melfort, Saskatchewan, to Deputy Minister of Indian Affairs, Ottawa, January 19, 1931 (ICC Documents, p. 646), and Jesse Mulberry, Stewart Valley, Saskatchewan, to H.E. Hume, Deputy Commissioner of Dominion Lands, Regina, July 28, 1931 (ICC Documents, p. 653).

were still required as reserve lands.<sup>74</sup> In August of that same year, Commissioner Graham again urged action:

there is a strong desire on the part of the James Roberts Band at Lac La Ronge, and the Amos Charles Band at Stanley to have their quota of land set aside at once, as they feel now that the unoccupied lands have been handed over to the province they will be rapidly acquired, and their chances of getting good land are diminishing every year, which no doubt is absolutely right. . . .<sup>75</sup>

On August 31, 1931, the Secretary of Indian Affairs advised Commissioner Graham that the Department hoped to make a final selection of the reserves that year, and he instructed a surveyor to inspect the Candle Lake lands with one of the principals or headmen from the Lac La Ronge Band to determine which area would be most appropriate for reserve purposes.<sup>76</sup> Inspector W. Murison originally planned to accompany a surveyor to Candle Lake to inspect the lands that were to be set aside, but it was decided that he would proceed on his own, as it was unlikely that there would be sufficient time to survey the reserves in that year.<sup>77</sup> According to the report on Inspector Murison's 1931 trip to Candle Lake, two headmen of the James Roberts Band, John Bell and John Morin, accompanied him and assisted in the selection of an area comprising 33,401.2 acres, which was then marked and identified on township plans.<sup>78</sup> However, although the lands had been selected by the Band, difficulties were subsequently encountered in setting aside the area

74 H.E. Hume, Deputy Commissioner of Dominion Lands, Ottawa, to Secretary, Department of Indian Affairs, Ottawa, August 25, 1931 (ICC Documents, p. 657).

75 W.M. Graham, Indian Commissioner, Regina, to Secretary, Department of Indian Affairs, Ottawa, August 28, 1931 (ICC Documents, p. 658).

76 A.F. MacKenzie, Secretary, Department of Indian Affairs, Ottawa, to Commissioner of Dominion Lands, Ottawa, August 31, 1931 (ICC Documents, p. 660), and MacKenzie to H.W. Fairchild, Surveyor, Department of Indian Affairs, Edmonton, August 31, 1931, NA, RG 10, vol. 7766, file 17107-12 (ICC Documents, p. 661).

77 A.F. MacKenzie, Secretary, Department of Indian Affairs, Ottawa, to W.M. Graham, Indian Commissioner, Regina, September 14, 1931 (ICC Documents, p. 664); MacKenzie to Graham, September 19, 1931, NA, RG 10, vol. 7768, file 27107-12 (ICC Documents, p. 665). During the 1931 annuity payments to the band, Inspector Murison reported that the James Roberts and Amos Charles Bands wanted their lands to be set aside without further delay because they "appear to realize that it will only be a question of time until the game and fur will disappear, and that the future generation will have to depend largely upon cultivating the land and raising stock as a means of livelihood. The reason given for asking for additional land near Stanley was that there are some of their people who would not want to move away from their old home and who would prefer to make their living by fishing and raising garden stuff. They would like to have provision made so that this would be possible." W. Murison to W.M. Graham, October 1, 1931, DIAND file 672/30-12, vol. 1 (ICC Documents, p. 675).

78 W.M. Graham, Indian Commissioner, Regina, to Secretary, Department of Indian Affairs, Ottawa, November 4, 1931 (ICC Documents, p. 680). In his report of the same date, Inspector Murison indicated that the lands were selected bearing in mind those areas subject to timber berths and homesteading claims made prior to the lands being reserved by the Department of Indian Affairs. Murison to Graham, November 4, 1931, NA, RG 10, vol. 7768, file 27107-12 (ICC Documents, p. 682).

as a reserve because of Saskatchewan's desire to make the Candle Lake area available for non-Indian settlement.<sup>79</sup>

In the face of resistance from the province, Duncan Campbell Scott wrote to the Saskatchewan Deputy Minister of Natural Resources on November 20, 1931:

The Indians of the James Roberts and Amos Charles bands are still entitled under the terms of Treaty to receive reserve lands to the extent of approximately 80 sq. miles (51,200 acres). As you are aware the Department has been selecting a considerable portion of this area in the vicinity of Candle lake, where it is desired to reserve for them an area of approximately 70 sq. miles (44,800 acres), leaving the remaining area due them to be selected in the Lac la Ronge district. . . .

. . . this Department holds that it is entitled to select any lands within the area temporarily reserved not previously alienated, in order to satisfy the conditions of Treaty so provided for in Clause 10 of the Agreement between the Dominion of Canada and the Province of Saskatchewan on the transfer of the natural resources, inasmuch as this selection was arranged with the Department of the Interior prior to the date of the transfer of the natural resources and can be held to be an arrangement within the meaning and intent of Clause 2 of the Agreement.<sup>80</sup>

Canada contended that these lands remained under federal administration and control because the reservation with the Department of the Interior had excepted them from transfer under the NRTA. The province of Saskatchewan, on the other hand, argued that these lands were provincial Crown lands and that the province's concurrence was a prerequisite to any reserve land selection under section 10 of the NRTA.<sup>81</sup>

Indian Affairs referred the matter to the Department of Justice for legal advice in 1933. The Department of Justice's opinion was to the effect that these lands were "earmarked" by Indian Affairs as federal lands, with the result that they had not been transferred to provincial jurisdiction.<sup>82</sup> On Feb-

79 W. Murison, Inspector of Indian Agencies, Regina, to Secretary, Department of Indian Affairs, Ottawa, May 2, 1936 (ICC Documents, p. 720).

80 D.C. Scott, Deputy Superintendent General of Indian Affairs, Ottawa, to J. Barnett, Deputy Minister of Natural Resources, Province of Saskatchewan, Regina, November 20, 1931, NA, RG 10, vol. 7768, file 17107-12 (ICC Documents, pp. 690-91).

81 Letter from Saskatchewan Minister of Natural Resources to T.G. Murphy, Superintendent General for Indian Affairs, January 9, 1933, states that "[n]o selection of this particular land was made by the Indian Department prior to the Transfer of the Resources, and an inspector from the Indian Department was only sent in to look over the land at some considerable time after the Transfer; so that these lands can only come within the concluding part of Paragraph 10 of the Transfer Agreement, and the Province must therefore consider its own interests before the Provincial Minister in charge could possibly agree with the further transfer being made" (ICC Documents, p. 707).

82 W.S. Edwards, Deputy Minister of Justice, Ottawa, to Deputy Superintendent General of Indian Affairs, Ottawa, September 8, 1933 (ICC Documents, pp. 710-12).

ruary 25, 1938, the Department of Justice provided a further opinion on whether the provinces of Saskatchewan, Manitoba, and Alberta were “obligated to carry out the policy of setting apart Indian reserves which was carried out by the Dominion Government” prior to the NRTA.<sup>83</sup> The opinion expressed was that, under section 10 of the NRTA, Canada had the right to determine the amount of land owed to an Indian band, but that there must be “complete accord” between Canada and the province over the selection of lands.<sup>84</sup>

The issue was debated between federal and provincial politicians and officials for several years without resolution. Finally, on November 24, 1938, T.C. Davis, the Attorney General for Saskatchewan, wrote to the federal Minister of Mines and Resources, Thomas A. Crerar (who also served as the Superintendent General of Indian Affairs), requesting that Canada abandon its claim to the Candle Lake lands. Davis’s letter indicates that Saskatchewan was opposed to setting aside reserves at Candle Lake for northern bands and suggested that “compensating factors” could be provided for the bands if Canada was prepared to withdraw its claim to these lands:

The land would belong to a tribe of Indians at Lac la Ronge and Ile a la Crosse. These Indians are trappers, hunters and fishermen, and are not farmers, and, in my opinion, cannot be made farmers under any conditions. They are infinitely better where they are.

The land would be useless to them, as they certainly never will move upon it, and they can merely hold it for speculative purposes, for the purpose of deriving some revenue from it by sale, or otherwise.

The land should be made available forthwith for white settlement, and I would think that these Indians should be given reservations up in their own country, instead of hooking them onto the Agricultural section of the Province.

*Some compensating factors can be provided for them, where they live.*

While I am in Ottawa, I would like to discuss this problem with you, and I am merely writing you this note, which will reach you before I get there, so that you may be advised beforehand that I would like to discuss this matter with you.

*It would be much better to give them exclusive trapping and hunting rights in some area in the North, than to bother with this.*

They already have forty-two square miles of fair Agricultural land tied up North of Prince Albert, which is doing them absolutely no good, as it is entirely vacant, and it is

<sup>83</sup> Dr. Harold McGill, Director, Indian Affairs Branch, Department of Mines and Resources, Ottawa, to K.R. Daly, Senior Solicitor, Legal Division, Department of Mines and Resources, Ottawa, February 18, 1938, NA, RG 10, vol. 7748, file 27001 (ICC Documents, p. 752).

<sup>84</sup> D.W. Cory, Solicitor, Legal Division, Department of Mines and Resources, Ottawa, to Dr. Harold McGill, Director, Indian Affairs Branch, Ottawa, February 25, 1938 (ICC Documents, p. 754).

only preventing a lot of people who need homes, from making them thereon, and providing themselves with a means of livelihood.<sup>85</sup>

Subsequently, Dr. Harold McGill, Director of the Indian Affairs Branch, proposed through internal departmental correspondence on April 20, 1939, that Indian Affairs withdraw its claim to the lands because the Lac La Ronge Band was not inclined to pursue agriculture as a means of livelihood. In any event, he wrote, there was sufficient agricultural land at Little Red River Reserve 106A. McGill was also of the opinion that, because no formal reserve selection had been made prior to the execution of the NRTA, the Candle Lake lands had been transferred to provincial ownership and control in 1930. Based on his interpretation of the NRTA – which ran counter to advice received from the federal Justice Department – McGill proposed withdrawal of the federal claim at Candle Lake on the condition that “the claims of these bands to preferential treatment in the allocation of hunting and trapping rights in the north be recognized by the Province even though in area they might greatly exceed the acreage limits fixed by the Treaties.”<sup>86</sup>

Superintendent General Crerar accepted this advice and, on May 6, 1939, wrote to W.F. Kerr, the Saskatchewan Minister of Natural Resources, advising him of Canada’s decision in the following terms:

May I advise you therefore that a conclusion has been reached to withdraw the claim we have made to additional land at Candle Lake, concerning which you protested, and to leave your Government free to make the land available for white settlement as suggested in Mr. Davis’ letter above referred to.

*In doing so however, I rely on the understanding as expressed by Mr. Davis that “compensating factors can be provided the Indians where they live.” It is suggested that this understanding might be implemented by your granting our request for lands for their immediate use as outlined in my letter to you under date of April 27th. Also that at some future time when the question of selection of exclusive hunting and trapping grounds comes up for consideration that you be generous enough to ignore the acreage limits set down in the treaties.*

You are aware that under the treaties the limitation of 640 acres to each family of five is fixed for “farming lands.” While this might be adequate for the type of land contemplated by the treaties I think you will agree that it is not a proper yardstick to use in measuring hunting and trapping areas, which occupations by their nature demand a wider range.

85 T.C. Davis, Attorney General, Province of Saskatchewan, Regina, to T.A. Crerar, Minister of Mines and Resources, Ottawa, November 24, 1938 (ICC Documents, pp. 755-56). Emphasis added.

86 Dr. Harold McGill, Director, Indian Affairs Branch, Ottawa, to Deputy Minister, Indian Affairs Branch, April 20, 1939 (ICC Documents, p. 766).

These matters must of necessity be left for future consideration and negotiation, and in the meantime it gives me pleasure to release the Candle Lake lands to you free from the claims formerly urged by this Department on behalf of its Indian wards.<sup>87</sup>

Based on its perception that Saskatchewan would honour the understanding contained in these communications, the Indian Affairs Branch withdrew its claim to Candle Lake, and did so apparently without consulting the James Roberts or Amos Charles Bands. Whether and to what extent that withdrawal was legally effective to defeat the Lac La Ronge Band's claim to these lands is now the subject of separate legal proceedings brought by the Band against the governments of Saskatchewan and Canada.

### **Subsequent Reserve Surveys, 1935-48**

In 1935, 1595.6 additional acres were added to Little Red River IR 106A for the joint use and benefit of the Montreal Lake and Lac La Ronge Bands. In 1948, Little Red River IR 106A was officially divided into two separate reserves for the Bands. The Lac La Ronge Band's portion of the old reserve was designated as Little Red River IR 106C and comprised a total area of 32,007.9 acres.<sup>88</sup> As a result of these actions, the Lac La Ronge Band received 1607.9 acres of reserve in 1935 in addition to the 30,400 acres set aside for the Band during the first survey in 1897. In 1948, an additional 6400 acres were set aside as Little Red River IR 106D for the Lac La Ronge Band.<sup>89</sup>

Thus, by the end of 1948, the various surveys had resulted in a total allocation to the Lac La Ronge Band of approximately 43,762 acres, or 68.4 square miles, of reserve land. Table 2 provides a summary of the reserve allocations from 1897 to 1948 and the estimated population of the Band at each successive survey of land. These figures are based on the information placed before the Commission and can be confirmed by reference to the original documentation. As noted previously, the Band received 30,400 acres during the first survey in 1897 – enough land for 237 band members.<sup>90</sup> Based on departmental records, the Band had 484 members at that time,

87 T.A. Crerar, Minister of Mines and Resources, Ottawa, to W.F. Kerr, Minister of Natural Resources, Province of Saskatchewan, Regina, May 6, 1939 (ICC Documents, pp. 772-73). Emphasis added.

88 Order in Council PC 1297, March 31, 1948 (ICC Documents, p. 843); W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Ottawa, to Saskatchewan Regional Supervisor, Indian Affairs Branch, Regina, May 17, 1961 (ICC Documents, p. 1134).

89 See W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, to Saskatchewan Regional Supervisor, Regina, May 17, 1961 (ICC Documents, pp. 1134-36): "By Provincial Executive Order No. 2144/48, dated December 3, 1948, an additional area of 6,400 acres was set aside for the Lac La Ronge Indians. This reserve was confirmed by P.C. 1419, dated March 21, 1950, and designated Little Red River Indian Reserve No. 106D."

90  $30,400 \div 128 \text{ acres} = 237.5$ .

which would have entitled it to 61,952 acres (484 x 128 acres), or 96.8 square miles.

**TABLE 2**  
**Lac La Ronge Band Reserve Allocations, 1897-1948**

<b>Year of Survey</b>	<b>Band Population in Year of Survey</b>	<b>Acres Received in Year of Survey</b>	<b>Cumulative Acres Surveyed as Reserve</b>
1897	484	30,400.00	30,400.00
1909	526	5,354.09	35,754.09
1935	741	1,607.90	37,361.99
1948	969	6,400.00	43,761.99

By 1948, Indian Affairs acknowledged that the Lac La Ronge Band was still entitled to additional reserve lands, although the precise amount of land to which the Band was entitled remained a matter of controversy. The most recent calculations by Indian Affairs had been made in 1939, based on 1938 figures that showed a band population of 758. Taking into account the lands already allocated, it was then estimated that the Lac La Ronge Band was still owed approximately 60,000 additional acres.<sup>91</sup>

On numerous occasions between 1948 and 1960, the Band asked, without success, to have these lands set apart. There is no question that Indian Affairs officials were aware of the diminishing land base in the area and therefore of the urgency of satisfying the Band's outstanding entitlement. In 1951, for instance, Superintendent E.S. Jones reported as follows:

You will recall that the same request was made several years ago. At that time part at least of the territory they are entitled to was chosen by the Indians and inspected by myself. However, the matter was not considered urgent by the Department and was accordingly left in abeyance.

In view of developments in the La Ronge and Stanley areas over the past three years, this decision was indeed regrettable. For instance one area selected by the Indians at Stanley is now worked by the La Ronge Uranium Company, a Toronto

<sup>91</sup> In April 1939, the Director of Indian Affairs stated that the 1938 populations for the James Roberts and Amos Charles Bands were 475 and 283, respectively, for a combined population of 758 (Dr. Harold McGill to Deputy Minister of Indian Affairs, April 15, 1939 [ICC Documents, pp. 764-65]). In 1942, the Superintendent of Reserves and Trusts used these population figures to estimate that the James Roberts Band was entitled to 40,125 acres, and the Amos Charles Band was entitled to 19,861 acres, for a combined total acreage owed to the Lac La Ronge Band of 58,986 acres (D.J. Allan to R.S. Davis, Indian Agent, Leask, Saskatchewan, August 10, 1942 [ICC Documents, p. 808]).



Syndicate, and is proving quite valuable. As a matter of fact, two-thirds of the territory selected by the Indians at that time has been staked and is now in process of development.

Unfortunately there is very little territory now available to the Indians in those areas, but, unless immediate action is taken, there will be nothing left this side of the Barren lands.<sup>92</sup>

In later correspondence, Superintendent Jones noted that “[t]he Indians concerned are entitled to an additional 60,000 acres under Treaty rights, as stated in previous correspondence from the Department in Ottawa,”<sup>93</sup> and that, at his request, the Bands were then selecting the additional lands which they wished included as reserves. The province, however, was reluctant to agree to transfer the lands requested by the Band, since the selected locations interfered with the province’s future mineral, hydroelectric, and tourism plans.<sup>94</sup> Nonetheless, the province was apparently aware of its obligations in this regard. In July 1954, R.G. Young, the Director of Conservation for the Province of Saskatchewan, stated in correspondence to J.W. Churchman, provincial Deputy Minister of Natural Resources, that, under the terms of the *NRTA*, Saskatchewan would have “to acquiesce to their request for more land [since] it is obvious that Saskatchewan is obliged to provide land from time to time to the Indians as their number increases.”<sup>95</sup> Saskatchewan preferred, however, that the federal Indian Affairs Branch select other locations.

### **Lac La Ronge Band Council Resolution, 1960-64**

Eventually, in 1960, the Band’s frustration prompted it to seek legal counsel. On December 7, 1960, the Band’s lawyer, R.M. Hall, wrote to N.J. McLeod, the Regional Supervisor of Indian Affairs, requesting further information regarding the Band’s outstanding reserve land entitlement. Mr. Hall noted that the Band was under the impression that it was entitled to approximately 60,000 acres of land under treaty, of which only 6000 acres had been allocated.<sup>96</sup> Mr. McLeod responded two days later to say that Mr. Hall’s letter had

92 E.S. Jones, Superintendent, Carlton Agency, Indian Affairs Branch, Prince Albert, Saskatchewan, to J.P.B. Ostrander, Regional Supervisor of Indian Agencies, Regina, August 15, 1951 (ICC Documents, p. 885).

93 E.S. Jones, Superintendent, Carlton Agency, Indian Affairs Branch, Prince Albert, Saskatchewan, to J.T. Warden, Acting Regional Supervisor of Indian Agencies, Regina, September 18, 1953 (ICC Documents, pp. 904-05).

94 R.G. Young, Director of Conservation, Department of Natural Resources, Province of Saskatchewan, to J.W. Churchman, Deputy Minister of Natural Resources, Province of Saskatchewan, Regina, July 15, 1954 (ICC Documents, pp. 941-43).

95 R.G. Young, Director of Conservation, Department of Natural Resources, Province of Saskatchewan, to J.W. Churchman, Deputy Minister of Natural Resources, Province of Saskatchewan, Regina, July 15, 1954 (ICC Documents, p. 941).

96 R.M. Hall, Barrister, Prince Albert, Saskatchewan, to N.J. McLeod, Saskatchewan Regional Supervisor, Regina, December 7, 1960, DIAND file 676/30-12-t56, vol. 2 (ICC Documents, p. 1105).

been forwarded to Ottawa with a request "that a search of the records be made to ascertain, according to the treaty, what additional lands the James Roberts Band are entitled to."<sup>97</sup>

A meeting between Indian Affairs and the Band was held on December 28, 1960, to discuss this issue. The minutes indicate that there was considerable discussion about proposed land selections, but there is no reference to the amount of land outstanding or the basis on which the Band's entitlement would be determined.<sup>98</sup> The Band's lawyer did not attend this meeting, and, aside from the two letters referred to above, there is no record of any further correspondence or discussions with the Band's legal counsel.

By 1961, the Department was preparing to enter into negotiations with the province to settle the outstanding entitlements of five "northern bands" — Portage La Loche, Fond du Lac, Stoney Rapids, Lac La Hache, and Lac La Ronge — and requested instructions from Ottawa as to which date to use for determining population. Given the uncertainty within Indian Affairs about the proper date for determining land entitlement, W.C. Bethune, the Department's Superintendent of Reserves and Trusts, wrote to the Regional Supervisor for Saskatchewan on February 13, 1961, with directions on how negotiations with the province should proceed:

... I believe we should take the position that the reserve entitlement of Indians should be based on the population of the bands at the time reserves are set apart for them. As far as I know, this attitude has not been challenged by any province, and there is some justification for it. A problem is created when bands . . . received a portion of their reserve entitlement in past years, but it is thought that this situation can be worked out on a reasonable basis. The Portage La Loche, Fond du Lac, Stoney Rapids and Lac La Hache Bands have no reserves so this situation does not arise in those cases. The Lac La Ronge band on the other hand has had some reserves set apart for them, and I think that it would be just as well to clear up some of the other cases before we deal with the Lac La Ronge Band.

If the Deputy Minister of Natural Resources [for Saskatchewan] agrees to the setting aside of 16,640 acres for the La Loche Band, then we can assume that the Province is prepared to set aside reserves based on the current population.<sup>99</sup>

97 N.J. McLeod, Saskatchewan Regional Supervisor, Regina, to R.M. Hall, Barrister, Prince Albert, Saskatchewan, December 9, 1960 (ICC Documents, pp. 1106-07).

98 A.N. Wark, Superintendent, Carlton Agency, to Indian Affairs Branch, Ottawa, December 28, 1960 (ICC Documents, pp. 1109-11).

99 W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Ottawa, to Saskatchewan Regional Supervisor, Indian Affairs Branch, Regina, February 13, 1961 (ICC Documents, p. 1127).

Just over a month later, on March 28, 1961, J.W. Churchman, the Saskatchewan Deputy Minister for Natural Resources, wrote to Indian Affairs to request that no further action be taken until that department had developed a uniform treaty land entitlement policy. He also requested the Department's views on "whether the population figure to be taken is the population at the date the treaty was signed or the present time."<sup>100</sup> On April 12, 1961, George Davidson, the Deputy Minister for Indian Affairs, responded that

where bands have no reserves, the acreage to which they are entitled must be calculated on the basis of population at the time reserves are being selected and set apart. This method is acceptable to the Provinces of Alberta and British Columbia and has been used in both areas in very recent years.<sup>101</sup>

Thus, while confirming the use of current population for bands without reserves, Mr. Davidson offered no guidance on how the Department proposed to calculate the outstanding entitlements of multiple survey bands like Lac La Ronge.

In the following month, Superintendent Bethune wrote to the Regional Supervisor for Saskatchewan reiterating his earlier comments supporting the current population formula for bands with no reserves. With respect to multiple survey bands, however, he observed that "the problem becomes somewhat more difficult, and requires a reasonable attitude on the part of the Indians, ourselves and the provincial authorities."<sup>102</sup> In the same letter, Mr. Bethune provided a complete summary of the various surveys and allotments set aside for the Lac La Ronge Band up to that date and outlined a proposed method of calculating the Lac La Ronge entitlement as a percentage of the Band's population at the time of each successive survey:

The Lac La Ronge band first received a reserve in 1897 and, based on the population of the Band at that time, it represented 51.65% of their total entitlement. In 1909, additional lands were set aside for their use and, based on the 1909 population, the additional lands represented 7.95% of the total they would have been entitled to at that time. In 1948, additional land was set aside for their use, representing 5.15% of what their full entitlement would have been based on the 1948 population. It might, on this basis, be argued that the Lac La Ronge Band has received 64.76% of their total

100 J.W. Churchman, Deputy Minister of Natural Resources, Province of Saskatchewan, Regina, to George F. Davidson, Deputy Minister of Citizenship and Immigration, Ottawa, March 28, 1961 (ICC Documents, p. 1131).

101 George F. Davidson, Deputy Minister of Citizenship and Immigration, to J.W. Churchman, Deputy Minister of Natural Resources, Province of Saskatchewan, Regina, April 12, 1961 (ICC Documents, p. 1132).

102 W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Ottawa, to Saskatchewan Regional Supervisor, Indian Affairs Branch, Regina, May 17, 1961 (ICC Documents, pp. 1134-36).

reserve entitlement. The balance, 35.24% based on the 1961 population of 1,404, would amount to 63,330 acres.<sup>103</sup>

This method of calculating treaty land entitlement has come to be known as the "Bethune formula" or the "compromise formula." The evidence before us confirms that there was no precedent for this unique formula and that it had not been used by Indian Affairs on any other occasion to settle the outstanding entitlement of a multiple survey band. Bethune cautioned Indian Affairs to approach Saskatchewan with the compromise formula before consulting with the Band or its legal counsel.<sup>104</sup>

There is no further correspondence on the Lac La Ronge entitlement until March 6, 1962, when Indian Affairs officials prepared calculations for the respective entitlements of the five northern bands whose treaty land entitlements remained outstanding. Calculations were based on the 1961 band populations to determine the land quantum owed to the four bands without reserves. With respect to Lac La Ronge, however, the Saskatchewan Regional Supervisor expressed doubts about how the Band's entitlement should be calculated and asked that, if it was intended to pursue the compromise formula with Saskatchewan and request an additional 63,330 acres, "this submission to the provincial authorities should originate from your office rather than at the regional level."<sup>105</sup>

Although there is no record of this particular submission having been sent to the provincial authorities, a memorandum dated January 10, 1963, from Saskatchewan's Minister of Natural Resources, E. Kramer, to the provincial Cabinet confirms that the province had been presented with a proposal from Indian Affairs to settle the entitlements of the four landless bands by using current population figures.<sup>106</sup> The memorandum also refers to a specific proposal to provide "an additional 63,000 acres to complete the treaty entitlement" of the Lac La Ronge Band and repeats the Saskatchewan Deputy Attorney General's opinion that land entitlement under treaty is determined by

103 W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Ottawa, to Saskatchewan Regional Supervisor, Indian Affairs Branch, Regina, May 17, 1961 (ICC Documents, p. 1134).

104 "I think you might explore with the Province, and later with the Indians, the possibility of settling in full the treaty entitlement of Lac La Ronge Band on the basis of a further reserve or reserves totalling 63,330 acres. Until you ascertain the attitude of the province, I think it would be inadvisable to take the matter up with the Band or the law firm writing on their behalf." W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Ottawa, to Saskatchewan Regional Supervisor, Indian Affairs Branch, Regina, May 17, 1961 (ICC Documents, p. 1136).

105 W.J. Breunen, Acting Saskatchewan Regional Supervisor, Indian Affairs Branch, to Indian Affairs Branch, Ottawa, March 6, 1962 (ICC Documents, pp. 1167-69).

106 Eiling Kramer, Minister of Natural Resources, Province of Saskatchewan, Regina, to Cabinet, Government of Saskatchewan, Regina, January 10, 1963 (ICC Documents, pp. 1185-87).

band population at the time a treaty is signed, and not by reference to its current population.<sup>107</sup>

No further action was taken until April 1964, when J.G. McGilp, the Saskatchewan Regional Supervisor for Indian Affairs, reported that he had been invited to meet the Lac La Ronge Band Council on April 2, 1964, at which time he expected "to receive from them a request for approximately 60,000 acres of land to which I believe they are entitled under Treaty No. 6."<sup>108</sup> Prior to that meeting, Sid Read, a field officer for Indian Affairs, proposed that the land entitlement calculations be adjusted to take into account the Band's population increase from 1404 members in 1961 to 1590 members in 1964:

Due to the time lapse of roughly two and one half years since it was suggested by Headquarters that settlement be based on the 1961 population figure, it would seem only fair and just that negotiations for settlement today be based not on the population figure of that date but rather on the population as indicated by the present membership list.<sup>109</sup>

It is not clear whether Mr. McGilp offered information about the Bethune formula or Mr. Read's proposed modification to the settlement proposal when he met with the Band on April 2. Nonetheless, when Mr. McGilp wrote to Saskatchewan's Deputy Minister for Natural Resources, J.W. Churchman, on April 6, 1964, he proposed that the Band's 1964 population be used in the calculations, which would have resulted in an entitlement of 71,680 acres.<sup>110</sup> On April 19, Mr. McGilp met again with Mr. Churchman to discuss the proposed settlement. Mr. McGilp's subsequent report to headquarters in Ottawa suggests that the Department had consulted Band members about possible sites for additional reserve land, but that questions related to land quantum had not yet been discussed with them. Nevertheless, Mr. McGilp's report reveals that a tentative understanding had been struck with the province based on the 1961 population and the compromise formula advanced by Mr. Bethune:

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107 Eiling Kramer, Minister of Natural Resources, Province of Saskatchewan, Regina, to Cabinet, Government of Saskatchewan, Regina, January 10, 1963 (ICC Documents, p. 1187).

108 J.G. McGilp, Saskatchewan Regional Supervisor, Indian Affairs Branch, Regina, to Indian Affairs Branch, Ottawa, March 31, 1964 (ICC Documents, pp. 1285-86).

109 S.C. Read, Field Officer, Indian Affairs Branch, Saskatoon, to J.G. McGilp, Saskatchewan Regional Supervisor, Indian Affairs Branch, Regina, April 1, 1964 (ICC Documents, p. 1290).

110 J.G. McGilp, Saskatchewan Regional Supervisor, Indian Affairs Branch, Saskatoon, to J.W. Churchman, Deputy Minister of Natural Resources, Province of Saskatchewan, Regina, April 6, 1964, DIAND file 672/30-12-156, vol. 2 (ICC Documents, pp. 1295-97).

At a meeting in Regina yesterday, Mr. Churchman informed me that he is prepared to recommend the allocation of 63,330 acres of land to the La Ronge band to extinguish their land entitlement under Treaty 6. This was the figure raised with him in our request of two years ago and he believes that it only remains to clarify the actual parcel or parcels of land. I informed him that subject to your approval and that of the Indians, I accept the figure of 63,330 acres, based on the band population of 1,404 when the request was made in 1961. Mr. Churchman and I then examined the parcels of land marked on maps by the La Ronge Council on April 2nd, 1964, when I met with them at La Ronge.

Mr. Churchman has suggested that instead of the six separate sites suggested by the Indians, one or two large parcels should be chosen. I told Mr. Churchman I shall meet the Indians again and tell them of his suggestion. I am asking Superintendent Wark to arrange a meeting with La Ronge Council members as soon as possible, either in Prince Albert or La Ronge, so that I can advise them of the province's offer of 63,330 acres. I am sure the Indians will accept this figure. At the meeting we shall also re-examine proposed site or sites of the new reserve lands. I am fairly confident that the Indians will be prepared to request two or three sites instead of the six they suggested on April 2nd.

Tentatively a transfer of lands will be arranged in the next few months based on these considerations:

- (1) The land entitlement will be based on 35.24% of the band population of 1,404 as outlined by us in 1961, and will comprise 63,330 acres.
- (2) Mineral rights will be transferred with the lands.
- (3) Lands transferred will reach to the high water mark.
- (4) This selection of lands, makes up the full and final land entitlement of the La Ronge band under Treaty No. 6.<sup>111</sup>

Following the tentative agreement between Canada and Saskatchewan, Mr. McGilp arranged to meet with the Lac La Ronge Band Council on May 8, 1964. There are two versions of minutes to this meeting. The typewritten minutes show that there was little, if any, discussion on land quantum, noting simply that "[i]t seemed apparent that the Province would be prepared to agree on land entitlement based on 1961 population figures when request was first made. This would amount to 63,330 acres."<sup>112</sup> The handwritten minutes reflect a substantial amount of discussion with the Band Council about preferred locations for reserve selections, but there is only one notation in relation to land quantum. The minutes simply state:

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<sup>111</sup> J.G. McGilp, Saskatchewan Regional Supervisor, Indian Affairs Branch, Regina, to Indian Affairs Branch, Ottawa, April 20, 1964 (ICC Documents, pp. 1307-08).

<sup>112</sup> Lac La Ronge Band, La Ronge, Saskatchewan, Minutes of Council Meeting, May 8, 1964 (ICC Documents, p. 1319).

Mr. McGilp – explained why scattered areas picked could not be excepted [sic].

Amount coming 63,330 acres.

Council all in favor of excepting [sic] the above figure for settlement (Band resolution signed) . . . .<sup>113</sup>

A total of nine band members were on the Lac La Ronge Band Council in 1964, but no Chief was in office at that time. All seven council members in attendance at the meeting on May 8, 1964, executed a Band Council Resolution (BCR) on the same day.<sup>114</sup> The May 8, 1964, BCR set out the following terms of settlement:

Band Council Resolution – Do Hereby Resolve: That We, the Councillors of the Lac La Ronge Band, hereby agree to accept 63,330 acres as full land entitlement under Treaty No. 6.

- (1) The land entitlement will be based on 35.24% of the Band population of 1,404 in 1961, the date we requested land from the Province of Saskatchewan and will comprise 63,330 acres.
- (2) Mineral rights will be transferred with the land.
- (3) Land transferred will reach to the high water mark.
- (4) This selection of lands makes up the full and final land entitlement of the Lac La Ronge Band under Treaty No. 6.<sup>115</sup>

The striking similarity between the language in the BCR and the terms of the tentative settlement agreement reached between Indian Affairs and the province three weeks earlier on April 19, 1964, confirms that the land entitlement issue had been settled between Canada and Saskatchewan prior to the May 8, 1964, Band Council meeting and that the terms of settlement contained in the BCR were prepared by Indian Affairs in advance of that meeting.<sup>116</sup>

<sup>113</sup> Lac La Ronge Band, La Ronge, Saskatchewan, Minutes of Council Meeting, May 8, 1964 (ICC Documents, pp. 1320-21).

<sup>114</sup> In the Band's written submission to the Indian Claims Commission, it is suggested that the two Band councillors who did not attend the meeting were likely still on the traplines for the spring hunt along with the majority of other band members (Submissions of the Lac La Ronge Indian Band, May 31, 1994, vol. 2, pp. 316-20). Historically, there is evidence that Band members were habitually away at this time of the year. See E.S. Jones, Superintendent, Carlton Agency, Prince Albert, Saskatchewan, to J.P.B. Ostrander, Saskatchewan Regional Supervisor, Regina, May 10, 1950 (ICC Documents, p. 874), and Ostrander to A.I. Bereskin, Controller of Surveys, Province of Saskatchewan, Department of Natural Resources, Regina, May 11, 1950 (ICC Documents, p. 876).

<sup>115</sup> Chief and Council, Lac La Ronge Band, La Ronge, Saskatchewan, to Indian Affairs Branch, Ottawa, May 8, 1964 (ICC Documents, p. 1322).

<sup>116</sup> This assumption is confirmed by the testimony of Mr. Sid Read, an Economic Development Officer for Indian Affairs who attended the May 8, 1964, meeting with the Band Council. Mr. Read informed the Commission on

It is unclear from the record of the meetings between the Band Council and the Indian Affairs Branch whether the basis for calculating the outstanding entitlement was discussed. Nor do we know if mention was made of alternative approaches to calculating quantum – approaches that were, in fact, being used to settle the claims of other bands on the prairies and in northern Saskatchewan. It does not appear that there were any meetings with the Band membership as a whole to explain the implications of accepting the compromise formula as a settlement of the outstanding reserve land entitlement. The figure of 63,330 acres appears to have been placed before the Band Council and simply accepted. It is clear that Indian Affairs headquarters in Ottawa determined the amount of land owed to the Band by reference to departmental records and by applying the Bethune formula.<sup>117</sup>

Nine years would pass before the 63,330 acres of land promised to the Lac La Ronge Band in 1964 were surveyed and set aside as reserve. Some of the delay was attributable to the need to resolve competing claims to these same lands. For instance, the area selected by the Band at Bittern Lake was reduced by 2193 acres to accommodate the commercial interests of the Prince Albert Pulp and Paper Company.<sup>118</sup> Further delay was undoubtedly caused by Premier Ross Thatcher's announcement in 1968 that, despite Saskatchewan's obligations under the *NRTA*, there would be "no further alienation of provincial Crown lands for the establishment of Indian Reserves."<sup>119</sup> At that time, the provincial government was opposed to the creation of Indian reserves and extended the policy to lands that had already been requested by

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April 14, 1994, that the BCR was typed in advance for the Band Council to execute prior to adjourning the meeting (ICC Transcripts, April 14, 1994, pp. 118-19).

117 Mr. Sid Read testified that Ottawa headquarters, and Mr. Bethune specifically, developed the formula and determined the amount of land owed to the Band. Messrs. McGillp and Read conveyed to the Band the amount of land owed to it based on the calculations provided by headquarters in Ottawa, and there was no discussion of alternative methods of calculating TLE. Mr. Read could not offer any insights into the rationale for the formula and how it was developed other than to say that he felt it represented a "fair and equitable distribution of land that they [the La Ronge Band] had outstanding," and that officials at "the regional level took the information that we had received from headquarters as being the legitimate land entitlement that these bands could expect" (ICC Transcripts, April 14, 1994, pp. 110-15).

118 M.A. Laird, Chief of Parks, Province of Saskatchewan, Department of Natural Resources, Regina, to W.R. Parks, Deputy Minister of Natural Resources, Province of Saskatchewan, Regina, June 1, 1967 (ICC Documents, p. 1663), and T.A. Harper, Chief Resource Programs, Province of Saskatchewan, Department of Natural Resources, Regina, to J.S. Sinclair, Director of Northern Programs, Province of Saskatchewan, Department of Natural Resources, Prince Albert, April 30, 1968 (ICC Documents, p. 1748).

119 W.R. Parks, Deputy Minister of Natural Resources, Province of Saskatchewan, Regina, to T.A. Harper, Chief of Resource Programs, Department of Natural Resources, Province of Saskatchewan, Regina, September 11, 1968 (ICC Documents, p. 1765).



Indian Affairs for allocation as Indian reserve.<sup>120</sup> This policy was not relaxed until 1970, when the then Minister of Indian Affairs, Jean Chrétien, convinced Premier Thatcher to transfer certain provincial lands to reserve status.<sup>121</sup>

Between 1968 and 1973, four parcels of land totalling 64,285.0 acres were set aside for the Lac La Ronge Band and designated as reserve. Taking into account the 43,762.0 acres that had been surveyed prior to the 1964 settlement, the band received a total reserve allocation of 107,146.99 acres, or 167.4 square miles. Table 3 shows the acreage of the reserves surveyed for the band from 1897 to 1973.

**TABLE 3**  
**Lac La Ronge Band Reserves, 1879-1973**

<b>Year of Survey</b>	<b>Reserve</b>	<b>Acres in Year of Survey</b>	<b>Cumulative Acreage Received</b>
1897	Little Red River IR 106C	30,400.00	30,400.00
1909	13 small reserves near Lac La Ronge and Stanley	5,354.09	35,754.09
1935	Addition to Little Red River IR 106C	1,607.90	37,361.99
1948	Little Red River IR 106D	6,400.00	43,761.99
1968	Morin Lake IR 217	32,640.00	76,401.99
1970	Grandmoter's Bay IR 219	11,092.00	87,493.99
1973	Addition to Morin Lake 217	2,315.00	89,808.99
1973	Bittern Lake UR 218	17,338.00	107,146.99

Source: List of reserves with acreages, no author, c. May 1990 (ICC Documents, pp. 4379-80).

### **The Claim of the Lac La Ronge Indian Band**

As a result of research conducted by the Federation of Saskatchewan Indians in the 1970s, the Lac La Ronge Band claimed that it was entitled to additional

<sup>120</sup> On October 30, 1968, J. Barrie Ross, Saskatchewan's Minister of Natural Resources, wrote to the Minister of Indian Affairs, Jean Chrétien, advising that the province was opposed to Indian reserves because "[o]ur government does not feel the Indian 'problem' can be solved by enlarging or creating reserves. In fact, we contend that the opposite is true - if our Indian people are to improve their economic and social conditions they must be prepared to relocate in areas where employment and other opportunities are available" (ICC Documents, p. 1773).

<sup>121</sup> W. Ross Thatcher, Premier of Saskatchewan, Regina, to Jean Chrétien, Minister of Indian Affairs, Ottawa, February 23, 1970 (ICC Documents, p. 1839).

land because the current population formula had not been applied by officials of the Department of Indian Affairs and Northern Development (DIAND) to settle the Band's entitlement.<sup>122</sup> The Band argued that its entitlement to the application of that formula flowed from a proper interpretation of the treaty and that such a formula was supported by Canada's historical practice in relation to treaty land entitlement claims.

Counsel for Lac La Ronge also submitted that the Band was treated unfairly when compared with other multiple survey bands in Saskatchewan. In particular, the Peter Ballantyne Band (after Lac La Ronge, the largest band in the province) was offered a quantum of land calculated on the basis of Bethune's compromise formula in 1974, but rejected that offer after receiving independent advice that Canada's historical practice was based upon a current population model.<sup>123</sup> As discussed below, the Peter Ballantyne Band was later recognized by Canada as having an outstanding entitlement for the purposes of the 1976 Saskatchewan Agreement, which was based upon a current population formula fixed as of December 31, 1976, to calculate the amount of land owing. The Peter Ballantyne Band did not accept a settlement based on the Saskatchewan Agreement, but later agreed to the terms of the 1992 Saskatchewan Treaty Land Entitlement Framework Agreement. Under that agreement, the Band accepted approximately \$61.4 million in compensation. Those funds were used, in part, to purchase the Band's shortfall acreage of 22,466 acres.

### **The Saskatchewan Formula, 1976**

In 1975, the Federation of Saskatchewan Indians (FSI) and the governments of Canada and Saskatchewan intensified their efforts to settle the outstanding treaty land entitlement claims of those bands recognized as not having received their full entitlements under treaty (often referred to as the Entitlement Bands). Chief David Ahenakew of the Federation described the Indian position on treaty land entitlement in a July 3, 1975, letter, and stressed the importance of the current population formula (or Saskatchewan formula) as the appropriate method for both validating claims (i.e., determining whether

<sup>122</sup> Chief and Council, Lac La Ronge Band, La Ronge, Saskatchewan, Band Council Resolution, October 19, 1982 (ICC Documents, p. 3513).

<sup>123</sup> I.L.T. Vergette, Chief, Lands Division, Department of Indian Affairs, Ottawa, to O.N. Zakreski, Saskatchewan Regional Director, Department of Indian Affairs, Regina, March 12, 1974 (ICC Documents, p. 2163); S.C. Read, Prince Albert District Supervisor, Department of Indian Affairs, to Saskatchewan Regional Director, April 1, 1974 (ICC Documents, p. 2168); J.W. Clouthier, Director, Resource Division, Province of Saskatchewan, Department of Northern Saskatchewan, Prince Albert, to file, July 30, 1974 (ICC Documents, p. 2222); Zakreski to Acting Director, Economic Development Branch, August 23, 1974 (ICC Documents, p. 2223).

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a band is entitled to more land) and quantifying the land due to such entitlement bands:

#### Basic Principles

1. Any recognized band of Treaty Indians is entitled to a reserve based upon the formula of one square mile of land for every five people.
2. To determine whether a band received its entitlement to land under the Treaty, the population figures from the latest annuity pay sheets and the most recent band lists prior to the original survey of the reserve must be used. Should a band have received insufficient land based on the Treaty formula at the original survey, its full entitlement to land shall be determined by its population as determined by the annuity paysheets and band lists at the time that confirmation of additional reserve land is made. This formula is to be used until such time as the band receives its full entitlement to land under the treaty based on its population as shown by the latest annuity payment and most current band list prior to the confirmation of the parcel to give that band full entitlement to land under the Treaty.
3. Any band which legitimately requested a reserve under Treaty, and which was unlawfully or unreasonably denied a reserve, has the option to use the population figures of the year in which it made its request or current population statistics.
4. No band can renounce its full entitlement to land except in the manner stipulated in the *Indian Act* Surrender Provisions.
5. A band with outstanding land entitlement has the right to choose any unoccupied crown land as the site for the lands to fulfill its Treaty entitlement.<sup>124</sup>

Thus, the Federation's position was that a band's treaty land entitlement claim could be extinguished only if the total quantum of land set aside for the band was sufficient to meet the current population of the band at the time of any given survey. For bands that had not received any reserves, the date-of-first-survey population and the current population would be the same. However, in circumstances where a band did not receive the full quantum of land to which it was entitled at the time of any given survey, the Federation's position was that entitlement continued to increase as the band's population increased. Only a subsequent survey of land, based on the band's then current population, could terminate the band's entitlement. The Federation did not accept Canada's view that only a band with a date-of-first-survey shortfall acreage would have a "valid" claim to additional land.

On August 18, 1975, the Minister of Indian Affairs, Judd Buchanan, wrote to Saskatchewan Premier Allan Blakeney seeking the province's cooperation

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<sup>124</sup> D. Ahenakew, Chief, Federation of Saskatchewan Indians, Prince Albert, Saskatchewan, to Judd Buchanan, Minister of Indian Affairs, Ottawa, July 3, 1975 (ICC Documents, pp. 2331-32).

in settling the outstanding entitlement claims of at least 12 Entitlement Bands.<sup>125</sup> In November 1975, the Federation and Indian Affairs met to discuss which bands had outstanding entitlements. At that time the parties were in agreement on 12 Entitlement Bands. The Federation was then seeking to bring another nine bands, including Lac La Ronge, within the ambit of the agreement.<sup>126</sup> However, both DIAND and Saskatchewan considered the Lac La Ronge Band's entitlement to be closed because "[f]inal entitlement was given based on the Federal compromise formula and there appears to be no reason why negotiations should be reopened."<sup>127</sup>

On August 23, 1976, the Minister of Natural Resources for Saskatchewan, G.R. Bowerman, informed Chief Ahenakew that the province was prepared to settle entitlements based on the "FSI formula," subject to the condition that bands would be bound by these settlements. Mr. Bowerman stated that the FSI formula, which came to be referred as the "Saskatchewan formula,"

would take "present population" x 128 (acres per person) less land already received. "Present population" means that the population is permanently fixed as at December 31, 1976.<sup>128</sup>

He also stated that Canada would be "solely responsible for satisfaction of all land claims for which the Province has been previously advised by Canada that the claim for land has been extinguished."<sup>129</sup>

On August 31, 1976, Chief Ahenakew confirmed that the entitlement bands were prepared to enter into negotiations with the province on the basis of the

125 Judd Buchanan, Minister of Indian Affairs, Ottawa, to Allan Blakeney, Premier of Saskatchewan, Regina, August 18, 1975 (ICC Documents, pp. 2340-41).

126 The report of the meeting between the FSI and DIAND on November 7, 1975, lists 21 bands discussed by the parties: "The Department acknowledges that the following bands have not had all the land to which they are entitled: 1. Muskowekan 2. Piapot 3. One Arrow 4. Red Pheasant 5. Witchekan Lake 6. Canoe Lake 7. English River 8. Lac La Hache 9. Keeseekoose 10. Peter Ballantyne 11. Fond du Lac 12. Stony Rapids. The FSI agree with the above and seek to add: 1. Little Pine 2. Lucky Man 3. Nekaneet (Maple Creek) 4. Pelican Lake. The FSI also believe there may be a claim on: 1. Nut Lake 2. Kiuistino 3. Fishing Lake (All the above were once part of the Yellow Quill Band) 4. Lac la Ronge 5. Sakimay" (ICC Documents, pp. 2365-66). The Department took the position that the Lac La Hache and Portage La Loche Bands should also be taken off the list of Entitlement Bands because they signed Band Council Resolutions agreeing to final settlements of their TLE claims: W.J. Fox, Lands and Membership, Indian Affairs, to Lewis Lockhart, Legal Advisor, FSI, January 13 and February 2, 1976 (ICC Documents, pp. 2381, 2386).

127 R. Milen, Crown Solicitor, Province of Saskatchewan, Department of Northern Saskatchewan, Regina, to Lewis Lockhart, Legal Advisor, Federation of Saskatchewan Indians, Regina, November 21, 1975 (ICC Documents, p. 2369).

128 G.R. Bowerman, Minister of Northern Saskatchewan, Province of Saskatchewan, Regina, to D. Ahenakew, Chief, Federation of Saskatchewan Indians, Prince Albert, Saskatchewan, August 23, 1976 (ICC Documents, p. 2421).

129 G.R. Bowerman, Minister of Northern Saskatchewan, Province of Saskatchewan, Regina, to D. Ahenakew, Chief, Federation of Saskatchewan Indians, Prince Albert, Saskatchewan, August 23, 1976 (ICC Documents, p. 2423).

Saskatchewan formula.<sup>130</sup> Subsequently, on April 14, 1977, Indian Affairs Minister Warren Allmand advised that the federal cabinet had confirmed "that the official population figures as at December 31, 1976 [were to] be used as the base formula for determining entitlement for those bands that have not previously selected and received their full treaty entitlements to land."<sup>131</sup>

In July 1977, Minister Allmand wrote to Chief Ahenakew requesting a meeting to clarify which bands had outstanding entitlements.<sup>132</sup> Canada's position was reflected in a document prepared by Indian Affairs in August 1977 entitled "Criteria Used in Determining Bands with Outstanding Entitlements in Saskatchewan":

**1. Per Capita Entitlement Set Out in Treaty**

This was either 128 acres per person or 32 acres per person depending on the Treaty involved.

**2. Date of First Survey**

In most cases entitlement was calculated according to the population of a Band at the date of first survey. . . .

**3. Population**

Once the date at which entitlement was to be calculated had been established, the most accurate record of the Band population at that date was sought.

For any cases from 1965 onwards, the certified population figures published by the Indian Inuit Program Statistics Division were used. Statistics did not publish population figures prior to 1965 and, therefore, from 1951 onwards the membership rolls held by the Registrar provided the most accurate record of population. Prior to 1951, membership rolls were not kept and population figures were therefore taken from the treaty annuity paylists.

In determining the population from the treaty paylists, the figure used was that shown as "Total Paid" for the year in question. It should be noted that in using this figure, the following factors were not accounted for:

- i) Band members absent at the time of treaty payment;
- ii) New members subsequently adhering to treaty.

<sup>130</sup> D. Ahenakew, Chief, Federation of Saskatchewan Indians, Prince Albert, Saskatchewan, to G.R. Bowerman, Minister of Northern Saskatchewan, Province of Saskatchewan, Regina, August 31, 1976 (ICC Documents, p. 2432).

<sup>131</sup> Warren Allmand, Minister of Indian Affairs, Ottawa, to G.R. Bowerman, Minister of Northern Saskatchewan, Province of Saskatchewan, Regina, April 14, 1977 (ICC Documents, p. 2533). Also see D. Ahenakew, Chief, Federation of Saskatchewan Indians, Prince Albert, Saskatchewan, to file, February 12, 1977 (ICC Documents, p. 2528).

<sup>132</sup> Warren Allmand, Minister of Indian Affairs, Ottawa, to D. Ahenakew, Chief, Federation of Saskatchewan Indians, Regina, July 11, 1977 (ICC Documents, pp. 2559-60).

Although the above factors were not accounted for in our basic criteria and entitlement calculations, it was recognized that they might constitute a basis for future negotiation.

...

#### 4. Entitlement

Once the population at date of first survey had been determined, entitlement was calculated by multiplying this figure by the per capita acreage set out in the appropriate treaty.

...

#### 5. Lands Received

The amount of land received by a Band was determined by totalling the acreages of all Reserve lands set aside for the use and benefit of the Band in fulfilment of treaty entitlement.<sup>133</sup>

Despite the agreement, progress was slow in implementing the Saskatchewan formula.<sup>134</sup> By 1979, it had become evident that federal support for the Saskatchewan formula was waning when the Minister of Indian Affairs, J. Hugh Faulkner, showed a reluctance to sign a formal agreement confirming the understanding arrived at between the Federation and Saskatchewan, preferring instead to "proceed with the fulfilment of the recognized entitlements on an *ad hoc* basis."<sup>135</sup>

In November 1979, the new Minister of Indian Affairs, Jake Epp, announced in the House of Commons that the Saskatchewan formula was under review and would not be agreed upon until principles of fairness and equity among all Indian bands in the prairies had been addressed.<sup>136</sup> On August 11, 1980, yet another Minister of Indian Affairs, John Munro, outlined Canada's position on the Saskatchewan formula in a letter to Chief Sol Sanderson of the FSI, reiterating the federal view that, once a band's date-of-first-survey shortfall had been met, there could be no further entitlement claim:

The Federal Government fully supports the use of the formula to settle entitlements wherever possible even though it probably exceeds Canada's strict obligation under

133 DIAND, "Criteria Used in Determining Band with Outstanding Entitlements in Saskatchewan," unpublished memorandum, August 1977 [version 1] (ICC Documents, pp. 2565-73).

134 This prompted Chief Ahenakew to write to Prime Minister P.E. Trudeau on June 12, 1978, urging his government to fulfil its treaty obligations, stating that Indians "have treaty rights and those rights are perpetual. Regardless of what the government has done or will do to ignore, deny and trample those rights, they will continue to exist until the last Indian draws his last breath" (ICC Documents, p. 2866).

135 J. Hugh Faulkner, Minister of Indian Affairs, Ottawa, to G.R. Bowerman, Minister of the Environment, Province of Saskatchewan, Regina, February 27, 1979 (ICC Documents, p. 3149).

136 K.J. Tyler, Tyler & Wright Research Consultants, Ottawa, to Federation of Saskatchewan Indians, Regina, November 27, 1979 (ICC Documents, p. 3250); S. Sanderson, Chief, Federation of Saskatchewan Indians, Prince Albert, to A.J. Epp, Minister of Indian Affairs, Ottawa, November 28, 1979 (ICC Documents, p. 3254); Epp to Sanderson, December 3, 1979 (ICC Documents, p. 3277).

the treaties. However the Government's acceptance of the use of the formula in 1977 did not imply acceptance of the principle that the entitlement of a Band is to be recalculated at every date additional reserve land is provided. The Federal understanding of the Saskatchewan formula is that it does not come into play during the validation of entitlements but is used to determine the amount of land a Band may select once the [fact] of its entitlement has been established.<sup>137</sup>

This clarification of Canada's position apparently prompted Saskatchewan to review its previous commitment to the Saskatchewan formula and to postpone any further transfer of lands to the bands. On September 13, 1982, the province suggested that if the date-of-first-survey approach did represent the full extent of the Crown's obligations under treaty, the Saskatchewan formula "will result in a total quantum of land for the twenty-one bands with validated claims which will exceed considerably the total requirement according to the shortfall criteria."<sup>138</sup> The province, therefore, questioned whether the Saskatchewan Agreement would result in a transfer of lands to Indian bands in excess of the Crown's minimum obligations under the terms of treaty.

In May 1983, Indian Affairs' Office of Native Claims (ONC) released a new set of guidelines on treaty land entitlement, the 1983 ONC Guidelines, which repeated the Department's reliance on acreage calculations based on the date-of-first-survey population as the upper limit of the Crown obligation to provide reserve lands under treaty. Under the heading "Date for Entitlement Calculation," the 1983 ONC Guidelines state:

The date to be used in the land quantum calculations is seldom clearly spelled out in any of the treaties. . . . Legal advice from the Department of Justice suggests that, although the treaties do not clearly identify the date for which a Band's population base is to be determined for the land quantum calculations, the most reasonable date is not later than the date of first survey of land. It is Canada's general view that this is the date to be used to determine whether it has met its obligation under the treaties to provide a quantum of land to an Indian Band based on the population of that Band at date of first survey.<sup>139</sup>

137 John C. Munro, Minister of Indian Affairs, Ottawa, to S. Sanderson, Chief, Federation of Saskatchewan Indians, Prince Albert, August 11, 1980 (ICC Documents, p. 3402). Also see Minister Munro's letter dated July 7, 1982, to Gary Lane, Minister of Intergovernmental Affairs for Saskatchewan, where he states that "the claims resolution process consists of two distinct phases - validation and land selection." (ICC Documents, p. 3479).

138 G. Lane, Minister of Intergovernmental Affairs, Province of Saskatchewan, Regina, to John C. Munro, Minister of Indian Affairs, Ottawa, September 13, 1982 (ICC Documents, p. 3490).

139 DIAND, "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims," unpublished memorandum, May 1983 (ICC Documents, pp. 3585-86).

Based on legal advice that the Saskatchewan formula was not binding upon the province, but could be retained “as a matter of policy” if the province chose to do so, Saskatchewan pressed Indian Affairs to state its position on the quantum of land “legally necessary” to satisfy the entitlements of Saskatchewan bands and how that quantum would be determined.<sup>140</sup> In June 1984, Saskatchewan conducted an internal review and concluded that the 1976 Saskatchewan formula confused the question of strict legal entitlement based upon the date-of-first-survey approach with the question of what the governments of Canada and Saskatchewan were “prepared to do as a matter of policy . . .”<sup>141</sup>

Until 1986, both Canada and Saskatchewan continued to support the Saskatchewan formula as the basis of settlement over the “strict legal obligation” approach, which was limited to the date-of-first-survey shortfall acreage.<sup>142</sup> However, on March 18, 1988, the Saskatchewan Minister for Indian and Native Affairs, Grant Hodgins, withdrew provincial support for the Saskatchewan formula by advising the federal Minister of Indian Affairs, Bill McKnight, that “[p]ursuant to the Natural Resources Transfer Agreement, we are not willing to supply more land than the federal government requests to fulfill its treaty entitlement obligations.”<sup>143</sup> This announcement officially marked the demise of the Saskatchewan Agreement.

### **Saskatchewan Treaty Land Entitlement Framework Agreement, 1992**

In 1989, the Chiefs of the Starblanket and Canoe Lake Bands and the FSIN launched an action on behalf of Saskatchewan Indian Bands against the federal and provincial governments with respect to the Saskatchewan formula and the nature and scope of treaty land entitlement. In the same year, the Minister of Indian Affairs and the Federation of Saskatchewan Indian Nations agreed to establish the Office of the Treaty Commissioner (OTC), an independent office with a mandate to identify common ground between the parties and to develop proposals in an attempt to reconcile the conflicting positions of the parties on the interpretation and implementation of treaty land entitle-

140 M.C. Crane, Crown Solicitor, Province of Saskatchewan, to Richard Gosse, Deputy Minister of Justice, Province of Saskatchewan, October 31, 1983 (ICC Documents, pp. 3598A-3598C); S. Dutchak, Minister of Indian and Native Affairs, Province of Saskatchewan, Regina, November 14, 1983 (ICC Documents, pp. 3703-04).

141 [Author not identified], Province of Saskatchewan, June 13, 1984 (ICC Documents, p. 3739).

142 Ian Cowie, Deputy Minister, Indian and Native Affairs Secretariat, Province of Saskatchewan, Regina [comments at Chiefs' entitlement meeting], July 24, 1984 (ICC Documents, p. 3765), and Bill McKnight, Minister of Indian Affairs, Ottawa, to Harry Nicolaine, Red Pheasant Band, Cando, Saskatchewan, December 17, 1986 (ICC Documents, p. 4045).

143 Grant Hodgins, Minister of Indian and Native Affairs, Province of Saskatchewan, Regina, to Bill McKnight, Minister of Indian Affairs, Ottawa, March 18, 1988 (ICC Documents, p. 4252).



ment in Saskatchewan. In May 1990, the Treaty Commissioner issued his report recommending that the parties accept the "equity formula" as a compromise to their polarized positions.

The report began with an overview of the history of the 1976 Saskatchewan formula. Although Saskatchewan, Canada, and the Federation of Saskatchewan Indians had reached a common understanding under the Saskatchewan Agreement to use current populations as the basis for settling outstanding entitlements, a formal agreement was never signed and the formula was applied to just two bands.<sup>144</sup> Among the reasons cited for the formula's failure were a shortage of unoccupied Crown lands in the vicinity of the 27 TLE bands to satisfy their claim to some 1.3 million acres of land; federal-provincial disputes over who was obliged to pay for or provide the reserve lands; public resistance to proposed transfers of federal and provincial community pastures to the bands; demands by rural municipalities for compensation for the loss of grants in lieu of taxes paid by the province on lands that would cease being taxable on designation as Indian reserves; lobbying by wildlife organizations to abolish treaty hunting rights; and some public resentment over the recognition of "special rights" for Indians.<sup>145</sup> In addition, some officials within the federal Department of Indian Affairs questioned the merits of the Saskatchewan formula, criticizing it as inequitable:

The formula was viewed as inherently unfair to Bands which had received their full entitlement at the date of first reserve survey. Extreme examples were cited in support of this rationale, notably the case of Oxford House in Manitoba. This Band had a shortfall at first survey of 15 acres; under the "Saskatchewan" formula it would be entitled to some 20,000 acres.<sup>146</sup>

It was suggested that bands which received their entitlement at date of first survey (DOFS) would view the formula as inequitable and unfair because they would be excluded from receiving more reserve land, while other bands

144 The Fond du Lac and Stony Rapids Bands received additional allocations of land based on the 1976 Saskatchewan formula despite the fact that these bands had received full land entitlements in 1964 and 1965 and had signed Band Council Resolutions agreeing to accept areas of land based on their populations at the time of selection in "full and final" settlement of their outstanding treaty entitlements. Nevertheless, the parties agreed to recognize them as Entitlement Bands under the Saskatchewan formula because of significant delays between the respective dates on which lands were selected and the dates on which the reserves were actually set aside for the use and benefit of the Bands.

145 Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 10-16.

146 Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 18.

might receive thousands of acres in recognition of their increased populations even though their shortfalls were nominal.<sup>147</sup>

The OTC identified four possible formulae that could be used to settle treaty land entitlement and considered whether there was any historical evidence to support each formula. First, a band's population on the date of treaty signing was considered but rejected by the OTC because such a construction of treaty would fail to take into account members who were absent at the time of treaty signing as well as new adherents who later joined the band. Moreover, the OTC concluded that there was no historical precedent for this approach because no settlement of outstanding treaty land entitlement had ever been concluded on this basis.<sup>148</sup>

Second, the date-of-first-survey approach was considered and also rejected on the grounds that it did not take into account band members who were absent at the time of the survey, new adherents, or descendants from these two categories. With respect to Canada's assertion that the date-of-first-survey formula represented the extent of its "lawful obligation" under treaty, the OTC stated that

no precedents, legal or historical, exist to support this theory. In fact, the historic practice of the Department from c. 1883 to c. 1975 was to use the most recent population of a band to determine the amount of land to be surveyed to fulfill the treaty entitlement, partial or outstanding.<sup>149</sup>

With respect to the current population formula, the OTC report suggested that such an approach would result in an allocation of land in excess of the treaty formula of one square mile per family of five. For instance, if a band received 60 per cent of its entitlement on the date of first survey, an outstanding entitlement would remain for 40 per cent of the band membership. However, the use of current population figures, minus land already received on the date of first survey, would distort the percentage of entitlement that remained outstanding. Furthermore, the OTC stated that the current population formula would exceed the treaty formula because "[i]mplicit in this formula is the proposition that all reserves in the prairie provinces would be

147 For instance, see Roland Wright, Federation of Saskatchewan Indians, Indian Rights and Treaty Research, Ottawa, Notes on Saskatchewan Treaty Land Entitlement Situation, November 16, 1987 (ICC Documents, p. 4186).

148 Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 38-39.

149 Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 40.

on a perpetual 'running balance' adjusted annually to meet increases or decreases in populations."<sup>150</sup>

Despite this conclusion, the OTC acknowledged that Indian Affairs had often used the current population formula to calculate entitlements from 1883 until recent times. Although Canada's rationale in applying this formula is unclear, the OTC report suggested that Indian Affairs used the formula as a justification to obtain, on behalf of the bands, the most land possible from the federal Department of the Interior prior to 1930, and from the provinces of Alberta, Saskatchewan, and Manitoba thereafter. The historical record suggests that, prior to 1893, Indian Affairs asserted complete authority to set aside reserves, in the process often disrupting the Department of the Interior's survey system and its administration of federal Crown lands. After 1893, a formal requirement was introduced – namely, that Indian reserves were subject to the authority of the Department of the Interior and any removal of them from the operation of the federal *Dominion Lands Act* required confirmation by Order in Council:

Indian Affairs was thereafter in a position where it had to justify to Interior each request for reserve lands as it was the Interior Department which controlled the Order in Council process. More often than not, Indian Affairs justified additional land for reserves on the basis of unfulfilled treaty obligations. As it had the only records of whether a band had in fact received all the land it was entitled to under treaty, Indian Affairs restored unto itself some measure of its former control of reserve establishment.<sup>151</sup>

After 1930, Indian Affairs was obliged to secure provincial concurrence as a prerequisite to obtaining additional land to settle entitlement claims. The OTC suggested that a similar rationale existed for Indian Affairs to advance the current population formula until recent years:

Indian Affairs successfully obtained land from the provinces of Alberta and Saskatchewan on the basis of contemporary population statistics until the 1960's when a combination of rapidly increasing Indian populations, competing demands for Crown

<sup>150</sup> Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 41.

<sup>151</sup> Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 43. On the same page, the report cites the case of Little Saskatchewan IR 48 in Manitoba as an example where the Band's land entitlement had been fulfilled on the date of first survey. Nevertheless, Indian Affairs sought to obtain more land for the Band to encourage its developing cattle industry, and represented to the Department of the Interior that the Band's entitlement had not been fulfilled. Accordingly, the formula was used as a justification for obtaining more land for the Band because Interior had no method of checking the figures.

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lands, and a growing sophistication in Indian land matters on the part of provincial lands branch officials effectively put a halt to Indian Affairs' "ancient" practice.<sup>152</sup>

Although the current population formula was used as the model of settlement in the 1976 Saskatchewan formula and in the 1984 Manitoba Agreement in Principle, the evidence before us suggests that the formula has been implemented only with respect to a handful of bands since the 1960s.<sup>153</sup>

The equity formula recommended by the OTC is strikingly similar to the compromise formula developed by W.C. Bethune in 1961 and applied to the Lac La Ronge Band in 1964. The report explained the rationale behind the equity formula in these terms:

The formula of a proportion of the Band's population today based on that percentage of individuals or families for whom no land was surveyed is from many points of view, a fair and equitable construction of the treaty obligation. The descendants of those families which were not included in the original survey would now be accounted for while the descendants of those families which were included in that survey would not. It is as if a group of 100 people adhered to treaty in 1990 and joined a band which had its entitlement fulfilled in 1900. The obligation to provide land is to the 100 new members, not to the "old" members which had their entitlement fulfilled in 1900. "Windfall" situations are thus removed and all bands are treated fairly thereby.<sup>154</sup>

The OTC advanced this formula to promote equity among bands. The OTC believed that such an approach would reconcile the competing interpretations of the parties, first, by using a date-of-first-survey analysis to determine the shortfall percentage of a band for validation purposes, and, second, by providing additional lands on the basis of the percentage of the band's current population that had not yet had its entitlement honoured. In this manner, the equity formula was intended to strike a balance between competing interpretations of treaty in the interests of concluding outstanding TLE claims.<sup>155</sup>

Finally, the OTC Report recommended an "honour payment" to bands that would have received more land under the Saskatchewan formula than they would under the equity formula. It was suggested that any band that would

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152 Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 44.

153 For example, the Stony Rapids and Fond du Lac Bands of northern Saskatchewan received lands in accordance with the 1976 Saskatchewan formula.

154 Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 44-45.

155 Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 46-47.

receive less land under this formula should receive compensation for the difference at \$141.81 per acre – the estimated unimproved value of agricultural Crown land in the province at that time. The rationale for the honour payment was that “[s]uch a measure would account for the fact that promises were made in accordance with the 1976 Saskatchewan Formula and that Governments must honour their undertakings.”<sup>156</sup>

The equity formula and other recommendations contained in the OTC Report were used as a departure point for extensive negotiations between Canada and the Federation of Saskatchewan Indians. Following a series of meetings in the spring and summer of 1990, the Federation, Canada, and the OTC agreed that (1) “current population” would be determined as of March 1991, and (2) subject to a cut-off date of 1955, the calculation of the percentage shortfall would take into account a band’s “adjusted-date-of-first-survey” population (including, in addition to the band’s base paylist population, absentees, new adherents, landless transfers, and non-treaty women who marry into a band). It was presumed that 1955 was the logical cut-off point between the “historical” and “current” populations of bands because paylists were available only until 1955, birth rates increased significantly after that date, and most additions to band memberships had occurred by then. In order to determine the adjusted-date-of-first-survey populations of the Entitlement Bands, it was agreed that the necessary research into treaty paylists would be carried out by the Office of the Treaty Commissioner.<sup>157</sup>

In January 1991, a General Protocol Agreement was signed calling for concurrent bilateral negotiations between TLE First Nations and Canada, and between Canada and Saskatchewan. The Protocol set out four stages for these negotiations, the first of which was achievement of the Protocol itself. During the second stage a Framework Agreement was to be negotiated, and, in the third stage, band specific agreements were to be drafted. The fourth and final stage contemplated implementation of the band specific agreements.

On September 22, 1992, the Saskatchewan Treaty Land Entitlement Framework Agreement was signed by the FSIN, Canada, Saskatchewan, and a majority of the Entitlement Bands in Saskatchewan.<sup>158</sup> This detailed agreement, almost 400 pages in length, included the following elements:

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156 Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 61.

157 Donna Gordon, *Treaty Land Entitlement: A History* (Ottawa: ICC, 1995), 132-33.

158 Saskatchewan, Treaty Land Entitlement, *Framework Agreement* (Federation of Saskatchewan Indian Nations, 1992), 81-84.

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- land entitlement for each band would be determined using the equity formula;
  - compensation would be paid to each Entitlement Band in lieu of lands to enable bands to purchase their shortfall acreage based on the “willing buyer/willing seller” principle;
  - compensation would be determined by multiplying the defined equity acres by \$262.19 (the average value of unimproved farm land in Saskatchewan);
  - in cases where a band would have received more land under the 1976 Saskatchewan formula than under the equity formula, the honour payment would be paid for the difference at \$141.81 per acre (the average value of unimproved agricultural Crown land in Saskatchewan);
  - First Nations whose entitlements were validated later would be entitled to the benefits of the Framework Agreement.

The Framework Agreement also contained provisions relating to the land acquisition process; federal-provincial cost sharing; the acquisition of minerals; water rights and co-management arrangements; provincial roads; third-party interests; urban reserves; the ratification and implementation of band specific agreements; procedures for reserve creation; tax loss compensation to rural municipalities; taxation; funding for existing and future programs; release, indemnity, and finality clauses; and provisions for dispute resolution through a settlement board or arbitration.

Of particular significance is Article 10, relating to the implementation and ratification of band specific agreements, which sets out detailed requirements for independent legal and financial advice to band members throughout the negotiation of such agreements. Furthermore, Article 10 deals with the information to be provided by a band to inform eligible voters of the contents and effect of both the Framework Agreement and the band's particular band specific agreement. Band specific agreements must be executed by the Chief and a majority of the Band councillors.

Under the Saskatchewan Framework Agreement, 27 Saskatchewan Bands have been recognized as having outstanding treaty land entitlements. The Lac La Ronge Band, however, is not among them.

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## PART III

### ISSUES

The claim before us raises complex legal issues that have not yet been addressed by the courts, although these issues have been reviewed and commented upon by the Commission in recent reports.<sup>159</sup> The difficult task of determining whether an outstanding lawful obligation is owed by the federal government to the Lac La Ronge Indian Band is compounded by the unique facts of the claim and by the extensive evidence adduced before us in relation to the historical practices and policies of the government with respect to treaty land entitlement.

That the parties were unable to agree on a list of issues speaks to the complexity of this claim. Counsel for the Band proposed the following statement of issues:

- 1) Should the decision of Indian Affairs [to reject the Band's claim] be reviewed by the Indian Claims Commission pursuant to the Specific Claims criteria?
- 2) What is the proper interpretation of Treaty as to [the] amount of land owed to a Band under Treaty 6?
- 3) When a Band receives land sometime after Treaty, what is the proper date to determine the Band population and quantify land entitlement?
- 4) Is Date of First Survey or Current Population the relevant formula?
- 5) Was the process followed in 1964 including the BCR signed by Councilors on May 8, 1964 sufficient to extinguish the TLE of the La Ronge Band?

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<sup>159</sup> See ICC, *Fort McKay First Nation Report on: Treaty Land Entitlement*, December 1995, and ICC, *Kawatoose First Nation Report on: Treaty Land Entitlement Inquiry*, March 1996.

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- 6) Can a Band Council by Resolution extinguish the land entitlement of the Band without anything further being done?
  - 7) Was a fiduciary duty owed by the Government of Canada to the Lac La Ronge Indian Band? Did they breach that duty?
  - 8) Did the La Ronge Band receive “preferential treatment” in relation to its TLE as was sought by Canada from Saskatchewan in 1939?
  - 9) Should the La Ronge Band have been validated and entitled to land under the Equity Formula?
  - 10) Was the La Ronge Band treated fairly in relation to other Saskatchewan Indian Bands in relation to its TLE?<sup>160</sup>

Canada suggested a reformulation of the Band's statement of issues into three questions:

- 1) To what band population figure is the Treaty 6 formula of 128 acres per person to be applied?
- 2) What is the effect of the 1964 BCR?
- 3) Did Canada breach any fiduciary obligation owed to the Band vis-à-vis the fulfilment of the Band's TLE?

With due respect to the parties, we have formulated and shall address the issues as follows:

Issue 1 What is the nature and extent of the Crown's obligation to provide reserve land to Indian bands under Treaty 6?

Issue 2 Has Canada satisfied its treaty obligation to provide reserve land to the Lac La Ronge Indian Band?

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<sup>160</sup> James Jodouin, legal counsel for Lac La Ronge Band, to Bruce Becker, Department of Justice Canada, November 10, 1993. It was initially agreed by the parties that the government of Saskatchewan would participate in this inquiry. To address the relative obligations of the province vis-à-vis the federal government, counsel for the Band proposed Issue 11 as follows: “Was the Province of Saskatchewan excused from its obligations under the NRTA to supply land for the La Ronge Band by the correspondence between Canada and Saskatchewan?” By letter dated November 22, 1993, Mr. Mitch McAdam, counsel on behalf of the province of Saskatchewan, objected to Issue 11 on the grounds that it fell outside the Commission's mandate. In light of the province's position, the parties agreed to withdraw Issue 11 and to participate in the inquiry without the province.



Issue 3 What impact, if any, did the 1964 Band Council Resolution have on the Lac La Ronge Indian Band's treaty land entitlement claim?

a Did the Lac La Ronge Indian Band Council have authority under the *Indian Act* to enter into a binding settlement agreement in 1964?

b Did the Lac La Ronge Indian Band provide a full and informed consent to the 1964 settlement?

Issue 4 Did Canada breach any fiduciary obligation or duty owed to the Lac La Ronge Indian Band in the fulfilment of its treaty land entitlement?

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## PART IV

### ANALYSIS

#### ISSUE 1

What is the nature and extent of the Crown's obligation to provide reserve land to Indian bands under Treaty 6?

#### **Interpretation of Reserve Clause**

The principal issue in this inquiry involves the interpretation of Treaty 6 and how the parties intended to determine band populations and to calculate the quantum of land owed to bands under the treaty. The relevant portion of Treaty 6, referred to throughout as the "reserve clause," is reproduced below:

And Her Majesty The Queen hereby agrees and undertakes to lay aside reserves for farming land, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each Band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them.<sup>161</sup>

The wording of the reserve clause is clear on two points. First, it is agreed that the clause directs Canada to set aside reserves for the use and benefit of Indian bands, with the amount of land to be determined by applying the treaty formula of one square mile per family of five, "or in that proportion for larger or smaller families." On a per capita basis, this amounts to 128

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<sup>161</sup> *Copy of Treaty No. 6 between Her Majesty The Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions*, IAND Publication No. QS-0574-000-EE-A-1 (Ottawa: Queen's Printer, 1964), p. 3 (ICC Documents, p. 3).

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acres per person. Second, the treaty describes a process for the selection and survey of reserves – namely, that a “suitable person” would be sent to determine and set aside the reserve after consulting with the Indians on the most suitable location. Although the treaty clearly prescribes the formula and process for reserve selection and survey, the reserve clause is completely silent regarding the date on which the band population is to be counted for purposes of calculating the amount of land owed to the band.

The Lac La Ronge Band submits that the proper interpretation of Treaty 6 is that Canada is obliged to provide lands in accordance with the current population formula, which the Band described in these terms:

A Band's Treaty land entitlement is calculated by taking the current population of the Band, multiplying it by 128 acres (in the case of Treaty No. 6) and subtract[ing] any land that the Band received under Treaty before that time.<sup>162</sup>

The Band argues that its interpretation of treaty is supported by the historical evidence of the parties' intentions at the time they entered into treaty and also by their subsequent conduct in implementing its terms. The Band further submits that the historical and true interpretation of Treaty 6 is that a band's entitlement is not fulfilled until it receives sufficient land for its population on the date the reserve is surveyed. On this theory, if a band does not receive enough land on the date of the survey to meet the requirements of the current population formula, the band's entitlement will continue to grow in accordance with its increasing population until it is satisfied in one of two ways: first, by the provision of additional land based on the band's current population, or, second, pursuant to a binding settlement agreement with Canada under which the band agrees to accept a lesser quantum of land in full satisfaction of its outstanding treaty land entitlement.

Canada submits that the most reasonable interpretation of Treaty 6, based on the written text and on the historical context surrounding the treaty negotiations, is that the band population on the date of first survey determines the total amount of land to be surveyed as reserve for the band. The argument was framed in these terms:

Canada's approach with respect to these date of first survey (“DOFS”) shortfall situations is consistent with Canada's interpretation of the treaty obligation being to provide land to bands based upon the population at the time the land is surveyed for the

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<sup>162</sup> Submissions of the Lac La Ronge Indian Band, May 31, 1992, p. 22.

band. Where a band receives land for the first time, the quantum will be based upon the population of the band at that time. If not enough land is provided, then Canada remains obliged under the treaty to set aside the DOFS shortfall.<sup>163</sup>

Therefore, Canada's position is that a band's treaty land entitlement is fixed as of the date of first survey. In other words, treaty land entitlement "crystallizes" on the date of first survey and does not fluctuate according to increases or decreases in band population after that critical date.

In the case of "landless" or "single survey" bands that have not received any reserve land, both Canada and the Lac La Ronge Band agree that there would be no practical distinction between their interpretations of treaty since the DOFS approach and the current population formula would each use the same population figure to determine entitlement for a landless band. The real difficulty lies in determining which formula should apply to "partial entitlement" or "multiple survey" bands like Lac La Ronge that received only a partial allocation of the entitlement owed on the date of first survey.

### **Principles of Treaty Interpretation**

No Canadian cases have dealt directly with these issues, but the courts have offered general guidance on the interpretation of Indian treaties. Thus, as a general principle, where the interpretation of an Indian treaty is in issue the courts have indicated that it is necessary to consider the broad historical context of the treaty involved. In *R. v. Taylor and Williams*, for example, the Ontario Court of Appeal stated that:

cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect.<sup>164</sup>

In light of the ambiguity in the treaty formula with regard to the proper date to use for calculating entitlement, it will be necessary to examine the contem-

<sup>163</sup> Submissions on Behalf of the Government of Canada, June 2, 1994, pp. 18-19.

<sup>164</sup> *R. v. Taylor and Williams* (1981), 34 OR (2d) 360 at 364 (Ont. CA), cited with approval in *R. v. Stoui*, [1990] 1 SCR 1025 at 1045 and 1068, [1990] 3 CNLR 127 at 155; *R. v. Sparrow*, [1990] 1 SCR 1075 at 1107-08; and *R. v. White and Bob* (1964), 50 DLR (2d) 613 (BCCA), where the British Columbia Court of Appeal stated some years earlier: "The Court is entitled 'to take judicial notice of the facts of history whether past or contemporaneous' as Lord du Parc said in *Monarch Steamship Co., Ltd. v. Karlsbamns Oljefabriker (A/B)*, [1949] A.C. 196 at p. 234, [1949] 1 All ER 1 at p. 20, and it is entitled to rely on its own historical knowledge and researches . . ." These cases are, therefore, consistent with the Specific Claims Policy which states that "all relevant historical evidence will be considered" in the assessment of claims, regardless of whether it is admissible in a court of law.

poraneous statements of the parties during the treaty negotiations and the subsequent conduct of the parties to assist in interpreting the treaty.<sup>165</sup>

Where the treaty is silent in some important respect, as in this case, the Supreme Court of Canada in *R. v. Stoui* suggested the following interpretive approach:

the treaty essentially has to be interpreted by determining the intention of the parties on the territorial question at the time it was concluded. It is not sufficient to note that the treaty is silent on this point. We must also undertake the task of interpreting the treaty on the territorial question with the same generous approach toward the Indians that applied in considering earlier questions. Now as then, we must do our utmost to act in the spirit of *Simon*.<sup>166</sup>

In *Claxton v. Saanichton Marina Ltd.*, the British Columbia Court of Appeal provided a useful summary of the principles developed by the courts to date on treaty interpretation:

- a. The treaty should be given a fair, large and liberal construction in favour of the Indians;
- b. Treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians;
- c. As the honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned;
- d. Any ambiguity in wording should be interpreted as against the drafters and should not be interpreted to the prejudice of the Indians if another construction is reasonably possible;
- e. Evidence by conduct or otherwise as to how the parties understood the treaty is of assistance in giving it content.<sup>167</sup>

Applying these principles, we shall attempt to determine the legal effect of Treaty 6 and the intentions of the parties at the time they entered into the

<sup>165</sup> *R. v. Horse*, [1988] 1 SCR 187 at 201, and *R. v. Stoui*, [1990] 1 SCR 1025 at 1049 and 1060. For a detailed analysis on the admissibility of extrinsic evidence as an aid to interpreting Indian treaties, see ICC, *Primrose Lake Air Weapons Range II Report on: Joseph Bighead Inquiry, Buffalo River Inquiry, Waterhen Lake Inquiry, Flying Dust Inquiry*, September 1995.

<sup>166</sup> *R. v. Stoui*, [1990] 1 SCR 1025 at 1068. In *Simon v. The Queen*, [1985] 2 SCR 387 at 404, the Supreme Court of Canada stated that the principles of international treaty law may by analogy be helpful in some instances, but are not determinative of Indian treaties because "[a]n Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law." Furthermore, the court stated the general principle that "Indian treaties should be given a fair, large and liberal construction in favour of the Indians" (*Simon* at 402). Madam Justice Wilson, in her dissent in *R. v. Horseman*, [1990] 1 SCR 901 at 907, stated that Indian treaties should not "be undermined by the application of the interpretive rules we apply to-day to contracts entered into by parties of equal bargaining power."

<sup>167</sup> *Claxton v. Saanichton Marina Ltd.*, [1989] 3 CNLR 46 at 50 (BCCA).

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treaty, beginning with an analysis of the written text of the treaty. Other relevant factors, such as the historical context of the treaty negotiations and the subsequent conduct of the parties, shall also be examined in an effort to shed light on what the intentions of the parties were at the time they entered into treaty.<sup>168</sup>

The reserve clause prescribes the treaty formula of one square mile for every family of five, as well as the process for the selection and survey of reserve land – namely, that “the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each Band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them.” The clause is prospective in nature and implies that government surveyors were to be sent after the treaty was signed to consult with the Indians on the location of their reserves and to carry out the surveys of the selected areas. The difficulty, however, is that the treaty does not specify the date to be used for determining a band’s entitlement. To resolve this issue, we shall turn to an examination of the historical record surrounding the treaty negotiations and the subsequent conduct of the parties.

### **Statements of Parties during Treaty Negotiations**

At Fort Carlton on August 19, 1876, Alexander Morris responded to concerns among the Indians that they would be forced to abandon their traditional way of life and to live on reserves. He explained the rationale for reserves and how they would be set aside:

Understand me, I do not want to interfere with your hunting and fishing. I want you to pursue it through the country, as you have heretofore done, but I would like your children to be able to find food for themselves and their children that come after them. . . .

I am glad to know that some of you have already begun to build and to plant, and I would like, on behalf of the Queen, to give each band that desires it, a home of their own: – I want to act in this matter while it is time. The country is wide and you are scattered, other people will come in. Now, unless the places where you would like to live are secured soon, there might be difficulty. The white man might come and settle on the very place where you would like to be.

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<sup>168</sup> The Supreme Court of Canada in *R. v. Stouit*, [1990] 1 SCR 1025 at 1045, examined the historical context of the treaty in question to determine the intentions of the parties and considered the following factors relevant to that inquiry: “1. continuous exercise of a right in the past and at present, 2. the reasons why the Crown made a commitment, 3. the situation prevailing at the time the document was signed, 4. evidence of relations of mutual respect and esteem between the negotiators, and 5. the subsequent conduct of the parties.”

Now what I and my brother Commissioners would like to do is this: we wish to give each band who will accept of it, a place where they may live: we wish to give you as much, or more land than you need; we wish to send a man that surveys the land, to mark it off, so you will know it is your own and no one will interfere with you. What I would propose to do, is what we have done in the other places. For every family of five, to reserve to themselves, one square mile. Then as you may not all have made up your minds where you would like to live: I will tell you how that will be arranged: we would do as has been done with happiest results at North West Angle [Treaty 3]. — *We would send next year a Surveyor to agree with you as to the place you would like.*

There is one thing I would say about the Reserves. The land is much more than you will ever be able to farm, and it may be that you would like to do as your brothers where I came from did. They, when they found they had too much land, asked the Queen to sell for them: they kept as much as they could want, and the price for which the remainder was sold, was put away to increase for them, and many bands now have a yearly income from the land.

But understand me. Once the reserve is set aside, it could not be sold, unless with the consent of the Queen and the Indians. As long as the Indians wish, it will stand there for their good, no one can take for their homes.

Of course, if when a reserve is chosen, a white man had already settled there, his rights must be respected.<sup>169</sup>

Before signing the treaty at Fort Carlton on August 23, 1876, one of the councillors, Pee-tee-quay-say, requested that, “[i]f our choice of a reserve does not please us, before it is surveyed, we want to be allowed to select another.” In response to this query, Morris stated, “You can have no difficulty in choosing your reserves: — be sure to take a good place, so there will be no need to change. You would not be held to your choice until it was surveyed.”<sup>170</sup> On the day following the treaty signing, Morris presented the two principal Cree Chiefs, Mis-to-wa-sis and Ah-tuk-uk-koop, with their treaty uniforms, medals, and flags, and, before giving them their treaty payments, Morris advised that “if any of the Chiefs had decided where they would like to have their reserves they could tell Mr. Christie when they went to be paid.”<sup>171</sup>

Morris made similar statements about reserves to the Indians assembled at Fort Pitt on September 7, 1876:

169 Report of the Treaty 6 Commissioners to Department of Indian Affairs, Ottawa, December 14, 1876, NA, RG 10, vol. 3636, file 6694-1 (ICC Documents, pp. 20-21). Emphasis added.

170 Report of the Treaty 6 Commissioners to Department of Indian Affairs, Ottawa, December 14, 1876, NA, RG 10, vol. 3636, file 6694-1 (ICC Documents, pp. 36 and 40).

171 Report of the Treaty 6 Commissioners to Department of Indian Affairs, Ottawa, December 14, 1876, NA, RG 10, vol. 3636, file 6694-1 (ICC Documents, pp. 46-47). There is no evidence that any of the Chiefs informed the Treaty Commissioners where they wanted their reserves to be located, and no schedule of reserves was attached to the treaty.

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We do not want to take away the means of living that you have now, we do not want to tie you down; we want you to have homes of your own, where your children can be taught to raise for themselves food from the mother earth. You may not all be ready for that, but some I have no doubt are, and in a short time others will follow. . . .<sup>172</sup>

After the treaty was signed at Fort Pitt on September 7, the Treaty Commissioners travelled to Battle River to meet with Red Pheasant and his councillors on September 16. Responding to complaints that settlers were encroaching upon the same land where the Indians made their homes, Morris offered the following advice in regard to the survey of reserves:

*Next Summer Commissioners will come to make payments here . . . and I hope that then you will be able to talk with them where you want your Reserve. . . . the sooner you select a place for your Reserve, the better, so that you can have the animals and agricultural implements, promised to you, and so that you may have the increase from the animals, and the tools to help you build houses on. . . . I am very anxious that you should think over this, and be able to tell the Commissioner next year where you want your Reserve.*<sup>173</sup>

The wording of Treaty 6 and its historical context confirm that one of the main objectives of the Crown was to open up large tracts of fertile agricultural land in Indian territory for settlement. At the same time, the treaty was intended to minimize conflict between Indians and non-Indians by providing for smaller tracts of land to be set aside as reserves to permit bands to take up agriculture as an alternative to their traditional livelihood based on hunting, fishing, and trapping. In the face of increasing demands on prime agricultural land, it was considered necessary to survey reserves as soon as possible to provide some protection for Indian lands and to facilitate the orderly settlement of the prairies. Accordingly, Morris informed the Indian signatories to Treaty 6 that Canada would send surveyors the following year to avoid disputes with settlers over the selection of reserve land.

### **Subsequent Conduct of Parties**

Although reserves were to be surveyed the year after treaty, some bands did not receive land until several years later. In those cases where there were delays in the survey of reserves, fluctuations in band populations created

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<sup>172</sup> Report of the Treaty 6 Commissioners to Department of Indian Affairs, Ottawa, December 14, 1876, NA, RG 10, vol. 3636, file 6694-1 (ICC Documents, p. 63).

<sup>173</sup> Report of the Treaty 6 Commissioners to Department of Indian Affairs, Ottawa, December 14, 1876, NA, RG 10, vol. 3636, file 6694-1 (ICC Documents, pp. 80-81). Emphasis added.



uncertainty among field surveyors over the population that should be used to determine the quantum of land owed to a band.<sup>174</sup> The fluctuations in band populations from the time of treaty underscored the ambiguity of the reserve clause and generated debate among government officials as to whether land quantum should be determined by the band's population at the time of treaty, on the date land was selected by the band, on the date the survey was actually carried out, or on some other basis altogether.

Despite (or perhaps because of) this uncertainty, Indian Affairs did not develop a uniform policy on the selection and survey of Indian reserves, though the general practice that emerged during the late 1800s was for the field surveyor to determine land entitlement by counting the population of the band at the time of the survey itself. Prior to the advent of band lists and Indian registers in 1951, the surveyor usually determined a band's population by counting the number of members on the most recent treaty annuity paylist available to him. Since the annuity paylist was primarily used as an accounting tool to list those members who received their treaty payments, it was not necessarily an accurate indication of a band's true membership in any given year. Nevertheless, the paylist was typically used by the field surveyor as a rough-and-ready guide for determining population figures in order to calculate how much land was owed to a particular band.<sup>175</sup> Based on the treaty paylist information, the surveyor would determine the size of a band's reserve and then consult with the Chief and headmen on the most suitable location for the reserve.

### **Treaty Land Entitlement of Multiple Survey Bands**

As a matter of general principle, where a band received its full land entitlement on the date of first survey, Canada and the Lac La Ronge Indian Band agree that the Crown's treaty obligation to provide reserve land to the band has been fully discharged. In our view, however, this general principle is subject to the findings and recommendations made by the Commission in the

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174 For instance, in 1890 A.W. Ponton sought instructions on how to survey a reserve for Chief Saskatchewan's band: "I may state that I am not aware what enumeration of a band to accept when allotting them their land . . . I am therefore without definite instructions or data, or settled policy to guide me" (A.W. Ponton to E. McColl, September 15, 1890, in NA, RG 10, vol. 1918, file 2790, quoted in Elaine M. Davies, "Treaty Land Entitlement: Development of Policy, 1886 to 1975," DIAND, Presentation to the Indian Claims Commission, November 15, 1994, p. 3).

175 ICC Documents, pp. 575 and 1199, tend to confirm that this was the historical practice of the Department of Indian Affairs. Respectively, Deputy Superintendent General, Ottawa, to Deputy Minister, Department of Justice, Ottawa, September 14, 1929, NA, RG 10, vol. 6820, file 492-4-2 (ICC Documents, p. 575), and Guy Favreau, Minister of Citizenship and Immigration, Ottawa, to Eiling Kramer, Minister of Natural Resources, Regina, May 13, 1963 (ICC Documents, p. 1199). For an analysis of government practices in regard to reserve selection and survey, see Donna Gordon, *Treaty Land Entitlement: A History* (Ottawa: ICC, December 1995).

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Fort McKay and Kawacatoose Reports, in which we concluded that every treaty Indian is entitled to be counted as a member of a band for entitlement purposes. In so saying, we decided that the term “every treaty Indian” includes (a) the base paylist population plus absentees and arrears, and (b) “late additions” – such as transfers from landless bands, new adherents, and, to the extent that they are landless transfers or new adherents in their own right, in-marrying non-treaty Indian women – who join a band after its full land entitlement has been allocated on the date of first survey.<sup>176</sup>

In those instances in which a band did not receive its full entitlement on the date of first survey, the parties disagree on which interpretation of treaty should apply, and their respective positions on this issue can produce radically different results. As stated above, Canada asserts that the most reasonable interpretation of treaty is that the amount of land owed to a band crystallizes on the date of first survey and remains fixed as of that date. Canada argues that the historical evidence supports this interpretation because “it was the intention of Canada and the signatory bands to have reserves set aside in the relatively near future after the making of the treaty, based upon the then existing Band populations.”<sup>177</sup> If a band did not receive its full reserve acreage in the first survey, Canada’s position is that its legal obligation under the treaty is limited to meeting the DOFS shortfall acreage. If Canada’s interpretation of treaty is correct, it follows that neither natural increases in a band’s population nor “late additions” to the band after the date of first survey would have any bearing on the Crown’s treaty obligations because land entitlement is determined by a one-time count of the band’s population on the date of first survey.

In essence, Canada takes the position that DOFS is determinative of two distinct issues relating to treaty land entitlement claims – validation and settlement. According to Canada’s interpretation of treaty, an entitlement claim is valid only where there is a continuing DOFS shortfall acreage. Furthermore, Canada is obliged to provide only the shortfall acreage to settle a band’s entitlement claim, regardless of any subsequent increase in band population or the length of any delay in satisfying the band’s outstanding entitlement.

The Lac La Ronge Band submits, on the other hand, that, where a band’s entitlement is not satisfied on the date of first survey, the most reasonable

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<sup>176</sup> ICC, *Fort McKay First Nation Report on: Treaty Land Entitlement*, December 1995, 76; ICC, *Kawacatoose First Nation Report on: Treaty Land Entitlement Inquiry*, March 1996, 136-37.

<sup>177</sup> Submissions on Behalf of the Government of Canada, June 2, 1994, p. 19.

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interpretation of treaty is to conclude that a band has a residual entitlement which “continues to grow, with the addition of Band members, until such time as the Band receives its full entitlement based on the latest population figure, after previous allotments have been deducted.”<sup>178</sup> The Band contends that the principles of treaty interpretation support this conclusion, because any ambiguity in the treaty should be resolved in favour of the Indians. Furthermore, it argues that the historical practice of the government was to satisfy outstanding entitlements by applying the current population formula.

Accordingly, the essence of the Band’s argument is that it has an outstanding entitlement to land because the prescribed treaty formula has not been fully applied in any previous survey. As with Canada and its date-of-first-survey approach, the Band is proposing that the Commission apply the current population formula for both validation and settlement purposes. Thus, until such time as a band has received its full entitlement based on the current population formula, it has a continuing and growing entitlement that may be settled only by recourse to a further grant of land sufficient to meet its population on the date of that subsequent survey.

The Commission has been asked in this inquiry to determine which of these two competing formulae represents the most reasonable interpretation of the reserve clause in Treaty 6. Canada and the Band advanced their respective formulae as the proper approach for both validation and settlement purposes. Neither party has offered any arguments in the alternative. In effect, each asks the Commission to choose between two competing interpretations of treaty and to accept the extreme results that can result when either formula is applied on a global basis without regard to the particular circumstances of a band.

In our view, it is also necessary to examine Canada’s historical practice and policy in relation to treaty land entitlement to determine whether this evidence can offer any guidance on the rights and obligations of the parties with respect to multiple survey bands.

### **Treaty Land Entitlement Practice and Policy**

The period between the signing of Treaty 6 and the enactment of the *Natural Resources Transfer Agreements* (NRTA) in 1930 was characterized by uncertainty and a lack of consensus among Indian Affairs officials on how the treaties should be interpreted and implemented. When the federal govern-

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<sup>178</sup> Submissions of the Lac La Ronge Indian Band, May 31, 1994, p. 23.

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ment began to survey reserves for Indian bands on the prairies under the numbered treaties, field surveyors and other officials raised questions about the population base to be used to determine entitlement.

The uncertainty surrounding treaty interpretation is manifest when one considers the particular history of the Lac La Ronge Band itself. Between 1889 and 1897, Indian Affairs officials in the field and at headquarters in Ottawa put forward a variety of approaches based on different population bases to calculate the entitlement of the Band. Ultimately, a new approach in the form of the compromise formula was developed by W.C. Bethune as a way of settling entitlements for multiple survey bands.<sup>179</sup> It is clear from the facts surrounding the Lac La Ronge Band's treaty land entitlement that Indian Affairs officials were not guided by a consistent interpretation of treaty and that they employed an ad hoc approach to surveying Indian reserves throughout this period. It is equally clear that the Lac La Ronge Band was not the only prairie band subject to the vagaries of shifting policies and opinions on treaty entitlement.

Despite the absence of a consistent interpretation of treaty or a definitive policy on this issue, we have seen that the usual practice followed by Indian Affairs was to calculate entitlement for landless bands by counting the number of members on the treaty payroll in the year in which the first survey was completed, regardless of whether the payroll preceded or followed the actual survey. Although the parties to Treaty 6 intended to complete the survey of reserves as soon as possible to avoid disputes over land selections, the record shows that many bands did not receive their full entitlements in their initial surveys. Shortfalls often resulted from surveying errors, or from Indian Affairs not having accurate information about band populations to determine the proper DOFS entitlement.

In the case of northern bands with outstanding entitlements, Indian Affairs often chose to delay the final selection of lands, and requested from the provinces "only sufficient areas to meet the actual present requirements of the respective bands, leaving selection of any balance until their future needs can be accurately determined."<sup>180</sup> This delay occurred in the case of Lac La Ronge in 1943, when the Director of Indian Affairs took the position that the

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179 See Appendix C to this report, "Land Entitlement of the Lac La Ronge Indian Band," for a historical summary of calculations made by Indian Affairs officials to determine the treaty land entitlement of the Lac La Ronge Band from 1889 to 1961.

180 Dr. Harold McGill, Director of Indian Affairs, Ottawa, to Deputy Minister of Indian Affairs, Ottawa, April 15, 1939 (ICC Documents, pp. 764-65).

Band's entitlement should not be fulfilled until its future requirements for land had been fully ascertained:

Would it, therefore, not be better to preserve their land credit rather than exhaust it at the present time in the selection of land which might later prove of little value to them and possibly in the wrong location? Saskatchewan is a young Province – no one, much less the Indians themselves, can forecast development trends during the years immediately before us. It has been suggested on more than one occasion that the Indians might be better served in so far as land is concerned by abandoning the original plan of a limited acreage of agricultural lands in favour of larger blocks of lands suitable for hunting and trapping development.<sup>181</sup>

After 1930, there were additional delays in fulfilling the entitlement of multiple survey bands because the NRTA required provincial consent to lands selected by bands. Disputes between Canada and the provinces over proposed reserve land selections were compounded by dramatic natural increases in band populations<sup>182</sup> and a diminishing land base for selection as unoccupied Crown land was taken up for other purposes such as settlement, forestry, and mining. The combined effect of these factors prompted concerns among government officials that an application of current population statistics would greatly increase the proportion of available land required to satisfy outstanding treaty land entitlement claims.<sup>183</sup> The resulting disputes between the provinces and Canada over land selections and land quantum further delayed the settlement of outstanding treaty land entitlement claims, and was particularly relevant in regard to the Lac La Ronge Band from 1930 onward.

181 Acting Director, Indian Affairs Branch, Department of Mines and Resources, Ottawa, to M. Christianson, Superintendent of Indian Agencies, Indian Affairs Branch, Department of Mines and Resources, Regina, August 10, 1943 (ICC Documents, pp. 812-13).

182 For instance, the population of the Lac La Ronge Band increased significantly after the 1940s. The population was 278 when the Band adhered to Treaty 6 in 1889 and was 435 on the date of first survey in 1897. Population increases were modest up to 1948, when there were 969 members, but the numbers increased significantly into the 1970s as follows: 1961, 1404; 1964, 1590; 1973, 2319.

183 This concern is reflected in a letter from Thos. B. Tamaki, a Regina solicitor, to the Saskatchewan Deputy Minister of Natural Resources, J.W. Churchman, on August 25, 1953: "Under the terms of the Indian Treaty No. 6, the Dominion government became trustees of certain lands which were promised to the Treaty Indians and which were to be granted to them as the Indian population increased. . . . Again, by the Indian Treaty No. 6 of 1876 the Treaty Indians, whose population has definitely increased since the last allocation of lands as I am informed, have become entitled to more Crown lands. . . . The above is my opinion and, in view of the great importance of this problem which involves the giving up of provincial assets worth perhaps untold millions of dollars and which involves future policy concerning Treaty Indians, I would suggest that this matter be referred to the Attorney General's Department for their opinion on the subject. . . . Generally, I would suggest that the Department act dumb until such time as we are forced to yield to the Federal authorities" (ICC Documents, p. 901).

In the 1950s, Canada sought to clarify its position on multiple survey bands; in particular, to clarify whether they were entitled merely to the DOFS shortfall acreage, or to an additional grant of land based on current population figures. However, the development of a uniform policy on treaty entitlement proved to be elusive and, in fact, Canada's legal advisors themselves could not give a definitive legal opinion on the extent of the Crown's treaty obligations.<sup>184</sup>

By 1954, some 80 years after Treaty 6 had been signed, Indian Affairs was still uncertain how to determine the amount of land owed to multiple survey bands. In the face of increasing difficulties with the provinces over proposed land selections, the Superintendent of Reserves and Trusts for Indian Affairs, L.L. Brown, wrote in April to the departmental Legal Advisor, W.M. Cory, seeking guidance on these issues. Mr. Brown's letter provides an excellent synopsis of the issues involved and the level of uncertainty that prevailed among DIAND officials:

The problem is, basically, what date is to be selected for purposes of determining the area of a Reserve for a Band, having in mind that under the Treaty the area is based on one square mile for each family of five.

The problem arises in this way. Some of our records clearly disclose that at the date a Reserve was set aside for a Band, in this type of case usually within a year or two after the Treaty, the Reserve was of a sufficient size to fulfil the Treaty obligation for the population of the Band at that date. However, there are a number of cases, probably more than we suspect, in which the Reserve or Reserves allotted to the Indians soon after the Treaty did not take up the entire land credit based on the population at the date of the Treaty. There are also a large number of cases, this applies throughout the Northwest Territories, where no Reserves have ever been established and hence the Treaty credit has not been used at all.

The obvious answer to the question of the date would seem to be the date of the Treaty, but it is doubtful if that can be accepted in most cases, for it is only in rare instances that we have any record of the population of the Band at the actual date of the Treaty. True, we usually have a figure showing the number of Indians for a particular Band at that date, but our records reveal in a great many cases dozens of names

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<sup>184</sup> On February 18, 1938, the Director of Indian Affairs wrote the senior legal advisor seeking an opinion on the effect of the NRTA and how the "amount of land which the Indians are entitled to receive [should] be determined": Harold McGill, Director, Indian Affairs Branch, Department of Mines and Resources, Ottawa, to K.R. Daly, Senior Solicitor, Legal Division, Department of Mines and Resources, Ottawa, NA, RG 10, vol. 7748, file 27001 (ICC Documents, pp. 752-53). The legal advisor did not provide any guidance on how to calculate treaty land entitlement and simply stated that, "[b]y reason of the wording of this legislation [the NRTA] the question of the amount of land which the Indians are entitled to receive would be determined by the Dominion the Provinces under these Acts having a voice in the location of the lands": D.W. Cory, Solicitor, Legal Division, Department of Mines and Resources, Ottawa, to Dr. Harold McGill, Director, Indian Affairs Branch, Department of Mines and Resources, Ottawa, February 25, 1938 (ICC Documents, p. 754).

were added within the next few years on advice that small groups, usually stragglers from the main group, had been overlooked. In other cases it was not until several years after the Treaty that any accurate list of the Indians in a particular Band was compiled, because it was usually some years after the Treaty before the Reserve for the Band was established and the Indians settled thereon.

It has been suggested that in the case of a Band which has taken only part of its land credit, the date for determining the population for land credit be the date on which the Reserve or Reserves were first selected. On this same theory it would follow if, as in the case of the Northwest Territories, a Band had never taken up any part of its land credit and was now intending to do so, that the population as of the present would form the basis. There may be good argument to support this theory. At first glance it would seem that Bands falling into these two categories would benefit to a greater extent than Bands who had taken their full land credit shortly after the Treaty, in the sense that the Band populations have generally increased over the last 75 years and that Bands now taking Reserves would receive a larger acreage. However, it must not be overlooked that these Bands have not derived any benefit from the lands they were entitled to over the past 75 years, whereas in many cases Bands that took their land credits have derived great benefit and in many instances built up substantial trust funds. I believe it is safe to say that in the majority of cases where a Band did take up its land credit, that Band is in a more advanced position today than a Band that did not and the Indians of the first Band certainly enjoy a more comfortable and, for the most part, economical existence. . . .

I believe you will agree that this problem appears difficult of solution and has many ramifications, not the least of which will be the fact that it may be essential to reach agreement with each of the Provinces affected. In our view it is a problem which should have been met and solved years ago and it is strange that it has not been raised by one of the Provinces, for in recent years we have been asking the Provinces for land for Reserves and up to this date they have given us what we asked for without questioning the right of the Indians to receive the land under the terms of the Treaty. It is inevitable that one of these days we will be questioned as to the land credit to which a Band is entitled and if so, will be in the embarrassing position of having to advise that we cannot answer the inquiry.

It would, therefore, be appreciated if you would take this problem under advisement and let us have your views as to what steps should be taken to secure an answer to it.<sup>185</sup>

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185 L.L. Brown, Superintendent, Reserves and Trusts, Indian Affairs, to W.M. Cory, Legal Advisor, April 9, 1954 (Reference 1/1-9 (R.T.)), or see Elaine Davies, DIAND Litigation Support, "Treaty Land Entitlement: Development of Policy, 1886 to 1975," DIAND, Presentation to the Indian Claims Commission, November 15, 1994, tab 8. With respect to Brown's suggestion that the province had not yet objected to any requests for lands, it would appear that senior officials in the provincial government had indeed questioned the policy rationale underlying the creation of Indian reserves: see R.G. Young, Director of Conservation, Department of Natural Resources, Saskatchewan, to J.W. Churchman, Deputy Minister, Department of Natural Resources, Regina, Saskatchewan, July 15, 1954 (ICC Documents, pp. 941-43).

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One month later, the Legal Advisor responded to Mr. Brown's request for a legal opinion:

On examining your files I find an interesting observation on the point in question made by Dr. Duncan Campbell Scott, a former Deputy Superintendent General of Indian Affairs, to the Deputy Minister of Justice in a letter dated the 4th of September, 1929. A portion of this letter is quoted herewith as follows:

The various treaties provide for so many acres per capita and the practice of the Department has been to take the census of the band at the time that the survey of the required acreage is made. The acreage as hereinafter stated will be varied at the time of survey to meet the decrease or increase of the membership at such time . . .

In a review of the problem there does not appear to be any possible way to give a firm legal opinion as to the rights of the Crown in right of Canada to arbitrarily set the selection date for purposes of determining the area of a reserve for a band under any of the above treaties.

The established practice of the Crown in right of Canada was in 1929 set out as above by Dr. Scott . . .<sup>186</sup>

In the absence of a clear policy, regional officials of Indian Affairs continued to press Ottawa during the 1950s for instructions on how to calculate the entitlement of multiple survey bands.<sup>187</sup> The Director of Indian Affairs instructed his officials in September 1955 to examine each proposal for land individually on its own merits and to "first deal with those [bands] where there seem[s] least room for doubt as to the desirability of securing the new land, where there is little likelihood of objection on the part of the Province,

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<sup>186</sup> Legal Advisor, Department of Citizenship and Immigration, Ottawa, to L.L. Brown, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, May 20, 1954, DIAND file 578/30-5, vol. 1 (ICC Documents, pp. 934-36). Counsel for the Band suggested that this letter constitutes an acknowledgment by Canada in 1954 that it was obliged to provide lands pursuant to the current population formula. With respect, we do not agree. It is true that Indian Affairs was aware of its "established practice" of calculating entitlement based on a band's population at the time of survey, but the opinion does not suggest that Canada was under a legal obligation to apply the current population formula to multiple survey bands. The letter merely identifies departmental practice and states that it was not possible to provide a definitive legal opinion on the extent of the Crown's treaty obligations.

<sup>187</sup> For example, on September 29, 1954, L.L. Brown wrote to R.F. Battle for instructions on the entitlement owing to the Upper Hay River Band and "whether the effective date for determining the population of a Band for purposes of establishing the land credit is the date of the Treaty or some later date in the case of Bands that have not yet taken up their full credit": L.L. Brown, Superintendent Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, to R.F. Battle, Regional Supervisor, Indian Affairs Branch, Department of Citizenship and Immigration, Calgary, September 29, 1954, DIAND file 777/30-3-207 (ICC Documents, p. 947).



and where the need for early action is obvious.”<sup>188</sup> Following these instructions, Indian Affairs advanced the current population formula to settle the outstanding entitlements of two multiple survey bands in northern Alberta – the Slaveys of Upper Hay River Band and the Little Red River Band – on the understanding that the Alberta government would not object to settlements on this basis.<sup>189</sup>

During the 1960s, Indian Affairs employed a similar case-by-case approach with Saskatchewan bands, but tended to advance the current population formula as the preferred means of settling treaty land entitlement claims in negotiations with the province. In April 1963, for example, the provincial Minister of Natural Resources, Eiling Kramer, informed Indian Affairs that Saskatchewan was prepared to meet its treaty obligations only to the extent that entitlement would be based on the “known or estimated population [of the bands] at the date of the treaty.”<sup>190</sup> On May 13, 1963, however, the Minister of Indian Affairs, Guy Favreau, asserted that bands without reserves should receive lands based on current populations:

On reading these treaties in their full context, it is obvious that the selection of land is to take place at some future date on the basis of one square mile for a family of five. This has always been interpreted to mean at the time of the selection. Precedent is in favour of the Indians in this regard. . . . We have definite figures as to the present population, but such is not the case with regard to the population at the time of the signing of the treaties. This means that the settlement on the basis of the present population is clean-cut and without the danger of disputes arising.<sup>191</sup>

In other instances, the formula was justified by Indian Affairs on the grounds that bands suffered a “loss of revenue because the land was not available to them over the years.”<sup>192</sup>

188 H.M. Jones, Director, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, to E.S. Jones, Regional Supervisor of Indian Agencies, Indian Affairs Branch, Department of Citizenship and Immigration, Regina, October 17, 1955 (ICC Documents, pp. 978-79).

189 Detailed information on the entitlement calculations for the Slaveys of Upper Hay River and the Little Red River Band were set out in Lew Lockhart’s “Thumbnail Sketches,” ICC Exhibit 10, tabs 21 and 22, respectively. With respect to the Upper Hay River Band, the Alberta government agreed in 1958 to provide an additional 25,901 acres, based on the Band’s 1955 population (agreed to by parties as a cut-off date), to satisfy the 1939 DOFS shortfall of 9128 acres (56,152 acres were set aside at DOFS). In the same year, the Little Red River Band received an additional 42,422 acres of land based on the Band’s 1955 population (used as a cut-off date), to satisfy the 1912 DOFS shortfall of 128 acres (18,048 acres were set aside at DOFS).

190 Eiling Kramer, Minister of Natural Resources, Regina, to R.A. Bell, Minister of Citizenship and Immigration, Ottawa, April 4, 1963 (ICC Documents, p. 1190).

191 Guy Favreau, Minister of Immigration and Immigration, Ottawa, to Eiling Kramer, Minister of Natural Resources, Regina, May 13, 1963 (ICC Documents, pp. 1199-1200).

192 W.P. McIntyre, Administrator of Lands, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, to Regional Supervisor—Alberta, Indian Affairs Branch, Department of Citizenship and Immigration, Alberta, May 17, 1965, DIAND file 775/30-4, vol. 1 (ICC Documents, p. 1545).

The Saskatchewan government ultimately acquiesced to the Minister of Indian Affairs and, in November 1963, the province agreed to negotiate settlements using current population figures for "Indian bands who have not as yet claimed their land rights."<sup>193</sup> Although it is clear that Saskatchewan agreed *as a matter of policy* to settle outstanding entitlements by using current population figures, the province did not necessarily accept that it was legally obliged to provide lands on this basis.<sup>194</sup>

Although agreement had been reached with Saskatchewan to use the current population formula for landless bands, uncertainty remained about how to calculate the amount of land owed to multiple survey bands. Following an internal review on outstanding treaty land entitlements, Indian Affairs expressed uncertainty about its position with respect to multiple survey bands:

In the past, we have insisted on the maximum amount of land that could be obtained from the Province, with considerable success. If we retreat from this position, the Indian people should be consulted before we accept final settlement. From correspondence on file it is clear that the three Prairie Provinces are consulting on precedents established or to be established in interpreting the treaties and their obligations under the 1930 Transfer of Natural Resources Agreement. Where a Band has received no land, the precedent has been established that the population at the time of selection should be used in arriving at the acreage to be provided. Unfortunately, there is no similar precedent for Bands which have received only partial entitlement.<sup>195</sup>

Nevertheless, Indian Affairs continued to advance the current population formula to settle TLE claims for both single survey and multiple survey bands throughout Saskatchewan, Alberta, and Manitoba into the early 1980s. The most compelling example relates to the 1976 Saskatchewan formula, whereby Canada, Saskatchewan, and the Federation of Saskatchewan Indians agreed to a modified form of the current population formula which fixed band populations as of December 31, 1976, to settle outstanding treaty land entitlement claims in Saskatchewan. It is very important to recognize, however, that Canada and Saskatchewan appeared to agree to the Saskatchewan

193 J.W. Churchman, Deputy Minister of Natural Resources, Regina, to A.H. MacDonald, Director of Northern Affairs, Prince Albert, Saskatchewan, November 26, 1963 (ICC Documents, p. 1238).

194 G.G. Rathwell, Director of Resource Lands, Department of Natural Resources, Regina, to F.B. Chalmers, Special Assistant to the Assistant Deputy Minister, Department of Mines and Resources, Winnipeg, February 20, 1970 (ICC Documents, p. 1837).

195 C.T.W. Hyslop, Acting Director, Economic Development Branch, Department of Indian Affairs, Ottawa, to G.A. Poupore, Acting Director, Indian Assets, Department of Indian Affairs, Ottawa, December 12, 1969 (ICC Documents, p. 1817).

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formula as a model for *settlement*, but Indian Affairs continued to use the date-of-first-survey approach to determine the threshold question of *validation* (i.e., which bands were entitled to more land). According to the criteria developed by Indian Affairs to validate claims, bands with a DOFS shortfall acreage were recognized as having an outstanding entitlement for the purposes of obtaining a settlement under the Saskatchewan formula.<sup>196</sup> The Federation of Saskatchewan Indians, however, considered the Saskatchewan formula to be a compromise to their position that the proper treaty formula is to provide lands based on current population statistics.

The Saskatchewan formula was implemented in the case of only two bands and, as discussed earlier, a formal agreement was never signed. In retrospect it would appear that the current population formula proved to be an unworkable method of settling entitlement claims primarily because of the substantial increase in band populations after the 1940s and the lack of unoccupied Crown lands. In the aftermath of the parties' failed efforts to settle outstanding entitlements based on the 1976 Saskatchewan formula, the Federation of Saskatchewan Indians, Canada, and Saskatchewan signed the 1992 Saskatchewan Treaty Land Entitlement Framework Agreement and agreed to a modified equity formula as a fair and equitable compromise between the date-of-first-survey approach and the current population formula.

In our view, the historical evidence does not conclusively demonstrate one way or the other that a band's entitlement was intended to crystallize on the date of first survey or to grow in accordance with the band's current population. Nevertheless, a number of conclusions can be drawn from an examination of Indian Affairs' practices and policies on treaty land entitlement.

First, there was considerable uncertainty among government officials about the proper interpretation of the treaty reserve clause. This uncertainty is directly attributable to the ambiguity in the treaty and to the fact that Canada's legal advice was inconclusive on the question of land entitlement. As a result, Indian Affairs' policies and practices were ad hoc in nature and often led to inconsistencies in the interpretation and implementation of treaty.

Second, the general practice of Indian Affairs was to use the date-of-first-survey population to determine whether a band had an outstanding entitlement to land. Typically, Indian Affairs would compare the band's population

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<sup>196</sup> There are two notable exceptions to this general rule. Despite the fact that the Stoney Rapids and Fond du Lac Bands received their full DOFS entitlements during the 1960s, they were nevertheless recognized as entitlement bands under the 1976 Saskatchewan formula because of inordinate delays in surveying their reserves.

with the amount of land actually surveyed on the date of first survey and, if there was a DOFS shortfall acreage, the band was recognized by Indian Affairs as having a valid claim to more land. Although DOFS analysis was used to determine the threshold question of whether a band had an outstanding claim to additional lands for validation purposes, Indian Affairs did on several occasions provide additional land to bands even though they had received their full entitlements on the date of first survey.<sup>197</sup> On balance, however, the evidence does not support the view that the current population formula was used by Indian Affairs to determine whether a band had a valid claim to additional land.

Third, if a band had an outstanding entitlement based on a DOFS shortfall, the general practice until 1976 was for Indian Affairs to apply or advance the current population formula as the preferred approach to settle the band's claim. The evidence suggests that Indian Affairs advanced the current population formula for a number of reasons: (1) some officials felt that it represented the safest course of action in light of the ambiguity in the treaty; (2) even if the formula exceeded Canada's strict treaty obligations, many bands required a larger land base for economic development; (3) the formula was used as a justification for obtaining more land from the federal Department of the Interior prior to 1930 and from the provinces after 1930; and (4) the allocation of lands in excess of the DOFS shortfall was justified on the grounds that compensation was owed to bands for being deprived of the full use and benefit of land owed them since the date of first survey.

Fourth, in the 1980s federal and provincial officials withdrew support for the current population formula as the standard model for settlement. In response to changing circumstances, as well as the greater level of sophistication among all parties in relation to treaty land entitlement claims, various alternatives to the date-of-first-survey approach and the current population formula have been developed in recent years. Alternative settlement models have been developed that often involve a combination of land, money, and other forms of valuable consideration to satisfy outstanding entitlement claims. For instance, the 1992 Saskatchewan Treaty Land Entitlement Framework Agreement provided that cash compensation would be paid to the enti-

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<sup>197</sup> For instance, in 1975 the Minister of Indian Affairs stated that the Nikaneet Band did not have a valid claim to more land, but that he would support the Band's application for more land on "social and economic grounds" because it had an inadequate land base: Judd Buchanan, Minister of Indian Affairs, Ottawa, to D. Ahenakew, Chief, Federation of Saskatchewan Indians, Prince Albert, Saskatchewan, December 10, 1975 (ICC Documents, p. 2377).

tlement bands in lieu of land to allow them to purchase their shortfall lands from private owners and the Crown on a willing seller/willing buyer basis.

Fifth, while the date-of-first-survey approach was generally used by Indian Affairs to determine whether a band had an outstanding entitlement, there was no evidence before the Commission to suggest that Canada ever settled a band's entitlement simply by allocating the DOFS shortfall acreage. During the course of the inquiry, Canada could not refer the Commission to a single instance where a multiple survey band received *only* the DOFS shortfall acreage in satisfaction of its outstanding entitlement claim.

In our view, the evidence relating to the practices and policies of Indian Affairs does not support the Band's argument that Canada and First Nations intended to apply current population figures to settle treaty land entitlements for both single survey and multiple survey bands. Although the formula was advanced by Indian Affairs to settle outstanding entitlement claims for many years, it does not follow that Canada necessarily accepted the formula as the proper interpretation of treaty and as a reflection of its lawful obligations. We also disagree with Canada's argument that the date of first survey was consistently applied by Indian Affairs to settle the outstanding entitlements of partial entitlement bands. The evidence does not support this position.

### **Other Considerations**

The Band argued that the concept of "need" was the underlying rationale for the historical application of the current population formula and the primary factor considered by Canada to determine a band's land quantum:

Canada and the Indians expressly chose to implement Treaty by setting aside only as much land as Canada determined was "needed" by a Band, at any particular time. The "balance" of the entitlement was left outstanding. When further land was "needed," the population of a Band, at the time of the "need," was used to calculate the entitlement. This process, which continually looked to the future, continued until such time as the entitlement was fulfilled. Accordingly, this concern for the future "needs" of a Band, rather than compensation for loss of use of reserve lands, has historically been the underlying rationale for the use of the Current Population Formula.<sup>198</sup>

<sup>198</sup> Submissions of the Lac La Ronge Indian Band, May 31, 1994, pp. 115-16.

Counsel for the Band added that this approach was consistent with the Indian understanding that lands would be provided under treaty on the basis of bands' current population figures.<sup>199</sup>

The evidence supports the proposition that Indian Affairs considered the needs of a band as a justification for applying the current population formula. However, the concept of need is far too vague to be used as the legal test for determining the nature and extent of the Crown's treaty obligations to provide reserve land to Indian bands. For example, consider the case of a band that received its full entitlement on the date of first survey but still needed more land because its population had increased and the existing resource base was inadequate for the band's present population and future growth. If the concept of need was used as the main criterion for determining the extent of the Crown's treaty obligations, neither the band nor Canada could determine with any certainty whether the band had a legitimate claim to additional reserve land.

There can be no doubt that the interpretation and implementation of a treaty involves issues of great importance to both First Nations and the Canadian public in general. Such matters, if at all possible, should be resolved in the spirit of reconciliation through good-faith negotiations between the parties. Given the inherent flexibility in the relationship between First Nations and the Crown, it is desirable as a matter of social policy to move beyond purely legal grounds to resolve disputes over the interpretation of the rights and obligations of the parties under treaty.<sup>200</sup> However, although it is entirely appropriate for the parties to consider moral and equitable grounds and the needs of Indian bands in land entitlement matters, we are unable to find as a matter of law or treaty interpretation that Canada is under a legal obligation to apply the current population formula to settle the outstanding entitlements of multiple survey bands.

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199 Mr. Alex Kennedy, a Cree elder who appeared before the Commission, stated that the Indian interpretation of the treaty was that "as the population of the people increased within the First Nations, they will be allowed to select land . . ." (ICC Transcript, January 25, 1994, vol. 1, p. 92). The Commission also heard from Gordon Thunderchild (a member of the Thunderchild Band), who stated that the Indians' understanding of the treaty was that "for every family of five, there is one section [one square mile], so generally that was understood to be, but the other understanding that they had on top of that is that consideration would be given, you know, for each child born after that, you know, that it remains open-ended. That it was their understanding. I have heard Elders speak of that in that nature . . . That was their belief that the children here, yet unborn, would have to be considered. Our reserves would be crowded eventually, no place for them to make a living" (ICC Transcript, January 26, 1994, vol. 2, pp. 145-46).

200 For instance, there may be compelling social and economic grounds for allocating additional reserve land to many northern bands whose current land holdings are ill-suited for agriculture or other forms of economic development.

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The Lac La Ronge Band also advanced the current population formula as the proper interpretation of treaty because the case law requires that the treaty be given a large and liberal construction and that doubtful expressions be resolved in favour of the Indians. We are cognizant of these principles. However, the courts have also cautioned that even a generous interpretation of the treaty must be reasonable and must attempt to reconcile the competing practical interests of the parties.<sup>201</sup> In our view, the difficulty with the current population formula as an interpretation of treaty is that its application can lead to absurd results that militate against a reconciliation of the parties' competing interests. The following comments will illustrate that point.

It would be impractical to use the current population formula for validation purposes to determine whether a band received its full entitlement under treaty. The use of criteria based on a constantly fluctuating current population would make it difficult to settle entitlement claims because it has been very common for a band to experience a marginal increase in its population in the interval between the taking of a band census, the date of the band's land selection, and the date of the survey actually being carried out. As a result, the census can rapidly become unreliable, and a nominal shortfall of land could result, even in circumstances where Indian Affairs exercised due diligence to ensure that the lands were surveyed as quickly as possible. If current population figures were used as the determining criteria for validation purposes, this practice would effectively open the floodgates to a multitude of new claims based entirely on a technical application of the formula.

The application of the current population formula to multiple survey bands is also problematic when it is used as the basis for settling valid entitlement claims, because no distinction is made between band members who have not been counted in a land entitlement calculation and members whose forebears have been counted in a previous survey of reserve land. Canada submits that a global application of the current population formula could create inconsistencies and inequities among bands:

The interpretation of treaty advocated by the Band suggests a floating entitlement which varies year by year, or perhaps day by day, as the Band population fluctuates. While this may be a reasonable approach where a band has not been given any land,

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<sup>201</sup> Although the court in *Sioui* emphasized the importance of the principle that treaties should be interpreted broadly in favour of the Indians, the court stated that there are limits to this general principle: "Even a generous interpretation of the document . . . must be realistic and reflect the intention of both parties, not just that of the Hurons. The Court must choose from among the various possible interpretations of the common intention the one which best reconciles the Hurons' interests and those of [the Crown]" (*R. v. Sioui*, [1990] 1 SCR 1025 at 1069).

it fails to take into account the fact that *lands have been set aside in a DOFS shortfall situation* (such as the instant case). In other words, the Band's interpretation does not distinguish between a band which has had 99% of its land set aside since the time of treaty, and a second band with the identical current population which is just receiving the first of its land today. Both bands are entitled to the same amount of land despite the fact that the first band has had the use and benefit of (or revenues from) 99% of the DOFS lands for over 100 years.<sup>202</sup>

We agree that the formula is conceptually flawed. If the formula were applied broadly to bands across the prairies without regard to the factual circumstances of individual claims, we have no doubt that it would lead to absurdities and would create inequities among bands. For example, if a band had a one-acre shortfall at date of first survey because of a minor error during the survey, the application of the current population formula today could lead to an entitlement of enormous consequence simply because the band's population has increased dramatically since that date. In such circumstances, the remedy would often be disproportionate to the nature of the band's actual damages in economic terms.

### **Conclusions on the Interpretation of the Reserve Clause**

In our view, the wording of the treaty and the surrounding historical context suggest that the parties intended to carry out the selection and survey of reserves within a short time following treaty to avoid conflicts with settlers over land selections. Despite the absence of clear wording in the treaty or definitive policy guidelines on treaty land entitlement, the general practice of Indian Affairs was to calculate the amount of land to be set aside by counting the number of band members on the most recent treaty annuity payroll available to the field surveyor at the time of the survey. If the parties had intended to use the populations of Indian bands at the time of the treaty to determine land entitlement, this could have been accomplished easily by attaching a schedule to the treaty listing the respective population figures for each band that signed treaty.<sup>203</sup> The fact that Indian Affairs lacked reliable information

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202 Submissions on Behalf of the Government of Canada, June 2, 1994, p. 19. Emphasis in original. Support for Canada's argument can be found in the 1990 Report of the Office of the Treaty Commissioner which stated: "The formula was viewed as inherently unfair to Bands which had received their full entitlement at the date of first reserve survey. Extreme examples were cited in support of this rationale, notably the case of Oxford House Band in Manitoba. This Band had a shortfall at first survey of 15 acres; under the 'Saskatchewan' formula it would be entitled to some 20,000 acres." Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 18.

203 For example, the Robinson-Huron and Robinson-Superior Treaties of 1850 set out the general size and location of the reserves selected by the bands as schedules to those treaties.



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on band population figures at the time of treaty suggests that such an interpretation was not intended by the parties.

If a band received the amount of land to which it was entitled on the date of first survey, Canada considers that its obligations were satisfied. Where a band did not receive its full entitlement, the date-of-first-survey population still figured prominently and was used by Indian Affairs to determine whether a band had an outstanding entitlement to reserve land based on a shortfall acreage. It is only where a band did not receive its full entitlement at first survey – or where the band subsequently acquired new unfulfilled entitlement by virtue of “late additions” who joined the band after the first survey – that the issue arises as to what is the most appropriate population to use for establishing a band’s treaty land entitlement.

In our view, the most reasonable interpretation of the reserve clause is that every treaty Indian is entitled to be counted – once – for treaty land entitlement purposes, and that the parties intended to determine the size of Indian reserves by reference to a band’s population on or before the date of first survey. This interpretation is supported by the wording of the reserve clause itself, by the statements made by the parties during the treaty negotiations, and by the subsequent conduct of the parties relating to the selection and survey of reserves. We reiterate that this conclusion is consistent with the principles outlined in the Commission’s Fort McKay and Kawacatoose Reports. These reports provide that all treaty Indians, including “late additions,” are entitled to be counted for entitlement purposes, even if they join a band after its full land entitlement has been set aside.<sup>204</sup>

In general, we agree with the statement in the 1983 ONC Guidelines that, “although the treaties do not clearly identify the date for which a band’s population base is to be determined for the land quantum calculations the most reasonable date is not later than the date of first survey of land.”<sup>205</sup> Depending on the facts of any given case, it may be necessary to consider many questions in selecting the date on which a band’s population should be assessed, including the specific terms of treaty, the circumstances surrounding the selection of land by the band, delays in the survey of treaty land, and the reasons for those delays. That being said, and subject to due consideration being given to “late additions” to the band after the date of first survey, we do not believe that the facts of this case require us to inquire further than

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<sup>204</sup> ICC, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry*, December 1995; ICC, *Kawacatoose First Nation Report on Treaty Land Entitlement Inquiry*, March 1996.

<sup>205</sup> DIAND, “Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims,” unpublished memorandum, May 1983 (ICC Documents, pp. 3585-86).

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the Lac La Ronge Band's population in 1897, when the initial survey took place. Although the population of the Band grew from 278 on the date of adhesion to treaty in 1889 to 484 in 1897, neither Canada nor the Band has suggested that a date earlier than the date of first survey would be appropriate in the present case. In light of the historical record, we consider the date-of-first-survey figures to be both reasonable and fair as a starting point in the particular circumstances of this claim.

### **Summary of Findings on Issue 1**

Based on established principles of law relating to the interpretation of Indian treaties, we make the following findings about the nature and extent of the Crown's obligations to provide reserve land to Indians under the terms of Treaty 6:

- 1 The purpose and intention of the treaty is that each band is entitled to 128 acres of land for each member of the band, and every treaty Indian is entitled to be counted in an entitlement calculation as a member of a band.
- 2 For a band without reserves, the quantum of land entitlement crystallizes no later than the date of the first survey and shall be based on the actual band membership, including band members who were absent at the time of the survey.
- 3 If the band received its full land entitlement at date of first survey, Canada's treaty obligations are satisfied, subject to the principle that "late additions" are entitled to be counted for entitlement purposes.
- 4 If a band did not receive its full entitlement at date of first survey, or if a new or additional shortfall arose as a result of "late additions" joining the band after first survey, the band has an outstanding treaty entitlement to the shortfall acreage, and Canada must provide at least this amount of land in order to discharge its obligation to provide reserve lands under treaty.
- 5 Canada's failure to provide the full land entitlement at date of first survey, or subsequently to provide sufficient additional land to fulfil any new treaty land entitlement arising by virtue of "late additions" joining the band after first survey, constitutes a breach of the treaty and a corresponding breach of fiduciary obligation. A breach of treaty or fiduciary obligation can give rise to an equitable obligation to provide restitution to the band.

- 6 Natural increases or decreases in the band's population after the date of first survey have no bearing on the amount of land owed to the band under the terms of treaty.

## ISSUE 2

Has Canada satisfied its treaty obligation to provide reserve land to the Lac La Ronge Indian Band?

If we apply the treaty principles outlined above to the facts of this claim, does the Lac La Ronge Indian Band have a valid treaty land entitlement claim?

In 1897, eight years after the Lac La Ronge Band adhered to Treaty 6, the Band received its first survey of reserve land when 30,400 acres were set aside at Little Red River Reserve 106. This allotment was sufficient for 237.5 people under the treaty formula.

According to Indian Affairs' records, the Lac La Ronge Band had 484 members in 1897. Assuming that this figure is accurate, the Lac La Ronge Band was entitled to 61,952 acres ( $484 \times 128$  acres), based on the date-of-first-survey population.<sup>206</sup> In light of the fact that only 30,400 acres were set aside as reserve, the Band suffered a corresponding shortfall of 31,552 acres on the date of first survey.

Subsequent surveys in 1909, 1935, and 1948 allocated 13,362 additional acres to the Band, for a total reserve holding of 43,762 acres. Accordingly, these allocations were not sufficient to meet the Band's treaty land entitlement of 61,952 acres based on its DOFS population.

By 1964, the Band still had an outstanding entitlement, based on the DOFS shortfall acreage. On May 8, 1964, the Lac La Ronge Band Council passed a Resolution accepting an additional 63,330 acres of land to settle the Band's outstanding entitlement. In 1968, a survey of 32,640 acres satisfied the outstanding DOFS shortfall acreage by increasing the total reserve holdings to 76,402 acres. In 1970 and 1973, three additional parcels comprising 30,745 acres were surveyed.

In total, the Lac La Ronge Band received almost 107,147 acres over a 75-year period between 1897 and 1973. Based on the evidence before us, we find that Canada had satisfied the Band's treaty land entitlement of 61,952

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<sup>206</sup> There is no evidence before the Commission to indicate whether the Lac La Ronge Band's entitlement should be greater than 61,952 acres as a result of "late additions" joining the Band after the date of first survey. If there were "late additions" to the Band, the figure of 61,952 acres used throughout this report may need to be revised accordingly.

acres by 1968, and that 45,195 additional acres were set aside as reserve for the band in excess of Canada's obligations under the terms of Treaty 6.<sup>207</sup>

Although it is clear that the Crown satisfied its treaty obligation to provide reserve land to the Lac La Ronge Band, the fact remains that Canada did not completely satisfy this obligation until 1968, some 70 years after the date of first survey. We have not received submissions from either Canada or the Band as to the legal or equitable consequences that should flow from this 70-year time lapse, or from Canada's ultimate provision of the 45,195 acres in excess of its legal obligation under Treaty 6. Since the parties did not make any specific submissions on this point, we do not propose to address those questions in this report.

### ISSUE 3

What impact, if any, did the 1964 Band Council Resolution have on the Lac La Ronge Indian Band's treaty land entitlement claim?

On May 8, 1964, the Lac La Ronge Band Council met with federal officials to discuss the terms of a proposed settlement that was intended to fulfil the Band's outstanding treaty land entitlement. According to the minutes of the meeting, the Band Council was informed that the province was prepared to allocate an additional 63,330 acres of land to be set aside in three blocks. Based on the information provided to the Band Council at that meeting, the councillors voted unanimously in favour of a Band Council Resolution (BCR) stating that the Band agreed to accept 63,330 acres as "the full and final land entitlement of the Lac La Ronge Band under Treaty 6."<sup>208</sup>

The Band submits that the Band Council did not have the authority or power under the *Indian Act* to extinguish the Band's treaty land entitlement pursuant to the May 8, 1964, Band Council Resolution. Counsel argued that the onus of proof is on the government to establish the extinguishment of a treaty right and to demonstrate that the BCR was valid and legally binding on the Lac La Ronge Band.<sup>209</sup> On the other hand, Canada asserts that it was not necessary to rely on the BCR as a binding "settlement" because the Band's treaty land entitlement was satisfied by providing land in excess of the shortfall acreage.<sup>210</sup>

207 This excess area of 45,195 acres may have to be reduced if it is determined that "late additions" after the date of first survey increased the Band's overall entitlement to more than 61,952 acres.

208 Minutes of Lac La Ronge Band Council meeting, May 8, 1964 (ICC Documents, p. 1319).

209 Submissions of the Lac La Ronge Indian Band, May 31, 1994, pp. 384-85.

210 Submissions on Behalf of the Government of Canada, June 2, 1994, p. 39.

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In light of our finding that Canada had discharged its treaty obligation to provide reserve land to the Lac La Ronge Band by 1968, Canada is correct in asserting that the 1964 BCR is irrelevant to the question of whether the Band's treaty land entitlement was satisfied. The only context within which the BCR might become relevant is if the Band could establish that it is entitled to restitution as a result of Canada's not fulfilling the entitlement until 1968, some 70 years after the date of first survey. In that event, it would become necessary to consider whether the BCR and the acceptance of 63,330 acres as "full and final entitlement" constitutes a binding settlement on the Band with regard to its claim to the shortfall acreage plus restitution for the continuing breach until 1968. As mentioned previously, any comments at this point as to the merit or validity of such a claim based on restitutionary grounds would be premature in the absence of evidence and argument.

Moreover, we believe that, having regard to our conclusion that Canada fulfilled its lawful obligation and satisfied the Band's treaty land entitlement, it is not necessary for us to address whether (a) the Lac La Ronge Band Council had authority under the *Indian Act* to enter into a binding settlement agreement on behalf of the Band in 1964, or (b) the Band provided a full and informed consent to the 1964 settlement. These questions might yet have relevance in the context of a claim that the settlement contemplated by the 1964 BCR should be reopened on restitutionary grounds, but no such claim has been made in this inquiry, nor do we wish to be taken as making any suggestion regarding the merits of such a claim.

#### ISSUE 4

Did Canada breach any fiduciary obligation or duty owed to the Lac La Ronge Indian Band in the fulfilment of its treaty land entitlement?

The Band submits that Canada owed a fiduciary duty to the Lac La Ronge Band in 1964 regarding the settlement of its outstanding land entitlement. The Band claims that the Crown has a general fiduciary responsibility to Indian people, and that the Crown specifically undertook to act in the best interests of the Lac La Ronge Band in negotiations with the province to settle the Band's outstanding entitlement, to advise the Band fully of all material facts and options, and to obtain a full and informed consent from the Band to any terms of settlement or proposals reached with the province.<sup>211</sup> The Band

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<sup>211</sup> Submissions of the Lac La Ronge Indian Band, May 31, 1994, pp. 372-77.

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submits that Canada acted in a fiduciary capacity on behalf of the Band in negotiations with Saskatchewan in regard to the amount of land required to satisfy the Band's outstanding treaty land entitlement claim. The Band asserts that Canada did not handle the negotiations properly and did not advance the current population formula, despite the fact that Saskatchewan was prepared to provide substantially more land to the Band. Instead, Canada invented the compromise formula, which resulted in the Band obtaining less land than it could have received.

Finally, the Band asserts that Canada undertook to act on behalf of the Band in its dealings with the province and that Canada obtained a specific undertaking from Saskatchewan in 1939 to provide "preferential treatment" to the Lac La Ronge Band when its claim to land was ultimately settled. The undertaking provided by the province was in exchange for Canada's agreement to withdraw a claim to lands at Candle Lake for the Band. The Band submits that Canada seemingly forgot or ignored the province's undertaking to provide "preferential treatment," and that Canada's failure to raise the undertaking on behalf of the Band during negotiations with the province in the 1960s constituted a substantial breach of the fiduciary duty owed to the Lac La Ronge Band.<sup>212</sup>

Canada contends that it does not owe a specific fiduciary duty to the Band as a result of discussions with Saskatchewan over the amount of land required to satisfy the treaty obligations owing to the Band. Canada disputes the factual and legal premise behind the Band's proposition that, if Indian Affairs had handled the negotiations in a conscientious manner, it could have obtained more land for the Band because the province was prepared to provide land based on the current population formula. First, Canada argues that Indian Affairs did attempt to obtain more land for the Band, but that the province refused to provide it. Second, Canada denies that it had a fiduciary obligation to obtain as much land from the province as possible, because the Crown's legal obligation was to provide only the amount of land required to satisfy the terms of the treaty. Since the calculation under the Bethune formula provided an amount exceeding the requirements under treaty, it cannot be argued that Canada breached any fiduciary obligation arising out of its discussions with the province.

Furthermore, Canada asserts that each of the other bases on which the Band argues that Canada breached its fiduciary obligation is premised on the

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<sup>212</sup> Submissions of the Lac La Ronge Indian Band, May 31, 1994, p. 373.

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assumption that the May 8, 1964, Band Council Resolution constituted a binding settlement of the Lac La Ronge Band's treaty land entitlement. As Canada neither asserted this assumption nor relied upon it, it submits that there is no need to respond to these allegations. Canada claims that its obligation lay in the provision of lands in accordance with the date-of-first-survey formula, and that the fiduciary character of the relationship between Canada and the Band neither adds to nor subtracts from the scope of Canada's legal obligations under the treaty.<sup>213</sup>

With due respect to the parties, however, the Commission has decided not to address whether the 1964 settlement represented a breach of fiduciary obligation in the context of this case. We have reached this decision for the following reasons.

First, the focus of the parties' arguments during the course of the inquiry has been on the interpretation of treaty. Both parties presumed that the nature and extent of the Crown's obligations were defined entirely by the proper treaty formula. Canada argued in support of a date-of-first-survey approach to define the treaty obligation, whereas the Band submitted that the current population formula applies. As discussed previously, neither party addressed the elements of a claim based on restitutionary grounds or whether, if such a claim exists, the 45,195 acres allocated by Canada in excess of the Band's strict land entitlement is sufficient to address the Band's restitutionary interest. It is only fair that the parties should have an opportunity to make specific submissions on this issue after having the benefit of considering the implications of our findings in this report.

Second, it is important to remember that the Lac La Ronge Band has claimed that it has a continuing legal interest in the Candle Lake and Lac La Ronge School Lands as reserve lands that have never been lawfully surrendered to the Crown. It is difficult to separate the allegations of breach of fiduciary duty in the present inquiry from the legal and factual questions raised by the Candle Lake and School Lands claims. Although the Candle Lake and School Lands claims were the subject matter of a separate inquiry before the Commission, it is unclear at present whether the Commission will hear these inquiries because the Lac La Ronge Band withdrew its request for an inquiry into those matters in December 1995.<sup>214</sup>

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<sup>213</sup> Submissions on Behalf of the Government of Canada, June 2, 1994, pp. 39-41.

<sup>214</sup> Chief Harry Cook, Lac La Ronge Indian Band, to Co-Chairs Bellegarde and Prentice, Indian Claims Commission, December 19, 1995 (ICC file 2107-4-3).

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Finally, the Band has raised an alternative argument that, if no reserve was created at Candle Lake, Canada nevertheless withdrew the Band's claim to land in the area in exchange for an undertaking from the province to provide "preferential treatment" to the Band in the settlement of its land entitlement. The Band submits that this arrangement imposed a specific and distinct fiduciary obligation on Canada that it failed to discharge. Logically, it is necessary first to determine whether a reserve was created at Candle Lake. If a reserve interest was in fact created, it will be unnecessary to explore whether a specific fiduciary obligation arose in regard to the Candle Lake circumstances. If, however, the finding is that no reserve interest was created, it will be necessary to consider the alternative argument relating to whether there was an obligation on Canada to obtain "preferential treatment" for the Band by obtaining more land than it did from the province in 1964.

It can be seen, therefore, that the issues raised in the Candle Lake and School Lands claims are interconnected with arguments relating to breach of fiduciary obligations in the present case. Accordingly, some care should be taken to ensure that they are not viewed in isolation from one another and that a comprehensive approach is taken to the resolution of these claims. We therefore propose to reserve our findings with respect to this final issue. If the Lac La Ronge Indian Band decides to proceed with inquiries into the Candle Lake and School Lands claims, the parties will be given an opportunity to present arguments on whether the Crown owed a fiduciary obligation to the Band under the circumstances and, if so, what is the nature and extent of that obligation.

### **Summary of Findings on Issues 2, 3, and 4**

- 1 Canada has satisfied its treaty obligation to provide reserve land to the Lac La Ronge Band.
- 2 Having determined that Canada has satisfied its treaty obligation to provide reserve land to the Band, and in the absence of evidence or argument on the question of whether the Band is entitled to additional compensation in the nature of restitution, it is unnecessary for the Commission to decide at this time whether (a) the Lac La Ronge Band Council had the authority under the *Indian Act* in 1964 to enter into a valid and binding settlement agreement, or (b) whether the Band provided a full and informed consent to the 1964 settlement.
- 3 The claims advanced by the Band in relation to breach of fiduciary obligation are inextricably connected to the Candle Lake and School Lands



claims. In the absence of evidence and argument in respect to those claims, the Commission is reluctant to decide at this time whether Canada owed a specific and distinct fiduciary obligation to the Band and, if so, what is the nature and extent of such obligation.

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# PART V

## FINDINGS AND RECOMMENDATIONS

The purpose of this inquiry was to examine the history of the Lac La Ronge Band's treaty land entitlement claim and report on whether the Government of Canada properly rejected the claim. To determine whether the claim disclosed an outstanding lawful obligation, we have examined the following specific legal issues in this inquiry:

- Issue 1 What is the nature and extent of the Crown's obligation to provide reserve land to Indian bands under Treaty 6?
- Issue 2 Has Canada satisfied its treaty obligation to provide reserve land to the Lac La Ronge Indian Band?
- Issue 3 What impact, if any, did the 1964 Band Council Resolution have on the Lac La Ronge Indian Band's treaty land entitlement claim?
- a Did the Lac La Ronge Band Council have authority under the *Indian Act* to enter into a binding settlement agreement in 1964?
  - b Did the Lac La Ronge Indian Band provide a full and informed consent to the 1964 settlement?
- Issue 4 Did Canada breach any fiduciary obligation or duty owed to the Lac La Ronge Indian Band in the fulfilment of its treaty land entitlement?

**RECOMMENDATIONS**

In accordance with the mandate of this Commission, we hereby recommend to the parties:

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**RECOMMENDATION 1**

**That Canada has satisfied its treaty obligation to provide reserve land to the Lac La Ronge Indian Band by providing the Band with 107,147 acres of land between 1897 and 1973.**

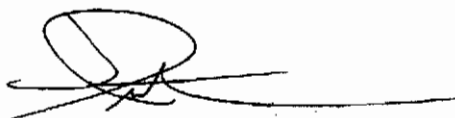
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**RECOMMENDATION 2**

**That the Commission makes no findings or recommendations as to whether the Band has a valid claim based on restitutionary or fiduciary grounds. If any such claims are to be made, they should form the subject matter of additional submissions in a separate inquiry before the Commission into the Candle Lake and Lac La Ronge School Lands claims.**

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FOR THE INDIAN CLAIMS COMMISSION



P.E. James Prentice, QC  
Commission Co-Chair

March 1996



Carole T. Corcoran  
Commissioner

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# APPENDIX A

## LAC LA RONGE INDIAN BAND TREATY LAND ENTITLEMENT INQUIRY

- |                                      |   |
|--------------------------------------|---|
| <b>1 Decision to conduct inquiry</b> | March 3, 1993   |
| <b>2 Notices sent to parties</b>     | March 8, 1993   |
| <b>3 Planning conference</b>         | April 1, 1993   |
| <b>4 Community sessions</b>          | January 25 and 26, 1994<br>Lac La Ronge, Saskatchewan |

The Commission heard from the following witnesses on January 25, 1994: Chief Harry Cook, John Cook, Senator Myles Venne, Alex Kennedy, Reverend Samuel Charles, Nora Carle, Dave McIlmoyl. On January 26, 1994, Mr. Gordon Thunderchild appeared before the Commission.

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|--------------------------|---|
| <b>5 Expert evidence</b> | April 14, 1994<br>Saskatoon, Saskatchewan |
|--------------------------|---|

The Commission heard from the following witnesses: Lewis Lockhart and Sid Read.

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| <b>6 Legal argument</b> | June 14, 1994<br>Saskatoon, Saskatchewan |
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## APPENDIX B

### THE RECORD OF THE INQUIRY

The formal record of the inquiry consists of the following:

- Documentary record (18 volumes of documents and one supplementary volume)
- Exhibits
- Transcripts (5 volumes, including the transcript of legal proceedings)

The report of the Commission and letters of transmittal to the parties will complete the record for this inquiry.

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## APPENDIX C

### LAND ENTITLEMENT OF THE LAC LA RONGE INDIAN BAND

This appendix provides a historical analysis of the manner in which the Department of Indian Affairs calculated the entitlement of the Lac La Ronge Indian Band from the time of adhesion to Treaty 6 in 1899 until the signing of the 1964 Band Council Resolution.

At the time the Band signed the adhesion agreement to Treaty 6 on February 11, 1889, the Lac La Ronge Band's treaty payroll disclosed that 278 members of the Band received their annuity payments.<sup>1</sup> In October 1889, Canada made a second annuity payment to the Lac La Ronge and Montreal Lake Bands and also intended to set aside reserves for the Bands in satisfaction of their full entitlements, based on their populations at that time.<sup>2</sup> The Indian Affairs surveyor, A.W. Ponton, set aside a reserve for the Montreal Lake Band based on the Band population as set out in the October 1889 treaty payroll, but the survey planned for the Lac La Ronge Band was postponed.

The first survey of reserve land for the Lac La Ronge Band took place in 1897, when 56.5 square miles were surveyed at Little Red River IR 106 for the Lac La Ronge and Montreal Lake Bands. Although this was the first survey for the Lac La Ronge Band, the surveyor calculated the entitlement of the two Bands by reference to their combined population in the October 1889 treaty payroll.<sup>3</sup> As suggested by Canada, it is not entirely clear why the surveyor used the 1889 treaty payroll as the population base:

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- 1 A.G. Irvine, Treaty Commissioner, Ottawa, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, April 6, 1889 (ICC Documents, p. 123).
  - 2 Author unknown, Regina, to Indian Commissioner, Regina, [November 3,] 1889 (ICC Documents, pp. 137-43), and A.W. Ponton, Surveyor, Regina, to Superintendent General of Indian Affairs, Ottawa, November 25, 1889 (ICC Documents, pp. 144-46).
  - 3 A.W. Ponton, Surveyor, Ottawa, to Department of Indian Affairs, Ottawa, April 14, 1899, NA, RG 10, vol. 7766, file 27107-4, pt. 2 (ICC Documents, p. 298). The surveyor reported: "The census of the bands in 1889 gave their numbers as 435, which would entitle them under stipulations of Treaty 6 to 87 square miles of land. Of this area the reserve surveyed by the undersigned at Montreal Lake in 1889 – known as Indian Reserve No. 106 – provides 23 square miles, and the reserve forming the subject matter of this letter – known as 106A – provides 56.5 square miles, or a total of 79.5 square miles, and it would therefore appear that they are still entitled to 7.5 square miles over and above the area already set aside in reserve for their use" (ICC Documents, p. 296).
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Although this date suggests a “date of Adhesion” approach to the determination of the relevant date to be used for TLE purposes, it is equally consistent with a date of first survey approach since the Montreal Lake Band had a reserve surveyed for it in 1889. The surveyor appears to have treated the two Bands as one for TLE purposes, and this treatment appears to have continued until approximately 1906.<sup>4</sup>

In 1907, departmental accountant D.C. Scott focused on the date-of-adhesion population, implicitly excluding late adherents who joined the Band after 1889 and explicitly rejecting natural increases in the population.<sup>5</sup> The Secretary for Indian Affairs, J.D. McLean, instructed the local agent, Thomas Borthwick, to obtain information with respect to the combined population of the Montreal Lake and Lac La Ronge Bands to determine the amount of lands still owing to them under treaty. He noted that the population of the Bands had increased significantly since the treaty was signed, and directed Mr. Borthwick to ascertain “how far this increase is referable to natural increase and how far to the addition of families who were not present at the first payments and who subsequently came in from the hunting grounds and joined the Band.”<sup>6</sup> He later advised Mr. Borthwick that he “should deal with actual number of persons admitted to treaty at the time the same was made. Those Indians born since that time should not be counted.”<sup>7</sup>

In April 1908, Mr. Borthwick responded that, in addition to the 377 members of the two Bands who were paid annuities in February 1889, there were 89 “additions apart from natural increase.” He stated that 466 combined members should be used “as a basis of calculation as to the area of land due them in reserves and divided as follows: James Roberts Band 365 William Charles Band 101 total 466.”<sup>8</sup> W.J. Chisholm, the Inspector for Indian Agencies, advised Ottawa that he had examined the pay sheets and concluded that “the Agent’s method of calculation appears to be strictly correct, as the first aim is to ascertain the number at present in the Band who are eligible, had they presented themselves, to be enrolled at the date of the signing of the

4 Submissions on Behalf of the Government of Canada, June 2, 1994, p. 8. See also S. Bray, Chief Surveyor, Department of Indian Affairs, Ottawa, to Acting Deputy Superintendent General of Indian Affairs, Ottawa, October 31, 1906, NA, RG 10, vol. 7766, file 27107-4, pt. 2 (ICC Documents, pp. 343-44), and S. Stewart, Assistant Secretary, Department of Indian Affairs, to W.J. Chisholm, Inspector of Indian Agencies, Prince Albert, October 31, 1906 (ICC Documents, p. 345).

5 D.C. Scott, Accountant, Department of Indian Affairs, Ottawa, to Deputy Superintendent General of Indian Affairs, Ottawa, March 22, 1907 (ICC Documents, p. 361).

6 J.D. McLean, Secretary, Department of Indian Affairs, Ottawa, to Thomas A. Borthwick, Indian Agent, Carlton Agency, March 23, 1907, NA, RG 10, vol. 7537, file 27132-1, pt. 1 (ICC Documents, p. 362).

7 J.D. McLean, Secretary, Department of Indian Affairs, Ottawa, to Thomas A. Borthwick, Indian Agent, Carlton Agency, May 20, 1907, NA, RG 10, vol. 7537, file 27132-1, pt. 1 (ICC Documents, p. 367).

8 Thomas A. Borthwick, Indian Agent, Carlton Agency, to Secretary, Department of Indian Affairs, April 21, 1908, NA, RG 10, vol. 7537, file 27132-1, pt. 1 (ICC Documents, p. 408).

treaty.”<sup>9</sup> According to the Inspector’s calculations (based on the 1889 treaty population of 463 and adjusted to include 52 new adherents and absentees), the Lac La Ronge and Montreal Lake Bands were entitled to 92.6 square miles, of which “13.1 square miles remains to be set apart.”<sup>10</sup> Based on these figures, the Carlton Agency was instructed to set aside additional reserve lands for the James Roberts and William Charles Bands.<sup>11</sup>

In 1910, an official with Indian Affairs known as E. Jean calculated the Lac La Ronge Band’s entitlement by reference to two different population bases: the 1897 population of 484, and the 1909 population of 516 members. This suggests that there was some confusion over the appropriate date to use. The same official also concluded that the Montreal Lake Band was entitled to more land, based on the Band’s current population, even though Montreal Lake had reportedly received its full reserve allocation.<sup>12</sup> Only two weeks later, a memorandum written by Indian Commissioner David Laird reverted to the October 1889 payroll as the basis for the Lac La Ronge Band’s entitlement (i.e., the date of first survey for the Montreal Lake Band).<sup>13</sup>

In December 1914, the accountant for the Department noted that the James Roberts Band had been divided into two separate bands in 1910. The James Roberts Band continued to live in the Lac La Ronge area, while the other band, under Chief Amos Charles, resided at Stanley Mission. The accountant calculated the Band’s entitlement by reference to the treaty population of 1889, as opposed to the 1897 DOFS population suggested by the Department in 1910.<sup>14</sup>

9 W.J. Chisholm, Inspector of Indian Agencies, Battleford, to Secretary, Department of Indian Affairs, December 27, 1908, NA, RG 10, vol. 7537, file 27132-1, pt. 1 (ICC Documents, p. 421).

10 W.J. Chisholm, Inspector of Indian Agencies, Battleford, to Secretary, Department of Indian Affairs, December 27, 1908, NA, RG 10, vol. 7537, file 27132-1, pt. 1 (ICC Documents, p. 422).

11 J.D. McLean, Secretary, Department of Indian Affairs, Ottawa, to W.J. Chisholm, Inspector of Indian Agencies, Prince Albert, June 6, 1908, NA, RG 10, vol. 7537, file 27132-1, pt. 1 (ICC Documents, p. 415). “There appears to be no doubt that these Indians are deficient of a considerable area of land under the treaty. Mr. Borthwick has gone into the question of natural increase in order to ascertain the number of Indians who are entitled to land at the time of the treaty. He estimates this number at 466. The two reserves for the said Band namely Nos. 106 and 106A contained respectively 23 and 56.5 square miles. If Mr. Borthwick[’s] figures are correct the area to which these Indians are still entitled is 13.5 square miles” (ICC Documents, p. 415).

12 E. Jean, Department of Indian Affairs, Ottawa, Memorandum, September 27, 1910, NA, RG 10, vol. 7766, file 27107-4, pt. 1 (ICC Documents, pp. 437-39).

13 David Laird, Indian Commissioner, Ottawa, to Accountant, Department of Indian Affairs, Ottawa, October 14, 1910, NA, RG 10, vol. 7766, file 27107-4, pt. 1 (ICC Documents, p. 443).

14 F.A. Paget, Accountant, Department of Indian Affairs, Ottawa, to D.C. Scott, Deputy Superintendent General of Indian Affairs, Ottawa, December 11, 1914, NA, RG 10, vol. 7766, file 27107-4, pt. 1. See also J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to W.J. Chisholm, Inspector of Indian Agencies, Prince Albert, February 9, 1915, NA, RG 10, vol. 7766, file 27107-4, pt. 1 (ICC Documents, p. 465). With respect to the division of the Band, the James Roberts and Amos Charles Bands were later amalgamated in 1949 with the agreement of the two communities: D.J. Allan, Superintendent, Reserves and Trusts, Ottawa, to Director, Indian Affairs Branch, Ottawa, February 14, 1949 (ICC Documents, pp. 850-52); Chiefs and Councils,



In March 1920, marginal notations on a letter from Indian Commissioner W.M. Graham calculated the outstanding entitlements of the Lac La Ronge and Montreal Lake Bands based on current populations.<sup>15</sup> In 1922, the Secretary for Indian Affairs stated that the Lac La Ronge and Stanley Bands were entitled to an additional 61,125.6 acres, based on their 1920 population of 914 members.<sup>16</sup> These letters suggest that the trend within Indian Affairs was to use current population figures, as opposed to the date of admission or DOFS population bases, to calculate the Lac La Ronge entitlement. However, only three months later, departmental secretary McLean favoured the 1910 population base over current census figures as the basis for entitlement (1910 being the year that the Lac La Ronge Band split into the James Roberts and Amos Charles Bands).<sup>17</sup> Indian Affairs continued to use the 1910 population base to calculate the Lac La Ronge Band's entitlement until at least 1931, when it was suggested that the Band was entitled to 80 square miles based on its current population.<sup>18</sup>

In May 1936, while the dispute over the Candle Lake lands was still ongoing, A.F. MacKenzie, the Secretary of Indian Affairs, stated that the Band was not entitled to 80 square miles (as suggested by Indian Affairs in 1931) but rather 52.1 square miles, based on the 1910 population of the Lac La Ronge Bands (i.e., date of band split).<sup>19</sup> Only six months later, he reconsidered and concluded that the joint entitlement of the two Bands should be based on the current population figures rather than the 1910 population base, a basis that would have entitled them to 95,616 acres in total.<sup>20</sup> In May 1937,

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James Roberts and Amos Charles Bands, to Indian Affairs Branch, June 27, 1949 (ICC Documents, p. 856); and E.S. Jones, Superintendent, Carlton Agency, to J.P.B. Ostrander, Regional Supervisor of Indian Agencies, Regina, July 7, 1949 (ICC Documents, p. 857).

15 W.M. Graham, Indian Commissioner, Regina, to "Sir," March 31, 1920, NA, RG 10, vol. 7537, file 27132-1, pt. 1 (ICC Documents, p. 496).

16 J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to W.R. Taylor, Indian Agent, Regina, September 22, 1922, NA, RG 10, vol. 7537, file 27132-1 (ICC Documents, p. 509).

17 Author unknown, Department of Indian Affairs, Ottawa, Memo, December 14, 1922 (ICC Documents, p. 511), and J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to W.R. Taylor, Indian Agent, Regina, February 9, 1923, NA, RG 10, vol. 7537, file 27132-1, pt. 1 (ICC Documents, p. 512).

18 On August 28, 1931, Indian Commissioner W.M. Graham stated that the Band was entitled to 52.1 square miles, based on the 1910 population of the Band: Graham to Secretary, Department of Indian Affairs (ICC Documents, p. 659). Compare this letter with that of Deputy Superintendent General D.C. Scott in 1931, which stated that the Band was entitled to 80 square miles, based on its current population: D.C. Scott to J. Barnett, Deputy Minister of Natural Resources, Province of Saskatchewan, Regina, November 20, 1931, NA, RG 10, vol. 7768, file 27107-12 (ICC Documents, p. 690).

19 A.F. MacKenzie, Secretary, Department of Indian Affairs, Ottawa, to W. Murlison, Inspector of Indian Agencies, Regina, May 19, 1936 (ICC Documents, p. 721).

20 A.F. MacKenzie, Secretary, Department of Indian Affairs, to C.P. Schmidt, Acting Inspector of Indian Agencies, Regina, November 30, 1936 (ICC Documents, p. 727). The 1936 population of James Roberts Band was 468 members and the population of Amos Charles Band was 279 members, which entitled the Bands to 59,904 acres and 35,712 acres, respectively.

T.R.L. MacInnes, the Secretary of Indian Affairs, clarified that the amount of land received by the Bands prior to 1936 must be deducted from these entitlement figures, leaving a total outstanding entitlement of 58,322 acres.<sup>21</sup>

In 1938, F.H. Peters, the Surveyor General for Canada, wrote that the Lac La Ronge and Stanley Bands were still entitled to 59,986 acres, based on their combined 1938 populations.<sup>22</sup> On April 15, 1939, H.W. McGill, the Director for Indian Affairs, wrote to the Deputy Minister suggesting that the Department seek lands from Saskatchewan and Alberta to set aside reserves for a number of bands, including the Lac La Ronge Band. The Director used the current 1938 population base for entitlement purposes, but proposed that Indian Affairs not ask the provinces for the full acreage entitlements of the bands at the present time; rather, the Department should "select only sufficient areas to meet the actual present requirements of the respective bands, leaving selection of any balance until their future needs can be accurately determined."<sup>23</sup> Five days later, the Director wrote to the Deputy Minister to recommend that the Department withdraw its claim to Candle Lake on the condition that Saskatchewan recognize "the claims of these bands to preferential treatment in the allocation of hunting and trapping rights in the north . . . even though in area they may greatly exceed the acreage limits fixed by the Treaties."<sup>24</sup> This confirms that, when Indian Affairs withdrew the Band's claim to Candle Lake in May 1939, the Department was calculating the Band's outstanding entitlement based on the 1938 population figures, which amounted to an entitlement of 59,986 acres according to the Department's records.

From 1939 until about 1953, the Department did not recalculate the Band's entitlement by using contemporary population figures and continued to use 1938 as the base population.<sup>25</sup> For instance, in August 1943, the Acting Director for Indian Affairs stated that the Band was entitled to approximately

21 T.R.L. MacInnes, Secretary, Indian Affairs Branch, Ottawa, to Thomas Robertson, Inspector of Indian Agencies, Regina, May 27, 1937, NA, RG 10, vol. 9157, file 303-6 (ICC Documents, pp. 741-42).

22 F.H. Peters, Surveyor General, Department of Mines and Resources, Ottawa, to D.J. Allan, Superintendent, Reserves and Trusts, Indian Affairs Branch, Ottawa, December 27, 1938 (ICC Documents, p. 758).

23 H.W. McGill, Director, Indian Affairs Branch, Ottawa, to Deputy Minister of Indian Affairs, April 15, 1939 (ICC Documents, p. 765).

24 H.W. McGill, Director, Indian Affairs Branch, Ottawa, to Deputy Minister of Indian Affairs, April 20, 1939 (ICC Documents, p. 768).

25 T.A. Crerar, Minister of Indian Affairs, Ottawa, to W.F. Kerr, Minister of Natural Resources, Regina, April 27, 1939 (ICC Documents, p. 770); D.J. Allan, Superintendent, Reserves and Trusts, Indian Affairs Branch, Ottawa, to R.S. Davis, Indian Agent, Leask, Saskatchewan, August 10, 1942 (ICC Documents, p. 808); Acting Director, Indian Affairs Branch, Ottawa, to M.J. Christianson, Superintendent of Indian Agencies, Regina, August 10, 1943 (ICC Documents, p. 812); and E.S. Jones, Superintendent, Carlton Agency, Prince Albert, to J.T. Warden, Acting Regional Supervisor, Regina, September 18, 1953 (ICC Documents, p. 904).

60,000 more acres of land, which “represents a land credit against which they can claim at any time but once this credit is exhausted they can select no further lands where in the future they might wish to establish themselves.”<sup>26</sup>

In December 1959, W.C. Bethune, Chief of Reserves and Trusts for Indian Affairs, wrote to the Regional Supervisor for Saskatchewan regarding the outstanding entitlement of the Lac La Ronge Band. It appears that Mr. Bethune was under the mistaken impression that the Band’s first survey of reserve lands was in 1909:

The reserves were selected in 1909 when the band population was 526. On this basis treaty entitlement would then be 67,328 acres, and they would still be entitled to a further 23,707 acres.

I might add that as no reserves have been established for the northern Indians the Province, I believe, would have no objection to establishing entitlement on the basis of the present day population.<sup>27</sup>

This letter is the first evidence that Indian Affairs distinguished between single survey and multiple survey bands for the purposes of determining how the outstanding treaty land entitlements should be calculated for these two categories of bands. Mr. Bethune clearly advocated use of the current population formula to determine the entitlement of single survey bands (a method consistent with the date-of-first-survey approach for single survey bands that have not yet received any reserves). Although Mr. Bethune did not offer any comments on how the Lac La Ronge Band’s entitlement should be calculated, it is clear that he considered multiple survey bands to be in a distinct category because they had received a portion of their lands in previous surveys.

On May 17, 1961, Mr. Bethune suggested that “[w]here partial settlement of land entitlement is reached at several times the problem becomes somewhat more difficult, and requires a reasonable attitude on the part of the Indians, ourselves and the provincial authorities.”<sup>28</sup> Based on his view that

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26 Acting Director, Indian Affairs Branch, Ottawa, to M.J. Christianson, Superintendent of Indian Agencies, Regina, August 10, 1943 (ICC Documents, p. 812). See also E.S. Jones, Superintendent, Carlton Agency, Prince Albert, to J.T. Warden, Acting Regional Supervisor, Regina, September 18, 1953 (ICC Documents, p. 904), which states that the Band was entitled to 60,000 acres. This entitlement appears to have been based on the 1938 population of the Band, but does not count additional lands received by the Band in 1935 and 1948 (approximately 8008 acres). This suggests that the Band’s entitlement was not calculated on the basis of the 1953 population of the Band (a total of 1088 members according to the 1953 treaty paylist). If the government had used the Band’s 1953 population, the entitlement would have amounted to 139,264 acres minus lands received (approximately 43,762 acres), leaving an outstanding balance of 95,502 acres.

27 Chief, Reserves and Trusts, Indian Affairs Branch, Ottawa, to Regional Supervisor of Indian Agencies, Regina, December 18, 1959 (ICC Documents, p. 1061).

28 W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Ottawa, to Regional Supervisor of Indian Agencies, Regina, May 17, 1961 (ICC Documents, p. 1136).

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the current population formula was inappropriate for multiple survey bands, Mr. Bethune suggested that the outstanding entitlement of the Lac La Ronge Band should be based on the percentage of the Band's population that received land at the time of each survey. He concluded that the Band had received 64.76 per cent of its total entitlement and was, therefore, entitled to the remaining 35.24 per cent based on the 1961 population of 1404 members. This calculation amounted to 63,330 acres outstanding (128 acres x 1404 x 35.24%). Bethune's formula was unique because it was not based on a fixed date-of-first-survey approach; nor did it accept that the current population formula was applicable to multiple survey bands. Rather, his formula represented a "compromise" between these two approaches because it used current population figures to determine the proportion of land the band received in each successive survey.

Based on the foregoing correspondence from 1889 (the date of treaty adhesion) through to the 1960s, it is clear that there was no consensus among Indian Affairs officials regarding the extent of Canada's treaty obligations and the proper method for calculating the Lac La Ronge Band's treaty land entitlement. This analysis, albeit confusing and protracted, is intended to demonstrate that the Department of Indian Affairs did not consistently calculate the Band's entitlement on the basis of either the date-of-first-survey approach or the current population formula. Indeed, there was considerable uncertainty within the Department of Indian Affairs about the nature of its treaty obligations and, as a consequence, Indian Affairs adopted an ad hoc approach in calculating the entitlement of the Lac La Ronge Band.

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# RELATED MATERIAL

Donna Gordon  
Treaty Land Entitlement: A History  
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**DONNA GORDON**

**TREATY LAND ENTITLEMENT  
A HISTORY**

Prepared for the Indian Claims Commission

**OTTAWA  
DECEMBER 1995**

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# INTRODUCTION

Post-Confederation treaties concluded between the Crown (in right of Canada) and various Indian nations in the Prairie provinces, parts of Ontario, British Columbia, and the Northwest Territories – the so-called numbered treaties – all stipulated the reservation of land for the benefit of Indian bands. In all cases, the size of these allotments was to be determined according to a formula of a stated area for each family of five persons, “or in that proportion for larger or smaller families.” Treaties 1, 2, and 5 set aside 160 acres per family; the others set aside one square mile or 640 acres per family.

Unfortunately, the treaties do not provide the specific details required for the implementation of this provision. Variations in the interpretation of who should be included in the calculation of reserve size, and at what date, have created confusion and the possibility of inequitable treatment of bands, even within the same treaty area. Since the early 1970s, the federal government and Canada’s First Nations have been conducting research and negotiations towards finally settling all outstanding treaty land entitlement claims. During that process, various criteria have been established regarding population figures for (a) the calculation of the land entitlement of each band under treaty, and (b) for those bands found to be still owed land, the quantum of land now due.

It is important to note that this is a *background historical paper*, prepared solely to provide an overview of the past for those who are now investigating treaty land entitlement claims. It is a preliminary attempt to outline the historical aspects of reserve land entitlement: what was written into the treaties and reported at the negotiations; how Canada calculated reserve size at the time of survey; how research has been conducted on this question since the 1970s; what the basis of validation has been for particular claims; and what the terms of settlement have been. The paper will deal only with treaty land provisions and, more specifically, with the determination of the *quan-*

*tity* of land promised in those agreements. It will not address issues relating to the location, *quality* of reserve land, or the reserve's economic potential in the determination of its size.

The history of treaty land entitlement claims is complicated and convoluted – what is true for one group at one particular time might not be true for another group or another time. Exceptions can be found for nearly every statement, depending on the time, the location, or the particular people making the decisions. This paper does not pretend to present every nuance of every issue. Time constraints and limited research material have necessarily narrowed the scope of this study, and the information it presents is therefore neither definitive nor conclusive.

The documents used were primarily (but not solely) those submitted to the Indian Claims Commission (ICC) by the parties to the Inquiry into the Lac La Ronge First Nation's treaty land entitlement claim. While voluminous, they were not comprehensive. To do justice to this topic, more research must be conducted (especially into the areas of the First Nations' understanding of the treaties, the past practice of the government in establishing and surveying reserves, and the terms of settlements of modern treaty land entitlement claims). This paper offers no conclusions or recommendations, but simply attempts to present, in a logical and organized fashion, the history of some aspects of this very complicated topic, based on the material at hand.

The information presented here is organized in four parts: Part 1 describes the legislative framework and gives some background information about pre-Confederation reserves; Part 2 discusses the treaty-making process and surveys the numbered reserves; Part 3 documents the post-1970 treaty land entitlement claims validation process; and Part 4 details post-1970 treaty land entitlement claim settlements. Most of the discussion revolves around the three Prairie provinces (where the influence of the various provincial governments' policies adds further complicating factors to the discussion). Treaty bands in Ontario are only now beginning to submit treaty land entitlement claims, and while some background is given on those claims, they are not dealt with in any substantive manner. A Glossary of Terms provides a general explanation of the terms that come up in treaty land entitlement research, and a select bibliography lists some of the important documents on the subject.\*

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# PART I

## BACKGROUND

Treaty land entitlement issues are confined to the post-Confederation “numbered treaties” (Treaties 1-11) because each of them stipulated that reserve size was to be determined according to band populations. The primary legislative framework and a brief summary of the reserve provisions in pre-Confederation agreements with Indian groups in the rest of Canada are reviewed in this section to provide background for the question of why this provision was included in the texts of the numbered treaties and its implications today.

## FEDERAL/PROVINCIAL RESPONSIBILITIES

### **Royal Proclamation of 1763**

The *Royal Proclamation* issued by King George III of England in 1763 is considered to be the foundation of the British treaty-making process with Indian groups west of Quebec (although the exact boundaries of the area covered by the *Proclamation* are debatable). It declared that Indian lands could not be purchased by private individuals, unless first surrendered to the Crown at a public meeting of the native people interested in the land:

And whereas it is just and reasonable, and essential to our Interests, and the Security of our Colonies, and the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds. . . .

. . . We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time Any of the said Indians

would be inclined to dispose of the said Lands, the same shall be purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians . . .<sup>1</sup>

### **British North America Act (1867) / Constitution Act (1982)**

In the distribution of legislative powers under the *British North America Act* (1867),<sup>2</sup> the federal government assumed exclusive jurisdiction over “Indians and lands reserved for Indians (s. 91(24)).” The provinces retained exclusive jurisdiction for “the Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon” (s. 92(5)) and “All lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces . . . in which the same are situate or arise . . .” (s. 109).

Aboriginal and treaty rights were recognized and confirmed in the *Constitution Act* (1982) as amended in 1983:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provisions of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

### **Transfer of Rupert’s Land**

Rupert’s Land was the name applied to the territories granted by Charles II in 1670 to the Hudson’s Bay Company, comprising (according to the most liberal interpretation) all those territories watered by the rivers flowing into Hudson Bay. In 1870, “Rupert’s Land and the North West Territory” was officially transferred to Canada. The Hudson’s Bay Company received monetary compensation, along with the right to retain certain blocks of land around its trading posts and one-twentieth of the arable land in the ceded territories.

1 *Royal Proclamation*, October 7, 1763, in Robert J. Surtees, *The Original People* (Toronto: Holt, Rinehart and Winston, 1971), 27-29.

2 *British North America Act, 1867*, s. 91(24), in Derek Smith, ed., *Canadian Indians and the Law: Selected Documents, 1663-1972*, Carleton Library No. 87 (Toronto: McClelland & Stewart, 1975), 62-63.

In their address to the Queen arguing for the transfer of Rupert's Land, representatives of Canada declared themselves ready to continue Britain's policy: "the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with aborigines."<sup>3</sup> The actual Order transferring this territory specified that "any claims of Indians to compensation for lands required for the purpose of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; the [Hudson's Bay] company shall be relieved of all responsibility in respect of them."<sup>4</sup>

### Indian Act

The *Indian Act* deals with the management and administration of Indian lands and assets. There is no provision in the *Indian Act* for the *creation* of reserves.

### Ontario

At Confederation, Ontario's northwestern boundary had not been clearly defined. The 55,000 square miles ceded to the Crown by the Ojibway Indians in 1873 under Treaty 3 were within an area which, between 1870 and 1889, was claimed by both Ontario and Canada. Ontario's claim that its true western boundary extended to the Lake of the Woods and its northern limit to James Bay and the Albany River was upheld by a board of arbiters in 1878 and confirmed on appeal to Great Britain in a judgment of the Judicial Committee of the Privy Council in 1884.<sup>5</sup>

Canada, however, continued to argue that, even if the boundary extended as far west as Ontario claimed, the natural resources belonged to the Dominion as a result of the purchase of Indian lands by Treaty 3. This issue was decided in 1888 in *St. Catherine's Milling Company v. The Queen*, again in favour of Ontario. In effect, the Judicial Committee ruled that lands ceded by Treaty 3 were the property of the Crown in the right of the Province, not the Dominion, and the federal government had no powers under the *BNA Act* to assign reserves unilaterally under the Treaty:

3 Address of the Senate and House of Commons (Canada) to the Queen, December 16-17, 1867, being Schedule A to *Order of Her Majesty in Council Admitting Rupert's Land and the North-Western Territory into the Union*, reprinted in RSC 1970, App. II, No. 9, 264.

4 *Order of Her Majesty in Council Admitting Rupert's Land the North-Western Territory into the Union*, June 23, 1870, s. 14, reprinted in RSC 1970, App. II, No. 9, 257-63.

5 Ontario, Parliament, Legislative Assembly, *Sessional Papers*, 1889, No. 60.

The ceded territory was at the time of the union, land vested in the Crown, subject to "an interest other than that of the province in the same," within the meaning of Sect. 109 [*BNA Act, 1867*]; and must now belong to Ontario in terms of that clause . . .

. . . The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian Title.<sup>6</sup>

The boundary between Ontario and Manitoba was subsequently confirmed by imperial statute in 1889.<sup>7</sup>

If, as the Judicial Committee decided in *St. Catherine's Milling*, the land ceded by Treaty 3 was, by virtue of section 109 of the *BNA Act*, the property of the province, then only the province could set aside reserves for the Indians. To settle the question of Treaty 3 reserves surveyed before the boundary issue was resolved, both the federal and provincial governments signed an agreement on April 16, 1894, in accordance with the draft provided in *An Act for the Settlement of Certain Questions between the Governments of Canada and Ontario respecting Indian Lands* enacted on July 10, 1891.<sup>8</sup> By this agreement, Ontario would have to give its consent to any future treaties concluded between Canada and the Indians, within the province's boundaries, and either confirm or veto the reserves previously set apart under the terms of Treaty 3.

### **Natural Resources Transfer Agreements (1930) – Prairie Provinces**

When Manitoba, Saskatchewan, and Alberta attained provincial status in 1870 and 1905, Canada retained the administration of lands and resources in order to assure that settlement would not be interrupted. Control of the ungranted lands and natural resources was not transferred to the provinces until 1930.<sup>9</sup> At that time, it was recognized that not all reserve lands promised in the treaties had been allotted, so provisions were included to protect the interests of the Indians. The agreements provided that the provinces would transfer to Canada sufficient unoccupied Crown land to enable Canada to fulfil its treaty obligations to the Indians:

6 *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 AC 46 (PC).

7 *Canada (Ontario Boundary) Act, 1889* (UK), 52-53 Vict., c. 28 (ICC, La Ronge TLE Documents, pp. 463-64).

8 *An Act for the Settlement of certain questions between the Government of Canada and Ontario, respecting Indian Lands*, July 10, 1891 (UK), 54-55 Vict., c. 5.

9 Memoranda of Agreement scheduled to the *British North America Act, 1930*, reprinted in RSC 1970, Apps. at 367-74 (Manitoba), 377-85 (Alberta), and 385-92 (Saskatchewan).



All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.<sup>10</sup>

### PRE-CONFEDERATION ESTABLISHMENT OF RESERVES

Reserves were established in the Maritimes, Ontario, Quebec, and British Columbia before Confederation. The methods used to establish these reserves varied, but with one exception – Manitoulin Island in 1862 – reserve size was not determined according to any known or stated formula.

In Quebec under the French régime, the state did not recognize any legal rights or title to the land on the part of the Indians, and neither contemplated nor made any formal land cessions.<sup>11</sup> Between 1635 and 1760, however, six reserves were established along the St Lawrence River. These were lands which the Jesuit missionaries had obtained through seigneurial grant to aid in their religious work with the Indians. Some of these tracts were then granted to the Indians for their use, but always with the proviso that the lands could not be alienated without the Jesuits' approval.

There were no further provisions for Indian lands in Quebec until 1851. In that year, legislation was enacted granting land which would result in the establishment of nine more reserves:

That tracts of Land in Lower Canada, not exceeding in the whole two hundred and thirty thousand Acres, may, under orders in council to be made in that behalf, be described, surveyed and set out by the Commissioner of Crown Lands, and that such tracts of Land shall be and are hereby respectively set apart and appropriated to and for the use of the several Indian Tribes in Lower Canada . . .<sup>12</sup>

10 *Agreement between the Dominion of Canada and the Province of Saskatchewan for the Transfer of the Natural Resources of Saskatchewan*, 20 March 1930, s. 10, reprinted in RSC 1970, App. II, No. 9, 388.

11 Peter A. Cumming and Neil H. Mickenberg, *Native Rights in Canada*, 2nd ed. (Toronto: General Publishing Co., 1972), 66.

12 Province of Canada Statutes, 14 & 15 Vict., c. 106. Cited in Cumming and Mickenberg, *Native Rights*.

Governments in early Nova Scotia and New Brunswick gave no evidence of recognizing aboriginal title, and there were no general surrenders of land or treaties negotiated. When land was reserved for the Indians by the government of the day, "it continued to belong to the Crown for the benefit of the province subject to a usufructory right in favour of the Indians. Thus the title to these lands remained with the Crown along with the prerogative for disposal methods and for making legislation to them."<sup>13</sup> During the 1700s, some Indian groups successfully petitioned for land grants in the same manner as their non-native neighbours, while others had areas reserved simply by right of occupancy. In 1819 the Lieutenant Governor of Nova Scotia proposed that reserves of no more than 1000 acres be established in each county, to be held in trust for those Indians who wanted to settle. Cape Breton, a separate jurisdiction until 1820, reacted to the mounting tension between Indians and squatters in the early 1830s by surveying and reserving some 12,000 acres of land already occupied by Indian groups. There does not appear to have been any consideration of population distribution in any of these allotments.

In British Columbia, reserves were established in the 1850s while the territory was still provisionally governed by the Hudson's Bay Company. The policy of HBC Chief Factor James Douglas at the time was to allow tribes to select as much land as the Indians themselves judged necessary. Owing to the expansion of white settlement, subsequent colonial governments reversed this policy and reduced the reserves whenever possible. The size of these reserves was not directly determined by population. (After Confederation, Canada attempted to persuade the provincial government to allocate reserve lands equal in per capita area to those in the Prairies, but the most the province would agree to was a maximum of 20 acres per family.)

Early land cession treaties in Ontario rarely included provision for reserves since it was assumed that the Indians would relocate as settlers moved in. Occasionally, Indians asked to retain particular small areas for their own use, and these were granted. In an 1806 agreement, for example, the Mississaugas of Credit River retained three small areas traditionally used as fisheries at the mouths of the Credit River (8940 acres), Sixteen Mile Creek (968 acres), and Twelve Mile Creek (1320 acres). Immediately after the War of 1812, a "growing comprehension by Indians of what the land sale agreements meant" was evidenced in the insistence on substantial reserve

13 Marie Laforest, *Indian Land Administration and Policy in the Maritime Provinces (Nova Scotia and New Brunswick to 1867)* (n.p., 1978), 77 (copy in DIAND, Claims and Historical Research Centre, M31).

locations for specific bands and specific purposes.<sup>14</sup> At the preliminary negotiations of the Long Woods and Huron Tracts (southwestern Ontario, around London and Sarnia) in 1818, the Indians listed the reserves they wanted:

- 1st Four miles square at some distance below the Rapids of the river St. Clair.
- 2nd One mile in front by four deep bordering on the said river and adjoining to the Shawanoe Reserve (Sombra Township).
- 3rd. Six miles at Kettle Point, Lake Huron.
- 4th. Two miles Square at the River au Sable.
- 5th. Two miles square at Bear's Creek, also a reserve for Tomico and his band up the Thames which he will point out when he arrives.<sup>15</sup>

Presumably, the locations corresponded to sites of habitual use. There is no record of how the quantity of land was determined, although there is some indication that it was simply an estimate of what would be needed: Chief Chawne, speaking on behalf of the assembled Chiefs, "added that they expected that if the King's representative felt the reserves were too small they would be enlarged at the time of the final agreement."<sup>16</sup> In 1826, when the first four reserves on the list were surveyed for the Chippewas of Chenail Ecarte and St Clair (now the Walpole Island, Sarnia, and Kettle and Stony Point Bands), they received exactly what they had asked for at the 1818 council. Although the annuities offered were calculated on a per capita basis, there is no indication that the size of the reserves bore any relationship to the total number taking treaty or to the number of people actually residing at the various sites.

In 1849 mineral discoveries rather than settlement caused the government of Upper Canada to contemplate treating with the Indians north of Lakes Huron and Superior. In preparation, Alexander Vidal and T.G. Anderson were sent on a fact-finding mission to the area to inform the Indians of the government's intentions and to determine what the different bands would expect in return. In the late summer and autumn of 1849, Vidal and Anderson managed to meet with 16 of the 22 chiefs in the area, and their resulting report

set forth the terms which might be considered by government. These included suggestions regarding the size of annuity payments, the preservation of hunting and fishing

14 R.J. Surtees, "Indian Land Cessions in Ontario, 1763-1862: The Evolution of a System" (unpublished PhD thesis, Carleton University, Ottawa, 1982), 204.

15 Minutes of a Council at Amherstburg, October 16, 1818, National Archives of Canada [hereinafter NA], Claus Papers, vol. 11, pp. 95-96, quoted in R.J. Surtees, *Indian Land Surrenders in Ontario, 1763-1863* (Ottawa: DIAND, February 1984), 80.

16 Ibid.

rights and the establishment of reserve lands (including locations and size). The report also provided information regarding the location, population and principal men of the several bands who claimed rights to specific locations, and who numbered, in all, about 2600 people.<sup>17</sup>

William B. Robinson was commissioned to negotiate the actual treaties, which he successfully completed the following summer. The texts of both the Robinson-Superior Treaty, signed on September 7, 1850, and the Robinson-Huron Treaty, signed two days later, included a schedule of reserves. Although there were apparently some discussions beforehand concerning an allotment formula of a certain number of acres per capita, no such formula was written into the treaties.<sup>18</sup> Robinson reported that “[i]n allowing the Indians to retain reservations of land for their own use I was governed by the fact that they in most cases asked for such tracts as they had heretofore been in the habit of using for purposes of residence and cultivation.”<sup>19</sup>

Whatever descriptions of the reserves appear in the text of the treaty are in blocks: for example, “Wabakekik, three miles front, near Shebawenaning, by five miles inland, for himself and band.”<sup>20</sup> It is not clear how much time was spent discussing the quantity of land to be set aside for the different bands, although Robinson is clearly aware that the allotments were not to be too large. In his report, he defends the reservation at Garden River, which “is the largest and perhaps of most value, but as it is occupied by the most numerous band of Indians and from its locality (nine miles from the Sault) is likely to attract others to it, I think it was right to grant what they expressed a desire to retain.”<sup>21</sup>

The only example found of reserve size based on population before Confederation is on Manitoulin Island in 1862. In the hope of inducing large groups of Indians to relocate to an area isolated from white society, the Indian title to the Manitoulin Island chain had been ceded in August 1836 and protected by the Crown as an Indian territory. Few made the move. By 1860 there were about 1200 Indians on the islands, but white settlement and

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17 Surtees, “Indian Land Cessions in Ontario,” 246.

18 *Ibid.*, 154.

19 W.B. Robinson to Colonel Bruce, Superintendent General of Indian Affairs, September 24, 1850, in A. Morris, *The Treaties of Canada with the Indians* (1880; repr., Toronto: Coles, 1979), 19.

20 Robinson-Huron Treaty, September 9, 1850, in Morris, *Treaties*, 307. Note that not all the reserves are defined in even this general manner. For example, Shawenakishick and his band were to receive “a tract of land now occupied by them, and contained between two rivers, called Whitefish River, and Wanabitsaseke, seven miles inland.”

21 W.B. Robinson to Hon. Col. Bruce, Superintendent General of Indian Affairs, September 24, 1850, in Morris, *Treaties*, 19.

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industry were moving in. In October 1862 the resident Indians agreed to surrender their interest in the islands, so that lands could be sold. According to the terms of the agreement, land was to be retained by the Indians on the basis of 100 acres for each head of a family or each family of orphans, and 50 acres for each single adult or single orphan. Each Indian was to be allowed to make his own selection, provided that "the lots selected shall be contiguous or adjacent to each other, so that settlements on the Island may be as compact as possible."<sup>22</sup> It was also expressly stated that the selections had to be made within one year of the completion of the survey, but this would pose few administrative problems since the Indian population on the island was stable and well defined, a resident Indian agent having been established there since 1836. Clearly, the wording of this document implies an individual interest in the land allocations; the lots were to be selected in a block simply for ease of administration. The document does not contain the usual stated prohibition against alienation of the land without Crown approval, but rather states that the deeds or patents for the lands to be selected are to contain "such conditions for the protection of the grantees as the Governor in Council may, under the law, deem requisite."<sup>23</sup> There is no indication that subsequent treaty negotiators had access to or knowledge of this agreement.

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22 The Manitoulin Island Treaty, October 6, 1862, in Morris, *Treaties*, 309-13. This is not a "treaty" in the sense that we use that word today, but rather a "surrender for sale."

23 *Ibid.*

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## PART II

### RESERVES IN THE NUMBERED TREATIES

#### TREATY NEGOTIATIONS AND THE NUMBERED TEXTS

After Confederation, each of the 11 “numbered treaties,” covering Canada’s midwestern and northern regions, provided for a per capita allotment – a certain number of acres “per family of five, or in that proportion for larger or smaller families.” The texts of the various treaties, along with the correspondence, accounts, and reports related to them, help to provide some insight into what was intended by this clause.

#### **Treaties 1 and 2 (1871)**

The negotiations with the Cree and Saulteaux Indians of Manitoba at Fort Garry in 1871 successfully concluded the first Indian treaty for the new Dominion of Canada. They mark the only occasion where records show extensive discussion of reserve size, and this was the first treaty to stipulate the establishment of reserve size according to a formula based on band population. Since the treaties that followed continued to include a reserve “formula,” it is important to look closely at the negotiations and surrounding circumstances of Treaty I in order to understand this provision.

Except for the general principles espoused in the *Royal Proclamation* and, to some extent, the precedent of treaties completed in previous administrations, the Canadian government in 1871 had no established policy or procedures to follow in making treaties with the Indians. Indeed, it had little knowledge of the Indians in the newly acquired territories, and was depending on Lieutenant Governor Adams Archibald to “report upon the state of the Indian Tribes now in the Territories; their numbers, wants and claims, the system heretofore pursued by the Hudson’s Bay Company in dealing with them . . .”<sup>24</sup> For the most part, treaty negotiators were given some broad

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<sup>24</sup> Canada, Parliament, *Sessional Papers*, 1870, No. 20, quoted in Ronald C. Maguire, *An Historical Reference Guide to the Stone Fort Treaty (Treaty One, 1871)* (Ottawa: DIAND, 1980).

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parameters and left to work out details in the field. Treaty Commissioner Wemyss Simpson's instructions from Ottawa, for example, included a copy of the Robinson-Superior Treaty and strong admonitions to be frugal. He was specifically told to offer no more than \$12 per family of five for annuities. The question of reserves had occupied only one sentence:

One part of your duty, and by no means the least important, will be to select desirable Reserves for the use of the Indians themselves, with a view to the gradual introduction of those agencies which in Canada have operated so beneficially in promoting settlement and civilization among the Indians.<sup>25</sup>

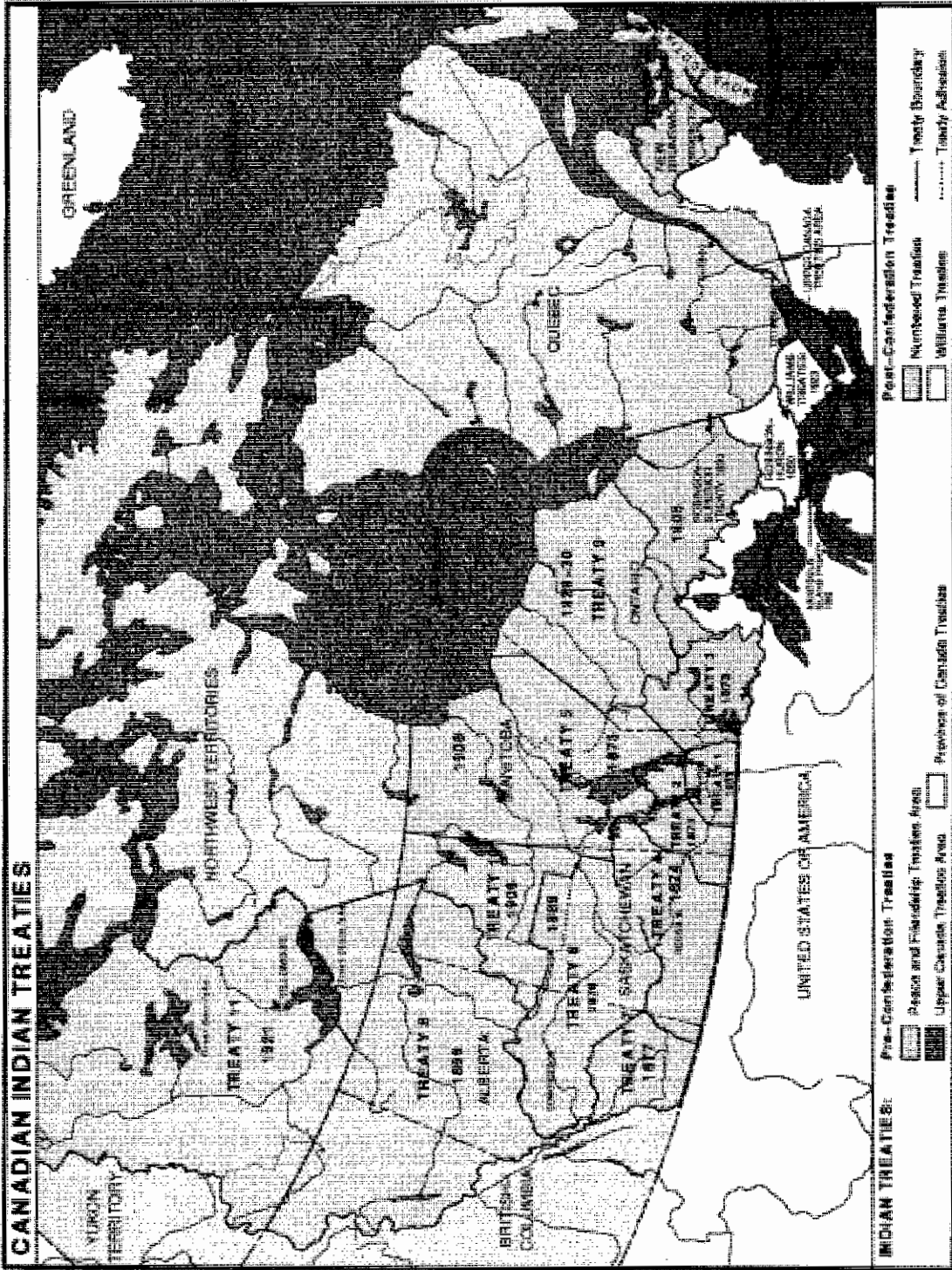
If Ottawa was mostly concerned with monetary considerations, Manitoba's Lieutenant Governor, who took the lead in Treaty 1 negotiations, needed to make land a priority as well. There were only about 7 million acres in the whole of the province of Manitoba as it existed in 1871, including lakes, swamps, and other areas unsuitable for agriculture or development. About one-quarter of that area was already promised – one-twentieth to the Hudson's Bay Company on account of provisions in the Rupert's Land purchase, 1.4 million acres for the Métis and original white settlers under the *Manitoba Act*, free grants to the military volunteers who had come to quell the Red River Rebellion, and various other allotments for schools, railway lands, and so on. Aboriginal interest in the land had to be dealt with before these grants could be made. Settlers were arriving daily to stake free homestead grants, but were prevented from cutting trees or ploughing land by the different Indian groups in the area, who insisted that all such development must await the treaty. It was important for the development of this fledgling province that as much land as possible be made available to new settlers.

Whenever land had been reserved in pre-Confederation agreements, the general practice had been to allow the Indians to select any reasonable amount of land they themselves deemed necessary. From Archibald's report, it appears that the Commissioners began the discussion of reserves in a similar manner: "When we met this morning, the Indians were invited to state their wishes as to the reserves, they were to say how much they thought would be sufficient and whether they wished them all in one or in several places."<sup>26</sup> During the previous year, however, Archibald had had several

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25 Joseph Howe, Secretary of State for the Provinces, to Commissioners S. Dawson, R. Pither, and W. Simpson, May 6, 1871, NA, RG 10, vol. 363, pp. 249-63.

26 A. Archibald to Secretary of State for the Provinces, July 29, 1871, in Morris, *Treaties*, 33-34.





meetings with various Indian groups and knew that the Indians were expecting large areas to be reserved for them, and so he included in his opening address a warning that the reserves “will be large enough, but you must not expect them to be larger than will be enough to give a farm to each family, where farms shall be required.”<sup>27</sup> The Indians either did not understand this warning or chose to ignore it, for they put forward demands for reserves which, according to Simpson, “amounted to about three townships per Indian, and included the greater part of the settled portions of the Province.”<sup>28</sup> In response, the Commissioners specifically defined the limits of their offer: “We told them that what we proposed to allow them was an extent of one hundred and sixty acres for each family of five, or in that proportion; that they might have their land where they choose, not interfering with existing occupants. . . .”<sup>29</sup>

That the Commissioners arrived at this particular formula is not surprising. The reserves were meant to provide the Indians with an alternative economic base – agriculture – when they were no longer able to support themselves by hunting and fishing. Archibald had been instrumental in convincing Ottawa to adopt the American quarter-section (160-acre) free homestead grant in the *Dominion Lands Act* being drafted at the time. Since instructions to the Commissioners had specified annuity payments based on a family of five, 160 acres for each family of five was, for Archibald at least, a logical offer.

Neither Archibald nor Simpson had accurate population figures for any of the Bands, so the text of Treaty 1 (and later Treaty 2) refers to the *location* of various reserves but not the *size*. For example, Henry Prince’s Band was granted “so much of land on both sides of the Red River, beginning at the south line of St. Peter’s Parish, as will furnish one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families.”<sup>30</sup>

The only mention of any Indian concern about the limit on reserve size appears in the newspaper *Manitoban*, which covered the negotiations in depth:

Providing for Posterity. Wa-sus-koo-koon – I understand thoroughly that every 20 people get a mile square; but if an Indian with a family of five, settles down, he may have more children. Where is their land?

27 Morris, *Treaties*, 28-29.

28 W. Simpson to Secretary of State for the Provinces, November 3, 1871, in Morris, *Treaties*, 39-40.

29 Archibald to Secretary of State for the Provinces, July 29, 1871, in Morris, *Treaties*, 33-34.

30 Treaty No. 1, August 3, 1871, in Morris, *Treaties*, 315.

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His Excellency – Whenever his children get more numerous than they are now, they will be provided for further West. Whenever the reserves are found too small the Government will sell the land, and give the Indians land elsewhere.<sup>31</sup>

Immediately after concluding the treaty at Fort Garry, the Commissioners travelled to Manitoba Post to negotiate with the Indians in that area. Treaty 2 was signed on August 21, 1871, but there is no record of what discussion, if any, took place. Simpson sums up the whole of the negotiation in his report: “it was evident that the Indians of this part had no special demands to make, but having a knowledge of the former treaty, desired to be dealt with in the same manner and on the same terms as those adopted by the Indians of the Province of Manitoba.”<sup>32</sup>

### **Treaty 3 (1873)**

The third of the numbered treaties, concluded at the Northwest Angle of the Lake of the Woods on October 3, 1873, provided for a much larger reserve allotment than had the previous two: “such reserve whether for farming or other purposes shall in nowise exceed in all one square mile for each family of five, or in that proportion for larger or smaller families.” The reserve allotment was, therefore, increased fourfold, from 32 acres per person to 128 acres per person.

The 1873 negotiation was the third attempt to treat with the Indians at Lake of the Woods, and the negotiators recognized that it would be necessary to offer more liberal terms than in the past. There is nothing on record about whether previous negotiations had reached the stage of discussing specific government offers of reserve land, and it is not entirely clear how the acreage limits established in 1873 came about. The new Lieutenant Governor of Manitoba, Alexander Morris, was appointed to negotiate the treaty, and although there had been considerable correspondence regarding the gratuity and annuity moneys to be offered, as late as two weeks before his departure from Fort Garry, Morris still had not received any instructions regarding the reserves.<sup>33</sup> Deputy Superintendent General of Indian Affairs William Spragge noted in his book of memoranda in May 1873 that reserves were to be the same extent as in Treaties 1 and 2, but the instructions Morris received by

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31 D.J. Hall, “A Serene Atmosphere? Treaty 1 Revisited” (1984), 4 (2) *Canadian Journal of Native Studies*, 352.

32 W. Simpson to Secretary of State for the Provinces, November 3, 1871, in Morris, *Treaties*, 41.

33 Telegram, A. Morris to Minister of the Interior, September [?], 1873: “Presume reserves to be granted to Indians but have no instruction . . .,” Public Archives of Manitoba [hereinafter PAM], MG 12, B1, no. 439, quoted in Wayne Daugherty, *Treaty Research Report: Treaty Three* (Ottawa: DIAND, 1986), 28.

telegram from the Minister of the Interior on September 20, 1873, authorized him to grant reserves not to exceed one square mile per family of five or in that proportion.<sup>34</sup> Why or how this new figure was chosen is not known.

On October 2, when the Treaty Commissioners put forward the terms of the proposed treaty, Morris reported: "The Commissioners had had a conference and agreed, as they found there was no hope of a treaty for a less sum, to offer five dollars per head, a present of ten dollars, and reserves of farming and other lands not exceeding one square mile per family of five, or in that proportion, sums within the limits of our instructions."<sup>35</sup> Notes dated October 3, 1873, and headed "Surveying of Reserves" are in the Morris papers, and indicate what the Commissioners might have discussed with regard to the reserves:

Before a year from now, the reserves will be surveyed and properly marked, and that part of the land that is fit for cultivation will be divided into lots of 160 acres – then every family not already settled on the land will have the right to select his own lot; in any case of conflict of right the decision will be given by the Commissioner or any person appointed by him, according to the principle that the first occupant will have the preference – This lot will belong to the family to which it will have been allocated.<sup>36</sup>

This passage was not included in the treaty proper or in any report to headquarters about the proceedings. Instead, Morris indicated that they were not able to define the reserve limits precisely at the time the treaty was signed, but urged that the surveys be done as soon as possible:

I have further to add, that it was found impossible, owing to the extent of the country treated for, and the want of knowledge of the circumstances of each band, to define the reserves to be granted to the Indians. It was therefore agreed that the reserves should be hereafter selected by officers of the Government, who should confer with the several bands, and pay due respect to lands actually cultivated by them. . . . I would suggest that instructions should be given to Mr. Dawson to select the reserves with all convenient speed; and, to prevent complication, I would further suggest that no patents should be issued, or licenses granted, for mineral or timber lands, or other lands, until the question of the reserves has been first adjusted.<sup>37</sup>

34 NA, RG 10, vol. 724, May 31, 1873; PAM, MG 12, B1, no. 490, Campbell to Morris, September 20, 1873.

35 Morris to Minister of the Interior, October 14, 1873 (ICC, Washagamis Documents, pp. 70-103).

36 PAM, Morris Papers, October 3, 1873, item 510, quoted in John Taylor, "Manitoba Treaty Land Disparity Research Report," prepared for the Treaty Land Entitlement Committee of Manitoba Inc. and the Minister of Indian Affairs, Ottawa, August 1994, p. 33.

37 Morris, *Treaties*, 52.

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In July 1874 Simon Dawson and Robert Pither were appointed by order in council to select the reserves, in consultation with the Indians concerned.

#### **Treaty 4 (1874)**

Lieutenant Governor Morris urged the government to continue the treaty-making process westward. In the Qu'Appelle and Fort Ellice territory, which was covered by Treaty 4 in 1874, it was not advancing settlement, natural resource development, or transportation routes that were precipitating factors, but Morris's concerns about Métis unrest and their influence on the Indians in the area. The Indians were, in fact, quite disturbed about survey activity in the area, especially in relation to the Hudson's Bay Company lands that had been promised with the transfer of Rupert's Land to Canada. There is considerable correspondence leading up to the negotiations regarding the extent of the territory to be included in the treaty and who should negotiate on behalf of the government, but there is no indication that Morris was given any detailed instructions from Ottawa regarding treaty terms. Since the Minister of the Interior, David Laird, was part of the Treaty Commission, however, such instructions may have been dispensed with in this particular case.

From the available record of proceedings of these negotiations, it would appear that there was little discussion about the actual treaty terms. The Indians were preoccupied with the Hudson's Bay Company lands issue and tried repeatedly to get the Commissioners to deal with those concerns. It was not until the afternoon of September 12 that the government was able to make its offer:

the Commissioners submitted their terms for a treaty, which were in effect similar to those granted at the North-West Angle, except that the money present offered was eight dollars per head, instead of twelve dollars as there.<sup>38</sup>

Throughout the record, it is evident that the government party thought that settlement would not advance to this area in the near future, and therefore the need for reserves was not urgent: "We have come through the country for many days and we have seen hills and but little wood and in many places little water, and it may be a long time before there are many white men settled upon this land."<sup>39</sup> All references to reserve surveys are for some unspecified future date within the next couple of decades:

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<sup>38</sup> *Ibid.*, 81.

<sup>39</sup> *Ibid.*, 96.

We are ready to promise to give \$1000 every year, for twenty years to buy powder and shot and twine, by the end of which time I hope you will have your little farms. If you will settle down we would lay off land for you, a square mile for every family of five . . .

. . . When you are ready to plant the Queen's men will lay off Reserves so as to give a square mile to every family of five persons . . .

If the Queen gives them [the Hudson's Bay Company] land to hold under her she has a perfect right to do it, just as she will have a perfect right to lay off lands for you if you agree to settle on them.<sup>40</sup>

As with the previous treaties, the Commissioners knew that all the Indians interested in the treaty were not present at the negotiations. In this case their estimate was so far off that the party sent to pay annuities the following year had to wire to Ottawa twice to get additional money to pay the numbers of Indians they met.<sup>41</sup>

### **Treaty 5 (1875)**

The southern portion of the area covered by Treaty 5 was negotiated in 1875-76, and Lieutenant Governor Morris and James McKay were commissioned by the government to act on its behalf. Unfortunately there are no newspaper accounts or secretary's notes to report what was said at the meetings, for Treaty 5 has a number of unique features which are important in a general discussion of reserve entitlement. Lieutenant Governor Morris's official report of the treaty negotiations does not always provide the information needed to explain why things happened the way they did.

To begin with, Morris was specifically instructed by the Minister of the Interior, David Laird, to offer reserves of only 160 acres per family of five. There is no direct explanation as to why the more generous allotment of Treaties 3 and 4 was not continued, but the Minister did imply that the land to be treated for was less valuable to the government at this stage:

in view of the comparatively small area of the Territory proposed to be ceded and of the fact that it is not required by the Dominion Government for immediate use either for railroad or other public purposes, it is hoped that it will not be found necessary to give the Indians either as present or as annuity a larger amount than five dollars, the amount secured to the Indians of Treaties Nos. 1 and 2 under the recent arrangements.<sup>42</sup>

<sup>40</sup> Ibid., 93, 96, 100.

<sup>41</sup> Ibid., 117 and 85-86.

<sup>42</sup> Laird to Morris, August 10, 1875, quoted in Kenneth S. Coates and William R. Morrison, *Treaty Research Report: Treaty Five* (Ottawa: DIAND, 1986), 17.

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This notion was reinforced the following year when the Pas and Cumberland Bands, knowing the more generous terms negotiated at Forts Carlton and Pitt (Treaty 6), balked at adhering to Treaty 5. Thomas Howard, the Commissioner taking the adhesion,

at last made them understand the difference between their position and the Plain Indians, by pointing out that the land they would surrender would be useless to the Queen, while what the Plain Indians gave up would be of value to her for homes for her white children.<sup>43</sup>

Another unique feature to Treaty 5 is that a smaller allotment is specified for one group of Indians only. The members of the Norway House Band who asked to be relocated to an area where they could farm were given only 20 acres per person (100 acres for each family of five), and those that remained at Norway House would get nothing except what they currently held. In his report, Morris does not even mention the decreased acreage, let alone report any discussion of or explanation for this change from the normal procedures.<sup>44</sup>

The text of Treaty 5 was also the first to give some indication as to *when* the reserves were to be set aside, although it did so only for some of the bands. The Minister of the Interior had stated in his instructions to Morris that "it is very important that the reserves should if possible be selected this year, after the treaty is concluded and not postponed, as had been the practice heretofore to the following year."<sup>45</sup> The issue of reserve location seems to have provided the most difficulty for Morris, and, in the treaty negotiations after the meeting at Berens River, he divided the negotiations, dealing first with the terms offered (which would have included the reserve formula) and afterwards with the reserve sites. The chosen locations were written into the text of the treaty, with, for some of the bands, a timeframe included:

For the band of Saulteaux in the Berens River region *now settled, or who may within two years settle therein*, a reserve . . . so as to comprehend one hundred and sixty acres for each family of five . . .

. . . inasmuch as a number of the Indians now residing in and about Norway House, of the band of whom David Rundle is Chief, are desirous of removing to a locality where they can cultivate the soil, Her Majesty the Queen hereby agrees to lay aside a reserve on the west side of Lake Winnipeg, in the vicinity of Fisher River, so as

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43 Morris, *Treaties*, 162.

44 See *ibid.*, 148 and 346.

45 Laird to Morris, August 10, 1875, quoted in Coates and Morrison, *Treaty Research Report, Treaty Five*, 18.

to give one hundred acres to each family of five, or in that proportion for larger or smaller families, *who shall remove to the said locality within "three years," it being estimated that ninety families or thereabouts will remove within the said period, and that a reserve will be laid aside sufficient for that or the actual number. . .*<sup>46</sup>

[re Grand Rapids adhesion] . . . And Her Majesty agrees, through the said Commissioners, to assign a reserve of sufficient area to allow one hundred and sixty acres to each family of five, or in that proportion for larger and smaller families – *such reserves to be laid off and surveyed next year, on the south side of the River Saskatchewan.*<sup>47</sup>

There is no mention of when the survey is to take place for Poplar River and Cross Lake Bands. (In a letter to the Minister of the Interior the following year, however, Morris does advise that "to prevent complications and misunderstandings, it would be desirable that many of the reserves should be surveyed without delay . . .")

### Treaty 6 (1876)

Just a year after concluding Treaty 5, Morris travelled to Fort Carlton and Fort Pitt and offered the Crees there the more generous terms, as regards both reserve land and gratuity payment, agreed to in Treaties 3 and 4. There is no explanation for this move. Morris, because of his "large experience and past success," received no instructions from Ottawa about how to proceed with these negotiations,<sup>48</sup> and there is nothing in the record to indicate that the Indians themselves had suggested the increased benefits.

Some Indians had expressed concerns that by signing the treaty they would have to abandon hunting and live on reserves, so when Morris outlined the government's offers on the second day of negotiations, he explained the idea of reserves very thoroughly:

Understand me, I do not want to interfere with your hunting and fishing. I want you to pursue it through the country, as you have heretofore done, but I would like your children to be able to find food for themselves and their children that come after them. . . .

I am glad to know that some of you have already begun to build and to plant; and I would like on behalf of the Queen to give each band that desires it a home of their own; I want to act in this matter while it is time. The country is wide and you are

<sup>46</sup> Treaty No. 5, in Morris, *Treaties*, 345-46. Emphasis added.

<sup>47</sup> Adhesion, September 25, 1875, in Morris, *Treaties*, 349. Emphasis added.

<sup>48</sup> PAM, Morris Papers, Laird to Morris, July 15, 1876, quoted in John L. Taylor, *Treaty Research Report: Treaty Six* (Ottawa: DIAND, 1986), 8.

scattered, other people will come in. Now unless the places where you would like to live are secured soon there might be difficulty. The white man might come and settle on the very place where you would like to be. Now what I and my brother Commissioners would like to do is this: we wish to give each band who will accept of it a place where they may live; we wish to give you as much land or more land than you need; we wish to send a man that surveys the land to mark it off, so you will know it is your own, and no one will interfere with you. What I would propose to do is what we have done in the other places. For every family of five a reserve to themselves of one square mile. Then, as you may not all have made up your minds where you would like to live, I will tell you how that will be arranged; we would do as has been done with happiest results at the North-West Angle. We would send next year a surveyor to agree with you as to the place you would like . . .<sup>49</sup>

The reserves, therefore, would be marked off as soon as possible – “next year” – to ensure the claim before white settlement took up all the land, but the bands would not be compelled to live on them.

There are only two recorded comments by the Indians with regard to reserves. The first was included in the list of additional items requested by the Chiefs: “If our choice of a reserve does not please us before it is surveyed we want to be allowed to select another . . .” To this Morris replied: “You can have no difficulty in choosing your reserves; be sure to take a good place so that there will be no need to change; you would not be held to your choice until it was surveyed.” The second was enunciated by Joseph Thoma, a Saulteaux who seems to have had some knowledge of the treaties already completed, and who purported to speak on behalf of Red Pheasant. Among a list of additional items he requested was “ten miles around the reserve where I may be settled,”<sup>50</sup> but Morris would not agree to any of these terms and the Indians did not press the matter.

Many of the Indians indicated that they had already begun to farm, or were ready to settle down, and Morris seems to have anticipated that the shift in economic dependence from the hunt to the farm would happen quickly. In response to demands for financial assistance while they were beginning to till the earth, Morris acquiesced but stipulated a three-year limit: “we would give them provisions to aid them while cultivating, to the extent of one thousand dollars per annum, but for three years only, as after that time they should be able to support themselves.”<sup>51</sup> There is no schedule of reserves in Treaty 6, but the Chiefs were instructed to indicate their desired reserve locations to

49 Morris, *Treaties*, 204-05.

50 *Ibid.*, 215, 218, and 220.

51 *Ibid.*, 186.



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Commissioner W.J. Christie, who included a list of these sites with his report.<sup>52</sup>

### **Treaty 7 (1877)**

David Laird, now Lieutenant Governor of the North-West Territories, and Lieutenant-Colonel James McLeod of the North-West Mounted Police represented the federal government at the 1877 negotiations for the seventh Indian treaty at Blackfoot Crossing in what is now southern Alberta. In his introductory remarks to the Chiefs, Laird explained that "the Queen wishes to offer you the same as was accepted by the Crees,"<sup>53</sup> including reserves based on one square mile per family of five. The proximity to the Crees' territory probably influenced this decision, but the knowledge that cattle rather than crops would likely provide the alternative economic base may have played some role in the decision against matching the smaller reserves of Treaties 1, 2, and 5.

There is no mention of any discussion about reserve size in the official reports of the negotiations. Laird does report:

With respect to the reserves, the Commissioners thought it expedient to settle at once their location, subject to the approval of the Privy Council. By this course it is hoped that a great deal of subsequent trouble in selecting reserves will be avoided. . . .<sup>54</sup>

So, while Laird set about preparing the document for signature, McLeod met with the different Chiefs to locate reserve sites. "He succeeded so well in his mission that we were able to name the places chosen in the treaty."<sup>55</sup>

### **Treaty 8 (1899)**

With the signing of Treaty 7, all the aboriginal interest in the so-called fertile belt had been dealt with. More than two decades passed before any new treaty negotiations took place, and it was mineral development rather than settlement which provided the impetus. The territory of the eighth treaty includes most of northern Alberta, the portion of northeastern British Columbia east of the Rocky Mountains, part of the Northwest Territories south of Hay River and Great Slave Lake, and the extreme northwestern corner of Saskatchewan. A desire to ensure safe passage for the miners and prospec-

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<sup>52</sup> See *ibid.*, 195.

<sup>53</sup> *Ibid.*, 268.

<sup>54</sup> *Ibid.*, 261.

<sup>55</sup> *Ibid.*, 259.

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tors on their way to the Yukon gold fields caused the government to send out Commissioners David Laird, James Hamilton Ross, and James McKenna to meet with the First Nations of the area in the summer of 1899.

Although it is obvious that the federal government relied heavily on previous treaties when deciding on the terms of Treaty 8, the nature of the land and the economic condition and habits of the Native people in the area caused some deviation from the past, especially with regard to the reserve provisions. Federal officials were aware that the Indians were apprehensive about the proposed treaty:

From the information which has come to hand it would appear that the Indians who we are to meet fear the making of a treaty will lead to their being grouped on reserves. Of course, grouping is not now contemplated; but there is the view that reserves for future use should be provided for in the treaty. I do not think this is necessary . . . it would appear that the Indians there act rather as individuals than as a nation. . . . They are adverse to living on reserves; and as that country is not one that will be settled extensively for agricultural purposes it is questionable whether it would be good policy to even suggest grouping them in the future. The reserve idea is inconsistent with the life of a hunter, and is only applicable to an agricultural country.<sup>56</sup>

The result of this discussion was the "reserves in severalty" provision which appears for the first time in Treaty 8. Not wanting to completely abandon the old system, the Commissioners were instructed as follows:

As to reserves, it has been thought that the conditions of the North country may make it more desirable to depart from the old system, and if the Indians are agreeable, to provide land in severalty for them to the extent of 160 acres to each, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council. Of course, if the Indians prefer Reserves you are at liberty to undertake to set them aside. The terms of the treaty are left to your discretion with this stipulation that obligations to be assumed under it shall not be in excess of those assumed in treaties covering the North West Territories.<sup>57</sup>

There appears to have been little, if any, discussion about the *size* of the reserves, but the Commissioners had repeatedly to assure the different bands that they would not be forced to abandon their traditional livelihood to settle

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<sup>56</sup> James McKenna to Superintendent General of Indian Affairs, April 17, 1899, NA, RG 10, vol. 3848, file 75236-1.

<sup>57</sup> Clifford Sifton, Superintendent General of Indian Affairs, to Laird, McKenna, and Ross, May 12, 1899, April 17, 1899, NA, RG 10, vol. 3848, file 75236-1.

on farming reserves. They were assured that the reserves would be set apart in the future, as needed:

The Indians are given the option of taking reserves or land in severalty. As the extent of the country treated for made it impossible to define reserves or holdings, and as the Indians were not prepared to make selections, we confined ourselves to an undertaking to have reserves and holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required. There is no immediate necessity for the general laying out of reserves or the allotting of land. It will be quite time enough to do this as advancing settlement makes necessary the surveying of the land. Indeed, the Indians were generally averse to being placed on reserves. It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves. We had to very clearly explain to them that the provision for reserves and allotments of land were made for their protection, and to secure to them in perpetuity a fair portion of the land ceded, in the event of settlement advancing.<sup>58</sup>

### Treaty 9 (1905)

In any examination of the post-Confederation numbered treaties, Treaty 9 stands out as atypical in a number of ways. It is the only treaty in which the province was represented at the negotiations, and it is the only one of this group which includes a schedule of reserve locations *and sizes*. The April 16, 1894, agreement between Canada and the province of Ontario specified "that any future treaties with the Indians in respect of territory in Ontario to which they have not before the passing of the said statute surrendered their claim aforesaid, shall be deemed to require the concurrence of the government of Ontario."<sup>59</sup> When increasing settlement, mining activity, and railway construction forced the federal government to deal with aboriginal claims in northern Ontario in 1905, the provincial government insisted that one of the treaty party be a provincial appointee and that the Commissioners choose the reserve sites.

The Articles of Treaty 9 stipulate:

His Majesty the King hereby agrees and undertakes to lay aside reserves for each band, the same not to exceed in all one square mile for each family of five, or in that proportion for larger and smaller families; and the location of the said reserves hav-

58 Commissioners' Report, September 22, 1899, included in *Treaty No. 8*, 6-7. See also Charles Mair, *Through the Mackenzie Basin: A Narrative of the Athabaska and Peace River Treaty Expedition of 1899* (Toronto, 1908), 56-59, 61-62, and 64, and James McKenna's report of the 1900 adhesions in *Treaty No. 8*, 21.

59 *An Act for the Settlement of certain questions between the Governments of Canada and Ontario, respecting Indian Lands*, July 10, 1891 (UK), 54-55 Vict., c. 5, s. 6.

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ing been arranged between His Majesty's commissioners and the chiefs and headmen, as described in the schedule of reserves hereto attached, the boundaries thereof to be hereafter surveyed and defined . . .<sup>60</sup>

Each of the reserve sites listed in the schedules includes the size – Abitibi, 30 square miles; Matachewan, 16 square miles; Moose Factory Creeks at Chapleau, 160 acres, etc. These reserves were in fact based on population figures obtained by the Commissioners at the time of the negotiations, although this is not mentioned in the official report. It states only that “these reserves, being of reasonable size, will give a secure and permanent interest in the land which the indeterminate possession of a large tract could never carry,” and that the reserves were intended to be “of sufficient extent to meet their present and future requirements.”<sup>61</sup>

### **Treaty 10 (1906)**

The terms of Treaty 10 differ from Treaty 8 only in that the agricultural provisions are less specific. Once again, the treaty provided for reserves of one square mile per family of five, or reserves in severalty of 160 acres per person. The Indians in the Treaty 10 area, like those in Treaty 8, were concerned primarily with the potential impact of the treaty process on their hunting and trapping rights, and Commissioner McKenna assured them that the government did not intend to interfere with their way of living. The reserves would be set aside only when they needed them:

The Indians were given the option of taking reserves or land in severalty when they felt the need of having land set apart for them. I made it clear that the government had no desire to interfere with their mode of life or restrict them to reserves, and that it undertook to have land in the proportions stated in the treaty set apart for them, when conditions interfered with their mode of living and it became necessary to secure their possession of land.<sup>62</sup>

### **Treaty 11 (1921)**

Increased mineral exploration in the Mackenzie River Valley north of the 60th parallel, especially after the discovery of oil at Norman Wells in 1920, provided the impetus for Treaty 11. H.A. Conroy, who petitioned for the treaty and who negotiated it as Commissioner, considered the reserve allocation an

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<sup>60</sup> *Treaty No. 9.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Treaty No. 10.*

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important element to be considered, not only for agricultural potential but also for resource revenues:

The most important point of all is the fact that the rapid and unprecedented encroachment of white people means that the Indians, unless protected, will be robbed of their fair share of the best land. It must be taken into consideration that the aboriginal owners are entitled to their share of oil bearing lands as well as agricultural lands but to obtain this it is necessary to make Treaty, otherwise great injustices will be done them.<sup>63</sup>

The treaty had stipulated reserves of one square mile for each family of five (the severalty option being specifically eliminated). Conroy, however, makes no mention of any discussions of reserves in his report.

### SELECTION AND SURVEY OF RESERVES IN THE NUMBERED TREATIES

*Note: To do this section properly, it would be necessary to research every survey file for each treaty band in Canada, noting all references to entitlement calculations. The information that follows is based on a small sample, and therefore cannot be used to draw definitive conclusions. The more comprehensive research suggested above would greatly benefit discussions of this topic.*

Each of the numbered treaties granted reserve lands based on a band's population, but, with the exception of Treaty 9, none clearly identified when or how that population base would be determined. In the first seven treaties, it is evident that government negotiators intended that reserves would be surveyed in the immediate future. (The bands did not necessarily have to settle on this land right away, but, by marking off these areas, the rest of the territory would be freed up for settlement and development.) For the northern treaties (Treaties 8, 10, and 11), Treaty Commissioners made specific assurances that surveys would not take place until the bands requested them.

For the most part, all the Treaty Commissioners were aware that those attending the negotiations did not represent the total aboriginal population of the territory. The first six treaties contained standard census clauses: "And further, that Her Majesty's Commissioners shall, as soon as possible after the

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63 H.A. Conroy to D.C. Scott, October 13, 1920, NA, RG 10, vol. 4042, file 336,877, quoted in Kenneth S. Coates and William R. Morrison, *Treaty Research Report: Treaty Eleven (1921)* (Ottawa: DIAND, 1986), 25.

execution of this treaty, cause to be taken, an accurate census of all the Indians inhabiting the tract above described, distributing them in families . . .”<sup>64</sup> Only one reference has been found linking this proposed census with reserve size, and that was made by Lieutenant Governor Archibald in a dispatch the year following Treaty 1:

When the Treaty 3rd August last was made, the Indians were promised that a Census of their different tribes should be taken with as little delay as possible and that immediately afterwards the Reserves should be laid off . . .<sup>65</sup>

In the texts of the relevant treaty, however, the census clause is directly tied only to the annuity provisions and, being separated from the reserve clauses by paragraphs dealing with gratuities, schools, and alcohol, cannot be seen as giving any direction to the issue of population base.

This lack of direction caused problems for those officials actively involved in selecting and surveying reserves, and over the years there were requests for a definite policy statement. In 1890, for example, A.W. Ponton wrote to the Inspector of Indian Agencies at Winnipeg about problems encountered in surveying a reserve for Chief Sakatcheway in Treaty 3: “I am not aware what numeration of a band to accept when allotting them their land . . . I am therefore without definite instructions or data or settled policy to guide me.”<sup>66</sup> In 1939 the Surveyor General investigated the treaty land entitlement situation for a number of prairie bands, calculated the amount due using different population bases, and concluded that a “definite policy as to the basis of population which is to be used in the calculation of the areas to be requested to be set aside as reserves should be agreed upon by your branch as soon as possible.”<sup>67</sup> In 1961 Saskatchewan’s Deputy Minister of Natural Resources wrote to the Deputy Minister of Citizenship and Immigration (the department responsible for Indian Affairs at the time) with regard to a request for reserve lands for the Portage la Loche Band:

One obvious question arising from Treaty 10 is the method of arriving at the number of acres to be set aside. Perhaps you could let me have your Department’s view as to

<sup>64</sup> *Treaty No. 6.*

<sup>65</sup> Lieutenant Governor A. Archibald to Secretary of State for the Provinces, July 6, 1872, NA, RG 10, vol. 3555, file 11, reel C-10098.

<sup>66</sup> A.W. Ponton to E. McColl, September 15, 1890, NA, RG 10, vol. 1918, file 2790, cited in Elaine M. Davies, “Treaty Land Entitlement - Development of Policy: 1886 to 1975,” Prepared for DIAND’s presentation to the Indian Specific Claims Commission, Ottawa, November 15, 1994, tab 3.

<sup>67</sup> F.H. Peters, Surveyor General, to D.J. Allan, Superintendent, Reserves and Trusts, Department of Indian Affairs, October 19, 1939, p. 5, NA, RG 10, vol. 7777, file 27131-1.

whether the population figure to be taken is the population at the date the treaty was signed or the present time. . . .

I would appreciate your advice as to what other Provinces in similar circumstances are being asked to do at the moment in regard to this matter. I am sure it would be most desirable from your point of view that a uniform policy be adopted at this time and we are most anxious to give this matter careful and complete consideration before proceeding further.<sup>68</sup>

From time to time federal officials did express opinions on what the policy was or should be. Ponton's 1890 request, for example, brought a response from R. Sinclair, writing on behalf of the Deputy Superintendent General of Indian Affairs:

a Band of Indians is in every case entitled to an amount of land corresponding to the census taken immediately subsequent to the treaty, notwithstanding any subsequent depletion or increase in the number of members in the Bands.<sup>69</sup>

Canada responded to Saskatchewan's 1961 inquiry with the statement:

It is our view that in cases of this kind, where bands have no reserves, the acreage to which they are entitled must be calculated on the basis of population at the time reserves are being selected and set apart. This method is acceptable to the Provinces of Alberta and British Columbia and has been used in both areas in very recent years.<sup>70</sup>

It does not appear, however, that any ongoing, consistent, and well-defined policy issued from the office of the Minister of Indian Affairs. In the material available for this paper, there were only two references to ministerial statements, and the first does not relate specifically to population figures. In his 1875 instructions to W.J. Christie concerning his duties in carrying out Treaty 4 provisions, the Deputy Minister of the Interior wrote: "The Minister thinks that the Reserves should not be too numerous and that, so far as may be practicable, as many of the Chiefs of Bands speaking one language, as will consent, should be grouped together on one Reserve."<sup>71</sup> The second, potentially more important to this paper, makes reference to a ruling of the Minis-

68 J.W. Churchman to George F. Davidson, March 28, 1961 (ICC, La Ronge TLE Documents, p. 1131).

69 R. Sinclair to E. McColl, October 14, 1890, NA, RG 10, vol. 1918, file 2790, cited in Davies, "Treaty Land Entitlement," note 66 above, tab 4.

70 Davidson to Churchman, April 12, 1961 (ICC, La Ronge TLE Documents, p. 1132).

71 [D. Laird, Minister of the Interior,] to W.J. Christie, Indian Commissioner, July 15, 1875, in NA, RG 10, vol. 3622, file 5007 (ICC, Kahkewistahaw TLE Documents, pp. 151-59).

ter in about December 1890 regarding “the allotment of land and the areas of Reserves and lots held in severalty” in Treaty 8.<sup>72</sup> Unfortunately, the particular ruling was not found.

Since neither specific treaty direction nor policy statement is available, it becomes necessary to look at the practice and conduct of the people involved in reserve selection and survey. In *R. v. Taylor and Williams*, the judge stated:

Finally, if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms. As already stated, counsel for both parties to the appeal agreed that recourse could be had to the surrounding circumstances and judicial notice could be taken of the facts of history. In my opinion, that notice extends to how, historically, the parties acted under the treaty after its execution.<sup>73</sup>

Instructions to and methods employed by surveyors were not necessarily uniform, and the surviving record is not always detailed enough to come to reliable conclusions. In the early years, surveys were directed by Department of Indian Affairs officials in the field, and the relevant information was not always relayed to officials in Ottawa. As Chief Surveyor Samuel Bray explained in 1904:

in former years the Northwest Surveyors received their instructions, frequently verbally, in fact practically always verbally, from the Indian Commissioner at Regina. The Department was seldom informed of the work the surveyors were engaged in, and their returns were delayed from one to three years before they reached the Department and in some instances were not forwarded to the Department at all. This proceeding is evidently unworkable and I submit very undesirable. Of late years it has been the practice to issue instructions in writing to Surveyors (in detail if necessary) for each survey which may be required.<sup>74</sup>

As well, in later years it is not always clear whether a request for additional land was to fulfil entitlement or to provide extra land for economic reasons.

### Single Survey

When a band had not previously received any reserve land, the practice was, with few exceptions, to calculate the area using the population of the band at the date of the survey. This number might be derived from recent annuity

72 J.D. McLean, Secretary, Department of Indian Affairs, to A.W. Ponton, Surveyor, April 15, 1901, NA, RG 10, vol. 3959, file 141,977-6, reel C-10167.

73 *R. v. Taylor and Williams* (1981), 34 OR 360 (Ont. CA) at 367 (ICC, La Ronge TLE Documents, p. 2608).

74 S. Bray, Chief Surveyor, to Deputy Superintendent General of Indian Affairs, February 11, 1904, NA, RG 10, vol. 4005, file 40050-2, reel C-10170.



paylists, the surveyor's or Indian agent's count of band members, or a combination or variation of these. Alternative population bases were sometimes put forward as more appropriate interpretations of the treaties, but they were seldom applied. As the Minister in charge of Indian Affairs explained in 1963:

On reading these treaties in their full context, it is obvious that the selection of land is to take place at some future date on the basis of one square mile for a family of five. This has always been interpreted to mean at the time of the selection. Precedent is in favour of the Indians in this regard. I understand there is not a great deal involved as there is no appreciable increase; deaths and deletions through marriage of Indian women to non-Indians and to members of other bands have kept the membership fairly steady, at least until the last decade. We have definite figures as to the present population, but such is not the case with regard to the population at the time of the signing of the treaties. This means that the settlement on the basis of the present population is clean-cut and without the danger of disputes arising. . . .<sup>75</sup>

### *Examples*

1) In 1872, two years after the signing of Treaty 1, surveyors were sent to mark out the reserve boundaries. At Roseau River, there was a misunderstanding about the size of the proposed reserve. When the Chief refused to allow the surveyor to take a census, the Lieutenant Governor's private secretary explained why it was necessary:

The extent of the Reserves to which they will be entitled depends upon the number of people of which the tribe consists, and, so soon as this is found out, the Reserve will be run off and marked, so that every Indian may see the boundary of the lands assigned to the tribe.<sup>76</sup>

2) For the survey of the Beaver Lake Reserve in Alberta in May 1907, Indian Affairs requested that the Department of the Interior reserve from sale and settlement an area of 21 square miles in the vicinity of Beaver Lake until a reserve of that size could be surveyed for the 105 Indians that the latest census indicated made up the Beaver Lake Band.<sup>77</sup>

3) In Ontario's ratification of the adhesions to Treaty 9 in 1931, the province agreed to set aside land for a Treaty 5 band at Deer Lake. The treaty-time

<sup>75</sup> Guy Favreau, Minister of Citizenship and Immigration, to E. Kramer, Minister of Natural Resources, Saskatchewan, May 13, 1963 (ICC, La Ronge TLE Documents, pp. 1199-1200).

<sup>76</sup> Maguire, *Historical Reference Guide*, note 24 above, 26.

<sup>77</sup> J.D. McLean to P.G. Keyes, May 3, 1907, DIAND file 779/30-9-131, in D. Gordon, "Beaver Lake I.R. No. 131 Entitlement & Other Land Matters," unpublished paper prepared for Treaty and Aboriginal Rights Research Centre and the Indian Association of Alberta, March 1979.

population was known and stated, but the reserve size was based on current population figures:

The said Commissioners appointed to negotiate said extension of said James Bay Treaty Number 9, among other things, reported that, –

“A band of Indians residing in the vicinity of Deer Lake within the territory included in Treaty No. 5, signed Adhesion to said Treaty on the 9th June, 1910, and under its conditions were assured a reserve in the proportion of 32 acres per capita. At this time the territory formed no part of the Province of Ontario, it being then part of the Northwest Territories. A final selection of the reserve had not been made and although the band in 1910 resided in the vicinity of Deer Lake and the members have since changed their abode and are now in larger numbers resident about Sandy Lake, situate within territory covered by the Commission under which the undersigned Commissioners are functioning. [i.e. Treaty Nine]

In 1910 when this band was admitted they numbered 95, augmented in the year following by 78 Indians transferred from the Indian [Island] Lake band resident in Manitoba. These numbers have now increased to 332, and as the Island Lake Indians have been allotted their reserve and have had it duly surveyed on a basis excluding those transferred to the Deer Lake Band, the latter are now entitled to a grant.”

That the Deer Lake band of Indians desire that a reserve be set aside for said band . . . .

Schedule “C” - Reserves Approved and Confirmed . . .

For Deer Lake Band: Sandy Lake Narrows. – Lying at the Narrows, being a stretch of water lying between Sandy Lake and Lake Co-pe-te-qua-yah, the reserve to comprise 10624 acres, or approximately 17 square miles . . . [332 x 32 = 10624]<sup>78</sup>

4) In 1939 the Surveyor General calculated the entitlement of the Portage La Loche Band:

This band has no reserves and the Indians have expressed themselves as desiring three reserves one in Alberta and the other two in Saskatchewan. In 1938 at treaty payment the population of the band was 79. On a basis of 128 acres for each Indian this number (79) were entitled that year to 10112 acres.<sup>79</sup>

Alberta and Saskatchewan had tentatively agreed to transfer the required lands, but after Indian Agency Inspector Ostrander inspected the area late in 1939, he advised against the location as a reserve. Some attempt was made to find an alternative site, but in the end there was no survey.

78 Copy of an Order in Council, approved by the Lieutenant Governor of Ontario, June 18, 1931, reprinted in *The James Bay Treaty, Treaty No. 9* (Ottawa: Queen's Printer, 1964), 32.

79 Memorandum, F.H. Peters to D.J. Allan, Superintendent of Reserves and Trusts, Indian Affairs, October 19, 1939, NA, RG 10, vol. 7777, file 27131-1.

In 1961 the La Loche Band chose three sites for proposed reserves – 320 acres where the Band members had their garden plots, some 10,000 acres along the west shore of Methy Lake, and 6400 acres on the Methy River where it emptied into Peter Pond Lake. This acreage was based on current population:

The total Indian population of the la Loche band on the day of the last annual treaty payment was 130 men, women and children. According to Treaty No. 10 agreements, they should be entitled to approximately 16,640 acres.<sup>80</sup>

These particular locations were not surveyed.

In 1964, the La Loche Band did finally have reserve lands surveyed for it, and the acreage was based on current population:

... Reserve on the basis of 23,424 acres for 183 people as follows – approximately 13,120 acres on South West side of Lac La Loche; approximately 5,760 acres situated North end of Linvall and Palmbere lakes; approximately 4,544 acres situated on Peter Pond Lake extending one mile on the Lake shore north of the 18 mile landing.<sup>81</sup>

5) In 1986, the Cree Band of Fort Chipewyan in northern Alberta, which had not previously received any reserve lands, reached an agreement with Canada and the province of Alberta whereby the Band would receive a combination of land and monetary compensation to fulfil its treaty land entitlement, based on current population (all parties agreeing to a “cut-off” date):

... 14. The parties acknowledge that the population of the band utilized calculating the amount of land that should be set aside under Treaty No. 8 was the 1982 population and did not include any persons who have or may become members subsequent to that date, including those who do so as a result of S.C. 1985 C. 27.<sup>82</sup>

### *Exceptions*

On at least two occasions, the Department of Indian Affairs stated that entitlement calculations were based on populations other than in the year of survey – and in both cases the numbers were more advantageous to the Band.

80 N.J. McLeod, Regional Supervisor, Saskatchewan, to W.C. Bethune, Chief, Reserves and Trusts, January 9, 1961 (ICC, La Ronge TLE Documents, pp. 1115-17).

81 La Loche Band Council Resolution, February 11, 1964 (ICC, La Ronge TLE Documents p. 1256).

82 Entitlement Agreement, December 23, 1986 (ICC, La Ronge TLE Documents, p. 4053).

1) In 1882, the Indian agent for the Qu'Appelle Agency reported that surveys had been completed for Treaty 4 Bands at Crooked and Round Lakes:

I may here state that in 1877 these bands had been allotted reserves on the north side of the Qu'Appelle River; owing to the want of timber for building and fencing purposes, it was considered advisable to move them to the south side.

The area of each reserve has been allotted to each band in proportion to the paysheets of 1879, *the year in which the largest number of Indians were paid their annuities.*<sup>83</sup>

2) This same criterion was used again in 1884 for the survey of the reserve for Chief James Seenum in Treaty 6 (Alberta). In this case, the arrangement was more formal. When the surveyor arrived to establish the area of the reserve, which according to his instructions was to be based on the number paid at the previous annuity payments, the Chief took exception. Apparently supported by an interpreter present at the negotiations of Treaty 6, he maintained that Commissioners Morris and Christie had promised a large area, which they described according to various physical land marks. The population of his band having decreased dramatically since adhesion to treaty, the Chief refused to accept the small amount of land which the current population would entitle it to. The Assistant Indian Commissioner negotiated with the Chief and arrived at an agreement:

As a misunderstanding has since the signing of the treaty existed between the said band and the Department of Indian Affairs as to the quantity of land to be given as a Reserve for the said band it has this day been agreed to [unreadable] hereto that the quantity of land which the band is to receive will be that quantity which it would have been granted if the reserve had been surveyed at that time the greatest number were paid under the said Chief, at any one time, this fact to be decided by the paysheets.<sup>84</sup>

### Multiple Surveys

In some cases, the initial survey did not provide all the land to which a band was entitled under treaty. This may have been the result of surveyor error or inaccurate knowledge of band membership in the year of survey. Sometimes, especially in the late 1930s and early 1940s, Indian Affairs officials deliberately chose to delay the final selection of entitlement lands, choosing only

83 A. McDonald, Indian Agent, Qu'Appelle, to Superintendent General of Indian Affairs, January 19, 1882, in Canada, Department of Indian Affairs, *Annual Report*, 1881, 224.

84 Hayter Reed, Indian Commissioner for Manitoba and the North-West Territories, Agreement with Chief James Seenum, September 24, 1884, NA, RG 10, vol. 3586, file 1195, reel C-10103.

enough land “to meet the actual present requirements” and holding “their land credit as a sleeve account rather than to make the selection now and regret it later.”<sup>85</sup>

Two research projects from the 1970s, which looked into Department of Indian Affairs practices in cases of multiple surveys, are generally relied upon in modern discussions. The first was prepared by Heather Flynn for the Lands Branch of Indian Affairs in 1974 (see Appendix A). It demonstrates some of the problems associated with understanding this issue, giving examples of additional lands provided to bands for social and economic reasons, or to correct inequities in treaty allotment, but with the purpose stated as to provide entitlement lands.<sup>86</sup> The second, prepared in 1978 by Ken Tyler and Bennett McCardle as a joint project for the Federation of Saskatchewan Indians and the Indian Association of Alberta (and attached as Appendix B), concluded that “the Department has never attempted to fulfill any band’s Treaty entitlement by adding to a band’s existing reserve lands only that area of land by which the original survey fell short.”<sup>87</sup>

While both of these studies add to our knowledge of this topic, it is my opinion that neither are extensive enough to provide a solid basis for conclusion. From the documents reviewed for this paper, it is evident that almost every possible population date was used at one time or another; sometimes different calculations were used in the same period of time because instructions came from different sources (the regional office rather than headquarters, for example). It is, however, impossible from this small sampling to state positively that one practice predominated over another. A much more thorough study of reserve surveys, looking at as much of the available correspondence as possible, is necessary to establish the total historical picture.

The most complete set of survey documents available to me were those of the Lac La Ronge First Nation. The following is a summary of the various statements found relating to treaty land entitlement calculations for that Band, and it is included here to illustrate how complicated this topic can be.

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85 Dr. Harold McGill, Director of Indian Affairs, to Deputy Minister of Indian Affairs, April 15, 1939 (ICC, La Ronge TLE Documents, pp. 764-65); Acting Director of Indian Affairs to M. Christianson, Superintendent of Indian Agencies, August 10, 1943 (ICC, La Ronge TLE Documents, pp. 812-13); and D.J. Allan, Superintendent, Reserves and Trusts, to Christianson, January 26, 1944 (ICC, La Ronge TLE Documents, pp. 820-21).

86 G.A. Poupore, Manager of Indian Lands, to W. Fox, Special Projects Officer, Indian Affairs, February 6, 1975 (ICC, Kawacatoose Exhibit 27).

87 Joe Dion, President, Indian Association of Alberta, to Hugh Faulkner, Minister of Indian Affairs, November 30, 1978 (ICC, La Ronge TLE Documents, pp. 3052-87).

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***Lac La Ronge and the "Compromise Formula"***

The Lac La Ronge Band in Saskatchewan received reserve lands in intermittent allotments over a span of almost 75 years. The documentary record shows that at various times different government officials used almost every possible population base to calculate the entitlement due to this Band, including a unique formula invented in 1960 and used only for this particular Band.

***1897 – Date-of-First-Survey Shortfall***

Members of the Lac La Ronge Band are descendants of the James Roberts Band who adhered to Treaty 6 on February 11, 1889. The William Charles Band of Montreal Lake (which was then and always has been a distinctly separate band) also adhered to the treaty at the same time and place. The Bands were paid twice in 1889 – in February when they entered treaty, and again in October at the regularly scheduled annuity payments.

A reserve of 23 square miles was surveyed at Montreal Lake (Indian Reserve 106) for the William Charles Band by A.W. Ponton in the fall of 1889. Ponton attended the annuity payments before he consulted the Chief as to location, and the area surveyed fulfilled the treaty reserve promise to that Band, based on its current population.

A single, large block of land, also based on the Band's current population, was selected for the James Roberts people at Lac La Ronge at the annuity payments in October 1889 but, for a number of reasons, it was never surveyed. Over the next few years the members of the La Ronge Band made several requests for agricultural land south of where they actually lived, so that, when they could no longer support themselves by traditional means, they would have a place to go. Government officials suggested that the Montreal Lake Band also required farming lands, since there was little available on its reserve. In 1897 the Department agreed to mark off one area of farm lands, which could be used by both Bands (and, as later suggested, by other bands in the north who did not have arable lands in their hunting territories). The Indian agent was specifically instructed that band members were not to have a say in the selection – "the Reserve will not be the sole property of either Band but will be held for the joint use of such members of both bands as may decide to leave their present homes and take up stock-raising

and farming on the new location and that therefore the Department reserves to itself the right to select the site.”<sup>88</sup>

In the summer of 1897, A.W. Ponton surveyed 56.5 square miles as Little Red River Reserve 106A. In his report he indicated that entitlement calculations were based on the *combined* population of the Montreal Lake and La Ronge Bands at the second annuity payment to the Bands in October 1889 (that is, the date of first survey for the Montreal Lake Band):

The census of the Bands in 1889 gave their numbers as 435, which would entitle them under the stipulations of Treaty 6 to 87 square miles of land. Of this area the reserve surveyed by the undersigned at Montreal Lake in 1889 – known as Indian Reserve No. 106 – provides 23 square miles, and the reserve forming the subject of this letter – known as 106A – provides 56.5 square miles, or a total of 79.5 square miles, and it would therefore appear that they are still entitled to 7.5 square miles over and above the area already set aside and reserved for their use.<sup>89</sup>

#### *1909 – Population at Treaty (Including Late Adhesions)*

In 1907 Duncan Campbell Scott, then the Department of Indian Affairs' accountant, noted that the population of the Montreal Lake and La Ronge Bands had increased substantially since 1889. Suggesting that additional lands might be forthcoming, he asked the agent to report on whether the growth was a result of natural increase or additions of “Indians who were hunting apart from the main Band when they joined the Treaty.”<sup>90</sup> Upon receiving this request, Agent Borthwick requested clarification: “Should the natural increase of the additions since their admission to treaty privileges be included or only the actual number at the time of admission?”<sup>91</sup> Indian Affairs Secretary J.D. McLean responded: “you should deal with the actual number of persons admitted to treaty at the time the same was made. Those Indians born since that time should not be counted.”<sup>92</sup>

In April 1908 Borthwick delivered a detailed analysis showing 89 “additions apart from natural increase” to both the Montreal Lake and La Ronge Bands. This number was added to the 377 paid to the two Bands at the first

<sup>88</sup> A.E. Forget, Indian Commissioner, Regina, to Indian Agent, Carlton Agency, April 30, 1897, NA, RG 10, vol. 3601, file 1754 1/2 (ICC, La Ronge TLE Documents, p. 239).

<sup>89</sup> Ponton to Department of Indian Affairs, April 14, 1899, NA, RG 10, vol. 7766, file 27107-4, pt. 2 (ICC, La Ronge TLE Documents, pp. 296-98).

<sup>90</sup> Scott to Deputy Superintendent General of Indian Affairs, March 22, 1907 (ICC, La Ronge TLE Documents, p. 361).

<sup>91</sup> Borthwick to Secretary, Department of Indian Affairs, May 10, 1907, NA, RG 10, vol. 7537, file 27132-1, pt 1 (ICC, La Ronge TLE Documents, p. 366).

<sup>92</sup> McLean to Borthwick, May 20, 1907 (ICC, La Ronge TLE Documents, p. 367).

payment in February 1889 (which Borthwick identifies as the "1888" paylist) to arrive at a total of 466.<sup>93</sup> Secretary McLean then advised the Inspector of Indian Agencies that

There appears to be no doubt that these Indians are deficient of a considerable area of land under the treaty. Mr. Borthwick has gone into the question of natural increase in order to ascertain the number of Indians who were entitled to land at the time of the treaty. He estimates this number at 466. The two reserves for the said band namely Nos. 106 and 106A contain respectively 23 and 56.5 square miles. If Mr. Borthwick's figures are correct, the area to which these Indians are still entitled is 13.5 square miles. . . .<sup>94</sup>

Inspector Chisholm reviewed Borthwick's figures and agreed with his decision to begin with the February 1889 paylist "as the first aim is to ascertain the number at present in the bands who were eligible, had they presented themselves, to be enrolled at the date of the signing of the treaty." He did, however, revise Borthwick's total downwards to 463 – leaving, by his calculation, 13.1 square miles due to the Bands.<sup>95</sup> In the 1909-10 survey season, J. Lestock Reid marked out a total of 10.4 acres in 13 small reserves near Lac la Ronge and Stanley – and reported that the band had now "2.7 square miles" still owing to them.<sup>96</sup>

#### *September 1910 – Current Population / New Adherents Reopening Entitlement*

In the fall of 1910, a controversy over the allocation of revenue from timber sales on Indian Reserve (IR) 106A caused a review of the ownership of that reserve. An explanatory memo was prepared by "E. Jean" (who is not identified either as to branch or position). The Montreal Lake Band, he states, received a surplus of entitlement land with the survey of IR 106 in 1889, based on its population in that year. According to an 1895 memorandum from the Deputy Superintendent General of Indian Affairs, nine square miles of the proposed new reserve (106A) was to be allocated to the Montreal Lake people, but they were to surrender an equal amount of land from their

93 Borthwick to Secretary, Indian Affairs, April 21, 1908, NA, RG 10, vol. 7537, file 27,132-1, pt. 1 (ICC, La Ronge TLE Documents, pp. 408-10).

94 J.D. McLean to W.J. Chisholm, June 6, 1908, NA, RG 10, vol. 7537, file 27,132-1, pt. 1 (ICC, La Ronge TLE Documents, pp. 415-16).

95 Chisholm to Secretary, Indian Affairs, December 27, 1908, NA, RG 10, vol. 7537, file 27132-1, pt. 1 (ICC, La Ronge TLE Documents, pp. 421-24).

96 Memorandum of J. Lestock Reid, February 25, 1910, and J.D. McLean to P.G. Keyes, Department of Interior, March 4, 1910 (ICC, La Ronge TLE Documents, pp. 434-36).



present reserve. Jean then calculated their entitlement in 1897, when IR 106A was surveyed, using current population figures: "The population of the Montreal Lake Band in 1897 (143 souls) would entitle them to 28.6 square miles and the 9 square miles referred to with the 23 square miles in Reserve 106 gave them a total of 32 square miles." Therefore, "the Montreal Lake Band was not even entitled to the 9 square miles unless they surrendered land in the old Reserve – which they did not appear to have done."

Jean concluded his memo with a statement about the current entitlement situation of both the Montreal Lake and Lac La Ronge Bands:

Of course the population of the two Bands has kept increasing since 1897 by the admission of Indians to Treaty and [page torn, words missing] they are both entitled to more land than they have received so far. The population in 1909 was:

Montreal Lake	187
Lac la Ronge	516

This would give the former 37.2 square miles and the latter 103.2 square miles.<sup>97</sup>

Entitlement, according to the understanding of this particular official at least, was to be based on current population and, even if a band had received its full quota, the subject could be reopened subsequently by the admission of non-treaty Indians.

#### *October 1910 – Date-of-First-Survey Population*

Two weeks after the above memo was written, Indian Commissioner David Laird contradicted its interpretation. In a memorandum to the accountant, in which he quotes from Jean's memo, he continued to base his calculations on the population in October 1889 (second payment):

the very utmost share of reserve 106A which they [Montreal Lake Band] can claim is 9 square miles. The Lac la Ronge band had no other reserve surveyed for them at that time and though they be assigned the remainder of 106A, or 47.5 square miles [56.5 - 9], they would still be short (their number paid in 1889 being 334) of 19.3 square miles.<sup>98</sup>

<sup>97</sup> Memorandum of E. Jean, September 27, 1910, NA, RG 10, vol. 7766, file 27107-4, pt. 1 (ICC, La Ronge TLE Documents, pp. 437-39).

<sup>98</sup> Laird to Accountant, October 14, 1910, NA, RG 10, vol. 7766, file 27107-4, pt. 1 (ICC, La Ronge TLE Documents, pp. 440-43).

*1914 – Population at Treaty (Including Late Adhesions)*

In 1914 the Department of Indian Affairs accountant, F.A. Paget, wrote a memorandum about the entitlement situation of the La Ronge and Montreal Lake Bands in which he states that his calculations were “based on the population at the time they were admitted to Treaty in 1888 and 1889.” While he does use the figure of 99 said to have been paid to the Montreal Lake Band in February 1889, the figure he uses for the Lac La Ronge Band is closer to Agent Borthwick’s 1908 final total of treaty-time plus new adherents to treaty. Based on this memo, Deputy Superintendent General D.C. Scott stated that the La Ronge Band was still owed 14.9 square miles.<sup>99</sup>

*March 1920 – Current Population*

At the bottom of an extract from a communication written by Commissioner W.A. Graham in March 1920 are a series of handwritten calculations of outstanding entitlement for each of the two La Ronge factions and the Montreal Lake Band, based on current population figures. It was, however, “not convenient to arrange to have surveys made in that locality this year,”<sup>100</sup> and so no action was taken. Two years later, Indian Agent Taylor forwarded a request from the Chief of the James Roberts Band for “the remaining seven square miles of their reserve” (probably one-half of the 14.9 square miles calculated by D.C. Scott in 1914), to which Secretary J.D. McLean replied with the 1920 figures:

At that time [1920] the population was as follows:

Montreal Lake band	271
Lac la Ronge band	379
Stanley band	264
Total	914

At 128 acres each, they would be entitled to 116,992 acres [182.8 square miles], leaving a deficit of 61,125.6 acres [95.5 square miles].<sup>101</sup>

*September 1922 – Date of Band Split*

In 1910, the two separate groups making up the Lac La Ronge Band split into two bands – the James Roberts (La Ronge) Band and the Amos Charles

<sup>99</sup> F.A. Paget to D.C. Scott, December 11, 1914, and D.C. Scott to Archdeacon J.A. MacKay, Prince Albert, Sask., January 9, 1915, NA, RG 10, vol. 7766, file 27107-4, pt. 1 (ICC, La Ronge TLE Documents, pp. 458-63).

<sup>100</sup> Extract of letter from W.M. Graham, March 31, 1920, and J.D. McLean to Graham, April 9, 1920, NA, RG 10, vol. 7537, file 27132-1, pt 1 (ICC, La Ronge TLE Documents, pp. 496, 497).

<sup>101</sup> W.R. Taylor to J.D. McLean, Assistant Deputy and Secretary, September 8, 1922, and McLean to Taylor, September 26, 1922, NA, RG 10, vol. 7537, file 27132-1, pt. 1 (ICC, La Ronge TLE Documents, pp. 509-10).

(Stanley) Band. Separate paylists and trust accounts were created, but reserve lands were not formally divided between the two groups.

In 1922, when the James Roberts Band requested the balance of its lands, Indian Affairs officials first responded with quotations of area due based on current populations (see above). At the time, McLean was unsure how the total reserve land was divided. When that information was subsequently found, a new calculation was made based on the population at the date the band split:

In 1910, the Lac la Ronge band was divided again into Lac la Ronge, under James Roberts[,] and Stanley, under Amos Charles. Their capital and I would suppose their interest in the land of Indian Reserve No. 106A was divided in the proportion of Lac la Ronge 315 to Stanley 235. We have no information as to the division of the 10.4 sq. miles laid out by Mr. Reid, but it will be nearly equally divided.

The population of Lac la Ronge in 1922 is 377. The population of Stanley in 1922 is 241. If we take the population of 1910 as a basis for these two bands, Lac la Ronge would be entitled to 63 sq. miles. They have 27.2 sq. miles in I.R. No. 106A and say 5.2 at Lac la Ronge, total 32.4 sq. miles. They have therefore due about 30.6 sq. miles. Accordingly the Stanley band would be entitled to 47 sq. miles; they have 20.3 at reserve 106A and say 5.2 at Stanley, total of 25.5 sq. miles. There will still be due 21.5 sq. miles.<sup>102</sup>

J.D. McLean relayed these figures to Agent Taylor in February 1923. No survey was requested, but there is nothing on file to indicate the reason. The figures are repeated in correspondence in December 1926, August 1931, and May 1936.<sup>103</sup>

#### *November 1936 – Current Population*

In November 1936 both the Surveyor General and the Secretary of Indian Affairs again quoted entitlement lands owing based on current population figures – 93.6 square miles for the 468 members of James Roberts Band and 55.8 square miles for the 279 members of Amos Charles Band. (In this correspondence, the figure cited for acres received to date was incorrect, so the estimate of “more than 20,000 acres” still due to each Band has little relevance.)<sup>104</sup>

<sup>102</sup> Memo [unsigned], Department of Indian Affairs, Ottawa, December 14, 1922, NA, RG 10, vol. 7537, file 27132-1 (ICC, La Ronge TLE Documents, p. 511).

<sup>103</sup> J.D. McLean to W.M. Graham, December 15, 1926; W.M. Graham to Secretary, Indian Affairs, August 28, 1931, and A.F. Mackenzie to W. Murison, May 19, 1936 (ICC, La Ronge TLE Documents, pp. 534-35, 658-59, 721).

<sup>104</sup> Chief Surveyor to Mr White, November 30, 1936, and A.F. MacKenzie to C.P. Schmidt, Regina, November 30, 1936 (ICC, La Ronge TLE Documents, pp. 726-27).

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*April 1939 – Current Population*

Current population figures were also quoted in April 1939 in a request from Director Harold McGill to the Deputy Minister of Indian Affairs to expedite surveys.<sup>105</sup>

*December 1959 – Shortfall at Date of First Survey / Current Population*

A second occurrence of a *possible* calculation based on shortfall at date of first survey was found (the date used was *not* the date of first survey, but the memorandum seems to indicate that the author considered that it was). In December 1959 the Chief of Reserves and Trusts wrote to the Regional Supervisor for Saskatchewan regarding lands for the La Ronge Band: "The reserves were selected in 1909 when the Band population was 526. On this basis treaty entitlement would then be 67,328 acres, and they would still be entitled to a further 23,707 acres." He continued, however: "I might add that as no reserves have been established for the northern Indians the Province, I believe, would have no objection to establishing entitlement on the basis of present day population."<sup>106</sup>

*1961 – Bethune's Compromise Formula*

In the early 1950s, there is correspondence on file relating to requests for surveys for the Lac La Ronge Band, to the point where it appears that some lands at Stanley were even identified as being potential reserve lands.<sup>107</sup> No entitlement calculations appear for this period, however. In 1953, the Superintendent of the Carlton Agency informed the Regional Supervisor that "the Indians concerned are entitled to an additional 60,000 acres under Treaty rights, as stated in previous correspondence." This figure cannot be based on current population (which he gives as 1088), but he gives no clues as to where this was found.<sup>108</sup>

In December 1960 solicitors for the Lac La Ronge Band wrote to the Department of Indian Affairs requesting the balance of reserve lands due under treaty. The lawyers did not have the correct figures available, but made the request based on information given them by the Band:

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105 Harold McGill to Deputy Minister, April 15, 1939 (ICC, La Ronge Documents, pp. 754-65).

106 Chief, Reserves and Trusts, to Regional Supervisor, December 18, 1959 (ICC, La Ronge TLE Documents, p. 1061).

107 E.S. Jones to J. Ostrander, June 11, 1952 (ICC, La Ronge TLE Documents, p. 894).

108 E.S. Jones to J.T. Warden, September 18, 1953 (ICC, La Ronge TLE Documents, pp. 904-05).

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Our clients advise us that under the Treaty provision was made for 60,000 acres of land for this Band. This was computed on the basis of one section of land for every five members of the Band. We understand that of this amount only 6000 acres has been allocated and we have been requested to take the necessary steps to have the balance allocated.<sup>109</sup>

Indian Affairs officials were aware that the La Ronge Band had “a fairly substantial land entitlement to their credit,” but needed to do some research to determine the exact acreage.<sup>110</sup> When the Regional Supervisor wrote to headquarters asking for clarification on the population base to use in entitlement calculations, the Chief of Reserves and Trusts, W.C. Bethune, replied:

I believe we should take the position that the reserve entitlement of Indians should be based on the population of the bands at the time reserves are set apart for them. As far as I know, this attitude has not been challenged by any province, and there is some justification for it. A problem is created when bands received a portion of their reserve entitlement in past years, but it is thought that this situation can be worked out on a reasonable basis.<sup>111</sup>

At this time, Canada was also involved in the process of negotiating with the province of Saskatchewan for lands for four northern bands, which had never received any reserve land. Internal provincial correspondence on file indicates that Saskatchewan officials were not eager to transfer Crown lands to Canada, especially in the north where mineral development was ongoing. It is not clear, however, how much of this reluctance had been communicated to the Department of Indian Affairs.

Bethune saw the La Ronge situation as a “problem.” His solution, which he appears to have arrived at without consulting anyone else, was to calculate this Band’s entitlement based on a percentage of current population:

Our feeling is that when the reserve entitlement of a band is satisfied at the one time it should be based on the total population of the band at that time, no matter whether it was at the time of treaty or many years afterwards. Where partial settlement of land entitlement was reached at several times the problem becomes somewhat more difficult, and requires a reasonable attitude on the part of the Indians, ourselves and the provincial authorities. The Lac la Ronge Band first received a reserve in 1897 and,

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109 Cuelenaere, Hall & Schmit to N.J. McLeod, Regional Supervisor, December 7, 1960 (ICC, La Ronge TLE Documents, p. 1105).

110 N.K. Ogden for Chief, Reserves and Trusts, to Regional Supervisor, Saskatchewan, January 6, 1961 (ICC, La Ronge TLE Documents, p. 1114).

111 Bethune to Regional Supervisor, February 13, 1961 (ICC, La Ronge TLE Documents, p. 1127).

based on the population of the Band at that time, it represented 51.56% of their total entitlement. In 1909, additional lands were set aside for their use and, based on the 1909 population, the additional lands represented 7.95% of the total they would have been entitled to at that time. In 1948, additional land was set aside for their use, representing 5.16% of what their full entitlement would have been based on the 1948 population. It might, on this basis, be argued that the Lac la Ronge Band has received 64.76% of their total reserve entitlement. The balance, 35.24%, based on the 1961 population of 1,404, would amount to 63,330 acres.<sup>112</sup>

Without any apparent discussion or debate, this new and unique formula – in fact, that exact acreage – formed the basis for the amount of land which the La Ronge Band received as its “full and final land entitlement” under treaty.<sup>113</sup> (It must be noted that, since the early 1970s, the Band has disputed the validity of this formula and of the Band Council Resolution as a release; it currently has a claim before the Indian Claims Commission and an action proceeding in the Saskatchewan Court of Queen’s Bench on this issue.)

### **Treatment of Absentees, Membership Additions, and “Double Counts”**

It is evident that Department of Indian Affairs officials, at one time or another, considered absentees, new adherents, transfers from landless bands, and people receiving reserve land elsewhere in calculating reserve size. They did not necessarily treat them in the same manner every time, however. The following are examples for each of the categories.

#### ***Absentees***

September 6, 1898. Indian Commissioner A.E. Forget calculated entitlement for the Yellow Quill/Kinistino Bands, Treaty 4, Saskatchewan: “There were 358 Indians paid in this Band last month and two were reported absent, making a total of 360 of a population which would entitle them to 72 square miles.”<sup>114</sup>

#### ***New Adherents***

September 6, 1898. Indian Commissioner A.E. Forget recommended that the Kinistino Band, with a population of “about fifty persons,” receive a reserve large enough for 75, since “owing to the attractions of the locality it is likely

<sup>112</sup> W.C. Bethune to Regional Supervisor, Saskatchewan, May 17, 1961 (ICC, La Ronge TLE Documents, p. 1136).

<sup>113</sup> Lac La Ronge Band Council Resolution, May 8, 1964 (ICC, La Ronge TLE Documents, p. 1322).

<sup>114</sup> NA, RG 10, vol. 3935, file 118537-1 (ICC, La Ronge TLE Documents, pp. 269-71).

to be increased by the adhesion of some few straggling hunting Indians scattered throughout the unsettled territory . . . ”<sup>115</sup>

December 18, 1910. Surveyor J.K. McLean reported on his work at Norway House Reserve, Manitoba: “Owing to the additional number of non-Treaty Indians taken recently into Treaty at this place, an area of 7264 acres was added to the north end of the reserve.”<sup>116</sup>

October 19, 1939. Surveyor General F.H. Peters reported on the entitlement situation of a number of bands in northern Alberta:

The Utikuma Lake, the Wabiskaw, the Tall Cree bands have reserves, but due to natural increases and non-treaty Indians who have joined these bands, additional lands are required for them. . . .

[re Utikuma Lake] 154 non-treaty Indians joined the band since 1909; if they alone were entitled to additional land they would receive 154 times 128 acres, or 19,712 acres. . . .

In making final settlement with these Indians with regard to land due them, it is our opinion that the additional area should be based on present population instead of upon the number of Indians who have joined the band since the survey of the reserves at Utikuma Lake. In this connection our reasons are based on the following points.

1. If the additional lands were to be based wholly on the number of non-treaty Indians who have joined the band since date of survey of their reserves in 1908-1909, this would leave out of consideration all descendants of these non-treaty Indians.

2. It is possible that some of the non-treaty Indians who joined are now dead and that others have left the band, some commuted and transferred and consequently they should not be considered in the matter of additional lands for these bands.<sup>117</sup>

In a draft letter dated October 20, 1939, the Minister of Mines and Resources (who was responsible for Indian Affairs) endorsed the Surveyor General’s ideas: “The Utikuma Lake, the Tall Crees and the Wabiskaw Indians are requesting more lands. In each case a large number of non-treaty Indians have joined these bands since their present reserves were surveyed and they are entitled to additional lands under the provisions of Treaty eight. . . .”<sup>118</sup>

115 Kenneth Tyler and Bennett McCardle, Report on Multiple Surveys Practices, attached as appendices B, C, and D to Joe Dion, President, Indian Association of Alberta, to Hugh Faulkner, Minister of Indian Affairs, November 30, 1978, doc. 8, p. 2.

116 McLean to Pedley, December 18, 1910, NA, RG 10, vol. 4019, file 279393-6, reel C-10173.

117 Memorandum, F.H. Peters, Surveyor General, to D.J. Allan, Superintendent, Reserves and Trusts, October 19, 1939, NA, RG 10, vol. 7777, file 27131-1 (ICC, La Ronge TLE Documents, pp. 783-84).

118 Minister of Mines and Resources to Minister of Lands and Mines, Alberta, October 20, 1939 (ICC, La Ronge TLE Documents, p. 786).

***Transfers from Landless Bands***

February 22, 1928. William Gordon, Indian Agent, Norway House, Manitoba, made the case for additional reserve land for the Cross Lake Band based on the addition of people from other bands which had not yet received reserve lands:

I am well aware that the Government cannot be expected to continue altering the boundaries of reserves to meet increases in population, as they have not done so to cover decreases . . . I have not all of the records, but from what I have, I am of the opinion that much of the increase of the Cross Lake Band, between the years 1877 and 1913 were migrations from other Bands whose reserves had not yet been surveyed. In 1908 some 73 persons from Split Lake, York, Oxford House, Nelson River and Nelson House were added to the Band."<sup>119</sup>

***Double Counts***

June 20, 1890. Survey Instructions to A.W. Ponton (Treaty 3): "The surveyor will ascertain . . . if any portion of this Band received its land with some other Band."<sup>120</sup>

September 15, 1890. Surveyor Ponton: "There are no means of his [the surveyor's] knowing whether or not some of the families [have been accounted] for in the allotment of land to other bands especially when such allotments have been surveyed in different years . . ."<sup>121</sup>

October 31, 1906. Assistant Secretary S. Stewart regarding additional land for Lac La Ronge Band: "The question is a rather complicated one, as great care must be taken to prevent giving land to the same Indians a second time."<sup>122</sup>

June 11, 1913. Survey Instructions to I.J. Steele (Treaty 8): "Care requires to be taken in all cases that the same Indian does not obtain land in two different places."<sup>123</sup>

December 27, 1966. H.T. Vergette to R.M. Connelly:

119 William Gordon, Indian Agent, to Assistant Deputy and Secretary, Department of Indian Affairs, February 22, 1928, NA, RG 10, vol. 7772, file 27123-32.

120 NA, RG 10, vol. 1918, file 2790, reel C-11,110.

121 A.W. Ponton to E. McColl, Inspector of Indian Agencies, September 15, 1890, NA, RG 10, vol. 1918, file 2790.

122 S. Stewart to W.J. Chisholm, Inspector of Indian Agencies, October 31, 1906 (ICC, La Ronge TLE Documents, p. 345).

123 J.D. McLean to I.J. Steele, June 11, 1913, NA, RG 10, vol. 4019, file 279,393-9, reel C-10,173.



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the changes in band nomadic habits, transfers, or movement between bands, divisions, etc. have created a very complex problem. It is not simply a matter of selecting the figure from a Paylist or census representing the total membership and using this as the basis for requesting a free grant of land from the Province, although this has been the method used most frequently. To be scrupulously fair, we should carefully examine the history of the band organization and development from the signing of the Treaty until the present date to determine: 1) If there were any abnormal fluctuations in membership over the years; 2) If so, what are the reasons?; 3) If the records reflect substantial increases in membership resulting from an influx of Indians from other bands which may have already received their land entitlement; 4) In the case of new reserves, did these Indians once belong to a group for which lands have already been set apart?; 5) Any other significant information having a bearing on land entitlement. . . . <sup>124</sup>

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<sup>124</sup> DIAND, file 574/30-4-22, cited in Davies, "Treaty Land Entitlement," note 66 above, tab 11.

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## PART III

### TREATY LAND ENTITLEMENT CLAIMS: POLICY AND PROCESS

#### SPECIFIC CLAIMS POLICY IN GENERAL

Native claims are not new phenomena in Canada. It is true that, prior to 1951, claim activity was discouraged by *Indian Act* restrictions on the use of band funds and individual monetary contributions for the prosecution of claims, as well as the need for government approval to sue the Crown. Nevertheless, claims dealing with hunting, fishing, and trapping rights or breach of obligation in the administration of lands and assets have been a feature of almost all periods of our country's history.

Until the mid 1970s, there was no attempt to establish standard claims resolution processes. Grievances were dealt with on an ad hoc basis through the government's normal administrative channels, by special investigation or commission, or by arbitration. Claims for treaty entitlement lands (either for reserve establishment or for additions) were dealt with through the regular departmental bureaucracy, with no standard process in place to research, analyse, or dispute decisions.

After World War II, there were attempts to develop some mechanism to deal with the growing backlog of claims. Two joint Senate/House of Commons committees (1945 and 1959) recommended the establishment of an Indian Claims Commission similar to the one set up by the United States government. A series of bills designed to implement these recommendations, however, all died on the order paper. Further development in that direction ceased in 1968 when the Liberal government under Prime Minister Pierre Trudeau called for a complete review of Indian Affairs policy.

The result of this review was the June 1969 release of the White Paper on Indian policy.<sup>125</sup> In it, the federal government proposed to repeal the *Indian Act* and take legislative steps to enable Indians to control their lands and

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<sup>125</sup> DIAND, *Statement of the Government of Canada on Indian Policy, 1969* [The White Paper] (Ottawa: Queen's Printer, 1969) [hereinafter White Paper].

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acquire title to them, to eliminate the Department of Indian Affairs, to provide funds for Indian economic development, to meet "lawful obligations" with respect to claims and treaties, and to transfer to the provinces administration of such programs as education, health, and welfare. Canada called upon the support of "the Indian people, the provinces and all Canadians" in this attempt to move away from the "authoritarian tradition of colonial administration for Indian people" towards a policy of integrating the Indian people into "full and equal participation in the cultural, social, economic and political life of Canada." Indian reaction, however, was immediate, unified, and strongly negative,<sup>126</sup> and by March 1971 the White Paper had been shelved.

The White Paper did result in the appointment of Lloyd Barber as Indian Claims Commissioner in December 1969. From the beginning, however, Barber was hampered by a mandate limited to examining and reporting on possible mechanisms for settlement of grievances or claims, with no power to resolve them. As well, he often worked amid criticism and opposition from the Indian people, who viewed the Commission as an attempt to force upon them the policy of the White Paper. The Commission wound up in March 1977, with the "available means for resolving claims largely unchanged."<sup>127</sup> The Canadian Indian Rights Commission, which had been established in 1976 to facilitate a bilateral federal/Indian claims resolution process, dissolved in January 1979 when the National Indian Brotherhood withdrew.

In the meantime, work on native land claims continued. Federal funding to provincial, territorial, and regional native organizations and Indian bands to enable them to research and document claims properly began in the early 1970s and has continued to the present. In July 1974 the Office of Native Claims (ONC) was set up within the Department of Indian Affairs and Northern Development (DIAND) to deal with the increasing number of both specific and comprehensive claims being submitted. Working closely with the federal Department of Justice, it had as its primary function to "conduct basic research, to represent the government in claims negotiations with native groups and to formulate policies relating to the development of claims and conduct of negotiations."<sup>128</sup>

The Office of Native Claims had only limited success in resolving specific claims. By 1981, only 12 of over 70 specific claims accepted for negotiation had been settled. Another 80 claim submissions still awaited a decision on

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126 Indian Chiefs of Alberta, *Citizens Plus* [The Red Paper] (1970; repr. Edmonton, 1995).

127 Richard C. Daniel, *A History of Native Claims Processes in Canada, 1867-1979*, prepared for DIAND, Research Branch (Ottawa: DIAND, February 1980), 228.

128 *Ibid.*, 228.

whether they would be accepted. A departmental review of the policy and process in 1981 resulted in a number of changes. Among them was the establishment of a separate branch to deal with specific claims only. Still, by the end of the decade, only three or four negotiated settlements were being achieved each year – fewer than the number of claims being submitted, with the result that the backlog of unresolved specific claims kept growing.<sup>129</sup> In April 1991, after consulting Indian leaders on how to improve the process, the Prime Minister announced a new government initiative “to resolve claims more quickly, efficiently and fairly.” Its major components included increased resources, administrative policy adjustments (such as “fast tracking” smaller claims), inclusion of pre-Confederation claims, the establishment of an Indian Specific Claims Commission to review rejected claims, and the creation of a Joint First Nation/Government Working Group on Specific Claims Policy and Processes to review and make recommendations “on all the existing acceptance and compensation criteria upon which the Specific Claims Policy is based.”<sup>130</sup>

### **Lawful Obligation**

Canada first stated that “lawful obligations must be recognized” as public policy on claims and treaties in the 1969 White Paper. No definition was given but a narrow meaning was implied: “The terms and effects of the treaties between the Indian people and the Government are widely misunderstood. A plain reading of the words used in the treaties reveals the limited and minimal promises which were included in them. . . .”<sup>131</sup> There was, however, no further clarification of this policy.

In January 1972, DIAND asked the Department of Justice for a “ruling on the interpretation of the treaties and relevant Federal-Provincial agreements in regard to the population date on which to base the entitlement. . . . there is no known judicial precedent to guide us in determining the Federal Government’s position. Since any decision by Cabinet could eventually end up being tested in the courts . . . it must be based on sound legal principles. . . .”<sup>132</sup> Justice’s response, if any, was not released by the government, but in March of the following year both the Minister of Indian Affairs and DIAND officials made clear statements to the Island Lake Band in Manitoba

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129 DIAND, *Federal Policy for the Settlement of Native Claims* (Ottawa: DIAND, March 1993), 20.

130 *Ibid.*, 22-23.

131 White Paper, note 125 above, 11.

132 H.T. Vergette to R.M. Connelly, January 12, 1972, in Tyler and McCardle, Multiple Surveys Report, note 115 above, doc. 116.

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that Canada's "lawful obligation" was to provide reserve land according to the population at the date of first survey (although in that particular case Canada was prepared to go beyond that and request additional lands from the province in order to fulfil entitlement):

- On March 15, 1973, J.G. McGilp (who at the time appears to have been working as a special representative with DIAND) wrote to the Island Lake Chiefs:

I am putting in writing the position of the Government with respect to your request for fulfilment of your treaty land entitlement. . . .

The Government is committed to meeting its lawful obligation. It is quite possible to argue that the lawful obligation would be met with the provision of 2,939 acres [the shortfall at date of first survey]. It is recognized, however, that there has been a lapse of many years during which the Island Lake Bands did not have the use of that particular land. Therefore, the Government is prepared to put forward for the consideration of the Bands, its readiness to approach the province with a formula if the Bands consider it appropriate.<sup>133</sup>

- Later that same month, the Minister wrote to the Chiefs on this issue:

In 1924, when land was first selected, the population of the Island Lake Band was 649, according to the annuity payroll. Therefore the obligation under Treaty No. 5 was to lay aside reserves not exceeding 20,768 acres. Two reserves were selected by the Island Lake Band in 1924 and surveyed in 1925. They contained 17,829 acres. This left 2,939 acres to be selected.

In order to discharge the Treaty requirement, the Government is still obliged to lay aside 2,939 acres as reserve land. I am prepared to do this and make the necessary demand upon the Province of Manitoba . . .

I am willing to go further than this and approach the Province on the basis that the land selected in 1924 was 85.9% of entitlement, and that the remaining 14.1% be calculated using the population of your Bands as at December 31, 1972. This would mean adding about 14,000 acres to the reserves.

A settlement as set out above would not preclude your Bands advancing proposals based on social, economic or other grounds rather than on Treaty entitlement. But I do think that the Treaty entitlement of your Bands to land should be settled as a first step now. . . .<sup>134</sup>

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<sup>133</sup> J.G. McGilp to Chief Charlie Knott et al., March 15, 1973, DIAND, file 574/30-4-22 (ICC, La Ronge TLE Documents, p. 2059).

<sup>134</sup> Jean Chrétien, Minister of Indian Affairs and Northern Development, to Chief James Mason et al., DIAND, file 574/30-4-22 (ICC, La Ronge TLE Documents, p. 2061).

Six months later, the Minister of Indian Affairs publicly reiterated that the recognition of “lawful obligations” remained the basis of government policy. Again, there was no attempt in this statement to give more precise meaning to the term, but this time the Minister continued in a manner that seemed to imply a broader interpretation:

The Federal Government's commitment to honour the Treaties was most recently restated by Her Majesty the Queen, when speaking to representatives of the Indian people of Alberta in Calgary on July 5. She said: “You may be assured that my Government of Canada recognizes the importance of full compliance with the spirit and terms of your Treaties.”<sup>135</sup>

First Nations found, however, that Office of Native Claims bureaucrats adopted a “narrow, excessively legalistic approach” to validation criteria “contrary to the spirit and intent of the Treaties.”<sup>136</sup> Claim settlement stalled and frustration grew. In 1982 Canada published *Outstanding Business: A Native Claims Policy – Specific Claims*, in an attempt to present a “clear, articulate policy.” It states: “The government has clearly established that its primary objective with respect to specific claims is to discharge its lawful obligation as determined by the courts if necessary.” It then defines the parameters:

#### 1) Lawful Obligation

The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding “lawful obligation,” i.e., an obligation derived from the law on the part of the federal government.

A lawful obligation may arise from the following circumstances:

- i) The non-fulfillment of a treaty or agreement between Indians and the Crown;
- ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
- iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
- iv) An illegal disposition of Indian land.

#### 2) Beyond Lawful Obligation

In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:

<sup>135</sup> DIAND, Press Release, Jean Chrétien, “Statement on Claims of Indian and Inuit People” (August 8, 1973), p. 1.

<sup>136</sup> Sol Sanderson, Federation of Saskatchewan Indians, to John Munro, Minister of Indian Affairs, September 24, 1982 (ICC, La Ronge TLE Documents, pp. 3503-05). See also DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: DIAND, 1982) [hereinafter *Outstanding Business*], 15.

- i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
- ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.<sup>137</sup>

In the same year as the publication of this policy statement, the Minister of Indian Affairs provided a more concise definition:

. . . Canada has interpreted its lawful obligation to be the shortfall between what the band should have received at first survey and the lands it has actually received over the years.<sup>138</sup>

It must be noted, however, that this is merely an *interpretation*: the issue has never been decided in the courts.

### **Federal/Provincial/First Nation Involvement in Validation and Settlement**

Over the years there have been questions concerning the division of responsibilities in the resolution of treaty land entitlement issues. In 1954 legal counsel for the Department of Indian Affairs stated that "there does not appear to be any possible way to give a firm legal opinion as to the rights of the Crown in right of Canada to *arbitrarily* set the selection date for purposes of determining the area of a reserve for a band . . . ." <sup>139</sup> Some two decades later, Commissioner Lloyd Barber also gave his opinion that Canada should not act unilaterally in dealing with treaty land entitlement matters:

In the light of the obvious ambiguity in this treaty promise, the inequitable nature of the promise, and the present day needs of the Bands, I suggest that the situation requires a process of negotiation which gives adequate consideration to the Indian position. This is the type of issue where it is not appropriate for the Federal Government to make a unilateral decision. The treaties were agreements between two parties and consequently any points that require clarification should be decided through a process where both parties are equally represented. . . .<sup>140</sup>

<sup>137</sup> *Outstanding Business*, 3, 19, 20.

<sup>138</sup> John Munro, Minister of Indian Affairs, to Gary Lane, Minister of Intergovernmental Affairs, Saskatchewan, July 7, 1982 (ICC, La Ronge TLE Documents, p. 3479).

<sup>139</sup> Legal Advisor, Department of Citizenship and Immigration, to L.L. Brown, Indian Affairs, May 20, 1954, DIAND, file 578/30-5, vol. 1 (ICC, La Ronge TLE Documents, pp. 934-37). Emphasis added.

<sup>140</sup> Lloyd Barber, Indian Claims Commissioner, to Jean Chrétien, Minister of Indian Affairs and Northern Development, October 5, 1972 (ICC, La Ronge TLE Documents, p. 2000).

Who should influence validation and settlement policy: Canada, the province, First Nations? Since validation and settlement are distinctly separate functions in the claim process, would the same people necessarily be involved in determining the framework for both? The answers to these questions depend to some extent on the particular jurisdiction involved.

### **Ontario**

In a series of judicial decisions and legislative agreements beginning with the *St. Catherine's Milling* case in the 1880s and ending with the passage of *An Act for the Settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve lands* in 1924, it was determined that Ontario, by virtue of its control over Crown lands under sections 92(13) and 109 of the *BNA Act, 1867*, had authority to fulfil the Indian reserve clauses of those treaties included within its jurisdiction. As a result of those decisions and agreements, it also became necessary for Canada to obtain provincial agreement on both the extent and the location of all Indian reserves selected under treaty. In Ontario, then, all aspects of treaty land fulfilment involve a trilateral process requiring the cooperation and agreement of the First Nations, the government of Ontario, and the federal government.<sup>141</sup>

### **Manitoba/Alberta/Saskatchewan**

The situation in the Prairies provinces is less clear because there has been no legal or judicial resolution to these questions. The Federation of Saskatchewan Indians (FSI) consistently advocated that *validation* of land entitlement claims was strictly a bilateral process involving Canada and the First Nations:

The validation procedure clearly concerns unfinished administrative business between Canada and the Indian Nations . . . The Federal Government acts on behalf of the Crown as a party to the treaties. The Indian Nations are the other party to those agreements and therefore reserve the right to determine the specific policy on entitlement lands through negotiations with the Crown's representative for validation of each band's entitlement. . . .

The validation procedure for each Band is clearly within Federal and Indian Government jurisdiction. . . .<sup>142</sup>

141 Donald McMahon, "Enforceability at Law of the Numbered Treaty Provisions Relating to Land," paper prepared for Osgoode Law School, Toronto, [fall 1985], p. 13.

142 Sol Sanderson, Federation of Saskatchewan Indians, to Gary Lane, September 19, 1982 (ICC, La Ronge TLE Documents, p. 3492). See also David Ahenakew to Warren Allmand, July 22, 1977 (ICC, La Ronge TLE Documents, p. 2565).



They were supported in this position by at least two government bodies.<sup>143</sup>

There is not enough material available to comment on the positions of Alberta and Manitoba in this matter, but in the province of Saskatchewan, it appears that policy changed depending on which government was in power. In 1963, for example, the Minister of Natural Resources reported to cabinet that the Deputy Attorney General was of the opinion that "the right of selection in the Dominion can only be exercised when this province agrees as to the necessity, the size and the location of the reserve . . ." <sup>144</sup> By 1975 thinking had changed to the point that the cabinet minister responsible for Indian matters stated publicly that validation was strictly a matter to be decided by the federal government and the First Nations.<sup>145</sup> A change of government brought another line of thinking in 1982, when the Minister of Intergovernmental Affairs wrote that, while he considered validation of treaty land entitlement to be "an unfinished administrative matter between the bands and the federal government," the provisions of the Natural Resources Transfer Agreement allowed for provincial involvement in the process:

The provincial Minister must be "in agreement with" the federal Minister with respect to the provincial crown lands which are selected and considered necessary to fulfil Canada's obligation. In order to agree with a selection of land, the provincial Minister first must *concur* with the validation process which establishes the entitlement claim. I am certain that you will agree that this provincial position is not only reasonable but also a part of the "agreement" process between the federal and provincial Ministers.<sup>146</sup>

Neither Canada nor the Federation of Saskatchewan Indians agreed that this position was reasonable, however, and by April 1984 the province had abandoned it.<sup>147</sup>

It is more difficult to get a clear picture of Canada's position because it often does not totally separate the fact of entitlement (that is, the simple determination of whether or not a band received all of the reserve land to

143 Leon Mitchell, *Report of the Treaty Land Entitlement Commission* (Winnipeg: TARR Centre, January 18, 1983), 11 (v. 1); Indian Claims Commission, Research Resource Centre, *Indian Claims in Canada: An Introductory Essay and Selected List of Library Holdings* (Ottawa: Information Canada, 1975), 17.

144 Eiling Kramer, Minister of Natural Resources, Saskatchewan, to Cabinet, January 10, 1963 (ICC, La Ronge TLE Documents, pp. 1185-87).

145 Paper presented by Ted Bowerman, Minister of Northern Saskatchewan, to the Federation of Saskatchewan Indians, Regina, December 4, 1975 (ICC, La Ronge TLE Documents, p. 2370).

146 J. Gary Lane, Minister of Intergovernmental Affairs, to John Munro, Minister of Indian Affairs and Northern Development, October 7, 1982 (ICC, La Ronge TLE Documents, pp. 3511-12).

147 Munro to Lane, November 25, 1982 (ICC, La Ronge TLE Documents, pp. 3530-32); Sanderson to Lane, September 19, 1982 (ICC, La Ronge Documents, pp. 3492-93); and Briefing Report to Saskatchewan Cabinet, part III, April 4, 1984 (ICC, La Ronge TLE Documents, p. 3614).

which it was entitled under treaty) from the question of settlement. In discussions of the Island Lake (Manitoba) entitlement issues in 1969, some federal officials clearly limited validation to Canada and the First Nation:

There are, in fact, two negotiations which must be undertaken by Federal authorities. The first is the negotiation with the Island Lake Band itself to determine, on a mutually acceptable basis, the residual entitlement of the band to reserve lands. The second is the negotiation with the province to seek the transfer to Canada, under the provisions of the Natural Resources Transfer Agreement, of the lands necessary to enable Canada to fulfil its obligation to the band under the treaty.<sup>148</sup>

In contrast, throughout the 1970s, there are references to attempts to involve the province in some aspects of the validation process. In April 1974, for example, the federal department's Prince Albert District Supervisor wrote to the Director of the Resource Division of the provincial Department of Northern Saskatchewan:

I would ask that you review this matter from the following points: 1) Are you receptive to the fact that Peter Ballantyne has an outstanding entitlement? 2) Do you concur that the formula used in establishing the outstanding entitlement appears to be fair and reasonable?<sup>149</sup>

In January 1977 the Director of the Lands and Membership Branch of the Department of Indian Affairs wrote to the Director General of the Manitoba Region regarding confusion about two different validation calculations that had been made for the Brokenhead Band in Manitoba:

To date, no firm agreement has been reached between the Federal Government, the Provincial Government and the Indian Bands and Associations as to the criteria to be used in calculating entitlement. In December of 1975, the Department proposed the use of a series of fixed criteria as a basis for determining unfulfilled entitlements in the Province of Saskatchewan. These criteria have not been accepted, officially, by the Province of Saskatchewan or the Federation of Saskatchewan Indians but during the last year, they have been used by the Department whenever making entitlement calculations. . . .<sup>150</sup>

148 G.A. Poupore, Acting Director, Indian Assets, to C.T.W. Hyslop, Acting Director, Economic Development, Indian Affairs, November 17, 1969, DIAND, file 574/30-4-22 (ICC, La Ronge TLE Documents, pp. 1812-14).

149 S.C. Read, Supervisor, Prince Albert District, to J.W. Clouthier, Director, Resource Division, Department of Northern Saskatchewan, April 24, 1974, DIAND, file 672/30-26-200 (ICC, La Ronge TLE Documents, p. 2174).

150 G.A. Poupore, Director, Lands and Membership Branch, DIAND, to Director General, Manitoba Region, January 26, 1977, in Tyler and McCardle, Multiple Surveys Report, doc. 51.

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In November 1982, however, the Minister of Indian Affairs responded to the province of Saskatchewan's attempts to review and approve the validation process with a clear and definite statement of authority: "Validation of a claim and determination of what the outstanding federal obligation under the terms of the treaty is a federal responsibility. . . ."151

With regard to the *selection* process, after a treaty land entitlement claim has been validated, there has been some debate over the years as to exactly what rights the Natural Resources Transfer Agreement gave to the provinces. Can they influence the "quantum" of land or are they limited to agreeing to the location of the reserve? In 1938 the Department of Indian Affairs' legal counsel was of the opinion that "by reason of the wording of this legislation the question of the amount of land which the Indians are entitled to receive would be determined by the Dominion, the Provinces under these Acts having a voice in the location of the Lands."<sup>152</sup>

In January 1983 the Manitoba Treaty Land Entitlement Commission also took that position:

It would be unjust to consider that those words in Section 11 of the Manitoba Natural Resources Transfer Agreement are to be interpreted as conferring on a province the power or authority to frustrate Canada from being able to meet its Treaty obligations to the Indian Bands. On the contrary, it is my view that these words are to be interpreted as imposing an obligation on the province to do whatever is necessary to enable Canada to fulfill its Treaty land obligations to Indians *as Canada and the Indian Bands may agree*, until these obligations are fully carried out.<sup>153</sup>

In 1990 the Treaty Commissioner for Saskatchewan concurred: "With due respect, this Commission submits that the provinces have no voice in the determination of land quantum."<sup>154</sup>

Over the years, however, various bureaucratic statements and legal opinions have expressed the opposite view. In 1970, for example, the Department of Indian Affairs looked closely at this particular issue when the province of Manitoba insisted on having input into the question of land quantum for the Island Lake entitlement settlement. Its conclusion was that the province did

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151 Munro to Lane, November 25, 1982, note 147 above.

152 W.M. Cory, Solicitor, Legal Division, Department of Mines and Resources, to H. McGill, Director of Indian Affairs, February 25, 1938 (ICC, La Ronge TLE Documents, p. 754).

153 Mitchell, *Report of the TLE Commission*, 54. Emphasis added.

154 Cliff Wright, *Office of the Treaty Commissioner, Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 51.

have a say in determining the amount of land necessary to fulfil Canada's obligations:

• Acting Chief, Lands Division:

It should be impressed upon the Bands that Canada is not in a position to settle their treaty land entitlement without the concurrence of the Province as to the formula for settlement. . . .<sup>155</sup>

• B.R. Biddicombe:

. . . the departmental view is that there are two negotiations, one between Canada and the Band and one between Canada and the Province of Manitoba.<sup>156</sup>

• Director of the Economic Development Branch:

According to the Legal Advisor, the wording of the Transfer of Natural Resources Agreement provides no means by which the Federal Government can force a province to accept its decision as to the amount of land required to satisfy land credits under treaty. I am informed that the formula to extinguish partial land entitlements would have to be subject to negotiations with the province. . . .<sup>157</sup>

According to the opinion of legal counsel for the province of Saskatchewan in October 1983, the province has a voice in decisions on land quantum:

3 (a) The question of how much land is necessary to fulfill treaty obligations is a justiciable one which could be settled by a court of law if necessary. In other words, that issue is an objective question and not a subjective one which is dependent on the policy of the federal government as to what its lawful obligations are or on the beliefs of the Indians as to what their treaty rights are;

(b) Even though the question of how much land is required to fulfill outstanding treaty obligations is a question of law, it is nevertheless open to the federal and the provincial governments to agree upon a particular formula to determine the quantum of the land required to meet outstanding treaty land entitlements. . . .<sup>158</sup>

155 H.T. Vergette to Head, Secretariat Division, September 14, 1970, DIAND, file 574/30-4-22 (ICC, La Ronge TLE Documents, p. 1889).

156 B.R. Biddicombe to J.B. Bergevin, Deputy Minister of Indian Affairs, October 6, 1970, DIAND, file 574/30-4-22 (ICC, La Ronge TLE Documents, p. 1902).

157 F.J. Doucet to J.B. Bergevin, October 13, 1970, DIAND, file 574/20-4-22 (ICC, La Ronge TLE Documents, p. 1904).

158 M. Cheryl Crane, Crown Solicitor, Constitution Branch, Saskatchewan, to Dr. R. Gosse, Deputy Minister of Justice, Saskatchewan, October 31, 1983 (ICC, La Ronge TLE Documents, pp. 3601-02).

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## VALIDATION PROCESS

### **Dates for Establishing Population Figures**

Canada's policy on treaty land entitlement since at least 1975, and continuing to the present day, is as the Minister of Indian Affairs stated in 1982: "Canada has interpreted its lawful obligation to be the shortfall between what the band should have received at first survey and the lands it has actually received over the years."<sup>159</sup> While the "date of first survey" has been the cornerstone of most of the treaty land entitlement research conducted on behalf of prairie bands to date, it has not always been, and is not now, accepted by all parties. Other dates, which have been proposed and which might be considered by the courts in any litigation on this issue, include date of treaty adhesion, date of reserve selection, date of each subsequent survey in cases of multiple surveys, and others. Following is a brief discussion of each alternative.

### ***Treaty Adhesion***

At least two of the Prairie provinces and the federal government have at various times declared treaty-time population as the basis for reserve land calculation – Saskatchewan in 1963 ("The known or estimated population at the date of treaty will be used in calculating land entitlement"<sup>160</sup>); Canada in 1972 ("The Department of Justice takes the view that we are obligated only to supply an amount of land based on the population at the time of the signing of the treaty"<sup>161</sup>); and Alberta in 1977 ("These land entitlements will be calculated on the basis of the Band population as counted at the time of Treaty signing"<sup>162</sup>). All abandoned this position, primarily because inaccurate figures and unstable band formations at treaty time made it impossible to conduct any meaningful research in those years:

the particulars of populations cannot be found for several of the Indian bands as they existed at the time of Treaty. The situation which prevailed through much of the northern areas was that at the signing of Treaty, two or three Indians presented themselves as Chief and Headmen and signed Treaty on behalf of a large group of Indians which later became separated into smaller bands and recognized by the Department of Indian Affairs of the time. It is most difficult to trace back all the individual families

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<sup>159</sup> Munro to Lane, July 7, 1982, note 138 above.

<sup>160</sup> E. Kramer, Minister of Natural Resources, Saskatchewan, to R.A. Bell, Minister of Indian Affairs, April 4, 1963 (ICC, La Ronge TLE Documents, pp. 1190-91).

<sup>161</sup> To Department Secretariat, April 19, 1972 (ICC, La Ronge TLE Documents, p. 1969).

<sup>162</sup> Lou Hyndman, Minister of Federal and Intergovernmental Affairs, Alberta, to Warren Allmand, Minister of Indian Affairs, April 27, 1977 (ICC, La Ronge TLE Documents, p. 2536).

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in order to ascertain the population at Treaty time of the present day bands except for the overall totals.<sup>163</sup>

Arguments against the use of treaty-time population also included the loss of revenue caused by the land not being available over the years and the recognition that, in the north especially, Treaty Commissioners had clearly promised that reserves would not be surveyed until they were needed.<sup>164</sup>

One proposal put forward in 1975 would have used population figures at date of treaty "in cases where the treaties specifically delineate lands for a Band."<sup>165</sup> (The example used in this argument was Cross Lake in Treaty 5, but Treaties 1, 2, and 7 also contain descriptions of reserve locations that would have fit the parameters of this proposal.) Nothing was found in the available records to rebut this argument, but it was clearly never adopted, for in 1977 the Minister of Indian Affairs admonished Alberta for its treaty-time population stand:

I find untenable your government's stated intention to fix treaty entitlement on the basis of band population at the time of treaty. I would suggest that such a position is excessively restrictive and overlooks entirely the benefits to be gained from providing Indian citizens of Alberta with a land base commensurate with their needs.<sup>166</sup>

### ***Natural Resources Transfer Agreement***

During the negotiations leading to the transfer of Crown lands and natural resources to the provinces, Manitoba tried to stipulate that land required for future reserves would be limited to the Superintendent General's estimate of the area still owing to the First Nations of that province – a total of about 100,000 acres based on 1928 population figures for two bands with no reserve lands and six with partial entitlement.<sup>167</sup> Canada would not agree to this stipulation:

The various treaties provide for so many acres per capita and the practice of the Department has been to take the census of the band at the time that the survey of the

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163 G.F. Davidson, Deputy Minister of Citizenship and Immigration, to J.W. Churchman, Deputy Minister of Natural Resources, Saskatchewan, April 12, 1961 (ICC, La Ronge TLE Documents, p. 1132).

164 W.P. McIntyre, Acting Administrator of Lands, to Alberta Regional Supervisor, Department of Indian Affairs, May 17, 1965, and H.T. Vergette to R.M. Connelly, December 27, 1966, DIAND, file 574/30-4-22.

165 H.R. Phillips, Acting Chief, Lands Administration Division, DIAND, to G.A. Poupore, Manager, Indian Lands, DIAND, January 23, 1975 (ICC, La Ronge TLE Documents, p. 2278).

166 Warren Allmand, Minister of Indian Affairs, to Lou Hyndmen, Minister of Federal and Intergovernmental Affairs, Alberta, June 23, 1977 (ICC, La Ronge TLE Documents, pp. 2551-53).

167 Treaty & Aboriginal Rights Research Program (TARR) Manitoba, *Treaty Land Entitlement in Manitoba, 1970-1981* ([Winnipeg], February 1982), 150, 151, 152.

required acreage is made. The acreage as hereinafter stated will be varied at the time of survey to met the decrease or increase of the membership at such time. I do not think accordingly that it would be proper to insert any limitation of acres in the Agreement. When these surveys come to be made the Department will be able to satisfy the Province of Manitoba as to our strict adherence to treaty conditions. . . .<sup>168</sup>

Apparently this particular date was also proposed in 1954, although it is not known by whom or in what context. At the time, the Department of Indian Affairs was "not prepared to offer comment on this suggestion as it did not originate in this office," and there is no further reference to it in any other correspondence.<sup>169</sup>

### ***Reserve Confirmation by Order in Council***

The date of reserve confirmation seems to have been considered only in 1975. It was put forward as a possibility for use when more reliable dates could not be established, but it was recognized to be of limited value since "such confirmation was often not given until many years after the land had been selected and surveyed for a particular Band, thus resulting in numerous administrative problems."<sup>170</sup>

### ***Reserve "Selection" / First Survey***

In February 1970 officials from the province of Saskatchewan declared that they had settled on the use of population figures from the year in which application for reserve land was made:

Bands are entitled to land on a per capita basis, but the Treaty does not state the date when the Band population is to be used in calculating the area of land entitlement. Is it the date of Treaty? The date of the application for land, or is it when the final settlement is made which could be many years later when the population has had a considerable increase? We have taken the position that the area of land entitlement is established on the basis of the Band population at the time of the original application for land. Once the area so established has been allocated, there is no further obligation on the part of the Province under the NRTA, Section 11. . . .<sup>171</sup>

<sup>168</sup> Ibid., 157.

<sup>169</sup> Davies, "Treaty Land Entitlement," note 66 above, tab 8.

<sup>170</sup> H.R. Phillips, Acting Chief, Lands Administration Division, to G.A. Poupore, Manager, Indian Lands, January 23, 1975 (ICC, La Ronge TLE Documents, p. 2279).

<sup>171</sup> F.B. Chalmers, Department of Mines and Natural Resources, Manitoba, to G.G. Rathwell, Department of Natural Resources, Saskatchewan, February 5, 1970 (ICC, La Ronge TLE Documents, p. 1831).

When the Department of Indian Affairs began band-by-band entitlement research in the early 1970s, the population figures were based on a similar date, but usually referred to as the date of "selection." No precise definition of this term could be found, but it was "broadly understood as the first date at which the reserve was effectively requested by, used, or set aside for, a band."<sup>172</sup> In some cases, this date preceded the date of survey by a number of years. For example, the Wabisca Band (Treaty 8, Alberta) selected four reserves in 1909 that were not surveyed until 1913; when the department investigated this Band's entitlement in 1974, the 1909 population was used in the calculation.<sup>173</sup>

The details required to establish a "date of selection" could only be found by researching early correspondence between the Indian Agent and the Department of Indian Affairs, located in archival files or annual reports.<sup>174</sup> This entailed time-consuming research, and in too many cases there was not enough information in the correspondence to determine a specific date of selection. This population base was abandoned by June 1975 and replaced with membership figures from the "date of initial survey."<sup>175</sup>

### ***Each Survey in Cases of Multiple Surveys***

Since treaty land entitlement research began in earnest in the 1970s, prairie First Nations have advanced the principle that entitlement should "grow or shrink indefinitely along with band population" until full allocation is achieved. In 1975 the President of the Federation of Saskatchewan Indians wrote to the Minister of Indian Affairs:

Should a band have received insufficient land based on the Treaty formula at the original survey, its full entitlement to land shall be determined by its population as determined by the annuity paysheets and band lists at the time that confirmation of additional reserve land is made. This formula is to be used until such time as the band receives its full entitlement to land under the Treaty based on its population as shown by the latest annuity payment and most current band list prior to the confirmation of the parcel to give that band full entitlement to land under the treaty.<sup>176</sup>

172 Tyler and McCardle, Multiple Surveys Report, p. B-4.

173 Attachment to Memo from G.A. Poupore, Manager, Indian Lands, to W. Fox, Operations Branch, February 6, 1975 (see Appendix A).

174 H.R. Phillips, Acting Chief, Lands Administration Division, to G.A. Poupore, Manager, Indian Lands, January 23, 1975 (ICC, La Ronge TLE Documents, p. 2278).

175 G.A. Poupore to J.R. Worster, Province of Saskatchewan, June 23, 1975 (ICC, La Ronge TLE Documents, p. 2101).

176 David Ahenakew, Federation of Saskatchewan Indians (FSI), to Judd Buchanan, Minister of Indian Affairs and Northern Development, July 3, 1975 (ICC, La Ronge TLE Documents, p. 2332; Tyler and McCardle, Multiple Surveys Report, p. B1).



In January 1978 the Indian Association of Alberta included a similar statement in its position paper on entitlement:

The position of the Indian Association of Alberta is based on the previous practice and precedents of the Canadian and Alberta governments and it is that until the total entitlement of a band has been granted, the entitlement should continue to increase in relation to the population of the band. . . .

. . . This formula provides that as long as a band's outstanding entitlement claim remains unsatisfied, the extent of the band's entitlement would continue to increase or decrease with population, the extent of one square mile per family of five.<sup>177</sup>

Today, this same principle forms the basis of the claim of the Lac La Ronge First Nation, both in its litigated proceedings and in its submission before the Indian Claims Commission.

The arguments put forward in favour of this position are based on treaty interpretation and past practice of the department:

- 1 That treaty land entitlement was "intended . . . to meet the Indian people's need for residence and economic support over long periods of time" and that Treaty Commissioners had confirmed "the right of the bands to delay their choice of all or part of their land until they were ready to use it."<sup>178</sup>
- 2 That past practice of the department was to base reserve size on current population figures at each and every survey (see discussion on Multiple Surveys, above). Even the "compromise formula" applied to La Ronge was a variation on the "current population" base.
- 3 That the federal government's acceptance and advocacy of the "Saskatchewan formula" led the associations to believe that their ongoing method of determining entitlement based on population in the year of each successive survey was accepted, since that formula was based on current population statistics (albeit with a cut-off date of December 31, 1976):

The terms of this agreement led the Indian associations to believe that their method of calculation had been accepted and vindicated. It was not logical to believe that entitlement for some bands, who had had the benefit of only one survey in the past, might now receive land on the basis of population at December 31, 1976; while others

<sup>177</sup> Indian Association of Alberta, "Indian Land Entitlement: Position Paper," January 1978, pp. 12 and 14. The Manitoba Indian Brotherhood also put forward this calculation in its June 1979 "Treaty Land Entitlement - Validation Criteria."

<sup>178</sup> Tyler and McCardle, Multiple Surveys Report, pp. B1-B2.

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(who had by chance or choice received land through more than one survey, whether that one survey had taken place in 1876 or as late as 1976) were restricted to the amount by which a survey had fallen short *as much as a century earlier*.<sup>179</sup>

In validation negotiations over the years, Canada has never endorsed this position. There was no debate on the specific arguments presented in the early correspondence – all that is on record are notations of verbal responses by Office of Native Claims staff in a 1978 discussion regarding the Meadow Lake entitlement situation. As the researcher for the Federation of Saskatchewan Indians, Ken Tyler, reported on the proceedings of the meeting:

Graham Swan then interjected that, "That's not the way we do it," and went on to explain that if the shortfall at the date of the original survey of the first bit of reserve land for a band was ever made good, then the O.N.C. considered that Band's entitlement to have been fulfilled, no matter what the Band's population might have been when the additional land was surveyed. . . . I also asked Mr. Goudie if he could cite any case in which the Department of Indian Affairs had ever consciously attempted to fulfil entitlement for any band upon the basis of only making up the amount of land that was due at the date of first survey. I conceded that the past practice of the Department might be somewhat confusing, but that I knew of no case in which this had been done, while I knew of several, particularly in Northern Alberta, where the current population of a band had been identified as the basis upon which outstanding entitlement should be calculated for bands which had only received a portion of their reserve allocation.

Goudie replied that, "We are not talking about precedents," and that the practice of the Department years ago was of little or no relevance. . . . I also asserted that the principle which the O.N.C. was now enunciating contradicted "the philosophy of the Saskatchewan Formula," in that it made little sense to agree that outstanding land entitlement should be calculated upon the current (Dec. 31, 1976) population today, but that it should not have been based upon current population in the past.

Goudie replied: "That might very well be, but that's the way it's always been done". . .<sup>180</sup>

In its submission to the Indian Claims Commission in 1994, Canada addresses only the factual situation of the La Ronge Band and does not attempt any explanation of the precedents brought forward by the provincial Indian organizations:

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<sup>179</sup> Ibid., pp. B7-B8.

<sup>180</sup> Ken Tyler, FSI, to Walter Gordon, FSI, November 6, 1978 (ICC, La Ronge TLE Documents, p. 3035).

The most reasonable interpretation of this treaty [6] is to calculate the number of Band members at the time that the reserve is first surveyed for the purposes of calculating the quantum of land owed to a band under the treaty formula. . . .

. . . there is no support for the interpretation advanced by the Band contained in the treaty, the adhesion agreement, nor the reports regarding the making of the treaty or the signing of the adhesion. On the contrary, each of these sources would suggest that it was the intention of Canada and the signatory bands to have reserves set aside in the relatively near future after the making of the treaty, based upon the then existing band populations.

Likewise, the band can find little support for its position in the history of dealings between Canada and the band with respect to the treaty land entitlement question. Although Canada altered its views on the quantum of land remaining owing to the Band on several occasions, only the correspondence from the 1936-1938 period would suggest an adoption of the interpretation advanced by the band, and this correspondence is probably the result of confusing bands which had received lands with those that had not (i.e. a confusing of appropriate methodology). The great majority of the historical record concerning the outstanding TLE issue, and especially the earlier material is suggestive of a fixed shortfall approach to the satisfaction of the Band's outstanding TLE.<sup>181</sup>

### **Evolution of Validation Criteria**

Agreement on the use of date of first survey was only the first step in the process of validating treaty land entitlement claims. Decisions still had to be made regarding various technical aspects of the research and interpretation of the data. Both Canada and the First Nations recognized the need to develop some sort of research framework, and in the mid-1970s various "principles," "positions," and "proposals" were put forward. Unfortunately, there was little review or response to any of these submissions, nor was there a concerted attempt to arrive at an agreed set of criteria to assure accuracy and consistency from the beginning. The consequence was that simultaneous but independent research projects on band membership and reserve survey histories in some cases resulted in very different conclusions.

From the beginning, Canada took the lead in establishing "acceptable" validation criteria. As the research and analysis of various situations proceeded, standards established by the Department of Indian Affairs were modified and expanded – often at the initiation of the First Nations, but only with the approval of the Department of Justice. (In fact, although the documents throughout the 1970s suggest that the parameters "evolved" through a consultative process involving Department of Indian Affairs officials and First

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181 Submissions on Behalf of the Government of Canada, 1994, ICC, La Ronge TLE Inquiry, pp. 1 and 19.

Nations, by the early 1980s Indian Affairs officials were giving the Department of Justice credit for the work.<sup>182</sup>) The benchmark was always Canada's "lawful obligations" as defined by Canada's legal counsel.

In the beginning, Canada's primary determinant for a claim to outstanding treaty land entitlement was that the total amount of reserve land set aside for a particular band be less than the amount due to it, based on the number of people paid on the treaty annuity payroll in the year of first survey. As the process evolved, the standards for determining population were expanded to include band members who happened to be absent in that particular year but who subsequently returned, as well as additions to band membership of people who had never received land elsewhere (new adherents to treaty or transferees from bands who had not received entitlement lands). The following is an attempt to follow this process of development and to demonstrate how these criteria formed the basis of entitlement validations and settlements in the Prairies from 1976 to about 1990, when the validation criteria seem to have become more limited.

### *Criteria in 1975*

Both Canada and the First Nations in Saskatchewan began band-by-band treaty land entitlement studies in the early 1970s. A 1973 Department of Indian Affairs working paper on partial land entitlements in Saskatchewan was not widely distributed,<sup>183</sup> but by August 1975 work had progressed to the point that the Minister of Indian Affairs could provide the Premier of Saskatchewan with a list of all bands in that province, detailing original survey dates, populations at time of first survey, entitlement acres, and acres received. (Twelve bands according to this list had a shortfall at date of first survey.) The Minister did include a caution:

I know that the Federation has conducted considerable research into this question on behalf of many Bands and I should point out that their research findings may differ from our own. This is partly due to the nomadic habits and loose organization of Indian bands during the last century and the disturbances at the time of the Riel

182 From about 1980 to 1983, the work of the joint FSI / DIAND technical committee – both research and evaluation – to finalize the nine outstanding entitlement claims in Saskatchewan "was carried out under the supervision of ONC, and using the validation criteria established for us by the Department of Justice." Murray Inch to Marla Bryant, January 18, 1982 (ICC file 2000-18, Memorandum from Stewart Raby to Wilma Jacknife, June 12, 1994, doc. 8).

183 John Tobias, FSI, to Walter Gordon, FSI, April 19, 1973 (ICC, La Ronge TLE Documents, pp. 2073-74).

Rebellion. These coupled with questionable or inadequate records make for uncertainty and I emphasize that the attached figures are not absolute.<sup>184</sup>

In October 1975 the Federation of Saskatchewan Indians notified the province that it would identify 23 bands with partial entitlement.<sup>185</sup>

From this discrepancy in numbers it was obvious that the researchers were using different frameworks to reach their conclusions and it was suggested that "a reasonable basis for determining the reliability of data to be used in substantive discussion of Band entitlement" be developed. The Chief of the Federation of Saskatchewan Indians had already written to the Minister of Indian Affairs with five "basic principles" which he insisted be included in any policy developed to deal with land entitlement. They were:

1. Any recognized band of Treaty Indians is entitled to a reserve based upon the formula of one square mile of land for every five people.
2. To determine whether a band received its entitlement to land under the Treaty, the population figures from the latest annuity pay sheets and the most recent band lists prior to the original survey of the reserve must be used. Should a band have received insufficient land based on the Treaty formula at the original survey, its full entitlement to land shall be determined by its population as determined by the annuity paysheets and band lists at the time that confirmation of additional reserve land is made. This formula is to be used until such time as the band receives its full entitlement to land under the treaty based on its population as shown by the latest annuity payment and most current band list prior to the confirmation of the parcel to give that band full entitlement under the Treaty.
3. Any band which legitimately requested a reserve under Treaty, and which was unlawfully or unreasonably denied a reserve, has the option to use the population figures of the year in which it made its request or current population statistics.
4. No band can renounce its full entitlement to land except in the manner stipulated in the Indian Act Surrender Provisions.
5. A band with outstanding land entitlement has the right to choose any unoccupied crown land as the site for the lands to fulfill its Treaty entitlement.<sup>186</sup>

The Minister's response to these principles is not available, but notes of a meeting in May 1976 record the reaction of William Fox, a Special Projects Officer with the Department of Indian Affairs, who informed the Federation

<sup>184</sup> Judd Buchanan, Minister of Indian Affairs, to Allan Blakeney, Premier of Saskatchewan, August 18, 1975 (ICC, La Ronge TLE Documents p. 2340). In January 1976 Canada notified the FSI that, after further research, one of the bands did not qualify and would be removed from the list (A. Kroeger, Deputy Minister of Indian Affairs, to D. Ahenakew, FSI, January 28, 1976, ICC, La Ronge TLE Documents, pp. 2383-84).

<sup>185</sup> Cy Standing, Secretary, FSI, to Ted Bowerman, Minister of Department of Northern Saskatchewan, October 1, 1975 (ICC, La Ronge TLE Documents, p. 2363).

<sup>186</sup> D. Ahenakew to J. Buchanan, July 3, 1975 (ICC, La Ronge TLE Documents, pp. 2331-32).

that, although negotiations were necessary on the second point, he could not accept the five points and the Federation's letter was not acceptable. Fox wanted "to establish a process that would involve solutions not the 10 commandments."<sup>187</sup>

Mr. Fox had already written to the Chief of the Federation of Saskatchewan Indians in December 1975 with his own suggested criteria for entitlement research (see Appendix C):

- (1) The population count to be used for dates prior to 1951 will be taken from the treaty annuity paylists for the appropriate year but can be based on other sources if there is adequate evidence to indicate that another source would be more accurate; after 1951, population figures will be taken from the membership rolls.
- (2) The date of selection shall be deemed to be the date of the first survey for those Bands which were in treaty when land was set aside. In cases where Bands adhered to treaty after land had been set aside, the population shall be that at the time of the adhesion. There are some reserves set aside which were not surveyed as such but were established from the township surveys carried out by the Department of the Interior in the course of the original surveying of all lands for homestead purposes. In such cases the date of selection shall be the year in which the reserve was first identified and used as an Indian Reserve.
- (3) The acreage of land set aside will be the acreage stated in the Order in Council setting it aside except where this has been altered by a subsequent survey. In cases where an Order in Council does not state the acreage of a Reserve, the acreage will be that shown on the plan of survey; where a reserve is described by metes and bounds which indicate an area greater or smaller than that which is said to have been set aside, the metes and bounds will be used to determine the acreage.
- (4) Where a Band has exchanged land for a greater or lesser acreage, calculations of its entitlement are to be based on the acreage originally set aside and not on the accretions.

These "criteria" did not address some issues which concerned First Nations, such as multiple surveys, and were in many ways too general to deal satisfactorily with the problem of establishing a population base. Although First Nations continued to discuss a broad range of criteria issues,<sup>188</sup> there is no written record of negotiations or discussions with Department of Indian Affairs staff. Even though Fox's proposed criteria were not accepted – offi-

<sup>187</sup> Notes of a meeting held in Regina on May 11, 1976 (ICC, La Ronge TLE Documents, p. 2396).

<sup>188</sup> In August 1976 the Prairie Indian Rights Technical Group produced a chart of the position taken by parties interested in entitlement – Canada, the three provinces, and the three provincial treaty organizations – on various validation and settlement issues. See ICC, La Ronge TLE Documents, pp. 2412.

cially or otherwise – by the First Nations, Canada used them consistently in its research and considered them to be the “established criteria.”

### *Criteria in 1977*

As a result of negotiations with Federation staff in February 1977, Canada agreed to recognize entitlement claims for an additional four Saskatchewan Bands (Lucky Man, Little Pine, Thunderchild, and Nikaneeet). As the Office of Native Claims explained in its paper, “Criteria Used in Determining Bands with Outstanding Entitlement in Saskatchewan,” in order to recognize an entitlement claim for these four bands, “it was found necessary to modify the criteria to accommodate unique circumstances affecting individual Bands. However, such modifications were made only when absolutely necessary and, in all other cases, consistent application of the established criteria was maintained.”<sup>189</sup> The paper was written in August 1977 and distributed to the three Prairie provincial Indian organizations in July 1978.<sup>190</sup>

According to this paper, a band’s reserve land entitlement was calculated

- a) according to the population at the date of first survey (as indicated on the plan of survey);
- b) when the first survey occurred before 1951, the population figure used was that shown as “Total Paid” on the annuity payroll for the year of survey;
- c) entitlement was calculated by multiplying this population figure by the per capita acreage set out in the appropriate treaty;
- d) this figure was compared with the total of all reserve lands set aside for the use and benefit of that band in fulfilment of treaty entitlement.

There were a number of population factors that were specifically not accounted for in these criteria:

- i) Band members absent at the time of treaty payment.

<sup>189</sup> DIAND, Office of Native Claims, “Criteria Used in Determining Bands with Outstanding Entitlement in Saskatchewan,” August 1977 (ICC, La Ronge TLE Documents, pp. 2565-73 and 2591-606). It should be noted that two versions of this paper exist. The “criteria” in both are basically the same, but there are more examples and explanations in one than the other. It is not clear which of these papers was distributed to the various Indian organizations in 1978, although the shorter version, which is marked “Without Prejudice,” is often included in document submissions. The two versions are attached as Appendices D and E.

<sup>190</sup> H. Flynn, Lands and Membership Branch, Indian Affairs, August 30, 1977 (ICC, La Ronge TLE Documents, pp. 2565-73, 2591-2606), and J. Hugh Faulkner to Lawrence Whitehead, July 3, 1978 (ICC, La Ronge TLE Documents, p. 2917).

- ii) New members subsequently transferring into the Band from other Bands which may or may not have received their full treaty land entitlement.
- iii) New members subsequently adhering to treaty.
- iv) Members subsequently transferring out of the Band to other Bands.

Although the above factors were not accounted for in our basic criteria and entitlement calculations, it was recognized that they might constitute a basis for future negotiation with the F.S.I. Notes were therefore included in our reports for any cases in which these factors were found to arise to any great extent.<sup>191</sup>

In fact, one of the four newly accepted claims – Thunderchild – was based entirely on absentees and transfers from landless bands.

### ***Criteria Changes, 1978 to 1982***

#### ***Paylist Numbers***

In 1978 Band researchers questioned Canada's reliance on the "Total Paid" column of the paylists. Treaty annuity paylists were not designed to be a "census" of the band; they were, rather, financial statements designed to account for the distribution of money. Band members paid regularly showed up in the Total Paid column for that year but, because of limits imposed by the Department of Indian Affairs on the total amount any one family could receive in a given year, people absent for a number of years might receive all of their money as "arrears" (the current year's payment becoming arrears in a subsequent year). These particular people, "although they were undoubtedly and inarguably present at the time of the payments,"<sup>192</sup> would not be listed in Total Paid. Combining the totals of the Arrears and Total Paid columns was not necessarily a quick solution, for other families who had been absent for only one year would be included in both. Instead, it was necessary to look carefully at each family, to make the best determination of the number of people present at the treaty payments for any particular year.

Given its stated position of determining the most accurate population figures, it is safe to assume that Canada altered its research practices as a result of this discussion. Certainly by 1983, very careful analysis above and beyond the Total Paid numbers was mandatory:

In paylist analysis, all individuals being claimed for entitlement purposes are traced. This includes a review of all band paylists in a treaty area for the years that an individ-

<sup>191</sup> ONC, "Criteria Used in Determining Bands with Outstanding Entitlement in Saskatchewan," August 1977, p. 6 (ICC, La Ronge TLE Documents, p. 2596).

<sup>192</sup> Ken Tyler, minutes of meeting with ONC, June 27, 1978 (ICC, La Ronge TLE Documents, p. 2898).



ual is absent, if necessary. All agent's notations are investigated regarding the movements, transfers, payment of arrears, or any other event that affects the status of a band member. A ten to fifteen year period is usually covered depending on the individual case. This period would generally begin at the time the treaty was first signed, through the date of first survey and a number of years afterwards.<sup>193</sup>

### *Absentees*

The department's 1977 criteria had specifically excluded band members absent in the year of survey, although "it was recognized that they might constitute a basis for negotiation." Canada did agree to recognize an entitlement claim for the Thunderchild Band based partly on absentees and, by the middle of 1979, it is apparent that researchers were regularly including this category of people in population counts.

Care was taken to determine that people included in this category were bona fide band members, and that they had continuity with the band both before and after the year of survey. The Manitoba Indian Brotherhood (MIB) Treaty Land Entitlement Validation Criteria, put together in June 1979, stated that "Band members who were absent in the year of survey must be traced and accounted for and must be included in the total population count unless the evidence dictates otherwise. . . ." The total population figures (people paid and those absent) prior to the survey (or the fixing of the reserve boundaries) are used as the base for the calculations of land entitlement . . .<sup>194</sup>

### *Double Counts*

Researchers working on behalf of the First Nations never based their population statistics solely on the "Totals" indicated on the payroll. From the beginning, they were analysing these documents more carefully and eliminating any band members found to have received land with another band. When in February 1977, for example, researchers from the Office of Native Claims and the Federation of Saskatchewan Indians compared population numbers for the Thunderchild Band, Canada's count was higher than that of the Federation because the Federation "had deducted from the total any Indians who had been found to have received lands before joining the Thunderchild Band."<sup>195</sup>

193 DIAND, "Office of Native Claims Historical Research Guidelines for TLE Claims" (Ottawa, May 1983) [hereinafter "ONC Guidelines"], p. 3. See Appendix F.

194 "Treaty Land Entitlement - Validation Criteria," June 1979, pp. 3, 4, in TARR, *Treaty Land Entitlement in Manitoba, 1970-1981* (Winnipeg: TARR, Manitoba, February 1982), app. VII.

195 Minutes of Meeting, February 9 and 10, 1977 (ICC, La Ronge TLE Documents, p. 2512).

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The June 1979 Manitoba Treaty Land Entitlement Validation Criteria indicated:

The M.I.B. Treaty research program conducts a payroll analysis for each Band by tracing each name, whether paid or absent, in the year of survey, both before and after that date. Any person which the evidence shows as having been in the year of survey, a fraud (claiming annuities for a larger family than he really had), a fictitious name (a person paid annuities under his real name and also under one or more aliases), or a member of some other Band, is deducted from the total population count.

It is not known exactly when Canada's researchers also included this step in their work. The report on the payroll work done for the Department of Indian Affairs to confirm population statistics for the Kawacatoose Treaty Land Entitlement claim in 1992 states that

The recommended count is arrived at by subtracting "double count" individuals from the total number of band members present and paid at first survey (DOFS).

The total number of individuals paid in 1876 is 146 (21 men, 29 women, 96 children and 0 "other relatives"). Since the Double Count is 0, the figure of 146 is also the Recommended Count.<sup>196</sup>

### *New Adherents*

As early as 1976 the Indian Association of Alberta (IAA) advocated that, under the terms of the treaties, additional land was owing to a band which had increased in population due to the addition of band members adhering to treaty (formally or informally) for the first time. The Federation of Saskatchewan Indians had no official position at that time, and the Manitoba Indian Brotherhood agreed with Alberta First Nations "insofar as it applies to additions to a band which did not receive its full entitlement before additions."<sup>197</sup>

As stated above, before 1977 the Department of Indian Affairs specifically excluded "new members subsequently adhering to treaty" while at the same time recognizing that they "might constitute a basis for future negotiation." In that year, the Federation of Saskatchewan Indians argued that, even though the Pelican (or Chitek) Lake Band had received all the land to which it was

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<sup>196</sup> Theresa A. Ferguson, "Report on the Kawacatoose Band Date of First Survey Population," prepared for DIAND, Specific Claims West, July 31, 1992, p. 4 (ICC, Kawacatoose TLE Documents, p. 252).

<sup>197</sup> Prairie Indian Rights Technical Group, "Comparison of Prairie Association Positions on Land Entitlement Issues," draft, August 18, 1976 (ICC, La Ronge TLE Documents, p. 2414).

entitled based on the number of paid annuities at the date of first survey in 1917, there was a shortfall based on a large number of new adherents who had been admitted to the Band in 1949. The Federation's argument in this case was that this was a shortfall based on the population of the Band in the year of survey – the late adherents were living with, and members of, the Band in 1917 who had chosen not to enter treaty at that time. Indian Affairs staff were "inclined to agree" but reserved a decision until the historical facts could be verified.<sup>198</sup>

Soon after, the Federation advanced the entitlement claim of the Saulteaux Band, based entirely on a series of admissions to the Band after 1956 of people adhering to treaty for the first time. Land was surveyed for these people in 1909, in the expectation that the Band would eventually join treaty. The surveyor was instructed to determine the population. Although he estimated a Band membership of about 140 people, he surveyed only enough land for 70. In 1954, 69 people adhered to treaty as the Sautleaux Band. Using its 1975 criteria ("In cases where Bands adhered to treaty after land had been set aside, the population shall be that at the time of the adhesion"), the government's obligation to provide reserves had been met. However, the Federation presented evidence that at least 92 people who had never before taken treaty were added to the Band lists between 1954 and 1967, and that these people were also entitled to receive lands under treaty.<sup>199</sup>

The Office of Native Claims was persuaded by these arguments and agreed to recognize the claims of both the Pelican Lake Band and the Saulteaux Band, based entirely on the additions of new adherents after entitlement had been fulfilled at first survey. On April 23, 1979, Georgina Wyman, Director of the Specific Claims Group of the Office of Native Claims, wrote to Federation staff, clearly indicating Canada's "position" that new adherents would be included in the calculations towards validating an entitlement claim:

In the course of discussions between the Office of Native Claims and research staff of the Federation of Saskatchewan Indians on the validation of outstanding entitlement claims, the question was raised as to what additional entitlement, if any, is due to bands which have taken late adherents to treaty into band membership. We agreed to look into this with a view to formulating a position for departmental approval. This work has now been done, and I am writing to inform you of the basis on which the

198 Draft memorandum from David Ahenakew, FSI, re Report on Partial Land Entitlement, February 1977 (ICC, La Ronge TLE Documents, p. 2529).

199 Minutes of Land Entitlement Validation Meeting, June 27, 1978 (ICC, La Ronge TLE Documents, pp. 2876-83).

department is prepared to accept late adherents as an additional criteria for validating entitlements.

The department has agreed in principle that bands are entitled to additional reserve land on account of late adherents to treaty, both formal (i.e. those who were party to a formal adhesion to treaty) and informal (in other words, those who were simply added to a band's payroll by the Indian Agent without a formal adhesion being taken). The term "late adherents" is used here to mean a native person who takes treaty for the first time, none of whose forebears had ever previously taken either treaty or scrip. Persons such as white women who marry into a band, and likewise those who transfer from one band to another would be excluded under such a definition. Establishing that a person was a late adherent under these criteria will involve an analysis of the annuity paylists and membership records.

In calculating the entitlement due to a band on account of its taking late adherents into membership, the department is prepared to proceed as follows. As a first step, the band's original entitlement, according to its population at the date of first survey, would be determined. To this would be added the per capita treaty allotment (usually 128 acres) for each late adherent (excluding descendants) to arrive at a "total entitlement" for the band. If this "total entitlement" has been met, then the band would not be deemed to have an outstanding entitlement today. If, on the other hand, the band has not received enough land to meet this "total entitlement," then an outstanding entitlement would be recognized.

I hope that this explains the department's position clearly. If you have any questions on the proposed method of calculation or the definition of late adherents, I will be pleased to try and answer them.<sup>200</sup>

### *Transferees from Landless Bands*

In 1976 only the Indian Association of Alberta advocated that "transfers from bands which did not receive full entitlement to bands which did, carry entitlement with them." Canada had not developed a definite position on other aspects of late additions to band population, but the "I.A.A. position that transfers to bands with full entitlement from bands still due land has been rejected."<sup>201</sup>

While specifically excluding "new members subsequently transferring into the Band from other Bands which may or may not have received their full treaty land entitlement" from their "established" calculation criteria, Canada made an exception and agreed to recognize an entitlement claim for the Thunderchild Band based partly on additional members who had transferred from bands with no reserve lands. For some reason, only six people were paid with Thunderchild in 1881 when the reserve was surveyed. Because

<sup>200</sup> G.A. Wyman to Anita Gordon, April 23, 1979 (ICC file 2000-18, Memorandum from Stewart Raby to Wilma Jacknife, June 12, 1994, doc. 2).

<sup>201</sup> "Comparison of Prairie Association Positions," note 197 above (ICC, La Ronge TLE Documents, pp. 2414-15).

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Canada realized the absurdity of basing entitlement on such a low figure, "entitlement was calculated according to both the 1880 and 1882 population figures, but found to be fulfilled in both cases."<sup>202</sup> In 1889 the Nipahase Band and the few remaining members of the Young Chipewyan Band transferred into the Thunderchild Band: the Nipahase Band had never been allotted reserve lands and the Young Chipewyan reserve had been relinquished when the Band had broken up in 1897.

Since neither of these Bands had, in effect, received any lands prior to joining Thunderchild, notes were included in our report to indicate that an argument could be put forward that these members be provided with an entitlement.

During the discussions with the F.S.I. in Regina, it was finally agreed that the Thunderchild Band's entitlement would be calculated according to the combined populations of the three Bands. . . . Thus, as a result of negotiation, allowance was made both for absentees and for the new members joining the Band and the Department agreed to recognize the Thunderchild Band as having an outstanding entitlement.<sup>203</sup>

Canada considered that Thunderchild was an anomaly, and its basic position remained unchanged. In about 1981-82, however, the Joint Federation of Saskatchewan Indians / Department of Indian Affairs Committee on Entitlement presented the facts of the Poundmaker Band entitlement and suggested a policy change that would allow for the inclusion of people who transfer from bands who had not received their entitlement lands:

Indians who transfer from one band to another are not taken into account in determining a band's population for entitlement purposes. To do so would involve a great deal of research, and would present considerable practical difficulty. If it is argued that a band is entitled to receive land for an Indian who transfers into it from another band, then by the same token the band he left should lose that individual's entitlement. This latter result, of course, is not feasible. In consequence, neither transfers into, nor out of, a band are considered for entitlement purposes.

There are, however, cases where an Indian has transferred from a band which had not received land to one which has already had its reserve surveyed. Under the present policy, this Indian would not be counted in either band and would thus never receive his per capita land entitlement. *We believe that consideration would be given to taking transfers from landless bands into account for entitlement pur-*

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202 ONC, "Criteria Used in Determining Bands with Outstanding Land Entitlement in Saskatchewan," August 1977, p. 8 (ICC, La Ronge TLE Documents, p. 2598).

203 *Ibid.*

*poses, as long as the transferee was not counted for entitlement purposes with any other band.*<sup>204</sup>

The Office of Native Claims and the Department of Justice concurred, and made it very clear that the addition of these people would create an entitlement claim for bands who had received all the land to which they were entitled according to their membership when the reserve was first surveyed:

The Poundmaker and Sweetgrass Bands were provided with enough land to satisfy their treaty land entitlements based on the band's population at date of first survey. However, people later transferred into these bands (Poundmaker and Sweetgrass) from other bands which had not yet received treaty lands. Our research has indicated that none of these transferees were ever counted in the treaty entitlement calculation for any other band. Our legal counsel advises us that each Indian is entitled, under the terms of Treaty 6, to be counted in the population base used to calculate the Crown's overall liability, provided that he or she has not been included in an entitlement calculation elsewhere. *The Department of Justice has taken the position that, since the Indians who transferred to the Poundmaker and Sweetgrass Bands had never been included in such a calculation, the two Bands have an outstanding treaty land entitlement.*<sup>205</sup>

#### *Settlement Calculations for Entitlements Based on Late Additions*

When Canada first accepted claims based on new adherents after survey, it calculated settlement acreage in the same manner as bands with a shortfall based on population at date of first survey, applying the Saskatchewan formula to the entire population of the band according to membership at December 31, 1976. The Federation of Saskatchewan Indians interpreted the provisions of the Saskatchewan Agreement in a more limited way:

I would conclude that under Treaty Six and the Saskatchewan Formula the Federal Government is obligated to set aside for the Chitek Lake Band 128 acres for each of the surviving 1949 and 1950 new adherents and their descendants as of 31 December 1976. Mr. Hawley's report [written on behalf of the Office of Native Claims] concludes that the Saskatchewan Formula ought to be applied to the entire population of the band, and that land ought to be provided on the basis of the 31 December, 1976 total membership. In my opinion this goes considerably beyond the Government's obligation under the formula. This would become quite apparent if one were to con-

<sup>204</sup> Joint FSI/DIAND Committee on Entitlement, Report No. 7, Poundmaker Band #114 (ICC file 2000-18, Raby to Jackknife, June 12, 1994, doc. 9). Emphasis added.

<sup>205</sup> W. Zaharoff to G. Powell, December 13, 1982 (ICC file 2000-18, Raby to Jackknife, June 12, 1994, doc. 16). Emphasis added. See also J.D. Leask's comments on a draft policy paper by R.M. Connelly, November 15, 1982 (ICC file 2000-18, Raby to Jackknife, June 12, 1994, doc. 5).

sider the not at all unlikely possibility that a band may have had its Treaty land entitlement fulfilled fifty or one hundred years ago, with only a very few surplus acres provided. If one person were to have adhered to Treaty with such a band in the early 1970s by the logic of the conclusion in Mr. Hawley's report, the Government of Canada would be obligated to provide sufficient land to the band to accommodate this new adherent and the total population increase of the entire band from the date of survey until 31 December 1976. Such an interpretation of the Saskatchewan Formula would have made a non-Treaty Indian an extremely valuable asset indeed to a great many bands. . . .<sup>206</sup>

While Federation staff proposed extensive membership and genealogical studies to determine the number of people to be considered in the settlement of these types of claims, Canada suggested that entitlement

be calculated on the basis of the percentage by which the band's original entitlement (at the date of first survey – or in this case selection) was increased as the result of the influx of new adherents. This percentage would then be applied to the band's December 31, 1976 population, as per the Saskatchewan Formula . . . We believe that this approach is a fair one . . .<sup>207</sup>

This method was adopted. For Saskatchewan bands validated on the basis of new adherents and transferees from landless bands, then, settlement acres were calculated in the following manner:

Pelican Lake Band:

(i)	Population at date of selection/survey (1921)	42
(ii)	New Adherents to treaty	57
(iii)	Total	99
(iv)	New Adherents as % of (iii)	57.5%
(v)	December 1976 population	347
(vi)	57.5% of 1976 entitlement	25,539 acres
(vii)	Less surplus provided in 1921	<u>3,254 acres</u>
(viii)	Outstanding entitlement	22,285 acres <sup>208</sup>

<sup>206</sup> Tyler, Wright & Daniel to Graham Swan, March 24, 1980 (ICC file 2000-18, Raby to Jacknife, June 12, 1994, doc. 3).

<sup>207</sup> J.R. Goudie to Ken Tyler, June 25, 1980 (ICC file 2000-18, Raby to Jacknife, June 12, 1994, doc. 4).

<sup>208</sup> Bernard Lotselle to Chief Leo Thomas, Pelican Lake Band, August 27, 1980 (ICC, Kahkewistahaw TLE Inquiry, Exhibit 4, tab 17).

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***Criteria in May 1983***

In May 1983, the Department of Indian Affairs produced the "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims" (attached as Appendix F). In the introduction, the criteria are stated to be

intended as guidelines in the research and validation process for treaty land entitlement claims. They have evolved from historical research done by the Office of Native Claims (ONC) in consultation with the Federal Department of Justice, and in consultation with the research representatives of the claimant bands. Each claim is reviewed on its own merits keeping in mind these guidelines. However, as experience has taught, new and different circumstances have arisen with each claim. Therefore, the review process is not intended to be restricted to these guidelines.

With regard to the determination of population figures, the guidelines are very specific:

An outstanding treaty land entitlement exists when the amount of land which a band has received in fulfillment of its entitlement is less than what the band was entitled to receive under the terms of the treaty which the band adhered or signed. This is referred to as shortfall of land. There are two situations where a shortfall may exist. The first is when the land surveys fail to provide enough land to fulfill the entitlement. The second is when new members who have never been included in a land survey for a band, join a band that has had its entitlement fulfilled. The objective is to obtain as accurate a population of the band as is possible on the date that the reserve was first surveyed. . . .

. . . Where a claim depends solely on new adherents or transfers from landless bands, the band memberships may be traced through to the present day.

The following principles are generally observed in an annuity payroll analysis:

***Persons included for entitlement purposes:***

- 1) Those names on the payroll in the year of survey.
- 2) Absentees who are paid arrears. These are band members who are absent for the year of survey but who return and are paid arrears for that year.  
Absentees who return and who are not paid arrears. These people must be traceable to: when they became band members and how long they remained as members during say, a ten to fifteen year period around the date of survey. Generally, continuity in band memberships is required. Also it must be shown that they were not included in the population base of another band for treaty land entitlement purposes, while absent from the band.
- 3) New Adherents to treaty. These are Indians, who had never previously signed or adhered to treaty and consequently have never been included in an entitlement calculation.



- 4) Transfers from Landless Bands. These are Indians who have taken treaty as members of one band, then transferred to another band without having been included in the entitlement calculation of the original band, or of the band to which they have transferred. The parent band may not have received land, whereas the host band may have already had its entitlement fulfilled. These Indians are acceptable, as long as they have never been included in a land quantum calculation with another band.
- 5) Non-Treaty Indians who marry into a Treaty Band. This marriage, in effect, makes them new adherents to Treaty.

***Persons not included***

- 1) Absentees, new adherents and transfers from landless bands, who do not retain a reasonable continuity of membership in the band, i.e.: they are away most of the time. However, these are dealt with on a case by case basis and there may be circumstances which warrant the inclusion of a band member even though he may be absent for an extended period of time.
- 2) Where the agent's notes in the payroll simply states "married to non-treaty," those people are not included. They could be non native or métis and therefore ineligible.
- 3) Where the agent's notation simply reads "admitted" (which often meant admitted to band and not to treaty) and no letter of admission to treaty can be found, these persons are excluded.
- 4) Persons who are not readily traceable . . .
- 5) Persons who were included in the population base of another band for treaty land entitlement purposes.
- 6) Persons names which are discovered to be fraudulent.

The paper then went on to explain how a shortfall was calculated:

This is a simple calculation where the most accurate population figure obtained from the payroll analysis, is multiplied by the per capita allotment of the appropriate treaty. Where the amount of land received is less than the calculated entitlement, a shortfall is said to exist and therefore an outstanding land entitlement is owed to the band. Where the land quantum received is equal to or exceeds this calculation, the entitlement has been fulfilled.

These guidelines were widely distributed to researchers, Indian organizations, and First Nations, sometimes with suggestions that previous research be reviewed. In 1983 and 1984 at least, the Office of Native Claims itself actively initiated reviews of previously rejected claims and recalculated enti-

tlement on the basis of these new criteria. For example, according to research done in 1981, Ochapowace (Saskatchewan) had no entitlement claim, but in October 1983 R.M. Connelly wrote to the Chief that

this is not the final word on the claim. The ONC and the Department of Justice agreed that further research was necessary as there appeared to be a number of persons who were possible late additions to the band. . . .

Late this past summer the ONC did preliminary research on late additions to the Ochapowace Band and identified a number of persons who were potential late additions and this fact warranted further investigation. This type of research had not been done in the original research as it was felt by the DINA/FSI Committee that the outstanding entitlement was based on a strict shortfall at the date of first survey. In late September the task of investigating the individuals identified in the later research commenced. Should this research identify at least 8 persons as bona fida late additions to the Ochapowace Band and they be acceptable to the Department of Justice as members, then your band will have a valid claim to outstanding treaty land entitlement. . . .<sup>209</sup>

#### *Determining the "Base Paylist" in Population Counts*

From the beginning, researchers working on behalf of the Bands disagreed with Canada's use of paylist figures from the year of survey, arguing that it would have been the most recent annuity paylists *prior* to the survey to which the surveyors had access.<sup>210</sup> If, for example, a reserve was surveyed in July 1881, Canada calculated entitlement based on the annuity pay sheets for 1881, regardless of when the payment was made. The Bands' researchers argued that, when annuities were paid after July, it was unreasonable to expect the surveyor to know what the population *would be* but, since he did have access to the 1880 records, those population figures should determine entitlement. Despite the many discussions on the technical aspects of claims and the close working relationship during the joint FSI/DIAND research project, consensus had not been reached on this point in the mid 1980s. Sometime before 1994, however, Canada appears to have adopted the Bands' approach. A "partial list of bands in Saskatchewan, Manitoba and Alberta for whom a 'base paylist' year has been established" is included in a "Research Methodology for Treaty Land Entitlement" produced by the Office of the Treaty Commissioner for Saskatchewan:

209 R.M. Connelly to Chief, Ochapowace Band, October 28, 1983 (ICC file 2000-18, Raby to Jacknife, June 12, 1994, doc. 18).

210 D. Ahenakew, FSI, to Judd Buchanan, July 3, 1975 (ICC, La Ronge TLE Documents, pp. 2331-32). See also FSI, "Population Base for Entitlement Calculation," n.d. (ICC, La Ronge TLE Documents, pp. 3116-22).

This is the payroll which the surveyor might most likely have used in determining reserve sizes; it is *not* in many cases the actual year of the survey itself.<sup>211</sup>

### ***Schedule of Validated Claims to 1990***

#### ***Manitoba***

- 25 bands validated, all apparently on the basis of shortfall at date of first survey

#### ***Saskatchewan***

- DOFS shortfall  
Canoe Lake\*, Cowessess, English River\*, Flying Dust, Fond du Lac\*, Joseph Bighead, Keeseekoose\*, Muskowekwan\*, Nikaneet, Okanese, One Arrow\*, Peter Ballantyne\*, Piapot\*, Red Pheasant\*, Stony Rapids\*<sup>212</sup>
- Shortfall at date of treaty adherence  
Witchehan Lake (received land in 1918, although they did not adhere to treaty until 1950; entitlement based on population in 1950)
- Band amalgamations  
Beardy's, Ochapowace, Mosquito/Grizzly Bear's Head
- "Late adhesions" specified in validation letters  
Moosomin (transferees from landless bands), Onion Lake (transferees from landless bands), Pelican Lake/Chitek Lake (late adherents), Poundmaker (transferees from landless bands), Sweetgrass (transferees from landless bands)
- Other "late adhesion" validations  
Saulteaux (new adherents to treaty), Thunderchild (absentees and transferees), Muskeg Lake
- Band splits  
Little Pine, Lucky Man, Nut Lake/Yellow Quill

#### ***Alberta***

- Alexander (shortfall at date of first survey to which late adherents and landless transferees have been added), Alexis (band split), Cree Chipewyan

<sup>211</sup> Office of the Treaty Commissioner for Saskatchewan, "Research Methodology for Treaty Land Entitlement," draft, Regina, 1994, p. ii.

<sup>212</sup> The First Nations identified with an asterisk were listed in November 1975 as those the Department of Indian Affairs acknowledged had not received all the land to which they were entitled. At the time, DIAND researchers were basing their calculations solely on the total number paid on the annuity paylists in the year of survey.

(initial entitlement), Fort McMurray (shortfall at date of first survey / band split), Gordon Benoit (severalty), Janvier (new adherents and transferees), Grouard (severalty), Laboucan (severalty), Loon River (initial entitlement), Sturgeon Lake (shortfall at date of first survey to which late adherents and landless transferees have been added), Tallcree (shortfall at date of first survey), Whitefish Lake (shortfall at date of first survey to which late adherents and landless transferees have been added), Woodland Cree (initial entitlement)

### ***Validation Criteria after 1990***

In March 1988 the Assistant Deputy Minister of Indian Affairs summarized the departmental review of treaty land entitlement issues which had taken place in 1987 and early 1988 by stating that the

policies and authorities currently in place enable TLE *settlements* up to the extent of entitlement calculated on the basis of date of first survey population. The opinion of the Department of Justice is that Canada's lawful obligation to this extent is clear.<sup>213</sup>

He went on to say that "the *validation* of TLE claims has always been done on the basis of whether the band in question could prove an outstanding entitlement at DOFS [date of first survey]."<sup>214</sup> This statement seems to ignore the fact that claims based solely on the additions of new adherents and transfers from landless bands had been validated in the past, and they were in fact still being considered for negotiation in 1988. (In May of that year, Rem Westland responded to a question about Canada's policy on transfers from landless bands in connection with the follow-up research for the Fort McKay treaty land entitlement claim – a claim which had been submitted in May 1987 based entirely on transfers and which had been rejected: "There is no policy, *per se*, which is specific to landless transfers. You have been provided with the Specific Claims Branch (SCB) guidelines for entitlement research which covers all of those whom we consider eligible for treaty land entitlement purposes."<sup>215</sup>)

In January 1992 staff of the Federation of Saskatchewan Indian Nations (FSIN) asked for clarification of the Department of Indian Affairs' validation

213 D.K. Goodwin, Assistant Deputy Minister of Indian Affairs, to Regional Directors General, Manitoba, Saskatchewan, and Alberta, March 15, 1988 (ICC, La Ronge TLE Documents, pp. 4242-44).

214 Ibid.

215 R.C. Westland, Director, Specific Claims Branch, to Jerome Slavik, Legal Counsel for Fort McKay Band, May 26, 1988 (ICC, Fort McKay TLE Documents).

policy. Al Gross, the Director of Treaty Land Entitlement, reiterated that the method used to accept claims had not changed; the 1983 Guidelines – which he calls a “federal policy paper” – were still in effect:

The federal policy paper dated May 1983, titled Office of Native Claims Historical Research Guidelines for TLE Claims continues to be the foundation for developing prospective band claims to outstanding TLE . . .

In the case of TLE claims in Saskatchewan the Treaty Commissioner’s Office proposed an alternate means of determining the eligible population for the bands negotiating settlements with the government. This proposal was intended as part of the overall formula for determining compensation in that particular negotiation. When agreed to in negotiations, the formula will be applied only to those bands which first qualify for entitlement based on the 1983 policy. . .

The so-called “Adjusted Date of First Survey Population Count Proposed” in Saskatchewan must be understood as part of the overall settlement approach. It does not affect the criteria for determining validation in the first instance.

This clarification is being provided to confirm that the government’s policy on the acceptance of the TLE claims has not been changed.<sup>216</sup>

Despite this assurance, Saskatchewan’s Ocean Man Band received notice in November 1993 that its entitlement claim was not accepted for negotiation because Canada’s research determined no date-of-first-survey shortfall, based on paylist population plus absentees. The letter went on to emphasize:

By policy we do not accept treaty land entitlement claims if the land entitlement based on the date of first survey population has been received. Only if there is a shortfall in land based on the date of first survey population does the category of late adherents to treaty get consideration within the context of an entitlement negotiation . . .<sup>217</sup>

Now, Mr. Gross explained:

. . . In treaty land entitlement claims, Canada’s position is that our lawful obligation to a band is fulfilled when sufficient land under the per capita land provision of the treaty is provided to the band as of the date of first survey. This position is based on legal advice. All individuals who can be identified as members of a given band as of the date of first survey are eligible to be counted for purposes of land allotment. In researching these claims all tools available to us which can facilitate reconstruction of the band membership in that year are used. We rely not just on what the surveyor

<sup>216</sup> A. Gross, Director, Treaty Land Entitlement, DIAND, to S. Raby, FSIN, January 20, 1992 (ICC, Kawacatoose TLE Documents, pp. 230-31).

<sup>217</sup> Juliet Balfour, Treaty Land Entitlement, DIAND, to Chief and Council, Ocean Man Band, November 5, 1993, DIAND, file B8265/08.

knew to be the band population, but on what the present day, best evidence shows to constitute that membership.

The categories we generally use to determine the date of first survey population include: 1) people on the payroll in the year of first survey or on the payroll to which the surveyor would have had access when carrying out the survey; 2) people paid treaty annuities after the date of first survey as absentees from the band membership at the date of first survey; and 3) people paid treaty annuity arrears after the date of first survey for that year.

. . . In the course of researching the band's history we have, in the past, also identified individuals who have joined the band after the date of first survey up to the present day. The categories of persons to be identified in the research report are set out in the 1983 Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims. We will continue this research practice. If bands have claims based upon a date of first survey shortfall, depending on all the circumstances surrounding the claim, we may then take into account these other categories in negotiating settlements to these claims.

We must be clear with claimant bands, however, that our lawful obligation extends only to the strict date of first survey population. That number is the threshold which claimant bands must reach before a treaty land entitlement claim will be accepted. Therefore, if a band does not establish a land shortfall based on the date of first survey population, it has no TLE claim. If, however, this shortfall exists, we are then able to consider the addition into the claim of those additional persons identified as having joined the band after the date of first survey. This is known as the adjusted date of first survey population which is only used to determine compensation, not claim validation. . . .<sup>218</sup>

According to Ian Gray of the Department of Justice, the 1983 Guidelines did "not clearly state the distinction between the basis for validation and the basis for negotiation." But, he states, that point was clarified in Mr. Gross's letter of January 20, 1992, when he wrote: "The so-called 'Adjusted Date of First Survey Population Count Proposed' in Saskatchewan must be understood as part of the overall settlement approach. It does not affect the criteria for determining validation in the first instance."<sup>219</sup>

The Minister of Indian Affairs, Ron Irwin, explained Canada's position to the Indian Claims Commissioners in February 1993:

Canada's position is that it has an outstanding TLE legal obligation only if a claimant First Nation did not receive sufficient land, based on a DOFS population comprising its base payroll, absentees and arrears. This is the threshold test for an outstanding

<sup>218</sup> A. Gross, Director, TLE, DIAND, to S. Raby, FSIN, November 30, 1993, DIAND, file B8265/08.

<sup>219</sup> Ian D. Gray to Lorne Koback, Director, TLE, Saskatchewan Region, memo, February 11, 1994, DIAND, file SCW-2-393-1 (ICC file 2107-15-01, vol. 1).

legal obligation with regard to TLE claims. Other categories such as landless transfers, late adherents and so on, may be considered only where a DOFS shortfall has been established and then only if the settlement negotiations have brought these categories into play as in the 1992 Saskatchewan Framework Agreement.<sup>220</sup>

### **Individual versus Collective Rights**

When the Director General of Specific Claims, Rem Westland, appeared before the Indian Claims Commission on December 16, 1994, he expressed the opinion that treaty land entitlement is a collective right:

one thing that impressed itself on me as I became familiar with treaty land entitlement is that treaty land entitlement is a collective right. It is not an individual right. And with that understanding, as I learned about treaty land entitlement, and from time to time through looking at particular claims would delve into the remarkable dissecting of numbers that goes on in the research business, I was struck by the illogical points that individuals who did not have this right could reopen or constitute a collective right.<sup>221</sup>

Others argue that treaty land entitlement is a right of each individual Indian adhering to treaty.

Lieutenant Governor Adams Archibald – a central figure in the negotiations of Treaty 1 in 1871 – stated in 1872:

When the Treaty 3rd August last was made, the Indians were promised that a Census of their different tribes should be taken with as little delay as possible and that immediately afterwards the Reserves should be laid off *allotting to each soul Thirty-two acres*. A year, or nearly a year, has elapsed and not a step has been taken towards ascertaining the number of Indians, or laying off the Reserves . . .<sup>222</sup>

From at least 1905 to 1913, surveyors were instructed by the Department of Indian Affairs to indicate in their report or on the survey plan itself “the names of the Indians entitled to receive land and for whom the land shown is set apart.”<sup>223</sup>

In 1976 the Deputy Minister of Indian Affairs did put forward the “collective rights” argument in explaining Canada’s position on the Nikaneet claim.

220 ICC file 2107-3-1.

221 ICC, Fort McKay Transcript, p. 84, December 16, 1994 (Rem Westland).

222 Adams Archibald to Secretary of State for the Provinces, July 6, 1872, NA, RG 10, vol. 3555, file 11, reel C-10098. Emphasis added.

223 J.D. McLean to I.J. Steele, Dominion Land Surveyor, June 11, 1913, NA, RG 10, vol. 4019, file 279393-9, reel C-10173. See also Secretary, DIAND, to J. Lestock Reid, DLS, February 5, 1905, NA, RG 10, vol. 4005, file 240050-2, reel C-10170.

(The Nikaneet [or Maple Creek] Band never formally adhered to treaty. Some of its members are descendants of people who were paid treaty annuities with various Chiefs in Treaties 4 and 6 until 1882. According to the Band's claim submission, these people were denied annuities after that year in an attempt to relocate them from the Cypress Hills area.) In rejecting the claim, A. Kroeger wrote:

The position has been taken on the grounds that the treaty promise to set land aside is a commitment made to a *band*. As such the treaty entitlement belongs to bands and is transferrable only when a band is formally divided into a number of smaller bands or if bands formally join together. The Maple Creek Band was not created through the division of other bands: it was a group of Indian people who had band allegiances when treaty was signed and who as individuals chose to ignore those allegiances. This group became a Band under the Indian Act of the day, when, as a matter of practical need, land was set apart on their behalf in 1912.<sup>224</sup>

However, after negotiations with the Federation of Saskatchewan Indians and the Band, Canada changed its position. All of the documents detailing the progress of this claim were not available, but from the information at hand it would appear that by 1982 Canada had agreed to accept the claim, in part, at least, because of an altered view on "collective rights": "The Nikaneet claim established the principle that all treaty Indians are entitled to be counted in some Band or other for entitlement purposes."<sup>225</sup>

This concept was reinforced later that year. In December 1982 W.J. Zaharoff, a senior claims analyst with the Office of Native Claims, wrote to Graham Powell, the Executive Director of Intergovernmental Relations with the province of Saskatchewan, regarding the Poundmaker and Sweetgrass claims: "Our legal counsel advises us that *each Indian* is entitled, under the terms of Treaty 6, to be counted in the population base used to calculate the Crown's overall liability, provided that he or she has not been included in an entitlement calculation elsewhere."<sup>226</sup>

In 1983, when the Department of Indian Affairs distributed its guidelines for treaty land entitlement research, it stated:

224 A. Kroeger, Deputy Minister of Indian Affairs, to David Ahenakew, FSI, January 28, 1976 (ICC, La Ronge TLE Documents, p. 2383).

225 J.D. Leask, Director General, Reserves and Trusts, to R.M. Connelly, Director, Specific Claims, November 15, 1982 (ICC file 2000-18, S. Raby to W. Jacknife, June 12, 1994, doc. 5).

226 W.J. Zaharoff to G. Powell, December 13, 1982 (ICC file 2000-18, S. Raby to W. Jacknife, June 12, 1994, doc. 16). Emphasis added.



The general principle which applies in all categories of land entitlement claims is that each Treaty Indian Band is entitled to a certain amount of land based on the number of members. Conversely, *each treaty Indian is entitled to be included in an entitlement calculation as a member of an Indian Band.*<sup>227</sup>

In 1994 Mr. Westland was asked if that particular section from the guidelines was still valid. He replied:

I don't think it ever was. That isn't to say that it wasn't used, and that isn't to say that we didn't accept a few claims on the basis of that second part of the sentence. . . . From my perspective as Director General for the policy it's illogical to have guidelines where the right is a collective right for land, to factor into it aspects of individual rights to land which are not the ones we're talking about, as being rights that could open up settled collective rights. . . .<sup>228</sup>

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<sup>227</sup> "ONC Guidelines," May 1983, note 193 above, p. 1. Emphasis added.

<sup>228</sup> ICC, Fort McKay Transcript, pp. 84, 86, December 16, 1994 (Rem Westland).

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## PART IV

### CLAIM SETTLEMENT

#### SASKATCHEWAN

In August 1976 the Federation of Saskatchewan Indians and the province of Saskatchewan reached an agreement on the settlement of treaty land entitlement claims in that province. Among the main points of this agreement was that the amount of reserve land for settlement purposes was to be based on "present population" x 128 (acres per person) less land already received." It was agreed that a "cut-off" date would be established, and therefore present population was to mean the population as at December 31, 1976. There were no major concerns about the ability to transfer all required lands in the north as there was still a lot of unoccupied Crown land available. There were concerns, however, that it would be more difficult to fulfil obligations based on this liberal formula in the southern agricultural areas, and so the province stipulated a number of principles for claims in this area:

- 1) land be sought by attempts to secure federal and provincial unoccupied Crown land and, where it can be arranged, federal and provincial Crown land where the Province can satisfy the occupants
- 2) Any Band unhappy with this must look solely to Canada for satisfaction since Canada alienated almost all the land in the South prior to the Resources Transfer Agreement, 1930.<sup>229</sup>

Canada was also informed that the federal government would be expected to purchase patented lands where Crown land was not available.

Before the Minister of Indian Affairs could endorse this agreement, he first had to bring it to Cabinet. The federal ministers were warned about the implications of accepting this agreement:

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<sup>229</sup> Ted Bowerman, Minister of Department of Northern Saskatchewan, to David Ahenakew, Chief, FSI, August 23, 1976 (ICC, La Ronge TLE Documents, p. 2442).

Prior to Cabinet consideration of the Saskatchewan proposal, Justice advised that any contribution by the Federal Government of either land or money based on the Saskatchewan formula will constitute a commitment to the formula as the Federal Government's interpretation of its treaty obligation.<sup>230</sup>

The joint press release issued by the Minister of Indian Affairs and the Federation of Saskatchewan Indians on August 24, 1977, announcing Canada's endorsement of the Saskatchewan Agreement, has no mention of any federal lands or money in the future settlements:

Under the agreement, the Province will be providing Crown lands under their administration. Where Provincial Crown lands are occupied, the occupants must be satisfied before lands can be transferred to the Federal Government for Treaty entitlement purposes. Saskatchewan is also prepared to fulfill entitlement to the Bands concerned by providing, instead of lands, opportunities to Bands for revenue sharing in resource development or participation in joint ventures.<sup>231</sup>

Problems in implementing the agreement became obvious very quickly. There was not enough unoccupied Crown land in the vicinity of existing reserves to satisfy entitlements. Canada and the province could not agree on cost-sharing proposals, each government insisting that purchase of land was the other's responsibility.<sup>232</sup> Various attempts to agree to terms to include in a formal, written agreement failed. Only two Bands – Fond du Lac and Stony Rapids – received all their settlement lands based on "Saskatchewan formula" calculations. Some others had part of their entitlements set aside before both the provincial and federal governments began to distance themselves from the Saskatchewan formula in the mid 1980s. A federal review of entitlement issues in 1987 concluded that "policies and authorities currently in place enable TLE settlements up to the extent of entitlement calculated on the basis of date of first survey populations." This was, according to the Department of Justice, the "full extent of Canada's lawful obligations."<sup>233</sup>

In 1989 the chiefs of the Canoe Lake and Starblanket Bands and the Federation of Saskatchewan Indian Nations (FSIN), on behalf of all Saskatchewan

230 "Federal Role in Fulfillment of Outstanding Treaty Land Entitlements in Saskatchewan," October 27, 1977, p. 3 (ICC, La Ronge TLE Documents, p. 2658).

231 DIAND / FSI, Press Release, "Agreement Fulfills Land Entitlements under Treaty for Saskatchewan Indians," August 24, 1977 (ICC, La Ronge TLE Documents, p. 2584).

232 See Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 11, for more details.

233 D.R. Goodwin, Assistant Deputy Minister, DIAND, to Regional Directors, March 15, 1988 (ICC, La Ronge TLE Documents, pp. 4242-44).

Indians, launched a court action submitting that the 1976 Saskatchewan TLE Agreement was valid and enforceable. In 1990, partly in response to this legal action, Canada and the FSIN agreed to the establishment of the Office of the Treaty Commissioner (OTC) for Saskatchewan to deal with outstanding treaty-related business. One of the first issues to be dealt with was to be treaty land entitlement.

The Treaty Commissioner's task was not a simple one: to develop proposals for the settlement of entitlement claims that would satisfy the concerns of both the First Nations (who held that current population statistics should be used to calculate land quantum) and Canada (who maintained that its "lawful obligation" was to provide land based on date-of-first-survey shortfall). In May 1990 the Treaty Commissioner presented his "Report and Recommendations" to Canada and the First Nations. Among the main points was that a method of calculation termed the "equity formula" was to be used to determine land quantum. Basically, the equity formula applied the percentage of shortfall at first survey to the current population statistics – that is,  $\text{Current Population} \times \text{Per Capita Treaty Allotment} \times \text{Percentage Shortfall} = \text{Equity Formula}$ . It also provided that any First Nation that received less land under the equity formula than it would have received under the "Saskatchewan formula" should be compensated for the difference based on a value per acre. This was termed the "honour payment."

From a series of meetings held in the spring and summer of 1990, the Federation of Saskatchewan Indian Nations, Canada, and the Office of the Treaty Commissioner agreed that: (a) "current population" would be determined as of March 1991, and (b) the population base for the calculation of the "percentage shortfall" would not be limited to the actual number of people paid in the year of first survey, since some validated bands did not have a shortfall at this date, but would include absentees, new adherents, transfers from landless bands, and marriages to non-treaty women. This "adjusted-date-of-first-survey" statistic would represent the "historical population." Believing that it was reasonable to make a distinction between "historical" population and "current" population, the parties chose an arbitrary cut-off date of 1955. (This choice was not entirely arbitrary, but based on some practical and logical considerations: paylists were available only to 1955, birth rates began to rise significantly in this era, and there was an increased likelihood that most additions to a band's membership after this date would have been included in the entitlement calculation for some other

band.) The Office of the Treaty Commissioner was to conduct the research necessary to determine these figures.

On January 16, 1991, a General Protocol Agreement was put in place setting out the four stages in the negotiations process: General Protocol Agreement, Framework Agreement, Band Specific Agreements, and Implementations.

On September 22, 1992, representatives of the majority of the TLE First Nations in Saskatchewan, Canada, and Saskatchewan signed a Framework Agreement on settlement terms for treaty land entitlement for those particular TLE First Nations.<sup>234</sup> The Framework Agreement stipulates that land quantum is based on the equity formula and that any First Nation that would receive less land under the equity formula than under the Saskatchewan formula would receive \$141.81 for every acre of difference as an "honour payment."

### Settled Claims

- Under the Saskatchewan Formula

Fond du Lac, Stoney Rapids

- Within the Framework Agreement (Equity Formula)

Beardy's, Canoe Lake, English River, Flying Dust, Joseph Bighead, Keeseekoose, Little Pine, Moosomin, Mosquito/Grizzly Bear's Head, Muskeg Lake, Muskowekwan, Nut Lake/Yellow Quill, Ochapowace, Okanese, One Arrow, Onion Lake, Pelican Lake, Peter Ballantyne, Piapot, Poundmaker, Red Pheasant, Saulteaux, Starblanket, Sweetgrass, Thunderchild, Witchekan Lake

### ALBERTA

Canada had initially attempted to convince the province of Alberta to agree to provide settlement lands according to a formula similar to that used in Saskatchewan. Alberta steadfastly refused to consider such a proposal. Sometime in the mid 1980s Canada shifted its emphasis from the development of province-wide entitlement agreements to settlement discussions with individual First Nations. The settlements reached basically provided for the establishment of reserve land for the affected First Nation, as well as financial compensation. While it is reported that "[i]n all cases, Canada maintained that its

<sup>234</sup> It should be noted that a number of Bands mentioned by the Framework Agreement have refused to sign that agreement or have not yet ratified it.

'legal obligation' was to provide Reserve land based on Date of First Survey (DOFS) population statistics of the affected First Nation,"<sup>235</sup> it is impossible to reach this conclusion from the documents available.

The Settlement Agreement for the Janvier Band, for example, makes a very general statement about the validation of the claim: "as a result of research presented by the Janvier Indian First Nation, the Minister of Indian Affairs and Northern Development accepted the Janvier Indian First Nation's claim as negotiable under the federal government's specific claims policy."<sup>236</sup> The claim as submitted and accepted was based entirely on new adherents and transferees from landless bands after the survey – there was a surplus of land according to the population at date of first survey. Unfortunately, the exact number of late additions finally agreed upon is not available. It is known that research conducted on behalf of the Band in 1985 had determined that there were 11 people to be added (seven new adherents and four transferees from the Portage La Loche Band before its reserve was surveyed in 1965). These extra people would have entitled the band to a maximum of 1408 acres (11 x 128). According to the settlement agreement, the Janvier Band received 3400 acres in land and cash payments of \$3.2 million from Canada and \$1.8 million from Alberta.

### Settled Claims

Alexis, Fort Chipewyan Cree, Sturgeon Lake, Whitefish Lake, Woodland Cree, Grouard, Janvier, Tallcree

### MANITOBA<sup>237</sup>

In 1982 the Manitoba government appointed Leon Mitchell as a one-person commission to report on treaty land entitlement in Manitoba. His mandate was to review the history of treaty land entitlement issues in Manitoba and the other provinces, to solicit the views of interested parties, and to offer recommendations on terms of settlement. He submitted his report in January 1983. Among the major recommendations was that land quantum should be based on the First Nation populations as of December 31, 1976.

Using Commissioner Mitchell's report as a base, a tripartite negotiating process began in early 1983. By the summer of 1984, a Treaty Land Entitle-

<sup>235</sup> TARR Manitoba, *A Debt to Be Paid: Treaty Land Entitlement in Manitoba* (rev. ed., Winnipeg: TARR Manitoba, October 1994), 23.

<sup>236</sup> Janvier Settlement Agreement, March 25, 1993, p. 2.

<sup>237</sup> Information in this section primarily from TARR Manitoba, *A Debt to Be Paid*, note 235 above.

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ment Agreement in Principle had been developed by the parties. It outlined the proposed terms of settlement and included the provision that land quantum was to be based on First Nation membership as of December 31, 1976. The agreement in principle was conditional upon ratification by the First Nations, Canada, and Manitoba. For a number of reasons, among which was the Manitoba First Nations' sense that terms of settlement for Alberta entitlement claims exceeded the benefits offered under the Agreement in Principle, it never moved forward to the ratification stage and was eventually abandoned.

Following the Oka conflict during the summer of 1990, Canada announced its intention to increase its efforts to resolve, among other issues, treaty land entitlement in the Prairie provinces. After some preliminary discussions with the representatives of Canada and Manitoba on October 14, 1993, a Protocol on the Negotiations of Treaty Land Entitlement in Manitoba was signed by the duly mandated representatives of the Treaty Land Entitlement Committee, Canada, and Manitoba. The Protocol sets out the framework for the concurrent bilateral negotiations – that is, Treaty Land Entitlement Committee/Canada arising from obligations under the treaties, and Canada/Manitoba arising from obligations under the Manitoba Natural Resources Transfer Agreement – and outlines the issues to be dealt with in these discussions. A target date has been set for the development of a framework agreement.

In October 1995, settlement negotiations were breaking down because of a dispute over cost-sharing between Ottawa and Manitoba. Most of the land required to settle outstanding claims is unoccupied northern Crown land which, according to the 1930 Natural Resources Transfer Agreement, the province is obliged to provide. About 10 percent of the settlement lands, however, are for bands in southern Manitoba where necessary land must be purchased because Crown land is scarce. The provincial government is refusing to provide money towards the cost of these lands. While Canada and the province are negotiating this issue, Manitoba's Minister responsible for native affairs stated that

for the northern bands, Manitoba has offered to create interim protection zones of land selected by the bands. Those zones would have a two-year freeze to keep them available for a settlement.<sup>238</sup>

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<sup>238</sup> "Manitoba Indians Push Hard for Land-Teaty Settlement," *Globe and Mail* (Toronto), October 31, 1995, A9.

***Settled Claims***

- Claims settled independently of the Manitoba Treaty Land Entitlement Committee

Garden Hill (divided among the Island Lake Bands: St Theresa Point, Wasagamack, Garden Hill, Red Sucker Lake)

Long Plain

- TLE Committee

Broken Head Ojibway, Buffalo Point, Rolling River, Sapotawayak, Wuskwi Sipiik, Fox Lake, Gods Lake, Nelson House, Norway House, Opaskasgayak, Oxford House, Sayisi Dene, Shamattawa, War Lake, York Factory, Mathias Colomb, Barren Lands, Northlands



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## GLOSSARY OF TERMS

Treaty land entitlement research has developed its own specialized language. General explanations of the meaning of some of these terms, quoting from reliable sources wherever possible, are given below. These explanations cannot, however, be regarded as precise definitions because no attempt has been made to investigate thoroughly when and how different groups may have applied the terms in slightly different ways.

**absentee** "Absentees who are paid arrears . . . are band members who are absent for the year of survey but who return and are paid arrears for that year. Absentees who return and who are not paid arrears . . . must be traceable to: when they became band members and how long they remained as band members. . . . Generally, continuity in band memberships is required. Also it must be shown that they were not included in the population base of another band for treaty land entitlement purposes, while absent from the band." (DIAND, "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims" [May 1983], 3.)

**adjusted-date-of-first-survey (ADOFS) statistics** This formula is unique to the **Framework Agreement** negotiated in 1990 to settle treaty land entitlement claims in Saskatchewan. *See also equity formula*

Number paid in year of survey + absentees/arrears + new adherents + transfers from landless bands + marriages to non-treaty women - double counts (to 1955)

It represents the "historical population" to be used as the date-of-first-survey population in calculating the percentage shortfall in the **equity formula** – that is, all eligible additions to the band after the year of survey

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are considered, for the purpose of this calculation, to have been present in that year.

**Bethune formula** A variation of the **compromise formula**. According to the Bethune formula the amount of land owing is determined by the addition of percentage calculations according to population figures at each successive survey for bands with multiple surveys. It was used in 1961 by W.C. Bethune, Chief of Reserves and Trusts, Department of Indian Affairs and Northern Development, to calculate outstanding treaty land entitlement for the Lac La Ronge Band in Saskatchewan:

The Lac la Ronge Band first received a reserve in 1897 and, based on the population of the Band at that time, it represented 51.56% of their total entitlement. In 1909, additional lands were set aside for their use and, based on the 1909 population, the additional lands represented 7.95% of the total they would have been entitled to at that time. In 1948, additional land was set aside for their use, representing 5.16% of what their full entitlement would have been based on the 1948 population. It might, on this basis, be argued that the Lac la Ronge Band has received 64.76% of their total reserve entitlement. The balance, 35.24%, based on the 1961 population of 1,404, would amount to 63,330 acres.

W.C. Bethune to Regional Supervisor, Saskatchewan, 17 May 1961  
(ICC La Ronge TLE Documents, p. 1136.)

**claim** (as distinguished from “dispute” or “grievance”)

“In normal usage, ‘grievance’ suggests some ground for complaint, and ‘dispute’ suggests contention between two or more parties, whereas ‘claim’ denotes that a ground for complaint rests upon a right or a supposed right. Thus, while an Indian band might have a grievance concerning restrictions on the fishing practices of its members, which might lead to a dispute between the band and the government, we would only call this a claim if it included a statement to the effect that the Indians had a fishing *right* which was being violated.”

Richard C. Daniel, *A History of Native Claims Processes in Canada, 1867-1979* (Ottawa: DIAND, 1980), 194-95.

The Federation of Saskatchewan Indians maintained that treaty land entitlement issues were not claims, but rather administrative matters reflecting back on the treaties. (D. Ahenakew, minutes of meeting with Warren Allmand, Minister of Indian Affairs, January 1977 [ICC, La Ronge TLE documents, p. 2496], and in letter to the minister dated July 22, 1977 [ICC, La Ronge TLE documents, p. 2562].)

**comprehensive claims** Native rights based on traditional use and occupancy that have not been extinguished by treaty or superseded by law. (DIAND, Office of Native Claims, *Native Claims: Policy, Processes and Perspectives* [Ottawa: DIAND, February 20, 1978], 4.)

**compromise formula** This formula calculates the percentage of entitlement shortfall based on the population at date of survey, and then uses this percentage to determine how much additional land the band would be entitled to based on current population.

- 1)  $100 - [\text{Acres received} \div (\text{population at date of survey} \times \text{treaty allotment}) \times 100] = \text{percentage shortfall}$
- 2)  $\text{Percentage shortfall} \times (\text{current population} \times \text{treaty allotment}) = \text{acres due}$

This formula was put forward by Canada in 1972 for the Island Lake Band (Manitoba) and in 1974 for the Peter Ballantyne Band (Saskatchewan), but the province of Manitoba and the Peter Ballantyne Band refused to agree to it. *See also Bethune formula and equity formula*

**current population formula** This formula establishes that, when insufficient land was set aside at first survey, the land credit is to be based on band membership at each subsequent survey until entitlement is fulfilled.

$$\text{Current population} \times \text{treaty allotment} - \text{lands received} = \text{land due}$$

**date of first survey (DOFS)** The date of first survey is the date at which the exterior boundaries of the reserve are so clearly identified that they could have been found on the ground. (This definition covers the situation where reserve lands were not actually surveyed but were selected from contemporary detailed township surveys.)

**double counts** Double-count individuals are those whose land entitlement has been fulfilled either through their inclusion in the land entitlement of another band, or through their receipt of land or money scrip. (Theresa

Ferguson, "Report on the Kawacatoose Band Date of First Survey Population," DIAND, July 31, 1992 [ICC, Kawacatoose TLE Documents, p. 252.]

**equity formula** Proposed in May 1990 by the Treaty Commissioner for Saskatchewan and adopted as the formula to be used in the settlement of treaty land entitlement in Saskatchewan, the equity formula applies the percentage of shortfall at first survey against the current population statistics.

- 1) Acres received at DOFS  $\div$  (population at DOFS x treaty allotment) x 100 = percentage shortfall
- 2) Percentage shortfall x current population - lands received = acres due

Although this was the formula offered by the Treaty Commissioner, the actual calculations which ensued became, for a variety of reasons, much more complicated. The strict use of date-of-first-survey population figures proved to be unworkable and an **adjusted-date-of-first-survey (ADOFS)** population figure was used instead.

**Framework Agreement** The culmination in 1992 of stage two of a four-part strategy negotiated by Canada, the province, and the Saskatchewan treaty land entitlement bands to settle TLE claims in Saskatchewan. Stage one (the General Protocol Agreement) was signed on January 16, 1991. Stage three (Band Specific Agreements) and stage four (Implementation) are in progress.

**lawful obligation** In the June 1969 White Paper, Canada first stated as public policy on claims and treaties that "lawful obligations must be recognized." No definition of the term "lawful obligations" was provided, but a narrow meaning was implied: "The terms and effects of the treaties between the Indian people and the Government are widely misunderstood. A plain reading of the words used in the treaties reveals the limited and minimal promises which were included in them. . . ." At no time since the 1969 White Paper has the term been formally interpreted by the federal government or the courts.

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A thorough analysis of this term can be found in Michael Bossin, "Beyond Lawful Obligations," in *Indian Land Claims in Canada*, ed. B. Morse (Wallaceburg: Association of Iroquois and Allied Indians, Grand Council Treaty # 3 and Union of Ontario Indians, Walpole Island Research Centre, 1981). He states: "The term 'lawful' was included in the original statement of government obligations to circumscribe the implications of fulfilment of undefined 'moral' obligations and to emphasize that the government would admit obligations which would have standing in a court of law or which are based on legal principles or standards" (p. 75).

He also says: "In both standard English and legal dictionaries a distinction lies between the words 'lawful' and 'legal.' A **lawful** obligation is not necessarily a **legal** obligation. The former contemplates the substance of the law, the latter its form. 'Legal' implies literal connection or conformity with statute or common law or its administration. 'Lawful' is a more general word which suggests conformity to the principle rather than the letter of the law. Furthermore, 'lawful' more clearly implies an ethical content than does 'legal'" (p. 116).

**new adherents to treaty** "These are Indians who have never previously signed or adhered to treaty and consequently have never been included in an entitlement calculation." ("ONC Guidelines," 4.)

**Natural Resources Transfer Agreements (NRTA)** 1930 Agreements with Manitoba, Saskatchewan, and Alberta transferring the administration of natural resources and the control of Crown lands from Canada to the province. All three agreements included provisions for the transfer of unoccupied Crown lands to enable Canada to fulfil its treaty obligations to the Indians.

**reserve** "Any tract or tracts of land set apart by treaty or otherwise for the use or benefit or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered and includes all the trees, wood, timber, soil, stone, minerals, metals or other valuable thereon or therein" (*Indian Act*, 1876).

"A tract of land, the legal title to which is vested in Her Majesty that has been set apart by Her Majesty for the use and benefit of a band" (*Indian Act*, 1951).

**Saskatchewan formula** A variation of the **current population formula** whereby the “current population” was fixed at December 31, 1976.

Population at December 31, 1976 x treaty allotment – lands received = land due

This formula formed the basis for the calculation of land due in claim settlements according to an agreement between the province of Saskatchewan and the First Nations of Saskatchewan (Saskatchewan Agreement of 1976), which was also endorsed by Canada.

The Saskatchewan formula was subsequently repudiated by both the provincial and the federal governments; treaty land entitlement claims in Saskatchewan are being settled on the basis of the **Framework Agreement** and the **equity formula**.

**specific claims** “Grievances that Indian people might have about the Government’s administration of Indian lands and other assets under the various Indian Acts and Regulations, and those claims that might exist with regard to the actual fulfilment or interpretation of the Indian Treaties or Agreements and Proclamations affecting Indians and reserve lands” (DIAND, *Native Claims*, 3).

“[S]pecific actions and omissions of government as they relate to obligations undertaken under treaty, requirements spelled out in legislation and responsibilities regarding the management of Indian assets” (DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: DIAND, 1982), 3).

“‘[S]pecific claims’: those claims which are based on lawful obligations” (*Outstanding Business*, 13).

“Basically, a specific claim is an allegation by the Indians that the Crown, through its servants or agents has committed a wrong by maladministration of Indian matters or by breach of a treaty for which it ought to pay compensation” (G.V. La Forest, “Report on Administrative Processes for the Resolution of Specific Indian Claims,” paper prepared for DIAND, Ottawa, 1979, quoted in W. Moss and P. Niemczak, *Aboriginal Land Claims Issues* [Ottawa: Library of Parliament Research Branch, 1992], 6).

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**transferees from landless band** "These are Indians who have taken treaty as members of one band, and then transferred to another band without having been included in the entitlement calculation of the original band, or of the band to which he or she has transferred. The parent band may not have received land, whereas the host band may have already had its entitlement fulfilled." ("ONC Guidelines," 4.)

**treaty** Treaties can be seen as a mechanism for the settlement of comprehensive claims, to the extent that they were intended to give recognition to certain Indian interests in land, to provide compensation for the effects of settlement of a particular territory, or to create a general agreement between the Crown and various Indian tribes as to their future relationship. (Daniel, *History of Native Claims Processes*, 1.)

**treaty land entitlement (TLE)** Treaty land entitlement is the term used to describe Indian rights to reserve lands in the Prairie provinces, northern Ontario, and northern British Columbia, which flow from Treaties 1 to 11, negotiated and confirmed between various Indian tribes and the Crown in right of Canada. It is "a subset of specific claims," according to DIAND, *Federal Policy for the Settlement of Native Claims* (Ottawa: DIAND, March 1993), 19.

**treaty annuity paylist** Treaty annuity paylists are forms on which were recorded the payment of treaty annuities to individual Indians. Indians are grouped by band; names of family heads are recorded with the numbers in each family broken down according to men, women, boys, girls, and other relatives; remarks indicated births, deaths, and sometimes information about people entering or leaving the band.

These forms provide the first source of data for treaty land entitlement calculations. They cannot, however, be relied upon as infallible. Their primary function was to account for the money distributed, not to record census information. Inconsistent spelling of Indian names, inaccurate translations, and the inclusion of some people on particular band lists for administrative convenience only, for example, must be considered when using these records.

**validation** "The determination by Canada that a Band has not received the full quantum of reserve land to which it is entitled under the terms of a

Treaty” (“Agreement in Principle – Manitoba Treaty Land Entitlement,” draft, April 3, 1986 [ICC, La Ronge TLE Documents, p. 3960]). The term was used throughout the 1970s and 1980s. In 1995, however, Canada prefers the term “accepted for negotiation.”



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## SELECT BIBLIOGRAPHY

This select bibliography brings together some of the important publications and documents on treaty land entitlement, most of which date from the last 15 years. A number of documents were consulted in the collection of the Department of Indian Affairs and Northern Development, Claims and Historical Research Centre, and their file numbers are cited. The bibliography is divided into the following sections: General Sources, Claims Policy, Alberta, British Columbia, Manitoba, Saskatchewan.

### GENERAL SOURCES

- Bartlett, Richard H. "Re: The Establishment of Indian Reserves on the Prairies." (1980) 3 Canadian Native Law Reporter
- Coates, Kenneth S., and William R. Morrison. *Treaty Research Report: Treaty Five*. Ottawa: Department of Indian Affairs and Northern Development (DIAND), 1986
- *Treaty Research Report: Treaty Ten*. Ottawa: DIAND, 1986
- *Treaty Research Report: Treaty Eleven (1921)*. Ottawa: DIAND, 1986
- Cumming, Peter A., and Neil H. Mickenberg. *Native Rights in Canada*. 2nd ed. Toronto: General Publishing Co., 1972
- Daugherty, Wayne E. *Treaty Research Report: Treaty Three*. Ottawa: DIAND, 1986
- Dempsey, Hugh A. *Treaty Research Report: Treaty Seven*. Ottawa: DIAND, 1987
- Henderson, William B. "Canada's Indian Reserves: Pre-Confederation." Paper prepared for DIAND, February 1980
- Indian Claims Commission, Research Resource Centre. *Indian Claims in Canada: An Essay and Bibliography*. Ottawa, 1975
- Jacobs, D. "The Indian Claims Resolution Process." Association of Iroquois and Allied Indians, Walpole Island. March 1980

- Madill, Dennis. *Treaty Research Report: Treaty Eight*. Ottawa: DIAND, 1986
- McMahon, Donald. "Enforceability at Law of the Numbered Treaty Provisions relating to Land." Paper prepared for Osgoode Law School, Toronto [fall 1985]
- McNab, David T. "The Administration of Treaty No. 3: The Location of the Boundaries of Treaty 3 Indian Reserves in Ontario, 1873-1915." In Ian A. Getty and A.S. Lussier, eds., *As Long of the Sun Shines and Water Flows: A Reader in Canadian Native Studies*. Vancouver: University of British Columbia Press, 1983
- McNeil, Kent. "Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations." In *Studies in Aboriginal Rights*, No. 5. Saskatoon: University of Saskatchewan Native Law Centre, 1982
- McQuillan, D. Aidan. "Creation of Indian Reserves on the Canadian Prairies, 1870-1885." (1980) 70 (4) *Geographic Review*
- Morris, Alexander. *The Treaties of Canada with the Indians*. Toronto, 1880; repr. Toronto: Coles, 1979
- Morrison, James. *Treaty Research Report: Treaty Nine (1905-1906), The James Bay Treaty*. Ottawa: DIAND, 1986
- Morse, Bradford W., ed. *Indian Land Claims in Canada*. Wallaceburg: Association of Iroquois and Allied Indians, Grand Council Treaty No. 3, and Union of Ontario Indians, Walpole Island Research Centre, April 1981
- Morton, W.L. *Manitoba: A History*. 2nd ed. Toronto: University of Toronto Press, 1967
- Smith, Derek G. *Canadian Indians and the Law: Selected Documents, 1663-1972*. Carleton Library No. 87. Toronto: McClelland & Stewart, 1975
- Surtees, R.J. "Indian Land Cessions in Ontario, 1763-1862: The Evolution of a System." Unpublished PhD thesis, Carleton University, Ottawa, 1982
- *Indian Land Surrenders in Ontario, 1763-1867*. Ottawa: DIAND, February 1984
- *The Original People*. Toronto: Holt, Rinehart and Winston, 1971
- *Treaty Research Report: The Robinson Treaties*. Ottawa: DIAND, 1986
- Taylor, John L. *Treaty Research Report: Treaty Four*. Ottawa: DIAND, 1985
- *Treaty Research Report: Treaty Six*. Ottawa: DIAND, 1986
- Tyler, Kenneth, and Bennett McCardle. Report on Multiple Survey Practices. Attached as Appendices B, C, and D to letter from Joe Dion, President of Indian Association of Alberta, to Hugh Faulkner, Minister of Indian Affairs, November 30, 1978

---

## CLAIMS POLICY

- Assembly of First Nations. *Doublespeak of the 90's: A Comparison of Federal Government and First Nations Perceptions of the Land Claims Process*. Ottawa: AFN, August 1990
- Barber, Lloyd I. "The Implications of Indian Claims for Canada." Paper delivered at Banff School of Advanced Management, Banff, March 9, 1973
- Daniel, Richard C. *A History of Native Claims Processes in Canada, 1867-1979*. Prepared for DIAND, Research Branch. Ottawa: DIAND, February 1980
- Daniel, Richard, and J. Tobias. "Report on Specific Claims: Research & Development Evaluation Study." Ottawa: Tyler & Wright Research Consultants, 11 January 1978
- Davies, Elaine M. "Treaty Land Entitlement – Development of Policy: 1886 to 1975." Prepared for DIAND's Presentation to the Indian Specific Claims Commission. Ottawa, November 15, 1994. (ICC Fort McKay TLE Inquiry, Exhibit 11)
- Department of Indian Affairs and Northern Development (DIAND). *Federal Policy for the Settlement of Native Claims*. Ottawa: DIAND, March 1993
- "Indian Claims in Canada." Ottawa, 1975
  - *Outstanding Business: A Native Claims Policy — Specific Claims*. Ottawa: DIAND, 1982
  - Press Release. Jean Chrétien. "Statement Made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development, on Claims of Indian and Inuit People." August 8, 1973
  - "Program Directives 20-1, vol. 1: Indian and Inuit Affairs. Chapter 3, Lands, Revenues and Trusts, PD 3.1 – New Bands/New Reserves/New Communities." January 25, 1988
  - "Review of Specific Claims Policy. Draft Working Paper." Ottawa, 1980
  - *Statement of the Government of Canada on Indian Policy 1969* [The White Paper]. Ottawa: Queen's Printer, 1969
  - "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims." May 1983. Photocopy
  - Office of Native Claims. "Specific Claims." 12 May 1978
- Moss, Wendy, and Peter Niemczak. *Aboriginal Land Claims Issues*. Ottawa: Library of Parliament Research Branch, 1992
- Sanders, Douglas. "Native Claims in Canada: A Review of Law and Policy." Paper prepared for panel on Native Land Claims held at mid-winter meet-
-

- ing of Alberta branch, Canadian Bar Association, February 1975. (Copy at DIAND, Claims and Historical Research Centre, D22)
- Taylor, John L. *Canadian Indian Policy during the Inter-War Years, 1918-1939*. Ottawa: DIAND, 1984
- Tyler, Kenneth J. "A Modest Proposal for Legislative Reform to Facilitate the Settlement of Specific Indian Claims." (1981) 3 *Canadian Native Law Reporter*
- Ugarenko, L.G. "The Federal Government and Indian Land Claims in Canada: An Overview of Policies, Claims and Settlements from 1969 to 1979." Paper submitted to Department of Anthropology, McMaster University, Hamilton, 1980
- Weaver, Sally M. "A Case Study on the Role of Social Sciences in Policy Formation: The White Paper on Indian Policy (1969)." Paper prepared for the National Social Science Conference on Social Science and Public Policy in Canada, Ottawa, November 1975
- "Indian Policy in the New Conservative Government: The Nielsen Task Force (1985) in the Context of Recent Policy Initiatives." Paper prepared for The Native Studies Review, University of Saskatchewan, April 3, 1986
  - "Recent Directions in Canadian Indian Policy." Paper prepared for the Annual Meeting of the Canadian Sociology and Anthropology Association, London, Ontario, May 31, 1978
  - "The Role of Social Science in Formulating Canada's Indian Policy: A Preliminary History of the Hawthorn-Tremblay Report." University of Waterloo, 1976. (Copy at DIAND, Claims and Historical Research Centre, M53)

### ALBERTA

- Cree Band of Fort Chipewyan. Treaty Land Entitlement Settlement Agreement. 1986
- Grouard Indian Band. Treaty Land Entitlement Settlement Agreement. November 29, 1991
- Indian Association of Alberta. "Indian Land Entitlement: Position Paper." C. 1976
- "The Indian Right to Land: Position Paper." September 1987
  - Treaty & Aboriginal Rights Research. "Draft Discussion Paper: Specific Claims Policy." March 1987
  - Treaty & Aboriginal Rights Research. "Entitlement Surveys and Claims Catalogue." 1978

- Janvier Indian Band. Treaty Land Entitlement Settlement Agreement. March 25, 1993
- Price, Richard T. "Indian Land Claims in Alberta: Politics and Policy Making (1968-1971)." MA thesis, Department of Political Science, University of Alberta, Edmonton, 1977
- "Indian Treaty Land Entitlement Claims in Alberta: Tripartite Negotiations and Settlements (1971-1988)." Paper presented at the Canadian Historical Association Annual Meeting, June 1989
- Sturgeon Lake Band of Indians. Treaty Land Entitlement Settlement Agreement. 1989
- Tallcree Indian Band #446. Treaty Land Entitlement Settlement Agreement. December 14, 1993
- Whitefish Lake Indian Band #459. Treaty Land Entitlement Settlement Agreement. January 11, 1990
- Woodland Cree Indian Band #474. Treaty Land Entitlement Settlement Agreement. August 20, 1991

### BRITISH COLUMBIA

- Blake, T.M. "Indian Reserve Allocation in British Columbia." (March 1973) 3 B.C. Perspectives
- Exell, R.E. "Indians and the Law: The Shaping of Government Policy in British Columbia Respecting Aboriginal Rights and Indian Land Claims: A Brief History." Prepared for Continuing Legal Education. Vancouver, October 1982. (Copy at DIAND, Claims and Historical Research Centre, M55)

### MANITOBA

- Aboriginal Justice Inquiry of Manitoba. *The Justice System and Aboriginal People*. Vol. 1
- Gallo, James. "Definition of a Band for Validation of Treaty Land Entitlements – First Draft." Prepared for Manitoba Indian Brotherhood. August 31, 1978
- "The Manitoba Natural Resources Transfer Act and the Canada-Ontario Dispute of 1883-1915." Prepared for DIAND, Manitoba Region. Winnipeg, June 21, 1983
- Garden Hill First Nation. Treaty Land Entitlement Settlement Agreement. November 29, 1991

- Hall, D.J. "A Serene Atmosphere? Treaty One Revisited." (1984) 4 (2) The Canadian Journal of Native Studies
- Indian Tribes of Manitoba. "Wahbung: Our Tomorrows." October 1971. Typescript. (Copy at DIAND, Claims and Historical Research Centre, M63)
- Long Plain First Nation. Treaty Land Entitlement Settlement Agreement. 1994
- Maguire, Ronald C. *An Historical Reference Guide to the Stone Fort Treaty (Treaty One, 1871)*. Ottawa: DIAND, 1980
- Manitoba Indian Brotherhood, Treaties & Aboriginal Rights Research Program. "Treaty Land Entitlement in Manitoba – The Historical Basis for the Saskatchewan Formula." March 7, 1979. Typescript
- Treaty & Aboriginal Rights Research Program. *Treaty Land Entitlement in Manitoba, 1970-1981*. [Winnipeg], February 1982
- Mitchell, Leon. *Report of the Treaty Land Entitlement Commission*. Winnipeg: TARR Centre, January 18, 1983
- Taylor, John L. "Manitoba Treaty Land Disparity Research Report." Prepared for the Treaty Land Entitlement Committee of Manitoba Inc. and the Minister of Indian Affairs. Ottawa, August 1994
- Treaty & Aboriginal Rights Research Centre of Manitoba. *A Debt to be Paid: Treaty Land Entitlement in Manitoba*. Rev. ed. Winnipeg: TARR Centre of Manitoba, October 1994

### SASKATCHEWAN

- Bartlett, Richard H. "Re: The Establishment of Reserves in Saskatchewan." Prepared for Federation of Saskatchewan Indians. N.d. (Copy at DIAND, Claims and Research Centre, K25)
- Federation of Saskatchewan Indian Nations, Indian Rights & Treaties Research. "Draft FSIN Position Papers: i) Claims Policy; ii) Land Entitlement." Prepared by Indian Rights and Treaties Research, Regina, [October 1987]
- Federation of Saskatchewan Indians, Indian Rights & Treaties Research. "Program Report. April 1, 1980 – March 31, 1981." Submitted by Indian Rights & Treaties Research, Regina, March 31, 1981. (Copy at DIAND, Claims and Historical Research Centre, X93)
- Knoll, David. "Unfinished Business: Treaty Land Entitlement and Surrender Claims in Saskatchewan." Unpublished paper, Saskatoon, [c. 1987]
- Lockhart, Lewis M. "Report to the Indian Claims Commission Regarding Various Aspects of the Treaty Land Entitlement of the Lac la Ronge Band (including Thumbnail Sketches)." Saskatchewan, March 11, 1994

- Office of the Treaty Commissioner. "Draft - Research Methodology for Treaty Land Entitlement (TLE)." Saskatchewan, 1994
- Pitsula, James M. "The Blakeney Government and the Settlement of Treaty Indian Land Entitlements in Saskatchewan, 1975-1982." Regina, n.d. (Copy at DIAND, Claims and Historical Research Centre, D75)
- Saskatchewan. Treaty Land Entitlement. *Framework Agreement*. N.p.: Federation of Saskatchewan Indian Nations, 1992
- Tyler, Kenneth. "Report Concerning the Calculation of the Outstanding Treaty Land Entitlement in Saskatchewan, 1978." Submitted to the Indian Claims Commission. Winnipeg, 1995. (ICC, Kawacatoose TLE Inquiry, Exhibit 16)
- Wright, Cliff. *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement*. Saskatchewan, May 1990





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# **APPENDIX A**

## **RESIDUAL LAND ENTITLEMENT UNDER TREATY**

**PREPARED BY HEATHER FLYNN FOR THE  
DEPARTMENT OF INDIAN AFFAIRS AND  
NORTHERN DEVELOPMENT LAND DIVISION**

**OCTOBER 1974**

## RESIDUAL LAND ENTITLEMENT UNDER TREATY

The following is the result of a study which was undertaken to determine the basis on which lands have previously been provided to Indian Bands in the Prairie Provinces in fulfilment of residual treaty entitlement. The study covered both the period prior to the 1930 Transfer of Natural Resources Agreements when the lands were acquired from the Department of the Interior and the period after 1930, when the lands were acquired from the Provinces.

The term "residual entitlement" was interpreted to apply only to those cases where a Band, having already received part of its land entitlement under treaty, received the remainder of the land to which it was entitled, thus fulfilling entitlement in accordance with our present method of calculation.

Using this interpretation of the term, very few true examples of Bands having received lands as residual entitlement could be located. However, a number of interesting examples were uncovered which seem to be indicative of the varied policy followed by the Department of Indian Affairs, over the years, in dealing with the matter of treaty entitlement. Basically these examples fall into six categories, as follows: -

### 1. Entitlement fulfilled according to our calculations, but additional lands acquired at a later date, based on an increase in population and recalculation of entitlement:

Band	Treaty	Province	Lands Acquired Before or After 1930
Lake St. Martin	2	Manitoba	Before 1930
Little Saskatchewan	2	Manitoba	Before 1930
Chemahawin	5	Manitoba	Before 1930
Stony	7	Alberta	Before 1930
Beaver of Horse Lake and Clear Hills	8	Alberta	Before 1930
Little Red River	8	Alberta	After 1930
Sucker Creek	8	Alberta	Before 1930

In some of the above cases, social and economics needs also seem to have been a consideration in acquiring the additional lands. Also, in the case of the Sucker Creek Band a split in Band is involved, however, in all cases, a major factor in the acquisition of the lands appears to have been an increase in Band population and recalculation of treaty entitlement.

**2. Entitlement fulfilled according to our calculations, but additional lands acquired at a later date, since the entitlement under those Treaties which provided for only 160 acres per family of five was considered too small: -**

<b>Band</b>	<b>Treaty</b>	<b>Province</b>	<b>Lands Acquired Before or After 1930</b>
Lake St. Martin	2	Manitoba	Before 1930
Little Saskatchewan	2	Manitoba	Before 1930
Fisher River	5	Manitoba	Before 1930

In these cases, social and economic needs also appear to have been a major factor in acquiring the additional lands. However, recognition by both the Department of Indian Affairs and Department of the Interior of the inequity of these Treaties which provided for only 160 acres per family of five as opposed to 640 acres per family of five.

The Lake St. Martin and Little Saskatchewan Bands are listed under both this category and category 1, since more than one additional parcel of land was acquired for each Band, at different times, and based on different factors.

**3. Entitlement fulfilled according to our calculations, but additional lands acquired at a later date as entitlement for non-treaty Indians entering the Band: -**

<b>Band</b>	<b>Treaty</b>	<b>Province</b>	<b>Lands Acquired Before or After 1930</b>
Bigstone or Wabasca	8	Alberta	After 1930

**4. Full entitlement not received but request for further lands not based on treaty entitlement:**

<b>Band</b>	<b>Treaty</b>	<b>Province</b>	<b>Lands Acquired Before or After 1930</b>
Grand Rapids	5	Manitoba	Before 1930

Additional lands were set aside for this Band in 1896 and these lands fulfilled the Band's residual treaty entitlement. When requesting the lands, however, the Department of Indian Affairs appeared to have been unaware that the Grand Rapids Band was entitled to further lands under treaty and it was coincidental that the lands requested fulfilled the Band's residual entitlement.

**5. Full entitlement not received, residual entitlement calculated according to current population figures.**

<b>Band</b>	<b>Treaty</b>	<b>Province</b>	<b>Lands Acquired Before or After 1930</b>
Slaves of Upper River	8	Alberta	After 1930

**6. Full entitlement not received, residual entitlement calculated on a percentage basis (i.e. according to a type of "compromise" formula):**

<b>Band</b>	<b>Treaty</b>	<b>Province</b>	<b>Lands Acquired Before or After 1930</b>
Lac La Ronge	6	Saskatchewan	After 1930

Reports are attached for each of the Bands listed in this paper which outline in more detail the basis on which additional lands were acquired.

Indian Lands,  
February 1975

**LAKE ST. MARTIN BAND – TREATY NO. 2 – MANITOBA**

This Band adhered to Treaty No. 2 which entitled the Indians to Reserve lands in the amount of 32 acres per person.

The Narrows Indian Reserve No. 49 was surveyed for the Band in 1877 and was confirmed with an area of 4,083 acres, in 1913, by Order in Council P.C. 2876. In 1877 the population of the Band was 121, entitling the Indians to a total of 3,872 acres and it would therefore appear that their entitlement under Treaty 2 was fulfilled at this time.

However, the following additional lands were subsequently set aside for the Lake St. Martin Band:

**1. The Narrows I.R. 49A**

This Reserve, comprising 1902.90 acres was withdrawn from the Dominion Lands Act and set apart for the Lake St. Martin Band by Order in Council P.C. 1606, dated July 1, 1913.

In 1906 the Assistant Secretary applied to the Secretary of the Department of the Interior for these lands, basing his request on the following factors:

The reserve as now constituted contains 4083 acres. *The population of the band at the last annuity payments was 154, or a fraction over 26½ acres per capita. Under treaty stipulations they were entitled to 32 acres per capita, it will thus be seen that at present the band is short 840 acres of this amount.*

As a rule the reserves are larger than the bands occupying them can make use of, but in this case I consider the band justified in requesting an enlargement. The population has increased from 102 in 1896 to 154 in 1906 or 50 per cent in ten years. The band is in a highly prosperous condition, their cattle shows an increase of 39 head the past year, being 163 in 1905, and 202 head in 1906. Cattle raising will be their principal industry, and it is hay, and pasture land they ask for. The land they would like to have is situated immediately west of the present west line of the reserve, and extending back from the lake about 1/2 mile, on this land there is large quantities of hay, and pasture. I should mention that the eastern portion of their reserve is swampy, and quite a portion is useless for any purpose. I trust that the Department will be able to make the enlargement as suggested as the band now have to go off the reserve to find sufficient hay for their stock, and are afraid that settlers may come in and shut them out of this.

This application was renewed in 1912, and approved by the Department of the Interior.

### **2. 624.1 acre Addition to I.R. 49A**

In 1922 application was made to the Department of the Interior for further hay lands for the Lake St. Martin Band. Again, the treaty entitlement of the Band was recalculated using current population figures and the request was based on those calculations, as indicated by the following extract from the letter written by the Assistant Deputy and Secretary of Indian Affairs to The Controller of the Department of the Interior on August 4, 1922:

*The Indians of the Lake St. Martin band (Narrows Indian reserves Nos. 49 and 49-A) are in need of additional hay land to ensure the proper wintering of their stock. This band numbers 212, which number, at the ratio of 160 acres per family of 5, would entitle them to 6184 acres. The area of their reserves No. 49 and 49-A totals 5294 acres and the local Indian Agent has recommended that the following lands be added to reserve No. 49-A, - . . .*

The Department of the Interior approved the application and the lands were set aside as an addition to Indian Reserve No. 49A by Order in Council P.C. 2071 dated October 12, 1923. It is noted that it is stated in the Order in Council:

*Whereas a request has been made by the Department of Indian Affairs for the setting apart for the Indians, under the terms of Treaty No. 2, of a track of land as an addition to Indian Reserve No. 49-A, in Townships 31 and 32, in Range 7, West of the Principal Meridian, in the Province of Manitoba, comprising an area of 624.1 acres. The Department of Indian Affairs states that the reserve, as at present set apart, does not contain the area to which the Indians are entitled under the Treaty, and, furthermore, that the lands now applied for are required for hay land, to ensure the proper wintering of the stock of those Indians.*

### **3. 690.5 acre Addition to I.R. 49**

In 1928 application was again made to the Department of the Interior for additional hay lands for the Lake St. Martin Band. This request was based on the fact that under the terms

of Treaty No. 5, the Indians were allowed only 160 acres per family of 5 which was not sufficient land to enable them to make a living from cattle raising, as indicated in the following extract from the letter of request from the Assistant Deputy and Secretary of Indian Affairs to the Secretary of the Department of the Interior:

*The Bands have taken up cattle raising as a means of livelihood but under the condition of Treaty 2 these Indians are only allowed 160 acres per family of five which is not sufficient to raise cattle for their sustenance. It has become necessary to procure more land in order that the Indians may have enough hay to winter their stock.*

This application was approved by the Department of the Interior and the lands were set aside again as an addition to Indian Reserve No. 49 by Order in Council P.C. 350 dated February 27, 1929.

It thus appears that in the case of the Lake St. Martin Band the various requests for additional lands were based on several factors, namely:

- i) Recalculation of entitlement according to current population figures.
- ii) Social and economic needs.
- iii) Insufficient land having been provided under the terms of Treaty 5.

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### **LITTLE SASKATCHEWAN BAND – TREATY NO. 2 – MANITOBA**

This Band adhered to Treaty 2 which entitled the Indians to Reserve lands in the amount of 32 acres per person.

The Little Saskatchewan Indian Reserve No. 48 was surveyed for the Band in 1881 with an area of 3,200 acres. In 1881 the population of the Band was 100, entitling the Indians to a total of 3,200 acres and it would, therefore, appear that their entitlement under Treaty 2 was fulfilled at this time.

However, the following additional lands were subsequently set aside for the Little Saskatchewan Band:

#### **1. 76.9 acre addition to Indian Reserve No. 48**

By Order in Council PC 1607 dated July 1, 1913, 76.9 acres were withdrawn from the Dominion Lands Act and set apart as an addition to the Little Saskatchewan Indian Reserve No. 48.

This Order in Council States:

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Whereas an application has been received from the Department of Indian Affairs to have certain lands in township 31, range 8, West of the Principal Meridian, aggregating 76.90 acres, set apart as an addition to Reserve numbered 48 at Lake St. Martin, in the Province of Manitoba; *And whereas the Department of Indian Affairs states that the Reserve, as at present set apart, does not contain the area which the Indians are entitled to under the Treaty and, furthermore, that the lands now applied for are required for hay purposes and that if they be not granted the Indians must abandon cattle raising; . . .*

Since the Order in Council states that the Reserves at present set apart for the Band does not contain the area to which the Indians are entitled under Treaty, it is presumed that the area is calculated from the current population figures in 1913, as based on the 1881 population, entitlement was fulfilled.

## **2. Dauphin River Indian Reserve No. 48A**

In 1911, application was made to the Department of the Interior for a separate Reserve for a small group of the Little Saskatchewan Band residing at the mouth of the Dauphin River. In his letter to the Secretary of the Department of the Interior requesting the lands, the Assistant Secretary of Indian Affairs stated:

*The said band is one of those comprised in treaty No. 2 under which they are provided with only 160 acres for each family of five instead of 640 acres as in some of the other treaties. The Band has its quota of land in the resource mentioned; (these are 138 members in all) but the land is represented as being very unfavourable for farming purposes, and that it would also be a hardship to compel the Indians at Dauphin River to join the main body of their band. It is therefore desired to secure the two plots of land shown on the sketch for the Indians residing at the locality, and as the quota of land under the Treaty is very small, it is considered that the said lands should be granted without cutting off any portion of the main reserve in exchange.*

The lands, comprising 821 acres, were subsequently set aside for the Band by Order in Council P.C. 3866 dated October 22, 1921.

## **3. Little Saskatchewan Indian Reserve No. 48B**

In 1928, additional lands were again requested from the Department of the Interior for the Little Saskatchewan Band. In a letter dated October 4, 1928 to the Commissioner of Dominion Lands, the Assistant Deputy and Secretary of Indian Affairs stated:

*In further explanation I may say this band at present has 176 members which under the provisions of Treaty would entitle them to 5632 acres. Their present reserves Nos. 48 and 48A together contain 4101.3 acres and with the addition of the 431.5 acres asked for, they would still be short of the amount provided for in the Treaty.*

The lands, comprising 240.6 acres were set aside for the Band by Order in Council P.C. 349 dated February 27, 1929, which stated:

Whereas application has been made by the Department of Indian Affairs for the setting apart for the Indians of the Little Saskatchewan Band No. 48 of a certain tract of land in Township 31, Range 7, West of the Principal Meridian, in the Province of Manitoba, comprising an area of 240.60 acres more or less, it having been represented that owing to changed conditions it is impossible for the Indians to make a living on the present restricted area of their reserve, additional land being requisite for their needs for pasturage: It has also been represented that the Indians have been largely deprived of hunting and fishing as a means of livelihood.

Thus, although the request for the lands clearly states that they were required as entitlement under Treaty, based on the Band's population in 1928, the Order in Council indicates that the lands were provided for social and economic reasons.

It thus appears that the various requests for additional lands for the Little Saskatchewan Band were based on one or more of the following factors in each case:

- i) Recalculation of entitlement based on current day population figures.
- ii) The smaller amount of lands provided under the terms of Treaty No. 2.
- iii) Social and economic needs.

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### CHEMAHAWIN BAND – TREATY 5 – MANITOBA

This Band adhered to Treaty 5 in 1876 which entitled the Indians to Reserve lands in the amount of 32 acres per person. Lands were first surveyed for the Band in 1883, at which time the Band population was 95, entitling the Indians to a total of 3040 acres.

The following reserves, totalling 3,090.61 acres, were subsequently set aside for the Chemahawin Band:

Chemahawin Indian Reserve 32A		
Chemahawin Indian Reserve 32B	3,010.33 acres	– Surveyed 1883,
Chemahawin Indian Reserve 32C		– confirmed by P.C. 875, 1930.
Chemahawin Indian Reserve 32D		
Poplar Point Indian Reserve 32F	80.28 acres	– Surveyed 1894
		– confirmed by P.C. 3027, 1895.

Total 3,090.61 acres

It would thus appear that according to our calculations, the Band's entitlement was fulfilled at this time. In 1914, however, further lands were requested from the Department of the Interior as an addition to Poplar Point Indian Reserve 32F. It can be seen from the following extracts from correspondence which took place at this time, that this request was based on the current population of the Band in 1912, although consideration also appears to have



been given to the fact that under Treaty 5 the Band received only 160 acres per family of 5 as opposed to 640 acres in other treaties:

On January 12, 1914, Chief Surveyor Bray reported to the Deputy Superintendent General:

*According to the census of 1912 the band had 133 members entitling them to 4,256 acres. They have only 3,091 acres. They are therefore deficient even under the small area allowed by the treaty. . . . 1165 acres. I beg to submit that their request appears to be a reasonable one and would recommend that it be granted. They apply for a strip two miles long by 27.40 chains wide. This is an area of only 438 acres.*

Subsequently on March 17, 1974[sic], the Assistant Deputy and Secretary of Indian Affairs wrote to the Secretary of the Department of the Interior:

*This band is deficient in the area allowed by the treaty, which in this case is only 160 acres for each family of five. The request appears to be very reasonable and it is desired to accede to it. I have therefore to request you to be good enough to inform me whether the said strip of land is available for the purpose of an Indian Reserve.*

In 1919, the lands, comprising 366 acres were surveyed and in 1930 they were set aside as an addition to Poplar Point Indian Reserve No. 32F by Order in Council P.C. 1178.

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## ALBERTA

### **Beaver Band of Horse Lake and Clear Hills**

This Band, formerly known as the Dunvagan Band, adhered to Treaty 8 in 1899, under which they were entitled to 128 acres per Indian. They selected their lands in 1905 and these were surveyed at the same time. The Beaver Reserve No. 152, containing 15,360 acres (or 24 Square miles), was set aside by Order in Council in 1907. Also selected and surveyed for the Beaver Band in 1905 was the Neepee Reserve No. 152A. It comprised 260 acres and was intended for the use of Chief Neepee and his wife. This particular Reserve was surrendered and sold in 1929, however, it was not until 1932 that the Department realized that the Reserve had never been confirmed and had it set aside by Order in Council.

At the date of the selection of their Reserve (1905), the Beaver Band's population (from the payroll) was 112, thereby giving them an entitlement of 14,336 acres. According to our calculations then, this Band had received lands in excess of their full entitlement by 1907. However, in 1911 the Indian Agent for the Greater Slave Lake Agency reported that the Beaver Indians living at Grande Prairie claimed that they had not been consulted when Beaver Reserve No. 152 was surveyed. The Agent relayed the Indians' request that a small

reserve be set apart for them, "convenient to their hunting grounds." In 1912, the Department advised the Agent that, "it is, however, desired that you shall make a careful census of the Duvagan Band" in order to ascertain whether there is a greater area of land still due them under the terms of Treaty 8.

It appears that the Agent went ahead as instructed and, according to the 1913 Treaty payroll, found the Band to comprise 151 members. Based on this population figure the Band's total entitlement would be 19,328 acres. As they had received only 15,620 acres they were left with an outstanding entitlement of 3,708 acres. Subsequently, the Indians selected an additional 4,032 acres in 1914 that was confirmed as the Horse Lake Reserve No. 152B by Order in Council (P.C. 936) in 1920.

According to correspondence in 1931, "this Reserve was located for the purpose of completing the acreage to which the Beaver Indians of the Duvagan Band were entitled . . ." This observation is reiterated in a letter dated January 2, 1936.

The following explanation is given:

. . . the Department in 1914 provided the Horse Lakes Indian Reserve No. 152B for the purpose of the permanent residence of the Indians living in the Grande Prairie District. With the provision of this Reserve, the Band received the balance of the land to which they were entitled, in fact the area was somewhat in excess of the Treaty requirements.

It appears from the available correspondence that the Beaver Band's entitlement was recalculated in 1913 based on the higher 1913 population figures and, as a result, the Band was awarded the Horse Lake Reserve No. 152B in order to fulfil their outstanding land entitlement.

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777/30-8-152B

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### LITTLE RED RIVER BAND – TREATY 6 – ALBERTA

The Little Red River Band adhered to Treaty 6 in 1899 which entitled the Indians to reserve lands in the amount of 128 acres per person. In 1912, 18,349 acres were set aside for the Band as Fox Lake Indian Reserve No. 162. These lands were Surveyed in 1912 and at this date the Band population was 141, entitling the Indians to 18,048 acres and it would therefore appear that the Band's entitlement was fulfilled.

Over the years, however, many Indians joined the Little Red River Band and its population had increased to 473 by 1955. Negotiations were therefore commenced with the Province to acquire additional lands for the Band. As shown in the following extract from a letter dated October 10, 1956, from R.F. Battle, Regional Supervisor of Indian Agencies to M.G.

Jensen, Deputy Minister of the Alberta Dept. Of Lands and Forests, these lands were requested as outstanding treaty entitlement, based on the current population in 1955:

You will recall our recent discussion in which I promised to set before you the lands selected by the Indians in the Fort Vermillion Agency so that you could ascertain if they could be made available before an official request is submitted from our Department. For purposes of clarity, I shall deal with each Band separately.

CREE BAND – LITTLE RED RIVER

*The population of this Band as recorded when we opened negotiations in 1955 was 473, which give them a land credit of approximately 60544 acres.*

FOX LAKE RESERVE NO. 152

*An area totalling 18049 acres has already been set aside for them, leaving a credit balance of 41695 acres. The land they have requested by resolution is as follows: . . .*

Again, in his formal request to Mr. Jensen for these lands, dated February 8, 1957, H.M. Jones, the Acting Deputy Minister, states:

I should be pleased if you would consider this letter as an official application for the following lands the acquisition of which will fulfill the land credits now due the Little River Band of Indians. . . .

The request was approved by the Province of Alberta and the additional lands, consisting of 7,744 acres as an addition to Fox Lake Indian Reserve No. 162 and 34,678 acres as John D'Or Prairie Indian Reserve No. 215, were vested in Canada under Certificates of Title in 1965. The addition to Fox Lake Indian Reserve was set aside by Federal Order in Council P.C. 1965-1312 dated July 23, 1965, which states:

Whereas the lands described in Schedule "A" hereto were obtained from the Province of Alberta for the use and benefit of the Little Red River Band of Indians as an addition to Fox Lake Indian Reserve number one hundred and sixty-two (162), *being part of their land entitlement under treaty number eight: . . .*

Jean D'Or Prairie Indian Reserve No. 215 was set aside by Federal Order in Council P.C. 1965-1440, dated August 11, 1965, which states:

That the lands described in Schedule "A" hereto *were in part acquired from Her Majesty in right of the Province of Alberta in satisfaction of Treaty entitlement for the Little Red River Band of Indians and in part purchased from the said Province for the said Band; . . .*

It thus appears that in 1955 additional lands were requested from the Province of Alberta for the Little Red River Band as residual treaty entitlement, based on current population figures, and the Province of Alberta agreed to this request.

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Files: 775/30-1 Vols. 1-3  
775/30-2-162  
775/30-2-215

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**ALBERTA**

**Sucker Creek Band**

The Sucker Creek Band did not come into existence as such until 1910. Prior to that its members belonged to the Kinnosayo Band and consequently adhered to Treaty 8 in 1899. Entitlement under this Treaty was 128 acres per Indian.

In 1900 the Kinnosayo Band selected certain lands for their Reserves. Included among these was a parcel containing 11,955.2 acres for those members of the Band living in the Sucker Creek area (estimated to be about 93). These lands were surveyed in 1902 and set aside by Order in Council in 1904 as the Sucker Creek Reserve No. 150A.

The Sucker Creek Band was formally created when the Kinnosayo Band split into five smaller bands in 1910. At this time the population at Sucker Creek was 108, thereby giving the new Band an entitlement of 13,824 acres. It is assumed that the Sucker Creek Band retained the 11,955.2 acres that had been set aside for those members of the Kinnesayo Band living in that area in 1904. However, based on the increased population of the Sucker Creek portion of the Band by 1910, they were still entitled to approximately 1,869 acres.

In order to rectify the situation and fulfil outstanding entitlement, an addition of 3,344.6 acres (or 5.7 square miles) was made to the Sucker Creek Reserve in 1913. These lands were confirmed by Order in Council P.C. 2144 which explained that:

*... application has been made by the Department of Indian Affairs for additional lands in connection with . . . Sucker Creek Indian Reserve No. 150A, the lands included in the said reserve(s) not containing the area to which the Indians are entitled under treaty.*

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Files: 777/30-1 Vol.1  
777/30-3-150A Vol. 1 (PARC)  
RG 10 File 27131-1 Vol. 7777

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**FISHER RIVER BAND – TREATY 5 – MANITOBA**

This Band adhered to Treaty No. 5, as part of the Norway House Band, which entitled the Indians to 32 acres per person.

In 1877, the Fisher River Indian Reserve No. 44, comprising 9,000 acres, was surveyed for the Fisher River Indians. At this date, there were no official population figures for the Band since it was still part of the Norway House Band. By 1878, however, the Fisher River Band was listed separately with a population of 186. This would entitle the Indians to a total of 5,952 acres.

Since the Fisher River Indian Reserve contained 9,000 acres, it would appear that the entitlement of the Fisher River Band was fulfilled. However, the following additional lands were subsequently set aside for the Band:

**1) 2,054 and 2,560 acre Addition to Indian Reserve No. 44**

Application was made to the Department of the Interior for these lands in 1893 and 1896. They were requested for hay-growing purposes, without any mention of treaty entitlement.

The application was approved and the lands were set aside apart for the Fisher River Band as an addition to Indian Reserve No. 44 by Order in Council P.C. 2980, dated August 25, 1896.

**2) 160 acre Addition to Indian Reserve No. 44, Indian Reserve No. 44A**

In 1905 application was again made to the Department of the Interior for additional hay lands for the Fisher River Band. In making this request, the Secretary of the Department of Indian Affairs wrote to the Secretary of the Department of the Interior:

*The Indians of the Fisher River Indian Reserve, Manitoba, have made a special request to have a certain tract of land situated in township 28, Range 1, West, added to their reserve. A hay meadow is situated in the said tract which they especially require. The Indian Commissioner has stated that the soil of this reserve is the only one in the Norway House Agency suitable for farming and stock-raising, and that these Indians are doing fairly well in that direction with prospects of extending their operations, and further as the Indians of Treaty 5, to which Treaty these Indians belong, receive far less land per capita than the Indians of Treaty Nos. 3, 4, 6 and 7, he recommends that the addition they ask for be granted.*

The Department of the Interior, however, would not agree to providing these lands in 1905, but in 1906 the Department of Indian Affairs again requested the additional lands. Again, in writing to the Secretary of the Department of the Interior, the Secretary of Indian Affairs stated:

*According to the provisions of Treaty Nos. 2 and 5 only 160 acres of land were allotted to each family of five persons, whereas in the other Treaties an area of 128 acres was allotted to each family of five persons. No reason appears to be given to explain the cause of the different treatment.*

*An area of 160 acres for each family of five persons is small in any case, and especially so where the land is not good quality, and where, as is the present instance, the band is reported to be making considerable progress in agriculture. The Department is very anxious to encourage these people. The Fisher River reserve is the only one in that district that is considered to be suitable for agricultural purposes. Under the circumstances it is considered reasonable and advisable that an addition should be made to the reserve.*

The Department of the Interior approved this second request in 1906 when the Secretary of that Department wrote to the Secretary of Indian Affairs:

*I am directed to inform you that there would appear to be some reasonable ground why the application should be favourably considered as the area set aside for each family is much under the grant which is usually made by the Government for purposes of this kind.*

Subsequently, by Order in Council P.C. 2215 dated October 2, 1911, 160 acres were set aside as an addition to Indian Reserve No. 44 and 1,920 acres as Fisher River Indian Reserve No. 44A.

This case would not seem to be a good example of lands having been set aside as residual entitlement. However, it has been included since it seems to illustrate a recognition by both the Department of Indian Affairs and Department of the Interior of the inequity of those Treaties which provided for only 160 acres per family of five as opposed to 640 acres per family of five.

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### BIGSTONE (WABASCA) BAND – TREATY 8 – ALBERTA

This Band adhered to Treaty 8 in 1899, which entitled the Indians to reserve lands in the amount of 128 acres per person. The Band selected four reserves in 1909 when their population was 263, giving them an entitlement of 33,664 acres. These reserves were surveyed in 1913 and set aside by Orders in Council in 1924, 1925 and 1930 and together they comprised 37,352 acres, as follows:

Wabasca Indian Reserve No. 166	21,040 acres
Wabasca Indian Reserve No. 166A	1,563 acres
Wabasca Indian Reserve No. 166B	6,094 acres
Wabasca Indian Reserve No. 166C	<u>8,655 acres</u>
	37,352 acres

Thus, in 1913, it would appear that the Band's entitlement was fulfilled. However, by 1937 a number of non-treaty Indians had joined the Band and application was therefore made to the Province of Alberta for additional lands. On April 23, 1937, H.W. McGill, Director of Indian Affairs wrote to the Deputy Minister of the Alberta Department of Lands and Mines:

*I have to draw to your attention the situation with regard to reserves under Treaty 8 for the Wabasca Indians. When Indian Reserves No. 166, 166A, 166B, 166C, containing altogether 37,352 acres were laid out in 1913, an additional area of 4,480 acres was due to them under the quota provided for in Treaty No. 8 if the lands were taken in common. Since then 213 non-treaty Indians have joined this band which entitles them to a further area of 27,264 acres, or a total addition of 31,753 acres. As non-treaty Indians are still joining the band it does not seem possible to state the total area to which this band may be entitled but it*

does seem advisable to select some of the additional land to which they are now entitled as soon as possible.

It is noted that in addition to requesting lands for the "non-treaty" Indians, Mr. McGill also calculates the original entitlement of the Band according to the population at the date of survey, in 1913, and not the date of selection, in 1909.

A 14,431 acre parcel of land was subsequently surveyed, with Provincial approval, as part of the Band's residual entitlement under Treaty 8. The matter was then overlooked for a number of years and it was not until 1956 that the matter was again raised with the Province. At that time, H.G. Jensen, Deputy Minister of the Alberta Department of Lands and Forests wrote to R.F. Battle.

*It is noted that 14,434.1 acres were selected out of 31,733 acres to which the Band of Indians were entitled. The outer boundaries of the land selected were surveyed and posted by T.W. Brown and contain 14,434.1 acres exclusive of statutory road allowances, rivers and water areas.*

.....

*It is noted that Mr. T.W. Brown's survey was made in 1937. As there are still 17,299 acres to be selected for this band of Indians, I wondered if some progress has been made in that selection, and if probably the whole amount might be transferred at the same time.*

Mr. Battle replied:

The selection of the additional 17,299 acres for this Band is receiving the active consideration of the Band, but as they are of a rather nomadic type, it is difficult to get them together for a definite decision. It is not expected that this can be finalized before next Spring, and as indications are that the area which will be chosen will not adjoin the proposed Reserve No. 166D, I do not feel that the transfer of Reserve No. 166D should be delayed until that time.

Accordingly, in 1957, Alberta transferred the 14,432.7 acre parcel to Canada and in 1958 the lands were set aside by Federal Order in Council P.C. 1958-931 as Wabasca Indian Reserve No. 166D. No further action appears to have been taken, however, to select the remaining 17,299 acres for the Wabasca Band.

It thus appears that, in this case, additional lands were requested from the Province of Alberta as part of the entitlement for 213 non-treaty Indians who joined the Band between the years 1913 to 1937.

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Files: 777/30-17 vols. 1&2  
777/30-17-183

**GRAND RAPIDS BAND – MANITOBA**

This Band adhered to Treaty 5 in 1875 which entitled the Indians to Reserve lands in the amount of 32 acres per person.

The Grand Rapids Indian Reserve No. 33, containing 2,752 acres, was surveyed for the Band in 1877. At this time the population of the Band was 137, entitling the Indians to a total of 4,384 acres.

In 1891 application was made to the Department of the Interior for an addition to the Grand Rapids Reserve, however, at this time was proposed to exchange part of the existing reserve for these lands. It later became evident that the Department of the Interior was willing to provide the additional lands without an exchange and the matter of a surrender of part of the Grand Rapids Reserve was therefore dropped.

The additional lands, comprising 1,899 acres, were set aside as an addition to the Grand Rapids Reserve by Order in Council P.C. 312 in 1896. The total area of land set aside for the Grand Rapids Band was then 4,651 acres, which fulfilled their entitlement under Treaty 5. It appears however that when requesting these additional lands, the Department of Indian Affairs was unaware that the Grand Rapids Band was entitled to further lands under treaty and it was coincidental that the lands requested fulfilled the Band's residual entitlement under Treaty 5.

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Files: 578/30-48-33 Vol. 1 & 2

**SLAVES OF UPPER HAY RIVER BAND – TREATY 8 – ALBERTA**

This Band adhered to Treaty 8 in 1900 which entitled it to reserve lands in the amount of 128 acres per person. The Band selected lands in 1940, at which time its population was 554, entitling the Indians to a total of 70,912 acres.

It was not until 1946 that official application was made to the Province of Alberta for these lands and, subsequently, in 1949 and 1950, the following reserves were transferred from Alberta to Canada for the use and benefit of the Slaves of Upper Hay River Band:

Amber River	211	5,763.00 acres
Bistcho Lake	213	876.20 acres
Bushe River	207	5,170.00 acres
Hay Lake	209	30,530.00 acres
Jackfish Point	214	256.00 acres
Moose Prairie	208	7,741.00 acres
Upper Hay River	212	115.00 acres
Zama Lake	210	<u>5,701.00 acres</u>
		56,152.20 acres



In 1955 an official request was made to the Province to exchange Moose Prairie Reserve No. 208, since the reserve lacked agricultural potentialities. In exchange, sufficient land was requested to fulfil the remainder of the Band's treaty entitlement, which appears to have been calculated on the current Band population of 583 on June 1, 1955, as indicated in the following correspondence:

- a) On December 1, 1955, Laval Fortier wrote to H.G. Jensen, Deputy Minister of the Alberta Department of Lands and Forests:

Following investigation by a Dominion Land Surveyor and a representative of the Provincial Government, Moose Prairie Indian Reserve No. 208, in Twp. 110, R. 20, W3M, was transferred to the Government of Canada by Executive Order of the Province of Alberta No. 817/49 dated the 14th of July, 1949. The area is 7,741 acres and the Reserve was established for the Slaves of Upper Hay River Band of Indians.

After establishment of the Reserve, it became apparent that it was unsuitable for farming, being an alkali flat. Because of lack of agricultural potentialities, the Reserve will not provide for the ultimate establishment of the Indians on the land.

The Indians themselves would like to have the existing Reserve exchanged for land adjoining and to the south of Bushe River Reserve No. 207. *The proposed area, 22,400 acres, would still leave the total acreage included in Indian Reserves set aside for this Band below the treaty land credit. The population of the Slave Band of Hay Lake and Upper Hay River was 583 at treaty paying time in June last.* The location and area of existing Reserves for this Band are:

.....

*If the proposed exchange was effected, the total acreage set aside would be 70,810. The pertinent clause in Treaty No. 8 adhesion No. 3, approved 1901 is:*

"And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands who desire reserves, the same not to exceed in all one square mile for each family of five – and for such families or individual Indians as may prefer to live apart from band reserves, to provide land in severalty to the extent of 160 acres to each Indian . . ."

\_\_\_\_\_”

- b) On October 10, 1956, R.F. Battle, Regional Supervisor of Indian Agencies wrote to H.J. Jensen:

If you will refer to Colonel Fortier's letter of December 1st, 1955, and your reply of December 19, 1955, you will note that we had requested the exchange of Moose Prairie Reserve #208 for lands lying adjacent to the present Bushe River Reserve #207, and we also asked for additional lands in this area to take care of a portion of the remaining credit of the above band. *This was given approval in principle by your Department on the basis of a total of 22,400 acres adjacent to the Bushe River Reserve. This left a remaining credit for the Slave Band in the amount of 3813.45 acres, and it was your request that we make application for lands to complete the entire allotment for the Slave Band.*

Since then you and I have had discussions with respect to enlarging the Upper Hay River Reserve #212, which has a present acreage of 115. We have had a University undergraduate, Mr. Findlay, making soil analysis in the Fort Vermilion area during the past summer, and I am attaching copies of his reports, which may be of interest to your Department.

*After a series of negotiations with the Slave Band Council, they have now agreed to take the balance of their land credit in the vicinity of their present reserve at Upper Hay River. The lands requested are as follows:*

.....

This extension to the Upper Hay River Reserve would amount to approximately 3860 acres, which exceeds the land credit by approximately 55 acres. It is realized of course, that we are working in approximations and the actual acreages of the sectional fractions will not be known until a survey is carried out.

Accordingly, in 1960, in exchange for the Moose Prairie Reserve, the Province conveyed to Canada 22,512.3 acres as an addition to Bushe River Indian Reserve No. 207 and 3,389 acres as an addition to Upper Hay River Indian Reserve No. 212. The total acreage received by the Slaves of Upper Hay River was, therefore, 74,311.85 acres, calculated as follows:

56,152.20 acres -  
7,741.65 (Moose Prairie)  
 48,410.55 &  
 22,512.30 & (add. Bushe River)  
3,389.00 (add. Upper Hay River)  
 78,311.85

Indian Lands  
 October 1976 [sic]

Files: 701/30-1-1  
 775/30-1 Vols 1-3  
 775/30-12  
 775/30-3-207  
 775/30-3-209 Vols. 1&2  
 775/30-3-210

775/30-3-211  
 775/30-3-212 Vols. 1&2  
 775/30-3-213  
 775/30-3-214

**LAC LA RONGE BAND: – TREATY NO. 6 – SASKATCHEWAN**

The Lac La Ronge Band adhered to Treaty 6 in 1889 which entitled it to reserve lands in the amount of 128 acres per person.

Prior to 1949 various parcels of land were set apart for this Band as partial settlement of its Treaty land entitlement. In 1961 the Band requested the remainder of the lands to which they were entitled under Treaty and a formula was developed to calculate their outstanding entitlement at 63,330 acres, as follows:

1897 – Population – 484 Entitlement	–	61,952 acres
Lands Received	–	32,007.9 acres
or	–	51.65%
1909 – Population – 526 Entitlement	–	67,328 acres
Lands Received	–	5,354.1 acres
or	–	7.95%
1948 – Population – 969 Entitlement	–	124,032 acres
Lands Received	–	6,400 acres
or	–	5.16%
1961 – Population – 1404 Entitlement	–	179,712 acres
Lands Received	–	32,007.9
to date		5,354.1
		<u>6,400.0</u>
<u>43,762 acres</u>		
or	–	51.65%
		7.95%
		<u>5.16%</u>
		<u>64.76%</u>

Balance 35.24% or 63,330 acres.

On April 20, 1964, J.G. McGilp, Regional Supervisor in Saskatchewan, reported to Ottawa:

*At a meeting in Regina yesterday, Mr. Churchman informed me that he is prepared to recommend the allocation of 63,330 acres of land to the La Ronge Band to extinguish their land entitlement under Treaty 6. This was the figure raised with him in our request of two years ago and he believes that it only remains to clarify the actual parcel or parcels of lands. I informed him that subject to your approval and that of the Indians, I accept the figure of 63,330 acres, based on the band population of 1,404 when the request was made in 1961.*

Subsequently, by Band Council Resolution dated May 8, 1964, the Lac La Ronge Band resolved:

That We, the Councillors of the Lac La Ronge Band, hereby agree to accept 63,330 acres as full land entitlement under No. 6.

*(1) The land entitlement will be based on 35.24% of the Band population of 1,404 in 1961; the date we requested land from the Province of Saskatchewan and will comprise 63,330 acres.*

- (2) Mineral rights will be transferred with the land.
- (3) Land transferred will reach the high water mark.
- (4) This selection of lands makes up the full and final land entitlement of the Lac La Ronge Band under Treaty No. 6.

The lands were transferred to Canada and set apart for the use and benefit of the Lac La Ronge Band by Federal Orders in Council, as follows:

- i) 32,640 acres set apart as Morin Lake I.R. 217 by Order in Council P.C. 1968-1782.
- ii) 11,092 acres set apart as Grandmother's Bay I.R. 219 by Order in Council P.C. 1970-1613.
- iii) 17,338 acres set apart as Biltern [sic] Lake I.R. 218 by Order in Council P.C. 1973-2676.
- iv) 2,315 acres set apart as an addition to Morin Lake, I.R. 217 by Order in Council P.C. 1973-2677.

Indian Lands  
October 1974

Files: 672/30-12-155 vol 1-3  
672/30-12-218 vol 1-2  
672/30-12-217 vol 1-2  
672/30-12-     vol 1-2  
672/30-12-219

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# APPENDIX B

## MULTIPLE SURVEYS REPORT

WRITTEN BY KEN TYLER AND BENNETT MCCARDLE

### Which comprises

- Appendix B, "Land Entitlement in Cases of Multiple Survey – Recent Discussions (1974-1978),"
- C, "Case Summaries and Policy Correspondence relating to Land Entitlement in Cases of Multiple Surveys (before 1974)," and
- D, "The Compromise Formula (1961-1974): Partial Compliance with the Indian Position Lac La Ronge (1961-1966)," of a letter from Joe Dion, President, Indian Association of Alberta, to Hugh Faulkner, Minister of Indian Affairs, November 30, 1978

(attached documents not included)

## MULTIPLE SURVEYS REPORT – APPENDIX B

LAND ENTITLEMENT IN CASES OF MULTIPLE SURVEY –  
RECENT DISCUSSIONS (1974-1978)

1. An intensification of negotiations between the bands and the Federal Government over Treaty land entitlement grants took place immediately after 1973, when the Federal Minister of Indian Affairs undertook to fulfill the "lawful obligations" of the Government towards the Indian people. However, the success of this undertaking depended in part upon the Federal Government's determination to acquire from the Provinces, under the Natural Resources Transfer Agreements, enough land to fulfill the terms of the Treaties.

2. The Federal Government's acceptance and advocacy of the Saskatchewan formula in negotiations with all three Provinces during 1977 and 1978 (Documents 58 to 61 and 67) was a significant step forward to this end. However, the actual implementation of the formula, and in particular its application to cases of multiple survey, has been the subject of a serious misunderstanding between the three Prairie Indian associations (on the one hand) and the Office of Native Claims (on the other). This disagreement threatens to undermine the basis for current negotiations on a significant number of outstanding Treaty entitlement cases.

3. The misunderstanding has developed in very recent times, but has originated in the divergent approaches of the two parties toward the identification of their responsibilities to the bands. The Indian associations, working from the traditional understanding of the spirit of the Treaties and from detailed archival research, have expressed a view consistent with findings from both sources. This view is that Treaty land entitlement, intended as it was to meet the Indian people's needs for residence and economic support over long periods of time, should grow or shrink indefinitely along with band population, until it is fulfilled by the band's own decision to take their full and final allocation of land. The right of the bands to delay their choice of all or part of their land until they were ready to use it, and to take land on the basis of full band population at survey, has been repeatedly confirmed by the Federal Government's actions from the Treaty negotiations to the present (See Appendices C and D). This pattern is further confirmed in the principles of the Saskatchewan formula of 1977, which provides that the Treaty land entitlement of bands with unfulfilled *or partly fulfilled* entitlement shall grow up until the present day (as represented by the arbitrary cut-off date of December 31, 1976). This agreement, although itself a concession by the bands limiting the scope of their choice to a fixed date unrelated to the band's needs, is as close as is practically possible to the Indian understanding and experience of past Treaty land entitlement grants.

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4. The Office of Native Claims, however, has recently adopted the position that entitlement was fixed at and by a totally arbitrary point – the date of the *first occasion on which any land was set aside for the bands*. It is a fact that many bands did take their land, by choice or necessity, in the course of multiple surveys over extended periods of time. But in fact research has *not uncovered any precedent for this position* among all past cases of multiple survey. Nor does the logic of the Saskatchewan formula provide for the fixation of entitlement at any point whatever, other than at a final grant or a cut-off date agreed upon between the band itself and the Federal Crown.

5. Reasons for the Office of Native Claims' present interpretation of the Saskatchewan formula (as it applies to multiple surveys) emerge from a reading of policy correspondence since 1974. It appears that the position originated, during a period (1974-1976) in which parallel but separate negotiations were being held on behalf of several bands in different provinces. The Lands Branch of D.I.A.N.D. was to some extent confused as to the policy to be followed in entitlement calculations; the status of the "compromise formula" was still in doubt; there was continuing confusion concerning the existence of any precedent whatever for such calculations; and further misunderstandings arose out of discussions of the technical meaning of the terms "selection," "survey" and "first survey"; culminating in the transfer of negotiations from the Lands Branch to the O.N.C. in late 1977. These developments are described in more detail below.

6. By mid-1974 the Federal Government had reached a stalemate in its entitlement negotiations with the Provinces (and in particular Manitoba) the details of which are given in Appendix D. Manitoba's rejection of the "compromise formula" in the Island Lake negotiations – a formula which continued, in modified form, D.I.A.'s previous practice of granting land according to population at each successive survey – was followed by similar rejections from Indian bands in Manitoba and Saskatchewan. The Peter Ballantyne band in Saskatchewan specifically cited past practice in its refusal to negotiate on the compromise formula (Document 46). The Minister of Indian Affairs, however, would not positively commit himself to the bands' position, the compromise formula, or the Province of Manitoba's minimum offer (Document 122).

7. The Lands Branch and other offices with D.I.A.N.D., therefore, continued throughout 1974 and 1975 to research the history of bands with outstanding land entitlement. Correspondence shows that this research proceeded as might be expected from the state of negotiations, without a basis of any definite policy as to how to calculate entitlement. A certain confusion was displayed even within the confines of the same branch of Indian Affairs. For example, in a brief dated in late 1974 (Document 47) the head of the Lands Branch calculated four cases of entitlement involving multiple survey by using population at selection date before initial survey (Brokenhead and the Pas), at date of second survey (Cross Lake) and at date of second survey for a band faction involved in a band split (Gambler).

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8. The work done by Lands Branch researchers up to this date both reflected and in its turn increased the confusion. Directions to researchers to tabulate total acreage surveyed, and to pinpoint date of survey appear to have been given without specific instructions to identify as such the special cases involving more than one past allocation. As a result, researchers (perhaps quite unintentionally) produced figures and summaries that masked the actual incidence of distinct and multiple surveys for individual bands. (See e.g., Documents 44, 45, 54 and tabulations dated 1967-1973 on D.I.A.N.D. (Ottawa) File 701/30-1, Vol. 1).

9. Therefore, the foremost policy question faced by the Lands Branch in 1974-1975 was not, (as previous negotiations suggested it should have been) the implications of the policy advocated on behalf of the Island Lake bands in 1969-1970 and put forward by the Peter Ballantyne and other bands in 1973-1974. Instead, Lands concentrated on the definition of the date of (initial) "selection" – broadly understood as the first date at which the reserve was effectively requested by, used, or set aside for, a band. Detailed research was called for (Document 48) to determine the exact historical circumstances of this selection in the first instance. The research done under this head had the effect of showing that "selection" was generally hard to pinpoint, and that a more definite date – specifically the date of the act of surveying on the ground – was preferable for use in calculation of outstanding legal entitlement (Document 53).

10. The same research also developed a further source of confusion: that of resurvey of abandoned reserves. In a number of cases during the 1870's and 1880's, the initial survey of a reserve had been rejected by a band as unsatisfactory, or by the Government as conflicting with non-Indian claims. This survey was abandoned, without formalities, and a new reserve was surveyed and confirmed for the benefit of the band. A distinction was necessary between the "first" (abandoned) and "second" (accepted) initial survey in each individual phase of the band's land allocation, and this distinction was not always clearly made. As the head of the Lands Branch used the term "first survey" in 1977 (Document 56), it appeared to indicate only the *first act of survey in each of two separate allocations of land* for a single band. (Thus the band had two "first surveys," one for each confirmed grant.) In the absence of any clearly stated policy on multiple allocations, the term "first survey" remained to some extent ambiguous.

11. The decision to specify date of *survey* rather than date of *selection* together with the format of the research used to supply information to the negotiators on a casual basis, had the effect of gradually committing the Lands Branch to calculations based exclusively on first (initial) surveys only. That this was not either their original intention nor a definite policy directive (until at least 1976) is suggested by the contradictions in data provided on request to outsiders.



12. In spite of this political and terminological uncertainty, the Lands Branch compiled and submitted to each of the three Provincial Governments, in the early summer of 1975, preliminary lists of bands with outstanding entitlement, together with *several alternative methods* of calculating the amount of land due in each case. For the reasons described above, the information relating to certain cases involving multiple survey was inaccurate. Copies of the Saskatchewan Indians did not communicate effectively to that association the fact that D.I.A. had settled on a definite policy with regard to this issue.

13. On the other hand, at the same time as these submissions went from Ottawa to the Provinces, the Federation of Saskatchewan Indians clearly expressed its own position on the issue of multiple survey calculations in a policy letter dated July 3, 1976. This letter – which received no direct response from the Minister and no response whatever until 1976 – stated clearly that:

To determine whether a band received its entitlement to land under the treaty, the population figures from the latest annuity paysheets and the most recent band lists prior to the original survey of the reserve must be used. Should a band have received insufficient land based on the treaty formula at the original survey, its full entitlement to land shall be determined by its population . . . at the time that confirmation of additional reserve land is made. This formula is to be used until such time as the band receives its full entitlement to land under the treaty based on its population as shown by the latest annuity payment and most current band list prior to the confirmation of the parcel to give that band full entitlement to land under the treaty. (Document 2, Paragraph 2)

From that time on, the F.S.I. acted upon the principles expressed in Chief Ahenakew's letter. Similarly, the Indian Association of Alberta proceeded to make its calculations on behalf of the bands based on population at each successive survey, according to precedents observed in the course of its historical research.

14. The Department of Indian Affairs, however, had yet to make a policy decision on the issue of partial land entitlement generally. A number of other cases mainly involving single-survey rather than multiple survey grants in the past were at issue, and neither the Provinces nor the bands (Manitoba and Saskatchewan), involved, appeared ready to settle on a mutually agreeable basis. The Federal Government thus took the step of seeking a test case upon which to proceed to the Federal Court for a final solution of the issue of partial land entitlement.

15. The case it decided upon was that of the Tall Cree band in Treaty 8, Alberta. A temporary reservation of land for this band, based on full band population at 1966, had been awaiting formal confirmation from D.I.A.N.D. This reservation – overlooked by Ottawa for nine years – was partially revoked by Alberta in 1975 for reasons irrelevant to the size of the grant (See Appendix C, Paragraph 17). The Minister of Indian Affairs, while objecting to infringement of the reservation, admitted privately to Alberta that the size of the band's claim was in fact a

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matter for debate and negotiation (Document 51). In March of 1976, the Federal Government – again, without notice to the band – drafted a letter proposing a Federal Court resolution of the issue, using Tall Cree's situation as a test case (Document 54). It is unclear whether this proposal was in fact forwarded to the Province, but it is nevertheless obvious that the Federal Government was sufficiently uncertain of its obligations that it felt the need for a judicial solution, even in the absence of declared opposition (at that date) from the Province involved.

16. While the Federal Government considered this extreme measure, research and negotiation continued, involving both the Government and the Indian representatives. At a meeting in May of 1976, the Federal representative referred to the F.S.I.'s policy statement of July 1975 (Document 2, Paragraph 2) as requiring further negotiation (Document 55, a – b), but no such action was taken. The Lands Branch's own definition of the term "first survey" remained unclear (Document 56).

17. It was not until February of 1977 that the point was debated with respect to a specific case, that of Yellow Quill's Band (Document 57). On this occasion, and in contrast to its previous treatments of this and similar cases, D.I.A.N.D. was clearly using population at first (initial) survey and allocation as the date at which entitlement was fixed once and for all. The F.S.I.'s representative did not press the real difference that existed between the Federation's general policy and that of the Government. However, he did notify the D.I.A.N.D. representative that a reference back to the band was necessary. This being so, it seems that a genuine misunderstanding may have arisen from this meeting. It is regrettable that the contradiction clearly evident between the methods used on either side was not pursued at that time.

18. One reason for this inaction may be found in the approval of the Saskatchewan formula by the Federal Minister of Indian Affairs in the Spring of 1977 (Documents 58 and 59). The terms of this agreement led the Indian associations to believe that their method of calculation had been accepted and vindicated. It was not logical to believe that entitlement for some bands, who had had the benefit of only one survey in the past, might now receive land on the basis of population at December 31, 1976; while others (who had by chance or choice received land through more than one survey, whether that one survey had taken place in 1876 or as late as 1976) were restricted to the amount by which a survey had fallen short *as much as a century earlier*.

19. The Associations' trust that their assumptions were correct was confirmed by the Federal Government's vigorous advocacy of the Saskatchewan formula in negotiations with the Alberta Government in 1977 and early 1978. Indeed, the Minister of Indian Affairs even cited the precedents set by surveys for the Little Red River and Slavey of Upper Hay River bands in the 1950's – two cases where land had been granted by multiple survey based on population at each successive survey. The Minister emphasized that the aim of this formula was to

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provide a land base commensurate to the needs of the Indian people (Document 60 and Appendix C, Cases 4 and 5).

20. The Indian Association of Alberta's position paper on Treaty land entitlement was developed in late 1976 and throughout 1977. It outlines the I.A.A.'s method of calculation in cases of multiple survey, together with examples drawn from past surveys in Alberta. This paper (Documents 1 and 62) was presented to the Federal Government in January of 1978. The Office of Native Claims, however, did not examine this document closely enough to determine the difference between the I.A.A.'s position and that which they had inherited from the Lands Branch upon the takeover of responsibilities by the O.N.C. in mid-1977.

21. In March of 1978, the Indian Association of Alberta held its first meeting with the Office of Native Claims on the subject of technical aspects of entitlement research. Five major areas of disagreement between the O.N.C. and the I.A.A. were identified by the former at that meeting: the method of calculation was not one of them. As explained in Document 66, the O.N.C.'s outline of its calculation principles, basing a band's entitlement on population at "first survey," was not expressed as a contradiction of the I.A.A.'s position paper. Furthermore, due to the inherent ambiguity of the phrase, it was not understood by the I.A.A. at that meeting in the sense intended by the O.N.C.

The first clear notice to the I.A.A. of the O.N.C.'s position came indirectly in a letter (Document 63) to the Chief of the Alexis band, received in early May 1978, but not referred to the general land entitlement bill until September. The Federation of Saskatchewan Indians reiterated its position of July 1975 (in the context of a different discussion) in a letter to O.N.C. in May 1978 (Document 64). It was not until a meeting in late June of 1978 that the O.N.C. and F.S.I. thoroughly discussed the nature of the disagreement (Document 65). A meeting with similar results took place between the I.A.A. and O.N.C. on July 7, 1978 (Document 66).

23. At each of these meetings, the parties reaffirmed their respective positions and agreed to disagree. The O.N.C. undertook to ask the Minister of Indian Affairs to send an official confirmation of the O.N.C.'s position. On July 31, 1978, such a letter went out to each of the three Indian associations involved, together with an outline of "criteria used in determining bands with outstanding entitlements in Saskatchewan," dated August 1977 (Documents 67 and 68).

24. This set of "criteria," according to the Minister represented the Department's interpretation of the agreement known as the Saskatchewan formula, and provided a "sound and equitable basis" for the calculation of outstanding Treaty land entitlement. This view cannot be shared by the Indian associations.

25. The most unusual feature of the "criteria" paper is that it contains *no reference whatever to the principle of entitlement calculations based on population at December*

31, 1976 – the essential element of the Saskatchewan formula. Entitlement is treated, in Section 4 of the paper, as being fixed at first survey. It alleges that historical precedents are uniformly (with a few exceptions of an unusual kind) in favour of this assertion. Finally, the application of “compromise formula” at Lac La Ronge is treated as an abnormally generous, and not an unusually restricted, interpretation of the Government’s past practice.

26. Therefore, this set of criteria is not merely out of keeping with the I.A.A.’s and the F.S.I.’s practice in calculating entitlement and with historical precedent; it is in conflict with the Saskatchewan formula itself as endorsed by the Minister of Indian Affairs. Whether this contradiction is intentional or not is unclear, but (whatever its origin) it must be contrasted with the countervailing evidence. To this end, Appendix C sets out adverse cases and policy correspondence. Appendix D accounts for the most obvious “exception” to the Saskatchewan formula as an exception to and compromise with a *more* generous – *not a less* generous – alternative solution.

27. The O.N.C.’s position – which is essentially the same as that put forward by the Province of Manitoba in 1969-1970 and rejected by D.I.A.N.D. at that time – is therefore open to attack on logical and historical grounds, as well as the general moral or political grounds put forward in the past, both by Indian representatives and by officials within the Department of Indian Affairs.

## MULTIPLE SURVEYS REPORT – APPENDIX “C”

**CASE SUMMARIES AND POLICY CORRESPONDENCE RELATING TO  
LAND ENTITLEMENT IN CASES OF MULTIPLE SURVEY  
(BEFORE 1974)**

1. **The Treaty Negotiations:** Clear assurances were given by the Crown's representatives at the various Treaty negotiations that the bands would not be forced to choose reserves until such time as they were ready to settle on the land and begin to cultivate or otherwise make use of their land allocation. In other words, the Treaty right to land was not to be tied to, or fixed by, any particular date. The needs of the bands themselves, as these changed over time, were to determine the Crown's actions in fulfilling its obligation to grant land under the Treaty.

This point was made repeatedly in the course of Treaty negotiations. At the discussion of Treaty Three in 1873, Crown Commissioner Alexander Morris found that it was

impossible, owing to the extent of the country treated for, and the want of knowledge of the circumstances of each band, to define the reserves to be granted to the Indians. It was therefore agreed that the reserves should be hereafter selected by officers of the Government, who should confer with the several bands, and pay due respect to lands actually cultivated by them. (Document 3)

Although Morris recommended that the government have the reserves selected “with all convenient speed” his intention was merely to safeguard the Indians' interest in their territory against the intrusion of non-Indian claims.

At Treaty Four negotiations in 1874, Morris emphasized the connection between the bands' readiness to begin farming and the government's obligation to lay out reserves (Document 4) but in 1876 he cautioned Treaty Six bands to

be sure to take a good place so that there will be no need to change; you would not be held to your choice until it was surveyed. (Document 5)

The Crown's intention was to suit its performance of Treaty obligations to the band's own pace of change.

to help you in the days that are to come [;] we do not want to take away the means of living that you have now [;] we do not want to tie you down; we want you to have homes of your own where your children can be taught too raise for themselves food from the mother earth. You may not all be ready for that, but some, I have no doubt, are, and in a short time others will follow. (Document 6)

Indeed, just as Morris expected, many of these bands chose lands almost immediately, while others waited for years until the need for reserve land took precedence over other considerations.

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In the northern parts of the Prairie Provinces, however, a delay between the time of Treaty negotiations and the survey of reserves was the rule rather than the exception. The Treaty Eight commissioners explained that

As the extent of the country treated for made it impossible to define reserves or holdings, and as the Indians were not prepared to make selections, we confined ourselves to an undertaking to have reserves and holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required. There is no immediate necessity for the general laying out of reserves or the allotting of land . . . Indeed, the Indians were generally averse to being placed on reserves. It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves. We had to very clearly explain to them that the provision for reserves and allotments of land were made for their protection, and to secure them in perpetuity a fair portion of the land ceded, in the event of settlement advancing. (Document 7)

These assurances were made by the surveyors sent out by the Department of Indian Affairs, who, when surveying land for a band, used the population of the band at the date of the survey to determine the size of their entitlement. Very recently, the Treaty assurances cited above have been used (by H.T. Vergette, head of the Land Surveys and Titles section of the Department of Indian and Northern Affairs) in support of the principle that land entitlement for the Island Lake band should *continue to increase until fully satisfied*. (Document 95)

2. **Early Surveys of Reserves** were generally intended to fulfil completely the entitlement of the band in question. They were usually based on a formula, contained in the Treaty text, which allotted a specified number of acres per person in the band, the amount per capita varying according to the particular Treaty involved. The date at which the band's population was taken for purposes of calculation was a date *at or within a year of the survey itself*, depending on the date of available band membership lists or other reliable sources of information.

3. Many of these initial surveys did in fact fulfil the entitlement of the bands in question. Some, however, did not. There were various reasons for this shortfall in the size of the allotment.

4. Sometimes, owing to conflicting claims or to the band's own dissatisfaction with the grant, the original survey was cancelled and the reserve abandoned before its final approval by the Government. A new survey was made on their behalf, superseding the original first survey, and on the basis of population at the date of the *new* survey – *not* according to population at the time of the original request.

5. In other cases the initial survey only partially fulfilled the band's entitlement as calculated at that survey. Sometimes completion was deliberately delayed by the wishes of the band itself, or because of disagreement within the band. Often, however, the government

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failed to respond to a band's definite requests for land out of a lack of funds or staff, or through error and confusion, or because of a desire to force the band to change its choice of land to one more in keeping with the Department's wishes. In the years after 1930, however, the Department of Indian Affairs began to advise bands with partial outstanding entitlement to postpone selection of their final allotment until they had full information concerning the value of their lands (e.g. documents 27A, 70-73, 89-94). The result, whatever the motive, was the same for most bands: a widening gap between initial and final survey, a steadily increasing band population, and a shrinking land area from which to choose their reserves.

6. **In the period before 1900**, there were relatively few cases of multiple surveys as such. The Department of Indian Affairs had in some cases not yet become aware that entitlement had not been fulfilled. However, cases such as that of the Yellow Quill surveys illustrate D.I.A.'s procedure for closing out partial land entitlement surveys.

**CASE 1 (1898): YELLOW QUILL BAND (NUT LAKE, KINISTINO AND FISHING LAKE BANDS – TREATY 4, SASKATCHEWAN)**

These three bands were originally considered as a single band, known as Yellow Quill's, which adhered to Treaty 4 in 1874. In 1881 land was surveyed for the band at Nut Lake and Fishing Lake. This survey did not fulfil the band's entitlement at that time as determined by the population at date of survey.

In 1898 D.I.A. received a request for the survey of land for the band's third group (Kinistino) which did not wish to share in the reserves laid out in 1881. To determine the band's outstanding entitlement in 1898, D.I.A. officials in both Ottawa and Regina used the band's total population at 1898, as shown in the 1898 Treaty annuity paylists. Land was set aside on this basis, but due to an error in calculation it proved insufficient to fulfil entitlement at that date. (Documents 8-16)

7. **For the period from 1910 to 1915**, further examples can be cited. This was a time of increased activity in D.I.A.'s survey office, so that a large number of long-pending survey requests were carried out in both the older and newer Treaty areas.

**CASE 2 (1914): HORSE LAKES BAND (TREATY 8, ALBERTA)**

The Beaver of Dunvegan Band (now known as the Horse Lakes Band) was granted reserve land north of the Peace River in 1905, which was insufficient to provide for its total population at that date.

In 1911 a faction of the band living south of the Peace River, who had not participated in the 1905 selection, requested another reserve to be located near its own territory. In 1914, therefore, D.I.A.'s surveyor laid out land enough to bring the band's total holdings up to their entitlement according to its population in 1913. The

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band's entitlement was therefore fulfilled by this second survey. (Documents 17 and 18)

8. The same logic was applied to other such cases in the 1920's and 1930's, which for various reasons were not then resolved. (Examples include the Cross Lake, Peter Ballantyne, and Lac La Ronge cases: see Documents 19-24, 24A, 26-27A)

9. By the time of the transfer of Crown Lands and natural resources from Federal to Provincial control in 1930, many bands had still not received their full entitlement under the Treaties. Therefore, during the negotiation of the transfer agreements, the Federal government specified that further areas of land be made available by the Provinces when and as necessary to fulfil the terms of the Treaties.

10. The Deputy Minister of Indian Affairs (D.C. Scott) specified, while drafting the agreements in 1929, that D.I.A. had no right to place any limit on the total acreage to be granted out of Provincial lands for reserves in the future. Band entitlement was to continue to rise (or fall) along with band population, until such time as it was completely fulfilled. Moreover, the Department of Indian Affairs (according to the version of the resources agreement then under discussion) was not required to consult the Provinces with respect to any aspect whatever of Treaty land entitlement grants. (Documents 25 and 25A)

11. From 1930 onwards (and up almost to the present day) the Federal government has made repeated grants of land, by arrangement with the Provinces, intended to fulfil Treaty land entitlement with bands who received part of their allocation before 1930. At first, D.I.A. met with resistance from Provincial governments – especially from Manitoba – which forced Departmental officials to articulate their views on the extent of their obligations. After some discussion, D.I.A. in 1937-38 decided to begin surveys for certain bands based on their present-day population at second (or third) survey. (Documents 26-27)

12. One anomalous exception to the practice of granting land based on population at second survey is found in the Janvier Band surveys of 1922 and 1930.

### CASE 3: JANVIER BAND (TREATY 8, ALBERTA)

The first survey for this band was made in 1922 on the basis of the surveyor's own estimate of the band's needs, since the nature of the territory and the band's movements prevented him from personally enumerating all those who might be members of the band (but who were not shown on Treaty paylists). The surveyor's figure was in fact larger than that which appeared on the Treaty paylists. After completion of his survey, he pointed out the need for a temporary reservation of land adjacent to the reserve to accommodate any further band members who might present themselves in



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the near future. Due to resistance from the Department of the Interior, D.I.A. did not make this further reservation.

The second survey, in 1930, was not made on the basis either of the surveyor's estimate in 1922 or the 1922 paylists, or paylists available for 1929. Instead, use was made of a certain list of figures dated 1924, which had been specifically transmitted for the purpose by the local Indian Agent, and which was supplemented by the population of one extra family known to be living with the band although officially inscribed on a neighbouring band's payroll. This figure was the first and most easily available figure which came to hand when D.I.A. officials in 1928 confronted the confused situation of this band. Land was set aside on the basis of this composite figure (which reflected natural increase in the families involved between 1922 and 1924).

13. It is obvious that the formula used in the Janvier case can in no way be considered a precedent for the fixation of entitlement at first survey. Instead it represents (like the later "compromise formula") an imperfect application of the principle that entitlement varies over time along with the population of the band. As such it is (at worst) irrelevant to the debate over the fixation of entitlement according to any particular date of survey.

14. During the 1950s, after the slowdown in D.I.A. activities caused by the war, requests were received from several bands in Northern Alberta for surveys of additional land. These were actively promoted by D.I.A. officials at all levels. However, when it came to the determination of the amount of land to which each band was entitled, the Department initially displayed confusion concerning its own obligations and past practises. (Documents 28 and 30)

15. D.I.A.'s Superintendent of Reserves and Trusts accordingly decided to define his position by submitting the matter to D.I.A.'s legal advisor. His response (Document 29) noted the ambiguity of the Treaty provisions and, accordingly, used as a guide to interpretation the actions taken by D.I.A. in the past – as outlined by D.C. Scott during the resources transfer negotiations of 1930 (see paragraph 10 above). However, he refused to give a firm opinion as to the Federal government's unilateral right to set the basis for calculation at any particular date, and recommended that D.I.A. settle any outstanding cases purely by negotiation with the *Provinces*, starting from the principles laid down by Scott in 1929. The role of the bands (as original parties to the Treaty) was not referred to in the opinion.

16. The legal advisor's opinion, then, was firm in designating *the precedents set by D.I.A.* – including the allocation of land to bands on the basis of population at each successive survey – *as the only basis for negotiation with the Provinces*. D.I.A. officials therefore went ahead to negotiate settlements of three cases with the Province of Alberta on the basis recommended by its advisor. One case (Tall Cree Band) was unaccountably delayed until the 1960's. The two others, however, were concluded within six years of the initial approach to the Province.

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**CASE 4: LITTLE RED RIVE BAND (TREATY 8, ALBERTA)**

The Little Red River Band had land set aside for it in 1912, which was insufficient to fulfil its entitlement in that year.

In 1955 the Federal Government, prompted by requests from the band, approached the Province with a proposal to settle the band's outstanding entitlement, together with that of the Slaveys of Upper Hay River and the Tall Cree Band. Upon the Province's assent the Department went forward with final land selections, which were completed by a survey in 1958. The population base used for this survey was that of 1955, accepted as a "cut-off" date marking the time at which the Province agreed to the principle of selection.

Due to an error in enumeration, however, the survey did not fulfil the band's entitlement at that date. (Documents 31 to 36, and 60)

**CASE 5: SLAVEYS OF UPPER HAY RIVER (NOW DENE THA) BAND (TREATY 8, ALBERTA)**

This band had land set aside for it by a survey in 1946, which was insufficient to provide for the band's population at that date.

Negotiations to set aside extra land for this band extended, as for the Little Red River Band, between the original approach to the Province in 1955 and final survey in 1958. Survey was based upon the band's population in 1955 but, as with Little Red River, an error in enumeration prevented the fulfilment of the band's entitlement at that time. (Documents 31 to 36, and 60)

16. In the 1960's contradictory precedents were set by two parallel attempts at settlement in the northern parts of the Prairie Provinces. These two proposals, however, were not radically different in nature. In the Lac La Ronge case a new "compromise" formula for calculation of entitlement was invented to deal with an exceedingly complex situation involving quadruple surveys. This formula, unique as it is to the Lac La Ronge case, nevertheless illustrates the Government's desire to confirm, however indirectly, the principle that entitlement varies with land size at each successive survey until that entitlement has been definitely fulfilled. (See Appendix D).

17. The Tall Cree case, which follows directly the precedents of the 1950's, provides a more logical link between the surveys before 1930 and the present discussion of entitlement calculation principles.

**CASE 6: TALL CREE BAND (TREATY 8, ALBERTA)**

The Tall Cree Band (or Cree Band of Vermilion) received land in 1912 for one segment of the group. Further land was surveyed for it in 1915, based on population

figures at that survey, but owing to an error in calculation the band received less than its full entitlement at that time.

Provision of extra land for the band was discussed in 1955 (see Case 4, above) but was not carried out. The band repeated its request in the early 1960's, and in preparing for selection of extra land the Federal Government explicitly adopted the precedent set by the 1955 agreements. Accordingly, land enough to provide for the band's population at 1965 was selected by the band, after considerable study. This land was temporarily reserved by the Provincial government in 1966, pending a more formal request from the Federal government.

This formal approach was apparently overlooked for some years. It was not until 1975 that the Federal government expressed doubt as to the basis of the Tall Cree settlement; moreover, in the interim the reservation was partly rescinded without notice by Alberta. The definite undertaking originally given to the band to set aside the reserve as selected by them was in its turn rescinded, without notice to the band, by the Federal Government. (Documents 37-43, 50-52, 54)

18. The circumstances of the Federal Government's withdrawal from the principle expressed in the Little Red River and Slavey settlements – while part way through its negotiations on behalf of both the Tall Cree and Island Lake Bands – are discussed in some detail in Appendix B. It will be explained that the history of entitlement grants in the Prairie Provinces was largely overlooked or misunderstood.

## MULTIPLE SURVEYS REPORT – APPENDIX D

**THE COMPROMISE FORMULA (1961-1974): PARTIAL COMPLIANCE WITH THE INDIAN POSITION LAC LA RONGE (1961-1966)**

1. The so-called “compromise formula” for the calculation of partial Treaty land entitlement was invented by an Indian Affairs Branch official in 1961 for the purpose of settling the outstanding entitlement of the Lac La Ronge Band in Saskatchewan. Lac La Ronge had received land by means of four previous surveys (in 1897, 1909, 1935 and 1948) none of which had fulfilled the band’s outstanding entitlement according to population at each successive survey. Their request for another survey in 1960 led the I.A.B. to consider a final settlement of their rights under Treaty Six.

2. The entitlement of the Little Red River and Slavey of Upper Hay River bands of Alberta had been settled in 1955-1958 on the basis of total acreage according to population at second survey (1955 used as a cut-off date). However, the same formula was not used at Lac La Ronge. Instead of proposing a survey on the basis of 128 acres per person based on the 1960 population, W.C. Bethune, head of I.A.B.’s Reserves and Trusts Branch, put forward what he called a “reasonable” compromise: Lac La Ronge’s entitlement would be based on the population at each successive survey, but the amount due in 1961 would be calculated as a *percentage* of the total due under the maximum formula. Thus, the band at initial survey in 1897 had received 61,952 acres, or 51.65 percent of its entitlement based on an 1897 population of 484. In 1909, the band received 5,354.1 acres, or 7.95 percent of its entitlement based on a 1909 population of 526. In 1948, the band received 6,400 acres, or 5.16% of its entitlement based on a 1948 population of 969. (A survey made in 1935 was overlooked.) Therefore, by 1961 the total percentage received was  $51.65 + 7.95 + 5.16$  or 64.76%. Outstanding entitlement at 1961 was therefore 35.24 percent ( $100 - 64.76$ ) of entitlement based on a 1961 population of 1,404 – or 63,330 acres. The format of these calculations makes clear the derivation of the compromise formula from the formula based on total acreage based on population at each survey. (Documents 73 through 77 and 85)

3. Bethune’s invention of the new formula seems to have been motivated by the unusual complexity of the particular situation at Lac La Ronge. The band had already received a large number of individual reserves by means of several separate surveys. Little good agricultural land was available in their vicinity. Previous attempts to obtain land from the Province had failed; therefore, it was apparently foreseen that the Province would adopt a restrictive interpretation of its obligations. Bethune anticipated the need for a compromise even before the first moves in the negotiation were made. The subsequent attitude of the Provincial Government did in fact fully justify Bethune’s fears. (Documents 76, 77 and D.I.A.N.D. file 601/30-1)

4. Bethune appears to have created the formula himself without consultation outside the I.A.B. He certainly did not consult with the band before approaching the Province for its approval, nor did he indicate either to the Province or – later on – to the band, that there might have been a more advantageous alternative. Presented to the band as a *fait accompli* in 1964, the 63,330 acre compromise-formula allotment was voted on and accepted by the Lac La Ronge Band Council without question (Documents 79 to 84)

It appears that the band was in fact pleased with the prospect of a settlement of its long-standing land deficiency. The fact remains, however, that settlements made elsewhere before 1964 (for the Little Red River and Slaveys of Upper Hay River bands in the 1950's) and soon after (for Tall Cree band in 1965-1966) were made specifically on the basis of *full acreage* according to population at final survey. (See especially Document 37)

5. The I.A.B.'s representatives in 1964 also sought and obtained from the Lac La Ronge band an agreement to the effect that the 63,330-acre grant would represent its "full and final land entitlement . . . under Treaty No. 6". (Document 82, Clause 4) This waiver provided, therefore, not only that the cut-off date for calculation was to be 1961 rather than 1964 (Clause 1) but also that the band was to be legally bound by the compromise formula itself. Such a waiver would not have been necessary if the Department had been certain of the upper limits of its legal obligation to set aside land for the band.

6. The Lac La Ronge band received land on the agreed-upon basis in subsequent years, in the course of which other formulae were being put forward in parallel cases. The compromise formula was, therefore, an anomaly in that it was a restriction of the terms of earlier and contemporary settlements of Treaty land entitlement. However, it did share an important feature of these settlements: it tied the size of a band's outstanding entitlement to the band's population, as it increased or decreased, until such time as a final survey overtook and satisfied the band's entitlement once and for all.

### **The Island Lake (Manitoba) Negotiations (1967-1974)**

7. The second attempt to apply the compromise formula was made some years after the Lac La Ronge surveys, in the course of negotiations over reserves for the Island Lake bands of Treaty Five (Manitoba). The evidence in their case shows clearly that the formula was vigorously advocated by the I.A.B. as a solution of *second choice to the maximum formula originally put forward by the Department itself*. The formula used at Lac La Ronge was revived only in the face of the Province's restrictive proposals. Manitoba offered the amount of land outstanding to the Band at the *first survey only*, claiming that such a stand was both "logical", and was supported by precedent – although no previous case was cited. Curiously this provincial position, which the Department of Indian Affairs so vigorously opposed, has now gained the imprimatur of the Federal Office of Native Claims.

8. The Island Lake band has been allocated land in 1924, which was insufficient to fulfil their entitlement according to population at that date. The band and local I.A.B. officials

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requested extra land repeatedly during the 1940's, but were advised by I.A.B. in Ottawa to delay the use of outstanding "land credits" until the band's needs and the resources available to meet them were known and analyzed. Similar advice was given in the same period to the Lac La Ronge Bands. (Documents 86 to 94)

9. In the 1960's, the band renewed its request for land, contemporaneously with requests from the Tall Cree band in Alberta. The head of the Land Surveys and Titles Section of I.A.B. (H.T. Vergette) was led to consider what policy to adopt with respect to the Island Lake case. He concluded that he was required (because of the undertakings made at the time of the Treaty negotiations, the precedents set elsewhere by D.I.A., and the losses to the band caused by delay in land allocation) to request land for them on the basis of *128 acres per person according to total present-day population* (minus the area of the previous grants). However, he acknowledged that the Provinces might not co-operate on this basis, and that the Federal Government might not be able to force the issue. He, therefore, called for a "scrupulously fair" examination of the history and merits of this and similar cases to make sure that their claim to extra land was straightforward and that it could be so represented in detail to the Province. (Document 95)

10. The case rested in abeyance for three years. In 1969, it was again revived, at the same time as the band was legally divided into four separate bands (each with its own outstanding entitlement). As recommended by Vergette in 1967, the Department of Indian Affairs requested 64,379 acres from the Province early in 1969, being the amount derived directly from the four bands' *total population in 1968*. Manitoba refused, and made a counter-offer of 2,939 acres, representing the *shortfall at first survey in 1924*, on the grounds that

- a) this was the most "logical" interpretation of the totally ambiguous terms of the Treaty;
- b) that even if the Treaty required provision of more than the offer, Manitoba was liable only for the amount outstanding at the transfer of natural resources in 1930; and
- c) that the Provinces offer was in line with past precedents in all three Prairie provinces.

(Documents 96 to 98)

11. D.I.A. immediately rejected the offer – on general moral grounds, on grounds of precedent, and because of the band's loss of use of the land since the time of original survey. (Documents 99 to 102) However, D.I.A. Lands Branch and Regional officials still felt bound by the 1954 legal opinion (Document 29) which stated that the formula to be used could be settled only by negotiation. In spite of their firm convictions as to D.I.A.'s liability under the Treaties, they were in the position of having to negotiate the land from the Provinces without agreement on the meaning of the Natural Resources Transfer Agreement, which bound the Province to co-operate to some unknown extent in the provision of land to the Indians. Nevertheless, the opinion referred to directed them to adhere to the precedents described by D.S.G.I.A. Scott in 1929, including the variation of entitlement with population over time.

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12. Unfortunately, D.I.A. officials also lacked a clear understanding of the precedents upon which their negotiations were to be based – even of the recent settlements of the 1950's. (For an exception, see Document 109) D.I.A.'s previous research projects on entitlement (see D.I.A.N.D. – Ottawa File 701/30-1 at 1967-1973) were apparently considered unreliable sources of information. This deficiency was to weaken D.I.A.'s arguments considerably, and apparently contributes even today to the Office of Native Claims' impression that the "compromise formula" is an abnormally *generous*, rather than a uniquely *restricted*, settlement in the context of past grants under the Treaties.

13. D.I.A.'s negotiations with the Province were redirected at this time to involve the bands themselves as primary parties, the Province (in theory) being only a secondary element. This move in 1969 represents the first acknowledgement of the band's right to have the "first voice" in approval of negotiating principles. Together the Federal Government and Indian representatives would seek from Manitoba "the maximum amount of land that could be obtained from the Province". (Document 102; See also, Document 101 and later documents)

14. In view of the legal advisor's directive to proceed by negotiation, and the band's request that D.I.A. negotiate on their behalf, D.I.A.'s Regional Director for Manitoba put forward in early 1970 an "alternate formula" – the Lac La Ronge compromise formula of 1961 – as "the best possible deal for the Island Lake band", given the Province's earlier refusal of what D.I.A. considered the ideal settlement. In 1924, Island Lake had received 85.9 percent of its entitlement as at that date. The new claim was for the remainder, 11,591 acres (or 14.1 percent) based on a 1968 population of 2,569 people. (Documents 100 and 103)

15. The new proposal was favourably received by the Province at first, but in mid-1970 it was unexpectedly rejected by the Manitoba Cabinet on the same grounds as had been cited for the rejection of the first proposal – logic, presumed precedent and the wording of the resources transfer agreement. (Documents 106 and 107)

16. D.I.A. officials still maintained that "the Band [was] entitled to a better settlement than that proposed by the Province" (Document 113) but accepted that there could be no resolution without Provincial concurrence. They hoped that on-going historical research would provide firmer evidence of favourable precedents. This research went on throughout 1971 and early 1972, while the Lands Branch and a Departmental Committee on Partial Land Entitlement prepared materials for a Cabinet decision on the issue. Manitoba Regional Director Conolly again proposed in April 1972 that the compromise formula be used to calculate both the Island Lake and the Cross Lake bands' outstanding entitlement. He believed that by that time the Province would have changed its stance and would approve the submission rejected in 1970. (Documents 108 through 120)

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16. No action was taken until March 1973, when the Minister of Indian Affairs (in response to urgent requests from the Island Lake Bands) offered to put forward the compromise formula to the Province again. However, the Minister implied that D.I.A. felt its "lawful obligation" to the band might be limited to shortfall at first survey (Manitoba's offer). Its agreement to put forward a "further" claim based on the compromise formula was no more than a *moral* obligation (created by loss of use and occupancy since first survey), without binding legal force. (Documents 121 and 122)

17. Privately, however, D.I.A. was aware of strong arguments in favour of the maximum formula, which it had been advised to accept. In a briefing paper of early 1973, a Departmental analyst outlined a detailed history of the case. He pointed out that Manitoba's assertions concerning precedents was totally incorrect. (Documents 126, Item 10d) These precedents were that:

The practice and policy of the Department was such as to seek from the provinces lands, whether as a first application or for additional lands when only partial land entitlement under treaty had been obtained, on the basis of current population. (Document 126, Item 11f)

In the absence of a clear method of calculation prescribed by Treaty, these precedents were to govern interpretation. They did not support either formulae based on population at Treaty, or population at time of first survey. Moreover, these lesser proposals were clearly inequitable, given the bands' loss of use and occupancy and the delays in land allocation caused in the 1940's by D.I.A. itself.

18. Accordingly the Department in 1973 was urged to provide land to Island Lake based on *full present-day population*, "in accordance with the general understanding and practice followed by the Department in earlier years". If the Province could not be prevailed on to give up the land under this formula, the Federal Government would have to provide the difference itself. (Document 126)

19. Again, no definite results emerged either from the Government's private study or the Minister's public actions. Both the bands and the Manitoba Government eventually rejected the compromise formula, the former because it was too restricted, the latter because it was too generous. To this day the Island Lake bands have received no further land in fulfilment of the Treaty.

20. Since that date the Federal Government has vacillated (as described in Appendix B) between various points of view with respect to its true legal obligations. However, the compromise formula has remained in the minds of some participants in negotiation, despite an increasing tendency towards narrow legal interpretation of the Treaty provisions. In early 1974, H.T. Vergette proposed the compromise formula in settlement of the Peter Ballantyne band's entitlement. In so doing he repeated his views of 1966, justifying the formula by



reference to the Treaties, precedents set by D.I.A., and the bands' claim for compensation for loss of use of the lands since first survey. The only reason he gave for not advancing the band's position (based on full present-day population) was that he "doubt[ed] the Province will accept this figure." (Document 127) Otherwise, he implies, D.I.A. would readily accept it as a legitimate interpretation of its obligations under the Treaties.

21. Since the approval of the Saskatchewan Formula in 1977, the compromise formula has been, in practice, a dead issue. It is necessary, however, to remember the circumstances under which it was first created and advocated by D.I.A. In the Lac La Ronge case, it was an original but arbitrary compromise created by an I.A.B. official (without discussion or consultation outside the Department) to meet an excessively complex situation in which the Province was expected to resist large requests for land. In the Island Lake case, it was put forward as a second-best solution in the spirit of the Treaty and past precedent, after the Province had refused the larger proposal. In both cases the more generous precedents were known to Departmental officials, and were rejected out of political necessity. In neither case was the compromise formula (as has recently been suggested by the Office of Native Claims – Document 68, Section 4) an "exception" to otherwise "straightforward" calculations based on population at date of first survey.

# APPENDIX C

**WILLIAM J. FOX, SPECIAL PROJECTS OFFICER,  
DEPARTMENT OF INDIAN AFFAIRS,  
TO  
CHIEF D. AHENAKEW,  
FEDERATION OF SASKATCHEWAN INDIANS, OTTAWA**

**DECEMBER 15, 1975**

[copy]

Indian and           Affaires Indiennes  
Northern Affairs    et du Nord

OTTAWA, Ontario K1A 0H4  
December 15, 1975

Chief D. Ahenakew,  
Federation of Saskatchewan Indians,  
1114 Central Avenue,  
PRINCE ALBERT, Saskatchewan

*Our File No. 601/30-1-1*

Dear Chief Ahenakew:

I am writing to you following a recent meeting with Mr. Lockhart in Ottawa. At that time Mr. Lockhart, Mr. Rob Milen, the Provincial Representative and I discussed the Treaty entitlement situation. I agreed to send you a proposal for a reasonable basis for determining the reliability of data to be used in substantive discussions of Band entitlement. I suggest we should consider the use of the following criteria:

- (1) The population count to be used for dates prior to 1951 will be taken from the treaty annuity paylists for the appropriate year but can be based on other sources if there is adequate evidence to indicate that another source would be more accurate; after 1951, population figures will be taken from the membership rolls.
- (2) The date of selection shall be deemed to be the date of the first survey for those Bands which were in treaty when land was set aside. In cases where Bands adhered to treaty after land had been set aside, the population shall be that at the time of the adhesion. There are some reserves set aside which were not surveyed as such but were established from the township surveys carried out by the Department of the Interior in the course of the original surveying of all lands for homestead purposes. In such cases the date of selection shall be the year in which the reserve was first identified and used as an Indian Reserve.
- (3) The acreage of land set aside will be the acreage stated in the Order In Council setting it aside except where this has been altered by a subsequent survey. In cases where an Order in Council does not state the acreage of a Reserve, the acreage will be that shown on the plan of survey; where a reserve is described by metes and bounds which indicate an area greater or smaller than that which is said to have been set aside, the metes and bounds will be used to determine the acreage.

- (4) Where a Band has exchanged land for a greater or lesser acreage, calculations of its entitlement are to be based on the acreage originally set aside and not on the accretions.

I would appreciate hearing your comments on the above criteria. It would be helpful if you would keep Mr. Milen informed so that he can advise his Minister when we have agreed on criteria.

Yours sincerely,  
Wm. J. Fox  
Special Projects Officer.

# APPENDIX D

## DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

### Criteria Used in Determining Bands with Outstanding Entitlements in Saskatchewan

Unpublished memorandum, August 1977 [Version 1]

WITHOUT PREJUDICE

**CRITERIA USED IN DETERMINING BANDS WITH OUTSTANDING ENTITLEMENTS IN SASKATCHEWAN**

Research to determine those Bands in Saskatchewan with outstanding treaty land entitlements was commenced in December, 1975. At this time an attempt was made to establish a series of *basic criteria* to be used in calculating entitlements. Basically, the approach taken was that entitlement would be calculated by multiplying the per capita entitlement set out in the appropriate Treaty by the total Band population at the date of first survey of Indian Reserve lands. The total amount of Reserve land received by a Band would be compared with this entitlement to determine whether it had been fulfilled or whether the Band was entitled to more land. As research progressed, it was often found necessary to modify the criteria to accommodate unique circumstances affecting individual Bands. However, such modifications were made only when absolutely necessary and in all other cases consistent application of the established criteria was maintained.

The following is a detailed outline of each of the criteria established, together with an explanation of any modifications found to be necessary during the course of research:

**1. Per Capita Entitlement Set Out in Treaty**

This was either 128 acres per person or 32 acres per person depending on the Treaty involved.

**2. Date of First Survey**

In most cases entitlement was calculated according to the population of a Band at the date of first survey. This date was determined by locating the first plan of survey of an Indian Reserve for the Band concerned. The term Indian Reserve, was interpreted as meaning a tract of land which was administered for the Band concerned in accordance with the terms of the Indian Act in effect at the time.

For example, in the case of the Keeseekoose Band, lands were surveyed for the Band at Swan River in 1877/78. However, these lands do not appear to have been administered as an Indian Reserve, and they were shortly abandoned by the Band which moved to the south and settled at Fort Pelly. Subsequently in 1883/84, lands were surveyed for the Keeseekoose Band at Fort Pelly and it was these lands which were later confirmed by Order-in-Council in 1889 as the Keeseekoose I.R. No. 66. Thus, in the case of the Keeseekoose Band, the date of first survey was considered to be 1883/84 rather than the earlier date of 1877/78.

Once the first plan of survey of an Indian Reserve for the Band concerned had been located, the exact date to be used as the date of first survey was established. This was taken from the plan of survey and was the date noted on the plan, by the surveyor, as the date at which he carried out the survey. If such a date was not recorded on the plan, the date on which the surveyor signed the plan was used.

For example, the first plan of survey of an Indian Reserve for the Muskowekan Band is the plan of the Muskowekan I.R. No. 85, recorded in the Canada Land Surveys Records as No. 197. The plan bears the notation, "surveyed in March 1884" and, therefore, the date of first survey used in this case was 1884.

In some cases Indian Reserves were not actually surveyed as such but were established from township surveys carried out by the Department of Interior in the course of the original surveying of all lands for homestead purposes. In such cases, population was taken at the year in which the reserve was first identified and used as an Indian Reserve.

In some cases a Band adhered to Treaty after land had been surveyed and set aside for its use and benefit. In such cases, the population at the date of adhesion was used. For example, the Witchekan Lake Band did not adhere to Treaty 6 until 1950, although the Witchekan Lake I.R. No. 117 was set aside in 1918. In this case calculations were based on the population in 1950 and the Band was found to have an outstanding entitlement.

Certain Bands made their first selection of lands in the 1960's and in these cases, formal agreement was reached between the Province, this Department and the Bands concerned that entitlement would be calculated according to the population at date of first selection of lands. In these cases, entitlement was calculated according to the selection date agreed upon in past negotiations.

### **3. Population**

Once the date at which entitlement was to be calculated had been established, the most accurate record of the Band population at that date was sought.

For any cases from 1965 onwards, the certified population figures published by the Indian Inuit Program Statistics Division were used. Statistics did not publish population figures prior to 1965 and, therefore, from 1951 onwards the membership rolls held by the Registrar provided the most accurate record of population. Prior to 1951, membership rolls were not kept and population figures were therefore taken from the treaty annuity paylists.

In determining the population from the treaty paylists, the figure used was that shown as "Total Paid" for the year in question. It should be noted that in using this figure, the following factors were not accounted for:

- i) Band members absent at the time of treaty payment;
- ii) New members subsequently adhering to treaty.

Although the above factors were not accounted for in our basic criteria and entitlement calculations, it was recognized that they might constitute a basis for future negotiation.

The Thunderchild Band provides an example of a Band affected both by absentees at the date of first survey and by a large number of new members joining the Band after the date of first survey. As stated previously, the basic criteria make no allowance for either of these factors; however, in this case the population figure of 6 in 1881 was so low that no attempt was made to use it. Instead, entitlement was calculated according to both the 1880 and 1882 population figures, but found to be fulfilled in both cases.

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According to the Treaty Paylists, the Thunderchild Band was joined by the Nipahase Band and few remaining members of the Young Chipewyan Band in 1889. The Young Chipewyan Band was originally allotted the Stony Knoll Reserve No. 107. However, in 1897 the Department of Indian Affairs relinquished the reserve and control of the lands was resumed by the Department of the Interior since the Band had broken up and amalgamated with other Bands in the area. The Nipahase Band had never been allotted any lands under Treaty 6. It was recognized that by calculating entitlement from the 1880 or 1882 populations, no allowance was made for the members of the Young Chipewyan and Nipahase Bands who joined the Thunderchild Band after those dates. Since neither of these Bands had, in effect, received any lands prior to joining Thunderchild, notes were included in our report to indicate that an argument could be put forward that these members be provided with an entitlement.

During the discussions with the Federation of Saskatchewan Indians in Regina, it was finally agreed that the Thunderchild Band's entitlement would be calculated according to the combined populations of the three Bands. In addition, it was agreed to use the Band populations in 1884, the second date of survey of lands for the Thunderchild Band, since no valid population figure for the Thunderchild Band was available at the date of first survey. Thus, as a result of negotiation, allowance was made both for the substantial number of absentees and for the new members joining the Band and the Department agreed to recognize the Thunderchild Band as having an outstanding entitlement.

#### **4. Entitlement**

Once the population at date of first survey had been determined, entitlement was calculated by multiplying this figure by the per capita acreage set out in the appropriate treaty.

The only exception to this method of calculating entitlement was the case of the Lac La Ronge Band. This Band provides a unique example of a Band whose residual entitlement was met by the Province of Saskatchewan in the 1960's on the basis of a type of compromise formula. Between the years 1897-1948 the Band had received a total of 43,761.99 acres in partial satisfaction of its entitlement under Treaty 6. In 1961, the Band officially requested the remainder of its entitlement. After a series of negotiations, agreement was reached between the Band, Federal and Provincial Governments that the Band's residual entitlement totalled 63,330 acres. This figure was arrived at by means of a formula which calculated the percentage of the Band's total entitlement received at each date lands were set aside. It was calculated that 51.65% was received in 1897, 7.95% in 1909 and 5.16% in 1948, totalling 64.76%. This meant that 35.24% of the Band's entitlement was outstanding, which, calculated from the population in 1961, equalled 63,330 acres.

In all other cases entitlement calculations proved straightforward, based on the population at date of first survey, or in the case of the exceptions mentioned previously in this report, at some other date decided upon. The same calculation process was applied in the case of Bands which split or divided to form one or more new Bands. Basically such Bands can be divided into two categories for entitlement purposes and were treated as follows:



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**i) Bands which split after lands had been received**

In such cases a Band had received some land before splitting and therefore the first survey also took place before the split. The population figure at the date of first survey would be that of the original Band and entitlement was therefore calculated from this figure, for the original Band as a whole and not separately for the new Bands. In determining whether entitlement had been fulfilled, the lands received by the original Band and any lands subsequently received by the new Bands were considered.

**ii) Bands which split before any lands had been received**

In such cases, the original Band had not received any land when it split and therefore the first surveys took place after the split, when lands were selected by the new Bands. Entitlement was therefore calculated separately for each Band, after the split, based on the dates of first survey.

An example of such a split is provided by the Keeseekoose and Duck Bay Bands. As explained previously in this report, the date of first survey for the Keeseekoose Band was considered to be 1883. In 1877, prior to this date a group of Indians who had always resided at Duck Bay split away from the Keeseekoose Band to be paid separately as the Duck Bay Band. Thus, when the Keeseekoose Band's entitlement was calculated according to the population in 1883, the Duck Bay Indians were no longer included in the Band. Entitlement was therefore calculated separately for the Keeseekoose Band. In determining whether entitlement had been fulfilled, the lands received by the Keeseekoose Band, only, were included and on this basis, the Band was found to have an outstanding entitlement.

The Duck Bay Band, now known as the Pine Creek Band, is located in Manitoba. Its entitlement would also be calculated separately, based on the date lands were first surveyed for the Band.

**5. Lands Received**

The amount of land received by a Band was determined by totalling the acreages of all Reserve lands set aside for the use and benefit of the Band in fulfilment of treaty entitlement.

The acreage was taken from the Order-in-Council setting aside the Reserve except in cases where it was altered by subsequent survey. For example, in the case of the Red Earth Band, a Reserve was originally surveyed in 1884 with an area of 2,711.64 acres. In 1911 it was resurveyed and found to contain 3,595.95 acres. The area of 3,595.95 acres was used in the Order-in-Council confirming the Reserve in 1912 and therefore 3,595.95 acres was also used as the area of the Reserve for entitlement purposes.

In cases where an Order-in-Council did not state the acreage of the Reserve, it was taken from the plan of survey of the Reserve.

In determining the total amount of land received by a Band, only those lands received as treaty entitlement were included. Lands received for the following reasons were not included in the total:

- i) Lands received in exchange for lands surrendered for sale.

- ii) Lands received in compensation for lands taken for public purposes.
- iii) Lands purchased with Band funds.

The Keeseekoose, Muskowekan, Thunderchild and Kinistino Bands all provide examples of Bands which purchased lands using Band funds. In none of these cases were the lands purchased by the Bands included in the lands received for entitlement purposes.

The Keeseekoose, Thunderchild and Kinistino Bands also provide examples of Bands which surrendered for sale some, or all, of the lands originally received in exchange for other lands. In all cases, the acreages of the lands originally set aside for the Bands were used for entitlement purposes and not the acreages of the lands subsequently received in exchange for those surrendered.

Department of Indian Affairs  
and Northern Development  
Prepared August 1977

# APPENDIX E

## DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

### Criteria Used in Determining Bands with Outstanding Entitlements in Saskatchewan

Prepared by H. Flynn, Lands and Membership Division

Unpublished, August 1977 [Version 2]

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## CRITERIA USED IN DETERMINING BANDS WITH OUTSTANDING ENTITLEMENTS IN SASKATCHEWAN

Research to determine those Bands in Saskatchewan with outstanding Treaty land entitlements was commenced in December, 1975. At this time an attempt was made to establish a series of basic criteria to be used in calculating entitlements. It was agreed that, basically, entitlement would be calculated by multiplying the per-capita entitlement set out in the appropriate Treaty by the total Band population at the date of first survey of Indian Reserve lands. The total amount of Reserve land received by a Band would be compared with this entitlement to determine whether it had been fulfilled or whether the Band was entitled to more land. As research progressed, it was often found necessary to modify the criteria to accommodate unique circumstances affecting individual Bands. However, such modifications were made only when absolutely necessary and in all other cases consistent application of the established criteria was maintained.

The Federation of Saskatchewan Indians put forward land entitlement claims for 25 Bands. Departmental research, based on the criteria established, initially confirmed the claims of 11 of these Bands. In February, 1977, a meeting was held with representatives of the F.S.I. in Regina to compare research findings on the 25 Bands put forward by the F.S.I. As a result of this meeting, the Department agreed to recognize the claims of four additional Bands, however this was on the basis of historical facts peculiar to those Bands and should not be construed as a change in the established criteria.

The following is a detailed outline of each of the criteria established, together with an explanation of any modifications found to be necessary during the course of our research:

### 1. Per-Capita Entitlement Set Out in Treaty

This was straightforward, being either 128 acres per person or 32 acres per person depending on the Treaty involved.

### 2. Date of First Survey

In most cases entitlement was calculated according to the population of a Band at the date of first survey. This date was determined by locating the first plan of survey of an Indian Reserve for the Band concerned. The term, Indian Reserve, was interpreted as meaning a tract of land which was administered for the Band concerned in accordance with the terms of the Indian Act in effect at the time.

For example, in the case of the Keeseekooseland Band, lands appear to have been surveyed for the Band at Swan River in 1877/78. However, these lands do not appear to have been administered as an Indian Reserve and, without any form of surrender, they were shortly abandoned by the Band which moved to the South and settled at Fort Pelly. Subsequently in 1883/84, lands were surveyed for the Keeseekooseland Band at Fort Pelly and it was these lands which were later confirmed by Order in Council in 1889 as the Keeseekooseland I.R. No. 66. Thus, in the case of the Keeseekooseland Band, the date of first survey was considered to be 1883/84 rather than the earlier date of 1877/78.

Once the first plan of survey of an Indian Reserve for the Band concerned had been located, the exact date to be used as the date of first survey was established. This was taken from the plan of survey and was the date noted on the plan, by the surveyor, as the date at which he carried out the survey. If such a date was not recorded on the plan, the date on which the surveyor signed the plan was used.

For example, the first plan of survey of an Indian Reserve for the Muskowekan Band is the plan of the Muskowekan I.R. No. 85, recorded in the Canada Land Surveys Records as No. 197. The plan bears the notation, "surveyed in March 1884" and, therefore, the date of first survey used in this case was 1884.

In some cases Indian Reserves were not actually surveyed as such but were established from township surveys carried out by the Department of Interior in the course of the original surveying of all lands for homestead purposes. In such cases, population was taken at the year in which the reserve was first identified and used as an Indian Reserve.

An example of such a situation is the Chitek Lake I.R. No. 191 which was temporarily reserved from the township surveys for the Pelican Lake Band in 1917. In this case the population in 1917 was used to calculate the Band's entitlement.

In some cases a Band adhered to Treaty after land had been surveyed and set aside for its use and benefit. In such cases, the population at the date of adhesion was used. For example, the Witchekan Lake Band did not adhere to Treaty 6 until 1950, although the Witchekan Lake I.R. No. 117 was set aside in 1918. In this case calculations were based on the population in 1950 and the Band was found to have an outstanding entitlement.

Certain Bands made their first selection of lands in the 1960's and in these cases, formal agreement was reached between the Province, this Department and the Bands concerned that entitlement would be calculated according to the population at date of first selection of lands. In these cases, entitlement was calculated according to the selection date agreed upon in past negotiations, although, for information purposes, calculations based on the date of first survey were also included in our reports. The Bands concerned are:— Fond du Lac, Stony Rapids, Lac La Hache and Portage La Loche.

It should be noted that, of those Bands, the Province has refused to re-open the entitlement claims of the Lac La Hache and Portage La Loche Bands, which it considers to have been settled in accordance with the past agreements. In the case of the Fond du Lac and Stony Rapids Bands, administrative problems delayed the Provincial transfer of some of the lands selected by the Bands and, until recently, the Bands had refused to accept these lands. They took the position that entitlement should be revised and recalculated according to present day population figures to compensate for the delay in the confirmation of all the lands originally selected. The Province has agreed to this request and the Fond du Lac and Stony Rapids Bands are both recognized as having outstanding entitlements.

### **3. Population**

Once the date at which entitlement was to be calculated had been established, the most accurate record of the Band population at that date was located.

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For any cases from 1965 onwards, the certified population figures published by the Indian Inuit Program Statistics Division were used. Statistics did not publish population figures prior to 1965 and, therefore, from 1951 onwards the membership rolls provided the most accurate record of population. Prior to 1951, membership rolls were not kept and population figures were therefore taken from the treaty annuity paylists.

In determining the population from the treaty paylists, the figure used was that shown as "Total Paid" for the year in question. It should be noted that in using this figure, the following factors were not accounted for:

- i) Band members absent at the time of treaty payment.
- ii) New members subsequently transferring into the Band from other Bands which may or may not have received their full treaty land entitlement.
- iii) New members subsequently adhering to treaty.
- iv) Members subsequently transferring out of the Band to other Bands.

Although the above factors were not accounted for in our basic criteria and entitlement calculations, it was recognized that they might constitute a basis for future negotiation with the F.S.I. Notes were therefore included in our reports for any cases in which these factors were found to arise to any great extent.

The Poundmaker Band provides an example of the effect a large amount of absentees will have on the population figure when taken from the Treaty Paylists. Firstly, however, it should be noted that, in this case, the basic entitlement calculations, in accordance with the established criteria, show entitlement to be fulfilled based on joint calculations with the Red Pheasant Band. It was recognized, however, that this method of calculation was based on the date of first survey of lands for the Red Pheasant Band, whereas the Poundmaker Band did not receive any lands until 1881, after it had split away to form a separate Band.

For the purpose of future negotiations, notes were therefore included to show entitlement calculations based on the population of the Poundmaker Band in 1881. It was [noted], however, that the Paylist showed an abnormally low figure of 96 as paid in 1881, compared to 157 in 1880 and 164 in 1882, increasing to 233 in 1884. It appeared that a considerable number of the Band paid in 1882 was absent in 1881 and notes were therefore included to this effect. In addition, it was noted that when the Poundmaker Reserve was surveyed in 1881, the surveyor, Simpson gave the Band population as 149.

During the February 1977 discussions with the F.S.I. in Regina, the entitlement calculation finally put forward by the Department as the most equitable was based on the population of 149 in 1881. Thus, although our basic criteria and entitlement calculations did not account for absentees, they were finally allowed for as a result of negotiation. I should note that even when calculated from the population of 149, the Poundmaker Band's entitlement has been fulfilled and the Band is not recognized as having an outstanding entitlement.

The Thunderchild Band provides an example of a Band affected both by absentees at the date of first survey and by a large number of new members joining the Band after the date of first survey. As stated previously, the basic criteria make no allowance for either of these

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factors, however, in this case the population figure of 6 in 1881 was so low that no attempt was made to use it. Instead, entitlement was calculated according to both the 1880 and 1882 population figures, but found to be fulfilled in both cases.

According to the Treaty Paylists, the Thunderchild Band was joined by the Nipahase Band and few remaining members of the Young Chipewyan Band in 1889. The Young Chipewyan Band was originally allotted the Stony Knoll Reserve No. 107, however in 1897 the Department of Indian Affairs relinquished the reserve and control of the lands was resumed by the Department of the Interior since the Band had broken up and amalgamated with other Bands in the area. The Nipahase Band had never been allotted any lands under Treaty 6. It was recognized that by calculating entitlement from the 1880 or 1882 populations, no allowance was made for the members of the Young Chipewyan and Nipahase Bands who joined the Thunderchild Band after those dates. Since neither of these Bands had, in effect, received any lands prior to joining Thunderchild, notes were included in our report to indicate that an argument could be put forward that these members be provided with an entitlement.

During the discussions with the F.S.I. in Regina, it was finally agreed that the Thunderchild Band's entitlement would be calculated according to the combined populations of the three Bands. In addition, it was agreed to use the Band populations in 1884, the second date of survey of lands for the Thunderchild Band since no valid population figure for the Thunderchild Band was available at the date of first survey. Thus, as a result of negotiation, allowance was made both for the absentees and for the new members joining the Band and the Department agreed to recognize the Thunderchild Band as having an outstanding entitlement.

The Pelican Lake Band provides yet another example of new members being admitted to the Band after the date at which entitlement was calculated. In this case entitlement was calculated according to the population in 1917 and found to be fulfilled. In 1949, however a total of 53 new members were officially admitted into the Band and paid under Treaty for the first time. If these members were to be provided with an entitlement, the Band would be entitled to more land and since it was recognized that such an argument might be put forward, notes to this effect were included in our report.

When the Pelican Lake Band was discussed with the F.S.I. in Regina, it became apparent that the F.S.I. was not basing its claim to outstanding entitlement purely on the fact that these new members were admitted in 1949. Instead, the F.S.I. claimed that these people were, in fact, Band members in 1917 and should have been included in the 1917 population figure when entitlement was calculated. The F.S.I. undertook to provide evidence to this effect and it was therefore agreed that no final position would be taken on the Band's entitlement at that time. Thus, in this case, the basic criteria did not allow for the new members and no final position has yet been taken as to whether or not they should be considered in calculating entitlement and this remains open to negotiation.

Apart from the foregoing exceptions, all other population figures for years prior to 1951 were based on the "Total Paid" figure from the Treaty Paylists, which was considered to be the most accurate record available.

As stated previously, from 1951 to 1964, the Membership Rolls were considered to provide the most accurate population records. It should be noted however that in the case of the Fond du Lac, Stony Rapids, Lac La Hache and Portage La Loche Bands agreement was reached between the Bands, this Department and the Province as to the basis of the calculation of their entitlements. This agreement covered the population figures to be used for each Band, as follows:

Fond du Lac	360 in 1961
Stony Rapids	382 in 1964
Lac La Hache	207 in 1964
Portage La Loche	183 in 1964

Although membership rolls were available for 1961 and 1964, the figures for the Fond du Lac, Stony Rapids and Lac La Hache Bands appear to have been taken from the Paylists. The figure for the Portage La Loche Band was provided by the Superintendent of the Meadow Lake Agency in 1964 and was not based on the membership rolls or the payroll. As stated previously, the Province has refused to re-open the entitlements of the Lac La Hache and Portage La Loche Bands but the Fond du Lac and Stony Rapids Bands are recognized as having outstanding entitlements.

#### 4. Entitlement

Once the population at date of first survey had been determined, entitlement was calculated by multiplying this figure by the per-capita acreage set out in the appropriate treaty.

The only exception to this method of calculating entitlement was the case of the Lac La Ronge Band. This Band provides a unique example of a Band whose residual entitlement was met by the Province of Saskatchewan in the 1960's on the basis of a type of compromise formula. Between the years 1897-1948 the Band had received a total of 43,761.99 acres in partial satisfaction of its entitlement under Treaty 6. In 1961, the Band officially requested the remainder of its entitlement. After a series of negotiations, agreement was reached between the Band, Federal and Provincial Governments that the Band's residual entitlement totalled 63,330 acres. This figure was arrived at by means of a formula which calculated the percentage of the Band's total entitlement received at each date lands were set aside. It was calculated that 51.65% was received in 1897, 7.95% in 1909 and 5.16% in 1948, totalling 64.76%. This meant that 35.24% of the Band's entitlement was outstanding, which, calculated from the population in 1961, equalled 63,330 acres. It should be noted that the Lac La Ronge Band has since repudiated this method of calculating its entitlement but the Province has refused to re-open the case on the basis that it was settled, in good faith, according to past agreement.

In all other cases entitlement calculations proved straightforward, based on the population at date of first survey, or in the case of the exceptions mentioned previously in this report, at some other date decided upon. The same calculation process was applied in the



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case of Bands which split or divided to form one or more new Bands. Basically such Bands can be divided into two categories for entitlement purposes and were treated as follows:

**i) Bands which split after lands had been received**

In such cases a Band had received some land before splitting and therefore the first survey also took place before the split. The population figure at the date of first survey would be that of the original Band and entitlement was therefore calculated from this figure, for the original Band as a whole and not separately for the new Bands. In determining whether entitlement had been fulfilled, the lands received by the original Band and any lands subsequently received by the new Bands were considered.

The Red Pheasant and Poundmaker Bands provided an example of such a split. The Poundmaker Band originally comprised part of the Red Pheasant Band and did not split away to form a separate Band until 1880. Lands were first surveyed for the Red Pheasant Band in 1878, before the Poundmaker Band split away and entitlement was therefore calculated jointly for the two Bands based on the combined population at this date. In determining whether entitlement had been fulfilled, the lands received by both the Red Pheasant and Poundmaker Bands were included. On this basis, the entitlement of both Bands was found to be extinguished.

As noted previously, during the discussions with the F.S.I. in Regina, this method of calculating entitlement was not the method finally put forward by the Department as the most equitable in the case of the Poundmaker Band. A similar change in position was also taken in the case of the Red Pheasant Band, which the Department had recognized as having an outstanding entitlement. However, these changes were made as a result of the negotiation process and should not be construed as a change in the basic criteria.

The Red Earth Band provides another example of a Band split after lands had been surveyed. In this case, the Red Earth and Shoal Lake Indians originally formed part of The Pas Band and were still included in The Pas Band when lands were first surveyed in 1882. Entitlement was therefore calculated according to the combined population of the three Bands in 1882 and in determining whether it had been fulfilled, the lands received by all three Bands were included. On this basis, the entitlement of all three Bands was found to be extinguished and the Red Earth Band is not recognized as having an outstanding entitlement.

A final example of this type of split is provided by the Yellow Quill Band which divided in 1905 to form three separate Bands – Fishing Lake, Nut Lake and Kinistino. When lands were first surveyed in 1881, the Yellow Quill Band was still a single unit. Entitlement was therefore calculated for the original Yellow Quill Band according to the 1881 population. In determining whether it had been fulfilled, the lands received by each of the new Bands were included, and on this basis entitlement was found to be extinguished. Since the entitlement of the original Band was fulfilled, the Department does not recognize the three new Bands of Fishing Lake, Nut Lake and Kinistino as having outstanding entitlement.

**ii) Bands which split before any lands had been received**

In such cases, the original Band had not received any land when it split and therefore the

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first surveys took place after the split, when lands were selected by the new Bands. Entitlement was therefore calculated separately for each Band, after the split, based on the dates of first survey.

An example of such a split is provided by the Keeseekoose and Duck Bay Bands. As explained previously in this report, the date of first survey for the Keeseekoose Band was considered to be 1883. In 1877, prior to this date a group of Indians who had always resided at Duck Bay split away from the Keeseekoose Band to be paid separately as the Duck Bay Band. Thus, when the Keeseekoose Band's entitlement was calculated according to the population in 1883, the Duck Bay Indians were no longer included in the Band. Entitlement was therefore calculated separately for the Keeseekoose Band. In determining whether entitlement had been fulfilled, the lands received by the Keeseekoose Band, only, were included and on this basis, the Band was found to have an outstanding entitlement.

The Duck Bay Band, now known as the Pine Creek Band, is located in Manitoba and was not therefore included in this research. However, its entitlement would also be calculated separately, based on the date lands were first surveyed for the Band.

#### **5. Lands Received**

The amount of land received by a Band was determined by totalling the acreages of all Reserve lands set aside for the use and benefit of the Band in fulfilment of treaty entitlement.

The acreage was taken from the Order-in-Council setting aside the Reserve except in cases where it was altered by subsequent survey. For example, in the case of the Red Earth Band, a Reserve was originally surveyed in 1884 with an area of 2,711.64 acres. In 1911 it was resurveyed and found to contain 3,595.95 acres. The area of 3,595.95 acres was used in the Order-in-Council confirming the Reserve in 1912 and therefore 3,595.95 acres was also used as the area of the Reserve for entitlement purposes.

In cases where an Order in Council did not state the acreage of the Reserve, it was taken from the plan of survey of the Reserve.

In determining the total amount of land received by a Band, only those lands received as treaty entitlement were included. Lands received for the following reasons were not included in the total:

- i) Lands received in exchange for lands surrendered for sale.
- ii) Lands received in compensation for lands taken for public purposes.
- iii) Lands purchased with Band funds.

The Keeseekoose, Muskowequan, Thunderchild and Kinistino Bands all provide examples of Bands which purchased lands using Band funds. In none of these cases were the lands purchased by the Bands included in the lands received for entitlement purposes.

The Keeseekoose, Thunderchild and Kinistino Bands also provide examples of Bands which surrendered for sale some, or all, of the lands originally received in exchange for other lands. In all cases, the acreages of the lands originally set aside for the Bands were

used for entitlement purposes and not the acreages of the lands subsequently received in exchange for those surrendered.

H. Flynn  
Lands and Membership [August 1977]

# APPENDIX F

**DEPARTMENT OF INDIAN AFFAIRS AND  
NORTHERN DEVELOPMENT**

**OFFICE OF NATIVE CLAIMS  
HISTORICAL RESEARCH GUIDELINES FOR  
TREATY LAND ENTITLEMENT CLAIMS**

Unpublished memorandum, May 1983

**OFFICE OF NATIVE CLAIMS HISTORICAL RESEARCH GUIDELINES  
FOR  
TREATY LAND ENTITLEMENT CLAIMS**

The general principle which applies in all categories of land entitlement claims is that each Treaty Indian Band is entitled to a certain amount of land based on the number of members. Conversely, each treaty Indian is entitled to be included in an entitlement calculation as a member of an Indian Band.

The following criteria are intended as guidelines in the research and validation process for treaty land entitlement claims. They have evolved from historical research done by the Office of Native claims (ONC) in consultation with the Federal Department of Justice, and in consultation with the research representatives of the claimant bands. Each claim is reviewed on its own merits keeping in mind these guidelines. However, as experience has taught, new and different circumstances have arisen with each claim. Therefore, the review process is not intended to be restricted to these guidelines.

Determining a Band's treaty land entitlement involves five basic steps:

- 1) Identification of the band and the applicable Treaty.
- 2) Determination of the relevant survey date.
- 3) Determination of the total lands received by the band.
- 4) Determination of the population base.
- 5) Overall entitlement calculations.

**A Identification of Claimant Band**

The claimant Band may be known by its original name or a new name. The present day band is traced to the ancestral band which originally signed or adhered to treaty. Depending on which of the eleven numbered treaties the band signed or adhere to, the band is entitled to a reserve acreage based on a per capita allotment of 32 acres per member or 128 acres per member.

**B Date for Entitlement Calculation**

The date to be used in the land quantum calculations is seldom clearly spelled out in any of the treaties. Some of the treaties refer to the laying aside or assignment of a reserve, others mention the selection of land. Legal advice from the Department of Justice suggests that, although the treaties do not clearly identify the data for which a band's population base is to be determined for the land quantum calculations, the most reasonable date is not later than the date of first survey of land. It is Canada's general view that this is the date to be used to determine whether it has met its obligation under the treaties, to provide a quantum of land to an Indian Band based on the population of that Band at date of first survey.

Generally the date to be used is taken from the plan of survey of the first reserve set aside for the use and benefit of an Indian Band. This is the date which is noted by the surveyor as

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the date which he carried out the survey. Other indicators that ought to be noted include the date on which the surveyor signed the plan and the date noted in the surveyor's field book.

In some cases, the date which is chosen for entitlement purposes is not the date of the first actual survey for a band's reserve. A reserve may have been surveyed for the band, but it was never administered as a reserve. Furthermore, if the band rejects the survey and abandons the reserve after the survey, another reserve may be surveyed elsewhere at a later date and confirmed by Order-in-Council. Depending on the facts in each case, this could be considered as the date of first survey. The later survey date could be used as date of first survey because this is when the first reserve, officially recognized by Order-in-Council, was set aside for the band.

### **C Lands Received**

The amount of land received by a Band is determined by totalling the acreages of all Reserve lands set aside for the use and benefit of the Band in fulfillment of treaty land entitlement.

The acreage figure is taken from the Order in Council setting aside the reserve. Subsequent surveys are also relevant and ought to be considered. In cases where an Order-in-Council confirming the reserve did not state the acreage of the reserve it was taken from the plan of survey of the reserve.

In determining the total amount of land received by a Band, only those lands received as treaty entitlement were included. Lands received for the following reasons were not included in the total unless the historical record warranted it:

- i) Lands received in exchange for land surrendered for sale.
- ii) Lands received in compensation for lands taken for public purposes.
- iii) Lands purchased with Band funds.

### **D Population Base for the Determination of an Outstanding Land Entitlement**

An outstanding treaty land entitlement exists when the amount of land which a band has received in fulfillment of its entitlement is less than what the band was entitled to receive under the terms of the treaty which the band adhered or signed. This is referred to as a shortfall of land. There are two situations where a shortfall may exist. The first is when the land surveys fail to provide enough land to fulfill the entitlement. The second is when new members who have never been included in a land survey for a band, join a band that has had its entitlement fulfilled. The objective is to obtain as accurate a population of the band as is possible on the date that the reserve was first surveyed. The only records which recorded membership of Indians in the bands prior to 1951 were the annuity paylists and the occasional census. The annuity paylists are what is generally relied upon in order to discover the population at the date of first survey. This is done by doing an annuity paylist analysis.

In paylist analysis, all individuals being claimed for entitlement purposes are traced. This includes a review of all band paylists in a treaty area for the years that an individual is

absent, if necessary. All agent's notations are investigated regarding the movements, transfers, payment of arrears, or any other event that affects the status of a band member. A ten to fifteen year period is usually covered depending on the individual case. This period would generally begin at the time the treaty was first signed, through the date of first survey and a number of years afterwards. Where a claim depends solely on new adherents or transfers from landless bands, the band memberships may be traced through to the present day.

The following principles are generally observed in an annuity pay list analysis:

***Persons included for entitlement purposes:***

- 1) Those names on the payroll in the year of survey.
- 2) Absentees who are paid arrears. These are band members who are absent for the year of survey but who return and are paid arrears for that year.  
Absentees who return and who are not paid arrears. These people must be traceable to: when they became band members and how land they remained as members during say, a ten to fifteen year period around the date of survey. Generally, continuity in band membership is required. Also it must be shown that they were not included in the population base of another band for treaty land entitlement purposes, while absent from the band.
- 3) New Adherents to treaty. These are Indians, who had never previously signed or adhered to treaty and consequently have never been included in an entitlement calculation.
- 4) Transfers from Landless Bands. These are Indians who have taken treaty as members of one band, then transferred to another band without having been included in the entitlement calculation of the original band, or of the band to which they have transferred. The parent band may not have received land, whereas the host band may have already had its entitlement fulfilled. These Indians are acceptable, as long as they have never been included in a land quantum calculation with another band.
- 5) Non-Treaty Indians who marry into a Treaty Band. This marriage, in effect, makes them new adherents to treaty.

***Persons not included***

- 1) Absentees, new adherents and transfers from landless bands, who do not retain a reasonable continuity of membership in the band i.e: they are away most of the time. However, these are dealt with on a case by case basis and there may be circumstances which warrant the inclusion of a band member even though he may be absent for an extended period of time.
- 2) Where the agent's notes in the payroll simply states "married to non-treaty", those people are not included. They could be non native or métis and therefore ineligible.

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- 3) Where the agents notation simply reads "admitted" (which often meant admitted to band and not to treaty) and no letter of admission to treaty can be found, these persons are excluded.
  - 4) Persons who are not readily traceable i.e.: they seem to appear from nowhere and disappear in a similar fashion.
  - 5) Persons who were included in the population base of another band for treaty land entitlement purposes.
  - 6) Person names which are discovered to be fraudulent.

### ***Land Entitlement Claims Arising from Band Amalgamation***

There are cases where a present day band was formed as a result of the amalgamation of two or more bands. An outstanding land entitlement will occur when one or more of the component bands has a shortfall of land before amalgamation with the other band or bands, and that shortfall causes a shortfall to exist for the amalgamated band. The payroll analysis is done for the component band or bands which have a shortfall, employing the same principles previously described.

In cases where one or more of the component bands has a surplus of land, and this surplus is greater than the deficit of the other component band(s), then the entitlement of the amalgamated band has been fulfilled. The Department of Justice concurs with this view. The deficit component bands would have had full use of the surplus land as full members of the amalgamated band.

### **E Calculation of a Shortfall**

This is a simple calculation where the most accurate population figure obtained from the payroll analysis, is multiplied by the per capita allotment of the appropriate treaty. Where the amount of land received is less than the calculated entitlement, a shortfall is said to exist and therefore an outstanding land entitlement is owed to the band. Where the land quantum received is equal to or exceeds this calculation, the entitlement has been fulfilled.

MAY 1983



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# RESPONSES

Canada's Response to the Fort McKay First Nation  
Treaty Land Entitlement Inquiry  
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RESPONSE TO THE INDIAN CLAIMS COMMISSION REPORT  
FORT MCKAY FIRST NATION —  
TREATY LAND ENTITLEMENT DECEMBER 1995

On December 6, 1996, the Indian Claims Commission released its report into the Fort McKay First Nation Treaty Land Entitlement Inquiry and recommended that Canada accept the claim for negotiation under the Specific Claims Policy. In the interests of expediting a review of the report and resolution of the claim, the Commission also recommended that a meeting be arranged among the parties 90 days following the release of the report to formally draw the inquiry to a close. The Commission scheduled a meeting on March 12, 1996, for the parties to discuss the report and its implications, but the meeting was cancelled because Canada had not completed its internal review of the report. On March 29, 1996, the Commission wrote to the Hon. Ronald A. Irwin, Minister of Indian Affairs, expressing its concerns about the cancellation of the meeting and requesting that it be rescheduled for April 12, 1996.

On April 1, 1996, Minister Irwin responded to the Commission's report. The following are excerpts from that letter:

First, I want to assure you that I am very interested in your work on TLE claims, and we are giving careful attention to your conclusions.

I know that you and the Fort McKay First Nation are anxious to have our response on your recommendation. Before I can provide that, I must draw attention to the fact that the First Nation has active litigation outstanding against Canada on the same issue. It is not the practice of this department to attempt resolution of claims while we are being sued. In this instance, the claim has proceeded through the Indian Specific Claims Commission (ISCC) because you decided to conclude the hearing and make your recommendation. Left to us, we would not have continued work while being sued.

We are not prepared to engage in efforts which may lead to a resolution of the claim on a policy basis while the litigation remains alive. Accordingly I ask that the First Nation place the litigation in abeyance.

If they do so, it would be my further recommendation that the ISCC carry out research on this claim in accordance with the approach to TLE outlined in your report. I suggest that, in relying on the conclusions of research put before you in the hearing, you may be including or excluding people who would or would not be eligible under your recommended approach.

I further suggest that it is premature for the ISCC to recommend we accept the claim for negotiation until this work is done.

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On April 4, 1996, Jerome Slavik, legal counsel for the Fort McKay First Nation, wrote to Mr. Ron Maurice, Commission Counsel, regarding Minister Irwin's letter. Mr. Slavik advised that

... Fort McKay *is not in active litigation against Canada* on this issue. In 1991, the Department of Justice requested that the litigation on this matter be held in abeyance pending the outcome of the specific claims process. Our client agreed to hold this litigation in abeyance and *for five (5) years*, no steps have been taken to proceed with litigation. [Mr. Slavik's emphasis.]

With respect to Minister Irwin's comment that it was premature for the Commission to recommend acceptance of the claim until further research had been concluded, Mr. Slavik stated:

In all previous TLE claims we have negotiated, it has *always* been the policy of DIAND to determine the final number of claimants and full extent of the TLE obligation *after* validation of the claim and commencement of negotiations. This is particularly true where there is clearly an outstanding lawful obligation for TLE and only a few persons amongst the whole "entitlement population" about whom the Band and DIAND may disagree.

Therefore, Mr. Slavik took the position that it was not necessary for the Commission to do further research and reiterated his request for a meeting with Canada to discuss the report. Although some steps had in fact been taken by the First Nation and Canada in the litigation, Mr. Slavik confirmed that the action had not been actively pursued and that it would be held in abeyance pending a response to the report from the Minister of Indian Affairs.

On May 17, 1996, Commission Co-Chair P.E. James Prentice and Commissioner Carole T. Corcoran replied to the Minister's letter informing him that the Commission had been advised that the action was in abeyance and requested a response from Minister Irwin on whether Canada was prepared to "review the claim on its merits in the interests of resolving this matter without the necessity of litigation." Furthermore, Commissioners Prentice and Corcoran strongly disagreed with the Minister's statement that it was premature for the Commission to recommend acceptance of the claim because the conclusions reached during the course of the inquiry were based on cogent and reliable evidence. They concluded that, even if additional research were to reveal discrepancies in the First Nation's outstanding land entitlement of 3815 acres, it was unlikely that such discrepancies would be sufficient to

nullify the claim entirely. Accordingly, the Commissioners emphasized that it was premature, and would result in a waste of time and money, to conduct additional research in the absence of a substantive response from Canada on whether it was prepared to accept the principles outlined by the Commission in its report.

A further letter was addressed to Minister Irwin from Mr. Maurice, proposing a meeting between the parties in early July. At the request of the Commission and the Fort McKay First Nation, the Deputy Minister of Indian Affairs, Mr. Scott Serson, agreed to discuss the report. The meeting was held on July 31, 1996, with representatives from the Indian Claims Commission, the Fort McKay First Nation, the Specific Claims Branch of DIAND, and the Department of Justice. Mr. Slavik made a detailed presentation to Deputy Minister Serson. Chief Jim Boucher also stated that he supported the general principles and recommendations enunciated by the Commission in the report but that the exact amount of land still owed to the band was a matter of negotiation. Mr. Serson advised that Canada would require more time to complete its internal review of the report and the implications it has for Canada's TLE policy. At the end of the meeting, the parties agreed to convene a conference call for late August to determine whether Canada was prepared to accept the claim for negotiation under the Specific Claims Policy. The First Nation also informed Canada that it would actively pursue litigation into this claim if Canada did not agree to enter into negotiations or if Canada did not respond to the merits of the claim by September 1, 1996. At the time this update was written, the Commission had not been informed of any further developments.



**THE COMMISSIONERS**



**Roger J. Augustine**, a MicMac, has been Chief of the Eel Ground First Nation of New Brunswick since 1980 and he served as president of the Union of New Brunswick–Prince Edward Island First Nations from 1988 to January 1994. Chief Augustine is active in promoting economic development among First Nations peoples, and is chairman of the Aboriginal Business Circle, and founder and chairman of the Micmac Maliseet Development Corporation and the Eagle Board Trust. He has been honoured for his efforts in founding and fostering the Eel Ground Drug and Alcohol Education Centre, as well as the Native Alcohol and Drug Abuse Rehabilitation Association. He was appointed Commissioner to the Indian Claims Commission in 1992.



**Daniel J. Bellegarde** is an Assiniboine/Cree from the Little Black Bear First Nation situated in southern Saskatchewan. From 1982 to 1984, Mr. Bellegarde worked with the Meadow Lake District Chiefs Joint Venture as a socio-economic planner. From 1984 to 1987, he was president of the Saskatchewan Indian Institute of Technologies. Since 1988 he has held the position of First Vice-Chief of the Federation of Saskatchewan Indian Nations. On March 17, 1994, he was appointed Co-Chair of the Indian Claims Commission.



**Carole T. Corcoran** is a Dene from the Fort Nelson Indian Reserve in northern British Columbia. Mrs. Corcoran has extensive experience in Aboriginal government and politics at the local, regional, and provincial levels. She served as a Commissioner on the Royal Commission on Canada's Future in 1990/91. She was appointed a Commissioner to the Indian Claims Commission in 1992, a Commissioner to the British Columbia Treaty Commission in April 1993, and a member of the Board of Governors of the University of Northern British Columbia in November 1993.



**Aurélien Gill**, a Montagnais of Mashteuiatsh (Pointe-Bleue), Quebec, graduated from Université Laval with a degree in education. A teacher, he served as the founding president of the Conseil Atikamekw et Montagnais before becoming Chief of the Mashteuiatsh (Pointe-Bleue) Montagnais community. He helped found the Institut culturel et éducatif Montagnais, the Corporation de Développement Économique Montagnaise, and the National Indian Brotherhood (today the AFN), among other associations. Mr. Gill also held positions within the federal government, including Director General, Quebec Region, Indian and Northern Affairs Canada. In 1991, he was named to the Ordre national du Québec. Mr. Gill was appointed Commissioner to the Indian Claims Commission in December 1994.



**P.E. James Prentice, QC**, is a lawyer with the Calgary firm of Rooney Prentice. He has an extensive background in land matters, including his work as legal counsel and negotiator for the Province of Alberta in the tripartite negotiations that resulted in the Sturgeon Lake Indian Claim Settlement of 1989. He also has experience in the administrative law field, having served as legal counsel on many land acquisition, expropriation, arbitration, and valuation matters in Alberta since 1981. From 1985 to 1992, Mr. Prentice chaired a quasi-judicial tribunal in Alberta. On March 17, 1994, he was named Co-Chair of the Indian Claims Commission.