INDIAN CLAIMS COMMISSION

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

PANEL

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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.

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.

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 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.

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 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 paylist 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 violation 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.

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.[1] 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.[2] 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.[3] 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 Entitlement Claims."[4] 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

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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.

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

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.[5] 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.[6]

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.[7] 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

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[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.

> 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 . . .[8]

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 5). The Fort McKay Indian Settlement is about 60 kilometres or 37 miles north of Fort McMurray in the heart of the tar sands.[9] 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

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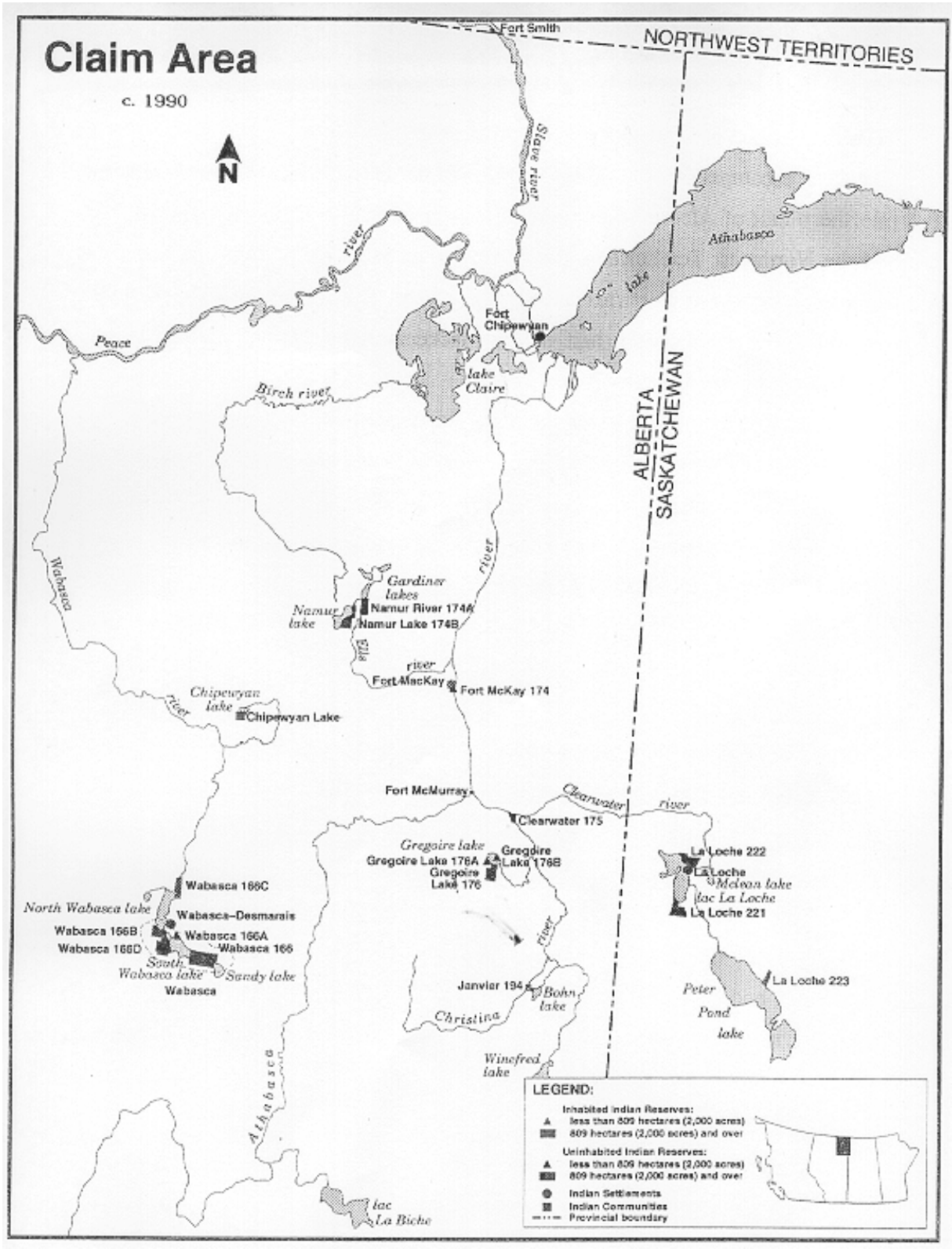
[8] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730 (July 27, 1992), amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1992, pursuant to Order in Council PC 1991-1329 (July 15, 1991).

[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 (ICC Exhibit 17).

McKay First Nation was 439, of which 217 were living on reserve and 27 were living on Crown land.[10]

[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.


Claim Area
c. 1990
N
Fort Smith
NORTHWEST TERRITORIES
Slave river
Athabasca
lake
Peace
river
Fort Chipewyan
lake Claire
Birch river
ALBERTA
SASKATCHEWAN
Wabasca
river
Gardiner lakes
Namur lake
Namur River 174A
Namur Lake 174B
Fort MacKay
Fort McKay 174
Chipewyan lake
Chipewyan Lake
Fort McMurray
Clearwater river
Clearwater 175
Gregoire lake
Gregoire Lake 176A
Gregoire Lake 176B
Gregoire Lake 176
La Loche 222
La Loche
McLean lake
lac La Loche
La Loche 221
Wabasca 166C
North Wabasca lake
Wabasca–Desmarais
Wabasca 166B
Wabasca 166A
Wabasca 166D
Wabasca 166
South Wabasca lake
Sandy lake
Wabasca
Janvier 194
Bohn lake
Christina
river
La Loche 223
Peter Pond lake
Winefred lake
Athabasca
lac La Biche
LEGEND:
Inhabited Indian Reserves:
less than 809 hectares (2,000 acres)
809 hectares (2,000 acres) and over
Uninhabited Indian Reserves:
less than 809 hectares (2,000 acres)
809 hectares (2,000 acres) and over
Indian Settlements
Indian Communities
Provincial boundary

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.

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.[11] 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.[12]

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

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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).

east, Lac La Biche to the south, and Wabasca to the west.[13] 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.[14]

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.[15] This influx of newcomers generated Treaty 8 in 1899 just as the westward movement of agricultural settlers had produced the first seven "numbered" treaties.[16]

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.[17] 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 Kinosayoo 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

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[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).

[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.

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.[18]

[18] By 1914 subsequent adhesions brought approximately 32 Indian bands under Treaty 8 (Madill, *Treaty Research Report: Treaty Eight*, 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

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 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.[19]

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 Comissioner,*
>
> his
> ADAM x BOUCHER, *Chipwyan*
> mark [*Headman*,
>
> his
> SEAPOTAKINUM x CREE, Cree
> mark [*Headman,*
>
> A. LACOMBE, *O.M.I*
> ARTHUR J. WARWICK,
> T. M. CLARKE,
> J. W. MARTIN,
> F. J. FITZGERALD,
> M. J. H. VERNON.

[19] Madill, *Treaty Research Report: Treaty Eight*, 109.

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.[20]

The groups represented at the Fort McMurray signing were arbitrarily placed on a single paylist, giving rise to "The Cree-Chipewyan Band of Fort McMurray."[21] 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

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[20] 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 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).

[21] ICC Exhibit 1, tab 17, p.1.

> flexible, with individuals and families being free to leave one group and join another, either temporarily or permanently.[22]

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 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 paylist.

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.[23]

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[22] 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.

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

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.[24] 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.[25]

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."[26]

Treaty Land Entitlement under Treaty 8

The post-Confederation treaties concluded between Canada and First Nations across the Prairie provinces, and 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 15 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 atomisitic 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

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[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*, 124-25.

> 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.[27]

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.[28] It seems plausible that the wording of this draft was based on the wording of Treaty 7 (1977), 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.

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

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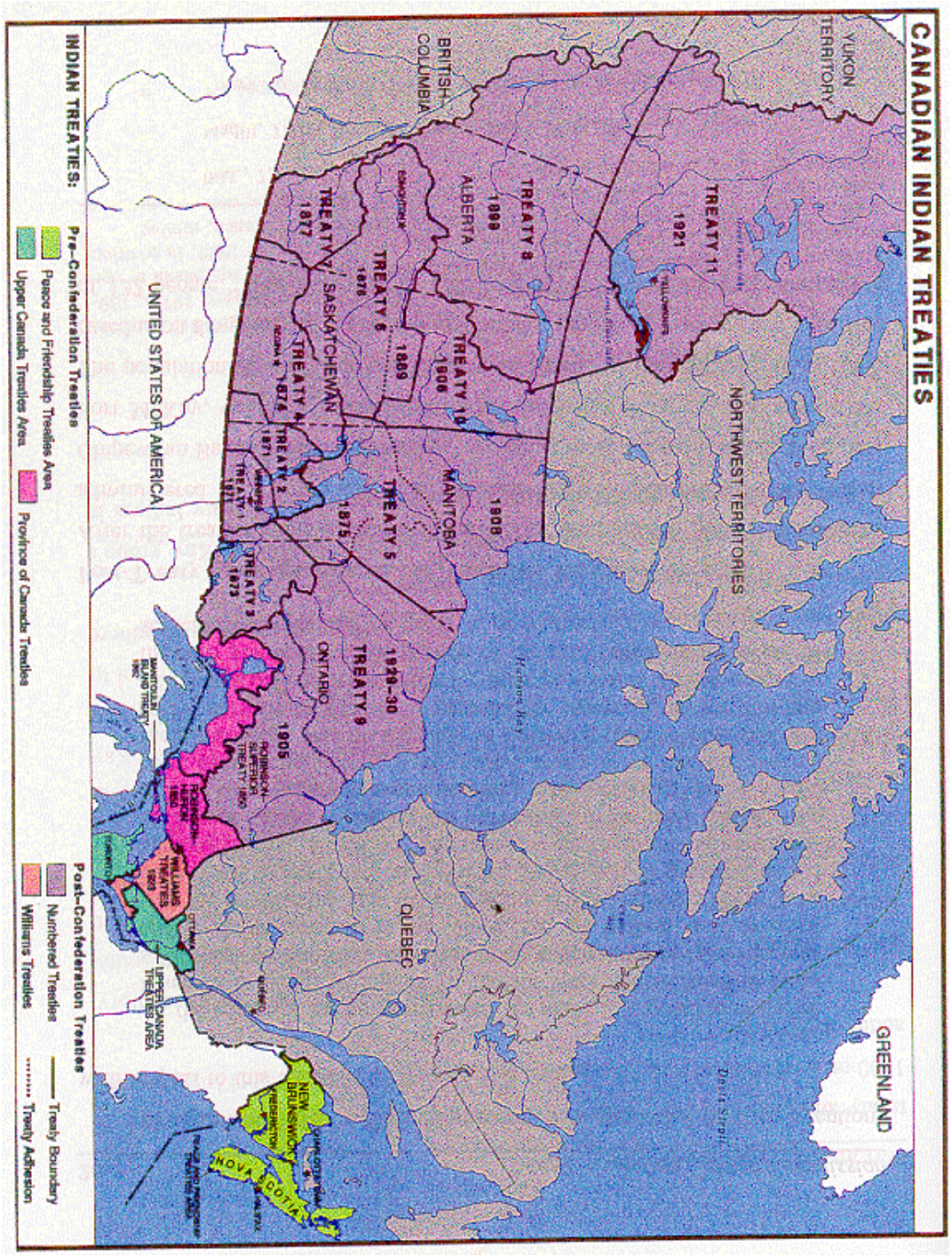
[27] James McKenna to Superintendent General of Indian Affairs, April 17, 1899, National Archives of Canada [hereinafter NA], RG 10, vol. 3848, file 75236-1.

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

apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian.[29]



[29] *Treaty No. 8*, note 18 above, 12-13.

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.[30]

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.[31] 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 paylist, appears to have consisted of 132 people.[32] The next year an additional 25 or 30 persons were admitted to treaty and placed on the "Cree-Chipewyan" list.[33] Seventeen others appeared in 1900 on a new list entitled "Stragglers at Ft. McMurray" to which 13 more were added in 1901.[34]

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

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30 Ibid., 7.

31 Madill, *Treaty Research Report: Treaty Eight*, 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.

300 kilometres or 185 miles north of Fort McKay in the Northwest Territories.[35] 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.[36] 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.[37] 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 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."[38]

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

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[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*, 81.

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

[38] ICC Transcript, pp. 109-10.

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." [39]

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

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

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.

here and wherever; people, he pay them off there."[40] 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.[41]

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 paylist 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.[42] The Portage La Loche group gained its own paylist in 1925 and the Janvier group was paid on its own list in 1941.[43]

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:

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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.

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 Cyr (or Sawyer), steerman.

> 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.[44]

An Order in Council dated May 6, 1954, finalized the establishment of two separate bands.[45] 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.[46]

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.[47]

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.[48] Since the Indians had been

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[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, p. 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

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."[49]

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 paylist 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] and paid at Fort McKay after 1916	44
	114

Harold Laird was Assistant Agent. Indian Affairs' Alberta Inspectorate, headed by J.A. Markle, was south of Edmonton at Red Deer.

[49] 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.

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 elder's 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 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.[50]

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."[51] On January 20, 1917, it was confirmed as Indian Reserve (IR) 174 for "the Indians."[52]

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. . . . [53]

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[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 paylist 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).

Robertson's survey plans indicated that both the Namur reserves were for the "Fort McKay Band of Chipewyan Indians."[54] 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.[55] 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.[56]

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

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[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.

[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).

Post-1915 Membership Additions to the Fort McKay Band[59]

Between 1915 and 1949, many individuals and families who were affiliated by marriage or family relations with the Fort McKay group, or 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.[60]

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 that 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.

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[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
Total	**135**

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.[61]

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:

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[61] N. Reddekopp, "Post 1915 Additions to the Membership of the Fort McKay Band," December 1994 (ICC Exhibit 18, pp. 8-9).

> 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 Fort McKay. These families have intermarried, share adjacent traplines, speak a common language (most Cree-speaking families, such as the Bouchers and Grandjambs, are bilingual). Moreover, for at least the last 60-70 years (or as long 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.[62]

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."[63]

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.

THE CLAIM OF THE FORT MCKAY FIRST NATION

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[62] 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.

[63] Donna Gordon, "Treaty Land Entitlement -- A History," unpublished manuscript prepared for ICC, Ottawa, November 1995, Schedule of Validated Claims to 1990.

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

The 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. . . .

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[64] These transfers were effected in 1963.

> . . . 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 paylist 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.[65] 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.[66] It is also the case that at least eight TLE claims have been validated on the basis of late adherents and landless transfers.[67]

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 transfers alone.[68] 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.[69]

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:

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[65] ICC Transcript, pp. 43-47, November 18, 1994 (Sean Kennedy).

[66] R.R. Connelly to Chief, Ochapowace Band, October 28, 1983 (ICC file 2000-18, Memorandum from Stewart Raby to Wilma Jacknife, June 12, 1994, doc. 18).

[67] Gordon, "Treaty Land Entitlement," note 62 above.

[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).

> 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.[70]

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

On December 16, 1994, the then Director General of Specific Claims, 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.[71]

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:

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

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

> 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.[72]

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.[73]

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 . . ."[74] or to "reconstruct who really was there."[75] 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 paylist[76] but rather 114 individuals. He bases his total of 114 on the

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72 Ibid., 84.

73 Ibid., 84 and 86.

74 Ibid., 36.

75 Ibid., 116.

76 Because there was no paylist 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 paylist who were affiliated

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.[77] With the figure of 114 Reddekopp suggests that there could be a shortfall in the acreage allotted the Fort McKay Band in 1915.[78] 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 x 128 = 14,592) – or 1130 acres more.

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).

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.[79]

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 individual right?**

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:

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[79] 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-fulfillment of a treaty or agreement between Indians and the Crown.
> . . .

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.

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 then 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."[80]

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?

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*.[81] The *Blackfoot* case concerned the interpretation of the ammunition clause in Treaty 7.[82] By the 1970s, ammunition was no longer a necessity and five

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[80] ICC Exhibit 18, p. 6.

[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."

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.[83] 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.[84]

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.[85] [Paragraph references omitted.]

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.

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[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 here 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.

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 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.[86]

The Treaty 8 Commissioners reported that "[n]one of the tribes appear to have any very definite organization."[87] 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."[88] 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

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[86] *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.

[87] *Treaty No. 8*, note 18 above, 8.

[88] Ibid., 7.

so that no member of a band would really be landless. At the same 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"[89] 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.[90] 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

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[89] This is a reference to assurances of the Treaty Commissioners as recorded on page 7 of *Treaty No. 8*.

[90] 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 person 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.

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."[91]

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.[92] 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.[93] 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.[94] 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."[95] 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.

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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 *Nowegijick 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.

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 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 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.[96] 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

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[96] *Joe et al. v. Findlay 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).

"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."[97] Furthermore, evidence of the subsequent conduct of the parties, from documents dated around the time of the treaty, indicates that Crown officials understood the treaty land entitlement obligation to be fixed at a particular point in time.[98] 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."[99]

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;

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97 Submissions on Behalf of the Government of Canada, p. 23.

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.

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 entitlement 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.[100]

- Since the honour of the Crown is involved, no appearance of "sharp dealing" should be sanctioned.[101]

- 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

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[100] 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.

[101] See *R v. Taylor and Williams*, note 86 above, at 123.

be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible.[102]

- Regard may be had to the subsequent conduct of the parties to ascertain how the parties understood the terms of the treaty.[103]

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:

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 that will affect treaty land entitlement.

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[102] 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).

[103] 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.

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"[104] (that is, population increases are considered but decreases are ignored), which is unacceptable and completely unworkable. Moreover, Canada argues 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

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[104] Submissions on Behalf of the Government of Canada, p. 31.

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* (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[105] 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."[106] 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

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105 Canada appears to be using the term "late addition" to include late adherents, landless transfers, and marriages in who become band members following DOFS.

106 Submissions on Behalf of the Government of Canada, p. 40.

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 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."[107]

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

There are two other points 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 than other First Nations who 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.[108] 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,"

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107 Ibid., 44.

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

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 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.[109]

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

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[109] Note 86 above, at 120.

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.

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 paylist 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 comprised 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.[110] Mr. Reddekopp concluded that the number of people actually present at Fort McKay in 1915, plus absentees, totalled 114 (70 from the paylist 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 paylist as a starting point in treaty land entitlement analysis. We recognize that a paylist has its own shortcomings, that it is not a band list, and that there was no paylist for the Fort McKay group in 1915. Furthermore, although the paylist is a relevant historical reference in the identification of band membership, it is not determinative. Membership is a factual

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[110] See ICC Transcript, p. 116, December 16, 1994 (Rem Westland).

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 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 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 that 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 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:

> **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

APPENDIX A

The Fort McKay First Nation Treaty Land Entitlement Inquiry

1	Decision to conduct inquiry	May 17, 1994
2	Notices sent to parties	May 17, 1994
3	Planning conference	August 31, 1994
4	Community session	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.

6 Legal argument May 8 and 9, 1995

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, tab 1-19, and vol. 2, tab 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.

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 ancestoral [sic] 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 aisde [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 that 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 situation 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 paylist 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 paylist 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 paylist 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 paylist 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 paylist 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