

INDIAN CLAIMS COMMISSION PROCEEDINGS



(1998) 6 ICCP

Reports

Roseau River Anishinabe First Nation
Treaty Land Entitlement Inquiry (Mediation)

Kahkewistahaw First Nation
Treaty Land Entitlement Inquiry

Lucky Man Cree Nation
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A PUBLICATION OF
THE INDIAN CLAIMS COMMISSION



(1998) 6 ICCP

CO-CHAIRS

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

COMMISSIONERS

Roger J. Augustine
Carole T. Corcoran
Aurélien Gill

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Indian Claims Commission

427 Laurier Avenue West, Suite 400

Ottawa, Canada K1P 1A2

(613) 943-2737

Fax (613) 943-0157

Web site: www.indianclaims.ca

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FROM THE CO-CHAIRS

This is the sixth volume of the *Indian Claims Commission Proceedings* to be published and we are pleased to present it on behalf of the Commissioners and staff of the Indian Claims Commission. This volume includes five reports of the Commission.

Two are reports of full inquiries completed by the Commission into rejected claims of First Nations. The first of these reports, released in November 1996, details the Commission's inquiry into the treaty land entitlement claim of the Kahkewistahaw First Nation. This inquiry dealt with whether the Kahkewistahaw First Nation had a valid claim to additional reserve land under the terms of Treaty 4. The second report, released in March 1997, is also an inquiry into a treaty land entitlement claim – that of the Lucky Man Cree Nation. This Saskatchewan First Nation requested an inquiry into its rejected claim for additional reserve land under the terms of Treaty 6.

The three remaining reports of this volume of the *Proceedings* demonstrate the usefulness of the Commission's planning conference in promoting discussion and clearing up misunderstandings over the nature of the First Nation's claims. The following three reports illustrate how the planning conference, chaired by the Commission as a neutral third party, can assist in resolving outstanding issues without the need for a full inquiry.

After 14 years in negotiation, the treaty land entitlement claim of the Roseau River Anishinabe First Nation was finally settled with the assistance of a mediator provided by the Indian Claims Commission. The Commission's report on this successful mediation was released in March 1996. In March 1997, the Commission released its report on the 1907 Surrender Claim of the Fishing Lake First Nation. In that report, Canada accepted the claim for negotiation under the Specific Claims Policy after considering the testimony of the First Nation's elders at a community session held by the Commission. Finally, the Commission's report into the Mikisew Cree First Nation's claim to economic benefits under Treaty 8, released in March 1997, outlines how the claim was accepted for negotiation by Canada without the need for a full inquiry into the matter.

We hope that you find the Commission's reports into these claims interesting and informative.

Daniel J. Bellegarde
Co-Chair

P.E. James Prentice, QC
Co-Chair

ABBREVIATIONS

BCR	Band Council Resolution
BCSC	British Columbia Supreme Court
CA	Court of Appeal
CNLR	Canadian Native Law Reporter
CPR	Canadian Patent Reporter
CTC	Canada Tax Cases
DIAND	Department of Indian Affairs and Northern Development
DINA	Department of Indian and Northern Affairs
DLR	Dominion Law Report
DLS	Dominion Land Surveyor
DOFS	date of first survey
FC	Canada Federal Court Reports
FCA	Federal Court Appeal Division
FCTD	Federal Court Trial Division
FSI	Federation of Saskatchewan Indians
FSIN	Federation of Saskatchewan Indian Nations
ICC	Indian Claims Commission
ICCP	Indian Claims Commission Proceedings
IR	Indian Reserve
MCFN	Mikisew Cree First Nation
MIB	Manitoba Indian Brotherhood
NA	National Archives of Canada
NR	National Reporter
NSCA	Nova Scotia Court of Appeal
NWMP	North-West Mounted Police
ONC	Office of Native Claims

ABBREVIATIONS

OTC	Office of the Treaty Commissioner
RSC	Revised Statutes of Canada
SCB	Specific Claims Branch
SCW	Specific Claims West
SCC	Supreme Court of Canada
SCR	Canada Supreme Court Reports
TLE	treaty land entitlement

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INDIAN CLAIMS COMMISSION

REPORT ON THE MEDIATION OF THE ROSEAU RIVER ANISHINABE FIRST NATION TREATY LAND ENTITLEMENT CLAIM

MARCH 1996

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PART I

INTRODUCTION

In February 1995, the Indian Claims Commission (ICC) agreed to sponsor the mediation of the Roseau River Anishinabe's treaty land entitlement claim.¹ The parties to the mediation made a joint request for the assistance of the Honourable Mr. Robert F. Reid. He was asked to assume the role of mediator. The Commission, as sponsor to the mediation, agreed to offer Mr. Reid's assistance.

Although the history of this claim reaches back to the 1880s, the Roseau River Anishinabe First Nation first filed a specific claim, in concert with the Manitoba Indian Brotherhood (MIB), to the Department of Indian Affairs and Northern Development (DIAND) in March 1978.² The Roseau River Anishinabe First Nation³ contended that the Crown had not fulfilled its obligation under Treaty 1 to set apart land for its use and benefit along the banks of the Roseau River. Claims such as this are known as "treaty land entitlement" (TLE) claims. 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.⁴ The treaty land entitlement claim of the Roseau River Anishinabe First Nation was ultimately accepted by the federal government for negotiation.

For more than 100 years the Anishinabe of the Roseau River watershed in southeastern Manitoba have pursued their treaty land entitlement claim stemming from Treaty 1 of 1871, and the events preceding, surrounding, and

1 Roseau River Anishinabe First Nation to The Honourable Ronald A. Irwin, Minister of Indian Affairs and Northern Development, February 10, 1995.

2 In 1977 the MIB formed the Manitoba Treaty Land Entitlement Committee, which, as part of its mandate, promoted and continued research to document treaty land entitlement claims for Manitoba First Nations and helped to initiate the settlement negotiation process. On March 1, 1978, the MIB submitted several First Nations' treaty land entitlement claims; one of the submissions was devoted to Roseau River Reserve 2 and Roseau Rapids Reserve 2A.

3 The Roseau River Anishinabe First Nation is the successor to the followers of Na-na-wa-nan, Ke-we-tayash, and Wa-ko-wush, who were signatories to Treaty 1.

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

subsequent to it. Complaints of failure to fulfil the treaty and its collateral promises, including failure to establish the promised reserve and to protect reserve lands against depredation, arose immediately after the treaty was signed. Although some adjustments were made over the years, the complaints were never satisfied. The information made available to the Commission suggests that, while the claim was not actively pursued at all times throughout this lengthy history, it was never abandoned by the Roseau River First Nation.

The First Nation submitted its treaty land entitlement claim in 1978; however, five years elapsed before it was finally accepted for negotiation. On November 5, 1982, the Honourable John Munro, then Minister for Indian Affairs and Northern Development, accepted the Roseau River Anishinabe First Nation's claim in the following terms:

[T]he claim which has been under consideration for some time, has been the subject of detailed historical and legal review and extensive discussion with your representatives. After reviewing the available facts and related evidence, I wish to advise you that the Roseau River Band has a valid treaty land entitlement claim . . .⁵

With this letter, a period of negotiation over compensation began that became increasingly marked by misunderstanding and acrimony. Finally, when the parties recognized that they had reached a complete impasse, they turned to the Indian Claims Commission for assistance by way of mediation. The Commission agreed, and the mediation proved successful. Within a few months an Agreement in Principle was achieved that soon thereafter was ratified by the First Nation.

⁵ The Honourable John C. Munro to Chief Felix Antoine, November 5, 1982.

PART II

A BRIEF HISTORY OF THE CLAIM⁶

As the Commission's involvement in this claim related to the mediation mandate, we did not have the benefit of historical records or detailed legal submissions from the parties setting out the basis of the claim. Accordingly, the Commission makes no findings of fact in this report.

The Anishinabe Ojibway occupied the Roseau River district of present-day Manitoba before the arrival of white settlers (*Roseau* is a French word meaning water reed). When settlers began to arrive in the area in the early 1800s, there was increasing pressure on Anishinabe lands, already occupied and cultivated by them. This pressure led to concern among the Anishinabe Chiefs and, soon after Confederation, the Chiefs demanded a treaty.

When Wemyss Simpson was appointed Indian Commissioner by the Privy Council in 1871, he was charged with the responsibility of entering into negotiations with the Indians of what is now Manitoba for the purpose of concluding Treaty 1 – the first of the “numbered treaties” in Canada. After arriving in Winnipeg in July of that year, he issued proclamations inviting the various local Bands to negotiate.⁷ On July 27, 1871, Mr. Simpson, together with the Lieutenant Governor of Manitoba and the North-West Territories, A.G. Archibald, met with several hundred of the “Chippewas” and “Swampy Cree” Indians at Lower Fort Garry.⁸ The Lieutenant Governor opened the proceedings with an address in which he said:

[Y]our Great Mother [the Queen], therefore, will lay aside for you “lots” of land to be used by you and your children forever. She will not allow the white man to intrude upon these lots. She will make rules to keep them for you, so that as long as the sun

6 Because this process was a mediation, the Commission did no research and made no findings. The following brief history draws on information and documents submitted to the mediator by the parties during the course of the mediation.

7 Canada, Parliament, *Sessional Papers*, 1872, vol. 7, no. 22, 10.

8 Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Saskatoon: Fifth House Publishers, 1991), 26.

shall shine, there shall be no Indian who has not a place that he can call his home, where he can go and pitch his camp, or if he chooses, build his house or till his land. . . .⁹

Among the provisions of Treaty 1 were the terms by which the various tribes, as signatories, were to have land apportioned and set aside for their exclusive use and enjoyment:

[H]er Majesty the Queen, and her successors for ever, hereby agrees and undertakes to lay aside and reserve for the sole and exclusive use of the Indians, the following tracts of land . . . and for the use of the Indians of whom Na-sha-ke-penias, Na-na-wan-nan, Ke-we-tayash and Wa-ko-wush are the Chiefs, so much land on the Roseau River as will furnish *one hundred and sixty acres for each family of five*, or in that proportion for larger or smaller families, *beginning at the mouth of the river* . . . it being understood however, that if, at the date of the execution of this treaty, there are any settlers within the bounds of any lands reserved by any band, Her Majesty reserves the right to deal with such settlers as She shall deem just, so as not to diminish the extent of land allotted to the Indians.¹⁰

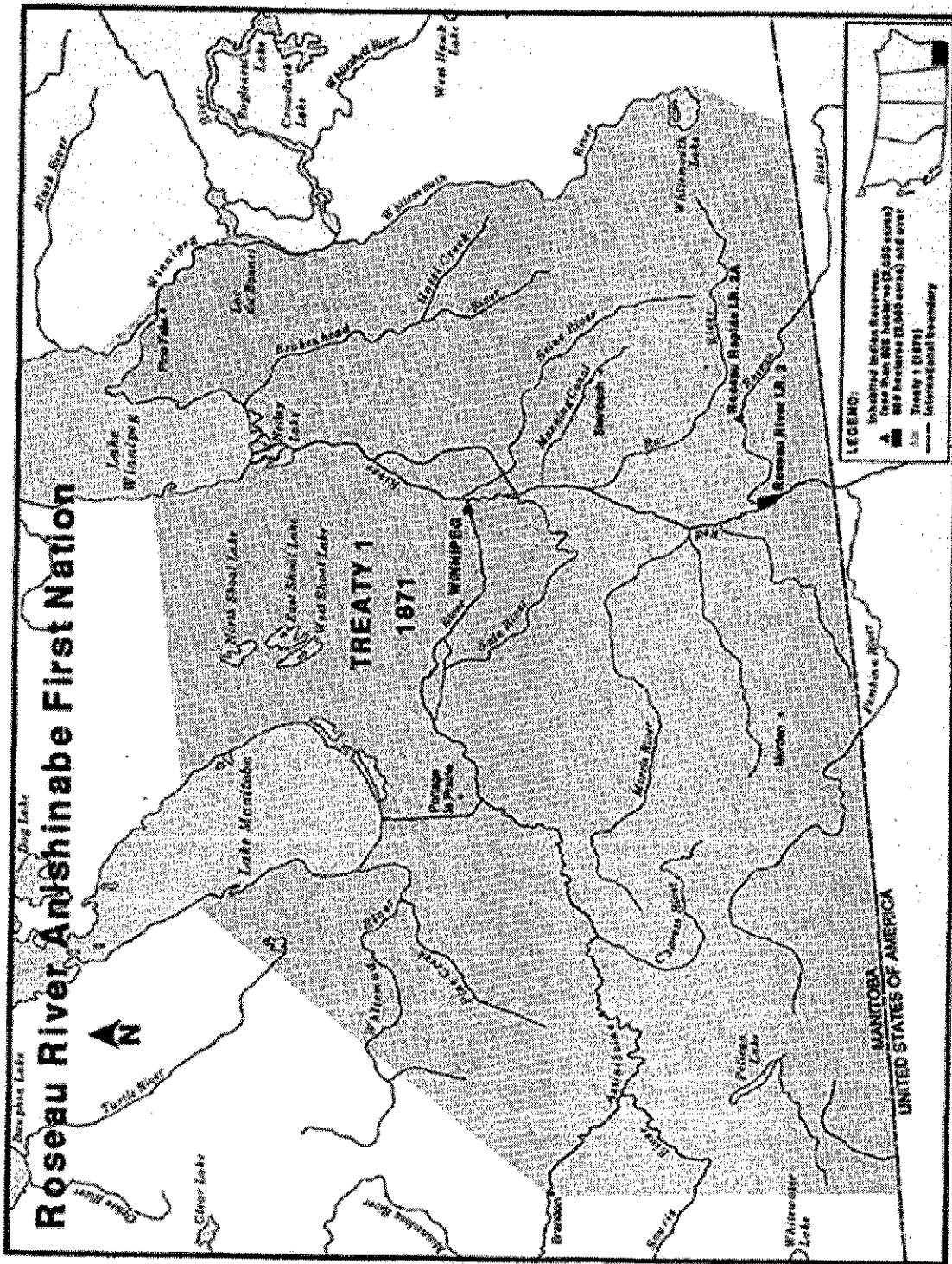
On behalf of the Chippewa and Swampy Cree, their Chiefs affixed their marks to Treaty 1 at Lower Fort Garry on August 3, 1871.

Immediately following the signing of Treaty 1, the Anishinabe Chiefs expressed their concern about the level of protection that the agreement was providing over their lands. Dissatisfaction mounted over the delay in surveying the promised reserve, the continuing encroachment of settlers on their land, and timber permits being granted on lands that the Anishinabe understood had been promised to them. The Anishinabe wanted to have a reserve that straddled the Roseau River and that ran along its length. It was not until 1874 that a proposed site was marked off at the mouth of the Roseau River. This was not, however, the final survey. The official survey did not occur until 1887, when a plan was prepared by the Dominion Land Surveyor. What was surveyed, however, was a *block-shaped reserve* that extended back from the river, not along its length.

The lands that eventually became the reserve (or reserves) were not set out until 1887 and 1888. By this time much of the land desired by the Anishinabe, and which they understood to be theirs, had already been alienated. Consequently, the designated reserve lands were in a different location from the reserve that the Anishinabe had understood would run along the

⁹ Morris, *Treaties*, 28.

¹⁰ Morris, *Treaties*, 314-15. Emphasis added.



river. In the end, the Roseau River Anishinabe First Nation asserted that Canada did not fulfil its promise to the Band to set aside the reserve promised to it by the terms of Treaty 1.

This historical complaint formed the basis of its specific claim and the subsequent negotiations that arose between Canada and the Roseau River Anishinabe First Nation more than 100 years later. When the negotiations eventually stalled, the First Nation made a request to the Indian Claims Commission for mediation. The mediation process resulted in a settlement agreement between the parties which was ultimately ratified by the First Nation.

PART III

THE COMMISSION'S MANDATE AND MEDIATION PROCESSES

The Indian Claims Commission (ICC) was created as a joint initiative after years of discussion between First Nations and the Government of Canada about how the widely criticized process for dealing with Indian land claims in Canada might be improved. It was established by an Order in Council dated July 15, 1991, appointing Harry S. LaForme, former commissioner of the Indian Commission of Ontario, as Chief Commissioner, and became fully operative with the appointment of six Commissioners in July 1992.

Its mandate to conduct inquiries under the *Inquiries Act* is set out in a commission issued under the Great Seal of Canada, which states:

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

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

Thus, at the request of a First Nation, the ICC can conduct an inquiry into a rejected specific claim or a dispute over compensation. The policies of the federal government differentiate between "comprehensive" and "specific" claims. The former are claims based on unextinguished aboriginal title and normally arise in areas of the country where no treaty exists between Indians and the federal government. The latter are claims involving a breach of treaty obligations, or where the Crown's lawful obligations have been otherwise unfulfilled, such as breach of an agreement or a dispute over compensation or the *Indian Act*, and include claims of fraud.

Although the Commission has no power to accept or force acceptance of a claim rejected by the government, it has the power to thoroughly review the claim and the reasons for its rejection with the claimant and the government. The *Inquiries Act* gives the Commission wide powers to conduct such an inquiry, to gather information, and even to subpoena evidence if necessary. If, at the end of an inquiry, the Commission concludes that the facts and law support a finding that Canada owes an outstanding lawful obligation to the claimant band, it may recommend to the Minister of Indian and Northern Affairs that a claim be accepted.

In addition to conducting inquiries into rejected claims and into disputes over the application of compensation criteria, the Commission is authorized to provide mediation services at the request of the parties to a specific claim to assist them in reaching an agreement.

The claim of the Roseau River Anishinabe First Nation was dealt with under the Commission's mediation mandate.

MEDIATION MANDATE

The Commission has a mandate to furnish mediation services. This mandate is spelled out in the Commission's terms of reference as follows:

And we do hereby a) authorize our Commissioners

...
(iii) to provide or arrange, at the request of the parties, such mediation services as may in their opinion assist the Government of Canada and an Indian band to reach an agreement in respect of any matter relating to an Indian specific claim.

From its inception, the Commission has interpreted its mandate broadly and has vigorously sought to advance mediation as an alternative to the courts, which are inherently adversarial in nature. In the interests of helping First Nations and Canada negotiate agreements that reconcile their competing interests in a fair, expeditious, and efficient manner, the Commission offers the parties a broad range of mediation services tailored to meet their particular goals.

Mediation is today a widely used method in Canada and throughout North America for the resolution of disputes without litigation, or of disputes already in litigation. It has grown immensely popular in the last few years, in light of its advantages over the uncertainty – and the unacceptable delays and costs – of the traditional litigation system. With considerable prescience,

those responsible for the creation of the Commission ensured that it would have the authority to exercise this facility, the value of which is demonstrated here. In our view, it remains underutilized, a situation we regard as unfortunate for all, and which, as can be seen in the Recommendation below, we have striven to correct.

PART IV

THE NEGOTIATIONS AND SUBSEQUENT MEDIATION

THE COMPENSATION NEGOTIATIONS

Although the Minister of Indian Affairs accepted the First Nations' entitlement claim in 1982, substantive negotiations did not begin until 1993. The central issues were the amount of compensation offered by Canada and the actual acreage to be set aside as reserve in fulfilment of the First Nation's outstanding treaty land entitlement. By March 1993, the parties had reached agreement on only a few specific points. Unfortunately, the parties were unable to reach agreement on the outstanding issues, and the talks failed.

Frustrated over the lack of progress, the Roseau River Anishinabe First Nation commenced litigation in November 1993 against Canada in the Federal Court action, *Alexander v. Her Majesty*. A caveat was filed over lands that the First Nation regarded as rightfully belonging to it, though the caveat was eventually lifted. In February 1994, after reviewing their positions, the parties began to explore the possibility of reopening negotiations. By agreement, the litigation was discontinued.

Negotiations resumed in October 1994 and continued until November, with the major areas of discussion still the land quantum and compensation issues. Eventually, however, disagreements arose and negotiations again came to an impasse. Given the inability of the parties to continue to negotiate through direct discussions, it became obvious that negotiations would not resume without outside assistance.

THE MEDIATION ¹¹

On January 4, 1995, Juliet Balfour, negotiator for Canada, wrote to the counsel for the Roseau River Anishinabe First Nation as follows:

¹¹ Since mediation discussions are confidential, no more than an outline of the course they took can be given here.

It appears that we have reached an impasse in these negotiations. . . . At this point . . . it may be helpful to have an impartial third party involved, in the hope of finding a solution to our current impasse. . . . it is my suggestion that our next meeting take place in the presence of a mediator provided by the Indian Specific Claims Commission to assist in finalizing this settlement. . . .

The First Nation approached the Honourable Ron Irwin, Minister of Indian and Northern Affairs, in January and February 1995 to discuss the prospect of mediation. These discussions resulted in the First Nation's endorsement of mediation sponsored by the Indian Claims Commission. Together, the parties proposed that the Honourable Robert Reid (a former judge who practises as an independent professional mediator and who acts as Legal and Mediation Advisor to the Commission) be asked to assume the role of mediator. The Commission agreed to offer Mr Reid's assistance.

On his appointment in early February 1995, Mr Reid began an immediate assessment of the situation. On February 10, Mr Rhys Jones, counsel for the Roseau River Anishinabe First Nation, asked Mr Reid to meet with his client's representatives on February 14 in Winnipeg. Mr Reid had been asked to give this matter high priority, and the meeting took place as requested.

Following the meeting, Mr Reid held telephone discussions with the representatives of the parties, having first cleared away the communications block. Since the reasons for the impasse were still not immediately apparent, he requested detailed written statements from each party setting out their respective positions:

These statements took some time to prepare, but by early April 1995, both parties had complied. After further telephone conferences with the representatives for the parties, Mr Reid arranged for a mediation meeting to take place in Winnipeg on May 19, 1995. On the preceding day, Mr Reid met with the parties individually, and the meetings lasted well into the evening.

The first face-to-face discussions between the parties took place on the following morning, with Mr Reid as Chair. They continued throughout the day and, in light of the history of the talks, they were remarkably productive. Indeed, by the end of the day all major areas of dispute appeared to have been resolved, and the parties shook hands on an agreement.

This was not, however, the end of the story. Serious problems arose when counsel sat down to express in writing the agreement that had apparently been reached at the negotiation table.

At the urgent request of the parties, Mr Reid returned to Winnipeg on July 11, 1995, to convene a further meeting. Having again spoken to the parties

separately, he opened the meeting by identifying 12 points of serious disagreement. Again, everyone set to work, and by the end of the day only a few issues remained outstanding. Unfortunately, among these issues was an apparently fundamental disagreement over what had been agreed. This problem would obviously require further thought on both sides. The session closed at the end of the day with a date set for what it was hoped would be the final meeting.

On July 24, 1995, the parties met again and, by the end of the day, agreement had been reached on all points, and the parties shook hands on what appeared finally to be a complete resolution of all problems.

SETTLEMENT AND RATIFICATION

Counsel again sat down to draw up the agreement, and this time they were successful. A 160-page Agreement in Principle was initialled on August 7, 1995. Members of the First Nation voted to ratify it on November 23, 1995.

Thus, a claim which had been pursued for more than 100 years, and which appeared to have become hopelessly mired in protracted discussion, was resolved in a few months. Those months were not always easy, and the deliberations were not always calm. Several times it appeared they might fail yet again. Yet one difficulty after another was resolved in discussions that were not only intense but, on occasion, dramatic.

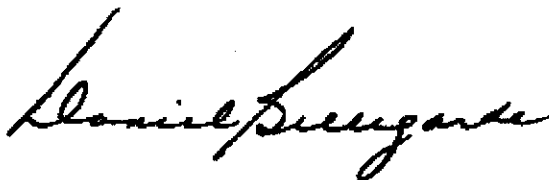
The parties deserve great credit for their persistence and their forbearance in the mediation discussions. The agreement could not have been achieved without sincerity and good will on both sides, and the shared desire to resolve a long-standing grievance in a fair and just manner.

PART V

RECOMMENDATION

We have been disappointed with the federal government's reluctance to take advantage of the Commission's mediation capability, and have expressed this disappointment both in meetings with representatives of government and in our reports (see particularly the Commission's *Annual Report, 1994/95*). We would like again to remind parties to specific claims of the value of mediation, which is now widely used for dispute resolution in the public sector. In particular, we recommend to the Government of Canada that it amend its present policies so as to include mediation as a normal aspect of the Specific Claims Process. We further recommend that Canada instruct departmental counsel and other representatives engaged in matters before the Commission to seek opportunities for mediation or to agree to participate meaningfully in mediation when it is sought by claimants.

FOR THE INDIAN CLAIMS COMMISSION



Daniel J. Bellegarde
Commission Co-Chair



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

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE TREATY LAND ENTITLEMENT CLAIM OF THE KAHKEWISTAHAW FIRST NATION

PANEL

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

COUNSEL

For the Kahkewistahaw First Nation
Stephen Pillipow

For the Government of Canada
Bruce Becker / Ian D. Gray

To the Indian Claims Commission
Ron S. Maurice / Kim Fullerton / Kathleen Lickers

NOVEMBER 1996

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EXECUTIVE SUMMARY

The Indian Claims Commission has been asked to inquire into whether the Government of Canada properly rejected the treaty land entitlement claim of the Kahkewistahaw First Nation. The general issue considered by the Commission was whether Canada set aside enough reserve land for Kahkewistahaw under the terms of Treaty 4. The unusual facts of the case, however, required us to clarify the process by which those individuals entitled to be counted in establishing a band's treaty land entitlement are identified. More particularly, we were required to determine the date as of which a band's treaty land entitlement is to be calculated, and the appropriate treaty annuity payroll to use as the starting point in actually calculating that entitlement.

Kahkewistahaw adhered to Treaty 4 in 1874, and, in the ensuing seven years, surveyors were sent out on three separate occasions to survey a reserve for the First Nation. William Wagner surveyed an area of 41,414 acres in 1876, but neither party contended that this survey should form the basis of calculating Kahkewistahaw's treaty land entitlement. The evidence shows that the First Nation never lived on or used the land surveyed by Wagner, and thus never accepted this land as its reserve.

Allan Poyntz Patrick and his assistant, William Johnson, were commissioned in 1880 to survey the reserves of those bands desiring them. Kahkewistahaw requested that a reserve be surveyed for his people, but, although Patrick's correspondence indicates that survey work was done, no plan of survey documenting these efforts has ever been located. The Commission concluded that Patrick and Johnson started, but likely did not complete, the survey of Kahkewistahaw's reserve in 1880.

Finally, in 1881, John C. Nelson surveyed the two areas that were eventually confirmed by Order in Council on May 17, 1889, as Kahkewistahaw Indian Reserves (IR) 72 and 72A. IR 72 comprised 73 square miles (46,720 acres) located roughly 130 kilometres east of Regina on the south shore of the Qu'Appelle River between Crooked Lake and Round Lake. When com-

pared to the land that the expert witnesses speculated had been surveyed by Patrick and Johnson the previous year, Nelson's survey added or substituted an area of 20 to 25 square miles. The reasons given by Nelson for including this area were to provide the First Nation with timber, access to the Qu'Appelle River, and agricultural land on which it had already commenced farming. Nelson also surveyed IR 72A containing 96 acres on the north shore of Crooked Lake to provide the First Nation with access to a productive fishery. In total, Kahkewistahaw received 46,816 acres of land, sufficient for 365 people under the Treaty 4 formula of 128 acres per person.

The complicating factor in this context was the First Nation's wildly fluctuating population during the relevant period. According to the treaty annuity paylists, the number of people paid with Kahkewistahaw grew from 65 in the year of treaty to 266 in 1876, 376 in 1879 and 430 in 1880. The population then fell sharply to 186 in 1881 and 160 in 1882, before rebounding to 274 in 1883.

The evidence indicates that these were very difficult times for Kahkewistahaw and other bands in the Qu'Appelle Valley. Many Indian people were unsure whether their futures were best assured by maintaining their traditional nomadic way of life or by converting to agriculture. In 1881 large numbers of people migrated from the reserves to the Cypress Hills to pursue the buffalo, but by 1882 the federal government was actively discouraging Indians from remaining in the area. Although some people – notably Nekaneet and his followers – remained in the Cypress Hills, the federal government in 1883 refused to continue paying treaty annuities there, and many Indians returned to the reserves.

KAHKEWISTAHAW FIRST NATION'S POSITION

It was in the context of this background that Kahkewistahaw submitted its claim for outstanding treaty land entitlement to Canada on May 20, 1992. The First Nation claimed that it settled on its reserve in late August or early September 1880 and that the survey process, even if not *completed* in 1880, was at least *commenced* that year. Arguing that Canada and a band would have to assess the size and location of the reserve *before* the survey actually took place, Kahkewistahaw submitted that the most appropriate date for calculating a band's treaty land entitlement is the date on which the reserve lands were *selected*, and not the date on which the survey was *completed*.

The First Nation also contended that the most appropriate treaty annuity "base paylist" to use in calculating the entitlement is either the paylist imme-

diately preceding the date of entitlement, or the payroll on which it can be shown that the surveyor actually relied in fixing the area of land to be surveyed. Regardless of whether the selection of land took place in 1880 or 1881, the First Nation argued that the selection occurred *before* the payment of treaty annuities on August 4, 1881, and that the appropriate base payroll is therefore the payroll of July 18, 1880.

Finally, Kahkewistahaw submitted that it had substantiated its treaty land entitlement claim on "the same or substantially the same basis" as the neighbouring Cowessess and Ochapowace First Nations, and thereby qualified to have its claim validated and settled under the terms of the 1992 Saskatchewan Treaty Land Entitlement Framework Agreement (the Framework Agreement). Ochapowace is an "Entitlement Band" as defined in the agreement, and both Ochapowace and Cowessess have settled their outstanding treaty land entitlement claims.

CANADA'S POSITION

Canada submitted that it is not possible to assess whether a given band's treaty land entitlement has been fulfilled until it receives land which is capable of being termed a "reserve." The survey work in 1880 by Patrick and Johnson did not satisfy this criterion because it did not result in the creation of a reserve.

Even if it might be maintained that the date of selection is the appropriate date for calculating a band's treaty land entitlement, Canada argued that the selection in this case involved an ongoing process of negotiation, which resulted in significant changes by Nelson in 1881 to the land base chosen in 1880. However, Canada also argued that it is more appropriate to use the date of first survey than the date of selection as the date for calculating treaty land entitlement, since it is not until a survey is completed that it can be determined whether the survey has been performed in accordance with treaty and is acceptable to both Canada and the band. Nelson's 1881 survey was clearly completed, but it was also accepted by Kahkewistahaw's people, who have continued to live on and use that land to the present day. They did not accept the suggested 1880 survey since they had already commenced farming on other land by the time Nelson arrived in 1881.

With respect to the appropriate treaty annuity payroll to use as Kahkewistahaw's base payroll, Canada contended that the 1881 payroll represents the most reliable evidence of the First Nation's population at the date of first survey. Canada also argued that it would be inappropriate to use the 1880

paylist because doing so would result in a number of people who had migrated to the Cypress Hills, and who had received their treaty land entitlement there, being counted twice for treaty land entitlement purposes.

Regarding Kahkewistahaw's claim to be entitled to validation and settlement under the terms of the Framework Agreement, Canada argued that the First Nation is not a party to the agreement and therefore is not entitled to claim any benefit from it.

SUMMARY OF POSITIONS

Although evidence was tendered showing the paylist population, absentees, arrears, and "late additions" (such as new adherents to treaty and transfers from landless bands) premised on an 1880 base paylist, neither party adduced any paylist analysis of "late additions" to the 1881 paylist. Subject to this caveat, the positions of the parties may be summarized as follows:

	Kahkewistahaw (1880 base paylist)	Canada (1881 base paylist)
Base paylist	430	186
Absentees and arrears	22	<u>70</u>
Total minus "late additions"	452	256
Late additions	<u>145</u>	
Total	597	

When it is considered that Kahkewistahaw received enough land for 365 people, it is obvious that choosing one of these alternatives over the other spells the difference between a significant outstanding treaty land entitlement owed by Canada, if we adopt the First Nation's approach, and a finding that the Crown has completely discharged its treaty obligations to provide land to Kahkewistahaw, if we prefer Canada's interpretation.

CONCLUSIONS

To determine whether the claim is valid, the Commission has had to consider the following issues:

- 1 What is the appropriate date for calculating Kahkewistahaw's treaty land entitlement?
- 2 What is Kahkewistahaw's population for treaty land entitlement purposes?

-
- 3 Has the First Nation established, pursuant to Article 17 of the Saskatchewan Treaty Land Entitlement Framework Agreement, an outstanding treaty land entitlement on the same or substantially the same basis as the Entitlement Bands, which are party to the Framework Agreement?

Our findings are stated briefly below.

Issue 1: Date for Calculating Treaty Land Entitlement

Based on the principles of treaty interpretation which have been developed in the courts and applied to land entitlement issues in previous inquiries before the Commission, we conclude that, as a general principle, a band's population on the date of first survey shall be used to calculate treaty land entitlement. Because it is important to develop and apply a consistent set of principles in relation to treaty land entitlement, we believe that we should not depart from the date of first survey as the standard except in unusual circumstances that would otherwise result in manifest unfairness.

The Commission sees nothing in the wording of Treaty 4 that would justify a different interpretation or approach to fixing the date on which Kawkewistahaw's treaty land entitlement should be calculated. A band's *entitlement* to reserve land arises upon the band signing or adhering to treaty, but the process of *quantifying* and *locating* the reserve is only triggered following a conference between the band and Canada's officers. However, it does not follow that the band's population on the date of selection should determine the size of the reserve. It is only when *agreement* or *consensus* is reached between the parties – by Canada agreeing to survey the land selected by the band, and by the band accepting that the survey has properly defined the desired reserve – that the land as surveyed can be said to constitute a reserve for the purposes of treaty, and that the parties can be said to have agreed to treat it as such. It is on this date that the band's population must be assessed to determine whether Canada has satisfied its treaty obligation to the band.

A completed survey verifies the precise *location* and *size* of a reserve, and is critical in measuring whether a band's treaty land entitlement has been fulfilled. A completed survey does not necessarily confirm, however, that the "first survey" of a band's reserve has occurred, particularly where the band rejects the lands as surveyed. The first survey can be identified by determining whether the reserve was surveyed or located in conformity with the treaty, and whether the survey or allotment was acceptable to Canada and to the band. The band's acceptance is demonstrated by its members actually living on and using the reserve. If the reserve boundaries have been adjusted, as in

the present case, then, in the words of the Office of the Treaty Commissioner, “it must be determined whether the adjustment really constituted a new survey of a new reserve, or just a change in the boundaries of a reserve essentially in the same location.”

The evidence in this inquiry indicates that Patrick and Johnson commenced but likely did not complete the survey of the Kahkewistahaw reserve in 1880. Even if that survey had been completed, the First Nation did not accept the suggested location of the reserve. Nelson’s survey in 1881 added or substituted 20 to 25 square miles of land. When considered in light of the total area of 73 square miles surveyed for the First Nation by Nelson, the new area represented approximately one-third of the size of the reserve. This substantial “adjustment” in location was further enhanced by the nature of the additional land, which included frontage on the Qu’Appelle River, timber, and the land already being farmed.

We conclude, therefore, that the survey by Nelson was the true “first survey” for Kahkewistahaw. Canada’s acceptance cannot be doubted, for the survey was eventually approved by Order in Council. Kahkewistahaw and his people accepted the reserve and have continued to live on and use it to the present day. The best evidence of the date of this first survey is the date on Nelson’s survey plan: August 20, 1881.

Issue 2: Kahkewistahaw’s Treaty Land Entitlement Population

The treaty paylist provides useful information regarding a band’s population at the date of first survey, but it is simply a *starting point* in determining the band’s population for treaty land entitlement purposes. The paylist is an accounting of treaty annuities paid to individuals under a given chief, and not necessarily an accurate census of band *membership*. Paylist analysis is required to establish the band’s *actual* membership – including band members who were absent at the date of first survey – and not simply the number of people who happened to be counted with the band in a given year. Since the base paylist is merely *prima facie* evidence which is subject to rebuttal, all available evidence that tends to establish or disprove the membership of certain individuals in the band should be considered and weighed.

Kahkewistahaw argued that the appropriate “base paylist” to use as a starting point in treaty land entitlement calculations is the most recent paylist to which the surveyor would have had access in conducting his survey, or any other paylist on which it can be shown the surveyor actually relied. Whether the date of first survey was 1880 or 1881, Kahkewistahaw contended that the

1880 payroll was the appropriate “base payroll,” since the First Nation maintained the date of selection was the proper date of entitlement and that date arguably preceded the payment of annuities to Kahkewistahaw on August 4, 1881.

The Commission has already stated its reasons for preferring the date of first survey to the date of selection. However, we also believe that the most reliable objective evidence of Kahkewistahaw’s population as of the August 20, 1881, date of first survey – and thus the appropriate “base payroll” – was the August 4, 1881, payroll, subject to adjustments for absentees and “late additions,” such as new adherents to treaty and transferees from landless bands.

Nelson may well have had access to this payroll when he completed his survey, but he likely relied on other information, such as earlier paylists, his discussions with the chief or Indian agent, and his own knowledge of the First Nation, in determining the size of the reserve. However, since the main question in this inquiry is whether Kahkewistahaw received sufficient treaty land, what Nelson actually *did* is less important than what Treaty 4 *obliged* him to do. In this case, his decision to survey enough land for 365 people actually worked to the benefit of the First Nation, since Treaty 4 required him only to provide land for 186, plus absentees and “late additions.”

We do not agree with Kahkewistahaw that a “fair, large and liberal construction [of Treaty 4] in favour of the Indians” requires us to adopt the First Nation’s approach; the same approach may work to the detriment of another band in another case. A fair, large, and liberal interpretation should yield a consistent principle that can be applied in all cases, rather than yielding results that are consistent only because they are invariably to the benefit of First Nations.

Therefore, if the 1881 base payroll is used as the starting point, the evidence shows that Kahkewistahaw had a population of 186, together with 70 absentees and arrears, at the date of first survey. Since the payroll research was predicated on an 1880 date of first survey, we do not have any reliable figures on the number of “late additions” to add to this preliminary total of 256. For its claim to be validated, Kahkewistahaw must demonstrate that more than 109 new adherents or landless transfers have joined the First Nation since 1881. Unless such evidence is forthcoming, we conclude that Kahkewistahaw has not established an outstanding treaty land entitlement.

We do not believe that we should make an exception in this case to the general rule that the date of first survey shall be used to calculate treaty land

entitlement. Such an exception is only to be made in unusual circumstances that might otherwise give rise to manifest unfairness. The evidence shows that Canada's officials conferred with Chief Kahkewistahaw and acted in good faith in setting aside a land base that, in accordance with the treaty, had river frontage, timber, and agricultural land for the First Nation's future needs.

Finally, since we have concluded that the 1881 payroll provides the best evidence of the First Nation's date-of-first-survey population, the question whether certain individuals should be counted with Kahkewistahaw or Nekaneeet has been rendered largely academic. However, even if we had preferred the 1880 payroll, we may have had serious reservations about including individuals paid with Kahkewistahaw in 1880 but subsequently paid at Fort Walsh. With respect to those people who were paid only once with Kahkewistahaw, one must consider whether they had a sufficient connection or continuity of membership with the First Nation. All "connecting factors" must be taken into account, especially where there are competing equities for including a particular person as a member of one band or another. It must be remembered that those individuals who were not counted with Kahkewistahaw in 1881 were still eligible to be included in the First Nation's treaty land entitlement calculation as absentees or landless transfers, provided that they were not counted with another band for treaty land entitlement purposes before rejoining Kahkewistahaw.

Issue 3: Saskatchewan Framework Agreement

The only basis upon which a band can establish an outstanding treaty land entitlement claim is in accordance with the legal obligations that flow from treaty. Section 17.03 of the Framework Agreement does not provide Kahkewistahaw with an independent basis for validation of its treaty land entitlement claim. It merely provides non-Entitlement Bands whose claims are subsequently accepted for negotiation by Canada with the opportunity to settle their claims in accordance with the Framework Agreement's principles of settlement.

We find that Kahkewistahaw has not established an outstanding entitlement, and therefore section 17.03 creates no obligation upon Canada or Saskatchewan to enter into a settlement with Kahkewistahaw in accordance with the Framework Agreement. Moreover, the circumstances of Cowessess and Ochapowace are distinguishable and do not afford Kahkewistahaw the basis for a claim to an outstanding treaty land entitlement. In any event, the real issue is not whether other cases have been decided differently, but whether

Kahkewistahaw has a proper claim for outstanding treaty land entitlement under the terms of Treaty 4. We have concluded that it does not.

RECOMMENDATION

Having found that the Kahkewistahaw First Nation has failed to establish that the Government of Canada owes an outstanding lawful obligation to provide land to the First Nation under treaty, under the principles enunciated by the Commission in the Fort McKay, Kawacatoose, and Lac La Ronge inquiries, or under the terms of the Saskatchewan Treaty Land Entitlement Framework Agreement, we therefore recommend to the parties:

That the claim of the Kahkewistahaw First Nation with respect to outstanding treaty land entitlement not be accepted for negotiation under Canada's Specific Claims Policy.

PART I

INTRODUCTION

BACKGROUND

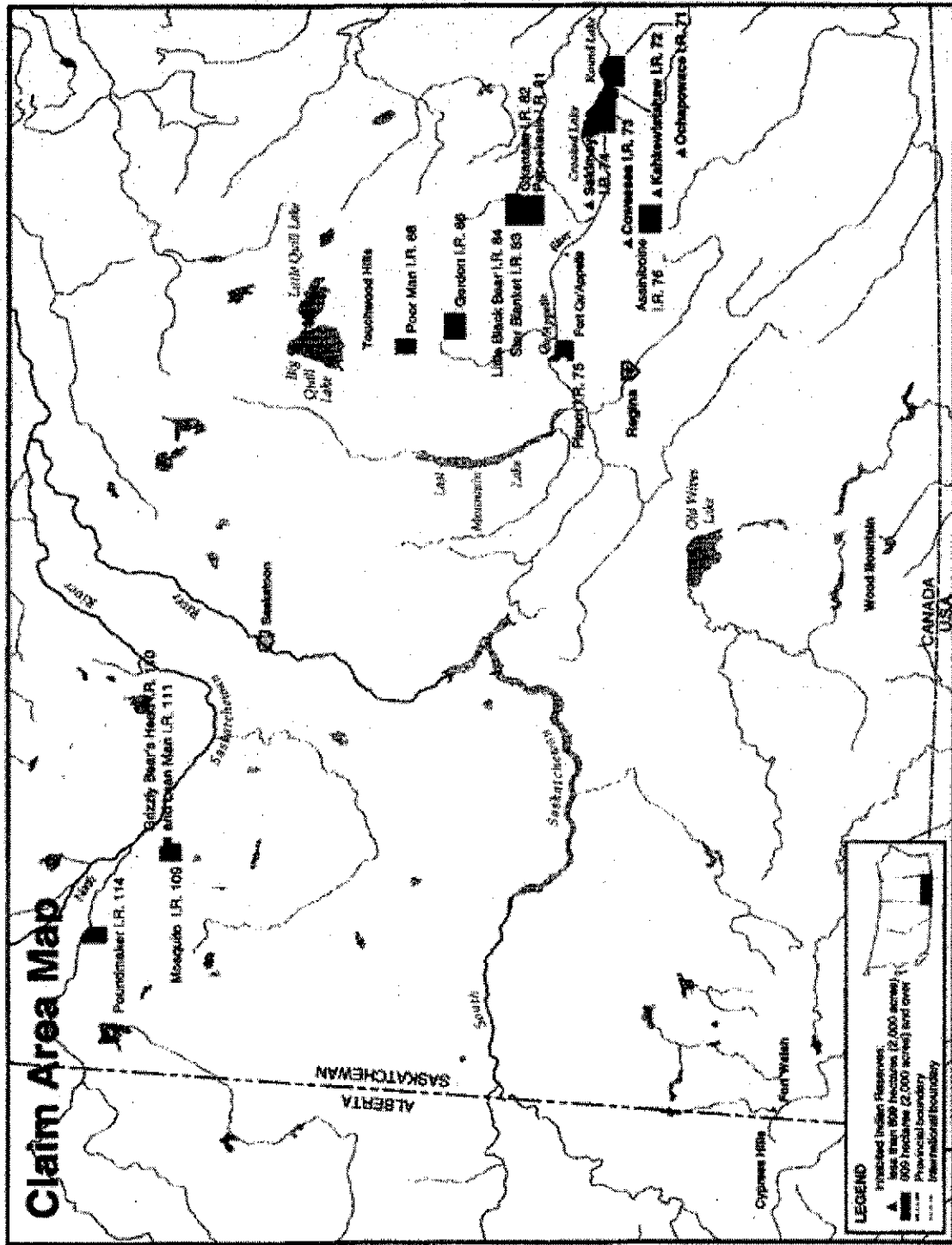
The inquiry that forms the subject matter of this report was convened at the request of the Kahkewistahaw First Nation.¹ The First Nation claims that Canada continues to owe it land under the terms of Treaty 4, whereas, in Canada's view, Kahkewistahaw has already received its full entitlement to treaty land. This inquiry requires the Indian Claims Commission (ICC) to clarify the process by which individuals entitled to be counted in establishing a band's treaty land entitlement are identified.²

Kahkewistahaw adhered to Treaty 4 on September 15, 1874. Under the terms of that treaty, Canada agreed to set aside reserves equal to one square mile (640 acres) for each family of five, or 128 acres for each member of the First Nation. The difficulty, however, is that the treaty does not state when or how a band's population should be counted for the purposes of calculating the amount of land to be set aside as reserve for its collective use and benefit.

Although a reserve of 41,414 acres was surveyed for the First Nation on the south side of Round Lake and the Qu'Appelle River in 1876 by William Wagner, neither Canada nor the First Nation suggested that Kahkewistahaw's entitlement to treaty land should be measured with reference to that survey because Kahkewistahaw never settled on that particular parcel of land. In effect, that reserve was never accepted by the First Nation.

1 Alternatively referred to throughout this report as "Kahkewistahaw" or the "First Nation."

2 For background on the difficult subject of treaty land entitlement, see the three inquiry reports released by the Indian Claims Commission involving the Fort McKay First Nation, Kawacatoose First Nation, and Lac La Ronge Indian Band: Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), now reported at p. 3 of volume 5 of the *Indian Claims Commission Proceedings* (ICCP); Indian Claims Commission, *Kawacatoose First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996), now reported at (1996) 5 ICCP 73; and Indian Claims Commission, *Lac La Ronge Indian Band Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996), now reported at (1996) 5 ICCP 235.



Another survey of land farther west and with no frontage on the Qu'Appelle River was undertaken in 1880 by Allan Poyntz Patrick and his assistant, William Johnson, but it is not clear whether this survey was completed. The following year, John C. Nelson surveyed and adjusted the reserve boundaries to include land being farmed by Kahkewistahaw band members, frontage on the Qu'Appelle River, and timber land. Nelson's work in 1881 resulted in the survey of Kahkewistahaw Indian Reserve (IR) 72, comprising an area of 73 square miles (46,720 acres) located roughly 130 kilometres east of Regina on the south shore of the Qu'Appelle River between Crooked Lake and Round Lake. IR 72 was adjoined on the east by the Ochapowace reserve (located on the site of the reserve surveyed for Kahkewistahaw by Wagner in 1876) and on the north and west by the Cowessess reserve.

Since IR 72 had only river frontage, Nelson also surveyed a small reserve on the north shore of Crooked Lake to provide access to a productive fishery. When this reserve was later found to be swampy, Nelson substituted an area of 96 acres on the north side of Crooked Lake in 1884 as a separate fishing station for Kahkewistahaw. This area became known as IR 72A.³ Comprising a total of 46,816 acres, Indian Reserves 72 and 72A provided sufficient land for 365 people under the terms of Treaty 4, and were confirmed by Order in Council on May 17, 1889.⁴

The central question in this inquiry is whether Kahkewistahaw's treaty land entitlement should be determined according to the population of the First Nation in 1880, when Patrick and Johnson commenced their survey work, or in 1881, when Nelson completed the survey that was approved by Order in Council.

The First Nation's claim to an outstanding treaty land entitlement was originally considered and rejected by the Department of Indian Affairs and Northern Development (DIAND) in the early 1980s. The issue resurfaced, however, during the negotiations that led to the execution of the Saskatchewan Treaty Land Entitlement Framework Agreement (the Framework Agreement) on September 22, 1992. The signatories to the Framework Agreement were the governments of Canada and Saskatchewan, and 26 Saskatchewan First Nations (the Entitlement Bands) whose treaty land entitlement (TLE) claims under Treaties 4, 6, or 10 had been "accepted for negotiation" or "validated" by

³ Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, pp. 7-8 (ICC Exhibit 6).

⁴ Order in Council PC 1151, May 17, 1889 (ICC Documents, pp. 40-45).

Canada prior to the date of the Framework Agreement.⁵ Kahkewistahaw was not included as an Entitlement Band, although, according to former Chief Louis Taypotat of the First Nation, it should have been:

During the negotiations of the Framework Agreement, it became apparent that the Date of First Survey research done by the Department of Indian Affairs and Northern Development in the early 1980's was not properly performed. We were advised that we should do further research to confirm the results of the Date of First Survey research done for us. It quickly became evident that this research was not properly performed for our First Nation. We should have been validated as a Treaty Land Entitlement Band. We therefore quickly prepared a claim which was submitted to your department for consideration. This was submitted to Al Gross [of DIAND] on May 20, 1992.⁶

The First Nation's submission of May 20, 1992,⁷ claimed that Kahkewistahaw's 1880 treaty annuity payroll should be treated as the appropriate base payroll, and proposed a population of 597 (including absentees, transfers from landless bands, and new adherents to treaty) for treaty land entitlement purposes. As a result, the First Nation's claim was for a reserve allocation of 76,416 acres based on the Treaty 4 formula of 128 acres per person, meaning that the 46,816 acres actually received represented a shortfall of 29,600 acres. The circumstances of the Ochapowace First Nation were cited as comparable to those of Kahkewistahaw:

The Ochapowace situation is similar to Kahkewistahaw's situation. The Ochapowace situation was fully canvassed with the Office of the Treaty Commissioner. Nelson's survey dealt with Ochapowace and Kahkewistahaw at the same time and the annuity payments were paid at the same time – Ochapowace on August 3, 1881 and Kahkewistahaw's one day later on August 4, 1881. In the Ochapowace situation, the Office of the Treaty Commissioner accepted 1880 as the appropriate payroll. It is, therefore, submitted that Kahkewistahaw's 1880 annuity payroll is also the most appropriate for the purpose of Kahkewistahaw's Treaty land entitlement.⁸

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

6 Chief Louis Taypotat and Councillors, Kahkewistahaw Indian Nation, to Ron Irwin, Minister, DIAND, February 7, 1994 (ICC Documents, p. 332).

7 Kahkewistahaw Band Treaty Land Entitlement Claim Submission, prepared by Pillipow & Company, May 20, 1992 (ICC Documents, pp. 3-10); Kahkewistahaw Band Date of First Survey Treaty Paylist Analysis, prepared by Pillipow & Company, undated (ICC Documents, pp. 64-73).

8 Kahkewistahaw Band Treaty Land Entitlement Claim Submission, prepared by Pillipow & Company, May 20, 1992 (ICC Documents, pp. 8-9).

In later submissions, counsel for Kahkewistahaw also cited the circumstances of neighbouring Cowessess as analogous to those of Kahkewistahaw. Ochapowace was eventually included as an Entitlement Band under the Saskatchewan Framework Agreement, and counsel for Kahkewistahaw noted that both Ochapowace and Cowessess have since settled their outstanding treaty land entitlement claims.

On May 11, 1994, the Kahkewistahaw claim was rejected by Canada for the second time, on the following grounds:

As you will recollect, the crux of the discussions was the appropriate Date of First Survey, i.e. 1880 or 1881. As a result of analysis, the federal view remains that the correct year for date of survey was 1881 rather than 1880. The fact that there was no plan of survey completed and available until 1881 distinguishes your claim from others with similar facts.

On this basis, the evidence does not indicate that your First Nation has a TLE shortfall and the claim does not fall within our Specific Claims Policy. I would note, in addition, that while the 1880 date was rejected on grounds related to the availability of a survey plan, it would not have been an appropriate date in any event. The 1880 date would have included people whose descendants benefitted in 1992 from the Nekaneet TLE settlement agreement. The movement of people to Nekaneet is a necessary consideration.⁹

The 1881 payroll, which Canada asserts as the appropriate base payroll, includes only 186 individuals paid under Kahkewistahaw. When 70 absentees and arrears are added to the 186 on the payroll, the result is a total population of 256¹⁰ – well below the figure of 365 people for whom land was surveyed by Nelson in 1881.

MANDATE OF THE INDIAN CLAIMS COMMISSION

Following the most recent rejection of the Kahkewistahaw claim, the First Nation requested that the Indian Claims Commission conduct an inquiry into

9 A.J. Gross, Director, Treaty Land Entitlement, DIAND, to Chief Louie Taypotat, Kahkewistahaw Indian Band, May 11, 1994 (ICC Documents, p. 2).

10 Ian D. Gray, Counsel, DIAND Legal Services, Specific Claims West, to Kim Fullerton, Indian Claims Commission, June 26, 1995, with accompanying charts, showing (a) population as recorded by annuity paysheets, and (b) population including absentees and arrears (ICC Exhibit 15). These figures do not include transfers from landless bands or new adherents to treaty, and there is no evidence before the Commission on the numbers of these "late additions" to Kahkewistahaw's population as of 1881.

the claim.¹¹ On August 31, 1994, the Commissioners agreed to conduct this inquiry.¹²

The Commission's authority to conduct inquiries under the *Inquiries Act* is mandated by Orders in Council which direct

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

- (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
- (b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.¹³

The Commission's mandate requires it to report on the validity of rejected claims "on the basis of Canada's Specific Claims Policy." That policy is set forth in a 1982 booklet published by DIAND entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, which states:

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

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

- i) The non-fulfillment of a treaty or agreement between Indians and the Crown. . . .¹⁴

The purpose of this inquiry is to inquire into and report on whether, on the basis of the Specific Claims Policy, Canada owes an outstanding lawful obligation to the Kahkewistahaw First Nation to provide additional reserve

11 Kahkewistahaw Indian Nation Band Council Resolution KAHK-BCR-005-081, May 9, 1994 (ICC Documents, p. 1). The application and supporting documents were forwarded to the Commission on June 1, 1994: Stephen Pillipow, Pillipow & Company, to Indian Claims Commission, June 1, 1994.

12 Dan Bellegarde and James Prentice, Co-Chairs, Indian Claims Commission, to Chief and Council, Kahkewistahaw First Nation, September 2, 1994; Daniel Bellegarde and James Prentice, Co-Chairs, Indian Claims Commission, to Ron Irwin, Minister of Indian and Northern Affairs, and Allan Rock, Minister of Justice and Attorney General, September 2, 1994.

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

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

land under the terms of Treaty 4. In the Commission's view, this broad question must be addressed by considering the following three issues:

- Issue 1 What is the appropriate date for calculating Kahkewistahaw's treaty land entitlement?
- Issue 2 What is Kahkewistahaw's population for treaty land entitlement purposes?
- Issue 3 Has the First Nation established, pursuant to Article 17 of the Saskatchewan Treaty Land Entitlement Framework Agreement, an outstanding treaty land entitlement on the same or substantially the same basis as the Entitlement Bands, which are party to the Framework Agreement?

We must first, however, consider the factual background to these issues.

PART II

THE INQUIRY

The parties agreed that the issues before the Commission in this inquiry did not require a community session to hear evidence from the elders. Two joint sessions were conducted in Saskatoon, Saskatchewan, on May 24 and 25, 1995, with treaty land entitlement experts appearing on behalf of the Kawatoose and Ocean Man First Nations in addition to Kawkewistahaw. The experts who testified were Kenneth Tyler, counsel with the Constitutional Law Branch of Manitoba's Department of Justice and a former adviser to the Federation of Saskatchewan Indian Nations (FSIN); Dr. Lloyd Barber, the chief negotiator for the FSIN on the Saskatchewan Framework Agreement; David Knoll, counsel for the FSIN in the negotiations on the Framework Agreement; James Gallo, the manager of Treaty Land Entitlement and Claims, Lands and Trusts Services, for DIAND, Manitoba Region, a former researcher on treaty land entitlement for the Manitoba Indian Brotherhood, and one of the architects of the Report of the Treaty Commissioner which preceded the Saskatchewan Framework Agreement; and James Kerby, counsel to Canada during the Saskatchewan Framework Agreement negotiations. The Commission also heard evidence from Peggy Martin-Brizinski and Jayme Benson of the Office of the Treaty Commissioner (OTC) with respect to two reports prepared by the OTC. In addition, the Commission has considered historical and documentary evidence entered as exhibits at the inquiry.

The parties each submitted written arguments to the Commission in February 1996, prior to making oral submissions at the final session in Saskatoon on February 22, 1996. The written submissions, documentary evidence, transcripts, and balance of the record of this inquiry are listed in Appendix A of this report.

HISTORICAL BACKGROUND

Treaty 4 (1874)

The background to the signing of Treaty 4 has been discussed in the Commission's recent report on the treaty land entitlement claim of the Kawacatoose First Nation. We adopt the following findings in relation to Treaty 4 from the Kawacatoose report:

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

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

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

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

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

1874, the third day of the conference, Morris gave the Chiefs the following assurances:

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

The next day Morris stated:

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

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

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

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

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

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

The Cree and Saulteaux Tribes of Indians, and all other the [sic] Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen, and her successors forever, all their rights, titles and privileges whatsoever to the lands included within the following limits. . . .

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

As soon as possible after the execution of this treaty Her Majesty shall cause a census to be taken of all the Indians inhabiting the tract hereinbefore described, and shall, next year, and annually afterwards for ever, cause to be paid in cash at some suitable season to be duly notified to the Indians, and at a place or places to be appointed for that purpose, within the territory ceded, each Chief twenty-five dollars; each Headman, not exceeding four to a band, fifteen dollars; and to every other Indian man, woman and child, five dollars per head; such payment to be made to the heads of families for those belonging thereto, unless for some special reason it be found objectionable.¹⁵

Like Kawacatoose, Kahkewistahaw (or “Him that flies around”) was one of the 13 chiefs who signed Treaty 4 at Fort Qu’Appelle in 1874. Although Kahkewistahaw and the majority of his people eventually came to call the Qu’Appelle Valley their home, Treaty 4 gives the chief’s place of origin as “towards the Cypress Hills.”¹⁶ The research panel from the Office of the Treaty Commissioner described Kahkewistahaw in these terms:

Kahkewistahaw as chief came from a prominent family of Plains Cree leaders. His father had signed the Selkirk Treaty in 1817, and his brother was also a noted chief. Kahkewistahaw’s band came from the east, and contained some Saulteaux people. There seems to have been an affiliation with Sakimay and with Cowessess. The band hunted in the Wood Mountain area as far west as the Cypress Hills, and came to Ft. Qu’Appelle every year for treaty payments. They evidently showed little interest in the fur trade or in agriculture, being primarily hunters.¹⁷

15 Indian Claims Commission, *Kawacatoose First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996), (1996) 5 ICGP 73 at 96-100. Footnote references omitted. Emphasis added.

16 *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu’Appelle and Fort Ellice* (Ottawa: Queen’s Printer, 1966), 5 (ICC Exhibit 16).

17 Office of the Treaty Commissioner, “Surveys of the Kahkewistahaw Reserve,” March 29, 1994, p. 1 (ICC Exhibit 2).

When the treaty was signed, Kahkewistahaw's Band numbered 65 members.

The key words of the treaty for the purposes of this inquiry are those found in the "reserve clause" highlighted in the foregoing excerpt from the Kawacatoose report. The important elements of this clause are the Crown's obligations to set aside a reserve comprising one square mile per family of five (or 128 acres per person) for each band, and to do so only after consulting with the band to ascertain its preferred location for the reserve.

As noted in the Kawacatoose report, the Indian Commissioners recognized when the treaty was signed that not all Indian bands were then prepared to convert from being "plains buffalo hunters to reserve agriculturalists." In addition to cash annuities, the treaty provided that bands would be furnished with supplies for hunting and trapping until they elected to take reserve land, at which time they would receive the implements necessary for an agrarian-based economy:

Her Majesty also agrees that . . . yearly and every year She will cause to be distributed among the different bands included in the limits of this treaty powder, shot, ball and twine, in all to the value of seven hundred and fifty dollars. . . .

It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any band thereof who are now actually cultivating the soil, or who shall hereafter settle on their reserves and commence to break up the land, that is to say: two hoes, one spade, one scythe and one axe for every family actually so cultivating, and enough seed wheat, barley, oats and potatoes to plant such land as they have broken up; also one plough and two harrows for every ten families so cultivating as aforesaid, also to each Chief for the use of his band as aforesaid, one yoke of oxen, one bull, four cows, a chest of ordinary carpenter's tools, five hand saws, five augers, one cross-cut saw, one pit saw, the necessary files and one grindstone, all the aforesaid articles to be given, once for all, for the encouragement of the practice of agriculture among the Indians.¹⁸

We noted in the Kawacatoose report that severe conditions faced the bands which adhered to Treaty 4 in 1874. Kenneth Tyler elaborated on these conditions with specific reference to the Kahkewistahaw First Nation:

In 1874, Chief Kahkewistahaw signed Treaty 4 on behalf of his Band. It was already easy to see that times of great difficulty lay ahead. The great herd of buffalo were [sic] rapidly disappearing[. W]ithin six years they would practically disappear from the Canadian Prairies; and within twelve years they would be all but exterminated in the

¹⁸ *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 7 (ICC Exhibit 16).

United States as well. As long as the buffalo had remained plentiful, the Plains Indians had prospered . . . proud and independent. When the buffalo departed they took this prosperity, and much else, with them. The members of the Kahkewistahaw Band had depended on the buffalo for survival. In the years following 1874, they were forced to depend upon the Canadian Government.¹⁹

Wagner's Survey (1876)

Following the execution of Treaty 4, Canada intended to proceed immediately with the establishment of reserves for those treaty Indians who desired them. In the summer of 1875, Surveyor General J.S. Dennis wrote:

He [the Deputy Minister of the Department of the Interior] recommends that Mr. Wagner, D.L.S., be employed to survey the tracts set apart with which view that gentleman should immediately follow the Commissioner to Qu'Appelle and, upon the decision of the locality of the Reserve in that vicinity, he should survey the same and then follow the Commissioner . . . to the Touchwood Hills or such other point as the latter may have proceeded to, at which place, should the Commissioner require to go on previous to the Surveyor's arrival, he might leave instructions, in detail, respecting the precise locality and extent of the Reserve to be surveyed. . . .

If the Minister approves, it might be suggested to the Commissioner that, *in setting apart any Reserves, the interests of the Indians should be considered* so far as to give them all the necessary frontage upon a river or lake, to include an abundance of land for farming purposes for the Band and at the same time, the tract should be made to run back and include a fair share also of land which may not be so desirable for farming but would be valuable for other purposes connected with the Band, such as hunting, etc.

If practicable, he would say that the Reserves should be as nearly square as the localities selected may permit of their being made.²⁰

Commissioner W.J. Christie met with the Indians of Treaty 4 in 1875 to pay annuities and to select reserves in accordance with the following instructions from the Minister:

I. As regards the selection of the Reserves.

Each Reserve should be selected, as the Treaty requires, after conference with the Band of Indians interested, and should, of course, be of the area provided by the Treaty.

¹⁹ Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, p. i (ICC Exhibit 6).

²⁰ Memorandum by J.S. Dennis, Surveyor General, July 13, 1875, National Archives of Canada [hereinafter NA], RG 10, vol. 3662, file 5007 (ICC Documents, pp. 161-62, 164-65). Emphasis added.

The Minister thinks that the Reserves should not be too numerous, so far as may be practicable, as many of the Chiefs of Bands speaking one language, as will consent, should be grouped together on one Reserve. . . .

I am to add that Mr. Wagner, the gentleman named in the memorandum [of Surveyor General Dennis] will be instructed to place himself at your disposal for the purpose of proceeding with the surveys of the Reserves as selected in the manner recommended by the Surveyor General.²¹

In their meetings with the Indians, Christie and surveyor William Wagner found that some bands were prepared to settle immediately and commence farming, while others such as the Kahkewistahaw First Nation preferred to continue their nomadic lifestyle:

Reserves.

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

The following Bands have no desire to commence farming at present, and gave no intimation with regard to the localities where they desired their reserves to be set apart. (They are plains hunters and depend entirely on the buffalo for subsistence.)

1. Kakiwistahaw's (58 families). . . .²²

Some 289 people followed Kahkewistahaw to Qu'Appelle to receive annuities in 1875, but Wagner did not survey a reserve for the First Nation that year.

In the fall of 1876, Wagner and Indian Agent Angus McKay met with the chiefs who had not yet obtained reserves for their bands. McKay reported on the land selections made for various bands, including Kahkewistahaw, that year:

On the 5th [September] while the payment was going on, Mr. Wagner and I consulted with the Chiefs and headmen of the bands who had been paid in regard to their reserves. At first we found them very unwilling to point out localities or to entertain the idea at all from a misunderstanding that once they accepted their reserves they

21 David Laird to W.J. Christie, July 16, 1875, NA, RG 10, vol. 3622, file 5007 (ICC Documents, pp. 153-54). Emphasis added.

22 W.J. Christie, Indian Commissioner, and M.G. Dickieson, to Minister of the Interior, October 7, 1875, NA, RG 10, vol. 3625, file 5489 (ICC Documents, pp. 173-76).

would come under the subjection and control of the white man. I pointed out where they were in error and at last they agreed to locate their reserves. . . .

I met several bands of Indians on the 7th, 8th and 9th and continued settling the reserves question during that time.

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

9th. Chief Ka-ke-westa-haw, or "He who flies around"

This Chief is a Cree Indian, the son of Sarina-Meh-chaihoo-kehew-ap or "He who sits with many Eagles," the famous "Austin's Guide" who was the chief of all the Cree tribe on the south side of the Saskatchewan and who was succeeded by the "Loud Voice."

This chief possesses many of the good qualities of his father and is very well disposed towards the Canadian Government. His Band numbers 63 families of the Cree tribe who have never attempted to do any farming. *Their reserve is fronting on the south side of the Crooked Lake on Qu'Appelle River beginning opposite the eastern limit of "Loud Voice's" reserve and extending westward and is very much the same as that of Star Blanket.*²³

The reserve surveyed by Wagner for Kahkewistahaw in 1876 contained 41,414 acres – enough land for 323 people, based on the Treaty 4 formula of 128 acres per person – and was situated on the site of the present reserve for the Ochapowace First Nation.²⁴ However, the evidence indicates that Kahkewistahaw and his people never settled on the reserve surveyed for them by Wagner:

That particular reserve does not appear to have been inhabited by the band, we don't have any definite evidence one way or the other but indirectly, it would appear that they were continuing to hunt, they were being paid, many of them being paid at Fort Walsh and were not settling on reserve.²⁵

Teresa Homik states in her report entitled "Kahkewistahaw Reserve Date of First Survey" that documentation of Kahkewistahaw's reserves proved troublesome from the outset:

23 Angus McKay to Superintendent General, October 14, 1876, NA, RG 10, vol. 3642, file 7581 (ICC Documents, pp. 184-87). Emphasis added.

24 ICC Transcript, May 25, 1995, p. 314 (Peggy Martin-Brizinski). It would appear that, in describing the reserve, Indian Agent McKay had confused Round Lake, on which Kahkewistahaw's 1876 reserve actually fronted, with Crooked Lake, which is also on the Qu'Appelle River but situated several miles to the west. Nevertheless, the eastern boundary of the reserve appeared exactly as described by McKay when Wagner later prepared the survey plan. The plan shows the eastern boundary of the reserve extending south from Round Lake and immediately opposite the eastern boundary of the reserve for Kakishiwai or "Loud Voice," which lay to the north of Round Lake: Natural Resources Canada, Canada Centre for Surveys and Mapping, Legal Surveys Division (Regina), "Indian Reserve Treaty No. 4, Ka-west-a-haw Band, River Qu'Appelle, surveyed during December, 1876 by William Wagner," CLSR Plan No. 969, Micro Plan 342 (ICC Documents, pp. 189, 308).

25 ICC Transcript, May 25, 1995, p. 314 (Peggy Martin-Brizinski).

According to records maintained by the Indian Lands Registry of the Department [of Indian Affairs and Northern Development], there is no record of any Order-in-Council confirming or establishing the reserve as surveyed by Wagner, nor is there any record of its surrender. There appears to be very little mention of it in the records of the Department. For example, during the years surrounding the above survey, it was the practice of Indian Affairs, then a branch of the Department of the Interior, to publish an annual schedule of Indian Reserves surveyed during the preceding year. Predictably, the schedule published in the Sessional Papers for the year ended October 31, 1876 does not mention Kahkewistahaw, as it was not surveyed until December of that year. Curiously, however, the schedule published in the following year, dealing with reserves surveyed during the year ended October 31, 1877, does not mention any of the reserves surveyed by Wagner near Crooked Lake in late 1876, including Kahkewistahaw.²⁶

In 1880, Surveyor General Lindsay Russell was asked to provide a list of all completed surveys, surveys under way, and reserves remaining to be surveyed.²⁷ The reserve surveyed by Wagner was identified as “Ka-west-a-haw Reserve 53.”²⁸ Yet, it is not entirely clear why the reserve surveyed for Kahkewistahaw in 1876 was never settled on by the First Nation or considered to be Kahkewistahaw’s reserve for the purposes of the treaty. Whatever the reasons, it is important to note that neither Canada nor the First Nation argued before this Commission that Wagner’s survey should be considered Kahkewistahaw’s “first survey” for treaty land entitlement purposes.

Survey Work by Patrick and Johnson (1880)

After Kahkewistahaw’s adhesion to Treaty 4 in 1874, life for his people became increasingly arduous with the dwindling of the great herds of buffalo on which all plains hunters had relied:

As for the majority of the Band who remained with Chief Kahkewistahaw, the years between 1875 and 1880 must have been very difficult. The buffalo were rapidly disappearing, and life on the Plains was becoming increasingly precarious. This situation was no doubt made worse by the flight of Sitting Bull with his large Band of Sioux into the Wood Mountain District in late 1876 and early 1877. This area seems to have been in the centre of Kahkewistahaw’s traditional hunting area. Within a short time they had wiped out the remaining buffalo in the area, and from then until they left in

26 Teresa M. Homik, “Kahkewistahaw Reserve Date of First Survey,” October 27, 1993 (ICC Documents, pp. 136-37).

27 Unknown to Lindsay Russell, Surveyor General, May 19, 1880, NA, RG 10, vol. 3713, file 20694 (ICC Documents, p. 207).

28 The reserve surveyed for Kahkewistahaw by Wagner was designated Indian Reserve 53 in “List of Indian Reserves,” May 26, 1880, NA, RG 10, vol. 3713, file 20694 (ICC Documents, pp. 209, 310).

1881, the Sioux formed a barrier which prevented any buffalo from travelling from the United States past Wood Mountain to the Crees north of there. Although the Kahkewistahaw Band had not yet chosen a reserve site, we know from Indian Affairs Records that in the Spring of 1879, the Band accepted four bushels of seed potatoes, some garden seeds, an axe, a spade and two hoes from the Government. From this it is clear that Kahkewistahaw and his people were beginning to consider agriculture as an alternative to the pursuit of the vanishing buffalo.²⁹

Teresa Homik stated that the acceptance of agricultural supplies by Kahkewistahaw members constituted “[i]ndirect confirmation of the settlement of at least some of the Band on land *of their own*.”³⁰ According to the OTC, the only land that the First Nation could arguably have called its own in 1879 would have been the 1876 reserve surveyed by Wagner,³¹ but the OTC research panel disagreed that the First Nation’s receipt of agricultural supplies necessarily implied settlement on that land:

In the report Kahkewistahaw Reserve: Date of First Survey, Teresa Homik argues that the distribution list of seed and agricultural implements for the North West Territories in 1879 gives indirect evidence that the band settled on their reserve by listing the “Ka-kee-wis-ta-haw” band as having received four bushels of seed potatoes, one axe, two hoes, and a spade. However, such a conclusion requires a great deal of conjecture. Agriculture implements and seed were supposed to be given to bands when they settled and commenced farming. If the members of the band had settled, it is possible that they had settled in an area other than the reserve area. The fact that the surveyor would later completely move the reserve suggests that the band had not permanently settled on the old reserve. Some band members may have been planning to settle in 1879 when they accepted the seed and implements, but never actually followed through on this activity until 1880, when Agent MacDonald [sic] persuaded them to go onto their new reserve. There are many possible scenarios to explain the distribution of seed and implements to the band and there was not enough strict monitoring of the distribution of these goods to use the fact that they received some of these items as proof that the band had settled on the 1876 reserve. What is clear was that a subsequent survey of a reserve for the Kahkewistahaw band moved the reserve to a new location.³²

29 Ken Tyler, “The Government of Canada and Kahkewistahaw Band,” undated, pp. 2-3 (ICC Exhibit 6). See also Canada, Parliament, *Sessional Papers*, 1880, vol. 13, no. 8, Paper no. 4, Annual Report of the Department of the Interior for the Year Ended 30th June 1879, p. 110, “Return of Seed distributed to Indian Bands in the Spring of 1879” and “Return of Agricultural Implements distributed to Indian Bands in the Spring of 1879” (ICC Documents, p. 202).

30 Teresa M. Homik, “Kahkewistahaw Reserve Date of First Survey,” October 27, 1993 (ICC Documents, p. 137). Emphasis added.

31 Office of the Treaty Commissioner, “Surveys of the Kahkewistahaw Reserve,” March 29, 1994, p. 4 (ICC Exhibit 2).

32 Office of the Treaty Commissioner, “Surveys of the Kahkewistahaw Reserve,” March 29, 1994, p. 2 (ICC Exhibit 2).

By the time treaty annuities were paid on July 18, 1880, living conditions for the Kahkewistahaw First Nation and other bands had become very difficult. Indian Agent McDonald was able to persuade several bands to take up reserves. McDonald's report of September 12, 1880, clearly demonstrates the critical state of the Indians and the need to move them to reserves:

A good deal of distress existed last winter, at this place [Qu'Appelle] particularly, owing to the men going to the plains, and leaving their women and children here; from those who could get work some return was got for the provisions supplied them. The fishing was not carried out as it might have been, on account of the severe winter [of 1879-80] and the slight clothing they had to protect themselves from the exposure on the lake. . . .

On my return from making the payments of annuities at the Cypress Hills, I found nearly all the Indians I had paid here, still camped about the Qu'Appelle lakes, and every few days calling at the office for relief. They were quite bewildered, not knowing what to do; to return to the plains was sure starvation, and every likelihood of the few horses they had being stolen from them.

I invited the chiefs and head men together, and explained the advantages they would derive by going on their reserves immediately; at the same time showed them the loss they would sustain every year by their not doing so. I also informed them that unless they went on their reserves I could not assist them in their work, nor could their old people be as well cared for.

I am happy to report that during the last week in August, and up to this date, I have succeeded in influencing eleven new bands, representing 2,310 souls, to go on their reserves. Four at the File Hills, which reserves are at present being surveyed by Mr. Patrick; four at the Crooked Lake, also being surveyed; one at Touchwood Hills; one here, and one at the Moose Mountains.

These Indians (Plain Crees) are totally ignorant of farming or the ordinary mode here of making a living, such as even making or setting a net, killing fish or small game, having always lived on the plains hunting the buffalo, and for the last seven years merely coming here for their annuities and presents. I have made provision for them on their reserves, and they are now being assisted in getting out logs and building houses for the winter.

These eleven bands, now having just gone on their reserves, have nothing to depend upon for a living, and until they produce something for themselves they must look for a liberal supply from a generous Government for support. Many of them have hardly enough to cover their persons, still they are willing to work and learn, and I look forward to seeing these Indians in a few years doing a good deal towards their own support.³³

33 A. McDonald, Indian Agent, Treaty No. 4, to Superintendent General of Indian Affairs, September 12, 1880, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1880*, 104-05 (ICC Documents, p. 344).

Allan Poyntz Patrick and his assistant, William Johnson, had been assigned to the North-West Territories in 1880 to survey reserves for those Indian bands desiring them. Upon the arrival of the surveyors in Qu'Appelle, Indian Agent McDonald urged them to lay out reserves as quickly as possible for those bands he had persuaded to settle. At year end, Patrick reported:

I have the honor to report to you on the result of the work which, during the past year, I have performed under your instructions. . . .

My work has embraced the survey of the following Indian reservations:—

- 1st. Assiniboine, north of Cypress Hills, embracing 340 square miles.
- 2nd. O'Karree's Band, File Hills, embracing 20 square miles.
- 3rd. Star Blanket's Band, File Hills, embracing 20 square miles.
- 4th. Pepeiksis Band, File Hills, embracing 45 square miles.
- 5th. Little Black Bear's Band, File Hills, embracing 45 square miles.
- 6th. Osoup's Band, Crooked Lake; and
- 7th. *Rewistahaw's* [sic] *Band, Crooked Lake. . . .*

Col. McDonald informed me that the Indian bands upon the "File Hill" and "Crooked Lake" reservations were making great complaints that their reserves had not been laid out; he requested me to lose no time in proceeding to define the limits of these reservations. In consequence of his urgent request, I divided my party, sending one in charge of my assistant, Mr. Johnson, to "Crooked Lake," while I proceeded myself to the "File Hills." Mr. Johnson has not as yet made any report to me, but in a short conversation I had with him I learned that he left the Indians on this reservation well satisfied; he also informed me that the soil is good and timber plentiful.³⁴

No survey plan or other record of Johnson's surveying efforts in 1880 has ever been located, and the boundaries he laid out are therefore uncertain. Indian Agent McDonald was the only other government official on location at the time, and his year-end report of January 3, 1881, added the following information:

I have the honor to state that *the following Reserves are yet to be surveyed and completed* (viz.):

³⁴ Report of Allan Poyntz Patrick, Dominion Topographical Surveyor, December 16, 1880, in Canada, Parliament, *Sessional Papers*, 1880-81, vol. 14, no. 8, Paper no. 14, Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1880 (ICC Documents, pp. 214, 216, 313, 315). Emphasis added. Canada and the First Nation agree that the reference to "Rewistahaw" is a misspelling of Kahkewistahaw, as there was no other band in the area with a similar name.

Standing Buffalo (Sioux)		Qu'Appelle
The Ocean Man		
The Ocean Man	}	Moose Mountains
Pheasant Reserves		
Yellow Quill		Nut Lake
Muscowaquans		Touchwood Hills
Loudvoice	}	
[Osoups		
<i>Kakewistahaw</i>		<i>Crooked Lake</i>
<i>Chakachas</i>		to be completed

. . . After this Little Child and Piapot will be the only two Chiefs who have not taken their Reserves.³⁵

Of the four reserves located at Crooked Lake noted in McDonald's report, the only completed survey plan by Patrick and Johnson on record is for O'Soup's reserve.³⁶ This is seemingly corroborated in a series of correspondence beginning with Patrick's telegram to Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs: "Have my plans and field notes arrived. Galt wants answer. A.P. Patrick."³⁷ Vankoughnet replied to Galt, the Assistant Indian Commissioner: "Answer June 13/81 to Mr. Galt. Mr. Patrick's plans and field notes not yet received. LVK"³⁸ Vankoughnet subsequently received Patrick's plans and field notes, and notified Galt:

With reference to my telegram of the 13th Instant in which I stated that Mr. Patrick's Plans and Field Notes had not been received, I have now to inform you that on the 15th and 17th Inst. respectively three Plans of (1) Little Black Bear, Star Blanket, O'Karree's and Pe-pe-kis-sis Reserves at File Hills, (2) Osoup's Reserve on the Qu'Appelle River and (3) the Assiniboine Reserve, Treaty 4, were received at this Department without any covering letter. They were apparently mailed at Fort Assiniboine, Montana Territory, about the 8th Instant.

I now send these documents to you inasmuch as they require to be examined and certified by Mr. Dewdney before they can be accepted by the Department as correct.³⁹

The delayed arrival of survey plans from Patrick was not surprising. Peggy Martin-Brizinski of the OTC testified that Patrick was criticized for his disor-

35 A. McDonald to E. Dewdney, Indian Commissioner, January 3, 1881, NA, RG 10, vol. 3713, file 20694 (ICC Documents, pp. 237, 318). Emphasis added.

36 Natural Resources Canada, Canada Centre for Surveys and Mapping, Legal Surveys Division (Regina), "Osoup's Reserve, Qu'Appelle River, (signed) A.P. Patrick, D.L.S.," CLSR Plan No. 204, Micro Plan 176 (ICC Documents, pp. 235, 329).

37 A.P. Patrick to L. Vankoughnet, June 13, 1881, NA, RG 10, vol. 3751, file 29992 (ICC Documents, p. 345).

38 L. Vankoughnet to E.T. Galt, June 13, 1881, NA, RG 10, vol. 3751, file 29992 (ICC Documents, p. 345).

39 [L. Vankoughnet] to E.T. Galt, June 23, 1881, NA, RG 10, vol. 3751, file 29992 (ICC Documents, pp. 236, 346).

derly record keeping.⁴⁰ This was confirmed in later documents in which Patrick was refused consideration for additional work.⁴¹ Nevertheless, based on Patrick's report of December 16, 1880, the OTC suggested that Patrick and Johnson had at least commenced some survey work in 1880 on Kahkewistahaw's behalf:

Being a year end report of work completed, this document [Patrick's report] clearly indicates that work was done on the Kahkewistahaw reserve in that year. . . .

Unfortunately, a plan for the survey of the Kahkewistahaw reserve cannot be located and possibly no longer exists; of all of the surveys which may have been carried out in Crooked Lakes, only the plan for O'Soup's reserve has been found. It was not unusual for records in that era to be lost or to have never been submitted. The Department of Indian Affairs records are full of references to documents that cannot now be located. It is also probable that the survey was not completed, as noted above, although one can presume that some work was done.⁴²

In its 1995 report, the OTC again stated that "Johnson's survey may have been incomplete."⁴³

Kenneth Tyler expressed fewer doubts about the establishment of a reserve as a result of Johnson's 1880 survey work:

Kahkewistahaw appears to have been one of those who was ready to settle, and, in August of 1880, he seems to have agreed to take a reserve near the Crooked Lakes. Surveyor Johnson was immediately dispatched to lay out a reserve for the Band. There had been 258 people paid with the Chief at Ft. Qu'Appelle the month previous, which would have entitled the Band to a reserve of almost 52 sq. miles. Johnson laid out more than 64 sq. miles of land for them, no doubt because he believed that some of the Indians under Manitoncan [sic] and Foremost Man⁴⁴ at the Cypress Hills would join Kahkewistahaw later. The location of this first reserve is not known for certain but it seems to have been about nine miles by seven, in the area that was later surrendered by the Band. It had no frontage on the Qu'Appelle River.⁴⁵

40 ICC Transcript, May 25, 1995, p. 315 (Peggy Martin-Brizinski).

41 Chas. H. Beddoe, Accountant's Branch, Department of the Interior, to A.M. Burgess, Deputy Minister of the Interior, August 17, 1885, NA, RG 88, vol. 296, file 0132 (ICC Documents, p. 121); Surveyor General, Technical Branch, to A.M. Burgess, Deputy Minister of the Interior, August 19, 1885, NA, RG 88, vol. 296, file 0132 (ICC Documents, p. 120). The Surveyor General wrote:

In reference to the application of Mr. A.P. Patrick's for employment on the surveys, the undersigned begs to submit that the past record of Mr. Patrick as a surveyor is most unsatisfactory.

In 1878 he was placed in charge of a survey of Indian Reserves and in 1880, the Hon. Mr. Dewdney found Mr. Patrick's accounts so mixed and irregular that he gave instructions for the work to be closed.

The cost of the survey was about [illegible] and for this large amount, very little work was performed.

42 Office of the Treaty Commissioner, "Surveys of the Kahkewistahaw Reserve," March 29, 1994, p. 3 (ICC Exhibit 2).

43 Office of the Treaty Commissioner, "Kahkewistahaw Special Report: Surveys and Demographics, Crooked Lakes Reserves, 1876-1884," May 1985, p. 4 (ICC Exhibit 5).

44 This reference is to Nekaneet, who is also referred to in various sources as "Nikaneet" and "Necanete," or in English translations as "Foremost Man," "Front Man," and "Goes Before." The official designation currently in use by the Band is "Nekaneet Indian Band."

45 Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, p. 4 (ICC Exhibit 6).

Tyler's report includes a sketch of the suggested location of the Kahkewistahaw reserve surveyed by Johnson, although Tyler noted on the sketch that "Johnson's survey plans have not been found, so this map is based upon conjecture."⁴⁶

The OTC did not share Tyler's confidence in the sources on which he relied to define the size of the reserve:

Using the 1881 survey as a guide, the location of the 1880 survey appears to have been immediately to the south of O'Soup's reserve. . . . Ken Tyler, in his undated unpublished report, "The Government of Canada and the Kahkewistahaw Band," argues that the reserve was located to the south of O'Soup's reserve and was approximately 9 miles wide and 7 miles deep. Although Tyler apparently took his information from a letter sent from A.F. Mackenzie to W. Graham, September 21, 1931 (DIA file 673/30-4-7, vol. 1), the contents of the letter do not confirm this measurement.⁴⁷

Jayne Benson also provided a sketch of the proposed location of the reserve which the OTC concluded had been surveyed or commenced in 1880.⁴⁸ The sketch shows the 1880 Kahkewistahaw reserve located along the entire south boundary of O'Soup's reserve, with no "panhandle" for O'Soup along the west boundary of the Kahkewistahaw reserve as suggested by Tyler. Benson prepared an additional sketch comparing the proposed location of the 1880 reserve with Kahkewistahaw IR 72 set aside in 1881.⁴⁹ If Benson's second sketch is correct, it is clear that there was a substantial difference between the 1880 survey and the reserve which was ultimately set aside for the First Nation in 1881.

Nelson's Survey (1881)

Following Indian Agent McDonald's report of January 3, 1881, regarding reserves "yet to be surveyed and completed," Indian Commissioner Edgar Dewdney was asked on March 17, 1881, to outline the steps by which he proposed "to have the boundaries of these Reserves run during the ensuing season."⁵⁰ Dewdney replied that he intended to employ John C. Nelson,⁵¹ who

⁴⁶ Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, p. 5 (ICC Exhibit 6).

⁴⁷ Office of the Treaty Commissioner, "Surveys of the Kahkewistahaw Reserve," March 29, 1994, p. 4 (ICC Exhibit 2). Unfortunately, the letter from A.F. Mackenzie to W. Graham referred to in this passage is not in evidence before the Commission.

⁴⁸ ICC Transcript, May 25, 1995, p. 319 (Jayme Benson). The sketch is located at ICC Documents, p. 328. Benson's sketch was based not on a survey plan but rather on the report by surveyor John C. Nelson, who, as discussed previously, performed the 1881 survey.

⁴⁹ ICC Documents, p. 329.

⁵⁰ Unknown to E. Dewdney, Indian Commissioner, March 17, 1881, NA, RG 10, vol. 3713, file 20694 (ICC Documents, p. 238).

⁵¹ E. Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, March 18, 1881, NA, RG 10, vol. 3713, file 20694 (ICC Documents, p. 239).

“has a good knowledge of the country and of the Indians, he having been for some years assisting Mr. Patrick who until lately was in our employ.”⁵²

When Nelson arrived at Crooked Lake, McDonald had laid much of the groundwork for establishing the reserves. McDonald gave the following account:

I have the honor to submit the following Report of matters connected with Treaty No. 4 during the year ended 30th June, 1881. . . .

There appeared at one time a little dissatisfaction and jealousy among the chiefs on the choice of the reserves at the Crooked and Round Lakes; I was able to effect an amicable understanding amongst them, and when Mr. Nelson, D.L.S., the gentleman instructed to locate the reserves, proceeded to work, he had no difficulty in satisfying each band as to their boundaries.

I may here state that in 1877 these bands had been allotted reserves on the north side of the Qu'Appelle River; owing to the want of timber for building and fencing purposes, it was considered advisable to move them to the south side.

*The area of each reserve has been allotted to each band in proportion to the paysheets of 1879, the year in which the largest number of Indians were paid their annuities.*⁵³

Nelson's report for the year ended December 31, 1881, is a pivotal piece of evidence in this inquiry for two reasons. First, it sheds additional light on the extent of the efforts of Patrick and Johnson in the preceding year. Second, it also provides some understanding of the chronology of events of late July and early August 1881 when Indian Agent McDonald was distributing annuities to the Indians in the Qu'Appelle Valley and Nelson was doing his survey work:

The season's work comprised the allotment [sic] of reserves in the following localities, viz. —

Moose Mountain
Crooked and Round Lakes
Nut Lake
Fishing Lake
Touchwood Hills
The Qu'Appelles. . . .

52 E. Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, February 5, 1881, NA, RG 10, vol. 3733, file 26733 (ICC Documents, p. 240).

53 A. McDonald, Indian Agent, to Superintendent General of Indian Affairs, January 19, 1882, in Canada, Parliament, *Sessional Papers*, 1882, vol. 15, no. 5, Paper no. 6, Annual Report of the Department of Indian Affairs for the Year Ended 31st Decwember, 1881 (ICC Documents, p. 212). Emphasis added.

On the 21st July the survey of the Moose Mountain reserves was completed, and a general stampede of the animals took place on the 22nd, causing a delay of two days. I followed them up at once, accompanied by Red Ears *alias* the Beaver Potato, a good tracker, whose services I procured at the Indian camp, and succeeded in capturing them far out on the Plains of the Souris.

I left for Crooked Lake immediately after.

From the Head of the Mountain I struck northwards over a fine undulating fertile prairie with clumps of young poplar, for about forty miles, and entered the woods south of the Qu'Appelle Valley at Crooked Lakes.

The Indians there having desired a change in the position of the reserves already surveyed, I was instructed to survey suitable reserves on the south side of the valley for the Bands of Mosquito, O'Soup, Ka-Kee-wis-ta-haw, Ka-Kee-she-way and Cha-ca-chas, and to reduce the length of the frontage on the river, of the reserves already surveyed for them.

The old reserves occupied a frontage on the north side of the valley of thirty-one miles, and a frontage on the south side of twenty-one miles.

As I had no plans of the work done last year by Mr. Patrick I proceeded to make a reconnaissance of that part of the Qu'Appelle River likely to be made the front of the new reserves. I also examined the country thoroughly. After doing this I communicated with Colonel McDonald, Indian Agent, at Qu'Appelle, some of the Indian chiefs being there at the time.

After much planning as to the best manner of adjusting these reserves, it was decided to cut five miles off the lower part of O'Soup's reserve so as to give Ka-Kee-wistahaw a frontage on the river, and some of the bottom lands where they had already commenced farming, Ka-Keewistahaw's Band have now a good reserve, and a fair share of the timber in the gulches leading to the river.

It will be seen by referring to the map, sketch B, the Band of Ka-Kee-wistahaw have no fishing ground in front of their reserve like the others at Crooked and Round Lakes. I therefore thought it desirable to reserve for them a small bit of ground on the north side of Crooked Lake for a fishing station.⁵⁴

Following the completion of the survey of the Moose Mountain reserves, Nelson needed two days to round up his animals following the stampede, and two more days to travel to the Qu'Appelle Valley. This means that he would not have been able to start his survey work on the Crooked Lake reserves until July 27, 1881.

⁵⁴ John C. Nelson, Surveyor, Department of the Interior, to Edgar Dewdney, Superintendent General, Department of Indian Affairs, January 10, 1882, NA, RG 10, vol. 3573, file 154, pt. 2 (ICC Documents, pp. 35-38, 241-42, 319-20). According to evidence presented by the OTC, Nelson's comment about cutting "five miles off the lower part of O'Soup's reserve" is likely inaccurate. "The O'Soup survey plan shows a strip of 7199 acres on the east end of the map which has commonly been assumed to have belonged to O'Soup. Notations on the plan, however, indicate that this was a median strip between the boundary of O'Soup's 1880 reserve and Wagner's 1876 line - which was in fact the eastern border of the 1876 survey of Kahkewistahaw's reserve": see Office of the Treaty Commissioner, "Surveys of the Kahkewistahaw Reserve," March 29, 1994, p. 3 (ICC Exhibit 2). Using the scale on the bottom of the O'Soup survey, it appears that the "median strip" comprised an east-west span of just over three miles, meaning that a length of slightly less than two miles was taken from O'Soup: A.P. Patrick, "O'soup's Reserve, Qu'Appelle River," Natural Resources Canada, Canada Centre for Surveys and Mapping, Legal Surveys Division, Plan 204, Micro Plan 176 (ICC Documents, pp. 235, 329).

The parties are in agreement that treaty annuities were paid to the Kahkewistahaw First Nation on August 4, 1881.⁵⁵ Ten days later, Nelson submitted the following interim report to the Assistant Indian Commissioner:

I have surveyed the Reserves for the Ocean Man and Pheasant's Rump at the Moose Mountain and in a few days will have completed the Reservations on the south side of the Qu'Appelle at Crooked Lake and Round Lake for O'Soup, Ka-kee-wis-ta-haw, Ka-kee-shee-way and Cha-cha-chas and Mosquito, a sketch of which will be sent you at an early date.⁵⁶

Nelson completed his sketch showing the four Indian reserves on Crooked Lake and Round Lake – Mosquito, O'Soup, Kahkewistahaw, and Kak-ishiway/Chacachas – on August 20, 1881.⁵⁷ A more formal plan of the four reserves was also prepared, but is undated and unsigned.⁵⁸

Several years later, after assuming a broader responsibility for Indian reserve surveys, Nelson approved the documents which were later confirmed by Order in Council in 1889 as the official plans of survey for IR 72 and IR 72A.⁵⁹ Kahkewistahaw received a total allocation of 46,816 acres – sufficient land for 365 people under the Treaty 4 formula of 128 acres per person.

Population Trends and Migrations (1874-85)

The survey projects undertaken by Wagner in 1876, Patrick and Johnson in 1880, and Nelson in 1881 can only be understood within the context of the

55 Submissions on Behalf of the Government of Canada, February 15, 1996, p. 1; Submissions on Behalf of the Kahkewistahaw First Nation, February 16, 1996, p. 59.

56 Extract of letter from J.C. Nelson, DLS, to E.T. Galt, Assistant Indian Commissioner, August 14, 1881, NA, RG 10, vol. 3742, file 29200 (ICC Documents, p. 249).

57 J.C. Nelson, "Sketch showing Indian Reserves on Crooked and Round Lakes," August 20, 1881 (ICC Documents, p. 247), which forms part of Nelson's year-end report for 1881 (John C. Nelson, Surveyor, Department of the Interior, to Edgar Dewdney, Superintendent General, Department of Indian Affairs, January 10, 1882, NA, RG 10, vol. 3573, file 154, pt. 2).

58 Natural Resources Canada, Canada Centre for Surveys and Mapping, Legal Surveys Division, "Treaty No. 4, Indian Reserves on Qu'Appelle River and Round and Crooked Lakes, North West Territory, Season of 1881," CLSR Plan No. 230, Micro Plan 436 (ICC Documents, pp. 250, 324).

59 Order in Council PC 1151, May 17, 1889 (ICC Documents, pp. 40-45, 123-30, 251-54). The final plans for Reserves 72 and 72A indicate that the surveys were conducted in August 1881, but the plans also indicate that they were approved by Nelson – who, by 1887, was in charge of Indian reserve surveys – on January 23, 1889. It is further apparent from Nelson's comments in a memorandum dated May 1, 1887, that these plans were prepared much later than August 1881: "It has long been felt desirable to collect in convenient form such information in regard to the extent and boundaries of the numerous Indian Reservations in the Province of Manitoba and the North-West Territories as might be necessary for the guidance of Indian Agents and other employees of this Department, or useful to the public, especially to settlers desirous of taking up lands in the vicinity of the reserves. In consequence *the following descriptions, and accompanying plans, have been prepared* by direction of the Honorable Edgar Dewdney, Indian Commissioner, *from the original records* of the Department, under the supervision of the undersigned." See memorandum by John C. Nelson, Department of Indian Affairs, May 1, 1887, NA, RG 2, 1642B, vol. 287 (ICC Documents, p. 123).

demographic changes occurring in the Kakhewistahaw First Nation and other bands in southern Saskatchewan at the time.

When Treaty 4 was signed and Wagner was surveying reserves in the area, many plains Indians were still earning their livelihood as buffalo hunters. As the buffalo became less plentiful, the Indian population was ravaged by starvation and disease. The OTC reviewed the plight of the Indians of that era:

The history in this instance begins just after the signing of Treaty Four, when the buffalo trade had already been pushed west, and bands of Plains Cree, Saulteaux, and Assiniboine were in transition. . . . The membership of the bands in the North West Territories in the 1870s and the early 1880s was fluid as bands adapted to changing circumstances; a band which might have 200 members one year might double in size within a calendar year.

Within this changing demographic environment, the treaty promises for reserve surveys were gradually being fulfilled in Treaty Four, beginning in 1875. There was no comprehensive census as promised in Treaty, but, rather, a gradual process of surveying reserves as the chiefs could be persuaded to settle upon them and begin farming. . . .

The conditions for survival of the Plains people were severe between 1876 and 1884. Most of the buffalo migrations into Canada from the U.S. were over, affected by mange, fires, and depletion through over-hunting for trade purposes. As a result, many people were moving into the Cypress Hills at the same time that reserves were being surveyed. The Cypress Hills offered access to the herds in the U.S., and the area between there and Wood Mountain to the east was the site of the last substantive buffalo migration into the Territories in 1881. The Cypress Hills was also recognized by the Assiniboine, Young Dogs, and some Cree as traditional territory, a winter haven with timber, game, and chinooks.

Fort Walsh, established in 1873, was a North West Mounted Police post which had an Indian agency and two Home Farms attached to it in 1879. These farms were sponsored by the Indian Department of the Department of the Interior. By the fall of 1879 the people who gathered at Fort Walsh for rations were starving, as NWMP police journals attest (see Journal of Colonel Irvine, NWMP, June 7, 1879: thousands of starving Indians present). In the spring of 1880 many left for the Milk and Missouri Rivers to hunt, returning in the late summer for annuities. The same pattern was repeated in 1881, and rations were once again offered. The largest number of Indians, 5000 or more, congregated at Fort Walsh in the summers of 1880-1881; rations and annuities were paid during these years to those who did not yet have reserves, but the government policy at the time was to encourage the Indians to become sedentary reserve dwellers who would make a living through farming. . . .

Angus McKay reported in 1876 that the seed had been given to the Indians at Qu'Appelle too late in the season to yield a harvest, and that provisions and employment building roads had to be provided to keep them from starving (McKay Oct. 14, 1876; PAC, RG10, vol. 3642, file 7581). Death from malnutrition, starvation, and disease was prevalent among the old and the young. Dysentery, smallpox, [and] mea-

sles were reported in 1880 (*Sessional Papers*, Annual Reports of the Commissioner of the NWMP 1880). In the summer of 1881 an epidemic of whooping cough took many children (*Sessional Papers*, Annual Reports of the Commissioner of the NWMP 1881).

The Indian Agents, the farming instructors, and the NWMP were working to keep the Indians from starving, while keeping rations at a bare minimum to discourage Indians from gathering at Walsh; the government urged them to move to reserves and begin farming. The Inspector of Indian Agencies, T.P. Wadsworth, wrote on August 29, 1881 that he was sure that the Indians were leaving their reserves to come to Walsh because they rejected the idea of having to work on their "reservations" for food, whereas they realized that they had only to show up at Walsh and the government would not let them starve (PAC, RG10, vol. 3744, file 29506-1). There was in fact insufficient work at Walsh for 5000 Indians to do; they were given some ammunition to hunt and fishing lines to take fish from the lakes, but otherwise there were far too many people for the government to fully realize its "work for rations" policy. Many had inadequate food and clothing to sustain prolonged physical endeavours. . . .

Many of the Indians gathered in the Cypress Hills wanted to continue the hunt as long as possible, and they realized the difficulties of farming. Given the precarious conditions, they chose to reduce the risks by going to where they might get rations. The Indians also argued repeatedly that the provision of agricultural assistance, ammunition, and rations were part of the treaty promises under Treaty Four (and Treaty Six). If they could not settle in the Hills permanently, as they hoped, they could at least expect government assistance for the period of transition and turmoil.

By late 1881 the government had tentatively decided to close Fort Walsh, and officials encouraged all bands to leave the area. The American government was guarding the border carefully, wary of the role of British Indians in horse thefts and in council with American relations. Only the lingering buffalo trade, and its spin off in the whiskey trade, provided a policy reason for keeping it open. By 1882 the government was actively moving people out of Walsh, cutting back rations to encourage them to go to reserves near Forts Battleford, Pitt, and Qu'Appelle. By 1883 they were refusing to pay annuities or issue rations, and bands which returned to Walsh were compelled to leave.⁶⁰

The OTC summarized the impact of these conditions on the populations, livelihoods, and interrelationships of a number of bands in the Qu'Appelle Valley and the Cypress Hills – including Kahkewistahaw, Cowessess (Little Child), Kakisheway (Loud Voice) and Chacachas, Sakimay, Nekaneet (Foremost Man), and Piapot:

There are some common points which can be made about all of the bands above:

⁶⁰ Office of the Treaty Commissioner, "Kahkewistahaw Special Report: Surveys and Demographics, Crooked Lakes Reserves, 1876-1884," May 1995, pp. 1-3 (ICC Exhibit 5).

1. The process of adhering to treaty and taking annuities was gradual over the first few years. Since most of the bands were nomadic, not everyone appeared each year in the place of payment. The decision to take annuity payments was a decision made by each family. As a result of the gradual adhesions, the populations recorded on the annuity lists began to peak around 1879.

2. With the exception of Sakimay, these bands did not begin settling on reserves until 1880-1881. . . . After Agent McDonald persuaded the other bands to settle on reserve in late summer 1880, at the time that Patrick was doing his surveys, they began to plan for seeding in the spring of 1881. Still, conditions were not right for many of them to stay on reserve.

3. Although it has not been included in the above descriptions to any extent, the government also realized that large numbers of people in destitute conditions could lead to an increase of other problems: horse raiding, theft, and even assaults on outsiders. They feared that the gathering of Indians and half-breeds might lead to riot or mass insurrection; they were aware that the police and agents were outnumbered even though the Indians were weakened by loss of horses (by raids from other groups), the confiscation of ammunition and supplies by American troops, and ill health. Indeed the Indians did call periodic councils to discuss what to do; Little Pine, Big Bear, and Piapot particularly exerted influence in these areas. They also realized the power of numbers:

In the spring of 1881, Cree bands from all regions of the Canadian prairies left their reserves to go south to meet with Little Pine and Big Bear. Even the new bands Dewdney had created were going to the council in American territory. What was also disconcerting to Canadian officials were the reports that Big Bear and Little Pine, who had gone to Montana to prepare for the council, had reached an accommodations [sic] with the Blackfoot and had participated in a joint raid against the Crow (Tobias 1983: 529).

The council which Tobias described was not held because the American military began to force Canadian Indians to return over the border. Still, such plans kept people moving; the councils which did occur involved the fulfilment of treaty rights by the government and the unpredictability of government actions in implementing the terms of the bargains struck. In the spring of 1881, in the Battleford District, rumours that soldiers were coming to the area caused many people to go south, apparently, as did the hopes of participating in a buffalo hunt.

4. Because of the poor economic conditions, and the climate of uncertainty regarding government policy, some leaders were able to command large followings, taking members away from the other, smaller bands. The tremendous growth in Piapot's band membership in 1881 shows this; he attracted followers from bands both in the Qu'Appelle and Battleford districts, possibly through promises like the one Foremost Man reported. In 1881 the combined population of the Little Pine and Lucky Man bands rose to 1587 from 1139 in 1880, and only 795 in 1879. The populations of these bands dropped dramatically in 1883, after they left Fort Walsh; some of the members rejoined other bands.

The movement of people from one band to another, and from one place of payment to another, and from one hunting site to another was widespread during this period among those bands still in transition from a hunting and trading economy to a sedentary agricultural one. It was one of the responses which people made to the situation, as was the choice of whether indeed to take annuity payments. In 1881, before annuity payments were made, many people made the choice to leave their reserves for the hunt, and to hold council with their relatives. Some joined chiefs like Piapot and Little Pine who proposed that larger numbers of people, with annuities and supplies combined, could exert more influence both in the Territories and the U.S. Some probably perished from malnutrition or one of the diseases prevalent at the time. . . . [T]he population drops in 1881 were part of an immediate concentration of people from the nomadic bands in a few large groups, followed by dispersal and the gradual diminishing of populations as bands settled on reserve.⁶¹

Several historical documents presented to the Commission support the OTC's analysis. First, the treaty annuity paylists for the various Qu'Appelle Valley bands (except Sakimay) clearly show fluctuating population figures in the years following treaty. Initially the numbers grew as more Indians adhered to treaty and sought annuities. After cresting in 1879 and 1880, the populations dropped sharply in 1881 and 1882 as individuals pursuing the hunt or seeking greater security or bargaining power in negotiations with the government gravitated towards bands like Piapot and Nekaneet in the Cypress Hills. Finally, the numbers grew again after 1882 when the Indians were encouraged to leave the Cypress Hills to return to their reserves and take up agriculture. These population changes are summarized in Table 1.⁶²

61 Office of the Treaty Commissioner, "Kahkewistahaw Special Report: Surveys and Demographics, Crooked Lakes Reserves, 1876-1884," May 1995, pp. 12-13 (ICC Exhibit 5).

62 There were several sources of population data in evidence before the Commission, including Office of the Treaty Commissioner, "Kahkewistahaw Special Report: Surveys and Demographics, Crooked Lakes Reserves, 1876-1884," May 1995, Appendix I (ICC Exhibit 5); Ian D. Gray, Counsel, DIAND Legal Services, Specific Claims West, to Kim Fullerton, Indian Claims Commission, June 26, 1995, attaching two population charts showing the population of the Kahkewistahaw First Nation (a) as recorded by the annuity paysheets, and (b) as recorded by the annuity paysheets, together with absentees and arrears (ICC Exhibit 15); Submissions on Behalf of the Kahkewistahaw First Nation, February 16, 1996, Schedule I (Population of Kahkewistahaw, Ochapowace, and Cowessess based on payroll (without arrears)) and Schedule II (Population of Kahkewistahaw, Ochapowace, and Cowessess based on payroll (with arrears)); Submissions on Behalf of the Government of Canada, February 15, 1996, p. 4 (charts entitled "Kahkewistahaw Band Population: Base Paylist" and "Kahkewistahaw Band Population: Including Absentees"); "Cowessess Band Population 1874-1955" (table) (ICC Exhibit 21); "Ochapowace" (table) (ICC Exhibit 22). The shaded areas within Table 1 designate years in which significant discrepancies exist between the population figures or numbers of absentees or arrears in Appendix I of the OTC report (Exhibit 5) and the corresponding figures in Exhibit 15 (Kahkewistahaw), Exhibit 21 (Cowessess), and Exhibit 22 (Ochapowace). The table reflects the payroll populations from Appendix I of the OTC report, since these figures are the only ones that show a breakdown of the locations where individuals were paid with the various Bands. The absentees and arrears have been obtained from Exhibits 15, 21, and 22 (although it should be noted that there is no evidence regarding absentees and arrears for Piapot and Nekaneet and no evidence regarding absentees for Cowessess and Ochapowace before the Commission). The totals, including absentees and arrears, are the sums of the foregoing figures, which, in most cases except the shaded areas on the table, correspond closely with the total figures in Exhibits 15, 21, and 22.

TABLE 1

Population Trends, 1874-83

	1874	1875	1876	1877	1878	1879	1880	1881	1882	1883
KAHKEWISTAHAW										
— Fort Qu'Appelle			219	284	211	235	258	186		
— Fort Walsh			47			141	72			
— Maple Creek							88			
— Fort Ellice							12			
— Crooked Lake									160	274
Paylist Total	65	289	266	284	211	376	430	186	160	274
— Absentees			10	42	99	11	9	68	62	11
— Arrears		36	61	34	15	18	12	2	6	21
TOTAL		325	337	360	325	405	451	256	228	306
NEKANEET (Foremost Man)										
— Fort Walsh								428	300	
COWESSESS										
— Fort Qu'Appelle			50	104	79	95	96	68		
— Fort Walsh			168	307		405	30		182	
— Maple Creek							357	300		
— Fort Ellice										
— Crooked Lake										
Paylist Total	74	195	218	411	79	500	483	368	386	345
— Arrears	51	75	124	127	125	61	50	70	43	35
TOTAL	125	270	342	538	204	561	533	438	429	380
OCHAPOWACE										
Kakisheway (Loud Voice)										
— Fort Qu'Appelle				187	244	154	235	152		
— Fort Walsh						149	69			
— Crooked Lake									245	314
Kakisheway Total			207	187	244	303	304	152	245	314
Chacachas										
— Fort Qu'Appelle			146	155	139	199	209	43		
— Fort Walsh			12				35			
— Crooked Lake										107
Chacachas Total			158	155	139	199	244	43		107
Paylist Total		426	365	342	383	502	548	195	245	421
Arrears		26	89	67	21	11	5	29	27	34
TOTAL		452	454	409	404	513	553	224	272	455
PIAPOT										
— Fort Qu'Appelle						331		11		
— Fort Walsh						20	201	1,400	894	
— Maple Creek							262			
— File Hills									47	
— Indian Head										587
TOTAL			139	194	29	351	463	1,411	941	587

It should be emphasized that the figures in Table 1 are reproduced here as evidence of trends only and should not be taken as this Commission's determination of the specific population for any given band in any particular year.

The numbers of individuals in these bands paid in locations *other than* Fort Walsh and Maple Creek (excluding absentees and arrears) rose to 1014 in 1879, dropped to 460 in 1881, and increased to 1627 in 1883. Similarly, the number of people paid with Kahkewistahaw at Fort Qu'Appelle and Fort Ellice grew to 430 or 431 in 1880, diminished to 186 in 1881 and 160 in 1882, and grew to 274 in 1883. At the same time, the number of individuals paid with all five bands in Fort Walsh and Maple Creek reached a maximum of 2128 in 1881 (when the numbers outside the Cypress Hills were at their lowest ebb), but dropped to none in 1883 when Canada decided to discourage Indians from residing at Fort Walsh by refusing to pay annuities or provide rations there. As Dewdney wrote in early 1882:

I have thought it expedient to send Mr. Peter Erasmus to Fort Walsh to see the Indians in that neighbourhood and explain to them the necessity of their moving to their several reserves, as has been urged by you since your return from the East. I wish the Indians to understand that no payments will be made at Fort Walsh in the future, and it is expected that they will join their respective Chiefs and be paid with them. . . .

It has been reported that Buffalo are coming north in considerable numbers. Should such be the case I fear it will be difficult to induce the hunters to come north and leave the plains, nor can we expect it.

The Indians however should be informed that the responsibility of remaining out must rest with them, that no supplies will be kept at Fort Walsh and that when the hunt is over they will be expected to do as desired by the Government, viz. return to their several reserves.⁶³

Dewdney's instructions to Erasmus were equally explicit:

You are aware that the Government has been most anxious that the Indians south join their proper bands and return north. Your personal knowledge of the northern Indians will no doubt aid you in obtaining this end. You will take with you the pay-lists of 1879 which will assist your memory. Any families whom you may find have left their own proper Chiefs and joined others, you will inform that it is imperative before they receive any more annuity money, that they re-join their proper Chiefs. . . .

63 E. Dewdney, Indian Commissioner, to Colonel Irvine, Commissioner, NWMP, May 30, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 361, 363).

In order that the Indians south may have sufficient time to return to their respective bands, I have decided to pay the annuity money some what later than heretofore, say about September next.⁶⁴

Another source that corroborates the evidence of the OTC regarding Kahkewistahaw's population changes is the 1881 year-end report by Dewdney to the Superintendent General of Indian Affairs. Dewdney detailed the efforts to encourage the Indians to settle on their reserves following the decimation of the buffalo north of the 49th parallel:

I have the honour to submit my Report on Indian matters in the North-West Territories and Manitoba, for the year ending 1881. . . .

I am glad to be able to state that during the last season, the efforts made by the Government to induce a greater number of the wild Indians to remain on their Reserves and work, has not been without success; while in certain districts, where active interest has been taken by the agents in charge, and where the chiefs have realized the advantages to be derived from tilling the soil, a very marked progress has been made.

The surrender of "Sitting Bull" early in the summer; the visit of His Excellency the Governor General to the Territories; the return of a large number of our own Indians from the South, where most of them had been for nearly two (2) years; and the advent of the buffalo in large numbers, have rendered the past year an eventful one for the Indians. . . .

At this time the report of buffalo coming north in large numbers was found to be correct, and it was thought advisable, under those circumstances, to pay the Indians their annuities and give them an opportunity of securing leather and sinews of both of which they were in great need. From that time to this a number of our Indians have been supporting themselves from the hunt, thus relieving the Government to some extent from the compulsory issue of large quantities of food supplies to the destitute, but it is very questionable whether the saving thus effected will in the end prove beneficial. I see no means by which we can prevent the Indians following buffalo if they come within easy reach as long as they have horses, guns and ammunition, neither do I think it would be advisable to force them to their reserves while there is a chance that they may make a living by hunting, as we are not in a position to set them all to work, and the result would be that we would be compelled to feed them and get nothing in return; in the meantime, land is being broken up on the reserves, and when the buffalo disappear and they are compelled to settle down, we will be in a better position to receive them. . . .

We expect that large numbers of Indians who are now in the south but who belong to the reserves in the north, will return this year to their reservations in the western portion of Treaty 4, which includes Qu'Appelle, Crooked Lake, File Hills, Touchwood

⁶⁴ E. Dewdney, Indian Commissioner, to Peter Erasmus, Indian Department Special Service, May 30, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, p. 364).

Hills and Quill Lake, and settle, and we will be compelled to keep a large staff of assistants to instruct them; but as on many of these reserves there are now numbers of Indian families who are comfortable, and who have taken to cultivating their ground, I anticipate no difficulty in inducing those who come in to work.⁶⁵

Further support for the OTC's analysis is found in two letters which confirm the return of many of Kahkewistahaw's people to the reserve. The first was written by Indian Agent McDonald to Assistant Indian Commissioner E.T. Galt in June 1882:

I have the honor to report that on my return of the 10th instant, I found the Indians under Mr. English from Ft. Walsh District had arrived the night previous. . . .

They numbered, as far as I was able to arrive at:

Assiniboines, Long Lodge		97	souls
" The Man that took the coat		157	"
Cree Coweses (Little Child)	(Crooked Lake)	85	"
Ka-ki-wis-ta-haw	(Crooked Lake)	33	"
Pe-pe-ki-sis	(File Hills)	53	"
Stragglers, Touchwd. Hills Res.	(File Hills)	<u>28</u>	"
in all about			<u>453</u>

Ka-ki-wis-ta-haw's party was picked up on their way in from Wood Mountain in a starving condition. They had but a few horses and one cart, and it was fortunate for them that they fell in with English's party.⁶⁶

In the second letter, the Inspector Indian Agencies and Superintendent Indian Farms, J.P. Wadsworth, updated Dewdney on the progress that had been made by Kahkewistahaw by 1883:

Early upon the morning of May 5th altho a snow storm prevailed the Indian Agent, the Farming Instructor (Mr. Setter) and myself first visited Ka-ka-wis-tahaw's reserve, a distance of 8 miles, this Band are farming in a magnificent gully between "Round" and "Crooked" Lakes, they were not at work on account of the arrival of their friends: in an interview with the Chief and his Headmen they asked for a schoolmaster, a resident farming instructor, and that the Doctor should visit them oftener, they also asked for more work oxen: *the Band only came from the Plains last year, they have*

65 E. Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, January 1, 1882 (ICC Documents, pp. 348-49).

66 A. McDonald, Indian Agent, to E.T. Galt, Assistant Indian Commissioner, June 20, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, p. 367).

16 dwellings and already had 12 acres wheat sown: the work had all been done by Indians and was well performed.⁶⁷

Regarding the return of Kahkewistahaw members to the Qu'Appelle Valley in 1882 and 1883, Kenneth Tyler observed:

A few families from the Band had settled on the Reserve in 1880, but most did not abandon life on the Plains until 1882. In 1883, several more Band members came in from Cypress Hills. Although Foremost Man's Band was expected to settle with Kahkewistahaw's people, this was not to be. The majority of that Band stubbornly resisted Government pressure and remained near the Cypress Hills.⁶⁸

Peggy Martin-Brizinski of the OTC testified on the same point:

By late 1881 there is a tentative decision to close Fort Walsh. The reason for that is a couple of things, one of them was they felt that if they closed the fort that they would force people to leave that area and to go back to the reserves in the Qu'Appelle and Battleford Districts. The other reason was pressure from the American government because Fort Walsh was so close to the border it was sort of a jumping off point to get down to the Milk River area, and the American military was actively intervening to discourage the British Indians from coming down below the border.

So pressure from the American government was one of the factors which led them to consider closing that. They also had a very active buffalo-whisky trade which they were quite concerned about as well, flourishing in that area. So they wanted to get people out of that area, and they were also depleting the game and fish resources there too, they were having great difficulty keeping people alive.

So in 1882 they begin to force people to move out of that region and in 1882 the majority of the bands leave in the spring and many of them are back by the fall, not yet in the position to be able to farm and being lured by the possibility of buffalo in that area, the hope that they were going to come back, and the promise of rations.

In 1883 another push to [move] the people out and the majority of people go to their reserves and stay after 1883. So you see a lot of people, the populations are – or the issue of new adherents – or sorry, landless transfers – in a lot of the band research it becomes quite prominent around '83 and '84, you see people going back onto reserves and adding to the population there.

So there is a lot of pressure to keep people out of that particular region and they close down Fort Walsh and quit paying annuities or rations out of that post. The only bands that remain down there is [sic]Nikaneet and Foremost Man. . . .⁶⁹

67 J.P. Wadsworth, Inspector Indian Agencies and Superintendent Indian Farms, to E. Dewdney, Indian Commissioner, May 30, 1883, NA, RG 10, vol. 3640, file 7452, pt. 1 (ICC Documents, pp. 376-77). Emphasis added.

68 Kenneth Tyler, "The Government of Canada and Kahkewistahaw Band," undated, p. 14 (ICC Exhibit 6).

69 ICC Transcript, May 25, 1995, pp. 333-35 (Peggy Martin-Brizinski).

In summary, the decline in the numbers of buffalo contributed to the lack of food, the prevalence of disease, and the discord among Indian people as to whether they should choose the traditional hunting pursuits or a sedentary agricultural lifestyle on the reserve. These factors, in turn, led to high levels of migration among bands from the signing of Treaty 4 in 1874 until the closing of Fort Walsh in 1883. In 1881 and 1882, in particular, this pattern of migration resulted in record populations at Fort Walsh and significantly reduced populations in the Qu'Appelle Valley, as many people apparently decided at that time to leave their reserves to pursue a traditional way of life. In 1883 and the following years, after the government stopped paying annuities or providing rations at Fort Walsh, many people clearly rejoined Kahkewistahaw and other bands on their reserves, but it appears that some people remained in the Cypress Hills and were eventually recognized as a separate band under Nekaneet. It is against this turbulent backdrop that we must determine whether Canada satisfied its obligation to survey a reserve for the Kahkewistahaw First Nation under Treaty 4.

Nekaneet

The references by Kenneth Tyler and the OTC to Nekaneet are significant in this inquiry because Canada submitted that many of the individuals included in Kahkewistahaw's claim "received a significant treaty land entitlement settlement" with Nekaneet in 1992 and should not be included in Kahkewistahaw's population count.

According to the OTC research panel:

Foremost Man, or Nekaneet, or Front Man was the leader of a band which [was] paid separately for only two years, 1881 and 1882. Necanete, or Goes Before, was paid with Kahkewistahaw in 1875, and in 1876 seems to have been the head of a group paid at Fort Walsh. He was not with the band at Qu'Appelle in 1877 or 1878, but he appeared again with the band at Fort Walsh in 1879 and in 1880. In 1881 he headed his own band of 428 people at Fort Walsh; this diminished to 300 in 1882. Some of the Flying Round faction who were paid separately from Kahkewistahaw in 1880 under the Headman Manitoucan joined [Nekaneet] in 1881, as did people from other bands such as Piapot, Cowessess, Little Black Bear, Kakisheway, and Peepeekesis (Sparrow Hawk).

The band was denied annuity payments after 1882 because they refused, in the spring of 1882, to leave Fort Walsh and take a reserve elsewhere. . . .

The band remained in the Cypress Hills, and [because annuity payments were denied after 1882] its composition over the years can only be derived from oral history. The government believed that most of the members were stragglers from other bands, and that they should return to their own reserves for payment. It does

appear from genealogy done with band members that people did join Foremost Man from the U.S., from Piapot, from some of the Qu'Appelle bands, and from Mosquito and Red Pheasant bands in the Battleford District.⁷⁰

The OTC also made the following observations in its 1994 report:

Kahkewistahaw shows a similar pattern of movement. The population in 1879 was 339, and up to 430 in 1880. In 1881 it is only 186, insufficient for a survey of land for 365 people. Nelson would not have been surveying for a population as recorded in the paylists for that year; again, he would have known that many people had left in that year. *We know that some went to Foremost Man*, and others probably were among the large group of stragglers at Fort Walsh and Maple Creek that year. *The split away of Foremost Man probably accounts for the failure of the population to return to the pre-1881 size*, but this permanent loss could not have been predicted by the surveyor.⁷¹

Kenneth Tyler testified that "there were a substantial number of people in the Nekaneeet Band that had been associated with the Kahkewistahaw Band"; he also noted that Nekaneeet's following was derived from "a large number of . . . bands" and arose out of the "general distress and turmoil" which accompanied the disappearance of the buffalo.⁷²

Historical correspondence shows that Canada for many years viewed Nekaneeet's followers as stragglers from other bands and refused to recognize Nekaneeet himself as anything more than a headman:

I have the honor to report that the Indians now encamped in the Cypress Hills and along the Railroad in that vicinity lately sent one Joseph Tanner, an intelligent and well to do Indian, to interview me with the intention of endeavoring to obtain permission to select a Reserve adjacent to Maple Creek. Among the reasons advanced by them were that it was their country where they had long resided and they had through their representative "Frontman" been promised land in the neighborhood some years ago by a Departmental Official.

In replying I stated that their request could not be granted on the following ground:

...

3. That the Indians petitioning have no right to show why they should be granted a Reserve either at Cypress or any other point as they are not members of any one Band

70 Office of the Treaty Commissioner, "Kahkewistahaw Special Report: Surveys and Demographics, Crooked Lakes Reserves, 1876-1884," May 1995, p. 9 (ICC Exhibit 5).

71 Office of the Treaty Commissioner, "Surveys of the Kahkewistahaw Reserve," March 29, 1994, p. 6 (ICC Exhibit 2).

72 ICC Transcript, May 24, 1995, pp. 80-81 (Kenneth Tyler).

but stragglers from a number of Bands. Besides which Foremost Man is not a Chief and had never been paid as such.

4. That nearly all, if not all his followers have been claimed by other Chiefs as belonging to them. . . .

6. That many of the petitioners have already been allotted lands in Reserves already surveyed on which are settled the bands to which they at one time claimed allegiance and of course cannot receive land a second time in another part of the country.

7. That many of these Indians have been paid with their bands and even last payment a number now petitioning were paid in the Qu'Appelle district and such a changing about cannot be authorized, otherwise endless trouble and confusion would ensue.⁷³

The importance of the Nekaneet "connection" relates to the final population count for the Kahkewistahaw First Nation for treaty land entitlement purposes, and raises certain questions about which First Nation – Kahkewistahaw or Nekaneet – should be entitled to claim particular individuals as members for the purpose of quantifying treaty land entitlement. Ultimately, the issue of which, if any, members of Nekaneet are to be included or excluded for the purposes of calculating Kahkewistahaw's treaty land entitlement must be addressed. Before we can consider that issue, however, we must establish whether Kahkewistahaw has a valid claim, first, by determining the date on which its treaty land entitlement is to be calculated, and, second, by identifying the base payroll that should be used in making that calculation.

⁷³ E. Dewdney, Commissioner of Indian Affairs, to Superintendent General of Indian Affairs, December 20, 1884, pp. 1-3 (ICC Exhibit 29).

PART III

ISSUES

Although Canada and Kakhewistahaw did not prepare an agreed statement of issues for this inquiry, the concerns identified by them are strikingly similar. The main dispute is whether Canada set aside enough reserve land for Kakhewistahaw under the terms of Treaty 4. In the Commission's view, however, to address this claim properly, we must answer the following three questions:

- Issue 1 What is the appropriate date for calculating Kakhewistahaw's treaty land entitlement?
- Issue 2 What is Kakhewistahaw's population for treaty land entitlement purposes?
- Issue 3 Has the First Nation established, pursuant to Article 17 of the Saskatchewan Treaty Land Entitlement Framework Agreement, an outstanding treaty land entitlement on the same or substantially the same basis as the Entitlement Bands, which are party to the Framework Agreement?

Kakhewistahaw's position on these issues is that the appropriate date for calculating treaty land entitlement was 1880 and, therefore, the 1880 treaty annuity payroll ought to be used to determine the First Nation's population for entitlement purposes. Kakhewistahaw also submitted that, even if the Commission should conclude that 1881 was the First Nation's entitlement date, the 1880 payroll should nevertheless be used as the "base payroll" to determine the entitlement population. According to the First Nation's treaty annuity payroll analysis, the entitlement population (not including "late additions," such as new adherents to treaty and transfers from landless bands) was 452. Since Canada set aside enough land for only 365 people, Kakhewistahaw asserted in its submissions to the Commission that there is an outstanding

shortfall of land in the amount of 11,040 acres.⁷⁴ However, although it acknowledged that the question of "late additions" was being dealt with in the Fort McKay and Kawacatoose inquiries, the First Nation also noted that it does not accept Canada's position that "late additions" are not to be counted for treaty land entitlement purposes. Therefore, in its earlier request to Canada to have its claim accepted for negotiation, Kahkewistahaw also sought treaty land for 145 "late additions," which led to a cumulative entitlement population of 597 and an overall shortfall of 29,600 acres.⁷⁵

Canada, on the other hand, asserted that the appropriate date for calculating Kahkewistahaw's treaty land entitlement was the August 20, 1881, date on the survey plan for IR 72. Further, Canada took the view that "the August 4, 1881 payroll (which lists 186 individuals) provides the best evidence of the Band's population at the Date of First Survey (DOFS)."⁷⁶ According to Canada's analysis, the First Nation received a substantial surplus of land because the population at date of first survey was only 186, but Canada set aside sufficient land for 365 people.

The Commission's tasks in this report, then, are, first, to identify a sound legal and policy approach to these questions and, second, to apply that approach to the unique facts and circumstances that surround the survey of the Kahkewistahaw reserves.

By admission of the parties, the third issue in this inquiry is identical to an issue which was recently argued before us by the same counsel in the treaty land entitlement claim of the Kawacatoose First Nation. We note that it was after the oral submissions were heard by the Commission in this inquiry that the Commission released its report on the Kawacatoose inquiry.⁷⁷ The parties did not have an opportunity to review that report in making their submissions in this case, but agreed to rely on the submissions made by the parties in the Kawacatoose inquiry in addressing this issue.

⁷⁴ Submissions on Behalf of the Kahkewistahaw First Nation, February 16, 1996, p. 78.

⁷⁵ Kahkewistahaw Band Treaty Land Entitlement Claim Submission, prepared by Pillipow & Company, May 20, 1992 (ICC Documents, pp. 3-10), together with Kahkewistahaw Band Date of First Survey Treaty Paylist Analysis, prepared by Pillipow & Company, undated (ICC Documents, pp. 64-73).

⁷⁶ Submissions on Behalf of the Government of Canada, February 15, 1996, p. 1.

⁷⁷ Indian Claims Commission, *Kawacatoose First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996).

PART IV

ANALYSIS

ISSUE 1: DATE FOR CALCULATING TREATY LAND ENTITLEMENT

What is the appropriate date for calculating Kahkewistahaw's treaty land entitlement?

The essential question in this inquiry is whether Canada satisfied its obligations under Treaty 4 by setting aside sufficient reserve land for the Kahkewistahaw First Nation. The reserve clause in Treaty 4 describes the process for establishing Indian reserves and the nature of the Crown's obligation:

And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families. . . .⁷⁸

The wording of this clause confirms that a band's reserve was to be set aside by delegated representatives of the federal government after consulting the band on the preferred location of its reserve. Although the process is described, the treaty does not state clearly the date on which the band's population should be counted to determine the size of the reserve. It is therefore necessary to consider certain well-defined principles of law relating to the interpretation of Indian treaties, and to apply those fundamental concepts to treaty land entitlement and to the particular circumstances of this case, to determine whether Canada has set aside sufficient land for Kahkewistahaw under Treaty 4. The Commission employed this same method in the Fort McKay, Kawacatoose, and Lac La Ronge inquiries.

⁷⁸ *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 6 (ICC Exhibit 16).

The difficulty in determining Kahkewistahaw's treaty land entitlement arises from the unique facts of this case. Not only is there considerable uncertainty over the date of first survey for the First Nation, but Kahkewistahaw's population fluctuated wildly during the critical time when IR 72 was surveyed. Kahkewistahaw argued that the date as of which entitlement should be calculated is 1880, when the payroll population of the First Nation was 430, based on the First Nation's payroll research. Canada contended that Kahkewistahaw's entitlement date was 1881 – when the payroll population plummeted to 186 – because the survey of IR 72 was commenced in 1880 but not completed until the following year. Since Kahkewistahaw received a reserve allocation sufficient for 365 people in the 1881 survey, choosing one date over the other will result in either a significant outstanding treaty land entitlement owed by Canada or a finding that the Crown has completely discharged its treaty obligations to provide land to the Kahkewistahaw First Nation.

Principles of Treaty Land Entitlement

At the outset the Commission must consider whether the population of a band on the date of first survey or the date of selection of reserve land should be used to calculate its treaty land entitlement. It should be noted that the Kahkewistahaw First Nation assumed for the purposes of the present inquiry that the date-of-first-survey *approach* is the appropriate method of calculating treaty land entitlement. Nevertheless, Kahkewistahaw also questioned the fundamental premise of the date-of-first-survey approach by asserting that the date of selection rather than the date of survey is the more appropriate point *within the survey process* for determining entitlement. Counsel argued that this is the logical conclusion when the terms of Treaty 4 are interpreted in light of the surrounding historical context and the six established principles enunciated by the courts on the interpretation of Indian treaties. These principles have been concisely restated in the Office of the Treaty Commissioner's *Report and Recommendations on Treaty Land Entitlement*:

1. The treaty should be given a fair, large and liberal construction in favour of the Indians.
2. Treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians.
3. As the honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned.

4. Any ambiguity in wording should be interpreted as against the drafters and should not be interpreted to the prejudice of the Indians if another construction is reasonably possible.
5. Evidence by conduct or otherwise as to how the parties understood the treaty is of assistance in giving it content.
6. The treaty was made with Indians not bands, and an examination of the treaty as a whole indicates that most terms are intended to treat individual Indians equally, and bands in proportion to their populations.⁷⁹

The principles identified in the three treaty land entitlement inquiries conducted by the Commission in relation to the Fort McKay, Kawacatoose, and Lac La Ronge First Nations provide a useful starting point for the analysis in this case. Those principles were based upon a thorough review of the limited case authority on treaty land entitlement and, more significantly, upon the established rules relating to the interpretation of Indian treaties.

In its previous decisions, the Commission has reasoned that the quantum of land a band is entitled to receive to satisfy its treaty land entitlement should, as a general rule, be based on the band's population at the time of the first survey. As we stated in the Fort McKay report:

- 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.⁸⁰

What is difficult in each case is determining when the first survey took place and who the members of the band were at the time.

In the Lac La Ronge inquiry, the Commission interpreted the reserve clause in Treaty 6 and considered a number of possible dates and approaches for calculating treaty land entitlement, including the date of treaty, the date of selection, the date of first survey, and the current date. Although the wording of the reserve clause in Treaty 6 (signed in 1876) is

79 Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 24.

80 Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), repr. (1996) 5 ICCP 3 at 53. Emphasis added. It should be noted that, unlike Treaty 6, Treaty 4 does not allow for land to be provided in severalty. However, the general principle providing for the quantum of land to be determined at the time of the first survey is similar under these two treaties, in our view.

not identical to that contained in Treaty 4, the two are substantially similar. Treaty 6 provides that "the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each Band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them."⁸¹ After considering the various options for calculating entitlement, the Commission made the following conclusions about the interpretation of the reserve clause:

In our view, the wording of the treaty and the surrounding historical context suggest that the parties intended to carry out the selection and survey of reserves within a short time following treaty to avoid conflicts with settlers over land selections. Despite the absence of clear wording in the treaty or definitive policy guidelines on treaty land entitlement, the general practice of Indian Affairs was to calculate the amount of land to be set aside by counting the number of band members on the most recent treaty annuity paylist available to the field surveyor at the time of the survey. If the parties had intended to use the populations of Indian bands at the time of the treaty to determine land entitlement, this could have been easily accomplished by attaching a schedule to the treaty listing the respective population figures for each band that signed treaty. The fact that Indian Affairs lacked reliable information on band population figures at the time of treaty suggests that such an interpretation was not intended by the parties. . . .

In our view, the most reasonable interpretation of the reserve clause is that every treaty Indian is entitled to be counted – once – for treaty land entitlement purposes, and that the parties intended to determine the size of Indian reserves by reference to a band's population on or before the date of first survey. This interpretation is supported by the wording of the reserve clause itself, by the statements made by the parties during the treaty negotiations, and by the subsequent conduct of the parties relating to the selection and survey of reserves. We reiterate that this conclusion is consistent with the principles outlined in the Commission's Fort McKay and Kawatoose Reports. These reports provide that all treaty Indians, including "late additions," are entitled to be counted for entitlement purposes, even if they join a band after its full land entitlement has been set aside.

In general, we agree with the statement in the 1983 [Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims] that, "although the treaties do not clearly identify the date for which a band's population base is to be determined for the land quantum calculations the most reasonable date is not later than the date of first survey of land." Depending on the facts of any given case, it may be necessary to consider many questions in selecting the date on which a band's population should be assessed, including the spe-

81 For comparative purposes, the wording of the reserve clause in Treaty 4 is set out on pages 14 and 59 of this report.

*cific terms of treaty, the circumstances surrounding the selection of land by the band, delays in the survey of treaty land, and the reasons for those delays.*⁸²

Taking into account its findings and recommendations in the Fort McKay and Kawacatoose inquiry reports, the Commission summarized its findings on the nature and extent of the Crown's obligations by setting out six principles, which provide a useful analytical approach for dealing with treaty land entitlement claims:

- 1 The purpose and intention of the treaty is that each band is entitled to 128 acres of land for each member of the band, and every treaty Indian is entitled to be counted in an entitlement calculation as a member of a band.
- 2 *For a band without reserves, the quantum of land entitlement crystallizes no later than the date of the first survey and shall be based on the actual band membership, including band members who were absent at the time of the survey.*
- 3 If the band received its full land entitlement at date of first survey, Canada's treaty obligations are satisfied, subject to the principle that "late additions" are entitled to be counted for entitlement purposes.
- 4 If a band did not receive its full entitlement at the date of first survey, or if a new or additional shortfall arose as a result of "late additions" joining the band after first survey, the band has an outstanding treaty entitlement to the shortfall acreage, and Canada must provide at least this amount of land in order to discharge its obligation to provide reserve lands under treaty.
- 5 Canada's failure to provide the full land entitlement at date of first survey, or subsequently to provide sufficient additional land to fulfil any new treaty land entitlement arising by virtue of "late additions" joining the band after first survey, constitutes a breach of the treaty and a corresponding breach of fiduciary obligation. A breach of treaty or fiduciary obligation can give rise to an equitable obligation to provide restitution to the band.
- 6 Natural increases or decreases in the band's population after the date of first survey have no bearing on the amount of land owed to the band under the terms of treaty.⁸³

While the Commission has not completely ruled out the possibility that other dates might be more appropriate depending on particular facts in other cases, we continue to endorse the general principle that the population on the date of first survey should be used to calculate treaty land entitlement

⁸² Indian Claims Commission, *Lac La Ronge Indian Band Report on Treaty Land Entitlement* (Ottawa, March 1996), repr. (1996) 5 ICCP 235 at 316-17.

⁸³ Indian Claims Commission, *Lac La Ronge Indian Band Report on Treaty Land Entitlement* (Ottawa, March 1996), repr. (1996) 5 ICCP 235 at 318-19.

unless there are unusual circumstances which would otherwise result in manifest unfairness. In our view, every claim must be assessed on its own merits, but it is also important to develop and apply a consistent set of principles on treaty land entitlement to avoid the problems that have resulted from frequent changes in government practices and policies over the last century. Not only have these changes frustrated the settlement of outstanding entitlement claims, but the application of *ad hoc* and inconsistent criteria has created inequities and a profound sense of injustice among First Nations.

Having identified the Commission's general principles relating to treaty land entitlement, we must consider whether the particular wording of Treaty 4 or the understanding of the treaty signatories justifies an interpretation and approach other than date of first survey. Kahkewistahaw submitted that "the correct interpretation of Treaty 4 provides that the area of the reserve is to be determined at the time the First Nation selects a reserve and communicates their desire to the officers of the Crown who have been appointed for the purposes of assigning reserves to the Indians. . . . It is the process of selection that determines the First Nation's Date of First Survey, not the date when the survey of a reserve is actually completed."⁸⁴ Counsel relied on the wording of Treaty 4 and the principles of treaty interpretation as support for the following submissions:

- (a) A fair, large and liberal interpretation of Treaty 4 indicates that it is when the First Nation selects a reserve that the size of the reserve was to be determined.
- (b) It would be the natural understanding of the Indians that the size of the reserve would be determined at the time that the reserve was selected by the First Nation based on the population at that time, not at some later point in time when a survey was concluded.
- (c) Canada drafted the terms of Treaty 4 which were presented to the Indians on a take-it-or-leave-it basis. Therefore, the *contra proferentum* rule requires that any lack of clarity, errors or omissions in the drafting of the terms in Treaty 4 are to be interpreted against Canada.
- (d) Kahkewistahaw's interpretation of Treaty 4 is a reasonably [sic] construction of Treaty 4. Canada's construction of Treaty 4 is clearly prejudicial to the Indians, therefore, Kahkewistahaw's construction should be accepted.
- (e) Canada's prior conduct has clearly indicated that the Date of First Survey is the date of the initial or first "selection" of land by the First Nation and certainly not later than the date land was "first surveyed" for the First Nation with the First Nation's input as required by Treaty 4.

84 Submissions on Behalf of the Kahkewistahaw First Nation, February 16, 1996, p. vii.

- (f) Kahkewistahaw's interpretation of Treaty 4 would ensure that all Indians receive land and are treated equally, fairly and consistently.⁸⁵

With respect, we do not agree with counsel for Kahkewistahaw that the date of selection is the proper approach to the interpretation of Treaty 4. First, there is nothing in the wording of the treaty or in the subsequent conduct of the parties to suggest that treaty land entitlement should be calculated when the First Nation selected or requested land in a particular location. It is clear that a band's *entitlement* to reserve land arises upon the band signing or adhering to treaty. However, the *quantification* and *location* of the band's entitlement are not triggered until certain procedures described in the treaty are carried out. Under Treaty 4, "*such reserves [are] to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians.*" In our view, the purpose of the "conference" with the band was to ensure that the land to be set aside as reserve met with the approval of the chief and headmen and that it was suitable for its intended purpose (which was typically agriculture in the case of bands in southern Saskatchewan). However, it does not necessarily follow that the band's population on the date of selection should determine the size of the reserve.

In theory, the process of setting apart a reserve should have been straightforward. The band would identify the location it wanted for its reserve and would meet with Canada's officers – often the Indian agent or the surveyor or both – to communicate its choice. There would, in that sense, be a "conference" as contemplated by Treaty 4. If Canada agreed with the band's selection, and assuming there were no conflicting claims for the selected lands, steps would be taken to survey the reserve following a calculation of the band's entitlement. Because Indian Affairs did not maintain comprehensive band lists or reliable census data until about 1951, the band's population would be estimated based on the best information available to the surveyor at that time – including paylist figures, discussions with the chief, the Indian agent and others, and the surveyor's own knowledge of the band. In fact, it was not unusual for the surveyor to provide land in excess of the band's paylist population in situations where the government estimated that a substantial number of band members were absent at the time of the survey.

⁸⁵ Submissions on Behalf of the Kahkewistahaw First Nation, February 16, 1996, pp. vii-viii.

Based on the best information available, the surveyor would determine the band's population, calculate the area of land to be set aside, run survey lines on the ground, establish monuments to identify the area, document the work in field notes, complete a survey plan, and submit the plan to Ottawa for approval and registration. From the perspective of the band, members could accept the reserve set aside by the surveyor, either expressly by stating their approval or implicitly by residing on and using the reserve for their collective benefit. Conversely, the band might express its disapproval by objecting to Canada's officers or simply by refusing to live on or use the reserve as surveyed.

It was only when *agreement* or *consensus* was reached between the parties to the treaty – by Canada agreeing to survey the land selected by the band, and by the band accepting the survey as properly defining the desired reserve – that the land as surveyed could be said to constitute a reserve for the purposes of the treaty. Therefore, the date of first survey was significant because, if the band accepted the surveyed land as its reserve, the completion and acceptance of the first survey provided evidence that both parties agreed that the land would be treated as an Indian reserve for the purposes of the treaty.⁸⁶ Since the survey is important evidence of Canada's intention to establish a reserve, it is not unreasonable to use the date on the survey plan as the date of first survey for entitlement calculation, provided that the completion of the physical survey of the reserve boundaries can be shown to have coincided roughly with the preparation of the survey plan. Once it has been concluded that a reserve has been set aside, the population must be assessed on this date to determine whether Canada has satisfied the band's treaty land entitlement.

We are mindful of the six principles of treaty interpretation, which have been defined by the courts and raised by counsel for Kahkewistahaw. We do not agree, however, that those principles drive us inexorably to the conclusions that the First Nation would have us reach. In our view, using the date of first survey as the operative date for calculating treaty land entitlement represents an interpretation that is "fair, large and liberal" and accords with the

⁸⁶ For the purposes of this inquiry, it was not necessary to consider whether a federal order in council accepting the survey was required before a beneficial interest could vest in the reserve or whether an order in council was required to establish a "reserve" under the *Indian Act*. However, it is interesting to note that the Commission's interpretation is entirely consistent with the interpretation of the treaty offered by the deputy minister of justice on August 12, 1876: "The undersigned leans to the opinion that, the survey and setting out of the reserve having been done with the expressed consent and approval of the Indians and having since been acquiesced in by them, no Order-in-Council is necessary . . ." (Z.A. Lash, signing on behalf of the Deputy Minister of Justice, to the Department of Interior, August 12, 1876, NA, RG 10, vol. 3637, file 6853 (ICC Exhibit 20)).

manner in which the land allocation process would have been understood by the Indians at the time of survey.

We disagree that using the date of first survey rather than the date of selection is “clearly prejudicial to the Indians,” or that using the date of selection “would ensure that all Indians receive land and are treated equally, fairly and consistently.” It is not accurate to suggest that one approach is universally favourable to the Indians and the other is consistently prejudicial. Calculating a band’s population on the date of selection would work to the band’s detriment if the band’s population was increasing, just as calculating the population on the date of first survey would be disadvantageous if the population was decreasing.

We believe that the Commission’s approach is supportable as a fair and reasonable interpretation of Treaty 4. We note in passing that this approach is also consistent with the methodology developed by Canada in the Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims (the 1983 ONC Guidelines), which identify five distinct steps to determine whether a band has received its full land entitlement:

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.

...

B Date for Entitlement Calculation

The date to be used in the land quantum calculations is seldom clearly spelled out in any of the treaties. Some of the treaties refer to the laying aside or assignment of a reserve, others mention the selection of land. Legal advice from the Department of Justice suggests that, although the treaties do not clearly identify the date for which a band’s population base is to be determined for the land quantum calculations, *the most reasonable date is not later than the date of first survey of land. It is Canada’s general view that this is the date to be used to determine whether it has met its obligation under the treaties, to provide a quantum of land to an Indian Band based on the population of that Band at date of first survey.*

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 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.*⁸⁷

As the last paragraph implies, where more than one survey has been performed for a given band, a critical issue in determining whether a band's treaty land entitlement has been satisfied is to ascertain which survey is the band's *first* survey. According to the OTC's "Research Methodology for Treaty Land Entitlement (TLE)" guidelines, the "first survey" can be identified by

- determining whether the reserve was surveyed or located in conformance with the terms of the treaty – in this case, following consultation between Canada's officers and the band as required by Treaty 4;
- determining whether the survey or allotment was acceptable to the band; and
- determining whether the survey or allotment was accepted by Canada.⁸⁸

A completed survey verifies the precise *location* and *size* of a reserve, and is critical in measuring whether a band's treaty land entitlement has been fulfilled. A completed survey does not necessarily confirm, however, that the "first survey" of a band's reserve has *occurred*, particularly where the band rejects the lands as surveyed.

Therefore, we find the most reasonable conclusion to be derived from the interpretation of Treaty 4 is that the date of first survey is the appropriate date for calculating treaty land entitlement. We interpret the Crown's obligation under Treaty 4 to be the allocation of 128 acres of land for each band member at the time that land was *set apart* as a reserve for the use and benefit of the band. It was only when land was *surveyed* by Canada in accordance with the treaty, and *accepted* by the band, that it could be said that the

87 DIAND, "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims," May 1983 (ICC Documents, pp. 59-60). Emphasis added.

88 Office of the Treaty Commissioner, "Research Methodology for Treaty Land Entitlement (TLE)," 1994 (ICC Exhibit 20). Section C of this document was separately produced in this inquiry as ICC Exhibit 14.

land was properly set apart. Therefore, subject to exceptions being made in unusual circumstances which would otherwise result in manifest unfairness, the general rule is that the population on the date of first survey shall be used to calculate a band's treaty land entitlement.

Having concluded that the appropriate date for calculating Kahkewistahaw's treaty land entitlement is the date of first survey, the Commission must determine which survey constituted the "first survey" for Kahkewistahaw. Once that determination has been made, identifying the date of first survey will be relatively straightforward.

Kahkewistahaw's First Survey

Canada's position is that the 1880 survey by Johnson was never completed, and that Nelson's survey in 1881 was an entirely separate process. It maintains that Nelson's work should be considered the true first survey because it actually resulted in the reserve that was set aside for Kahkewistahaw. Alternatively, counsel argued that reserve selection was an ongoing negotiation, which culminated in 1881 when the final reserve boundaries were surveyed by Nelson. Counsel for Kahkewistahaw, however, considered that, subject to "adjustments" by Nelson in 1881, the selection and survey work in 1880 constituted the first survey.

In reviewing this claim, we have closely considered the following statement from the OTC's research guidelines:

Some bands have had several reserves, and were moved either at their own request or at that of the government. Sometimes the band never settled on the earlier reserves. What you need to find is the reserve which was actually used by the band, and agreed to by them. If the boundaries were later "adjusted," it must be determined whether the adjustment really constituted a new survey of a new reserve, or just a change in the boundaries of a reserve essentially in the same location. . . .⁸⁹

There is little doubt that, to some extent at least, specific land was identified and selected by the Kahkewistahaw First Nation during a "conference" with Indian Agent McDonald in 1880. McDonald was authorized and instructed to encourage bands to select reserves and settle on them. Patrick and Johnson were authorized and instructed to survey the reserves of those bands desiring them. Based on a preponderance of the evidence before us, it appears that Johnson commenced but likely did not complete or forward any

⁸⁹ Office of the Treaty Commissioner, "Research Methodology for Treaty Land Entitlement (TLE)," 1994, pp. 2-3 (ICC Exhibit 20). Emphasis added.

plan of survey to Ottawa for approval, and, therefore, the land identified in 1880 was never formally approved as a reserve by the Superintendent General of Indian Affairs or the Minister of the Interior.

This conclusion is supported by the following three pieces of correspondence. First, Indian Agent McDonald reported on January 3, 1881, that the Crooked Lake reserves for O'Soup's Band and Kahkewistahaw were "to be completed." Second, in Patrick's December 16, 1880, year-end report, he stated that Johnson had not yet reported on the surveys at Crooked Lake. In mid-June 1881 Patrick submitted his plans and field notes to Ottawa for a number of reserves, including O'Soup's Band, but no plan was forwarded for Kahkewistahaw. This fact tends to confirm that, if Johnson had surveyed the Kahkewistahaw reserve in 1880, Patrick would have submitted the plan and field notes to Ottawa for approval or, if the only step which remained was the completion of the survey plan itself, he would have made at least some mention of the area involved.

Third, after Nelson completed his survey in 1881, he reported on January 10, 1882, that he had "adjusted" the reserves, but that no plans from the previous year had been available. More to the point, Nelson's report suggests either that no reserve had been set aside for Kahkewistahaw in 1880, or that the adjustments made to the 1880 survey were substantial:

After much planning as to the best manner of adjusting these reserves, it was decided to cut five miles off the lower part of O'Soup's reserve so as to give Ka-Kee-wistahaw a frontage on the river, and some of the bottom lands where they had already commenced farming, Ka-Keewistahaw's Band have now a good reserve, and a fair share of the timber in the gulches leading to the river.⁹⁰

Counsel for Canada asserted that the appropriate government authority could not have approved Johnson's work because no survey laid out the precise whereabouts of the land that had presumably been selected by the First Nation. To this, counsel for Kahkewistahaw replied:

Now to us the boundaries may not be identifiable because we can't find the survey plan of the 1880 survey, but *that doesn't mean that they weren't identifiable to the First Nation and to McDonald*. Certainly when the First Nation would have made its selection they would have said we want this area, and McDonald would have said

⁹⁰ John C. Nelson, Surveyor, Department of the Interior, to Edgar Dewdney, Superintendent General, Department of Indian Affairs, January 10, 1882, NA, RG 10, vol. 3573, file 154, pt. 2 (ICC Documents, pp. 35-38, 241-42, 319-20).

okay, this is going to be your reserve right here, and just because we don't have boundaries doesn't mean that they didn't know where the reserve was at that time, and certainly we have clear indication from McDonald that they had went [sic] on to their reserve, and I think that the facts have to speak for themselves in this situation.⁹¹

Counsel for Kahkewistahaw drew attention to the fact that Nelson referred to his survey work in 1881 as “adjusting” reserves “already surveyed.” Although Nelson did not have plans of the work done by Patrick and Johnson the previous year, it is fair to say that he probably knew where those boundaries were located. The First Nation argued, moreover, that Canada administered the land selected in 1880 as a reserve for almost a year:

COMMISSIONER PRENTICE: What do you mean it had been administered as a reserve?

MR. PILLIPOW: Well it was referred to as a reserve, and the Indians were living on it. The members of the First Nation were living on it, were building homes on it, were cultivating the soil on it, would be providing rations on it and were basically – it was basically their reserve.⁹²

In our view, this conclusion is not borne out by the facts in this case. Although some survey work had been done in 1880, there is no evidence of where Johnson located the boundaries. Even if there was sufficient evidence to establish that the reserve had been identified with some certainty by Kahkewistahaw and the Indian Agent in 1880, Nelson's report confirms that the First Nation did not accept that land as its reserve. Nelson stated that he had to “cut off” five miles from O'Soup's reserve to provide Kahkewistahaw with frontage on the river and to include lands already being farmed by some of the First Nation's members.

Counsel for Canada argued that Nelson's changes to the Kahkewistahaw reserve in 1881 resulted from a request by the First Nation and additional consultations with Canada.⁹³ While it is not entirely clear from the historical record whether Kahkewistahaw was one of the chiefs who had requested a change, this is a reasonable inference to draw considering, first, the First Nation's lack of river frontage in 1880, and, second, the fact that its members were farming on lands that were not included within the boundaries of the reserve prior to Nelson's “adjustments” in 1881. Furthermore, the subsequent conduct of the First Nation shows that it accepted the reserve laid out

91 ICC Transcript, February 22, 1996, pp. 173-74 (Stephen Pillipow). Emphasis added.

92 ICC Transcript, February 22, 1996, p. 173 (Stephen Pillipow).

93 ICC Transcript, February 22, 1996, pp. 149-50 (Bruce Becker).

by Nelson in 1881, and there is no evidence before the Commission to the contrary.

It is likely that no one will ever know the extent of the work completed by Johnson in 1880. It may be that, without working papers from Patrick or Johnson, Nelson had to start from scratch and conduct the entire survey over again. However, even if a reserve had been laid out by Johnson in 1880 and both Indian Agent McDonald and the First Nation could identify it with some precision, the question remains whether the changes implemented in 1881 by Nelson constituted, in the words of the OTC, "a new survey of a new reserve, or just a change in the boundaries of a reserve essentially in the same location." Canada argued that the changes were significant:

Although Nelson uses the phrase "adjusting these reserves," suggesting reserves already existed, we submit that on balance the quotation suggests a major re-working of the very sketchy work done the previous fall. Firstly, he had no plans from the previous work, perhaps suggesting that none existed. Secondly, he felt compelled to make a "reconnaissance of that part of the Qu'Appelle River" and "thoroughly examine the country." Surely, if he was making only minor adjustments to an existing reserve no such detailed preparation would be required. Thirdly, he refers to his work as making "new reserves"; again suggesting he was doing more than simply making minor adjustments.⁹⁴

According to counsel for the First Nation, Nelson's report confirmed that he was merely "adjusting" the "already surveyed" Kahkewistahaw reserve and was not performing a completely new survey.

In our view, the evidence before us demonstrates that the adjustments made by Nelson were considerable. We have had regard for Canada's arguments on this point, but more telling, we believe, is Nelson's report of the decision "to cut five miles off the lower part of O'Soup's reserve so as to give Ka-Kee-wistahaw a frontage on the river, and some of the bottom lands where they had already commenced farming." When this statement is considered in the context of the sketches by Kenneth Tyler and Jayme Benson comparing the proposed 1880 survey by Patrick and Johnson with Nelson's 1881 survey, it is apparent that Nelson's work added or substituted an area of 20 to 25 square miles in relation to a reserve that ultimately totalled slightly more than 73 square miles. This represents approximately one-third of the total area reserved for the First Nation in 1881. We consider a change of this magnitude to be substantial.

⁹⁴ Submissions on Behalf of the Government of Canada, February 15, 1996, p. 7.

The adjustment made by Nelson was substantial not only in terms of *location*. It also enhanced the *value* of the reserve from Kahkewistahaw's perspective because the new boundaries included frontage on the Qu'Appelle River, "timber in the gulches leading to the river," and land already being farmed by the First Nation.

We also find that the Kahkewistahaw First Nation did not consider the proposed 1880 survey to be "acceptable" in the sense that Kahkewistahaw and Canada had agreed to treat the land identified by Johnson as a reserve for the purposes of Treaty 4. The additional 20 to 25 square miles of "bottom lands," where some of the First Nation's members were farming in 1881, were clearly outside the area earmarked the preceding year. We cannot agree with counsel for Kahkewistahaw that the proposed 1880 reserve was administered by Canada as a reserve for almost a year because the members of the First Nation "were living on it, were building homes on it, were cultivating the soil on it." Nelson's report shows the opposite to be true.

Even if Patrick and Johnson *had* finished the 1880 survey, complete with monuments and a registered survey plan, it would not have constituted the First Nation's first survey any more than the 1876 survey by Wagner. The existence of a survey plan would not change the fact that Kahkewistahaw did not accept the area surveyed by Patrick and Johnson and that some members had already moved into the adjoining 20 to 25 square miles by the time Nelson arrived.

As a result, we conclude that the work by Patrick and Johnson in 1880 did not constitute the "first survey" for the Kahkewistahaw First Nation. Rather, Nelson's survey in 1881 must be considered the true "first survey" for the purposes of Kahkewistahaw's treaty land entitlement calculation. The subsequent conduct of the parties confirms that they agreed to treat the 1881 survey as the First Nation's reserve under Treaty 4. Although the Commission does not make any findings on whether a federal order in council is necessary before an Indian reserve can be created, the fact that the survey plan submitted by Nelson was accepted by Canada by means of an Order in Council provides evidence that the Crown agreed to the reserve surveyed by Nelson in 1881. From the First Nation's perspective, it is important to note that Chief Kahkewistahaw and his people did not object to, and did not refuse to live on or use, the reserve as surveyed. In our opinion, the parties reached a consensus and agreement that the reserve surveyed by Nelson represented the First Nation's selected reserve under Treaty 4.

To pinpoint the date of the first survey, we rely again on the following excerpt from the 1983 ONC Guidelines:

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 [on] 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.⁹⁵

The date on the plan of survey in this case is August 20, 1881, and we conclude that this represents the best evidence of the First Nation's date of first survey. Neither of the parties proposed an alternative date in 1881, nor are we aware of any other date from around the time of Nelson's survey that would be preferable. As we stated earlier in this report, it is not unreasonable to use the date on the survey plan for the effective date of first survey because it was on this date that the land was effectively set aside as reserve and the parties agreed to treat the land as reserve.

ISSUE 2: KAHKEWISTAHAW'S TREATY LAND ENTITLEMENT POPULATION

What is Kahkewistahaw's population for treaty land entitlement purposes?

General Principles

Since we have concluded that the date of first survey for Kahkewistahaw was August 20, 1881, the next task is to determine the First Nation's relevant population at that time. Moreover, while the date-of-first-survey population is the starting point for determining the acreage of land to which the First Nation became entitled, it must be borne in mind that any absentees on the date of first survey (including those who were paid arrears for that year), as well as "late additions," such as new adherents and landless transferees who joined the First Nation after August 20, 1881, also became entitled to be counted for treaty land entitlement purposes. However, the entitlement of these absentees and "late additions" arose only if they or their direct ancestors had not been included in another band's treaty entitlement count.

Counsel for both Kahkewistahaw and Canada referred to the treaty annuity paylists from 1879 to 1881 as the focal point of their analyses to determine

⁹⁵ DIAND, "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims," May 1983 (ICC Documents, p. 60).

the First Nation's date-of-first-survey population. Although a treaty payroll provides useful evidence of a band's population at a relevant point in time, it must be remembered that the payroll is simply the *starting point* in determining a band's population for treaty land entitlement purposes. The payroll must be recognized as merely an accounting of treaty annuities paid to individuals under a given chief, and not necessarily as an accurate census of band *membership*. As stated by counsel for the First Nation:

We fully recognize that the payroll has shortcomings, but it is the best evidence right now that we have on what a population of a First Nation would be at any particular time, so that would be the starting point. . . .⁹⁶

Similarly, Peggy Martin-Brizinski testified:

Q. So it [the payroll] wouldn't depict an accurate picture of the band's total membership, population, for any particular time?

A. P. MARTIN-BRIZINSKI: No, I don't believe that it does and the more we learn about this I think the more it becomes clear. For example, the elders have pointed out that there may very well have been band members who, for various reasons, were unable to go to these places of the annuity payments, given the circumstances of [the]time, the distance to travel, the difficulties of travel, and that they simply may not have shown up on those annuity pay lists. In addition to which, we really don't know a lot, in retrospect, about what band membership meant at that period of time and again, this was an accounting procedure on these pay lists and it was not meant to take an accurate count of people, nor was it meant to comment on membership.⁹⁷

In each case, the payroll analysis is important to establish the band's *actual membership* – including band members who were absent at the date of first survey – and not simply the number of people who happened to be counted with the band in a given year. All available evidence that tends to establish or disprove the membership of certain individuals with a band should be considered and weighed. In other words, the base payroll is simply *prima facie* evidence, which is subject to rebuttal.

Kahkewistahaw asserted that, even if 1881 was the date of first survey, the appropriate payroll to be used to determine the First Nation's date-of-first-survey population is still the 1880 payroll. Nelson would have had access to

⁹⁶ ICC Transcript, February 22, 1996, p. 49 (Stephen Pillipow).

⁹⁷ ICC Transcript, May 25, 1995, pp. 292-93 (Peggy Martin-Brizinski).

this payroll prior to commencing his survey in 1881 and likely used it to determine the area of the reserve. Moreover, according to counsel for Kahkewistahaw, the evidence confirms that Nelson did not use the 1881 payroll to determine the size of the reserve. Based on Nelson's report on his 1881 survey activities, counsel submitted that Nelson arrived at the Crooked Lake area and began his survey of the Kahkewistahaw reserve *prior* to the treaty annuity payments at Qu'Appelle on August 4, 1881. Even though Nelson was in the general area when the 1881 payments were made, counsel maintained that the evidence shows that he did not have access to the 1881 payroll and did not use that information to determine the size of the reserve. Moreover, since only 186 members of the First Nation were paid at Qu'Appelle in 1881 and Nelson surveyed enough land for 365 people, counsel asserted that it is reasonable to conclude that Nelson did not use the 1881 payroll to determine the size of the reserve. Rather, counsel submitted that the 1880 payroll was probably used by Nelson because the amount of land set aside corresponds closely with the 1880 population figures.

Therefore, Kahkewistahaw submitted that the 1880 payroll should be used as the "base payroll" or starting point for determining the total entitlement of the First Nation. According to that payroll, 358 individuals were paid under Kahkewistahaw at Qu'Appelle, Maple Creek, and Fort Ellice on July 18, 1880. After Johnson started his survey work near Crooked Lake in late August or early September 1880, an additional 72 individuals were paid under the headman Manitoucan at Fort Walsh in October 1880, for a base payroll total of 430. To this number, counsel submitted that a further 22 members, who were absent or paid arrears in 1880, should be added, for a total of 452 members as of the date of first survey. Based on the arguments and figures presented by counsel for Kahkewistahaw at the inquiry, the First Nation has an outstanding treaty land entitlement of 11,040 acres. As previously noted, this number rises to 29,600 acres if the entitlement of 145 "late additions" identified by Kahkewistahaw in seeking to have its claim accepted for negotiation by Canada in 1992 is established.

Canada's position in this inquiry is that the 1880 payroll is not the appropriate starting point to determine the First Nation's treaty land entitlement. Simply put, Canada maintained that the August 4, 1881, payroll, rather than the 1880 payroll, provides the most accurate reflection of Kahkewistahaw's actual population on the date of first survey (i.e., August 20, 1881). Canada relied on the fact that Nelson was in the Crooked Lake area from July 21 to August 26, 1881, surveying a number of reserves, including one for

Kahkewistahaw. Counsel asserted that, since the annuity payments were made on August 4, 1881, it is reasonable to conclude that Nelson had up-to-date information on the First Nation's population figures before he completed his survey. With respect to Kahkewistahaw's submission that Nelson did not use the 1880 payroll because the amount of land surveyed did not correspond with that population base, Canada submitted:

[T]his is a particularly unfair argument. It amounts to arguing that the fact a surplus of land was provided in 1881 by the Nelson survey is evidence that a shortfall exists. Nelson may have felt it necessary to provide additional lands for other band members who may have been paid at other locations such as Fort Walsh as had happened in previous years. This would not have been an unusual occurrence with the shifting and fluctuating band populations of the day.⁹⁸

Canada relied on the OTC's report on the 1880 survey of the adjacent Cowessess Band to illustrate the point. In that case, only 96 people were members of O'Soup's Band in 1880, but Patrick set aside enough land for three times that population "perhaps in anticipation that some of Cowessess' people would join O'Soup there."⁹⁹ Counsel suggested that, in the case of Kahkewistahaw, Nelson may have also had regard for the 1881 payroll, but simply set aside excess lands in consideration of those individuals who were absent at the time of the survey or who were paid at other locations such as Fort Walsh. Since Nelson was undoubtedly aware that 72 people had been paid at Fort Walsh in 1880, he may have speculated that the same thing might occur in 1881.

In the final analysis, Canada asserted that it is not clear which payroll or other information available to Nelson was used to determine the area of the reserve. Canada relied on the testimony of Peggy Martin-Brizinski of the OTC to illustrate the difficulty of ascertaining how decisions were made regarding the survey of reserves at Crooked Lake:

Well at the time all this is happening, people are leaving the reserves; this is when Nelson arrives to do his surveys and when he gets there a lot of the people simply aren't there at the time of the survey. One of the classic examples of this, when he goes to confer with Agent McDonald in late July, he has to make some decisions, given the absence of a lot of people, what he's going to do, and Agent McDonald apparently advises him to use the 1879 pay list because he believes that you would

⁹⁸ Submissions on Behalf of Canada, February 15, 1996, p. 15.

⁹⁹ Office of the Treaty Commissioner, "Kahkewistahaw Special Report: Surveys and Demographics, Crooked Lakes Reserves, 1876-1884," May 1995, p. 6 (ICC Exhibit 5).

find a maximum number of people paid in that particular year. So Nelson seems to have been advised to use the 1879 pay list, though this is not the pay list immediately prior to his survey. So this is a case where one doesn't necessarily look at pay list immediately prior to the survey but the best evidence that he may have used another pay list.

However, if you actually look at the size of the reserves that Nelson was surveying it seems possible that he may not have used, in some cases, 1879, he may have used a partial list from 1880, particularly ones from the Qu'Appelle area as opposed to Fort Walsh. *We don't really know what he would have used.* However, in all cases the reserves are surveyed larger than the populations of 1881. The annuity payments are taking place roughly between July 26th and August 20th in the Qu'Appelle and Fort Walsh, Maple Creek payment places. It's possible that he could have had information at the time of the surveys in the field, of what those population sizes were, given the annuity payment. However, if you look at the actual size of the reserve, it doesn't seem at all feasible that he would have paid much attention to that because he's surveying reserves larger than the populations at the annuity payment post. So it seems – when we got into this it seemed more likely that he would have used either 1879 or 1880 population figures to do his assessment.¹⁰⁰

In light of the fact that the parties took different positions on which payroll should be used as the base payroll to calculate entitlement, we have carefully considered certain comments by counsel for Canada regarding the distinctions between the “objective,” “subjective,” and “continuity of membership” approaches to payroll selection. In our view, these comments raise the following questions:

- 1 Assuming that a single base payroll should be used, should the base payroll be the payroll closest in time to the date of first survey (even if that payroll *followed* the date of first survey), the payroll immediately preceding the date of first survey, or the payroll that was actually relied upon by the surveyor?
- 2 Alternatively, should a multiple-year method such as the “continuity of membership” approach or some form of averaging be used to derive a more realistic and consistent population during this period when the First Nation's payroll population was so widely variable?

Counsel for Canada described the objective approach to payroll selection in these terms:

¹⁰⁰ ICC Transcript, May 25, 1995, pp. 327-28 (Peggy Martin-Brizinski).

Objectively if the goal is to determine the population of the band when the reserve is surveyed for it, then we would not look at the 1879 payroll even though it's – you're sure that those are the people that the reserve was surveyed for. You would look at the payroll closer to the time of the actual survey because it would be more – more relevant in terms of what the population was when the survey occurred.¹⁰¹

In essence, the objective approach uses the payroll that represents the “best evidence” of the band's population at the date of first survey, regardless of whether the survey preceded or followed the payment of annuities. Therefore, one possible outcome of this approach is that, if the survey *preceded* the payment of annuities in a given year, the surveyor would not have had the benefit of knowing what the base payroll population *would be* when he conducted his survey.

The subjective approach, which was implicit in the position of the First Nation, focuses on the most recent payroll to which the surveyor had access, or on some other payroll on which it can be shown that the surveyor actually relied. The apparent advantage of the subjective approach is that it may result in a higher correlation between a given payroll population and the quantum of land actually surveyed for the band. The obvious disadvantage is that the payroll may have been out of date when the reserve was surveyed, which could result in the reserve's size bearing little or no relationship to the band's population at the date of first survey.

An alternative to these two methods – the continuity-of-membership approach – may have some appeal in a case such as this because the First Nation's population diverged so widely from year to year. The theory behind the approach is to focus on those members of the community who consistently appeared on the payroll over a number of years, instead of choosing a particular payroll in which the population “spiked” either upward or downward. According to counsel for Canada, the major drawback to using continuity of membership is that, without a base year to use as a starting point, “you move away from the idea of being able to say with certainty who was counted.”¹⁰² The same advantages and disadvantages presumably apply to averaging, with the added concern that an average can be skewed depending on the years averaged – meaning that the resulting figure may not be representative of a band's population at all.

The Commission concludes that the objective approach is the most logical choice among these options because the purpose of payroll analysis is to

101 ICC Transcript, February 22, 1996, p. 162 (Bruce Becker).

102 ICC Transcript, February 22, 1995, p. 161 (Bruce Becker).

“obtain as accurate a population of the band as is possible on the date that the reserve was first surveyed.”¹⁰³ Each case must be assessed on its own merits based on the historical information available. In Kahkewistahaw’s case, the August 4, 1881, payroll provides the most reliable evidence of the First Nation’s population as of the August 20, 1881, date of first survey. Whether or not Nelson had access to this information before he completed his survey on August 20, 1881, is a “red herring,” since the real question is the First Nation’s actual population on the date of first survey. In this case, there can be no doubt that the 1881 payroll provides the most accurate reflection of Kahkewistahaw’s population on the date of first survey.

We recognize that using a subjective approach – either the payroll immediately preceding the date of first survey, or the payroll on which the surveyor actually relied – has a strong appeal since the focus is on the work done by the surveyor relying on information actually available to him. Counsel for the First Nation also used arguments made by the Ochapowace First Nation in support of a subjective approach: first, that the approach is based on “the best information available, recorded at the time by the people that had the responsibility to make the decision”; and, second, that a “fair, large and liberal construction in favour of the Indians” requires the selection of the “population at last annuity payment prior to survey.”¹⁰⁴

The central question in this inquiry is whether sufficient reserve land was set aside for each and every member of the Kahkewistahaw First Nation on August 20, 1881. In determining whether the Crown discharged its treaty obligations, we are less concerned with what the officers “responsible to make the decision” actually *did* than with what they were *obliged* to do under the terms of Treaty 4. The issue is how the treaty should be interpreted to establish a band’s population. It is logical that the parties to the treaty would have expected land to be allocated on the basis of a population that was current on the date of the survey because this was the date when the land was effectively set aside for the use and benefit of the band. It is not reasonable to suggest that the parties to treaty intended the size of an Indian reserve to be determined by population figures that were several months out of date and, therefore, unreliable. Although the responsible officers may have used readily available historical statistics, they should have used current population statistics. If current statistics were not yet available, they could have

103 DIAND, “Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims,” May 1983 (ICC Documents, p. 61).

104 William J. Pillipow to Emil Korchinski, Office of the Treaty Commissioner, November 23, 1990 (ICC Documents, pp. 47-48).

conducted an independent count or made the reserve selection subject to adjustment.

In the case of some Treaty 4 bands like Kahkewistahaw, for example, many band members chose not to live on the reserves but to pursue the buffalo and a traditional way of life for as long as they could. Thus, when Nelson surveyed the reserves at Crooked Lake in 1881, there is evidence to suggest that he may have been aware that many band members were absent. As a result, he considered it appropriate to set aside land in excess of each band's entitlement (based on 1881 population figures) on the assumption that some members were absent and would later rejoin their respective bands.

The First Nation's other argument is that a "fair, large and liberal construction in favour of the Indians" requires the use of the subjective approach based on the paylist immediately preceding the selection of land. We disagree. We believe that a fair, large, and liberal construction should still yield a consistent principle that can be applied in all cases, rather than yielding results that are consistent only because they are invariably to the benefit of First Nations. If the Commission and the parties were to choose one of the subjective approaches and apply it uniformly in all cases, the approach chosen might benefit some bands while operating to the detriment of others, depending on the circumstances involved.

Employing the objective approach, the paylist closest in time to August 20, 1881 – when Nelson completed the survey of the reserves that were acceptable to both Canada and Kahkewistahaw – was the paylist of August 4, 1881. In our view, subject to adjustments being made for absentees and "late additions," this paylist represents the best evidence of Kahkewistahaw's population as of the date of first survey. Proximity in time is particularly important in cases like this in which significant population swings quickly rendered the figures in earlier paylists unreliable as indicators of Kahkewistahaw's population at first survey.

In any event, the 1881 paylist satisfies both the objective approach and a subjective approach, since it is clear from Nelson's interim report dated August 14, 1881, and his plan dated August 20, 1881,¹⁰⁵ that Nelson did not complete his survey until some two weeks *following* the payment of annuities. The 1881 paylist was readily available and should have been used by Nelson to determine the size of the reserve. If Nelson did not use this paylist

¹⁰⁵ J.C. Nelson, "Sketch showing Indian Reserves on Crooked and Round Lakes," August 20, 1881 (ICC Documents, p. 247).

information, this oversight actually operated to the benefit of Kahkewistahaw because Nelson set aside approximately twice the amount of land than would have been justified by the First Nation's base payroll population of 186.

Conclusions Regarding Kahkewistahaw's Treaty Land Entitlement

Applying the principles outlined above to the facts in this case, the Commission concludes that the date of first survey for the Kahkewistahaw First Nation was August 20, 1881. Given the close proximity in time between the date of the survey and the treaty annuity payments to Kahkewistahaw on August 4, 1881, the 1881 payroll is the proper starting point for the entitlement calculation because it provides the best evidence of Kahkewistahaw's actual date-of-first-survey population. According to the payroll information available for 1881, there were 186 members of the First Nation paid at Qu'Appelle, plus an additional 70 absentees and arrears, for a total date-of-first-survey population of 256 members. Since enough land was set aside for 365 individuals, Kahkewistahaw has not established an outstanding date-of-first-survey shortfall. Rather, there was a surplus of 14,048 acres, representing sufficient land for more than 109 individuals who were not present in 1881.

We emphasize, however, that our analysis does not include any "late additions," such as new adherents and landless transferees, who may have joined Kahkewistahaw after the date of first survey and would have thereby become entitled to be included in the First Nation's entitlement calculation. Since the payroll research conducted to date has been premised on the assumptions that (a) 1880 was the date of first survey, and (b) the 1880 payroll is the appropriate base payroll, we have no reliable figures on how many "late additions" should be included in Kahkewistahaw's total entitlement count. Although it is possible that Kahkewistahaw may be able to establish an outstanding entitlement claim, this will be a difficult threshold to achieve since the First Nation would have to show that an additional 109 new adherents or landless transferees joined it after 1881.

Finally, before addressing the issue arising from the Saskatchewan Treaty Land Entitlement Framework Agreement, it is necessary to deal with two additional considerations. The first is whether there are unusual circumstances in this case that would result in manifest unfairness unless we make an exception to the general rule that the population as of date of first survey shall be used to calculate treaty land entitlement. We conclude that such an exception is not warranted. The facts in this case suggest that Canada's officials acted in good faith when they took steps to set aside a land base in

accordance with the treaty for the benefit of the First Nation. Canada's surveyors consulted and conferred with Chief Kahkewistahaw and his people, and undertook to ensure that the First Nation had river frontage, timber, and good agricultural land for its future needs. The land that was ultimately surveyed and set aside as Indian Reserve 72 was fit for agricultural purposes and met with Kahkewistahaw's approval. Although the First Nation's population peaked in 1880, it has not been established that the 1880 number was representative of the true population base for Kahkewistahaw. Despite evidence that the First Nation's payroll population in 1881 was only 186, Canada's officials nevertheless surveyed enough land for 365 people. Since Canada set aside more land than the treaty formula prescribed, one can only presume that it did so either owing to the surveyor's inadvertence or his assumption that others would join Kahkewistahaw after the reserve was surveyed. In either event, the result worked to Kahkewistahaw's benefit.

The second consideration we must address is the relevance of the relationship between Kahkewistahaw and Nekaneet in this inquiry. According to Canada, it is not appropriate to use 1880 as the date of first survey because the 1880 payroll included many members of Nekaneet's Band who were later recognized as a separate band and whose descendants received a substantial treaty land entitlement settlement in 1992:

Nekaneet was paid under Kahkewistahaw in 1879 and 1880. In 1881 and 1882 Nekaneet and a significant number of others on the 1880 Kahkewistahaw list were paid separately under Nekaneet (ICC 80 and Exhibit 5 page 9). We cannot be sure of the exact number, but much of the decline in Kahkewistahaw's population between 1880 and 1881 is accounted for in this migration. Most of those who left after 1880 were paid for only one year with Kahkewistahaw. Those who left with Nekaneet did in fact receive their own reserve in the Cypress Hills area and the Nekaneet Band recently received a significant treaty land entitlement settlement (more than \$8 million). Accordingly, Canada has dealt with its treaty land entitlement obligations as they relate to those individuals who left Kahkewistahaw under Nekaneet between 1880 and 1881. Undoubtedly, others that left that year have also been counted with other bands. To use the 1880 population would require Canada to provide land for these individuals twice.¹⁰⁶

Counsel for Kahkewistahaw acknowledged that many of Kahkewistahaw's members were in the Cypress Hills with Nekaneet in 1881 and 1882, but asserted that these individuals should have been included in Kahkewistahaw's

¹⁰⁶ Submissions on Behalf of the Government of Canada, February 15, 1996, pp. 5-6.

population base for entitlement purposes. In support of this view, counsel referred to a letter dated December 20, 1884, in which Indian Commissioner Edgar Dewdney advised the Superintendent General of Indian Affairs that Nekaneet's request for a reserve had been rejected on the grounds that Nekaneet was not a chief, and his "followers" had already received treaty land entitlement under other chiefs.¹⁰⁷

Since we have concluded that the 1881 payroll provides the best evidence of Kahkewistahaw's date-of-first-survey population, this point has been rendered largely academic. In any event, although it is reasonable to conclude that some Kahkewistahaw *members* counted at Fort Qu'Appelle in 1880 were at Fort Walsh in 1881 and 1882, and were thus absent when the reserve was surveyed, any members who subsequently rejoined Kahkewistahaw became entitled to be included in the entitlement calculation as absentees. Any members in 1880 who switched their affiliations in 1881 and 1882, but later rejoined Kahkewistahaw without being counted as part of a treaty land calculation with another band, became entitled to be included in Kahkewistahaw's treaty land entitlement calculation as landless transfers. The important point is that, for the First Nation to be able to claim treaty land entitlement for absentees and landless transfers, it must be shown that these individuals were not counted with other bands for treaty land entitlement purposes before rejoining Kahkewistahaw.

It must be remembered that treaty annuity paylists do not prove conclusively whether an individual was a *member* of a given band. The treaty annuity payroll was simply an accounting tool used for administrative purposes and is only one source of evidence to be considered. For this reason, we cannot agree with the First Nation's unqualified assertion that individuals paid with Kahkewistahaw in 1880 and with Nekaneet at Fort Walsh in 1881 and 1882 "were members of the Kahkewistahaw First Nation and were included in Kahkewistahaw's population for determining the size of the Kahkewistahaw reserve."¹⁰⁸ There is simply insufficient evidence before the Commission to support or deny this assertion.

Therefore, even if the Commission had agreed with Kahkewistahaw's submission that it would be appropriate to rely on an 1880 base payroll in this case, we may have had serious reservations about including in Kahkewistahaw's entitlement calculation any individuals paid with Kahkewistahaw in 1880 but subsequently paid at Fort Walsh. This is because there is *prima*

¹⁰⁷ Submissions on Behalf of the Kahkewistahaw First Nation, February 16, 1996, pp. 74-75.

¹⁰⁸ Submissions on Behalf of the Kahkewistahaw First Nation, February 16, 1996, p. 74.

facie evidence that a large proportion of Kahkewistahaw's population decline from 1880 to 1881 can be accounted for by the migration of individuals to the Cypress Hills. With respect to those people who were paid only once with Kahkewistahaw – on the 1880 payroll – one must consider whether they had a sufficient connection or continuity of membership with the First Nation. While it may be appropriate, for entitlement purposes, to include “one time onlys” on the base payroll of a band, all of the “connecting factors” must be taken into account, especially where there are competing equities for including a particular person as a member of one band or another. Since each Indian is entitled to be counted only once for entitlement purposes, it would be necessary to consider whether Nekaneet has a stronger claim to any individuals who were paid annuities with Kahkewistahaw for only one year in 1880 but who thereafter became long-term members of Nekaneet.

Counsel for Kahkewistahaw further contended that, in light of the deaths of many members of the First Nation between 1880 and 1882, the fact that Kahkewistahaw's population rebounded to the extent that it did in the three years following 1882 is evidence that many of the surviving members of the First Nation who were counted at Fort Walsh in 1881 and 1882 subsequently rejoined and settled with Kahkewistahaw. The evidence confirms that many Indians died in 1880 and 1881 as a result of malnutrition, starvation, and disease. There can be no doubt that the conditions facing the plains Indians in the 1870s and 1880s were tragic and were aggravated by the disappearance of the buffalo and the difficult transition to an agrarian way of life.

However, we note that, although Kahkewistahaw's date-of-first-survey population was 256, including absentees and arrears, Nelson set aside a reserve that was large enough for 365 people, according to the treaty formula. Although the First Nation undoubtedly suffered hardship during these years, it was provided with a surplus of land based on its 1881 payroll population. As we concluded previously, Canada's officials made efforts in good faith to set aside a land base in accordance with the treaty for Kahkewistahaw's benefit. Based on our findings that land was provided for an additional 109 people, if the First Nation can demonstrate that more than this number joined or rejoined it after the date of first survey, then it could perhaps substantiate an outstanding treaty land entitlement. Our review of the population statistics in evidence in this inquiry, however, makes this outcome appear unlikely.

ISSUE 3: SASKATCHEWAN FRAMEWORK AGREEMENT

Has the First Nation established, pursuant to Article 17 of the Saskatchewan Treaty Land Entitlement Framework Agreement, an outstanding treaty land entitlement on the same or substantially the same basis as the Entitlement Bands, which are party to the Framework Agreement?

As the Commission noted in Part III of this report, the submissions made by the parties in relation to Article 17 of the 1992 Saskatchewan Treaty Land Entitlement Framework Agreement (the Framework Agreement) were virtually identical to those made by the parties (represented by the same counsel) in the Kawacatoose inquiry. The only difference in the present inquiry is that Kahkewistahaw is seeking validation on the same basis as the Ochapowace and Cowessess First Nations rather than the seven Entitlement Bands relied upon by Kawacatoose.

Since the release of the Kawacatoose report, we remain unchanged in our view that section 17.03 is limited to circumstances in which a band's treaty land entitlement claim has *already* been accepted for negotiation in accordance with the terms of treaty. In other words, section 17.03 applies in the context of *settlement*. It does *not* afford a separate basis for *validation* apart from treaty. It represents an agreement among Canada, Saskatchewan, and the Entitlement Bands that, once a non-Entitlement Band's claim has been accepted for negotiation independently of the Framework Agreement itself, then the settlement of that claim can be dealt with much more expeditiously by avoiding protracted bargaining on points that have already been negotiated.

If we had determined that Kahkewistahaw had an outstanding treaty land entitlement on the basis of Treaty 4 and the principles set forth in the Fort McKay, Kawacatoose, and Lac La Ronge cases, then we would have concluded that the claim should be validated. In that event, it would have been our view that Canada and Saskatchewan should extend the principles of the Framework Agreement to a settlement with the First Nation (providing that Kahkewistahaw elected to opt in under section 17.04). However, we have found that Canada owes no obligation under treaty to validate Kahkewistahaw's claim, and thus we also conclude that section 17.03 creates no obligation upon Canada or Saskatchewan to enter into a settlement with Kahkewistahaw in accordance with the Framework Agreement.

Nevertheless, in light of Kahkewistahaw's position that the settlements with Cowesses and Ochapowace constitute some sort of precedent which should

bind Canada's future handling of validation claims, we will review the evidence before us regarding the validations of those Bands with a view to establishing whether their circumstances form the basis of a claim to an outstanding treaty land entitlement.

Cowessess

Cowessess' circumstances can immediately be distinguished in one respect because Patrick and Johnson actually completed the survey and plan of the O'Soup reserve in 1880. However, we have already concluded that, even if a survey plan had been completed for Kahkewistahaw in 1880, the First Nation's date of first survey would still have been 1881 because Kahkewistahaw moved onto adjoining lands and thus did not accept the area surveyed by Johnson. The OTC noted how this response differed from Cowessess:

We are not aware of which survey was accepted for Cowessess by Canada, but believe that there is good reason to use the 1880 O'Soup survey as the first survey, as the trail of evidence clearly indicates the nature and size of the adjustment made by Nelson in 1881. *The O'Soup faction began to live on the reserve in 1880, and to continue to reside there during and after the Nelson survey. There is no indication that O'Soup, unlike the bands formerly located to the north of the river, wanted any relocation in 1881.*¹⁰⁹

Since the evidence suggests that Cowessess accepted the reserve surveyed in 1880 without any substantial adjustments, the parties agreed that the appropriate date of first survey for Cowessess was 1880 rather than 1881. On these grounds, we consider the Cowessess scenario to be distinguishable from the circumstances surrounding the Kahkewistahaw claim. Kahkewistahaw did not accept the reserve surveyed in 1880, which necessitated substantial adjustments in 1881.

Ochapowace

Ochapowace is very similar to Kahkewistahaw in terms of population trends (high in 1879, peaking in 1880, and plummeting in 1881) and date of first survey (1881), but, although the Ochapowace claim was accepted for negotiation, Kahkewistahaw's claim has been rejected. Since Canada's legal opinion on the Ochapowace claim is privileged and has not been disclosed, it is difficult to ascertain the precise reasons why that claim was validated and settled

¹⁰⁹ Office of the Treaty Commissioner, "Surveys of the Kahkewistahaw Reserve," March 29, 1994, p. 5 (ICC Exhibit 2). Emphasis added.

under the Framework Agreement. However, Canada stated that there are significant differences because Ochapowace was complicated by the informal but “forced” amalgamation of the Kakisheway and Chacachas Bands by Nelson and McDonald in the course of surveying the reserve. As noted by counsel for Canada:

The Ochapowace situation . . . was the product of a “forced amalgamation” of the Kakisheway and Chacachas Bands. Many of the Chacachas Band members did not want to be a part of the new band and departed. This is why the Band population was so low in 1881 (Note the 1881 Date of First Survey, not 1880). The hardship caused by the amalgamation and the added difficulty of arriving at the populations because of the existence of two separate bands and two separate reserves may have played a significant role in the claim being accepted.¹¹⁰

Further background information regarding Ochapowace was provided in the two reports by the OTC. In its May 1995 report, the OTC stated:

When Nelson did his survey work [in 1881], he and Agent McDonald in Treaty Four seem to have made a decision to place both Loud Voice [Kakisheway] and Chacachas on the same reserve. It is not clear just how the decision was made, but the bands were not involved and there was never any formal amalgamation. In the year of the survey many members of both bands were absent hunting; 11 of Chacachas' members were paid with Kakisheway, and only 43 were paid at Qu'Appelle. When some of the band members came to Crooked Lakes in 1882, they were upset to find that they no longer had their own lands, and they asked for a separate reserve. . . . In 1883 the 107 Chacachas members, then on reserve, were paid separately, but by 1884 the two lists had been combined, thus effecting an amalgamation. Only about 45 band members joined Loud Voice; the others, including Chacachas remained stragglers. . . .¹¹¹

In its report of March 29, 1994, the OTC commented:

In the case of Ochapowace, we are aware that 1881 has been accepted as the Date of First Survey for the band, based on Nelson's survey. Although we can surmise that there was an 1880 survey, we do not have any evidence of the size or locations of these reserves. Since, however, the survey of 1881 was the first joint reserve that we know of (Chacachas and Kakisheway), there was reason to use 1881 as the [date of first survey] in this case.¹¹²

110 Submissions on Behalf of the Government of Canada, February 15, 1996, p. 24.

111 Office of the Treaty Commissioner, “Kahkewistahaw Special Report: Surveys and Demographics, Crooked Lakes Reserves, 1876-1884,” May 1995, p. 7 (ICC Exhibit 5).

112 Office of the Treaty Commissioner, “Surveys of the Kahkewistahaw Reserve,” March 29, 1994, p. 4 (ICC Exhibit 2).

That report also makes it evident that, in the 1881 survey by Nelson, Ochapowace received sufficient land for 413 people but was or became entitled to land for 419 people.¹¹³ Notwithstanding the difference of only six people, this represents an outstanding treaty land entitlement and a valid basis for distinguishing the Ochapowace claim, unless Kahkewistahaw can establish that it has sufficient absentees and “late additions” to increase its 1881 entitlement population from the base payroll figure of 186 to a number exceeding 365.

Conclusions Regarding Cowessess and Ochapowace

In conclusion, based on the limited evidence before us regarding the validations of Cowessess and Ochapowace, we find it difficult to conclude that the circumstances of these bands are of any value as precedents to Kahkewistahaw. We do not agree that the First Nation’s argument on this point has merit in any event. As we stated in the Kawacatoose report:

We do not view the suggestion that Canada has gone beyond its lawful obligation in previous validations or settlements as creating new “high water marks” to which, as a minimum, all future validations and settlements must conform, failing which Canada is in breach of its fiduciary obligations to non-Entitlement Bands. The proper basis for validation contemplated by section 17.03 is the basis required by Treaty 4.¹¹⁴

Although we are not prepared to make a finding on whether the validations of Cowessess and Ochapowace were properly determined, the real issue in any event is not whether other cases have been differently decided, but whether Kahkewistahaw has a proper claim for outstanding treaty land entitlement under the terms of Treaty 4. We have concluded that it does not.

¹¹³ Office of the Treaty Commissioner, “Surveys of the Kahkewistahaw Reserve,” March 29, 1994, pp. 5-6 (ICC Exhibit 2).

¹¹⁴ Indian Claims Commission, *Kawacatoose First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996), 190, repr. (1996) 5 ICCP 73 at 217.

PART V

CONCLUSIONS AND RECOMMENDATION

CONCLUSIONS

The Commission has been asked to inquire into and report on whether the Government of Canada properly rejected the specific claim submitted by the Kahkewistahaw First Nation. To determine whether the claim is valid, we have had to consider the following issues:

- 1 What is the appropriate date for calculating Kahkewistahaw's treaty land entitlement?
- 2 What is Kahkewistahaw's population for treaty land entitlement purposes?
- 3 Has the First Nation established, pursuant to Article 17 of the Saskatchewan Treaty Land Entitlement Framework Agreement, an outstanding treaty land entitlement on the same or substantially the same basis as the Entitlement Bands, which are party to the Framework Agreement?

Our findings are stated briefly below.

Issue 1: Date for Calculating Treaty Land Entitlement

As a general principle, a band's population on the date of first survey shall be used to calculate treaty land entitlement rather than its population on the date of selection of reserve land. In the case of Kahkewistahaw, the substantial changes made by Nelson in 1881 to the survey work by Patrick and Johnson in 1880 constituted "a new survey of a new reserve," and not "just a change in the boundaries of a reserve essentially in the same location." These changes arose out of Kahkewistahaw's desire to include adjoining agricultural land, river frontage, and timber land in its reserve. Therefore, the date of first survey was the August 20, 1881, date of Nelson's survey, which was

conducted in accordance with treaty and accepted by both Canada and the First Nation.

Issue 2: Kahkewistahaw's Treaty Land Entitlement Population

The payroll that provides the most reliable evidence of a band's population at date of first survey is the payroll closest in time to the date of first survey, at which time the band's treaty land is set aside for the band's use and benefit. Nevertheless, the treaty payroll is simply a *starting point* in determining the band's population for treaty land entitlement purposes, since the payroll must be analysed to establish the band's *actual membership* as opposed to individuals who were simply counted with the band in a given year. The most reliable objective evidence of Kahkewistahaw's population as of the August 20, 1881, date of first survey – and thus the appropriate “base payroll” – was the August 4, 1881, payroll, subject to appropriate adjustments being made for absentees and “late additions,” such as new adherents to treaty and transferees from landless bands. Using the 1881 base payroll as the starting point, the evidence shows that Kahkewistahaw had a population of 186, together with 70 absentees and arrears, at the date of first survey. However, all the payroll research was predicated on an 1880 date of first survey, so we do not have any reliable figures on the number of “late additions” to add to this preliminary total of 256. For its claim to be validated, the First Nation must demonstrate that more than 109 absentees, new adherents, or landless transfers – including individuals who may have been counted with Nekaneet at Fort Walsh in 1881 – subsequently joined or rejoined Kahkewistahaw. The Commission believes that this result is fair because the evidence shows that Canada's officials conferred with Chief Kahkewistahaw and acted in good faith to provide a land base in accordance with treaty, having sufficient river frontage, timber, and agricultural land for the First Nation's future needs.

Issue 3: Saskatchewan Framework Agreement

The only basis upon which a band can establish an outstanding treaty land entitlement claim is in accordance with the legal obligations that flow from treaty. Section 17.03 of the Framework Agreement does not provide Kahkewistahaw with an independent basis for validation of its treaty land entitlement claim. It merely provides non-Entitlement Bands whose claims are subsequently validated by Canada with the opportunity to settle their claims in accordance with the Framework Agreement's principles of settlement. We find that Kahkewistahaw has not established an outstanding entitlement in

accordance with treaty, and therefore section 17.03 creates no obligation upon Canada or Saskatchewan to enter into a settlement with the First Nation in accordance with the Framework Agreement. Moreover, the circumstances of Cowessess and Ochapowace are distinguishable and do not afford Kahkewistahaw the basis for a claim to an outstanding treaty land entitlement.

RECOMMENDATION

Having found that the Kahkewistahaw First Nation has failed to establish that the Government of Canada owes an outstanding lawful obligation to provide land to the First Nation under treaty, under the principles enunciated by the Commission in the Fort McKay, Kawacatoose, and Lac La Ronge inquiries, or under the terms of the Saskatchewan Treaty Land Entitlement Framework Agreement, we therefore recommend:

That the claim of the Kahkewistahaw First Nation with respect to outstanding treaty land entitlement not 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

KAHKEWISTAHAW FIRST NATION TREATY LAND ENTITLEMENT INQUIRY

- | | | |
|---|--------------------------------------|-------------------|
| 1 | Decision to conduct inquiry | August 31, 1994 |
| 2 | Notices sent to parties | September 2, 1994 |
| 3 | Planning conference | February 1, 1995 |
| 4 | Community and expert sessions | |

By agreement of the parties, a community session was not held in relation to the present inquiry. However, on May 24 and 25, 1995, the panel held joint sessions in Saskatoon, Saskatchewan, with representatives from the Kawacatoose and Ocean Man First Nations, hearing from the following witnesses:

- Kenneth Tyler, Counsel, Constitutional Law Branch, Manitoba Department of Justice
- David Knoll, Counsel, Federation of Saskatchewan Indian Nations
- Dr. Lloyd Barber, chief negotiator for Federation of Saskatchewan Indian Nations for the purpose of negotiating the Saskatchewan Framework Agreement
- James Gallo, Manager, Treaty Land Entitlement and Claims, Lands and Trusts Services, Department of Indian Affairs and Northern Development
- James Kerby, legal counsel to Canada for the purpose of negotiating the Saskatchewan Framework Agreement
- Panel of research experts from the Office of the Treaty Commissioner: Jayme Benson and Peggy Martin-Brizinski

5 **Oral submissions** *Saskatoon* February 22, 1996

6 **Content of formal record**

The formal record for the Kawacatoose First Nation Inquiry consists of the following materials:

- 37 exhibits tendered during the Inquiry, including the documentary record (1 volume of documents with annotated index)
- Transcripts from expert sessions (2 volumes)
- Written submissions of counsel for Canada and the claimants
- Transcripts of oral submissions (1 volume)
- Authorities and supplemental authorities submitted by counsel with their written submissions
- Correspondence among the parties and the Commission

The report of the Commission and letters of transmittal to the parties will complete the formal record of this Inquiry.

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE TREATY LAND ENTITLEMENT CLAIM OF THE LUCKY MAN CREE NATION

PANEL

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

COUNSEL

For the Lucky Man Cree Nation
Thomas R. Berger, QC

For the Government of Canada
Richard Wex

To the Indian Claims Commission
Ron S. Maurice / Thomas A. Gould / Michelle Mann

MARCH 1997

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PART I

INTRODUCTION

Few events have been more pivotal in Canadian history than the North-West Rebellion of 1885. Although there are differing interpretations of the causes of the rebellion and the involvement of Indian Nations in it, there is no doubt that it had profound repercussions for the Conservative government of the day, as well as for the Indian Band that forms the subject matter of this inquiry. On the national stage, the handling of the uprising and the subsequent hanging of Métis leader Louis Riel were significant factors in the federal Tories' eventual fall from grace with the electorate in Quebec. At the local level, the rebellion delayed the process of selecting and surveying a reserve for the members of the Lucky Man Band, who appeared to have been on the verge of accepting, albeit reluctantly, that the traditional pursuit of buffalo had ceased to be viable. In the aftermath of the revolt, Lucky Man himself and some of his followers fled to the United States, while others remained on Indian Reserve (IR) 116, which was eventually set apart in 1887. That reserve, surveyed by Dominion Land Surveyor John C. Nelson "For the Bands of Chiefs 'Little Pine' and 'Lucky Man,'"¹ contained 25 square miles (16,000 acres), or sufficient land for 125 people under the Treaty 6 formula of one square mile for each family of five (or 128 acres per person).

The claimant in this inquiry is the Lucky Man Cree Nation,² which is at present entitled to the use and benefit of a reserve (the 1989 reserve) comprising 7680 acres located roughly 120 kilometres northwest of Saskatoon and approximately 15 kilometres east of Mayfair, Saskatchewan. This reserve is located within the boundaries of Treaty 6, to which Chief Lucky Man and his followers adhered on July 2, 1879, and constitutes sufficient land for 60 people under Treaty 6. The reserve itself was not formally set apart for the First Nation until a Treaty Land Entitlement Settlement Agreement (the Settle-

1 Order in Council PC 1151, May 17, 1889 (ICC Documents, pp. 410-12).

2 Alternatively referred to as "Lucky Man," the "First Nation," or the "Band," depending on the historical context.

ment Agreement) was agreed to by the First Nation and Canada on November 23, 1989. The lands formerly formed part of the Meeting Lake Prairie Farm Rehabilitation Administration Community Pasture, and the sole economic activity on the reserve remains the lease or rental of the land base to area ranchers for grazing purposes.

Although the Lucky Man Cree Nation agreed to the selection of the 1989 reserve for its future use and benefit, it has nevertheless continued to claim that the reserve is too small to satisfy Canada's treaty obligation to provide reserve land under Treaty 6 and was, at the time of its survey, more than a century overdue. On July 7, 1995, however, Canada rejected the First Nation's request that the claim be accepted for negotiation.³ As a result, counsel for Lucky Man on December 13, 1995, requested the present inquiry before the Indian Claims Commission (the Commission).⁴

This inquiry boils down to one central issue: What is the appropriate date for calculating the First Nation's population for treaty land entitlement purposes? On the one hand, Lucky Man proposes three alternative dates in the early 1880s. The First Nation claims that, depending on the date of entitlement chosen, and subject to further payroll analysis to quantify more precisely the entitlement population, the acreage of treaty land to which the First Nation is entitled, and the shortfall in treaty land received, are as set forth in Table 1.

TABLE 1
Lucky Man Cree Nation Treaty Land Entitlement

Year of Entitlement	Paylist Population	Entitlement (at 128 acres per person)	Acreage Received under Settlement Agreement	Shortfall (in acres)
1880	754	96,512	7,680	88,832
1882	872	111,616	7,680	103,936
1883	366	46,848	7,680	39,168

Canada, on the other hand, contends that the only realistic choices are 1980 – the year on which the Settlement Agreement was based – or, in the alternative, the 1887 date of first survey for IR 116. The First Nation's population in 1980 was 60, and in 1887 it was 62. If the latter date is chosen,

³ Al Gross, Specific Claims West, Department of Indian and Northern Affairs, to Chief and Council, Lucky Man Cree Nation, July 7, 1995 (ICC Documents, p. 572).

⁴ Thomas R. Berger, QC, Berger & Nelson, to Norma Diamond, Director of Liaison and Communications, Indian Claims Commission, December 13, 1995.

Canada “would be prepared, should the Band agree, to conduct further research (including a payroll analysis) to determine the Band’s actual DOFS [date-of-first-survey] population.”⁵

Our task is to review these alternatives and decide which is most appropriate for the purpose of establishing the First Nation’s treaty land entitlement.

MANDATE OF THE INDIAN CLAIMS COMMISSION

The mandate of this Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on “whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where that claim has already been rejected by the Minister. . . .”⁶ The role of the Commission in this inquiry is to determine whether the claim of the Lucky Man Cree Nation should be accepted by Canada for negotiation under the Specific Claims Policy. This policy, outlined in the 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding “lawful obligation” on the part of the federal government. A lawful obligation specifically includes claims based upon “[a] breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.”⁷

The Commission has *not* been asked to quantify Lucky Man’s outstanding entitlement, if any, to treaty land. Rather, in light of the Specific Claims Policy and the historical background set forth in the following section of this report, we are asked to decide the appropriate date for calculating the First Nation’s treaty land entitlement. If so, it will be up to the parties to negotiate a settlement of the outstanding entitlement, failing which it will remain open to the First Nation to request a further inquiry before the Commission to address this aspect of the claim.

5 Submissions on Behalf of the Government of Canada, November 19, 1996, p. 45.

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

7 Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171-85 [hereinafter *Outstanding Business*].

PART II

THE INQUIRY

In this part of our report, we will review the historical background to the Lucky Man claim. We have derived our factual findings from the documentary evidence forming the record in these proceedings since there was no oral testimony in evidence before us. Although many inquiries involve community sessions to gather relevant information and to provide an opportunity for elders and other members of the community to speak to the Commissioners, the First Nation advised the Commission on July 9, 1996, that a community session would not be necessary in the conduct of this inquiry.

In preparation for the oral submissions in Saskatoon on December 3, 1996, counsel for Canada submitted written arguments to the Commission on November 19, 1996, to which counsel for Lucky Man responded on November 26, 1996. That same day, the Commission released its report on the treaty land entitlement claim of the Kahkewistahaw First Nation.⁸ To provide the parties with an opportunity to respond to the Kahkewistahaw report, the Commission invited supplementary written submissions, which were received from Canada on December 8, 1996, and from the First Nation on December 19, 1996. The written submissions, documentary evidence, transcripts, and the balance of the record of this inquiry are referenced in Appendix A of this report.

HISTORICAL BACKGROUND

Treaty 6 and the Lucky Man Band

Throughout the late 1860s and early 1870s, the Plains Cree were growing concerned about increasing encroachments on their territory by white settlers. The great buffalo herds that had once been the cornerstone of Indian

⁸ Indian Claims Commission, *Kahkewistahaw First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, November 1996).

culture were vanishing from the prairie. Word had already spread to the Cree that the government had entered treaty negotiations with the Chippewa Indians to the east,⁹ and the fact that boundary and railway surveyors were increasingly evident suggested that the Cree could no longer expect to claim the sole right to live on and make use of the vast western landscape. These and other equally ominous factors led some Cree chiefs to consider negotiating treaty with the government to protect their heritage and to assure their future in the new Dominion. The government, too, was anxious to formalize relations with the people of the plains so that the settlement of western Canada could proceed smoothly.

To that end, Treaty Commissioners were appointed in the 1870s by the Government of Canada to negotiate treaties with the Indian nations of the western prairies. The Treaty Commissioners selected in 1876 were Alexander Morris (Lieutenant Governor of Manitoba and the North-West Territories, including present-day Saskatchewan), W.J. Christie (Hudson's Bay Company chief factor), and James McKay (Minister of Agriculture for Manitoba). The three met with Chiefs of the Cree and Assiniboine Nations at Fort Carlton and Fort Pitt.¹⁰

These negotiations resulted in a number of Chiefs signing Treaty 6 at or near Fort Carlton on August 23 and 28, 1876, and at Fort Pitt on September 9, 1876. Under the terms of the treaty, the Indian signatories agreed to "cede, release, surrender and yield up" to Canada "all their rights, titles and privileges whatsoever, to the lands included within the . . . limits" of the Treaty 6 area, as well as "all other lands wherever situated, in the North-West Territories, or in any other Province or portion of Her Majesty's Dominions, situated and being within the Dominion of Canada."¹¹ In exchange, the Indians were promised, among other things, reserve lands, annuities, and farm implements and instruction to ease their transition from a buffalo-based subsistence to an agrarian economy. Of greatest interest in the present inquiry are the following terms of Treaty 6:

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and

9 Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 168 (ICC Exhibit 1).

10 Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 196-244 (ICC Exhibit 1).

11 Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 352 (ICC Exhibit 1).

dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say:-

*That the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them.*¹²

At the time of treaty, Lucky Man was a headman under the legendary Big Bear, one of the most powerful of the Cree Chiefs who later became known for his strong stands against government attempts to erode native rights and autonomy. Big Bear was not present at the initial treaty negotiations at Fort Carlton and did not arrive at Fort Pitt until September 13, 1876, the final day of treaty talks that year.¹³ He appeared without his band, informing the Commissioners that he represented other bands still out on the plains and that he would not sign treaty on their behalf without representatives from those bands being present. As Morris reported, Big Bear stated:

"I am glad to meet you, I am alone; but if I had known the time, I would have been here with all my people. I am not an undutiful child, I do not throw back your hand; but as my people are not here, I do not sign. I will tell them what I have heard, and next year I will come." About an hour afterwards the Big Bear came to Fort Pitt House to see the Governor, and again repeated that he accepted treaty as if he had signed it, and would come next year, with all his people, to meet the commissioners and accept it.¹⁴

Several more Cree bands adhered to Treaty 6 in the years that followed. Despite Big Bear's assurance in 1876 that he would consider signing the treaty the following year, he did not sign. Over the next few years, in fact, Big Bear became a leading advocate for revising Treaty 6 to reflect more favourable terms, both for those Indians who had already signed treaty and for those who had not yet adhered. Since he had not been present at the initial treaty meetings, he decided to wait and see whether the government would honour its treaty obligations, but in the meantime he tried to negotiate and

12 Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 352-53 (ICC Exhibit 1). Emphasis added.

13 Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 239-42 (ICC Exhibit 1).

14 Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 242 (ICC Exhibit 1).

improve upon what he and other Cree leaders, such as Piapot and Little Pine, perceived to be inadequate treaty provisions. In particular, he sought to obtain Canada's agreement to permit only Indians to hunt buffalo.¹⁵ Big Bear also resisted attempts by the government to have the Crown's law become the exclusive law by which his people were governed,¹⁶ and he sought to preserve and strengthen Indian autonomy and influence. As historian John Tobias states:

Believing that small reserves were more susceptible to the control of the Canadian government and its officials, Big Bear, Piapot, and Little Pine sought to effect a concentration of the Cree people in an Indian territory similar to the reservation system in the United States. In such a territory the Cree would be able to preserve their autonomy, or at least limit the ability of others to control them; they would be better able to take concerted action on matters of importance to them.¹⁷

The strong stands taken by Big Bear and other Indian leaders at this time led to the Cree being regarded with a mixture of fear and respect. As Big Bear biographer Hugh Dempsey wrote:

Big Bear was not the only chief to protest the lot of the Crees. Little Pine had refused to accept treaty in 1877 because it would mean losing his freedom, and Piapot, complaining that the terms of Treaty Four were inadequate, would not take a reserve. Even the peaceful chief Star Blanket was concerned about insufficient help to start farming, while Beardy angrily demonstrated against the low rations. But Big Bear's dramatic appeals at Fort Pitt and Sounding Lake in 1877 and 1878 had made him the symbol of government defiance, both among disaffected Indians and the white people in nearby settlements. To the Cree, Big Bear was a determined, unyielding leader who was trying to unite the Indians and thus negotiate a better deal from the government.¹⁸

Even Edgar Dewdney, the newly appointed Indian Commissioner for the North-West Territories who later became the lightning rod for Cree disaffection, acknowledged after meeting Big Bear in 1879: "He is a very independent character, self reliant, and appears to know how to make his own living without begging from the Government."¹⁹

15 John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879-1885" (1983) *64 Canadian Historical Review*, 519 at 523-24.

16 Olive P. Dickason, *Canada's First Nations* (Toronto: McClelland and Stewart, 1992), 302.

17 John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879-1885" (1983) *64 Canadian Historical Review*, 519 at 527.

18 Hugh A. Dempsey, *Big Bear: The End of Freedom* (Vancouver: Greystone Books, 1984), 86-87.

19 Hugh A. Dempsey, *Big Bear: The End of Freedom* (Vancouver: Greystone Books, 1984), 90.

With the spread of settlement and the disappearance of the buffalo, the last quarter of the 19th century represented a time of great social, economic, and spiritual upheaval for the plains Indians. In the years immediately following the initial execution of Treaty 6 in 1876, buffalo became more difficult to find. Big Bear and other Chiefs moved their bands into the Cypress Hills area in southwest Saskatchewan near the border with the United States to be close to the last remaining herds. The Cree bands regularly travelled south across the 49th parallel into the United States in pursuit of the great beasts.

American authorities viewed Canadian Indians as troublesome and sought to prevent them from crossing the border and inciting unrest among American Indians and settlers. In particular, the U.S. government believed that these incursions would adversely affect its attempts to settle American Indians on reserves. The American military harassed the Cree when they crossed the border, chasing them out wherever possible. Initially, Canadian authorities were not opposed to the Cree crossing the border in search of food. They believed that eventually the depletion of buffalo stocks, together with the government's continued promotion of farming, would persuade Canada's Indians to enter treaty and take reserves. In the meantime, since Canadian authorities also believed that any problems with Canadian Indians in the United States were related to the scarcity of buffalo, they requested that the Americans allow hunting within their borders:

The Canadian Government is making great exertions to settle their Indians and to induce them to become herdsmen and to cultivate land and raise supplies of food for themselves, but in the meantime and until this is accomplished Half-Breeds and Indians alike depend upon the chase, particularly of the Buffalo, for subsistence. . . .²⁰

Despite exhaustive efforts by the Cree, buffalo hunts became increasingly inconsistent and unproductive. Consequently, some members of Big Bear's Band began to question his strategy of refusing to adhere to treaty, believing that the benefits of treaty might alleviate some of the hardships they were facing. Adhering to treaty, some felt, would at least secure annuity payments, with which they could purchase some provisions for their struggling families. As Tobias notes, Commissioner Dewdney was ready and willing to use the situation to his advantage:

20 Report of the Privy Council, Minister of the Interior, September 22, 1879, National Archives of Canada [hereinafter NA], RG 10, vol. 3652, file 8589-1 (ICC Documents, pp. 13-14).

The new Indian Commissioner quickly sought to use rations as a means of getting control over the Cree. In the fall of 1879 he announced that rations were to be provided only to Indians who had taken treaty. To get the Cree into treaty more easily and to reduce the influence of recalcitrant leaders, Dewdney announced that he would adopt an old Hudson's Bay Company practice of recognizing any adult male Cree as chief of a new band if he could induce 100 or more persons to recognize him as leader. He expected that the starving Cypress Hills Cree would desert their old leaders to get rations. As a means of demonstrating Canada's control over the Cree, Dewdney ordered that only the sick, aged, and orphans should receive rations without providing some service to one of the government agencies in the West.

Dewdney's policies seemed to work, for when the Cree and Assiniboine who had gone to hunt in Montana returned starving, their resolve weakened. Little Pine's people convinced their chief to take treaty in 1879, but when Big Bear refused to do the same, almost half of his following joined Lucky Man or Thunderchild to form new bands in order to receive rations.²¹

Twenty lodges splintered off from the Big Bear Band, and, on July 2, 1879, at Fort Walsh, Lucky Man signed an adhesion to Treaty 6 as their new Chief.²² The adhesions signed by Lucky Man and Little Pine stated:

And whereas, the said Commissioner [Dewdney] has recognized the said Little Pine as the head man of his Band, and the said band of twenty lodges have selected and appointed Pap-a-way the Lucky Man, one of their number, as the head man of their band, and have presented him as such to the said Commissioner, who has recognized and accepted him as such head man;

Now, this instrument witnesseth that the said Little Pine and Pap-a-way, or the Lucky Man, for themselves and on behalf of the bands which they represent, do transfer, surrender and relinquish to Her Majesty the Queen, her heirs and successors to and for the use of her Government of the Dominion of Canada, all their right, title and interest whatsoever, which they have held or enjoyed, of, in and to the territory described and fully set out in the said treaty [6]; also all their right, title and interest whatsoever to all other lands wherever situated, whether within [the] limits of any other treaty heretofore made or hereafter to be made with Indians or elsewhere in Her Majesty's territories, to have and to hold the same unto and for the use of Her Majesty the Queen, her heirs and successors forever. And do hereby agree to accept the several benefits, payments and reserves promised to the Indians adhering to the said treaty at Carlton and Fort Pitt on the dates above mentioned; and further, do solemnly engage to abide by, carry out and fulfil all the stipulations, obligations and conditions contained on the part of the Indians therein named, to be observed and performed, and in all things to conform to the articles of the said treaty, as if the said

21 John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879-1885" (1983) 64 *Canadian Historical Review*, 519 at 526-27.

22 Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 366 (ICC Exhibit 1).

Little Pine and Pap-a-way or the Lucky Man and the bands whom they represent had been originally contracting parties thereto, and had been present at the treaty at Carlton and Fort Pitt, and had there attached their signatures to the said treaty.²³

Although Dewdney formally recognized Lucky Man as the leader of the 20 lodges referred to in the adhesion to Treaty 6 in 1879, Lucky Man and his followers remained closely aligned with Big Bear and Little Pine and continued to travel with them for several years.

When annuity payments were distributed in September 1879 at Fort Walsh, 470 individuals were identified as belonging to the Lucky Man Band, including Lucky Man and four headmen.²⁴ Dewdney agreed to pay annuities to Little Pine and Lucky Man at Fort Walsh because he thought it would be onerous for the bands to travel to more northerly agencies when most of their hunting was confined to the south.²⁵ Fort Walsh and the Cypress Hills, however, lay within the boundaries of Treaty 4, well south of the limits of Treaty 6.

Lucky Man did not select reserve land directly after adhering to treaty. Instead, like many other bands, he and his people tried to continue subsisting by traditional means. The buffalo had all but disappeared by the end of the 1870s, however, and the Cree living in the Cypress Hills were constantly threatened with starvation. In his report for 1880, Dewdney reported: "The bulk of the Indians in the North-West Territories are to-day and have been for the last 12 months, almost entirely dependent on the Government for their existence."²⁶ Nevertheless, they continued to hunt, travelling ever farther in search of sustenance and using the provisions allocated under treaty as a means of subsidizing their traditional pursuit of the buffalo.

Despite the depletion of the buffalo herds and increasing pressure from American authorities to block Cree access to hunting grounds south of the border, the government continued to have difficulty inducing the traditional hunters to settle on reserves. Treaty 4 Indian Agent Edwin Allen commented in his annual report for 1880 that Lucky Man, Little Pine, and another Band, Piapot, had returned to Fort Walsh from hunting buffalo in the Missouri River district, but too late to receive the distribution of annuities in July that year.

23 Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 366-67 (ICC Exhibit 1).

24 Lucky Man Band Paylists, 1879-1955 (ICC Exhibit 2).

25 Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 366.

26 E. Dewdney, Indian Commissioner, to Superintendent-General of Indian Affairs, Ottawa, December 31, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1880."

The Bands were weary from their search for buffalo, he wrote, "in a very destitute condition, almost without any clothing of any description."²⁷

The first discussions between Lucky Man and the government regarding reserve locations appear to have occurred in the fall of 1880. Allen met with the Chiefs of several bands at Fort Walsh to determine whether they intended to select and settle on reserves:

I held several councils with the Indians who had not yet determined on a reservation with a view of ascertaining their opinion on the matter; there were several chiefs present, the principal being Pie-à-pot, Little Pine and Lucky Man. The first two of these chiefs expressed a wish of settling in this mountain, and *Lucky Man wished to locate in the neighbourhood of Battleford. I could get no definite answer from any of the chiefs as to when they would settle down. They were anxious to receive their annuity payments. . . . I consulted Colonel Macleod, and he agreed with me in recommending the payment of those who had not arrived for the regular payment in July. The Indians . . . came from the plains with the expectation of receiving their payments and purchasing clothing, &c., before returning again, the camp numbered about 2,500 persons drawing rations.*²⁸

Arrangements were put into effect from October 1 to 6, 1880, to pay the bands that had missed the earlier annuity distributions. The Lucky Man payroll shows that 754 individuals were paid with the Band at Fort Walsh in 1880.²⁹

Despite indicating that he wished to locate near Battleford within the boundaries of Treaty 6, Lucky Man continued during the ensuing year to pursue the buffalo in southern Saskatchewan and the United States, and showed no inclination to settle on a reserve. No reserve was set apart for the Band at that time. Commissioner Dewdney and many of his colleagues still maintained their belief that the ever-decreasing supply of buffalo would soon force the Cree onto reserves, as the government wished. In 1881, Dewdney instructed the new Indian Agency Inspector, T.P. Wadsworth, to attempt to convince the Treaty 6 Indians to move north:

27 Edwin Allen, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1880" (ICC Documents, p. 26).

28 Edwin Allen, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1880" (ICC Documents, p. 26). Emphasis added.

29 Lucky Man Band Paylists, 1879-1955 (ICC Exhibit 2).

From Mr. Allen you will get a copy of the payroll of Indians paid last October at Fort Walsh. You will see from it that stragglers from no less than 43 different Bands were paid there. They must be told that they must join their own Chiefs and cannot be paid this year unless they accede to this request.

There are three Bands, viz: "Little Pine," "Pie Pot" and "Lucky Man" who have not settled on their Reservations – although "Pie pot" agreed, I believe, to take one of Reservations surveyed at Crooked Lakes, and he should move there with his Band. "Little Pine" & "Lucky Man" when they joined the treaty, were anxious to be in Treaty 6. You will see the agreement in Mr. Morris' Book of Treaties made with the Indians – page 366. Last year they returned so late from the South and in such a wretched condition that it was thought advisable to pay them at Ft. Walsh but, at that time, they were told they must go North this year, and I hope you will be able to bring this about. These Indians are the wildest of our Plain Indians and have remained out as long as there was any chance of getting buffalo. I am of the opinion that this spring they will see that it is useless to depend any longer on that source of food supply and you should take the earliest opportunity of informing them of the urgent necessity there is for their settling down. If they agree to this proposition & you feel yourself satisfied that they are earnest – let me know at once in order that provisions might be made to meet their demand.

I promised "Lucky Man" that if I came south this year, I would take him with me and let him see that those already settled were making a very good start and that the reports they heard from Halfbreeds and interested parties that Indians could not live on the assistance given them by the Government, was untrue. Inform him that I find it impossible to visit the South as I had expected during this Spring, but that if he is anxious to go North & see for himself, you will assist him. He could arrange for his Band to go to the Saskatchewan and you might take him with you and assist him to look out for a location. I would not object to his taking another of the Headmen of his Band with him.³⁰

Still, the Cree remained resolute. Ultimately, 802 people were paid annuities with the Lucky Man Band at Fort Walsh in 1881.³¹

The Fort Walsh area remained a rendezvous point for the Cree. Lucky Man, Little Pine, and Big Bear set up camp for part of the year in the United States as they continued to hunt for buffalo. However, when the hunt was over, the Indians returned to Fort Walsh, as they had previously, to receive annuities and purchase provisions.

Finally, the government and the North-West Mounted Police (NWMP) decided that Fort Walsh had to be closed to discourage this practice and to force the bands that had not yet chosen reserves to make their selections.

³⁰ Edgar Dewdney, Indian Commissioner, to T.P. Wadsworth, Inspector of Indian Agencies, February 21, 1881, NA, RG 10, vol. 3726, file 27335 (ICC Documents, pp. 47-49).

³¹ Lucky Man Band Paylists, 1879-1955 (ICC Exhibit 2).

The government had begun to view Fort Walsh as a centre where the traditional Indian way of life was subsidized by the Department of Indian Affairs. A report by Indian Agent Denny reflected the government position at the time:

It will be a good thing should the Police and Indian Dept. leave this place altogether as early as possible next summer, before the big camp of mixed Crees, now across the line come back.

The Indians will always make this a centre, as long as the Police and I[ndian] Dept. remain, and I can see that the only way to get them on to their reserves is for this place to be abandoned. . . .

If all were not here, the Indians certainly would not come here, and if the Police and I[ndian] Dept. wait till the Indians go back to their reserves, they will remain here always. This big camp I speak of is comprised of Indians from all points some from Edmonton, there are about 200 lodges, the principle Chiefs being Little Pine, Little Poplar, Lucky Man and Big Bear. This camp is now across the line, but in case they run out of Buffalos or are driven back by the Americans will at once make for this place, but if this place were abandoned I think they would gradually break up and go back to where they belong.³²

Denny reiterated his views in a subsequent letter to Dewdney:

As long as there are a few Buffalo south and around these Hills and as long as the Police and Indian Department remain at this place this camp of Crees will remain away from their Reserves and come in here for their payments and when they run out of provisions for grub.

They go across the line for Buffalo and whiskey and have easy times and then congregate and come to this place, which is within easy reach when they get a little hard up.

This combination is a hard one to break up and can only be done in two ways. Either men enough should be stationed here to make them do what is required or else this point should be altogether abandoned and that as early as possible.³³

The government was also concerned that the Cypress Hills offered limited agricultural potential. As early as 1880, Indian Agent Allen had noted the difficulties experienced by the Assiniboines in the area:

I next visited the Assiniboine Reservation at the Head of Cypress Mountain. The reserve is situated in an excellent locality, for wood and water, but the climate is such

32 C.E. Denny, Indian Agent, to Hayter Reed, Assistant Indian Commissioner, December 6, 1881 (ICC Documents, pp. 67-68).

33 C.E. Denny, Indian Agent, to Edgar Dewdney, Indian Commissioner, December 14, 1881, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, p. 74).

that it is useless to think of continuing agriculture in that locality owing to the early frosts and snow storms which are so prevalent. . . . Although their crops were a failure they appear in no way discouraged, on the contrary, they speak of looking for a better location for their reserve next year.³⁴

These sentiments were echoed by the NWMP Commissioner the following year in his recommendation that the government close Fort Walsh:

In making this recommendation I am in a great measure prompted by the knowledge of the fact that the Indian Department do not consider that the farming operations at Maple Creek have been successful in the past, and that they are still less likely to prove so in the future.

It has been proved beyond a doubt that the Cypress Hills are not suited for agricultural purposes. The police force has been stationed here for six years, and yet there is not a *bona fide* settler within one hundred miles of Fort Walsh.³⁵

Another aggravation for the Crown was the fact that Fort Walsh and the Cypress Hills were located within the Treaty 4 area. Dewdney and the government made it clear that they did not want to have Lucky Man, or any other band, selecting lands outside its own treaty area. Quite simply, the Department was not prepared to accommodate any Treaty 6 Indians who wished to locate their reserves in the Cypress Hills region.³⁶

Although the Department desired the Cree to return north to the Treaty 6 area, the Cree were not easily persuaded to cooperate. In a report to the Minister of the Interior, NWMP Commissioner A.G. Irvine described his attempt to convince the Cree to move north:

At the time of "Pie-a-pot's" departure from Fort Walsh [June 23, 1882], the Cree chief "Big Bear" (non-treaty Indian), "Lucky Man," and "Little Pine," with about 200 lodges, finding that I would not assist them in any way unless they went north, started from Fort Walsh to the plains in a southerly direction. These Chiefs informed me that their intention was to take "a turn" on the plains in quest of Buffalo, and after their

34 Edwin Allen, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1880" (ICC Documents, p. 26).

35 A.G. Irvine, Commissioner, NWMP, to Minister of the Interior, February 1, 1882, Canada, Parliament, *Sessional Papers*, 1882, No. 18, "Annual Report of the Department of the Interior for the Year Ended 30th June, 1881," Part III, North-West Mounted Police Force (ICC Documents, p. 30).

36 Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Edgar Dewdney, Indian Commissioner, May 11, 1882, NA, RG 10, vol. 3744, file 29056-2 (ICC Documents, p. 122).

hunt to go north. They added that they did not intend crossing the international boundary line, – a statement which I considered questionable at the time.

I, therefore, at the request of the officer commanding the United States troops at Fort Assinaboine, informed the American authorities of the departure of these Chiefs. The Americans in expressing their thanks were much gratified with the information imparted.³⁷

Irvine went on to state that, with the departure of these Chiefs, “Fort Walsh was entirely rid of Indians.”³⁸ His assessment was premature, however, and, with the coming of fall, he realized that the fort could not be closed as planned.

In the fall of 1882, the Cree again returned to Fort Walsh following the annual buffalo hunt. The hunt had not gone well that season. Some 2000 Indians representing various bands gathered at the fort, their condition apparently so poor that it was later described by the NWMP surgeon, Augustus Jukes, as a state of “extreme wretchedness.”³⁹ Irvine himself thought their condition to be so dire that they could not make a journey north, even if they could be persuaded to do so.⁴⁰ Nevertheless, he convened a general council with the Chiefs at Fort Walsh on September 17, 1882, to discuss the matter. Several Chiefs at the meeting indicated that they were prepared to select reserve sites, although some were still reluctant to move north:

For some considerable time they made no demand for aid from the Government, but as the cold weather came on, being very poorly clad, and insufficiently supplied with food, they experienced much hardship from exposure and starvation. It was then that they requested me to transmit to you their message to the effect that “Pie-a-pot” wished to settle on the Reserve given him by Mr. Wadsworth last summer. “Little Pine” who is a relation of “Pie-a-pot’s” to settle alongside of him, “Lucky man” and “Front man” wanted their reserves at Big Lake [located within the Treaty 4 boundaries] about thirty miles east of Fort Walsh. All wanted to receive their annuity money to enable them to make their winter Buffalo hunt. . . .⁴¹

37 A.G. Irvine, Commissioner, NWMP, to Minister of the Interior, January 1, 1883, Canada, Parliament, *Sessional Papers*, 1883, No. 23, “Annual Report of the Department of the Interior for the Year 1882,” Part III, North-West Mounted Police Force (ICC Documents, p. 167).

38 A.G. Irvine, Commissioner, NWMP, to Minister of the Interior, January 1, 1883, Canada, Parliament, *Sessional Papers*, 1883, No. 23, “Annual Report of the Department of the Interior for the Year 1882,” Part III, North-West Mounted Police Force (ICC Documents, p. 167).

39 Dr Augustus Jukes, Surgeon, NWMP, to Frederick White, Controller, NWMP, October 17, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, p. 134).

40 A.G. Irvine, Commissioner, NWMP, to Minister of the Interior, January 1, 1883, Canada, Parliament, *Sessional Papers*, 1883, No. 23, “Annual Report of the Department of the Interior for the Year 1882,” Part III, North-West Mounted Police Force (ICC Documents, p. 167).

41 A.G. Irvine, Commissioner, NWMP, to Minister of the Interior, January 1, 1883, Canada, Parliament, *Sessional Papers*, 1883, No. 23, “Annual Report of the Department of the Interior for the Year 1882,” Part III, North-West Mounted Police Force (ICC Documents, p. 167).

It should be noted that Irvine had already threatened to withhold assistance if the Chiefs were not willing to indicate where they wished to settle.

It was obvious that, despite Dewdney's reluctance to let annuities again be paid at Fort Walsh, Irvine believed that no other option was viable, "inasmuch as I foresaw if no aid was accorded them, they would starve, and in a starving condition might have attempted to commit depredations."⁴² Dewdney eventually agreed to pay annuities at the fort. However, he made it plain that Irvine was to impress on the Indians that requests from the northern Cree for reserves in the Cypress Hills would not be entertained, nor would the Cree receive further assistance unless they moved north:

You are aware that the Southern Country is not the country of the Crees and they should be told that it is no good their making a request to be given Reserves in the South.

I hope you will impress upon the Indians that they have brought their helpless condition on themselves, that they have been warned that they would suffer if they remained South and the longer they continue to act against the wishes of the Govt the more wretched will they become. . . .⁴³

The Department was forced to abandon its original plan to close the fort during the summer of 1882, although officials believed that the longer the outpost remained open, the more difficult it would be to entice the Indians northward. Treaty 4 Indian Agent Allan McDonald distributed annuity money that fall at Fort Walsh. The paylists for 1882 indicate that 872 Indians were paid with the Lucky Man Band.⁴⁴ Fort Walsh remained open through the winter of 1882-83 and additional provisions were distributed to prevent starvation among the Indians camped in the Cypress Hills.

On December 8, 1882, Chief Big Bear finally signed an adhesion to Treaty 6 at Fort Walsh. Dewdney at this time reasserted his intention to have the Cree move north to the areas set out in Treaty 6. In Dewdney's eyes, the situation at Fort Walsh was worsening. In his annual report to the Department, he wrote:

The large sum expended last year in assisting Indians to remove to their reserves was, to a great extent, thrown away, the greater number of them having returned to

42 A.G. Irvine, Commissioner, NWMP, to Minister of the Interior, January 1, 1883, Canada, Parliament, *Sessional Papers*, 1883, No. 23, "Annual Report of the Department of the Interior for the Year 1882," Part III, North-West Mounted Police Force (ICC Documents, p. 167).

43 Edgar Dewdney, Indian Commissioner, to A.G. Irvine, Commissioner, NWMP, October 27, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 143-44).

44 Lucky Man Band Paylists, 1879-1955 (ICC Exhibit 2).

Fort Walsh, where they had been accustomed to be fed without work, and where they had been bribed by the traders to remain and receive their payments.

These Indians until lately made the Cypress Hills their point of rendezvous, and were a source of more or less anxiety, as, owing to their proximity to the International boundary line, they were constantly tempted to make incursions across the border into the camps of the United States Indians on horse-thieving expeditions; these, of course, being followed up by reprisals, which in the end, if not stopped, might have led to more serious complications of an international nature.

I consequently decided to make another effort to disperse these bands and endeavor to get them to move to those sections of the Territories which they had formerly claimed as their own and had ceded under treaty to the Dominion.

On being approached in this direction it was discovered that they were desirous of procuring fixed ammunition, of making one final horse-stealing expedition across the line in all the force at their command, return with as many scalps as possible, then after a certain delay acquiesce with our wishes. Their requests were refused, and on being told that every effort would be made on our behalf, as well as by the United States troops, to frustrate any such attempt, and to catch and punish the offenders, the idea, in the main, was abandoned. Repeated promises were then made on the part of the Indians, and as often broken by them, to leave Cypress Hills, until after two months constant talking and urging, the 2nd of July saw all but some 125 lodges of recalcitrants with their backs towards the hills on the trails leading to their respective reserves.⁴⁵

Lucky Man and some of his followers were among those who went north following the demolition of Fort Walsh in 1883, but they soon returned to the Cypress Hills. Upon arriving in Maple Creek, they were met by Dewdney's Assistant Commissioner, Hayter Reed, and told to return north. Lucky Man explained that he had only returned to gather up some of his members who had stayed behind. Dewdney, who later questioned the Chief's motives in his 1883 annual report, had instructed Reed to have Lucky Man and his people escorted northward, if necessary, by a detachment of the NWMP to ensure that they would not stray. Irvine reported on the NWMP's efforts in this regard:

During the month of July, a strong escort was furnished to proceed with the Indians travelling from Maple Creek to Battleford, with a view of their settling upon their legitimate reserves. In the month of September it was found that notwithstanding the number of Indians who, at the request of the Indian Department, had proceeded to their reserves, we had still a very large camp remaining at Maple Creek, at which

⁴⁵ Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, October 2, 1883, Canada, Parliament, *Sessional Papers*, 1884, No. 4, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883" (ICC Documents, p. 186).

place they desired to remain for the winter. Knowing it to be the policy of the Government that these Indians should be removed from the proximity of the boundary, and located on their reserves north of the Canadian Pacific Railway line, and being fully aware how important it was that this judicious policy should be carried into effect, I was but too willing, at the request of [His] Honour the Lieutenant-Governor, to accompany the Acting Assistant Indian Commissioner to Maple Creek for the purpose of moving the Indians as desired.

It affords me much pleasure to be able to report that the result of my mission was an eminently successful one. On mustering the Indians, I inform[ed] them that it was not the intention of the Government to allow them to remain at Maple Creek as they had no reserve there, and further that their loitering about the Canadian Pacific Railway line was contrary to their own interests. I explained to them the terms of the Vagrant Act recently extended to these Territories, stating to them that no body of men would be allowed to remain idly about the country, and that unless the wishes of the Government were acceded to, I should be forced to make arrests. In the case of "Lucky Man" who had returned from his reservation with the buck-boards and carts given him by the Indian Department, I explained to that Chief that these articles had been supplied with a view of enabling the Indians to follow agricultural pursuits on their reserves, and thus gain their own livelihood. I told "Lucky Man" that he had accepted the articles in question, and other aid from the Indian Department, upon these conditions, and that unless he promptly returned with his entire camp, to their reservation, he would be arrested.

The Indians brought forward all manner of frivolous excuses in view of having their move delayed. These excuses I would not entertain for a moment. I told the Indians so in the plainest of language, and they proceeded northward the same day.⁴⁶

Dewdney knew that the government policy of moving the Cree onto reserves meant that they would have to abandon their traditional ways, and he acknowledged that this decision was difficult for them to accept:

It is a matter of no wonder that such a strong stand should have been made against our repeated efforts to cause them to leave their old haunts, places associated with thoughts of freedom and plenty, whilst the buffalo roamed the Plains in countless numbers. Leaving these hills behind them dashed to the ground the last hope to which they had so strenuously and fondly clung, of once more being able to live by the chase.⁴⁷

46 A.G. Irvine, Commissioner, NWMP, to Minister of the Interior, January 1, 1884, Canada, Parliament, *Sessional Papers*, 1884, [No. 125], "Report of the Commissioner of the North-West Mounted Police Force, 1883" (ICC Documents, pp. 192-93).

47 Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, October 2, 1883, Canada, Parliament, *Sessional Papers*, 1884, No. 4, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883" (ICC Documents, p. 186).

By November 1883 the Lucky Man and Little Pine Bands had camped near Battleford. The Department's year-end report included the following comments with regard to Little Pine's people:

These Indians are at Battleford and not actually on the land selected by them, but are to move on to it so soon as the warm weather of the spring will permit.⁴⁸

The Lucky Man Band was described in these terms:

These Indians may be considered as virtually settled, as they are being kept working in neighbourhood of Battleford prior to moving to Reserve, being adjacent.⁴⁹

The paylists indicate that, at the November 15, 1883, distribution of annuities at Battleford, 366 Indians were paid with the Lucky Man Band.⁵⁰

Settlement of the Lucky Man Band

In the spring of 1883, Dewdney informed Assistant Indian Commissioner E.T. Galt of his intention to number all reserves, surveyed or not, in Manitoba and the North-West Territories.⁵¹ Reserves 116, 117, and 118 were assigned to Little Pine, Lucky Man, and Big Bear, respectively. However, since 1918, the number 117 has been used to denote the Witchekan Lake Indian Reserve, which was set aside that year for the Witchekan Lake Band.⁵² Whether the number 117 was ever associated with an actual site on which Lucky Man *intended* to settle is unclear. In 1883, Lucky Man appears to have camped in the Battleford area, although there is no precise description of his location. Similarly, there is no evidence before us that a Reserve 117 was ever *formally* set aside for the Lucky Man Band. Still, it is interesting to note that, later in the spring of 1883, Commissioner Dewdney purchased 10 yoke of oxen as required by Treaty 6 "to go North with the Indians, for 'Big Bear,' 'Little Pine' and 'Lucky Man.'"⁵³

48 Canada, Parliament, *Sessional Papers*, 1884, No. 4, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1883" (ICC Documents, p. 190).

49 Canada, Parliament, *Sessional Papers*, 1884, No. 4, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1883" (ICC Documents, p. 190).

50 Lucky Man Band Paylists, 1879-1955 (ICC Exhibit 2).

51 Edgar Dewdney, Indian Commissioner, to E.T. Galt, Assistant to the Commissioner, March 5, 1883, NA, RG 10, vol. 3582, file 889 (ICC Documents, pp. 181-82).

52 G.A. Poupore, Director, Lands and Membership, to Director of Operations, Saskatchewan Region, April 28, 1977 (ICC Documents, pp. 516-17).

53 W. McGirr for Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, May 25, 1883, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, p. 184).

Throughout this period, tensions between the government and the Cree increased. The government believed that Big Bear was trying to establish the Cree on adjacent reserves so that they could be readily organized into a unified confederation.⁵⁴ The young nation of Canada feared this as a potential threat and instituted plans to maintain distance between proposed reserve sites. Hayter Reed wrote to the Superintendent General of Indian Affairs in April 1884 to inform him of the Commissioner's intentions concerning reserves:

The Agent was ordered to place [farming] instructors on Red Pheasant's, Poundmakers, Little Pines, Lucky Mans, Thunder Child and Big Bears Reserves —, but as the bands of Chiefs Little Pine, & Lucky Man have not fulfilled their promises by settling on Reserves, and working, I am under the belief none have been engaged for them. . . .

If the Bands of Little Pine and Lucky Man should consent to settle on Reserves where the Commissioner considers it most desirable to place them, they will be well away from other Indians (viz at the Two Ponds about 30 miles above Poundmakers on the Battle River) consequently it would be advisable to have an Instructor, instead of an overseer for them, if not one for each band; and the latter course I respectfully submit would be found in the interests of the Department: owing to their numbers, (over 700 between the two bands). . . .⁵⁵

Battleford District Indian Agent J.M. Rae advised Reed in April 1884 that "Little Pine's and Lucky Man's Bands started from here [Battleford] to go to *their Reserves* as per agreement."⁵⁶ The location of this "reserve" was later described by Rae as being "near Poundmaker's,"⁵⁷ but, by the end of spring in 1884, there was still no formal survey of a reserve for the Lucky Man Band.

Lucky Man and Little Pine stopped at Poundmaker's reserve en route from Battleford to "their Reserves." Poundmaker invited the Chiefs to be present when Chief Big Bear arrived for a council planned for later that spring.⁵⁸ Rae sent a proxy, Mr Gardner, to meet the Lucky Man and Little Pine Bands at Poundmaker's reserve. Gardner had instructions to persuade the two Chiefs

54 Olive P. Dickason, *Canada's First Nations* (Toronto: McClelland and Stewart, 1992), 302.

55 Hayter Reed, Assistant Indian Commissioner, to Superintendent General of Indian Affairs, April 14, 1884, NA, RG 10, vol. 3664, file 9843 (ICC Documents, pp. 206-07).

56 J.M. Rae, Indian Agent, to Hayter Reed, Assistant Indian Commissioner, April 23, 1884, NA, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Documents, p. 209). Emphasis added.

57 J.M. Rae, Indian Agent, to Superintendent General of Indian Affairs, October 13, 1884, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year ended 31st December, 1884," 85 (ICC Documents, p. 236).

58 J.M. Rae, Indian Agent, to Hayter Reed, Assistant Indian Commissioner, April 23, 1884, NA, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Documents, p. 209).

to accept their treaty provisions and to move from Poundmaker's reserve to establish their own settlements. Gardner informed Lucky Man and Little Pine that, until they accepted their farming implements and cattle and started to work, they would receive no further rations.⁵⁹

Rae reported that Gardner was unable to convince the Chiefs to accept the treaty provisions:

Mr. Gardner whom I sent out with the Instructor tried to get the young men to take their implements and cattle (the latter I had to take from the other reserves as I did not want them to have as an excuse that they had nothing to work with). The Chiefs however prevailed on the young men not to take them. Under the circumstances and acting on my order, Mr. Gardner stopped their rations.⁶⁰

Eventually, some younger members of the two bands decided to break ranks with their Chiefs and start farming. They were joined shortly by Chief Little Pine himself. As Deputy Superintendent General of Indian Affairs, Lawrence Vankoughnet, noted when he drafted the year-end report:

On the opposite side of Battle River [from the reserves of Thunder Child and Nepahase] are the reserves of Chiefs Pondmaker [sic] and Little Pine. The band of the latter chief only settled on their reserve last spring [i.e., spring 1884]. They however ploughed seventy acres, fenced fifty acres and planted thirty acres of land, besides cutting one hundred tons of hay, and erecting twelve houses, two stables, a store house and a building in which to keep their implements and tools.⁶¹

Nevertheless, the arrival of Big Bear at Poundmaker's reserve in May 1884 pre-empted the government's plans, at least temporarily. In his annual report to the Department in the fall of 1884, Rae recounted the events of the preceding spring:

Most of Lucky Man's men joined Little Pine, who has always shown himself well inclined. In this respect, however, his head councillor, Mistutinwas, is the better of the two. They then began working, and did well, getting in thirty-four acres crop and fencing the same, also putting up a house and storehouse for the instructor. In May Big Bear and his party came down from Pitt, and Lucky Man's people began to leave

59 J.M. Rae, Indian Agent, to Hayter Reed, Assistant Indian Commissioner, April 23, 1884, NA, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Documents, p. 209).

60 J.M. Rae, Indian Agent, to Hayter Reed, Assistant Indian Commissioner, April 23, 1884, NA, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Documents, p. 209).

61 Superintendent General of Indian Affairs, to Governor General in Council, Annual Report, January 1, 1885, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884" (ICC Documents, p. 201).

their work. Kamanitowas, the headman, however, said he wished to leave his chief and join Little Pine. There was not much trouble with those who now remained on the reserve, until a Thirst Dance was begun, when even Little Pine and his people left their work for a short time. . . .⁶²

By early May 1884, Big Bear had informed government officials that he wished to have a reserve near Lucky Man and Little Pine, who had evidently camped near "Wolf Dung Hill, about 40 miles beyond Poundmakers."⁶³ The actual location of Wolf Dung Hill is not clearly described in the documentation, but Big Bear's proposed site reportedly would have positioned him next to Poundmaker. The Department strongly resisted this proposition. Vankoughnet advised Dewdney in May 1884 that "Big Bear should not be allowed to take his Reserve near [Poundmaker's reserve close to] Battleford, his country being in the Fort Pitt district, and for other obvious reasons."⁶⁴ In a telegram to the Commissioner in June, Vankoughnet was more direct: "Fear more serious complications in future if Big Bear and Pound Maker have Reserves adjoining."⁶⁵

Later that summer, Rae heard that Lucky Man, Poundmaker, and Big Bear were planning on taking up a reserve at Buffalo Lake near Hobbema, Alberta.⁶⁶ Rae consequently warned Poundmaker that he would not receive any assistance from the government if he was to abandon his existing reserve.⁶⁷ Shortly thereafter, Dewdney wired the following instructions to Rae:

As Little Pine behaving his band to be well rationed. Lucky Man band to be fed if in any way acquiescing to your demands in this you to judge. Poundmaker will not be allowed another Reserve or take cattle.⁶⁸

62 J.M. Rae, Indian Agent, to Superintendent General of Indian Affairs, Annual Report, October 13, 1884, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884," 85 (ICC Documents, p. 236).

63 J.M. Rae, Indian Agent, to Edgar Dewdney, Indian Commissioner, June 28, 1884, NA, RG 10, vol. 3576, file 309, pt B (ICC Documents, p. 215).

64 Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Edgar Dewdney, Indian Commissioner, May 12, 1884, NA, RG 10, vol. 3576, file 309, pt B (ICC Documents, p. 212).

65 Deputy Superintendent General of Indian Affairs to Edgar Dewdney, Indian Commissioner, June 27, 1884, NA, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Documents, p. 213).

66 J.M. Rae, Indian Agent, to Edgar Dewdney, Indian Commissioner, June 29, 1884, NA, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Documents, p. 219).

67 J.M. Rae, Indian Agent, to Edgar Dewdney, Indian Commissioner, June 29, 1884, NA, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Documents, p. 219).

68 Edgar Dewdney, Indian Commissioner, to J.M. Rae, Indian Agent, July 5, 1884, NA, RG 10, vol. 3576, file 309, pt A (ICC Documents, p. 221).

The warning did not sway Poundmaker or Lucky Man, and both departed with Big Bear for Buffalo Lake.⁶⁹

Most members of the Little Pine Band chose not to follow Big Bear, however, and remained at their reserve. Dominion Land Surveyor John C. Nelson arrived in the Battleford area in July 1884 to survey reserves for bands desiring them, but Chief Little Pine “expressed a wish to have the survey of his Reserve postponed.”⁷⁰ Nelson thus left without conducting a survey.

Some members of the Lucky Man Band continued to travel with Big Bear and Lucky Man, while others apparently remained with Little Pine at this time. According to the October 20, 1884, payroll, only 82 Indians were paid with the Lucky Man Band at a “reserve,” which was not specifically identified.⁷¹ Lucky Man himself did not appear on the payroll for that year.⁷²

Lucky Man continued his association with Big Bear and, in July 1884, they met with Louis Riel at Duck Lake.⁷³ There, a number of chiefs had gathered together with the Métis leader to prepare a summary of grievances for the Crown. Duck Lake was the opportunity Big Bear had been looking for. The old Chief vocalized his concerns about the need to revise the terms of treaty, as well as his reluctance to exchange his freedom for life on a reserve.⁷⁴

Lucky Man apparently remained with Big Bear after the Duck Lake conference and throughout the following winter, and was paid annuities at Fort Pitt in the fall of 1884.⁷⁵ On Big Bear’s 1884 payroll, Lucky Man was identified as an ex-Chief and paid as Band member 100.⁷⁶ Remarks on the payroll also indicate that several of the families with Big Bear had previously been paid as members of the Lucky Man or Little Pine Bands. Of the people travelling with Big Bear, Vankoughnet wrote:

It is satisfactory to be able to report that the Indians who, as stated in my report of last year, were induced to remove north from the country bordering on the boundary line between Canada and the United States, have settled upon reserves, and are now making fair progress in farming – with the exception of Big Bear and his band, who delay their selection of a reserve, and who as they roam about the country and visit

69 J.M. Rae, Indian Agent, to Edgar Dewdney, Indian Commissioner, June 30, 1884, NA, RG 10, vol. 3576, file 309, pt B (ICC Documents, p. 220).

70 John C. Nelson, Dominion Land Surveyor, to Indian Commissioner, December 31, 1884, NA, RG 10, vol. 3703, file 17728 (ICC Documents, pp. 273-74).

71 Lucky Man Band Paylists, 1879-1955 (ICC Exhibit 2).

72 Lucky Man Band Paylists, 1879-1955 (ICC Exhibit 2).

73 J.M. Rae, Indian Agent, to Edgar Dewdney, Indian Commissioner, July 29, 1884, NA, RG 10, vol. 3576, file 309, pt A (ICC Documents, p. 226).

74 Hugh A. Dempsey, *Big Bear: The End of Freedom* (Vancouver: Greystone Books, 1984), 136-42.

75 Big Bear Band Paylists, 1882-1884 (ICC Documents, pp. 290-91).

76 Big Bear Band Paylists, 1882-1884 (ICC Documents, pp. 290-91).

the reserves of other bands, endeavoring to instil disaffection among them, are a cause of considerable anxiety. Up to the present time, however, their efforts to induce the Cree Indians generally to increase their demands from the Government have been futile.⁷⁷

In the same report, Inspector Wadsworth commented on meeting with the Indians at Fort Pitt:

In passing through Fort Pitt I was interviewed by Big Bear, Lucky Man, Little Poplar, and their followers. I endeavored to convince them how much better off they would be if they chose a reserve and settled down.⁷⁸

In the fall of 1884, Commissioner Dewdney grew increasingly concerned with the Cree Bands that had not yet selected reserves. His frustrations surfaced in a report to the Superintendent General:

A few of the Indians that came from the South the year before last have not selected a reserve, notably those under Big Bear and Lucky Man. . . .

It has been recommended that Lucky Man be deposed from the temporary position of Chief, which he occupies. He is utterly worthless, and was paid as an ordinary Indian at the last payment.

His followers have joined Big Bear.⁷⁹

The table accompanying the Department's year-end report for 1884 indicates that neither Little Pine nor Lucky Man had selected reserves and had them surveyed and set apart for the benefit of their respective band members. Big Bear is shown as having a reserve in the Long Lake area, although the table also notes: "Reserve not definitely located."⁸⁰

The 1885 Uprising and Its Aftermath

Big Bear had travelled from Duck Lake to Fort Pitt late in the summer of 1884. He informed department officials that he would settle on a reserve

77 Superintendent General of Indian Affairs to Governor General in Council, Annual Report, January 1, 1885, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884," x (ICC Documents, p. 197).

78 T.P. Wadsworth, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, September 17, 1884, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884," 150 (ICC Documents, p. 203).

79 Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, November 25, 1884, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884," 158 (ICC Documents, p. 246). Emphasis added.

80 Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1884" (ICC Documents, p. 281).

after receiving annuities but, once again, he failed to select a reserve. In November, Big Bear camped near Frog Lake, approximately 30 miles to the southeast of Fort Pitt, where he intended to wait out the winter. In the meantime, pressure from the Department to have the Chief select a reserve site mounted. Resentment also grew within his own ranks.

The Cree were close to their breaking point. The buffalo were gone, and the Department refused to provide them with provisions until they had selected reserves. Some of the younger Indians, including Little Bear, Big Bear's son, saw the old Chief as an impediment to progress and persisted in the belief that reserves would alleviate their suffering. They grew tired of Big Bear's resistance to change, and their frustrations continued to mount in the early months of 1885.

The Indian sub-agent at Fort Pitt, Thomas Quinn, reported that little progress had been made over the winter in having Big Bear select a reserve site. Big Bear had continued with his strategy of delay in the hope that he would eventually win concessions from the government and revisions in the terms of the treaty. In February 1885, however, Quinn managed to obtain a commitment from the Chief to select a reserve in the spring,⁸¹ but the Department was not satisfied with this vague promise. Another Indian Affairs official, Métis interpreter Peter Ballendine, was sent to Fort Pitt early in March to persuade Big Bear to select a definite reserve site. After daily meetings with Ballendine, Big Bear finally indicated that he would choose a reserve at the mouth of "Dog Rump Creek," 30 miles from Frog Lake.⁸²

Big Bear was not quite through yet, however. After the Ballendine meetings, he stipulated that he would not leave Frog Lake until he had first met with either Commissioner Dewdney or Assistant Commissioner Reed. Big Bear was perhaps hoping for one more audience with the Crown to voice his concerns. Nevertheless, by March, events beyond the Chief's control had begun to unfold. On March 3, 1885, Louis Riel declared his own provisional government in the territories. Two weeks later, on March 18, the North-West Rebellion began after Riel took prisoners and seized stores at Batoche.⁸³

Following the outbreak of the Riel insurrection, word quickly spread to the Frog Lake settlement. The frustrations of the younger chiefs finally found a vent and, with news of the Métis hostilities, violence exploded at the small

81 Thomas Quinn, Indian Sub-Agent, to Edgar Dewdney, Indian Commissioner, February 25, 1885, NA, RG 10, vol. 3580, file 730 (ICC Documents, pp. 310-12).

82 Thomas Quinn, Indian Sub-Agent, to Edgar Dewdney, Indian Commissioner, March 13, 1885, NA, RG 10, vol. 3580, file 730 (ICC Documents, pp. 319-22).

83 Hugh A. Dempsey, *Big Bear: The End of Freedom* (Vancouver: Greystone Books, 1984), 136-42.

village. A group of Indians killed several white inhabitants, including Quinn and two clergymen, on April 2, 1885. Although the reasons for these killings were undoubtedly linked in some ways to the Riel revolt, they were more directly related to factors affecting the Cree alone. In any case, the slayings were carried out by younger Indians.⁸⁴ It appears that Big Bear tried to stop the violence, realizing that any chance of negotiating or holding out for a better deal with the government would end with the deaths of the white men. The army and the police sent to put down Riel would eventually travel to confront the Cree.

The evidence before the Commission does not suggest that Lucky Man participated in any of the killings that day at Frog Lake, but he was clearly there when they took place. The armed response anticipated by Big Bear was not long in coming. Relentlessly pursued after Frog Lake and an ensuing battle at Fort Pitt, the Cree were inevitably defeated by the greater numbers of the military and the police. Lucky Man and Little Bear fled to the United States in late June after the uprising.⁸⁵

On August 21, 1885, Commissioner Dewdney wrote to the Superintendent General of Indian Affairs to identify the bands considered to be either loyal or disloyal during the 1885 rebellion. Even that portion of the Lucky Man Band that had remained at the Little Pine reserve – seven men, four women, and 58 children – was considered disloyal. Both Lucky Man and Big Bear were later identified by Indian Affairs as having participated in the 1885 rebellion:

With the exception of Big Bear's band these Indians were disposed to be loyal. However, Big Bear (and Lucky Man who was there from Battleford) carried most of the older Indians with them. They were followed by the scum of the Indians, & had long resisted entering Treaty & after doing so had been a constant source of trouble, as they had been before in the U[nited] States. . . .⁸⁶

In the wake of the rebellion, the Department set about instituting policies designed to ensure that another revolt could not occur:

- Annuity payments were temporarily withheld from bands considered to have been disloyal to the Crown.⁸⁷

84 Hugh A. Dempsey, *Big Bear: The End of Freedom* (Vancouver: Greystone Books, 1984), 136-42.

85 Hugh A. Dempsey, *Big Bear: The End of Freedom* (Vancouver: Greystone Books, 1984), 179-80.

86 Indian Affairs, "Memo re Indians who took part in Rebellion of 1885," March 19, 1894, NA, RG 10, vol. 3710, file 19550-4 (ICC Documents, p. 435).

87 Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Edgar Dewdney, Indian Commissioner, October 28, 1885, NA, RG 10, vol. 3584, file 1130, pt 1B (ICC Documents, p. 342).

- The tribal system in the North-West Territories was “broken up as much as possible, so that each individual Indian may be dealt with instead of through the Chiefs.”⁸⁸ One method of “striking at the heart of the tribal system and that of community of lands” was to subdivide reserves into individual farms, which was expected “to foster self-reliance, to increase a spirit of emulation in their labors, and hasten the attainment of independence . . . [and] the sense of personal proprietorship and responsibility.”⁸⁹
- Efforts were made to disarm all Indians, “not by compulsion but by persuasion and by keeping ammunition from them.”⁹⁰
- The pass system was instituted “to prevent . . . Indians who were involved in the rebellion from leaving the Reserves without passes signed by an official of the Department,” but was also to be “introduced as far as practicable in the loyal Bands as well.”⁹¹
- Horses belonging to rebel Indians were to be confiscated and sold, with the proceeds to be applied to the purchase of cattle and other necessities for the bands.⁹²
- Since the Department considered that Big Bear’s Band “would doubtless continue to be a source of trouble . . . which will be greatly minimized if they are scattered amongst a number of Bands,” the Band was dismantled and its members redistributed.⁹³

For the time being, Lucky Man, too, was gone and no longer a concern of the Department. As for those who remained behind, Indian Agent J.A. MacKay reported that Little Pine’s reserve “is the most recently settled of any in this

88 Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Edgar Dewdney, Indian Commissioner, October 28, 1885, NA, RG 10, vol. 3584, file 1130, pt 1B (ICC Documents, p. 341).

89 Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, November 17, 1886, Canada, Parliament, *Sessional Papers*, 1887, No. 6, “Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886,” 108-09 (ICC Documents, p. 365).

90 Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Edgar Dewdney, Indian Commissioner, October 28, 1885, NA, RG 10, vol. 3584, file 1130, pt 1B (ICC Documents, p. 343).

91 Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Edgar Dewdney, Indian Commissioner, October 28, 1885, NA, RG 10, vol. 3584, file 1130, pt 1B (ICC Documents, pp. 343-46).

92 Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Edgar Dewdney, Indian Commissioner, October 28, 1885, NA, RG 10, vol. 3584, file 1130, pt 1B (ICC Documents, p. 352).

93 Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Edgar Dewdney, Indian Commissioner, October 28, 1885, NA, RG 10, vol. 3584, file 1130, pt 1B (ICC Documents, p. 347).

agency, and the bands that occupy it (Little Pine's and Lucky Man's) have been very much broken up by the rebellion."⁹⁴

Eventually, after 11 years of "exile" in the United States, Lucky Man was returned to Canada in 1896 by American authorities. When he crossed the border, Lucky Man was arrested for participating in the Frog Lake massacre but was released in July 1896 when he could not be directly linked to any of the killings.⁹⁵ After his release, Lucky Man set out for the Hobbema Agency by train to link up with some of his party who were awaiting him there. His whereabouts after that departure are difficult to track, although evidence suggests that he died in Montana in 1899.

Indian Reserve 116

We have no evidence that the Lucky Man Band was ever given a reserve designated only for its members before 1989. However, some members of the Band lived on IR 116 after it was surveyed in 1887. In the Department's 1887 Annual Report, Deputy Superintendent General Vankoughnet described the reserve arrangement between the Lucky Man and Little Pine Bands in these terms:

The Battleford Agency embraces at present the reserves and bands of Moosomin, Thunder Child (with the subsidiary bands of Nipahays and young Chipewayan living on the same reserve), Little Pine (with the subsidiary band of Lucky-man on the same reserve), Poundmaker, Sweet Grass, Red Pheasant, Mosquito (with the subsidiary bands of Bear's Head and Lean Man on the same reserve).⁹⁶

Dominion Land Surveyor John C. Nelson, who had been sent away by Little Pine in 1884, returned to supervise the survey of IR 116 in 1887. In his report to the Superintendent General, Nelson stated:

On our return to camp, Mr. Gopsil [the local farming instructor] and I examined the lands upon which the bands of "Little Pine" and "Lucky Man" have settled, and I decided to make the reserve five miles square as shown by the accompanying plan, marked (d), and proceeded with the survey.

94 J.A. MacKay, Indian Agent, Battleford, to Superintendent General of Indian Affairs, Annual Report, August 13, 1886, Canada, Parliament, *Sessional Papers*, 1887, No. 6, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886," 127 (ICC Documents, p. 362).

95 A.B. Perry, Superintendent, NWMP, Annual Report, December 22, 1896, Canada, Parliament, *Sessional Papers*, 1897, No. 15, "Report of the Commissioners of the North-West Mounted Police Force, 1896," App. B (ICC Documents, p. 461).

96 Superintendent General of Indian Affairs to Governor General, Annual Report, 1887, Canada, Parliament, *Sessional Papers*, 1888, No. 15, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1887" (ICC Documents, p. 370).

The reserve contains twenty-five sections and a small gore adjoining the west boundary of Poundmaker's Reserve. The townships in which it lies are sub divided. It is situated on Battle River, thirty-five miles west of Battleford. The location is remarkably beautiful and the soil is very much better than that on the reserve of Poundmaker which bounds it on the east side. There are hay meadows, rich soil, plenty of good water, a variety of wild berries, fishing grounds, and on the north side of Battle River an abundance of timber; on the north side, however, the soil is generally light and sandy.⁹⁷

The survey plan for IR 116 is dated September 1887, and both it and the accompanying description state that the reserve was surveyed “[f]or the Bands of Chiefs ‘Little Pine’ and ‘Lucky Man.’”⁹⁸ Neither of the old Chiefs was present during the survey, however, since Little Pine had died in 1885 and Lucky Man was still in the United States. The reserve comprised 25 square miles, more or less, and was confirmed by Order in Council PC 1151 on May 17, 1889.⁹⁹ The 1887 payroll showed the population of the Lucky Man Band paid at the “Little Pine Reservation” as 62.¹⁰⁰

There are no indications in any of the documents following the 1885 uprising that the Lucky Man Band ever requested a reserve of its own. In the ensuing years, Band members participated in the farming activities on IR 116. In correspondence dated April 28, 1892, however, Hayter Reed, newly appointed as Indian Commissioner, provided a summary of provisions distributed to bands in the Battleford Agency under the terms of Treaty 6. The Little Pine Band was listed as receiving one horse, eight oxen, one bull and 12 cows,¹⁰¹ but no separate mention was made of the Lucky Man Band. Nevertheless, from time to time in correspondence and official records, IR 116 was variously referred to as the “Little Pine and Lucky Man Indian Reserve” or the “Little Pine Indian Reserve,” but never as the “Lucky Man Indian Reserve.”

The Little Pine and Lucky Man Bands shared a common trust account until the fiscal year ending in 1979, and it is only since 1980 that the Lucky Man

97 John C. Nelson, D.L.S., in charge Indian Reserve Surveys, to Superintendent General of Indian Affairs, December 30, 1887, Canada, Parliament, *Sessional Papers*, 1888, No. 15, “Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1887” (ICC Documents, pp. 374-75). The township subdivision referred to by Nelson had been performed by Dominion Land Surveyor C.F. Leclerc in 1884, and the copies of Leclerc's plans in evidence before the Commission contain handwritten notations indicating the location of “Little Pine's Reserve.” It seems clear, however, that these notations were endorsed on the plans in 1887 or later since they state that the reserve was “surveyed” in 1887.

98 Order in Council PC 1151, May 17, 1889 (ICC Documents, pp. 410-12).

99 Order in Council PC 1151, May 17, 1889 (ICC Documents, pp. 410-12).

100 Lucky Man Band Paylists, 1879-1955 (ICC Exhibit 2).

101 Hayter Reed, Indian Commissioner, to Deputy Superintendent General, April 28, 1892, NA, RG 10, vol. 3876, file 73870 (ICC Documents, pp. 426-31).

Band has held a separate trust account. Lucky Man has had its own separate treaty annuity paylists continuously since 1879, however.

The 1989 Settlement Agreement

On April 26, 1974, the members of the Lucky Man Band assembled at the home of member Simon Okemow on IR 116 to consider the election of the Band's first Chief since Lucky Man himself had left to join Big Bear in 1884. They decided to hold an election on May 7, 1974, with the new Chief and councillors to be elected by "the custom of the Band." One of the major concerns expressed at the meeting was that the Band did not have its own reserve, and "[i]t was agreed by the Band that we approach the Federation [of Saskatchewan Indians] to assist the Band in getting a separate reserve."¹⁰²

The minutes of this meeting were forwarded to H.L. Hansen, Supervisor for the North Battleford District, who acknowledged in reply that he had not yet received any response from his Regional Director "as to whether there was any historic reason why Lucky Man Band do not have their own Council and if there is anything to prevent them now from electing their own Band Council."¹⁰³ The Band subsequently passed a Band Council Resolution dated June 7, 1974, requesting that the Department "recognize our Election by Band Custom, effective May 23, 1974."¹⁰⁴ There is no evidence before the Commission to suggest that it was improper for the Band to elect its own Chief and councillors, and subsequent events indicate that Canada was prepared to accept the results of the election and recognize the newly elected Council.

Later that year, the Lucky Man and Little Pine Bands submitted a claim development proposal to Canada to obtain financial assistance to research and develop their treaty land entitlement claims. By the late 1970s, research disclosed that, together, the two bands did not receive all the land to which they were entitled under Treaty 6. In 1980, the Lucky Man Band submitted a treaty land entitlement proposal to Canada, and, nine years later, the Band and Canada entered into the Settlement Agreement of November 23, 1989.¹⁰⁵

Under the terms of the Settlement Agreement, Canada agreed to set apart the 7680 acres of land described in Part I of this report as reserve for the

¹⁰² Minutes of meeting of the members of the Lucky Man Band, April 26, 1974, Submissions on Behalf of the Government of Canada, November 19, 1996, Exhibit 10.

¹⁰³ H.L. Hansen, District Supervisor, North Battleford District, to Rod King, Federation of Saskatchewan Indians, April 29, 1974, Submissions on Behalf of the Government of Canada, November 19, 1996, Exhibit 10.

¹⁰⁴ Band Council Resolution 1974-75/2, June 7, 1974, Submissions on Behalf of the Government of Canada, November 19, 1996, Exhibit 10.

¹⁰⁵ Submissions on Behalf of the Government of Canada, November 19, 1996, pp. 6-7.

use and benefit of the Band. As part of the Settlement Agreement, the Band provided Canada with an absolute surrender of

all the Lucky Man Band's right, title, interest and benefit which the Band, the members of the Lucky Man Band of Indians, for themselves and each of their respective heirs, successors, descendants and permitted assigns, may have (if any) in and to Reserve No. 116 established by Order in Council P.C. 1151 dated the 17th of May, 1889, the description of which Reserve is as follows:

The whole of Little Pine and Lucky Man Indian Reserve No. 116 as shown on a Plan of Survey No. 284 of record in the Canada Lands Survey Records at Ottawa.¹⁰⁶

The Settlement Agreement and surrender were later approved by a referendum of Band members. A separate Settlement Agreement was entered into with the Little Pine Band in 1993.¹⁰⁷

¹⁰⁶ Schedule "A" to the Notice of Referendum, The Lucky Man Band of Indians, Document of Surrender, July 15, 1989, Submissions on Behalf of the Government of Canada, November 19, 1996, Exhibit 2.

¹⁰⁷ Submissions on Behalf of the Government of Canada, November 19, 1996, p. 7.

PART III

ISSUES

The parties to this inquiry are agreed that the only question to be determined by the Commission is the appropriate date for calculating the Lucky Man Cree Nation's population for treaty land entitlement purposes. Counsel for Canada was quite specific in noting that "[t]he Commission is not being asked to make findings with respect to the issue of the Band's population at any given date."¹⁰⁸ That is an evidentiary issue which, depending on the Commission's recommendations arising out of this inquiry, the parties will attempt to resolve themselves through further research and payroll analysis.

The question of the appropriate date for calculating treaty land entitlement requires the Commission to consider a couple of subsidiary issues, however. First, Canada invited us to conclude that the effects of the 1989 Settlement Agreement are twofold: (a) it precludes Lucky Man from claiming to be entitled to any additional treaty land, and (b) it represents a final agreement between the parties that the First Nation's population of 60 in 1980 should be the operative treaty land entitlement population. The First Nation disagrees with this characterization of the Settlement Agreement. We will therefore consider, as a preliminary matter, whether the Settlement Agreement imposes the sorts of restrictions suggested by Canada.

Second, in the event that the Settlement Agreement is not determinative of the entire inquiry, it will become necessary for us to review the terms of Treaty 6 to identify the principles for calculating a band's treaty land entitlement population. We have already undertaken a similar process in our recent report dealing with the treaty land entitlement claim of the Kahkewistahaw First Nation under Treaty 4, and we will consider whether the principles identified in that case also apply to Treaty 6 and to the treaty land entitlement claim of the Lucky Man Cree Nation.

¹⁰⁸ Submissions on Behalf of the Government of Canada, November 19, 1996, p. 1.

Finally, we will turn to the broad issue of determining which of the alternative historical dates for calculating treaty land entitlement is most appropriate in the circumstances of this case.

PART IV

ANALYSIS

ISSUE 1 THE 1989 SETTLEMENT AGREEMENT

Terms of the Settlement Agreement

It is Canada's position in this inquiry that the Settlement Agreement of November 23, 1989, between Canada and the Lucky Man Cree Nation disposes of the First Nation's treaty land entitlement claim. Canada put forward two bases for this position. First, Canada contended that the terms of the Settlement Agreement, when considered in the context of the negotiations leading up to that agreement, preclude Lucky Man from claiming any further entitlement to land under Treaty 6. Second, if the Commission should decide that the Settlement Agreement does not prohibit the First Nation from claiming further treaty land entitlement, Canada submitted that the parties nevertheless contracted under the Settlement Agreement that the First Nation's 1980 population of 60 should form the basis of its treaty land entitlement. This second argument is predicated on the assumption that the Lucky Man Band ceased to exist in the aftermath of the 1885 rebellion and was not reconstituted until the mid-1970s.

In response, Lucky Man submitted that it is inappropriate for Canada to go behind the terms of the Settlement Agreement when those terms, in the First Nation's view, clearly provide that the First Nation is entitled to bring forward a claim of this precise nature. The First Nation also rejected Canada's suggestion that it had ceased to exist for the century preceding its reconstitution in 1974.

The relevant provisions of the Settlement Agreement are paragraphs 3, 10, and 11:

3. RELEASE

(A) In consideration of this Treaty Land Entitlement Settlement Agreement and in particular the covenants and agreements contained herein and subject to the provisions of paragraph (B), the Band does hereby:

- i) cede, release and surrender to Canada all claims, rights, title, interests and benefits the Band ever had, now has or may hereafter have by reason of or in any way arising out of land quantum pursuant to Treaty No. 6, up to 7,680 acres, more or less, as such lands are more particularly described in Schedule "1" annexed hereto; and
- ii) release and forever discharge Canada, Her servants, agents and successors from all obligations imposed on, and from all promises and undertakings made by Canada under Treaty No. 6 relating to land entitlement of up to 7,680 acres, more or less, and does hereby waive any rights, actions or causes of action, claims or demands of whatever nature or kind which the Band ever had, now has or may hereafter have against Canada by reason of or in any way arising out of Treaty No. 6 relating to land entitlement of up to 7,680 acres, more or less, it being further understood by the parties hereto that this agreement, and in particular the covenants contained herein, represent full and final satisfaction of all obligations or undertakings of Canada relating to land entitlement of up to 7,680 acres, more or less, contained in Treaty No. 6; and is in full satisfaction of all manner of costs, legal fees, travel and other expenses expended by the Band or its representatives for the purpose of arriving to and entering into this Settlement Agreement;

(B) The Release referred to in paragraph (A) herein is given without prejudice to and without it being construed in any way as a forfeiture or waiver by the Band, its members or each or any of them, to any claim the Band, its members or each or any of them may have:

- a) to compensation for allegedly being denied the privileges of the full use and benefit of Reserve lands to which the Band had Treaty Entitlement,
- b) to compensation in lieu of land should it be determined at some future date that the Band had a greater Treaty Land Entitlement than the quantum of the land set aside as the Band's Reserve as such lands are more particularly described in Schedule "A" hereto. . . .

10. ENTIRE AGREEMENT

- a) All of the schedules attached hereto form part of this Settlement Agreement.
- b) This Settlement Agreement shall be the entire agreement and there is no representation, warranty, collateral agreement or condition affecting this Settlement Agreement except as expressed within it.

11. **PRESUMPTIONS**

There shall not be any presumption that doubtful expressions in this Settlement Agreement be resolved in favour of either party.¹⁰⁹

Effect of Release Provisions

Canada relied on correspondence between the parties in the years preceding the Settlement Agreement to support its argument that the agreement precludes the Lucky Man Cree Nation from claiming additional treaty land entitlement. Canada also argued that the minutes of Chief Rod King's October 22, 1980, treaty land entitlement proposal to Canada further support that position. In Canada's view, considering the Settlement Agreement in the context of these documents leads to the following conclusions:

- The parties intended to treat the First Nation's treaty land entitlement claim as mutually exclusive of its claim for loss of use of reserve lands from 1882 until the current reserve was set aside in 1989. Canada argued that the First Nation's attempt to establish its present claim on a treaty land entitlement basis is entirely inconsistent with the First Nation's position throughout the negotiation of the Settlement Agreement.¹¹⁰
- The parties intended to fully resolve Lucky Man's treaty land entitlement claim by means of the Settlement Agreement.¹¹¹
- The Settlement Agreement was based on a professional evaluation by the First Nation's own experts of Lucky Man's existing and future socio-economic needs. As such, it satisfied one of the major objectives of Treaty 6, which was to provide bands with an adequate land base. Canada contended that, by providing the agreed land, it fully discharged its obligation to provide treaty land to the First Nation.¹¹²
- The Settlement Agreement was based on the First Nation's agreed population of 60 in 1980, representing the First Nation's highest population since the mid-1880s. Canada contended that the settlement was therefore based on the "current population formula" for calculating treaty land entitlement,

109 Treaty Land Entitlement Settlement Agreement, dated November 23, 1989, between Her Majesty the Queen in right of Canada, as represented by the Minister of Indian Affairs and Northern Development, and the Lucky Man Band of Indians (ICC Exhibit 4).

110 ICC Transcript, December 3, 1996, pp. 97-101 (Richard Wex).

111 ICC Transcript, December 3, 1996, pp. 113-16 (Richard Wex).

112 ICC Transcript, December 3, 1996, pp. 101-03 (Richard Wex).

and as a result was even more generous than the Saskatchewan formula, which was based on band populations as of December 31, 1976.¹¹³

- The release in the Settlement Agreement was intended to apply only if the courts had articulated a principle of law, or if Canada had adopted a new approach to determining treaty land entitlement, such that Lucky Man would receive a better deal in such circumstances than it received under the Settlement Agreement. Canada argued that subparagraph 3(B) was specifically *not* intended to permit the First Nation to advance a further treaty land entitlement claim under circumstances other than those just described. Canada also contended that those qualifying circumstances had not arisen. In a legal sense, no court has ever held that the appropriate date for determining a band's population for treaty land entitlement purposes is the date of treaty adhesion (nor has the Indian Claims Commission, for that matter) and, as a matter of policy, Canada has never taken the position that it has a lawful obligation to set aside land for a band on the basis of its population at the date of treaty adhesion.¹¹⁴

We do not agree with Canada. Although counsel for Lucky Man submitted that the short answer to Canada's position on this issue is that it runs afoul of the parol evidence rule, the Commission does not consider it necessary to base its decision on a technical application of that rule. We conclude that the Settlement Agreement on its face does not say what Canada claims it does.

We interpret the Settlement Agreement to mean that, in exchange for Lucky Man giving up all rights to IR 116, Canada provided the First Nation with the 1989 reserve containing 7680 acres, or sufficient land for 60 people – the First Nation's population in 1980. At the same time, in subparagraph 3(A) the First Nation released Canada from any further obligation to provide land or to reimburse the First Nation for any additional costs associated with negotiating the Settlement Agreement. The Settlement Agreement clearly does *not* preclude the First Nation from seeking compensation *in lieu of* additional treaty land should it eventually be determined that the First Nation's treaty land entitlement should be based on a population of *more* than 60 people. Nor does the agreement prevent the First Nation from claiming compensation for loss of use.

¹¹³ ICC Transcript, December 3, 1996, pp. 96-97 (Richard Wex).

¹¹⁴ ICC Transcript, December 3, 1996, pp. 104-12 (Richard Wex).

Clause 3(B)(b) states in clear and unambiguous terms that the release in subparagraph 3(A) is given without prejudice to the First Nation's right to compensation in lieu of land "should it be determined at some future date that the Band had a greater Treaty Land Entitlement than the quantum of the land set aside as the Band's Reserve" under the Settlement Agreement. The words "should it be determined at some future date" are not limited in any way, and we conclude that it is open not only to the courts but also to this Commission to make such a determination if that conclusion is justified on the evidence. To suggest that only a court of law can make this determination would be contrary to one of the main objectives of the Specific Claims Policy since it would require the First Nation to resort to litigation to resolve the issue.

We consider the intentions of the parties as expressed in the correspondence preceding the Settlement Agreement to be irrelevant. The process of negotiation is one in which the positions of the parties may change many times, with the result that the intention underlying the eventual agreement may bear little resemblance to the position taken by one of the parties at an earlier point in time.

Counsel for Lucky Man also argued that, although the courts have been willing to consider evidence of negotiations preceding the treaties,¹¹⁵ they are much more reluctant to do so in the context of modern agreements where the parties have been represented by counsel.¹¹⁶ It is a principle of treaty interpretation that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian,"¹¹⁷ but in this case the parties have agreed in paragraph 11 of the Settlement Agreement that this presumption shall not apply in its interpretation. Similarly, subparagraph 10(b) provides that the Settlement Agreement is the entire agreement between the parties, and that no representation, warranty, collateral agreement, or condition shall be found to affect the Settlement Agreement unless contained expressly within it. In our view, these terms make it clear that it is not open to the Commission to consider interpretations which, in Canada's submission, are suggested by the correspondence preceding the Settlement Agreement.

115 *R. v. Sioui*, [1990] 3 CNLR 127 at 150 (SCC).

116 ICC Transcript, December 3, 1996, pp. 49-51 (Thomas Berger), relying on *Eastmain v. Robinson*, [1993] 1 FC 501 at 515-16, 99 DLR (4th) 16, Decary JA.

117 *Nowegijick v. The Queen*, [1983] 1 SCR 29, 46 NR 41, [1983] 2 CNLR 89 at 94, [1983] CTC 20.

Treaty Land Entitlement Population of Reconstituted Band

Before embarking on a review of the principles for identifying the most appropriate date for determining a band's treaty land entitlement, we must consider Canada's further preliminary argument that the parties contracted under the Settlement Agreement to use the First Nation's 1980 population of 60 as the basis of its treaty land entitlement. This argument is based on two assumptions. The first assumption is that the Lucky Man Band ceased to exist following the 1885 rebellion, and that its claim arose only after the First Nation was recently "reconstituted" as a separate legal entity. Until the First Nation had been reconstituted, Canada contended that it was under no obligation to set aside a separate reserve in the intervening years when the First Nation did not exist.¹¹⁸

The second assumption is that the parties in fact agreed in the Settlement Agreement to resolve fully Lucky Man's treaty land entitlement claim on the basis of the First Nation's population of 60 as of October 22, 1980. Canada acknowledged that, in most cases, the appropriate date for determining treaty land entitlement is the date of first survey. However, Canada argued that date-of-first-survey analysis does *not* apply where the treaty stipulates the area or boundaries of a band's reserve, or where Canada and a band have otherwise agreed on the boundaries of the band's reserve or the band's population for treaty land entitlement purposes.¹¹⁹ In this case, Canada contended that it is unnecessary to determine Lucky Man's date-of-first-survey population because the parties, by the terms of the 1989 Settlement Agreement, agreed on a population count to be used for treaty land entitlement purposes.

We have already dealt with the latter of these assumptions. With all due respect to counsel for Canada, we do not see in the terms of the Settlement Agreement any agreement of the parties, express or otherwise, that the First Nation's treaty land entitlement population should be limited to 60. Indeed, the terms of the exception to the release in subparagraph 3(B)(b) make it clear that the parties intended to leave it open to the First Nation to bring a claim for compensation in lieu of additional treaty land entitlement over and above the 7680 acres provided under the agreement.

With regard to the assumption that the Band ceased to exist shortly after 1885, Canada argued that Lucky Man had not been a chief prior to the Band's adhesion to Treaty 6 in 1879, but had merely led a faction of Big Bear's Band into treaty in order to be able to collect annuities. After adhe-

118 ICC Transcript, December 3, 1996, p. 234 (Richard Wex).

119 ICC Transcript, December 3, 1996, pp. 222-23 (Richard Wex).

sion, Band members continued to travel with Big Bear until some settled with Little Pine in 1884. The remainder stayed with Big Bear until they were dispersed in the wake of the 1885 rebellion. Counsel submitted that Lucky Man was deposed as Chief after 1883, and that no new Chief was chosen until 1974. In support of its contention that the Band ceased to have a separate existence shortly after the rebellion, Canada pointed to the fact that no separate trust accounts were maintained for the Band until after it was reconstituted in 1974. Moreover, Canada argued that no separate references were made to the Band in the Annual Reports of the Department after 1888.¹²⁰

We agree with the Lucky Man Cree Nation, however, that it has continued to exist without interruption since it adhered to Treaty 6 in 1879. As counsel for the First Nation submitted, the Department's Annual Report for 1886 referred to *both* the Lucky Man and Little Pine Bands as being settled on IR 116, and surveyor John C. Nelson's 1887 survey plan also expressly states that the reserve was surveyed for *both* bands. This was confirmed in Order in Council PC 1151 dated May 17, 1889, and separate band paylists have been maintained for the two Bands in every year since 1879.¹²¹ Canada's own records appear to counter its arguments, and we tend to agree with the First Nation that the fact that it did not appear in the Annual Reports after 1888 demonstrates more that the Band ceased to be an administrative concern for the Department than that the Band ceased to exist altogether. We also concur with the First Nation's argument that Lucky Man's status as an ordinary member of Big Bear's Band commencing in 1884 merely meant that he ceased to be Chief of the Lucky Man Band, not that the Band ceased to exist. In short, we see nothing in the Settlement Agreement or in the other factual evidence before us to suggest that the First Nation's existence should not be considered to have been ongoing at all relevant times.

We will now consider Treaty 6 and the fundamental principles in identifying the date for calculating treaty land entitlement.

ISSUE 2 DATE FOR CALCULATING LAND ENTITLEMENT UNDER TREATY 6

It will be recalled that the Lucky Man Cree Nation has proposed three alternative dates for calculating its treaty land entitlement – 1880, 1882, and 1883 – while Canada has, in reply, submitted two dates – 1887 and 1980.

¹²⁰ ICC Transcript, December 3, 1996, pp. 224-31 (Richard Wex).

¹²¹ ICC Transcript, December 3, 1996, pp. 77-80 (Thomas Berger).

We have already rejected Canada's arguments based on 1980. It now remains to consider the other possibilities.

The Indian Claims Commission has addressed the issue of the most appropriate date for calculating a band's treaty land entitlement in its recent report dealing with the treaty land entitlement claim of the Kahkewistahaw First Nation. In that case, the Commission considered the reserve clause in Treaty 4.

In this inquiry, the question is again whether Canada satisfied its lawful obligation by setting aside sufficient reserve land, but we are asked to consider the slightly different reserve clause in Treaty 6. Whereas Treaty 4 stated that reserves were "to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians,"¹²² the "reserve clause" in Treaty 6 provides:

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, provided all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say:—

That the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them. . . .¹²³

In the Kahkewistahaw report, we summarized the broad principles that the Commission has derived from the leading decisions of the Supreme Court of Canada on treaty interpretation. Although there is limited case authority on the specific question of treaty land entitlement, we set forth the principles that the Commission has developed in its earlier reports dealing with the treaty land entitlement claims of the Fort McKay, Kawacatoose, and Lac La Ronge First Nations. We do not propose to review all that material again in this report, but we note the following conclusion from the Kahkewistahaw report:

¹²² *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 6.

¹²³ Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 352-53 (ICC Exhibit 1).

While the Commission has not completely ruled out the possibility that other dates might be more appropriate depending on particular facts in other cases, we continue to endorse the general principle that the population on the date of first survey should be used to calculate treaty land entitlement unless there are unusual circumstances which would otherwise result in manifest unfairness. In our view, every claim must be assessed on its own merits, but it is also important to develop and apply a consistent set of principles on treaty land entitlement to avoid the problems that have resulted from frequent changes in government practices and policies over the last century. Not only have these changes frustrated the settlement of outstanding entitlement claims, but the application of *ad hoc* and inconsistent criteria has created inequities and a profound sense of injustice among First Nations.¹²⁴

In other words, in the absence of “unusual circumstances which would otherwise result in manifest unfairness,” the Commission will normally apply the date-of-first-survey approach to calculate treaty land entitlement.

In the present case, land was surveyed by John Nelson in 1887 on behalf of members of both the Little Pine and Lucky Man Bands. It is the Commission’s view that this represents *prima facie* evidence of the date of first survey for Lucky Man unless the First Nation can show that Treaty 6, unlike Treaty 4, contemplates an entitlement date other than the date of first survey, or that there are unusual circumstances in this case that would make it manifestly unfair to rely on 1887 as the date of first survey.

Positions of the Parties

Consultation

With the general principle in the Kahkewistahaw report as a starting point, it is now necessary to consider whether the specific wording of Treaty 6 should result in an interpretation and approach other than date of first survey. The Lucky Man Cree Nation contended that the date-of-first-survey approach is inappropriate. Counsel argued that the phrase “after consulting with the Indians thereof as to the locality” means that Canada’s obligation to set aside a reserve for the First Nation arose as soon as the consultation took place. As a fiduciary, Canada was obliged to act with reasonable diligence in setting apart a reserve, and was not permitted to postpone this important matter.¹²⁵

Canada acknowledged that it is obliged to set aside a reserve for a given band within a reasonable period of time following consultation, but contended that the treaty contemplates a reserve selection process and not sim-

¹²⁴ Indian Claims Commission, *Kahkewistahaw First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, November 1996), 65-66.

¹²⁵ ICC Transcript, December 3, 1996, p. 253 (Thomas Berger).

ply a consultation.¹²⁶ Under this process, either Canada or the band would initially identify its chosen location for a reserve, and the other party would have to agree to that choice. The survey would then be conducted based on the best information of the band's population available to the surveyor at the time. Upon completion of the survey, the band could accept the reserve either expressly (by saying so) or implicitly (by living on and using the reserve for its benefit).

Canada objected to the First Nation's date-of-consultation approach on the basis that it represented an attempt by the First Nation to alter its treaty right to be consulted into a right to determine *when* and *where* its reserve would be located.¹²⁷ In Canada's view, the final selection of a reserve for a band is an exercise of the royal prerogative; the Crown is not obliged to blindly follow the band's instructions in choosing a reserve location if there are good policy and other reasons for not doing so.¹²⁸ Ultimately, Canada contended that, although it is required to exercise its discretion reasonably, it nevertheless retains the right, to be exercised reasonably, to disagree with a band's selection of reserve land.¹²⁹

To these submissions, Lucky Man responded that reserve selection is not simply at Canada's discretion, but rather that it is necessary to consider what is reasonable under the treaty.¹³⁰ Counsel acknowledged that Canada did not have to set aside a reserve in the location requested by a band, but it was nevertheless obliged to set aside a reserve *somewhere*. Canada could not postpone the reserve selection and survey process for 100 years, and then suggest that the population at that late date of first survey should represent the most appropriate basis for establishing the band's treaty land entitlement.¹³¹

Settling Down as a Condition Precedent to Reserve Selection

The Lucky Man Cree Nation further attacked Canada's approach to reserve selection on the basis that it incorporated a condition precedent – namely, that a band must have settled before its reserve could be set aside – that was not stipulated by Treaty 6.¹³² Counsel argued that the reserve clause in Treaty 6 makes it clear that reserves could be set aside before band members actu-

126 ICC Transcript, December 3, 1996, p. 133 (Richard Wex).

127 ICC Transcript, December 3, 1996, p. 192 (Richard Wex).

128 Submissions on Behalf of the Government of Canada, November 19, 1996, pp. 17-18.

129 ICC Transcript, December 3, 1996, p. 193 (Richard Wex).

130 ICC Transcript, December 3, 1996, p. 55 (Thomas Berger).

131 ICC Transcript, December 3, 1996, pp. 60-61 (Thomas Berger).

132 Submissions on Behalf of the Lucky Man Cree Nation, November 26, 1996, pp. 21-29.

ally settled down. It would be reasonable to expect that the Indians would settle down on the “reserves for farming lands” referred to in the reserve clause,¹³³ but settlement would obviously not be a condition precedent on the “other reserves for the benefit of the said Indians.” According to the First Nation, these “other reserves” were intended to ensure that, as settlement advanced, the Indians would have land on which they could later settle.¹³⁴ Counsel argued that the treaty provisions were transitional in nature and contemplated that some Indians would be settled on reserves and others would not.¹³⁵ Indeed, Canada’s practice was not to require a band to settle down if it chose not to do so.¹³⁶

Canada countered that the “other reserves” referred to in the reserve clause were merely intended to supplement or enhance the primary farming reserve on which a band settled, but that it would not be possible to locate these “other reserves” without knowing where the principal reserve would be.¹³⁷ That being said, it was necessary, in Canada’s view, for a band to identify with some particularity the location it desired for its principal reserve. As counsel stated:

It cannot be said, under the terms of the treaty, that Canada was obliged to immediately set apart reserves for bands based on the mere possibility that, at some unknown time in the future, a band may settle in a certain general area. The band, in our view, was obliged to identify a location it wanted for its reserve and Canada had to feel reasonably comfortable that the band was sincere in its indication and had fixed its mind on this location before a site could be agreed to. This is entirely inconsistent with Mr. Berger’s submission on behalf of his client. We say that, you know, consultation wasn’t enough, there had to be a meeting of the minds, Canada had to feel that the band was truly committed to identifying a site, if not to settle immediately, that it would eventually settle on it. Until the band indicated that it was truly prepared to settle on a particular site that was agreeable to Canada, we submit that the implementation of Canada’s obligation to set aside a reserve would be postponed in the hope that both parties could agree to a suitable site.¹³⁸

Counsel for Canada noted that, in the treaty negotiations, Commissioner Morris promised that a band would not be held to its reserve selection until the reserve had been surveyed.¹³⁹ Therefore, it made sense to determine the

133 ICC Transcript, December 3, 1996, p. 64 (Thomas Berger).

134 ICC Transcript, December 3, 1996, p. 64 (Thomas Berger).

135 ICC Transcript, December 3, 1996, pp. 65-66 (Thomas Berger).

136 ICC Transcript, December 3, 1996, pp. 68-69 (Thomas Berger).

137 ICC Transcript, December 3, 1996, pp. 139-40 (Richard Wex).

138 ICC Transcript, December 3, 1996, pp. 188-89 (Richard Wex).

139 ICC Transcript, December 3, 1996, pp. 205-06 (Richard Wex).

band's population at the time when the parties had reached agreement as to the reserve lands to be set aside for the band. Surveying a reserve without a consensus being reached between the parties would, in many cases, result in unnecessary expense, a waste of the surveyor's time, and delays in surveying reserves for bands which *had* agreed with Canada on the land to be set aside.¹⁴⁰

Finally, Canada contended that, although the reserve clause does not specifically refer to agreement of the parties, such agreement can be inferred from the following clauses of Treaty 6:

That during the next three years, *after two or more of the reserves* hereby agreed to be set apart to the Indians, *shall have been agreed upon and surveyed*, there shall be granted to the Indians included under the Chiefs adhering to the treaty at Carlton, each spring, the sum of one thousand dollars to be expended for them by Her Majesty's Indian Agents, in the purchase of provisions for the use of such of the Band as are actually settled on the reserves and are engaged in cultivating the soil, to assist them in such cultivation. . . .

That with regard to the Indians included under the Chiefs adhering to the treaty at Fort Pitt, and to those under Chiefs within the treaty limits who may hereafter give their adhesion thereto (exclusively, however, of the Indians of the Carlton region) there shall, during three years, *after two or more reserves shall have been agreed upon and surveyed*, be distributed each spring among the bands cultivating the soil on such reserves, by Her Majesty's Chief Indian Agent for this treaty in his discretion, a sum not exceeding one thousand dollars, in the purchase of provisions for the use of such members of the band as are actually settled on the reserves and engaged in the cultivation of the soil, to assist and encourage them in such cultivation. . . .¹⁴¹

In response to Canada's argument that the Lucky Man Band had not stated a "genuine preference" as to the locality in which it wished to settle, the First Nation replied that Treaty 6 merely required a band to identify a locality, and not a specific area within a locality, in which it desired its reserve.¹⁴² Counsel contended that it would be wise for the Crown's representatives to seek a consensus regarding the lands to be set aside. If, however, no such consensus was forthcoming, Canada's fiduciary obligation to act in the best interest of the band by surveying a reserve – even if the parties were unable to agree on its location – would arise as soon as the consultation had occurred. If

¹⁴⁰ ICC Transcript, December 3, 1996, pp. 131-32 (Richard Wex).

¹⁴¹ Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 354-55 (ICC Exhibit 1). Emphasis added.

¹⁴² ICC Transcript, December 3, 1996, p. 76 (Thomas Berger).

Canada failed to set aside a reserve in such circumstances, then, in the First Nation's view, a *prima facie* breach of fiduciary obligation would occur.¹⁴³

Membership and "Double Counts"

Canada argued that the population levels of the Lucky Man Band in 1880 and 1882 represented "an extremely short-lived moment of an apparently very high number of band members . . . the majority of whom were not . . . actual members of the band but, rather, [were] individuals who joined with Lucky Man around that two-year period for treaty annuity purposes only."¹⁴⁴ The essence of this argument is that the presence of an individual on a given payroll is not necessarily conclusive that the individual was a member of the band with which he or she was paid. Paylist analysis would be required to determine whether the individual actually *was* a member.

Counsel also suggested that large numbers of these individuals on the Lucky Man paylists for 1880 and 1882 later left the Band and joined other bands, where they have already been counted for treaty land entitlement purposes. Providing them with treaty land entitlement with Lucky Man would result in "double counts," meaning that Canada would "pay twice" under Treaty 6.¹⁴⁵

These are questions that more properly relate to the question of quantifying the First Nation's population count and treaty land entitlement acreage should it be determined that Canada owes an outstanding lawful obligation to provide treaty land to the First Nation. The present inquiry, however, is concerned only with the issue of whether a lawful obligation is owed in the first place. As we pointed out in Part III of this report, Canada itself noted that the Commission has been asked to refrain from dealing with questions of quantum unless an outstanding lawful obligation is found and the parties are unable to resolve the population count through negotiation. In keeping with the spirit of this request, the Commission does not propose to address the membership and "double count" issues in this report.

Implications of Kahkewistahaw Report

As we have already noted, the oral submissions by counsel in this case took place on December 3, 1996, just one week after the Commission issued its report dealing with the treaty land entitlement claim of the Kahkewistahaw

¹⁴³ ICC Transcript, December 3, 1996, p. 255 (Thomas Berger).

¹⁴⁴ ICC Transcript, December 3, 1996, p. 127 (Richard Wex).

¹⁴⁵ ICC Transcript, December 3, 1996, p. 127 (Richard Wex).

First Nation. In recognition that the parties had not had sufficient opportunity to address the Commission's findings in that report, the Commission permitted counsel to place supplementary written submissions before us to deal with that report.

Before addressing the parties' supplementary submissions, we will set forth certain of the key conclusions the Commission reached in that report:

[T]here is nothing in the wording of the treaty or in the subsequent conduct of the parties to suggest that treaty land entitlement should be calculated when the First Nation selected or requested land in a particular location. It is clear that a band's *entitlement* to reserve land arises upon the band signing or adhering to treaty. However, the *quantification* and *location* of the band's entitlement are not triggered until certain procedures described in the treaty are carried out. Under Treaty 4, "*such reserves [are] to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians.*" In our view, the purpose of the "conference" with the band was to ensure that the land to be set aside as reserve met with the approval of the chief and headmen and that it was suitable for its intended purpose (which was typically agriculture, in the case of bands in southern Saskatchewan). However, it does not necessarily follow that the band's population on the date of selection should determine the size of the reserve. . . .

It was only when *agreement* or *consensus* was reached between the parties to the treaty – by Canada agreeing to survey the land selected by the band, and by the band accepting the survey as properly defining the desired reserve – that the land as surveyed could be said to constitute a reserve for the purposes of the treaty. Therefore, the date of first survey was significant because, if the band accepted the surveyed land as its reserve, the completion and acceptance of the first survey provided evidence that both parties agreed that the land would be treated as an Indian reserve for the purposes of the treaty. Since the survey is important evidence of Canada's intention to establish a reserve, it is not unreasonable to use the date on the survey plan as the date of first survey for entitlement calculation, provided that the completion of the physical survey of the reserve boundaries can be shown to have coincided roughly with the preparation of the survey plan. Once it has been concluded that a reserve has been set aside, the population must be assessed on this date to determine whether Canada has satisfied the band's treaty land entitlement. . . .

A completed survey verifies the precise *location* and *size* of a reserve, and is critical in measuring whether a band's treaty land entitlement has been fulfilled. A completed survey does not necessarily confirm, however, that the "first survey" of a band's reserve has *occurred*, particularly where the band rejects the lands as surveyed.

Therefore, we find the most reasonable conclusion to be derived from the interpretation of Treaty 4 is that the date of first survey is the appropriate date for calculating treaty land entitlement. We interpret the Crown's obligation under Treaty 4 to be the allocation of 128 acres of land for each band member at the time that land was

set apart as a reserve for the use and benefit of the band. It was only when land was *surveyed* by Canada in accordance with the treaty, and *accepted* by the band, that it could be said that the land was properly set apart. Therefore, subject to exceptions being made in unusual circumstances which would otherwise result in manifest unfairness, the general rule is that the population on the date of first survey shall be used to calculate a band's treaty land entitlement.¹⁴⁶

In light of the facts of the present case, it is not surprising that Canada's submissions echo the approach taken by the Commission in the Kahkewistahaw report. Counsel noted that the purpose of the "consultation" under Treaty 6, like the "conference" under Treaty 4, was to ensure that the lands to be set aside as the band's reserve met with the approval of the Chief and headmen and would be suitable for its intended purpose. Canada's approach, which contemplates a meeting of the minds or a consensus with regard to the lands to be selected, is consistent with the Commission's comments in Kahkewistahaw.

For its part, the First Nation did not disagree with the Kahkewistahaw report, as far as it went. However, the First Nation contended that the survey process contemplated in the Kahkewistahaw report reached an impasse in the present case when the parties were unable to achieve the necessary agreement or consensus on the lands to be set aside:

The principles set out in the *Kahkewistahaw* case proceed on the footing that steps are taken in a reasonable way: a band adheres to the treaty, consultation between Canada and the Band takes place, and then consensus is reached, i.e., Canada agrees to survey the lands selected, and the Band accepts the survey as properly defining the reserve.

The Commission pointed out that there had to be *agreement* or *consensus* "by Canada agreeing to survey the land selected by the band, and by the band accepting that the survey has properly defined the desired reserve. . . ."

But what happens where no agreement or consensus is reached? What if there is an impasse?

What is the situation where the procedure is aborted? Where consultation takes place but no steps are taken thereafter? Where no agreement or consensus is reached? Where no survey is carried out for over 100 years?

This is where the exception to the general rule as set out in the *Kahkewistahaw* case must come into play: Are these circumstances unusual? Would application of the DOFS [date of first survey] rule result in manifest unfairness?¹⁴⁷

¹⁴⁶ Indian Claims Commission, *Kahkewistahaw First Nation Report on Treaty Land Entitlement* (Ottawa, November 1996), 67-69 and 72-73.

¹⁴⁷ Supplementary Submission on Behalf of the Lucky Man Cree Nation, December 19, 1996, p. 2.

In the First Nation's submission, the circumstances were unusual, and using the date-of-first-survey approach would result in manifest unfairness. It was "not only unusual" but "unique," counsel noted, that, notwithstanding the consultations in 1880 and 1882, the members of the Lucky Man Band were eventually placed on Little Pine's reserve and no reserve was set aside for Lucky Man for over 100 years.¹⁴⁸ The First Nation argued that Canada's unilateral imposition of a requirement that a band settle before a reserve would be set aside for it, when such a term is not required by treaty, is manifestly unfair. Moreover, since Lucky Man had "virtually settled" in 1883 but still no reserve was set apart for its use and benefit, it would again be manifestly unfair to apply the Kahkewistahaw approach in this case. Canada was responsible, as a fiduciary, to proceed with reasonable diligence in surveying a reserve for the Band, and, as a fiduciary, it is responsible for not having done so, according to the First Nation.¹⁴⁹

Consensus and Date of First Survey

Having had careful regard for the parties' submissions, the Commission concludes that Canada has put forward the most reasonable interpretation of the reserve clause in Treaty 6. The contentious words of the reserve clause are contained in the phrase "after consulting with the Indians thereof as to the locality which may be found to be most suitable for them." In our view, the word "consulting" contemplates the initial discussions in which an Indian band informs Canada's agents of its preferred location for a reserve. We agree with Canada's point, however, that other clauses in the treaty give fuller expression to the parties' intention that a band's reserve shall be "*agreed upon* and surveyed." It is just this sort of consensus or meeting of the minds that the Commission referred to in its report dealing with the Kahkewistahaw Band of Treaty 4, and we believe that this conclusion is equally applicable to bands under Treaty 6.

The Lucky Man Cree Nation argued that the obligation to set aside a reserve arose as soon as "consultation" took place. In fact, we consider that the obligation to set aside a reserve arose even earlier – upon a band's adhesion to treaty. As we stated in the Kahkewistahaw report, however, the *quantification* and *location* of a band's entitlement were not triggered until the consensus contemplated by the treaty was achieved. As a general rule, the consensus to which we refer would normally occur upon *completion* of the

¹⁴⁸ Supplementary Submission on Behalf of the Lucky Man Cree Nation, December 19, 1996, p. 6.

¹⁴⁹ Supplementary Submission on Behalf of the Lucky Man Cree Nation, December 19, 1996, pp. 6-7.

survey – that is, at the date of first survey. It is true that there had to be a preliminary understanding of some sort between Canada and a band with respect to a specific location before a survey would even be undertaken. In our view, this preliminary understanding was not sufficient to constitute the consensus that we contemplate. It was only *following* the survey, when the band indicated its acceptance of the surveyed area as its reserve – either expressly (by saying so) or implicitly (by living on or using the reserve for its benefit) – that a true consensus could have been said to exist. It is for these reasons that the Commission attaches such significance to the date of first survey.

That being said, we agree with the First Nation that the treaty does not require a band to settle down before a reserve can be set apart for it. We further agree that the treaty provisions themselves were transitional in nature and contemplated that some bands would settle on reserves immediately and others would not.¹⁵⁰ Still, as Canada contended, before a reserve would be set aside for a band, Canada had to “feel reasonably comfortable” that the band was truly committed to identifying a site, if not to settle immediately, then to settle there eventually.¹⁵¹

We find support for these conclusions in the report of Treaty Commissioner Alexander Morris regarding the Treaty 6 negotiations of August 19, 1876:

Now what I and my brother Commissioners would like to do is this: we wish to give each band who will accept of it a place where they may live; we wish to give you as much or more land than you need; we wish to send a man that surveys the land to mark it off, so you will know it is your own, and no one will interfere with you. What I would propose to do is what we have done in other places. For every family of five a reserve to themselves of one square mile. Then, as you may not all have made up your minds where you would like to live, I will tell you how that will be arranged: we would do as has been done with happiest results at the North-West Angle. *We would send next year a surveyor to agree with you as to the place you would like.*¹⁵²

Four days later, during the fourth day of negotiations, Commissioner Morris was asked to include among the terms of treaty that the Indians be permitted

¹⁵⁰ ICC Transcript, December 3, 1996, pp. 65-66 (Thomas Berger).

¹⁵¹ ICC Transcript, December 3, 1996, p. 188 (Richard Wex).

¹⁵² Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 204-05 (ICC Exhibit 1).

to retain "liberty to change the site of the reserves before the survey."¹⁵³ To this request, Morris responded:

You can have no difficulty in choosing your reserves; be sure to take a good place so that there will be no need to change; you would not be held to your choice until it was surveyed.¹⁵⁴

We take from these passages that Canada and the Indians who adhered to Treaty 6 intended that the consultation process would ultimately result in some form of an agreement – whether express or implied, written or oral – between Canada and a band as to the reserve land to be set aside for that band's use and benefit. We also find it significant that the intention was clearly expressed that a band would not be held to its choice of land until its reserve was surveyed. It is our view that this concession, granted at the specific request of the Indians, makes it reasonable to conclude that the parties did not intend to finally resolve the question of a band's treaty land entitlement until the parties had agreed on the reserve lands to be set aside, and those lands had been surveyed.

Nonetheless, the Commission does not accept Canada's contention that setting aside reserve land is simply a matter of royal prerogative, and that Canada, rather than a band, is "the decision maker as to both when and where the reserve would be located."¹⁵⁵ Canada was required to "consult" with the Indians by the express terms of Treaty 6. For a true meeting of the minds to take place, both parties must have input into the process, and both must agree on the reserve selected and surveyed.

Arguably, the logical extension of this requirement for consensus is that, just as it would have been open to a band to reject for its own reasons a reserve site selected by Canada, it would have been equally open to Canada to reject sites requested by the band if there were valid reasons for doing so. Canada's discretion in this regard would presumably have to have been exercised reasonably, however. One of the most important – and difficult – roles of government, then and now, is to weigh and reconcile competing interests, and in doing so Canada must have particular regard for treaty rights and the fiduciary nature of its relationship with the Indians. We do not consider this

¹⁵³ Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 185 (ICC Exhibit 1).

¹⁵⁴ Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 218 (ICC Exhibit 1).

¹⁵⁵ Submissions on Behalf of the Government of Canada, November 19, 1996, p. 17.

to mean that Canada was immutably bound to prefer the position of the Indians in all cases in which competing policy or other interests arose. What it *does* mean, in our view, is that, if, in the context of setting apart reserves, Canada chose a competing interest over the interests of a particular band, it must have had reasons for doing so that were valid and not coloured by improper considerations.

Manifest Unfairness

We have already stated in this report and in our previous treaty land entitlement reports that, as a general principle, the Commission will normally apply the date-of-first-survey approach to calculate treaty land entitlement. Completion and acceptance of the first survey – and, in most cases, settlement by the band – represent evidence that both parties agreed that the land would be treated as an Indian reserve for the purposes of the treaty. We have also concluded that the survey in 1887 by John Nelson represents *prima facie* evidence of the date of first survey for Lucky Man. Since it is our view that the date of first survey represents the appropriate date for calculating treaty land entitlement under Treaty 6 as well as under Treaty 4, the remaining question that the Commission must address is whether there are unusual circumstances in this case that would make it manifestly unfair to rely on 1887 as the date of first survey.

With this question in mind, we will now consider the historical circumstances surrounding the three dates for calculating treaty land entitlement proposed by the Lucky Man Cree Nation – 1880, 1882, and 1883 – and the fourth date – 1887 – proposed by Canada.

Events of 1880

It will be recalled that Indian Agent Edwin Allen reported on September 30, 1880, that he had “held several councils with the Indians who had not yet determined on a reservation with a view of ascertaining their opinion on the matter,” and that “Lucky Man wished to locate in the neighbourhood of Battleford.”¹⁵⁶ Allen also reported that he “could get no definite answer from any of the chiefs as to when they would settle down.”¹⁵⁷

156 Edwin Allen, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, “Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1880” (ICC Documents, p. 26).

157 Edwin Allen, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, “Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1880” (ICC Documents, p. 26).

In the submission of the Lucky Man Cree Nation, Allen's discussions with the Indians constituted the consultation required by Treaty 6 and thus triggered Canada's obligation to set apart a reserve for the Band. As counsel stated:

As time goes by, and settlement proceeds, choices as to locations dwindle. The responsibility was one which could not be shirked. It is the essence of the Crown's fiduciary duty to act in the best interests of the band. The Crown should have performed its duty under the treaty. In this case there was consultation in 1880 when Lucky Man indicated that he and his followers wished to locate in the neighbourhood of Battleford. There was no reason not to set aside a reserve at Battleford in 1880, unless this argument of the Crown that the Indians had to be ready to settle down is a sound argument.¹⁵⁸

Canada responded that, although Lucky Man did indicate a general location for a reserve, he "only made these indications for much needed governmental aid . . . and he had not fixed his mind on a site."¹⁵⁹ Counsel argued that the record shows that Lucky Man and his followers were destitute and anxious to receive their annuity payments so that they could return to the plains and to the United States to hunt for buffalo.¹⁶⁰ Canada also argued on the basis of Agent Allen's report that Lucky Man refused "to provide a firm commitment . . . as to when he would settle or identify a particular site,"¹⁶¹ and on this basis Canada denied that it had an obligation to set apart a reserve for Lucky Man in 1880.

It is clear enough from Allen's report and from other reports in both earlier and later years that Canada's policy objective at the time was to encourage all bands of plains Indians, through occasionally dubious means, to select and settle on reserves as soon as possible to reduce the potential for conflict with settlers over land selection and to hasten the bands' transition to agricultural self-sufficiency. It is also clear from Allen's report that the Indians of the Lucky Man Band were more interested in pursuing the hunt than in identifying a specific location where they would have liked to settle:

The Indians were in a very destitute condition, almost without clothing of any description, and from 15 to 20 persons in each lodge; they came from the plains with the

158 ICC Transcript, December 3, 1996, p. 56 (Thomas Berger).

159 ICC Transcript, December 3, 1996, p. 142 (Richard Wex).

160 ICC Transcript, December 3, 1996, p. 147 (Richard Wex).

161 ICC Transcript, December 3, 1996, p. 186 (Richard Wex).

expectation of receiving their payments and purchasing clothing, &c., *before returning again.* . . .¹⁶²

The evidence before us points to the conclusion that Canada was willing to set apart reserves for any Indian bands desiring them, but, other than making a general expression of interest in the Battleford area, Lucky Man and his followers were not yet ready to select a specific site in 1880. In the overall context of Allen's report and all the historical evidence we have reviewed, it is obvious that Lucky Man and his followers were more concerned about hunting buffalo in 1880 than turning their minds to selecting a specific reserve site. This conclusion is reinforced by Indian Commissioner Edgar Dewdney's comment in February 1881 when he referred to Lucky Man and certain other bands as "the wildest of our Plains Indians [who] have remained out as long as there was any chance of getting Buffalo."¹⁶³

In short, there is no evidence before the Commission of any common understanding regarding a specific parcel of land between Canada and the Band in 1880. As a result, we cannot conclude that Canada owed a lawful obligation to unilaterally set apart a reserve for Lucky Man that year, nor do we judge Canada's failure to do so to be manifestly unfair in the circumstances.

Events of 1882

We find that, with the exception of the proposed reserve location in the Fort Walsh area – and the additional complications that this location created – the circumstances of the 1882 "consultation" were very similar to those in 1880. The bands of Lucky Man and other Chiefs arrived at Fort Walsh after an unsuccessful hunt, and, with the onset of cold weather and lacking food and warm clothing, they were suffering from exposure and starvation. Piapot returned from the north with complaints about the "reception" that he and his people had received there, and he "received the sympathy of the other chiefs who were in no manner anxious to go northward."¹⁶⁴ While negotiating with the bands "in view of moving these Indians northward," Canada issued

¹⁶² Edwin Allen, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880" (ICC Documents, p. 26). Emphasis added.

¹⁶³ Edgar Dewdney, Indian Commissioner, to T.P. Wadsworth, Inspector of Indian Agencies, February 21, 1881, NA, RG 10, vol. 3726, file 27335 (ICC Documents, p. 48).

¹⁶⁴ A.G. Irvine, Commissioner, NWMP, to Minister of the Interior, January 1, 1883, Canada, Parliament, *Sessional Papers*, 1883, No. 23, "Annual Report of the Department of the Interior for the Year 1882," Part III, North-West Mounted Police Force (ICC Documents, p. 167).

rations "sparingly" to encourage compliance.¹⁶⁵ Under pressure to select and move onto northern reserves, Lucky Man and Nekaneeet instead requested reserves at Big Lake about 30 miles east of Fort Walsh. More tellingly, perhaps, they sought their annuity payments so that they could undertake their winter buffalo hunt.¹⁶⁶

Canada again argued that Lucky Man had no sincere intention to settle or select a reserve in 1882, and merely indicated Big Lake as a reserve location to obtain annuities and other provisions. Counsel submitted that, in these circumstances, Canada was not obliged to set apart a reserve since the Band was still not prepared to give up its traditional lifestyle and choose a site. In response to this submission, counsel for Lucky Man replied:

But Mr. Wex says, he says, well that wasn't genuine, they only did it because they were desperate and they wanted rations. Well this doesn't, in my submission, Mr. Commissioner, mean that it wasn't a choice that they made. If you make a choice because you're desperate it's still a genuine choice. And Indians throughout the history of our country have had to make those choices because they were desperate, it was the only choice open to them. And it doesn't lie in the mouth of the Crown 100 years later to say, well you only made that choice, you only chose Big Lake because you were desperate. I submit, with respect to Mr. Wex, that that's not an answer to the selection of Big Lake by Lucky Man in 1882.¹⁶⁷

In our view, the question that the Commission must properly decide is *not* whether the Band requested a reserve, or whether the Band intended to select a reserve or conversely intended to continue hunting buffalo. The real question is whether the parties agreed on the land to be set apart for the Band. We do not see in the events of 1882 any evidence that Canada and Lucky Man reached any such agreement, either expressly or implicitly. In this context, we cannot conclude that Canada was under a lawful obligation to set apart a reserve for the Band in 1882.

The First Nation argued that the reason a site was not selected in 1882 was that the parties reached an impasse because Canada was not willing to set apart a reserve at Big Lake as requested by the Band. Canada contended that there were good reasons for its refusal:

165 A.G. Irvine, Commissioner, NWMP, to Minister of the Interior, January 1, 1883, Canada, Parliament, *Sessional Papers*, 1883, No. 23, "Annual Report of the Department of the Interior for the Year 1882," Part III, North-West Mounted Police Force (ICC Documents, p. 167).

166 A.G. Irvine, Commissioner, NWMP, to Minister of the Interior, January 1, 1883, Canada, Parliament, *Sessional Papers*, 1883, No. 23, "Annual Report of the Department of the Interior for the Year 1882," Part III, North-West Mounted Police Force (ICC Documents, p. 167).

167 ICC Transcript, December 3, 1996, pp. 260-61 (Thomas Berger).

- Lucky Man and the other Treaty 6 Indians who had regularly congregated in the Fort Walsh area in the late 1870s and early 1880s had already been advised by 1882 that they would have to go north to receive their treaty land and future annuities, so they knew that selecting reserve lands near Fort Walsh would not be acceptable to Canada.¹⁶⁸
- Big Lake is located within the geographical area described in Treaty 4, whereas Lucky Man – described by Dewdney as “anxious to be in Treaty 6”¹⁶⁹ – had adhered to the later treaty. As Deputy Superintendent General Lawrence Vankoughnet instructed Dewdney:

The removal of Indians from within the limits of a treaty to which they were parties to another treaty in which they have no interest is, as you are aware, considered very objectionable by the Department.

Complications which it is most desirable to avoid are almost certain to arise at some time or another unless the status of the Bands included within the various treaties is carefully preserved. . . .¹⁷⁰

Counsel for Canada noted that one such “complication” was the difference in the benefits provided under the various treaties.¹⁷¹

- The soil and climatic conditions in the Fort Walsh area were not considered to be conducive to agriculture and settlement.¹⁷²
- As the buffalo became more scarce and the Indians were forced to travel farther afield – particularly into the United States – to sustain themselves, heightened tensions among settlers and Indians on both sides of the border and the interest in maintaining international relations led to Canada discouraging Indians from remaining in locations near the boundary.¹⁷³

The First Nation did not suggest that Canada’s policies in 1882 were misstated by counsel for Canada in this inquiry, but counsel for Lucky Man countered that the Commission must look to the terms of Treaty 6, and not Canada’s policy, to determine Canada’s outstanding lawful obligations to the First Nation. Therefore, Canada’s relations with the United States, and Lucky Man’s own knowledge that a reserve in the Cypress Hills would be unaccept-

168 ICC Transcript, December 3, 1996, p. 197 (Richard Wex).

169 Edgar Dewdney, Indian Commissioner, to T.P. Wadsworth, Inspector of Indian Agencies, February 21, 1881, NA, RG 10, vol. 3726, file 27335 (ICC Documents, p. 47).

170 Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Edgar Dewdney, Indian Commissioner, May 11, 1882, NA, RG 10, vol. 3744, file 29056-3 (ICC Documents, pp. 122-23).

171 ICC Transcript, December 3, 1996, p. 198 (Richard Wex).

172 ICC Transcript, December 3, 1996, pp. 151 and 199-200 (Richard Wex).

173 ICC Transcript, December 3, 1996, pp. 151-52 and 196 (Richard Wex).

able to Canada, were irrelevant considerations.¹⁷⁴ Counsel also noted that Treaty 6 did not limit where reserves for bands adhering to that treaty were to be located, whereas, by way of comparison, the Indian signatories to the treaty surrendered their claims to *all* lands, not only within the Treaty 6 area but also throughout Canada.¹⁷⁵ Counsel further implied that Lucky Man should have been able to claim a reserve within the Treaty 4 area since the Band had adhered to Treaty 6 at Fort Walsh and had been paid there from 1879 to 1882.¹⁷⁶ Finally, the First Nation argued that, if the soil conditions in and around the Cypress Hills were unsuitable, then Canada should have set apart a reserve elsewhere in a locality where the soil *was* suitable.¹⁷⁷

As we stated earlier in our analysis, selecting a location for Lucky Man's reserve was not a decision that either Canada or the Band could make on its own. Even if the Band *was* sincere in its desire to locate at Big Lake – and, based on the evidence, we are not persuaded that it was – it is at least arguable that Canada could disagree with the Band's choice of land in that area if it had good reasons for doing so, just as it would have been open to the Band to refuse to accept a reserve unilaterally selected by Canada in a location considered unsuitable by the Band.

Although the First Nation condemned the reasons advanced by Canada for refusing in the early 1880s to permit Lucky Man and other bands to settle near Fort Walsh, we note that even counsel for the First Nation was prepared to concede that Canada was earnest in its efforts to have Lucky Man settle down.¹⁷⁸ At that early date there likely were any number of potential reserve locations that would have been well-suited to the Band's needs and desires – if the Band had been interested in identifying a reserve. *We find that the Band was simply not ready to do so in 1882.* This is not intended as a condemnation of the Band's motives and intentions, although they were clearly contrary to Canada's wishes and frustrated many of the officials who were called upon to deal with the Band. In fact, the Commission must admire the independence of spirit and the fierce determination with which the Band sought to retain its traditional way of life. Nevertheless, as long as the Band was unwilling to select a specific reserve, we must conclude that Canada was not lawfully obliged to do so unilaterally, and that failing to do so was not manifestly unfair in the circumstances.

174 Submissions on Behalf of the Lucky Man Cree Nation, November 26, 1996, pp. 29-33.

175 Submissions on Behalf of the Lucky Man Cree Nation, November 26, 1996, pp. 31-32.

176 Submissions on Behalf of the Lucky Man Cree Nation, November 26, 1996, p. 32.

177 Submissions on Behalf of the Lucky Man Cree Nation, November 26, 1996, p. 32.

178 ICC Transcript, December 3, 1996, pp. 262-63 (Thomas Berger).

Relocation to Battleford in 1883

Despite Lucky Man's reluctance to move north to the Battleford area and give up his nomadic way of life, the record shows that the Band *had* left for the Battleford area by July 2, 1883, with the few who ventured to return to the Cypress Hills being returned north under police escort.¹⁷⁹ The First Nation relied on the notation in the Department's year-end Annual Report for 1883 as evidence that Lucky Man's people "may be considered as virtually settled, as they are being kept working in neighbourhood of Battleford prior to moving to Reserve, being adjacent."¹⁸⁰ In addition to this reference to the Band being "virtually settled," counsel for the First Nation relied on two other facts to show that the Band must have settled in 1883. First, Dewdney advised Assistant Indian Commissioner E.T. Galt on March 5, 1883, of his intention to number all reserves in Manitoba and the North-West Territories, and in fact the number "117" was assigned to Lucky Man,¹⁸¹ although no formal reserve had yet been surveyed for the Band. Second, Lucky Man's 1884 paylist demonstrates that 82 people were paid with the Band "at Reserve."¹⁸²

However, the evidence also shows that in 1883 – contended by the First Nation to be the year in which the Band settled down – Lucky Man's people were paid at *Battleford*¹⁸³ and *not* on a reserve. Indian Agent Rae's 1884 report indicates that the members of both the Lucky Man and Little Pine Bands "were kept close to Battleford" during the fall and winter of 1883 and did not move off to reserves until the spring of 1884. We have also had regard for the fact that there is no evidence of an Indian Reserve 117 being set apart for Lucky Man, and indeed that number was eventually reassigned to the Witchekan Lake Band. More to the point, however, although Lucky Man and his people may have been leaning towards selecting a reserve in the Battleford area in 1883, we see nothing in the events of that year to suggest that Canada and the Band reached any sort of agreement on a specific parcel of land to be surveyed and set apart as the Band's reserve. For this reason, we cannot conclude that Canada was lawfully obliged to set apart a reserve for the Band in 1883, or that failing to do so was manifestly unfair in the circumstances. Even if we had concluded that "settling down" *was* a condi-

179 Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, October 2, 1883, Canada, Parliament, *Sessional Papers*, 1884, No. 4, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1883" (ICC Documents, p. 186).

180 Canada, Parliament, *Sessional Papers*, 1884, No. 4, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1883" (ICC Documents, p. 190).

181 ICC Transcript, December 3, 1996, p. 72 (Thomas Berger).

182 Lucky Man Band Paylists, 1879-1955 (ICC Exhibit 2).

183 Lucky Man Band Paylists, 1879-1955 (ICC Exhibit 2).

tion precedent to setting apart a reserve, we still cannot conclude on the evidence before us that the Lucky Man Band had in fact settled in 1883.

Events of 1884

The evidence shows that, after spending the fall and winter of 1883 in the vicinity of Battleford, Lucky Man and his people moved off “towards their reserve near Poundmaker’s” in the spring of 1884.¹⁸⁴ It appears that, before reaching “their reserve,” the members of both bands stopped off at Poundmaker’s reserve, where they remained for a lengthy period of time until, with rations withheld as long as they failed to move, and finally driven by hunger, they agreed to go on to “their reserve.” Rae commented that “[m]ost of Lucky Man’s men joined Little Pine, who has always shown himself well inclined.”¹⁸⁵ Dewdney later commented in his annual report of November 25, 1884, that “[a] few of the Indians who came from the South the year before last, have not selected a reserve, notably those under Big Bear and Lucky Man.”¹⁸⁶ Dewdney also reported that Big Bear, despite repeated promises to go to a reserve, remained unsettled, and that Lucky Man’s followers had joined him.

We agree with Canada’s characterization of the situation when it contended that Lucky Man’s Band had split, with some members settling with Little Pine and others, including Lucky Man himself, rejoining Big Bear.¹⁸⁷ That faction of the Band in transit with Big Bear did not appear to have any desire or intention to select or settle on a reserve. With respect to the remainder of the Band which appears to have settled with Little Pine in 1884, the only evidence before us is Little Pine’s request to have the selection and survey of a reserve postponed.

In our view, although “settling down” does not constitute a condition precedent to setting apart a reserve, the fact that a band in a given case *has* settled down is a strong indication that the band has chosen the land that it would like to have set apart as its reserve. We find that, in this case, Canada responded in an appropriate and timely manner by having Nelson on hand in

184 J.M. Rae, Indian Agent, to Superintendent General of Indian Affairs, October 13, 1884, Canada, Parliament, *Sessional Papers*, 1885, No. 3, “Annual Report of the Department of Indian Affairs for the Year ended 31st December, 1884” (ICC Documents, p. 236).

185 J.M. Rae, Indian Agent, to Superintendent General of Indian Affairs, October 13, 1884, Canada, Parliament, *Sessional Papers*, 1885, No. 3, “Annual Report of the Department of Indian Affairs for the Year ended 31st December, 1884” (ICC Documents, p. 236).

186 Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, November 25, 1884, Canada, Parliament, *Sessional Papers*, 1885, No. 3, “Annual Report of the Department of Indian Affairs for the Year ended 31st December, 1884” (ICC Documents, p. 246).

187 ICC Transcript, December 3, 1996, p. 169 (Richard Wex).

1884 to survey a reserve for those members of the Little Pine and Lucky Man Bands who had decided to settle. However, in light of Little Pine's refusal to permit a survey to proceed, we do not see how it can be concluded that Canada was lawfully obliged to set apart a reserve for the Band in 1884, or that failing to do so was manifestly unfair in the circumstances.

The 1885 Rebellion and Its Aftermath

We have already described the turmoil associated with the rebellion of 1885 as well as the steps taken by Canada in the wake of the violence. There was no evidence adduced by either Canada or the Band to suggest that the parties even turned their minds to the question of selecting land to be set apart as a reserve for the Band in 1885.

Given the chaos and uncertainty spawned by these circumstances, we conclude that, even if Canada became obliged to proceed diligently to set apart a reserve for the Band after 1884, it was not reasonable to require or expect it to do so in 1885. The circumstances of 1885 were unusual and indeed unique, but, that being said, we do not find any manifest unfairness in the fact that a reserve was not set apart.

Survey of Indian Reserve 116 in 1887

The Commission has already addressed at length in this report, and in the reports of its other treaty land entitlement inquiries, its philosophy in relying, as a matter of general principle, on the date-of-first-survey approach to the calculation of treaty land entitlement. In the final analysis, we conclude that the approach is appropriate in this case and that the date of first survey for the Lucky Man Band was 1887 when Nelson surveyed IR 116.

We agree with Canada's statement that important objectives of the parties in entering into Treaty 6 were to facilitate the orderly settlement of the prairies, to minimize conflict between Indians and non-Indians, and to provide the Indians with a land base based on population.¹⁸⁸ We also agree with counsel for Lucky Man that the treaty provisions were transitional in nature and contemplated that some Indians would settle on reserves immediately and others would not.¹⁸⁹ We conclude that, in light of Treaty Commissioner Morris's promise that bands would not be held to their choice of land until the survey was performed, it would have been reasonable for the parties to anticipate that a band's entitlement would similarly not crystallize until the

¹⁸⁸ Submissions on Behalf of the Government of Canada, November 19, 1996, p. 42.

¹⁸⁹ ICC Transcript, December 3, 1996, pp. 65-66 (Thomas Berger).

survey took place. Finally, we also conclude that the terms of Treaty 6 contemplate a consensus between the parties on the question of reserve selection, rather than mere "consultation" in the limited sense proposed by the First Nation.

Canada argued that, when Nelson arrived in 1887 to survey in the Battleford area:

he found that the remaining members of both the Little Pine and Lucky Man Bands had settled together. He consequently surveyed the reserve for both bands. The reserve was set aside for *both* Lucky Man and Little Pine Bands by Order in Council P.C. 1151, dated May 17, 1889.¹⁹⁰

Nelson's survey plan of IR 116 specifically states that it was prepared "For the Bands of Chiefs 'Little Pine' & 'Lucky Man'" and that the land was surveyed in September 1887.¹⁹¹ We find, on the basis of this evidence, that Canada has established, at least on a *prima facie* basis, that IR 116 was surveyed for both the Little Pine and Lucky Man Bands in 1887.

Are the circumstances of this case so "unusual" that the application of the date-of-first-survey approach would result in manifest unfairness to the Lucky Man Cree Nation? It will be recalled that the First Nation argued that the circumstances *were* unusual because the Band was consulted in 1880 and 1882, and settled in 1883, but it was "placed on the reserve . . . set aside for the Little Pine Band" in 1887 and did not receive a reserve of its own until 1989.¹⁹² With respect to the events of 1887, counsel for the First Nation added:

Then [counsel for Canada] said that in 1887 both bands chose I.R. 116, he said they jointly agreed. He said finally there was a meeting of the minds. We don't know any of that. All we know is that after the rebellion they were there. And given all of these events, the failure to set aside the reserve, the rebellion and the aftermath, all we know is that they were there and treated as a continuing band, called "a subsidiary band" in one of the reports, maybe that's a reasonable way of describing it because they didn't have their own reserve, they were a subsidiary band living on another band's reserve.¹⁹³

190 Submissions on Behalf of the Government of Canada, November 19, 1996, p. 44.

191 Order in Council PC 1151, May 17, 1889 (ICC Documents, pp. 410-12).

192 Supplemental Submissions on Behalf of the Lucky Man Cree Nation, December 19, 1996, p. 6.

193 ICC Transcript, December 3, 1996, p. 270 (Thomas Berger).

We have already considered and rejected Lucky Man's argument based on the content of "consultation," and we disagree with the First Nation's contention that Canada's approach requires a band to settle before land will be set apart for it. The new concern raised by the First Nation is whether the survey of 1887 represented a true meeting of the minds, or alternatively whether the Band had settled on Little Pine's reserve merely because it believed it had no other options or it was forced to do so by the Crown.

We have already stated that the consultation process must ultimately result in some form of an agreement – whether *express* or *implied* – between Canada and a band regarding the reserve to be set aside for the band's use and benefit. In this case, we conclude that there was such a consensus or meeting of the minds in 1887.

In his year-end report, Nelson stated that "Mr. Gopsil and I examined the lands upon which the bands of 'Little Pine' and 'Lucky Man' have settled, and I decided to make the reserve five miles square as shown by the accompanying plan, marked (d), and proceeded with the survey."¹⁹⁴ Clearly, by 1887, the members of the Little Pine and Lucky Man Bands had already been settled for some three years. Whether Nelson *actually* discussed reserve selection with the Lucky Man Band, or simply surveyed land to reflect the settlement of the Little Pine and Lucky Man Bands as he found them, we do not know. However, unlike preceding years in which Big Bear, Little Pine, Lucky Man, and their people had continued their nomadic pursuit of the buffalo, it was obvious to Nelson in 1887 when he arrived to perform the survey that there were specific lands with which the Band had chosen to associate itself. As we stated previously, "settling down" does not constitute a condition precedent to setting apart a reserve, but the fact that the Band *had* settled down was a strong indication that it had chosen the land it wanted to have set apart as its reserve. In this way, the Band demonstrated through its actions that it was prepared to take these lands as its reserve, and it was on the basis of this understanding that Nelson conducted the survey.

It is perhaps more significant, however, that none of the evidence before the Commission suggests that the members of the Little Pine and Lucky Man Bands were dissatisfied with the lands surveyed for their joint use and benefit. We commented in the Kahkewistahaw report that a band might express its disapproval of lands surveyed for it by objecting to Canada's officers or sim-

¹⁹⁴ John C. Nelson, D.L.S., in charge Indian Reserve Surveys, to Superintendent General of Indian Affairs, Annual Report, December 30, 1887, Canada, Parliament, *Sessional Papers*, 1888, No. 15, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1887" (ICC Documents, pp. 374-75).

ply by refusing to live on or use the reserve as surveyed. Alternatively, band members might accept the reserve as set apart by the surveyor, either expressly by stating their approval or implicitly by residing on and using the reserve for their collective benefit.¹⁹⁵ In the present case, the evidence demonstrates that the Band continued to reside on and use IR 116 until the new reserve was set apart for its sole use and benefit in 1989. We also understand that, as the new reserve is entirely made up of grazing lands which the First Nation leases to third parties, members of the First Nation continue to reside on IR 116 to this day.

Was the Band forced to live on Little Pine's reserve, or did it believe that it had no other alternative? It is clear that inhabiting a reserve near Battleford did not represent the Band's preferred way of life. Those members of the Band who had tried to return to the Cypress Hills in 1883 were marched back to Battleford under the watchful eye of the North-West Mounted Police. These people were, first and foremost, buffalo hunters, and, while the pickings were admittedly slim at Fort Walsh, there appears to have been no opportunity at all to hunt buffalo at Battleford.

Later, in the wake of the 1885 rebellion, many bands – particularly those such as Lucky Man that Canada considered “disloyal” – had their annuities temporarily eliminated or reduced, and were restricted in their movements and activities. Clearly, circumstances had changed, and it was likely very difficult for a band to express its dissatisfaction with a reserve *after* the rebellion with the same sense of fiery independence or determination that it might have been prepared to demonstrate *before* the rebellion. Nevertheless, it is also clear that, in the two years preceding the rebellion, many members of the Lucky Man Band resisted settling down and continued to travel with Big Bear. After the rebellion, some chose to flee to the United States because of their fear of reprisals and their desire to retain their traditional lifestyle. Other Indians, such as the members of the Nekaneet Band, continued to defy the government by remaining in the Cypress Hills. In these desperate and tragic times, Lucky Man's people were forced to make difficult choices, and most chose to stay on IR 116.

We note the following passage from the First Nation's submissions with regard to the significance of IR 116:

¹⁹⁵ Indian Claims Commission, *Kabkewistahaw First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, November 1996), 68-69.

In 1896, when Lucky Man returned from the U.S., with a remnant of his followers, he was put in jail, and his *followers were returned to the Little Pine reserve*. They were treated as rebels there, and some of them fled again to the U.S. . . . This does not alter the fact that when they returned to Canada they were returned to I.R. #116, *the reserve on which they had formerly resided, and where the members of the Band had settled*. (In 1887 Nelson surveyed #116 and referred to the lands upon which Little Pine *have settled*. . . . As was noted earlier, such settlement had taken place in 1883.)¹⁹⁶

Although we disagree with the First Nation's contention that settlement on IR 116 had taken place by 1883, we nevertheless agree that IR 116 was where the Band had settled – and *remained* settled. It was not until 1887, however, that Canada and the Band agreed that this land would be surveyed and set apart for the use and benefit of the Band under Treaty 6.

The record before us is virtually devoid of references to the Lucky Man Band in 1886. Had there been no survey by Nelson in 1887, we might have questioned why there was no evidence of steps being taken by Canada to confirm the Band's choice of reserve lands by conducting a survey in 1886. Since there *was* a survey in 1887, however, we are prepared to find, based on our experience in these matters, that the delay from 1886 to 1887 was not significant. In addition, we conclude that the interval between the time of treaty in 1879 until the survey in 1887 was not, in the circumstances of this case, unusual. More importantly, we cannot say that the delay was entirely attributable to Canada, nor indeed that it resulted more from Canada's actions or failure to act than those of the Band. In fact, we are more inclined to conclude that the delays were primarily attributable to the Band's desire to maintain its traditional way of life and its reluctance to select and settle on a reserve.

Therefore, we are of the view that the application of the date-of-first-survey approach in the circumstances of this case would not result in manifest unfairness to the Lucky Man Cree Nation. We appreciate that, without the benefit of playlist analysis, it might appear unfair that the First Nation's treaty land entitlement should be calculated using its 1887 population of 62 as a starting point rather than the much higher populations of 754, 872, or 366 in 1880, 1882, and 1883, respectively.

However, as we noted in Part I of this report, counsel for Canada indicated that, if the Commission concluded that 1887 was the appropriate date of first survey, Canada is prepared to undertake further research, including

¹⁹⁶ Submissions on Behalf of the Lucky Man Cree Nation, November 26, 1996, p. 38.

paylist analysis, to determine the First Nation's actual date-of-first-survey population. In our view, such research, to be consistent with our findings in the Fort McKay, Kawacatoose, Lac La Ronge, and Kahkewistahaw inquiries, should take into account any new adherents to treaty and transfers from landless bands who may have joined Lucky Man after 1887 and who have not received treaty land entitlement with another band. Similarly, where the research discloses that individuals should not be considered to have been members of the Lucky Man Band in 1887, or that some individuals on the 1887 paylist have already been counted elsewhere for treaty land entitlement purposes, those individuals should be excluded from the First Nation's treaty land entitlement population numbers. If the principle stated in the Lac La Ronge inquiry that "every treaty Indian is entitled to be counted – once – for treaty land entitlement purposes"¹⁹⁷ is consistently applied, then the unfairness suggested by the First Nation should be eliminated. The large numbers of people claimed by Lucky Man in 1880, 1882, and 1883 may not all be counted in the First Nation's treaty land entitlement population, but they will be counted *somewhere*. Similarly, if some people on those three paylists were properly members of Lucky Man in 1887 but were not counted that year, then the 1887 paylist total can be adjusted by including appropriate absentees, arrears, new adherents to treaty, and transfers from landless bands, while excluding those who were members in 1887 but who nevertheless received their treaty land entitlement elsewhere.

In accordance with the issues as placed before us, we do not make any findings at this time on the issue of quantifying the First Nation's claim. Our cursory review of the 1887 paylist indicates that 62 people were paid with the Lucky Man Band that year, but we know that careful paylist analysis might result in that figure being adjusted either up or down. Since the First Nation has received sufficient land for 60 people; we recommend that the parties undertake the necessary research to determine the First Nation's date-of-first-survey population. If, in the course of such negotiations, the principles from our earlier reports are properly applied to the facts of this case, we believe that the entitlement calculation will yield the proper result for the First Nation. If the parties are unable to resolve the issue through further research and negotiation, it remains open to the First Nation to request another inquiry before the Commission to quantify its claim.

¹⁹⁷ Indian Claims Commission, *Lac La Ronge Indian Band Report on Treaty Land Entitlement* (Ottawa, March 1996), (1996) 5 ICCP 235 at 317.

PART V

CONCLUSIONS AND RECOMMENDATION

CONCLUSIONS

The Commission has been asked to inquire into and report on whether the Government of Canada properly rejected the specific claim submitted by the Lucky Man Cree Nation. To determine whether the claim is valid, we have been asked to consider only one issue:

What is the appropriate date for calculating the Lucky Man Cree Nation's population for treaty land entitlement purposes?

The Commission has concluded that, as a general principle, the most reasonable interpretation of Treaty 6 is that an Indian band's treaty land entitlement should be based on its date-of-first-survey population, unless there are unusual circumstances that would otherwise result in manifest unfairness.

The treaty provides that reserves are to be set apart after Canada has consulted with band members "as to the locality which may be found to be most suitable for them." The consultation contemplated by the treaty is more than the band simply indicating a general area in which it would like to have a reserve set apart; rather, Canada and the band must reach a "meeting of the minds" or consensus with regard to the specific lands to be set apart for the band's use and benefit. Canada's completion of a survey and the band's acceptance of the reserve provide conclusive evidence that both parties have agreed to treat the surveyed land as an Indian reserve for the purposes of the treaty.

In this case, we consider that the appropriate date for calculating the First Nation's treaty land entitlement population is the date of first survey of IR 116 in 1887. We do not consider that the necessary "meeting of the minds" or consensus on the selection of a specific reserve site was reached by Canada and the Band in 1880, 1882, or 1883, and for this reason we cannot con-

clude that Canada's failure to survey and set apart a reserve for the Band in any of those years was manifestly unfair.

"Settling down" is not a condition precedent to establishing a reserve. Nevertheless, a band may, by settling down, give a strong indication of the location in which it wants its reserve to be surveyed. Until members of the Lucky Man Band settled in 1884, they had given no specific indication of where they wanted their reserve to be located. That year, some members of the Lucky Man Band settled near Battleford in 1884 with the Little Pine Band, but, despite this indication that they had chosen a reserve site, surveyor John Nelson was asked by Little Pine to postpone the survey. We conclude that, in these circumstances, Canada was not lawfully obliged to unilaterally set apart a reserve for the Band that year. Similarly, given the turmoil of the 1885 rebellion and its aftermath, we do not consider the delay in surveying IR 116 until 1887 to have been manifestly unfair or even unreasonable.

Under the Settlement Agreement of 1989, the Lucky Man Cree Nation surrendered its interest in IR 116 in exchange for its current reserve. By agreeing to this settlement, the First Nation did not, however, agree that its treaty land entitlement should be based solely on its 1980 population of 60, nor did it forgo its right to seek additional compensation in lieu of additional treaty land.

Having concluded that there are no unusual circumstances giving rise to manifest unfairness in this case, we find no reason to depart from the general principle that the Lucky Man Cree Nation's treaty land entitlement should be based on the First Nation's population as of its 1887 date of first survey.

RECOMMENDATION

Having found that 1887 is the Lucky Man Cree Nation's date of first survey and forms the appropriate basis for calculating the First Nation's treaty land entitlement, we therefore recommend:

That the parties undertake further research and paylist analysis on the basis of an 1887 date of first survey with a view to establishing the First Nation's proper treaty land entitlement population.

FOR THE INDIAN CLAIMS COMMISSION



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



Carole T. Corcoran
Commissioner

Dated this 27th day of March 1997

APPENDIX A

LUCKY MAN CREE NATION TREATY LAND ENTITLEMENT INQUIRY

1 **Planning conference** Saskatoon, June 18, 1996

2 **Community session**

At the request of the Lucky Man Cree Nation, a community session was not held in relation to this inquiry.

3 **Legal argument** Saskatoon, December 3, 1996

4 **Content of formal record**

The formal record for the Lucky Man Cree Nation Treaty Land Entitlement Inquiry consists of the following materials:

- 8 exhibits tendered during the inquiry
- the documentary record (2 volumes of documents with annotated index)
- written submissions and supplementary written submissions of counsel for Canada and the claimant
- transcript of oral submissions (1 volume)

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

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE CLAIM OF THE MIKISEW CREE FIRST NATION

PANEL

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

COUNSEL

For the Mikisew Cree First Nation
Jerome Slavik

For the Government of Canada
François Daigle

To the Indian Claims Commission
Ron S. Maurice

MARCH 1997

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PART I

INTRODUCTION

In January 1993, the Mikisew Cree First Nation submitted a specific claim to the Minister for Indian Affairs and Northern Development,¹ seeking the provision of economic benefits under Treaty 8. The First Nation was informed in March 1994 that the Department of Indian Affairs and Northern Development (DIAND) had made a preliminary decision to reject the claim,² but neither party appeared to consider this decision to be final. More correspondence and meetings followed, and in mid-June 1995 DIAND indicated that it was willing to discuss the First Nation's claim under the Specific Claims Policy (subject to formal acceptance).³ In responding to later inquiries by the First Nation, Canada took the position that acceptance of the claim for negotiation was in abeyance until a policy review of economic benefits claims was completed.⁴

On February 23, 1996, in the absence of a clear decision from the Minister on whether the claim would be accepted for negotiation, the First Nation asked the Indian Claims Commission (the Commission) to conduct an

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- 1 Statement of Claim, Mikisew Cree First Nation, Re: Failure of the Crown in Right of Canada to Provide Collective Economic Benefits Pursuant to Treaty 8, January 1993 (ICC Documents, pp. 83-140). A Band Council Resolution dated December 9, 1992, had authorized the submission of the claim (ICC Documents, pp. 81-82). See also the covering letter, Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, to Manfred Klein, Specific Claims West, referring to an enclosed Band Council Resolution and the Statement of Claim, January 12, 1993 (ICC Documents, pp. 182-83). A subsequent letter requests an amendment to the Statement of Claim, such amendment acknowledging an annual allocation of ammunition to the Band: Jerome Slavik to Manfred Klein, January 22, 1993 (ICC Documents, p. 184).
 - 2 The writer of the letter had qualified the decision as a "preliminary" one; effectively he invited the First Nation to pursue the claim further by submitting more evidence or written argument. Allan Tallman, Specific Claims West, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers and Solicitors, March 29, 1994 (ICC Documents, pp. 193-94).
 - 3 Rem Westland, Director General, Specific Claims Branch, DIAND, to Chief Archie Waquan, June 12, 1995 (ICC Documents, pp. 412-13).
 - 4 Mike Bouliane, Specific Claims Branch, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers and Solicitors, February 7, 1996 (ICC Documents, p. 426).
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inquiry. The basis for the request was that the Department's conduct and delay were tantamount to a rejection of the claim.⁵

Canada's response, on learning of the request, was that the Commission had no authority to consider the matter, since the First Nation's specific claim had not actually been rejected.⁶ Each party submitted written arguments to the Commission. In mid-November 1996, Commission counsel advised the First Nation and Canada that a decision had been made to proceed with the inquiry requested by the First Nation.⁷ A planning conference had already been held in June 1996, and a community session was scheduled for late November 1996.⁸

On November 20, 1996, the Commission received word that Canada had accepted the claim for negotiation.⁹ Canada's formal offer to negotiate was dated December 16, 1996.¹⁰ A meeting between the parties was planned for February 3, 1997.¹¹

This report sets out the background to the First Nation's claim and is based entirely on the documents the First Nation provided to the Commission. In view of Canada's decision to accept the claim, no further steps have been taken by the Commission to inquire into the First Nation's claim, and we make no findings of fact. This report is meant simply to advise the public that the First Nation's claim has been accepted for negotiation under the Specific Claims Policy.

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- 5 Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, to the Indian Claims Commission, February 23, 1996 (ICC Documents, pp. 427-28).
 - 6 François Daigle, Counsel, Department of Justice, to Isa Gros-Louis Ahenakew, Associate Legal Counsel, Indian Claims Commission, June 12, 1996 (ICC Documents, pp. 464-74). The writer stated that "Canada does not agree or admit that the claim has been rejected. The claimant has been advised that the acceptance of the claim for negotiation has been postponed pending the results of a review of the issue from a policy perspective. The matter is still under review."
 - 7 Ron S. Maurice, Commission Counsel, Indian Claims Commission, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, and to François Daigle, Counsel, Specific Claims Ottawa, November 18, 1996. See Appendix A to this report.
 - 8 See Indian Claims Commission, Planning Conference, Mikisew Cree First Nation, Treaty Entitlement to Economic Benefits, Ottawa, June 14, 1996 (ICC Documents, p. 550).
 - 9 Facsimile Transmission Sheet, Mamawi Developments Ltd., Fort Chipewyan, Alta, to Indian Claims Commission, Ottawa, with attached letters: (1) Dawn Waquan, Coordinator/Researcher, Mikisew Cree First Nation, to Indian Claims Commission, November 19, 1996; and (2) John Sinclair, Assistant Deputy Minister, Claims and Indian Government, DIAND, to Chief Archie Waquan, Mikisew Cree First Nation, November 7, 1996.
 - 10 John Sinclair, Assistant Deputy Minister, DIAND, to Chief Archie Waquan, Mikisew Cree First Nation, December 16, 1996 (Appendix B).
 - 11 Ian Gray, Senior Negotiator, Specific Claims Branch, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, January 17, 1997.

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission was established in 1991 to assist First Nations and Canada in the negotiation and fair resolution of specific claims. Order in Council PC 1992-1730 empowers the Commission to inquire into and report on whether or not Canada properly rejected a specific claim:

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

- a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
- b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.¹²

If the Commission had completed the inquiry into the Mikisew Cree First Nation's claim, the Commissioners would have evaluated that claim based upon Canada's Specific Claims Policy. DIAND has explained that policy in a booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.¹³ In particular, the government says that when considering specific claims:

[I]t will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.

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

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

...

THE CLAIMS PROCESS

As outlined in *Outstanding Business*, a First Nation may submit its specific claim to the Minister of Indian Affairs, who acts on behalf of the Government of Canada. The claimant First Nation begins the process by submitting a clear

12 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 21, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

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

and concise statement of claim, along with a comprehensive historical and factual background on which the claim is based. The claim is referred to DIAND's Specific Claims Branch (formerly Office of Native Claims). Specific Claims generally conducts its own confirming research into a claim, makes claim-related research findings in its possession available to the claimants, and consults with them at each stage of the review process.

Once all the necessary information has been gathered, the facts and documents will be referred by Specific Claims to the Department of Justice (Justice) for advice on the federal government's lawful obligation. Generally, if Justice finds that the claim discloses an outstanding lawful obligation, the First Nation is advised, and Specific Claims will offer to enter into compensation negotiations.

The present claim was first submitted to the Minister in January 1993. Three years later, the First Nation had not received any definite answer whether its claim would be accepted for negotiation. In February 1996, the First Nation asked the Commission to conduct an inquiry into the merits of the claim, based on the argument that DIAND's delay was sufficient to bring the claim within the Commission's authority.

PART II

HISTORICAL BACKGROUND

BACKGROUND TO THE FIRST NATION'S CLAIM

The Mikisew Cree First Nation is located in northeastern Alberta and was previously known as the Fort Chipewyan Cree Band. Most of the First Nation's 1874 members live off reserve in Fort Chipewyan. The First Nation's reserve lands were not set aside for it until the late 1980s.¹⁴

The First Nation's representatives signed Treaty 8 in 1899. The treaty included the following obligations which were undertaken by Canada:

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves . . . and for such families or individual Indians as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty . . . the selection of such reserves, and lands in severalty . . . to be made . . . after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.

FURTHER, Her Majesty agrees to supply each Chief of a Band that selects a reserve, for the use of that Band, ten axes, five hand-saws, five augers, one grindstone, and the necessary files and whetstones.

FURTHER, Her Majesty agrees that each Band that elects to take a reserve and cultivate the soil, shall, as soon as convenient after such reserve is set aside and settled upon, and the Band has signified its choice and is prepared to break up the soil, receive two hoes, one spade, one scythe and two hay forks for every family so settled, and for every three families one plough and one harrow, and to the Chief, for the use of his Band, two horses or a yoke of oxen, and for each Band potatoes, barley, oats and wheat . . . and to every family one cow, and every Chief one bull, and one mowing-machine and one reaper for the use of his Band when it is ready for them; for such families as prefer to raise stock instead of cultivating the soil, every family of five persons, two cows, and every Chief two bulls and two mowing-machines when ready

¹⁴ Statement of Claim, paragraph 2 (ICC Documents, p. 84); A. Tallman (Specific Claims West), "Mikisew Cree First Nation, Collective Economic Benefits Pursuant to Treaty No. 8 – Preliminary Analysis," October 20, 1993 (ICC Documents, p. 144).

for their use, and a like proportion for smaller or larger families. The aforesaid articles, machines and cattle to be given one for all for the encouragement of agriculture and stock raising; and for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing.¹⁵

The last of these clauses sometimes is referred to as a “cows and ploughs” entitlement.

The Report of Commissioners for Treaty No. 8 seems to indicate that the Commissioners understood that it was unlikely that any of the Bands would make immediate requests for reserve lands, or for the related economic benefits:

The assistance in farming and ranching is only to be given when the Indians actually take to these pursuits, and it is not likely that for many years there will be a call for any considerable expenditure under these heads. . . .

The Indians are given the option of taking reserves or land in severalty. . . . [A]s 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. . . .¹⁶

In 1922 the First Nation asked for reserve lands to be set aside. The Indian Agent responsible for the Band commented on the request:

To protect their interests, as guaranteed by treaty, both [the Chipewyan and the Cree of Fort Chipewyan Bands] asked for a reserve, not for farming, as they had no wish to farm, nor is the land suited for that purpose, but for hunting and trapping. To make the matter definite, I requested both bands to apply for a reservation, naming the area selected. This application has been received and is herewith attached.¹⁷

Reports for that year, and the next, indicate that both Bands wanted reserve lands to be set aside. Five years later, the Agent's Report indicates that no

15 *Treaty No. 8*, IAND Publication No. OS-0576-000-EE-A-16, Appendix I to the First Nation's Statement of Claim (ICC Documents, pp. 99-100).

16 Report of Commissioners for Treaty No. 8, Appendix I to the First Nation's Statement of Claim (ICC Documents, p. 94).

17 This statement is contained in the April 1995 report prepared by Specific Claims West: “Economic Benefits and Treaty No. 8 Bands in Alberta 1899-1940, The Crees of Fort Chipewyan (Mikisew)” (ICC Documents, p. 306). The statement is attributed to G. Card, reporting to the Assistant Deputy and Secretary of the Department of Indian Affairs, August 15, 1922, National Archives of Canada [hereinafter NA], RG 10, vol. 6921, file 770/28-3 pt 2).

reserve lands had been set aside for either and notes that the Fort Chipewyan Cree were no longer interested in the establishment of reserve lands.¹⁸

In 1986, Canada and the Cree Band of Fort Chipewyan came to an agreement dealing with the Band's reserve land entitlement under Treaty 8.¹⁹ The preamble to the Agreement states that the Crown's undertakings in Treaty 8 included the obligation to "lay aside reserves for such bands as desire reserves. . . which may be found suitable and open for selection" and that the Crown "ha[d] not fulfilled her obligations to the Cree Band in accordance with the aforementioned undertaking."²⁰ Since these obligations had not been met, Canada agreed to set aside reserve land (including land within the boundaries of Wood Buffalo National Park), to guarantee certain wildlife harvesting rights to the First Nation, to authorize and pay the costs of every boundary survey required for the Agreement, and to pay cash compensation in the amount of \$24 million.

The 1986 Agreement also contains a clause releasing the Crown from any further obligations arising out of the clause in Treaty 8 which obliged the Crown "to lay aside reserves for such bands as desire reserves . . . [or] to provide land in severalty. . . ." The release states:

It is understood by the Parties that this Agreement and in particular the covenants contained herein are for total satisfaction of all obligations of Her Majesty relating to land contained in the aforementioned part of the said Treaty²¹ and all manner of costs, legal fees, travel and expenses expended by the said Band or its representatives for the purpose of coming to this Agreement.²²

There was no mention in the release clause of Canada's obligations to provide the agricultural (economic) benefits contemplated by Treaty 8, and the release clause did not refer to any claims which the First Nation might bring other than in relation to land.

18 These statements are contained in the April 1995 report prepared by Specific Claims West, "Economic Benefits and Treaty No. 8 Bands in Alberta 1899-1940, The Crees of Fort Chipewyan (Mikisew)" (ICC Documents, pp. 306-07). A corroborating source for the fiscal year 1922-23 is the Annuity Payment Officer's Report, August 11, 1922, NA, RG 10, vol. 6921, file 779/28-3 pt 2. For the fiscal year 1923-24, the source is a report from Const. R.A. Williams to Fitzgerald, Officer Commanding the Royal Canadian Mounted Police, August 6, 1923, NA, RG 10, vol. 6921, file 779/28-3 pt 2. For the fiscal year 1927-28, the source is the Agent's Report on Annuity Payments, 1927, NA, RG 10, vol. 6921, file 779/28-3 pt 2.

19 Agreement, between Her Majesty the Queen in Right of Canada and the Cree Band of Fort Chipewyan, December 23, 1986.

20 Agreement, December 23, 1986, pp. 1-2.

21 That part of Treaty 8 dealt only with the setting aside of reserve lands for a band, the provision of land in severalty to individual families or band members, and the manner of selection of such lands. See clause 11 of the 1986 Agreement.

22 Agreement, December 23, 1986, clause 11.

First Nation's Statement of Claim

The Statement of Claim²³ refers to more than 60 years of “persistent efforts and requests” by the First Nation to have reserve lands set aside. Even though they were requested, the Treaty 8 “collective economic benefits” were not paid or delivered to the First Nation, since no reserve lands were set aside before the 1986 Agreement. The claimant says that the Band has no record of ever receiving the economic benefits that were promised, except for an annual allocation of ammunition.²⁴ No elder or band member has any recollection of those other benefits having been received by the First Nation.²⁵

The First Nation submitted that since the Minister is in the position of a fiduciary, the Minister must demonstrate that the economic benefits the First Nation is claiming were actually paid or delivered to the Band. The claimant says that the 1986 Agreement dealt with compensation only for the First Nation's loss of the use and benefit of reserve lands. It pointed out that Canada settled the economic benefits claims of the Woodland Cree and Lubicon Lake Bands for \$25,000 per band member, but, since the Mikisew First Nation was an original party to Treaty 8, rather than a band adhering to the treaty sometime after 1889 (as did the Woodland Cree and Lubicon Lake Bands), its grievance has a comparatively longer history.²⁶

The Statement of Claim seeks the prompt recognition and fulfilment of the First Nation's specific claim, namely – compensation for the First Nation's loss of the use of, and benefit from, Treaty 8's economic benefits, and argues that the Crown should now provide these collective economic benefits to the Mikisew Cree First Nation “in a contemporary manner and form acceptable to [the] First Nation.”²⁷

In a sworn statement, Chief Archie Waquan, of the Mikisew Cree First Nation, says that “[t]he first time I was apprised of our First Nation's entitlement to certain economic benefits under the terms of *Treaty 8*, including the ‘ploughs and cows’ provisions, was in 1991” and that “[t]o the best of my knowledge or recollection such benefits have never been provided to the Mikisew Cree First Nation.”²⁸

23 Statement of Claim, January 1993 (ICC Documents, pp. 83-140), incorporating the amendment requested January 22, 1993 (ICC Documents, p. 184).

24 Statement of Claim, as amended by the January 22, 1993, letter from Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, to Manfred Klein, Specific Claims West (ICC Documents, p. 184).

25 Statement of Claim, paragraph 4 (ICC Documents, p. 85).

26 Statement of Claim, paragraph 7 (ICC Documents, p. 86).

27 Statement of Claim, paragraph 13 (ICC Documents, p. 88).

28 Paragraphs 8 and 10 of the Statutory Declaration of Archie Waquan, dated February 21, 1995 (ICC Documents, pp. 271-72).

The 1995 Specific Claims West Report

The report prepared by Specific Claims West for the Mikisew claim includes the following observations and conclusions:

As this reference [in the Report of Commissioners for Treaty No. 8] makes clear, the government never contemplated a blanket distribution of agriculturally-related economic benefits to Treaty No. 8 bands. Instead, it planned to provide such economic benefits only when the individual bands satisfied the conditions of the Treaty for the receipt of such benefits.

... extant correspondence and other records leave little doubt that for the most [part] Chiefs and headmen spoke frankly with visiting representatives of the Department about bands' needs and wants and that those representatives typically facilitated most specific band requests. The main exception to this accommodation involved requests for farm equipment and livestock from bands judged to be inadequately prepared to undertake agriculture on a full-time basis.

... The economic situation of the Crees of Fort Chipewyan was [that] they had always found their livelihood in the hunting, fishing and trapping resources of the surrounding area. . . . the Crees had requested a reserve in 1922 because they feared losing access to traditional resources and not because they had any interest in farming. There are few records documenting economic benefits asked for and received by this Band and only one deals with farm-related goods or services. Instead, the surviving records emphasize the receipt of ammunition and fishing twine into the 1940s.²⁹

COMMUNICATIONS BETWEEN THE PARTIES

Approximately three years elapsed from the time the First Nation submitted the initial economic benefits claim to the Minister of Indian Affairs to when it was determined that the Commission would hold an inquiry. During this period, Canada and the First Nation had an exchange of correspondence.

The First Nation's first Statement of Claim is dated January 1993. Late in October 1993, the First Nation received a summary of the claim from Specific Claims West.³⁰ After Specific Claims West received the First Nation's response to the summary, the claim was referred to Justice for an opinion whether there was "a lawful obligation under the Specific Claims Policy."

29 Specific Claims West, "Economic Benefits and Treaty No. 8 Bands in Alberta, 1899-1940, April 1995" (ICC Documents, pp. 282, 285, 304).

30 Allan Tallman, Assistant Negotiator, Specific Claims West, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, October 20, 1993, and accompanying document, "for discussion purposes only," "Mikisew Cree First Nation, Collective Economic Benefits Pursuant to Treaty No. 8 - Preliminary Analysis, October 20, 1993" (ICC Documents, pp. 141-92).

Justice's opinion became known at the end of March 1994: the claim had not established an outstanding lawful obligation on the part of Canada to the First Nation, since the nonfulfilment of a treaty or agreement between the First Nation and the Crown had not been shown.³¹ Canada's position was that the Treaty 8 economic benefits could only be claimed once a band had made an election for reserve lands and chosen between agriculture and stock-raising. No reserve lands had been set aside until after the 1986 Agreement,³² and there was no evidence of an election by the Band between agriculture and stock-raising. However, since this was Canada's "preliminary" position, the Band was invited to submit additional evidence or argument.

In April 1994, counsel for the First Nation rejected Canada's preliminary position and requested a meeting.³³ It appears that the parties then met for discussions in Fort McMurray on June 15, 1994. Chief Archie Waquan later set out the Mikisew position in writing and requested another meeting with Specific Claims West to clear away any remaining "impediments" to the claim. Chief Waquan said he did not think that any further archival research into the First Nation's receipt of agricultural economic benefits would be necessary, since the setting aside of reserve lands, which had to happen before an election for agricultural benefits, had not taken place until after the 1986 Agreement.³⁴

Correspondence on November 9, 1994, refers to a research report commissioned by Specific Claims West to determine the extent to which Treaty 8 bands were provided with economic benefits.³⁵ The draft of this report, entitled "Economic Benefits and Treaty No. 8 Bands in Alberta, 1899-1940,"

31 Allan Tallman, Specific Claims West, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, March 29, 1994 (ICC Documents, pp. 193-94).

32 See 1986 Agreement.

33 Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, to A. Tallman, Specific Claims West, DIAND, April 11, 1994 (ICC Documents, pp. 195-96).

34 Chief Archie Waquan, Mikisew Cree First Nation, to Manfred Klein, Specific Claims West, DIAND, July 25, 1994 (ICC Documents, pp. 197-99, especially paragraph 9 at p. 199).

35 Allan Tallman, Negotiator, Specific Claims West, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, November 9, 1994. As well, Specific Claims West wrote to the Executive Director of the Athabasca Tribal Corporation on December 8, 1994, advising that research on the fulfilment of the economic benefits provisions of Treaty 8 was "currently well underway" and that the Tribal Corporation would be contacted once the research paper had been reviewed by Specific Claims West. Manfred P. Klein, Director, Specific Claims West, DIAND, to Tony Punko, Executive Director, Athabasca Tribal Corporation, December 8, 1994 (ICC Documents, pp. 208-09).

appears to have been circulated late in January 1995.³⁶ Two letters explained why Specific Claims West had taken the position that the research was necessary:

The research will focus on determining whether there is evidence that individual bands made a request for particular economic benefits and evidence that any economic benefits were delivered.³⁷

The research is required because we want to deal definitively with the issue and not have it drag on for years to come to the detriment of the First Nation and we want to ensure that we have a well documented file when it is submitted to the Department of Justice for review and analysis.³⁸

Late in January 1995 the Director General of the Specific Claims Branch of DIAND wrote to the Director of Specific Claims West setting out the approach of the Branch to economic benefits under treaty:

One of the responsibilities of this branch is to assure that the [Specific Claims] Policy is not used inappropriately. For example this Policy is not intended to be a source of funding for economic development, though a First Nation may well want to direct compensation for a claim towards investments which will improve the economic development opportunities of its members.

... In the case of claims for economic benefits under treaty... [w]e would require a demonstration that the benefits promised by treaty were requested by a First Nation at some point in history, and that the response(s) by Canada were of a kind which created an outstanding lawful obligation as may be assessed by DOJ [Department of Justice] under the criteria of the Policy.

If the record shows that such benefits were never requested, and that what we are facing is a first time request, DOJ will still assess in the usual way whether a lawful obligation under the Policy exists. The branch would not view such a claim as a high priority for the assignment of scarce time and resources, however.

In either case I would expect DOJ and ourselves, to assess the extent to which Canada's support to the claimant First Nation(s) over time has effectively met the objective of the treaty provision(s). If the treaties promise implements to assist the

36 B. Potyondi and T.M. Homik, "Economic Benefits and Treaty No. 8 Bands in Alberta, 1899-1940," draft report prepared for Specific Claims West, January 9, 1995 (ICC Documents, pp. 214-66). The ICC Documents include a January 30, 1995, "without prejudice" covering letter from DIAND, with neither the addressee nor the sender indicated, but apparently meant to accompany copies of the draft version of the research report. The letter specifies that, unlike the draft report, "[a] final report would contain statements which... have been confirmed in the historical record..." The writer limits the purpose of the report to the "provi[sion of]background information to the issue of the distribution of economic benefits to the First Nations which signed Treaty 8 in Alberta" (ICC Documents, p. 267).

37 Allan Tallman, Negotiator, Specific Claims West, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, November 9, 1994 (ICC Documents, pp. 200-01).

38 Manfred P. Klein, Director, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, November 25, 1994 (ICC Documents, p. 202).

transition to farming, for example, I think the record will show in most cases that Canada's support far exceeded a strict one-time provision of "cows and ploughs."³⁹

The Director of Specific Claims West was authorized to share this letter with any interested First Nations representatives.⁴⁰

In April 1995 a version of the January 1995 report was prepared by Specific Claims West for the Mikisew Cree First Nation with the title "Economic Benefits and Treaty No. 8 Bands in Alberta, 1899-1940: The Crees of Fort Chipewyan (Mikisew)." It seemed to confirm that the First Nation had not received any agricultural tools/implements, livestock, or seed under Treaty 8.⁴¹

Early in May 1995, the First Nation's Chief asked for a decision on the negotiation of the First Nation's claim for economic benefits.⁴² The response from DIAND was equivocal. That letter, dated June 12, 1995, and marked "without prejudice," included the following:

It is our view that there may be an obligation under Treaty 8 to provide the articles as specified in Treaty 8 to the MCFN [Mikisew Cree First Nation]. We further believe that the obligation is limited to the actual items mentioned in the treaty and to the number of families actually settled on the reserve.

As discussed . . . there are . . . two options available to the First Nation. The First Nation may pursue the specific claims process or can await the outcome of (and/or participate in) the developing Indian-Government process to determine how treaties should be understood and implemented in contemporary terms.

Subject to your agreement to proceed and a formal letter accepting your claim from DIAND's Assistant Deputy Minister of Claims and Indian Government, the Specific Claims Branch is prepared to enter into discussions concerning the First Nation's claim within the parameters of the Specific Claims Policy and DIAND's legal position. DIAND would view entering into discussion as part of unfinished business arising from the First Nation's 1986 treaty land entitlement settlement.

DIAND anticipates that any settlement reached under the Specific Claims Policy will bear a direct relationship to the actual benefits specified in the treaty. This approach is in accord with the legal position that the department has received with respect to the interpretation of the treaty positions.

39 Rem Westland, Director General, Specific Claims Branch, DIAND, to Manfred Klein, Director, Specific Claims West, January 27, 1995 (ICC Documents, pp. 210-13).

40 Rem Westland, Director General, Specific Claims Branch, DIAND, to Manfred Klein, Director, Specific Claims West, DIAND, January 27, 1995 (ICC Documents, pp. 210-13).

41 "Economic Benefits and Treaty No. 8 Bands in Alberta, 1899-1940: The Crees of Fort Chipewyan (Mikisew)," April 1995 (ICC Documents, pp. 273-401).

42 Chief Archie Waquan, Mikisew Cree First Nation, to Rem Westland, DIAND, May 5, 1995 (ICC Documents, p. 402).

To reiterate, your alternative is to participate in the planned treaty policy development process and to help determine in that context how economic benefit provisions of treaties might be assessed on a contemporary basis. If your expectation exceeds what could be provided under a specific claim (in return for a full release), it may be more appropriate for your First Nation to await the outcome of the treaties review process.⁴³

The parties met on July 25, 1995, to discuss the claim. DIAND again stated its offer to negotiate the claim, still subject to the conditions set out in the June 12, 1995, letter. The Band was asked to confirm that its members wished to proceed under the specific claims process and was told that an "acceptance package" would then be prepared. DIAND stated that any settlement "[would] have to bear a direct relationship to the actual benefits specified in the Treaty" and therefore would not follow the approach taken to value the economic benefits in other bands' treaty land entitlement settlements.⁴⁴

In August 1995 the First Nation gave written confirmation that it wished to negotiate settlement of the claim "pursuant to the economic benefits provisions of Treaty 8, as set out in our Statement of Claim."⁴⁵ Correspondence over the next six months included a December 1995 letter from the First Nation asking what the status was of the promised acceptance package, a January 1996 letter from the First Nation requesting a meeting to obtain a "clear and straight answer" why the First Nation's claim was not being accepted for negotiation, and, finally, a February 1996 letter from the Specific Claims Branch saying that the "acceptance package" was in abeyance, since DIAND was reviewing the "whole issue of the entitlement to the economic benefits of Treaty No. 8 and other similar treaties . . . from a policy perspective." That letter stated that a decision was anticipated within the next three months.⁴⁶

43 Rem Westland, Director General, Specific Claims Branch, DIAND, to Chief Archie Waquan, Mikisew Cree First Nation, June 12, 1995 (ICC Documents, pp. 412-13).

44 Manfred P. Klein, Director [Specific Claims West], DIAND, to Chief Archie Waquan, Mikisew Cree First Nation, August 2, 1995 (ICC Documents, pp. 418-19).

45 Chief Archie Waquan, Mikisew Cree First Nation, to Manfred Klein, Specific Claims West, DIAND, August 17, 1995 (ICC Documents, p. 420).

46 Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, to Mike Bouliane, Acting Director, Treaty Land Entitlements, DIAND, December 19, 1995 (ICC Documents, p. 423). Chief Archie Waquan, Mikisew Cree First Nation, to Scott Serson, DIAND, January 22, 1996 (ICC Documents, pp. 424-25). Mike Bouliane, Specific Claims Branch, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers and Solicitors, February 7, 1996 (ICC Documents, p. 426).

PART III

ISSUES

The claim submitted by the Mikisew Cree First Nation to the Minister raised two issues: (1) whether, under Treaty 8, there was an existing and outstanding lawful obligation on the part of Canada to provide economic benefits to the First Nation; and (2) the nature and value of any such outstanding benefits. Since, at the date of this report, the Minister has agreed to negotiate the claim, there has been no Commission inquiry into either issue. We make no findings of fact or any comment on the merits of the First Nation's claim for economic benefits under Treaty 8. This report has set out the background to the First Nation's claim, based on documents the First Nation provided.

The Commission's authority to conduct an inquiry into this claim was challenged by Canada, and this preliminary question was considered by the Commission. The Commission concluded that it had the authority to conduct an inquiry in these circumstances. Part IV of the report outlines the positions of the parties and the Commission's decision.

PART IV

THE COMMISSION'S AUTHORITY TO CONDUCT AN INQUIRY

As discussed above, the parties disagreed whether the facts of this case met the threshold for the Commission to conduct an inquiry. The question was whether the First Nation's claim *had been rejected* by the Minister. The claimant asked the Commission to conclude that DIAND's conduct in the three years since the First Nation submitted its claim was tantamount to a rejection.⁴⁷

In March 1996, the Commission advised Canada that the First Nation had requested an inquiry.⁴⁸ In June 1996, Justice wrote to the Commission, explaining how Canada regarded the progress of the claim.⁴⁹ This letter asserted that the Band had been informed that DIAND was prepared to recommend negotiation of the claim under the Specific Claims Policy. Moreover, since the Band disputed DIAND's "narrow and literal interpretation of the provisions of *Treaty 8*,"⁵⁰ the letter argued that the real issue was the different interpretations that each party had of Treaty 8 (rather than whether to negotiate at all). Counsel for Canada stated:

Canada does not agree or admit that the claim has been rejected. The claimant has been advised that the acceptance of the claim for negotiation has been postponed pending the results of a review of the issue from a policy perspective. The matter is still under review.⁵¹

47 Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, to the Indian Claims Commission, February 23, 1996 (ICC Documents, pp. 427-28).

48 Ron S. Maurice, Commission Counsel, Indian Claims Commission, to Mike Bouliane, Acting Director General, Specific Claims Branch, and to W. Elliott, Senior General Counsel, DIAND, Legal Services, March 5, 1996 (ICC Documents, pp. 433-34).

49 A. François Daigle, Counsel, Specific Claims Ottawa, DIAND Legal Services, to Isa Gros-Louis Ahenakew, Associate Legal Counsel, Indian Claims Commission, June 12, 1996 (ICC Documents, pp. 464-74).

50 Citing an August 1, 1995, letter from Chief Archie Waquan, Mikisew Cree First Nation, to the Honourable Ron Irwin, Minister for Indian Affairs (ICC Documents, pp. 414-17).

51 A. François Daigle, Counsel, Specific Claims Ottawa, DIAND Legal Services, to Isa Gros-Louis Ahenakew, Associate Legal Counsel, Indian Claims Commission, June 12, 1996 (ICC Documents, p. 465).

A planning conference for the Commission's inquiry into the First Nation's claim was held June 14, 1996. The First Nation had requested that a meeting with DIAND take place before the conference, in order to discuss the Department's "policy and approach" in the matter, or to discuss the stage reached in the Department's policy development on the issue of economic benefits claims.⁵² In reply, the Specific Claims Branch confirmed that the acceptance package was being "held in abeyance pending a review of the issue by the department from a policy perspective" and that the review had not been completed within the three additional months as anticipated on February 7, 1996.⁵³

In another letter, dated June 27, 1996, the Specific Claims Branch said that DIAND would not be able to announce its decision prior to July 31, 1996, but consideration of the claim was "ongoing." The First Nation's claim had not been rejected under the Specific Claims Policy; therefore, the Department was "unable to agree that [the] claim be 'deemed' rejected for the purposes of an inquiry by the Commission."⁵⁴ On July 16, 1996, after the planning conference, the Commission asked the parties to make written submissions on the question of the Commission's authority to proceed with the inquiry.⁵⁵

Before any submissions were received, the Director General of Specific Claims Branch wrote to the Chief of the Mikisew Cree First Nation suggesting that, since the internal policy paper had been completed, nothing should hold up the review of the claim:

[I]t is my intention to have the issues raised by your specific claim considered by the Senior Policy Committee at a September meeting. Once we have obtained instructions, we should be in a position to resume and complete our review of your specific claim and advise whether we are prepared to enter into settlement negotiations pursuant to the Specific Claims Policy.

52 Jerome Slavik, Ackroyd, Piasta, Roth & Day, to Michel Roy, DIAND, May 28, 1996 (ICC Documents, pp. 457-58).

53 Jerome Slavik, Ackroyd, Piasta, Roth & Day, to Michel Roy, DIAND, May 28, 1996 (ICC Documents, pp. 457-58). Michel Roy, Director General, Specific Claims Branch, to Chief Archie Waquan, Mikisew Cree First Nation, June 14, 1996 (ICC Documents, p. 475).

54 Michel Roy, Director General, Specific Claims Branch, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, June 27, 1996 (ICC Documents, pp. 481-82).

55 Isa Gros-Louis Ahenakew, Associate Legal Counsel, Indian Claims Commission, to Jerome Slavik, Ackroyd, Piasta, Roth and Day, Barristers & Solicitors, and to Francois Daigle, Counsel, Specific Claims Ottawa, DIAND Legal Services, July 16, 1996 (ICC Documents, pp. 491-92).

... let me reiterate that the claim has not been rejected by Canada. We continue to work steadily toward our goal of resolving the outstanding policy issues raised by your specific claim.⁵⁶

THE FIRST NATION'S POSITION

The Mikisew Cree First Nation maintained that the Commission's mandate did extend to the particular facts surrounding the First Nation's specific claim.⁵⁷ Within the limits of the constituting Order in Council, it argued, the Commission is an investigative body with the discretion to decide its own jurisdiction and procedures. In particular, the Commission could determine what amounted to a "rejection" of a claim as contemplated by the phrase "already rejected by the Minister," that is, according to the Terms of Reference.

Aside from verbal or written rejections of a claim, a person could conclude that a party had expressed its rejection by "action, inaction, or other conduct, such as the refusal or inability to make a decision . . . within a reasonable period of time, which is tantamount to a rejection, despite claims to the contrary." The First Nation argued that, even where no statutory time limit is placed on a Crown decision maker, previous court decisions indicate that the Crown's decision must be made within a reasonable time.

Counsel for the claimant argued that DIAND had already concluded that agricultural and farming entitlements had not been provided to the Mikisew Cree First Nation:

After extensive research, DIAND concluded in 1994 . . . these entitlements were not provided to the MCFN. This finding should have very promptly led to an acknowledgement of an outstanding lawful and fiduciary obligation. Yet, after 3 1/2 years, DIAND has refused to acknowledge a lawful obligation in this matter. They have refused to either accept a lawful obligation, enabling the claim to proceed to negotiation, or outright reject the claim, thus allowing our client to proceed with alternative remedies, whether in court or before the ICC.⁵⁸

Although the Crown must be given a reasonable time to assess its lawful obligation to the First Nation, in this case the policy issues which were explained as the reason for the government's delay in deciding whether to

56 Michel Roy, Director General, Specific Claims Branch, DIAND, to Chief Archie Waquan, Mikisew Cree First Nation, July 31, 1996 (ICC Documents, pp. 519-20).

57 Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, to Ron Maurice, Indian Claims Commission, August 15, 1996 (ICC Documents, pp. 556-64).

58 Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, to Ron Maurice, Indian Claims Commission, August 15, 1996 (ICC Documents, pp. 556-64).

negotiate the claim (the first stage of the process) should have been left to the next stage of the process. In other words, determining the settlement value of the claim was irrelevant to the question whether a "lawful obligation" existed.

The First Nation concluded that "the unwillingness, inability, and refusal [of the Minister] to decide, when combined with the extensive delay and other conduct of the Crown in this matter, [were] a breach of fiduciary conduct and obligation," and were tantamount to a rejection of the First Nation's claim by Canada.

CANADA'S POSITION

The starting point for Canada's written argument was that the Commission's role was "fundamentally linked and limited to reviewing Canada's application of the Specific Claims Policy" and that the question of the Commission's mandate to consider the First Nation's claim had to be considered in light of that limited role.⁵⁹ Canada emphasized that in this case there was no documentary basis for concluding that the Mikisew Cree First Nation's claim had been rejected.⁶⁰

Counsel for Canada argued that the relevant documentary evidence, which covered the period January 1993 to July 31, 1996, clearly showed that the First Nation's claim had not been rejected. What that correspondence did show was that Canada had not yet completed its review of the First Nation's claim; therefore, Canada had not decided whether to accept or reject the claim for negotiation.

Since the First Nation had made submissions to the Minister following the March 1994 letter outlining Canada's preliminary position, this action

59 Submissions on Behalf of the Government of Canada with Respect to the Mandate of the Indian Claims Commission, August 1, 1996 (ICC Documents, pp. 530-38).

60 Canada also distinguished the mandate challenge in this Mikisew case from that in the Lac La Ronge Candle Lake and Schools Inquiry, where the Commission relied on correspondence from DIAND that had been written in the context of litigation as evidence of the rejection of a claim. In the Lac La Ronge Inquiry, the government had taken the position that, unless a rejection had taken place within the context of the specific claims process, it would not be a rejection which was within the Commission's Terms of Reference. Although the claims in issue had been explicitly rejected, in writing, by the Senior Assistant Deputy Minister of DIAND, the government's position was that this "rejection" was outside the "process." The government had also argued that the specific claims process could not operate while a claim was the subject of active litigation, which was the case for both of the claims. In the decision, on behalf of the Commissioners, Justice Robert Reid explained that the Commission's exercise of jurisdiction must above all else be governed by considerations of fairness. The Commissioners also did not accept that the specific claims and litigation processes must be mutually exclusive and, in any event, "[t]he Commissioners interpret their mandate as remedial. Accordingly, they interpret it broadly to achieve its objective, which is to ensure, to the best of their ability, that claims which may be reasonably considered to fall within it are disposed of fairly." The decision was that the Commission *did* have the authority to consider the claims (ICC Documents, pp. 403-10).

showed that the claimant never believed the claim had been rejected. The fact that there had been later meetings between the parties, and that the claimant had submitted additional evidence and arguments, also confirmed the ongoing review of the claim.

Canada argued that the “mandate” dispute between the parties did not have to do with a “rejection” of the claim; instead, Canada said that the First Nation was objecting to the time that DIAND had taken to respond to the claim. On February 7, 1996, the First Nation was told that review of the claim had been delayed while the Department conducted a policy review of treaty entitlements. The First Nation was also told that Specific Claims intended to complete the review as soon as possible, probably within three months. However, instead of waiting the three months, the First Nation had requested that the Commission conduct an inquiry. Since January 1993, when the claim was filed, there had been “numerous” meetings between the parties, and research and other reports had been obtained and shared with the First Nation. Even 11 months after August 1995, the evidence was that Canada was actively reviewing the claim; the Specific Claims Branch was “fully committed” to completing its review.

In conclusion, Canada argued that the facts showed that the claim had been, and still was, under active consideration. The Specific Claims Branch had continued to state that it was committed to having the First Nation’s claim reviewed by senior department officials. DIAND’s conduct, therefore, could not be seen as inaction tantamount to a rejection of the First Nation’s claim.

THE COMMISSION’S DECISION

The Commission’s decision to conduct an inquiry into the First Nation’s claim was set out in a letter dated November 18, 1996 (attached as Appendix A to this report). It stated that the issue to be determined was whether DIAND’s delay was tantamount to a rejection of the First Nation’s claim. The history of the claim, including the main events and correspondence from January 1993 to July 24, 1996, was summarized. The letter concluded:

After considering the nature of the issues involved and the amount of time that this claim has been under review by the Specific Claims Branch, Co-Chair Bellegarde concluded that Canada has had sufficient time to determine whether an outstanding “lawful obligation” is owed to the [First Nation]. Under the circumstances, he considered the lengthy delay as being tantamount to a rejection of the claim for the purposes of determining whether [the Commissioners] have authority to proceed with an inquiry under their terms of reference. . . . Furthermore, the inquiry has been scheduled in

such a manner as to provide Canada with additional time to respond to the merits of the claim before proceeding with written and oral submissions. If Canada decides to accept the claim, it will not be necessary for the Commission to complete the inquiry.

... It is significant that the Specific Claims Branch initially offered to enter into negotiations with the Mikisew Cree First Nation under the policy on June 12, 1995... Over seventeen months have passed and Canada has yet to respond to a discrete legal question, namely, whether the Mikisew Cree First Nation received any of the economic entitlements promised under Treaty 8. ...

... The claimant has provided enough information for Canada to make a decision and, indeed, no further requests for information have been made by Canada. Since Canada refused to provide a certain date within which to respond and has not offered any valid explanation for the delay, other than to say that it is under active review, it is justifiable to conclude that a seventeen month delay is tantamount to a rejection of the claim for the purposes of responding to the Mikisew Cree First Nation's request for an inquiry.⁶¹

A Commission community session was scheduled for November 26, 1996. On November 20, 1996, the Commission received word that Canada had accepted the claim for negotiation,⁶² and the community session was cancelled. Canada's formal offer to negotiate was dated December 16, 1996.⁶³ A meeting between the parties was planned for February 3, 1997.⁶⁴ As a result, the Commission has suspended this inquiry.

POSTSCRIPT

On December 20, 1996, in the period between Canada's December 16, 1996, offer to negotiate the First Nation's claim and the scheduled February 3, 1997, meeting, the First Nation began a lawsuit in the Alberta courts against Canada and the Province of Alberta. This litigation was filed by a firm other

61 Ron S. Maurice, Commission Counsel, Indian Claims Commission, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, and to François Daigle, Counsel, Specific Claims Ottawa, November 18, 1996. See Appendix A.

62 Facsimile Transmission Sheet, Mamawi Developments Ltd., Fort Chipewyan, Alta, to Indian Claims Commission, Ottawa, with attached letters: (1) Dawn Waquan, Coordinator/Researcher, Mikisew Cree First Nation, to Indian Claims Commission, November 19, 1996; and (2) John Sinclair, Assistant Deputy Minister, Claims and Indian Government, DIAND, to Chief Archie Waquan, Mikisew Cree First Nation, November 7, 1996. Canada's formal offer to negotiate was dated December 16. John Sinclair, Assistant Deputy Minister, DIAND, to Chief Archie Waquan, Mikisew Cree First Nation, December 16, 1996 (Appendix A).

63 John Sinclair, Assistant Deputy Minister, DIAND, to Chief Archie Waquan, Mikisew Cree First Nation, December 16, 1996.

64 Ian Gray, Senior Negotiator, Specific Claims Branch, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, January 17, 1997.

than the one handling the economic benefits claim.⁶⁵ The lawsuit alleges that the federal Crown and its representatives engaged in misrepresentation, intentional concealment of the facts, fraud, and other behaviour in breach of fiduciary obligations in the negotiation of Treaty 8, that both the federal and provincial Crowns are in breach of the terms of Treaty 8, that both the federal and provincial Crowns engaged in misrepresentation, intentional concealment of the facts, fraud, and other behaviour in breach of fiduciary obligations in the negotiation of the 1986 Agreement, and that both the federal and provincial Crowns are in breach of the 1986 Agreement. In particular, this Statement of Claim seeks general and aggravated damages (each in the amount of one billion dollars), an order of specific performance in accordance with the terms of Treaty 8, and a declaration that the Treaty 8 obligation to provide lands to the First Nation is in fact an obligation in perpetuity.

In light of this lawsuit, Canada has declined to negotiate the First Nation's claim for economic benefits, at least until the implications of the lawsuit have been "fully analyzed." At the date of this report, the Commission understands that Canada and the First Nation have not begun negotiating the First Nation's claim for economic benefits.

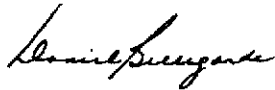
65 *Chief Archie Waquan v. Her Majesty the Queen (Canada and Alberta)*, Action No. 9601-18174, Alberta Court of Queen's Bench, Judicial District of Calgary, filed and issued by Rath & Company, Barristers & Solicitors, Priddis, Alberta, December 20, 1996.

PART V

CONCLUSION

In light of Canada's offer to accept the Mikisew Cree First Nation's claim for negotiation under the Specific Claims Policy, it is no longer necessary for an inquiry to be held into this matter. In making this report, we wish to affirm that it is essential that process and systemic issues in the specific claims process, such as the development of government policy regarding a certain category of claim, not be allowed to frustrate the timely acceptance or rejection for negotiation of individual claims, or frustrate the timely negotiation and settlement of those claims that have been accepted by Canada for negotiation. At a minimum, delay must be explained by something more than an assertion that a claim is "under active review," and projected completion dates should be met, or, at the least, failure to meet those dates must be explained in a meaningful manner. Just as fairness was the criterion governing the decision to conduct a Commission inquiry into the First Nation's claim, fairness to the parties must be the criterion that guides the conduct of either party seeking the resolution of a First Nation's claim.

FOR THE INDIAN CLAIMS COMMISSION



Daniel J. Bellegarde
Commission Co-Chair



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



Carole T. Corcoran
Commissioner

Dated this 27th day of March 1997

APPENDIX A

**Indian Claims
Commission**

**Commission
des revendications
des Indiens**

November 18, 1996

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Mr. Jerome N. Slavik
Ackroyd, Piasta, Roth & Day
Barristers & Solicitors
Fifteenth Floor
First Edmonton Place
10665 - Jasper Avenue
Edmonton, Alberta
T5J 3S9

Via fax: 403-423-8946

- And -

Mr. Francois Daigle
Counsel, Specific Claims Ottawa
DIAND Legal Services
1157 - 473 Albert Street
Ottawa, Ontario
K1A 0H8

Via fax: 613-991-5057

Dear Sirs:

**Re: Mikisew Cree First Nation [Treaty Entitlement to Economic Benefits]
Our File: 2108-11-02**

I am writing in regard to Canada's challenge to the mandate of the Commission to conduct an inquiry into this matter. Further to my verbal communication on September 17, 1996, Co-Chair Dan Bellegarde has carefully considered the written submissions of the parties and decided to proceed with the inquiry as requested by the Mikisew Cree First Nation (MCFN).

While due regard has been paid to the submissions of the parties, the principle of fairness was the governing factor in the decision to proceed with the inquiry. After considering the nature of the issues involved and the amount of time that this claim has been under review by the Specific Claims Branch, Co-Chair Bellegarde concluded that Canada has had sufficient time to determine whether an outstanding "lawful obligation" is owed to the MCFN. Under the circumstances, he considered the lengthy delay as being tantamount to a rejection of the claim for the purposes of determining whether they have authority to proceed with an inquiry under their terms of reference. He also felt that it would be unfair and prejudicial to the



Éd. Enterprise Building, Suite 400 - 427 ouest, av. Laurier Ave. West
P.O. Box/C.P. 1750, Station/Succursale "B", Ottawa, Canada K1P 1A2
Tel (613) 943-2737 Fax (613) 943-0157

MCFN if they did not proceed with the inquiry because this could effectively deprive the MCFN from having its claim reviewed by an independent third party. Furthermore, the inquiry has been scheduled in such a manner as to provide Canada with additional time to respond to the merits of the claim before proceeding with written and oral submissions. If Canada decides to accept the claim, it will not be necessary for the Commission to complete the inquiry.

The chronology of this claim and the detailed reasons for the decision are set out below.

CHRONOLOGY OF THE CLAIM

1. January, 1993 - MCFN files specific claim to economic entitlements under Treaty 8 to Specific Claims West (SCW).
2. October 20, 1993 - SCW forwards a discussion paper providing Canada's preliminary analysis of the claim to Mr. Slavik.
3. March 29, 1994 - Allan Tallman, SCW advised Mr. Slavik that Canada's preliminary position is that the claim does not establish an outstanding lawful obligation on the part of Canada. Canada offers MCFN opportunity to provide additional evidence or written arguments to be taken into consideration.
4. July 15, 1994 - Parties meet to discuss Canada's preliminary position and new arguments are presented to SCW by the MCFN. Following this meeting, SCW agreed to conduct research into the implementation of the agricultural and farming provisions of Treaty 8.
5. January 30, 1995 - SCW circulates copy of draft report entitled "Economic Benefits and Treaty No. 8 Bands in Alberta 1899-1940"
6. May 5, 1995 - Chief Waquan wrote to Rem Westland, Director General, Specific Claims Branch (SCB) seeking decision on the claim.
7. June 12, 1995 - Letter from Rem Westland to Chief Waquan on a "without prejudice" basis acknowledging that "there may be an obligation under Treaty 8 to provide the articles specified in Treaty 8 to the MCFN." Mr. Westland offered the following two options to the MCFN on how to proceed: "The MCFN may pursue the specific claims process or can await the outcome of (and/or participate in) the developing Indian-Government process to determine how treaties should be understood and implemented in contemporary terms. Subject to your agreement and a formal letter accepting your claim from DIAND's Assistant Deputy Minister of Claims

and Indian Government, the Specific Claims Branch is prepared to enter into discussions concerning the First Nation's claim within the parameters of the Specific Claims Policy and DIAND's legal position."

8. August 2, 1995 - Letter from Manfred Klein, SCW, to Chief Waquan confirming that SCW would be prepared to negotiate a claim with MCFN subject to the conditions set out in the June 12th letter.
9. August 17, 1995 - Letter from Chief Waquan to Manfred Klein indicating the MCFN is prepared to enter into negotiations for settlement of the specific claim.
10. December 19, 1995 - Mr. Slavik requests response from acting Director General, Mike Bouliane, regarding the status of "acceptance package" of the claim.
11. January 22, 1996 - Letter from Chief Waquan to Deputy Minister Scott Serson requesting meeting to discuss why the claim had not been accepted. Chief Waquan states that Mr. Bouliane advised the MCFN before Christmas that consideration of the claim had been upheld "for a number of so-called policy reasons" and that Mr. Bouliane had expressed concerns regarding the "precedent affect" and the potential "cost to Canada" if the claim were accepted for negotiation.
12. February 7, 1996 - Letter from Mike Bouliane to Chief Waquan stating that the "processing of the acceptance package is being held in abeyance" while the issue of entitlement to economic benefits was "under active review by the department from a policy perspective." Mr. Bouliane stated that he expected a decision from the department within a period of three months.
13. February 23, 1996 - Letter from Jerome Slavik to the Indian Claims Commission requesting an inquiry into "deemed rejection" of the claim.
14. June 12, 1996 - Letter from Francois Daigle to Isa Gros-Louis Ahenakew, ICC, objecting to the Commission proceeding with the inquiry because "Canada does not agree or admit that the claim had been rejected."
15. June 14, 1996 - At ICC Planning Conference in Ottawa, Francois Daigle objects to mandate of Commission to proceed with inquiry. In a letter on that date, Mr. Michel Roy, Director General of Specific Claims Branch, reiterated that the review of the claim had been "held in abeyance pending a review of the issue by the department from a policy perspective. Although the intention was to complete the review within three months, circumstances have not allowed us to do so." Mr. Roy advised that he was

"fully committed to having it reviewed by senior officials of the department."

16. June 27, 1996 - Letter from Michel Roy to Jerome Slavik responding to proposal made during the June 14th Planning Conference. Mr. Roy states that "Unfortunately, this Department is not in a position to advise before July 31, 1996 whether your client's claim will or will not be accepted for negotiation pursuant to the Specific Claims Policy. We are also unable to agree that this claim be 'deemed' rejected for the purposes of an inquiry by the Indian Claims Commission." Mr. Roy reiterated that the claim was under active consideration by the department.
17. July 24, 1996 - Letter from Chief Waquan to Michel Roy stating that the MCFN was "disappointed" that after three and a half years DIAND was continuing to procrastinate and delay acceptance of the claim.

POSITIONS OF THE PARTIES ON THE MANDATE OF THE COMMISSION

In Canada's written submissions dated August 1, 1996 Mr. Daigle submitted that the question of whether the Commission has a mandate to conduct an inquiry into this claim could be determined on a preliminary basis since the issue of rejection is not inextricably tied to the substantive aspects of the claim. For the purposes of determining this preliminary question, Mr. Daigle stated that the Commission cannot "deem" a claim to be rejected; rather, the relevant question is "whether Canada's conduct is tantamount to a rejection." In Canada's submission, it is not.

Mr. Daigle provided a brief recitation of the terms of reference contained in the Order in Council establishing the Commission and the salient facts in support of his assertion that the Commissioners do not have a mandate to proceed with an inquiry into this matter because it has not been rejected. Mr. Daigle referred to two previous decisions of the Commission to proceed with inquiries (the Athabasca Denesuline and the Lac La Ronge Indian Band) as support for the view that there must be a "rejection of the claim on its merits" before the Commission can proceed with an inquiry. While Mr. Daigle acknowledged that Canada's preliminary review of the claim in March 1994 did not disclose an outstanding lawful obligation, he stated that further evidence and arguments have been presented to the Department and no decision has been made conclusively one way or another. The crux of Canada's argument is that the claim has simply not been rejected. According to Mr. Daigle, "DIAND has not completed its review of the claim and has not yet determined whether, on its merits, the claim should be accepted or rejected pursuant to the Specific Claims Policy."

The Mikisew Cree First Nation's position is set out in a letter from Mr. Jerome

Slavik to the writer dated August 15, 1996. Mr. Slavik asserts that there is ample case authority to support the view that administrative bodies created under statute have the requisite authority and discretion to make decisions with respect to their jurisdiction, subject to judicial review of such decisions. While the Commission must satisfy itself that a claim has been rejected by the Minister before it can proceed with an inquiry into the claim, Mr. Slavik asserts that the ICC has the authority to determine what constitutes a "rejection". Aside from an express rejection in writing or verbally, Mr. Slavik suggests that a rejection can be based on "the action, inaction, or other conduct, such as the refusal or inability to make a decision of the Crown within a reasonable period of time, which is tantamount to a rejection, despite claims to the contrary."

Mr. Slavik stated that where a claim has been before the Crown for a reasonable period of time and no decision has been made, it is necessary to conclude at some point that the claim has essentially been rejected in order to allow the First Nation to pursue other alternatives. Although not directly applicable to the particular facts and circumstances before the Commission, Mr. Slavik referred to three cases dealing with applications for *mandamus* to compel a public authority to make a decision. In *Austin v. Minister of Consumer and Corporate Affairs* (1986), 12 CPR (3d) 190, the court held that, despite the absence of a statutory time limit, an authority under a legal duty to make a decision must do so within a reasonable period of time. In *Bhatnager v. Minister of Employment*, [1985] 2 FC 315 the court issued an order of *mandamus* requiring that the department make a decision on an immigration application by a certain date. While the court could not order the department to decide the outcome in a particular manner, it could issue *mandamus* owing to the lengthy delay in making the decision and the absence of an adequate explanation for the delay. Finally, Mr. Slavik cited *Ermineskin Band Council v. Registrar of Indian and Northern Affairs* [1987] 2 CNLR 70 where the court found that the Registrar was under a statutory duty to make a decision in regard to a membership protest filed by the Band. Mr. Justice Strayer stated that "*While there has been no express rejection of this demand, more than enough time has passed for a response and none has been forthcoming. This is tantamount to a refusal to decide.*" Therefore, Strayer J. concluded that by "refusing or failing to give a decision on either of these protests, the Registrar is preventing an appeal to a court at his interpretation of the law. I am not able to conclude that Parliament intended such a result." In *Ermineskin*, the delay involved was slightly less than two years from the time when the Band filed its first objection to the Registrar. Mr. Slavik submitted that the facts in this case are similar because the MCFN might be deprived of an opportunity to have the claim reviewed by the Commission given that the mandate expires on March 31, 1997.

THE COMMISSIONERS' REASONS

As mentioned previously, the Commission has decided to proceed with an inquiry into this matter. However, oral submissions will be scheduled to proceed no earlier than January of 1997. Taking into account the case authorities cited above it is clear that, while they have no direct application because the Commission cannot provide discretionary remedies like a court of equity, they are instructive on the question of whether Canada's delay in responding to the merits of the claim is tantamount to a rejection. Further support for the decision to proceed with the inquiry on account of lengthy delay can be found in the following authorities.

In *Re Friends of Oldman River Society* (1993), 105 DLR (4th) 444 (F.C.T.D.) the court offered its views on what constituted a reasonable period of time for a decision to be exercised under statute. The court held that the complexity of the subject matter has a direct bearing on whether there has been unreasonable delay under the circumstances. The court declined to order *mandamus* to compel the Minister of Transport to implement the recommendations of an environmental assessment panel since only 14 months had lapsed since the release of the panel's report and recommendations. The court held that there had been no unreasonable delay but remained seized of the matter to ensure that some forward progress was achieved.

In *R. v. Stapleton* (1983), 6 DLR (4th) 191 (N.S.C.A.) -- a Charter case involving an application to have criminal charges dismissed on the grounds that there had been unreasonable delay in bringing the matter to trial -- the court held that prejudice was a relevant factor in determining whether there was unreasonable delay. Also, the court stated that what constitutes a reasonable time depends on the circumstances.

In *Re Delmas and Vancouver Stock Exchange* (1994), 119 DLR (4th) 136 (BCSC) the court dealt with an application for prohibition and *certiorari* challenging the jurisdiction of the Vancouver Stock Exchange to proceed with disciplinary proceedings against the applicant. While a great deal of curial deference will be shown to bodies such as the Stock Exchange because of the highly specialized nature of the functions it performs, this case seems to suggest that the courts are generally reluctant to grant prerogative relief against the decisions of tribunals and administrative bodies. Although it is acknowledged that this case is not directly on point, it provides support for the view that the Commission can determine whether unreasonable delay is tantamount to a rejection of claim and that such decisions will generally be respected by the courts.

The Commission decided to proceed with the inquiry because Canada has had a reasonable period of time to respond to the merits of the claim. It is significant that the Specific Claims Branch initially offered to enter into negotiations with the

MCFN under the policy on June 12, 1995 subject to a formal letter of acceptance from DIAND Assistant Deputy Minister of Claims. Over seventeen months have passed and Canada has yet to respond to a discrete legal question, namely, whether the MCFN received any of the economic entitlements promised under Treaty 8. While the Commission appreciates that there are interpretive questions relating to the nature and scope of the treaty right, these issues are more properly the subject matter of settlement discussions.

The simple question is whether there are unfulfilled treaty obligations within the meaning of the Specific Claims Policy. Canada's delay in responding to the merits of this claim is not warranted under the circumstances because the delay appears to be related to issues which are extraneous to whether Canada has fulfilled its lawful obligations under Treaty 8. Simply put, questions related to the "precedent affect" or "potential cost to Canada" do not bear any relationship to the legal question in this matter. Even if the Commission were to conclude that it was justifiable for Canada to consider the broader policy implications of accepting the claim, the apparent lack of clarity in the policy (which was developed 14 years ago) cannot provide a justifiable reason for the patent delay in this case.

Given the narrow legal and factual questions before the Commission, there is no apparent reason why the Specific Claims Branch has not been able to accept or reject the claim within a period of seventeen months. In February 1996, the Specific Claims Branch itself estimated that the review would be completed within three months when the MCFN first pressed for a decision on the claim. The claimant has provided enough information for Canada to make a decision and, indeed, no further requests for information have been made by Canada. Since Canada refused to provide a certain date within which to respond and has not offered any valid explanation for the delay, other than to say that it is under active review, it is justifiable to conclude that a seventeen month delay is tantamount to a rejection of the claim for the purposes of responding to the MCFN's request for an inquiry.

Finally, questions of fairness and prejudice have been taken into account. First, the Commission's decision to proceed with the inquiry is not manifestly unfair or prejudicial to Canada. Although the Commission will hear community testimony on November 26, 1996 from the MCFN, written and oral submissions will not proceed until January 1997 at the earliest. The timing of the Commission's inquiry into this matter provides sufficient time for the Specific Claims Branch to consider the matter and make a decision on whether to accept the claim for negotiation.

While the Commission's decision to proceed with the inquiry will require that Canada expedite its internal review of the claim, they felt obligated to proceed with the inquiry as requested. The MCFN is simply requesting a timely response from Canada on the merits of the claim. If the claim is not accepted for

negotiation, the MCFN would then be in a position to seek an inquiry before the Commission or commence legal proceedings in the courts as a manner of seeking redress. To not proceed with the inquiry would occasion further delay and could frustrate the efforts of the MCFN to have their claim reviewed by an independent third party. Any further delay could effectively prevent an appeal to the Commission before March 1997 and could also prejudice the MCFN's ability to seek a legal remedy through the courts if the claim is ultimately barred through limitations periods or the doctrine of laches. In the Commission's view, such a result would not be fair in view of the narrow issue that is before Canada and the Commission.

If you have any questions or comments in regard to any of the above, please feel free to contact me at 613-947-3945.

Sincerely yours,



Ron S. Maurice
Commission Counsel

cc: Chief Waquan, Mikisew Cree First Nation, Via fax: 403-697-3826
Mr. Michel Roy, Director General, SCB, Via fax: 994-4123
Commissioners Bellegarde, Prentice and Corcoran

APPENDIX B



Indian and Northern
Affairs Canada

Affaires indiennes
et du Nord Canada

Assistant Deputy Minister Sous-ministre adjoint

Ottawa, Canada
K1A 0H4

December 16, 1996

WITHOUT PREJUDICE

Chief Archie Waquan
Mikisew Cree First Nation
P.O. Box 90
FORT CHIPEWYAN AB T0P 1B0

Dear Chief Waquan:

On behalf of the Government of Canada, and in accordance with the Specific Claims Policy, I offer, as set out below, to accept for negotiation of a settlement, the Mikisew Cree First Nation's (MCFN) specific claim regarding the MCFN's entitlement to the agricultural provisions of Treaty No. 8.

For the purpose of negotiations, Canada accepts that the MCFN has sufficiently established that Canada has a lawful obligation within the meaning of the Specific Claims Policy, with regard to the claim.

The steps of the claims process which will be followed hereafter include: conclusion of a negotiating protocol accord; negotiations toward a settlement agreement; drafting a settlement agreement; concluding the agreement; ratifying the agreement; and finally, implementation of the agreement.

Throughout the process, Canada's files, including all documents submitted to Canada concerning the claim, are subject to the Access to Information and Privacy legislation in force.

All negotiations are conducted on a "without prejudice" basis. Canada and the band acknowledge that all communications, oral, written, formal or informal, are made with the intention of encouraging settlement of the dispute between the parties only, and are not intended to constitute admissions by any party.

.../2

Canada

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The acceptance of the claim for negotiations is not to be interpreted as an admission of liability or fact by Canada. In the event that no settlement is reached and litigation ensues, Canada reserves the right to plead all defences available to it, including limitation periods, laches and lack of admissible evidence.

In the event that a final settlement is reached, the settlement agreement must contain a release from your band ensuring that this claim cannot be reopened. As part of the settlement, Canada will also require an indemnity from your band.

The federal negotiator, Mr. Ian Gray, has been designated to work with you on resolving this claim. I send my best wishes and I am optimistic that a fair settlement can be reached.

Yours sincerely,


John Sinclair
Assistant Deputy Minister
Claims and Indian Government

c.c.: Jerome Slavik

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE 1907 SURRENDER CLAIM OF THE FISHING LAKE FIRST NATION

PANEL

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

COUNSEL

For the Fishing Lake First Nation
Stephen M. Pillipow / Lisa D. Wilhelm

For the Government of Canada
Bruce Becker / Kim Kobayashi

To the Indian Claims Commission
Ron S. Maurice / Kim Fullerton / Kathleen Lickers / Grant
Christoff

MARCH 1997

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PART I

INTRODUCTION

On March 2, 1995, the Indian Claims Commission (ICC) agreed to conduct an inquiry into the rejected claim of the Fishing Lake First Nation.¹ The claim concerns the surrender of 13,170 acres of land from Fishing Lake Indian Reserve (IR) 89 on August 9, 1907. The surrender was approved by Governor in Council and the sale of the land was sanctioned on September 7, 1907.

The First Nation first submitted its claim to the Minister of Indian Affairs on April 23, 1989.² It argued that the claim should be validated under the federal government's Specific Claims Policy as a breach of lawful obligation on the following grounds:

1. That the alleged surrender on August 9, 1907, was null and void as having been obtained,
 - a) through duress and undue influence,
 - b) as an unconscionable agreement, and
2. That the alleged surrender on August 9, 1907 was null and void having been obtained without strict compliance with provisions of the *Indian Act*.
3. That the Crown breached its trust or fiduciary obligations in obtaining the alleged surrender.³

The claim was rejected on February 12, 1993. In his letter rejecting the claim, Jack Hughes, Research Manager for the Department of Indian Affairs and Northern Development (DIAND), stated that "the Federal position . . . is

1 Daniel Bellegarde and James Prentice, Co-Chairs, Indian Claims Commission (ICC), to Chief and Council, Fishing Lake First Nation, and to the Ministers of Justice and Indian and Northern Affairs, March 3, 1995 (ICC file 2107-23-1).

2 Fishing Lake Band, Band Council Resolution, April 23, 1989 (ICC Documents, p. 521).

3 Fishing Lake Band Land Claim: Legal Submission, delivered by Balfour Moss Milliken Laschuk & Kyle, Barristers and Solicitors (ICC Documents, p. 531).

that the claim fails to establish an outstanding lawful obligation to the Fishing Lake Indian Band as defined in the Specific Claims Policy.”⁴

In response to Canada’s rejection of the claim, the First Nation submitted a supplemental submission on September 29, 1994.⁵ It updated each of the issues raised in the First Nation’s original submission, and it addressed the new issue of “misrepresentation.” The First Nation contended that “the Crown negligently misrepresented the circumstances surrounding the surrender by failing to properly advise the First Nation members and as a result the First Nation agreed to the Alleged Surrender of 1907.”⁶ On January 31, 1995, the First Nation submitted a second supplemental submission, which raised another new issue. The First Nation argued that the consent required under Treaty 4 had not been obtained prior to the separation of the Fishing Lake, Nut Lake, and Kinistino Reserves and the surrender of 13,170 acres from Fishing Lake IR 89.⁷ Canada reviewed both of the First Nation’s supplemental submissions, and on June 14, 1995, Mr Hughes advised the First Nation that “as a result of this review we are not prepared to alter our preliminary position that the evidence and submissions are insufficient to establish that a lawful obligation exists on the part of the Federal Crown (‘Canada’) with respect to the 1907 surrender of a portion of Fishing Lake Reserve No. 89 (the ‘Reserve’).”⁸

At about the same time as the First Nation began submitting its supplemental arguments to the Minister of Indian Affairs, it also asked the Commission to review Canada’s rejection of its claim.⁹ At the request of a First Nation, the Commission can conduct an inquiry into a rejected specific claim pursuant to the *Inquiries Act*. The Commission’s mandate to conduct inquiries states, in part:

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

- 4 Jack Hughes, Research Manager, Specific Claims West, to William J. Pillipow, February 12, 1993 (ICC Documents, p. 653).
- 5 Supplemental Submission, Fishing Lake Band Specific Land Claim: 1907 Surrender, September 29, 1994 (ICC Documents, pp. 688-795).
- 6 Supplemental Submission, Fishing Lake Band Specific Land Claim: 1907 Surrender, September 29, 1994 (ICC Documents, pp. 756-57).
- 7 Supplemental Submission, Fishing Lake Band Specific Land Claim: 1907 Surrender, January 31, 1995, tabled at ICC Planning Conference, February 2, 1995 (ICC file 2107-23-1).
- 8 Jack Hughes, Research Manager, Prairie Specific Claims, to Chief Michael Desjarlais and Counsel, June 14, 1995 (ICC file 2107-23-1).
- 9 Stephen M. Pillipow to Commissioners, Indian Claims Commission, October 13, 1994, enclosing, *inter alia*, Fishing Lake First Nation, Band Council Resolution, September 28, 1994 (ICC file 2107-23-1).

- (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister . . . ¹⁰

Pursuant to this mandate, the Commission has developed a unique inquiry process. In it the parties are brought together at various stages to discuss the claim and to clarify the issues, evidence, and respective legal positions. The Commission encourages a full and open discussion of issues and exchange of documents, and all this work is done with the assistance of representatives from the Commission. The parties are asked to explain their positions on the claim and, as much as possible, plan the inquiry on a cooperative basis.

During the course of this particular inquiry, the First Nation had an opportunity to submit new evidence and arguments, which ultimately caused Canada to reconsider the rejection of the First Nation's claim and to offer to accept it for negotiation – an offer the First Nation has accepted. Canada's willingness to revisit its past legal opinion was a response, at least in part, to the constructive dialogue between the parties and the flexible nature of the Commission inquiry process.

We wish to emphasize that, in view of the parties' decision to enter into negotiations, no further steps have been taken by the Commission to inquire into the First Nation's claim. We make no findings of fact. This report, which contains a brief summary of the First Nations claim and the chronology of events leading up to Canada's decision, is simply meant to advise the public that the First Nation's claim has been accepted for negotiation under the Specific Claims Policy.

¹⁰ Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

PART II

HISTORY OF THE CLAIM

The Yellow Quill Band adhered to Treaty 4 on August 24, 1876, at Fort Pelly, North-West Territories.¹¹ Chief Yellow Quill and two headmen, Kenistin and Ne-Pin-awa, signed the adhesion, which, through Treaty 4, provided that reserves would be set aside for the Indians "of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families . . ."¹²

FISHING LAKE RESERVE SURVEYED

In September 1881, John C. Nelson, Dominion Land Surveyor, surveyed reserves for the Yellow Quill Band at Fishing Lake and Nut Lake. The reserve at Nut Lake was made up of 10,342 acres and was described by Nelson as "highly suitable for the production of barley and potatoes, and the lake abounds with fish and fowl."¹³ After completing the survey at Nut Lake, Nelson proceeded to Fishing Lake, "where some families of Yellow Quill's band had already settled,"¹⁴ and surveyed a reserve of 22,080 acres. The location of this reserve was also suitable for farming, he reported, the soil being very rich and there being plenty of good timber.¹⁵ The reserves at Fishing Lake and Nut Lake were confirmed by Order in Council on May 17, 1889, and were withdrawn from the operation of the *Dominion Lands Act* on June 12,

11 Canada, *Indian Treaties and Surrenders* (Ottawa 1891; facsim. repr. Toronto: Coles, 1971), vol. 1, no. 135, 320-21 (ICC Documents, p. 6).

12 *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), Cat. No. Ci 72-0466 (ICC Documents, p. 2).

13 John C. Nelson, Dominion Land Surveyor, to Superintendent General of Indian Affairs, January 10, 1882, Canada, Parliament, *Sessional Papers*, 1882, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1881," 132 (ICC Documents, p. 20).

14 John C. Nelson, Dominion Land Surveyor, to Superintendent General of Indian Affairs, January 10, 1882, Canada, Parliament, *Sessional Papers*, 1882, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1881," 133 (ICC Documents, p. 21).

15 John C. Nelson, Dominion Land Surveyor, to Superintendent General of Indian Affairs, January 10, 1882, Canada, Parliament, *Sessional Papers*, 1882, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1881," 133 (ICC Documents, p. 21).

1893.¹⁶ A third reserve, containing 9638 acres, was surveyed in 1900 “in the locality which [the Kinistino] Indians have for sometime occupied,”¹⁷ and confirmed by Order in Council on October 22, 1901.¹⁸

RESERVE LANDS OPENED FOR SETTLEMENT

Soon after the last reserve was surveyed, the Canadian Northern Railway Company applied for and was granted a right of way over a portion of the Fishing Lake reserve. Then in 1905 the company requested that the northern end of the Fishing Lake Reserve be opened for settlement.¹⁹ Frank Oliver, the new Superintendent General of Indian Affairs, advised his Deputy, Frank Pedley, of the company's request and sought information on the subject. James Campbell, a departmental employee, recommended a surrender of a portion of the reserve: “[T]he best policy, in the interests of all concerned, would apparently be to induce [the Indians] to surrender the Fishing Lake Reserve, and take an equivalent in land at Nut Lake or some other northern point. . . . Probably a surrender could be readily obtained as these Indians have apparently more than the usual aversion to contact with white men.”²⁰

Acting on Campbell's recommendation, Oliver sought the help of the Reverend Dr John McDougall of Calgary “to do special work for the Department in negotiating the surrender of portions or the whole of certain Indian reserves.”²¹ Part of this “special work” included negotiating the surrender at Fishing Lake.

Around the same time that the Reverend Dr McDougall was hired, the Department of Indian Affairs had the Kinistino, Fishing Lake, and Nut Lake reserves taken out of the distant Touchwood Hills Agency. Kinistino reserve was placed under the Duck Lake Agency and the remaining two were placed

16 Order in Council PC 1151, May 17, 1889 (ICC Documents, pp. 30-31); Order in Council PC 1694, June 12, 1893 (ICC Documents, pp. 32-34).

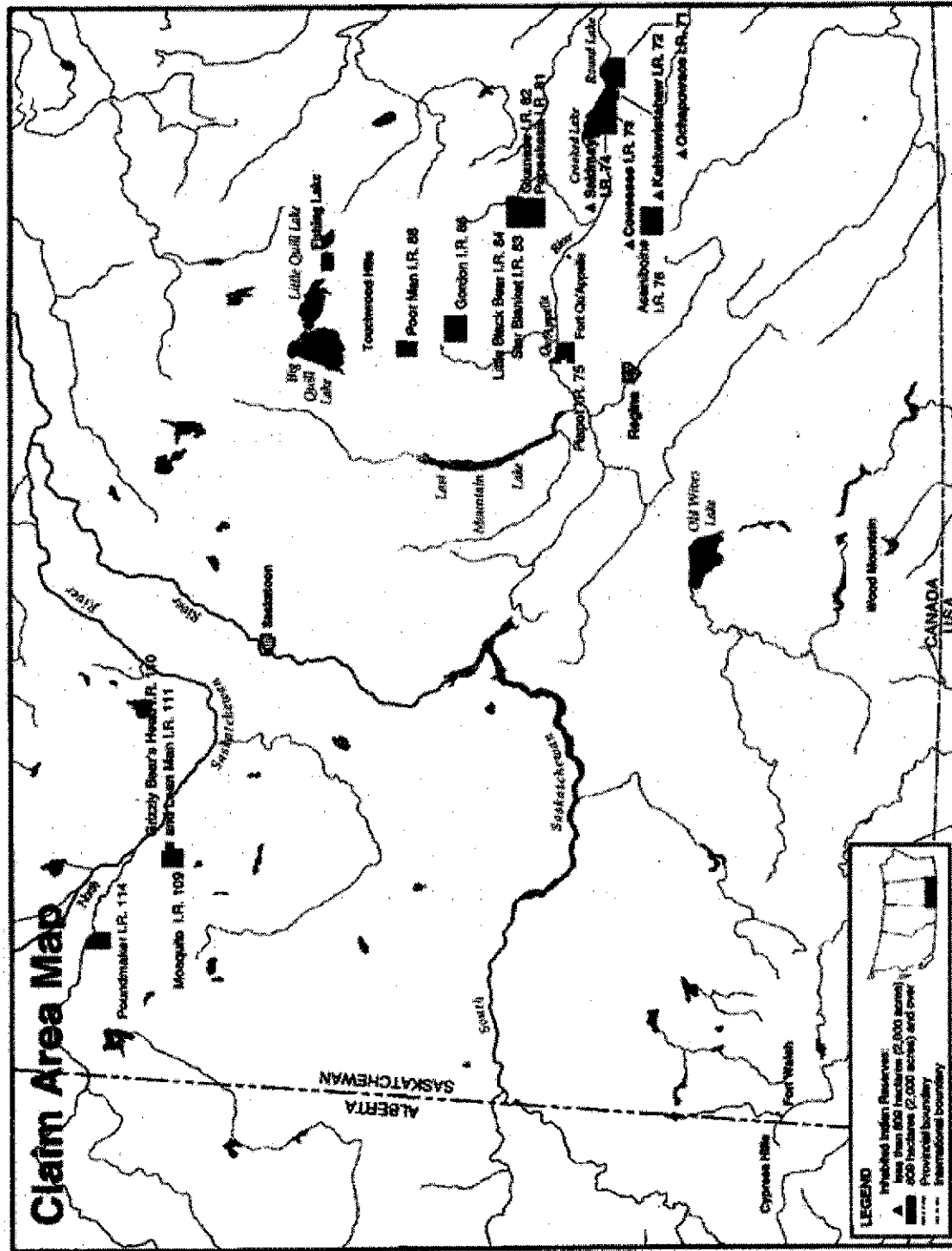
17 D.C. Scott, Accountant, to Deputy Superintendent General of Indian Affairs, September 19, 1906, National Archives of Canada [hereinafter NA], RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 119).

18 Order in Council PC 1898, October 22, 1901 (ICC Documents, pp. 38-39).

19 Frank Oliver, Superintendent General of Indian Affairs, to Frank Pedley, Deputy Superintendent General of Indian Affairs, July 3, 1905, NA, RG 10, vol. 4020, file 280470/2 (ICC Documents, p. 64).

20 James J. Campbell, Department of Indian Affairs, to Deputy Minister, Department of Indian Affairs, July 20, 1905, NA, RG 10, vol. 4020, file 280470/2 (ICC Documents, p. 68).

21 Frank Oliver, Superintendent General of Indian Affairs, to Frank Pedley, Deputy Superintendent General of Indian Affairs, July 3, 1905, NA, RG 10, vol. 4020, file 280470/2 (ICC Documents, p. 69).



under the Pelly Agency.²² This transfer, in addition to easing travel for the Indian agents, had the effect of making Inspector W.C. Graham responsible for both Fishing Lake and Nut Lake.²³

SEPARATION OF THE BANDS AND THE SURRENDER

Frank Pedley then instructed the Reverend Dr McDougall to seek the surrender of the Fishing Lake Reserve. Pedley also instructed McDougall on the matter of per capita cash distributions to the Band:

Under the provisions of section 70 of the [Indian] Act, as re-enacted by section 6, Chap. 34, Vic. 61, you will observe that not more than 10% of the proceeds of any lands surrendered, as may be agreed upon at the time of surrender, can be paid to the members of the band, and the remainder of the proceeds of sale shall be placed to the credit of the Indians, and the interest thereon paid to them from time to time.²⁴

It is possible that McDougall met with the Indians at Fishing Lake as early as October 9, 1905; however, the only evidence on record to indicate such a meeting is a telegraph message from Indian Agent H.A. Carruthers dated October 7, stating that "Rev McDougall meets Indians here to-day I accompany him west to fishing lake reserve on ninth."²⁵ It is clear that McDougall did meet with the Indians of Fishing Lake the following summer on July 16, 1906. His report of this meeting offers no indication of the position of the Indians on the matter of surrender. His letter does reveal, however, the implementation of a proposed amendment to the *Indian Act* under which the Department could now offer 50 per cent of the anticipated proceeds of sale as inducement to the surrender.²⁶

Acting towards securing the surrender at Fishing Lake, Pedley notified Agent Carruthers of a second meeting between McDougall and the Indians, planned for July 31, 1906. Pedley telegrammed Agent Carruthers to "[s]end

22 James J. Campbell, Department of Indian Affairs, to Deputy Superintendent General of Indian Affairs, August 22, 1905, NA, RG 10, vol. 3935, file 118537/1 (ICC Documents, p. 72). In March 1907, however, the Fishing Lake Reserve was returned to the supervision of the Touchwood Agent: see Frank Pedley, Deputy Superintendent General of Indian Affairs, to Secretary, Department of Indian Affairs, NA, RG 10, vol. 3935, file 118537/1 (ICC Documents, p. 143).

23 J.D. McLean, Secretary, Department of Indian Affairs, to David Laird, Indian Commissioner, Department of Indian Affairs, August 26, 1905, NA, RG 10, vol. 3935, file 118537/1 (ICC Documents, p. 73).

24 Frank Pedley, Deputy Superintendent General of Indian Affairs, to Reverend John McDougall, August 29, 1905, NA, RG 10, vol. 4020, file 280470/2 (ICC Documents, p. 75).

25 H.A. Carruthers, Indian Agent, to Department of Indian Affairs, October 7, 1905, NA, RG 10, vol. 4020, file 280470/2 (ICC Documents, p. 77).

26 Reverend John McDougall to J.D. McLean, Secretary, Department of Indian Affairs, July 17, 1906, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, pp. 104-06).

word at once to Indians to assemble on that date without fail. This must be attended to without fail.”²⁷ This telegram was received on the evening of July 28 by Indian Agent Fred Fischer, who sent a message to a local man in Wadena to notify the Indians at Nut Lake and Fishing Lake of McDougall’s impending visit.²⁸ In advance of this meeting, Pedley had forwarded to McDougall the forms of surrender for a portion of the Fishing Lake Reserve, amounting to 14,080 acres, and a cheque for \$7000.²⁹ Reverend McDougall took these with him to the Fishing Lake Reserve.

McDougall’s visit to Nut Lake on July 31, 1906, met with little success as “[o]n their [his and the Agent’s] arrival at Wadena it was found the Nut Lake Indians had already left their reserve. Fishing Lake Reserve was therefore visited on the 1st. instant, but only a few Indians were on the reserve.”³⁰ McDougall arranged for a meeting with the Indians at Fishing Lake on August 2, 1906, to discuss the surrender. His proposal was rejected. The reasons were provided by Indian Commissioner Laird in a report to Ottawa on August 7, 1906:

A meeting was arranged for the following day [August 2, 1906], when Dr. McDougall fully explained to the Indians their connection with the Nut Lake and Kinistino Indians. The Indians refused the surrender on the condition that the Nut Lake and Kinistino Bands share equally with them in the proceeds received from the sale of the surrendered part of their reserve. They claim that the three bands each look upon their own reserves as their distinct property, and besides they have nothing in common in their intercourse with each other.³¹

In his report of the meeting, McDougall recommended that “these People be considered as three distinct Bands.”³² This recommendation was considered by the Department in a memorandum dated September 19, 1906, to Pedley from Accountant Duncan Campbell Scott (who later became Deputy Superintendent General for Indian Affairs). Scott reported that “[t]he association of these Bands was purely fortuitous and there is no insurmountable

27 Frank Pedley, Deputy Superintendent General of Indian Affairs, to H.A. Carruthers, Indian Agent, July 27, 1906 (ICC Documents, p. 108).

28 Fred Fischer, Acting Indian Agent, to Frank Pedley, Deputy Superintendent General of Indian Affairs, July 31, 1906, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 111).

29 Frank Pedley, Deputy Superintendent General of Indian Affairs, to Reverend John McDougall, July 28, 1906, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 109).

30 David Laird, Indian Commissioner, to Secretary, Department of Indian Affairs, August 7, 1906, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 112).

31 David Laird, Indian Commissioner, to Secretary, Department of Indian Affairs, August 7, 1906, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 112).

32 Reverend John McDougall to Frank Pedley, Deputy Superintendent General of Indian Affairs, [August 10, 1906], NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 116).

obstacle to their separation if the feeling between the Indians of Nut and Fishing Lakes is as the Commissioner represents in his letter of the 7th August.”³³ He continued: “Without unnecessary argument, but taking a short cut toward a settlement, I would propose that as the Kinistino Indians have the just proportion to their numerical strength of the lands under Treaty, they be designated and considered a separate Band . . .”³⁴ Scott recommended that at the upcoming annuity payments, the chief men of the three Bands meet together, in the presence of the Indian Commissioner or other authorized official, to sign a document fixing their reserves at their current acreages. He stated that “[t]his will have the result of varying the Treaty and might be accepted by Order-in-Council in the usual way. It might be well, as the Kinistino Indians signed the original adhesion to Treaty at the same time as the other Band, to have their Chiefs also sign the Instrument.”³⁵

In November 1906 the Department informed the Reverend Dr McDougall of Scott’s views and requested his opinion. In his reply, McDougall rejected the “proposed method of settlement” put forward by Scott. He explained:

They [the Indians] consider themselves as three distinct Bands and from what I could learn on the ground strongly resent the idea of your Department that they still form portions of one Band. They say they never were one Band, are not now and seemingly never intend to be. If . . . these Indians are still due 6.3 square miles of land if the Department so thought fit this area might be attached to the Nut Lake Reserve thus giving a more proportionate reserve to these Nut Lake Indians, but taking them as they now are, I would deal with each one of these three Bands individually without calling their loyalties or requiring of them any formal acceptance of such a division. Why seek to divide those who on their own showing were never united.³⁶

Ignoring the views expressed by Dr McDougall, the Department set out to finalize the land allotments provided to Nut Lake, Fishing Lake, and Kinistino under Treaty 4 on the understanding that the three bands would then be considered separate and distinct and that each band would have exclusive rights to its own reserve.³⁷

33 D.C. Scott, Accountant, to Deputy Superintendent General of Indian Affairs, September 19, 1906, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 119).

34 D.C. Scott, Accountant, to Deputy Superintendent General of Indian Affairs, September 19, 1906, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, pp. 119-20).

35 D.C. Scott, Accountant, to Deputy Superintendent General of Indian Affairs, September 19, 1906, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 120).

36 Reverend John McDougall to Deputy Superintendent General of Indian Affairs, November 23, 1906, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, pp. 127-28).

37 Frank Pedley, Deputy Superintendent General of Indian Affairs, to David Laird, Indian Commissioner, December 11, 1906, NA, RG 10, vol. 3561, file 82/1 (ICC Documents, pp. 129-31).

In March 1907, Inspector W.M. Graham was instructed to carry out the task of separating the Nut Lake, Fishing Lake, and Kinistino Bands and was provided with the "separation agreement" prepared by the Department.³⁸ Once the separation agreement had been signed, Graham was to arrange for the surrender of 13,170 acres from the Fishing Lake Reserve; the Department agreed to advance 10 per cent of the proceeds from the surrendered lands for distribution among the Indians when the surrender was signed.³⁹ Graham accepted his instructions; however, rather than await the cash advance, Graham wrote to the Secretary of the Department, J.D. McLean, asking "to have the sum of \$10,000.00 placed to my credit as it will be necessary to make a cash payment at the time of taking the surrender."⁴⁰ McLean replied that the Department agreed to forward Graham \$10,000.⁴¹

In June 1907, unsure of what Graham's instructions had been regarding the separation of the three bands, Assistant Indian Commissioner McKenna in Winnipeg asked him to advise "promptly what arrangements have been made as to the submitting of the proposition to the Indians. A question has arisen as to the rights of individual Indians in the matter upon which it may be necessary to further instruct you."⁴² The question that had arisen concerned the "rights of individual Indians to elect as to the reserve upon which they will reside and the band in which they will be paid."⁴³ Mr McKenna provided the following example:

for instance, one Kah-ka-qua-nape, who appears to have been living on the Fishing Lake Reserve, presented himself for payment at Nut Lake claiming that he always received his money there. Mr. Agent MacArthur refused to pay him. This Indian was last paid in 1903, but the paylists do not show at what point he was paid.⁴⁴

38 Frank Pedley, Deputy Superintendent General of Indian Affairs, to W.A. Orr, Lands & Timber Branch, March 19, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 142), and Frank Pedley, Deputy Superintendent General of Indian Affairs, to W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, March 20, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 146).

39 Frank Pedley, Deputy Superintendent General of Indian Affairs, to W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, March 20, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 146).

40 W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to J.D. McLean, Secretary, Department of Indian Affairs, April 22, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 148).

41 J.D. McLean, Secretary, Department of Indian Affairs, to W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, May 11, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 150).

42 J.A.J. McKenna, Assistant Indian Commissioner, Department of Indian Affairs, to W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, June 15, 1907, NA, RG 10, vol. 3561, file 82/1 (ICC Documents, p. 155).

43 J.A.J. McKenna, Assistant Indian Commissioner, Department of Indian Affairs, to J.D. McLean, Secretary, Department of Indian Affairs, June 17, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 156).

44 J.A.J. McKenna, Assistant Indian Commissioner, Department of Indian Affairs, to J.D. McLean, Secretary, Department of Indian Affairs, June 17, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 156).

In his response to the Indian Commissioner, Graham reiterated his instructions first to "effect a separation of the Indians on these three Reserves," after which he was to take a surrender at Fishing Lake.⁴⁵ A few weeks later he wrote to McLean expressing some concern over Assistant Commissioner McKenna's intervention in the matter: "I thought my instructions regarding these land surrenders were to come from the Department and not from two sources, to make confusion."⁴⁶ He explained his view of his instructions:

I am first to get a separation of the Kinistino, Nut Lake and Fishing Lake Bands, allowing each to hold the reserves they are now residing upon. Then I return to Fishing Lake and ask them for a surrender of part of their reserve and if they agree to surrender I take it, and pay the Indians of Fishing Lake only.⁴⁷

In an effort to clarify matters after receiving Graham's letter, Secretary McLean wrote Assistant Commissioner McKenna: "If the question that has arisen is the one referred to in your letter of the 17th June last . . . addressed to the Department it does not affect the surrender or separation of these Bands in any way as it is a question of the payment of annuity money, which is governed by the rules pertaining to such, - i.e. - that where the annuitant resides there shall he be paid."⁴⁸

In reply, McKenna explained that Indian Agents MacArthur and Murison had encountered some difficulties in making payment to Kahkaquanape. At the annuity payment, Kahkaquanape claimed to belong to the Nut Lake Reserve and presented himself for payment there. The Indians of Nut Lake refused to recognize him as "belonging" to their reserve. Agent Murison then raised the point that, "as the three reserves were held in common, the Indians living upon the Nut Lake Reserve had no right to refuse admittance thereto to Kahkaquanape. [Agent Murison] stated that his information was that some of the Indians did not live continuously on one reserve and were

45 W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to David Laird, Indian Commissioner, June 19, 1907, NA, RG 10, vol. 3561, file 82/1 (ICC Documents, p. 157).

46 W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, July 4, 1907 (ICC Documents, p. 160).

47 W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, July 4, 1907 (ICC Documents, p. 160).

48 J.D. McLean, Secretary, Department of Indian Affairs, to J.A.J. McKenna, Assistant Indian Commissioner, Department of Indian Affairs, July 10, 1907, NA, RG 10, vol. 3561, file 82/1 (ICC Documents, p. 162).

paid some years at one point and some years at another.”⁴⁹ Assistant Commissioner McKenna went on to state:

I wrote Mr. Inspector Graham for the simple purpose of ascertaining whether he was so instructed as to admit of his dealing with such a question, and as to whether on the breaking up of this band into three parts the members would have any right of election as to where they would reside. . . . I feared that the question raised by Mr. Agent Murison might occasion difficulty in the negotiations which Mr. Graham is to carry out, and if his instructions do not cover the point, that it would be well to have him instructed as to the Department’s position upon the question.⁵⁰

There is no evidence in the historical record for this inquiry to suggest that the issue raised in this passage was ever considered again by the Department. In fact, the “Principal men” of Nut Lake affixed their marks to an agreement recognizing them as a separate band on July 27, 1907, followed by the “Principal men” of Kinistino on July 31. One week later, on August 7, the “Principal men” of Fishing Lake affixed their marks to this agreement.⁵¹

Two days later, on August 9, 1907, Inspector Graham secured the surrender of 13,170 acres from the Fishing Lake Band.⁵² Upon surrender, Graham paid each Indian at Fishing Lake \$100.⁵³ Nine members of the Fishing Lake Band affixed their marks to the surrender document.⁵⁴ In Graham’s report to Secretary McLean on August 21, 1907, he explained that the Indians at Fishing Lake were “not at all anxious to sell”:

I left the Agency on July 20th . . . On the way up I stayed two days at Fishing Lake while the Treaty payments were being made, but I did not say anything to the Indians about surrendering their reserve, until I had dealt with the Indians of Nut Lake and Kinistino. . . .

Graham then explained that he obtained the agreement to separate from the Indians at Nut Lake and Kinistino before going on to Fishing Lake. He arrived at Fishing Lake on August 6, 1907.

49 J.A.J. McKenna, Assistant Indian Commissioner, Department of Indian Affairs, to Secretary, Department of Indian Affairs, July 15, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 163).

50 J.A.J. McKenna, Assistant Indian Commissioner, Department of Indian Affairs, to Secretary, Department of Indian Affairs, July 15, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 164).

51 Separation Agreement executed between the Fishing Lake, Nut Lake, and Kinistino Band, August 7, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, pp. 167-69).

52 Surrender instrument and related documents, August 9, 1907 (ICC Documents, pp. 170-72).

53 Surrender instrument and related documents, August 9, 1907 (ICC Documents, pp. 170-72); Record of payments made by W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, August 12, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, pp. 176-85).

54 Surrender instrument and related documents, August 9, 1907 (ICC Documents, pp. 170-72).

The following day [August 7, 1907] I called the Indians together and explained to them that the Nut Lake and Kinistino Indians had relinquished all claim to the Fishing Lake Reserve, which was not theirs, and asked them if they were willing to relinquish their claims to Nut Lake and Kinistino reserves, which they agreed to do. I then asked them to surrender a portion of the Fishing Lake reserve, which was now theirs. I was surprised to find that they were not at all anxious to sell and it was two days before they agreed to sell. In fact, I had given up hope of getting the surrender, till just before starting for home a number of the Band came over and said they were willing to sign the surrender. A meeting was called and the whole Band voted for the surrender.⁵⁵

On August 30, 1907, Frank Oliver submitted the surrender to the Governor in Council for approval, recommending that authority be given for the disposition of the land according to the terms of the surrender.⁵⁶ The Governor in Council approved the surrender and sanctioned the proposed sale of the land by Order in Council dated September 7, 1907.⁵⁷ Most of the land was sold at three public auctions in 1909 and 1910.

55 W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, August 21, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, pp. 186-89).

56 Submission to the Governor in Council, August 30, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 191).

57 Order in Council, September 7, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 192).

PART III

ISSUES

The issues for this inquiry were framed as follows:

- I Was there a valid surrender on August 9, 1907, of some 13,170 acres of the Fishing Lake Reserve No. 89?
 - 1) Did the Crown obtain the surrender:
 - a) as a result of duress;
 - b) as a result of undue influence;
 - c) as a result of unconscionable agreement; or
 - d) as a result of negligent misrepresentation.
 - 2) Did the Crown when obtaining the surrender comply with the surrender procedures required by the *Indian Act*?
 - 3) Did the Crown have any trust or fiduciary obligations in relation to the surrender of 1905 from the First Nation, and if so, did the Crown *fulfil* those trust or fiduciary obligations when it obtained the surrender?
 - 4) Did the provisions of Treaty 4 require the Crown to obtain the consent of the Indians entitled to the Fishing Lake Reserve, prior to disposing of some 13,170 acres of the reserve, and if so was that consent obtained?
- II If the evidence is inconclusive by any of the previous issues, which party has the onus of proof?⁵⁸

⁵⁸ Grant Christoff, Associate Legal Counsel, Indian Claims Commission, to Stephen Pillipow and Kim Kobayashi, June 16, 1995 (ICC file 2107-23-1).

PART IV

THE INQUIRY

A planning conference was held on February 2, 1995, in Saskatoon, Saskatchewan, with representatives of the Fishing Lake First Nation, Canada, and the Commission in attendance. The planning conference is an informal meeting convened by Commission staff shortly after the inquiry begins. It was devised by the Commission to involve the parties to a claim where practicable in planning the inquiry, and also as a means of settling claims whenever possible without the need for a full inquiry. In this inquiry, representatives of the parties, with their legal counsel, met with the Legal and Mediation Advisor for the Commission to review and discuss the claim, identify the issues raised by the claim, and plan the inquiry on a cooperative basis.

Following this first meeting, Commission staff visited the Fishing Lake First Nation on April 10, 1995, to prepare for the more formal community session, which was held on July 27, 1995. During the community session, elders and other members of the First Nation have an opportunity to present historical evidence from their oral tradition, including evidence that may not be admissible in a court of law, directly to the Commission panel conducting the inquiry. The session is generally held in the First Nation community, if facilities are available, and is attended by representatives of Canada, the First Nation, and the Commission. Out of respect for the elders, and in recognition of the cultural values of First Nations, elders and community members who address the Commissioners are not required to testify under oath, nor is cross-examination permitted.

After hearing the information provided at the community session on July 27, 1995, oral submissions were scheduled for January 31, 1996. Oral submissions are one of the last stages in the Commission inquiry process. It is at this point that lawyers for the First Nation and Canada present written and oral arguments on the facts and the law. The Commissioners then prepare a formal report outlining their findings and recommendations. In this case, however, approximately six weeks before the date set for the oral submis-

sions, legal counsel for the First Nation notified Canada and the Commission that it had recently come to his attention that at least one (and possibly three) of the individuals who signed the surrender document in 1907 was not 21 years of age.⁵⁹ This was a potentially important point because, under the *Indian Act* in force at the time, the surrender had to be "assented to by a majority of the male members of the band of the full age of twenty-one years."⁶⁰

A conference call involving representatives of Canada, the First Nation, and the Commission was convened on January 9, 1996, to discuss this new information. It was agreed during the conference call that counsel for the First Nation would provide Canada with a review of the information by January 16, 1996, and that Canada would then be given an opportunity to conduct its own confirming research. As a result, it was agreed that the oral submissions would be postponed.⁶¹ They were subsequently rescheduled for March 26, 1996.⁶²

Another conference call was convened on March 12, 1996, following the completion of Canada's research. Canada maintained its position that it was prepared to proceed to the oral submissions stage of the inquiry process. Counsel for the First Nation advised that he intended to rely on *The Judicature Ordinance* in force in 1907 to argue that the affidavit certifying the surrender was not properly sworn according to the statutory standards in place at the time.⁶³ A week later, during a conference call on March 19, 1996, the parties agreed to adjourn the oral submissions again so that Canada could reconsider its legal opinion.

On May 7, 1996, Jack Hughes, Research Manager for DIAND, advised the Chief and Council of the First Nation that, "[a]s a result of a further and extensive review of the additional evidence and submissions provided in support of the Fishing Lake First Nation's 1907 surrender claim," the Department was prepared to recommend that the claim be accepted for negotiation under the Specific Claims Policy. He continued:

This recommendation is based upon the First Nation's submission that an outstanding lawful obligation on the part of the federal government ("Canada") exists within the

59 Stephen Pillipow to Kim Kobayashi, Department of Justice, December 21, 1995 (ICC file 2107-23-1).

60 See *Indian Act*, RSC 1886, c. 43, s. 39(a); *Indian Act*, RSC 1906, c. 81, s. 49(1).

61 Kathleen N. Lickers, Associate Legal Counsel, Indian Claims Commission, to Stephen Pillipow, Kim Kobayashi, and Bruce Becker, January 9, 1996 (ICC file 2107-23-1).

62 Kathleen N. Lickers, Associate Legal Counsel, Indian Claims Commission, to Stephen Pillipow, Kim Kobayashi, and Bruce Becker, February 5, 1996 (ICC file 2107-23-1).

63 Stephen Pillipow to Kim Kobayashi, Department of Justice, March 12, 1996 (ICC file 2107-23-1).

meaning of the Specific Claims Policy with respect to the 1907 surrender of a portion of the Fishing Lake Reserve No. 89 (the "Reserve Lands"). In particular, this recommendation is made on the basis of the First Nation's allegation that the Reserve Lands were not surrendered in accordance with the requirements of the *Indian Act*.⁶⁴

On June 17, 1996, counsel for the First Nation informed the Commission that the First Nation had provided a Band Council Resolution to Mr Hughes, "indicating that the First Nation [was] prepared to proceed with the negotiations of a settlement of the Claim and directing Specific Claims to immediately proceed with the recommendation to the Minister that the First Nation's Claim be accepted for negotiation."⁶⁵ The claim was formally accepted for negotiation on August 27, 1996.⁶⁶

The Commission's role in the process normally would have ended as soon as the First Nation's claim was accepted for negotiation. However, on September 30, 1996, counsel for the First Nation wrote to the Commission and asked if it would consider acting as a facilitator for the negotiations.⁶⁷ The Commission responded that it "would be pleased to provide a facilitator for these negotiations if Canada [was] also in agreement that the Commission's involvement would be of assistance in these negotiations."⁶⁸ Canada subsequently agreed to have the Commission facilitate the negotiations. Facilitation focuses almost entirely on matters relating to process. As "keeper of the process," the Commission is expected to chair the negotiation meetings and assist by producing an accurate record of the negotiations, following up on undertakings, and consulting with the parties to establish agreed upon agendas, venues, and times for meetings.

In the negotiation of this claim, the Commission has been asked to assist the parties as a neutral chair. Although the Commission is not at liberty to discuss the nature of the negotiation, we can say that the parties, as represented by the Fishing Lake First Nation and the Department of Indian Affairs, respectively, have worked cooperatively to establish a protocol for the ensu-

64 Jack Hughes, Research Manager - Prairie Provinces, to Chief Michael Desjarlais and Council, May 7, 1996, included in Kim Kobayashi, Counsel, to Kathleen Lickers, Associate Counsel, Indian Claims Commission, May 28, 1996 (ICC file 2107-23-1), and included at Appendix B.

65 Stephen M. Pillipow to Kathleen N. Lickers, Indian Claims Commission, June 17, 1996 (ICC file 2107-23-1).

66 John Sinclair, Assistant Deputy Minister, Claims and Indian Government, Department of Indian and Northern Affairs Canada, to Chief Michael Desjarlais, August 27, 1996, included in Stephen M. Pillipow to Kathleen N. Lickers, Indian Claims Commission, September 10, 1996 (ICC file 2107-23-1), and included at Appendix C.

67 Stephen M. Pillipow to Ron Maurice, Indian Claims Commission, September 30, 1996 (ICC file 2107-23-1).

68 Ron S. Maurice, Commission Counsel, Indian Claims Commission, to Stephen M. Pillipow, October 4, 1996 (ICC file 2107-23-1).

ing negotiations and we are confident that this Accord will assist the parties to arrive at a mutually acceptable resolution to the claim.

FOR THE INDIAN CLAIMS COMMISSION



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



Roger J. Augustine
Commissioner

Dated this 27th day of March 1997

APPENDIX A

FISHING LAKE FIRST NATION 1907 SURRENDER CLAIM INQUIRY

- | | | |
|---|-------------------------------------|------------------|
| 1 | Decision to conduct inquiry | March 2, 1995 |
| 2 | Notice sent to parties | March 2, 1995 |
| 3 | Planning conference | February 2, 1995 |
| 4 | Community and expert session | July 27, 1995 |

The Commission heard from the following witnesses: Chief Michael Desjarlais, Stella Nanequewetung, Eva Desjarlais, Helen Paquachan, Nora Kayseas, Grace Wahweaye, Andrew Slippery, Lawrence Desjarlais, Phillip Slippery, Ned Smoke, Wilson Desjarlais, Lawrence Wahpepiness. Expert evidence was heard from Larry Krakalovich.

- | | | |
|---|------------------------------------|-----------------|
| 5 | Canada's offer to negotiate | August 27, 1996 |
| 6 | Content of formal record | |

The formal record for the Fishing Lake First Nation 1907 Surrender Claim Inquiry consists of the following materials:

- documentary record (4 volumes of documents and annotated index)
- 43 exhibits
- transcripts (1 volume)
- correspondence among the parties and the Commission

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

APPENDIX B



Indian and Northern Affairs Canada / Affaires indiennes et du Nord Canada

File # 100-100000

Chief Michael Desjarlais and Council
Fishing Lake First Nation
P.O. Box 508
Wadena, Saskatchewan
S0A 4J0

WITHOUT PREJUDICE

For the Commission

Dr. M. ...

Dear Chief Desjarlais and Council:

Re: Fishing Lake First Nation - 1907 Surrender Claim

As a result of a further and extensive review of the additional evidence and submissions provided in support of the Fishing Lake First Nation's 1907 surrender claim, we are pleased to advise you that we are prepared to recommend to our Minister the acceptance of this claim for negotiation under the Specific Claims Policy as set out in this letter.

This recommendation is based upon the First Nation's submission that an outstanding lawful obligation on the part of the federal government ("Canada") exists within the meaning of the Specific Claims Policy with respect to the 1907 surrender of a portion of the Fishing Lake Reserve No. 89 (the "Reserve Lands"). In particular, this recommendation is made on the basis of the First Nation's allegation that the Reserve Lands were not surrendered in accordance with the requirements of the *Indian Act*.

The criteria governing the determination of compensation under the Specific Claims Policy are outlined on Schedule "A" attached to this letter. For the purposes of this claim, compensation will generally be guided by compensation criteria 1, 3, 8, 9 and 10.

On the basis of compensation criteria 3 and 8, compensation will likely consist of a cash payment to compensate the band for its loss of the Reserve Lands. Where it can be established, compensation may also include an amount based upon the net loss of use. In this regard, Canada is not prepared to accept the approach taken and the conclusions reached in the report by Dr. Schoney, "An Economic Assessment of the Loss of Fishing Lake Surrendered Lands" as a basis for determining net loss of use.

Compensation criterion 9 provides that any compensation paid shall take into account amounts already paid with respect to the claim. Therefore, amounts and consideration received as a result of the surrender of the Reserve Lands will be taken into account in determining compensation.

Compensation criterion 10 recognizes that the compensation criteria are general in nature and that "the actual amount which the claimant is offered will depend on the extent to which the claimant has established a valid claim, the burden of which rests with the claimant". In our view, a considerable degree of doubt exists with respect to the strength of the claim in light of the factual evidence available to support the claim. In determining the amount of compensation offered,

Canada

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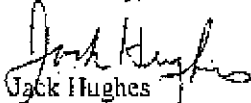
compensation criterion 10 will be applied to the extent of as much as 50% to reflect this degree of doubt.

Finally, in the event that a final settlement is reached, Canada will require a formal surrender of the Reserve Lands pursuant to the *Indian Act* and a release and indemnity from the Band with respect to the Band's claim.

The recommendation that this claim be accepted for negotiation is not to be interpreted as an admission of liability on the part of Canada. In the event that a settlement is not reached and litigation ensues, Canada reserves the right to plead all defences available to it including but not limited to limitation periods, laches, and lack of admissible evidence.

If the Band decides that it wishes to proceed with negotiations, we will then take steps to obtain a formal acceptance of this claim for negotiations under the Specific Claims Policy from our Minister. If you wish to discuss Canada's position in more detail before a final recommendation is made to the Minister, or to discuss the next steps in the process, please let us know. I can be reached at (604) 666-8733.

Yours truly,


Jack Hughes

Research Manager - Prairie Provinces

cc: Stephen Phillipow - Via fax (306) 665-3411
Kim Kobayashi, Department of Justice

SCHEDULE A

*Excerpt from Outstanding Business: A Native Claims Policy***Compensation**

The following criteria shall govern the determination of specific claims compensation:

- 1) As a general rule, a claimant band shall be compensated for the loss it has incurred and the damages it has suffered as a consequence of the breach by the federal government of its lawful obligations. This compensation will be based on legal principles.
- 2) Where a claimant band can establish that certain of its reserve lands were taken or damaged under legal authority, but that no compensation was ever paid, the band shall be compensated by the payment of the value of those lands at the time of the taking or the amount of the damage done, whichever is the case.
- 3)
 - (i) Where a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority, the band shall be compensated either by the return of these lands or by payment of the current, unimproved value of the lands.
 - (ii) Compensation may include an amount based on the loss of use of the lands in question, where it can be established that the claimants did in fact suffer such a loss. In every case the loss shall be the net loss.
- 4) Compensation shall not include any additional amount based on "special value to owner", unless it can be established that the land in question had a special economic value to the claimant band, over and above its market value.
- 5) Compensation shall not include any additional amount for the forcible taking of land.
- 6) Where compensation received is to be used for the purchase of other lands, such compensation may include reasonable acquisition costs, but these must not exceed 10% of the appraised value of the lands to be acquired.
- 7) Where it can be justified, a reasonable portion of the costs of negotiation may be added to the compensation paid. Legal fees included in those costs will be subject to the approval of the Department of Justice.
- 8) In any settlement of specific native claims the government will take third party interests into account. As a general rule, the government will not accept any settlement which will lead to third parties being dispossessed.

SCHEDULE A (cont'd)

- 9) Any compensation paid in respect to a claim shall take into account any previous expenditure already paid to the claimant in respect to the same claim.
- 10) The criteria set out above are general in nature and the actual amount which the claimant is offered will depend on the extent to which the claimant has established a valid claim, the burden of which rests with the claimant. As an example, where there is doubt that the lands in question were ever reserve land, the degree of doubt will be reflected in the compensation offered.
- 11) Where a claim is based on the failure of the Governor in Council to approve a surrender or the taking of land under the Indian Act, compensation shall not be based on the current, unimproved value of the land, but on any damages the claimant might have suffered between the period of the said surrender or forcible taking and the approval of the Governor in Council and by reason of such delay.

APPENDIX C



Indian and Northern
Affairs Canada

Assistant Deputy Minister

Ottawa, Canada
K1A 0S4

Affaires Indiennes
et du Nord Canada

Secur-ministre adjoint

AUG 27 1996
AOUT

WITHOUT PREJUDICE

Chief Michael Desjarlais
Fishing Lake First Nation
P.O. Box 508
WADENA SK S0A 4J0

Dear Chief Desjarlais:

Fishing Lake First Nation Specific Claim - 1907 Surrender.

On behalf of the Government of Canada, and in accordance with the Specific Claims Policy, I am pleased to accept for negotiation the Fishing Lake First Nation's specific claim concerning the 1907 surrender of a portion of the Fishing Lake Indian Reserve No. 89.

For the purposes of negotiations, Canada accepts that the Fishing Lake First Nation has sufficiently established that Canada has a lawful obligation within the meaning of the Specific Claims Policy, in respect to the First Nation's allegation that the reserve lands were not surrendered in accordance with the requirements of the *Indian Act*.

The criteria governing the determination of compensation are set out in the Specific Claims Policy booklet, "*Outstanding Business*". For the purposes of this claim, compensation will generally be guided by compensation criteria 1, 3, 8, 9 and 10.

While it is recognized that the Fishing Lake First Nation disagrees with the application of compensation criterion 10, Canada is prepared to accept the claim for negotiation on the understanding that compensation criterion 10 will be applied in determining any compensation offered. Our negotiator will be instructed to consider all relevant factors raised by the First Nation at the negotiating table in determining the extent to which criterion 10 will be applied in any offer of compensation.

Canada

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- 2 -

The steps of the claims process which will be followed hereafter include: conclusion of a negotiating protocol accord; negotiations toward a settlement agreement; drafting a settlement agreement; concluding the agreement; ratifying the agreement; and finally, implementation of the agreement.

Throughout the process, Canada's files, including all documents submitted to Canada concerning the claim, are subject to the Access to Information and Privacy legislation in force.

All negotiations are conducted on a "without prejudice" basis. Canada and the tribe acknowledge that all communication, oral, written, formal or informal, are made with the intention of encouraging settlement of the dispute between the parties only, and are not intended to constitute admissions by any party.

The acceptance of the claim for negotiation is not to be interpreted as an admission of liability or fact by Canada. In the event that no settlement is reached and litigation ensues, Canada reserves the right to plead all defenses available to it, including limitation periods, laches and lack of admissible evidence.

In the event that a final settlement is reached, the settlement agreement must contain a release from the Fishing Lake First Nation ensuring that this claim cannot be reopened. As part of the settlement, Canada will also require an indemnity from the First Nation.

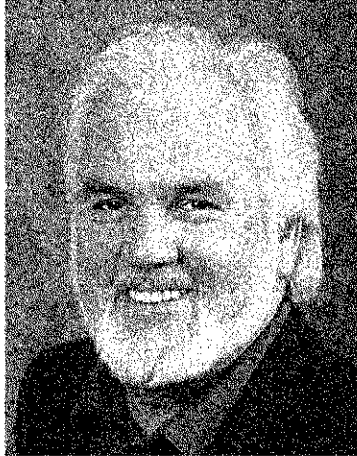
A negotiator from the Specific Claims Branch will be designated to work with you in resolving this claim. I send my best wishes and I am optimistic that a fair settlement can be reached.

Yours sincerely,



John Sinclair
Assistant Deputy Minister
Claims and Indian Government

THE COMMISSIONERS



Roger J. Augustine is a Micmac born at Eel Ground, New Brunswick, where he served as Chief from 1980 to 1996. He was president of the Union of NB-PEI First Nations from 1988 to January 1994. He is president of Black Eagle Management Enterprises and a member of the Management Board of Eagle Forest Products. He has been honoured for his efforts in founding and fostering both the Eel Ground Drug and Alcohol Education Centre and the Native Alcohol and Drug Abuse Rehabilitation Association. In February 1996, Mr Augustine was appointed a director to the National Aboriginal Economic Development Board. In June 1996, he was named Miramichi Achiever of the Year by the Miramichi Regional Development Corporation. He was appointed Commissioner to the Indian Claims Commission in 1992.



Daniel J. Bellegarde, Co-Chair, is an Assiniboine/Cree from the Little Black Bear First Nation in southern Saskatchewan. From 1981 to 1984, he worked with the Meadow Lake District Chiefs Joint Venture as a socio-economic planner. From 1984 to 1987, Mr Bellegarde was president of the Saskatchewan Indian Institute of Technologies. Since 1988, he has held the position of First Vice-Chief of the Federation of Saskatchewan Indian Nations. He was appointed Commissioner, then Co-Chair of the Indian Claims Commission on July 27, 1992, and April 19, 1994, respectively.



Carole T. Corcoran is a Dene from the Fort Nelson Indian Band in northern British Columbia. Mrs Corcoran is a lawyer with extensive experience in Aboriginal government and politics at local, regional, and provincial levels. She has served as a Commissioner on the Royal Commission on Canada's Future in 1990/91, and as Commissioner to the British Columbia Treaty Commission from 1993 to 1995. Mrs Corcoran was appointed as a Commissioner to the Indian Claims Commission in July 1992.



Aurélien Gill is a Montagnais from Mashteuiatsh (Pointe-Bleue), Quebec, where he served as Chief for nine years. He has helped found many important Aboriginal organizations, including the Conseil Atikamekw et Montagnais, the Conseil de la Police amérindienne; the Corporation de Développement Économique Montagnaise, and the National Indian Brotherhood (now the Assembly of First Nations). Mr Gill served as Quebec Regional Director in the Department of Indian Affairs and Northern Development, and is a member of the National Aboriginal Economic Development Board. Mr Gill is a member of several boards, including those of the Université du Québec à Chicoutimi and the Northern Engineering Centre at the Université de Montréal. He is a member of the Environmental Management Boards for the federal government and for the Province of Quebec. In 1991 he was named to the Ordre national du Québec. Mr Gill was appointed Commissioner of the Indian Claims Commission on December 8, 1994.



P.E. James Prentice, QC, Co-Chair, is a lawyer with the Calgary law firm Rooney Prentice. He has an extensive background in native land claims, including work as legal counsel and negotiator for the Province of Alberta in the tripartite negotiations that brought about the Sturgeon Lake Indian Claim Settlement of 1989. Mr Prentice is a member of the Canadian Bar Association, and was appointed Queen's Counsel in 1992. He was appointed Commissioner, then Co-Chair, of the Indian Claims Commission on July 27, 1992 and April 19, 1994, respectively.