INTRODUCTION

Post-Confederation treaties concluded between the Crown (in right of Canada) and various Indian nations in the Prairie provinces, parts of Ontario, British Columbia, and the Northwest Territories – the so-called numbered treaties – all stipulated the reservation of land for the benefit of Indian bands. In all cases, the size of these allotments was to be determined according to a formula of a stated area for each family of five persons, "or in that proportion for larger or smaller families." Treaties 1, 2, and 5 set aside 160 acres per family; the others set aside one square mile or 640 acres per family.

Unfortunately, the treaties do not provide the specific details required for the implementation of this provision. Variations in the interpretation of who should be included in the calculation of reserve size, and at what date, have created confusion and the possibility of inequitable treatment of bands, even within the same treaty area. Since the early 1970s, the federal government and Canada's First Nations have been conducting research and negotiations towards finally settling all outstanding treaty land entitlement claims. During that process, various criteria have been established regarding population figures for (a) the calculation of the land entitlement of each band under treaty, and (b) for those bands found to be still owed land, the quantum of land now due.

It is important to note that this is a *background historical paper*, prepared solely to provide an overview of the past for those who are now investigating treaty land entitlement claims. It is a preliminary attempt to outline the historical aspects of reserve land entitlement: what was written into the treaties and reported at the negotiations; how Canada calculated reserve size at the time of survey; how research has been conducted on this question since the 1970s; what the basis of validation has been for particular claims; and what the terms of settlement have been. The paper will deal only with treaty land provisions and, more specifically, with the determination of the *quan-*

tity of land promised in those agreements. It will not address issues relating to the location, *quality* of reserve land, or the reserve's economic potential in the determination of its size.

The history of treaty land entitlement claims is complicated and convoluted – what is true for one group at one particular time might not be true for another group or another time. Exceptions can be found for nearly every statement, depending on the time, the location, or the particular people making the decisions. This paper does not pretend to present every nuance of every issue. Time constraints and limited research material have necessarily narrowed the scope of this study, and the information it presents is therefore neither definitive nor conclusive.

The documents used were primarily (but not solely) those submitted to the Indian Claims Commission (ICC) by the parties to the Inquiry into the Lac La Ronge First Nation's treaty land entitlement claim. While voluminous, they were not comprehensive. To do justice to this topic, more research must be conducted (especially into the areas of the First Nations' understanding of the treaties, the past practice of the government in establishing and surveying reserves, and the terms of settlements of modern treaty land entitlement claims). This paper offers no conclusions or recommendations, but simply attempts to present, in a logical and organized fashion, the history of some aspects of this very complicated topic, based on the material at hand.

The information presented here is organized in four parts: Part 1 describes the legislative framework and gives some background information about pre-Confederation reserves; Part 2 discusses the treaty-making process and surveys the numbered reserves; Part 3 documents the post-1970 treaty land entitlement claims validation process; and Part 4 details post-1970 treaty land entitlement claim settlements. Most of the discussion revolves around the three Prairie provinces (where the influence of the various provincial governments' policies adds further complicating factors to the discussion). Treaty bands in Ontario are only now beginning to submit treaty land entitlement claims, and while some background is given on those claims, they are not dealt with in any substantive manner. A Glossary of Terms provides a general explanation of the terms that come up in treaty land entitlement research, and a select bibliography lists some of the important documents on the subject.*

* I owe a large debt of gratitude to the following people who, on very short notice, read and provided helpful, constructive comments on the first draft of this paper: Lew Lockhart, Leo Waisberg, Jim Gallo, Peggy Martin-McGuire, Bruce Becker, Al Gross, and Neil Reddekopp.

PART I

BACKGROUND

Treaty land entitlement issues are confined to the post-Confederation "numbered treaties" (Treaties 1-11) because each of them stipulated that reserve size was to be determined according to band populations. The primary legislative framework and a brief summary of the reserve provisions in pre-Confederation agreements with Indian groups in the rest of Canada are reviewed in this section to provide background for the question of why this provision was included in the texts of the numbered treaties and its implications today.

FEDERAL/PROVINCIAL RESPONSIBILITIES

Royal Proclamation of 1763

The *Royal Proclamation* issued by King George III of England in 1763 is considered to be the foundation of the British treaty-making process with Indian groups west of Quebec (although the exact boundaries of the area covered by the *Proclamation* are debatable). It declared that Indian lands could not be purchased by private individuals, unless first surrendered to the Crown at a public meeting of the native people interested in the land:

> And whereas it is just and reasonable, and essential to our Interests, and the Security of our Colonies, and the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds. . . .
>
> . . . We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time Any of the said Indians

would be inclined to dispose of the said Lands, the same shall be purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians . . .[1]

British North America Act (1867) / Constitution Act (1982)

In the distribution of legislative powers under the *British North America Act* (1867),[2] the federal government assumed exclusive jurisdiction over "Indians and lands reserved for Indians (s. 91(24))." The provinces retained exclusive jurisdiction for "the Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon" (s. 92(5)) and "All lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces . . . in which the same are situate or arise . . ." (s. 109).

Aboriginal and treaty rights were recognized and confirmed in the *Constitution Act* (1982) as amended in 1983:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
> (4) Notwithstanding any other provisions of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Transfer of Rupert's Land

Rupert's Land was the name applied to the territories granted by Charles II in 1670 to the Hudson's Bay Company, comprising (according to the most liberal interpretation) all those territories watered by the rivers flowing into Hudson Bay. In 1870, "Rupert's Land and the North West Territory" was officially transferred to Canada. The Hudson's Bay Company received monetary compensation, along with the right to retain certain blocks of land around its trading posts and one-twentieth of the arable land in the ceded territories.

1 *Royal Proclamation*, October 7, 1763, in Robert J. Surtees, *The Original People* (Toronto: Holt, Rinehart and Winston, 1971), 27-29.

2 *British North America Act, 1867*, s. 91(24), in Derek Smith, ed., *Canadian Indians and the Law: Selected Documents, 1663-1972*, Carleton Library No. 87 (Toronto: McClelland & Stewart, 1975), 62-63.

In their address to the Queen arguing for the transfer of Rupert's Land, representatives of Canada declared themselves ready to continue Britain's policy: "the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with aborigines."[3] The actual Order transferring this territory specified that "any claims of Indians to compensation for lands required for the purpose of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; the [Hudson's Bay] company shall be relieved of all responsibility in respect of them."[4]

Indian Act

The *Indian Act* deals with the management and administration of Indian lands and assets. There is no provision in the *Indian Act* for the *creation* of reserves.

Ontario

At Confederation, Ontario's northwestern boundary had not been clearly defined. The 55,000 square miles ceded to the Crown by the Ojibway Indians in 1873 under Treaty 3 were within an area which, between 1870 and 1889, was claimed by both Ontario and Canada. Ontario's claim that its true western boundary extended to the Lake of the Woods and its northern limit to James Bay and the Albany River was upheld by a board of arbiters in 1878 and confirmed on appeal to Great Britain in a judgment of the Judicial Committee of the Privy Council in 1884.[5]

Canada, however, continued to argue that, even if the boundary extended as far west as Ontario claimed, the natural resources belonged to the Dominion as a result of the purchase of Indian lands by Treaty 3. This issue was decided in 1888 in *St. Catherine's Milling Company v. The Queen*, again in favour of Ontario. In effect, the Judicial Committee ruled that lands ceded by Treaty 3 were the property of the Crown in the right of the Province, not the Dominion, and the federal government had no powers under the *BNA Act* to assign reserves unilaterally under the Treaty:

3 Address of the Senate and House of Commons (Canada) to the Queen, December 16-17, 1867, being Schedule A to *Order of Her Majesty in Council Admitting Rupert's Land and the North-Western Territory into the Union*, reprinted in RSC 1970, App. II, No. 9, 264.

4 *Order of Her Majesty in Council Admitting Rupert's Land the North-Western Territory into the Union*, June 23, 1870, s. 14, reprinted in RSC 1970, App. II, No. 9, 257-63.

5 Ontario, Parliament, Legislative Assembly, *Sessional Papers*, 1889, No. 60.

> The ceded territory was at the time of the union, land vested in the Crown, subject to "an interest other than that of the province in the same," within the meaning of Sect. 109 [*BNA Act, 1867*]; and must now belong to Ontario in terms of that clause . . .
>
> . . . The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian Title.[6]

The boundary between Ontario and Manitoba was subsequently confirmed by imperial statute in 1889.[7]

If, as the Judicial Committee decided in *St. Catherine's Milling*, the land ceded by Treaty 3 was, by virtue of section 109 of the *BNA Act*, the property of the province, then only the province could set aside reserves for the Indians. To settle the question of Treaty 3 reserves surveyed before the boundary issue was resolved, both the federal and provincial governments signed an agreement on April 16, 1894, in accordance with the draft provided in *An Act for the Settlement of Certain Questions between the Governments of Canada and Ontario respecting Indian Lands* enacted on July 10, 1891.[8] By this agreement, Ontario would have to give its consent to any future treaties concluded between Canada and the Indians, within the province's boundaries, and either confirm or veto the reserves previously set apart under the terms of Treaty 3.

Natural Resources Transfer Agreements (1930) – Prairie Provinces

When Manitoba, Saskatchewan, and Alberta attained provincial status in 1870 and 1905, Canada retained the administration of lands and resources in order to assure that settlement would not be interrupted. Control of the ungranted lands and natural resources was not transferred to the provinces until 1930.[9] At that time, it was recognized that not all reserve lands promised in the treaties had been allotted, so provisions were included to protect the interests of the Indians. The agreements provided that the provinces would transfer to Canada sufficient unoccupied Crown land to enable Canada to fulfil its treaty obligations to the Indians:

6 *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 AC 46 (PC).
7 *Canada (Ontario Boundary) Act, 1889* (UK), 52-53 Vict., c. 28 (ICC, La Ronge TLE Documents, pp. 463-64).
8 *An Act for the Settlement of certain questions between the Government of Canada and Ontario, respecting Indian Lands*, July 10, 1891 (UK), 54-55 Vict., c. 5.
9 Memoranda of Agreement scheduled to the *British North America Act, 1930*, reprinted in RSC 1970, Apps. at 367-74 (Manitoba), 377-85 (Alberta), and 385-92 (Saskatchewan).

> All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.[10]

PRE-CONFEDERATION ESTABLISHMENT OF RESERVES

Reserves were established in the Maritimes, Ontario, Quebec, and British Columbia before Confederation. The methods used to establish these reserves varied, but with one exception – Manitoulin Island in 1862 – reserve size was not determined according to any known or stated formula.

In Quebec under the French régime, the state did not recognize any legal rights or title to the land on the part of the Indians, and neither contemplated nor made any formal land cessions.[11] Between 1635 and 1760, however, six reserves were established along the St Lawrence River. These were lands which the Jesuit missionaries had obtained through seigneurial grant to aid in their religious work with the Indians. Some of these tracts were then granted to the Indians for their use, but always with the proviso that the lands could not be alienated without the Jesuits' approval.

There were no further provisions for Indian lands in Quebec until 1851. In that year, legislation was enacted granting land which would result in the establishment of nine more reserves:

> That tracts of Land in Lower Canada, not exceeding in the whole two hundred and thirty thousand Acres, may, under orders in council to be made in that behalf, be described, surveyed and set out by the Commissioner of Crown Lands, and that such tracts of Land shall be and are hereby respectively set apart and appropriated to and for the use of the several Indian Tribes in Lower Canada . . . [12]

10 *Agreement between the Dominion of Canada and the Province of Saskatchewan for the Transfer of the Natural Resources of Saskatchewan*, 20 March 1930, s. 10, reprinted in RSC 1970, App. II, No. 9, 388.

11 Peter A. Cumming and Neil H. Mickenberg, *Native Rights in Canada*, 2nd ed. (Toronto: General Publishing Co., 1972), 66.

12 Province of Canada Statutes, 14 & 15 Vict., c. 106. Cited in Cumming and Mickenberg, *Native Rights*.

Governments in early Nova Scotia and New Brunswick gave no evidence of recognizing aboriginal title, and there were no general surrenders of land or treaties negotiated. When land was reserved for the Indians by the government of the day, "it continued to belong to the Crown for the benefit of the province subject to a usufructory right in favour of the Indians. Thus the title to these lands remained with the Crown along with the prerogative for disposal methods and for making legislation to them."[13] During the 1700s, some Indian groups successfully petitioned for land grants in the same manner as their non-native neighbours, while others had areas reserved simpy by right of occupancy. In 1819 the Lieutenant Governor of Nova Scotia proposed that reserves of no more than 1000 acres be established in each county, to be held in trust for those Indians who wanted to settle. Cape Breton, a separate jurisdiction until 1820, reacted to the mounting tension between Indians and squatters in the early 1830s by surveying and reserving some 12,000 acres of land already occupied by Indian groups. There does not appear to have been any consideration of population distribution in any of these allotments.

In British Columbia, reserves were established in the 1850s while the territory was still provisionally governed by the Hudson's Bay Company. The policy of HBC Chief Factor James Douglas at the time was to allow tribes to select as much land as the Indians themselves judged necessary. Owing to the expansion of white settlement, subsequent colonial governments reversed this policy and reduced the reserves whenever possible. The size of these reserves was not directly determined by population. (After Confederation, Canada attempted to persuade the provincial government to allocate reserve lands equal in per capita area to those in the Prairies, but the most the province would agree to was a maximum of 20 acres per family.)

Early land cession treaties in Ontario rarely included provision for reserves since it was assumed that the Indians would relocate as settlers moved in. Occasionally, Indians asked to retain particular small areas for their own use, and these were granted. In an 1806 agreement, for example, the Mississaugas of Credit River retained three small areas traditionally used as fisheries at the mouths of the Credit River (8940 acres), Sixteen Mile Creek (968 acres), and Twelve Mile Creek (1320 acres). Immediately after the War of 1812, a "growing comprehension by Indians of what the land sale agreements meant" was evidenced in the insistence on substantial reserve

13 Marie Laforest, *Indian Land Administration and Policy in the Maritime Provinces (Nova Scotia and New Brunswick to 1867)* (n.p., 1978), 77 (copy in DIAND, Claims and Historical Research Centre, M31).

locations for specific bands and specific purposes.[14] At the preliminary negotiations of the Long Woods and Huron Tracts (southwestern Ontario, around London and Sarnia) in 1818, the Indians listed the reserves they wanted:

> 1st Four miles square at some distance below the Rapids of the river St. Clair.
> 2nd One mile in front by four deep bordering on the said river and adjoining to the Shawanoe Reserve (Sombra Township).
> 3rd. Six miles at Kettle Point, Lake Huron.
> 4th. Two miles Square at the River au Sable.
> 5th. Two miles square at Bear's Creek, also a reserve for Tomico and his band up the Thames which he will point out when he arrives.[15]

Presumably, the locations corresponded to sites of habitual use. There is no record of how the quantity of land was determined, although there is some indication that it was simply an estimate of what would be needed: Chief Chawne, speaking on behalf of the assembled Chiefs, "added that they expected that if the King's representative felt the reserves were too small they would be enlarged at the time of the final agreement."[16] In 1826, when the first four reserves on the list were surveyed for the Chippewas of Chenail Ecarte and St Clair (now the Walpole Island, Sarnia, and Kettle and Stony Point Bands), they received exactly what they had asked for at the 1818 council. Although the annuities offered were calculated on a per capita basis, there is no indication that the size of the reserves bore any relationship to the total number taking treaty or to the number of people actually residing at the various sites.

In 1849 mineral discoveries rather than settlement caused the government of Upper Canada to contemplate treating with the Indians north of Lakes Huron and Superior. In preparation, Alexander Vidal and T.G. Anderson were sent on a fact-finding mission to the area to inform the Indians of the government's intentions and to determine what the different bands would expect in return. In the late summer and autumn of 1849, Vidal and Anderson managed to meet with 16 of the 22 chiefs in the area, and their resulting report

> set forth the terms which might be considered by government. These included suggestions regarding the size of annuity payments, the preservation of hunting and fishing

14 R.J. Surtees, "Indian Land Cessions in Ontario, 1763-1862: The Evolution of a System" (unpublished PhD thesis, Carleton University, Ottawa, 1982), 204.

15 Minutes of a Council at Amherstburg, October 16, 1818, National Archives of Canada [hereinafter NA], Claus Papers, vol. 11, pp. 95-96, quoted in R.J. Surtees, *Indian Land Surrenders in Ontario, 1763-1863* (Ottawa: DIAND, February 1984), 80.

16 Ibid.

rights and the establishment of reserve lands (including locations and size). The report also provided information regarding the location, population and principal men of the several bands who claimed rights to specific locations, and who numbered, in all, about 2600 people.[17]

William B. Robinson was commissioned to negotiate the actual treaties, which he successfully completed the following summer. The texts of both the Robinson-Superior Treaty, signed on September 7, 1850, and the Robinson-Huron Treaty, signed two days later, included a schedule of reserves. Although there were apparently some discussions beforehand concerning an allotment formula of a certain number of acres per capita, no such formula was written into the treaties.[18] Robinson reported that "[i]n allowing the Indians to retain reservations of land for their own use I was governed by the fact that they in most cases asked for such tracts as they had heretofore been in the habit of using for purposes of residence and cultivation."[19]

Whatever descriptions of the reserves appear in the text of the treaty are in blocks: for example, "Wabakekik, three miles front, near Shebawenaning, by five miles inland, for himself and band."[20] It is not clear how much time was spent discussing the quantity of land to be set aside for the different bands, although Robinson is clearly aware that the allotments were not to be too large. In his report, he defends the reservation at Garden River, which "is the largest and perhaps of most value, but as it is occupied by the most numerous band of Indians and from its locality (nine miles from the Sault) is likely to attract others to it, I think it was right to grant what they expressed a desire to retain."[21]

The only example found of reserve size based on population before Confederation is on Manitoulin Island in 1862. In the hope of inducing large groups of Indians to relocate to an area isolated from white society, the Indian title to the Manitoulin Island chain had been ceded in August 1836 and protected by the Crown as an Indian territory. Few made the move. By 1860 there were about 1200 Indians on the islands, but white settlement and

17 Surtees, "Indian Land Cessions in Ontario," 246.

18 Ibid., 154.

19 W.B. Robinson to Colonel Bruce, Superintendent General of Indian Affairs, September 24, 1850, in A. Morris, *The Treaties of Canada with the Indians* (1880; repr., Toronto: Coles, 1979), 19.

20 Robinson-Huron Treaty, September 9, 1850, in Morris, *Treaties*, 307. Note that not all the reserves are defined in even this general manner. For example, Shawenakishick and his band were to receive "a tract of land now occupied by them, and contained between two rivers, called Whitefish River, and Wanabitsaseke, seven miles inland."

21 W.B. Robinson to Hon. Col. Bruce, Superintendent General of Indian Affairs, September 24, 1850, in Morris, *Treaties*, 19.

industry were moving in. In October 1862 the resident Indians agreed to surrender their interest in the islands, so that lands could be sold. According to the terms of the agreement, land was to be retained by the Indians on the basis of 100 acres for each head of a family or each family of orphans, and 50 acres for each single adult or single orphan. Each Indian was to be allowed to make his own selection, provided that "the lots selected shall be contiguous or adjacent to each other, so that settlements on the Island may be as compact as possible."[22] It was also expressly stated that the selections had to be made within one year of the completion of the survey, but this would pose few administrative problems since the Indian population on the island was stable and well defined, a resident Indian agent having been established there since 1836. Clearly, the wording of this document implies an individual interest in the land allocations; the lots were to be selected in a block simply for ease of administration. The document does not contain the usual stated prohibition against alienation of the land without Crown approval, but rather states that the deeds or patents for the lands to be selected are to contain "such conditions for the protection of the grantees as the Governor in Council may, under the law, deem requisite."[23] There is no indication that subsequent treaty negotiators had access to or knowledge of this agreement.

22 The Manitoulin Island Treaty, October 6, 1862, in Morris, *Treaties*, 309-13. This is not a "treaty" in the sense that we use that word today, but rather a "surrender for sale."

23 Ibid.

PART II

RESERVES IN THE NUMBERED TREATIES

TREATY NEGOTIATIONS AND THE NUMBERED TEXTS

After Confederation, each of the 11 "numbered treaties," covering Canada's midwestern and northern regions, provided for a per capita allotment – a certain number of acres "per family of five, or in that proportion for larger or smaller families." The texts of the various treaties, along with the correspondence, accounts, and reports related to them, help to provide some insight into what was intended by this clause.

Treaties 1 and 2 (1871)

The negotiations with the Cree and Saulteaux Indians of Manitoba at Fort Garry in 1871 successfully concluded the first Indian treaty for the new Dominion of Canada. They mark the only occasion where records show extensive discussion of reserve size, and this was the first treaty to stipulate the establishment of reserve size according to a formula based on band population. Since the treaties that followed continued to include a reserve "formula," it is important to look closely at the negotiations and surrounding circumstances of Treaty 1 in order to understand this provision.

Except for the general principles espoused in the *Royal Proclamation* and, to some extent, the precedent of treaties completed in previous administrations, the Canadian government in 1871 had no established policy or procedures to follow in making treaties with the Indians. Indeed, it had little knowledge of the Indians in the newly acquired territories, and was depending on Lieutenant Governor Adams Archibald to "report upon the state of the Indian Tribes now in the Territories; their numbers, wants and claims, the system heretofore pursued by the Hudson's Bay Company in dealing with them . . ."[24] For the most part, treaty negotiators were given some broad

24 Canada, Parliament, *Sessional Papers*, 1870, No. 20, quoted in Ronald C. Maguire, *An Historical Reference Guide to the Stone Fort Treaty (Treaty One, 1871)* (Ottawa: DIAND, 1980).

parameters and left to work out details in the field. Treaty Commissioner Wemyss Simpson's instructions from Ottawa, for example, included a copy of the Robinson-Superior Treaty and strong admonitions to be frugal. He was specifically told to offer no more than $12 per family of five for annuities. The question of reserves had occupied only one sentence:

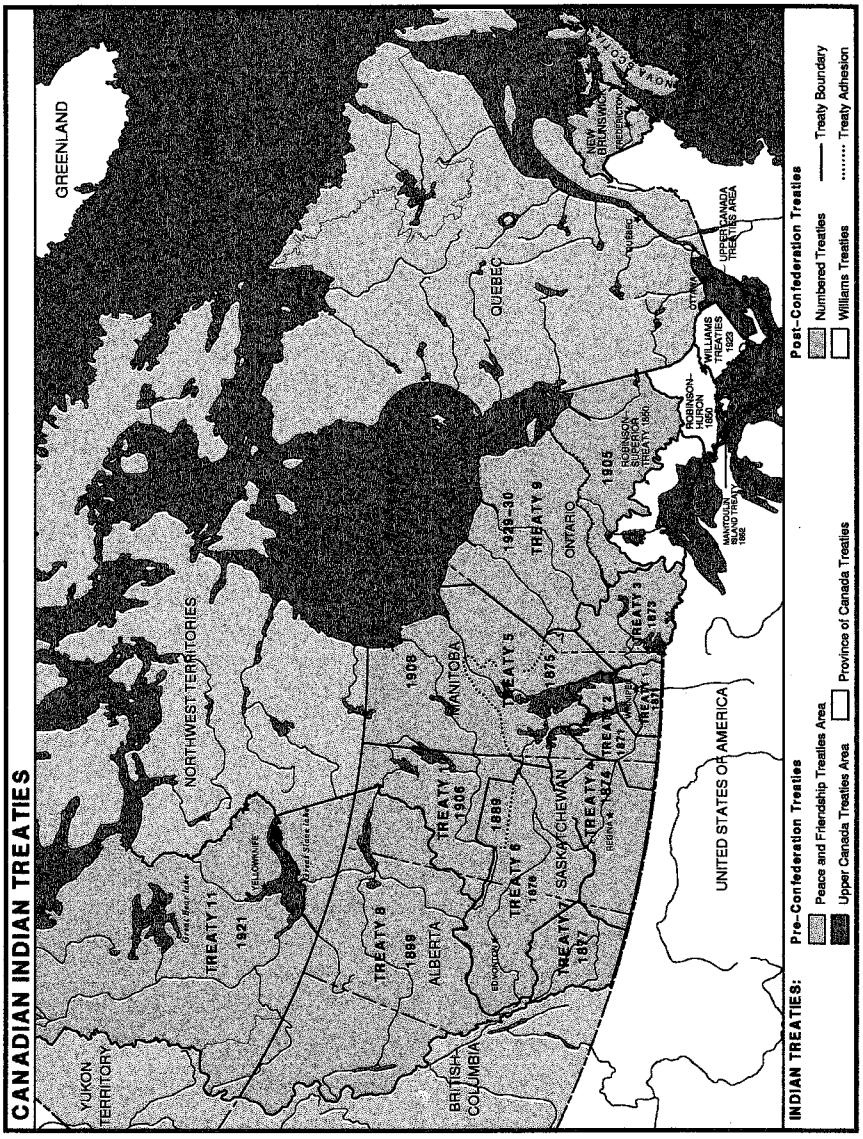
> One part of your duty, and by no means the least important, will be to select desirable Reserves for the use of the Indians themselves, with a view to the gradual introduction of those agencies which in Canada have operated so beneficially in promoting settlement and civilization among the Indians.[25]

If Ottawa was mostly concerned with monetary considerations, Manitoba's Lieutenant Governor, who took the lead in Treaty 1 negotiations, needed to make land a priority as well. There were only about 7 million acres in the whole of the province of Manitoba as it existed in 1871, including lakes, swamps, and other areas unsuitable for agriculture or development. About one-quarter of that area was already promised – one-twentieth to the Hudson's Bay Company on account of provisions in the Rupert's Land purchase, 1.4 million acres for the Métis and original white settlers under the *Manitoba Act*, free grants to the military volunteers who had come to quell the Red River Rebellion, and various other allotments for schools, railway lands, and so on. Aboriginal interest in the land had to be dealt with before these grants could be made. Settlers were arriving daily to stake free homestead grants, but were prevented from cutting trees or ploughing land by the different Indian groups in the area, who insisted that all such development must await the treaty. It was important for the development of this fledgling province that as much land as possible be made available to new settlers.

Whenever land had been reserved in pre-Confederation agreements, the general practice had been to allow the Indians to select any reasonable amount of land they themselves deemed necessary. From Archibald's report, it appears that the Commissioners began the discussion of reserves in a similar manner: "When we met this morning, the Indians were invited to state their wishes as to the reserves, they were to say how much they thought would be sufficient and whether they wished them all in one or in several places."[26] During the previous year, however, Archibald had had several

25 Joseph Howe, Secretary of State for the Provinces, to Commissioners S. Dawson, R. Pither, and W. Simpson, May 6, 1871, NA, RG 10, vol. 363, pp. 249-63.

26 A. Archibald to Secretary of State for the Provinces, July 29, 1871, in Morris, *Treaties*, 33-34.


CANADIAN INDIAN TREATIES
GREENLAND
YUKON TERRITORY
NORTHWEST TERRITORIES
TREATY 11
1921
YELLOWKNIFE
TREATY 8
1899
ALBERTA
BRITISH COLUMBIA
EDMONTON
1906
TREATY 10
1906
1889
TREATY 6
1876
TREATY 7
1877
SASKATCHEWAN
REGINA
TREATY 4
1874
TREATY 2
1871
TREATY 1
1871
MANITOBA
TREATY 5
1875
1923-30
TREATY 9
ONTARIO
1905
ROBINSON-SUPERIOR TREATY (1850)
TREATY 3
1873
QUEBEC
OTTAWA
WILLIAMS TREATIES 1923
ROBINSON-HURON 1850
MANITOULIN ISLAND TREATY 1862
UPPER CANADA TREATIES AREA
NEW BRUNSWICK
PRINCE EDWARD ISLAND
NOVA SCOTIA
YUKON
UNITED STATES OF AMERICA
INDIAN TREATIES:
Pre-Confederation Treaties
Peace and Friendship Treaties Area
Upper Canada Treaties Area
Province of Canada Treaties
Post-Confederation Treaties
Numbered Treaties
Williams Treaties
Treaty Boundary
Treaty Adhesion

meetings with various Indian groups and knew that the Indians were expecting large areas to be reserved for them, and so he included in his opening address a warning that the reserves "will be large enough, but you must not expect them to be larger than will be enough to give a farm to each family, where farms shall be required."[27] The Indians either did not understand this warning or chose to ignore it, for they put forward demands for reserves which, according to Simpson, "amounted to about three townships per Indian, and included the greater part of the settled portions of the Province."[28] In response, the Commissioners specifically defined the limits of their offer: "We told them that what we proposed to allow them was an extent of one hundred and sixty acres for each family of five, or in that proportion; that they might have their land where they choose, not interfering with existing occupants. . . ."[29]

That the Commissioners arrived at this particular formula is not surprising. The reserves were meant to provide the Indians with an alternative economic base – agriculture – when they were no longer able to support themselves by hunting and fishing. Archibald had been instrumental in convincing Ottawa to adopt the American quarter-section (160-acre) free homestead grant in the *Dominion Lands Act* being drafted at the time. Since instructions to the Commissioners had specified annuity payments based on a family of five, 160 acres for each family of five was, for Archibald at least, a logical offer.

Neither Archibald nor Simpson had accurate population figures for any of the Bands, so the text of Treaty 1 (and later Treaty 2) refers to the *location* of various reserves but not the *size*. For example, Henry Prince's Band was granted "so much of land on both sides of the Red River, beginning at the south line of St. Peter's Parish, as will furnish one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families."[30]

The only mention of any Indian concern about the limit on reserve size appears in the newspaper *Manitoban*, which covered the negotiations in depth:

> Providing for Posterity. Wa-sus-koo-koon – I understand thoroughly that every 20 people get a mile square; but if an Indian with a family of five, settles down, he may have more children. Where is their land?

27 Morris, *Treaties*, 28-29.
28 W. Simpson to Secretary of State for the Provinces, November 3, 1871, in Morris, *Treaties*, 39-40.
29 Archibald to Secretary of State for the Provinces, July 29, 1871, in Morris, *Treaties*, 33-34.
30 Treaty No. 1, August 3, 1871, in Morris, *Treaties*, 315.

> His Excellency – Whenever his children get more numerous than they are now, they will be provided for further West. Whenever the reserves are found too small the Government will sell the land, and give the Indians land elsewhere.[31]

Immediately after concluding the treaty at Fort Garry, the Commissioners travelled to Manitoba Post to negotiate with the Indians in that area. Treaty 2 was signed on August 21, 1871, but there is no record of what discussion, if any, took place. Simpson sums up the whole of the negotiation in his report: "it was evident that the Indians of this part had no special demands to make, but having a knowledge of the former treaty, desired to be dealt with in the same manner and on the same terms as those adopted by the Indians of the Province of Manitoba."[32]

Treaty 3 (1873)

The third of the numbered treaties, concluded at the Northwest Angle of the Lake of the Woods on October 3, 1873, provided for a much larger reserve allotment than had the previous two: "such reserve whether for farming or other purposes shall in nowise exceed in all one square mile for each family of five, or in that proportion for larger or smaller families." The reserve allotment was, therefore, increased fourfold, from 32 acres per person to 128 acres per person.

The 1873 negotiation was the third attempt to treat with the Indians at Lake of the Woods, and the negotiators recognized that it would be necessary to offer more liberal terms than in the past. There is nothing on record about whether previous negotiations had reached the stage of discussing specific government offers of reserve land, and it is not entirely clear how the acreage limits established in 1873 came about. The new Lieutenant Governor of Manitoba, Alexander Morris, was appointed to negotiate the treaty, and although there had been considerable correspondence regarding the gratuity and annuity moneys to be offered, as late as two weeks before his departure from Fort Garry, Morris still had not received any instructions regarding the reserves.[33] Deputy Superintendent General of Indian Affairs William Spragge noted in his book of memoranda in May 1873 that reserves were to be the same extent as in Treaties 1 and 2, but the instructions Morris received by

31 D.J. Hall, "A Serene Atmosphere? Treaty 1 Revisited" (1984), 4 (2) *Canadian Journal of Native Studies*, 352.
32 W. Simpson to Secretary of State for the Provinces, November 3, 1871, in Morris, *Treaties*, 41.
33 Telegram, A. Morris to Minister of the Interior, September [?], 1873: "Presume reserves to be granted to Indians but have no instruction . . .," Public Archives of Manitoba [hereinafter PAM], MG 12, B1, no. 439, quoted in Wayne Daugherty, *Treaty Research Report: Treaty Three* (Ottawa: DIAND, 1986), 28.

telegram from the Minister of the Interior on September 20, 1873, authorized him to grant reserves not to exceed one square mile per family of five or in that proportion.[34] Why or how this new figure was chosen is not known.

On October 2, when the Treaty Commissioners put forward the terms of the proposed treaty, Morris reported: "The Commissioners had had a conference and agreed, as they found there was no hope of a treaty for a less sum, to offer five dollars per head, a present of ten dollars, and reserves of farming and other lands not exceeding one square mile per family of five, or in that proportion, sums within the limits of our instructions."[35] Notes dated October 3, 1973, and headed "Surveying of Reserves" are in the Morris papers, and indicate what the Commissioners might have discussed with regard to the reserves:

> Before a year from now, the reserves will be surveyed and properly marked, and that part of the land that is fit for cultivation will be divided into lots of 160 acres – then every family not already settled on the land will have the right to select his own lot; in any case of conflict of right the decision will be given by the Commissioner or any person appointed by him, according to the principle that the first occupant will have the preference – This lot will belong to the family to which it will have been allocated.[36]

This passage was not included in the treaty proper or in any report to headquarters about the proceedings. Instead, Morris indicated that they were not able to define the reserve limits precisely at the time the treaty was signed, but urged that the surveys be done as soon as possible:

> I have further to add, that it was found impossible, owing to the extent of the country treated for, and the want of knowledge of the circumstances of each band, to define the reserves to be granted to the Indians. It was therefore agreed that the reserves should be hereafter selected by officers of the Government, who should confer with the several bands, and pay due respect to lands actually cultivated by them. . . . I would suggest that instructions should be given to Mr. Dawson to select the reserves with all convenient speed; and, to prevent complication, I would further suggest that no patents should be issued, or licenses granted, for mineral or timber lands, or other lands, until the question of the reserves has been first adjusted.[37]

34 NA, RG 10, vol. 724, May 31, 1873; PAM, MG 12, B1, no. 490, Campbell to Morris, September 20, 1873.

35 Morris to Minister of the Interior, October 14, 1973 (ICC, Washagamis Documents, pp. 70-103).

36 PAM, Morris Papers, October 3, 1873, item 510, quoted in John Taylor, "Manitoba Treaty Land Disparity Research Report," prepared for the Treaty Land Entitlement Committee of Manitoba Inc. and the Minister of Indian Affairs, Ottawa, August 1994, p. 33.

37 Morris, *Treaties*, 52.

In July 1874 Simon Dawson and Robert Pither were appointed by order in council to select the reserves, in consultation with the Indians concerned.

Treaty 4 (1874)

Lieutenant Governor Morris urged the government to continue the treaty-making process westward. In the Qu'Appelle and Fort Ellice territory, which was covered by Treaty 4 in 1874, it was not advancing settlement, natural resource development, or transportation routes that were precipitating factors, but Morris's concerns about Métis unrest and their influence on the Indians in the area. The Indians were, in fact, quite disturbed about survey activity in the area, especially in relation to the Hudson's Bay Company lands that had been promised with the transfer of Rupert's Land to Canada. There is considerable correspondence leading up to the negotiations regarding the extent of the territory to be included in the treaty and who should negotiate on behalf of the government, but there is no indication that Morris was given any detailed instructions from Ottawa regarding treaty terms. Since the Minister of the Interior, David Laird, was part of the Treaty Commission, however, such instructions may have been dispensed with in this particular case.

From the available record of proceedings of these negotiations, it would appear that there was little discussion about the actual treaty terms. The Indians were preoccupied with the Hudson's Bay Company lands issue and tried repeatedly to get the Commissioners to deal with those concerns. It was not until the afternoon of September 12 that the government was able to make its offer:

> the Commissioners submitted their terms for a treaty, which were in effect similar to those granted at the North-West Angle, except that the money present offered was eight dollars per head, instead of twelve dollars as there.[38]

Throughout the record, it is evident that the government party thought that settlement would not advance to this area in the near future, and therefore the need for reserves was not urgent: "We have come through the country for many days and we have seen hills and but little wood and in many places little water, and it may be a long time before there are many white men settled upon this land."[39] All references to reserve surveys are for some unspecific future date within the next couple of decades:

38 Ibid., 81.
39 Ibid., 96.

> We are ready to promise to give $1000 every year, for twenty years to buy powder and shot and twine, by the end of which time I hope you will have your little farms. If you will settle down we would lay off land for you, a square mile for every family of five . . .
>
> . . . When you are ready to plant the Queen's men will lay off Reserves so as to give a square mile to every family of five persons . . .
>
> If the Queen gives them [the Hudson's Bay Company] land to hold under her she has a perfect right to do it, just as she will have a perfect right to lay off lands for you if you agree to settle on them.[40]

As with the previous treaties, the Commissioners knew that all the Indians interested in the treaty were not present at the negotiations. In this case their estimate was so far off that the party sent to pay annuities the following year had to wire to Ottawa twice to get additional money to pay the numbers of Indians they met.[41]

Treaty 5 (1875)

The southern portion of the area covered by Treaty 5 was negotiated in 1875-76, and Lieutenant Governor Morris and James McKay were commissioned by the government to act on its behalf. Unfortunately there are no newspaper accounts or secretary's notes to report what was said at the meetings, for Treaty 5 has a number of unique features which are important in a general discussion of reserve entitlement. Lieutenant Governor Morris's official report of the treaty negotiations does not always provide the information needed to explain why things happened the way they did.

To begin with, Morris was specifically instructed by the Minister of the Interior, David Laird, to offer reserves of only 160 acres per family of five. There is no direct explanation as to why the more generous allotment of Treaties 3 and 4 was not continued, but the Minister did imply that the land to be treated for was less valuable to the government at this stage:

> in view of the comparatively small area of the Territory proposed to be ceded and of the fact that it is not required by the Dominion Government for immediate use either for railroad or other public purposes, it is hoped that it will not be found necessary to give the Indians either as present or as annuity a larger amount than five dollars, the amount secured to the Indians of Treaties Nos. 1 and 2 under the recent arrangements.[42]

40 Ibid., 93, 96, 100.
41 Ibid., 117 and 85-86.
42 Laird to Morris, August 10, 1875, quoted in Kenneth S. Coates and William R. Morrison, *Treaty Research Report: Treaty Five* (Ottawa: DIAND, 1986), 17.

This notion was reinforced the following year when the Pas and Cumberland Bands, knowing the more generous terms negotiated at Forts Carlton and Pitt (Treaty 6), balked at adhering to Treaty 5. Thomas Howard, the Commissioner taking the adhesion,

> at last made them understand the difference between their position and the Plain Indians, by pointing out that the land they would surrender would be useless to the Queen, while what the Plain Indians gave up would be of value to her for homes for her white children.[43]

Another unique feature to Treaty 5 is that a smaller allotment is specified for one group of Indians only. The members of the Norway House Band who asked to be relocated to an area where they could farm were given only 20 acres per person (100 acres for each family of five), and those that remained at Norway House would get nothing except what they currently held. In his report, Morris does not even mention the decreased acreage, let alone report any discussion of or explanation for this change from the normal procedures.[44]

The text of Treaty 5 was also the first to give some indication as to *when* the reserves were to be set aside, although it did so only for some of the bands. The Minister of the Interior had stated in his instructions to Morris that "it is very important that the reserves should if possible be selected this year, after the treaty is concluded and not postponed, as had been the practice heretofore to the following year."[45] The issue of reserve location seems to have provided the most difficulty for Morris, and, in the treaty negotiations after the meeting at Berens River, he divided the negotiations, dealing first with the terms offered (which would have included the reserve formula) and afterwards with the reserve sites. The chosen locations were written into the text of the treaty, with, for some of the bands, a timeframe included:

> For the band of Saulteaux in the Berens River region *now settled, or who may within two years settle therein*, a reserve . . . so as to comprehend one hundred and sixty acres for each family of five . . .
>
> . . . inasmuch as a number of the Indians now residing in and about Norway House, of the band of whom David Rundle is Chief, are desirous of removing to a locality where they can cultivate the soil, Her Majesty the Queen hereby agrees to lay aside a reserve on the west side of Lake Winnipeg, in the vicinity of Fisher River, so as

43 Morris, *Treaties*, 162.
44 See ibid., 148 and 346.
45 Laird to Morris, August 10, 1875, quoted in Coates and Morrison, *Treaty Research Report, Treaty Five*, 18.

> to give one hundred acres to each family of five, or in that proportion for larger or smaller families, *who shall remove to the said locality within "three years," it being estimated that ninety families or thereabouts will remove within the said period, and that a reserve will be laid aside sufficient for that or the actual number*. . . .[46]
>
> [re Grand Rapids adhesion] . . . And Her Majesty agrees, through the said Commissioners, to assign a reserve of sufficient area to allow one hundred and sixty acres to each family of five, or in that proportion for larger and smaller families – *such reserves to be laid off and surveyed next year*, on the south side of the River Saskatchewan.[47]

There is no mention of when the survey is to take place for Poplar River and Cross Lake Bands. (In a letter to the Minister of the Interior the following year, however, Morris does advise that "to prevent complications and misunderstandings, it would be desirable that many of the reserves should be surveyed without delay . . .")

Treaty 6 (1876)

Just a year after concluding Treaty 5, Morris travelled to Fort Carlton and Fort Pitt and offered the Crees there the more generous terms, as regards both reserve land and gratuity payment, agreed to in Treaties 3 and 4. There is no explanation for this move. Morris, because of his "large experience and past success," received no instructions from Ottawa about how to proceed with these negotiations,[48] and there is nothing in the record to indicate that the Indians themselves had suggested the increased benefits.

Some Indians had expressed concerns that by signing the treaty they would have to abandon hunting and live on reserves, so when Morris outlined the government's offers on the second day of negotiations, he explained the idea of reserves very thoroughly:

> Understand me, I do not want to interfere with your hunting and fishing. I want you to pursue it through the country, as you have heretofore done, but I would like your children to be able to find food for themselves and their children that come after them. . . .
>
> I am glad to know that some of you have already begun to build and to plant; and I would like on behalf of the Queen to give each band that desires it a home of their own; I want to act in this matter while it is time. The country is wide and you are

46 Treaty No. 5, in Morris, *Treaties*, 345-46. Emphasis added.
47 Adhesion, September 25, 1875, in Morris, *Treaties*, 349. Emphasis added.
48 PAM, Morris Papers, Laird to Morris, July 15, 1876, quoted in John L. Taylor, *Treaty Research Report: Treaty Six* (Ottawa: DIAND, 1986), 8.

> scattered, other people will come in. Now unless the places where you would like to live are secured soon there might be difficulty. The white man might come and settle on the very place where you would like to be. Now what I and my brother Commissioners would like to do is this: we wish to give each band who will accept of it a place where they may live; we wish to give you as much land or more land than you need; we wish to send a man that surveys the land to mark it off, so you will know it is your own, and no one will interfere with you. What I would propose to do is what we have done in the other places. For every family of five a reserve to themselves of one square mile. Then, as you may not all have made up your minds where you would like to live, I will tell you how that will be arranged; we would do as has been done with happiest results at the North-West Angle. We would send next year a surveyor to agree with you as to the place you would like . . .[49]

The reserves, therefore, would be marked off as soon as possible – "next year" – to ensure the claim before white settlement took up all the land, but the bands would not be compelled to live on them.

There are only two recorded comments by the Indians with regard to reserves. The first was included in the list of additional items requested by the Chiefs: "If our choice of a reserve does not please us before it is surveyed we want to be allowed to select another . . ." To this Morris replied: "You can have no difficulty in choosing your reserves; be sure to take a good place so that there will be no need to change; you would not be held to your choice until it was surveyed." The second was enunciated by Joseph Thoma, a Saulteaux who seems to have had some knowledge of the treaties already completed, and who purported to speak on behalf of Red Pheasant. Among a list of additional items he requested was "ten miles around the reserve where I may be settled,"[50] but Morris would not agree to any of these terms and the Indians did not press the matter.

Many of the Indians indicated that they had already begun to farm, or were ready to settle down, and Morris seems to have anticipated that the shift in economic dependence from the hunt to the farm would happen quickly. In response to demands for financial assistance while they were beginning to till the earth, Morris acquiesced but stipulated a three-year limit: "we would give them provisions to aid them while cultivating, to the extent of one thousand dollars per annum, but for three years only, as after that time they should be able to support themselves."[51] There is no schedule of reserves in Treaty 6, but the Chiefs were instructed to indicate their desired reserve locations to

49 Morris, *Treaties*, 204-05.
50 Ibid., 215, 218, and 220.
51 Ibid., 186.

Commissioner W.J. Christie, who included a list of these sites with his report.[52]

Treaty 7 (1877)

David Laird, now Lieutenant Governor of the North-West Territories, and Lieutenant-Colonel James McLeod of the North-West Mounted Police represented the federal government at the 1877 negotiations for the seventh Indian treaty at Blackfoot Crossing in what is now southern Alberta. In his introductory remarks to the Chiefs, Laird explained that "the Queen wishes to offer you the same as was accepted by the Crees,"[53] including reserves based on one square mile per family of five. The proximity to the Crees' territory probably influenced this decision, but the knowledge that cattle rather than crops would likely provide the alternative economic base may have played some role in the decision against matching the smaller reserves of Treaties 1, 2, and 5.

There is no mention of any discussion about reserve size in the official reports of the negotiations. Laird does report:

> With respect to the reserves, the Commissioners thought it expedient to settle at once their location, subject to the approval of the Privy Council. By this course it is hoped that a great deal of subsequent trouble in selecting reserves will be avoided. . . .[54]

So, while Laird set about preparing the document for signature, McLeod met with the different Chiefs to locate reserve sites. "He succeeded so well in his mission that we were able to name the places chosen in the treaty."[55]

Treaty 8 (1899)

With the signing of Treaty 7, all the aboriginal interest in the so-called fertile belt had been dealt with. More than two decades passed before any new treaty negotiations took place, and it was mineral development rather than settlement which provided the impetus. The territory of the eighth treaty includes most of northern Alberta, the portion of northeastern British Columbia east of the Rocky Mountains, part of the Northwest Territories south of Hay River and Great Slave Lake, and the extreme northwestern corner of Saskatchewan. A desire to ensure safe passage for the miners and prospec-

52 See ibid., 195.
53 Ibid., 268.
54 Ibid., 261.
55 Ibid., 259.

tors on their way to the Yukon gold fields caused the government to send out Commissioners David Laird, James Hamilton Ross, and James McKenna to meet with the First Nations of the area in the summer of 1899.

Although it is obvious that the federal government relied heavily on previous treaties when deciding on the terms of Treaty 8, the nature of the land and the economic condition and habits of the Native people in the area caused some deviation from the past, especially with regard to the reserve provisions. Federal officials were aware that the Indians were apprehensive about the proposed treaty:

> From the information which has come to hand it would appear that the Indians who we are to meet fear the making of a treaty will lead to their being grouped on reserves. Of course, grouping is not now contemplated; but there is the view that reserves for future use should be provided for in the treaty. I do not think this is necessary . . . it would appear that the Indians there act rather as individuals than as a nation. . . . They are adverse to living on reserves; and as that country is not one that will be settled extensively for agricultural purposes it is questionable whether it would be good policy to even suggest grouping them in the future. The reserve idea is inconsistent with the life of a hunter, and is only applicable to an agricultural country.[56]

The result of this discussion was the "reserves in severalty" provision which appears for the first time in Treaty 8. Not wanting to completely abandon the old system, the Commissioners were instructed as follows:

> As to reserves, it has been thought that the conditions of the North country may make it more desirable to depart from the old system, and if the Indians are agreeable, to provide land in severalty for them to the extent of 160 acres to each, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council. Of course, if the Indians prefer Reserves you are at liberty to undertake to set them aside. The terms of the treaty are left to your discretion with this stipulation that obligations to be assumed under it shall not be in excess of those assumed in treaties covering the North West Territories.[57]

There appears to have been little, if any, discussion about the *size* of the reserves, but the Commissioners had repeatedly to assure the different bands that they would not be forced to abandon their traditional livelihood to settle

56 James McKenna to Superintendent General of Indian Affairs, April 17, 1899, NA, RG 10, vol. 3848, file 75236-1.
57 Clifford Sifton, Superintendent General of Indian Affairs, to Laird, McKenna, and Ross, May 12, 1899, April 17, 1899, NA, RG 10, vol. 3848, file 75236-1.

on farming reserves. They were assured that the reserves would be set apart in the future, as needed:

> The Indians are given the option of taking reserves or land in severalty. As the extent of the country treated for made it impossible to define reserves or holdings, and as the Indians were not prepared to make selections, we confined ourselves to an undertaking to have reserves and holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required. There is no immediate necessity for the general laying out of reserves or the allotting of land. It will be quite time enough to do this as advancing settlement makes necessary the surveying of the land. Indeed, the Indians were generally averse to being placed on reserves. It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves. We had to very clearly explain to them that the provision for reserves and allotments of land were made for their protection, and to secure to them in perpetuity a fair portion of the land ceded, in the event of settlement advancing.[58]

Treaty 9 (1905)

In any examination of the post-Confederation numbered treaties, Treaty 9 stands out as atypical in a number of ways. It is the only treaty in which the province was represented at the negotiations, and it is the only one of this group which includes a schedule of reserve locations *and sizes*. The April 16, 1894, agreement between Canada and the province of Ontario specified "that any future treaties with the Indians in respect of territory in Ontario to which they have not before the passing of the said statute surrendered their claim aforesaid, shall be deemed to require the concurrence of the government of Ontario."[59] When increasing settlement, mining activity, and railway construction forced the federal government to deal with aboriginal claims in northern Ontario in 1905, the provincial government insisted that one of the treaty party be a provincial appointee and that the Commissioners choose the reserve sites.

The Articles of Treaty 9 stipulate:

> His Majesty the King hereby agrees and undertakes to lay aside reserves for each band, the same not to exceed in all one square mile for each family of five, or in that proportion for larger and smaller families; and the location of the said reserves hav-

58 Commissioners' Report, September 22, 1899, included in *Treaty No. 8*, 6-7. See also Charles Mair, *Through the Mackenzie Basin: A Narrative of the Athabaska and Peace River Treaty Expedition of 1899* (Toronto, 1908), 56-59, 61-62, and 64, and James McKenna's report of the 1900 adhesions in *Treaty No. 8*, 21.

59 *An Act for the Settlement of certain questions between the Governments of Canada and Ontario, respecting Indian Lands*, July 10, 1891 (UK), 54-55 Vict., c. 5, s. 6.

> ing been arranged between His Majesty's commissioners and the chiefs and headmen, as described in the schedule of reserves hereto attached, the boundaries thereof to be hereafter surveyed and defined . . . [60]

Each of the reserve sites listed in the schedules includes the size – Abitibi, 30 square miles; Matachewan, 16 square miles; Moose Factory Crees at Chapleau, 160 acres, etc. These reserves were in fact based on population figures obtained by the Commissioners at the time of the negotiations, although this is not mentioned in the official report. It states only that "these reserves, being of reasonable size, will give a secure and permanent interest in the land which the indeterminate possession of a large tract could never carry," and that the reserves were intended to be "of sufficient extent to meet their present and future requirements."[61]

Treaty 10 (1906)

The terms of Treaty 10 differ from Treaty 8 only in that the agricultural provisions are less specific. Once again, the treaty provided for reserves of one square mile per family of five, or reserves in severalty of 160 acres per person. The Indians in the Treaty 10 area, like those in Treaty 8, were concerned primarily with the potential impact of the treaty process on their hunting and trapping rights, and Commissioner McKenna assured them that the government did not intend to interfere with their way of living. The reserves would be set aside only when they needed them:

> The Indians were given the option of taking reserves or land in severalty when they felt the need of having land set apart for them. I made it clear that the government had no desire to interfere with their mode of life or restrict them to reserves, and that it undertook to have land in the proportions stated in the treaty set apart for them, when conditions interfered with their mode of living and it became necessary to secure their possession of land.[62]

Treaty 11 (1921)

Increased mineral exploration in the Mackenzie River Valley north of the 60th parallel, especially after the discovery of oil at Norman Wells in 1920, provided the impetus for Treaty 11. H.A. Conroy, who petitioned for the treaty and who negotiated it as Commissioner, considered the reserve allocation an

60 *Treaty No. 9.*
61 Ibid.
62 *Treaty No. 10.*

important element to be considered, not only for agricultural potential but also for resource revenues:

> The most important point of all is the fact that the rapid and unprecedented encroachment of white people means that the Indians, unless protected, will be robbed of their fair share of the best land. It must be taken into consideration that the aboriginal owners are entitled to their share of oil bearing lands as well as agricultural lands but to obtain this it is necessary to make Treaty, otherwise great injustices will be done them.[63]

The treaty had stipulated reserves of one square mile for each family of five (the severalty option being specifically eliminated). Conroy, however, makes no mention of any discussions of reserves in his report.

SELECTION AND SURVEY OF RESERVES IN THE NUMBERED TREATIES

Note: To do this section properly, it would be necessary to research every survey file for each treaty band in Canada, noting all references to entitlement calculations. The information that follows is based on a small sample, and therefore cannot be used to draw definitive conclusions. The more comprehensive research suggested above would greatly benefit discussions of this topic.

Each of the numbered treaties granted reserve lands based on a band's population, but, with the exception of Treaty 9, none clearly identified when or how that population base would be determined. In the first seven treaties, it is evident that government negotiators intended that reserves would be surveyed in the immediate future. (The bands did not necessarily have to settle on this land right away, but, by marking off these areas, the rest of the territory would be freed up for settlement and development.) For the northern treaties (Treaties 8, 10, and 11), Treaty Commissioners made specific assurances that surveys would not take place until the bands requested them.

For the most part, all the Treaty Commissioners were aware that those attending the negotiations did not represent the total aboriginal population of the territory. The first six treaties contained standard census clauses: "And further, that Her Majesty's Commissioners shall, as soon as possible after the

63 H.A. Conroy to D.C. Scott, October 13, 1920, NA, RG 10, vol. 4042, file 336,877, quoted in Kenneth S. Coates and William R. Morrison, *Treaty Research Report: Treaty Eleven (1921)* (Ottawa: DIAND, 1986), 25.

execution of this treaty, cause to be taken, an accurate census of all the Indians inhabiting the tract above described, distributing them in families . . ."[64] Only one reference has been found linking this proposed census with reserve size, and that was made by Lieutenant Governor Archibald in a dispatch the year following Treaty 1:

> When the Treaty 3rd August last was made, the Indians were promised that a Census of their different tribes should be taken with as little delay as possible and that immediately afterwards the Reserves should be laid off . . .[65]

In the texts of the relevant treaty, however, the census clause is directly tied only to the annuity provisions and, being separated from the reserve clauses by paragraphs dealing with gratuities, schools, and alcohol, cannot be seen as giving any direction to the issue of population base.

This lack of direction caused problems for those officials actively involved in selecting and surveying reserves, and over the years there were requests for a definite policy statement. In 1890, for example, A.W. Ponton wrote to the Inspector of Indian Agencies at Winnipeg about problems encountered in surveying a reserve for Chief Sakatcheway in Treaty 3: "I am not aware what numeration of a band to accept when allotting them their land . . . I am therefore without definite instructions or data or settled policy to guide me."[66] In 1939 the Surveyor General investigated the treaty land entitlement situation for a number of prairie bands, calculated the amount due using different population bases, and concluded that a "definite policy as to the basis of population which is to be used in the calculation of the areas to be requested to be set aside as reserves should be agreed upon by your branch as soon as possible."[67] In 1961 Saskatchewan's Deputy Minister of Natural Resources wrote to the Deputy Minister of Citizenship and Immigration (the department responsible for Indian Affairs at the time) with regard to a request for reserve lands for the Portage la Loche Band:

> One obvious question arising from Treaty 10 is the method of arriving at the number of acres to be set aside. Perhaps you could let me have your Department's view as to

64 *Treaty No. 6.*

65 Lieutenant Governor A. Archibald to Secretary of State for the Provinces, July 6, 1872, NA, RG 10, vol. 3555, file 11, reel C-10098.

66 A.W. Ponton to E. McColl, September 15, 1890, NA, RG 10, vol. 1918, file 2790, cited in Elaine M. Davies, "Treaty Land Entitlement - Development of Policy: 1886 to 1975," Prepared for DIAND's presentation to the Indian Specific Claims Commission, Ottawa, November 15, 1994, tab 3.

67 F.H. Peters, Surveyor General, to D.J. Allan, Superintendent, Reserves and Trusts, Department of Indian Affairs, October 19, 1939, p. 5, NA, RG 10, vol. 7777, file 27131-1.

> whether the population figure to be taken is the population at the date the treaty was signed or the present time. . . .
>
> I would appreciate your advice as to what other Provinces in similar circumstances are being asked to do at the moment in regard to this matter. I am sure it would be most desirable from your point of view that a uniform policy be adopted at this time and we are most anxious to give this matter careful and complete consideration before proceeding further.[68]

From time to time federal officials did express opinions on what the policy was or should be. Ponton's 1890 request, for example, brought a response from R. Sinclair, writing on behalf of the Deputy Superintendent General of Indian Affairs:

> a Band of Indians is in every case entitled to an amount of land corresponding to the census taken immediately subsequent to the treaty, notwithstanding any subsequent depletion or increase in the number of members in the Bands.[69]

Canada responded to Saskatchewan's 1961 inquiry with the statement:

> It is our view that in cases of this kind, where bands have no reserves, the acreage to which they are entitled must be calculated on the basis of population at the time reserves are being selected and set apart. This method is acceptable to the Provinces of Alberta and British Columbia and has been used in both areas in very recent years.[70]

It does not appear, however, that any ongoing, consistent, and well-defined policy issued from the office of the Minister of Indian Affairs. In the material available for this paper, there were only two references to ministerial statements, and the first does not relate specifically to population figures. In his 1875 instructions to W.J. Christie concerning his duties in carrying out Treaty 4 provisions, the Deputy Minister of the Interior wrote: "The Minister thinks that the Reserves should not be too numerous and that, so far as may be practicable, as many of the Chiefs of Bands speaking one language, as will consent, should be grouped together on one Reserve."[71] The second, potentially more important to this paper, makes reference to a ruling of the Minis-

68 J.W. Churchman to George F. Davidson, March 28, 1961 (ICC, La Ronge TLE Documents, p. 1131).

69 R. Sinclair to E. McColl, October 14, 1890, NA, RG 10, vol. 1918, file 2790, cited in Davies, "Treaty Land Entitlement," note 66 above, tab 4.

70 Davidson to Churchman, April 12, 1961 (ICC, La Ronge TLE Documents, p. 1132).

71 [D. Laird, Minister of the Interior,] to W.J. Christie, Indian Commissioner, July 15, 1875, in NA, RG 10, vol. 3622, file 5007 (ICC, Kahkewistahaw TLE Documents, pp. 151-59).

ter in about December 1890 regarding "the allotment of land and the areas of Reserves and lots held in severalty" in Treaty 8.[72] Unfortunately, the particular ruling was not found.

Since neither specific treaty direction nor policy statement is available, it becomes necessary to look at the practice and conduct of the people involved in reserve selection and survey. In *R. v. Taylor and Williams*, the judge stated:

> Finally, if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms. As already stated, counsel for both parties to the appeal agreed that recourse could be had to the surrounding circumstances and judicial notice could be taken of the facts of history. In my opinion, that notice extends to how, historically, the parties acted under the treaty after its execution.[73]

Instructions to and methods employed by surveyors were not necessarily uniform, and the surviving record is not always detailed enough to come to reliable conclusions. In the early years, surveys were directed by Department of Indian Affairs officials in the field, and the relevant information was not always relayed to officials in Ottawa. As Chief Surveyor Samuel Bray explained in 1904:

> in former years the Northwest Surveyors received their instructions, frequently verbally, in fact practically always verbally, from the Indian Commissioner at Regina. The Department was seldom informed of the work the surveyors were engaged in, and their returns were delayed from one to three years before they reached the Department and in some instances were not forwarded to the Department at all. This proceeding is evidently unworkable and I submit very undesirable. Of late years it has been the practice to issue instructions in writing to Surveyors (in detail if necessary) for each survey which may be required.[74]

As well, in later years it is not always clear whether a request for additional land was to fulfil entitlement or to provide extra land for economic reasons.

Single Survey

When a band had not previously received any reserve land, the practice was, with few exceptions, to calculate the area using the population of the band at the date of the survey. This number might be derived from recent annuity

72 J.D. McLean, Secretary, Department of Indian Affairs, to A.W. Ponton, Surveyor, April 15, 1901, NA, RG 10, vol. 3959, file 141,977-6, reel C-10167.

73 *R. v. Taylor and Williams* (1981), 34 OR 360 (Ont. CA) at 367 (ICC, La Ronge TLE Documents, p. 2608).

74 S. Bray, Chief Surveyor, to Deputy Superintendent General of Indian Affairs, February 11, 1904, NA, RG 10, vol. 4005, file 40050-2, reel C-10170.

paylists, the surveyor's or Indian agent's count of band members, or a combination or variation of these. Alternative population bases were sometimes put forward as more appropriate interpretations of the treaties, but they were seldom applied. As the Minister in charge of Indian Affairs explained in 1963:

> On reading these treaties in their full context, it is obvious that the selection of land is to take place at some future date on the basis of one square mile for a family of five. This has always been interpreted to mean at the time of the selection. Precedent is in favour of the Indians in this regard. I understand there is not a great deal involved as there is no appreciable increase; deaths and deletions through marriage of Indian women to non-Indians and to members of other bands have kept the membership fairly steady, at least until the last decade. We have definite figures as to the present population, but such is not the case with regard to the population at the time of the signing of the treaties. This means that the settlement on the basis of the present population is clean-cut and without the danger of disputes arising. . . .[75]

Examples

1) In 1872, two years after the signing of Treaty 1, surveyors were sent to mark out the reserve boundaries. At Roseau River, there was a misunderstanding about the size of the proposed reserve. When the Chief refused to allow the surveyor to take a census, the Lieutenant Governor's private secretary explained why it was necessary:

> The extent of the Reserves to which they will be entitled depends upon the number of people of which the tribe consists, and, so soon as this is found out, the Reserve will be run off and marked, so that every Indian may see the boundary of the lands assigned to the tribe.[76]

2) For the survey of the Beaver Lake Reserve in Alberta in May 1907, Indian Affairs requested that the Department of the Interior reserve from sale and settlement an area of 21 square miles in the vicinity of Beaver Lake until a reserve of that size could be surveyed for the 105 Indians that the latest census indicated made up the Beaver Lake Band.[77]

3) In Ontario's ratification of the adhesions to Treaty 9 in 1931, the province agreed to set aside land for a Treaty 5 band at Deer Lake. The treaty-time

75 Guy Favreau, Minister of Citizenship and Immigration, to E. Kramer, Minister of Natural Resources, Saskatchewan, May 13, 1963 (ICC, La Ronge TLE Documents, pp. 1199-1200).

76 Maguire, *Historical Reference Guide*, note 24 above, 26.

77 J.D. McLean to P.G. Keyes, May 3, 1907, DIAND file 779/30-9-131, in D. Gordon, "Beaver Lake I.R. No. 131 Entitlement & Other Land Matters," unpublished paper prepared for Treaty and Aboriginal Rights Reserarch Centre and the Indian Association of Alberta, March 1979.

population was known and stated, but the reserve size was based on current population figures:

> The said Commissioners appointed to negotiate said extension of said James Bay Treaty Number 9, among other things, reported that, –
>
> "A band of Indians residing in the vicinity of Deer Lake within the territory included in Treaty No. 5, signed Adhesion to said Treaty on the 9th June, 1910, and under its conditions were assured a reserve in the proportion of 32 acres per capita. At this time the territory formed no part of the Province of Ontario, it being then part of the Northwest Territories. A final selection of the reserve had not been made and although the band in 1910 resided in the vicinity of Deer Lake and the members have since changed their abode and are now in larger numbers resident about Sandy Lake, situate within territory covered by the Commission under which the undersigned Commissioners are functioning. [i.e. Treaty Nine]
>
> In 1910 when this band was admitted they numbered 95, augmented in the year following by 78 Indians transferred from the Indian [Island] Lake band resident in Manitoba. These numbers have now increased to 332, and as the Island Lake Indians have been allotted their reserve and have had it duly surveyed on a basis excluding those transferred to the Deer Lake Band, the latter are now entitled to a grant."
>
> That the Deer Lake band of Indians desire that a reserve be set aside for said band . . . .
>
> Schedule "C" - Reserves Approved and Confirmed . . .
>
> For Deer Lake Band: Sandy Lake Narrows. – Lying at the Narrows, being a stretch of water lying between Sandy Lake and Lake Co-pe-te-qua-yah, the reserve to comprise 10624 acres, or approximately 17 square miles . . . [332 x 32 = 10624][78]

4) In 1939 the Surveyor General calculated the entitlement of the Portage La Loche Band:

> This band has no reserves and the Indians have expressed themselves as desiring three reserves one in Alberta and the other two in Saskatchewan. In 1938 at treaty payment the population of the band was 79. On a basis of 128 acres for each Indian this number (79) were entitled that year to 10112 acres.[79]

Alberta and Saskatchewan had tentatively agreed to transfer the required lands, but after Indian Agency Inspector Ostrander inspected the area late in 1939, he advised against the location as a reserve. Some attempt was made to find an alternative site, but in the end there was no survey.

78 Copy of an Order in Council, approved by the Lieutenant Governor of Ontario, June 18, 1931, reprinted in *The James Bay Treaty, Treaty No. 9* (Ottawa: Queen's Printer, 1964), 32.

79 Memorandum, F.H. Peters to D.J. Allan, Superintendent of Reserves and Trusts, Indian Affairs, October 19, 1939, NA, RG 10, vol. 7777, file 27131-1.

In 1961 the La Loche Band chose three sites for proposed reserves – 320 acres where the Band members had their garden plots, some 10,000 acres along the west shore of Methy Lake, and 6400 acres on the Methy River where it emptied into Peter Pond Lake. This acreage was based on current population:

> The total Indian population of the la Loche band on the day of the last annual treaty payment was 130 men, women and children. According to Treaty No. 10 agreements, they should be entitled to approximately 16,640 acres.[80]

These particular locations were not surveyed.

In 1964, the La Loche Band did finally have reserve lands surveyed for it, and the acreage was based on current population:

> . . . Reserve on the basis of 23,424 acres for 183 people as follows – approximately 13,120 acres on South West side of Lac La Loche; approximately 5,760 acres situated North end of Linvall and Palmbere lakes; approximately 4,544 acres situated on Peter Pond Lake extending one mile on the Lake shore north of the 18 mile landing.[81]

5) In 1986, the Cree Band of Fort Chipewyan in northern Alberta, which had not previously received any reserve lands, reached an agreement with Canada and the province of Alberta whereby the Band would receive a combination of land and monetary compensation to fulfil its treaty land entitlement, based on current population (all parties agreeing to a "cut-off" date):

> . . . 14. The parties acknowledge that the population of the band utilized calculating the amount of land that should be set aside under Treaty No. 8 was the 1982 population and did not include any persons who have or may become members subsequent to that date, including those who do so as a result of S.C. 1985 C. 27.[82]

Exceptions

On at least two occasions, the Department of Indian Affairs stated that entitlement calculations were based on populations other than in the year of survey – and in both cases the numbers were more advantageous to the Band.

80 N.J. McLeod, Regional Supervisor, Saskatchewan, to W.C. Bethune, Chief, Reserves and Trusts, January 9, 1961 (ICC, La Ronge TLE Documents, pp. 1115-17).

81 La Loche Band Council Resolution, February 11, 1964 (ICC, La Ronge TLE Documents p. 1256).

82 Entitlement Agreement, December 23, 1986 (ICC, La Ronge TLE Documents, p. 4053).

1) In 1882, the Indian agent for the Qu'Appelle Agency reported that surveys had been completed for Treaty 4 Bands at Crooked and Round Lakes:

> I may here state that in 1877 these bands had been allotted reserves on the north side of the Qu'Appelle River; owing to the want of timber for building and fencing purposes, it was considered advisable to move them to the south side.
>
> The area of each reserve has been allotted to each band in proportion to the paysheets of 1879, *the year in which the largest number of Indians were paid their annuities.*[83]

2) This same criterion was used again in 1884 for the survey of the reserve for Chief James Seenum in Treaty 6 (Alberta). In this case, the arrangement was more formal. When the surveyor arrived to establish the area of the reserve, which according to his instructions was to be based on the number paid at the previous annuity payments, the Chief took exception. Apparently supported by an interpreter present at the negotiations of Treaty 6, he maintained that Commissioners Morris and Christie had promised a large area, which they described according to various physical land marks. The population of his band having decreased dramatically since adhesion to treaty, the Chief refused to accept the small amount of land which the current population would entitle it to. The Assistant Indian Commissioner negotiated with the Chief and arrived at an agreement:

> As a misunderstanding has since the signing of the treaty existed between the said band and the Department of Indian Affairs as to the quantity of land to be given as a Reserve for the said band it has this day been agreed to [unreadable] hereto that the quantity of land which the band is to receive will be that quantity which it would have been granted if the reserve had been surveyed at that time the greatest number were paid under the said Chief, at any one time, this fact to be decided by the paysheets.[84]

Multiple Surveys

In some cases, the initial survey did not provide all the land to which a band was entitled under treaty. This may have been the result of surveyor error or inaccurate knowledge of band membership in the year of survey. Sometimes, especially in the late 1930s and early 1940s, Indian Affairs officials deliberately chose to delay the final selection of entitlement lands, choosing only

83 A. McDonald, Indian Agent, Qu'Appelle, to Superintendent General of Indian Affairs, January 19, 1882, in Canada, Department of Indian Affairs, *Annual Report*, 1881, 224.

84 Hayter Reed, Indian Commissioner for Manitoba and the North-West Territories, Agreement with Chief James Seenum, September 24, 1884, NA, RG 10, vol. 3586, file 1195, reel C-10103.

enough land "to meet the actual present requirements" and holding "their land credit as a sleeve account rather than to make the selection now and regret it later."[85]

Two research projects from the 1970s, which looked into Department of Indian Affairs practices in cases of multiple surveys, are generally relied upon in modern discussions. The first was prepared by Heather Flynn for the Lands Branch of Indian Affairs in 1974 (see Appendix A). It demonstrates some of the problems associated with understanding this issue, giving examples of additional lands provided to bands for social and economic reasons, or to correct inequities in treaty allotment, but with the purpose stated as to provide entitlement lands.[86] The second, prepared in 1978 by Ken Tyler and Bennett McCardle as a joint project for the Federation of Saskatchewan Indians and the Indian Association of Alberta (and attached as Appendix B), concluded that "the Department has never attempted to fulfill any band's Treaty entitlement by adding to a band's existing reserve lands only that area of land by which the original survey fell short."[87]

While both of these studies add to our knowledge of this topic, it is my opinion that neither are extensive enough to provide a solid basis for conclusion. From the documents reviewed for this paper, it is evident that almost every possible population date was used at one time or another; sometimes different calculations were used in the same period of time because instructions came from different sources (the regional office rather than headquarters, for example). It is, however, impossible from this small sampling to state positively that one practice predominated over another. A much more thorough study of reserve surveys, looking at as much of the available correspondence as possible, is necessary to establish the total historical picture.

The most complete set of survey documents available to me were those of the Lac La Ronge First Nation. The following is a summary of the various statements found relating to treaty land entitlement calculations for that Band, and it is included here to illustrate how complicated this topic can be.

85 Dr. Harold McGill, Director of Indian Affairs, to Deputy Minister of Indian Affairs, April 15, 1939 (ICC, La Ronge TLE Documents, pp. 764-65); Acting Director of Indian Affairs to M. Christianson, Superintendent of Indian Agencies, August 10, 1943 (ICC, La Ronge TLE Documents, pp. 812-13); and D.J. Allan, Superintendent, Reserves and Trusts, to Christianson, January 26, 1944 (ICC, La Ronge TLE Documents, pp. 820-21).

86 G.A. Poupore, Manager of Indian Lands, to W. Fox, Special Projects Officer, Indian Affairs, February 6, 1975 (ICC, Kawacatoose Exhibit 27).

87 Joe Dion, President, Indian Association of Alberta, to Hugh Faulkner, Minister of Indian Affairs, November 30, 1978 (ICC, La Ronge TLE Documents, pp. 3052-87).

Lac La Ronge and the "Compromise Formula"

The Lac La Ronge Band in Saskatchewan received reserve lands in intermittent allotments over a span of almost 75 years. The documentary record shows that at various times different government officials used almost every possible population base to calculate the entitlement due to this Band, including a unique formula invented in 1960 and used only for this particular Band.

1897 – Date-of-First-Survey Shortfall

Members of the Lac La Ronge Band are descendants of the James Roberts Band who adhered to Treaty 6 on February 11, 1889. The William Charles Band of Montreal Lake (which was then and always has been a distinctly separate band) also adhered to the treaty at the same time and place. The Bands were paid twice in 1889 – in February when they entered treaty, and again in October at the regularly scheduled annuity payments.

A reserve of 23 square miles was surveyed at Montreal Lake (Indian Reserve 106) for the William Charles Band by A.W. Ponton in the fall of 1889. Ponton attended the annuity payments before he consulted the Chief as to location, and the area surveyed fulfilled the treaty reserve promise to that Band, based on its current population.

A single, large block of land, also based on the Band's current population, was selected for the James Roberts people at Lac La Ronge at the annuity payments in October 1889 but, for a number of reasons, it was never surveyed. Over the next few years the members of the La Ronge Band made several requests for agricultural land south of where they actually lived, so that, when they could no longer support themselves by traditional means, they would have a place to go. Government officials suggested that the Montreal Lake Band also required farming lands, since there was little available on its reserve. In 1897 the Department agreed to mark off one area of farm lands, which could be used by both Bands (and, as later suggested, by other bands in the north who did not have arable lands in their hunting territories). The Indian agent was specifically instructed that band members were not to have a say in the selection – "the Reserve will not be the sole property of either Band but will be held for the joint use of such members of both bands as may decide to leave their present homes and take up stock-raising

and farming on the new location and that therefore the Department reserves to itself the right to select the site."[88]

In the summer of 1897, A.W. Ponton surveyed 56.5 square miles as Little Red River Reserve 106A. In his report he indicated that entitlement calculations were based on the *combined* population of the Montreal Lake and La Ronge Bands at the second annuity payment to the Bands in October 1889 (that is, the date of first survey for the Montreal Lake Band):

> The census of the Bands in 1889 gave their numbers as 435, which would entitle them under the stipulations of Treaty 6 to 87 square miles of land. Of this area the reserve surveyed by the undersigned at Montreal Lake in 1889 – known as Indian Reserve No. 106 – provides 23 square miles, and the reserve forming the subject of this letter – known at 106A – provides 56.5 square miles, or a total of 79.5 square miles, and it would therefore appear that they are still entitled to 7.5 square miles over and above the area already set aside and reserved for their use.[89]

1909 – Population at Treaty (Including Late Adhesions)

In 1907 Duncan Campbell Scott, then the Department of Indian Affairs' accountant, noted that the population of the Montreal Lake and La Ronge Bands had increased substantially since 1889. Suggesting that additional lands might be forthcoming, he asked the agent to report on whether the growth was a result of natural increase or additions of "Indians who were hunting apart from the main Band when they joined the Treaty."[90] Upon receiving this request, Agent Borthwick requested clarification: "Should the natural increase of the additions since their admission to treaty privileges be included or only the actual number at the time of admission?"[91] Indian Affairs Secretary J.D. McLean responded: "you should deal with the actual number of persons admitted to treaty at the time the same was made. Those Indians born since that time should not be counted."[92]

In April 1908 Borthwick delivered a detailed analysis showing 89 "additions apart from natural increase" to both the Montreal Lake and La Ronge Bands. This number was added to the 377 paid to the two Bands at the first

88 A.E. Forget, Indian Commissioner, Regina, to Indian Agent, Carlton Agency, April 30, 1897, NA, RG 10, vol. 3601, file 1754 1/2 (ICC, La Ronge TLE Documents, p. 239).

89 Ponton to Department of Indian Affairs, April 14, 1899, NA, RG 10, vol. 7766, file 27107-4, pt. 2 (ICC, La Ronge TLE Documents, pp. 296-98).

90 Scott to Deputy Superintendent General of Indian Affairs, March 22, 1907 (ICC, La Ronge TLE Documents, p. 361).

91 Borthwick to Secretary, Department of Indian Affairs, May 10, 1907, NA, RG 10, vol. 7537, file 27132-1, pt 1 (ICC, La Ronge TLE Documents, p. 366).

92 McLean to Borthwick, May 20, 1907 (ICC, La Ronge TLE Documents, p. 367).

payment in February 1889 (which Borthwick identifies as the "1888" paylist) to arrive at a total of 466.[93] Secretary McLean then advised the Inspector of Indian Agencies that

> There appears to be no doubt that these Indians are deficient of a considerable area of land under the treaty. Mr. Borthwick has gone into the question of natural increase in order to ascertain the number of Indians who were entitled to land at the time of the treaty. He estimates this number at 466. The two reserves for the said band namely Nos. 106 and 106A contain respectively 23 and 56.5 square miles. If Mr. Borthwick's figures are correct, the area to which these Indians are still entitled is 13.5 square miles. . . .[94]

Inspector Chisholm reviewed Borthwick's figures and agreed with his decision to begin with the February 1889 paylist "as the first aim is to ascertain the number at present in the bands who were eligible, had they presented themselves, to be enrolled at the date of the signing of the treaty." He did, however, revise Borthwick's total downwards to 463 – leaving, by his calculation, 13.1 square miles due to the Bands.[95] In the 1909-10 survey season, J. Lestock Reid marked out a total of 10.4 acres in 13 small reserves near Lac la Ronge and Stanley – and reported that the band had now "2.7 square miles" still owing to them.[96]

September 1910 – Current Population / New Adherents Reopening Entitlement

In the fall of 1910, a controversy over the allocation of revenue from timber sales on Indian Reserve (IR) 106A caused a review of the ownership of that reserve. An explanatory memo was prepared by "E. Jean" (who is not identified either as to branch or position). The Montreal Lake Band, he states, received a surplus of entitlement land with the survey of IR 106 in 1889, based on its population in that year. According to an 1895 memorandum from the Deputy Superintendent General of Indian Affairs, nine square miles of the proposed new reserve (106A) was to be allocated to the Montreal Lake people, but they were to surrender an equal amount of land from their

93 Borthwick to Secretary, Indian Affairs, April 21, 1908, NA, RG 10, vol. 7537, file 27,132-1, pt. 1 (ICC, La Ronge TLE Documents, pp. 408-10).

94 J.D. McLean to W.J. Chisholm, June 6, 1908, NA, RG 10, vol. 7537, file 27,132-1, pt. 1 (ICC, La Ronge TLE Documents, pp. 415-16).

95 Chisholm to Secretary, Indian Affairs, December 27, 1908, NA, RG 10, vol. 7537, file 27132-1, pt. 1 (ICC, La Ronge TLE Documents, pp. 421-24).

96 Memorandum of J. Lestock Reid, February 25, 1910, and J.D. McLean to P.G. Keyes, Department of Interior, March 4, 1910 (ICC, La Ronge TLE Documents, pp. 434-36).

present reserve. Jean then calculated their entitlement in 1897, when IR 106A was surveyed, using current population figures: "The population of the Montreal Lake Band in 1897 (143 souls) would entitle them to 28.6 square miles and the 9 square miles referred to with the 23 square miles in Reserve 106 gave them a total of 32 square miles." Therefore, "the Montreal Lake Band was not even entitled to the 9 square miles unless they surrendered land in the old Reserve – which they did not appear to have done."

Jean concluded his memo with a statement about the current entitlement situation of both the Montreal Lake and Lac La Ronge Bands:

> Of course the population of the two Bands has kept increasing since 1897 by the admission of Indians to Treaty and [page torn, words missing] they are both entitled to more land than they have received so far. The population in 1909 was:
>
> | | |
> |---|---|
> | Montreal Lake | 187 |
> | Lac la Ronge | 516 |
>
> This would give the former 37.2 square miles and the latter 103.2 square miles.[97]

Entitlement, according to the understanding of this particular official at least, was to be based on current population and, even if a band had received its full quota, the subject could be reopened subsequently by the admission of non-treaty Indians.

October 1910 – Date-of-First-Survey Population

Two weeks after the above memo was written, Indian Commissioner David Laird contradicted its interpretation. In a memorandum to the accountant, in which he quotes from Jean's memo, he continued to base his calculations on the population in October 1889 (second payment):

> the very utmost share of reserve 106A which they [Montreal Lake Band] can claim is 9 square miles. The Lac la Ronge band had no other reserve surveyed for them at that time and though they be assigned the remainder of 106A, or 47.5 square miles [56.5 - 9], they would still be short (their number paid in 1889 being 334) of 19.3 square miles.[98]

97 Memorandum of E. Jean, September 27, 1910, NA, RG 10, vol. 7766, file 27107-4, pt. 1 (ICC, La Ronge TLE Documents, pp. 437-39).

98 Laird to Accountant, October 14, 1910, NA, RG 10, vol. 7766, file 27107-4, pt. 1 (ICC, La Ronge TLE Documents, pp. 440-43).

1914 – Population at Treaty (Including Late Adhesions)

In 1914 the Department of Indian Affairs accountant, F.A. Paget, wrote a memorandum about the entitlement situation of the La Ronge and Montreal Lake Bands in which he states that his calculations were "based on the population at the time they were admitted to Treaty in 1888 and 1889." While he does use the figure of 99 said to have been paid to the Montreal Lake Band in February 1889, the figure he uses for the Lac La Ronge Band is closer to Agent Borthwick's 1908 final total of treaty-time plus new adherents to treaty. Based on this memo, Deputy Superintendent General D.C. Scott stated that the La Ronge Band was still owed 14.9 square miles.[99]

March 1920 – Current Population

At the bottom of an extract from a communication written by Commissioner W.A. Graham in March 1920 are a series of handwritten calculations of outstanding entitlement for each of the two La Ronge factions and the Montreal Lake Band, based on current population figures. It was, however, "not convenient to arrange to have surveys made in that locality this year,"[100] and so no action was taken. Two years later, Indian Agent Taylor forwarded a request from the Chief of the James Roberts Band for "the remaining seven square miles of their reserve" (probably one-half of the 14.9 square miles calculated by D.C. Scott in 1914), to which Secretary J.D. McLean replied with the 1920 figures:

> At that time [1920] the population was as follows:
>
> | | |
> |---|---|
> | Montreal Lake band | 271 |
> | Lac la Ronge band | 379 |
> | Stanley band | 264 |
> | Total | 914 |
>
> At 128 acres each, they would be entitled to 116,992 acres [182.8 square miles], leaving a deficit of 61,125.6 acres [95.5 square miles].[101]

September 1922 – Date of Band Split

In 1910, the two separate groups making up the Lac La Ronge Band split into two bands – the James Roberts (La Ronge) Band and the Amos Charles

99 F.A. Paget to D.C. Scott, December 11, 1914, and D.C. Scott to Archdeacon J.A. MacKay, Prince Albert, Sask., January 9, 1915, NA, RG 10, vol. 7766, file 27107-4, pt. 1 (ICC, La Ronge TLE Documents, pp. 458-63).

100 Extract of letter from W.M. Graham, March 31, 1920, and J.D. McLean to Graham, April 9, 1920, NA, RG 10, vol. 7537, file 27132-1, pt 1 (ICC, La Ronge TLE Documents, pp. 496, 497).

101 W.R. Taylor to J.D. McLean, Assistant Deputy and Secretary, September 8, 1922, and McLean to Taylor, September 26, 1922, NA, RG 10, vol. 7537, file 27132-1, pt. 1 (ICC, La Ronge TLE Documents, pp. 509-10).

(Stanley) Band. Separate paylists and trust accounts were created, but reserve lands were not formally divided between the two groups.

In 1922, when the James Roberts Band requested the balance of its lands, Indian Affairs officials first responded with quotations of area due based on current populations (see above). At the time, McLean was unsure how the total reserve land was divided. When that information was subsequently found, a new calculation was made based on the population at the date the band split:

> In 1910, the Lac la Ronge band was divided again into Lac la Ronge, under James Roberts[,] and Stanley, under Amos Charles. Their capital and I would suppose their interest in the land of Indian Reserve No. 106A was divided in the proportion of Lac la Ronge 315 to Stanley 235. We have no information as to the division of the 10.4 sq. miles laid out by Mr. Reid, but it will be nearly equally divided.
>
> The population of Lac la Ronge in 1922 is 377. The population of Stanley in 1922 is 241. If we take the population of 1910 as a basis for these two bands, Lac la Ronge would be entitled to 63 sq. miles. They have 27.2 sq. miles in I.R. No. 106A and say 5.2 at Lac la Ronge, total 32.4 sq. miles. They have therefore due about 30.6 sq. miles. Accordingly the Stanley band would be entitled to 47 sq. miles; they have 20.3 at reserve 106A and say 5.2 at Stanley, total of 25.5 sq. miles. There will still be due 21.5 sq. miles.[102]

J.D. McLean relayed these figures to Agent Taylor in February 1923. No survey was requested, but there is nothing on file to indicate the reason. The figures are repeated in correspondence in December 1926, August 1931, and May 1936.[103]

November 1936 – Current Population

In November 1936 both the Surveyor General and the Secretary of Indian Affairs again quoted entitlement lands owing based on current population figures – 93.6 square miles for the 468 members of James Roberts Band and 55.8 square miles for the 279 members of Amos Charles Band. (In this correspondence, the figure cited for acres received to date was incorrect, so the estimate of "more than 20,000 acres" still due to each Band has little relevance.)[104]

102 Memo [unsigned], Department of Indian Affairs, Ottawa, December 14, 1922, NA, RG 10, vol. 7537, file 27132-1 (ICC, La Ronge TLE Documents, p. 511).

103 J.D. McLean to W.M. Graham, December 15, 1926; W.M. Graham to Secretary, Indian Affairs, August 28, 1931, and A.F. Mackenzie to W. Murison, May 19, 1936 (ICC, La Ronge TLE Documents, pp. 534-35, 658-59, 721).

104 Chief Surveyor to Mr White, November 30, 1936, and A.F. MacKenzie to C.P. Schmidt, Regina, November 30, 1936 (ICC, La Ronge TLE Documents, pp. 726-27).

April 1939 – Current Population

Current population figures were also quoted in April 1939 in a request from Director Harold McGill to the Deputy Minister of Indian Affairs to expedite surveys.[105]

December 1959 – Shortfall at Date of First Survey / Current Population

A second occurrence of a *possible* calculation based on shortfall at date of first survey was found (the date used was *not* the date of first survey, but the memorandum seems to indicate that the author considered that it was). In December 1959 the Chief of Reserves and Trusts wrote to the Regional Supervisor for Saskatchewan regarding lands for the La Ronge Band: "The reserves were selected in 1909 when the Band population was 526. On this basis treaty entitlement would then be 67,328 acres, and they would still be entitled to a further 23,707 acres." He continued, however: "I might add that as no reserves have been established for the northern Indians the Province, I believe, would have no objection to establishing entitlement on the basis of present day population."[106]

1961 – Bethune's Compromise Formula

In the early 1950s, there is correspondence on file relating to requests for surveys for the Lac La Ronge Band, to the point where it appears that some lands at Stanley were even identified as being potential reserve lands.[107] No entitlement calculations appear for this period, however. In 1953, the Superintendent of the Carlton Agency informed the Regional Supervisor that "the Indians concerned are entitled to an additional 60,000 acres under Treaty rights, as stated in previous correspondence." This figure cannot be based on current population (which he gives as 1088), but he gives no clues as to where this was found.[108]

In December 1960 solicitors for the Lac La Ronge Band wrote to the Department of Indian Affairs requesting the balance of reserve lands due under treaty. The lawyers did not have the correct figures available, but made the request based on information given them by the Band:

105 Harold McGill to Deputy Minister, April 15, 1939 (ICC, La Ronge Documents, pp. 754-65).
106 Chief, Reserves and Trusts, to Regional Supervisor, December 18, 1959 (ICC, La Ronge TLE Documents, p. 1061).
107 E.S. Jones to J. Ostrander, June 11, 1952 (ICC, La Ronge TLE Documents, p. 894).
108 E.S. Jones to J.T. Warden, September 18, 1953 (ICC, La Ronge TLE Documents, pp. 904-05).

> Our clients advise us that under the Treaty provision was made for 60,000 acres of land for this Band. This was computed on the basis of one section of land for every five members of the Band. We understand that of this amount only 6000 acres has been allocated and we have been requested to take the necessary steps to have the balance allocated.[109]

Indian Affairs officials were aware that the La Ronge Band had "a fairly substantial land entitlement to their credit," but needed to do some research to determine the exact acreage.[110] When the Regional Supervisor wrote to headquarters asking for clarification on the population base to use in entitlement calculations, the Chief of Reserves and Trusts, W.C. Bethune, replied:

> I believe we should take the position that the reserve entitlement of Indians should be based on the population of the bands at the time reserves are set apart for them. As far as I know, this attitude has not been challenged by any province, and there is some justification for it. A problem is created when bands received a portion of their reserve entitlement in past years, but it is thought that this situation can be worked out on a reasonable basis.[111]

At this time, Canada was also involved in the process of negotiating with the province of Saskatchewan for lands for four northern bands, which had never received any reserve land. Internal provincial correspondence on file indicates that Saskatchewan officials were not eager to transfer Crown lands to Canada, especially in the north where mineral development was ongoing. It is not clear, however, how much of this reluctance had been communicated to the Department of Indian Affairs.

Bethune saw the La Ronge situation as a "problem." His solution, which he appears to have arrived at without consulting anyone else, was to calculate this Band's entitlement based on a percentage of current population:

> Our feeling is that when the reserve entitlement of a band is satisfied at the one time it should be based on the total population of the band at that time, no matter whether it was at the time of treaty or many years afterwards. Where partial settlement of land entitlement was reached at several times the problem becomes somewhat more difficult, and requires a reasonable attitude on the part of the Indians, ourselves and the provincial authorities. The Lac la Ronge Band first received a reserve in 1897 and,

109 Cuelenaere, Hall & Schmit to N.J. McLeod, Regional Supervisor, December 7, 1960 (ICC, La Ronge TLE Documents, p. 1105).

110 N.K Ogden for Chief, Reserves and Trusts, to Regional Supervisor, Saskatchewan, January 6, 1961 (ICC, La Ronge TLE Documents, p. 1114).

111 Bethune to Regional Supervisor, February 13, 1961 (ICC, La Ronge TLE Documents, p. 1127).

based on the population of the Band at that time, it represented 51.56% of their total entitlement. In 1909, additional lands were set aside for their use and, based on the 1909 population, the additional lands represented 7.95% of the total they would have been entitled to at that time. In 1948, additional land was set aside for their use, representing 5.16% of what their full entitlement would have been based on the 1948 population. It might, on this basis, be argued that the Lac la Ronge Band has received 64.76% of their total reserve entitlement. The balance, 35.24%, based on the 1961 population of 1,404, would amount to 63,330 acres.[112]

Without any apparent discussion or debate, this new and unique formula – in fact, that exact acreage – formed the basis for the amount of land which the La Ronge Band received as its "full and final land entitlement" under treaty.[113] (It must be noted that, since the early 1970s, the Band has disputed the validity of this formula and of the Band Council Resolution as a release; it currently has a claim before the Indian Claims Commission and an action proceeding in the Saskatchewan Court of Queen's Bench on this issue.)

Treatment of Absentees, Membership Additions, and "Double Counts"

It is evident that Department of Indian Affairs officials, at one time or another, considered absentees, new adherents, transfers from landless bands, and people receiving reserve land elsewhere in calculating reserve size. They did not necessarily treat them in the same manner every time, however. The following are examples for each of the categories.

Absentees

September 6, 1898. Indian Commissioner A.E. Forget calculated entitlement for the Yellow Quill/Kinistino Bands, Treaty 4, Saskatchewan: "There were 358 Indians paid in this Band last month and two were reported absent, making a total of 360 of a population which would entitle them to 72 square miles."[114]

New Adherents

September 6, 1898. Indian Commissioner A.E. Forget recommended that the Kinistino Band, with a population of "about fifty persons," receive a reserve large enough for 75, since "owing to the attractions of the locality it is likely

112 W.C. Bethune to Regional Supervisor, Saskatchewan, May 17, 1961 (ICC, La Ronge TLE Documents, p. 1136).
113 Lac La Ronge Band Council Resolution, May 8, 1964 (ICC, La Ronge TLE Documents, p. 1322).
114 NA, RG 10, vol. 3935, file 118537-1 (ICC, La Ronge TLE Documents, pp. 269-71).

to be increased by the adhesion of some few straggling hunting Indians scattered throughout the unsettled territory . . ."[115]

December 18, 1910. Surveyor J.K. McLean reported on his work at Norway House Reserve, Manitoba: "Owing to the additional number of non-Treaty Indians taken recently into Treaty at this place, an area of 7264 acres was added to the north end of the reserve."[116]

October 19, 1939. Surveyor General F.H. Peters reported on the entitlement situation of a number of bands in northern Alberta:

> The Utikuma Lake, the Wabiskaw, the Tall Cree bands have reserves, but due to natural increases and non-treaty Indians who have joined these bands, additional lands are required for them. . . .
> [re Utikuma Lake] 154 non-treaty Indians joined the band since 1909; if they alone were entitled to additional land they would receive 154 times 128 acres, or 19,712 acres. . . .
>
> In making final settlement with these Indians with regard to land due them, it is our opinion that the additional area should be based on present population instead of upon the number of Indians who have joined the band since the survey of the reserves at Utikuma Lake. In this connection our reasons are based on the following points.
>
> 1. If the additional lands were to be based wholly on the number of non-treaty Indians who have joined the band since date of survey of their reserves in 1908-1909, this would leave out of consideration all descendants of these non-treaty Indians.
>
> 2. It is possible that some of the non-treaty Indians who joined are now dead and that others have left the band, some commuted and transferred and consequently they should not be considered in the matter of additional lands for these bands.[117]

In a draft letter dated October 20, 1939, the Minister of Mines and Resources (who was responsible for Indian Affairs) endorsed the Surveyor General's ideas: "The Utikuma Lake, the Tall Crees and the Wabiskaw Indians are requesting more lands. In each case a large number of non-treaty Indians have joined these bands since their present reserves were surveyed and they are entitled to additional lands under the provisions of Treaty eight. . . ."[118]

115 Kenneth Tyler and Bennett McCardle, Report on Multiple Surveys Practices, attached as appendices B, C, and D to Joe Dion, President, Indian Association of Alberta, to Hugh Faulkner, Minister of Indian Affairs, November 30, 1978, doc. 8, p. 2.

116 McLean to Pedley, December 18, 1910, NA, RG 10, vol. 4019, file 279393-6, reel C-10173.

117 Memorandum, F.H. Peters, Surveyor General, to D.J. Allan, Superintendent, Reserves and Trusts, October 19, 1939, NA, RG 10, vol. 7777, file 27131-1 (ICC, La Ronge TLE Documents, pp. 783-84).

118 Minister of Mines and Resources to Minister of Lands and Mines, Alberta, October 20, 1939 (ICC, La Ronge TLE Documents, p. 786).

Transfers from Landless Bands

February 22, 1928. William Gordon, Indian Agent, Norway House, Manitoba, made the case for additional reserve land for the Cross Lake Band based on the addition of people from other bands which had not yet received reserve lands:

> I am well aware that the Government cannot be expected to continue altering the boundaries of reserves to meet increases in population, as they have not done so to cover decreases . . . I have not all of the records, but from what I have, I am of the opinion that much of the increase of the Cross Lake Band, between the years 1877 and 1913 were migrations from other Bands whose reserves had not yet been surveyed. In 1908 some 73 persons from Split Lake, York, Oxford House, Nelson River and Nelson House were added to the Band."[119]

Double Counts

June 20, 1890. Survey Instructions to A.W. Ponton (Treaty 3): "The surveyor will ascertain . . . if any portion of this Band received its land with some other Band."[120]

September 15, 1890. Surveyor Ponton: "There are no means of his [the surveyor's] knowing whether or not some of the families [have been accounted] for in the allotment of land to other bands especially when such allotments have been surveyed in different years . . ."[121]

October 31, 1906. Assistant Secretary S. Stewart regarding additional land for Lac La Ronge Band: "The question is a rather complicated one, as great care must be taken to prevent giving land to the same Indians a second time."[122]

June 11, 1913. Survey Instructions to I.J. Steele (Treaty 8): "Care requires to be taken in all cases that the same Indian does not obtain land in two different places."[123]

December 27, 1966. H.T. Vergette to R.M. Connelly:

119 William Gordon, Indian Agent, to Assistant Deputy and Secretary, Department of Indian Affairs, February 22, 1928, NA, RG 10, vol. 7772, file 27123-32.
120 NA, RG 10, vol. 1918, file 2790, reel C-11,110.
121 A.W. Ponton to E. McColl, Inspector of Indian Agencies, September 15, 1890, NA, RG 10, vol. 1918, file 2790.
122 S. Stewart to W.J. Chisholm, Inspector of Indian Agencies, October 31, 1906 (ICC, La Ronge TLE Documents, p. 345).
123 J.D. McLean to I.J. Steele, June 11, 1913, NA, RG 10, vol. 4019, file 279,393-9, reel C-10,173.

the changes in band nomadic habits, transfers, or movement between bands, divisions, etc. have created a very complex problem. It is not simply a matter of selecting the figure from a Paylist or census representing the total membership and using this as the basis for requesting a free grant of land from the Province, although this has been the method used most frequently. To be scrupulously fair, we should carefully examine the history of the band organization and development from the signing of the Treaty until the present date to determine: 1) If there were any abnormal fluctuations in membership over the years; 2) If so, what are the reasons?; 3) If the records reflect substantial increases in membership resulting from an influx of Indians from other bands which may have already received their land entitlement; 4) In the case of new reserves, did these Indians once belong to a group for which lands have already been set apart?; 5) Any other significant information having a bearing on land entitlement. . . . [124]

124 DIAND, file 574/30-4-22, cited in Davies, "Treaty Land Entitlement," note 66 above, tab 11.

PART III

TREATY LAND ENTITLEMENT CLAIMS: POLICY AND PROCESS

SPECIFIC CLAIMS POLICY IN GENERAL

Native claims are not new phenomena in Canada. It is true that, prior to 1951, claim activity was discouraged by *Indian Act* restrictions on the use of band funds and individual monetary contributions for the prosecution of claims, as well as the need for government approval to sue the Crown. Nevertheless, claims dealing with hunting, fishing, and trapping rights or breach of obligation in the administration of lands and assets have been a feature of almost all periods of our country's history.

Until the mid 1970s, there was no attempt to establish standard claims resolution processes. Grievances were dealt with on an ad hoc basis through the government's normal administrative channels, by special investigation or commission, or by arbitration. Claims for treaty entitlement lands (either for reserve establishment or for additions) were dealt with through the regular departmental bureaucracy, with no standard process in place to research, analyse, or dispute decisions.

After World War II, there were attempts to develop some mechanism to deal with the growing backlog of claims. Two joint Senate/House of Commons committees (1945 and 1959) recommended the establishment of an Indian Claims Commission similar to the one set up by the United States government. A series of bills designed to implement these recommendations, however, all died on the order paper. Further development in that direction ceased in 1968 when the Liberal government under Prime Minister Pierre Trudeau called for a complete review of Indian Affairs policy.

The result of this review was the June 1969 release of the White Paper on Indian policy.[125] In it, the federal government proposed to repeal the *Indian Act* and take legislative steps to enable Indians to control their lands and

125 DIAND, *Statement of the Government of Canada on Indian Policy, 1969* [The White Paper] (Ottawa: Queen's Printer, 1969) [hereinafter White Paper].

acquire title to them, to eliminate the Department of Indian Affairs, to provide funds for Indian economic development, to meet "lawful obligations" with respect to claims and treaties, and to transfer to the provinces administration of such programs as education, health, and welfare. Canada called upon the support of "the Indian people, the provinces and all Canadians" in this attempt to move away from the "authoritarian tradition of colonial administration for Indian people" towards a policy of integrating the Indian people into "full and equal participation in the cultural, social, economic and political life of Canada." Indian reaction, however, was immediate, unified, and strongly negative,[126] and by March 1971 the White Paper had been shelved.

The White Paper did result in the appointment of Lloyd Barber as Indian Claims Commissioner in December 1969. From the beginning, however, Barber was hampered by a mandate limited to examining and reporting on possible mechanisms for settlement of grievances or claims, with no power to resolve them. As well, he often worked amid criticism and opposition from the Indian people, who viewed the Commission as an attempt to force upon them the policy of the White Paper. The Commission wound up in March 1977, with the "available means for resolving claims largely unchanged."[127] The Canadian Indian Rights Commission, which had been established in 1976 to facilitate a bilateral federal/Indian claims resolution process, dissolved in January 1979 when the National Indian Brotherhood withdrew.

In the meantime, work on native land claims continued. Federal funding to provincial, territorial, and regional native organizations and Indian bands to enable them to research and document claims properly began in the early 1970s and has continued to the present. In July 1974 the Office of Native Claims (ONC) was set up within the Department of Indian Affairs and Northern Development (DIAND) to deal with the increasing number of both specific and comprehensive claims being submitted. Working closely with the federal Department of Justice, it had as its primary function to "conduct basic research, to represent the government in claims negotiations with native groups and to formulate policies relating to the development of claims and conduct of negotiations."[128]

The Office of Native Claims had only limited success in resolving specific claims. By 1981, only 12 of over 70 specific claims accepted for negotiation had been settled. Another 80 claim submissions still awaited a decision on

126 Indian Chiefs of Alberta, *Citizens Plus* [The Red Paper] (1970; repr. Edmonton, 1995).
127 Richard C. Daniel, *A History of Native Claims Processes in Canada, 1867-1979*, prepared for DIAND, Research Branch (Ottawa: DIAND, February 1980), 228.
128 Ibid., 228.

whether they would be accepted. A departmental review of the policy and process in 1981 resulted in a number of changes. Among them was the establishment of a separate branch to deal with specific claims only. Still, by the end of the decade, only three or four negotiated settlements were being achieved each year – fewer than the number of claims being submitted, with the result that the backlog of unresolved specific claims kept growing.[129] In April 1991, after consulting Indian leaders on how to improve the process, the Prime Minister announced a new government initiative "to resolve claims more quickly, efficiently and fairly." Its major components included increased resources, administrative policy adjustments (such as "fast tracking" smaller claims), inclusion of pre-Confederation claims, the establishment of an Indian Specific Claims Commission to review rejected claims, and the creation of a Joint First Nation/Government Working Group on Specific Claims Policy and Processes to review and make recommendations "on all the existing acceptance and compensation criteria upon which the Specific Claims Policy is based."[130]

Lawful Obligation

Canada first stated that "lawful obligations must be recognized" as public policy on claims and treaties in the 1969 White Paper. No definition was given but a narrow meaning was implied: "The terms and effects of the treaties between the Indian people and the Government are widely misunderstood. A plain reading of the words used in the treaties reveals the limited and minimal promises which were included in them. . . ."[131] There was, however, no further clarification of this policy.

In January 1972, DIAND asked the Department of Justice for a "ruling on the interpretation of the treaties and relevant Federal-Provincial agreements in regard to the population date on which to base the entitlement. . . . there is no known judicial precedent to guide us in determining the Federal Government's position. Since any decision by Cabinet could eventually end up being tested in the courts . . . it must be based on sound legal principles. . . ."[132] Justice's response, if any, was not released by the government, but in March of the following year both the Minister of Indian Affairs and DIAND officials made clear statements to the Island Lake Band in Manitoba

129 DIAND, *Federal Policy for the Settlement of Native Claims* (Ottawa: DIAND, March 1993), 20.
130 Ibid., 22-23.
131 White Paper, note 125 above, 11.
132 H.T. Vergette to R.M. Connelly, January 12, 1972, in Tyler and McCardle, Multiple Surveys Report, note 115 above, doc. 116.

that Canada's "lawful obligation" was to provide reserve land according to the population at the date of first survey (although in that particular case Canada was prepared to go beyond that and request additional lands from the province in order to fulfil entitlement):

- On March 15, 1973, J.G. McGilp (who at the time appears to have been working as a special representative with DIAND) wrote to the Island Lake Chiefs:

> I am putting in writing the position of the Government with respect to your request for fulfilment of your treaty land entitlement. . . .
>
> The Government is committed to meeting its lawful obligation. It is quite possible to argue that the lawful obligation would be met with the provision of 2,939 acres [the shortfall at date of first survey]. It is recognized, however, that there has been a lapse of many years during which the Island Lake Bands did not have the use of that particular land. Therefore, the Government is prepared to put forward for the consideration of the Bands, its readiness to approach the province with a formula if the Bands consider it appropriate.[133]

- Later that same month, the Minister wrote to the Chiefs on this issue:

> In 1924, when land was first selected, the population of the Island Lake Band was 649, according to the annuity paylist. Therefore the obligation under Treaty No. 5 was to lay aside reserves not exceeding 20,768 acres. Two reserves were selected by the Island Lake Band in 1924 and surveyed in 1925. They contained 17,829 acres. This left 2,939 acres to be selected.
>
> In order to discharge the Treaty requirement, the Government is still obliged to lay aside 2,939 acres as reserve land. I am prepared to do this and make the necessary demand upon the Province of Manitoba . . .
>
> I am willing to go further than this and approach the Province on the basis that the land selected in 1924 was 85.9% of entitlement, and that the remaining 14.1% be calculated using the population of your Bands as at December 31, 1972. This would mean adding about 14,000 acres to the reserves.
>
> A settlement as set out above would not preclude your Bands advancing proposals based on social, economic or other grounds rather than on Treaty entitlement. But I do think that the Treaty entitlement of your Bands to land should be settled as a first step now. . . .[134]

133 J.G. McGilp to Chief Charlie Knott et al., March 15, 1973, DIAND, file 574/30-4-22 (ICC, La Ronge TLE Documents, p. 2059).

134 Jean Chrétien, Minister of Indian Affairs and Northern Development, to Chief James Mason et al., DIAND, file 574/30-4-22 (ICC, La Ronge TLE Documents, p. 2061).

Six months later, the Minister of Indian Affairs publicly reiterated that the recognition of "lawful obligations" remained the basis of government policy. Again, there was no attempt in this statement to give more precise meaning to the term, but this time the Minister continued in a manner that seemed to imply a broader interpretation:

> The Federal Government's commitment to honour the Treaties was most recently restated by Her Majesty the Queen, when speaking to representatives of the Indian people of Alberta in Calgary on July 5. She said: "You may be assured that my Government of Canada recognizes the importance of full compliance with the spirit and terms of your Treaties."[135]

First Nations found, however, that Office of Native Claims bureaucrats adopted a "narrow, excessively legalistic approach" to validation criteria "contrary to the spirit and intent of the Treaties."[136] Claim settlement stalled and frustration grew. In 1982 Canada published *Outstanding Business: A Native Claims Policy – Specific Claims*, in an attempt to present a "clear, articulate policy." It states: "The government has clearly established that its primary objective with respect to specific claims is to discharge its lawful obligation as determined by the courts if necessary." It then defines the parameters:

> 1) Lawful Obligation
>
> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise from the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown;
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.
>
> 2) Beyond Lawful Obligation
>
> In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:

135 DIAND, Press Release, Jean Chrétien, "Statement on Claims of Indian and Inuit People" (August 8, 1973), p. 1.
136 Sol Sanderson, Federation of Saskatchewan Indians, to John Munro, Minister of Indian Affairs, September 24, 1982 (ICC, La Ronge TLE Documents, pp. 3503-05). See also DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: DIAND, 1982) [hereinafter *Outstanding Business*], 15.

i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[137]

In the same year as the publication of this policy statement, the Minister of Indian Affairs provided a more concise definition:

> . . . Canada has interpreted its lawful obligation to be the shortfall between what the band should have received at first survey and the lands it has actually received over the years.[138]

It must be noted, however, that this is merely an *interpretation*: the issue has never been decided in the courts.

Federal/Provincial/First Nation Involvement in Validation and Settlement

Over the years there have been questions concerning the division of responsibilities in the resolution of treaty land entitlement issues. In 1954 legal counsel for the Department of Indian Affairs stated that "there does not appear to be any possible way to give a firm legal opinion as to the rights of the Crown in right of Canada to *arbitrarily* set the selection date for purposes of determining the area of a reserve for a band . . . ."[139] Some two decades later, Commissioner Lloyd Barber also gave his opinion that Canada should not act unilaterally in dealing with treaty land entitlement matters:

> In the light of the obvious ambiguity in this treaty promise, the inequitable nature of the promise, and the present day needs of the Bands, I suggest that the situation requires a process of negotiation which gives adequate consideration to the Indian position. This is the type of issue where it is not appropriate for the Federal Government to make a unilateral decision. The treaties were agreements between two parties and consequently any points that require clarification should be decided through a process where both parties are equally represented. . . .[140]

137 *Outstanding Business*, 3, 19, 20.
138 John Munro, Minister of Indian Affairs, to Gary Lane, Minister of Intergovernmental Affairs, Saskatchewan, July 7, 1982 (ICC, La Ronge TLE Documents, p. 3479).
139 Legal Advisor, Department of Citizenship and Immigration, to L.L. Brown, Indian Affairs, May 20, 1954, DIAND, file 578/30-5, vol. 1 (ICC, La Ronge TLE Documents, pp. 934-37). Emphasis added.
140 Lloyd Barber, Indian Claims Commissioner, to Jean Chrétien, Minister of Indian Affairs and Northern Development, October 5, 1972 (ICC, La Ronge TLE Documents, p. 2000).

Who should influence validation and settlement policy: Canada, the province, First Nations? Since validation and settlement are distinctly separate functions in the claim process, would the same people necessarily be involved in determining the framework for both? The answers to these questions depend to some extent on the particular jurisdiction involved.

Ontario

In a series of judicial decisions and legislative agreements beginning with the *St. Catherine's Milling* case in the 1880s and ending with the passage of *An Act for the Settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve lands* in 1924, it was determined that Ontario, by virtue of its control over Crown lands under sections 92(13) and 109 of the *BNA Act, 1867*, had authority to fulfil the Indian reserve clauses of those treaties included within its jurisdiction. As a result of those decisions and agreements, it also became necessary for Canada to obtain provincial agreement on both the extent and the location of all Indian reserves selected under treaty. In Ontario, then, all aspects of treaty land fulfilment involve a trilateral process requiring the cooperation and agreement of the First Nations, the government of Ontario, and the federal government.[141]

Manitoba/Alberta/Saskatchewan

The situation in the Prairies provinces is less clear because there has been no legal or judicial resolution to these questions. The Federation of Saskatchewan Indians (FSI) consistently advocated that *validation* of land entitlement claims was strictly a bilateral process involving Canada and the First Nations:

> The validation procedure clearly concerns unfinished administrative business between Canada and the Indian Nations . . . The Federal Government acts on behalf of the Crown as a party to the treaties. The Indian Nations are the other party to those agreements and therefore reserve the right to determine the specific policy on entitlement lands through negotiations with the Crown's representative for validation of each band's entitlement. . . .
>
> The validation procedure for each Band is clearly within Federal and Indian Government jurisdiction. . . .[142]

141 Donald McMahon, "Enforceability at Law of the Numbered Treaty Provisions Relating to Land," paper prepared for Osgoode Law School, Toronto, [fall 1985], p. 13.

142 Sol Sanderson, Federation of Saskatchewan Indians, to Gary Lane, September 19, 1982 (ICC, La Ronge TLE Documents, p. 3492). See also David Ahenakew to Warren Allmand, July 22, 1977 (ICC, La Ronge TLE Documents, p. 2565).

They were supported in this position by at least two government bodies.[143]

There is not enough material available to comment on the positions of Alberta and Manitoba in this matter, but in the province of Saskatchewan, it appears that policy changed depending on which government was in power. In 1963, for example, the Minister of Natural Resources reported to cabinet that the Deputy Attorney General was of the opinion that "the right of selection in the Dominion can only be exercised when this province agrees as to the necessity, the size and the location of the reserve . . ."[144] By 1975 thinking had changed to the point that the cabinet minister responsible for Indian matters stated publicly that validation was strictly a matter to be decided by the federal government and the First Nations.[145] A change of government brought another line of thinking in 1982, when the Minister of Intergovernmental Affairs wrote that, while he considered validation of treaty land entitlement to be "an unfinished administrative matter between the bands and the federal government," the provisions of the Natural Resources Transfer Agreement allowed for provincial involvement in the process:

> The provincial Minister must be "in agreement with" the federal Minister with respect to the provincial crown lands which are selected and considered necessary to fulfil Canada's obligation. In order to agree with a selection of land, the provincial Minister first must *concur* with the validation process which establishes the entitlement claim. I am certain that you will agree that this provincial position is not only reasonable but also a part of the "agreement" process between the federal and provincial Ministers.[146]

Neither Canada nor the Federation of Saskatchewan Indians agreed that this position was reasonable, however, and by April 1984 the province had abandoned it.[147]

It is more difficult to get a clear picture of Canada's position because it often does not totally separate the fact of entitlement (that is, the simple determination of whether or not a band received all of the reserve land to

143 Leon Mitchell, *Report of the Treaty Land Entitlement Commission* (Winnipeg: TARR Centre, January 18, 1983), 11 (v. 1); Indian Claims Commission, Research Resource Centre, *Indian Claims in Canada: An Introductory Essay and Selected List of Library Holdings* (Ottawa: Information Canada, 1975), 17.

144 Eiling Kramer, Minister of Naturual Resources, Saskatchewan, to Cabinet, January 10, 1963 (ICC, La Ronge TLE Documents, pp. 1185-87).

145 Paper presented by Ted Bowerman, Minister of Northern Saskatchewan, to the Federation of Saskatchewan Indians, Regina, December 4, 1975 (ICC, La Ronge TLE Documents, p. 2370).

146 J. Gary Lane, Minister of Intergovernmental Affairs, to John Munro, Minister of Indian Affairs and Northern Development, October 7, 1982 (ICC, La Ronge TLE Documents, pp. 3511-12).

147 Munro to Lane, November 25, 1982 (ICC, La Ronge TLE Documents, pp. 3530-32); Sanderson to Lane, September 19, 1982 (ICC, La Ronge Documents, pp. 3492-93); and Briefing Report to Saskatchewan Cabinet, part III, April 4, 1984 (ICC, La Ronge TLE Documents, p. 3614).

which it was entitled under treaty) from the question of settlement. In discussions of the Island Lake (Manitoba) entitlement issues in 1969, some federal officials clearly limited validation to Canada and the First Nation:

> There are, in fact, two negotiations which must be undertaken by Federal authorities. The first is the negotiation with the Island Lake Band itself to determine, on a mutually acceptable basis, the residual entitlement of the band to reserve lands. The second is the negotiation with the province to seek the transfer to Canada, under the provisions of the Natural Resources Transfer Agreement, of the lands necessary to enable Canada to fulfil its obligation to the band under the treaty.[148]

In contrast, throughout the 1970s, there are references to attempts to involve the province in some aspects of the validation process. In April 1974, for example, the federal department's Prince Albert District Supervisor wrote to the Director of the Resource Division of the provincial Department of Northern Saskatchewan:

> I would ask that you review this matter from the following points: 1) Are you receptive to the fact that Peter Ballantyne has an outstanding entitlement? 2) Do you concur that the formula used in establishing the outstanding entitlement appears to be fair and reasonable?[149]

In January 1977 the Director of the Lands and Membership Branch of the Department of Indian Affairs wrote to the Director General of the Manitoba Region regarding confusion about two different validation calculations that had been made for the Brokenhead Band in Manitoba:

> To date, no firm agreement has been reached between the Federal Government, the Provincial Government and the Indian Bands and Associations as to the criteria to be used in calculating entitlement. In December of 1975, the Department proposed the use of a series of fixed criteria as a basis for determining unfulfilled entitlements in the Province of Saskatchewan. These criteria have not been accepted, officially, by the Province of Saskatchewan or the Federation of Saskatchewan Indians but during the last year, they have been used by the Department whenever making entitlement calculations. . . .[150]

148 G.A. Poupore, Acting Director, Indian Assets, to C.T.W. Hyslop, Acting Director, Economic Development, Indian Affairs, November 17, 1969, DIAND, file 574/30-4-22 (ICC, La Ronge TLE Documents, pp. 1812-14).

149 S.C. Read, Supervisor, Prince Albert District, to J.W. Clouthier, Director, Resource Division, Department of Northern Saskatchewan, April 24, 1974, DIAND, file 672/30-26-200 (ICC, La Ronge TLE Documents, p. 2174).

150 G.A. Poupore, Director, Lands and Membership Branch, DIAND, to Director General, Manitoba Region, January 26, 1977, in Tyler and McCardle, Multiple Surveys Report, doc. 51.

In November 1982, however, the Minister of Indian Affairs responded to the province of Saskatchewan's attempts to review and approve the validation process with a clear and definite statement of authority: "Validation of a claim and determination of what the outstanding federal obligation under the terms of the treaty is a federal responsibility. . . ."[151]

With regard to the *selection* process, after a treaty land entitlement claim has been validated, there has been some debate over the years as to exactly what rights the Natural Resources Transfer Agreement gave to the provinces. Can they influence the "quantum" of land or are they limited to agreeing to the location of the reserve? In 1938 the Department of Indian Affairs' legal counsel was of the opinion that "by reason of the wording of this legislation the question of the amount of land which the Indians are entitled to receive would be determined by the Dominion, the Provinces under these Acts having a voice in the location of the Lands."[152]

In January 1983 the Manitoba Treaty Land Entitlement Commission also took that position:

> It would be unjust to consider that those words in Section 11 of the Manitoba Natural Resources Transfer Agreement are to be interpreted as conferring on a province the power or authority to frustrate Canada from being able to meet its Treaty obligations to the Indian Bands. On the contrary, it is my view that these words are to be interpreted as imposing an obligation on the province to do whatever is necessary to enable Canada to fulfill its Treaty land obligations to Indians *as Canada and the Indian Bands may agree*, until these obligations are fully carried out.[153]

In 1990 the Treaty Commissioner for Saskatchewan concurred: "With due respect, this Commission submits that the provinces have no voice in the determination of land quantum."[154]

Over the years, however, various bureaucratic statements and legal opinions have expressed the opposite view. In 1970, for example, the Department of Indian Affairs looked closely at this particular issue when the province of Manitoba insisted on having input into the question of land quantum for the Island Lake entitlement settlement. Its conclusion was that the province did

151 Munro to Lane, November 25, 1982, note 147 above.
152 W.M. Cory, Solicitor, Legal Division, Department of Mines and Resources, to H. McGill, Director of Indian Affairs, February 25, 1938 (ICC, La Ronge TLE Documents, p. 754).
153 Mitchell, *Report of the TLE Commission*, 54. Emphasis added.
154 Cliff Wright, *Office of the Treaty Commissioner, Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 51.

have a say in determining the amount of land necessary to fulfil Canada's obligations: XXXXXX

· Acting Chief, Lands Division:

> It should be impressed upon the Bands that Canada is not in a position to settle their treaty land entitlement without the concurrence of the Province as to the formula for settlement. . . .[155]

· B.R. Biddicombe:

> . . . the departmental view is that there are two negotiations, one between Canada and the Band and one between Canada and the Province of Manitoba.[156]

· Director of the Economic Development Branch:

> According to the Legal Advisor, the wording of the Transfer of Natural Resources Agreement provides no means by which the Federal Government can force a province to accept its decision as to the amount of land required to satisfy land credits under treaty. I am informed that the formula to extinguish partial land entitlements would have to be subject to negotiations with the province. . . .[157]

According to the opinion of legal counsel for the province of Saskatchewan in October 1983, the province has a voice in decisions on land quantum:

> 3 (a) The question of how much land is necessary to fulfill treaty obligations is a justiciable one which could be settled by a court of law if necessary. In other words, that issue is an objective question and not a subjective one which is dependent on the policy of the federal government as to what its lawful obligations are or on the beliefs of the Indians as to what their treaty rights are;
> (b) Even though the question of how much land is required to fulfill outstanding treaty obligations is a question of law, it is nevertheless open to the federal and the provincial governments to agree upon a particular formula to determine the quantum of the land required to meet outstanding treaty land entitlements. . . .[158]

155 H.T. Vergette to Head, Secretariat Division, September 14, 1970, DIAND, file 574/30-4-22 (ICC, La Ronge TLE Documents, p. 1889).
156 B.R. Biddicombe to J.B. Bergevin, Deputy Minister of Indian Affairs, October 6, 1970, DIAND, file 574/30-4-22 (ICC, La Ronge TLE Documents, p. 1902).
157 F.J. Doucet to J.B. Bergevin, October 13, 1970, DIAND, file 574/20-4-22 (ICC, La Ronge TLE Documents, p. 1904).
158 M. Cheryl Crane, Crown Solicitor, Constitution Branch, Saskatchewan, to Dr. R. Gosse, Deputy Minister of Justice, Saskatchewan, October 31, 1983 (ICC, La Ronge TLE Documents, pp. 3601-02).

VALIDATION PROCESS

Dates for Establishing Population Figures

Canada's policy on treaty land entitlement since at least 1975, and continuing to the present day, is as the Minister of Indian Affairs stated in 1982: "Canada has interpreted its lawful obligation to be the shortfall between what the band should have received at first survey and the lands it has actually received over the years."[159] While the "date of first survey" has been the cornerstone of most the the treaty land entitlement research conducted on behalf of prairie bands to date, it has not always been, and is not now, accepted by all parties. Other dates, which have been proposed and which might be considered by the courts in any litigation on this issue, include date of treaty adhesion, date of reserve selection, date of each subsequent survey in cases of multiple surveys, and others. Following is a brief discussion of each alternative.

Treaty Adhesion

At least two of the Prairie provinces and the federal government have at various times declared treaty-time population as the basis for reserve land calculation – Saskatchewan in 1963 ("The known or estimated population at the date of treaty will be used in calculating land entitlement"[160]); Canada in 1972 ("The Department of Justice takes the view that we are obligated only to supply an amount of land based on the population at the time of the signing of the treaty"[161]); and Alberta in 1977 ("These land entitlements will be calculated on the basis of the Band population as counted at the time of Treaty signing"[162]). All abandoned this position, primarily because inaccurate figures and unstable band formations at treaty time made it impossible to conduct any meaningful research in those years:

> the particulars of populations cannot be found for several of the Indian bands as they existed at the time of Treaty. The situation which prevailed through much of the northern areas was that at the signing of Treaty, two or three Indians presented themselves as Chief and Headmen and signed Treaty on behalf of a large group of Indians which later became separated into smaller bands and recognized by the Department of Indian Affairs of the time. It is most difficult to trace back all the individual families

159 Munro to Lane, July 7, 1982, note 138 above.

160 E. Kramer, Minister of Natural Resources, Saskatchewan, to R.A. Bell, Minister of Indian Affairs, April 4, 1963 (ICC, La Ronge TLE Documents, pp. 1190-91).

161 To Department Secretariat, April 19, 1972 (ICC, La Ronge TLE Documents, p. 1969).

162 Lou Hyndman, Minister of Federal and Intergovernmental Affairs, Alberta, to Warren Allmand, Minister of Indian Affairs, April 27, 1977 (ICC, La Ronge TLE Documents, p. 2536).

> in order to ascertain the population at Treaty time of the present day bands except for the overall totals.[163]

Arguments against the use of treaty-time population also included the loss of revenue caused by the land not being available over the years and the recognition that, in the north especially, Treaty Commissioners had clearly promised that reserves would not be surveyed until they were needed.[164]

One proposal put forward in 1975 would have used population figures at date of treaty "in cases where the treaties specifically delineate lands for a Band."[165] (The example used in this argument was Cross Lake in Treaty 5, but Treaties 1, 2, and 7 also contain descriptions of reserve locations that would have fit the parameters of this proposal.) Nothing was found in the available records to rebut this argument, but it was clearly never adopted, for in 1977 the Minister of Indian Affairs admonished Alberta for its treaty-time population stand:

> I find untenable your government's stated intention to fix treaty entitlement on the basis of band population at the time of treaty. I would suggest that such a position is excessively restrictive and overlooks entirely the benefits to be gained from providing Indian citizens of Alberta with a land base commensurate with their needs.[166]

Natural Resources Transfer Agreement

During the negotiations leading to the transfer of Crown lands and natural resources to the provinces, Manitoba tried to stipulate that land required for future reserves would be limited to the Superintendent General's estimate of the area still owing to the First Nations of that province – a total of about 100,000 acres based on 1928 population figures for two bands with no reserve lands and six with partial entitlement.[167] Canada would not agree to this stipulation:

> The various treaties provide for so many acres per capita and the practice of the Department has been to take the census of the band at the time that the survey of the

163 G.F. Davidson, Deputy Minister of Citizenship and Immigration, to J.W. Churchman, Deputy Minister of Natural Resources, Saskatchewan, April 12, 1961 (ICC, La Ronge TLE Documents, p. 1132).

164 W.P. McIntyre, Acting Administrator of Lands, to Alberta Regional Supervisor, Department of Indian Affairs, May 17, 1965, and H.T. Vergette to R.M. Connelly, December 27, 1966, DIAND, file 574/30-4-22.

165 H.R. Phillips, Acting Chief, Lands Administration Division, DIAND, to G.A. Poupore, Manager, Indian Lands, DIAND, January 23, 1975 (ICC, La Ronge TLE Documents, p. 2278).

166 Warren Allmand, Minister of Indian Affairs, to Lou Hyndmen, Minister of Federal and Intergovernmental Affairs, Alberta, June 23, 1977 (ICC, La Ronge TLE Documents, pp. 2551-53).

167 Treaty & Aboriginal Rights Research Program (TARR) Manitoba, *Treaty Land Entitlement in Manitoba, 1970-1981* ([Winnipeg], February 1982), 150, 151, 152.

> required acreage is made. The acreage as hereinafter stated will be varied at the time of survey to met the decrease or increase of the membership at such time. I do not think accordingly that it would be proper to insert any limitation of acres in the Agreement. When these surveys come to be made the Department will be able to satisfy the Province of Manitoba as to our strict adherence to treaty conditions. . . .[168]

Apparently this particular date was also proposed in 1954, although it is not known by whom or in what context. At the time, the Department of Indian Affairs was "not prepared to offer comment on this suggestion as it did not originate in this office," and there is no further reference to it in any other correspondence.[169]

Reserve Confirmation by Order in Council

The date of reserve confirmation seems to have been considered only in 1975. It was put forward as a possibility for use when more reliable dates could not be established, but it was recognized to be of limited value since "such confirmation was often not given until many years after the land had been selected and surveyed for a particular Band, thus resulting in numerous administrative problems."[170]

Reserve "Selection" / First Survey

In February 1970 officials from the province of Saskatchewan declared that they had settled on the use of population figures from the year in which application for reserve land was made:

> Bands are entitled to land on a per capita basis, but the Treaty does not state the date when the Band population is to be used in calculating the area of land entitlement. Is it the date of Treaty? The date of the application for land, or is it when the final settlement is made which could be many years later when the population has had a considerable increase? We have taken the position that the area of land entitlement is established on the basis of the Band population at the time of the original application for land. Once the area so established has been allocated, there is no further obligation on the part of the Province under the NRTA, Section 11. . . .[171]

168 Ibid., 157.
169 Davies, "Treaty Land Entitlement," note 66 above, tab 8.
170 H.R. Phillips, Acting Chief, Lands Administration Division, to G.A. Poupore, Manager, Indian Lands, January 23, 1975 (ICC, La Ronge TLE Documents, p. 2279).
171 F.B. Chalmers, Department of Mines and Natural Resources, Manitoba, to G.G. Rathwell, Department of Natural Resources, Saskatchewan, February 5, 1970 (ICC, La Ronge TLE Documents, p. 1831).

When the Department of Indian Affairs began band-by-band entitlement research in the early 1970s, the population figures were based on a similar date, but usually referred to as the date of "selection." No precise definition of this term could be found, but it was "broadly understood as the first date at which the reserve was effectively requested by, used, or set aside for, a band."[172] In some cases, this date preceded the date of survey by a number of years. For example, the Wabisca Band (Treaty 8, Alberta) selected four reserves in 1909 that were not surveyed until 1913; when the department investigated this Band's entitlement in 1974, the 1909 population was used in the calculation.[173]

The details required to establish a "date of selection" could only be found by researching early correspondence between the Indian Agent and the Department of Indian Affairs, located in archival files or annual reports.[174] This entailed time-consuming research, and in too many cases there was not enough information in the correspondence to determine a specific date of selection. This population base was abandoned by June 1975 and replaced with membership figures from the "date of initial survey."[175]

Each Survey in Cases of Multiple Surveys

Since treaty land entitlement research began in earnest in the 1970s, prairie First Nations have advanced the principle that entitlement should "grow or shrink indefinitely along with band population" until full allocation is achieved. In 1975 the President of the Federation of Saskatchewan Indians wrote to the Minister of Indian Affairs:

> Should a band have received insufficient land based on the Treaty formula at the original survey, its full entitlement to land shall be determined by its population as determined by the annuity paysheets and band lists at the time that confirmation of additional reserve land is made. This formula is to be used until such time as the band receives its full entitlement to land under the Treaty based on its population as shown by the latest annuity payment and most current band list prior to the confirmation of the parcel to give that band full entitlement to land under the treaty.[176]

172 Tyler and McCardle, Multiple Surveys Report, p. B-4.

173 Attachment to Memo from G.A. Poupore, Manager, Indian Lands, to W. Fox, Operations Branch, February 6, 1975 (see Appendix A).

174 H.R. Phillips, Acting Chief, Lands Administration Division, to G.A. Poupore, Manager, Indian Lands, January 23, 1975 (ICC, La Ronge TLE Documents, p. 2278).

175 G.A. Poupore to J.R. Worster, Province of Saskatchewan, June 23, 1975 (ICC, La Ronge TLE Documents, p. 2101).

176 David Ahenakew, Federation of Saskatchewan Indians (FSI), to Judd Buchanan, Minister of Indian Affairs and Northern Development, July 3, 1975 (ICC, La Ronge TLE Documents, p. 2332; Tyler and McCardle, Multiple Surveys Report, p. B1).

In January 1978 the Indian Association of Alberta included a similar statement in its position paper on entitlement:

> The position of the Indian Association of Alberta is based on the previous practice and precedents of the Canadian and Alberta governments and it is that until the total entitlement of a band has been granted, the entitlement should continue to increase in relation to the population of the band. . . .
>
> . . . This formula provides that as long as a band's outstanding entitlement claim remains unsatisfied, the extent of the band's entitlement would continue to increase or decrease with population, the extent of one square mile per family of five.[177]

Today, this same principle forms the basis of the claim of the Lac La Ronge First Nation, both in its litigated proceedings and in its submission before the Indian Claims Commission.

The arguments put forward in favour of this position are based on treaty interpretation and past practice of the department:

1 That treaty land entitlement was "intended . . . to meet the Indian people's need for residence and economic support over long periods of time" and that Treaty Commissioners had confirmed "the right of the bands to delay their choice of all or part of their land until they were ready to use it."[178]

2 That past practice of the department was to base reserve size on current population figures at each and every survey (see discussion on Multiple Surveys, above). Even the "compromise formula" applied to La Ronge was a variation on the "current population" base.

3 That the federal government's acceptance and advocacy of the "Saskatchewan formula" led the associations to believe that their ongoing method of determining entitlement based on population in the year of each successive survey was accepted, since that formula was based on current population statistics (albeit with a cut-off date of December 31, 1976):

> The terms of this agreement led the Indian associations to believe that their method of calculation had been accepted and vindicated. It was not logical to believe that entitlement for some bands, who had had the benefit of only one survey in the past, might now receive land on the basis of population at December 31, 1976; while others

177 Indian Association of Alberta, "Indian Land Entitlement: Position Paper," January 1978, pp. 12 and 14. The Manitoba Indian Brotherhood also put forward this calculation in its June 1979 "Treaty Land Entitlement - Validation Criteria."

178 Tyler and McCardle, Multiple Surveys Report, pp. B1-B2.

> (who had by chance or choice received land through more than one survey, whether that one survey had taken place in 1876 or as late as 1976) were restricted to the amount by which a survey had fallen short *as much as a century earlier*.[179]

In validation negotiations over the years, Canada has never endorsed this position. There was no debate on the specific arguments presented in the early correspondence – all that is on record are notations of verbal responses by Office of Native Claims staff in a 1978 discussion regarding the Meadow Lake entitlement situation. As the researcher for the Federation of Saskatchewan Indians, Ken Tyler, reported on the proceedings of the meeting:

> Graham Swan then interjected that, "That's not the way we do it," and went on to explain that if the shortfall at the date of the original survey of the first bit of reserve land for a band was ever made good, then the O.N.C. considered that Band's entitlement to have been fulfilled, no matter what the Band's population might have been when the additional land was surveyed. . . . I also asked Mr. Goudie if he could cite any case in which the Department of Indian Affairs had ever consciously attempted to fulfil entitlement for any band upon the basis of only making up the amount of land that was due at the date of first survey. I conceded that the past practice of the Department might be somewhat confusing, but that I knew of no case in which this had been done, while I knew of several, particularly in Northern Alberta, where the current population of a band had been identified as the basis upon which outstanding entitlement should be calculated for bands which had only received a portion of their reserve allocation.
>
> Goudie replied that, "We are not talking about precedents," and that the practice of the Department years ago was of little or no relevance. . . . I also asserted that the principle which the O.N.C. was now enunciating contradicted "the philosophy of the Saskatchewan Formula," in that it made little sense to agree that outstanding land entitlement should be calculated upon the current (Dec. 31, 1976) population today, but that it should not have been based upon current population in the past.
>
> Goudie replied: "That might very well be, but that's the way it's always been done". . . [180]

In its submission to the Indian Claims Commission in 1994, Canada addresses only the factual situation of the La Ronge Band and does not attempt any explanation of the precedents brought forward by the provincial Indian organizations:

179 Ibid., pp. B7-B8.
180 Ken Tyler, FSI, to Walter Gordon, FSI, November 6, 1978 (ICC, La Ronge TLE Documents, p. 3035).

> The most reasonable interpretation of this treaty [6] is to calculate the number of Band members at the time that the reserve is first surveyed for the purposes of calculating the quantum of land owed to a band under the treaty formula. . . .
>
> . . . there is no support for the interpretation advanced by the Band contained in the treaty, the adhesion agreement, nor the reports regarding the making of the treaty or the signing of the adhesion. On the contrary, each of these sources would suggest that it was the intention of Canada and the signatory bands to have reserves set aside in the relatively near future after the making of the treaty, based upon the then existing band populations.
>
> Likewise, the band can find little support for its position in the history of dealings between Canada and the band with respect to the treaty land entitlement question. Although Canada altered its views on the quantum of land remaining owing to the Band on several occasions, only the correspondence from the 1936-1938 period would suggest an adoption of the interpretation advanced by the band, and this correspondence is probably the result of confusing bands which had received lands with those that had not (i.e. a confusing of appropriate methodology). The great majority of the historical record concerning the outstanding TLE issue, and especially the earlier material is suggestive of a fixed shortfall approach to the satisfaction of the Band's outstanding TLE.[181]

Evolution of Validation Criteria

Agreement on the use of date of first survey was only the first step in the process of validating treaty land entitlement claims. Decisions still had to be made regarding various technical aspects of the research and interpretation of the data. Both Canada and the First Nations recognized the need to develop some sort of research framework, and in the mid-1970s various "principles," "positions," and "proposals" were put forward. Unfortunately, there was little review or response to any of these submissions, nor was there a concerted attempt to arrive at an agreed set of criteria to assure accuracy and consistency from the beginning. The consequence was that simultaneous but independent research projects on band membership and reserve survey histories in some cases resulted in very different conclusions.

From the beginning, Canada took the lead in establishing "acceptable" validation criteria. As the research and analysis of various situations proceeded, standards established by the Department of Indian Affairs were modified and expanded – often at the initiation of the First Nations, but only with the approval of the Department of Justice. (In fact, although the documents throughout the 1970s suggest that the parameters "evolved" through a consultative process involving Department of Indian Affairs officials and First

181 Submissions on Behalf of the Government of Canada, 1994, ICC, La Ronge TLE Inquiry, pp. 1 and 19.

Nations, by the early 1980s Indian Affairs officials were giving the Department of Justice credit for the work.[182]) The benchmark was always Canada's "lawful obligations" as defined by Canada's legal counsel.

In the beginning, Canada's primary determinant for a claim to outstanding treaty land entitlement was that the total amount of reserve land set aside for a particular band be less than the amount due to it, based on the number of people paid on the treaty annuity paylist in the year of first survey. As the process evolved, the standards for determining population were expanded to include band members who happened to be absent in that particular year but who subsequently returned, as well as additions to band membership of people who had never received land elsewhere (new adherents to treaty or transferees from bands who had not received entitlement lands). The following is an attempt to follow this process of development and to demonstrate how these criteria formed the basis of entitlement validations and settlements in the Prairies from 1976 to about 1990, when the validation criteria seem to have become more limited.

Criteria in 1975

Both Canada and the First Nations in Saskatchewan began band-by-band treaty land entitlement studies in the early 1970s. A 1973 Department of Indian Affairs working paper on partial land entitlements in Saskatchewan was not widely distributed,[183] but by August 1975 work had progressed to the point that the Minister of Indian Affairs could provide the Premier of Saskatchewan with a list of all bands in that province, detailing original survey dates, populations at time of first survey, entitlement acres, and acres received. (Twelve bands according to this list had a shortfall at date of first survey.) The Minister did include a caution:

> I know that the Federation has conducted considerable research into this question on behalf of many Bands and I should point out that their research findings may differ from our own. This is partly due to the nomadic habits and loose organization of Indian bands during the last century and the disturbances at the time of the Riel

182 From about 1980 to 1983, the work of the joint FSI / DIAND technical committee – both research and evaluation – to finalize the nine outstanding entitlement claims in Saskatchewan "was carried out under the supervision of ONC, and using the validation criteria established for us by the Department of Justice." Murray Inch to Marla Bryant, January 18, 1982 (ICC file 2000-18, Memorandum from Stewart Raby to Wilma Jacknife, June 12, 1994, doc. 8).

183 John Tobias, FSI, to Walter Gordon, FSI, April 19, 1973 (ICC, La Ronge TLE Documents, pp. 2073-74).

> Rebellion. These coupled with questionable or inadequate records make for uncertainty and I emphasize that the attached figures are not absolute.[184]

In October 1975 the Federation of Saskatchewan Indians notified the province that it would identify 23 bands with partial entitlement.[185]

From this discrepancy in numbers it was obvious that the researchers were using different frameworks to reach their conclusions and it was suggested that "a reasonable basis for determining the reliability of data to be used in substantive discussion of Band entitlement" be developed. The Chief of the Federation of Saskatchewan Indians had already written to the Minister of Indian Affairs with five "basic principles" which he insisted be included in any policy developed to deal with land entitlement. They were:

1. Any recognized band of Treaty Indians is entitled to a reserve based upon the formula of one square mile of land for every five people.
2. To determine whether a band received its entitlement to land under the Treaty, the population figures from the latest annuity pay sheets and the most recent band lists prior to the original survey of the reserve must be used. Should a band have received insufficient land based on the Treaty formula at the original survey, its full entitlement to land shall be determined by its population as determined by the annuity paysheets and band lists at the time that confirmation of additional reserve land is made. This formula is to be used until such time as the band receives its full entitlement to land under the treaty based on its population as shown by the latest annuity payment and most current band list prior to the confirmation of the parcel to give that band full entitlement under the Treaty.
3. Any band which legitimately requested a reserve under Treaty, and which was unlawfully or unreasonably denied a reserve, has the option to use the population figures of the year in which it made its request or current population statistics.
4. No band can renounce its full entitlement to land except in the manner stipulated in the Indian Act Surrender Provisions.
5. A band with outstanding land entitlement has the right to choose any unoccupied crown land as the site for the lands to fulfill its Treaty entitlement.[186]

The Minister's response to these principles is not available, but notes of a meeting in May 1976 record the reaction of William Fox, a Special Projects Officer with the Department of Indian Affairs, who informed the Federation

184 Judd Buchanan, Minister of Indian Affairs, to Allan Blakeney, Premier of Saskatchewan, August 18, 1975 (ICC, La Ronge TLE Documents p. 2340). In January 1976 Canada notified the FSI that, after further research, one of the bands did not qualify and would be removed from the list (A. Kroeger, Deputy Minister of Indian Affairs, to D. Ahenakew, FSI, January 28, 1976, ICC, La Ronge TLE Documents, pp. 2383-84).

185 Cy Standing, Secretary, FSI, to Ted Bowerman, Minister of Department of Northern Saskatchewan, October 1, 1975 (ICC, La Ronge TLE Documents, p. 2363).

186 D. Ahenakew to J. Buchanan, July 3, 1975 (ICC, La Ronge TLE Documents, pp. 2331-32).

that, although negotiations were necessary on the second point, he could not accept the five points and the Federation's letter was not acceptable. Fox wanted "to establish a process that would involve solutions not the 10 commandments."[187]

Mr. Fox had already written to the Chief of the Federation of Saskatchewan Indians in December 1975 with his own suggested criteria for entitlement research (see Appendix C):

(1) The population count to be used for dates prior to 1951 will be taken from the treaty annuity paylists for the appropriate year but can be based on other sources if there is adequate evidence to indicate that another source would be more accurate; after 1951, population figures will be taken from the membership rolls.
(2) The date of selection shall be deemed to be the date of the first survey for those Bands which were in treaty when land was set aside. In cases where Bands adhered to treaty after land had been set aside, the population shall be that at the time of the adhesion. There are some reserves set aside which were not surveyed as such but were established from the township surveys carried out by the Department of the Interior in the course of the original surveying of all lands for homestead purposes. In such cases the date of selection shall be the year in which the reserve was first identified and used as an Indian Reserve.
(3) The acreage of land set aside will be the acreage stated in the Order in Council setting it aside except where this has been altered by a subsequent survey. In cases where an Order in Council does not state the acreage of a Reserve, the acreage will be that shown on the plan of survey; where a reserve is described by metes and bounds which indicate an area greater or smaller than that which is said to have been set aside, the metes and bounds will be used to determine the acreage.
(4) Where a Band has exchanged land for a greater or lesser acreage, calculations of its entitlement are to be based on the acreage originally set aside and not on the accretions.

These "criteria" did not address some issues which concerned First Nations, such as multiple surveys, and were in many ways too general to deal satisfactorily with the problem of establishing a population base. Although First Nations continued to discuss a broad range of criteria issues,[188] there is no written record of negotiations or discussions with Department of Indian Affairs staff. Even though Fox's proposed criteria were not accepted – offi-

187 Notes of a meeting held in Regina on May 11, 1976 (ICC, La Ronge TLE Documents, p. 2396).
188 In August 1976 the Prairie Indian Rights Technical Group produced a chart of the position taken by parties interested in entitlement – Canada, the three provinces, and the three provincial treaty organizations – on various validation and settlement issues. See ICC, La Ronge TLE Documents, pp. 2412.

cially or otherwise – by the First Nations, Canada used them consistently in its research and considered them to be the "established critieria."

Criteria in 1977

As a result of negotiations with Federation staff in February 1977, Canada agreed to recognize entitlement claims for an additional four Saskatchewan Bands (Lucky Man, Little Pine, Thunderchild, and Nikaneet). As the Office of Native Claims explained in its paper, "Criteria Used in Determining Bands with Outstanding Entitlement in Saskatchewan," in order to recognize an entitlement claim for these four bands, "it was found necessary to modify the criteria to accommodate unique circumstances affecting individual Bands. However, such modifications were made only when absolutely necessary and, in all other cases, consistent application of the established criteria was maintained."[189] The paper was written in August 1977 and distributed to the three Prairie provincial Indian organizations in July 1978.[190]

According to this paper, a band's reserve land entitlement was calculated

a) according to the population at the date of first survey (as indicated on the plan of survey);

b) when the first survey occurred before 1951, the population figure used was that shown as "Total Paid" on the annuity paylist for the year of survey;

c) entitlement was calculated by multiplying this population figure by the per capita acreage set out in the appropriate treaty;

d) this figure was compared with the total of all reserve lands set aside for the use and benefit of that band in fulfilment of treaty entitlement.

There were a number of population factors that were specifically not accounted for in these criteria:

i) Band members absent at the time of treaty payment.

189 DIAND, Office of Native Claims, "Criteria Used in Determining Bands with Outstanding Entitlement in Saskatchewan," August 1977 (ICC, La Ronge TLE Documents, pp. 2565-73 and 2591-606). It should be noted that two versions of this paper exist. The "criteria" in both are basically the same, but there are more examples and explanations in one than the other. It is not clear which of these papers was distributed to the various Indian organizations in 1978, although the shorter version, which is marked "Without Prejudice," is often included in document submissions. The two versions are attached as Appendices D and E.

190 H. Flynn, Lands and Membership Branch, Indian Affairs, August 30, 1977 (ICC, La Ronge TLE Documents, pp. 2565-73, 2591-2606), and J. Hugh Faulkner to Lawrence Whitehead, July 3, 1978 (ICC, La Ronge TLE Documents, p. 2917).

ii) New members subsequently transferring into the Band from other Bands which may or may not have received their full treaty land entitlement.
iii) New members subsequently adhering to treaty.
iv) Members subsequently transferring out of the Band to other Bands.

Although the above factors were not acounted for in our basic criteria and entitlement calculations, it was recognized that they might constitute a basis for future negotiation with the F.S.I. Notes were therefore included in our reports for any cases in which these factors were found to arise to any great extent.[191]

In fact, one of the four newly accepted claims – Thunderchild – was based entirely on absentees and transfers from landless bands.

Criteria Changes, 1978 to 1982

Paylist Numbers

In 1978 Band researchers questioned Canada's reliance on the "Total Paid" column of the paylists. Treaty annuity paylists were not designed to be a "census" of the band; they were, rather, financial statements designed to account for the distribution of money. Band members paid regularly showed up in the Total Paid column for that year but, because of limits imposed by the Department of Indian Affairs on the total amount any one family could receive in a given year, people absent for a number of years might receive all of their money as "arrears" (the current year's payment becoming arrears in a subsequent year). These particular people, "although they were undoubtedly and inarguably present at the time of the payments,"[192] would not be listed in Total Paid. Combining the totals of the Arrears and Total Paid columns was not necessarily a quick solution, for other families who had been absent for only one year would be included in both. Instead, it was necessary to look carefully at each family, to make the best determination of the number of people present at the treaty payments for any particular year.

Given its stated position of determining the most accurate population figures, it is safe to assume that Canada altered its research practices as a result of this discussion. Certainly by 1983, very careful analysis above and beyond the Total Paid numbers was mandatory:

In paylist analysis, all individuals being claimed for entitlement purposes are traced. This includes a review of all band paylists in a treaty area for the years that an individ-

191 ONC, "Criteria Used in Determining Bands with Outstanding Entitlement in Saskatchewan," August 1977, p. 6 (ICC, La Ronge TLE Documents, p. 2596).
192 Ken Tyler, minutes of meeting with ONC, June 27, 1978 (ICC, La Ronge TLE Documents, p. 2898).

> ual is absent, if necessary. All agent's notations are investigated regarding the movements, transfers, payment of arrears, or any other event that affects the status of a band member. A ten to fifteen year period is usually covered depending on the individual case. This period would generally begin at the time the treaty was first signed, through the date of first survey and a number of years afterwards.[193]

Absentees

The department's 1977 criteria had specifically excluded band members absent in the year of survey, although "it was recognized that they might constitute a basis for negotiation." Canada did agree to recognize an entitlement claim for the Thunderchild Band based partly on absentees and, by the middle of 1979, it is apparent that researchers were regularly including this category of people in population counts.

Care was taken to determine that people included in this category were bona fide band members, and that they had continuity with the band both before and after the year of survey. The Manitoba Indian Brotherhood (MIB) Treaty Land Entitlement Validation Criteria, put together in June 1979, stated that "Band members who were absent in the year of survey must be traced and accounted for and must be included in the total population count unless the evidence dictates otherwise. . . ." The total population figures (people paid and those absent) prior to the survey (or the fixing of the reserve boundaries) are used as the base for the calculations of land entitlement . . .[194]

Double Counts

Researchers working on behalf of the First Nations never based their population statistics solely on the "Totals" indicated on the paylist. From the beginning, they were analysing these documents more carefully and eliminating any band members found to have received land with another band. When in February 1977, for example, researchers from the Office of Native Claims and the Federation of Saskatchewan Indians compared population numbers for the Thunderchild Band, Canada's count was higher than that of the Federation because the Federation "had deducted from the total any Indians who had been found to have received lands before joining the Thunderchild Band."[195]

193 DIAND, "Office of Native Claims Historical Research Guidelines for TLE Claims" (Ottawa, May 1983) [hereinafter "ONC Guidelines"], p. 3. See Appendix F.

194 "Treaty Land Entitlement – Validation Criteria," June 1979, pp. 3, 4, in TARR, *Treaty Land Entitlement in Manitoba, 1970-1981* (Winnipeg: TARR, Manitoba, February 1982), app. VII.

195 Minutes of Meeting, February 9 and 10, 1977 (ICC, La Ronge TLE Documents, p. 2512).

The June 1979 Manitoba Treaty Land Entitlement Validation Criteria indicated:

> The M.I.B. Treaty research program conducts a paylist analysis for each Band by tracing each name, whether paid or absent, in the year of survey, both before and after that date. Any person which the evidence shows as having been in the year of survey, a fraud (claiming annuities for a larger family than he really had), a fictitious name (a person paid annuities under his real name and also under one or more aliases), or a member of some other Band, is deducted from the total population count.

It is not known exactly when Canada's researchers also included this step in their work. The report on the paylist work done for the Department of Indian Affairs to confirm population statistics for the Kawacatoose Treaty Land Entitlement claim in 1992 states that

> The recommended count is arrived at by subtracting "double count" individuals from the total number of band members present and paid at first survey (DOFS).
>
> The total number of individuals paid in 1876 is 146 (21 men, 29 women, 96 children and 0 "other relatives"). Since the Double Count is 0, the figure of 146 is also the Recommended Count.[196]

New Adherents

As early as 1976 the Indian Association of Alberta (IAA) advocated that, under the terms of the treaties, additional land was owing to a band which had increased in population due to the addition of band members adhering to treaty (formally or informally) for the first time. The Federation of Saskatchewan Indians had no official position at that time, and the Manitoba Indian Brotherhood agreed with Alberta First Nations "insofar as it applies to additions to a band which did not receive its full entitlement before additions."[197]

As stated above, before 1977 the Department of Indian Affairs specifically excluded "new members subsequently adhering to treaty" while at the same time recognizing that they "might constitute a basis for future negotiation." In that year, the Federation of Saskatchewan Indians argued that, even though the Pelican (or Chitek) Lake Band had received all the land to which it was

196 Theresa A. Ferguson, "Report on the Kawacatoose Band Date of First Survey Population," prepared for DIAND, Specific Claims West, July 31, 1992, p. 4 (ICC, Kawacatoose TLE Documents, p. 252).

197 Prairie Indian Rights Technical Group, "Comparison of Prairie Association Positions on Land Entitlement Issues," draft, August 18, 1976 (ICC, La Ronge TLE Documents, p. 2414).

entitled based on the number of paid annuities at the date of first survey in 1917, there was a shortfall based on a large number of new adherents who had been admitted to the Band in 1949. The Federation's argument in this case was that this was a shortfall based on the population of the Band in the year of survey – the late adherents were living with, and members of, the Band in 1917 who had chosen not to enter treaty at that time. Indian Affairs staff were "inclined to agree" but reserved a decision until the historical facts could be verified.[198]

Soon after, the Federation advanced the entitlement claim of the Saulteaux Band, based entirely on a series of admissions to the Band after 1956 of people adhering to treaty for the first time. Land was surveyed for these people in 1909, in the expectation that the Band would eventually join treaty. The surveyor was instructed to determine the population. Although he estimated a Band membership of about 140 people, he surveyed only enough land for 70. In 1954, 69 people adhered to treaty as the Sautleaux Band. Using its 1975 criteria ("In cases where Bands adhered to treaty after land had been set aside, the population shall be that at the time of the adhesion"), the government's obligation to provide reserves had been met. However, the Federation presented evidence that at least 92 people who had never before taken treaty were added to the Band lists between 1954 and 1967, and that these people were also entitled to receive lands under treaty.[199]

The Office of Native Claims was persuaded by these arguments and agreed to recognize the claims of both the Pelican Lake Band and the Saulteaux Band, based entirely on the additions of new adherents after entitlement had been fulfilled at first survey. On April 23, 1979, Georgina Wyman, Director of the Specific Claims Group of the Office of Native Claims, wrote to Federation staff, clearly indicating Canada's "position" that new adherents would be included in the calculations towards validating an entitlement claim:

> In the course of discussions between the Office of Native Claims and research staff of the Federation of Saskatchewan Indians on the validation of outstanding entitlement claims, the question was raised as to what additional entitlement, if any, is due to bands which have taken late adherents to treaty into band membership. We agreed to look into this with a view to formulating a position for departmental approval. This work has now been done, and I am writing to inform you of the basis on which the

198 Draft memorandum from David Ahenakew, FSI, re Report on Partial Land Entitlement, February 1977 (ICC, La Ronge TLE Documents, p. 2529).

199 Minutes of Land Entitlement Validation Meeting, June 27, 1978 (ICC, La Ronge TLE Documents, pp. 2876-83).

department is prepared to accept late adherents as an additional criteria for validating entitlements.

The department has agreed in principle that bands are entitled to additional reserve land on account of late adherents to treaty, both formal (i.e. those who were party to a formal adhesion to treaty) and informal (in other words, those who were simply added to a band's paylist by the Indian Agent without a formal adhesion being taken). The term "late adherents" is used here to mean a native person who takes treaty for the first time, none of whose forebears had ever previously taken either treaty or scrip. Persons such as white women who marry into a band, and likewise those who transfer from one band to another would be excluded under such a definition. Establishing that a person was a late adherent under these criteria will involve an analysis of the annuity paylists and membership records.

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

I hope that this explains the department's position clearly. If you have any questions on the proposed method of calculation or the definition of late adherents, I will be pleased to try and answer them.[200]

Transferees from Landless Bands

In 1976 only the Indian Association of Alberta advocated that "transfers from bands which did not receive full entitlement to bands which did, carry entitlement with them." Canada had not developed a definite position on other aspects of late additions to band population, but the "I.A.A. position that transfers to bands with full entitlement from bands still due land has been rejected."[201]

While specifically excluding "new members subsequently transferring into the Band from other Bands which may or may not have received their full treaty land entitlement" from their "established" calculation criteria, Canada made an exception and agreed to recognize an entitlement claim for the Thunderchild Band based partly on additional members who had transferred from bands with no reserve lands. For some reason, only six people were paid with Thunderchild in 1881 when the reserve was surveyed. Because

200 G.A. Wyman to Anita Gordon, April 23, 1979 (ICC file 2000-18, Memorandum from Stewart Raby to Wilma Jacknife, June 12, 1994, doc. 2).

201 "Comparison of Prairie Association Positions," note 197 above (ICC, La Ronge TLE Documents, pp. 2414-15).

Canada realized the absurdity of basing entitlement on such a low figure, "entitlement was calculated according to both the 1880 and 1882 population figures, but found to be fulfilled in both cases."[202] In 1889 the Nipahase Band and the few remaining members of the Young Chipewyan Band transferred into the Thunderchild Band: the Nipahase Band had never been allotted reserve lands and the Young Chipewyan reserve had been relinquished when the Band had broken up in 1897.

> Since neither of these Bands had, in effect, received any lands prior to joining Thunderchild, notes were included in our report to indicate that an argument could be put forward that these members be provided with an entitlement.
>
> During the discussions with the F.S.I. in Regina, it was finally agreed that the Thunderchild Band's entitlement would be calculated according to the combined populations of the three Bands. . . . Thus, as a result of negotiation, allowance was made both for absentees and for the new members joining the Band and the Department agreed to recognize the Thunderchild Band as having an outstanding entitlement.[203]

Canada considered that Thunderchild was an anomaly, and its basic position remained unchanged. In about 1981-82, however, the Joint Federation of Saskatchewan Indians / Department of Indian Affairs Committee on Entitlement presented the facts of the Poundmaker Band entitlement and suggested a policy change that would allow for the inclusion of people who transfer from bands who had not received their entitlement lands:

> Indians who transfer from one band to another are not taken into account in determining a band's population for entitlement purposes. To do so would involve a great deal of research, and would present considerable practical difficulty. If it is argued that a band is entitled to receive land for an Indian who transfers into it from another band, then by the same token the band he left should lose that individual's entitlement. This latter result, of course, is not feasible. In consequence, neither transfers into, nor out of, a band are considered for entitlement purposes.
>
> There are, however, cases where an Indian has transferred from a band which had not received land to one which has already had its reserve surveyed. Under the present policy, this Indian would not be counted in either band and would thus never receive his per capita land entitlement. *We believe that consideration would be given to taking transfers from landless bands into account for entitlement pur-*

202 ONC, "Criteria Used in Determining Bands with Outstanding Land Entitlement in Saskatchewan," August 1977, p. 8 (ICC, La Ronge TLE Documents, p. 2598).
203 Ibid.

> *poses, as long as the transferee was not counted for entitlement purposes with any other band.*[204]

The Office of Native Claims and the Department of Justice concurred, and made it very clear that the addition of these people would create an entitlement claim for bands who had received all the land to which they were entitled according to their membership when the reserve was first surveyed:

> The Poundmaker and Sweetgrass Bands were provided with enough land to satisfy their treaty land entitlements based on the band's population at date of first survey. However, people later transferred into these bands (Poundmaker and Sweetgrass) from other bands which had not yet received treaty lands. Our research has indicated that none of these transferees were ever counted in the treaty entitlement calculation for any other band. Our legal counsel advises us that each Indian is entitled, under the terms of Treaty 6, to be counted in the population base used to calculate the Crown's overall liability, provided that he or she has not been included in an entitlement calculation elsewhere. *The Department of Justice has taken the position that, since the Indians who transferred to the Poundmaker and Sweetgrass Bands had never been included in such a calculation, the two Bands have an outstanding treaty land entitlement.*[205]

Settlement Calculations for Entitlements Based on Late Additions

When Canada first accepted claims based on new adherents after survey, it calculated settlement acreage in the same manner as bands with a shortfall based on population at date of first survey, applying the Saskatchewan formula to the entire population of the band according to membership at December 31, 1976. The Federation of Saskatchewan Indians interpreted the provisions of the Saskatchewan Agreement in a more limited way:

> I would conclude that under Treaty Six and the Saskatchewan Formula the Federal Government is obligated to set aside for the Chitek Lake Band 128 acres for each of the surviving 1949 and 1950 new adherents and their descendants as of 31 December 1976. Mr. Hawley's report [written on behalf of the Office of Native Claims] concludes that the Saskatchewan Formula ought to be applied to the entire population of the band, and that land ought to be provided on the basis of the 31 December, 1976 total membership. In my opinion this goes considerably beyond the Government's obligation under the formula. This would become quite apparent if one were to con-

204 Joint FSI/DIAND Committee on Entitlement, Report No. 7, Poundmaker Band #114 (ICC file 2000-18, Raby to Jacknife, June 12, 1994, doc. 9). Emphasis added.

205 W. Zaharoff to G. Powell, December 13, 1982 (ICC file 2000-18, Raby to Jacknife, June 12, 1994, doc. 16). Emphasis added. See also J.D. Leask's comments on a draft policy paper by R.M. Connelly, November 15, 1982 (ICC file 2000-18, Raby to Jacknife, June 12, 1994, doc. 5).

> sider the not at all unlikely possibility that a band may have had its Treaty land entitlement fulfilled fifty or one hundred years ago, with only a very few surplus acres provided. If one person were to have adhered to Treaty with such a band in the early 1970s by the logic of the conclusion in Mr. Hawley's report, the Government of Canada would be obligated to provide sufficient land to the band to accommodate this new adherent and the total population increase of the entire band from the date of survey until 31 December 1976. Such an interpretation of the Saskatchewan Formula would have made a non-Treaty Indian an extremely valuable asset indeed to a great many bands. . . .[206]

While Federation staff proposed extensive membership and genealogical studies to determine the number of people to be considered in the settlement of these types of claims, Canada suggested that entitlement

> be calculated on the basis of the percentage by which the band's original entitlement (at the date of first survey – or in this case selection) was increased as the result of the influx of new adherents. This percentage would then be applied to the band's December 31, 1976 population, as per the Saskatchewan Formula . . . We believe that this approach is a fair one . . .[207]

This method was adopted. For Saskatchewan bands validated on the basis of new adherents and transferees from landless bands, then, settlement acres were calculated in the following manner:

Pelican Lake Band:		
(i)	Population at date of selection/survey (1921)	42
(ii)	New Adherents to treaty	57
(iii)	Total	**99**
(iv)	New Adherents as % of (iii)	57.5%
(v)	December 1976 population	347
(vi)	57.5% of 1976 entitlement	25,539 acres
(vii)	Less surplus provided in 1921	3,254 acres
(viii)	Outstanding entitlement	22,285 acres[208]

206 Tyler, Wright & Daniel to Graham Swan, March 24, 1980 (ICC file 2000-18, Raby to Jacknife, June 12, 1994, doc. 3).

207 J.R. Goudie to Ken Tyler, June 25, 1980 (ICC file 2000-18, Raby to Jacknife, June 12, 1994, doc. 4).

208 Bernard Loiselle to Chief Leo Thomas, Pelcian Lake Band, August 27, 1980 (ICC, Kahkewistahaw TLE Inquiry, Exhibit 4, tab 17).

Criteria in May 1983

In May 1983, the Department of Indian Affairs produced the "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims" (attached as Appendix F). In the introduction, the criteria are stated to be

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

With regard to the determination of population figures, the guidelines are very specific:

> An outstanding treaty land entitlement exists when the amount of land which a band has received in fulfillment of its entitlement is less than what the band was entitled to receive under the terms of the treaty which the band adhered or signed. This is referred to as shortfall of land. There are two situations where a shortfall may exist. The first is when the land surveys fail to provide enough land to fulfill the entitlement. The second is when new members who have never been included in a land survey for a band, join a band that has had its entitlement fulfilled. The objective is to obtain as accurate a population of the band as is possible on the date that the reserve was first surveyed. . . .
>
> . . . Where a claim depends solely on new adherents or transfers from landless bands, the band memberships may be traced through to the present day.
>
> The following principles are generally observed in an annuity paylist analysis:
>
> ***Persons included for entitlement purposes:***
>
> 1) Those names on the paylist in the year of survey.
>
> 2) Absentees who are paid arrears. These are band members who are absent for the year of survey but who return and are paid arrears for that year.
>
>   Absentees who return and who are not paid arrears. These people must be traceable to: when they became band members and how long they remained as members during say, a ten to fifteen year period around the date of survey. Generally, continuity in band memberships is required. Also it must be shown that they were not included in the population base of another band for treaty land entitlement purposes, while absent from the band.
>
> 3) New Adherents to treaty. These are Indians, who had never previously signed or adhered to treaty and consequently have never been included in an entitlement calculation.

4) Transfers from Landless Bands. These are Indians who have taken treaty as members of one band, then transferred to another band without having been included in the entitlement calculation of the original band, or of the band to which they have transferred. The parent band may not have received land, whereas the host band may have already had its entitlement fulfilled. These Indians are acceptable, as long as they have never been included in a land quantum calculation with another band.

5) Non-Treaty Indians who marry into a Treaty Band. This marriage, in effect, makes them new adherents to Treaty.

Persons not included

1) Absentees, new adherents and transfers from landless bands, who do not retain a reasonable continuity of membership in the band, i.e.: they are away most of the time. However, these are dealt with on a case by case basis and there may be circumstances which warrant the inclusion of a band member even though he may be absent for an extended period of time.

2) Where the agent's notes in the paylist simply states "married to non-treaty," those people are not included. They could be non native or métis and therefore ineligible.

3) Where the agent's notation simply reads "admitted" (which often meant admitted to band and not to treaty) and no letter of admission to treaty can be found, these persons are excluded.

4) Persons who are not readily traceable . . .

5) Persons who were included in the population base of another band for treaty land entitlement purposes.

6) Persons names which are discovered to be fraudulent.

The paper then went on to explain how a shortfall was calculated:

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

These guidelines were widely distributed to researchers, Indian organizations, and First Nations, sometimes with suggestions that previous research be reviewed. In 1983 and 1984 at least, the Office of Native Claims itself actively initiated reviews of previously rejected claims and recalculated enti-

tlement on the basis of these new criteria. For example, according to research done in 1981, Ochapowace (Saskatchewan) had no entitlement claim, but in October 1983 R.M. Connelly wrote to the Chief that

> this is not the final word on the claim. The ONC and the Department of Justice agreed that further research was necessary as there appeared to be a number of persons who were possible late additions to the band. . . .
>
> Late this past summer the ONC did preliminary research on late additions to the Ochapowace Band and identified a number of persons who were potential late additions and this fact warranted further investigation. This type of research had not been done in the original research as it was felt by the DINA/FSI Committee that the outstanding entitlement was based on a strict shortfall at the date of first survey. In late September the task of investigating the individuals identified in the later research commenced. Should this research identify at least 8 persons as bona fida late additions to the Ochapowace Band and they be acceptable to the Department of Justice as members, then your band will have a valid claim to outstanding treaty land entitlement. . . .[209]

Determining the "Base Paylist" in Population Counts

From the beginning, researchers working on behalf of the Bands disagreed with Canada's use of paylist figures from the year of survey, arguing that it would have been the most recent annuity paylists *prior* to the survey to which the surveyors had access.[210] If, for example, a reserve was surveyed in July 1881, Canada calculated entitlement based on the annuity pay sheets for 1881, regardless of when the payment was made. The Bands' researchers argued that, when annuities were paid after July, it was unreasonable to expect the surveyor to know what the population *would be* but, since he did have access to the 1880 records, those population figures should determine entitlement. Despite the many discussions on the technical aspects of claims and the close working relationship during the joint FSI/DIAND research project, consensus had not been reached on this point in the mid 1980s. Sometime before 1994, however, Canada appears to have adopted the Bands' approach. A "partial list of bands in Saskatchewan, Manitoba and Alberta for whom a 'base paylist' year has been established" is included in a "Research Methodology for Treaty Land Entitlement" produced by the Office of the Treaty Commissioner for Saskatchewan:

209 R.M. Connelly to Chief, Ochapowace Band, October 28, 1983 (ICC file 2000-18, Raby to Jacknife, June 12, 1994, doc. 18).

210 D. Ahenakew, FSI, to Judd Buchanan, July 3, 1975 (ICC, La Ronge TLE Documents, pp. 2331-32). See also FSI, "Population Base for Entitlement Calculation," n.d. (ICC, La Ronge TLE Documents, pp. 3116-22).

This is the paylist which the surveyor might most likely have used in determining reserve sizes; it is *not* in many cases the actual year of the survey itself.[211]

Schedule of Validated Claims to 1990

Manitoba

- 25 bands validated, all apparently on the basis of shortfall at date of first survey

Saskatchewan

- DOFS shortfall
  Canoe Lake*, Cowessess, English River*, Flying Dust, Fond du Lac*, Joseph Bighead, Keeseekoose*, Muskowekwan*, Nikaneet, Okanese, One Arrow*, Peter Ballantyne*, Piapot*, Red Pheasant*, Stony Rapids*[212]
- Shortfall at date of treaty adherance
  Witchekan Lake (received land in 1918, although they did not adhere to treaty until 1950; entitlement based on population in 1950)
- Band amalgamations
  Beardy's, Ochapowace, Mosquito/Grizzly Bear's Head
- "Late adhesions" specified in validation letters
  Moosomin (transferees from landless bands), Onion Lake (transferees from landless bands), Pelican Lake/Chitek Lake (late adherents), Poundmaker (transferees from landless bands), Sweetgrass (transferees from landless bands)
- Other "late adhesion" validations
  Saulteaux (new adherents to treaty), Thunderchild (absentees and transferees), Muskeg Lake
- Band splits
  Little Pine, Lucky Man, Nut Lake/Yellow Quill

Alberta

- Alexander (shortfall at date of first survey to which late adherents and landless transferees have been added), Alexis (band split), Cree Chipewyan

211 Office of the Treaty Commissioner for Saskatchewan, "Research Methodology for Treaty Land Entitlement," draft, Regina, 1994, p. ii.

212 The First Nations identified with an asterisk were listed in November 1975 as those the Department of Indian Affairs acknowledged had not received all the land to which they were entitled. At the time, DIAND researchers were basing their calculations solely on the total number paid on the annuity paylists in the year of survey.

(initial entitlement), Fort McMurray (shortfall at date of first survey / band split), Gordon Benoit (severalty), Janvier (new adherents and transferees), Grouard (severalty), Laboucan (severalty), Loon River (initial entitlement), Sturgeon Lake (shortfall at date of first survey to which late adherents and landless transferees have been added), Tallcree (shortfall at date of first survey), Whitefish Lake (shortfall at date of first survey to which late adherents and landless transferees have been added), Woodland Cree (initial entitlement)

Validation Criteria after 1990

In March 1988 the Assistant Deputy Minister of Indian Affairs summarized the departmental review of treaty land entitlement issues which had taken place in 1987 and early 1988 by stating that the

> policies and authorities currently in place enable TLE *settlements* up to the extent of entitlement calculated on the basis of date of first survey population. The opinion of the Department of Justice is that Canada's lawful obligation to this extent is clear.[213]

He went on to say that "the *validation* of TLE claims has always been done on the basis of whether the band in question could prove an outstanding entitlement at DOFS [date of first survey]."[214] This statement seems to ignore the fact that claims based solely on the additions of new adherents and transfers from landless bands had been validated in the past, and they were in fact still being considered for negotiation in 1988. (In May of that year, Rem Westland responded to a question about Canada's policy on transfers from landless bands in connection with the follow-up research for the Fort McKay treaty land entitlement claim – a claim which had been submitted in May 1987 based entirely on transfers and which had been rejected: "There is no policy, *per se*, which is specific to landless transfers. You have been provided with the Specific Claims Branch (SCB) guidelines for entitlement research which covers all of those whom we consider eligible for treaty land entitlement purposes."[215])

In January 1992 staff of the Federation of Saskatchewan Indian Nations (FSIN) asked for clarification of the Department of Indian Affairs' validation

213 D.K. Goodwin, Assistant Deputy Minister of Indian Affairs, to Regional Directors General, Manitoba, Saskatchewan, and Alberta, March 15, 1988 (ICC, La Ronge TLE Documents, pp. 4242-44).

214 Ibid.

215 R.C. Westland, Director, Specific Claims Branch, to Jerome Slavik, Legal Counsel for Fort McKay Band, May 26, 1988 (ICC, Fort McKay TLE Documents).

policy. Al Gross, the Director of Treaty Land Entitlement, reiterated that the method used to accept claims had not changed; the 1983 Guidelines – which he calls a "federal policy paper" – were still in effect:

> The federal policy paper dated May 1983, titled Office of Native Claims Historical Research Guidelines for TLE Claims continues to be the foundation for developing prospective band claims to outstanding TLE . . .
>
> In the case of TLE claims in Saskatchewan the Treaty Commissioner's Office proposed an alternate means of determining the eligible population for the bands negotiating settlements with the government. This proposal was intended as part of the overall formula for determining compensation in that particular negotiation. When agreed to in negotiations, the formula will be applied only to those bands which first qualify for entitlement based on the 1983 policy. . .
>
> The so-called "Adjusted Date of First Survey Population Count Proposed" in Saskatchewan must be understood as part of the overall settlement approach. It does not affect the criteria for determining validation in the first instance.
>
> This clarification is being provided to confirm that the government's policy on the acceptance of the TLE claims has not been changed.[216]

Despite this assurance, Saskatchewan's Ocean Man Band received notice in November 1993 that its entitlement claim was not accepted for negotiation because Canada's research determined no date-of-first-survey shortfall, based on paylist population plus absentees. The letter went on to emphasize:

> By policy we do not accept treaty land entitlement claims if the land entitlement based on the date of first survey population has been received. Only if there is a shortfall in land based on the date of first survey population does the category of late adherents to treaty get consideration within the context of an entitlement negotiation . . .[217]

Now, Mr. Gross explained:

> . . . In treaty land entitlement claims, Canada's position is that our lawful obligation to a band is fulfilled when sufficient land under the per capita land provision of the treaty is provided to the band as of the date of first survey. This position is based on legal advice. All individuals who can be identified as members of a given band as of the date of first survey are eligible to be counted for purposes of land allotment. In researching these claims all tools available to us which can facilitate reconstruction of the band membership in that year are used. We rely not just on what the surveyor

216 A. Gross, Director, Treaty Land Entitlement, DIAND, to S. Raby, FSIN, January 20, 1992 (ICC, Kawacatoose TLE Documents, pp. 230-31).

217 Juliet Balfour, Treaty Land Entitlement, DIAND, to Chief and Council, Ocean Man Band, November 5, 1993, DIAND, file B8265/08.

knew to be the band population, but on what the present day, best evidence shows to constitute that membership.

The categories we generally use to determine the date of first survey population include: 1) people on the paylist in the year of first survey or on the paylist to which the surveyor would have had access when carrying out the survey; 2) people paid treaty annuities after the date of first survey as absentees from the band membership at the date of first survey; and 3) people paid treaty annuity arrears after the date of first survey for that year.

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

We must be clear with claimant bands, however, that our lawful obligation extends only to the strict date of first survey population. That number is the threshold which claimant bands must reach before a treaty land entitlement claim will be accepted. Therefore, if a band does not establish a land shortfall based on the date of first survey population, it has no TLE claim. If, however, this shortfall exists, we are then able to consider the addition into the claim of those additional persons identified as having joined the band after the date of first survey. This is known as the adjusted date of first survey population which is only used to determine compensation, not claim validation. . . .[218]

According to Ian Gray of the Department of Justice, the 1983 Guidelines did "not clearly state the distinction between the basis for validation and the basis for negotiation." But, he states, that point was clarified in Mr. Gross's letter of January 20, 1992, when he wrote: "The so-called 'Adjusted Date of First Survey Population Count Proposed' in Saskatchewan must be understood as part of the overall settlement approach. It does not affect the criteria for determining validation in the first instance."[219]

The Minister of Indian Affairs, Ron Irwin, explained Canada's position to the Indian Claims Commissioners in February 1993:

Canada's position is that it has an outstanding TLE legal obligation only if a claimant First Nation did not receive sufficient land, based on a DOFS population comprising its base paylist, absentees and arrears. This is the threshold test for an outstanding

218 A. Gross, Director, TLE, DIAND, to S. Raby, FSIN, November 30, 1993, DIAND, file B8265/08.
219 Ian D. Gray to Lorne Koback, Director, TLE, Saskatchewan Region, memo, February 11, 1994, DIAND, file SCW-2-393-1 (ICC file 2107-15-01, vol. 1).

> legal obligation with regard to TLE claims. Other categories such as landless transfers, late adherents and so on, may be considered only where a DOFS shortfall has been established and then only if the settlement negotiations have brought these categories into play as in the 1992 Saskatchewan Framework Agreement.[220]

Individual versus Collective Rights

When the Director General of Specific Claims, Rem Westland, appeared before the Indian Claims Commission on December 16, 1994, he expressed the opinion that treaty land entitlement is a collective right:

> one thing that impressed itself on me as I became familiar with treaty land entitlement is that treaty land entitlement is a collective right. It is not an individual right. And with that understanding, as I learned about treaty land entitlement, and from time to time through looking at particular claims would delve into the remarkable dissecting of numbers that goes on in the research business, I was struck by the illogical points that individuals who did not have this right could reopen or constitute a collective right.[221]

Others argue that treaty land entitlement is a right of each individual Indian adhering to treaty.

Lieutenant Governor Adams Archibald – a central figure in the negotiations of Treaty 1 in 1871 – stated in 1872:

> When the Treaty 3rd August last was made, the Indians were promised that a Census of their different tribes should be taken with as little delay as possible and that immediately afterwards the Reserves should be laid off *allotting to each soul Thirty-two acres*. A year, or nearly a year, has elapsed and not a step has been taken towards ascertaining the number of Indians, or laying off the Reserves . . .[222]

From at least 1905 to 1913, surveyors were instructed by the Department of Indian Affairs to indicate in their report or on the survey plan itself "the names of the Indians entitled to receive land and for whom the land shown is set apart."[223]

In 1976 the Deputy Minister of Indian Affairs did put forward the "collective rights" argument in explaining Canada's position on the Nikaneet claim.

220 ICC file 2107-3-1.
221 ICC, Fort McKay Transcript, p. 84, December 16, 1994 (Rem Westland).
222 Adams Archibald to Secretary of State for the Provinces, July 6, 1872, NA, RG 10, vol. 3555, file 11, reel C-10098. Emphasis added.
223 J.D. McLean to I.J. Steele, Dominion Land Surveyor, June 11, 1913, NA, RG 10, vol. 4019, file 279393-9, reel C-10173. See also Secretary, DIAND, to J. Lestock Reid, DLS, February 5, 1905, NA, RG 10, vol. 4005, file 240050-2, reel C-10170.

(The Nikaneet [or Maple Creek] Band never formally adhered to treaty. Some of its members are descendants of people who were paid treaty annuities with various Chiefs in Treaties 4 and 6 until 1882. According to the Band's claim submission, these people were denied annuities after that year in an attempt to relocate them from the Cypress Hills area.) In rejecting the claim, A. Kroeger wrote:

> The position has been taken on the grounds that the treaty promise to set land aside is a commitment made to a *band*. As such the treaty entitlement belongs to bands and is transferrable only when a band is formally divided into a number of smaller bands or if bands formally join together. The Maple Creek Band was not created through the division of other bands: it was a group of Indian people who had band allegiances when treaty was signed and who as individuals chose to ignore those allegiances. This group became a Band under the Indian Act of the day, when, as a matter of practical need, land was set apart on their behalf in 1912.[224]

However, after negotiations with the Federation of Saskatchewan Indians and the Band, Canada changed its position. All of the documents detailing the progress of this claim were not available, but from the information at hand it would appear that by 1982 Canada had agreed to accept the claim, in part, at least, because of an altered view on "collective rights": "The Nikaneet claim established the principle that all treaty Indians are entitled to be counted in some Band or other for entitlement purposes."[225]

This concept was reinforced later that year. In December 1982 W.J. Zaharoff, a senior claims analyst with the Office of Native Claims, wrote to Graham Powell, the Executive Director of Intergovernmental Relations with the province of Saskatchewan, regarding the Poundmaker and Sweetgrass claims: "Our legal counsel advises us that *each Indian* is entitled, under the terms of Treaty 6, to be counted in the population base used to calculate the Crown's overall liability, provided that he or she has not been included in an entitlement calculation elsewhere."[226]

In 1983, when the Department of Indian Affairs distributed its guidelines for treaty land entitlement research, it stated:

224 A. Kroeger, Deputy Minister of Indian Affairs, to David Ahenakew, FSI, January 28, 1976 (ICC, La Ronge TLE Documents, p. 2383).

225 J.D. Leask, Director General, Reserves and Trusts, to R.M. Connelly, Director, Specific Claims, November 15, 1982 (ICC file 2000-18, S. Raby to W. Jacknife, June 12, 1994, doc. 5).

226 W.J. Zaharoff to G. Powell, December 13, 1982 (ICC file 2000-18, S. Raby to W. Jacknife, June 12, 1994, doc. 16). Emphasis added.

> The general principle which applies in all categories of land entitlement claims is that each Treaty Indian Band is entitled to a certain amount of land based on the number of members. Conversely, *each treaty Indian is entitled to be included in an entitlement calculation as a member of an Indian Band.*[227]

In 1994 Mr. Westland was asked if that particular section from the guidelines was still valid. He replied:

> I don't think it ever was. That isn't to say that it wasn't used, and that isn't to say that we didn't accept a few claims on the basis of that second part of the sentence. . . . From my perspective as Director General for the policy it's illogical to have guidelines where the right is a collective right for land, to factor into it aspects of individual rights to land which are not the ones we're talking about, as being rights that could open up settled collective rights. . . .[228]

227 "ONC Guidelines," May 1983, note 193 above, p. 1. Emphasis added.
228 ICC, Fort McKay Transcript, pp. 84, 86, December 16, 1994 (Rem Westland).

PART IV

CLAIM SETTLEMENT

SASKATCHEWAN

In August 1976 the Federation of Saskatchewan Indians and the province of Saskatchewan reached an agreement on the settlement of treaty land entitlement claims in that province. Among the main points of this agreement was that the amount of reserve land for settlement purposes was to be based on "'present population' x 128 (acres per person) less land already received." It was agreed that a "cut-off" date would be established, and therefore present population was to mean the population as at December 31, 1976. There were no major concerns about the ability to transfer all required lands in the north as there was still a lot of unoccupied Crown land available. There were concerns, however, that it would be more difficult to fulfil obligations based on this liberal formula in the southern agricultural areas, and so the province stipulated a number of principles for claims in this area:

1) land be sought by attempts to secure federal and provincial unoccupied Crown land and, where it can be arranged, federal and provincial Crown land where the Province can satisfy the occupants
2) Any Band unhappy with this must look solely to Canada for satisfaction since Canada alienated amost all the land in the South prior to the Resources Transfer Agreement, 1930.[229]

Canada was also informed that the federal government would be expected to purchase patented lands where Crown land was not available.

Before the Minister of Indian Affairs could endorse this agreement, he first had to bring it to Cabinet. The federal ministers were warned about the implications of accepting this agreement:

229 Ted Bowerman, Minister of Department of Northern Saskatchewan, to David Ahenakew, Chief, FSI, August 23, 1976 (ICC, La Ronge TLE Documents, p. 2442).

> Prior to Cabinet consideration of the Saskatchewan proposal, Justice advised that any contribution by the Federal Government of either land or money based on the Saskatchewan formula will constitute a commitment to the formula as the Federal Government's interpretation of its treaty obligation.[230]

The joint press release issued by the Minister of Indian Affairs and the Federation of Saskatchewan Indians on August 24, 1977, announcing Canada's endorsement of the Saskatchewan Agreement, has no mention of any federal lands or money in the future settlements:

> Under the agreement, the Province will be providing Crown lands under their administration. Where Provincial Crown lands are occupied, the occupants must be satisfied before lands can be transferred to the Federal Government for Treaty entitlement purposes. Saskatchewan is also prepared to fulfill entitlement to the Bands concerned by providing, instead of lands, opportunities to Bands for revenue sharing in resource development or participation in joint ventures.[231]

Problems in implementing the agreement became obvious very quickly. There was not enough unoccupied Crown land in the vicinity of existing reserves to satisfy entitlements. Canada and the province could not agree on cost-sharing proposals, each government insisting that purchase of land was the other's responsibility.[232] Various attempts to agree to terms to include in a formal, written agreement failed. Only two Bands – Fond du Lac and Stony Rapids – received all their settlement lands based on "Saskatchewan formula" calculations. Some others had part of their entitlements set aside before both the provincial and federal governments began to distance themselves from the Saskatchewan formula in the mid 1980s. A federal review of entitlement issues in 1987 concluded that "policies and authorities currently in place enable TLE settlements up to the extent of entitlement calculated on the basis of date of first survey populations." This was, according to the Department of Justice, the "full extent of Canada's lawful obligations."[233]

In 1989 the chiefs of the Canoe Lake and Starblanket Bands and the Federation of Saskatchewan Indian Nations (FSIN), on behalf of all Saskatchewan

230 "Federal Role in Fulfillment of Outstanding Treaty Land Entitlements in Saskatchewan," October 27, 1977, p. 3 (ICC, La Ronge TLE Documents, p. 2658).

231 DIAND / FSI, Press Release, "Agreement Fulfills Land Entitlements under Treaty for Saskatchewan Indians," August 24, 1977 (ICC, La Ronge TLE Documents, p. 2584).

232 See Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 11, for more details.

233 D.K. Goodwin, Assistant Deputy Minister, DIAND, to Regional Directors, March 15, 1988 (ICC, La Ronge TLE Documents, pp. 4242-44).

Indians, launched a court action submitting that the 1976 Saskatchewan TLE Agreement was valid and enforceable. In 1990, partly in response to this legal action, Canada and the FSIN agreed to the establishment of the Office of the Treaty Commissioner (OTC) for Saskatchewan to deal with outstanding treaty-related business. One of the first issues to be dealt with was to be treaty land entitlement.

The Treaty Commissioner's task was not a simple one: to develop proposals for the settlement of entitlement claims that would satisfy the concerns of both the First Nations (who held that current population statistics should be used to calculate land quantum) and Canada (who maintained that its "lawful obligation" was to provide land based on date-of-first-survey shortfall). In May 1990 the Treaty Commissioner presented his "Report and Recommendations" to Canada and the First Nations. Among the main points was that a method of calculation termed the "equity formula" was to be used to determine land quantum. Basically, the equity formula applied the percentage of shortfall at first survey to the current population statistics – that is, Current Population x Per Capita Treaty Allotment x Percentage Shortfall = Equity Formula. It also provided that any First Nation that received less land under the equity formula than it would have received under the "Saskatchewan formula" should be compensated for the difference based on a value per acre. This was termed the "honour payment."

From a series of meetings held in the spring and summer of 1990, the Federation of Saskatchewan Indian Nations, Canada, and the Office of the Treaty Commissioner agreed that: (a) "current population" would be detemined as of March 1991, and (b) the population base for the calculation of the "percentage shortfall" would not be limited to the actual number of people paid in the year of first survey, since some validated bands did not have a shortfall at this date, but would include absentees, new adherents, transfers from landless bands, and marriages to non-treaty women. This "adjusted-date-of-first-survey" statistic would represent the "historical population." Believing that it was reasonable to make a distinction between "historical" population and "current" population, the parties chose an arbitrary cut-off date of 1955. (This choice was not entirely arbitrary, but based on some practical and logical considerations: paylists were available only to 1955, birth rates began to rise significantly in this era, and there was an increased likelihood that most additions to a band's membership after this date would have been included in the entitlement calculation for some other

band.) The Office of the Treaty Commissioner was to conduct the research necessary to determine these figures.

On January 16, 1991, a General Protocol Agreement was put in place setting out the four stages in the negotiations process: General Protocol Agreement, Framework Agreement, Band Specific Agreements, and Implementations.

On September 22, 1992, representatives of the majority of the TLE First Nations in Saskatchewan, Canada, and Saskatchewan signed a Framework Agreement on settlement terms for treaty land entitlement for those particular TLE First Nations.[234] The Framework Agreement stipulates that land quantum is based on the equity formula and that any First Nation that would receive less land under the equity formula than under the Saskatchewan formula would receive $141.81 for every acre of difference as an "honour payment."

Settled Claims

· Under the Saskatchewan Formula

Fond du Lac, Stoney Rapids

· Within the Framework Agreement (Equity Formula)

Beardy's, Canoe Lake, English River, Flying Dust, Joseph Bighead, Keeseekoose, Little Pine, Moosomin, Mosquito/Grizzly Bear's Head, Muskeg Lake, Muskowekwan, Nut Lake/Yellow Quill, Ochapowace, Okanese, One Arrow, Onion Lake, Pelican Lake, Peter Ballantyne, Piapot, Poundmaker, Red Pheasant, Saulteaux, Starblanket, Sweetgrass, Thunderchild, Witchekan Lake

ALBERTA

Canada had initially attempted to convince the province of Alberta to agree to provide settlement lands according to a formula similar to that used in Saskatchewan. Alberta steadfastly refused to consider such a proposal. Sometime in the mid 1980s Canada shifted its emphasis from the development of province-wide entitlement agreements to settlement discussions with individual First Nations. The settlements reached basically provided for the establishment of reserve land for the affected First Nation, as well as financial compensation. While it is reported that "[i]n all cases, Canada maintained that its

234 It should be noted that a number of Bands mentioned by the Framework Agreement have refused to sign that agreement or have not yet ratified it.

'legal obligation' was to provide Reserve land based on Date of First Survey (DOFS) population statistics of the affected First Nation,"[235] it is impossible to reach this conclusion from the documents available.

The Settlement Agreement for the Janvier Band, for example, makes a very general statement about the validation of the claim: "as a result of research presented by the Janvier Indian First Nation, the Minister of Indian Affairs and Northern Development accepted the Janvier Indian First Nation's claim as negotiable under the federal government's specific claims policy."[236] The claim as submitted and accepted was based entirely on new adherents and transferees from landless bands after the survey – there was a surplus of land according to the population at date of first survey. Unfortunately, the exact number of late additions finally agreed upon is not available. It is known that research conducted on behalf of the Band in 1985 had determined that there were 11 people to be added (seven new adherents and four transferees from the Portage La Loche Band before its reserve was surveyed in 1965). These extra people would have entitled the band to a maximum of 1408 acres (11 x 128). According to the settlement agreement, the Janvier Band received 3400 acres in land and cash payments of $3.2 million from Canada and $1.8 million from Alberta.

Settled Claims

Alexis, Fort Chipewyan Cree, Sturgeon Lake, Whitefish Lake, Woodland Cree, Grouard, Janvier, Tallcree

MANITOBA[237]

In 1982 the Manitoba government appointed Leon Mitchell as a one-person commission to report on treaty land entitlement in Manitoba. His mandate was to review the history of treaty land entitlement issues in Manitoba and the other provinces, to solicit the views of interested parties, and to offer recommendations on terms of settlement. He submitted his report in January 1983. Among the major recommendations was that land quantum should be based on the First Nation populations as of December 31, 1976.

Using Commissioner Mitchell's report as a base, a tripartite negotiating process began in early 1983. By the summer of 1984, a Treaty Land Entitle-

235 TARR Manitoba, *A Debt to Be Paid: Treaty Land Entitlement in Manitoba* (rev. ed., Winnipeg: TARR Manitoba, October 1994), 23.
236 Janvier Settlement Agreement, March 25, 1993, p. 2.
237 Information in this section primarily from TARR Manitoba, *A Debt to Be Paid,* note 235 above.

ment Agreement in Principle had been developed by the parties. It outlined the proposed terms of settlement and included the provision that land quantum was to be based on First Nation membership as of December 31, 1976. The agreement in principle was conditional upon ratification by the First Nations, Canada, and Manitoba. For a number of reasons, among which was the Manitoba First Nations' sense that terms of settlement for Alberta entitlement claims exceeded the benefits offered under the Agreement in Principle, it never moved forward to the ratification stage and was eventually abandoned.

Following the Oka conflict during the summer of 1990, Canada announced its intention to increase its efforts to resolve, among other issues, treaty land entitlement in the Prairie provinces. After some preliminary discussions with the representatives of Canada and Manitoba on October 14, 1993, a Protocol on the Negotiations of Treaty Land Entitlement in Manitoba was signed by the duly mandated representatives of the Treaty Land Entitlement Committee, Canada, and Manitoba. The Protocol sets out the framework for the concurrent bilateral negotiations – that is, Treaty Land Entitlement Committee/Canada arising from obligations under the treaties, and Canada/Manitoba arising from obligations under the Manitoba Natural Resources Transfer Agreement – and outlines the issues to be dealt with in these discussions. A target date has been set for the development of a framework agreement.

In October 1995, settlement negotiations were breaking down because of a dispute over cost-sharing between Ottawa and Manitoba. Most of the land required to settle outstanding claims is unoccupied northern Crown land which, according to the 1930 Natural Resources Transfer Agreement, the province is obliged to provide. About 10 percent of the settlement lands, however, are for bands in southern Manitoba where necessary land must be purchased because Crown land is scarce. The provincial government is refusing to provide money towards the cost of these lands. While Canada and the province are negotiating this issue, Manitoba's Minister responsible for native affairs stated that

> for the northern bands, Manitoba has offered to create interim protection zones of land selected by the bands. Those zones would have a two-year freeze to keep them available for a settlement.[238]

238 "Manitoba Indians Push Hard for Land-Teaty Settlement," *Globe and Mail* (Toronto), October 31, 1995, A9.

Settled Claims

· Claims settled independently of the Manitoba Treaty Land Entitlement Committee

Garden Hill (divided among the Island Lake Bands: St Theresa Point, Wasagamack, Garden Hill, Red Sucker Lake)
Long Plain

· TLE Committee

Broken Head Ojibway, Buffalo Point, Rolling River, Sapotawayak, Wuskwi Sipihk, Fox Lake, Gods Lake, Nelson House, Norway House, Opaskasgayak, Oxford House, Sayisi Dene, Shamattawa, War Lake, York Factory, Mathias Colomb, Barren Lands, Northlands

GLOSSARY OF TERMS

Treaty land entitlement research has developed its own specialized language. General explanations of the meaning of some of these terms, quoting from reliable sources wherever possible, are given below. These explanations cannot, however, be regarded as precise definitions because no attempt has been made to investigate thoroughly when and how different groups may have applied the terms in slightly different ways.

absentee "Absentees who are paid arrears . . . are band members who are absent for the year of survey but who return and are paid arrears for that year. Absentees who return and who are not paid arrears . . . must be traceable to: when they became band members and how long they remained as band members. . . . Generally, continuity in band memberships is required. Also it must be shown that they were not included in the population base of another band for treaty land entitlement purposes, while absent from the band."(DIAND, "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims" [May 1983], 3.)

adjusted-date-of-first-survey (ADOFS) statistics This formula is unique to the **Framework Agreement** negotiated in 1990 to settle treaty land entitlement claims in Saskatchewan. *See also* **equity formula**

> Number paid in year of survey + absentees/arrears + new adherents + transfers from landless bands + marriages to non-treaty women - double counts (to 1955)

It represents the "historical population" to be used as the date-of-first-survey population in calculating the percentage shortfall in the **equity formula** – that is, all eligible additions to the band after the year of survey

are considered, for the purpose of this calculation, to have been present in that year.

Bethune formula A variation of the **compromise formula**. According to the Bethune formula the amount of land owing is determined by the addition of percentage calculations according to population figures at each successive survey for bands with multiple surveys. It was used in 1961 by W.C. Bethune, Chief of Reserves and Trusts, Department of Indian Affairs and Northern Development, to calculate outstanding treaty land entitlement for the Lac La Ronge Band in Saskatchewan:

> The Lac la Ronge Band first received a reserve in 1897 and, based on the population of the Band at that time, it represented 51.56% of their total entitlement. In 1909, additional lands were set aside for their use and, based on the 1909 population, the additional lands represented 7.95% of the total they would have been entitled to at that time. In 1948, additional land was set aside for their use, representing 5.16% of what their full entitlement would have been based on the 1948 population. It might, on this basis, be argued that the Lac la Ronge Band has received 64.76% of their total reserve entitlement. The balance, 35.24%, based on the 1961 population of 1,404, would amount to 63,330 acres.
>
> W.C. Bethune to Regional Supervisor, Saskatchewan, 17 May 1961 (ICC La Ronge TLE Documents, p. 1136.)

claim (as distinguished from "dispute" or "grievance")

> "In normal usage, 'grievance' suggests some ground for complaint, and 'dispute' suggests contention between two or more parties, whereas 'claim' denotes that a ground for complaint rests upon a right or a supposed right. Thus, while an Indian band might have a grievance concerning restrictions on the fishing practices of its members, which might lead to a dispute between the band and the government, we would only call this a claim if it included a statement to the effect that the Indians had a fishing *right* which was being violated."
>
> Richard C. Daniel, *A History of Native Claims Processes in Canada, 1867-1979* (Ottawa: DIAND, 1980), 194-95.

> The Federation of Saskatchewan Indians maintained that treaty land entitlement issues were not claims, but rather administrative matters reflecting back on the treaties. (D. Ahenakew, minutes of meeting with Warren Allmand, Minister of Indian Affairs, January 1977 [ICC, La Ronge TLE documents, p. 2496], and in letter to the minister dated July 22, 1977 [ICC, La Ronge TLE documents, p. 2562.])

comprehensive claims Native rights based on traditional use and occupancy that have not been extinguished by treaty or superseded by law. (DIAND, Office of Native Claims, *Native Claims: Policy, Processes and Perspectives* [Ottawa: DIAND, February 20, 1978], 4.)

compromise formula This formula calculates the percentage of entitlement shortfall based on the population at date of survey, and then uses this percentage to determine how much additional land the band would be entitled to based on current population.

> 1) 100 - [Acres received ÷ (population at date of survey x treaty allotment) x 100] = percentage shortfall
> 2) Percentage shortfall x (current population x treaty allotment) = acres due

This formula was put forward by Canada in 1972 for the Island Lake Band (Manitoba) and in 1974 for the Peter Ballantyne Band (Saskatchewan), but the province of Manitoba and the Peter Ballantyne Band refused to agree to it. *See also* **Bethune formula** and **equity formula**

current population formula This formula establishes that, when insufficient land was set aside at first survey, the land credit is to be based on band membership at each subsequent survey until entitlement is fulfilled.

> Current population x treaty allotment – lands received = land due

date of first survey (DOFS) The date of first survey is the date at which the exterior boundaries of the reserve are so clearly identified that they could have been found on the ground. (This definition covers the situation where reserve lands were not actually surveyed but were selected from contemporary detailed township surveys.)

double counts Double-count individuals are those whose land entitlement has been fulfilled either through their inclusion in the land entitlement of another band, or through their receipt of land or money scrip. (Theresa

Ferguson, "Report on the Kawacatoose Band Date of First Survey Population," DIAND, July 31, 1992 [ICC, Kawacatoose TLE Documents, p. 252.])

equity formula Proposed in May 1990 by the Treaty Commissioner for Saskatchewan and adopted as the formula to be used in the settlement of treaty land entitlement in Saskatchewan, the equity formula applies the percentage of shortfall at first survey against the current population statistics.

1) Acres received at DOFS ÷ (population at DOFS x treaty allotment) x 100 = percentage shortfall
2) Percentage shortfall x current population – lands received = acres due

Although this was the formula offered by the Treaty Commissioner, the actual calculations which ensued became, for a variety of reasons, much more complicated. The strict use of date-of-first-survey population figures proved to be unworkable and an **adjusted-date-of-first-survey (ADOFS)** population figure was used instead.

Framework Agreement The culmination in 1992 of stage two of a four-part strategy negotiated by Canada, the province, and the Saskatchewan treaty land entitlment bands to settle TLE claims in Saskatchewan. Stage one (the General Protocol Agreement) was signed on January 16, 1991. Stage three (Band Specific Agreements) and stage four (Implementation) are in progress.

lawful obligation In the June 1969 White Paper, Canada first stated as public policy on claims and treaties that "lawful obligations must be recognized." No definition of the term "lawful obligations" was provided, but a narrow meaning was implied: "The terms and effects of the treaties between the Indian people and the Government are widely misunderstood. A plain reading of the words used in the treaties reveals the limited and minimal promises which were included in them. . . ." At no time since the 1969 White Paper has the term been formally interpreted by the federal government or the courts.

A thorough analysis of this term can be found in Michael Bossin, "Beyond Lawful Obligations," in *Indian Land Claims in Canada*, ed. B. Morse (Wallaceburg: Association of Iroquois and Allied Indians, Grand Council Treaty # 3 amd Union of Ontario Indians, Walpole Island Research Centre, 1981). He states: "The term 'lawful' was included in the original statement of government obligations to circumscribe the implications of fulfilment of undefined 'moral' obligations and to emphasize that the government would admit obligations which would have standing in a court of law or which are based on legal principles or standards" (p. 75).

He also says: "In both standard English and legal dictionaries a distinction lies between the words 'lawful' and 'legal.' A **lawful** obligation is not necessarily a **legal** obligation. The former contemplates the substance of the law, the latter its form. 'Legal' implies literal connection or conformity with statute or common law or its administration. 'Lawful' is a more general word which suggests conformity to the principle rather than the letter of the law. Furthermore, 'lawful' more clearly implies an ethical content than does 'legal'" (p. 116).

new adherents to treaty "These are Indians who have never previously signed or adhered to treaty and consequently have never been included in an entitlement calculation." ("ONC Guidelines," 4.)

Natural Resources Transfer Agreements (NRTA) 1930 Agreements with Manitoba, Saskatchewan, and Alberta transferring the administration of natural resources and the control of Crown lands from Canada to the province. All three agreements included provisions for the transfer of unoccupied Crown lands to enable Canada to fulfil its treaty obligations to the Indians.

reserve "Any tract or tracts of land set apart by treaty or otherwise for the use or benefit or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered and includes all the trees, wood, timber, soil, stone, minerals, metals or other valuable thereon or therein" (*Indian Act*, 1876).

"A tract of land, the legal title to which is vested in Her Majesty that has been set apart by Her Majesty for the use and benefit of a band" (*Indian Act*, 1951).

Saskatchewan formula A variation of the **current population formula** whereby the "current population" was fixed at December 31, 1976.

> Population at December 31, 1976 x treaty allotment – lands received = land due

This formula formed the basis for the calculation of land due in claim settlements according to an agreement between the province of Saskatchewan and the First Nations of Saskatchewan (Saskatchewan Agreement of 1976), which was also endorsed by Canada.

The Saskatchewan formula was subsequently repudiated by both the provincial and the federal governments; treaty land entitlement claims in Saskatchewan are being settled on the basis of the **Framework Agreement** and the **equity formula**.

specific claims "Grievances that Indian people might have about the Government's administration of Indian lands and other assets under the various Indian Acts and Regulations, and those claims that might exist with regard to the actual fulfilment or interpretation of the Indian Treaties or Agreements and Proclamations affecting Indians and reserve lands" (DIAND, *Native Claims*, 3).

"[S]pecific actions and omissions of government as they relate to obligations undertaken under treaty, requirements spelled out in legislation and responsibilities regarding the management of Indian assets" (DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: DIAND, 1982), 3).

"'[S]pecific claims': those claims which are based on lawful obligations" (*Outstanding Business*, 13).

"Basically, a specific claim is an allegation by the Indians that the Crown, through its servants or agents has committed a wrong by maladministration of Indian matters or by breach of a treaty for which it ought to pay compensation" (G.V. La Forest, "Report on Administrative Processes for the Resolution of Specific Indian Claims," paper prepared for DIAND, Ottawa, 1979, quoted in W. Moss and P. Niemczak, *Aboriginal Land Claims Issues* [Ottawa: Library of Parliament Research Branch, 1992], 6).

transferees from landless band "These are Indians who have taken treaty as members of one band, and then transferred to another band without having been included in the entitlement calculation of the original band, or of the band to which he or she has transferred. The parent band may not have received land, whereas the host band may have already had its entitlement fulfilled." ("ONC Guidelines," 4.)

treaty Treaties can be seen as a mechanism for the settlement of comprehensive claims, to the extent that they were intended to give recognition to certain Indian interests in land, to provide compensation for the effects of settlement of a particular territory, or to create a general agreement between the Crown and various Indian tribes as to their future relationship. (Daniel, *History of Native Claims Processes*, 1.)

treaty land entitlement (TLE) Treaty land entitlement is the term used to describe Indian rights to reserve lands in the Prairie provinces, northern Ontario, and northern British Columbia, which flow from Treaties 1 to 11, negotiated and confirmed between various Indian tribes and the Crown in right of Canada. It is "a subset of specific claims," according to DIAND, *Federal Policy for the Settlement of Native Claims* (Ottawa: DIAND, March 1993), 19.

treaty annuity paylist Treaty annuity paylists are forms on which were recorded the payment of treaty annuities to individual Indians. Indians are grouped by band; names of family heads are recorded with the numbers in each family broken down according to men, women, boys, girls, and other relatives; remarks indicated births, deaths, and sometimes information about people entering or leaving the band.

These forms provide the first source of data for treaty land entitlement calculations. They cannot, however, be relied upon as infallible. Their primary function was to account for the money distributed, not to record census information. Inconsistent spelling of Indian names, inaccurate translations, and the inclusion of some people on particular band lists for administrative convenience only, for example, must be considered when using these records.

validation "The determination by Canada that a Band has not received the full quantum of reserve land to which it is entitled under the terms of a

Treaty" ("Agreement in Principle – Manitoba Treaty Land Entitlement," draft, April 3, 1986 [ICC, La Ronge TLE Documents, p. 3960]). The term was used throughout the 1970s and 1980s. In 1995, however, Canada prefers the term "accepted for negotiation."

SELECT BIBLIOGRAPHY

This select bibliography brings together some of the important publications and documents on treaty land entitlement, most of which date from the last 15 years. A number of documents were consulted in the collection of the Department of Indian Affairs and Northern Development, Claims and Historical Research Centre, and their file numbers are cited. The bibliography is divided into the following sections: General Sources, Claims Policy, Alberta, British Columbia, Manitoba, Saskatchewan.

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APPENDIX A

RESIDUAL LAND ENTITLEMENT UNDER TREATY

PREPARED BY HEATHER FLYNN FOR THE

DEPARTMENT OF INDIAN AFFAIRS AND
NORTHERN DEVELOPMENT LAND DIVISION

OCTOBER 1974

RESIDUAL LAND ENTITLEMENT UNDER TREATY

The following is the result of a study which was undertaken to determine the basis on which lands have previously been provided to Indian Bands in the Prairie Provinces in fulfilment of residual treaty entitlement. The study covered both the period prior to the 1930 Transfer of Natural Resources Agreements when the lands were acquired from the Department of the Interior and the period after 1930, when the lands were acquired from the Provinces.

The term "residual entitlement" was interpreted to apply only to those cases where a Band, having already received part of its land entitlement under treaty, received the remainder of the land to which it was entitled, thus fulfilling entitlement in accordance with our present method of calculation.

Using this interpretation of the term, very few true examples of Bands having received lands as residual entitlement could be located. However, a number of interesting examples were uncovered which seem to be indicative of the varied policy followed by the Department of Indian Affairs, over the years, in dealing with the matter of treaty entitlement. Basically these examples fall into six categories, as follows: -

1. Entitlement fulfilled according to our calculations, but additional lands acquired at a later date, based on an increase in population and recalculation of entitlement:

Band	Treaty	Province	Lands Acquired Before or After 1930
Lake St. Martin	2	Manitoba	Before 1930
Little Saskatchewan	2	Manitoba	Before 1930
Chemahawin	5	Manitoba	Before 1930
Stony	7	Alberta	Before 1930
Beaver of Horse Lake and Clear Hills	8	Alberta	Before 1930
Little Red River	8	Alberta	After 1930
Sucker Creek	8	Alberta	Before 1930

In some of the above cases, social and economics needs also seem to have been a consideration in acquiring the additional lands. Also, in the case of the Sucker Creek Band a split in Band is involved, however, in all cases, a major factor in the acquisition of the lands appears to have been an increase in Band population and recalculation of treaty entitlement.

2. Entitlement fulfilled according to our calculations, but additional lands acquired at a later date, since the entitlement under those Treaties which provided for only 160 acres per family of five was considered too small: -

Band	Treaty	Province	Lands Acquired Before or After 1930
Lake St. Martin	2	Manitoba	Before 1930
Little Saskatchewan	2	Manitoba	Before 1930
Fisher River	5	Manitoba	Before 1930

In these cases, social and economic needs also appear to have been a major factor in acquiring the additional lands. However, recognition by both the Department of Indian Affairs and Department of the Interior of the inequity of these Treaties which provided for only 160 acres per family of five as opposed to 640 acres per family of five.

The Lake St. Martin and Little Saskatchewan Bands are listed under both this category and category 1, since more then one additional parcel of land was acquired for each Band, at different times, and based on different factors.

3. Entitlement fulfilled according to our calculations, but additional lands acquired at a later date as entitlement for non-treaty Indians entering the Band: -

Band	Treaty	Province	Lands Acquired Before or After 1930
Bigstone or Wabasca	8	Alberta	After 1930

4. Full entitlement not received but request for further lands not based on treaty entitlement:

Band	Treaty	Province	Lands Acquired Before or After 1930
Grand Rapids	5	Manitoba	Before 1930

Additional lands were set aside for this Band in 1896 and these lands fulfilled the Band's residual treaty entitlement. When requesting the lands, however, the Department of Indian Affairs appeared to have been unaware that the Grand Rapids Band was entitled to further lands under treaty and it was coincidental that the lands requested fulfilled the Band's residual entitlement.

5. Full entitlement not received, residual entitlement calculated according to current population figures.

Band	Treaty	Province	Lands Acquired Before or After 1930
Slaves of Upper River	8	Alberta	After 1930

6. Full entitlement not received, residual entitlement calculated on a percentage basis (i.e. according to a type of "compromise" formula):

Band	Treaty	Province	Lands Acquired Before or After 1930
Lac La Ronge	6	Saskatchewan	After 1930

Reports are attached for each of the Bands listed in this paper which outline in more detail the basis on which additional lands were acquired.

Indian Lands,
February 1975

LAKE ST. MARTIN BAND – TREATY NO. 2 – MANITOBA

This Band adhered to Treaty No. 2 which entitled the Indians to Reserve lands in the amount of 32 acres per person.

The Narrows Indian Reserve No. 49 was surveyed for the Band in 1877 and was confirmed with an area of 4,083 acres, in 1913, by Order in Council P.C. 2876. In 1877 the population of the Band was 121, entitling the Indians to a total of 3,872 acres and it would therefore appear that their entitlement under Treaty 2 was fulfilled at this time.

However, the following additional lands were subsequently set aside for the Lake St. Martin Band:

1. The Narrows I.R. 49A

This Reserve, comprising 1902.90 acres was withdrawn from the Dominion Lands Act and set apart for the Lake St. Martin Band by Order in Council P.C. 1606, dated July 1, 1913.

In 1906 the Assistant Secretary applied to the Secretary of the Department of the Interior for these lands, basing his request on the following factors:

> The reserve as now constituted contains 4083 acres. *The population of the band at the last annuity payments was 154, or a fraction over 26½ acres per capita. Under treaty stipulations they were entitled to 32 acres per capita, it will thus be seen that at present the band is short 840 acres of this amount.*
>
> As a rule the reserves are larger then the bands occupying them can make use of, but in this case I consider the band justified in requesting an enlargement. The population has increased from 102 in 1896 to 154 in 1906 or 50 per cent in ten years. The band is in a highly prosperous condition, their cattle shows an increase of 39 head the past year, being 163 in 1905, and 202 head in 1906. Cattle raising will be their principal industry, and it is hay, and pasture land they ask for. The land they would like to have is situated immediately west of the present west line of the reserve, and extending back from the lake about 1/2 mile, on this land there is large quantities of hay, and pasture. I should mention that the eastern portion of their reserve is swampy, and quite a portion is useless for any purpose. I trust that the Department will be able to make the enlargement as suggested as the band now have to go off the reserve to find sufficient hay for their stock, and are afraid that settlers may come in and shut them out of this.

This application was renewed in 1912, and approved by the Department of the Interior.

2. 624.1 acre Addition to I.R. 49A

In 1922 application was made to the Department of the Interior for further hay lands for the Lake St. Martin Band. Again, the treaty entitlement of the Band was recalculated using current population figures and the request was based on those calculations, as indicated by the following extract from the letter written by the Assistant Deputy and Secretary of Indian Affairs to The Controller of the Department of the Interior on August 4, 1922:

> The Indians of the Lake St. Martin band (Narrows Indian reserves Nos. 49 and 49-A) are in need of additional hay land to ensure the proper wintering of their stock. *This band numbers 212, which number, at the ratio of 160 acres per family of 5, would entitle them to 6184 acres. The area of their reserves No. 49 and 49-A totals 5294 acres and the local Indian Agent has recommended that the following lands be added to reserve No. 49-A, - . . .*

The Department of the Interior approved the application and the lands were set aside as an addition to Indian Reserve No. 49A by Order in Council P.C. 2071 dated October 12, 1923. It is noted that it is stated in the Order in Council:

> Whereas a request has been made by the Department of Indian Affairs for the setting apart for the Indians, under the terms of Treaty No. 2, of a track of land as an addition to Indian Reserve No. 49-A, in Townships 31 and 32, in Range 7, West of the Principal Meridian, in the Province of Manitoba, comprising an area of 624.1 acres. *The Department of Indian Affairs states that the reserve, as at present set apart, does not contain the area to which the Indians are entitled under the Treaty,* and, furthermore, that the lands now applied for are required for hay land, to ensure the proper wintering of the stock of those Indians.

3. 690.5 acre Addition to I.R. 49

In 1928 application was again made to the Department of the Interior for additional hay lands for the Lake St. Martin Band. This request was based on the fact that under the terms

of Treaty No. 5, the Indians were allowed only 160 acres per family of 5 which was not sufficient land to enable them to make a living from cattle raising, as indicated in the following extract from the letter of request from the Assistant Deputy and Secretary of Indian Affairs to the Secretary of the Department of the Interior:

> The Bands have taken up cattle raising as a means of livelihood but *under the condition of Treaty 2 these Indians are only allowed 160 acres per family of five which is not sufficient to raise cattle for their sustenance.* It has become necessary to procure more land in order that the Indians may have enough hay to winter their stock.

This application was approved by the Department of the Interior and the lands were set aside again as an addition to Indian Reserve No. 49 by Order in Council P.C. 350 dated February 27, 1929.

It thus appears that in the case of the Lake St. Martin Band the various requests fro additional lands were based on several factors, namely:

i) Recalculation of entitlement according to current population figures.

ii) Social and economic needs.

iii) Insufficient land having been provided under the terms of Treaty 5.

Indian Lands
October 1974

File: 27127-13
vol 7775
R.G. 10.

LITTLE SASKATCHEWAN BAND – TREATY NO. 2 – MANITOBA

This Band adhered to Treaty 2 which entitled the Indians to Reserve lands in the amount of 32 acres per person.

The Little Saskatchewan Indian Reserve No. 48 was surveyed for the Band in 1881 with an area of 3,200 acres. In 1881 the population of the Band was 100, entitling the Indians to a total of 3,200 acres and it would, therefore, appear that their entitlement under Treaty 2 was fulfilled at this time.

However, the following additional lands were subsequently set aside for the Little Saskatchewan Band:

1. 76.9 acre addition to Indian Reserve No. 48

By Order in Council PC 1607 dated July 1, 1913, 76.9 acres were withdrawn from the Dominion Lands Act and set apart as an addition to the Little Saskatchewan Indian Reserve No. 48.

This Order in Council States:

> Whereas an application has been received from the Department of Indian Affairs to have certain lands in township 31, range 8, West of the Principal Meridian, aggregating 76.90 acres, set apart as an addition to Reserve numbered 48 at Lake St. Martin, in the Province of Manitoba;
>
> *And whereas the Department of Indian Affairs states that the Reserve, as at present set apart, does not contain the area which the Indians are entitled to under the Treaty and,* furthermore, that the lands now applied for are required for hay purposes and that if they be not granted the Indians must abandon cattle raising; . . .

Since the Order in Council states that the Reserves at present set apart for the Band does not contain the area to which the Indians are entitled under Treaty, it is presumed that the area is calculated from the current population figures in 1913, as based on the 1881 population, entitlement was fulfilled.

2. Dauphin River Indian Reserve No. 48A

In 1911, application was made to the Department of the Interior for a separate Reserve for a small group of the Little Saskatchewan Band residing at the mouth of the Dauphin River. In his letter to the Secretary of the Department of the Interior requesting the lands, the Assistant Secretary of Indian Affairs stated:

> *The said band is one of those comprised in treaty No. 2 under which they are provided with only 160 acres for each family of five instead of 640 acres as in some of the other treaties. The Band has its quota of land in the resource mentioned; (these are 138 members in all) but the land is represented as being very unfavourable for farming purposes, and that it would also be a hardship to compel the Indians at Dauphin River to join the main body of their band. It is therefore desired to secure the two plots of land shown on the sketch for the Indians residing at the locality, and as the quota of land under the Treaty is very small, it is considered that the said lands should be granted without cutting off any portion of the main reserve in exchange.*

The lands, comprising 821 acres, were subsequently set aside for the Band by Order in Council P.C. 3866 dated October 22, 1921.

3. Little Saskatchewan Indian Reserve No. 48B

In 1928, additional lands were again requested from the Department of the Interior for the Little Saskatchewan Band. In a letter dated October 4, 1928 to the Commissioner of Dominion Lands, the Assistant Deputy and Secretary of Indian Affairs stated:

> *In further explanation I may say this band at present has 176 members which under the provisions of Treaty would entitle them to 5632 acres. Their present reserves Nos. 48 and 48A together contain 4101.3 acres and with the addition of the 431.5 acres asked for, they would still be short of the amount provided for in the Treaty.*

The lands, comprising 240.6 acres were set aside for the Band by Order in Council P.C. 349 dated February 27, 1929, which stated:

> Whereas application has been made by the Department of Indian Affairs for the setting apart for the Indians of the Little Saskatchewan Band No. 48 of a certain tract of land in Township 31, Range 7, West of the Principal Meridian, in the Province of Manitoba, comprising an area of 240.60 acres more or less, it having been represented that owing to changed conditions it is impossible for the Indians to make a living on the present restricted area of their reserve, additional land being requisite for their needs for pasturage: It has also been represented that the Indians have been largely deprived of hunting and fishing as a means of livelihood.

Thus, although the request for the lands clearly states that they were required as entitlement under Treaty, based on the Band's population in 1928, the Order in Council indicates that the lands were provided for social and economic reasons.

It thus appears that the various requests for additional lands for the Little Saskatchewan Band were based on one or more of the following factors in each case:

i) Recalculation of entitlement based on current day population figures.

ii) The smaller amount of lands provided under the terms of Treaty No. 2.

iii) Social and economic needs.

Indian Lands
October 1974

Files: 401/30-16 Vols 1 and 2

CHEMAHAWIN BAND – TREATY 5 – MANITOBA

This Band adhered to Treaty 5 in 1876 which entitled the Indians to Reserve lands in the amount of 32 acres per person. Lands were first surveyed for the Band in 1883, at which time the Band population was 95, entitling the Indians to a total of 3040 acres.

The following reserves, totalling 3,090.61 acres, were subsequently set aside for the Chemahawin Band:

Chemahawin Indian Reserve 32A Chemahawin Indian Reserve 32B Chemahawin Indian Reserve 32C Chemahawin Indian Reserve 32D	3,010.33 acres	– Surveyed 1883, – confirmed by P.C. 875, 1930.
Poplar Point Indian Reserve 32F	80.28 acres	– Surveyed 1894 – confirmed by P.C. 3027, 1895.
	Total 3,090.61 acres	

It would thus appear that according to our calculations, the Band's entitlement was fulfilled at this time. In 1914, however, further lands were requested from the Department of the Interior as an addition to Poplar Point Indian Reserve 32F. It can be seen from the following extracts from correspondence which took place at this time, that this request was based on the current population of the Band in 1912, although consideration also appears to have

been given to the fact that under Treaty 5 the Band received only 160 acres per family of 5 as opposed to 640 acres in other treaties:

On January 12, 1914, Chief Surveyor Bray reported to the Deputy Superintendent General:

> *According to the census of 1912 the band had 133 members entitling them to 4,256 acres. They have only 3,091 acres. They are therefore deficient even under the small area allowed by the treaty. . . .. 1165 acres.* I beg to submit that their request appears to be a reasonable one and would recommend that it be granted. They apply for a strip two miles long by 27.40 chains wide. This is an area of only 438 acres.

Subsequently on March 17, 1974[sic], the Assistant Deputy and Secretary of Indian Affairs wrote to the Secretary of the Department of the Interior:

> *This band is deficient in the area allowed by the treaty, which in this case is only 160 acres for each family of five.* The request appears to be very reasonable and it is desired to accede to it. I have therefore to request you to be good enough to inform me whether the said strip of land is available for the purpose of an Indian Reserve.

In 1919, the lands, comprising 366 acres were surveyed and in 1930 they were set aside as an addition to Poplar Point Indian Reserve No. 32F by Order in Council P.C. 1178.

Indian Lands
October 1974

Files: 578/30-43-32A Vols 1-3

ALBERTA

Beaver Band of Horse Lake and Clear Hills

This Band, formerly known as the Dunvagan Band, adhered to Treaty 8 in 1899, under which they were entitled to 128 acres per Indian. They selected their lands in 1905 and these were surveyed at the same time. The Beaver Reserve No. 152, containing 15,360 acres (or 24 Square miles), was set aside by Order in Council in 1907. Also selected and surveyed for the Beaver Band in 1905 was the Neepee Reserve No. 152A. It comprised 260 acres and was intended for the use of Chief Neepee and his wife. This particular Reserve was surrendered and sold in 1929, however, it was not until 1932 that the Department realized that the Reserve had never been confirmed and had it set aside by Order in Council.

At the date of the selection of their Reserve (1905), the Beaver Band's population (from the paylist) was 112, thereby giving them an entitlement of 14,336 acres. According to our calculations then, this Band had received lands in excess of their full entitlement by 1907. However, in 1911 the Indian Agent for the Greater Slave Lake Agency reported that the Beaver Indians living at Grande Prairie claimed that they had not been consulted when Beaver Reserve No. 152 was surveyed. The Agent relayed the Indians' request that a small

reserve be set apart for them, "convenient to their hunting grounds." In 1912, the Department advised the Agent that, "it is, however, desired that you shall make a careful census of the Dunvagan Band" in order to ascertain whether there is a greater area of land still due them under the terms of Treaty 8.

It appears that the Agent went ahead as instructed and, according to the 1913 Treaty paylist, found the Band to comprise 151 members. Based on this population figure the Band's total entitlement would be 19,328 acres. As they had received only 15,620 acres they were left with an outstanding entitlement of 3,708 acres. Subsequently, the Indians selected an additional 4,032 acres in 1914 that was confirmed as the Horse Lake Reserve No. 152B by Order in Council (P.C. 936) in 1920.

According to correspondence in 1931, "this Reserve was located for the purpose of completing the acreage to which the Beaver Indians of the Dunvagan Band were entitled . . ." This observation is reiterated in a letter dated January 2, 1936.

The following explanation is given:

> . . . the Department in 1914 provided the Horse Lakes Indian Reserve No. 152B for the purpose of the permanent residence of the Indians living in the Grande Prairie District. With the provision of this Reserve, the Band received the balance of the land to which they were entitled, in fact the area was somewhat in excess of the Treaty requirements.

It appears from the available correspondence that the Beaver Band's entitlement was recalculated in 1913 based on the higher 1913 population figures and, as a result, the Band was awarded the Horse Lake Reserve No. 152B in order to fulfil their outstanding land entitlement.

Indian Lands
October 1974

Files: 777/30-8
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LITTLE RED RIVER BAD – TREATY 6 – ALBERTA

The Little Red River Band adhered to Treaty 6 in 1899 which entitled the Indians to reserve lands in the amount of 128 acres per person. In 1912, 18,349 acres were set aside for the Band as Fox Lake Indian Reserve No. 162. These lands were Surveyed in 1912 and at this date the Band population was 141, entitling the Indians to 18,048 acres and it would therefore appear that the Band's entitlement was fulfilled.

Over the years, however, many Indians joined the Little Red River Band and its population had increased to 473 by 1955. Negotiations were therefore commenced with the Province to acquire additional lands for the Band. As shown in the following extract from a letter dated October 10, 1956, from R.F. Battle, Regional Supervisor of Indian Agencies to M.G.

Jensen, Deputy Minister of the Alberta Dept. Of Lands and Forests, these lands were requested as outstanding treaty entitlement, based on the current population in 1955:

> You will recall our recent discussion in which I promised to set before you the lands selected by the Indians in the Fort Vermillion Agency so that you could ascertain if they could be made available before an official request is submitted from our Department. For purposes of clarity, I shall deal with each Band separately.
>
> CREE BAND – LITTLE RED RIVER
>
> *The population of this Band as recorded when we opened negotiations in 1955 was 473, which give them a land credit of approximately 60544 acres.*
>
> FOX LAKE RESERVE NO. 152
>
> *An area totalling 18049 acres has already been set aside for them, leaving a credit balance of 41695 acres.* The land they have requested by resolution is as follows: . . . .

Again, in his formal request to Mr. Jensen for these lands, dated February 8, 1957, H.M. Jones, the Acting Deputy Minister, states:

> I should be pleased if you would consider this letter as an official application for the following lands the acquisition of which will fulfill the land credits now due the Little River Band of Indians. . . .

The request was approved by the Province of Alberta and the additional lands, consisting of 7,744 acres as an addition to Fox Lake Indian Reserve No. 162 and 34,678 acres as John D'Or Prairie Indian Reserve No. 215, were vested in Canada under Certificates of Title in 1965. The addition to Fox Lake Indian Reserve was set aside by Federal Order in Council P.C. 1965-1312 dated July 23, 1965, which states:

> Whereas the lands described in Schedule "A" hereto were obtained from the Province of Alberta for the use and benefit of the Little Red River Band of Indians as an addition to Fox Lake Indian Reserve number one hundred and sixty-two (162), *being part of their land entitlement under treaty number eight: . . .*

Jean D'Or Prairie Indian Reserve No. 215 was set aside by Federal Order in Council P.C. 1965-1440, dated August 11, 1965, which states:

> That the lands described in Schedule "A" hereto *were in part acquired from Her Majesty in right of the Province of Alberta in satisfaction of Treaty entitlement for the Little Red River Band* of Indians and in part purchased from the said Province for the said Band; . . .

It thus appears that in 1955 additional lands were requested from the Province of Alberta for the Little Red River Band as residual treaty entitlement, based on current population figures, and the Province of Alberta agreed to this request.

Indian Lands
October 1974

Files: 775/30-1 Vols. 1-3
775/30-2-162
775/30-2-215

ALBERTA

Sucker Creek Band

The Sucker Creek Band did not come into existence as such until 1910. Prior to that its members belonged to the Kinnosayo Band and consequently adhered to Treaty 8 in 1899. Entitlement under this Treaty was 128 acres per Indian.

In 1900 the Kinnosayo Band selected certain lands for their Reserves. Included among these was a parcel containing 11,955.2 acres for those members of the Band living in the Sucker Creek area (estimated to be about 93). These lands were surveyed in 1902 and set aside by Order in Council in 1904 as the Sucker Creek Reserve No. 150A.

The Sucker Creek Band was formally created when the Kinnosayo Band split into five smaller bands in 1910. At this time the population at Sucker Creek was 108, thereby giving the new Band an entitlement of 13,824 acres. It is assumed that the Sucker Creek Band retained the 11,955.2 acres that had been set aside for those members of the Kinnesayo Band living in that area in 1904. However, based on the increased population of the Sucker Creek portion of the Band by 1910, they were still entitled to approximately 1,869 acres.

In order to rectify the situation and fulfil outstanding entitlement, an addition of 3,344.6 acres (or 5.7 square miles) was made to the Sucker Creek Reserve in 1913. These lands were confirmed by Order in Council P.C. 2144 which explained that:

> . . . application has been made by the Department of Indian Affairs for additional lands in connection with . . . Sucker Creek Indian Reserve No. 150A, *the lands included in the said reserve(s) not containing the area to which the Indians are entitled under treaty.*

Indian Lands
October 1974

Files: 777/30-1 Vol.1
777/30-3-150A Vol. 1 (PARC)
RG 10 File 27131-1 Vol. 7777

FISHER RIVER BAND – TREATY 5 – MANITOBA

This Band adhered to Treaty No. 5, as part of the Norway House Band, which entitled the Indians to 32 acres per person.

In 1877, the Fisher River Indian Reserve No. 44, comprising 9,000 acres, was surveyed for the Fisher River Indians. At this date, there were no official population figures for the Band since it was still part of the Norway House Band. By 1878, however, the Fisher River Band was listed separately with a population of 186. This would entitle the Indians to a total of 5,952 acres.

Since the Fisher River Indian Reserve contained 9,000 acres, it would appear that the entitlement of the Fisher River Band was fulfilled. However, the following additional lands were subsequently set aside for the Band:

1) 2,054 and 2,560 acre Addition to Indian Reserve No. 44

Application was made to the Department of the Interior for these lands in 1893 and 1896. They were requested for hay-growing purposes, without any mention of treaty entitlement.

The application was approved and the lands were set aside apart for the Fisher River Band as an addition to Indian Reserve No. 44 by Order in Council P.C. 2980, dated August 25, 1896.

2) 160 acre Addition to Indian Reserve No. 44, Indian Reserve No. 44A

In 1905 application was again made to the Department of the Interior for additional hay lands for the Fisher River Band. In making this request, the Secretary of the Department of Indian Affairs wrote to the Secretary of the Department of the Interior:

> The Indians of the Fisher River Indian Reserve, Manitoba, have made a special request to have a certain tract of land situated in township 28, Range 1, West, added to their reserve. A hay meadow is situated in the said tract which they especially require. The Indian Commissioner has stated that the soil of this reserve is the only one in the Norway House Agency suitable for farming and stock-raising, and that these Indians are doing fairly well in that direction with prospects of extending their operations, *and further as the Indians of Treaty 5, to which Treaty these Indians belong, receive far less land per capita than the Indians of Treaty Nos. 3, 4, 6 and 7, he recommends that the addition they ask for be granted.*

The Department of the Interior, however, would not agree to providing these lands in 1905, but in 1906 the Department of Indian Affairs again requested the additional lands. Again, in writing to the Secretary of the Department of the Interior, the Secretary of Indian Affairs stated:

> *According to the provisions of Treaty Nos. 2 and 5 only 160 acres of land were allotted to each family of five persons, whereas in the other Treaties an area of 128 acres was allotted to each family of five persons. No reason appears to be given to explain the cause of the different treatment.*
>
> *An area of 160 acres for each family of five persons is small in any case, and especially so where the land is not good quality, and where, as is the present instance, the band is reported to be making considerable progress in agriculture.* The Department is very anxious to encourage these people. The Fisher River reserve is the only one in that district that is considered to be suitable for agricultural purposes. Under the circumstances it is considered reasonable and advisable that an addition should be made to the reserve.

The Department of the Interior approved this second request in 1906 when the Secretary of that Department wrote to the Secretary of Indian Affairs:

> *I am directed to inform you that there would appear to be some reasonable ground why the application should be favourably considered as the area set aside for each family is much under the grant which is usually made by the Government for purposes of this kind.*

Subsequently, by Order in Council P.C. 2215 dated October 2, 1911, 160 acres were set aside as an addition to Indian Reserve No. 44 and 1,920 acres as Fisher River Indian Reserve No. 44A.

This case would not seem to be a good example of lands having been set aside as residual entitlement. However, it has been included since it seems to illustrate a recognition by both the Department of Indian Affairs and Department of the Interior of the inequity of those Treaties which provided for only 160 acres per family of five as opposed to 640 acres per family of five.

Indian Lands
October 1974

BIGSTONE (WABASCA) BAND – TREATY 8 – ALBERTA

This Band adhered to Treaty 8 in 1899, which entitled the Indians to reserve lands in the amount of 128 acres per person. The Band selected four reserves in 1909 when their population was 263, giving them an entitlement of 33,664 acres. These reserves were surveyed in 1913 and set aside by Orders in Council in 1924, 1925 and 1930 and together they comprised 37,352 acres, as follows:

Wabasca Indian Reserve No. 166	21,040 acres
Wabasca Indian Reserve No. 166A	1,563 acres
Wabasca Indian Reserve No. 166B	6,094 acres
Wabasca Indian Reserve No. 166C	8,655 acres
	37,352 acres

Thus, in 1913, it would appear that the Band's entitlement was fulfilled. However, by 1937 a number of non-treaty Indians had joined the Band and application was therefore made to the Province of Alberta for additional lands. On April 23, 1937, H.W. McGill, Director of Indian Affairs wrote to the Deputy Minister of the Alberta Department of Lands and Mines:

> I have to draw to your attention the situation with regard to reserves under Treaty 8 for the Wabasca Indians. *When Indian Reserves No. 166, 166A, 166B, 166C, containing altogether 37,352 acres were laid out in 1913, an additional area of 4,480 acres was due to them under the quota provided for in Treaty No. 8 if the lands were taken in common. Since then 213 non-treaty Indians have joined this band which entitles them to a further area of 27,264 acres, or a total addition of 31,753 acres.* As non-treaty Indians are still joining the band it does not seem possible to state the total area to which this band may be entitled but it

> does seem advisable to select some of the additional land to which they are now entitled as soon as possible.

It is noted that in addition to requesting lands for the "non-treaty" Indians, Mr. McGill also calculates the original entitlement of the Band according to the population at the date of survey, in 1913, and not the date of selection, in 1909.

A 14,431 acre parcel of land was subsequently surveyed, with Provincial approval, as part of the Band's residual entitlement under Treaty 8. The matter was then overlooked for a number of years and it was not until 1956 that the matter was again raised with the Province. At that time, H.G. Jensen, Deputy Minister of the Alberta Department of Lands and Forests wrote to R.F. Battle.

> *It is noted that 14,434.1 acres were selected out of 31,733 acres to which the Band of Indians were entitled.* The outer boundaries of the land selected were surveyed and posted by T.W. Brown and contain 14,434.1 acres exclusive of statutory road allowances, rivers and water areas.

. . . . . .

> It is noted that Mr. T.W. Brown's survey was made in 1937. *As there are still 17,299 acres to be selected for this band of Indians, I wondered if some progress has been made in that selection, and if probably the whole amount might be transferred at the same time.*

Mr. Battle replied:

> The selection of the additional 17,299 acres for this Band is receiving the active consideration of the Band, but as they are of a rather nomadic type, it is difficult to get them together for a definite decision. It is not expected that this can be finalized before next Spring, and as indications are that the area which will be chosen will not adjoin the proposed Reserve No. 166D, I do not feel that the transfer of Reserve No. 166D should be delayed until that time.

Accordingly, in 1957, Alberta transferred the 14,432.7 acre parcel to Canada and in 1958 the lands were set aside by Federal Order in Council P.C. 1958-931 as Wabasca Indian Reserve No. 166D. No further action appears to have been taken, however, to select the remaining 17,299 acres for the Wabasca Band.

It thus appears that, in this case, additional lands were requested from the Province of Alberta as part of the entitlement for 213 non-treaty Indians who joined the Band between the years 1913 to 1937.

Indian Lands
October 1974

Files: 777/30-17 vols. 1&2
777/30-17-183

GRAND RAPIDS BAND – MANITOBA

This Band adhered to Treaty 5 in 1875 which entitled the Indians to Reserve lands in the amount of 32 acres per person.

The Grand Rapids Indian Reserve No. 33, containing 2,752 acres, was surveyed for the Band in 1877. At this time the population of the Band was 137, entitling the Indians to a total of 4,384 acres.

In 1891 application was made to the Department of the Interior for an addition to the Grand Rapids Reserve, however, at this time was proposed to exchange part of the existing reserve for these lands. It later became evident that the Department of the Interior was willing to provide the additional lands without an exchange and the matter of a surrender of part of the Grand Rapids Reserve was therefore dropped.

The additional lands, comprising 1,899 acres, were set aside as an addition to the Grand Rapids Reserve by Order in Council P.C. 312 in 1896. The total area of land set aside for the Grand Rapids Band was then 4,651 acres, which fulfilled their entitlement under Treaty 5. It appears however that when requesting these additional lands, the Department of Indian Affairs was unaware that the Grand Rapids Band was entitled to further lands under treaty and it was coincidental that the lands requested fulfilled the Band's residual entitlement under Treaty 5.

Indian Lands
October 1974

Files: 578/30-48-33 Vol. 1 & 2

SLAVES OF UPPER HAY RIVER BAND – TREATY 8 – ALBERTA

This Band adhered to Treaty 8 in 1900 which entitled it to reserve lands in the amount of 128 acres per person. The Band selected lands in 1940, at which time its population was 554, entitling the Indians to a total of 70,912 acres.

It was not until 1946 that official application was made to the Province of Alberta for these lands and, subsequently, in 1949 and 1950, the following reserves were transferred from Alberta to Canada for the use and benefit of the Slaves of Upper Hay River Band:

Amber River	211	5,763.00 acres
Bistcho Lake	213	876.20 acres
Bushe River	207	5,170.00 acres
Hay Lake	209	30,530.00 acres
Jackfish Point	214	256.00 acres
Moose Prairie	208	7,741.00 acres
Upper Hay River	212	115.00 acres
Zama Lake	210	5,701.00 acres
		56,152.20 acres

In 1955 an official request was made to the Province to exchange Moose Prairie Reserve No. 208, since the reserve lacked agricultural potentialities. In exchange, sufficient land was requested to fulfil the remainder of the Band's treaty entitlement, which appears to have been calculated on the current Band population of 583 on June 1, 1955, as indicated in the following correspondence:

a) On December 1, 1955, Laval Fortier wrote to H.G. Jensen, Deputy Minister of the Alberta Department of Lands and Forests:

> Following investigation by a Dominion Land Surveyor and a representative of the Provincial Government, Moose Prairie Indian Reserve No. 208, in Twp. 110, R. 20, W3M, was transferred to the Government of Canada by Executive Order of the Province of Alberta No. 817/49 dated the 14th of July, 1949. The area is 7,741 acres and the Reserve was established for the Slaves of Upper Hay River Band of Indians.
>
> After establishment of the Reserve, it became apparent that it was unsuitable for farming, being an alkali flat. Because of lack of agricultural potentialities, the Reserve will not provide for the ultimate establishment of the Indians on the land.
>
> The Indians themselves would like to have the existing Reserve exchanged for land adjoining and to the south of Bushe River Reserve No. 207. *The proposed area, 22,400 acres, would still leave the total acreage included in Indian Reserves set aside for this Band below the treaty land credit. The population of the Slave Band of Hay Lake and Upper Hay River was 583 at treaty paying time in June last.* The location and area of existing Reserves for this Band are:
>
> . . . . . .
>
> *If the proposed exchange was effected, the total acreage set aside would be 70,810. The pertinent clause in Treaty No. 8 adhesion No. 3, approved 1901 is:*
>
> "And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands who desire reserves, the same not to exceed in all one square mile for each family of five – and for such families or individual Indians as may prefer to live apart from band reserves, to provide land in severalty to the extent of 160 acres to each Indian . . ."
>
> _____"

b) On October 10, 1956, R.F. Battle, Regional Supervisor of Indian Agencies wrote to H.J. Jensen:

> If you will refer to Colonel Fortier's letter of December 1st, 1955, and your reply of December 19, 1955, you will note that we had requested the exchange of Moose Prairie Reserve #208 for lands lying adjacent to the present Bushe River Reserve #207, and we also asked for additional lands in this area to take care of a portion of the remaining credit of the above band. *This was given approval in principle by your Department on the basis of a total of 22,400 acres adjacent to the Bushe River Reserve. This left a remaining credit for the Slave Band in the amount of 3813.45 acres, and it was your request that we make application for lands to complete the entire allotment for the Slave Band.*

Since then you and I have had discussions with respect to enlarging the Upper Hay River Reserve #212, which has a present acreage of 115. We have had a University undergraduate, Mr. Findlay, making soil analysis in the Fort Vermilion area during the past summer, and I am attaching copies of his reports, which may be of interest to your Department.

After a series of negotiations with the Slave Band Council, they have now agreed to take the balance of their land credit in the vicinity of their present reserve at Upper Hay River. The lands requested are as follows:

. . . . . .

This extension to the Upper Hay River Reserve would amount to approximately 3860 acres, which exceeds the land credit by approximately 55 acres. It is realized of course, that we are working in approximations and the actual acreages of the sectional fractions will not be known until a survey is carried out.

Accordingly, in 1960, in exchange for the Moose Prairie Reserve, the Province conveyed to Canada 22,512.3 acres as an addition to Bushe River Indian Reserve No. 207 and 3,389 acres as an addition to Upper Hay River Indian Reserve No. 212. The total acreage received by the Slaves of Upper Hay River was, therefore, 74,311.85 acres, calculated as follows:

56,152.20 acres -
7,741.65 (Moose Prairie)
48,410.55 &
22,512.30 & (add. Bushe River)
3,389.00 (add. Upper Hay River)
78,311.85

Indian Lands
October 1976 [sic]

Files: 701/30-1-1
775/30-1 Vols 1-3
775/30-12
775/30-3-207
775/30-3-209 Vols. 1&2
775/30-3-210
775/30-3-211
775/30-3-212 Vols. 1&2
775/30-3-213
775/30-3-214

LAC LA RONGE BAND: – TREATY NO. 6 – SASKATCHEWAN

The Lac La Ronge Band adhered to Treaty 6 in 1889 which entitled it to reserve lands in the amount of 128 acres per person.

Prior to 1949 various parcels of land were set apart for this Band as partial settlement of its Treaty land entitlement. In 1961 the Band requested the remainder of the lands to which they were entitled under Treaty and a formula was developed to calculate their outstanding entitlement at 63,330 acres, as follows:

1897 – Population – 484 Entitlement	–	61,952 acres
Lands Received	–	32,007.9 acres
or	–	51.65%
1909 – Population – 526 Entitlement	–	67,328 acres
Lands Received	–	5,354.1 acres
or	–	7.95%
1948 – Population – 969 Entitlement	–	124,032 acres
Lands Received	–	6,400 acres
or	–	5.16%
1961 – Population – 1404 Entitlement	–	179,712 acres
Lands Received	–	32,007.9
to date		5,354.1
		6,400.0
43,762 acres		
or	–	51.65%
		7.95%
		5.16%
		64.76%

Balance 35.24% or 63,330 acres.

On April 20, 1964, J.G. McGilp, Regional Supervisor in Saskatchewan, reported to Ottawa:

> *At a meeting in Regina yesterday, Mr. Churchman informed me that he is prepared to recommend the allocation of 63,330 acres of land to the La Ronge Band to extinguish their land entitlement under Treaty 6.* This was the figure raised with him in our request of two years ago and he believes that it only remains to clarify the actual parcel or parcels of lands. *I informed him that subject to your approval and that of the Indians, I accept the figure of 63,330 acres, based on the band population of 1,404 when the request was made in 1961.*

Subsequently, by Band Council Resolution dated May 8, 1964, the Lac La Ronge Band resolved:

> That We, the Councillors of the Lac La Ronge Band, hereby agree to accept 63,330 acres as full land entitlement under No. 6.
>
> *(1) The land entitlement will be based on 35.24% of the Band population of 1,404 in 1961; the date we requested land from the Province of Saskatchewan and will comprise 63,330 acres.*

(2) Mineral rights will be transferred with the land.

(3) Land transferred will reach the high water mark.

(4) This selection of lands makes up the full and final land entitlement of the Lac La Ronge Band under Treaty No. 6.

The lands were transferred to Canada and set apart for the use and benefit of the Lac La Ronge Band by Federal Orders in Council, as follows:

i) 32,640 acres set apart as Morin Lake I.R. 217 by Order in Council P.C. 1968-1782.

ii) 11,092 acres set apart as Grandmother's Bay I.R. 219 by Order in Council P.C. 1970-1613.

iii) 17,338 acres set apart as Biltern [sic] Lake I.R. 218 by Order in Council P.C. 1973-2676.

iv) 2,315 acres set apart as an addition to Morin Lake, I.R. 217 by Order in Council P.C. 1973-2677.

Indian Lands
October 1974

Files: 672/30-12-155 vol 1-3
672/30-12-218 vol 1-2
672/30-12-217 vol 1-2
672/30-12- vol 1-2
672/30-12-219

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APPENDIX B

MULTIPLE SURVEYS REPORT

WRITTEN BY KEN TYLER AND BENNETT MCCARDLE

Which comprises

Appendix B, "Land Entitlement in Cases of Multiple Survey – Recent Discussions (1974-1978),"

C, "Case Summaries and Policy Correspondence relating to Land Entitlement in Cases of Multiple Surveys (before 1974)," and

D, "The Compromise Formula (1961-1974): Partial Compliance with the Indian Position Lac La Ronge (1961-1966)," of a letter from Joe Dion, President, Indian Association of Alberta, to Hugh Faulkner, Minister of Indian Affairs, November 30, 1978

(attached documents not included)

MULTIPLE SURVEYS REPORT – APPENDIX B

LAND ENTITLEMENT IN CASES OF MULTIPLE SURVEY – RECENT DISCUSSIONS (1974-1978)

1. An intensification of negotiations between the bands and the Federal Government over Treaty land entitlement grants took place immediately after 1973, when the Federal Minister of Indian Affairs undertook to fulfill the "lawful obligations" of the Government towards the Indian people. However, the success of this undertaking depended in part upon the Federal Government's determination to acquire from the Provinces, under the Natural Resources Transfer Agreements, enough land to fulfill the terms of the Treaties.

2. The Federal Government's acceptance and advocacy of the Saskatchewan formula in negotiations with all three Provinces during 1977 and 1978 (Documents 58 to 61 and 67) was a significant step forward to this end. However, the actual implementation of the formula, and in particular its application to cases of multiple survey, has been the subject of a serious misunderstanding between the three Prairie Indian associations (on the one hand) and the Office of Native Claims (on the other). This disagreement threatens to undermine the basis for current negotiations on a significant number of outstanding Treaty entitlement cases.

3. The misunderstanding has developed in very recent times, but has originated in the divergent approaches of the two parties toward the identification of their responsibilities to the bands. The Indian associations, working from the traditional understanding of the spirit of the Treaties and from detailed archival research, have expressed a view consistent with findings from both sources. This view is that Treaty land entitlement, intended as it was to meet the Indian people's needs for residence and economic support over long periods of time, should grow or shrink indefinitely along with band population, until it is fulfilled by the band's own decision to take their full and final allocation of land. The right of the bands to delay their choice of all or part of their land until they were ready to use it, and to take land on the basis of full band population at survey, has been repeatedly confirmed by the Federal Government's actions from the Treaty negotiations to the present (See Appendices C and D). This pattern is further confirmed in the principles of the Saskatchewan formula of 1977, which provides that the Treaty land entitlement of bands with unfulfilled *or partly fulfilled* entitlement shall grow up until the present day (as represented by the arbitrary cut-off date of December 31, 1976). This agreement, although itself a concession by the bands limiting the scope of their choice to a fixed date unrelated to the band's needs, is as close as is practically possible to the Indian understanding and experience of past Treaty land entitlement grants.

4. The Office of Native Claims, however, has recently adopted the position that entitlement was fixed at and by a totally arbitrary point – the date of the *first occasion on which any land was set aside for the bands*. It is a fact that many bands did take their land, by choice or necessity, in the course of multiple surveys over extended periods of time. But in fact research has *not uncovered any precedent for this position* among all past cases of multiple survey. Nor does the logic of the Saskatchewan formula provide for the fixation of entitlement at any point whatever, other than at a final grant or a cut-off date agreed upon between the band itself and the Federal Crown.

5. Reasons for the Office of Native Claims' present interpretation of the Saskatchewan formula (as it applies to multiple surveys) emerge from a reading of policy correspondence since 1974. It appears that the position originated, during a period (1974-1976) in which parallel but separate negotiations were being held on behalf of several bands in different provinces. The Lands Branch of D.I.A.N.D. was to some extent confused as to the policy to be followed in entitlement calculations; the status of the "compromise formula" was still in doubt; there was continuing confusion concerning the existence of any precedent whatever for such calculations; and further misunderstandings arose out of discussions of the technical meaning of the terms "selection," "survey" and "first survey"; culminating in the transfer of negotiations from the Lands Branch to the O.N.C. in late 1977. These developments are described in more detail below.

6. By mid-1974 the Federal Government had reached a stalemate in its entitlement negotiations with the Provinces (and in particular Manitoba) the details of which are given in Appendix D. Manitoba's rejection of the "compromise formula" in the Island Lake negotiations – a formula which continued, in modified form, D.I.A.'s previous practice of granting land according to population at each successive survey – was followed by similar rejections from Indian bands in Manitoba and Saskatchewan. The Peter Ballantyne band in Saskatchewan specifically cited past practice in its refusal to negotiate on the compromise formula (Document 46). The Minister of Indian Affairs, however, would not positively commit himself to the bands' position, the compromise formula, or the Province of Manitoba's minimum offer (Document 122).

7. The Lands Branch and other offices with D.I.A.N.D., therefore, continued throughout 1974 and 1975 to research the history of bands with outstanding land entitlement. Correspondence shows that this research proceeded as might be expected from the state of negotiations, without a basis of any definite policy as to how to calculate entitlement. A certain confusion was displayed even within the confines of the same branch of Indian Affairs. For example, in a brief dated in late 1974 (Document 47) the head of the Lands Branch calculated four cases of entitlement involving multiple survey by using population at selection date before initial survey (Brokenhead and the Pas), at date of second survey (Cross Lake) and at date of second survey for a band faction involved in a band split (Gambler).

8. The work done by Lands Branch researchers up to this date both reflected and in its turn increased the confusion. Directions to researchers to tabulate total acreage surveyed, and to pinpoint date of survey appear to have been given without specific instructions to identify as such the special cases involving more than one past allocation. As a result, researchers (perhaps quite unintentionally) produced figures and summaries that masked the actual incidence of distinct and multiple surveys for individual bands. (See e.g., Documents 44, 45, 54 and tabulations dated 1967-1973 on D.I.A.N.D. (Ottawa) File 701/30-1, Vol. 1).

9. Therefore, the foremost policy question faced by the Lands Branch in 1974-1975 was not, (as previous negotiations suggested it should have been) the implications of the policy advocated on behalf of the Island Lake bands in 1969-1970 and put forward by the Peter Ballantyne and other bands in 1973-1974. Instead, Lands concentrated on the definition of the date of (initial) "selection" – broadly understood as the first date at which the reserve was effectively requested by, used, or set aside for, a band. Detailed research was called for (Document 48) to determine the exact historical circumstances of this selection in the first instance. The research done under this head had the effect of showing that "selection" was generally hard to pinpoint, and that a more definite date – specifically the date of the act of surveying on the ground – was preferable for use in calculation of outstanding legal entitlement (Document 53).

10. The same research also developed a further source of confusion: that of resurvey of abandoned reserves. In a number of cases during the 1870's and 1880's, the initial survey of a reserve had been rejected by a band as unsatisfactory, or by the Government as conflicting with non-Indian claims. This survey was abandoned, without formalities, and a new reserve was surveyed and confirmed for the benefit of the band. A distinction was necessary between the "first" (abandoned) and "second" (accepted) initial survey in each individual phase of the band's land allocation, and this distinction was not always clearly made. As the head of the Lands Branch used the term "first survey" in 1977 (Document 56), it appeared to indicate only the *first act of survey in each of two separate allocations of land* for a single band. (Thus the band had two "first surveys," one for each confirmed grant.) In the absence of any clearly stated policy on multiple allocations, the term "first survey" remained to some extent ambiguous.

11. The decision to specify date of *survey* rather than date of *selection* together with the format of the research used to supply information to the negotiators on a casual basis, had the effect of gradually committing the Lands Branch to calculations based exclusively on first (initial) surveys only. That this was not either their original intention nor a definite policy directive (until at least 1976) is suggested by the contradictions in data provided on request to outsiders.

12. In spite of this political and terminological uncertainty, the Lands Branch compiled and submitted to each of the three Provincial Governments, in the early summer of 1975, preliminary lists of bands with outstanding entitlement, together with *several alternative methods* of calculating the amount of land due in each case. For the reasons described above, the information relating to certain cases involving multiple survey was inaccurate. Copies of the Saskatchewan Indians did not communicate effectively to that association the fact that D.I.A. had settled on a definite policy with regard to this issue.

13. On the other hand, at the same time as these submissions went from Ottawa to the Provinces, the Federation of Saskatchewan Indians clearly expressed its own position on the issue of multiple survey calculations in a policy letter dated July 3, 1976. This letter – which received no direct response from the Minister and no response whatever until 1976 – stated clearly that:

> To determine whether a band received its entitlement to land under the treaty, the population figures from the latest annuity paysheets and the most recent band lists prior to the original survey of the reserve must be used. Should a band have received insufficient land based on the treaty formula at the original survey, its full entitlement to land shall be determined by its population . . . at the time that confirmation of additional reserve land is made. This formula is to be used until such time as the band receives its full entitlement to land under the treaty based on its population as shown by the latest annuity payment and most current band list prior to the confirmation of the parcel to give that band full entitlement to land under the treaty. (Document 2, Paragraph 2)

From that time on, the F.S.I. acted upon the principles expressed in Chief Ahenakew's letter. Similarly, the Indian Association of Alberta proceeded to make its calculations on behalf of the bands based on population at each successive survey, according to precedents observed in the course of its historical research.

14. The Department of Indian Affairs, however, had yet to make a policy decision on the issue of partial land entitlement generally. A number of other cases mainly involving single-survey rather than multiple survey grants in the past were at issue, and neither the Provinces nor the bands (Manitoba and Saskatchewan), involved, appeared ready to settle on a mutually agreeable basis. The Federal Government thus took the step of seeking a test case upon which to proceed to the Federal Court for a final solution of the issue of partial land entitlement.

15. The case it decided upon was that of the Tall Cree band in Treaty 8, Alberta. A temporary reservation of land for this band, based on full band population at 1966, had been awaiting formal confirmation from D.I.A.N.D. This reservation – overlooked by Ottawa for nine years – was partially revoked by Alberta in 1975 for reasons irrelevant to the size of the grant (See Appendix C, Paragraph 17). The Minister of Indian Affairs, while objecting to infringement of the reservation, admitted privately to Alberta that the size of the band's claim was in fact a

matter for debate and negotiation (Document 51). In March of 1976, the Federal Government – again, without notice to the band – drafted a letter proposing a Federal Court resolution of the issue, using Tall Cree's situation as a test case (Document 54). It is unclear whether this proposal was in fact forwarded to the Province, but it is nevertheless obvious that the Federal Government was sufficiently uncertain of its obligations that it felt the need for a judicial solution, even in the absence of declared opposition (at that date) from the Province involved.

16. While the Federal Government considered this extreme measure, research and negotiation continued, involving both the Government and the Indian representatives. At a meeting in May of 1976, the Federal representative referred to the F.S.I.'s policy statement of July 1975 (Document 2, Paragraph 2) as requiring further negotiation (Document 55, a – b), but no such action was taken. The Lands Branch's own definition of the term "first survey" remained unclear (Document 56).

17. It was not until February of 1977 that the point was debated with respect to a specific case, that of Yellow Quill's Band (Document 57). On this occasion, and in contrast to its previous treatments of this and similar cases, D.I.A.N.D. was clearly using population at first (initial) survey and allocation as the date at which entitlement was fixed once and for all. The F.S.I.'s representative did not press the real difference that existed between the Federation's general policy and that of the Government. However, he did notify the D.I.A.N.D. representative that a reference back to the band was necessary. This being so, it seems that a genuine misunderstanding may have arisen from this meeting. It is regrettable that the contradiction clearly evident between the methods used on either side was not pursued at that time.

18. One reason for this inaction may be found in the approval of the Saskatchewan formula by the Federal Minister of Indian Affairs in the Spring of 1977 (Documents 58 and 59). The terms of this agreement led the Indian associations to believe that their method of calculation had been accepted and vindicated. It was not logical to believe that entitlement for some bands, who had had the benefit of only one survey in the past, might now receive land on the basis of population at December 31, 1976; while others (who had by chance or choice received land through more than one survey, whether that one survey had taken place in 1876 or as late as 1976) were restricted to the amount by which a survey had fallen short *as much as a century earlier*.

19. The Associations' trust that their assumptions were correct was confirmed by the Federal Government's vigorous advocacy of the Saskatchewan formula in negotiations with the Alberta Government in 1977 and early 1978. Indeed, the Minister of Indian Affairs even cited the precedents set by surveys for the Little Red River and Slavey of Upper Hay River bands in the 1950's – two cases where land had been granted by multiple survey based on population at each successive survey. The Minister emphasized that the aim of this formula was to

provide a land base commensurate to the needs of the Indian people (Document 60 and Appendix C, Cases 4 and 5).

20. The Indian Association of Alberta's position paper on Treaty land entitlement was developed in late 1976 and throughout 1977. It outlines the I.A.A.'s method of calculation in cases of multiple survey, together with examples drawn from past surveys in Alberta. This paper (Documents 1 and 62) was presented to the Federal Government in January of 1978. The Office of Native Claims, however, did not examine this document closely enough to determine the difference between the I.A.A.'s position and that which they had inherited from the Lands Branch upon the takeover of responsibilities by the O.N.C. in mid-1977.

21. In March of 1978, the Indian Association of Alberta held its first meeting with the Office of Native Claims on the subject of technical aspects of entitlement research. Five major areas of disagreement between the O.N.C. and the I.A.A. were identified by the former at that meeting: the method of calculation was not one of them. As explained in Document 66, the O.N.C.'s outline of its calculation principles, basing a band's entitlement on population at "first survey," was not expressed as a contradiction of the I.A.A.'s position paper. Furthermore, due to the inherent ambiguity of the phrase, it was not understood by the I.A.A. at that meeting in the sense intended by the O.N.C.

The first clear notice to the I.A.A. of the O.N.C.'s position came indirectly in a letter (Document 63) to the Chief of the Alexis band, received in early May 1978, but not referred to the general land entitlement bill until September. The Federation of Saskatchewan Indians reiterated its position of July 1975 (in the context of a different discussion) in a letter to O.N.C. in May 1978 (Document 64). It was not until a meeting in late June of 1978 that the O.N.C. and F.S.I. thoroughly discussed the nature of the disagreement (Document 65). A meeting with similar results took place between the I.A.A. and O.N.C. on July 7, 1978 (Document 66).

23. At each of these meetings, the parties reaffirmed their respective positions and agreed to disagree. The O.N.C. undertook to ask the Minister of Indian Affairs to send an official confirmation of the O.N.C.'s position. On July 31, 1978, such a letter went out to each of the three Indian associations involved, together with an outline of "criteria used in determining bands with outstanding entitlements in Saskatchewan," dated August 1977 (Documents 67 and 68).

24. This set of "criteria," according to the Minister represented the Department's interpretation of the agreement known as the Saskatchewan formula, and provided a "sound and equitable basis" for the calculation of outstanding Treaty land entitlement. This view cannot be shared by the Indian associations.

25. The most unusual feature of the "criteria" paper is that it contains *no reference whatever to the principle of entitlement calculations based on population at December*

31, 1976 – the essential element of the Saskatchewan formula. Entitlement is treated, in Section 4 of the paper, as being fixed at first survey. It alleges that historical precedents are uniformly (with a few exceptions of an unusual kind) in favour of this assertion. Finally, the application of "compromise formula" at Lac La Ronge is treated as an abnormally generous, and not an unusually restricted, interpretation of the Government's past practice.

26. Therefore, this set of criteria is not merely out of keeping with the I.A.A.'s and the F.S.I.'s practice in calculating entitlement and with historical precedent; it is in conflict with the Saskatchewan formula itself as endorsed by the Minister of Indian Affairs. Whether this contradiction is intentional or not is unclear, but (whatever its origin) it must be contrasted with the countervailing evidence. To this end, Appendix C sets out adverse cases and policy correspondence. Appendix D accounts for the most obvious "exception" to the Saskatchewan formula as an exception to and compromise with a *more* generous – *not a less* generous – alternative solution.

27. The O.N.C.'s position – which is essentially the same as that put forward by the Province of Manitoba in 1969-1970 and rejected by D.I.A.N.D. at that time – is therefore open to attack on logical and historical grounds, as well as the general moral or political grounds put forward in the past, both by Indian representatives and by officials within the Department of Indian Affairs.

MULTIPLE SURVEYS REPORT – APPENDIX "C"

CASE SUMMARIES AND POLICY CORRESPONDENCE RELATING TO LAND ENTITLEMENT IN CASES OF MULTIPLE SURVEY (BEFORE 1974)

1. **The Treaty Negotiations**: Clear assurances were given by the Crown's representatives at the various Treaty negotiations that the bands would not be forced to choose reserves until such time as they were ready to settle on the land and begin to cultivate or otherwise make use of their land allocation. In other words, the Treaty right to land was not to be tied to, or fixed by, any particular date. The needs of the bands themselves, as these changed over time, were to determine the Crown's actions in fulfilling its obligation to grant land under the Treaty.

This point was made repeatedly in the course of Treaty negotiations. At the discussion of Treaty Three in 1873, Crown Commissioner Alexander Morris found that it was

> impossible, owing to the extent of the country treated for, and the want of knowledge of the circumstances of each band, to define the reserves to be granted to the Indians. It was therefore agreed that the reserves should be hereafter selected by officers of the Government, who should confer with the several bands, and pay due respect to lands actually cultivated by them. (Document 3)

Although Morris recommended that the government have the reserves selected "with all convenient speed" his intention was merely to safeguard the Indians' interest in their territory against the intrusion of non-Indian claims.

At Treaty Four negotiations in 1874, Morris emphasized the connection between the bands' readiness to begin farming and the government's obligation to lay our reserves (Document 4) but in 1876 he cautioned Treaty Six bands to

> be sure to take a good place so that there will be no need to change; you would not be held to your choice until it was surveyed. (Document 5)

The Crown's intention was to suit its performance of Treaty obligations to the band's own pace of change.

> to help you in the days that are to come [;] we do not want to take away the means of living that you have now [;] we do not want to tie you down; we want you to have homes of your own where your children can be taught too raise for themselves food from the mother earth. You may not all be ready for that, but some, I have no doubt, are, and in a short time others will follow. (Document 6)

Indeed, just as Morris expected, many of these bands chose lands almost immediately, while others waited for years until the need for reserve land took precedence over other considerations.

In the northern parts of the Prairie Provinces, however, a delay between the time of Treaty negotiations and the survey of reserves was the rule rather than the exception. The Treaty Eight commissioners explained that

> As the extent of the country treated for made it impossible to define reserves or holdings, and as the Indians were not prepared to make selections, we confined ourselves to an undertaking to have reserves and holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required. There is no immediate necessity for the general laying out of reserves or the allotting of land . . . Indeed, the Indians were generally averse to being placed on reserves. It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves. We had to very clearly explain to them that the provision for reserves and allotments of land were made for their protection, and to secure them in perpetuity a fair portion of the land ceded, in the event of settlement advancing. (Document 7)

These assurances were made by the surveyors sent out by the Department of Indian Affairs, who, when surveying land for a band, used the population of the band at the date of the survey to determine the size of their entitlement. Very recently, the Treaty assurances cited above have been used (by H.T. Vergette, head of the Land Surveys and Titles section of the Department of Indian and Northern Affairs) in support of the principle that land entitlement for the Island Lake band should *continue to increase until fully satisfied.* (Document 95)

2. **Early Surveys of Reserves** were generally intended to fulfil completely the entitlement of the band in question. They were usually based on a formula, contained in the Treaty text, which allotted a specified number of acres per person in the band, the amount per capita varying according to the particular Treaty involved. The date at which the band's population was taken for purposes of calculation was a date *at or within a year of the survey itself,* depending on the date of available band membership lists or other reliable sources of information.

3. Many of these initial surveys did in fact fulfil the entitlement of the bands in question. Some, however, did not. There were various reasons for this shortfall in the size of the allotment.

4. Sometimes, owing to conflicting claims or to the band's own dissatisfaction with the grant, the original survey was cancelled and the reserve abandoned before its final approval by the Government. A new survey was made on their behalf, superseding the original first survey, and on the basis of population at the date of the *new* survey – *not* according to population at the time of the original request.

5. In other cases the initial survey only partially fulfilled the band's entitlement as calculated at that survey. Sometimes completion was deliberately delayed by the wishes of the band itself, or because of disagreement within the band. Often, however, the government

failed to respond to a band's definite requests for land out of a lack of funds or staff, or through error and confusion, or because of a desire to force the band to change its choice of land to one more in keeping with the Department's wishes. In the years after 1930, however, the Department of Indian Affairs began to advise bands with partial outstanding entitlement to postpone selection of their final allotment until they had full information concerning the value of their lands (e.g. documents 27A, 70-73, 89-94). The result, whatever the motive, was the same for most bands: a widening gap between initial and final survey, a steadily increasing band population, and a shrinking land area from which to choose their reserves.

6. **In the period before 1900**, there were relatively few cases of multiple surveys as such. The Department of Indian Affairs had in some cases not yet become aware that entitlement had not been fulfilled. However, cases such as that of the Yellow Quill surveys illustrate D.I.A.'s procedure for closing out partial land entitlement surveys.

CASE 1 (1898): YELLOW QUILL BAND (NUT LAKE, KINISTINO AND FISHING LAKE BANDS – TREATY 4, SASKATCHEWAN

These three bands were originally considered as a single band, known as Yellow Quill's, which adhered to Treaty 4 in 1874. In 1881 land was surveyed for the band at Nut Lake and Fishing Lake. This survey did not fulfil the band's entitlement at that time as determined by the population at date of survey.

In 1898 D.I.A. received a request for the survey of land for the band's third group (Kinistino) which did not wish to share in the reserves laid out in 1881. To determine the band's outstanding entitlement in 1898, D.I.A. officials in both Ottawa and Regina used the band's total population at 1898, as shown in the 1898 Treaty annuity paylists. Land was set aside on this basis, but due to an error in calculation it proved insufficient to fulfil entitlement at that date. (Documents 8-16)

7. **For the period from 1910 to 1915**, further examples can be cited. This was a time of increased activity in D.I.A.'s survey office, so that a large number of long-pending survey requests were carried out in both the older and newer Treaty areas.

CASE 2 (1914): HORSE LAKES BAND (TREATY 8, ALBERTA)

The Beaver of Dunvegan Band (now known as the Horse Lakes Band) was granted reserve land north of the Peace River in 1905, which was insufficient to provide for its total population at that date.

In 1911 a faction of the band living south of the Peace River, who had not participated in the 1905 selection, requested another reserve to be located near its own territory. In 1914, therefore, D.I.A.'s surveyor laid out land enough to bring the band's total holdings up to their entitlement according to its population in 1913. The

band's entitlement was therefore fulfilled by this second survey. (Documents 17 and 18)

8. The same logic was applied to other such cases in the 1920's and 1930's, which for various reasons were not then resolved. (Examples include the Cross Lake, Peter Ballantyne, and Lac La Ronge cases: see Documents 19-24, 24A, 26-27A)

9. By the time of the transfer of Crown Lands and natural resources from Federal to Provincial control in 1930, many bands had still not received their full entitlement under the Treaties. Therefore, during the negotiation of the transfer agreements, the Federal government specified that further areas of land be made available by the Provinces when and as necessary to fulfil the terms of the Treaties.

10. The Deputy Minister of Indian Affairs (D.C. Scott) specified, while drafting the agreements in 1929, that D.I.A. had no right to place any limit on the total acreage to be granted out of Provincial lands for reserves in the future. Band entitlement was to continue to rise (or fall) along with band population, until such time as it was completely fulfilled. Moreover, the Department of Indian Affairs (according to the version of the resources agreement then under discussion) was not required to consult the Provinces with respect to any aspect whatever of Treaty land entitlement grants. (Documents 25 and 25A)

11. From 1930 onwards (and up almost to the present day) the Federal government has made repeated grants of land, by arrangement with the Provinces, intended to fulfil Treaty land entitlement with bands who received part of their allocation before 1930. At first, D.I.A. met with resistance from Provincial governments – especially from Manitoba – which forced Departmental officials to articulate their views on the extent of their obligations. After some discussion, D.I.A. in 1937-38 decided to begin surveys for certain bands based on their present-day population at second (or third) survey. (Documents 26-27)

12. One anomalous exception to the practice of granting land based on population at second survey is found in the Janvier Band surveys of 1922 and 1930.

CASE 3: JANVIER BAND (TREATY 8, ALBERTA)

The first survey for this band was made in 1922 on the basis of the surveyor's own estimate of the band's needs, since the nature of the territory and the band's movements prevented him from personally enumerating all those who might be members of the band (but who were not shown on Treaty paylists). The surveyor's figure was in fact larger than that which appeared on the Treaty paylists. After completion of his survey, he pointed out the need for a temporary reservation of land adjacent to the reserve to accommodate any further band members who might present themselves in

the near future. Due to resistance from the Department of the Interior, D.I.A. did not make this further reservation.

The second survey, in 1930, was not made on the basis either of the surveyor's estimate in 1922 or the 1922 paylists, or paylists available for 1929. Instead, use was made of a certain list of figures dated *1924*, which had been specifically transmitted for the purpose by the local Indian Agent, and which was supplemented by the population of one extra family known to be living with the band although officially inscribed on a neighbouring band's paylist. This figure was the first and most easily available figure which came to hand when D.I.A. officials in 1928 confronted the confused situation of this band. Land was set aside on the basis of this composite figure (which reflected natural increase in the families involved between 1922 and 1924).

13. It is obvious that the formula used in the Janvier case can in no way be considered a precedent for the fixation of entitlement at first survey. Instead it represents (like the later "compromise formula") an imperfect application of the principle that entitlement varies over time along with the population of the band. As such it is (at worst) irrelevant to the debate over the fixation of entitlement according to any particular date of survey.

14. During the 1950s, after the slowdown in D.I.A. activities caused by the war, requests were received from several bands in Northern Alberta for surveys of additional land. These were actively promoted by D.I.A. officials at all levels. However, when it came to the determination of the amount of land to which each band was entitled, the Department initially displayed confusion concerning its own obligations and past practises. (Documents 28 and 30)

15. D.I.A.'s Superintendent of Reserves and Trusts accordingly decided to define his position by submitting the matter to D.I.A.'s legal advisor. His response (Document 29) noted the ambiguity of the Treaty provisions and, accordingly, used as a guide to interpretation the actions taken by D.I.A. in the past – as outlined by D.C. Scott during the resources transfer negotiations of 1930 (see paragraph 10 above). However, he refused to give a firm opinion as to the Federal government's unilateral right to set the basis for calculation at any particular date, and recommended that D.I.A. settle any outstanding cases purely by negotiation with the *Provinces*, starting from the principles laid down by Scott in 1929. The role of the bands (as original parties to the Treaty) was not referred to in the opinion.

16. The legal advisor's opinion, then, was firm in designating *the precedents set by D.I.A.* – including the allocation of land to bands on the basis of population at each successive survey – *as the only basis for negotiation with the Provinces*. D.I.A. officials therefore went ahead to negotiate settlements of three cases with the Province of Alberta on the basis recommended by its advisor. One case (Tall Cree Band) was unaccountably delayed until the 1960's. The two others, however, were concluded within six years of the initial approach to the Province.

CASE 4: LITTLE RED RIVE BAND (TREATY 8, ALBERTA)

The Little Red River Band had land set aside for it in 1912, which was insufficient to fulfil its entitlement in that year.

In 1955 the Federal Government, prompted by requests from the band, approached the Province with a proposal to settle the band's outstanding entitlement, together with that of the Slaveys of Upper Hay River and the Tall Cree Band. Upon the Province's assent the Department went forward with final land selections, which were completed by a survey in 1958. The population base used for this survey was that of 1955, accepted as a "cut-off" date marking the time at which the Province agreed to the principle of selection.

Due to an error in enumeration, however, the survey did not fulfil the band's entitlement at that date. (Documents 31 to 36, and 60)

CASE 5: SLAVEYS OF UPPER HAY RIVER (NOW DENE THA) BAND (TREATY 8, ALBERTA)

This band had land set aside for it by a survey in 1946, which was insufficient to provide for the band's population at that date.

Negotiations to set aside extra land for this band extended, as for the Little Red River Band, between the original approach to the Province in 1955 and final survey in 1958. Survey was based upon the band's population in 1955 but, as with Little Red River, an error in enumeration prevented the fulfilment of the band's entitlement at that time. (Documents 31 to 36, and 60)

16. In the 1960's contradictory precedents were set by two parallel attempts at settlement in the northern parts of the Prairie Provinces. These two proposals, however, were not radically different in nature. In the Lac La Ronge case a new "compromise" formula for calculation of entitlement was invented to deal with an exceedingly complex situation involving quadruple surveys. This formula, unique as it is to the Lac La Ronge case, nevertheless illustrates the Government's desire to confirm, however indirectly, the principle that entitlement varies with land size at each successive survey until that entitlement has been definitely fulfilled. (See Appendix D).

17. The Tall Cree case, which follows directly the precedents of the 1950's, provides a more logical link between the surveys before 1930 and the present discussion of entitlement calculation principles.

CASE 6: TALL CREE BAND (TREATY 8, ALBERTA)

The Tall Cree Band (or Cree Band of Vermilion) received land in 1912 for one segment of the group. Further land was surveyed for it in 1915, based on population

figures at that survey, but owing to an error in calculation the band received less than its full entitlement at that time.

Provision of extra land for the band was discussed in 1955 (see Case 4, above) but was not carried out. The band repeated its request in the early 1960's, and in preparing for selection of extra land the Federal Government explicitly adopted the precedent set by the 1955 agreements. Accordingly, land enough to provide for the band's population at 1965 was selected by the band, after considerable study. This land was temporarily reserved by the Provincial government in 1966, pending a more formal request from the Federal government.

This formal approach was apparently overlooked for some years. It was not until 1975 that the Federal government expressed doubt as to the basis of the Tall Cree settlement; moreover, in the interim the reservation was partly rescinded without notice by Alberta. The definite undertaking originally given to the band to set aside the reserve as selected by them was in its turn rescinded, without notice to the band, by the Federal Government. (Documents 37-43, 50-52, 54)

18. The circumstances of the Federal Government's withdrawal from the principle expressed in the Little Red River and Slavey settlements – while part way through its negotiations on behalf of both the Tall Cree and Island Lake Bands – are discussed in some detail in Appendix B. It will be explained that the history of entitlement grants in the Prairie Provinces was largely overlooked or misunderstood.

MULTIPLE SURVEYS REPORT – APPENDIX D

THE COMPROMISE FORMULA (1961-1974): PARTIAL COMPLIANCE WITH THE INDIAN POSITION LAC LA RONGE (1961-1966)

1. The so-called "compromise formula" for the calculation of partial Treaty land entitlement was invented by an Indian Affairs Branch official in 1961 for the purpose of settling the outstanding entitlement of the Lac La Ronge Band in Saskatchewan. Lac La Ronge had received land by means of four previous surveys (in 1897, 1909, 1935 and 1948) none of which had fulfilled the band's outstanding entitlement according to population at each successive survey. Their request for another survey in 1960 led the I.A.B. to consider a final settlement of their rights under Treaty Six.

2. The entitlement of the Little Red River and Slavey of Upper Hay River bands of Alberta had been settled in 1955-1958 on the basis of total acreage according to population at second survey (1955 used as a cut-off date). However, the same formula was not used at Lac La Ronge. Instead of proposing a survey on the basis of 128 acres per person based on the 1960 population, W.C. Bethune, head of I.A.B.'s Reserves and Trusts Branch, put forward what he called a "reasonable" compromise: Lac La Ronge's entitlement would be based on the population at each successive survey, but the amount due in 1961 would be calculated as a *percentage* of the total due under the maximum formula. Thus, the band at initial survey in 1897 had received 61,952 acres, or 51.65 percent of its entitlement based on an 1897 population of 484. In 1909, the band received 5,354.1 acres, or 7.95 percent of its entitlement based on a 1909 population of 526. In 1948, the band received 6,400 acres, or 5.16% of its entitlement based on a 1948 population of 969. (A survey made in 1935 was overlooked.) Therefore, by 1961 the total percentage received was 51.65 + 7.95 + 5.16 or 64.76%. Outstanding entitlement at 1961 was therefore 35.24 percent (100 – 64.76) of entitlement based on a 1961 population of 1,404 – or 63,330 acres. The format of these calculations makes clear the derivation of the compromise formula from the formula based on total acreage based on population at each survey. (Documents 73 through 77 and 85)

3. Bethune's invention of the new formula seems to have been motivated by the unusual complexity of the particular situation at Lac La Ronge. The band had already received a large number of individual reserves by means of several separate surveys. Little good agricultural land was available in their vicinity. Previous attempts to obtain land from the Province had failed; therefore, it was apparently foreseen that the Province would adopt a restrictive interpretation of its obligations. Bethune anticipated the need for a compromise even before the first moves in the negotiation were made. The subsequent attitude of the Provincial Government did in fact fully justify Bethune's fears. (Documents 76, 77 and D.I.A.N.D. file 601/30-1)

4. Bethune appears to have created the formula himself without consultation outside the I.A.B. He certainly did not consult with the band before approaching the Province for its approval, nor did he indicate either to the Province or – later on – to the band, that there might have been a more advantageous alternative. Presented to the band as a *fait accompli* in 1964, the 63,330 acre compromise-formula allotment was voted on and accepted by the Lac La Ronge Band Council without question (Documents 79 to 84)

It appears that the band was in fact pleased with the prospect of a settlement of its long-standing land deficiency. The fact remains, however, that settlements made elsewhere before 1964 (for the Little Red River and Slaveys of Upper Hay River bands in the 1950's) and soon after (for Tall Cree band in 1965-1966) were made specifically on the basis of *full acreage* according to population at final survey. (See especially Document 37)

5. The I.A.B.'s representatives in 1964 also sought and obtained from the Lac La Ronge band an agreement to the effect that the 63,330-acre grant would represent its "full and final land entitlement . . . under Treaty No. 6". (Document 82, Clause 4) This waiver provided, therefore, not only that the cut-off date for calculation was to be 1961 rather than 1964 (Clause 1) but also that the band was to be legally bound by the compromise formula itself. Such a waiver would not have been necessary if the Department had been certain of the upper limits of its legal obligation to set aside land for the band.

6. The Lac La Ronge band received land on the agreed-upon basis in subsequent years, in the course of which other formulae were being put forward in parallel cases. The compromise formula was, therefore, an anomaly in that it was a restriction of the terms of earlier and contemporary settlements of Treaty land entitlement. However, it did share an important feature of these settlements: it tied the size of a band's outstanding entitlement to the band's population, as it increased or decreased, until such time as a final survey overtook and satisfied the band's entitlement once and for all.

The Island Lake (Manitoba) Negotiations (1967-1974)

7. The second attempt to apply the compromise formula was made some years after the Lac La Ronge surveys, in the course of negotiations over reserves for the Island Lake bands of Treaty Five (Manitoba). The evidence in their case shows clearly that the formula was vigorously advocated by the I.A.B. as a solution of *second choice to the maximum formula originally put forward by the Department itself*. The formula used at Lac La Ronge was revived only in the face of the Province's restrictive proposals. Manitoba offered the amount of land outstanding to the Band at the *first survey only*, claiming that such a stand was both "logical", and was supported by precedent – although no previous case was cited. Curiously this provincial position, which the Department of Indian Affairs so vigorously opposed, has now gained the imprimatur of the Federal Office of Native Claims.

8. The Island Lake band has been allocated land in 1924, which was insufficient to fulfil their entitlement according to population at that date. The band and local I.A.B. officials

requested extra land repeatedly during the 1940's, but were advised by I.A.B. in Ottawa to delay the use of outstanding "land credits" until the band's needs and the resources available to meet them were known and analyzed. Similar advice was given in the same period to the Lac La Ronge Bands. (Documents 86 to 94)

9. In the 1960's, the band renewed its request for land, contemporaneously with requests from the Tall Cree band in Alberta. The head of the Land Surveys and Titles Section of I.A.B. (H.T. Vergette) was led to consider what policy to adopt with respect to the Island Lake case. He concluded that he was required (because of the undertakings made at the time of the Treaty negotiations, the precedents set elsewhere by D.I.A., and the losses to the band caused by delay in land allocation) to request land for them on the basis of *128 acres per person according to total present-day population* (minus the area of the previous grants). However, he acknowledged that the Provinces might not co-operate on this basis, and that the Federal Government might not be able to force the issue. He, therefore, called for a "scrupulously fair" examination of the history and merits of this and similar cases to make sure that their claim to extra land was straightforward and that it could be so represented in detail to the Province. (Document 95)

10. The case rested in abeyance for three years. In 1969, it was again revived, at the same time as the band was legally divided into four separate bands (each with its own outstanding entitlement). As recommended by Vergette in 1967, the Department of Indian Affairs requested 64,379 acres from the Province early in 1969, being the amount derived directly from the four bands' *total population in 1968*. Manitoba refused, and made a counter-offer of 2,939 acres, representing the *shortfall at first survey in 1924*, on the grounds that

a) this was the most "logical" interpretation of the totally ambiguous terms of the Treaty;
b) that even if the Treaty required provision of more than the offer, Manitoba was liable only for the amount outstanding at the transfer of natural resources in 1930; and
c) that the Provinces offer was in line with past precedents in all three Prairie provinces. (Documents 96 to 98)

11. D.I.A. immediately rejected the offer – on general moral grounds, on grounds of precedent, and because of the band's loss of use of the land since the time of original survey. (Documents 99 to 102) However, D.I.A. Lands Branch and Regional officials still felt bound by the 1954 legal opinion (Document 29) which stated that the formula to be used could be settled only by negotiation. In spite of their firm convictions as to D.I.A.'s liability under the Treaties, they were in the position of having to negotiate the land from the Provinces without agreement on the meaning of the Natural Resources Transfer Agreement, which bound the Province to co-operate to some unknown extent in the provision of land to the Indians. Nevertheless, the opinion referred to directed them to adhere to the precedents described by D.S.G.I.A. Scott in 1929, including the variation of entitlement with population over time.

12. Unfortunately, D.I.A. officials also lacked a clear understanding of the precedents upon which their negotiations were to be based – even of the recent settlements of the 1950's. (For an exception, see Document 109) D.I.A.'s previous research projects on entitlement (see D.I.A.N.D. – Ottawa File 701/30-1 at 1967-1973) were apparently considered unreliable sources of information. This deficiency was to weaken D.I.A.'s arguments considerably, and apparently contributes even today to the Office of Native Claims' impression that the "compromise formula" is an abnormally *generous*, rather than a uniquely *restricted*, settlement in the context of past grants under the Treaties.

13. D.I.A.'s negotiations with the Province were redirected at this time to involve the bands themselves as primary parties, the Province (in theory) being only a secondary element. This move in 1969 represents the first acknowledgement of the band's right to have the "first voice" in approval of negotiating principles. Together the Federal Government and Indian representatives would seek from Manitoba "the maximum amount of land that could be obtained from the Province". (Document 102; See also, Document 101 and later documents)

14. In view of the legal advisor's directive to proceed by negotiation, and the band's request that D.I.A. negotiate on their behalf, D.I.A.'s Regional Director for Manitoba put forward in early 1970 an "alternate formula" – the Lac La Ronge compromise formula of 1961 – as "the best possible deal for the Island Lake band", given the Province's earlier refusal of what D.I.A. considered the ideal settlement. In 1924, Island Lake had received 85.9 percent of its entitlement as at that date. The new claim was for the remainder, 11,591 acres (or 14.1 percent) based on a 1968 population of 2,569 people. (Documents 100 and 103)

15. The new proposal was favourably received by the Province at first, but in mid-1970 it was unexpectedly rejected by the Manitoba Cabinet on the same grounds as had been cited for the rejection of the first proposal – logic, presumed precedent and the wording of the resources transfer agreement. (Documents 106 and 107)

16. D.I.A. officials still maintained that "the Band [was] entitled to a better settlement than that proposed by the Province" (Document 113) but accepted that there could be no resolution without Provincial concurrence. They hoped that on-going historical research would provide firmer evidence of favourable precedents. This research went on throughout 1971 and early 1972, while the Lands Branch and a Departmental Committee on Partial Land Entitlement prepared materials for a Cabinet decision on the issue. Manitoba Regional Director Conolly again proposed in April 1972 that the compromise formula be used to calculate both the Island Lake and the Cross Lake bands' outstanding entitlement. He believed that by that time the Province would have changed its stance and would approve the submission rejected in 1970. (Documents 108 through 120)

16. No action was taken until March 1973, when the Minister of Indian Affairs (in response to urgent requests from the Island Lake Bands) offered to put forward the compromise formula to the Province again. However, the Minister implied that D.I.A. felt its "lawful obligation" to the band might be limited to shortfall at first survey (Manitoba's offer). Its agreement to put forward a "further" claim based on the compromise formula was no more than a *moral* obligation (created by loss of use and occupancy since first survey), without binding legal force. (Documents 121 and 122)

17. Privately, however, D.I.A. was aware of strong arguments in favour of the maximum formula, which it had been advised to accept. In a briefing paper of early 1973, a Departmental analyst outlined a detailed history of the case. He pointed out that Manitoba's assertions concerning precedents was totally incorrect. (Documents 126, Item 10d) These precedents were that:

> The practice and policy of the Department was such as to seek from the provinces lands, whether as a first application or for additional lands when only partial land entitlement under treaty had been obtained, on the basis of current population. (Document 126, Item 11f)

In the absence of a clear method of calculation prescribed by Treaty, these precedents were to govern interpretation. They did not support either formulae based on population at Treaty, or population at time of first survey. Moreover, these lesser proposals were clearly inequitable, given the bands' loss of use and occupancy and the delays in land allocation caused in the 1940's by D.I.A. itself.

18. Accordingly the Department in 1973 was urged to provide land to Island Lake based on *full present-day population*, "in accordance with the general understanding and practice followed by the Department in earlier years". If the Province could not be prevailed on to give up the land under this formula, the Federal Government would have to provide the difference itself. (Document 126)

19. Again, no definite results emerged either from the Government's private study or the Minister's public actions. Both the bands and the Manitoba Government eventually rejected the compromise formula, the former because it was too restricted, the latter because it was too generous. To this day the Island Lake bands have received no further land in fulfilment of the Treaty.

20. Since that date the Federal Government has vacillated (as described in Appendix B) between various points of view with respect to its true legal obligations. However, the compromise formula has remained in the minds of some participants in negotiation, despite an increasing tendency towards narrow legal interpretation of the Treaty provisions. In early 1974, H.T. Vergette proposed the compromise formula in settlement of the Peter Ballantyne band's entitlement. In so doing he repeated his views of 1966, justifying the formula by

reference to the Treaties, precedents set by D.I.A., and the bands' claim for compensation for loss of use of the lands since first survey. The only reason he gave for not advancing the band's position (based on full present-day population) was that he "doubt[ed] the Province will accept this figure." (Document 127) Otherwise, he implies, D.I.A. would readily accept it as a legitimate interpretation of its obligations under the Treaties.

21. Since the approval of the Saskatchewan Formula in 1977, the compromise formula has been, in practice, a dead issue. It is necessary, however, to remember the circumstances under which it was first created and advocated by D.I.A. In the Lac La Ronge case, it was an original but arbitrary compromise created by an I.A.B. official (without discussion or consultation outside the Department) to meet an excessively complex situation in which the Province was expected to resist large requests for land. In the Island Lake case, it was put forward as a second-best solution in the spirit of the Treaty and past precedent, after the Province had refused the larger proposal. In both cases the more generous precedents were known to Departmental officials, and were rejected out of political necessity. In neither case was the compromise formula (as has recently been suggested by the Office of Native Claims – Document 68, Section 4) an "exception" to otherwise "straightforward" calculations based on population at date of first survey.

APPENDIX C

WILLIAM J. FOX, SPECIAL PROJECTS OFFICER,

DEPARTMENT OF INDIAN AFFAIRS,
TO
CHIEF D. AHENAKEW,
FEDERATION OF SASKATCHEWAN INDIANS, OTTAWA

DECEMBER 15, 1975

[copy]
Indian and Northern Affairs
Affaires Indiennes et du Nord

OTTAWA, Ontario K1A 0H4
December 15, 1975

Chief D. Ahenakew,
Federation of Saskatchewan Indians,
1114 Central Avenue,
PRINCE ALBERT, Saskatchewan

Our File No. 601/30-1-1

Dear Chief Ahenakew:

I am writing to you following a recent meeting with Mr. Lockhart in Ottawa. At that time Mr. Lockhart, Mr. Rob Milen, the Provincial Representative and I discussed the Treaty entitlement situation. I agreed to send you a proposal for a reasonable basis for determining the reliability of data to be used in substantive discussions of Band entitlement. I suggest we should consider the use of the following criteria:

(1) The population count to be used for dates prior to 1951 will be taken from the treaty annuity paylists for the appropriate year but can be based on other sources if there is adequate evidence to indicate that another source would be more accurate; after 1951, population figures will be taken from the membership rolls.

(2) The date of selection shall be deemed to be the date of the first survey for those Bands which were in treaty when land was set aside. In cases where Bands adhered to treaty after land had been set aside, the population shall be that at the time of the adhesion. There are some reserves set aside which were not surveyed as such but were established from the township surveys carried out by the Department of the Interior in the course of the original surveying of all lands for homestead purposes. In such cases the date of selection shall be the year in which the reserve was first identified and used as an Indian Reserve.

(3) The acreage of land set aside will be the acreage stated in the Order in Council setting it aside except where this has been altered by a subsequent survey. In cases where an Order in Council does not state the acreage of a Reserve, the acreage will be that shown on the plan of survey; where a reserve is described by metes and bounds which indicate an area greater or smaller than that which is said to have been set aside, the metes and bounds will be used to determine the acreage.

(4) Where a Band has exchanged land for a greater or lesser acreage, calculations of its entitlement are to be based on the acreage originally set aside and not on the accretions.

I would appreciate hearing your comments on the above criteria. It would be helpful if you would keep Mr. Milen informed so that he can advise his Minister when we have agreed on criteria.

Yours sincerely,
Wm. J. Fox
Special Projects Officer.

APPENDIX D

DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

Criteria Used in Determining Bands with Outstanding Entitlements in Saskatchewan

Unpublished memorandum, August 1977 [Version 1]

WITHOUT PREJUDICE

CRITERIA USED IN DETERMINING BANDS WITH OUTSTANDING ENTITLEMENTS IN SASKATCHEWAN

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

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

1. Per Capita Entitlement Set Out in Treaty

This was either 128 acres per person or 32 acres per person depending on the Treaty involved.

2. Date of First Survey

In most cases entitlement was calculated according to the population of a Band at the date of first survey. This date was determined by locating the first plan of survey of an Indian Reserve for the Band concerned. The term Indian Reserve, was interpreted as meaning a tract of land which was administered for the Band concerned in accordance with the terms of the Indian Act in effect at the time.

For example, in the case of the Keeseekoose Band, lands were surveyed for the Band at Swan River in 1877/78. However, these lands do not appear to have been administered as an Indian Reserve, and they were shortly abandoned by the Band which moved to the south and settled at Fort Pelly. Subsequently in 1883/84, lands were surveyed for the Keeseekoose Band at Fort Pelly and it was these lands which were later confirmed by Order-in-Council in 1889 as the Keeseekoose I.R. No. 66. Thus, in the case of the Keeseekoose Band, the date of first survey was considered to be 1883/84 rather than the earlier date of 1877/78.

Once the first plan of survey of an Indian Reserve for the Band concerned had been located, the exact date to be used as the date of first survey was established. This was taken from the plan of survey and was the date noted on the plan, by the surveyor, as the date at which he carried out the survey. If such a date was not recorded on the plan, the date on which the surveyor signed the plan was used.

For example, the first plan of survey of an Indian Reserve for the Muskowekan Band is the plan of the Muskowekan I.R. No. 85, recorded in the Canada Land Surveys Records as No. 197. The plan bears the notation, "surveyed in March 1884" and, therefore, the date of first survey used in this case was 1884.

In some cases Indian Reserves were not actually surveyed as such but were established from township surveys carried out by the Department of Interior in the course of the original surveying of all lands for homestead purposes. In such cases, population was taken at the year in which the reserve was first identified and used as an Indian Reserve.

In some cases a Band adhered to Treaty after land had been surveyed and set aside for its use and benefit. In such cases, the population at the date of adhesion was used. For example, the Witchekan Lake Band did not adhere to Treaty 6 until 1950, although the Witchekan Lake I.R. No. 117 was set aside in 1918. In this case calculations were based on the population in 1950 and the Band was found to have an outstanding entitlement.

Certain Bands made their first selection of lands in the 1960's and in these cases, formal agreement was reached between the Province, this Department and the Bands concerned that entitlement would be calculated according to the population at date of first selection of lands. In these cases, entitlement was calculated according to the selection date agreed upon in past negotiations.

3. Population

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

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

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

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

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

The Thunderchild Band provides an example of a Band affected both by absentees at the date of first survey and by a large number of new members joining the Band after the date of first survey. As stated previously, the basic criteria make no allowance for either of these factors; however, in this case the population figure of 6 in 1881 was so low that no attempt was made to use it. Instead, entitlement was calculated according to both the 1880 and 1882 population figures, but found to be fulfilled in both cases.

According to the Treaty Paylists, the Thunderchild Band was joined by the Nipahase Band and few remaining members of the Young Chipewyan Band in 1889. The Young Chipewyan Band was originally allotted the Stony Knoll Reserve No. 107. However, in 1897 the Department of Indian Affairs relinquished the reserve and control of the lands was resumed by the Department of the Interior since the Band had broken up and amalgamated with other Bands in the area. The Nipahase Band had never been allotted any lands under Treaty 6. It was recognized that by calculating entitlement from the 1880 or 1882 populations, no allowance was made for the members of the Young Chipewyan and Nipahase Bands who joined the Thunderchild Band after those dates. Since neither of these Bands had, in effect, received any lands prior to joining Thunderchild, notes were included in our report to indicate that an argument could be put forward that these members be provided with an entitlement.

During the discussions with the Federation of Saskatchewan Indians in Regina, it was finally agreed that the Thunderchild Band's entitlement would be calculated according to the combined populations of the three Bands. In addition, it was agreed to use the Band populations in 1884, the second date of survey of lands for the Thunderchild Band, since no valid population figure for the Thunderchild Band was available at the date of first survey. Thus, as a result of negotiation, allowance was made both for the substantial number of absentees and for the new members joining the Band and the Department agreed to recognize the Thunderchild Band as having an outstanding entitlement.

4. Entitlement

Once the population at date of first survey had been determined, entitlement was calculated by multiplying this figure by the per capita acreage set out in the appropriate treaty.

The only exception to this method of calculating entitlement was the case of the Lac La Ronge Band. This Band provides a unique example of a Band whose residual entitlement was met by the Province of Saskatchewan in the 1960's on the basis of a type of compromise formula. Between the years 1897-1948 the Band had received a total of 43,761.99 acres in partial satisfaction of its entitlement under Treaty 6. In 1961, the Band officially requested the remainder of its entitlement. After a series of negotiations, agreement was reached between the Band, Federal and Provincial Governments that the Band's residual entitlement totalled 63,330 acres. This figure was arrived at by means of a formula which calculated the percentage of the Band's total entitlement received at each date lands were set aside. It was calculated that 51.65% was received in 1897, 7.95% in 1909 and 5.16% in 1948, totalling 64.76%. This meant that 35.24% of the Band's entitlement was outstanding, which, calculated from the population in 1961, equalled 63,330 acres.

In all other cases entitlement calculations proved straightforward, based on the population at date of first survey, or in the case of the exceptions mentioned previously in this report, at some other date decided upon. The same calculation process was applied in the case of Bands which split or divided to form one or more new Bands. Basically such Bands can be divided into two categories for entitlement purposes and were treated as follows:

i) Bands which split after lands had been received

In such cases a Band had received some land before splitting and therefore the first survey also took place before the split. The population figure at the date of first survey would be that of the original Band and entitlement was therefore calculated from this figure, for the original Band as a whole and not separately for the new Bands. In determining whether entitlement had been fulfilled, the lands received by the original Band and any lands subsequently received by the new Bands were considered.

ii) Bands which split before any lands had been received

In such cases, the original Band had not received any land when it split and therefore the first surveys took place after the split, when lands were selected by the new Bands. Entitlement was therefore calculated separately for each Band, after the split, based on the dates of first survey.

An example of such a split is provided by the Keeseekoose and Duck Bay Bands. As explained previously in this report, the date of first survey for the Keeseekoose Band was considered to be 1883. In 1877, prior to this date a group of Indians who had always resided at Duck Bay split away from the Keeseekoose Band to be paid separately as the Duck Bay Band. Thus, when the Keeseekoose Band's entitlement was calculated according to the population in 1883, the Duck Bay Indians were no longer included in the Band. Entitlement was therefore calculated separately for the Keeseekoose Band. In determining whether entitlement had been fulfilled, the lands received by the Keeseekoose Band, only, were included and on this basis, the Band was found to have an outstanding entitlement.

The Duck Bay Band, now known as the Pine Creek Band, is located in Manitoba. Its entitlement would also be calculated separately, based on the date lands were first surveyed for the Band.

5. Lands Received

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

The acreage was taken from the Order-in-Council setting aside the Reserve except in cases where it was altered by subsequent survey. For example, in the case of the Red Earth Band, a Reserve was originally surveyed in 1884 with an area of 2,711.64 acres. In 1911 it was resurveyed and found to contain 3,595.95 acres. The area of 3,595.95 acres was used in the Order-in-Council confirming the Reserve in 1912 and therefore 3,595.95 acres was also used as the area of the Reserve for entitlement purposes.

In cases where an Order-in-Council did not state the acreage of the Reserve, it was taken from the plan of survey of the Reserve.

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

i) Lands received in exchange for lands surrendered for sale.

ii) Lands received in compensation for lands taken for public purposes.
iii) Lands purchased with Band funds.

The Keeseekoose, Muskowekan, Thunderchild and Kinistino Bands all provide examples of Bands which purchased lands using Band funds. In none of these cases were the lands purchased by the Bands included in the lands received for entitlement purposes.

The Keeseekoose, Thunderchild and Kinistino Bands also provide examples of Bands which surrendered for sale some, or all, of the lands originally received in exchange for other lands. In all cases, the acreages of the lands originally set aside for the Bands were used for entitlement purposes and not the acreages of the lands subsequently received in exchange for those surrendered.

Department of Indian Affairs
and Northern Development
Prepared August 1977

APPENDIX E

DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

Criteria Used in Determining Bands with Outstanding Entitlements in Saskatchewan

Prepared by H. Flynn, Lands and Membership Division

Unpublished, August 1977 [Version 2]

CRITERIA USED IN DETERMINING BANDS WITH OUTSTANDING ENTITLEMENTS IN SASKATCHEWAN

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

The Federation of Saskatchewan Indians put forward land entitlement claims for 25 Bands. Departmental research, based on the criteria established, initially confirmed the claims of 11 of these Bands. In February, 1977, a meeting was held with representatives of the F.S.I. in Regina to compare research findings on the 25 Bands put forward by the F.S.I. As a result of this meeting, the Department agreed to recognize the claims of four additional Bands, however this was on the basis of historical facts peculiar to those Bands and should not be construed as a change in the established criteria.

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

1. Per-Capita Entitlement Set Out in Treaty

This was straightforward, being either 128 acres per person or 32 acres per person depending on the Treaty involved.

2. Date of First Survey

In most cases entitlement was calculated according to the population of a Band at the date of first survey. This date was determined by locating the first plan of survey of an Indian Reserve for the Band concerned. The term, Indian Reserve, was interpreted as meaning a tract of land which was administered for the Band concerned in accordance with the terms of the Indian Act in effect at the time.

For example, in the case of the Keeseekoose Band, lands appear to have been surveyed for the Band at Swan River in 1877/78. However, these lands do not appear to have been administered as an Indian Reserve and, without any form of surrender, they were shortly abandoned by the Band which moved to the South and settled at Fort Pelly. Subsequently in 1883/84, lands were surveyed for the Keeseekoose Band at Fort Pelly and it was these lands which were later confirmed by Order in Council in 1889 as the Keeseekoose I.R. No. 66. Thus, in the case of the Keeseekoose Band, the date of first survey was considered to be 1883/84 rather than the earlier date of 1877/78.

Once the first plan of survey of an Indian Reserve for the Band concerned had been located, the exact date to be used as the date of first survey was established. This was taken from the plan of survey and was the date noted on the plan, by the surveyor, as the date at which he carried out the survey. If such a date was not recorded on the plan, the date on which the surveyor signed the plan was used.

For example, the first plan of survey of an Indian Reserve for the Muskowekan Band is the plan of the Muskowekan I.R. No. 85, recorded in the Canada Land Surveys Records as No. 197. The plan bears the notation, "surveyed in March 1884" and, therefore, the date of first survey used in this case was 1884.

In some cases Indian Reserves were not actually surveyed as such but were established from township surveys carried out by the Department of Interior in the course of the original surveying of all lands for homestead purposes. In such cases, population was taken at the year in which the reserve was first identified and used as an Indian Reserve.

An example of such a situation is the Chitek Lake I.R. No. 191 which was temporarily reserved from the township surveys for the Pelican Lake Band in 1917. In this case the population in 1917 was used to calculate the Band's entitlement.

In some cases a Band adhered to Treaty after land had been surveyed and set aside for its use and benefit. In such cases, the population at the date of adhesion was used. For example, the Witchekan Lake Band did not adhere to Treaty 6 until 1950, although the Witchekan Lake I.R. No. 117 was set aside in 1918. In this case calculations were based on the population in 1950 and the Band was found to have an outstanding entitlement.

Certain Bands made their first selection of lands in the 1960's and in these cases, formal agreement was reached between the Province, this Department and the Bands concerned that entitlement would be calculated according to the population at date of first selection of lands. In these cases, entitlement was calculated according to the selection date agreed upon in past negotiations, although, for information purposes, calculations based on the date of first survey were also included in our reports. The Bands concerned are:– Fond du Lac, Stony Rapids, Lac La Hache and Portage La Loche.

It should be noted that, of those Bands, the Province has refused to re-open the entitlement claims of the Lac La Hache and Portage La Loche Bands, which it considers to have been settled in accordance with the past agreements. In the case of the Fond du Lac and Stony Rapids Bands, administrative problems delayed the Provincial transfer of some of the lands selected by the Bands and, until recently, the Bands had refused to accept these lands. They took the position that entitlement should be revised and recalculated according to present day population figures to compensate for the delay in the confirmation of all the lands originally selected. The Province has agreed to this request and the Fond du Lac and Stony Rapids Bands are both recognized as having outstanding entitlements.

3. Population

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

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

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

i) Band members absent at the time of treaty payment.
ii) New members subsequently transferring into the Band from other Bands which may or may not have received their full treaty land entitlement.
iii) New members subsequently adhering to treaty.
iv) Members subsequently transferring out of the Band to other Bands.

Although the above factors were not accounted for in our basic criteria and entitlement calculations, it was recognized that they might constitute a basis for future negotiation with the F.S.I. Notes were therefore included in our reports for any cases in which these factors were found to arise to any great extent.

The Poundmaker Band provides an example of the effect a large amount of absentees will have on the population figure when taken from the Treaty Paylists. Firstly, however, it should be noted that, in this case, the basic entitlement calculations, in accordance with the established criteria, show entitlement to be fulfilled based on joint calculations with the Red Pheasant Band. It was recognized, however, that this method of calculation was based on the date of first survey of lands for the Red Pheasant Band, whereas the Poundmaker Band did not receive any lands until 1881, after it had split away to form a separate Band.

For the purpose of future negotiations, notes were therefore included to show entitlement calculations based on the population of the Poundmaker Band in 1881. It was [noted], however, that the Paylist showed an abnormally low figure of 96 as paid in 1881, compared to 157 in 1880 and 164 in 1882, increasing to 233 in 1884. It appeared that a considerable number of the Band paid in 1882 was absent in 1881 and notes were therefore included to this effect. In addition, it was noted that when the Poundmaker Reserve was surveyed in 1881, the surveyor, Simpson gave the Band population as 149.

During the February 1977 discussions with the F.S.I. in Regina, the entitlement calculation finally put forward by the Department as the most equitable was based on the population of 149 in 1881. Thus, although our basic criteria and entitlement calculations did not account for absentees, they were finally allowed for as a result of negotiation. I should note that even when calculated from the population of 149, the Poundmaker Band's entitlement has been fulfilled and the Band is not recognized as having an outstanding entitlement.

The Thunderchild Band provides an example of a Band affected both by absentees at the date of first survey and by a large number of new members joining the Band after the date of first survey. As stated previously, the basic criteria make no allowance for either of these

factors, however, in this case the population figure of 6 in 1881 was so low that no attempt was made to use it. Instead, entitlement was calculated according to both the 1880 and 1882 population figures, but found to be fulfilled in both cases.

According to the Treaty Paylists, the Thunderchild Band was joined by the Nipahase Band and few remaining members of the Young Chipewyan Band in 1889. The Young Chipewyan Band was originally allotted the Stony Knoll Reserve No. 107, however in 1897 the Department of Indian Affairs relinquished the reserve and control of the lands was resumed by the Department of the Interior since the Band had broken up and amalgamated with other Bands in the area. The Nipahase Band had never been allotted any lands under Treaty 6. It was recognized that by calculating entitlement from the 1880 or 1882 populations, no allowance was made for the members of the Young Chipewyan and Nipahase Bands who joined the Thunderchild Band after those dates. Since neither of these Bands had, in effect, received any lands prior to joining Thunderchild, notes were included in our report to indicate that an argument could be put forward that these members be provided with an entitlement.

During the discussions with the F.S.I. in Regina, it was finally agreed that the Thunderchild Band's entitlement would be calculated according to the combined populations of the three Bands. In addition, it was agreed to use the Band populations in 1884, the second date of survey of lands for the Thunderchild Band since no valid population figure for the Thunderchild Band was available at the date of first survey. Thus, as a result of negotiation, allowance was made both for the absentees and for the new members joining the Band and the Department agreed to recognize the Thunderchild Band as having an outstanding entitlement.

The Pelican Lake Band provides yet another example of new members being admitted to the Band after the date at which entitlement was calculated. In this case entitlement was calculated according to the population in 1917 and found to be fulfilled. In 1949, however a total of 53 new members were officially admitted into the Band and paid under Treaty for the first time. If these members were to be provided with an entitlement, the Band would be entitled to more land and since it was recognized that such an argument might be put forward, notes to this effect were included in our report.

When the Pelican Lake Band was discussed with the F.S.I. in Regina, it became apparent that the F.S.I. was not basing its claim to outstanding entitlement purely on the fact that these new members were admitted in 1949. Instead, the F.S.I. claimed that these people were, in fact, Band members in 1917 and should have been included in the 1917 population figure when entitlement was calculated. The F.S.I. undertook to provide evidence to this effect and it was therefore agreed that no final position would be taken on the Band's entitlement at that time. Thus, in this case, the basic criteria did not allow for the new members and no final position has yet been taken as to whether or not they should be considered in calculating entitlement and this remains open to negotiation.

Apart from the foregoing exceptions, all other population figures for years prior to 1951 were based on the "Total Paid" figure from the Treaty Paylists, which was considered to be the most accurate record available.

As stated previously, from 1951 to 1964, the Membership Rolls were considered to provide the most accurate population records. It should be noted however that in the case of the Fond du Lac, Stony Rapids, Lac La Hache and Portage La Loche Bands agreement was reached between the Bands, this Department and the Province as to the basis of the calculation of their entitlements. This agreement covered the population figures to be used for each Band, as follows:

Fond du Lac	360 in 1961
Stony Rapids	382 in 1964
Lac La Hache	207 in 1964
Portage La Loche	183 in 1964

Although membership rolls were available for 1961 and 1964, the figures for the Fond du Lac, Stony Rapids and Lac La Hache Bands appear to have been taken from the Paylists. The figure for the Portage La Loche Band was provided by the Superintendent of the Meadow Lake Agency in 1964 and was not based on the membership rolls or the paylist. As stated previously, the Province has refused to re-open the entitlements of the Lac La Hache and Portage La Loche Bands but the Fond du Lac and Stony Rapids Bands are recognized as having outstanding entitlements.

4. Entitlement

Once the population at date of first survey had been determined, entitlement was calculated by multiplying this figure by the per-capita acreage set out in the appropriate treaty.

The only exception to this method of calculating entitlement was the case of the Lac La Ronge Band. This Band provides a unique example of a Band whose residual entitlement was met by the Province of Saskatchewan in the 1960's on the basis of a type of compromise formula. Between the years 1897-1948 the Band had received a total of 43,761.99 acres in partial satisfaction of its entitlement under Treaty 6. In 1961, the Band officially requested the remainder of its entitlement. After a series of negotiations, agreement was reached between the Band, Federal and Provincial Governments that the Band's residual entitlement totalled 63,330 acres. This figure was arrived at by means of a formula which calculated the percentage of the Band's total entitlement received at each date lands were set aside. It was calculated that 51.65% was received in 1897, 7.95% in 1909 and 5.16% in 1948, totalling 64.76%. This meant that 35.24% of the Band's entitlement was outstanding, which, calculated from the population in 1961, equalled 63,330 acres. It should be noted that the Lac La Ronge Band has since repudiated this method of calculating its entitlement but the Province has refused to re-open the case on the basis that it was settled, in good faith, according to past agreement.

In all other cases entitlement calculations proved straightforward, based on the population at date of first survey, or in the case of the exceptions mentioned previously in this report, at some other date decided upon. The same calculation process was applied in the

case of Bands which split or divided to form one or more new Bands. Basically such Bands can be divided into two categories for entitlement purposes and were treated as follows:

i) Bands which split after lands had been received

In such cases a Band had received some land before splitting and therefore the first survey also took place before the split. The population figure at the date of first survey would be that of the original Band and entitlement was therefore calculated from this figure, for the original Band as a whole and not separately for the new Bands. In determining whether entitlement had been fulfilled, the lands received by the original Band and any lands subsequently received by the new Bands were considered.

The Red Pheasant and Poundmaker Bands provided an example of such a split. The Poundmaker Band originally comprised part of the Red Pheasant Band and did not split away to form a separate Band until 1880. Lands were first surveyed for the Red Pheasant Band in 1878, before the Poundmaker Band split away and entitlement was therefore calculated jointly for the two Bands based on the combined population at this date. In determining whether entitlement had been fulfilled, the lands received by both the Red Pheasant and Poundmaker Bands were included. On this basis, the entitlement of both Bands was found to be extinguished.

As noted previously, during the discussions with the F.S.I. in Regina, this method of calculating entitlement was not the method finally put forward by the Department as the most equitable in the case of the Poundmaker Band. A similar change in position was also taken in the case of the Red Pheasant Band, which the Department had recognized as having an outstanding entitlement. However, these changes were made as a result of the negotiation process and should not be construed as a change in the basic criteria.

The Red Earth Band provides another example of a Band split after lands had been surveyed. In this case, the Red Earth and Shoal Lake Indians originally formed part of The Pas Band and were still included in The Pas Band when lands were first surveyed in 1882. Entitlement was therefore calculated according to the combined population of the three Bands in 1882 and in determining whether it had been fulfilled, the lands received by all three Bands were included. On this basis, the entitlement of all three Bands was found to be extinguished and the Red Earth Band is not recognized as having an outstanding entitlement.

A final example of this type of split is provided by the Yellow Quill Band which divided in 1905 to form three separate Bands – Fishing Lake, Nut Lake and Kinistino. When lands were first surveyed in 1881, the Yellow Quill Band was still a single unit. Entitlement was therefore calculated for the original Yellow Quill Band according to the 1881 population. In determining whether it had been fulfilled, the lands received by each of the new Bands were included, and on this basis entitlement was found to be extinguished. Since the entitlement of the original Band was fulfilled, the Department does not recognize the three new Bands of Fishing Lake, Nut Lake and Kinistino as hving outstanding entitlement.

ii) Bands which split before any lands had been received

In such cases, the original Band had not received any land when it split and therefore the

first surveys took place after the split, when lands were selected by the new Bands. Entitlement was therefore calculated separately for each Band, after the split, based on the dates of first survey.

An example of such a split is provided by the Keeseekoose and Duck Bay Bands. As explained previously in this report, the date of first survey for the Keeseekoose Band was considered to be 1883. In 1877, prior to this date a group of Indians who had always resided at Duck Bay split away from the Keeseekoose Band to be paid separately as the Duck Bay Band. Thus, when the Keeseekoose Band's entitlement was calculated according to the population in 1883, the Duck Bay Indians were no longer included in the Band. Entitlement was therefore calculated separately for the Keeseekoose Band. In determining whether entitlement had been fulfilled, the lands received by the Keeseekoose Band, only, were included and on this basis, the Band was found to have an outstanding entitlement.

The Duck Bay Band, now known as the Pine Creek Band, is located in Manitoba and was not therefore included in this research. However, its entitlement would also be calculated separately, based on the date lands were first surveyed for the Band.

5. Lands Received

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

The acreage was taken from the Order-in-Council setting aside the Reserve except in cases where it was altered by subsequent survey. For example, in the case of the Red Earth Band, a Reserve was originally surveyed in 1884 with an area of 2,711.64 acres. In 1911 it was resurveyed and found to contain 3,595.95 acres. The area of 3,595.95 acres was used in the Order-in-Council confirming the Reserve in 1912 and therefore 3,595.95 acres was also used as the area of the Reserve for entitlement purposes.

In cases where an Order in Council did not state the acreage of the Reserve, it was taken from the plan of survey of the Reserve.

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

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

The Keeseekoose, Muskowequan, Thunderchild and Kinistino Bands all provide examples of Bands which purchased lands using Band funds. In none of these cases were the lands purchased by the Bands included in the lands received for entitlement purposes.

The Keeseekoose, Thunderchild and Kinistino Bands also provide examples of Bands which surrendered for sale some, or all, of the lands originally received in exchange for other lands. In all cases, the acreages of the lands originally set aside for the Bands were

used for entitlement purposes and not the acreages of the lands subsequently received in exchange for those surrendered.

H. Flynn
Lands and Membership [August 1977]

APPENDIX F

DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

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

Unpublished memorandum, May 1983

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

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

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

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

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

A Identification of Claimant Band

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

B Date for Entitlement Calculation

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

Generally the date to be used is taken from the plan of survey of the first reserve set aside for the use and benefit of an Indian Band. This is the date which is noted by the surveyor as

the date which he carried out the survey. Other indicators that ought to be noted include the date on which the surveyor signed the plan and the date noted in the surveyor's field book.

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

C Lands Received

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

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

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

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

D Population Base for the Determination of an Outstanding Land Entitlement

An outstanding treaty land entitlement exists when the amount of land which a band has received in fulfillment of its entitlement is less that what the band was entitled to receive under the terms of the treaty which the band adhered or signed. This is referred to as a shortfall of land. There are two situation where a shortfall may exist. The first is when the land surveys fail to provide enough land to fulfill the entitlement. The second is when new members who have never been included in a land survey for a band, join a band that has had its entitlement fulfilled. The objective is to obtain as accurate a population of the band as is possible on the date that the reserve was first surveyed. The only records which recorded membership of Indians in the bands prior to 1951 were the annuity paylist and the occasional census. The annuity paylists are what is generally relied upon in order to discover the population at the date of first survey. This is done by doing an annuity paylist analysis.

In paylist analysis, all individuals being claimed for entitlement purposes are traced. This includes a review of all band paylists in a treaty area for the years that an individual is

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

The following principles are generally observed in an annuity pay list analysis:

Persons included for entitlement purposes:

1) Those names on the paylist in the year of survey.

2) Absentees who are paid arrears. These are band members who are absent for the year of survey but who return and are paid arrears for that year.

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

3) New Adherents to treaty. These are Indians, who had never previously signed or adhered to treaty and consequently have never been included in an entitlement calculation.

4) Transfers from Landless Bands. These are Indians who have taken treaty as members of one band, then transferred to another band without having been included in the entitlement calculation of the original band, or of the band to which they have transferred. The parent band may not have received land, whereas the host band may have already had its entitlement fulfilled. These Indians are acceptable, as long as they have never been included in a land quantum calculation with another band.

5) Non-Treaty Indians who marry into a Treaty Band. This marriage, in effect, makes them new adherents to treaty.

Persons not included

1) Absentees, new adherents and transfers from landless bands, who do not retain a reasonable continuity of membership in the band i.e: they are away most of the time. However, these are dealt with on a case by case basis and there may be circumstances which warrant the inclusion of a band member even though he may be absent for an extended period of time.

2) Where the agent's notes in the paylist simply states "married to non-treaty", those people are not included. They could be non native or métis and therefore ineligible.

3) Where the agents notation simply reads "admitted" (which often meant admitted to band and not to treaty) and no letter of admission to treaty can be found, these persons are excluded.

4) Persons who are not readily traceable i.e.: they seem to appear from nowhere and disappear in a similar fashion.

5) Persons who were included in the population base of another band for treaty land entitlement purposes.

6) Person names which are discovered to be fraudulent.

Land Entitlement Claims Arising from Band Amalgamation

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

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

E Calculation of a Shortfall

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

MAY 1983