

INDIAN CLAIMS COMMISSION

SANDY BAY OJIBWAY FIRST NATION TREATY LAND ENTITLEMENT INQUIRY

PANEL

Commissioner Renée Dupuis, C.M., Ad.E. (Chair)
Commissioner Daniel J. Bellegarde
Commissioner Alan C. Holman

COUNSEL

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To the Indian Claims Commission
John B. Edmond / Diana Kwan

June 2007

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SUMMARY

SANDY BAY OJIBWAY FIRST NATION TREATY LAND ENTITLEMENT INQUIRY Manitoba

The report may be cited as Indian Claims Commission, *Sandy Bay Ojibway First Nation: Treaty Land Entitlement Inquiry* (Ottawa, June 2007).

*This summary is intended for research purposes only.
For a complete account of the inquiry, the reader should refer to the published report.*

Panel: Chief Commissioner R. Dupuis, C.M., Ad.E. (Chair), Commissioner D.J. Bellegarde,
Commissioner A.C. Holman

Treaties – Treaty 1 (1871, 1876); **Treaty Interpretation** – Outside Promises; **Treaty Land Entitlement**
– Land Occupied Prior to Treaty, Landless Transfer, Late Adherent, Marriage, Policy, Population
Formula, Quality of Land, **Band** – Membership; **Manitoba**

THE SPECIFIC CLAIM

In 1982, the Sandy Bay Ojibway First Nation submitted a treaty land entitlement (TLE) claim that was rejected by the Department of Indian Affairs and Northern Development (DIAND) in 1985. In 1991, following further research analyzing paylists, Canada again advised the First Nation that there was no outstanding treaty land entitlement. In 1998, the Sandy Bay First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into its TLE; this request was accepted. At issue in this inquiry is whether the First Nation has an outstanding treaty land entitlement.

BACKGROUND

The Sandy Bay Ojibway First Nation makes its home on the southwest shore of Lake Manitoba. Originally, the Sandy Bay Ojibway First Nation was referred to as the White Mud River Band, which was part of the Portage Band that signed Treaty 1 on August 3, 1871. Shortly after Treaty 1 was signed, the Portage Band was divided into three distinct bands: the Portage Band, the Long Plain First Nation, and the Sandy Bay Ojibway First Nation. A revision to Treaty 1 was then signed in 1876, on which the Sandy Bay Ojibway First Nation signed in its own name. Each of the three bands was to receive a reserve as well as a proportional share of the original Portage reserve, which had not yet been surveyed but was originally intended for all three bands.

In July 1876, Dominion Land Surveyor J. Lestock Reid reported that the Sandy Bay Ojibway First Nation wanted to settle on the western shore of Lake Manitoba. Included in this area were five farms previously occupied by Sandy Bay members; two of these farms were within the reserve. Township 18, range 9, originally surveyed by Dominion Land Surveyor C.P. Brown in 1873 and located on the western shore of Lake Manitoba, was set aside as a reserve for the Sandy Bay Ojibway First Nation. After a period of flooding and a time during which many members withdrew from the treaty and later were readmitted, the reserve was confirmed as Sandy Bay Indian Reserve (IR) 5 by Order in Council 2876 on November 21, 1913.

In the 1920s, questions arose regarding the Sandy Bay Reserve's eastern boundary, which bordered the shore of Lake Manitoba. To clarify the situation, Order in Council 1004, dated May 13, 1930, was issued, which set apart six square miles of marsh, or 3,840 acres (more or less), for the Sandy Bay Indian Reserve.

In 1970, Order in Council 1970-2030 set apart approximately 495 acres of former road allowances for the use and benefit of the First Nation.

ISSUES

What is the amount of land in I.R. No. 5 which can be credited toward TLE? What is the amount of land originally set apart for Sandy Bay Ojibway First Nation in Treaty 1 and in 1876? What amount of land was provided to Sandy Bay in 1930 (OIC P.C. 1004 dated May 13, 1930) and 1970 (OIC P.C. 1970-2030 dated Nov. 24, 1970)? Can the lands provided in 1930 and 1970 be credited toward TLE? What amount of land, if any, should not be credited toward TLE on the grounds that it was land improved and occupied prior to Treaty? What is the population number for Sandy Bay Ojibway First Nation to calculate the amount of land to which it is entitled pursuant to Treaty?

FINDINGS

This inquiry focuses on whether the Sandy Bay Ojibway First Nation has an outstanding treaty land entitlement claim. Part of answering this question involves determining how much land was originally set aside for the First Nation. In examining the 1913 Order in Council setting aside the reserve, the panel concludes that 12,102 acres of dry land were set aside and that no marshland was included as part of the reserve. The panel further concludes that the 1930 Order in Council was issued to clarify and confirm that the six square miles of marsh were intended to be part of the reserve. However, while the marshland was intended to be part of the reserve, the panel finds that the marshlands cannot be attributed to TLE since a fundamental goal of Treaty 1 was to encourage the development of an agriculturally based economy among First Nations. Marshland could not have fulfilled this goal; therefore, even though marsh may be considered land, it cannot be credited toward TLE.

With respect to the issue of land improved and occupied prior to treaty, the panel concludes that the two farms which fell within reserve boundaries at the date of first survey were occupied by members of the Sandy Bay Ojibway First Nation. As a result, the Band is entitled to count these two members as part of the date of first survey population; however, the lands of these two farms should not be credited toward TLE. In other words, lands occupied and improved prior to treaty should not diminish the Band's land entitlement.

As for the issue dealing with the population number for the Sandy Bay Ojibway First Nation, which is required to calculate its TLE, the panel first had to determine where 17 people – claimed by both the Sandy Bay Ojibway First Nation and the Long Plain First Nation – should be counted. Based on the evidence presented, the panel concludes that these 17 people must be deducted from Sandy Bay's TLE population count and should be counted with the Long Plain First Nation. In addition, with respect to Sandy Bay's TLE population count, the panel notes that additional research is required to determine whether any of the 38 non-treaty women may be added to the Sandy Bay population count. Based on the evidence presented, the panel has determined that the population count is 207. There are an additional seven people whom the panel cannot conclude, based on the evidence, whether to add to the population count.

RECOMMENDATION

We therefore recommend that this claim not be accepted for negotiation.

REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

Cases Referred To

R. v. Marshall, [1999] 3 SCR 456. *Merritt v. Toronto (City)* (1913) 48 SCR 1.

ICC Reports Referred To

Fort McKay First Nation: Treaty Land Entitlement Inquiry (Ottawa, December 1995), reported (1996) 5 ICCP 3.

Treaties and Statutes Referred To

Canada, *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions*, August 3, 1871 (Ottawa: Queen's Printer, 1957); Copy of Revision to Treaty No. 1, June 20, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxviii–xxix.

Other Sources Referred To

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

COUNSEL, PARTIES, INTERVENORS

J.R.N. Boudreau for the Sandy Bay Ojibway First Nation; P. Robinson for the Government of Canada; J.B. Edmond, D. Kwan to the Indian Claims Commission.

PART I
INTRODUCTION

BACKGROUND TO THE INQUIRY

The Sandy Bay Ojibway First Nation¹ makes its home on the southwest shore of Lake Manitoba. Originally, the Sandy Bay First Nation was referred to as the White Mud River Band, which was part of the Portage Band that signed Treaty 1 on August 3, 1871. At that time, the Portage Band was to receive a reserve. Shortly after Treaty 1, the Portage Band was divided into three distinct bands. Each group supported either Chief Yellow Quill, Short Bear, or Na-naw-wach-ew-wa-capow. In 1876, the Portage Band was recognized as three separate bands, and Treaty 1 was revised. Short Bear's group became the Long Plain First Nation, and Na-naw-wach-ew-wa-capow became the Chief of the Sandy Bay First Nation. A revision to Treaty 1 was then signed in 1876, on which the Sandy Bay First Nation signed in its own name. Each of the three bands was to receive a reserve as well as a proportional share of the original Portage reserve, which had not yet been surveyed but was originally intended for all three bands.

In July 1876, Dominion Land Surveyor J. Lestock Reid reported that Sandy Bay wanted to settle on the western shore of Lake Manitoba. According to Brown's field notes, the township had originally been taken for a reserve by the Sioux. Following Reid's report, however, the land was set aside as a reserve for the Sandy Bay First Nation. Included in this area were five farms previously occupied by Sandy Bay members; two farms fell within the boundaries of the reserve. Township 18, range 9, originally surveyed by Dominion Land Surveyor C.P. Brown in 1873 and located on the western shore of Lake Manitoba, was set aside as a reserve for the Sandy Bay First Nation. After a period of flooding and a time during which many members withdrew from treaty and later were readmitted, the reserve was confirmed as Sandy Bay Indian Reserve (IR) 5 by Order in Council 2876 on November 21, 1913.

In the 1920s, questions arose regarding the Sandy Bay Reserve's eastern boundary, which bordered the shore of Lake Manitoba. To clarify the situation, Order in Council 1004, dated May 13, 1930, was issued, which set apart six square miles of marshland, or 3,840 acres (more or less), for the Sandy Bay Indian Reserve.

¹ For ease of reference, the Sandy Bay Ojibway First Nation is referred to as the Sandy Bay First Nation or Sandy Bay throughout the report.

In 1970, Order in Council 1970-2030 set apart approximately 495 acres of former road allowances for the use and benefit of the First Nation.

In 1982, the Sandy Bay First Nation submitted a treaty land entitlement (TLE) claim to what was then known as the Office of Native Claims. The claim was originally rejected in 1985. In 1991, following further research analyzing paylists, Canada again advised the First Nation that there was no outstanding treaty land entitlement. A full historical background to the First Nation's claim is found at Appendix A to this report. In 1998, the Sandy Bay First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into its TLE. The ICC accepted this request for inquiry. However, after Sandy Bay presented its issues for inquiry, Canada objected to the scope of the inquiry, arguing that the issues had not been previously considered by Canada. After receiving written submissions from the parties on the ICC's mandate, the panel ruled on June 28, 1999, that it would proceed with an inquiry into the issues presented by Sandy Bay, and that Canada would be given a reasonable amount of time to consider any new matters. This ruling is reproduced as Appendix B to this report.

Following the ICC's ruling on its mandate, further research was undertaken to clarify issues surrounding the TLE claim. A series of events outside of the inquiry process occurred, affecting both the First Nation and Canada's participation in the inquiry. Progress of the inquiry was delayed; however, in 2003, present legal counsel for the First Nation was appointed and the parties proceeded with the inquiry.

At a planning conference in September 2004, the parties agreed to proceed directly to the written and oral submissions of the inquiry, without holding a community session. However, the parties were unable to reach agreement on the Statement of Issues. Canada proposed a two-phased inquiry process, with which the First Nation did not agree. In addition, the Long Plain First Nation sought standing to intervene in the Sandy Bay inquiry with respect to 17 people claimed as members by both First Nations. After receiving written submissions from the parties, the panel ruled on November 22, 2004, that the inquiry would be conducted in a single phase, granted the Long Plain First Nation standing to seek intervention, and finalized the issues. This ruling is reproduced as Appendix C to this report.

In granting standing to the Long Plain First Nation, the panel specified that a Band Council Resolution (BCR) had to be provided, in addition to written submissions. An oral hearing into this

matter was scheduled for June 15, 2005. Shortly afterwards, on June 29, 2005, the panel issued a written ruling, granting standing to the Long Plain First Nation to provide written and oral submissions on the 17 people claimed by both Sandy Bay and Long Plain. This ruling is reproduced as Appendix D to this report.

A chronology of this inquiry is set forth in Appendix E of this report.

MANDATE OF THE COMMISSION

The mandate of the Indian Claims Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on “whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister.”² This Policy, outlined in DIAND’s 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding “lawful obligation” on the part of the federal government.³ The term “lawful obligation” is defined in *Outstanding Business* as follows:

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

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

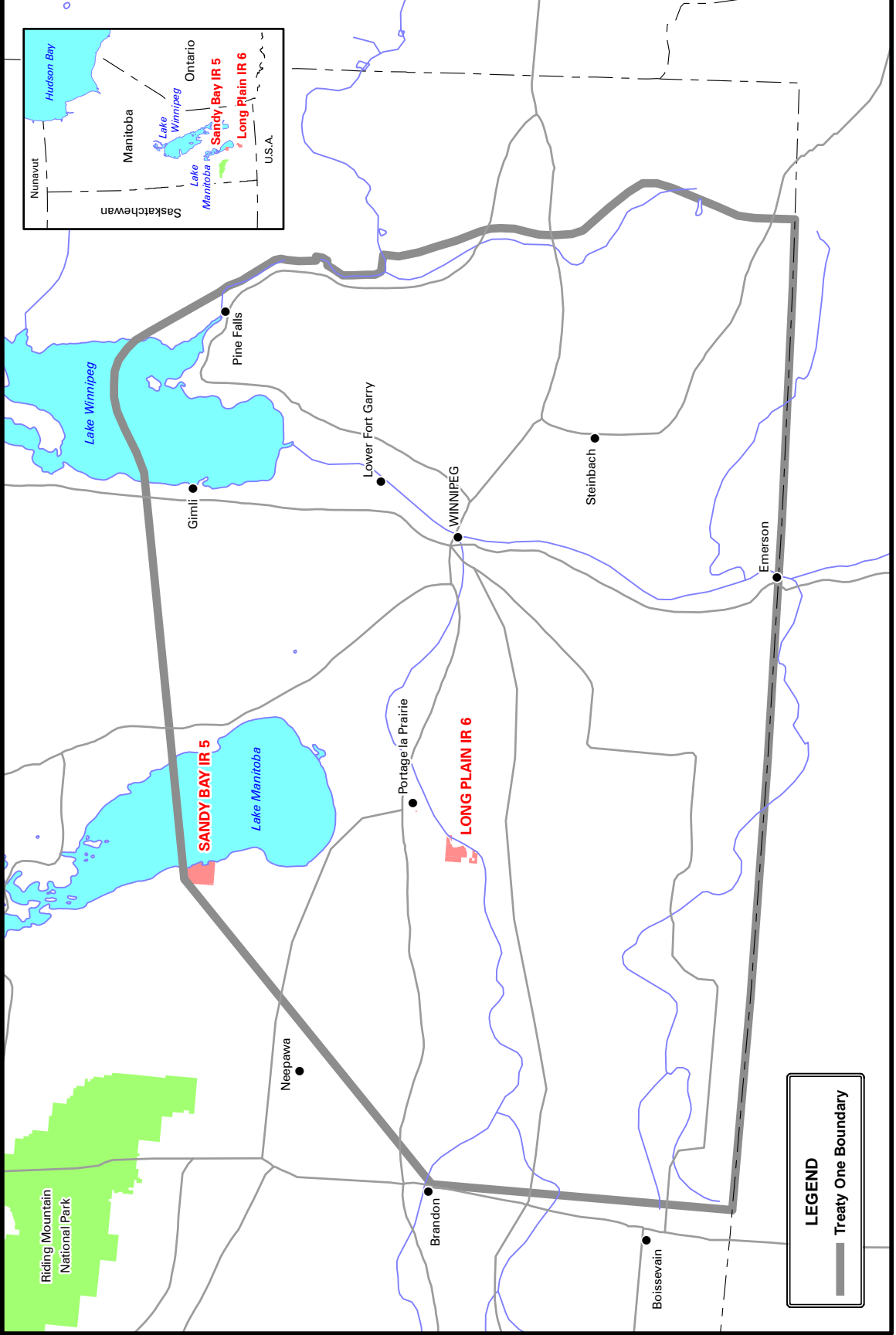
- i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
- ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
- iii) A breach of an obligation arising out of government administration of Indian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

² Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

³ Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171–85 (hereafter *Outstanding Business*).

Map 1

Claim Area Map



LEGEND
— Treaty One Boundary

PART II
THE FACTS

The Sandy Bay First Nation makes its home on the southwest shore of Lake Manitoba. Originally, the Sandy Bay First Nation was referred to as the White Mud River Band, which was part of the Portage Band that signed Treaty 1 on August 3, 1871. Shortly after Treaty 1, Chief Na-naw-wachew-wa-capow wrote to Indian Commissioner Wemyss Simpson, stating that the White Mud River Band was not represented at treaty, and that it wanted to be separate from the Portage Band.

By 1875, the Portage Band had been divided into three distinct bands: the Portage Band, the Long Plain First Nation, and the Sandy Bay First Nation. A revision to Treaty 1 was then signed on June 20, 1876, on which the Sandy Bay First Nation signed in its own name. Each of the three bands was to receive a reserve as well as a proportional share of the original Portage reserve, which had not yet been surveyed but was originally intended for all three bands.

In July 1876, Dominion Land Surveyor J. Lestock Reid reported that the Sandy Bay First Nation wanted to settle on the western shore of Lake Manitoba. Included in this area were five farms previously occupied by Sandy Bay members. The western shore of Lake Manitoba had been surveyed by Dominion Land Surveyor C.P. Brown in 1873 as township 18, range 9, containing 12,085.81 acres of land, 492.55 acres of roads, and 10,949.19 acres of water and marsh on the western shore of Lake Manitoba. Brown's survey was approved on January 1, 1874. According to Brown's field notes, the township had originally been taken for a reserve by the Sioux. Following Reid's report, however, the land was set aside as a reserve for the Sandy Bay First Nation. In November 1876, Reid returned to the area but did not actually re-survey the township. Instead, he consulted with the First Nation with respect to the boundaries and based the reserve on the survey completed by Brown in 1873. He noted in his report that the area was approximately 900 acres greater than the First Nation's entitlement; but since a large percentage of the shore was muskeg and marsh, the entire township should be included in the reserve.

The land surveyed by Brown and reviewed by Reid for a reserve was eventually confirmed as Sandy Bay IR 5 by Order in Council 2876 on November 21, 1913. Between 1876 and 1913, questions had been raised by the Department of the Interior as to whether the Hudson's Bay Company still held any rights to the lands. Lieutenant Governor Alexander Morris protested the

delay in confirming the reserve, stating to both the Minister of the Interior and the Secretary of State that the Band was already living on the land and making improvements.

By 1879, the reserve was still not confirmed. By now, flooding had become an issue, and it would remain a problem until 1883. In 1880, the Department of the Interior examined the possibility of obtaining dry land near the reserve for agricultural purposes. This possibility was investigated in conjunction with the Band's request to extend the southern boundary of the reserve by two miles. Later, the Band advised that it wished for the western rather than the southern boundary to be extended as a means of acquiring more dry land. In 1881, Indian Agent Francis Ogletree agreed that the land on the south was flooded as well, and that it would be necessary to seek land on the west. In June 1881, Indian Superintendent James F. Graham instructed a dominion land surveyor to extend the reserve boundary south. However, when the surveyor arrived at the reserve, he was told by the Band that it wanted its reserve extended west, not south. The surveyor was unable to locate any dry land west of the reserve. By 1883, flooding on the Sandy Bay Reserve had subsided. Conditions remained favourable through 1884, allowing the Band to cultivate land.

As a result of the flooding, many members of the Band left the reserve, with very few occupying it by 1886. Indian Agent H. Martineau reported that many had left to join other bands. Some members took scrip and signed an agreement to leave the reserve, but because there were so few members left on the reserve, the members who took scrip continued to live on the reserve. However, some of the members who took scrip did not realize that they were withdrawing from treaty, and made accusations of being misinformed and misled. In 1887, Indian Agent Martineau reported that most of the Sandy Bay First Nation had taken scrip, and that the remaining members did not reside on the reserve. A similar report was filed in 1888. The Indian Agent's report in 1890 stated that all but one of the families on the reserve had withdrawn from the treaty. Later in 1890, the Minister of the Interior received a petition from the Sandy Bay scrip recipients requesting readmission to treaty. Deputy Superintendent General of Indian Affairs L. Vankoughnet recommended that the scrip recipients be allowed to rejoin the Band as long as the value of the scrip was repaid. In 1892, almost all of the Sandy Bay scrip recipients were readmitted to treaty.

On November 21, 1913, Order in Council 2876 was passed, confirming Sandy Bay IR 5, comprising all of fractional township 18, range 9, containing 19 square miles. This Order in Council excluded all road allowances on the reserve.

In the 1920s, questions arose regarding the Sandy Bay Reserve's eastern boundary, which bordered the shore of Lake Manitoba. More specifically, because the description in the 1913 Order in Council was unclear, the issue was whether the marshlands along Lake Manitoba were part of the Sandy Bay Reserve. In 1923, one government official stated that the marsh was excluded from the reserve, while in 1926 another official stated that the marsh was included in the reserve. In 1927, another official stated that the marsh was not included. By 1930, the Department of Indian Affairs had determined that the marsh had not been included in the reserve; yet it was the Band's understanding that the boundary of the reserve was the lake, not the marsh. To clarify the situation, Order in Council 1004, dated May 13, 1930, was issued, which set apart six square miles of marshland, or 3,840 acres (more or less), as an addition to the Sandy Bay Indian Reserve.

Concurrent with the confusion over the eastern boundary of the reserve was a quality-of-lands issue. In 1928, the Inspector of Indian Agencies, M. Christianson, reported that the conditions on the reserve were poor. Given that the population of the Band was growing, it would be difficult for band members to make a living off of the land. The Department of Indian Affairs acknowledged that the Band was no longer hunting and trapping, and that the land was of poor quality and unsuited to agriculture. As a result, the department proposed to relocate the Band. The issue was not raised again until 1932, when the department considered obtaining other lands and relocating the Band in order to address the quality-of-lands issue. However, the Chief Surveyor was not optimistic that suitable lands could be obtained for another reserve in the district. The department also considered amalgamating Sandy Bay with another band. At the same time, the First Nation requested that additional lands be secured for their use. However, there is no documentary evidence in this inquiry that this request was ever granted by the department.

In 1958, the Department of Indian Affairs wrote to the Government of Manitoba, proposing that the road allowances on the reserve be transferred to the reserve. The provincial government agreed on the condition that Canada exchange an area of land on the reserve for drainage purposes. In 1959, a Band Council Resolution was passed, agreeing to the exchange. In 1970, Order in Council 1970-2030 set apart approximately 495 acres of former road allowances for the use and benefit of the First Nation.

PART III
ISSUES

Final Statement of Issues Based on Panel Ruling November 22, 2004.

1. What is the amount of land in I.R. No. 5 which can be credited toward TLE?
 - a) What is the amount of land originally set apart for Sandy Bay First Nation in Treaty 1 and in 1876?
 - b) What amount of land was provided to Sandy Bay in 1930 (OIC P.C. 1004 dated May 13, 1930) and 1970 (OIC P.C. 1970-2030 dated Nov. 24, 1970)?
 - c) Can the lands provided in 1930 and 1970 be credited toward TLE?
2. What amount of land, if any, should not be credited toward TLE on the grounds that it was land improved and occupied prior to Treaty?
3. What is the population number for Sandy Bay First Nation to calculate the amount of land to which it is entitled pursuant to Treaty?

PART IV
ANALYSIS

ISSUE 1 LAND THAT CAN BE CREDITED TOWARD TLE

- 1 What is the amount of land in I.R. No. 5 which can be credited toward TLE?**
- a) What is the amount of land originally set apart for Sandy Bay First Nation in Treaty 1 and in 1876?**
 - b) What amount of land was provided to Sandy Bay in 1930 (OIC P.C. 1004 dated May 13, 1930) and 1970 (OIC P.C. 1970-2030 dated Nov. 24, 1970)?**
 - c) Can the lands provided in 1930 and 1970 be credited toward TLE?**

In this issue, the panel is being asked to make a factual finding as to the amount of land in Indian Reserve No. 5 that can be credited toward treaty land entitlement (TLE) for the Sandy Bay First Nation. The panel notes that the parties are in agreement regarding the lands in the 1970 Order in Council and that this issue is no longer an issue for the inquiry.

The parties have made submissions on what was surveyed in 1876 and on lands provided to Sandy Bay in 1930. In response to this issue, the panel has concluded that the amount of land originally set aside for the First Nation and confirmed in the 1913 Order in Council (OIC) is 12,102 acres. In the 1930 Order in Council, the panel has concluded that the marshland was confirmed as part of the original reserve. With respect to whether this marshland can be credited toward TLE, in this case the panel finds that marsh cannot be credited toward TLE.

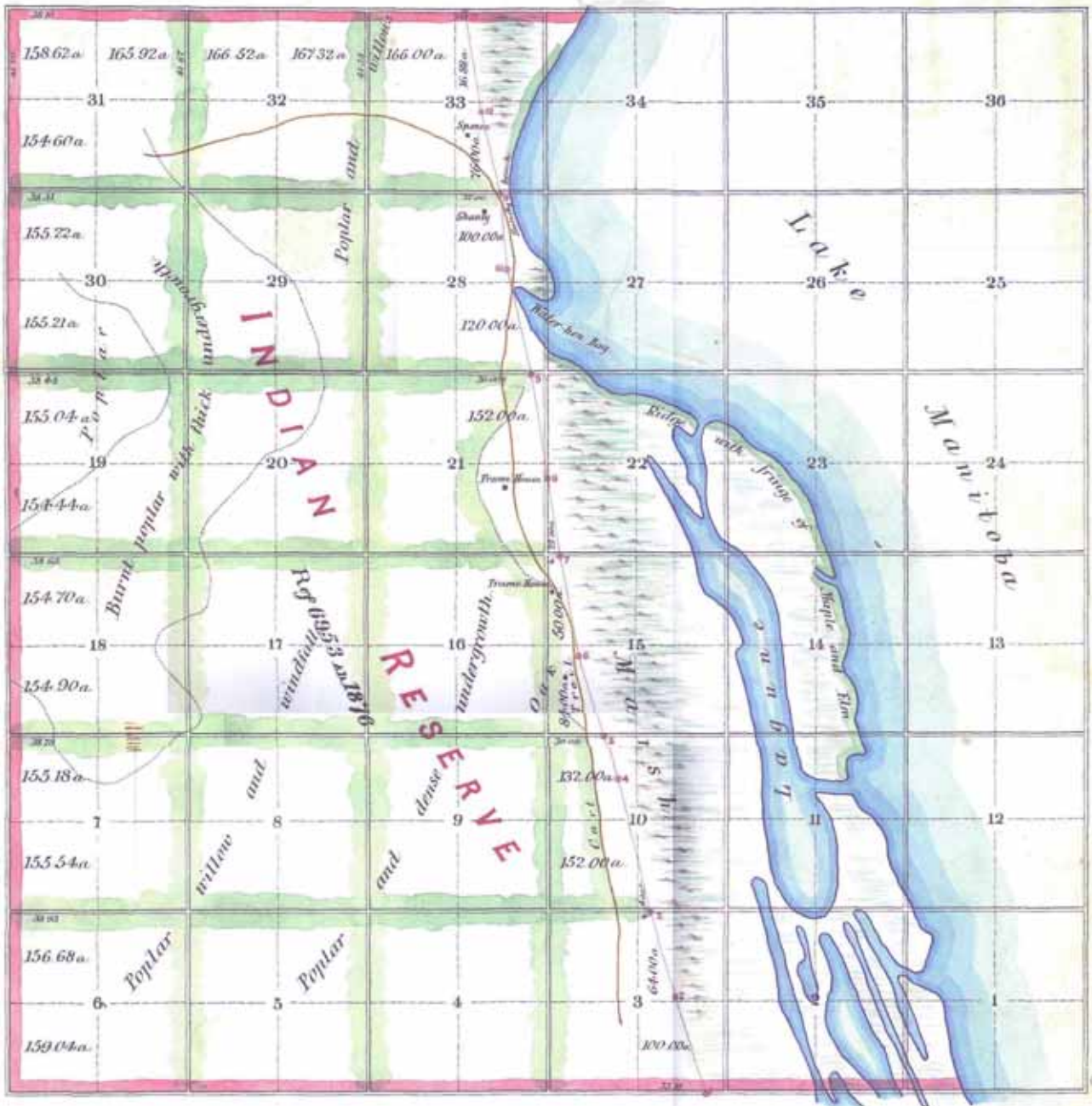
The panel's reasons follow.

Factual Background

On August 3, 1871, Treaty 1 was formally concluded at Lower Fort Garry.⁴ One of the original signatories was the Portage Band. However, by 1876, Treaty No. 1 was revised. The Portage Band was divided into three distinct bands: the Portage Band, Sandy Bay First Nation, and Long Plain First Nation, each with its own reserve. The three reserves were to contain each First Nation's

⁴ *The Manitoban*, PAM, August 12, 1871 (ICC Exhibit 1, p. 11).

Tr. I. Man.
 PLAN OF
 TOWNSHIP N^o 18
 RANGE 9 WEST OF 1st MERIDIAN
(Sandy Bay Ind. Trs.)
 Scale 40 Chains to an inch.



Surveyed by Deputy Surveyor
 (Sgd.) C. P. Brown
 August and September 1873

Dominion Lands Office
 Ottawa,
 1st January 1874.
 Approved & confirmed
 (Sgd.) J. S. Dennis
 Surveyor General.

Contents

Nett area.....	12085.81 acres
Roads.....	492.55
Water and Marsh.....	10949.19
Total area.....	23527.55

File 24157

*Justified
 1874
 C. P. Brown
 Deputy Surveyor*

proportional share of the original Portage reserve, which had not yet been surveyed and was intended for all three bands, relative to their population.⁵

In July 1876, Dominion Land Surveyor J. Lestock Reid reported that the Sandy Bay First Nation wished to have its reserve located on the western shore of Lake Manitoba in township 18, and he identified five prior holdings belonging to members of the Sandy Bay First Nation.⁶ Based on Reid's report, Alexander Morris, the Lieutenant Governor of Manitoba, recommended to the Minister of the Interior that township 18, range 9, be set aside as a reserve for Sandy Bay.⁷

Township 18, containing 12,085.81 acres of land, 492.55 acres of roads, and 10,949.19 acres of water and marsh, was originally surveyed by Dominion Land Surveyor C.P. Brown in 1873. His survey was approved on January 1, 1874.⁸ The area was visited by Dominion Land Surveyor J. Lestock Reid in November 1876. Reid did not actually re-survey township 18; instead, he consulted with the First Nation with respect to the boundaries and based the reserve on the survey completed by Brown in 1873.⁹ He noted in his report that the area is approximately 900 acres greater than the First Nation's entitlement but that a large percentage of the shore is muskeg and marsh, and he recommended that the entire township be included in the reserve.

On November 21, 1913, Order in Council 2876 was issued, confirming Sandy Bay IR No. 5:

Whereas Subsection (a) of Section 76 of the Dominion Lands Act, 1908, provides that the Governor in Council may withdraw from the operation of the Act, subject to

⁵ Copy of Revision to Treaty No. 1, June 20, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxvii–xxix (ICC Exhibit 1, p. 131).

⁶ J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor, July 12, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxxi (ICC Exhibit 1, pp. 138–39).

⁷ Alexander Morris, Lieutenant Governor, to Minister of the Interior, July 14, 1876, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, p. 140).

⁸ See Plan 782, "Plan of Township No. 18, Range 9, West of 1st Meridian (Sandy Bay Ind. Res.)," surveyed by C.P. Brown, Deputy Surveyor of Dominion Lands, August–September 1873, confirmed January 1, 1874, and certified as true copy April 19, 1906 (ICC Exhibit 2).

⁹ *Sandy Bay Treaty Land Entitlement Claim Additional Research Final Report*, Public History Inc., May 23, 2004 (ICC Exhibit 16, p. 13).

existing rights as defined or created thereunder, such lands as have been or may be reserved for Indians.

Therefore His Royal Highness the Governor General in Council is pleased to Order that the lands comprised within the following reserves shall be and the same are hereby withdrawn from the operations of the Dominion Lands Act, subject to existing rights as defined or created thereunder, namely. ...

7. Sandy Bay Indian Reserve, No. 5, comprising all of fractional township eighteen, range nine, west of the principal meridian, as shown on the official plan of the township, approved and confirmed on the first day of January, one thousand eight hundred and seventy-four, excepting thereout and therefrom the road allowance as shown on the said official plan; the said reserve containing by admeasurement nineteen square miles, more or less ...¹⁰

All road allowances were excluded from the reserve.

In the 1920s, questions arose regarding the Sandy Bay Reserve's eastern boundary, which bordered the shore of Lake Manitoba. N.B. Sheppard of the Land Patents Branch of the Department of the Interior wrote to T. Shanks, Assistant Surveyor General, inquiring as to whether sections 11 and 29 as well as the lands lying east of the traverse line on the survey – all in fractional township 18, range 9, west of the principal meridian – were intended to be included in IR 5.¹¹ Sheppard indicated that if the land to the east of the traverse line¹² was to be included in IR 5, then there was an error in the 19-square-mile area described. Assistant Surveyor General Shanks replied that the marshlands were excluded from the reserve, stating that “[t]he description of Sandy Bay Indian Reserve is evidently intended to include only the land west of the traverse line shown on the original township plan.”¹³

¹⁰ Governor General in Council, Privy Council Office, Order in Council 2876, November 21, 1913, LAC, 2, 1, vol. 1276 (ICC Exhibit 1, p. 262).

¹¹ N.B. Sheppard, Land Patents Branch, Department of the Interior, Ottawa, to T. Shanks, Assistant Surveyor General, June 25, 1923, Natural Resources Canada, Legal Surveys Division, file SM8207-06397-A, vol. 1 (ICC Exhibit 16, p. 93).

¹² It should be noted that Surveyor Brown's survey and field notes identify a segmented traverse line along the western edge of what he identified as marsh.

¹³ Thomas Shanks for Surveyor General, to N.B. Sheppard, Land Patents Branch, Department of the Interior Ottawa, July 18, 1923, Natural Resources Canada, Legal Survey's Division, file SM8207-06397-A, vol. 1 (ICC Exhibit 16, p. 95).

The concern regarding the eastern boundary of the reserve continued. On October 9, 1926, J.M. Roberts, Secretary of the School Lands Branch of the Department of the Interior, wrote to J.D. McLean, Assistant Deputy and Secretary of the Department of Indian Affairs, inquiring as to whether the area shown as “marsh” on the Township Plan, including section 11 and other lands lying east of the traverse line, were part of the Sandy Bay Indian Reserve.¹⁴ McLean responded that “Frac. Sec. 11-18-9-W.P.M., has been considered to be part of the Sandy Bay Indian reserve No. 5 and confirmed as such by Order in Council P.C. 2876, dated 21st NOV. 1913, when the confirmation of Sandy Bay stated that the reserve comprised all of Frac. Tp. 18-9-W.P.M. as shown on the official plan of the Township approved and confirmed 1st Jan. 1874.”¹⁵

However, in 1927, Surveyor General F.H. Peters indicated that the marshland was not included in the calculation of land within the township.

The plan of township 18-9-W.Pr. dated January 1st, 1874 [Brown’s Township survey] bears a tabulation showing the land in sections as 12085.81 acres and the water areas as 10949.19 acres. No section lines are shown on the marsh. The land area mentioned is almost exactly nineteen square miles as given in the description of the Indian Reserve. The height of the water in Lake Manitoba is subject to variation so that the marsh shown on the township plan would probably be completely under water at certain periods, and at the time the plan was issued, evidently the view was held that the marsh might be regarded as part of the lake. The opinion expressed in my memorandum of July 18th 1923 was based on these considerations.

If at any time it is found that the marsh has become sufficiently dry to be classified as land, it should be surveyed and added to the Indian Reserve.¹⁶

In 1930, the boundary was questioned again. On March 10, 1930, Indian Agent J. Waite sought advice from Indian Commissioner W.M. Graham.

¹⁴ J.M. Roberts, Secretary, School Lands Branch, Department of the Interior, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, October 9, 1926, DIAND file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 264).

¹⁵ J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to J.M. Roberts, Secretary, School Lands Branch, Department of the Interior, October 14, 1926, DIAND file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 265).

¹⁶ F.H. Peters, Surveyor General, to the Controller, School Lands Division, Dominion Lands Branch, Department of the Interior, February 9, 1927, DIAND file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 266).

Will you please advise me, of [sic] the water constitutes the boundary of a reserve, where the reserve is situated on a lake, or is a reserve similar to other lands, in that the shore of the lake is reserved as a public road. On the Sandy Bay Reserve there are three fishing camps on the lake shore, the fishing is usually good at this point, and there is a danger of other fishermen erecting camps in the vicinity. This will not only crowd out the Indian fisherman, but it will become a point of contention in time, and I would like a ruling in the matter. The reserve map shows nothing that would be of any help in this matter.¹⁷

Acting Assistant and Deputy Secretary A.F. MacKenzie (successor to J.D. McLean) wrote to Indian Commissioner Graham on March 21, 1930, stating that the marshlands on the shore of the lake were not included in the reserve.

I have to advise you that generally speaking Indian reserves fronting on lakes and rivers include all the lands within the land boundaries extending down to the waters on which the reserve fronts and parties camping on the shore of such waters without departmental authority, would be committing an act of trespass and could be prosecuted under the Act.

However, in the particular case mentioned, namely, Sandy Bay Indian reserve, the Department appears to be in a somewhat different position, inasmuch as the confirmatory Order in Council confirmed the reserve in accordance with the Township plan and stated the area to be approximately 19 sq. miles. The Township plan referred to shows an area of approximately 19 sq. miles without including the area covered by water and marsh and as this marsh is shown on the Township plan as extending along almost the entire water front, it is doubtful if the Department could support the contention except along the shore of Sec. 28 and a portion of the S.E. [1/4] Sec. 33.¹⁸

To clarify the situation, Order in Council 1004, dated May 13, 1930, set apart six square miles of marshland, or a total of 3,840 acres (more or less), as an addition to the Sandy Bay Indian Reserve.

All that portion of Township 18, Range 9, West of the Principal [sic] Meridian, lying between Lake Manitoba and Sandy Bay Indian Reserve No. 5, described as a marsh on the plan of the said township, approved and confirmed at Ottawa, by J.S. Dennis,

¹⁷ J. Waite, Indian Agent, to W.M. Graham, Indian Commissioner, March 10, 1930, DIAND file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 271).

¹⁸ A.F. MacKenzie, Secretary of Department of Indian Affairs, to W.M. Graham, Indian Commissioner, March 21, 1930, DIAND file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 273).

Surveyor General on the 1st day of January, 1874, of record in the Department of the Interior, containing by admeasurement Six square miles, more or less.¹⁹

Summary of First Nation's Position

The First Nation argues that 11,211 acres of land is the amount of land that can be credited for treaty land entitlement purposes.

To reach this figure, the First Nation argues that all of township 18, composed of either 12,085.81 or, based on the 1874 Brown survey, 12,102 acres of land, was set aside. The First Nation further argues that in 1876, Reid used the original Brown survey acreage of 12,085.81 and subtracted the agreed-upon "belt" acreage of 5,291 acres to arrive at 6,794.81 acres. Reid was told that Sandy Bay had 183 members so, according to the treaty formula, he divided 183 by five (36.6); rounded up to 37 families; and multiplied this number by 160 acres for a total of 5,920 acres that still had to be set aside.²⁰ Reid noted that the reserve was 874.81 acres over TLE entitlement; but because of the presence of about 900 acres of marsh and swamp, he concluded that the overage was acceptable.

The First Nation, in its land calculation, includes the amount comprising the belt. The 11,211 acreage results from adding the 5,291 acreage belt share to the 5,920 acreage treaty formula amount.

With respect to the 1930 Order in Council, the First Nation argues that the OIC *confirmed* that the six square miles of marshland were part of the reserve, as opposed to *added* land to the reserve. The First Nation argues that the boundary of the reserve extended to the water and included the marsh; this was consistent with Surveyor Reid's notes. Although questions in the 1920s had arisen as to whether the boundary of the reserve extended to the edge of the water or stopped at the shore, the confusion was resolved when the 1930 OIC confirmed that the six square miles were *already included* within township 18 and did not count as TLE lands.²¹

The First Nation further argues that the land that was to be provided in fulfillment of treaty obligations had to be "land" and not marsh. If providing marsh fulfills treaty obligations, then a

¹⁹ Order in Council PC 1004, May 13, 1930, LAC, RG 2, Series 1, vol. 1840 (ICC Exhibit 1, p. 274).

²⁰ Written Submissions on Behalf of the Sandy Bay Ojibway First Nation, January 31, 2006, at p. 32.

²¹ Written Submissions on Behalf of the Sandy Bay Ojibway First Nation, January 31, 2006, at p. 52.

breach of the honour of the Crown has occurred. In addition, a breach of fiduciary duty has occurred because the First Nation was never consulted as to its desire for marsh area. If the 1930 Order in Council provided land that was an “addition” in fulfillment of treaty obligations, then Canada must explain why there was absolutely no consultation with the Band. The First Nation was never told that marsh would count as TLE.

In any event, the First Nation submits that marsh is not “land.” Land promised under treaty was, according to the statements of Lieutenant Governor of Manitoba and the North-West Territories Adam G. Archibald during Treaty 1 negotiations, “[t]o form a farm for each family”; as well, Archibald stated that “there shall be no Indian who has not a place that he can call his home, where he can go and pitch his camp, or if he chooses, build his house and till his land.”²²

Summary of Canada’s Position

Canada states that the reserve was confirmed by the 1913 Order in Council, which sets aside 12,160 acres or “19 sq. miles, more or less” for the First Nation. However, Canada submits that the 12,160 acres is Reid’s allocation, which is not completely accurate. Instead, 12,102 acres, as identified in the survey, is more accurate.²³ Canada further states that at this time, the marsh did not likely form part of the original reserve. Instead, in 1930 the marshland added to the reserve was “the continuation of the setting apart of reserve lands pursuant to Treaty 1.”²⁴ As well, the marsh was necessary to provide the First Nation with exclusive access to the lake and fishing.

Although the 1930 Order in Council specifies “six sq. miles, more or less,” which is approximately 3,840 acres, Canada accepts that the land east of the traverse line on the survey is 2,914 acres. A 1991 memorandum by Regional Surveyor for Energy, Mines and Resources G. Kitchen sets out the township as 15,000 acres. The original Brown survey identified 12,085.81 acres of land. Therefore, when 12,085.81 is subtracted from the 15,000 acres, the result is 2,914 acres. Canada states that the critical issue in this inquiry is whether the 2,914 acres can be counted

²² Reply Submission on Behalf of the Sandy Bay Ojibway First Nation, May 30, 2006, at p. 31.

²³ Written Submissions on Behalf of the Government of Canada, May 16, 2006, at para. 28.

²⁴ Written Submissions on Behalf of the Government of Canada, May 16, 2006, at para. 137.

toward fulfilling treaty land entitlement. Canada argues that this amount can be counted toward fulfilling treaty land entitlement.

The practice of counting the marsh toward TLE is based on treaty interpretation. Canada states that the duty to consult the First Nation, with respect to selection and location of reserve lands, was met. There is no specific discussion in Treaty 1 regarding land quality. Each party understood that the reserve included land diverse in nature and quality, and for multiple uses. There was no expectation that only arable land would suffice.²⁵ The First Nation was satisfied with the reserve's location, and it had specifically requested land on the water's edge to allow the continuation of a traditional lifestyle that included a mixture of hunting and fishing.

Canada further argues that marsh is "land" based on court cases such as *Merritt v. Toronto (City)*²⁶. Since marshlands are "land," this addition can then be counted as part of TLE; therefore, 2,914 acres are added to TLE.

The Panel's Reasons

1913 Order in Council

This inquiry focuses on whether the Sandy Bay First Nation has an outstanding treaty land entitlement (TLE) claim. Part of answering this question involves determining how much land was originally set aside for the First Nation. This issue seeks to answer this question.

Determining the amount of land set aside for the reserve requires the panel to make a factual finding that will assist in establishing whether there is an outstanding TLE. The logical starting point for the panel is the 1913 Order in Council (2876), which states that the reserve comprises all of township 18 as shown on the official plan. Township 18 was originally surveyed by C.P. Brown in late 1873, and his survey was approved in 1874. Following the Revision to Treaty 1, Surveyor Reid

²⁵ Written Submissions on Behalf of the Government of Canada, May 16, 2006, at para. 103.

²⁶ *Merritt v. Toronto (City)* (1913) 48 SCR 1.

was advised that the First Nation wanted to have its reserve located on the west shore of Lake Manitoba.²⁷ Reid visited the area again and reported the following:

On my arrival amongst the White Mud Band of Indians I found their Chief was away but I pointed out to Baptiste Spence one of the Councillors the boundaries of the Reserve being the whole of the fractional Township 18 Range 9 West on the West shore of Lake Manitoba containing twelve thousand one hundred and two acres (12102) acres being nearly nine hundred acres over and above what they are actually entitled to but owing to a large percentage of the front of the Reserve along the Lake Shore being muskeg and marsh I would suggest that the whole Township be included in the Reserve.²⁸

Reid did not re-survey the area; instead he relied on Brown's township survey, completed as part of general surveys in Manitoba and approved in 1874. Reid reported that his calculations were based on the following:

I found this Band (White Mud River) to number one hundred and eighty three (183) persons being almost (37) thirty seven families of five each and they being entitled to the same grants as Yellow Quills Band would have a total area of eleven thousand two hundred and eleven (11211 acres) but as in the case of Yellow Quills Reserve there is a large portion of the front on the Lake drowned land I would therefore propose that the whole of the fractional Township 18 Range 9 West containing twelve thousand one hundred and two acres be set apart for this Band the White Mud River Indians. ...²⁹

Reid noted the extent of the marsh and muskeg and compensated for this poorer quality of land by allocating an additional 900 acres to the First Nation.

Unfortunately, it is not entirely clear how much dry land is contained in township 18. On the one hand, the Order in Council states that the entire fractional township is set aside; and on the other

²⁷ J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor, July 12, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxxi (ICC Exhibit 1, pp. 138–39).

²⁸ J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor of Manitoba, November 30, 1876, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, pp. 152–53).

²⁹ J. Lestock Reid, Dominion Land Surveyor, c. 1876, attached to W.A. Austin, Department of Indian Affairs, to Deputy Minister, March 1, 1888, LAC, RG 10, v. 3624, f. 5217-1 (ICC Exhibit 1, pp. 244–45).

hand, 19 square miles (12,160 acres) is specified. The question for the panel is whether the 19 square miles is solely dry land or includes the marsh. An examination of township 18, as shown in Brown's survey, shows that the amount of dry land is approximately 12,087.81 acres, which is close to Brown's original survey figure and Reid's description. The discrepancy between the 12,102 acres and the 12,087.81 acres may be attributable to more land being dry when Reid visited the site. In any event, from this figure the panel concludes that no marshland was included as part of the reserve in the 1913 OIC.

1930 Order in Council

With respect to Order in Council 1004, passed on May 13, 1930, the issue between the parties is whether the six square miles were *added* to the reserve or whether the amount of marshland was *confirmed* as part of the reserve. Canada argues that the marshland was added, while the First Nation argues that the marshland was confirmed as part of the reserve. The parties also differ over whether the marshland can be credited to fulfilling the First Nation's TLE.

Based on the facts, the evidence, and the panel's examination of Brown's survey, the panel concludes that six square miles of marshland were confirmed as part of the reserve by the 1930 OIC. It appears that in 1876, the intention was to set aside the entire fractional township as the reserve. However, a description error was made in the 1913 OIC, in which all of the fractional township was set aside but 19 square miles were specified. The result was that only the dry land formed the reserve. After an examination of the historical documentation, the panel notes that the policy of the Department of Indian Affairs was to include the marshlands in the reserve. The panel reasons that in this case, the marshlands were not included owing to a description error, and that the 1930 OIC was issued to clarify the situation and *confirm* the six square miles of marshland as part of the reserve.

Can Marshland be Counted Toward TLE?

The question then turns to whether the marshland can be attributed to TLE. The panel notes that Canada has argued that the marshland is land based on jurisprudence; however, this analysis does

not necessarily apply when considering whether marshland is land for TLE purposes. In this case, the panel finds that marshland cannot be attributed to TLE.

The First Nation has stated that its interests at the time of reserve creation were to preserve a traditional way of life, which included hunting and fishing. As the Band was granted exclusive use of the marsh, the marsh would allow access to the lake for fishing. Access to fishing would have allowed the Band to maintain its economic well-being. In essence, the lands and the marsh that form the reserve were usable to the Band. Since the First Nation elected not to proceed with a community session, there is no oral history on the practices of the Band at the time of treaty or shortly afterwards. The panel therefore does not have any oral history on how advanced the Band's farming practices were, or on how heavily the Band was involved in fishing at that time. The lack of oral history evidence on this issue is a distinct disadvantage. However, in reaching its conclusions on marshlands, the panel is guided by the background to Treaty 1.

The government's goals at the time Treaty 1 was negotiated were to secure title to the land and to open the country for settlement. At the same time, the government wanted to encourage Indians to settle on reserves and adopt a sedentary lifestyle. Reserves were intended to provide a means of economic self-sufficiency through agricultural production. With this policy in mind, and given the challenges that Indians were facing at this time, the panel concludes that any lands set aside for reserve purposes should have been usable to the Band for agricultural purposes. Support for this conclusion can be found in the record for inquiry.

In his opening address at the start of Treaty 1 negotiations, Lieutenant Governor Archibald said:

Your Great Mother wishes the good of all races under her sway. She wishes her red children to be happy and contented. She wishes them to live in comfort. She would like them to adopt the habits of the whites, to till land and raise food, and store it up against a time of want. She thinks this would be the best thing for her red children to do, that it would make them safer from famine and distress, and make their homes more comfortable.

But the Queen, though she may think it good for you to adopt civilized habits, has no idea of compelling you to do so. This she leaves to your choice, and you need

not live like the white man unless you can be persuaded to do so with your own free will. Many of you, however, are already doing this.³⁰

His comments reflect the Crown's focus on agriculture. Archibald went on to describe reserves.

These 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. They will enable you to earn a living should the chase fail, and should you choose to get your living by tilling, you must not expect to have included in your reserve more of hay grounds than will be reasonably sufficient for your purposes in case you adopt the habits of farmers.

...

When you have made your Treaty you will still be free to hunt over much of the land included in the Treaty. ... Till these lands are needed for use you will be free to hunt over them, and make all the use of them which you have made in the past. But when lands are needed to be tilled or occupied, you must not go on them any more. There will still be plenty of land that is neither tilled nor occupied where you can go and roam and hunt as you have always done, and, if you wish to farm, you will go to your own reserve where you will find a place ready for you to live on and cultivate.³¹

The First Nations had a different understanding of the reserve system and had originally requested more land. *The Manitoban* newspaper reported on all eight days of the negotiations; included in the reports was a detailed account of the various First Nations' demands regarding the location and size of their reserves. On July 29, 1871, *The Manitoban* reported that Ay-ee-ta-pe-tung stated:

I will tell you what I mean to reserve. When first you (His Excellency) began to travel (from Fort William), you saw something afar off, and this is the land you saw. At that time you thought I will have that some day or other; but behold you see before now the lawful owner of it. I understand you are going to buy this land from me. ...With regard to land within the Settlement, I have nothing to say, as I am on the outside.

³⁰ Lieutenant Governor, Manitoba, to Secretary of State, July [27], 1871, Canada, *Report on the Indian Branch of the Department of the Secretary of State for the Provinces for the year ending June 30, 1871*, pp. 16–17 (ICC Exhibit 16, p. 35).

³¹ Lieutenant Governor, Manitoba, to Secretary of State, July [27], 1871, Canada, *Report on the Indian Branch of the Department of the Secretary of State for the Provinces for the Year Ending June 30, 1871*, pp. 16–17 (ICC Exhibit 16, p. 36).

But you will see from this document that I have made a claim, (written document handed in); and I want to know what is to be allowed me. (This claim is about 160 miles long by 60 broad, and extends from the mouth of Tobacco Creek, to Medicine Lodge at Pembina, from there north-west to White Clair; thence down to Stony Creek, a branch of the White Mud River, at the upper crossing, and from thence North, to the Salt Springs, on Lake Winnepegosis). No chief appears to represent the Indians at White Mud River, ... teh [sic] chief gave me authority to mention to the Commissioner, for the White Mud River Indians, that they wished their reserve attached to ours. This is the reason our claim extends so far north as Salt Springs.³²

However, Archibald explained the purpose of the reserve and the allotment of 160 acres for each family of five. In addition, the Treaty 1 negotiations had been deadlocked for a few days until Henry Prince, Chief of the St. Peter's Band, asked how the Indians were expected to cultivate the land. Archibald's response was that much assistance would be provided; a school and instructor would be provided to each reserve, and the Indians would be provided with ploughs and harrows. The addition of these agricultural provisions altered the whole tenor of the negotiations. Shortly afterwards, Treaty 1 was signed on August 3, 1871. However, the agricultural provisions that had broken the deadlock in the negotiations were omitted in the text of Treaty 1. These omitted agricultural provisions were the "outside promises" that were the subject of the Revision to Treaty 1 in 1876.³³

Further context is provided by D. Aidan McQuillan in his article, *Creation of Indian Reserves on Canadian Prairies: 1870–1885*,³⁴ which discusses government policy regarding Indians in western Manitoba. The article provides the socio-economic context of the 1870s and examines the general conditions that First Nations in Canada faced. This was a period of transition, during which traditional ways of life were being challenged by rapid settlement, disease, and the disappearance of the buffalo. At the same time, the government hoped to convert the Indians to a sedentary lifestyle

³² Transcription of article entitled "Fourth Day's Proceedings" from *The Manitoban*, August 12, 1871 (ICC Exhibit 1, p. 10).

³³ D.J. Hall, "'A Serene Atmosphere'?: Treaty 1 Revisited" (1984) 4:2 *The Canadian Journal of Native Studies*, 321 at 327 (ICC Exhibit 25, p. 7).

³⁴ D. Aidan McQuillan, "Creation of Indian Reserves on Canadian Prairies: 1870–1885" (Oct. 1980) 70:4 *Geographical Review*, 370–96 (ICC Exhibit 23, appendix D, p. 1626).

with settlement on a reserve, encouraging agriculture as a means of self-sufficiency. In addition to providing implements and tools for farming, the government hired a number of agricultural instructors to establish “model” farms that served as teaching farms adjacent to reserves.

All these references show that while the First Nations primarily pursued traditional ways of life that included hunting, trapping, and fishing, the goal was to convert this lifestyle to one focused on agriculture. The panel infers that to fulfill this policy goal in Treaty 1, the Crown would have to provide not only agricultural tools and implements, but also appropriate land. As a result, for land to be credited to TLE, the land should be usable and fulfill the goals of treaty. In this particular inquiry, an essential goal of Treaty 1 was to encourage the development of an agriculturally based economy among First Nations. Marshland could not have been used to fulfill this goal; therefore, marshland, even though it may be considered land, cannot be credited to TLE.

ISSUE 2 LAND THAT SHOULD NOT BE CREDITED TOWARD TLE

2 What amount of land, if any, should not be credited toward TLE on the grounds that it was land improved and occupied prior to Treaty?

This issue addresses the question of whether the lands farmed and occupied by two Sandy Bay members, George Spence and Robert Sutherland, prior to treaty, can be counted toward TLE.

Factual Background

During his initial visit to survey a reserve for Sandy Bay in July 1876, Dominion Land Surveyor Reid reported that he had located five prior holdings belonging to:

1. George Spence, S.E. 1/4 section, of section 33, Township 18, range 9, west. A house about 30 feet by 20 feet, stable, nine head of cattle, four horses, and has lived here about two years.

2. Robert Sutherland, N.E. 1/4 section of section 33, Township 18, range 9, west. A small house; has lived here about two years.

3. Matawawawin, N.W. 1/4 section of section 26, Township 17, range 9, west. A small house, stable, and has about an acre in garden; has lived here eight years.

4. Joseph DeJaislais, N.W. 1/4 section of section 23, Township 17, range 9, west. Owing to not being able to find the posts, the position of these buildings are not

accurate; two small houses, stable, two cows, three calves and three horses; has lived here about fifteen years.

5. Battiste Spence, N.W. 1/4 section of section 2, Township 17, range 9, west. Has four horses, built his house last fall.³⁵

Many First Nations people included in Treaties 1 and 2 had occupied and improved lands, within or outside their eventual reserves, prior to entering into treaty. George Spence and Robert Sutherland occupied lands that were included within the reserve boundaries; whereas as the pre-treaty land holdings occupied by Matawawawin, Joseph DeJaislais and Battiste Spence were outside of the reserve boundaries. The issue of prior holdings arose during pre-treaty meetings between the government and First Nations.³⁶ Reports from the negotiations indicate that the First Nations were concerned that they would lose their prior holdings if they took treaty.³⁷ At the negotiation of Treaty 1, “an agreement was concluded that properties occupied and cultivated before the Treaty were to be held exclusive of and in addition to the per capita Treaty entitlement.”³⁸ There are a number of historical documents which support the position that such prior land holdings were to be held in addition to reserve land granted under Treaty.³⁹

The revised Treaty 1, agreed to on June 10, 1876, states:

And it is further agreed that the Indians residing heretofore and now in the neighbourhood of the White Mud River shall be recognized as a distinct Band, and Na-wa-che-way-a-pow shall be accepted as their Chief, that as some of them have settled there and desire to remain, those of them who have substantial improvements

³⁵ J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor, July 12, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxx (ICC Exhibit 1, p. 138).

³⁶ Wemyss Simpson, Indian Commissioner, to Secretary of State, November 3, 1871, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and The North-West Territories* (Toronto: Belfords, Clarke, & Co., 1880), 38 (ICC Exhibit 12, p. 68).

³⁷ Author unknown, to W. Simpson, July 26, 1873, LAC, RG 10, vol. 3614, file 4311 (ICC Exhibit 30, p. 21).

³⁸ Jim Gallo, TARR Centre Manitoba, *Properties Occupied and Cultivated Prior to Treaty*, September 28, 1978, 2 (ICC Exhibit 12, p. 3).

³⁹ Jim Gallo, TARR Centre Manitoba, *Properties Occupied and Cultivated Prior to Treaty*, September 28, 1978, 2 (ICC Exhibit 12, pp. 3–5).

shall be protected in their holdings, except in cases where the land so occupied has already been sold or granted by the Department of the Interior to other parties, but the said Indians will not be allowed to occupy or take up any other lands than those already bona fide occupied by each of them.⁴⁰

Summary of First Nation's Position

The First Nation argues that the 320 acres occupied and improved by George Spence and Robert Sutherland prior to treaty and contained within the reserve's boundaries should not be credited to TLE. Based on the legislation, on Treaty 1, and on the Revision to Treaty 1, these lands were protected. The First Nation points out that lands held by non-Indians were protected and states that Indians who held similar lands should be treated the same way. In addition, the First Nation argues that the title passed to George Spence and Robert Sutherland was prior to treaty; therefore, treaty could not affect these grants.

Because George Spence and Robert Sutherland each occupied and improved 160 acres, these 320 acres should be deducted from the amount of land received for TLE. Canada breached an obligation to exclude lands occupied and improved prior to treaty when calculating TLE.

Summary of Canada's Position

Canada clarified at the oral session (June 29, 2006) that if individual Indians were in occupation of improved lands prior to Treaty 1, then the specific amount of that land should not be counted toward TLE. However, these individuals can be counted toward the date of first survey (DOFS) population as long as they met the criteria.

Canada argues that George Spence and Robert Sutherland were not in possession of holdings at the time of treaty in 1871. In 1876, Surveyor Reid reported that they had only been there "about 2 years."⁴¹ Canada also states that the Treaty 1 promise was modified by the 1876 amendment; however, the 1876 amendment does not apply to Spence and Sutherland because they did not live in the White Mud River area.

⁴⁰ Copy of Revision to Treaty 1, June 20, 1876 (ICC Exhibit 1, p. 131).

⁴¹ J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor, July 12, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxx (ICC Exhibit 1, p. 138).

Instead, Spence and Sutherland held their land under a “location title,” which has a specific meaning under section 10 of the 1876 *Indian Act*. That is,

Any Indian or non-Treaty Indians in ... the Province of Manitoba ... who has, or shall have, previously to the selection of a reserve, possession of and made permanent improvements on a plot of land which has been or shall be included in or surrounded by a reserve, shall have the same privileges, neither more or less, in respect of such plot, as an Indian enjoys who holds under a location title.⁴²

Essentially, Canada states that no acreage should be deducted from the total acreage credited to TLE.

The Panel’s Reasons

The panel finds that the lands previously occupied should not be counted toward TLE.

These lands were occupied and improved by at least 1874, as reported by Reid.⁴³ George Spence and Robert Sutherland’s lands were located within the reserve boundaries. There are two governing treaty documents in this issue: Treaty 1, and the Revision to Treaty 1.

The panel believes that the treaty documents govern in this issue, and as such the panel is guided by the Supreme Court of Canada’s principles on treaty interpretation as set out in *R. v. Marshall*⁴⁴:

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation.
2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories.

⁴² *Indian Act*, 1876 S.C. 1876, C. 18 (39 Vict), as cited in Written Submissions on Behalf of the Government of Canada, May 16, 2006, at para. 174.

⁴³ J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor, July 12, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxx (ICC Exhibit 1, p. 138).

⁴⁴ *R. v. Marshall*, [1999] 3 SCR 456.

3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed.
4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed.
5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties.
6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time.
7. A technical or contractual interpretation of treaty wording should be avoided.
8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what 'is possible on the language' or realistic.
9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context.⁴⁵

In addition, the Supreme Court in *Marshall* sets out a two-step approach to interpreting a treaty:

The fact that both the words of the treaty and its historic and cultural context must be considered suggests that it may be useful to approach the interpretation of a treaty in two steps. First, the words of the treaty clause at issue should be examined to determine their facial meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences. This exercise will lead to one or more possible interpretations of the clause. As noted in *Badger, supra*, at para. 76, "the scope of treaty rights will be determined by their wording". The objective at this stage is to develop a preliminary, but not necessarily determinative, framework for the historical context inquiry, taking into account the need to avoid an unduly restrictive interpretation and the need to give effect to the principles of interpretation.

At the second step, the meaning or different meanings which have arisen from the wording of the treaty right must be considered against the treaty's historical and

⁴⁵ *R. v. Marshall*, [1999] 3 SCR 456 at 512–13.

cultural backdrop. A consideration of the historical background may suggest latent ambiguities or alternative interpretation not detected at first reading. Faced with a possible range of interpretations, courts must rely on the historical context to determine which comes closest to reflecting the parties' common intention. This determination requires choosing "from among the various possible interpretations of the common intention the one which best reconciles" the parties' interests: *Sioui, supra*, at p. 1069. Finally, if the court identifies a particular right which was intended to pass from generation to generation, the historical context may assist the court in determining the modern counterpart of that right: *Simon, supra*, at pp. 402–3; *Sundown, supra*, at paras. 30 and 33.⁴⁶

Based on these principles, the panel must undertake a two-step analysis, taking into consideration first the relevant words of the treaty and then the historical and cultural context at the time the treaty was negotiated.

In step one, the panel must examine the words of Treaty 1 and the Revision to Treaty 1. Treaty 1 states:

... if, at the date of the execution of this treaty, there are any settlers within the bounds of any lands reserved by any band, Her Majesty reserves the right to deal with such settlers as She shall deem just, so as not to diminish the extent of land allotted to Indians.

In addition, the Revision to Treaty 1 specifies that "... those of them who have substantial improvements shall be protected in their holdings. ..."⁴⁷

Both the First Nation and Canada agree that pre-treaty land holdings should not be counted toward TLE and that the individuals occupying the land prior to treaty should be counted toward the DOFS population. In this issue, the First Nation and Canada disagree over when these lands were occupied, with Canada arguing that the lands were occupied after Treaty 1. Therefore, the panel must proceed to step two in interpreting the treaty provisions, and consider the historical and cultural context at the time Treaty 1 and the Revision to Treaty 1 were concluded. This approach specifically addresses the location of Spence and Sutherland.

⁴⁶ *R. v. Marshall*, [1999] 3 SCR 456 at 514–15.

⁴⁷ Copy of Revision to Treaty 1, June 20, 1876 (ICC Exhibit 1, p. 131).

In this inquiry, the evidence shows that Spence and Sutherland's farms fell within the boundaries of the reserve. Furthermore, according to treaty land entitlement principles, the amount of land set aside for a reserve is based on the band's total population at the date of first survey. That is, whatever lands are at the time occupied by band members are not relevant to TLE calculations. The panel believes that it would be unfair, as Canada argues, to strictly interpret location and limit the application of these treaty provisions to the area of White Mud River when in fact the Band itself was always a separate band and had occupied the west shore of Lake Manitoba. The treaty provisions are general statements regarding the Band and its collective entitlement, irrespective of the location of the actual White Mud River. Spence and Sutherland occupied the lands that fell within reserve boundaries and were members of the First Nation. Therefore, the Band is entitled to count these two members as part of its DOFS population. However, the lands that Spence and Sutherland occupied should not be credited to TLE. In other words, lands occupied prior to treaty should not diminish the Band's treaty land entitlement.

ISSUE 3 POPULATION NUMBER FOR LAND CALCULATION

3 What is the population number for Sandy Bay First Nation to calculate the amount of land to which it is entitled pursuant to Treaty?

A key component in a TLE claim is population; that is, the question of TLE is based both on the amount of land originally received by the First Nation, and on the First Nation's population. In order for a TLE claim to be found, the amount of land the First Nation receives must be shown to be less than what the First Nation is entitled to based on its population.

Part of the history of this inquiry involved a TLE working group organized and facilitated by the Indian Claims Commission to assist the parties in attempting to sort out the population of Sandy Bay at the date of first survey (DOFS). The working group exchanged preliminary positions on the TLE population for Sandy Bay, but could not reach agreement on 38 identified people. At least 17 of these 38 people were paid with Long Plain First Nation at its DOFS. These 17 people are currently being claimed by Sandy Bay for its population count.

Because of the overlap between the two bands, the Long Plain First Nation sought standing to intervene on the issue of where, in Sandy Bay's inquiry, the 17 people should be counted. After

written submissions and an oral hearing, the Long Plain First Nation was granted intervener status on June 29, 2005. This ruling can be found in Appendix D. The 17 people are significant to Long Plain because of current negotiations over loss-of-use compensation. Determining the population number is based on Canada's TLE policy, which does not permit people to be counted with two bands (i.e., double count). If these 17 people are counted with Long Plain, they are landed transfers and not eligible to be counted with Sandy Bay, and vice versa. This specific issue centres on where these 17 people should be counted.

Summary of Sandy Bay's Position

Sandy Bay states that 183 people were counted by Surveyor Reid at DOFS. The 17 people in the Levasseur family and the Weegeegon (also referred to as Weewagon, Weezeegon, and Weezegan) family are also being claimed, for a subtotal of 200 people. It is argued that the affidavits of the Levasseur family provide strong evidence that the family members were properly affiliated with Sandy Bay and in fact clearly state they were with the White Mud River / Sandy Bay group and had been living there for several years prior to treaty. In addition, Michel Levasseur was later the Chief of Sandy Bay.

These families were placed on the wrong payroll, and this error is the result of a lack of proper discipline applied by Canada to the paylists.

As well, Sandy Bay claims an additional 35 people on its list, for a total of 235.

Summary of Long Plain's Position

The Long Plain First Nation argues that the 17 people from the Levasseur family and the Weegeegon family were on the DOFS payroll for Short Bear, who was chief of Long Plain First Nation at this time. Long Plain states that there was an opportunity for the families to associate themselves with White Mud / Sandy Bay prior to 1877; however, the White Mud Band was paid separately from the Portage Band in 1873, 1874, and 1875. In addition, these families did not choose to be paid with White Mud.

The Long Plain First Nation further argues that the Levasseur children were born at different locations around southern Manitoba. The affidavits of the Levasseurs provided by Sandy Bay speak to residency, not membership.

Lastly, Long Plain First Nation argues that the inclusion of the three families on the 1876 list is significant owing to the context of treaty payment. Because of the division of the Portage list into three bands, it was clear that each member was selecting affiliation.

Summary of Canada's Position

With respect to the 17 people, Canada states that they are properly counted on Long Plain's DOFS payroll. The 14 members of the Levasseur family were paid on the Long Plain list and counted for Long Plain First Nation's TLE. In addition, Canada states that there is no other evidence showing that the three members of the Weegeegon family were not landed transfers to Sandy Bay in 1877. Therefore, this family is properly counted on Long Plain's DOFS payroll.

Following the working group, Canada agreed to add an additional 13 people originally in dispute, bringing Canada's total proposed population count to 207. These 13 additional people include 11 questionables from the DOFS population list⁴⁸ and two people in the "other" category.⁴⁹ These two people are the wife of Joseph Boileau (ticket #4) and a child of Baptiste Metwawenin Sr (ticket #23).

The Panel's Reasons

The 17 People

This issue questions where the 17 people should be counted. The reason why the membership of these 17 people is an issue is partly due to history. There were three distinct groups within the Portage Band that originally signed Treaty 1 in 1871. Each group supported either Chief Yellow Quill, Short Bear, or Na-naw-wach-ew-wa-capow. In 1876, the Portage Band was recognized as three separate bands, and Treaty 1 was revised. Short Bear's group became the Long Plain First Nation, and Na-naw-wach-ew-wa-capow became the Chief of the Sandy Bay First Nation.

The specific question before the panel is whether residency can form the basis for membership.

⁴⁸ Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26, p. 17).

⁴⁹ Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26, p. 20).

The evidence on the 17 people can be summarized as follows:

- Long Plain has shown that the 17 people were on Short Bear's payroll in 1876; and
- Sandy Bay has provided affidavits attesting to the residency of these people and how they had settled at Sandy Bay and eventually became members of Sandy Bay.

The ICC has previously examined the issue of membership in the *Fort McKay First Nation Treaty Land Entitlement Inquiry*. In examining whether the Fort McKay First Nation had a TLE, the panel established many TLE principles that formed the basis for Canada's current TLE guidelines. More specifically, the panel examined the relevance of paylists and their relationship to membership and stated the following:

Although the "residency approach" is very interesting, we are unwilling to depart from the established practice of relying on the payroll as a starting point in treaty land entitlement analysis. We recognize that a payroll has its own shortcomings, that it is not a band list, and that there was no payroll for the Fort McKay group in 1915. Furthermore, although the payroll is a relevant historical reference in the identification of band membership, it is not determinative. Membership is a factual question, established on the basis of all relevant evidence, including the oral testimony of elders.⁵⁰

In addition, the ICC, in referring to a situation in which individuals who were paid annuities with one band and subsequently receive annuities with another, stated:

... when an individual has transferred between bands and it is unclear where that person should be counted, the practice has been to assess the strength of the individual's connection to each band, usually in terms of continuity of association.⁵¹

In this inquiry, the panel sees no reason to depart from the practice of using the payroll as a starting point from which to identify band membership. In other words, without compelling evidence the panel will not determine membership solely on evidence related to residency. As a result, the

⁵⁰ Indian Claims Commission, *Fort McKay First Nation: Treaty Land Entitlement Inquiry* (1996) 5 ICCP 3 at p. 59.

⁵¹ Indian Claims Commission, *Fort McKay First Nation: Treaty Land Entitlement Inquiry* (1996) 5 ICCP 3 at p. 56.

panel finds that there is insufficient evidence to show that the 17 people were not properly on Short Bear's payroll in 1876. At the meeting held in 1876, these 17 people chose to be counted with Short Bear, and there is no evidence that shows these people were put on Long Plain's list against their wishes.

These 17 people must be deducted from Sandy Bay's population count, and they should be counted with Long Plain First Nation.

The Population Number

The panel's attention must now turn to calculating the population number of Sandy Bay, based on the evidence presented in the record and the submissions of the parties. During the course of the TLE working group, Canada and Sandy Bay reached an agreement to count 194 people (172 DOFS, and 22 absentees and arrears), and 37 people were agreed to be in dispute.⁵²

In written submissions, Canada agreed to add an additional 13 people originally in dispute, bringing Canada's total proposed population count to 207.⁵³ These 13 people include 11 questionables from the DOFS population list,⁵⁴ and two people in the "other" category.⁵⁵ These two people are the wife of Joseph Boileau (ticket #4) and a child of Baptiste Metwawenin Sr (ticket #23). In addition, Canada has acknowledged that some of the 38 non-treaty women claimed by Sandy Bay in its written submissions may be counted for TLE. However, additional genealogical research and information are required.⁵⁶

In its written submissions, Sandy Bay has proposed a population count of 235, while Canada has proposed a population count of 207.

⁵² Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26).

⁵³ Written Submissions on Behalf of the Government of Canada, May 16, 2006, p. 54.

⁵⁴ Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26, p. 17).

⁵⁵ Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26, p. 20).

⁵⁶ Written Submissions on Behalf of the Government of Canada, May 16, 2006, p. 71.

Sandy Bay's proposed population number of 235 breaks down into the following:

DOFS population	183
Levasseur / Weegeegon families	17
Subtotal	200
<u>Arrears & absentees</u>	<u>35</u>
Total TLE population	235

Sandy Bay rests its arguments on the arrears and absentees. In its written submissions, Sandy Bay argues that the following 23 people should be counted:⁵⁷

#10	Paul Desjarlais	7 people
#24	Baptiste Metwawenin Jr	3 people
#11	Joseph Desjarlais	3 people
#23	Baptiste Metwawenin Sr	10 people

During the course of the TLE working group, Sandy Bay and Canada agreed that 13 people on tickets #10, 24, and 11 would be counted.⁵⁸ Sandy Bay's written submissions do not acknowledge the prior agreement that was reached during the course of the working group, nor do the submissions challenge the conclusions that were reached by the working group. Canada has not reduced its proposed population count by these people, nor is Canada disputing the inclusion of these 13 people in the population count.

With respect to the 10 people on Baptiste Metwawenin Sr's ticket, nine were originally agreed to be counted, with one child in dispute during the course of the working group.⁵⁹ This one

⁵⁷ Written Submissions on Behalf of the Sandy Bay Ojibway First Nation, January 31, 2006, p. 89.

⁵⁸ Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26, p. 4).

⁵⁹ Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26, p. 4 and p. 20).

child was added to the count by Canada in its written submissions,⁶⁰ and the other nine are not in dispute.

In addition, Sandy Bay argues that the following six people should be counted:⁶¹

#56	Kahweetahpeness or Oosketoak	4 people
#139	Francis Desmarais	1 person
#40	Saswis	1 person

During the course of the working group, Sandy Bay agreed to exclude these people from the population count.⁶² There is no reason given in the submissions for why Sandy Bay has changed its position from the time of the working group, nor is any additional evidence provided to show why these people should now be counted. The one person claimed by Sandy Bay on ticket #4, Joseph Boileau, was added to the count by Canada in its written submissions.⁶³

Of the 35 people claimed as arrears and absentees in Sandy Bay's written submissions, the following five people remain:⁶⁴

#17	Keewaytanook	1 person
#49	Wezaesaquet	4 people

Keewaytanook, #17, remains in dispute between the parties; this is consistent with the chart of questionables agreed to by the parties during the course of the working group.⁶⁵ Wezaesaquet, #49,

⁶⁰ Written Submissions on Behalf of the Government of Canada, May 16, 2006, p. 53.

⁶¹ Written Submissions on Behalf of the Sandy Bay Ojibway First Nation, January 31, 2006, p. 89.

⁶² Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26, p. 13).

⁶³ Written Submissions on Behalf of the Government of Canada, May 16, 2006, p. 54.

⁶⁴ Written Submissions on Behalf of the Sandy Bay Ojibway First Nation, January 31, 2006, p. 89.

⁶⁵ Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26, p. 20).

does not appear in the working group. However, in written submissions⁶⁶ Canada argues that this person was also known as “Louison Lacoite.” The working group parties agreed to exclude Louison Lacoite from the population count.⁶⁷

Of the 35 people claimed as arrears and absentees by Sandy Bay in its written submissions, only one person, #17 Keewaytanook, is actually in dispute between the parties. In its written submissions, Sandy Bay also claimed an additional two people from ticket #20, Christine Matwawind.⁶⁸ This person was not found during the course of the working group; an analysis of the paylists on the record was required to determine where this person could be counted. A paylist analysis for this ticket was completed, and the analysis indicates that the two people on this ticket were likely included in the DOFS count.

The following seven people actually remain in dispute between Canada and Sandy Bay:

#17	Keewaytanook	1 person
#29½	Netawoosake	3 people
#12	Kahkeekayake	1 person
#53	Weescoup’s son	1 person
#342	Gilbert Roulette	1 person

In addition, Sandy Bay has claimed that some or all of the non-treaty women could be included in the population count; statements made by Jim Gallo form the basis of this argument.⁶⁹ During the course of the working group, Sandy Bay had agreed to exclude the 38 non-treaty women from the population count.⁷⁰ Sandy Bay did not provide an explanation in its written submissions for

⁶⁶ Written Submissions on Behalf of the Government of Canada, May 16, 2006, p. 64.

⁶⁷ Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26, p. 9).

⁶⁸ Written Submissions on Behalf of the Sandy Bay Ojibway First Nation, January 31, 2006, p. 92.

⁶⁹ Written Submissions on Behalf of the Sandy Bay Ojibway First Nation, January 31, 2006, p. 78.

⁷⁰ Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26, pp. 7–8).

why it was changing its position from the working group, nor did it provide any additional evidence or research to show that some or all of these women could be counted.

In summary, the 35 people in Sandy Bay’s written submissions include 22 people who were already included in the population count during the course of the working group, 10 people who were agreed to be excluded from the count during the working group, and two people who were added to the count in Canada’s written submissions. After all of the accounting, one person of the 35 listed remains as actually in dispute between the parties; however, when the results of the working group are also taken into account, there are seven people in total actually in dispute between the parties.

Given the information on the record and noting that additional research is required to determine whether any of the 38 non-treaty women may be added, the panel has determined that the population count is 207. We cannot conclude from the evidence before us that the seven people who are in dispute should be included in Sandy Bay’s population count. Since the panel has concluded that marshlands cannot be credited to TLE, the TLE calculation is:

Original reserve acreage	12,102
Belt deduction	5,291
Total land received	6,811
Population count for this amount $[(6,811 / 160) \times 5]$	= 213

PART V
CONCLUSIONS AND RECOMMENDATION

This inquiry focuses on whether the Sandy Bay First Nation has an outstanding treaty land entitlement claim. Part of answering this question involves determining how much land was set aside for the First Nation in 1876.

In examining the 1913 Order in Council confirming the reserve, the panel concludes that 12,102 acres of dry land were set aside and that no marshland was included as part of the reserve. The panel further concludes that the 1930 Order in Council, which set aside six square miles of marshland for the Sandy Bay First Nation, was issued to clarify and confirm that this area was intended to be part of the reserve. Although the marshland was intended to be part of the reserve, the panel finds that the marshlands cannot be attributed to TLE since a fundamental goal of Treaty 1 was to encourage the development of an agriculturally based economy among First Nations. Marshland could not have fulfilled this goal; therefore, even though marsh may be considered land, it cannot be credited toward TLE.

With respect to the issue of land improved and occupied prior to treaty, the panel concludes that the two farms which fell within reserve boundaries at the date of first survey were occupied by members of the Sandy Bay First Nation. As a result, the Band is entitled to count these two members as part of the date of first survey population; however, the lands of these two farms should not be credited toward TLE. In other words, lands occupied and improved prior to treaty should not diminish the Band's land entitlement.

As for the issue dealing with the population number for the Sandy Bay First Nation, which is used for calculating its TLE, the panel first had to determine where 17 people, claimed by both the Sandy Bay First Nation and the Long Plain First Nation, should be counted. Based on the evidence presented, the panel concludes that these 17 people must be deducted from Sandy Bay's TLE population count and should be counted with the Long Plain First Nation. In addition, with respect to Sandy Bay's TLE population count, the panel finds that additional research is required to determine whether any of the 38 non-treaty women may be added to Sandy Bay's population count. Based on the evidence presented, the panel has determined that the population count is 207. As well,

there are seven people whom the panel cannot conclude, based on the evidence, whether to add to Sandy Bay's population count.

We therefore recommend that this claim not be accepted for negotiation.

FOR THE INDIAN CLAIMS COMMISSION

Three handwritten signatures in black ink. The first signature is 'Renée Dupuis', the second is 'Daniel J. Bellegarde', and the third is 'Alan C. Holman'.

Renée Dupuis, C.M., Ad.E.
Chief Commissioner (Chair)

Daniel J. Bellegarde
Commissioner

Alan C. Holman
Commissioner

Dated this 28th day of June, 2007

APPENDIX A
HISTORICAL BACKGROUND

SANDY BAY OJIBWAY FIRST NATION
TREATY LAND ENTITLEMENT INQUIRY

Indian Claims Commission

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INTRODUCTION

The reserve of the Sandy Bay First Nation (IR 5) is located on the southwest shore of Lake Manitoba. At the time of survey in 1876, many members of the First Nation were of Ojibway and French ancestry, having descended from French-Ojibway fur trade associations.¹

The First Nation settled in the White Mud River region, close to the present-day reserve, and established a farming community there prior to treaty.² It was referred to as the “White Mud River Band of Indians” until 1876, when it changed its name to Sandy Bay.³ “The Sandy Bay community was also comprised of a number of Ojibway families who, in former times, recognized the leadership of the Chiefs of the Portage Band.”⁴ The Department of Indian Affairs⁵ historically associated the Sandy Bay First Nation as being part of the Portage Band, as occurred at the negotiations of Treaty 1.

NEGOTIATION OF TREATY 1, 1871⁶

When Canada acquired Rupert’s Land and the North-Western Territory in 1870, the dominion government assumed the obligation to reconcile the interests of the First Nations and Métis peoples who inhabited the region with the needs of the growing population of settlers.⁷

First Nations in Manitoba anticipated changes to their ways of life as a result of the 1870 transfer. They were familiar with American-style treaty-making as well as the Selkirk Treaty and were anxious to negotiate treaties as a means “to secure their lands and way of life as far as possible,

¹ Roger Townshend, TARR Centre Manitoba, *Treaty Land Entitlement for the Sandy Bay Indian Band*, November 1982, 1 (ICC Exhibit 4, p. 4).

² Roger Townshend, TARR Centre Manitoba, *Treaty Land Entitlement for the Sandy Bay Indian Band*, November 1982, 1 (ICC Exhibit 4, p. 4).

³ Hereafter referred to as Sandy Bay First Nation or the First Nation but also referred to as White Mud River Band.

⁴ Roger Townshend, TARR Centre Manitoba, *Treaty Land Entitlement for the Sandy Bay Indian Band*, November 1982, 1 (ICC Exhibit 4, p. 5).

⁵ Hereafter referred to as “the department.”

⁶ Treaty 1 is also referred to as the Stone Fort Treaty.

⁷ D.J. Hall, “‘A Serene Atmosphere’? Treaty 1 Revisited” (1984) 4:2 *The Canadian Journal of Native Studies*, 321 at 323 (ICC Exhibit 25, p. 3).

payment for lands taken by the whites, and government aid in making the transition to a new way of life.”⁸

Meetings between Canada and First Nations to negotiate Treaty 1 were scheduled to begin on July 25, 1871, at Lower Fort Garry, Manitoba. Owing to the late arrival of a number of First Nations, however, negotiations did not commence until the afternoon of July 27.⁹

Although the Sandy Bay First Nation was invited to participate in the treaty negotiations, it was not actively involved in the discussions, nor did any of its members sign the treaty. During the negotiations, the speaker for the Portage Band, Ay-ee-ta-pe-pe-tung, told the Treaty Commissioners that he had the authority of the “Chief” to negotiate on behalf of the White Mud River Indians.¹⁰ It is unknown, however, whether the “Chief” referred to by Ay-ee-ta-pe-pe-tung was Yellow Quill, Chief of the Portage Band; or Na-naw-wach-ew-wa-capow, Chief of the Sandy Bay First Nation.

Confusion regarding the identity of chiefs at treaty negotiations had been encountered previously. In his report on the negotiations of Treaty 1, the Lieutenant Governor of Manitoba and the North-West Territories, Adams G. Archibald, referred to the signing of the Selkirk Treaty in 1817, at which

certain Indians signed as chiefs and representatives of their people. Some of these Indians now deny that these men ever were chiefs or had authority to sign the Treaty.

With a view therefore to avoid a recurrence of any such question, we asked the Indians, as a first step, to agree among themselves in selecting their Chiefs, and then to present them to us and have their names and authority recorded.¹¹

⁸ D.J. Hall, “‘A Serene Atmosphere’? Treaty 1 Revisited” (1984) 4:2 *The Canadian Journal of Native Studies*, 321 at 323–25 (ICC Exhibit 25, pp. 3–5).

⁹ Adams G. Archibald to Secretary of State for the Provinces, July 29, 1871, Canada, *Report on the Indian Branch of the Department of the Secretary of State for the Provinces for the Year Ending June 30, 1871*, 14 (ICC Exhibit 1, p. 1).

¹⁰ Transcription of article entitled “Fourth Day’s Proceedings” from *The Manitoban*, August 12, 1871 (ICC Exhibit 1, p. 10).

¹¹ Adams G. Archibald to Secretary of State for the Provinces, July 29, 1871, Canada, *Report on the Indian Branch of the Department of the Secretary of State for the Provinces for the Year Ending June 30, 1871*, 14 (ICC Exhibit 1, p. 1).

Despite Archibald's efforts, Ay-ee-ta-pe-pe-tung's claim was refuted the following year in a letter written by Na-naw-wach-ew-wa-capow to the Indian Commissioner, in which the author indicated that no such authorization was given and that, in fact, he was Chief of the Sandy Bay First Nation during Treaty 1 negotiations.¹²

After much ceremony and preparation, formal negotiations began on July 27 and ran for eight days, concluding on August 3, 1871.¹³ In his opening address to the assembled First Nations, Lieutenant Governor Archibald described, in general terms, what Canada would offer in exchange for the extinguishment of their aboriginal title to the lands in question.

First. Your Great Mother, the Queen, wishes to do justice to all her children alike. She will deal fairly with those of the setting sun, just as she would with those of the rising sun. She wishes order and peace to reign through all her country, and while her arm is strong to punish the wicked man, her hand is also open to reward the good man every where in her Dominions.

Your Great Mother wishes the good of all races under her sway. She wishes her red children to be happy and contented. She wishes them to live in comfort. She would like them to adopt the habits of the whites, to till land and raise food, and store it up against a time of want. She thinks this would be the best thing for her red children to do, that it would make them safer from famine and distress, and make their homes more comfortable.

But the Queen, though she may think it good for you to adopt civilized habits, has no idea of compelling you to do so. This she leaves to your choice, and you need not live like the white man unless you can be persuaded to do so with your own free will. Many of you, however, are already doing this.¹⁴

Lieutenant Governor Archibald went on to describe the concept of reserves to those present.

Your Great Mother therefore, will lay aside for you 'Lots' of land to be used by you and your children forever. She will not allow the white man to intrude upon

¹² Na-naw-wach-ew-wa-capow, Chief of the White Mud River Indians, to Wemyss Simpson, Indian Commissioner, July 23, 1872, Library and Archives Canada (hereafter LAC), RG 10, vol. 3555, file 11 (ICC Exhibit 1, p. 19).

¹³ *The Manitoban*, Archives of Manitoba, PAM, August 12, 1871 (ICC Exhibit 1, p. 11).

¹⁴ Memorandum of an Address to the Indians by the Lieutenant Governor, Manitoba, July [27], 1871, Canada, *Report on the Indian Branch of the Department of the Secretary of State for the Provinces for the Year Ending June 30, 1871*, 16 (ICC Exhibit 16, p. 35).

these Lots. She will make rules to keep them for you, so that, as long as the sun shall shine, there shall be no Indian who has not a place that he can call his home, where he can go and pitch his camp, or if he chooses, build his house and till his land.

These 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. They will enable you to earn a living should the chase fail, and should you choose to get your living by tilling, you must not expect to have included in your reserve more of hay grounds than will be reasonably sufficient for your purposes in case you adopt the habits of farmers. The old settlers and the settlers that are coming in, must be dealt with on the principles of fairness and justice as well as yourselves. Your Great Mother knows no difference between any of her people. Another thing I want you to think over is this: in laying aside these reserves, and in everything else that the Queen shall do for you, you must understand that she can do for you no more than she has done for her red children in the East. If she were to do more for you, that would be unjust for them. She will not do less for you because you are all her children alike, and she must treat you all alike.

When you have made your Treaty you will still be free to hunt over much of the land included in the Treaty. ... Till these lands are needed for use you will be free to hunt over them, and make all the use of them which you have made in the past. But when lands are needed to be tilled or occupied, you must not go on them any more. There will still be plenty of land that is neither tilled nor occupied where you can go and roam and hunt as you have always done, and, if you wish to farm, you will go to your own reserve where you will find a place ready for you to live on and cultivate.¹⁵

Lieutenant Governor Archibald later commented that the First Nations did not understand his comments regarding reserve creation and size. He reported:

A general acquiescence in the views laid down by Mr. Simpson and myself was expressed, but it was quite clear by the proceedings of to-day, that our views were imperfectly apprehended. 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.

In defining the limits of their reserves, so far as we could see, they wished to have about two-thirds of the Province. We heard them out, and then told them it was quite clear that they had entirely misunderstood the meaning and intention of Reserves. We explained the object of these ... and then told them it was of no use for them to entertain any such ideas, which were entirely out of the question. We told

¹⁵ Memorandum of an Address to the Indians by the Lieutenant Governor, Manitoba, July [27], 1871, Canada, *Report on the Indian Branch of the Department of the Secretary of State for the Provinces for the Year Ending June 30, 1871*, 16–17 (ICC Exhibit 16, pp. 35–36).

them that whether they wished it or not, immigrants would come in and fill up the country; that every year from this one twice as many in number as their whole people there assembled, would pour into the Province, and in a little while would spread all over it, and that now was the time for them to come to an arrangement that would secure homes and annuities for themselves and their children.

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 chose, not interfering with existing occupants; that we should allow an annuity of twelve dollars for every family of five, or in that proportion per head. We requested them to think over these propositions till Monday morning.¹⁶

Indian Commissioner Wemyss Simpson, in his report dated July 20, 1871, also noted this misunderstanding. He stated:

When the subject of Reserves came up, it was found that the Indians had misunderstood the object of these Reservations, for their demands in this respect were utterly out of the question. After a prolonged discussion with them, I consulted with the Lieutenant Governor, and determined to let them at once understand the terms that I was prepared to offer, and I pointed out that the terms offered were those which would receive Her Majesty's consent. On further explanation of the subject, the Indians appeared to be satisfied, and willing to acquiesce in our arrangements as hereinafter mentioned, and having given them diagrams showing the size of the Lots they would individually become possessed of, and having informed them of the amount of their annuity, it was finally settled that they should meet on Monday, the 31st, and acquaint me with their decision.¹⁷

The Manitoban newspaper reported on all eight days of the negotiations. Included in the reports was a detailed account of the various First Nations' demands regarding the location and size of their reserves, made on July 29, 1871, including the apparent demand of the Sandy Bay First Nation. *The Manitoban* reported that Ay-ee-ta-pe-pe-tung stated:

¹⁶ Adams G. Archibald to Secretary of State, July 29, 1871, Canada, *Annual Report on the Indian Branch of the Department of the Secretary of State for the Provinces for the Year Ending June 30, 1871*, 15 (ICC Exhibit 1, p. 2).

¹⁷ Wemyss M. Simpson, Indian Commissioner, to Secretary of State, July 30, 1871, Canada, *Annual Report on the Indian Branch of the Department of the Secretary of State for the Provinces for the Year Ending June 30, 1871*, 18 (ICC Exhibit 1, p. 5).

I will tell you what I mean to reserve. When first you (His Excellency) began to travel (from Fort William), you saw something afar off, and this is the land you saw. At that time you thought I will have that some day or other; but behold you see before now the lawful owner of it. I understand you are going to buy this land from me. ...With regard to land within the Settlement, I have nothing to say, as I am on the outside. But you will see from this document that I have made a claim, (written document handed in); and I want to know what is to be allowed me. (This claim is about 160 miles long by 60 broad, and extends from the mouth of Tobacco Creek, to Medicine Lodge at Pembina, from there north-west to White Clair; thence down to Stony Creek, a branch of the White Mud River, at the upper crossing, and from thence North, to the Salt Springs, on Lake Winnepegosis). No chief appears to represent the Indians at White Mud River, ... teh [sic] chief gave me authority to mention to the Commissioner, for the White Mud River Indians, that they wished their reserve attached to ours. This is the reason our claim extends so far north as Salt Springs.¹⁸

Despite the First Nations' high initial expectations regarding the size of reserves, an understanding was eventually reached and Treaty 1 was concluded on August 3, 1871. In the treaty, a reserve was to be set aside for the use and benefit of the Portage Band according to a formula of 160 acres for each family of five (32 acres per person): the same formula presented to the First Nations at negotiations. Treaty 1 also promised an additional allotment of 25 square miles for the Portage Band, stating:

... and for the use of the Indians of whom Oo-za-we-kwun [Yellow Quill] is Chief, so much land on the south and east side of the Assiniboine, about twenty miles above the Portage, as will furnish one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families, reserving also a further tract enclosing said reserve, to comprise an equivalent to twenty-five square miles of equal breadth, to be laid out round the reserve, it being understood, however, that if, at the date of the execution of this treaty, there are any settlers within the bounds of any lands reserved by any band, Her Majesty reserves the right to deal with such settlers as She shall deem just, so as not to diminish the extent of land allotted to the Indians.¹⁹

¹⁸ Transcript of *The Manitoban*, PAM, August 12, 1871 (ICC Exhibit 1, p. 10).

¹⁹ Canada, *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions*, August 3, 1871 (Ottawa: Queen's Printer, 1957), 4 (ICC Exhibit 1, p. 7).

REQUESTS FOR SURVEY

Treaty 1 also stipulated that the government was to conduct a census of the First Nations, as soon as possible, in order to calculate the land entitlement of each First Nation.²⁰ In a letter dated July 6, 1872, Lieutenant Governor Archibald noted that nothing had been done in that regard during the year which had passed since the conclusion of Treaty 1 and instructed that a census be taken without delay. He stated:

When the Treaty of 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 as [sic] step has been taken towards ascertaining the number of Indians, or laying off the Reserve.

...

I feel a delicacy in interfering with matters outside my Jurisdiction, but I cannot allow a feeling of that kind to prevent me doing what I can to put out sparks, which if neglected might produce a serious conflagration. It is quite time these questions should be settled. Instructions should be given to have the Indian Census taken and the Reserves laid off, with the least possible delay, so as to avoid the very serious complications which may arise if the work is not done.²¹

There is no documentary evidence in this inquiry that a census was ever undertaken in fulfillment of Lieutenant Governor Archibald's recommendation.

On July 23, 1872, the Chief of the Sandy Bay First Nation, Na-naw-wach-ew-wa-capow, wrote to the Indian Commissioner requesting a reserve be surveyed for the use of his band, saying:

We, the inhabitance [sic] of the mouth of the River ask of you half mile up the river, from the mouth to the basse [sic] line, and from there to the big grass, for a free grant for us and our children, also north of the basse [sic] line to the mouth.

The reason we ask it of you is because we like the place having been born, and brought up in it so we would be much [one line of document illegible] ... you know that the whitemud [sic] Chief said nothing last summer about the lands, so that

²⁰ Canada, *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions*, August 3, 1871 (Ottawa: Queen's Printer, 1957), 4 (ICC Exhibit 1, p. 7).

²¹ Adams G. Archibald, Government House, to Secretary of State for the Provinces, July 6, 1872, LAC, RG 10, vol. 3555, file 11 (ICC Exhibit 1, pp. 15, 17).

is the reason he speaks now, and wishes to get satisfaction from you as soon as possible.²²

As mentioned previously, Na-naw-wach-ew-wa-capow also denied that Yellow Quill was given authority to represent Sandy Bay at Treaty 1 negotiations in 1871. He stated, “I should like now if you come and make at treaty with us.”²³ Subsequent correspondence indicates that Yellow Quill had been appointed Chief of the Portage Band by the Hudson’s Bay Company, rather than through traditional protocol. The Sandy Bay First Nation, therefore, did not acknowledge his authority as Chief.²⁴ Na-naw-wach-ew-wa-capow stated:

You have no dout [sic] seen me last summer if you remember you asked me who was my master, or Chief, I said no one. You asked me where I wished be, I said at White Mud is the place I wish to live, you also asked me my name, I told you Na-naw-wach-ew-wa-capow, Chief of the White Mud River.²⁵

On August 8, 1872, Na-naw-wach-ew-wa-capow made a second request for a reserve to be surveyed for the Sandy Bay First Nation, asking for the establishment of a reserve “on the shore of Lake Manitoba so as to be separate from the Portage Indians.”²⁶

By September 1872, Treaty 1 First Nations were beginning to speak of certain “outside promises” made at the negotiations which were not reflected in the text of the treaty (but were attached as a memorandum to Treaty 1) and were not being honoured by Canada. In a letter to the Secretary of State for the Provinces, the local Member of Parliament, John Schultz, reported:

²² Na-naw-wach-ew-wa-capow, Chief of White Mud River Indians, to Mr. Simpson, July 23, 1872, LAC, RG 10, vol. 3555, file 11(ICC Exhibit 1, pp. 18–19).

²³ Na-naw-wach-ew-wa-capow, Chief of White Mud River Indians, to Mr. Simpson, July 23, 1872, LAC, RG 10, vol. 3555, file 11(ICC Exhibit 1, p. 19).

²⁴ Alexander Morris, Lieutenant Governor, to Minister of the Interior, August 10, 1875, LAC, RG 10, vol. 3624, file 5217-1(ICC Exhibit 1, p. 99).

²⁵ Na-naw-wach-ew-wa-capow, Chief of White Mud River Indians, to Mr. Simpson, July 23, 1872, LAC, RG 10, vol. 3555, file 11(ICC Exhibit 1, p. 19).

²⁶ Na-naw-wach-ew-wa-capow, Chief of White Mud River Indians, to Indian Commissioner, August 8, 1872, LAC, RG 10, vol. 3555, file 11(ICC Exhibit 1, p. 21).

You are of course aware that the Treaty relations entered into or said to have been entered into with the Indians between Lake Shebandowin and the Lake of the Woods have been of so unsatisfactory a nature that the bands on the line of route have this year totally refused to accept the Government payment. You have doubtless also been informed that one of the Bands in the Province, that at Portage La Prairie have likewise refused to take the Treaty money for this year.

...

They say first, that at the Treaty of August 1871 certain promises were made to them by the Commissioner which have not since been fulfilled.

That these promises included Work oxen, Ploughs, Harrows, and other Agricultural implements, indispensable to a people who by the sale of their lands would be compelled to give up the Hunt and depend upon Agricultural pursuits.

That owing to the high price of merchandise here, the Three Dollars per head which they get is quite insufficient to supply even fishing twine for their nets and is not even equivalent to the loss of time entailed on those living at a distance in coming to the payments.

That the Treaty now in print is not as they understood it at the time when it was signed in August 1871.

That it was stated to them that no Indians in the other provinces ever received more than Three dollars per head for their lands and that they have now reason to believe that the Government has before paid as high as Four dollars per head.

That the Chief, Councillors and Head men alike only get three dollars per head here whereas in other parts of Canada the Chief, Councillors, &c receive a considerable amount more than the ordinary members of the tribe.

...

You have then a wide spread dissatisfaction among the Indians of the province[. T]his feeling is more likely to increase than decrease and is certain to influence the Plain Crees and other tribes west of us and may possibly lead to serious complications if the matter is not at once dealt with by the Government.²⁷

By 1873, no reserves had been surveyed for Treaty 1 First Nations. In a letter dated January 19, 1873, it was reported that Lieutenant Governor Alexander Morris (Archibald's successor) had recommended that reserves in Treaty 1 "should be surveyed with as little delay as possible."²⁸

²⁷ John Schultz to Secretary of State for the Provinces, September 23, 1872, LAC, RG 10, vol. 3555, file 11 (ICC Exhibit 1, pp. 22–25).

²⁸ Department of Secretary for the Provinces, Indian Office, to I.C. Aikin, Secretary of State of Canada, LAC, RG 10, vol. 3555, file 7, January 19, 1873 (ICC Exhibit 1, p. 27).

Correspondence indicates that preliminary steps were taken in August 1873 to survey the reserve for the Portage Band.²⁹ The Sandy Bay First Nation, however, considered itself separate from the Portage Band and had no interest in this reserve. On October 22, 1873, Indian Agent Molyneux St. John reported that the Indians of the Portage Band

are divided amongst themselves on the subject of a Chief. A large party of them have settled near White Mud River, and allege that they were not represented at the time of the Treaty; that they have their own Chief, their own habitations and lands on the borders of the lake, and they persistently refuse to have anything in common with Orzahwagan's Band. Their names are on the same paysheets, but that, they say, is our doing, not their own. ...

In the case of the White Mud River Indians, I have told them that men occupying houses would not be ejected, and that the Government would be informed of their position with a view to protecting them in the occupancy of such lands as they really possess.³⁰

The matter of the “outside promises” remained a significant issue between First Nations and Canada from 1873 until the spring of 1875, when the Governor General in Council formally recognized the “outside promises” made at Treaty 1 by means of an Order in Council dated April 30, 1875.³¹

By the summer of 1875, reserve lands had still not been set aside for the use of the Sandy Bay First Nation, and the government continued to associate it with the Portage Band. On August 10, 1875, Lieutenant Governor Morris advised the Minister of the Interior that the Sandy Bay First Nation (or White Mud Indians), “who live there constantly, should be recognized as a distinct Band

²⁹ See Joesph Howe, Indian Branch, to Molyneux St. John, April 3, 1873, LAC, RG 10, vol. 3555, file 11 (ICC Exhibit 1, pp. 30–31); W. Spragge, Deputy Superintendent of Indian Affairs, Indian Branch, Department of the Interior, to [J.]A.N. Provencher, Indian Commissioner, July 18, 1873, LAC, RG 10, vol. 3603, file 2120 (ICC Exhibit 1, pp. 32–35); Lindsay Russell, Assistant Surveyor General, Dominion Lands Office, to J.A.N. Provencher, Indian Commissioner, August 13, 1873, LAC, RG 10, vol. 3555, file 11 (ICC Exhibit 1, pp. 36–37); J.S. Dennis, Dominion Lands Office, Department of the Interior, to J.A.N. Provencher, Indian Commissioner, November 3, 1873, LAC, RG 10, vol. 3555, file 11 (ICC Exhibit 1, pp. 42–44).

³⁰ Molyneux St. John, Indian Agent, to J.A.[N.] Provencher, Indian Commissioner, October 22, 1873, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1874*, part 2, 59 (ICC Exhibit 1, p. 38).

³¹ Order in Council, April 30, 1875, LAC, RG 10, vol. 3571, file 124, part 2 (ICC Exhibit 1, pp. 95–97).

and should elect a Chief.”³² In a letter written three days later, Indian Commissioner J.A.N. Provencher reported to the Minister of the Interior following his visit to the Sandy Bay First Nation:

When I had occasion of visiting the fraction of Yellow Quill’s Band at White Mud River near Lake Manitoba, they insisted once more for having a Reserve granted to them in that locality.

I had already the honor to submit to your consideration the fact that these Indians are very quiet industrious altogether moved by the desire of improving their position and providing for the future of their children, they have already a dozen of houses built some since few years and would rely altogether to Farming if they had the means of doing it and if they were sure they would never be troubled in the possession of their property.

I have already given them the assurance, that they would be allowed to remain on their Lots as long as they will cultivate them, but I have reason to believe that a far greater encouragement would be given to them if that land was granted as a Reserve.

...

By the spirit of the opposition and the difference in the general way of living it is not likely that this fraction of the Indians will ever consent to join the main body of Yellow Quill; they would prefer to leave the Province altogether, and resume their hunting expeditions farther in the North West.³³

The Sandy Bay First Nation remained adamant in its request to be a band independent of the Portage Band. In October 1875, Indian Commissioner Provencher reported to the Superintendent General of Indian Affairs that the Sandy Bay First Nation

have refused to submit to their Chief, and ... have persisted in requesting the Government to acknowledge them as a separate Band from that with which they have been associated in the Treaty.

For several years past, these Indians, to the number of 180, have devoted themselves to farming, ...

The locality where they wish to remain, and where they have settled, and on which they have already built about twelve houses, is situate to the south-west of

³² Alexander Morris, Lieutenant Governor, to Minister of the Interior, August 10, 1875, LAC, RG 10, vol. 3624, file 5217-1(ICC Exhibit 1, p. 110).

³³ J.A.N. Provencher, Indian Commissioner, to Minister of the Interior, August 13, 1875, LAC, RG 10, vol. 3624, file 5217-1(ICC Exhibit 1, pp. 112–14).

Lake Manitoba. The locality suits them, because it gives them the arable ground they need and a good hunting and fishing country.

....

Some few other families already own eight houses to the south-east of the Portage ... They also ask to be separated from the party having Ozooquan the present Chief.³⁴

Despite these recommendations, Minister of the Interior David Laird was not convinced that the Sandy Bay First Nation should constitute a separate band. In a letter to Lieutenant Governor Morris dated April 21, 1876, Minister Laird wrote:

I should not feel disposed, with the information at present before me to recommend that they should be recognized as a distinct band with a Reserve and Chief of their own. The number of these Indians seems hardly to warrant their claiming a separate Reserve and Chief and there is certainly no land in the neighborhood where they are now living which would be available as a reserve for them. It seems very desirable that the White Mud River Indians should attach themselves either to Yellow Quill or Short Bear and share in the Reserve assigned to such portion of the Band. Any of these Indians, however, who are now settled in the neighborhood of White Mud River and desire to remain there will not be disturbed in their holdings unless indeed the land so held has already been granted to other parties by the Land Branch of this Department in ignorance of the fact of its being occupied by Indians. In no case, however, are Indians to consider themselves at liberty to settle on any fresh lands in that neighborhood.³⁵

Nevertheless, Laird left “the matter of the White Mud River Indians” to Lieutenant Governor Morris’ “discretion, having no doubt that ... [he] will make with them the most advantageous arrangements which the case admits.”³⁶

In June 1876, Lieutenant Governor Morris visited the Portage Band with a mandate to discuss the implementation of the “outside promises” and the leadership divisions among the First Nations,

³⁴ J.A.N. Provencher, Indian Commissioner, to Superintendent General of Indian Affairs, October 30, 1875, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June, 1876*, 41 (ICC Exhibit 1, p. 125).

³⁵ David Laird, Minister of the Interior, to Lieutenant Governor of Manitoba & the N.W.T., April 21, 1876, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, pp. 128–29).

³⁶ David Laird, Minister of the Interior, to Lieutenant Governor of Manitoba & the N.W.T., April 21, 1876, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, p. 129).

and to settle reserve issues inhibiting the settlement of the First Nations on reserves. Morris wrote that on the first day of discussion, the Sandy Bay First Nation had informed him

that they were Christians and had always lived at the White Mud River; that they did not wish to join either Yellow Quill's or Short Bear's reserve, but desired a reserve at the Big Point. I told them they could not have it there, as there were settlers, and the Government wished them to join one of the other bands, and explained to them that their holdings would be respected, except where inadvertently sold. ... Yellow Quill said his councillors were willing that the other Indians should have a separate reserve provided they retained the belt of twenty-five miles, in addition to their proportion of the reserve. I informed them this could not be done; the reserve belongs to all.³⁷

Morris wrote that on the second day

Yellow Quill told me that his band were now willing to separate from the others, and wished to select a reserve higher up the river. I informed them that I would accede to their request, but that they must do it at once, and on the approval thereof by the Privy Council it would be laid off. Short Bear's band still desired a reserve at the Long Plain, to which I assented. The White Mud River Indians asked for a separate reserve where they could farm, and I informed them that under the discretionary powers I possessed I would have a reserve selected for them, giving them their proportion of the original reserve. ... I then signed the agreement, and called upon Yellow Quill to do so. He came forward cheerfully and said he would sign it, because he now understood what he never did before, viz., what was agreed to at the Stone Fort. ... I then called on the White Mud River Indians to select a Chief and one Councilor, being under the impression at the time that they were the least numerous band, which, however, has turned out not to be the case, which they did at once.³⁸

On June 20, 1876, an agreement was reached between Canada and the First Nations of Treaty 1 (and Treaty 2) supplementing Treaty No 1 (and Treaty 2). This agreement dealt with the implementation of the “outside promises” and the division of the Portage Band into three separate

³⁷ Alexander Morris, Lieutenant Governor, to Minister of the Interior, July 8, 1876, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and The North-West Territories* (Toronto: Belfords, Clarke & Co., 1880), 139–40 (ICC Exhibit 1, pp. 134–35).

³⁸ Alexander Morris, Lieutenant Governor, to Minister of the Interior, July 8, 1876, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and The North-West Territories* (Toronto: Belfords, Clarke & Co., 1880), 140–41 (ICC Exhibit 1, pp. 135–36).

bands: Short Bear (later Long Plain), Yellow Quill, and Sandy Bay (still referred to as White Mud River), with separate reserves for each.³⁹ Regarding Sandy Bay, the agreement read:

And it is further agreed that the Indians residing heretofore, and now in the neighbourhood of the White Mud River, shall be recognized as a distinct Band, and Na-wa-che-way-ka-pow shall be accepted as their Chief, that as some of them have settled there and desire to remain, those of them who have substantial improvements shall be protected in their holdings, except in cases where the land so occupied has already been sold or granted by the Department of the Interior to other parties, but the said Indians will not be allowed to occupy or take up any other lands, than those already *bona fide* occupied by each of them.⁴⁰

PRIOR HOLDINGS OF SANDY BAY MEMBERS

Following the signing of the agreement dated June 20, 1876, Lieutenant Governor Morris instructed Dominion Land Surveyor J. Lestock Reid to visit the Sandy Bay First Nation to record all individuals with prior holdings and related improvements to the land.⁴¹ On July 12, 1876, Reid reported that, in the company of the Chief and councillors of the Sandy Bay First Nation, he had located five prior holdings, belonging to:

1. George Spence S.E. 1/4 section, of section 33, Township 18, range 9, west. A house about 30 feet by 20 feet, stable, nine head of cattle, four horses, and has lived here about two years.
2. Robert Sutherland, N.E. 1/4 section of section 33, Township 18, range 9, west. A small house; has lived here about two years.
3. Matawawawin, N.W. 1/4 section of section 26, Township 17, range 9, west. A small house, stable, and has fenced about an acre in garden; has lived here eight years.
4. Joseph DeJaislais, N.W. 1/4 section of section 23, Township 17, range 9, west. Owing to not being able to find the posts, the position of these buildings are not

³⁹ Copy of Revision to Treaty No. 1, June 20, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxviii–xxix (ICC Exhibit 1, pp. 131–32).

⁴⁰ Copy of Revision to Treaty No. 1, June 20, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxviii (ICC Exhibit 1, p. 131).

⁴¹ Alexander Morris, Lieutenant Governor, to Minister of the Interior, July 8, 1876, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and The North-West Territories* (Toronto: Belfords, Clarke & Co., 1880), 141 (ICC Exhibit 1, p. 136).

accurate; two small houses, stable, two cows, three calves and three horses; has lived here about fifteen years.

5. Battiste Spence, N.W. 1/4 section of section 2, Township 17, range 9, west. Has four horses, built his house last fall.⁴²

Later, in 1877, Indian Agent Francis Ogletree reported that the First Nation had made further improvements after Surveyor Reid's visit. He stated:

[t]hat the Reserve was pointed out to them by the Surveyor some months previous to being surveyed and after they had some nine houses built the Surveyor came to survey the Reserve, and told them he had made a mistake that where he pointed out to them areas on the Danish Reserve consequently he had to move further north which leaves those nine houses outside altogether which they complain of and which they ask to be included in the Reserve.⁴³

It was not uncommon for First Nations people in Treaties 1 and 2 to have occupied and improved lands prior to entering into treaty, either within or beyond the boundaries of their eventual reserves. The government became aware of these prior holdings during pre-treaty meetings with First Nations.⁴⁴ Reports of the negotiations suggest that the First Nations were concerned that they would lose their prior holdings if they took treaty.⁴⁵ A memorandum written by one of Canada's representatives at Treaty 1 recorded the concerns of the First Nations:

I remember the Indians asking the question whether the amount of land set apart for each family; that is 160 acres for every family of five; was meant to include the land already occupied by them.

⁴² J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor, July 12, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxx (ICC Exhibit 1, p. 138).

⁴³ Francis Ogletree, Indian Agent, to J.A.N. Provencher, Superintendent of Indian Affairs, August 20, 1877, LAC, RG 10, vol. 3556, file 24 (ICC Exhibit 1, p. 158).

⁴⁴ Wemyss Simpson, Indian Commissioner, to Secretary of State, November 3, 1871, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and The North-West Territories* (Toronto: Belfords, Clarke & Co., 1880), 38 (ICC Exhibit 12, p. 69).

⁴⁵ Author unknown, to W. Simpson, July 26, 1873, LAC, RG 10, vol. 3614, file 4311 (ICC Exhibit 30, p. 21).

The answer was that the allotment now provided for was irrespective of and in addition to their holdings ...⁴⁶

Historical documents indicate that, at the negotiation of Treaty 1, “an agreement was concluded that properties occupied and cultivated before the Treaty were to be held exclusive of and in addition to the per capita Treaty entitlement.”⁴⁷ Commissioner Wemyss Simpson reported on the case of Henry Prince’s Band of Treaty 1. This Band was known to have prior holdings at the time of treaty and “it was agreed that such plots should be considered as their own property.”⁴⁸ Numerous historical documents support the position that such prior land holdings were to be held in addition to reserve land granted under treaty.⁴⁹ The right of First Nations’ members to dispose of those holdings, however, was the subject of some controversy.

SURVEY OF SANDY BAY INDIAN RESERVE 5

On July 12, 1876, Dominion Land Surveyor J. Lestock Reid reported that

It seems to be the unanimous wish of this Band, to have their Reserve located on the west shore of Lake Manitoba, in Township 18, range 9, west, if such should meet the approval of the Government. The whole of this tract of country (township 18, range 9, west) consists apparently of large meadows lying low and wet, abundantly supplied with hay, with an occasional small ridge intervening, rising some two or three feet above the meadow lands, and though the country with the exception of those ridges is unfit for actual tillage, still it is one of the best, if not the best stock farming district in the Province.

The Indians say they will have plenty of fish from the lake, a good game country, abundance of hay for their stock, and sufficient land to cultivate. I find from

⁴⁶ Unknown author to unknown recipient, c. 1875, LAC, RG 10, vol. 3614, file 4311 (ICC Exhibit 30, pp. 45–46).

⁴⁷ Jim Gallo, TARR Centre Manitoba, *Properties Occupied and Cultivated Prior to Treaty*, September 28, 1978, p. 2 (ICC Exhibit 12, p. 3).

⁴⁸ Wemyss Simpson to E.A. Meredith, Deputy of the Minister of the Interior, February 15, 1875, LAC, RG 10, vol. 3614, file 4311 (ICC Exhibit 30, p. 23).

⁴⁹ See Jim Gallo, TARR Centre Manitoba, *Properties Occupied and Cultivated Prior to Treaty*, September 28, 1978, pp. 2–4 (ICC Exhibit 12, pp. 3–5).

the Land Office Register, that there is one entry, east 1/2 section 21, township 18, range 9, west, being a homestead and preemption.⁵⁰

On July 14, 1876, Alexander Morris recommended to the Minister of the Interior that the reserve and the prior holdings as described above be set aside for the use and benefit of the Sandy Bay First Nation.⁵¹ Morris forwarded a copy of Surveyor Reid's report, which included

'A' of his examination of the improvements of the Indians belonging to the White Mud River Band, and
'B' intimating the place where these Indians desire to have a Reserve allotted to them.

Morris wrote:

I see no reason why their desire should not be complied with, and if, on receipt, of this, you concur with me, I would be obliged by your telegraphing me, your approval thereof, in order, that Mr. Reid may lay off the Reserve.

I ask this, in view, of my contemplated speedy and protracted absence in the service of the Privy Council.⁵²

In the fall of 1876, Reid visited the area and recommended that all of fractional township 18, range 9, west of the principal meridian, totalling 12,102 acres, be set aside as a reserve for the Sandy Bay First Nation.⁵³ Reid's report to Lieutenant Governor Morris, dated November 30, 1876, states:

On my arrival amongst the White Mud Band of Indians I found their Chief was away but I pointed out to Baptiste Spence, one of the Councillors, the boundaries of the Reserve being the whole of the fractional Township 18 Range 9 West on the

⁵⁰ J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor, July 12, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxx–xxxii (ICC Exhibit 1, pp. 138–39).

⁵¹ Alexander Morris, Lieutenant Governor, to Minister of the Interior, July 14, 1876, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, p. 140).

⁵² Alexander Morris, Lieutenant Governor, to Minister of the Interior, July 14, 1876, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, pp. 140–41).

⁵³ J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor of Manitoba, November 30, 1876, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, p. 152–54).

West shore of Lake Manitoba containing twelve thousand one hundred and two acres (12,102) acres being nearly nine hundred acres over and above what they are actually entitled to but owing to a large per centage of the front of the Reserve along the Lake Shore being muskeg and marsh I would suggest that the whole Township be included in the Reserve.⁵⁴

Reid also mentioned that the First Nation had put up further improvements on the land.

I might here mention that since my visit to this locality in the Spring under instructions from you I found that some ten or twelve houses had been put up within the Reserve and I have much pleasure in reporting an apparent desire on the part of these Indians towards cultivating the lands and general improvements.⁵⁵

In later correspondence addressed to the Surveyor General, Reid detailed the reserve land calculation he used in surveying the Sandy Bay Reserve.

I found this Band (White Mud River) to number one hundred and eighty three (183) persons being almost (37) thirty seven families of five each and they being entitled to the same grants as Yellow Quills Band would have a total area of eleven thousand two hundred and eleven (11211 acres) acres but as in the case of Yellow Quills Reserve there is a large portion of the front on the Lake drowned land I would therefore propose that the whole of the fractional Township 18 Range 9 West containing twelve thousand one hundred and two acres be set apart for this Band the White Mud River Indians.⁵⁶

It should be noted that the 1876 treaty annuity payroll for the White Mud River Band, dated June 21, 1876, shows a total of 188 people belonging to 39 families as having received payment of treaty annuities with the Band at that time.⁵⁷

⁵⁴ J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor of Manitoba, November 30, 1876, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, pp. 152–53).

⁵⁵ J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor of Manitoba, November 30, 1876, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, pp. 153–54).

⁵⁶ Extract of report, J. Lestock Reid, Dominion Land Surveyor, c. 1876, attached to W.A. Austin, Department of Indian Affairs, to Deputy Minister, March 1, 1888, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, pp. 244–45).

⁵⁷ Treaty Annuity Paylist, White Mud River Band, June 21, 1876, LAC, RG 10, vol. 9531, pp. 158–59 (ICC Exhibit 18b, pp. 89–90).

Contrary to the common Indian reserve survey practices of the time, Dominion Land Surveyor Reid did not actually survey the Sandy Bay Reserve.⁵⁸ Fractional township 18, range 9, west of the principal meridian was surveyed and subdivided in August and September 1873 by Dominion Land Surveyor C.P. Brown (and confirmed in 1874) and originally set aside for the Sioux.⁵⁹ “Brown’s survey of these lands ... was not conducted with a view to the land being set aside as an Indian Reserve. Rather, it was carried out as part of the Dominion Land surveys in Manitoba.”⁶⁰ Dominion Land Surveyor Reid merely visited the area and showed Councillor Baptiste Spence the boundaries of the reserve, using Dominion Land Surveyor Brown’s 1873 survey and plan of fractional township 18, range 9, west of the principal meridian.⁶¹

Township 18 is referred to as a fractional township because “the eastern edge of the land in the township ... fronts on Lake Manitoba. There is a considerable extent of marsh along the shore, rendering it difficult to survey that portion of the township, let alone accurately define the water’s edge.”⁶²

The process of confirming the Sandy Bay Reserve by Order in Council was laden with complications. Once lands were set apart as reserves for the Sandy Bay, Long Plain, and Short Bear First Nations, questions were raised by Ottawa as to whether the Hudson’s Bay Company had any

⁵⁸ See Secretary of State for Canada, “Manual shewing [sic] the System of Survey adopted for the Public Lands of Canada in Manitoba and the North-West Territories, with Instructions to Surveyors, Illustrated by Diagrams,” First Edition, 30111 CLSR, 1871 (ICC Exhibit 14); Jim Gallo, Manager, Treaty Land Entitlement and Claims, INAC Manitoba, to Chris Angeconeb, Associate Legal Counsel, ICC, memorandum concerning Instructions to Surveyors, October 31, 2000 (ICC Exhibit 19).

⁵⁹ See Plan 782, “Plan of Township No. 18, Range 9, West of 1st Meridian (Sandy Bay Ind. Res.),” surveyed by C.P. Brown, Deputy Surveyor of Dominion Lands, August–September 1873, confirmed January 1, 1874, and certified as true copy April 19, 1906 (ICC Exhibit 2).

⁶⁰ *Sandy Bay Treaty Land Entitlement Claim Additional Research Final Report*, Public History Inc., May 23, 2004 (ICC Exhibit 16, pp. 10–11).

⁶¹ *Sandy Bay Treaty Land Entitlement Claim Additional Research Final Report*, Public History Inc., May 23, 2004 (ICC Exhibit 16, p. 13).

⁶² *Sandy Bay Treaty Land Entitlement Claim Additional Research Final Report*, Public History Inc., May 23, 2004 (ICC Exhibit 16, p. 11). It should be noted that Surveyor Brown’s survey and field notes identify a segmented traverse line along the western edge of what he identified as marsh.

rights to the lands.⁶³ The historical documentation of this inquiry suggests that the Minister of the Interior was hesitant to officially confirm these reserves until it was determined to whom the lands in question were vested.

The documentary record also indicates that Lieutenant Governor Morris strongly disagreed with the Minister's decision to delay the confirmation of Sandy Bay, Long Plain, and Short Bear Reserves, as well as with the suggestion that the land might not be available for the First Nations. In a letter to the Minister of the Interior dated February 19, 1877, Morris stated:

I presume you are unaware [sic] that on the Short Bear and White Mud Reserves, the Indians have erected Houses and commenced farms. I have therefore to point out to you that their eviction will be a necessary consequence of your present decision.

This matter is so important and your action will have so disturbing an effect on the Indian mind; regarding it, as they will do, as a breach of Treaty obligations, that I have deemed it my duty, to call the attention of the Privy Council thereto.⁶⁴

On the same day, Lieutenant Governor Morris drafted a letter to the Secretary of State, informing the Privy Council of the situation. Morris stated:

I am compelled by the gravity of the circumstances, as I view them, to call the attention of the Privy Council, to a serious difference of opinion which has arisen between the Minister of the Interior and myself, with regard to certain Indian Reserves, in the Province of Manitoba, and which I regard as no mere Departmental matter, but as seriously affecting the relations of the Government towards a large and influential Band of Saulteaux Indians, who maintain the closest and most intimate relations with the Indians of the Western Plains.

When the Treaty at the Stone Fort was made a Reserve was stipulated to be given to the Saulteaux Indians of the Portage, 'about twenty miles above the Portage.' Disputes arose as to the extent of Reserve. One was surveyed by the Government but the Indians refused to accept it. I was requested by the Honourable Mr. Laird, Minister of the Interior to endeavour to procure the settlement with this Band, of the 'outside promises' and the adjustment of the Reserve question.

⁶³ Alexander Morris, Lieutenant Governor, to Minister of the Interior, January 19, 1877, LAC, RG 10, vol. 3642, file 5217-1 (ICC Exhibit 1, pp. 347-60).

⁶⁴ Alexander Morris, Lieutenant Governor, to Minister of the Interior, February 19, 1877, LAC, RG 10, vol. 3642, file 5217-1 (ICC Exhibit 1, pp. 367-68).

I succeeded after much difficulty and two visits to them, in coming to an agreement with them, which was duly forwarded to the Minister of the Interior.

The band was really composed of three separate Bands.

By the instructions of the Minister, a Surveyor was placed at my disposal to accompany me, to survey the Reserves to be selected. These have been selected and surveyed, the locality of two of them having been sanctioned by the Minister in advance, subject of course to the approval of Council.

The Indians are living on them and two of the Bands have built houses and made a good commencement of a settlement.

The present Minister of the Interior declines 'to enter into any inquiry as to the origin of the negotiations with these Indians' and refuses to confirm the Reserves, on the ground that being in surveyed territory, there are School and Hudson's Bay Company's lands included in them, and that Indian Reserves should be in unsurveyed territory.

...

The question is very simple – By the Stone Fort Treaty, these Indians extinguished their title to the lands covered thereby, and were promised in return a Reserve about twenty miles from the Portage, which is now a very large Canadian settlement. Till now, no understanding could be arrived at with them, as to the extent and localities of the land to be set apart for them. ...

...

... As the good faith of the Crown is involved, I have been compelled to address you and can only express my earnest trust, that the Privy Council will consider my representations, which a full knowledge of the whole circumstances, and a positive conviction that the action of the Minister of the Interior will have consequences among the Indian tribes of the gravest character has compelled me to make.⁶⁵ [Emphasis in the original]

The Minister of the Interior responded to the Lieutenant Governor on July 6, 1877, stating:

2. I do not deem it necessary to enter into any inquiry as to the origin of the negotiations [sic] with these Indians, as in my opinion the Government have not the power to confirm these reserves as selected. ...

...

6. Under the provisions of this section [*Dominion Lands Act*, sections 6–21 inclusive], the lands which you have undertaken to convert into an Indian Reserve are not such lands as the law contemplates being retained for that purpose, but surveyed lands set out for settlement, in which the rights of the Hudson's Bay Company have become vested, and in which, by the operation of the Act of

⁶⁵ Alexander Morris, Lieutenant Governor, to Secretary of State, February 19, 1877, LAC, RG 10, vol. 3642, file 5217-1 (ICC Exhibit 1, pp. 369–75).

Parliament in that behalf, they have already acquired the title in fee simple. It is too obvious, therefore, to require discussion that neither this Department nor Parliament itself, would have any right to confiscate these lands, which have become private property, and convert them into an Indian Reserve, without the consent of the Hudson's Bay Company ...

...

10. It is not necessary that I should consider whether these points escaped the observation of my predecessor and yourself, but it is clear to my mind that it is not well to undertake in any case to convert lands set out for settlement into Indian Reserves. In every instance, such reserves should be selected from the unsurveyed lands of the Dominion, which are so very extensive as to furnish the Indians sufficient room for choice.

11. I regret that I am not able to confirm the reservations which you have been at so much trouble to make [illegible words].⁶⁶

Despite the disagreement among officials at higher levels, work at the local level continued. On August 20, 1877, Indian Agent Ogletree reported that the members of the Sandy Bay First Nation “were unanimous in stating that it was their intention to remain on their reserve and to go on with their improvements.”⁶⁷

By 1879, the Sandy Bay Reserve was still not confirmed. In January of that year, E. McColl, the Inspector of Indian Agencies (hereafter referred to as “Inspector”), reported that the Sandy Bay First Nation had requested “their Reserve extend south about two miles in order to include houses built by them previous to its survey.”⁶⁸

In April 1879, Indian Agent Ogletree investigated the request. He reported that if the reserve was to extend two miles to the south to include a house belonging to a man named Williams, “the same amount of land would be taken from some other part of the Reserve” and “it would have to be

⁶⁶ Department of the Interior, to Lieutenant Governor of Manitoba, July 6, 1877, LAC, RG 10, vol. 3642, file 5217-1 (ICC Exhibit 1, pp. 384–90).

⁶⁷ Francis Ogletree, Indian Agent, to J.A.N. Provencher, Superintendent of Indian Affairs, Manitoba, August 20, 1877, LAC, RG 10, vol. 3642, file 5217-1 (ICC Exhibit 1, p. 158).

⁶⁸ Extract of inspection report, E. McColl, Inspector of Indian Agencies, to unknown recipient, 1879, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 160).

taken from off the West-side” since the First Nation also had houses on the northern boundary of the reserve.⁶⁹

While waiting for the Department of the Interior to decide whether to confirm its reserve and/or to extend it two miles to the south, the Sandy Bay First Nation had the more immediate issue of flooding to deal with.

In September 1879, Indian Agent Ogletree reported:

last year their crops were very much injured by the wet season ... Their reserve is much better suited for stock raising and fishing purposes, they are well satisfied with their reserve, and were the seasons as dry now as formerly they would be able to farm more extensively, and many of them would in a few years be self-supporting.⁷⁰

In 1881, Indian Agent Ogletree reported that the water level of Lake Manitoba had risen “within the past three or four years some four or five feet thereby inundating the whole country for miles around with the exceptions of here and there, a small patch of ground scarcely large enough to build a house on.”⁷¹

Correspondence concerning whether the Sandy Bay Reserve should be extended two miles to the south continued in 1880, between the Surveyor General and Inspector McColl. A memorandum dated February 3, 1880, summarized an exchange of comments between the Surveyor General and Inspector McColl regarding the proposal “[t]hat the Sandy Bar [sic] Reserve be extended about 2 miles further south. Township 18 in range 9 W.”⁷² According to the memorandum, the Surveyor General remarked “[t]heir Reserve contains 891 acres more than they are entitled to. If it be extended 2 miles further south an equal quantity should be taken from the north end. This

⁶⁹ Francis Ogletree, Indian Agent, to E. McColl, Inspector of Indian Agencies, April 21, 1879, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 162).

⁷⁰ Francis Ogletree, Indian Agent, to Superintendent General of Indian Affairs, September 15, 1879, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1879*, 69 (ICC Exhibit 1, p. 164).

⁷¹ Francis Ogletree, Indian Agent, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 10, 1881, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881*, pt. 1, 62 (ICC Exhibit 1, p. 195).

⁷² Extract from memo, Surveyor General to unknown recipient, February 3, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 169).

extension would include a log house and improvements by one Williams.”⁷³ Inspector McColl, in turn, was said to have replied “Agent Ogiltree [sic] says could not cut off the north end as the Indians have their houses there. Cut off the west end. No entry made for any lands in proposed extension in Mr. Mills books.”⁷⁴ Reportedly, the Surveyor General then remarked:

Reserve at present given them has twice the frontage on lake than it has in depth. To further increase the frontage and lessen depth correspondingly would be to grant a most undue extent of front on lake in proportion to area. Indian Agent does not give information re Williams from knowledge on ground but merely proves no entry in Land Office. Williams may be white squatter, he was there previous to Surveys.

Can suggest no objection to their obtaining permits to cut wood for their own use but they have already received full quantity of land therefore if the land as well as wood were given them a similar quantity should be taken from present reserve.⁷⁵

QUALITY-OF-LAND ISSUES, 1877–1883

In September 1880, 14 members of the Sandy Bay First Nation wrote to the Lieutenant Governor of Manitoba, Joseph Cauchon, requesting assistance with the flooding that had been plaguing their Reserve. They stated:

During the last two or three years we have reaped little or no benefit from our crops.

Our Reserve is generally overflooded. It is impossible for us to continue in this place.

We will not be able to sow next Spring.”⁷⁶

⁷³ Extract from memo, Surveyor General to unknown recipient, February 3, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 169).

⁷⁴ Extract from memo, Surveyor General to unknown recipient, February 3, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 170).

⁷⁵ Extract from memo, Surveyor General to unknown recipient, February 3, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 170).

⁷⁶ Jean Baptiste Spence & other Indians of Sandy Bay Reserve, to Lieutenant Governor of Manitoba, September 24, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 171).

Cauchon forwarded their request to the Minister of the Interior on October 18, 1880.⁷⁷ On October 29, 1880, Deputy Superintendent General of Indian Affairs L. Vankoughnet responded to Lieutenant Governor Cauchon, stating that “enquiry will be made into this matter and if the complaints of the Indians are found to be well founded such remedial measures as may be possible will be adopted.”⁷⁸

In response to the First Nation’s request, Vankoughnet instructed the Acting Indian Superintendent at Winnipeg to consult with Indian Commissioner Edgar Dewdney “on the advisability of endeavouring to obtain some dry land in the vicinity of their Reserve for the purposes of agriculture.”⁷⁹ On November 5, 1880, Vankoughnet asked the Surveyor General, Lindsay Russell, for his suggestion on how it might be possible to accommodate the First Nation’s request to have its reserve extended two miles southward in order to obtain more arable land.⁸⁰

In response, Surveyor General Russell suggested:

That all those Indians of the band, unable to find land within the reserve suitable for cultivation, and at the same time prepared to immediately begin cultivation, be permitted to enter and take possession of by residence and cultivation, one quarter section each adjoining or as near to the Southern boundary of the present reserve as they may be able to find it. That for each quarter section so taken to the Southward by the band, a quarter section be taken off the rear of the reserve as it was originally granted, or if the Indians prefer off the north end of the Reserve, the equivalents of the new selections made to be thus deducted in a continuous block from some one side or other of the Reserve, as the Indians may indicate and may be approved and arranged with them.⁸¹

⁷⁷ Joseph Cauchon to Minister of the Interior, October 18, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 174).

⁷⁸ LVK [L. Vankoughnet] to Joseph Cauchon, Lieutenant Governor of Manitoba, October 29, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 175).

⁷⁹ L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to James F. Graham, Acting Indian Superintendent, October 12, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 173).

⁸⁰ L. Vankoughnet, Deputy Superintendent General, Department of Indian Affairs, to Lindsay Russell, Surveyor General, November 5, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, pp. 177–78).

⁸¹ Lindsay Russell, Surveyor General, Dominion Lands Office, Department of the Interior, to L. Vankoughnet, Deputy Superintendent General, Department of Indian Affairs, November 9, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, pp. 180–81).

On November 23, 1880, the department advised Acting Indian Superintendent James F. Graham that it had accepted Surveyor General Russell's proposal and instructed him that Indian Agent Ogletree should visit the reserve before the following spring, locate the First Nation members who wished to obtain farmland in the manner suggested by Russell, and report his findings to the department.⁸²

Two days later, Inspector McColl wrote in his annual report that, owing to the extensive flooding, the First Nation now wished the western boundary of its reserve extended to acquire more arable land, instead of the southern boundary.⁸³ McColl recommended that this request "should be granted, in order that the requisite agricultural facilities be afforded them. This extension, while apparently increasing the acreage, really gives them no greater quantity of land than they are entitled to under treaty stipulations."⁸⁴

In February 1881, Indian Agent Ogletree was instructed to carry out the proposal outlined in Surveyor General Russell's letter dated November 9, 1880, in accordance with the instructions given to Acting Indian Superintendent Graham in the letter dated November 23, 1880.⁸⁵ In a letter to Indian Superintendent Graham dated February 28, 1881, Ogletree stated:

in reference to the Surveyor's Generals [sic] letter recommending the location of Land on the South side of the Reserve, that all the Land for miles on the South is as wet as the Reserve itself, and to get dry land it will be necessary to go West, there may be Land enough in the west side of the Reserve fit for cultivation without going outside, but I am of the opinion that I will require the assistance of a Surveyor, if I find it necessary to locate them on other land, as the lines which have been run several years ago are all grown over with bush, and nearly all the Posts have been

⁸² Author unknown, to James F. Graham, Acting Indian Superintendent, November 23, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 182).

⁸³ E. McColl, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, November 25, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880*, 57 (ICC Exhibit 1, p. 186).

⁸⁴ E. McColl, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, November 25, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880*, 57 (ICC Exhibit 1, p. 186).

⁸⁵ James F. Graham, Indian Superintendent, to Edgar Dewdney, Indian Commissioner, February 15, 1881, DIAND, file 510/30-31-5, vol. 1 (ICC Exhibit 1, p. 188–89).

destroyed by fire. I might say that unless I have the option of locating Land on the West side, and the assistance of a Surveyor if necessary, it will be useless for me to go out.⁸⁶

The matter was set aside until June 1881, when Indian Superintendent Graham instructed Dominion Land Surveyor W.A. Austin to visit the Sandy Bay Reserve to implement Surveyor General Russell's plan. Austin was instructed to extend the reserve boundary to the south and

[t]hat for each quarter Section so taken to the Southward by the Band, a quarter section be taken off the rear of the Reserve as it was originally granted, or if the Indians prefer, off the north end of the Reserve, the equivalent of the new selections made to be thus deducted in a continuous block from some one side or other of the Reserve, as the Indians may indicate and may be approved and arranged with them.⁸⁷

Surveyor Austin visited the Sandy Bay Reserve in the early summer of 1881 to carry out those instructions, but later reported:

While at Totogan I met the chief, a councillor and a number of the Indians of the reserve, who informed me that they did not want their reserve extended to the north or south but an enlargement of it to the westward, extending to a small prairie ridge about 3 chains in width, where they might have a small portion of land on which to place their houses and cultivate, as their reserve was nearly all under water.

When I visited Mr. Ogletree at Portage La Prairie he informed me of the matter and said that I had better see the reserve for myself.

I therefore went along the north end of the reserve westward to the north-west corner and thence westward one and a-half miles or thereabouts to the aforementioned ridge, which is about 3 chains wide and 8 to 15 feet in height. Thence down the ridge southerly, inclining to the eastward for about two miles. I then went easterly to the front of the reserve nearly the whole way walking in the water with the exception of small isolated patches of ground, none of which I should say were over one foot above the water.⁸⁸

⁸⁶ Francis Ogletree, Indian Agent, to James F. Graham, Indian Superintendent, February 28, 1881, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, pp. 190–91).

⁸⁷ James F. Graham, Indian Superintendent, Indian Office, to W.A. Austin, Dominion Land Surveyor, June 13, 1881, LAC, RG 10, vol. 3745, file 29546 (ICC Exhibit 22, pp. 1–2).

⁸⁸ W.A. Austin, Dominion Land Surveyor, Gloucester, to Superintendent General of Indian Affairs December 22, 1881, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881*, 135–36 (ICC Exhibit 1, pp. 393–94).

The documentary record does not indicate whether Surveyor Austin adjusted the reserve boundaries at that time. It appears, however, that the flooding situation began to improve within a few months of Austin's report. In his annual report for the year 1882, Indian Agent Ogletree stated that the water level in Lake Manitoba was lower than it had been for several years.⁸⁹ In November of that year, Inspector McColl also noted the lower water level and expressed optimism that the reserve would once again be productive.⁹⁰ By 1883, Indian Agent Ogletree reported that flooding on the Sandy Bay Reserve had subsided substantially. He stated:

[The Sandy Bay Band] Put in 42 bushels of potatoes, 3 lbs. of turnip seed, 1 lb. of onion seed, and 1 lb. of carrot seed supplied by the Government, besides nearly an acre of potatoes, corn and other seeds belonging to Baptiste Spence, sen., which looked remarkably well on the 24th of July when I was paying them.

This reserve is in much better condition this year for farming. The Indians are in better spirits, and think that if the seasons come in as dry as usual they will be able to carry on farming profitably.

The water is some three or four feet lower than for several years past: where I travelled in a canoe in 1880 and 1881, we drove a double team this year. They will be in a better position to secure hay for their stock of which they have quite a number and they were in exceedingly good condition when I saw them.⁹¹

The documentary record indicates conditions on the Sandy Bay Reserve remained good through 1884, enabling the First Nation to cultivate crops and develop grazing and meadowlands.⁹²

⁸⁹ Francis Ogletree, Indian Agent, Portage la Prairie Agency, to Superintendent General of Indian Affairs, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 34 (ICC Exhibit 1, p. 198).

⁹⁰ E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to recipient unknown, November 28, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 152 (ICC Exhibit 1, p. 201).

⁹¹ Francis Ogletree, Indian Agent, Portage la Prairie Agency, Manitoba, to Superintendent General of Indian Affairs, September 1, 1883, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 54 (ICC Exhibit 1, p. 205).

⁹² E. McColl, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, October 30, 1884, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1884*, 123 (ICC Exhibit 1, p. 221).

WITHDRAWAL FROM TREATY 1

Despite Inspector McColl's report of improved conditions which, he anticipated, would lead to increased agricultural productivity on the Sandy Bay Reserve, the historical documentation for this inquiry indicates that a large number of Sandy Bay members either left the reserve or never maintained permanent residences there.

Inspector McColl reported in 1884 that the extensive flooding had forced many members of the Sandy Bay First Nation to find alternative methods of subsistence.

Owing to the flooded state of the reserve during a number of years past, nearly all the Indians abandoned it, and wandered about on lakes and rivers; through forests and over prairies, in order to obtain food for themselves and families.⁹³

Inspector McColl further reported, however, that "since the waters receded, they returned and resumed the cultivation of their former gardens with renewed energy."⁹⁴ The treaty annuity paylists indicate that 280 people belonging to 57 families received payment with the Sandy Bay First Nation (also referred to on the paylist as "Nahwahchewaykahpow's Band") at Sandy Bay on July 23, 1884.⁹⁵

In late 1884 or early 1885, administrative responsibility under the Department of Indian Affairs for the Sandy Bay First Nation was transferred from the Portage la Prairie Agency to the Manito-wah-pah Agency. In contrast with Inspector McColl's earlier report, the new Indian Agent, H. Martineau, suggested that the First Nation's apparent absence from the reserve was not abandonment due to flooding, but rather attributable to persistent "nomadic habits."⁹⁶ In his annual report dated June 30, 1885, Martineau commented:

⁹³ E. McColl, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, October 30, 1884, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1884*, 123 (ICC Exhibit 1, p. 221).

⁹⁴ E. McColl, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, October 30, 1884, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1884*, 123 (ICC Exhibit 1, p. 221).

⁹⁵ Treaty annuity paylist, Nahwahchewaykahpow's / Sandy Bay Band, July 23, 1884, LAC, RG 10, vol. 9359 (ICC Exhibit 18b, pp. 111–14).

⁹⁶ H. Martineau, Indian Agent, Manito-wah-pah Agency, to Superintendent General of Indian Affairs, June 30, 1885, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1885*, 49 (ICC Exhibit 1, p. 223).

Most of them come from the Prairie tribes and, as a consequence, were always absent from the reserve visiting their relatives and friends, or hunting, only returning about the months of June or July of each year, when they came to receive their annuity money, and then they went away again for another year; so in reality the band only numbered some five or six families who remained to improve the reserve.⁹⁷

Martineau continued, however, by stating that

[t]his spring they returned earlier than usual, took up land on the reserve, hauled logs to build their houses, broke up new land and planted potatoes in it, fenced it with good new rails, and some of them sowed wheat, barley peas, corn, beans, pumpkins, onions, carrots and turnips.⁹⁸

The historical correspondence for the year 1886 suggests another explanation of why so few members of the Sandy Bay First Nation were occupying their reserve. On October 11, 1886, Indian Agent Martineau reported that

“[t]he Indians of this band have left the reserve to join some other bands; as a consequence the school is closed, and the Government cattle and general property are under the care of the late teacher, awaiting your decision regarding the disposal of them.”⁹⁹

The treaty annuity paylists for the Sandy Bay First Nation indicate that 16 people belonging to six families received payment at Sandy Bay on July 9, 1886.¹⁰⁰ The 1886 payroll also includes notations

⁹⁷ H. Martineau, Indian Agent, Manito-wah-pah Agency, to Superintendent General of Indian Affairs, June 30, 1885, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1885*, 49 (ICC Exhibit 1, p. 223).

⁹⁸ H. Martineau, Indian Agent, Manito-wah-pah Agency, to Superintendent General of Indian Affairs, June 30, 1885, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1885*, 49 (ICC Exhibit 1, p. 223).

⁹⁹ H. Martineau, Indian Agent, Manito-wah-pah Agency, to Superintendent General of Indian Affairs, October 11, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1887*, 58 (ICC Exhibit 1, p. 230).

¹⁰⁰ Treaty annuity payroll, Sandy Bay Band, July 9, 1886, LAC, RG 10, vol. 9361 (ICC Exhibit 18b, pp. 119–22).

beside the names of 52 families indicating they had withdrawn from treaty, applied for discharge, or otherwise left the Band.¹⁰¹

A report filed by Commissioner R. Goulet in 1889 recounted the visit of the Half Breed Commission to the Sandy Bay reserve in February 1887.

These half breeds were treaty half-breeds who got their discharge in 1886 or 1887 & got their scrips in winter, February 1887, from the half breed Commission at Sandy Bay & Totogan. The most of them were actually living in good houses in Sandy Bay Indian Reserve & some of them had a small field or a garden near their houses at the time of the Commission visit there in Feb. 1887. At that time they wanted their scrips without signing the agreement that they had to leave the Reserve, houses and improvements, but being told that they had to do it they at last after some time, did sign said agreement but as there was only few Indians left in that Reserve they, the half-breeds continued to live on said Reserve in their houses and continued to cultivate their small fields or gardens, but I beleive [sic] their intention [was] all the time to petition the Government to get said Reserve opened for them to get homesteads on it in form of River lots....

I wrote them ... telling them that I thought it was hard to open up an Indian Reserve for settlement not to give them any hopes for nothing; but I am telling you if that could be done it would help them and be done with another settlement.¹⁰²

It was also reported by the Commissioner of Dominion Lands in 1890 that Commissioner Goulet had stated that members of the Sandy Bay First Nation took scrip¹⁰³ because they were under the “impression that all children born up till 1885 would be entitled to scrip. It was explained that this was not the case.”¹⁰⁴

Some members of the Sandy Bay First Nation made accusations of manipulation, misinformation, and other irregularities with respect to their acceptance of scrip. On December 7,

¹⁰¹ Treaty annuity payroll, Sandy Bay Band, July 9, 1886, LAC, RG 10, vol. 9361 (ICC Exhibit 18b, pp. 119–22).

¹⁰² R. Goulet, Half Breed Commissioner, to A. M. Burgess, Deputy Minister of the Interior, August 15, 1889, LAC, RG 10, vol. 3828, file 60717 (ICC Exhibit 18d, pp. 6–9).

¹⁰³ Certificates issued by the Department of the Interior in exchange for extinguishment of land claims.

¹⁰⁴ Commissioner of Dominion Lands, to Edgar Dewdney, Minister of the Interior, December 19, 1890, LAC, RG 10, vol. 3828, file 60717 (ICC Exhibit 18d, p. 15).

1886, E. McColl, the Superintendent and Inspector of Indian Agencies, reported on his investigation into these accusations.

On arriving at Sandy Bay Reserve on the 20th, I called a meeting of the half-breeds who had withdrawn from treaty ... I investigated complaints made against the agent [Martineau] that he unduly influenced them through misrepresentations to withdraw from treaty, but his accusers failed to sustain their charges against him. He produced letters from those parties themselves wherein they repeatedly implored him to release them from the obligations of treaty as they were desirous of obtaining scrip. George Spence and Little Fish were the only half-breeds present who claimed that they understood from what Mr. Martineau had stated to them that they could retain their possessions within the reserve after their withdrawal from treaty. The ex-chief and all the other half breeds present contradicted this, and said that the agent at a meeting held for the purpose told them all that they would have to leave the reserve as soon as they withdrew from treaty. It is therefore evident that they were aware of all the consequences which would follow upon their leaving treaty, and these trumped up grievances are manufactured by designing interested parties, or are inventions of the half-breeds themselves after they squandered the proceeds of their scrip or of their claims thereto. ... On my arrival at Totogan the following day Baptiste Metwaywenind called to see me, and represented that he never made an application to the agent to withdraw from treaty, although he understood that such had been made in his behalf by a scrip dealer. I find that his mark is attached to his application on file in this office, and that it is witnessed by one Garrioch whom I interviewed on the matter. It would appear from all the enquiries yet made by me that this party never understood when he made his mark that he was making an application to withdraw from treaty. However, I will make further enquiries into the matter and report at a subsequent date the result of my investigations.¹⁰⁵

McColl also noted that “the 16 Indians who now constitute the band were away at Riding Mountains, where they generally wander about hunting and trapping for their living.”¹⁰⁶

On January 1, 1887, John A. Macdonald, Superintendent General of Indian Affairs, informed the Marquess of Lansdowne, Governor General of Canada, that

¹⁰⁵ E. McColl, Superintendent & Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 7, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886*, 165 (ICC Exhibit 1, p. 233).

¹⁰⁶ E. McColl, Superintendent & Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 7, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886*, 165 (ICC Exhibit 1, p. 233).

[t]he greater number of the members of the band owning the reserve at Sandy Bay, on Lake Manitoba, were half-breeds and they have withdrawn from the band and accepted land scrip. There are therefore but a few families left in the community.¹⁰⁷

Macdonald, however, seemed unconcerned about the decrease in Sandy Bay's population, saying: "[T]his ... is all the better for them as their individual interest in the reserve and in the personal property of the band is, as a consequence of the diminution of the population, largely increased."¹⁰⁸

Indian Agent Martineau, in his report of August 22, 1887, stated not only that most of the First Nation had taken scrip and withdrawn from treaty, but also that the remaining members "do not ... reside on the reserve, but roam from one place to another."¹⁰⁹ In 1888, Martineau filed a similar report.¹¹⁰ Another report, from 1890, stated that "all the families on the reserve except one" had withdrawn from treaty.¹¹¹

READMITTANCE TO TREATY

On December 19, 1890, the Commissioner of Dominion Lands forwarded a petition from the Sandy Bay scrip recipients to the Minister of the Interior, Edgar Dewdney, in which they requested readmittance to treaty. In his covering letter, the Commissioner indicated that Half Breed Commissioner Goulet had explained to those receiving scrip that, by so doing, they forfeited rights to their reserve, which they now regretted, although they continued to occupy their lands on the

¹⁰⁷ John A. Macdonald, Superintendent General of Indian Affairs, to Marquess of Lansdowne, Governor General of Canada, January 1, 1887, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886*, xliii (ICC Exhibit 1, p. 236).

¹⁰⁸ John A. Macdonald, Superintendent General of Indian Affairs, to Marquess of Lansdowne, Governor General of Canada, January 1, 1887, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886*, xliii (ICC Exhibit 1, p. 236).

¹⁰⁹ H. Martineau, Indian Agent, Manito-Wa-Pah Agency, to Superintendent General of Indian Affairs, Ottawa, August 22, 1887, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1887*, 61 (ICC Exhibit 1, p. 238).

¹¹⁰ H. Martineau, Indian Agent, Manito-wa-paw Agency, to Superintendent General of Indian Affairs, Ottawa, August 20, 1888, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1888*, 50 (ICC Exhibit 1, p. 247).

¹¹¹ Commissioner of Dominion Lands, to Edgar Dewdney, Minister of the Interior, December 19, 1890, LAC, RG 10, vol. 3828, file 60717 (ICC Exhibit 18d, p. 15).

reserve.¹¹² The Commissioner of Dominion Lands reported that the scrip-takers now regretted their decision to withdraw from treaty and that Commissioner Goulet suggested that they be readmitted to treaty or that the one family still under treaty be relocated to another reserve, opening the Sandy Bay Reserve for settlement by the scrip recipients.¹¹³

On January 8, 1891, Deputy Superintendent General Vankoughnet suggested that “... the best plan would be to allow the Halfbreeds to rejoin the Band and to remain in possession of their lands on the ... stipulation that they refund the value of the scrip to the Government.”¹¹⁴

On October 29, 1892, Superintending Inspector McColl reported that “[n]early all the Sandy Bay Indians withdrew from treaty in 1887, but were subsequently readmitted at their urgent importunities on condition of their refunding the value of scrip given them; but during the interval the cultivation of their gardens was neglected, and therefore they retrograded instead of advancing, and are only beginning to regain their former prosperity.”¹¹⁵

On January 11, 1893, L. Vankoughnet, the Deputy Superintendent General of Indian Affairs, reported to Superintendent General T. Mayne Daly that an apparent increase of 178 people in the Indian population of the general region was attributable to the return of the Sandy Bay First Nation to treaty relations with Canada.¹¹⁶

¹¹² Commissioner of Dominion Lands, to Edgar Dewdney, Minister of the Interior, December 19, 1890, LAC, RG 10, vol. 3828, file 60717 (ICC Exhibit 18d, p. 15).

¹¹³ Commissioner of Dominion Lands, to Edgar Dewdney, Minister of the Interior, December 19, 1890, LAC, RG 10, vol. 3828, file 60717 (ICC Exhibit 18d, pp. 15–16).

¹¹⁴ L. Vankoughnet, Deputy Superintendent General, to Edgar Dewdney, Superintendent General of Indian Affairs, January 8, 1891, LAC, RG 10, vol. 3828, file 60717 (ICC Exhibit 18d, pp. 20–21).

¹¹⁵ E. McColl, Superintending Inspector, Manitoba Superintendency, to Superintendent General of Indian Affairs, October 29, 1892, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1892*, 55 (ICC Exhibit 1, p. 253).

¹¹⁶ L. Vankoughnet, Deputy Superintendent General of Indian Affairs, Ottawa, to T. Mayne Daly, Superintendent General of Indian Affairs, January 11, 1893, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1892*, xvi–xvii (ICC Exhibit 1, pp. 256–57).

CONFIRMATION OF SANDY BAY INDIAN RESERVE 5

The lands of Sandy Bay IR 5, containing 19 square miles, comprising all of fractional township 18, range 9, west of the principal meridian, excepting the road allowances shown on the official township plan, were withdrawn from the operation of the *Dominion Lands Act* by Order in Council 2876 dated November 21, 1913, which stated as follows:

WHEREAS Subsection (a) of Section 76 of the Dominion Lands Act, 1908, provides that the Governor in Council may withdraw from the operation of the Act, subject to existing rights as defined or created thereunder, such lands as have been or may be reserved for Indians.

THEREFORE His Royal Highness the Governor General in Council is pleased to order that the lands comprised within the following reserves shall be and the same are hereby withdrawn from the operations of the Dominion Lands Act, subject to existing rights as defined or created thereunder, namely:

...

7. Sandy Bay Indian Reserve, No. 5, comprising all of fractional township eighteen, range nine, west of the principal [sic] meridian, as shown on the official plan of the township, approved and confirmed on the first day of January, one thousand eight hundred and seventy-four, excepting thereout and therefrom the road allowances as shown on the said official plan; the said reserve containing by admeasurement nineteen square miles, more or less.¹¹⁷

Questioning of Reserve Boundaries

In 1923, questions arose regarding the precise boundaries of the Sandy Bay Reserve in relation to the marsh that bordered Lake Manitoba. The 1913 Order in Council described IR 5 as containing 19 square miles of land (or 12,160 acres) “more or less.” Questions also arose regarding school lands in the marsh.

On June 25, 1923, N.B. Sheppard of the Land Patents Branch of the Department of the Interior wrote to Thomas Shanks, Assistant Surveyor General, advising him that (according to the School Lands Division of the Department of the Interior) the School Lands Endowment was entitled to select lands in lieu of sections 11 and 29 in fractional township 18, range 9, west of the principal

¹¹⁷ Order in Council PC 2876, November 21, 1913, LAC, RG 2, Series 1, vol. 1276 (ICC Exhibit 1, pp. 260, 262).

meridian, which were apparently included in IR 5, as described in Order in Council 2876.¹¹⁸ Section 29 was located west of the marsh, but section 11 was within the marshy area. Sheppard asked if section 11 had been “sufficiently surveyed to constitute it School Lands”¹¹⁹ and pointed out that, if the land to the east of the traverse line was intended to be included in IR 5, there was evidently an error in the 19 square mile area quoted.

Writing on behalf of the Surveyor General, Shanks replied to Sheppard on July 18, 1923, stating: “Section 11, township 18-9-W.Pr. has not been surveyed so as to constitute it School Lands.”¹²⁰ Shanks also indicated that the marshlands were excluded from the reserve, saying “[t]he description of Sandy Bay Indian Reserve is evidently intended to include only the land west of the traverse line shown on the original township plan.”¹²¹

The discrepancy regarding the precise eastern boundary of the reserve and the marshlands continued into 1926. On October 9, 1926, J.M. Roberts, Secretary of the School Lands Branch of the Department of the Interior, wrote to J.D. McLean, Assistant Deputy and Secretary of the Department of Indian Affairs, to inquire whether the area lying east of the traverse line (including section 11), shown on the township plan, formed a portion of the Sandy Bay Indian Reserve.¹²² McLean responded that “Frac. Sec. 11-18-9-W.P.M., has been considered to be part of the Sandy Bay Indian Reserve No. 5 and confirmed as such by Order in Council, P.C. 2876, dated 21st

¹¹⁸ N.B. Sheppard, Land Patents Branch, Department of the Interior, to T. Shanks, Assistant Surveyor General, June 25, 1923, Natural Resources Canada, Legal Surveys Division, file SM8207-06397-A, vol. 1 (ICC Exhibit 16, p. 93).

¹¹⁹ N.B. Sheppard, Land Patents Branch, Department of the Interior, to T. Shanks, Assistant Surveyor General, June 25, 1923, Natural Resources Canada, Legal Surveys Division, file SM8207-06397-A, vol. 1 (ICC Exhibit 16, p. 93).

¹²⁰ Thomas Shanks for Surveyor General, to N.B. Sheppard, Land Patents Branch, Department of the Interior, July 18, 1923, Natural Resources Canada, Legal Surveys Division, file SM8207-06397-A, vol. 1 (ICC Exhibit 16, p. 95).

¹²¹ Thomas Shanks for Surveyor General, to N.B. Sheppard, Land Patents Branch, Department of the Interior, July 18, 1923, Natural Resources Canada, Legal Surveys Division, file SM8207-06397-A, vol. 1 (ICC Exhibit 16, p. 95).

¹²² J.M. Roberts, Secretary, School Lands Branch, Department of the Interior, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, October 9, 1926, DIAND file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 264).

NOV.1913, when the confirmation of Sandy Bay stated that the reserve comprised all of Frac. Tp. 18-9-W.P.M., as shown on the official plan of the Township approved and confirmed 1st Jan. 1874.”¹²³

In a February 1927 response directed to the Controller of the School Lands Division, however, Surveyor General F.H. Peters indicated that the marshland was not included in the calculation of land within the township.

The plan of township 18-9-W.Pr. dated January 1st, 1874 [Brown’s survey] bears a tabulation showing the land in sections as 12085.81 acres and the water areas as 10949.19 acres. No section lines are shown on the marsh. The land area mentioned is almost exactly nineteen square miles as given in the description of the Indian Reserve. The height of the water in Lake Manitoba is subject to variation so that the marsh shown on the township plan would probably be completely under water at certain periods, and at the time the plan was issued, evidently the view was held that the marsh might be regarded as part of the lake. The opinion expressed in my memorandum of July 18th 1923 was based on these considerations. [Note: this memorandum has not been found.]

If at any time it is found that the marsh has become sufficiently dry to be classified as land, it should be surveyed and added to the Indian Reserve.¹²⁴

In 1930, the eastern boundary came into question again, this time in relation to fishing. On March 10, 1930, Indian Agent J. Waite asked for advice from the department concerning the boundaries of the Sandy Bay Reserve.

Will you please advise me, of [sic] the water constitutes the boundary of a reserve, where the reserve is situated on a lake, or is a reserve similar to other lands, in that the shore of the lake is reserved as a public road. On the Sandy Bay Reserve there are three fishing camps on the lake shore, the fishing is usually good at this point, and there is a danger of other fishermen erecting camps in the vicinity. This will not only crowd out the Indian fisherman, but it will become a point of contention

¹²³ J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Secretary, Department of the Interior, October 14, 1926, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 265).

¹²⁴ F.H. Peters, Surveyor General, to the Controller, School Lands Division, Dominion Lands Branch, Department of the Interior, February 9, 1927, Natural Resources Canada, Surveyor General’s Office, file 8207-06397, Sandy Bay Indian Reserve (ICC Exhibit 1, p. 266).

in time, and I would like a ruling in the matter. The reserve map shows nothing that would be of any help in this matter.¹²⁵

In response, Acting Assistant Deputy and Secretary of the Department of Indian Affairs A.F. MacKenzie (successor to J.D. McLean) wrote to Indian Commissioner W.M. Graham on March 21, 1930, stating that the marshlands on the shore of the lake were not included in the reserve.

I have to advise you that generally speaking Indian reserves fronting on lakes and rivers include all the lands within the land boundaries extending down to the waters on which the reserve fronts and parties camping on the shore of such waters without departmental authority, would be committing an act of trespass and could be prosecuted under the Act.

However, in the particular case mentioned, namely, Sandy Bay Indian reserve, the Department appears to be in a somewhat different position, inasmuch as the confirmatory Order in Council confirmed the reserve in accordance with the Township plan and stated the area to be approximately 19 sq. miles. The Township plan referred to shows an area of approximately 19 sq. miles without including the area covered by water and marsh and as this marsh is shown on the Township plan as extending along almost the entire water front, it is doubtful if the Department could support its contention except along the shore of Sec. 28 and a portion of the S.E. [1/4] Sec. 33.

I am enclosing a blueprint of the reserve, on whi[ch] it is requested that the Indian Agent indicate the appro[xi]mate position of the camps of which he complains. I may [illegible word] that with a view to protecting the reserve front, the De[part]ment is in correspondence with the Department of the In[terior] in order to ascertain if they would consider the issue [illegible words] an amending Order in Council which would give us contr[ol] over all the land and marsh in this Township.¹²⁶ [Note: original document torn.]

The band members, however, told the Indian Agent that the boundary of the reserve at the time of survey was considered to be the shoreline of Lake Manitoba.

The Indians are again enquiring as to whether the Indian reserve lands continue to the edge of the water or not. I may say the Indians now inform the Agent

¹²⁵ J. Waite, Indian Agent, to W.M. Graham, Indian Commissioner, March 10, 1930, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 271).

¹²⁶ A.F. MacKenzie, Acting Assistant Deputy and Secretary, Department of Indian Affairs, to W.M. Graham, Indian Commissioner, March 21, 1930, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 273).

that at the time of the survey, the line running east and west on the north side of the reserve was 2½ miles long, and the line on the south of the reserve was 4 miles long. The Agent states that if this is correct, all the marshlands would be included in the reserve.¹²⁷

“ADDITION” OF MARSHLANDS TO IR 5

As a result of the above-mentioned correspondence, the Department of Indian Affairs requested an amending Order in Council “which would definitely establish the claim of the department to all the lands, marsh or otherwise, situate in this Township extending to the shore of Lake Manitoba.”¹²⁸ By Order in Council 1004, dated May 13, 1930, an area of six square miles (or 3,840 acres), more or less, was withdrawn from the operation of the *Dominion Lands Act* and set apart as an addition to the Sandy Bay Indian Reserve. The Order in Council described the lands as follows:

All that portion of Township 18, Range 9, West of the Principal [sic] Meridian, lying between Lake Manitoba and Sandy Bay Indian Reserve No. 5, described as a marsh on the plan of the said township, approved and confirmed at Ottawa, by J.S. Dennis, Surveyor General on the 1st day of January, 1874, of record in the Department of the Interior, containing by admeasurement Six square miles, more or less.¹²⁹

RETURN TO QUALITY-OF-LAND ISSUES

In 1928, M. Christianson, Inspector of Indian Agencies, filed a report regarding the Sandy Bay Reserve in which he stated:

The conditions on this reserve ... have caused me a lot of worry, as I cannot just see what is going to become of these Indians. The number in the band now is approximately 450 and it is impossible for them to make a living on the reserve, and as a consequence they are away from there most of the time. ... On the other hand we cannot herd them on the reserve, because if we did they would starve to death. There is no way for them to make a living there, and it is, therefore, necessary for them to

¹²⁷ W.M. Graham, Indian Commissioner, to Secretary, Department of Indian Affairs, January 9, 1931, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 275).

¹²⁸ A.F. MacKenzie, Acting Assistant Deputy and Secretary, Department of Indian Affairs, to Commissioner of Dominion Lands, March 21, 1930, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 272).

¹²⁹ Order in Council PC 1004, May 13, 1930, LAC, RG 2, Series 1, vol. 1840 (ICC Exhibit 1, p. 274).

get out to earn a living for themselves and their families. The future for these Indians looks to me anything but bright. ... If we could move some of this band to another location it would probably help to solve the question.¹³⁰

Inspector Christianson's letter apparently prompted officials at the Department of Indian Affairs to consider relocating the Sandy Bay First Nation. On July 30, 1928, Commissioner Graham forwarded Christianson's letter to the department and, in his covering letter, stated:

The situation at Sandy Bay, is to say the least, most disconcerting and the question is whether these Indians will ever be able to make a living at that point or not. We have a Farming Instructor there, but apparently no matter how good he may be, it is doubtful if conditions will ever improve. It seems to me that steps should be taken to close this reserve up by transferring the Indians to other points.¹³¹

The department did not respond to the proposal to relocate the First Nation until September 15, 1932, when a memorandum originating in the Minister's office stated:

The Minister has been informed that conditions at the Sandy Bay Reserve, Manitoba, leave much to be desired: The land is said to be of poor quality and, apparently, unsuited to agriculture; while hunting and trapping in the district have practically disappeared. The conditions leave the Indians with practically no means of livelihood except that of casual labour.

The Minister desires to be informed as to whether it is possible to have these Indians moved to another Reserve, or if the Department has any recommendations to make which might meet the situation.¹³²

A reply written on behalf of the Chief Surveyor and dated September 17, 1932, stated:

It is improbable that any suitable lands for another reserve could be obtained in that district for this band, except by purchase.

...

¹³⁰ M. Christianson, Inspector of Indian Agencies, to Graham, July 17, 1928, DIAND, file 510/30-31-5, vol. 1 (ICC Exhibit 1, pp. 267-68).

¹³¹ W.M. Graham, Indian Commissioner, to Scott, DIAND, file 510/30-31-5, vol. 1 (ICC Exhibit 1, p. 270).

¹³² F. Clapp for Private Secretary, Minister's Office, to Williams, September 15, 1932, DIAND, file 510/30-31-5, vol. 1 (ICC Exhibit 1, p. 277).

The present reserve contains 15,971 acres, of which 3,840 are classed as marsh lands in front of the reserve.¹³³

A second option, considered only briefly by the department, was to amalgamate the Sandy Bay First Nation with some other First Nation(s). Acting Deputy Superintendent General A.S. Williams reported on September 19, 1932, that

[i]n order to amalgamate this band with some other band it would require the consent of each band which might be difficult to obtain. It does not appear at the moment just where any such amalgamation could be effected.¹³⁴

On October 15, 1932, Inspector A.G. Hamilton reported on the condition of the reserve, suggesting several ways to improve matters. He recommended “[t]hat more hay lands be permitted,” “[t]hat commercial licences be supplied by the Dept.” for fishing purposes, and that “wild rice be purchased and planted along the lake shore within the boundary of the reserve.”¹³⁵ In a briefing memo written to the Superintendent General of Indian Affairs, Thomas G. Murphy, dated October 21, 1932, the Acting Deputy Superintendent General of Indian Affairs, A.S. Williams, stated that the Inspector’s recommendations “do not seem to provide a foundation on which to build permanent progress and development; and there are other objections.”¹³⁶

There is no documentary evidence in this inquiry that the department ever took action to relocate or amalgamate the Sandy Bay First Nation.

¹³³ W. R. White for Chief Surveyor, Department of Indian Affairs, to Williams, September 17, 1932, DIAND, file 510/30-31-5, vol. 1 (ICC Exhibit 1, p. 278).

¹³⁴ A.S. Williams, Acting Deputy Superintendent General of Indian Affairs, to Buskard, September 19, 1932, DIAND, file 510/30-31-5, vol. 1 (ICC Exhibit 1, p. 279).

¹³⁵ A.G. Hamilton, Inspector, Manitoba Inspectorate, Department of Indian Affairs, to Williams, October 15, 1932, DIAND, file 510/30-31-5, vol. 1 (ICC Exhibit 1, p. 284).

¹³⁶ A.S. Williams, Acting Deputy Superintendent General of Indian Affairs, to the Hon. Thomas G. Murphy, October 21, 1932, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 288).

With conditions at the Sandy Bay Reserve still poor, the First Nation requested that additional lands be secured for its use.¹³⁷ There is no documentary evidence in this inquiry that the department ever followed through on this request or that the First Nation raised it again.

“ADDITION” OF ROAD ALLOWANCES TO IR 5

Order in Council 2876 of November 21, 1913, which confirmed the Sandy Bay Indian Reserve, excluded all road allowances shown on the original township plan.¹³⁸ The original survey plan indicates that there were 492.55 acres of road allowances within township 18, range 9, west of the principal meridian.¹³⁹ In 1958, the Department of Indian Affairs communicated with the Government of Manitoba seeking to dedicate the road allowances to the First Nation, stating that it “would facilitate our administration of the Sandy Bay Reserve if ownership of the rights-of-way were re-vested in the Sandy Bay Band of Indians.”¹⁴⁰ The provincial government agreed to the request on the condition that Canada exchange an area of land upon the reserve for drainage purposes.¹⁴¹ Subsequent correspondence indicates that the area of land to be exchanged was located on the southern boundary of the reserve, adjacent to the road allowance along the southern boundaries of sections 3, 4, 5, and 6.¹⁴² On October 19, 1959, the Sandy Bay First Nation issued a Band Council

¹³⁷ J. Waite, Indian Agent, Indian Affairs Branch, Department of Mines and Resources, to Indian Affairs Branch, Department of Mines and Resources, February 7, 1946, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 290).

¹³⁸ Order in Council PC 2876, November 21, 1913, LAC, RG 2, Series 1, vol. 1276 (ICC Exhibit 1, pp. 260–63).

¹³⁹ Plan 782, “Plan of Township No. 18, Range 9, West of 1st Meridian (Sandy Bay Ind. Res.),” surveyed by C.P. Brown, Deputy Surveyor of Dominion Lands, August–September 1873, confirmed January 1, 1874, and certified as true copy April 19, 1906 (ICC Exhibit 2).

¹⁴⁰ R.D. Ragan, Regional Supervisor of Indian Agencies, to E.S. Wright, Department of Public Works, Highways Branch, September 18, 1958, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 296).

¹⁴¹ E.S. Wright, Right-of-Way Agent, Department of Public Works, Highways Branch, to R.D. Ragan, Supervisor of Indian Affairs, April 28, 1959, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 20, p. 7).

¹⁴² A.G. Leslie, Regional Supervisor of Indian Agencies, to E.S. Wright, Right-of-Way Agent, Department of Public Works, June 16, 1959, DIAND, file 501/31-4-31, vol. 1 (ICC Exhibit 20, p. 8).

Resolution (BCR) seeking the return of the road allowances to the Band.¹⁴³ By Band Council Resolution dated November 13, 1959, the First Nation agreed to the transfer to the province of the reserve land required for a drainage ditch.¹⁴⁴ It should be noted, however, that although the province had sought a strip of land along the entire southern boundary of the reserve, the BCR of November 13, 1959, refers only to land within section 6.¹⁴⁵

On December 30, 1959, W.C. Bethune, Chief of Reserves and Trusts, Department of Indian Affairs and Northern Development, wrote to the Manitoba Department of Public Works stating that the question of the transfer of road allowances and the surrender of land for the drainage ditch were two issues that should be dealt with separately.¹⁴⁶ A report prepared for this inquiry by Public History Inc. concluded that “[t]he history of the correspondence clearly illustrates that [the transfer of the road allowances] was an exchange of land, despite the suggestion by a senior DIA official in December 1959 that the drainage ditch be kept ‘separate and apart from the road question.’”¹⁴⁷

The provincial government subsequently applied further conditions to the transfer, stipulating that the road allowances bordering on the outside boundaries of the reserve would remain in the province’s possession and that the Canadian National Railway would receive title to the area within the railway’s right of way.¹⁴⁸

¹⁴³ Sandy Bay First Nation Band Council Resolution, October 19, 1959, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 298).

¹⁴⁴ Sandy Bay First Nation Band Council Resolution, November 13, 1959, DIAND, file 501/31-4-31, vol. 1 (ICC Exhibit 20, p. 9).

¹⁴⁵ Sandy Bay First Nation Band Council Resolution, November 13, 1959, DIAND, file 501/31-4-31, vol. 1 (ICC Exhibit 20, p. 9).

¹⁴⁶ W.C. Bethune, Chief, Reserves and Trusts, to E.S. Wright, Department of Public Works, Highways Branch, December 30, 1959, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 300).

¹⁴⁷ Public History Inc., “Sandy Bay Indian Reserve No. 5 – Road Allowances and Drainage Ditch,” preliminary report prepared for Sandy Bay Ojibway First Nation, October 25, 2000, 2 (ICC Exhibit 20, p. 2); W.C. Bethune, Chief of Reserves and Trusts, to Department of Public Works, December 30, 1959, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 300).

¹⁴⁸ E.S. Wright, Right-of-Way Agent, Department of Public Works, Highways Branch, to W.C. Bethune, Chief, Reserves and Trusts, March 10, 1960, DIAND, file 510/30-31-5, vol. 1 (ICC Exhibit 1, p. 301).

There was a significant delay between the passage of the November 13, 1959, Band Council Resolution and the ultimate conveyance of the road allowances to the First Nation, possibly because of the time it took to resolve the discrepancy between the BCR's terms and the province's expectations. Correspondence from the Department of Public Works in late 1964 indicates that this may have been the case.

We had of course assumed that the resolution referred to all of the area shown [on survey plan 1125] ... and were unaware that same covered section 6 only ...

It is the feeling of this Department that should the Band Council wish to have the road allowances reverted to the Reserve, they should be prepared to pass a resolution agreeing to convey to the Province, the area of drainage works shown on the plan of survey.¹⁴⁹

Despite its earlier reluctance to “consider relinquishing land” for the drainage ditch in sections 3, 4, 5, or 6,¹⁵⁰ the Sandy Bay First Nation eventually passed a Band Council Resolution on October 30, 1969, agreeing to transfer to the province, for drainage purposes, a right of way comprising a total of 10.2 acres of land in two quarter sections of section 6.¹⁵¹ In September 1970, the province transferred title to the road allowances to Canada, saying “[t]he issuance of this Title in the name of Canada concludes the exchange of properties.”¹⁵²

On November 24, 1970, the former road allowances, containing approximately 495 acres, were formally set apart for the use and benefit of the First Nation by Order in Council 1970-2030

¹⁴⁹ E.S. Wright, Right-of-Way Agent, Department of Public Works, Highways Branch, to H.R. Conn, Chief, Economic Development Division, Indian Affairs Branch, November 23, 1964, DIAND, file 501/31-4-31, vol. 1 (ICC Exhibit 20, pp. 46–47).

¹⁵⁰ P. Jackson, Superintendent, Dauphin Agency, to Regional Supervisor, February 20, 1964, DIAND, file 501/31-4-31, vol. 1 (ICC Exhibit 20, p. 29).

¹⁵¹ Sandy Bay First Nation Band Council Resolution, October 30, 1969, DIAND, file 501/31-4-31, vol. 1 (ICC Exhibit 20, p. 77).

¹⁵² H.A. Good, Director, Land Acquisition Branch, Department of Public Works, to Q.P. Jackson, Department of Indian Affairs and Northern Development, September 3, 1970, DIAND, file 501/31-4-31, vol. 1 (ICC Exhibit 20, p. 83).

“as an addition to ... Sandy Bay Indian Reserve Number 5.”¹⁵³ The schedule attached to the Order in Council describes the land as follows:

In Manitoba; all those portions of Government Road Allowances in township 18, range 9, west of the principal [sic] meridian, which lie within the boundaries of Sandy Bay Indian Reserve number 5, which boundaries are shown on plan 5158 in the Canada Lands Surveys Records at Ottawa, a copy of which is filed in the Land Titles Office at Portage la Prairie as 1125; LESS those portions taken for the right-of-way of the Canadian Northern Railway shown coloured pink on a plan registered in said Office as 429, a copy of which is recorded in said Records as 5107; the remainder containing about 495 acres.¹⁵⁴

¹⁵³ Order in Council PC 1970-2030, November 24, 1970, DIAND, file 577/31-4-18-5 (ICC Exhibit 1, p. 314).

¹⁵⁴ Order in Council PC 1970-2030, November 24, 1970, DIAND, file 577/31-4-18-5 (ICC Exhibit 1, p. 315).

APPENDIX B*

Interim Ruling, June 28, 1999

INDIAN CLAIMS COMMISSION

**INTERIM RULING: SANDY BAY FIRST NATION INQUIRY
TREATY LAND ENTITLEMENT CLAIM**

RULING ON GOVERNMENT OF CANADA OBJECTIONS

PANEL

Commission Co-Chair Daniel J. Bellegarde
Commissioner Roger J. Augustine
Commissioner Elijah Harper

COUNSEL

For the Sandy Bay First Nation
Rhys Jones

For the Government of Canada
Perry Robinson

To the Indian Claims Commission
David E. Osborn, QC / Chris Angeconeb

JUNE 28, 1999

SANDY BAY FIRST NATION INQUIRY

BACKGROUND

Further to correspondence from Canada objecting to the Commission's continued jurisdiction in the above-noted matter by letters dated November 12, 1998, and April 12, 1999, we have had an opportunity to consider the presentations of both parties in this matter and decide as follows.

FACTS

Sandy Bay First Nation originally made a submission to the Specific Claims Branch of Indian Affairs in November of 1982. The Band's main arguments at that time were as follows: 1) there was a land shortfall at the initial survey (date of first survey) established through historical and payroll analysis; 2) there was a shortfall of land based on a multiple survey-current population approach to calculating entitlement (the Band's main argument); and 3) there should have been an exclusion of lands occupied and improved by Indians (some 92.88 acres) prior to treaty from the total reserve allotment.

Under cover of letter, dated January 3, 1985, from R.M. Connelly, Director of the Specific Claims, to Andrew Beaulieu, Band Administrator, Canada rejected the claim. Canada wrote: "Based upon the per capita land allotment promised in Treaty No. 1 ... the total entitlement figure ... would be 11,812.36 acres. The band on the other hand has received a total of 15,928.26 acres allotted pursuant to treaty, and therefor there is no outstanding treaty land entitlement." It goes on to write, "[w]ith respect to the second argument ... no evidence was supplied that indicated that the federal government employed a general policy of using current population to calculate treaty land entitlement with subsequent surveys, or a specific policy to do so in determining the treaty land entitlement of the Sandy Bay Band. If such a policy did exist it would not alter the federal government's lawful obligation to provide land to the band pursuant to the terms of the treaty. The additions of land in 1930 and 1970 therefore have been considered as lands laid aside

INDIAN CLAIMS COMMISSION PROCEEDINGS

in fulfillment of the treaty obligation.” As for the third argument, Canada stated, “... there is insufficient substantial evidence to support the Band’s contention that these lands should be exclusive of the lands allotted under treaty. Furthermore, the lands allotted ... are sufficient to fulfil the treaty land entitlement even if the 92.88 acres are proven to have been exclusive of and in addition to the other lands allotted in fulfillment of the treaty land obligation.”

A Band Council Resolution dated April 2, 1998, from Sandy Bay First Nation requests that the Indian Claims Commission conduct an inquiry into the rejected claim. The Commissioners accepted this claim for inquiry and notice was sent to the parties by letter dated May 27, 1998.

On October 3, 1998, at a planning conference, counsel for Canada made it clear that the Band’s submission, as presented, constituted a new claim. Counsel for the Band undertook to forward its submissions in writing and this was subsequently forwarded to Canada and the ICC under cover of letter dated October 27, 1998. Canada relayed its objection regarding the restatement in letters dated November 12, 1998, and April 12, 1999.

The Band’s restatement basically states that, although Canada may have provided a sufficient quantum of land at the date of first survey in 1876, Canada should not receive credit for all of this land due to its poor quality. As well, the Band claims that Canada should not receive credit for additional allotments of land in the 1930s and 1970s since the land was not explicitly provided in fulfillment of the Treaty 1 obligations.

ISSUE

The Orders in Council establishing this Commission provide as follows:

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

(a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister¹

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

SANDY BAY FIRST NATION INQUIRY

The Policy, *Outstanding Business*, outlines what is required from a claimant:

1) Presentation of the Claim

Specific claims are presented by Indian bands to the Minister of Indian Affairs and Northern Development, acting on behalf of the Government of Canada. Because they often raise complex issues, claim presentations should include a clear, concise statement of what is being claimed, a comprehensive historical and factual background, and a statement of the grounds upon which the claim is based....

2) Review of Claims by the Office of Native Claims (ONC)

The Office of Native Claims undertakes a review of the claim at the direction of the Minister of Indian Affairs and Northern Development. In conducting its review, ONC analyses the historical facts presented in the claim and arranges for additional research if required. It also investigates the sequence of historical events surrounding the issues raised in the claim....

All pertinent facts and documents are then referred by ONC to the Department of Justice for advice on the federal government's lawful obligation....

...

5) Further Review of the Claim

A claim which has not been accepted for negotiation may be presented again at a later date for further review, should new evidence be located or additional legal arguments produced which may throw a different light on the claim.²

The issue is whether or not this is a “substantially new claim,” and if so, whether or not this affects the ICC’s jurisdiction to continue hearing this claim.

Canada’s objection is based on the view that this restated claim “... represents an unequivocal departure from the claim as originally presented ...” and that it has not yet been rejected by Canada. Canada further asserts that the submission be redirected to the Policy and Research Directorate of DIAND for assessment under the Claims Policy.

² Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 23–5; reprinted in (1994), 1 ICCP 171.

INDIAN CLAIMS COMMISSION PROCEEDINGS

RULING

We have read the materials submitted by the parties and appreciate the very able arguments of counsel.

The submission of the restatement initially arose because “the band was asked to restate its claim for the benefit of the Commission and the government of Canada. This was because the original claim submission appears to have been made without the benefit of legal advice.” The First Nation had previously submitted its claim through researchers from Treaty and Aboriginal Rights Research Centre (TARR). The First Nation has only now taken advantage of its ability to retain and instruct legal counsel in pursuit of its claim and, in doing so, has found (and conceded) that much of its submission has had to be changed. It can’t be disputed that the competent presentation of a specific land claim will normally require the expertise of a lawyer, particularly if issues are complex or involve questions of law. The First Nation cannot be faulted for seeking out the best possible representation in pursuit of its specific claim. We also note that, at the very minimum, the Band has been consistent in its claim that the Band’s lawful entitlement to reserve lands under Treaty 1 was never fulfilled.

Canada refers to the Claims Policy and notes that the “issues raised in the claim” are central to any claim assessment and that the Commission’s own Order in Council states that it is only to consider “those matters at issue when the dispute was initially submitted...” Canada also argues that if the commission accepts “the theory of the claims process and the ICC mandate that flows from the ... Band Submission [restatement] ... [that the result is] inconsistent with both the spirit, and the four cornered literal reading, of the Claims Policy...” However, Mr Robinson also concedes, “... it is difficult to set out precise criteria that would demarcate the exact point at which a previously submitted claim and rejected claim is so materially changed that it can properly be characterized as a ‘new’ claim that should be resubmitted to Canada for review.” In any case, we have, in past rulings, tended to view our mandate in a very broad manner. In the *Lax Kw’alaams* report we stated: “On an ordinary reading of our Orders in Council, we have concluded that the Commission’s mandate is remedial in nature and that it has a broad mandate to conduct inquiries into a wide range of issues which arise out of the application of Canada’s Specific Claims Policy. In our view, this Commission was created to assist parties in the negotiation of specific claims. This interpretation is supported by a statement by Minister Tom Siddon, as he then was, in which he suggested that the Commission’s mandate is not strictly limited to

SANDY BAY FIRST NATION INQUIRY

the four corners of the Specific Claims Policy.”³ That our mandate is remedial in nature is absolutely clear.

We note Canada’s submission that, if we accept Mr Jones’s account of the claims process, it would lead to results that were not contemplated by the policy and ICC mandate. As an illustration of the point, Canada writes:

1. A Band alleges a breach of fiduciary duty in relation to, say, a surrender of reserve land in 1940.
2. In a one page claim presentation, the band asserts that Canada owes the Band a lawful obligation on the basis that the Band did not receive the \$5000 as specified in the surrender documents.
3. In reviewing the claim, Canada investigates the sequence of historical events surrounding the issues raised in the claim and confirms that the band did receive the \$5000.
4. Consequently, Canada rejects the claim.
5. If Mr. Jones position accurately reflects Canada’s obligations and the ICC role, then the band would be allowed to request that the ICC commence an Inquiry to determine whether Canada owes an outstanding lawful obligation to the band in relation to the 1940 surrender.
6. On Mr. Jones account of the claims policy and the ICC mandate, the band could then raise a variety of issues related to the surrender such as lack of informed consent, fraud, exploitative transaction, undue influence etc. In other words, issues that were never raised by the band in its original submission.

Canada then goes on to outline the view that a First Nation might, as a strategy, line jump or completely circumvent the claims process in this manner. The view of the Commission is that each claim must be reviewed in its own unique circumstances. In this case, 17 years have passed since Sandy Bay first presented this claim to Canada and a proper review by legal counsel has necessitated a change in arguments. We can see no evidence to suggest that the Band is acting in bad faith, other than to have its claim finally dealt with.

Consequently, we are ruling against Canada’s objection. In the interest of fairness, Sandy Bay will not be required to re-submit its claim to the Specific Claims Branch of the Department of Indian Affairs. The Commission will continue to retain its jurisdiction in this matter and Canada will be given a reasonable amount of time to consider any new matters contained in the restatement of the Sandy Bay First Nation.

³ ICC, *Lax Kw’alaams Indian Band Inquiry* (Ottawa, June 1994), reported (1995) 3 ICCP 99 at 158.

INDIAN CLAIMS COMMISSION PROCEEDINGS


FOR THE INDIAN CLAIMS COMMISSION



Daniel J. Bellegarde
Commission Co-Chair



Roger J. Augustine
Commissioner



Elijah Harper
Commissioner

Dated this 28th day of June, 1999.

APPENDIX C

Interim Ruling, November 22, 2004

INDIAN CLAIMS COMMISSION

**INTERIM RULING: SANDY BAY OJIBWAY FIRST NATION INQUIRY
TREATY LAND ENTITLEMENT CLAIM**

PANEL

Chief Commissioner Renée Dupuis (Chair)
Commissioner Daniel J. Bellegarde
Commissioner Alan C. Holman

COUNSEL

For the Sandy Bay Ojibway First Nation
J. R. Norman Boudreau

For the Government of Canada
Perry Robinson

To the Indian Claims Commission
Diana Kwan

NOVEMBER 22, 2004

BACKGROUND

Canada has proposed that the inquiry proceed with a phased approach and has recommended that a third party be granted status to intervene. This third party, the Long Plain First Nation, has requested standing to intervene in the Sandy Bay inquiry. In addition, the parties have been unable to agree on the Statement of Issues. This preliminary ruling addresses all of these issues.

The Sandy Bay First Nation (hereinafter “the First Nation”) originally submitted their claim to the Specific Claims Branch in November 1982. Essentially, the First Nation’s claim is a Treaty Land Entitlement claim (hereinafter “TLE claim”).

In a letter dated January 3, 1985, the Director of the Specific Claims advised the First Nation that Canada had rejected the claim.

On April 2, 1998, the First Nation forwarded a Band Council Resolution (hereinafter “BCR”) to the Indian Claims Commission (hereinafter “the ICC”), requesting that an inquiry be conducted into the rejected claim. The Commissioners accepted this claim for inquiry and notice was given to the parties in a letter dated May 27, 1998.

The parties met at a Planning Conference on October 3, 1998. Legal counsel for Canada stated that the First Nation’s submission to the ICC constituted a new claim, and challenged the ICC’s mandate to assume jurisdiction over the claim. Counsel for the First Nation forwarded its submissions in writing on October 27, 1998. Canada responded with submissions dated November 12, 1998 and April 12, 1999. The ICC issued a ruling based on the parties’ written submissions on June 28, 1999, and determined that:

In the interest of fairness, Sandy Bay will not be required to re-submit its claim to the Specific Claims Branch of the Department of Indian Affairs. The Commission will continue to retain its jurisdiction in this matter and Canada will be given a reasonable amount of time to consider any new matters contained in the restatement of the Sandy Bay First Nation.¹

¹ Indian Claims Commission, *Sandy Bay First Nation Treaty Land Entitlement Inquiry Interim Ruling* (Ottawa, June 28, 1999) reported (2003)16 ICCP 39, p. 45.

Following the ICC's ruling on the mandate, further research was undertaken to clarify issues surrounding the TLE claim. As well, a series of events outside of the inquiry process occurred, resulting in delayed progress. Notably, the First Nation has had three changes in legal counsel, and faced a leadership dispute, which resulted in Canada withdrawing its participation in the inquiry until the dispute was resolved. In October 2003, present legal counsel for the First Nation was appointed, and the parties have attempted to proceed in the inquiry process.

At a Planning Conference held on September 10, 2004, the parties made some progress in understanding their respective positions, and agreed to proceed straight to the Oral Session with a site tour scheduled the day before the Oral Session. However, before setting timelines for the remainder of the inquiry process, Canada believes that a number of issues need to be addressed. To this end, Canada has made two requests requiring ruling from the Panel. Furthermore, Canada and the First Nation are unable to agree on the final order of the Statement of Issues, which also requires a ruling from the Panel.

On October 28, 2004, the ICC received correspondence from legal counsel for the Long Plain First Nation seeking standing to intervene in the Sandy Bay inquiry.

Issues

1. Should Canada's proposal for a two-phased inquiry process be accepted?
2. Should the ICC allow the Long Plain First Nation to seek standing to intervene in the Sandy Bay inquiry?
3. What should the final Statement of Issues be?

Summary

In summary, the Panel has made the following rulings:

1. The Panel has ruled that this inquiry will be conducted in a single phase. .
2. The Panel has determined that the Long Plain First Nation can apply to the ICC to seek standing in the following manner:

- a. The Long Plain First Nation must provide a BCR to the ICC supporting the motion to seek standing, and its written submissions, copied to all parties, on why the Long Plain First Nation should be granted standing to intervene by **Monday, December 20, 2004**;
 - b. Canada and the Sandy Bay First Nation are entitled to respond with written submissions, sent to the ICC and copied to all parties, by **Monday, January 17, 2005**; and
 - c. If the written submissions are sufficient, then the Panel will issue a ruling on whether or not the Long Plain First Nation will be granted standing. The Panel maintains the discretion of determining whether or not oral submissions will be necessary.
3. The Panel has determined that the Statement of Issues for the Sandy Bay inquiry to be:
1. *What is the amount of land in I.R. No. 5 which can be credited toward TLE?*
 - a. *What is the amount of land originally set apart for Sandy Bay First Nation in Treaty 1 and in 1876?*
 - b. *What amount of land was provided to Sandy Bay in 1930 (OIC P.C. 1004 dated May 13, 1930) and 1970 (OIC P.C. 1970-2030 dated Nov. 24, 1970)?*
 - c. *Can the lands provided in 1930 and 1970 be credited toward TLE?*
 2. *What amount of land, if any, should not be credited toward TLE on the grounds that it was land improved and occupied prior to Treaty?*
 3. *What is the population number for Sandy Bay First Nation to calculate the amount of land to which it is entitled pursuant to Treaty?*

Analysis & Ruling

1. *Should Canada's proposal for a two-phased inquiry process be accepted?*

At a Planning Conference held on September 10, 2004, Canada proposed a two-phased inquiry process where the first phase of the inquiry would focus on determining the TLE population of the First Nation, and the second phase would focus on the amount of TLE land west of the traverse line on Survey Plan 782. This proposal was outlined in more detail in correspondence dated

September 15, 2004. In summary, Canada has proposed to conduct the inquiry in the following manner:

- (1) Determine the TLE population of the First Nation;
- (2) Determine the amount of land west of the traverse line on Survey Plan 782, and if there is a TLE shortfall, then conduct a further inquiry into the following:
 - (a) whether a 492.55 acre road allowance counts toward TLE; and
 - (b) whether the 3840 acres of land east of the traverse line counts toward TLE.

Both the First Nation and Canada have participated in a TLE analysis summarized by the ICC's Research Unit. The parties agree that the minimum population is 194. The First Nation's maximum population is 231 with 37 identified questionable people. The First Nation and Canada do not agree on the amount of land west of the traverse line on Plan 782; however, Canada believes that determining the appropriate TLE population will resolve any land issues.

On September 16, 2004, the First Nation provided a letter rejecting Canada's proposal. Additional exchanges of correspondence occurred in which the parties reiterated their positions. On October 22, 2004, the First Nation stated their belief that "the most expeditious way to proceed is to deal with all matters as a whole rather than be denied the Commission's views of the full claim."

Canada's approach to TLE in this case is to focus on population and determine whether or not a TLE shortfall occurs based on the amount of land west of the traverse line on Survey Plan 782. Their position is that the population figure will be enough to determine whether or not there is a threshold shortfall based on the acreage they argue exists west of the traverse line on the Survey Plan.

The First Nation has rejected this approach, and does not believe that this phased approach would expedite the inquiry process. In addition, the First Nation prefers to have all of the issues examined in the inquiry at the same time.

The Panel has ruled that the amount of land and population is information needed in a TLE claim. As a result, the Panel has decided to conduct the Sandy Bay inquiry in a single phase.

2. *Should the ICC allow the Long Plain First Nation to seek standing to intervene in the Sandy Bay inquiry?*

Also at the Planning Conference on September 10, 2004, Canada advised of an issue with the Sandy Bay inquiry that may be relevant to the Long Plain First Nation. Further details were outlined in Canada's letter dated September 15, 2004. In 2000, the ICC released its report on the Long Plain TLE inquiry,² and recommended negotiations. Essentially, the ICC concluded that a TLE land shortfall and loss of use are tied to a band's TLE population. Canada and Long Plain entered into negotiations, and for the purposes of a settlement agreement, agreed on an acreage for the TLE shortfall. However, the parties did not agree on using the agreed upon acreage for loss of use compensation; instead, this compensation would be tied to population.

The issue that arises is that at one point, Sandy Bay and Long Plain were part of the same band – the Portage Band, along with Swan Lake. Swan Lake has settled their TLE, Long Plain is in negotiations, and Sandy Bay is in the ICC process. However, Canada and Sandy Bay disagree over 37 identified people and their inclusion in the TLE population count. Canada states that some of these 37 people may be more appropriately counted with Long Plain, and has a policy not to count people as members of two bands (ie, double-count). As such, they wish to put the Long Plain First Nation on notice and recommend that they be allowed to intervene by way of making submissions in the Sandy Bay inquiry.

Specifically, Canada has submitted the following:

Canada submits that it would be unfair to decide an issue that is vital to Long Plain's interest without putting Long Plain First Nation on notice and allowing them an opportunity to make submissions on point. Accordingly, Canada recommends that all playlist information/reports, compiled by Canada, Sandy Bay and the ICC in the context of this inquiry, be provided to the Long Plain First Nation to allow them to make informed representations on the issue of the band affiliation of individuals, that may be claimed by both First Nations.

² Indian Claims Commission, *Long Plain First Nation: Loss of Use Inquiry* (Ottawa, February 2000), reported (2000) 12 ICCP 269.

Long Plain should be afforded the opportunity to make these representations before the Commission so that the Commissioners will have all relevant information before them prior to making their recommendations.³

On September 24, 2004, the First Nation provided a written response to this request. The First Nation rejected any possibility of allowing Long Plain to intervene in the Sandy Bay inquiry. Essentially, the First Nation states that this claim is Sandy Bay's claim against Canada, and there is no reason for Long Plain to intervene. As well, the First Nation believes it should not be prejudiced by Canada's policy not to double-count.

A further exchange of correspondence occurred. On October 14, 2004, Canada provided another written response, reiterating Canada's position that it will not double-count members, and that this is the sole reason for recommending that Long Plain be granted permission to intervene. On October 22, 2004, the First Nation provided another response, confirming their position "that the Commission should reject Canada's proposal as being unnecessary and unwarranted ..." Additional exchanges occurred, confirming the parties' positions.

On October 28, 2004, the ICC received correspondence from legal counsel for the Long Plain First Nation. The Long Plain First Nation is seeking standing to intervene in the Sandy Bay inquiry:

We understand that pay lists are an issue before the Commission and that in fact, there are 17 people whose names appear on pay lists for both the Sandy Bay Ojibway Nation and the Long Plain First Nation at different times. The issue that the Commission is being asked to resolve, as we understand it, is to which pay list the individuals should be assigned. As you can appreciate, this issue is a very important one for the Long Plain First Nation as it moves toward resolution of its Loss of Use claim. The quantum of compensation will likely be tied to the pay lists.

Accordingly, please be advised that it is our intention to seek standing before the Commission to make representations with respect to this issue.⁴

Specifically, the Long Plain First Nation is seeking status to participate in Sandy Bay's inquiry and is inquiring into the ICC's procedures for seeking standing.

³ Correspondence from Canada, September 15, 2004.

⁴ Correspondence from the Long Plain First Nation's Legal Counsel, October 28, 2004.

Canada believes that the Long Plain First Nation should be accorded the opportunity to participate in the Sandy Bay inquiry. Participation has been defined as providing Long Plain with all of the payroll reports prepared for Sandy Bay and allowing Long Plain to make representations or submissions in the Sandy Bay inquiry.

Sandy Bay First Nation rejects any participation from the Long Plain First Nation. As Sandy Bay was not accorded the right to participate in settlement discussions regarding Long Plain's TLE claim, Sandy Bay does not believe that Long Plain should be involved in their claim.

The Panel believes that any party can apply to the ICC for standing to intervene in an inquiry. To do so, if the party seeking status is a First Nation, then that First Nation must provide a BCR supporting the motion to seek standing to intervene. The party is invited to make submissions on the question of whether or not the ICC should grant status to intervene. The parties to the inquiry are entitled to respond with their submissions. The Panel will then issue a ruling based on written submissions. If the Panel feels that the written submissions are not sufficient, the Panel has the option of hearing oral arguments on the issue.

In this case, the Long Plain First Nation is required to submit a BCR in support of the motion to seek intervention. This BCR can be submitted concurrently with Long Plain's written submissions. These written submissions, due by **Monday, December 20, 2004**, would address the reasons why the Long Plain First Nation should be granted standing to intervene in the Sandy Bay inquiry. The written submissions from Long Plain would also describe the extent of intervention sought. Both Canada and the Sandy Bay First Nation are entitled to respond to Long Plain's submissions, and their submissions expected by **Monday, January 17, 2005**. Following review of the written submissions, and if the Panel did not wish to hear oral submissions, the Panel would release a ruling on whether or not Long Plain would be granted standing to intervene in the Sandy Bay inquiry.

3. *What should the final Statement of Issues be?*

Both Canada and the First Nation have presented similar issues. The parties disagree on the order and wording of the issues. Canada proposes that Issue #1 should be population, while the First Nation prefers that land issues precede the determination of TLE population.

Canada's reason for placing the population issue first is related to its proposal for a phased inquiry. Canada believes that answering the population question will definitively resolve the quantum of land issue.

As the Panel has ruled against a two phased inquiry, and prefers to maintain consistency in its approach to TLE analysis, the Panel has determined that the following Statement of Issues should govern this inquiry:

1. What is the amount of land in I.R. No. 5 which can be credited toward TLE?
 - a. What is the amount of land originally set apart for Sandy Bay First Nation in Treaty 1 and in 1876?
 - b. What amount of land was provided to Sandy Bay in 1930 (OIC P.C. 1004 dated May 13, 1930) and 1970 (OIC P.C. 1970-2030 dated November 24, 1970)?
 - c. Can the lands provided in 1930 and 1970 be credited toward TLE?
2. What amount of land, if any, should not be credited toward TLE on the grounds that it was land improved and occupied prior to Treaty?
3. What is the population number for Sandy Bay First Nation to calculate the amount of land to which it is entitled pursuant to Treaty?

FOR THE INDIAN CLAIMS COMMISSION



Renée Dupuis (Chair)
Chief Commissioner



Daniel J. Bellegarde
Commissioner



Alan C. Holman
Commissioner

Dated this 22nd day of November, 2004.

APPENDIX D

Interim Ruling, June 29, 2005

INDIAN CLAIMS COMMISSION

**INTERIM RULING: SANDY BAY OJIBWAY FIRST NATION INQUIRY
TREATY LAND ENTITLEMENT CLAIM**

RULING ON LONG PLAIN FIRST NATION'S REQUEST TO INTERVENE

PANEL

Chief Commissioner Renée Dupuis (Chair)
Commissioner Daniel J. Bellegarde
Commissioner Alan C. Holman

COUNSEL

For the Sandy Bay Ojibway First Nation
J.R. Norman Boudreau

For the Long Plain First Nation
Jeffrey F. Harris

For the Government of Canada
Perry Robinson

To the Indian Claims Commission
Diana Kwan

June 2005

BACKGROUND

This ruling addresses the Long Plain First Nation's (hereinafter "Long Plain") request to intervene in the Sandy Bay Ojibway First Nation's (hereinafter "Sandy Bay") inquiry into its rejected treaty land entitlement (hereinafter "TLE") claim.

At a Planning Conference in September 2004, Canada advised of an issue with the Sandy Bay inquiry that may be relevant to Long Plain. Canada also proceeded to advise Long Plain of this issue.

On October 28, 2004, the Indian Claims Commission (hereinafter "ICC") received correspondence from Long Plain seeking standing to intervene in Sandy Bay's inquiry on the issue of population. In 2000, the ICC released its report on the Long Plain loss of use inquiry,¹ and recommended negotiations. Canada and Long Plain entered into negotiations, and for the purposes of a settlement agreement, agreed on an acreage for the TLE shortfall. However, the parties did not agree on using the agreed upon acreage for loss of use compensation; instead, this compensation would be tied to population. Sandy Bay and Long Plain were once part of the Portage Band, along with another First Nation. While the TLE has been settled, Long Plain is currently in negotiations over loss of use compensation.

Canada and Sandy Bay disagree over 38 identified people and their inclusion in the TLE population count. Canada states that 17 of these 38 people may be more appropriately counted with Long Plain, and has a policy not to count people as members of two bands (ie, double-count).

On November 22, 2004, the ICC released an interim ruling,² stating the following with respect to Long Plain's request to intervene:

The Panel has determined that the Long Plain First Nation can apply to the ICC to seek standing in the following manner:

- a. The Long Plain First Nation must provide a BCR to the ICC supporting the motion to seek standing, and its written submissions, copied to all parties, on why the Long Plain First Nation should be granted standing to intervene by Monday, December 20, 2004;

¹ Indian Claims Commission, *Long Plain First Nation Inquiry – Loss of Use Claim* (Ottawa, February 2000) reported (2000) 12 ICCP 269.

² Indian Claims Commission, *Sandy Bay First Nation Treaty Land Entitlement Inquiry Interim Ruling* (Ottawa, November 22, 2004).

- b. Canada and the Sandy Bay First Nation are entitled to respond with written submissions, sent to the ICC and copied to all parties, by Monday, January 17, 2005; and
- c. If the written submissions are sufficient, then the Panel will issue a ruling on whether or not the Long Plain First Nation will be granted standing. The Panel maintains the discretion of determining whether or not oral submissions will be necessary.

The ICC received a BCR from Long Plain on December 12, 2004. On December 20, 2004, the ICC received submissions from legal counsel for the Long Plain First Nation. On January 17, 2005, the ICC received submissions from legal counsel for Sandy Bay First Nation and Canada.

In February 2005, the Panel directed that an oral hearing be scheduled in Winnipeg.

On June 15, 2005, oral submissions were heard from the parties in Winnipeg.

ISSUES

1. Should the ICC allow the Long Plain First Nation to seek standing to intervene in the Sandy Bay inquiry?
2. If the Long Plain First Nation is allowed standing to intervene in the Sandy Bay inquiry, then what should be the nature and extent of this intervention?

SUMMARY

In summary, the Panel has made the following rulings:

1. The Long Plain First Nation will be permitted standing to intervene in Sandy Bay's inquiry;
2. Long Plain First Nation is granted standing in the following manner:
 - a. Canada is to provide a letter to Sandy Bay and Long Plain, copied to the ICC, confirming the identity of the 17 people in dispute by **Monday, July 4, 2005;**
 - b. The Long Plain First Nation is to provide written submissions to the parties on why the 17 people in dispute belong on Long Plain's payroll by **Monday, August 15, 2005;**

- c. Sandy Bay and Canada will respond to Long Plain's submissions in their written submissions as part of Issue no. 3 in the Statement of Issues in the inquiry. To this end, timelines for the remaining inquiry process have been set as follows:

Sandy Bay's Written Submissions:	Monday, September 26, 2005
Canada's Written Submissions:	Monday, November 7, 2005
Sandy Bay's Reply:	Monday, November 21, 2005
Oral Submissions (Winnipeg):	Thursday, January 12, 2006

- d. The Panel has reserved the right to request Long Plain to present oral submissions in Winnipeg on January 12, 2006. The ICC will advise Long Plain of this request at least a month prior to the Oral Submissions date.

SUMMARY OF LONG PLAIN'S POSITION

In their Motion Brief dated December 17, 2004, and in oral submissions on June 15, 2005, legal counsel for Long Plain set out the legal tests for intervener status. While deferring to the ICC's broad discretion in setting its own procedures, legal counsel argues that rule 109 of the Federal Court Rules provides guidance on the intervener issue:

- 109 (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.
- (2) Notice of motion under subsection (1) shall
- (a) set out the name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and
 - (b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.
- (3) In granting a motion under subsection (1), the Court shall give directions regarding
- (a) the service of documents; and
 - (b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.

In support of its argument for intervention, legal counsel for Long Plain has provided the following case law to the ICC:

Pfizer Canada Inc. v. Canada (Attorney General) 2001 FCT 1168
M. v. H. (1994) 20 O.R. (3d) 70
Eli Lilly Canada Inc. v. Canada (Minister of Health) [2001] F.C.J. No. 210
Abbott v. Canada (T.D.) [2000] 3 F.C. 482
Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd. [2000] F.C.J. No. 220
Chrétien v. Canada (Attorney General) [2005] F.C.J. No. 684

Notably, in *Pfizer Canada Inc. v. Canada (Attorney General)* 2001 FCT 1168, the Federal Court set out the three criteria for intervener status in dealing with an application from the Canadian Drug Manufacturers' Association to intervene in a federal court case dealing with patent registration³:

1. The applicant intervention must have an interest in the outcome;
2. The rights or the applicant will be seriously affected by the outcome to the litigation; and
3. The applicant, as intervener, will bring a different perspective to the proceedings.

In determining whether these criteria were met, the Court considered the following factors⁴:

1. Is the proposed intervener directly affected by the outcome?
2. Does there exist a justiciable issue and a veritable public interest?
3. Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?
4. Is the position of the proposed intervener adequately defended by one of the parties to the case?
5. Are the interests of justice better served by the intervention of the proposed third party?

³ *Pfizer Canada Inc. v. Canada (Attorney General)* 2001 FCT 1168 at para. 4.

⁴ *Pfizer Canada Inc. v. Canada (Attorney General)* 2001 FCT 1168 at para. 6.

6. Can the Court hear and decide the cause on its merits without the proposed intervener?

Long Plain FN argues that intervener status on the issue of population should be granted for the following reasons:

- Long Plain has an interest in the outcome

While Long Plain's TLE claim has been settled, the First Nation is in current negotiations over loss of use compensation. The 1994 TLE Settlement Agreement was based on a population figure of 223; however, Canada has indicated that the population figure will be re-addressed for the purposes of loss of use compensation. Sandy Bay's TLE claim, which depends on population, has yet to be validated. If the 17 members at issue are counted with Sandy Bay to validate their TLE, then, according to Canada's TLE policy, these members cannot be counted with Long Plain in their loss of use population calculation. Determining population is based on Canada's TLE policy, which does not permit people to be counted on two bands (ie, double count).

- Long Plain will be adversely affected by a judgment in the proceeding and the right of the FN will be seriously affected by the outcome of the litigation

If any of the people whose membership is disputed are included on Sandy Bay's payroll, then they will not be included on Long Plain's pay list, and Long Plain's possible compensation for loss of use will be reduced.

- Long Plain will bring a different perspective to the proceedings and is likely to make a useful contribution without causing prejudice to the parties

Long Plain states that it is in the best position to advocate as to who its members were and the ICC will have a more complete picture of population. In addition, Long Plain does not expect either Sandy Bay or Canada to advocate on its behalf. As a result, Long Plain can present evidence to provide a more complete view of the facts and issues.

To this end, Long Plain seeks full participation on issues regarding determination of pay list & band membership, including access to all pay list information / reports, the right to call and cross-examine witnesses, and make full submissions.

SUMMARY OF CANADA'S POSITION

Canada provided its written submissions on intervention on January 17, 2005, and oral submissions on June 15, 2005.

Canada confirmed that preliminary positions on TLE population have been exchanged between Canada and Sandy Bay, and that 38 identified people are in dispute. At least 17 of these 38 people were paid with Long Plain at their DOFS, and these 17 are currently being claimed by Sandy Bay for their population count. If these 17 people are counted with Long Plain, they are landed transfers and not eligible to be counted with Sandy Bay and vice versa.

As a result, Canada believes that it would be unfair to decide an issue that may affect Long Plain without allowing them to make submissions on this issue. Canada supports Long Plain's application for standing, and has recommended Long Plain's intervention on issue no. 3 of the inquiry – "What is the population number for Sandy Bay First Nation to calculate the amount of land to which it is entitled pursuant to Treaty?" Specifically, Canada has recommended that all payroll information / reports compiled by Canada, Sandy Bay and the ICC in this inquiry be provided to Long Plain to allow them to make informed representations on the issue of band affiliation for individuals claimed by both Sandy Bay and Long Plain.

SUMMARY OF SANDY BAY'S POSITION

Sandy Bay provided its written submissions on January 17, 2005, and oral submissions on June 15, 2005.

Sandy Bay argues that Long Plain should not be granted intervener status for the following reasons:

- Sandy Bay states that the focus should be on who should be on Sandy Bay's payroll, and not on where these individuals should be listed
- Sandy Bay's TLE can be resolved without prejudice to Long Plain

- Long Plain has no interest in the outcome of Sandy Bay's inquiry and there will be no impact on Long Plain's claim
- Sandy Bay is not and has not been involved in Long Plain's claim at any point in time
- Long Plain can only make a negligible contribution and allowing them to intervene would create greater complexity and cause more delays

In the alternative, Sandy Bay states that if Long Plain is granted intervener status, then Sandy Bay recommends the following degree of intervention:

- That Long Plain not be granted the right to call and cross examine witnesses;
- That the ICC give directions regarding the procedure to be followed, including service of documents and costs, to be based on the Rules of the Federal Court;
- That the ICC limit the intervention to the provision of documents not currently before the ICC and to making arguments; and
- That all documents and other evidence related to determining which individuals Long Plain could or could not claim, including documents used in Long Plain's initial claim validated in 1982 and used in subsequent processes, be provided to the ICC.

ANALYSIS & RULING

1. *Should the ICC allow the Long Plain First Nation to seek standing to intervene in the Sandy Bay inquiry?*

The Panel notes that the parties are not in dispute over the applicable law to seeking intervener status.

The criterion for intervener status in an administrative tribunal setting is similar; however, the discretion of an administrative tribunal to grant intervener status appears to be broader due to the nature of administrative tribunals. The following points regarding intervener status are noted by Macaulay & Sprague in *Hearings Before Administrative Tribunals*:

- interveners are not parties to the proceeding, but have an interest or perspective which may be of interest to the proceeding;

- the ability of an agency to grant intervener status is implicit in the agency's power to conduct a hearing;
- interveners are added at the discretion of the agency;
- an intervener's participation is defined by the agency;
- the degree of intervention is related to the extent to which the intervener can assist the agency in fulfilling its mandate; and
- the purpose of an intervener is to bring a view or expertise which will be useful in determining the relevant issue before the agency.⁵

A similar issue was heard by the ICC in the James Smith Cree Nation Inquiry. In that inquiry, the James Smith FN. had a partially accepted claim and requested an inquiry into the rejected part of their claim. Other bands who had an interest in the James Smith claim were put on notice by Canada, and the ICC invited these bands to participate in the inquiry. No agreement could be reached on the scope of participation from the other bands. As a result, the Panel conducted an oral hearing into the matter and issued an interim ruling in November 2002.⁶

Notably, the Panel stated:

1. Does the Commission have the mandate to allow an Indian Band to participate in the Inquiry of another Band when the Band seeking participation does not have a rejected specific claim relating to the subject matter of the Inquiry?

Yes. The Commission panels have heard and considered the objections and arguments of the James Smith Cree Nation, Canada and the other Host Bands to this issue and have concluded that yes, ***the Indian Claims Commission pursuant to its Order in Council and the Inquiries Act, has the power to exercise its discretion to hear any evidence and argument it deems requisite to the full investigation of the matters into which it is mandated to examine. In this regard, the Commission panel in this case is not limited to hearing the evidence and/or argument of only Bands that have submitted a claim or only those Bands who have a rejected claim.***

⁵ Macaulay and Sprague in *Hearings Before Administrative Tribunals* (1995: Carswell) at p. 12-61-12-62.

⁶ Indian Claims Commission, *James Smith Cree Nation Inquiry and Chakastaypasin IR 98 Surrender Claim* (Ottawa, November 1, 2002) reported (2003)16 ICCP 139.

2. If yes, does the Commission have the mandate to allow participation in the Inquiry to an Indian Band claiming an interest in a rejected specific claim of another Band, which claim is subject of an Inquiry by the Commission, without the consent of Canada and the Band whose claim has been rejected?

Yes. In the exercise of its discretion pursuant to its Order in Council and the *Inquiries Act*, the Commission panel may seek out and hear whatever witnesses it deems would be beneficial to its understanding of the issues. As previously stated, the Commission's authority is not limited to hearing from only those Bands with a rejected claim. In exercising this discretion, the Commission panel does not require the consent of either party to the inquiry.

Pursuant to its Order in Council, the Commission panel may adopt whatever method it deems expedient for the conduct of the inquiry. The flexibility of adopting its own procedures for inquiry means that the Commission has the power not only to adopt its own procedures, but it also has the power to control its own process. In so saying, it has the power to determine who it will hear in the absence of the parties' consent.⁷

Based on case law, the ICC's mandate, and past ICC precedent, the Panel believes that it has the authority to determine whether to grant intervener status to Long Plain.

Sandy Bay's claim is essentially a TLE claim, which is dependent on population. Issue No. 3 in the Statement of Issues of the inquiry reads:

3. What is the population number for Sandy Bay First Nation to calculate the amount of land to which it is entitled pursuant to Treaty?⁸

The impetus behind Long Plain's application for intervention is a situation where at least 17 people could be counted with either Sandy Bay or Long Plain. Canada's position is that a person cannot be counted for two different bands. In other words, Canada has a policy not to double count.

There is no doubt that placing these 17 people on one or the other's payroll will affect each band. If all 17 people are listed with Sandy Bay, their land entitlement is potentially validated or

⁷ Indian Claims Commission, *James Smith Cree Nation Inquiry and Chakastaypasin IR 98 Surrender Claim* (Ottawa, November 1, 2002) reported (2003)16 ICCP 139 at pp. 143-44.

⁸ Statement of Issues as set out in Indian Claims Commission, *Sandy Bay First Nation Treaty Land Entitlement Inquiry Interim Ruling* (Ottawa, November 22, 2004).

increased, but Long Plain's loss of use compensation is decreased. If all 17 people are listed with Long Plain, their compensation for loss of use is potentially increased, but Sandy Bay may no longer have a land entitlement or their entitlement is potentially decreased.

In determining whether Long Plain should be allowed to intervene, the focus must be on whether Long Plain can provide a perspective that can assist the Panel in making its recommendations in the Sandy Bay inquiry. More specifically, can Long Plain provide further information on the 17 people who could be part of Sandy Bay or Long Plain?

The Panel believes Long Plain can provide information on the 17 people who are at issue that will assist the Panel in making its recommendations on Issue No. 3 in the Sandy Bay inquiry, and as such, Long Plain is granted standing to intervene in this inquiry, on the question of the 17 people who are at issue.

2. *If the Long Plain First Nation is allowed standing to intervene in the Sandy Bay inquiry, then what should be the nature and extent of this intervention?*

While Long Plain has been granted status to intervene, further consideration must be given to the nature of the intervention granted.

Long Plain has requested full participation on the issues in the inquiry related to paylists and band membership, including the right to call witnesses and make full submissions. In addition, Long Plain has requested access to all pay list information and reports produced by the ICC and Sandy Bay.

Canada recommends Long Plain's participation on Issue No. 3 in the Statement of Issues, and that Long Plain be given access to all playlist information and reports compiled by Canada, Sandy Bay and the ICC to make submissions.

Sandy Bay requests that Long Plain be required to provide the ICC any documentation relating to paylists.

The issue with respect to intervention relates to 17 disputed people and their affiliations. Essentially, Long Plain is arguing that these 17 members should be counted with Long Plain and not Sandy Bay. During Oral Submissions, legal counsel for Long Plain advised that their base population

at DOFS was 223, which Canada agreed to in the 1994 TLE Settlement Agreement. As such, Long Plain is in a position to provide information on these 17 disputed members to the ICC.

The Panel directs the following nature and extent of intervention:

- a. Canada is to provide a letter to the parties confirming the identity of the 17 people in dispute by **Monday, July 4, 2005;**
- b. The Long Plain First Nation is to provide written submissions to Sandy Bay and Canada, copied to the ICC, on why the 17 people in dispute belong on Long Plain's payroll by **Monday, August 15, 2005;**
- c. Sandy Bay and Canada will respond to Long Plain's submissions in their written submissions as part of Issue no. 3 in the Statement of Issues in the inquiry. To this end, timelines for the remaining inquiry process have been set as follows:

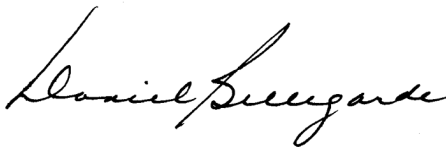
Sandy Bay's Written Submissions:	Monday, September 26, 2005
Canada's Written Submissions:	Monday, November 7, 2005
Sandy Bay's Reply:	Monday, November 21, 2005
Oral Submissions (Winnipeg):	Thursday, January 12, 2006

- d. The Panel has reserved the right to request Long Plain to present oral submissions in Winnipeg on January 12, 2006. The ICC will advise Long Plain of this request at least a month prior to the Oral Submissions date.

FOR THE INDIAN CLAIMS COMMISSION



Renée Dupuis
Chief Commissioner



Daniel J. Bellegarde
Commissioner



Alan C. Holman
Commissioner

Dated this 29th day of June, 2005.

APPENDIX E

CHRONOLOGY

Sandy Bay Ojibway First Nation: Treaty Land Entitlement Inquiry

- 1 **Planning conference**
 - Winnipeg, October 13, 1998
 - Winnipeg, October 28, 1999
 - Winnipeg, June 27, 2000
 - Winnipeg, August 13, 2002
 - Winnipeg, November 29, 2002
 - Winnipeg, February 11, 2004
 - Winnipeg, June 10, 2004
 - Vancouver, September 10, 2004
- 2 **Community session**

First Nation elected not to proceed with a Community Session.
- 3 **Site Visit** June 13, 2005
- 4 **Interim Rulings**

Sandy Bay Ojibway First Nation: Treaty Land Entitlement – Interim Ruling, June 28, 1999
Sandy Bay Ojibway First Nation: Treaty Land Entitlement – Interim Ruling, Nov 22, 2004
Sandy Bay Ojibway First Nation: Treaty Land Entitlement – Interim Ruling, June 29, 2005
- 5 **Written legal submissions**

Mandate Challenge

 - Submission on Behalf of the Sandy Bay Ojibway First Nation, February 2, 1999
 - Reply Submission on Behalf of the Government of Canada, April 12, 1999

Long Plain First Nations request to Intervene

 - Submission on Behalf of the Long Plain First Nation, December 17, 2004
 - Submission on Behalf of the Sandy Bay Ojibway First Nation, January 17, 2005
 - Submission on Behalf the Government of Canada, January 17, 2005

Written Submissions

 - Long Plain First Nation’s written submission re: Paylist Analysis, August 15, 2005
 - Submission on Behalf of the Sandy Bay Ojibway First Nation, January 31, 2006
 - Reply Submission on Behalf of the Long Plain First Nation, February 28, 2006
 - Submission on Behalf of the Government of Canada, May 16, 2006
 - Reply Submission on Behalf of the Sandy Bay Ojibway First Nation, May 30, 2006

6 Oral legal submissions

Winnipeg, June 15, 2005
Winnipeg, June 29–30, 2006

7 Content of formal record

The formal record of the Sandy Bay Ojibway First Nation Treaty Land Entitlement Inquiry consists of the following materials:

- Exhibits 1–30 tendered during the inquiry
- transcript of oral session (3 volumes)

The report of the Commission and letter of transmittal to the parties will complete the formal record of this inquiry.