INDIAN CLAIMS COMMISSION

GAMBLERS FIRST NATION INQUIRY
TREATY LAND ENTITLEMENT CLAIM

PANEL

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PART I

INTRODUCTION

BACKGROUND

This inquiry arises out of a claim by the Gamblers First Nation that Canada continues to owe it reserve land under the terms of Treaty 4.[1] The Gamblers First Nation adhered to Treaty 4 on September 21, 1874, as part of a group of Saulteaux Indians referred to as the "Fort Ellice Band" by Indian Commissioners Alexander Morris, David Laird, and W.J. Christie. During the treaty negotiations, the Gambler was a powerful spokesperson for this Band. The treaty indicates that the Band was led by Chief Waywayseecappo, but it included groups that were eventually recognized by Canada as separate bands under the Gambler, South Quill, Rattlesnake, and Sakimay. Under the terms of the treaty, Canada agreed to set aside reserves of one square mile (640 acres) for each family of five, or 128 acres per person. However, the treaty does not specify the time at which a band's population is to be calculated for the purposes of determining how much reserve land should be set aside for its collective use; nor does the treaty specify what the respective rights and obligations of the parties are in a situation in which a group within the band seeks and obtains a surrender of a portion of the reserve land so that a separate reserve can be set apart at another location. It is this latter feature that is unique to the Gamblers First Nation treaty land entitlement claim.

According to the First Nation, the Gambler and his followers did not have a reserve set apart for their own use and benefit until 1883 when, following the "surrender for exchange" in 1881 of a portion of the reserve originally surveyed for the Fort Ellice Band at Bird Tail Creek in 1877, a new reserve for the Gambler was laid out by Dominion Land Surveyor A.W. Ponton at Silver Creek. The First Nation submits that the 1877 survey was not conducted in accordance with the terms of Treaty 4 and must be considered invalid. Therefore, the First Nation claims that the appropriate date

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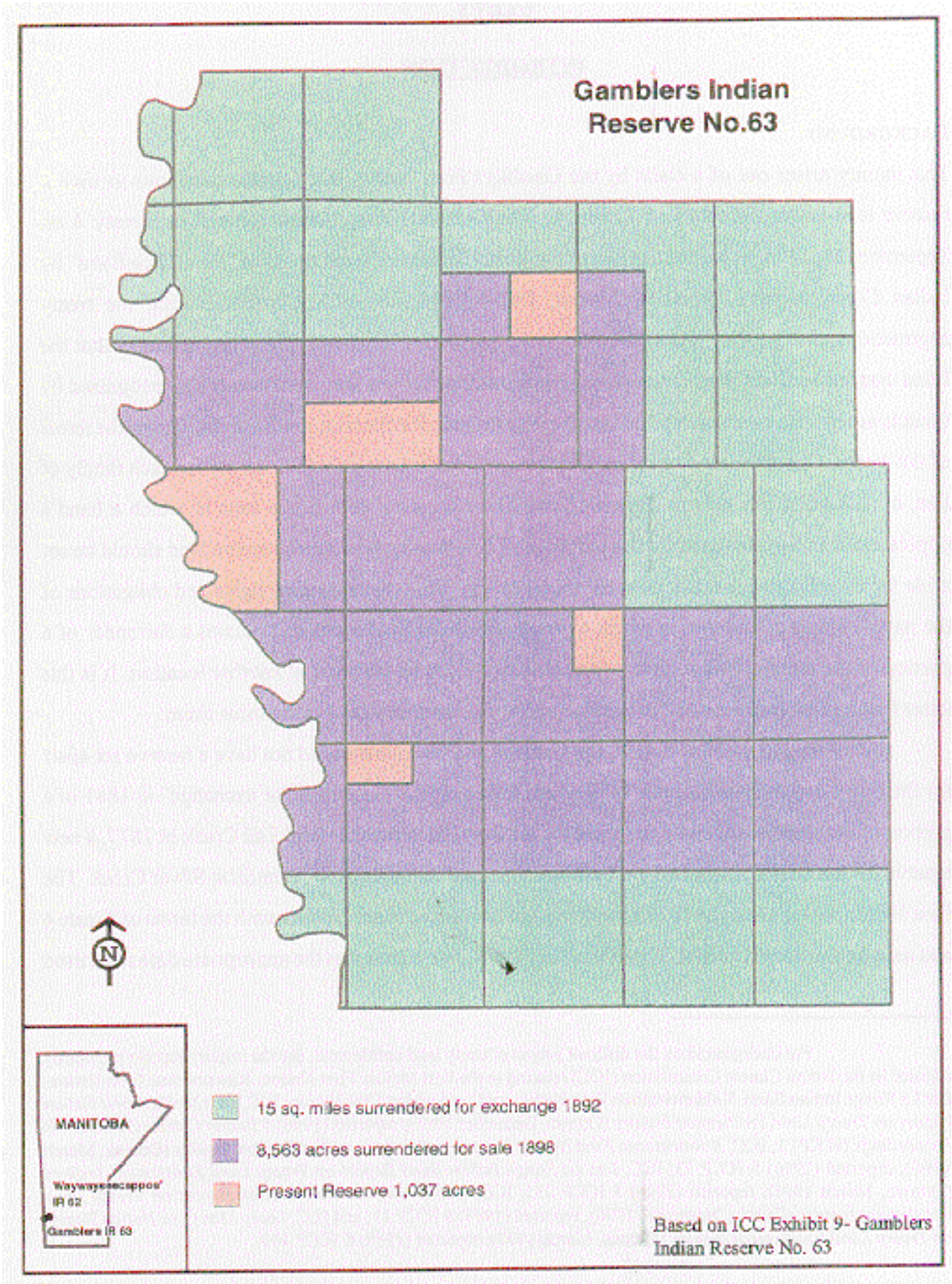
[1] For background on the difficult subject of treaty land entitlement, see the inquiry reports previously released by the Indian Claims Commission (ICC) relating to the Fort McKay First Nation, Kawacatoose First Nation, Lac La Ronge Indian Band, Kahkewistahaw First Nation, and Lucky Man Cree Nation: ICC, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 *Indian Claims Commission Proceedings* (ICCP) 3; ICC, *Kawacatoose First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73; ICC, *Lac La Ronge Indian Band Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 235; ICC, *Kahkewistahaw First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21; and ICC, *Lucky Man Cree Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109.


Gamblers Indian
Reserve No.63
N
MANITOBA
Waywayseecappo
IR 62
Gamblers IR 63
15 sq. miles surrendered for exchange 1892
8,563 acres surrendered for sale 1898
Present Reserve 1,037 acres
Based on ICC Exhibit 9- Gamblers
Indian Reserve No. 63

to be used to determine its entitlement to land is 1883, the year that reserve land was first surveyed for Gamblers First Nation. The First Nation asserts that its population in 1883 was 215, including individuals later paid arrears for that year, resulting in a treaty land entitlement of 27,520 acres. Since Indian Reserve (IR) 63, surveyed by Ponton, consisted of only 19,200 acres, the Gamblers First Nation claims a shortfall of 8320 acres.

By way of contrast, the Government of Canada argues that the Gambler was a member of Waywayseecappo's band in 1877 and that he and his people must be considered to have received their land entitlement as part of the survey of reserve land for the Fort Ellice Band in that year. At that time, surveyor William Wagner laid out a reserve of 71.67 square miles (45,869.49 acres), which was sufficient land for 358 people. Canada submits that, if the Sakimay and South Quill groups, which received separate reserves in 1876 and 1882, respectively, are excluded from consideration, the population of Waywayseecappo's band in 1877 was 190; therefore, the reserve set apart by Wagner satisfied the band's treaty land entitlement. Alternatively, if the Sakimay and South Quill groups are included, Canada contends that the 16,691 acres in their two reserves must also be included and the Fort Ellice Band's treaty land entitlement was still met. Finally, even if the First Nation is correct in its submission that 1883 was the date of first survey, Canada argues that the population figure of 215 relied on by the First Nation must be "revised downward to 148 by taking into account 26 'double counts,' 14 'one-time onlies' and 27 other 'probable double counts.'"[2] Since the 1883 survey provided 30 square miles of land – sufficient for 150 people – Canada claims that the First Nation received a surplus of reserve land even if you accept that the First Nation's assertion that the appropriate date to determine its land entitlement is 1883.

The central question in this inquiry is whether the Gamblers First Nation's treaty land entitlement should be determined according to the population of the Fort Ellice Band under Chief Waywayseecappo in 1877, when the Bird Tail Creek reserve was first surveyed, or in 1883, when the survey was completed for the Gambler's reserve at Silver Creek. It should be borne in mind, however, that the Commission has been asked to determine only what the appropriate date is for the purposes of calculating the treaty land entitlement of Gamblers First Nation. We have not been asked

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[2] Supplementary Submissions on Behalf of the Government of Canada, May 9, 1997, p. 9.

to determine the quantum of land the First Nation is entitled to or whether an outstanding entitlement to land is still owed by the Crown today.

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission's mandate to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued on September 1, 1992. The Order in Council directs:

> that our Commissioners on the basis of Canada's Specific Claims Policy . . . by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report upon:
>
> (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
>
> (b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.[3]

The Specific Claims Policy is set forth in a 1982 booklet published by the Department of Indian Affairs and Northern Development (DIAND) entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.[4] In considering a specific claim submitted by a First Nation to Canada, the Commission must assess whether Canada owes an outstanding lawful obligation to the First Nation in accordance with the guidelines provided in *Outstanding Business*:

> 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.

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[3] 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).

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

> 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.
>
> . . .
>
> In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:
>
> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or its agencies under authority.
>
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[5]

THE INQUIRY

The First Nation's claim to an outstanding treaty land entitlement was first submitted to Canada in 1981 and was most recently considered and rejected by the Department of Indian Affairs and Northern Development on March 17, 1994. A.J. Gross, Indian Affairs' Director of Treaty Land Entitlement, informed Chief James Tanner that the claim had been rejected on the following grounds:

> Upon review of the research it remains our view that Canada's treaty land obligation to the group which eventually became the Gamblers' [sic] Band was satisfied when land was surveyed in 1877 for that group as part of the Waywayseecappo Band. Since the Gamblers Band did not exist in 1877 when the obligation was fulfilled, it is to the Waywayseecappo Band that one must look to determine whether Canada has fulfilled its lawful obligation. There is no evidence that members of the Gamblers Band, created sometime after the March 7, 1881 surrender vote, considered themselves a separate band prior to 1881.
>
> It is, rather, our view, that the 1881 surrender resulted in agreement by Waywayseecappo Band members that its Bird Tail Creek Reserve could be reduced by 30 square miles in order to allow members who wanted to form the Gamblers Band to take a reserve of equal size elsewhere. This band division does not alter the

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[5] DIAND, *Outstanding Business: A Native Claims Policy - Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20, reprinted in [1994] 1 ICCP 171-85.

fact that Canada had already set aside enough land to satisfy its treaty land entitlement obligation to those band members.[6]

On January 22, 1996, Chief Tanner wrote to the Indian Claims Commission (the Commission) to request that this inquiry be convened,[7] and by June 14 of that year a planning conference had been held to discuss and to refine the issues, to clarify the parties' positions, and to plan the course of the inquiry. At the planning conference, the parties agreed that the Commission would be asked for its recommendations with regard to three issues:

1 Was Canada's obligation to provide treaty lands to the claimant in respect of the adherence to Treaty No. 4 on September 21, 1874 satisfied in 1877 with the selection and survey of the lands at Birdtail [sic] Creek for the "Fort Ellice Band"?

2 To what extent, if at all, did the "surrender for exchange" in 1881 affect the treaty land entitlement of the claimant?

3 What is the quantum of the claimant's outstanding treaty land entitlement, if any?[8]

The parties also discussed whether the Gambler's treaty land entitlement claim might affect other bands. Counsel for the First Nation, however, advised that "Rolling River's T.L.E. [treaty land entitlement] is not affected as their T.L.E. has been accepted [for negotiation by Canada]," and added that, "while other First Nations may be asked to provide information on their understanding of the historical background to the claim, no other First Nation has a legal interest in this claim and nor would they be affected by the Commission's recommendations."[9]

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6 A.J. Gross, Director, Treaty Land Entitlement, Dept. of Indian Affairs, Vancouver, BC, to Chief & Council, Gamblers Indian Band, Binscarth, Manitoba, March 17, 1994 (ICC Documents, pp. 703-04).

7 Chief James Tanner, Gamblers First Nation, Binscarth, Manitoba, to Indian Claims Commission, Ottawa, January 22, 1996.

8 Indian Claims Commission, Planning Conference Summary: Gamblers First Nation Treaty Land Entitlement, Ottawa, Ontario, June 14, 1996, p. 14.

9 Indian Claims Commission, Planning Conference Summary: Gamblers First Nation Treaty Land Entitlement, Ottawa, Ontario, June 14, 1996, pp. 11-12. The Rolling River First Nation comprises the descendants of South Quill and his people.

Following the receipt of written legal submissions by the First Nation on October 24, 1996, and by Canada on October 29, 1996, the Commission convened a hearing in Binscarth, Manitoba, on November 5 and 6, 1996, to receive testimony from members of the Gamblers First Nation and to hear legal arguments. However, because Canada had been unable to complete its paylist research and analysis, it was agreed that the oral submissions by counsel would be limited to two issues dealing with the appropriate date of first survey and the effect of the 1881 "surrender for exchange."

Canada later filed supplementary written submissions on May 9, 1997, to address the issue of the quantum, if any, of the First Nation's outstanding treaty land entitlement. The First Nation intended to respond to those submissions but, by that time, the research capacity of the Treaty and Aboriginal Rights Research (TARR) Centre of Manitoba, Inc., had been dedicated to assist in finalizing the Manitoba Treaty Land Entitlement Framework Agreement. For this reason, the parties agreed that the Commission's findings and recommendations in this inquiry should be restricted to identifying the Gambler's date of first survey and determining the impact of the 1881 "surrender for exchange" on the First Nation's treaty land entitlement pending further confirming research to be conducted by the First Nation.

During the course of the inquiry, the Commission has considered, in addition to the written and oral submissions already mentioned, some 700 pages of historical documents in addition to 11 other exhibits comprising several thousand pages of material. A summary of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set forth in Appendix A of this report.

INTERESTS OF THE WAYWAYSEECAPPO FIRST NATION IN THIS INQUIRY

Shortly after the completion of the oral sessions in November 1996, the Commission received a letter from Chief Murray Clearsky and the Waywayseecappo First Nation Band Council expressing concern that Waywayseecappo had not been notified of the inquiry or given an opportunity to participate, although it appeared that the issues being addressed might directly affect that First

Nation. The Council added that it also had claims with the federal government arising from the same circumstances.[10]

In a subsequent letter, the Waywayseecappo First Nation provided a fuller outline of its position:

> Our position is that the surrender of 1881 which purportedly surrendered 30 sections of land was invalid under the provisions of the *Indian Act* in force at the time.
>
> This surrender is invalid because only 23 out of at least 7 [sic] male members of the Band of the full age of 21 years assented to the surrender. A majority of the Band must assent.
>
> Alternatively if the surrender is valid which we deny, under the terms of the surrender it says, "And whereas since the assignment thereof as foresaid it has been found more convenient and for the interests of the said Band of Indians that the boundaries of the said reserve on the south and east side should be altered and in lieu of the lands (herein after described) by such alterations of boundaries ex[c]luded other lands of equal extent assigned to the said band." The surrender itself says that the band be assigned other land of equal extent. The band being what is now Waywayseecappo First Nation.
>
> Presumably this is why the department considered the band as one until the early 1970's when the government changed how it treated the people at Gamblers. The surrender dealt with 30 sections of land, Waywayseecappo First Nation was left 39 sections at its present location and three disappeared in the shuffle. The majority of the 30 sections that Waywayseecappo First Nation was assigned at what is now Gamblers was then surrendered without further notice to Waywayseecappo First Nation. These further surrenders directly affect the land base of Waywayseecappo First Nation because they dispose of land that belonged to the people of Waywayseecappo First Nation.[11]

Eventually, following a meeting involving Commission counsel, Chief Clearsky, and other members of the Band Council, it was agreed by Waywayseecappo that the Commission could proceed without evidence or submissions from that First Nation subject to the following understandings set forth in a letter dated January 27, 1998, from Ron S. Maurice, Commission Counsel, to the Chief and Council:

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[10] Chief and Council, Waywayseecappo First Nation, to Ron S. Maurice, Indian Claims Commission, Ottawa, November 14, 1996 (ICC file 2106-09-1).

[11] Chief Murray Clearsky and Council, Waywayseecappo First Nation, to Ron S. Maurice, Commission Counsel, Indian Claims Commission, March 12, 1997 (ICC file 2106-09-1).

the issues raised in [the Gamblers First Nation] inquiry, the historical evidence provided, and the legal arguments made in support of this claim relate to the specific claim of the Gambler's First Nation only. The Commission's mandate is to inquire into the claim and make recommendations to the Minister of Indian Affairs and Northern Development on whether the specific claim was properly rejected by Canada. The Commission will not make any decisions regarding the validity of any other potential claim by a First Nation unless we have been requested to do so. Nonetheless, I understand that there may be common historical facts and evidence between the Gambler's First Nation claim and any potential claim by the Waywayseecappo First Nation.

Generally speaking, the issues before the Commission relate to Canada's obligation to provide treaty land to the First Nations who adhered to Treaty 4 on September 21, 1874 and whether that obligation was met with the selection and survey of lands in 1877 at Birdtail [sic] Creek for the Fort Ellice Band. There are only two specific issues before the Commission: (1) what is the appropriate date of first survey? Is it 1877 when lands were set aside at Birdtail [sic] Creek or is it 1883 when Gambler's Indian Reserve #83 was set aside? (2) what impact, if any, did the "surrender for exchange" in 1881 have on the treaty land entitlement of the claimants? Regardless of whether the Commission recommends that the proper date of first survey is 1877 or 1881, it has been agreed that the Commission will not be making any recommendations on whether the Gambler's First Nation has an outstanding TLE shortfall and, if so, how much land is still owed because the parties have not completed the necessary paylist research and analysis.

For the sake of clarification, it might be helpful to summarize the issues that are not before the Commission in this inquiry. First, it should be emphasized that neither Canada [n]or the Gambler's First Nation has challenged the validity of the 1881 "surrender for exchange" so the Commission will not be making any findings on whether it was in compliance with the Crown's statutory or fiduciary obligations. Although it will be assumed to be valid for the purposes of addressing the issues in this inquiry, this is without prejudice to the Waywayseecappo First Nation and it would not preclude you from submitting a claim alleging that the 1881 surrender was invalid. Second, the Commission will not be making any findings on whether an outstanding TLE shortfall exists and, if so, who would be entitled to the shortfall acreage. Third, we are not considering whether there is a valid claim in relation to the approximately 3 square miles that were not accounted for after the "surrender for exchange" was completed and, if so, who is entitled to seek compensation for such a claim. Finally, we are not considering whether any subsequent band splits or surrenders of reserve land have any bearing on the potential claims of the First Nations. Therefore, this would not preclude the Waywayseecappo First Nation from submitting a claim in relation to any of the above issues.

In view of the above, the Commission would be prepared to explicitly state in its final report that the findings and recommendations made by the Commission are expressly limited to the specific claim of the Gambler's First Nation and are without prejudice to any claim or claims that the Waywayseecappo First Nation has

> or may have regarding the land set aside at Birdtail [sic] Creek for the adherents to Treaty 4. Furthermore, the findings and recommendations of the Commission will be subject to the understanding that we have not received submissions from the Waywayseecappo First Nation. When the Commission has issued its report, a copy of it will be provided to you for your consideration and if you have any concerns regarding the findings and recommendations of the Commission, it would be open for the Waywayseecappo First Nation to submit its own claim and submissions in relation to any of the historical or legal issues addressed in that report.[12]

The Commissioners hereby acknowledge and incorporate the foregoing understanding as part of this report.

We now turn to the factual background to the claim.

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[12] Ron S. Maurice, Commission Counsel, Indian Claims Commission, to Chief Murray Clearsky and Council, Waywayseecappo First Nation, January 27, 1998.

PART II

HISTORICAL BACKGROUND

The historical evidence related to the Gambler First Nation's claim, reviewed in this Part, includes several volumes of documentary evidence and the testimony provided by members of the Gambler First Nation at a community session on November 5, 1996. The Commission also considered the written submissions of the First Nation and Canada in addition to hearing oral submissions from legal counsel for the parties on November 6, 1996.

TREATY 4 – QU'APPELLE LAKES

In the summer of 1874, Alexander Morris, David Laird, and W.J. Christie[13] were appointed Commissioners to negotiate Treaty 4 with the Cree and Saulteaux Indians inhabiting an area of roughly 75,000 square miles lying west of the territory covered by Treaty 2 and situated between the United States/Canada boundary to the south and the Saskatchewan River to the north.[14] Fort Qu'Appelle was selected as a "convenient centre" for the negotiations,[15] and the Commissioners arrived there on September 8, 1874. Already gathered were Crees from various localities within the Treaty 4 area, as well as Saulteaux from Fort Pelly, Cypress Hills, Fort Ellice, and Qu'Appelle Lakes.

Upon his arrival in Qu'Appelle, Morris called upon the assembled Indians to identify the people who could speak for them.[16] According to this account of Morris's opening remarks, he said:

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[13] At the time of the treaty negotiations, Alexander Morris was the Lieutenant Governor of the North-West Territories, David Laird was the federal Minister of the Interior in the Liberal government of Alexander Mackenzie, and W.J. Christie of Brockville, Ontario, was a retired Hudson's Bay Company factor "and a gentleman of large experience among the Indian tribes." Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co., 1880; reprinted Saskatoon: Fifth House Publishers, 1991), 78.

[14] Order in Council PC 944, July 23, 1874, provides the general description for the area to be ceded; Order in Council PC 1332, November 4, 1876, refers to the appointment of the Commissioners. Both are found in *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 3.

[15] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co., 1880; reprinted Saskatoon: Fifth House Publishers, 1991), 78.

[16] This formality of asking the Indians to name their Chiefs started with the negotiation of Treaty 1 in 1871, at which Lieutenant Governor Archibald sought to avoid some of the problems that had arisen out of the Selkirk Treaty:

> "[To the Crees] . . . We want to speak to you about the land and what the Queen is willing to do for you, but before we tell you, we want you to tell us, who your Chiefs and headmen are who will speak for you, while we speak for the Queen, and we want to know what bands of Crees are here and who will speak for them. . . ."
>
> To the Saulteaux His Honor said: ". . . If you and your Chiefs will meet together in council and talk it over we will be glad to meet you, if you bring your Chief [Cote] to-morrow. You must also choose your speakers who will come with your Chief and speak for you."[17]

On September 9, 1874, Morris repeated his request that the assembly name its speakers. Can-a-ha-cha-pew, the Man of the Bow, replied that they were not ready, but "Peicheto's son, O-ta-ha-o-man, the Gambler" arose and addressed the crowd: "My dear friends, do you want me to speak for you to these great men?" and "the Indians signified their consent."[18] On the fourth day of the proceedings, both Cote, referred to by Commission Secretary M.G. Dickieson as "a leading Chief of the Saulteaux tribe" from Fort Pelly,[19] and Loud Voice, considered by Morris to be the "principal Chief" of the Crees,[20] indicated that the Gambler would speak on their behalf.[21]

Throughout the fourth and fifth days of the conference, the Gambler was virtually the only Indian speaker, but he insisted that they could not consider the terms of a treaty until the Indians' complaints about the Hudson's Bay Company were dealt with. Morris countered that he could not deal with Company matters, and was only there to discuss a treaty. It was not until the sixth and final

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> At the time of the treaty with the Earl of Selkirk, certain Indians signed as Chiefs and representatives of their people. Some of the 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 recorded.

Adams G. Archibald, Lieutenant Governor of Manitoba, to Joseph Howe, Secretary of State, July 29, 1871, in Morris, *Treaties of Canada*, 33.

17 Morris, *Treaties of Canada*, 88-89.

18 Morris, *Treaties of Canada*, 90.

19 Morris, *Treaties of Canada*, 87.

20 Alexander Morris, Lieutenant Governor, NWT, to Secretary of State for the Provinces, October 17, 1874, in Morris, *Treaties of Canada*, 80.

21 Morris, *Treaties of Canada*, 97 and 110.

day of the negotiations that the terms of a treaty agreement were discussed, and on that day the Gambler was silent.[22]

In later years, Morris would refer to the Gambler as "the chief spokesman" at Qu'Appelle,[23] but it appears that he did not participate at the conference as a chief. At one point during the negotiations, the Gambler pointed to someone else and said, "This is my chief."[24] Yet, the following day, he told Morris that "we have not chosen our Chiefs; we have not appointed our soldiers and councillors."[25] Once agreement on terms was reached, the Gambler was not brought forward as a Chief and did not sign the Treaty 4 document.

TREATY 4 – FORT ELLICE ADHESION

In the fall of 1873, a group of Indians at Fort Ellice, maintaining that they had not been party to any treaty, had complained to Lieutenant Governor Morris about survey work in progress on their lands. The petition, signed by "Wah-wa-shi-cabow" (Waywayseecappo) and three others, defined the land which they claimed to occupy:

> We the undersigned Saulteaux Indians at Fort Ellice, having seen a surveyor here marking out & posting off land, wish to inform Your Honour that we have never been a party to any Treaty already made to extinguish our title to land which we claim as ours, from Shoal Lake, on Oak River, westward to ten miles west of Fort Ellice, and therefore, cannot understand why this land should be surveyed.
> We are &c
> Wah-wa-shi-cabow ✘
> Kisak-ka-zick ✘
> Kannskagunin ✘
> Shapuy-witunk ✘[26]

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[22] Morris, *Treaties of Canada*, 87-125.

[23] Alexander Morris to Minister of the Interior, July 8, 1876, and December 4, 1876, in Morris, *Treaties of Canada*, 142 and 187.

[24] Morris, *Treaties of Canada*, 104. The Gambler was probably referring to Cote as "Chief" in this instance. Cote was the only Saulteaux Chief identified at the negotiations, and it is known that the Gambler traded around Fort Pelly where Cote resided.

[25] Morris, *Treaties of Canada*, 114.

[26] Petition, October 11, 1873 (ICC Exhibit 2, p. 1). This document is transcribed at pp. 1-2 of Treaty & Aboriginal Rights Research Program, Four Nations Confederacy, "Waywayseecappo I.R. No. 62, Gambler's I.R. No. 63 and Rolling River I.R. No. 67 Treaty Land Entitlement Report," May 1981 (ICC Exhibit 2). Any words not legible

Most of the land identified in the petition was included in the territory ceded under Treaty 2 in August 1871. In that treaty, five chiefs – including "Mekis [Michis] (the Eagle), or Giroux," who was identified as the Chief of "the Indians of Riding Mountain and Dauphin Lake and the remainder of the territory hereby ceded"[27] – claimed to represent the Indians in the area. However, the Fort Ellice Indians denied that they had given Mekis authority to speak for them and therefore did not consider themselves to be bound by the terms of Treaty 2. The Hudson's Bay Company trader in charge of the Swan River District seemed to agree:

> I have merely to report that the Fort Ellice Indians have not made any treaty for their lands. The treaty made by Michis and his band (belonging to Riding Mountain) they do not recognize as binding on the Fort Ellice Indians as Michis had not authority to act in their names.[28]

Morris concluded that "[t]hese Indians were included in the boundaries of Treaty Number Two, but had not been treated with owing to their distance from Manitoba House, where that treaty was made."[29]

Given these circumstances, it would have been usual to have the Fort Ellice Saulteaux adhere to the treaty covering their traditional hunting grounds. However, the North West Angle Indians who signed Treaty 3 in October 1873 received substantially more reserve land and annuities than had been negotiated in the previous treaties, and Morris may have felt that it would be impossible to convince the Fort Ellice Indians to accept the less favourable terms of Treaty 2. Instead, he invited

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on the copy of the original are taken from the transcription.

[27] *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with adhesions* (Ottawa: Queen's Printer, 1957), 11.

[28] Archibald McDonald, Trader in charge of Swan River District, Hudson's Bay Company, to Alexander Morris, Lieutenant Governor of North-West Territories, June 6, 1874, National Archives of Canada (hereinafter NA), RG 10, vol. 3610, file 3539 (ICC Documents, p. 3).

[29] Morris, *Treaties of Canada*, 79; Alexander Morris, Lieutenant Governor, NWT, to Secretary of State for the Provinces, October 17, 1874, in Morris, *Treaties of Canada*, 84-85.

them to go to Qu'Appelle in September 1874 to participate in the negotiation of Treaty 4. When they declined, Morris agreed to meet with them at Fort Ellice on his return.[30]

Commissioners Laird and Morris arrived at Fort Ellice on Saturday, September 19, 1874, and met with the assembled Indians on Monday, September 21. Not all the Indians of the Fort Ellice area were present, but those in attendance agreed to accept the terms of the Qu'Appelle treaty:

> On Monday we met the Band of Saulteaux Indians, who make their headquarters at Fort Ellice, and who have remained there, instead of going to Qu'Appelle at our request.
>
> This Band have been in the habit of migrating between the region covered by the Second Treaty and that comprehended by the Fourth, but had not been treated with.
>
> We proposed to them to give their adhesion to the Qu'Appelle Treaty, and surrender their claim to lands, wherever situated, in the North-West Territories, on being given a reserve and being granted the terms on which the treaty in question was made. We explained fully these terms and asked the Indians to present to us their Chief and headmen. As some of the band were absent, whom the Indians desired to be recognized as headmen, only the Chief and one headman were presented. These, on behalf of the Indians accepted the terms and thanked the Queen and the Commissioners for their care of the Indian people.[31]

On the adhesion document, Waywayseecappo and headman Ota-ma-koo-ewin (also known as "Shapous-e-tung's-First Son" or "The Man Who Stands on the Earth") affixed their marks on behalf of the assembled Saulteaux. Long Claws was the only other Indian mentioned by name at the Fort Ellice meeting in 1874.[32]

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[30] Alexander Morris, Lieutenant Governor, NWT, to Secretary of State for the Provinces, October 17, 1874, in Morris, *Treaties of Canada*, 84 (see also 98).

[31] Alexander Morris, Lieutenant Governor, NWT, to Secretary of State for the Provinces, October 17, 1874, in Morris, *Treaties of Canada*, 84.

[32] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 9. The notes taken by M.G. Dickieson, the Commission Secretary, state that a Chief and *two* headmen were presented, but the two names he recorded – "Ota-ma-koo-euin" and "Shaponetung's first son" – were the two which the adhesion document later attributed to the same man: Alexander Morris, Lieutenant Governor, NWT, to Secretary of State for the Provinces, October 17, 1874, in Morris, *Treaties of Canada*, 125. According to the paylists, two headmen were paid with Waywayseecappo in 1874. However, while the 1874 paylists provided names for the Chiefs, none of the other members of the bands were named but instead were merely categorized as "Headman" or "Indian." Nevertheless, from the 1875 paylists, it can be determined that the two men paid as headmen in 1874 were #22 Ota-Ma-Koo-ewin and #23 Savage. For Long Claws, see Morris, *Treaties of*

SELECTION AND SURVEY OF BIRD TAIL CREEK INDIAN RESERVE IN 1877

Reserve sites were not defined at the negotiations in 1874, but Treaty 4 specified that the bands would be consulted about location when reserves were surveyed:

> And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, *after conference with each band of the Indians*, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families.[33]

In an Order in Council dated July 9, 1875, W.J. Christie was appointed, together with "such other person as may be named for that purpose by the Minister of the Interior," to return to Fort Ellice and Qu'Appelle to obtain adhesions to Treaty 4 from bands absent the previous year, to pay annuities, and to meet with the bands to select reserves

> where they shall be deemed most convenient and advantageous for the Indians, each Reserve to be selected as provided by the Treaty *after conference with the Band of Indians interested therein*, and subject to the other conditions set forth in the Treaty.[34]

With regard to the last of these duties, Deputy Minister of the Interior E.A. Meredith provided the following additional instructions to Christie:

> I. As regards the selection of the Reserves.
>
> Each Reserve should be selected, as the Treaty requires, after conference with the Band of Indians interested, and should, of course, be of the area provided by the Treaty.
>
> The Minister thinks that the Reserves should not be too numerous, and that, so far as may be practicable, as many of the Chiefs of Bands speaking one language, as will consent, should be grouped together on one Reserve.

Canada, 124.

[33] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 6. Emphasis added.

[34] Order in Council, July 9, 1875, NA, RG 10, vol. 3622, file 5007 (ICC Documents, p. 46). Emphasis added.

> In connection with this part of your duties, I am desired to enclose for your information a copy of a memorandum and map prepared by the Surveyor General.
>
> The Minister desires me to inform you that he coincides with the views of the Surveyor General contained in that memo; I am to add that Mr. Wagner, the gentleman named in the memorandum will be instructed to place himself at your disposal for the purpose of proceeding, with the Surveys of the Reserves as selected in the manner recommended by the Surveyor General.[35]

Christie was given additional suggestions regarding the selection of reserves by the Surveyor General, J.S. Dennis, who recommended that the surveys take place "as soon as possible after the location of the Reserves in question may be decided upon between the Commissioner and the Indians," but that in locating the reserves the Commissioner should consider future settlement, the proposed route of the railway and both the agricultural and hunting needs of the Indians.[36] Christie confirmed his instructions in a letter dated July 28, 1875, to Meredith:

> 1. Selection of Reserves for Indians
>
> These will be as few in number as possible, and in locating them, every attention will be paid to the suggestions made by the Minister of Interior, as also in the memorandum furnished by the Surveyor General. As soon as the first Reserve has been decided on, probably with the Fort Ellice Indians, Mr. Wagner will be instructed to proceed with the Survey in the manner directed by the Surveyor General. With this object in view, he will likely accompany me to Fort Ellice.[37]

Christie, accompanied by Dickieson, who was also made a Commissioner to assist Christie, and surveyor William Wagner, arrived at Fort Ellice on the morning of August 24 and stayed until Sunday, August 29, 1875. Christie reported that the Indians at Ellice had much to say, "the

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[35] E.A. Meredith, Deputy Minister, Department of the Interior, to W.J. Christie, Treaty Commissioner, July 15, 1875, NA, RG 10, vol. 3622, file 5004 (ICC Documents, pp. 57-58).

[36] J.S. Dennis, Surveyor General, Memorandum, July 13, 1875, NA, RG 10, vol. 3622, file 5007 (ICC Documents, pp. 48-49). This memorandum was forwarded to Christie by Laird's Deputy Minister, E.A. Meredith, on July 15, 1875: E.A. Meredith, Deputy Minister, Department of the Interior, to W.J. Christie, July 15, 1875 (ICC Documents, p. 57).

[37] W.J. Christie, Indian Commissioner, Treaty 4, to E.A. Meredith, Deputy Minister, Department of the Interior, July 28, 1875, NA, RG 10, vol. 3622, file 5007 (ICC Documents, pp. 64-65).

'Gambler' from Qu'Appelle being the chief Orator."[38] In all, 357 Indians were paid on the paysheet headed "Wawasecapow's Band," including one chief, "Wawasecappo," and four headmen, Pasqua, Ota-ma-koo-ewin, Savage, and the Gambler. A note states that 19 of the families listed (97 people) were paid at Fort Qu'Appelle.[39]

In his initial report of September 9, 1875, regarding this meeting, Christie stated that "[t]he Chiefs at [Fort] Ellice were not all decided as to the locality of their Reserves."[40] However, in a subsequent report dated October 7, 1875, Christie and Dickieson indicated that the band had chosen reserve locations. Part of the band wanted a reserve on the Qu'Appelle River, some distance west of Fort Ellice, while the rest of the band had chosen a site nearer to Fort Ellice, at the head of Bird Tail Creek:

> The question of Reserves has been carefully considered and long interviews held with the Indians on the subject. Many of the Bands have no desire to settle and commence farming, and will not turn their attention to agriculture until they are forced to do so on account of the failure of their present means of subsistence by the extermination of the Buffalo. Others have commenced to farm already, although to a very slight extent, and wish to have their Reserves set apart as soon as possible. Instructions have been given to Mr. Wagner, D.L.S., to survey Reserves for the following bands which are included in this class, viz.:
>
> . . .
>
> 7. Wawaseecappo's Band (58 families) wants their Reserve at the head of the Bird Tail Creek, but as that locality is included in the limits of Treaty No. 2, no decision could be given until the Department had been consulted on the subject. A few families belonging to this Band have been settled for 9 or 10 years at the Round and Crooked Lakes on the Qu'Appelle River about 60 miles from Fort Ellice and as they have made considerable improvements there do not wish to be removed. As we

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[38] W.J. Christie, Indian Commissioner, to E.A. Meredith, Deputy Minister, Department of the Interior, September 9, 1875, Provincial Archives of Manitoba (hereinafter PAM), MG 12, B1, Alexander Morris, Lieutenant Governor's Collection, No. 1094 (ICC Documents, p. 68).

[39] Treaty Annuity Paylists, Treaty 4 (ICC Exhibit 12, tab 4, pp. 40-3). Sakimay is among the people listed as paid at Fort Ellice rather than Qu'Appelle.

[40] W.J. Christie, Indian Commissioner, to E.A. Meredith, Deputy Minister, Department of the Interior, September 9, 1875, PAM, MG 12, B1, Alexander Morris, Lieutenant Governor's Collection, No. 1094 (ICC Documents, p. 69).

> saw no serious objection to this, their wishes were acceded to and instructions given to Mr. Wagner accordingly. There are 7 families living at these lakes.[41]

Wagner was enthusiastic about the Bird Tail Creek location for a reserve:

> I left here in August 1875 and arrived with the Commissioners at Fort Ellice, where, after paying the Indians, the Reserve for this tribe was chosen by them at the head of Bird Tail Creek. Doubts arose amongst the gentlemen of the Commission if the tribe could get their Reserve in a tract of land surrendered under Treaty No. 2 since the Indians under the latter treaty have only 160 acres and the other 640 acres per family of five heads, it was therefore left for your decision.
>
> During this winter the reports of the gentleman entrusted with the Block north west of Riding Mountain towards Shell River, crossing with their lines the heads of Bird Tail Creek, will have been entered at your office and may corroborate my statements expressed in my former report that they are covered with plenty of poplar, spruce and tamarac[k], which easily can be brought down to the Prairie situated between the Riding Mountain and the Assiniboine River for the use of the settlers who will follow any railway brought through this tract of the country.
>
> The Fort Ellice Indians numbering 65 families will probably choose the midst of the woods and occupy nearly 2 townships or 41600 acres.
>
> Calculating that only a half will be used for timber and at the rate of 10 cords of firewood and 200 feet of timber (board measure) per acre besides fencing, which I know is a low estimate, will give for the Reserve, when granted, 210,000 cords of firewood and four ½ millions of Lumber sufficient to erect the buildings of 250 Settlers and keep them in wood for 12 years.[42]

As both Christie and Wagner recognized, Bird Tail Creek was situated in the area covered by Treaty 2, which provided for reserves of only 160 acres per family of five – one quarter of the 640 acres per family of five stipulated in Treaty 4. Since the Commissioners were uncertain whether a

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[41] W.J. Christie and M.G. Dickieson, Indian Commissioners, to Minister of the Interior, October 7, 1875, PAM, MG 12, B1, Alexander Morris, Lieutenant Governor's Collection, No. 1102 (ICC Documents, p. 83). Wagner later reported that the reserve to be set apart at Qu'Appelle would be headed by Sakimay (Mosquito):

> At the meeting of the Commissioners and the Indians at Qu'Appelle in 1875 it was decided that 7 families of the Fort Ellice Band, under the head of one – Mosquito – should get their Reserve at the Qu'Appelle River near Crooked Lake where they already are domiciled.

William Wagner, Dominion Land Surveyor, to Minister of the Interior, February 19, 1877, NA, RG 88, vol. 300, file 0644 (ICC Documents, p. 131).

[42] William Wagner, Dominion Land Surveyor, to Minister of the Interior, January 2, 1876, NA, RG 88, vol. 300, file 0644 (ICC Documents, pp. 105-06).

Treaty 4 band should be permitted a reserve within the geographical limits of Treaty 2, Christie decided to refer the matter to the Minister for a decision.[43] In October 1875, Morris, in his role as Lieutenant Governor of Manitoba and the North-West Territories, gave his opinion that the Band was "entitled to a Reserve of the extent mentioned in Treaty No. 4 and which may properly be given within the boundaries of No. 2."[44]

Although the Minister of the Interior had not yet given his opinion on this issue, the question of reserve land for the Fort Ellice Indians was discussed with the Band in the summer and fall of 1876. In the week of August 3, 1876, Dickieson, Indian Agent Angus McKay, and Wagner were all present at Fort Ellice to pay annuities and discuss reserve selection. However, many of the Fort Ellice Indians were away, some on the prairie hunting buffalo and others, including the Gambler, at Fort Carlton to witness the negotiation of Treaty 6. In his reports, Wagner made only two brief references to the August meeting. In one he stated that "the chief was not prepared to show to me the Point of Commencement of the reserve, but he might be prepared [to do so] when I am finished at Qu'Appelle River and then I shall also survey it during the winter."[45] In the other he said that "the chief of Indians could not decide yet."[46] According to Agent McKay's report on the proceedings, the Fort Ellice Indians were waiting the return of one of their headmen before locating their reserve:

> I arrived at Fort Ellice on the 2nd August and found a great many Indians already there. . . . Mr. Wagner had arrived on the 3rd and on the 5th he and I met the Indians at the Council tent and after a good deal of talking I learned from them that *they did not wish their reserves surveyed for the present as one of their head men was absent*. I then informed them that if such was the case, they would receive no cattle nor anything else except their rations, ammunition, twine and tobacco as the treaty provided that until they had their reserves marked out and had stables and hay for the cattle they were not to get any. . . .

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[43] William Wagner, Dominion Land Surveyor, to Minister of the Interior, January 2, 1876, NA, RG 88, vol. 300, file 0644 (ICC Documents, p. 106).

[44] Alexander Morris, Lieutenant Governor, Manitoba and North-West Territories, to Minister of the Interior, October 23, 1875, PAM, Lieutenant Governor's Collection, Letter Book J, No. 303 (ICC Documents, p. 94).

[45] William Wagner, Dominion Land Surveyor, to Minister of the Interior, October 1, 1876, NA, RG 88, vol. 300, file 0644 (ICC Documents, pp. 121-22).

[46] William Wagner, Dominion Land Surveyor, to Minister of the Interior, February 19, 1877, NA, RG 88, vol. 300, file 0644 (ICC Documents, p.132).

> I will now proceed to deal with the subject of Bands & their reserves. . . .
>
> 2nd. A small reserve has been already surveyed by Mr. Wagner for seven families of the Fort Ellice band [under Sakimay] on the North side of the Qu'Appelle at the head of the Crooked Lake. These families have always lived and hunted there and have built a few houses, cultivated some land and are all living on their reserve. . . .
>
> 19th. Chief Wa-wa-zhe-ga-bow [Waywayseecappo] or Standing in Readiness. This Indian is a Saulteaux as well as all his band with the exception of two or three families who are half-breeds. They number 50 families including 7 [under Sakimay] who have got their reserve on the Crooked Lake on the Qu'Appelle river. The greater number of this Band roam on the Prairie hunting Buffalo and very little is done by any of them in the way of farming. Some of them have houses but very few cattle and *this band for reasons already stated did not point out the spot where they desired their reserve. . . .*[47]

According to the paylists, the only headman absent in 1876 was the Gambler, who received his annuity at Fort Carlton.

With the Fort Ellice Band unwilling to commit to a reserve location, Wagner left to complete a number of surveys for other Treaty 4 bands. Finally, on his way to Fort Pelly in mid-December, Wagner stopped again at Fort Ellice to see if the Band was prepared to identify the preferred location for its reserve lands. However, nothing had changed, a situation that Wagner attributed directly to the Gambler:

> At Ellice, the Chief of Indians could not decide yet . . . in passing [I] tried the Chief of Fort Ellice Indians but of [sic] no avail. There are several houses where the chief lives, they keep cattle, have gardens and yet they are tampered with by the intrigues of one man – the [G]ambler – who hopes perhaps to get something more advantageous out of the Government, but since Mr. McKay is appointed Agent it may be expected he will explain this "[G]ambler" his situation properly.[48]

In October 1876, David Laird resigned as Minister of the Interior to assume new duties as the first Lieutenant Governor of the North-West Territories. In December, he was given the

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[47] Angus McKay to Superintendent General of Indian Affairs, October 14, 1876, NA, RG 10, vol. 3642, file 7581 (ICC Exhibit 12, vol. 2, tab 25, pp. 10, 12, 30-31, 48). Emphasis added.

[48] William Wagner, Dominion Land Surveyor, to Minister of the Interior, February 19, 1877, NA, RG 88, vol. 300, file 0644 (ICC Documents, p. 136).

additional appointment of Indian Superintendent for the region, and M.G. Dickieson was named his assistant. Writing from his headquarters at Swan River in May 1877, Laird reported that he had interviewed the Chiefs and headmen of three bands, including Waywayseecappo's, about the location of their reserves. He agreed with Morris that the selection of land by Waywayseecappo at the head of Bird Tail Creek should be approved notwithstanding its location within Treaty 2 territory, and asked that the government's decision be conveyed to him:

> Since my arrival here, I have had interviews with the Chiefs and principal men of three Indian Bands under the above Treaty, the location of whose Reserves has not yet been decided. You will find the Reserves of these Bands referred to in Messrs. Christie and Dickieson's report, page xxv of the Departmental Report of 1875.
>
> The delay in locating the Reserves of these Bands has been caused by disagreement among their members in making a selection. They appear to have settled their disputes and expressed to me that they wish their Reserves to be located as follows:
>
> 1. 'Wawasecappo's, or the Fort Ellice Band.' Their selection is pretty much as mentioned in Messrs. Christie and Dickieson's report [of October 7, 1875]. They desire a Reserve to be surveyed for them at the head of Bird Tail Creek, on the road leading from Swan Lake via Shell River, used by the North West Mounted Police in travelling to Swan River Barracks. The site is about 24 miles from Shoal Lake, and about 36 miles from the mouth of the Shell River. They would prefer to have the Reserve on both sides of the Bird Tail Creek, but will, I trust, be content to have it all on the West side.
>
> I know of only two objections to this selection – first, that it is within the limits of Treaty 2; secondly, that it is in Territory covered by the Block Surveys. The former objection, I consider of no weight, as the Government must give the granting of land somewhere in the Territories. The second in my opinion should not be urged. The Townships there, as I understand, have not been sub-divided, consequently if a Reserve were surveyed within the Block limits, the sub-division need never take place, so far as the area of the Reserve is considered. . . .
>
> It is very desirable that I should be informed whether or not the location of these Reserves is approved by the Government, in order that the Bands may be notified at the time of this summer's annuity payments. If approved they ought also to be surveyed as soon as possible.[49]

Surveyor General Dennis agreed with Laird's recommendation. David Mills, the Superintendent General of Indian Affairs, approved the location of the reserves as set out in Laird's report, and

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[49] David Laird, Lieutenant Governor and Indian Superintendent of the North-West Territories, to Minister of the Interior, May 9, 1877, NA, RG 10, vol. 3649, file 8187 (ICC Documents, pp. 141-44).

directed that they be surveyed.[50] Instructions to conduct these surveys were evidently conveyed to Wagner on June 13, 1877.[51]

Wagner and his survey party arrived in Fort Ellice later that month, after discussing various reserve surveys with Laird in Livingstone. Wagner's report on the survey of Waywayseecappo's reserve is brief, but it clearly indicates that the Chief and at least one other band member were actively involved in selecting the site:

> I then returned to Ellice where after several interviews with the Fort Ellice Chief, who sent a man with me to show to me the place and according to their wishes I have surveyed their Reserve. . . . I had made the Reserve 6 miles by 11½ miles . . .[52]

Wagner's diary indicates that, on June 27 and 28, he met with Waywayseecappo, who was ill. The Chief appointed a guide to point out the desired area, and on June 29 Wagner left for Bird Tail Creek with the guide and interpreter. It is not clear whether the guide remained throughout the survey, but Wagner apparently had instructions to survey a particular area; he recorded on July 13 that the original eastern boundary marked out by him did not include "the place wished for" and the following day he moved the boundary eastward:

> Wednesday 27th [June 1877] – Met the Chief Wa-was-a-cappo or Fort Ellice Chief.
>
> Thursday, 28th – Meeting with Indians in the Chief's Tent, who is very sick. Robillard interpreter. It was agreed that a guide should show to me what they want & where.
>
> Friday, 29th – Started with Indian Guide and Interpreter to the Police Crossing of the Bird Tail Creek.
>
> Saturday, 30th – Returned to Ellice, two of my carts which were broken in the bad roads arrived.
>
> Monday, 2nd day of July 1877 – Started for the survey with my party.

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[50] David Mills, Superintendent General of Indian Affairs, to J.S. Dennis, Surveyor General, June 4, 1877, NA, RG 10, vol. 3649, file 8167 (ICC Documents, p. 145).

[51] William Wagner, Dominion Land Surveyor, to Minister of the Interior, August 23, 1877, NA, RG 88, vol. 300, file 0644 (ICC Documents, p. 146).

[52] William Wagner, Dominion Land Surveyor, to Minister of the Interior, August 23, 1877, NA, RG 88, vol. 300, file 0644 (ICC Documents, pp. 147-48).

Tuesday, 3rd – Travelling, arriving at the 5th Correction line.

Wednesday, 4th – Running Trial line to see where the Crossing is situated – 140.00 chs.

Thursday, 5th – Prepared the South West Corner of Reserve, Thunderstorm begins at 2 o'clock - 300.00 chs. . . .

Friday, 13th – Began the East boundary, surveyed it for 150.00 chains when I found out that the place wished for was not in it.

Saturday, 14th – Began [illegible] miles east of this line on Correction line and ran up 240.00 chs. . . .

Thursday, 26th – Left Party to chain up Baseline and to finish that part of the East boundary where I was interrupted by Bird Tail Creek.

Friday, 27th – Arrived at Ellice with one man to go to Pelly to see about the next Reserve. . . .

Tuesday, 31st – Arrived at Pelly, saw the Lt. Governor who told me that Hard Quill had settled at the Qu'Appelle River and therefore not advisable to survey as bespoken last year. . . .

Friday, 3rd [August] – Arrived at Ellice.

Monday, 6th August – My party arrives from the Reserve at Bird Tail Creek. The "Gambler" comes to me to have the boundary changed.[53]

We will return to the details of the exchange that took place between the Gambler and Wagner below. For the moment, it is sufficient to state that the survey plan, completed in September 1877, showed 45,869 acres (71.67 square miles) of "Fine undulating Prairie with Hayswamps and Poplar bluffs, Soil Class one" in Townships 19 and 20, ranges 25 and 26, west of the principal meridian.[54] Bird Tail Creek meanders through the eastern portion of the reserve, and there are ponds and lakes at various places throughout the reserve.

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[53] William Wagner, Dominion Land Surveyor, "Diary of Surveys of Indian Treaty No. 4 from 19 February 1877 to 26 February 1878," January 26, 1878 (ICC Exhibit 12, vol. 1, tab 3).

[54] Survey Plan CLSR 2949, "Wa Was A Cappo's Band, Bird Tail Creek, surveyed during July 1877 by William Wagner, D.L.S., September 1877" (ICC Documents, p. 150). Note that the acreage reported does not appear to correspond with the survey plan. The Indians later maintained that they were to have a reserve of 12 miles by 6 miles, which would roughly correspond to the 71.67 square miles reported. However, the survey plan shows a reserve of 11 ½ miles by 6 miles – the figure used when the reserve was surrendered for exchange in 1883 – which equals 69 square miles.

Treaty 4 stipulated that the size of reserves would be determined according to a formula of one square mile for each family of five, "or in that proportion for larger or smaller families."[55] At 71.67 square miles the Bird Tail Creek reserve provided enough land for 358 people. The Bird Tail Creek reserve is also known as Lizard Point Indian Reserve 62.

INDIANS PAID UNDER CHIEF WAYWAYSEECAPPO AT FORT ELLICE

Wagner did not indicate in his report how he determined the Fort Ellice Band's population for calculating the size of the reserve at Bird Tail Creek. The treaty annuity paylists indicated that 371 people were paid with Waywayseecappo at Fort Ellice in August 1877, and another 31 were absent but paid arrears when they returned in 1878 and 1879, for a total membership of 402.[56]

However, as the Commission has remarked in its reports dealing with previous treaty land entitlement inquiries, treaty annuity paylists were merely financial forms designed to account for the annuities paid to treaty Indians to meet Canada's obligations. Although the paylists record the names of heads of families and the number of people in each family, they were never intended to provide accurate census records and are not necessarily reliable indicators of band structures or the places of residence of individuals or groups. In the case of Waywayseecappo's paylist, the evidence shows that officials included people regardless of their known place of residence. In 1881, four years after the survey of the Bird Tail Creek reserve, separate paylists were established for five groups previously paid together under Waywayseecappo at Fort Ellice: Waywayseecappo, Sakimay, South Quill, Rattlesnake, and the Gambler.[57]

There is evidence that three of these groups – Sakimay, South Quill, and Rattlesnake – had had houses and gardens at locations some distance from Fort Ellice for many years prior to the Treaty

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

56 Jim Gallo, Manager, Land Entitlement and Claims, Department of Indian Affairs, "Research Memorandum – Gamblers Band Treaty Land Entitlement," January 31, 1997 (ICC Exhibit 12, vol. 1, tab 1, p. 14).

57 On the other paylists established for these groups, each individual retained the same number as when paid with Waywayseecappo (i.e., No. 34 Waywayseecappo became No. 34 Gamblers). No new Chiefs or headmen were created; two of the four headmen were listed on Rattlesnake's paylist and the other two on Gambler's (Treaty Annuity Paylists, 1880 and 1881, ICC Exhibit 2, pp. 251-66). In 1882 Rattlesnake combined with Gambler and did not get a separate paylist again until 1893.

4 negotiations, that they continued to live at these locations after the treaty, and that they could not be convinced to move to the Bird Tail Creek reserve. Sakimay had a reserve surveyed at Crooked Lake in 1876 and the other two groups were eventually recognized as distinct bands and received reserve land at their chosen locations. There is no similar evidence relating to the Gambler before the Commission in this inquiry. The following provides a brief discussion of these groups and their relationship with the Waywayseecappo Band.

Sakimay

Sakimay, or the Mosquito, and his followers resided at Crooked Lake, about 65 miles along the Qu'Appelle River west of Fort Ellice. From her research of Hudson's Bay Company records, Jaye Goossen of Manitoba's Department of Tourism, Historic Resources Branch, identified Mosquito as being "among the Indians who enjoyed a regular trading arrangement at Fort Ellice in the 1860s, coming in together annually from the plains to trade furs and provisions"[58] Sakimay had asked the Commissioners in 1875 to have reserve land where he lived on the Qu'Appelle River at Crooked Lake, and in August 1876 Wagner and his crew surveyed a reserve of 4691 acres at that location. If Wagner had factored the Sakimay reserve into his calculations for the Bird Tail Creek reserve, the total acreage reserved would have been enough land for 395 people under the terms of treaty.[59]

South Quill

In June 1881, Alan McDonald, the Indian Agent for Treaty 4, reported that Sha-wa-ne-qua-nape ("South Quill") and his followers had been included in the allocation of reserve land for Waywayseecappo at Bird Tail Creek, but that they immediately afterwards began to ask for a separate reserve at Rolling River, about 45 miles east of Fort Ellice:

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[58] N. Jaye Goossen, Historic Resources Branch, Department of Tourism, Manitoba, "Indians of the Fort Ellice Region," March 1976, p. 20 (ICC Exhibit 2, p. 79).

[59] 4691 acres for Sakimay at Crooked Lake + 45,869 acres for the "Fort Ellice Band" at Bird Tail Creek = 50,560 acres ÷ the treaty formula of 640 acres per family of five = 79 square miles x 5 people per square mile = sufficient land for 395 people.

> Sha-wa-ne-qua-nape or "South Quill" has been a member of Way-way-see-cappo's Band (that is his name and those families who follow him were in the Pay sheet of that Chief) when I took charge of this Treaty.
>
> He as well as Sakamey of the Crooked Lake always objected taking their presents with the Chief. In Sakamey's case, on account of a special Reserve having been granted to him, I gave his Powder, Shot &c and his provisions separately. In Sha-wa-ne-qua-nape's case, I always handed his presents to the Chief, but he and his party always spoke separately from the Chief, and took their payments immediately after.
>
> All the Indians who accepted the Terms of the Treaty at Fort Ellice with the exception of Sakamey with I think 15 families have had [illegible] miles square allotted to [them] in what is known as Way-way-[see-cappo's] Reserve on the Bird Tail Creek.
>
> For the last two years Sha-wa-ne-qua-nape and Ootah-ne-qua and "old blind [illegible]" of his party have asked for a Reserve at the Rolling River. I have always told them, I had not the power of granting them another Reserve and also I thought the land they were applying for was already taken by White man.
>
> If it could be arranged I would strongly recommend that he and his party of 17 families or 78 souls be granted a special Reserve and get Way-way-see-cappo to surrender the same extent of his.
>
> These Indians have not been on the best of terms with the Chief and I do not think they will settle down until an arrangement of this kind is come to.[60]

A subsequent inquiry by A.J. Belch, the Dominion Land Agent at Birtle, Manitoba, disclosed that South Quill and his followers had occupied the Rolling River area "as hunting grounds for fully fifty years."[61] Indian Agent L.W. Herchmer endorsed Belch's comments,[62] having relayed in an earlier letter the comments of a "Frenchman (Treaty) who had lived there for over 20 years . . . that 'South Quill' when? he first made a Treaty with Gov. Morris, named the mouth of Rolling River, and the land along that stream for his Reserve."[63]

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[60] A. McDonald, Indian Agent, Treaty 4, Ellice, NWT, to Department of Indian Affairs, Ottawa, Ontario, June 26, 1881, NA, RG 10, vol. 3754, file 30848 (ICC Documents, pp. 270-71).

[61] A.J. Belch, Dominion Lands Agent, NWT, to A.M. Burgess, Secretary, Department of the Interior, Ottawa, Ontario July 13, 1882, NA, RG 10, vol. 3754, file 30848 (ICC Documents, p. 322).

[62] L.W. Herchmer, Indian Agent, to A.M. Burgess, Secretary, Department of the Interior, July 13, 1882, NA, RG 10, vol. 3754, file 30848 (ICC Documents, p. 327).

[63] L.W. Herchmer, Indian Agent, to Superintendent General of Indian Affairs, October 24, 1881, NA, RG 10, vol. 3754, file 30848 (ICC Documents, pp. 290-91).

In August 1882, the Dominion government set apart approximately 12,000 acres (18 ¾ square miles) for the band at Rolling River, although this reserve was not confirmed by Order in Council until September 22, 1893.[64] An equivalent amount of land was not surrendered from Waywayseecappo's reserve as suggested by Agent McDonald in 1881.

Rattlesnake

Rattlesnake and his followers were counted among Waywayseecappo's followers when land was set aside at Bird Tail Creek in 1877. As will be discussed at greater length below, they were also among the group of people associated with the Gambler who purported to surrender 32 square miles of land in the Bird Tail Creek reserve in 1881 for an equal amount at Silver Creek. Nevertheless, Indian Commissioner Hayter Reed reported in December 1889 that a "considerable portion who although allowed for when that reserve [the Gambler's] was surveyed, were at the time residing at Valley River . . . and had been settled there continuously for some thirty years previously."[65] Five years later, Canada surveyed an area of 18.25 square miles as IR 63A for Rattlesnake in the Valley River district between Riding and Duck Mountains, about 120 miles northeast of Fort Ellice, including 15 square miles in exchange for an equivalent area which was apparently surrendered from the Gambler's reserve on September 15, 1892. The Commission makes no findings regarding the validity of this surrender or any other surrenders involving Gambler's reserve land.

The Gambler

The fourth group to receive a discrete paylist, and a separate reserve from Waywayseecappo, was led by the Gambler. Unlike the people associated with Sakimay, South Quill, and Rattlesnake, however, there is no evidence that the Gambler and his followers lived at or occupied a particular location separate from Waywayseecappo before Treaty 4 in 1874 or the 1877 survey at Bird Tail Creek. According to research compiled by the First Nation, the Gambler was the eldest son of

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[64] Jim Gallo, Director, Treaties & Aboriginal Rights Research Program, Four Nations Confederacy, "Waywayseecappo I.R. No. 62, Gambler's I.R. No. 63 and Rolling River I.R. No. 67, Treaty Land Entitlement Report," May 6, 1981 (ICC Exhibit 2, pp. 36-37).

[65] Hayter Reed, Indian Commissioner, to Deputy Superintendent General of Indian Affairs, December 11, 1889, NA, RG 10, vol. 6654, file 106A-3-1-1 (ICC Exhibit 12, vol. 2, tab 10, pp. 1-2).

Peicheto, "a prosperous Indian trader and influential sub-Chief of the Portage Band during the 1850s and 60s"; he was also the grandson of John Tanner, a white captive of the Shawnee from Kentucky who had come to the Red River area with his adopted Ottawa mother, Netnokwa, and "grew up to be a much renowned hunter and Chief of one of the many Saulteaux Bands in the Red River country during the early 1800s."[66] Jaye Goossen's study of Hudson's Bay Company records discloses that the Gambler "visited Fort Ellice only infrequently, preferring to take most of his business to Fort Pelly."[67] According to the Gambler's own statement, he gathered Indians from the prairies to come to Fort Ellice and join "our Chief" Waywayseecappo:

> when Way-way-see-cappo was made Chief he gave me authority to go throughout all the plains, to collect all the Indians who belonged to Fort Ellice to join this Band. I went out, and made as many as I saw, understand that they were invited to come and join our Chief, having collected three hundred persons, including those who were here before we held councils. . . .[68]

Although the record is clear that the Gambler was a headman of Chief Waywayseecappo's Band in 1877, the Gambler's dissatisfaction with the survey at Bird Tail Creek ultimately led to the proposal for a surrender for exchange of reserve land in 1881 to establish a separate reserve for the Gambler and his followers.

GAMBLER'S DISCONTENT WITH LOCATION OF BIRD TAIL CREEK RESERVE

On July 28, 1877, Wagner left his crew to complete the Bird Tail Creek survey while he made arrangements for subsequent surveys. On August 6, the same day that Wagner's survey party returned and joined him at his camp near Fort Ellice,[69] the Gambler visited him to express his

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[66] Jim Gallo, Director, Treaties & Aboriginal Rights Research Program, Four Nations Confederacy, "Waywayseecappo I.R. No. 62, Gambler's I.R. No. 63 and Rolling River I.R. No. 67, Treaty Land Entitlement Report," May 6, 1981 (ICC Exhibit 2, p. 46 n1).

[67] N. Jaye Goossen, Historic Resources Branch, Department of Tourism, Manitoba, "Indians of the Fort Ellice Region," March 1976, p. 19 (ICC Exhibit 2, p. 78).

[68] A. McDonald, Indian Agent, Treaty 4, "Proceedings of a Council of Way-way-see-cappo's Band convened by the Chief and held in the Reserve, Bird Tail Creek," February 24, 1881 (ICC Documents, pp. 253-54).

[69] William Wagner, Dominion Land Surveyor, "Diary of Surveys of Indian Treaty No. 4 from 19 February 1877 to 26 February 1878," January 26, 1878 (ICC Exhibit 12, vol. 1, tab 3).

concerns about the survey at the Bird Tail Creek reserve. In a progress report on the summer's survey work, Wagner noted:

> After having finished I went into Camp near Fort Ellice to wait for the arrival of White Bear.
>
> During this time, an Indian belonging to the Fort Ellice Band – the "Gambler" – came to me to ask me to resurvey their Reserve, their Chief having done without his approval. I had made the Reserve 6 miles by 11 ½ miles [69 square miles] but he wished it to be 4 miles by 18 miles [72 square miles] and have the Reserve shifted 3 miles more East.
>
> Knowing the Gambler to be one of the most troublesome Indians in Treaty No. 4, who also went to Carleton last year to make trouble during the Treaty there, and he not being able to give me a good reason for the change I left it as I had done.[70]

In December 1877, the Indian Agent for Treaty 4 also reported that Chief Waywayseecappo and his headmen were dissatisfied with the reserve and wanted something different than Wagner had set apart for the band:

> Wawaseecappo's Band have their Reserve on Bird Tail Creek, but he and his Head men are dissatisfied with some of the land included in it, what they want is to have their Reserve about forty miles long and two or three wide, which I informed them I did not think it will be allowed.[71]

Three months later, in a letter to the Surveyor General dated March 26, 1878, Wagner provided additional details:

> As regards to the Reserve for Wa-wa-see-capo at Bird Tail Creek, plan of Reserve given by me to Mr. Whitcher in September last, I beg to repeat again that I have laid

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[70] William Wagner, Dominion Land Surveyor, to Minister of the Interior, August 23, 1877, NA, RG 88, vol. 300, file 0644 (ICC Documents, p. 148)

[71] A. MacDonald, Indian Agent, Treaty 4, to Deputy Minister of the Interior, December 28, 1877, NA, RG 10, vol. 3654, file 8904 (ICC Documents, p. 155). It is of some interest to note that, in the summer of 1876, Wagner had to convince Mosquito/Sakimay that he would not survey a reserve of similar dimensions:

> His [Sakimay's] idea of extent of Reserve differed materially with the reality (he wished to have it 40 miles along the River) but after I had explained to him the situation and seeing me determined to go on with the work he yielded and was reasonable.

William Wagner, Dominion Land Surveyor, to Minister of the Interior, February 19, 1877, NA, RG 88, vol. 300, file 0644 (ICC Documents, p. 133).

> out the Reserve according to the wishes of the chief, who sent his son in law with me, and the Government Interpreter – Robillard – was with us, but when one of the Councillors named Gambler returned he, probably to show me his influence, wished to move the Reserve 4 miles more West, to have it 4 miles wide and 18 miles long, which would have excluded all the improvements made by the Chief and his families. I proposed to him to move 4 miles East but would not give 18 miles in length, which he refused. Since then he left word with Mr. A. McDonald at Fort Ellice that they will be satisfied with a reserve 12 miles by 6 miles. I could not change it since Plan and field notes were entered – except I shall be empowered to do so by you.[72]

Mr Patrick Tanner stated at the community session that, in his opinion, the difficulty with the location of the Bird Tail Creek reserve arose because Wagner exceeded his authority in surveying the reserve:

> The surveyor Wagner, in my view did not listen to the Indian people, or he did not listen to his bosses, or whatever, from Canada, whoever his boss was, because Gambler had selected, and Wagner put it where he figured it should be. And it was agreed at the meeting that Gambler was to select this reserve, not Wagner. It seems like Wagner went ahead and made decisions on his own.[73]

There is no further reference on the record to the dissatisfaction of the Gambler and his followers with the Bird Tail Creek reserve until November 1880. At that time, Agent McDonald, apparently responding to correspondence concerning white settlers who had moved onto land in the southern portion of Waywayseecappo's reserve,[74] referred to Gambler's desire to relocate as a means of making the land available for the settlers. According to McDonald, Gambler and about 30 families had already moved and built houses at their new location:

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[72] William Wagner, Dominion Land Surveyor, to J.S. Dennis, Surveyor General, March 26, 1878, NA, RG 88, vol. 300, file 0644 (ICC Exhibit 12, vol. 4, tab 31, pp. 2-3).

[73] ICC Transcript, November 5, 1996, p. 13 (Patrick Tanner).

[74] From the material supplied to the Commission, it is impossible to tell the complete story about these settlers. In 1884, Hayter Reed advised the Superintendent General "with reference to the survey of the surrendered part of Way-way-see-cappo's Reserve on Bird Tail Creek, & to inform you that Mr. Ponton was instructed to make the survey & a plan was furnished him on which was shewn what changes it would be desirable to make in the interest of & at the request of the Department of the Interior who had I believe permitted some parties to enter for homestead on the south part of the Reserve & therefore wished a further surrender of that part." Hayter Reed, Acting Assistant Indian Commissioner, to Superintendent General of Indian Affairs, April 14, 1884, NA, RG 10, vol. 6654, file 106A-3-1 (ICC Documents, pp. 376-77).

> Your letter respecting the land taken up by the Sharmans on Waywayseecappo's Reserve has not been overlooked by me. Indians are to be handled differently from white men and I wished the application of the change to come from them. This has been the source of the delay. Another reason, the Chief is simple so I had to wait until I met the Gambler, one of his headmen. He is with me just now and the whole affair can be settled in this way.
>
> He and about 30 families have applied to be allowed to part from the Band and be allowed to take a Reserve . . . six by five miles north of Ellice, East side of the Assiniboine in Range 29 Township 18 commencing a little below a creek opposite the Red Deer Horn Creek as shown in map 1878. There are no settlers on it, but the Gambler and his party has [sic] six houses built on it.
>
> If this arrangement is agreeable to you, let me know as soon as possible, addressing your letter to Fort Ellice as I will be here again in four or five weeks.
>
> Mr. Armstrong D.L.S. is at present subdividing in the Range & Township the Gambler wants and it will be advisable (after the Band in Council votes the surrender of Thirty square miles of their present Reserve) to survey this Reserve.
>
> I strongly recommend this change as it will not only settle the Sharman claim, but will also settle the minds of discontented Indians, Indians who do not wish to remain with their present Chief.[75]

Two months later, on February 1, 1881, the Minister of the Interior asked Indian Commissioner Edgar Dewdney to review the file "respecting certain lands taken up by the Sharman family of Chief 'Wayzeecappoe's' Reserve, Bird Tail Creek, and the desire of the 'Gambler,' one of the Chief's Councillors to remove with 30 other families to a location 65 miles north of Ellice, on the East side of the Assiniboine." Agent McDonald had telegraphed and was waiting at Swan River Barracks for a decision.[76] After discussing the question with Inspector Wadsworth and reviewing a plan of the reserve, Dewdney recommended that *30 square miles* be surrendered from the southern portion of Waywayseecappo's reserve. It was Dewdney's opinion that "the Indians will not be disturbed in their improvements, and the land claimed by 'Sharman' will be surrendered."[77]

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[75] A. McDonald, Indian Agent, Treaty 4, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, November 21, 1880, NA, RG 10, vol. 6654, file 106A-3-1, mfm reel C-8045 (ICC Documents, pp. 226-27).

[76] [Minister of the Interior] to Edgar Dewdney, Indian Commissioner, February 1, 1881, NA, RG 10, vol. 6654, file 106A-3-1 (ICC Documents, pp. 228-29). McDonald's telegram was not among the documents supplied to the Commission.

[77] Edgar Dewdney, Indian Commissioner, to Minister of the Interior, February 2, 1881, NA, RG 10, vol. 6654, file 106A-3-1 (ICC Documents, pp. 230-31).

This letter was forwarded to McDonald on February 9, 1881, with advice that a surveyor would be instructed to contact him to identify the *32 square miles* to be surrendered, as well as the land to be set apart as the Gambler's new reserve on the Assiniboine River.[78] There is no apparent explanation in the record for the discrepancy between Dewdney's recommendation that 30 square miles be surrendered and the Minister's approval for a surrender of 32 square miles. At any rate, the Commission makes no findings or conclusions in regard to whether this discrepancy may constitute a valid basis for a separate claim.

SURRENDER FOR EXCHANGE IN 1881

On February 24, 1881, Agent McDonald travelled to the Bird Tail Creek reserve at the invitation of Chief Waywayseecappo. He and an interpreter, Peter Hourie, met with 23 male members of the Band of "the full age of twenty-one years," who had assembled there expressly to discuss the proposal to surrender part of the reserve so that the Gambler and his followers could establish their own reserve. According to Wagner's account of the council meeting, the Gambler explained to one of the councillors why he had complained about Wagner's survey of Bird Tail Creek reserve in 1877:

> The Gambler answered, "You ask me the reason why I want to leave the Reserve, I will make you understand, my reason is this, when Way-way-see-cappo was made Chief he gave me authority to go throughout all the plains, to collect all the Indians who belonged to Fort Ellice to join this Band. I went out, and made as many as I saw, understand that they were invited to come and join our Chief, having collected three hundred persons, including those who were here before we held councils, when I was choosen [sic] to select the place for our Reserve, this I did; it was also agreed that when the survey was made, I was to accompany the surveyor and show him what we wanted. At the time he came, I had other important matters to attend to, so the Chief took him to the place. It was not exactly the place I had selected. I was told before that the Reserve was to be 12 x 6 miles. The Reserve was to have been on both sides of Bird Tail Creek instead of which it was put three miles too far west. Out of the three hundred persons I had collected, a large number were dissatisfied with the Reserve. They said they would not work on the Reserve, as it did not suit them. I told them stop first, I will speak to the Chief, and let him know of this: some of the party who spoke to me as dissatisfied were, Savage, Headman, Pisqua, Head Man, Ka-ka-quash and New-tin. I told them the Chief and I made

[78] [Minister of the Interior] to Lt. Col. A. McDonald, Indian Agent, February 9, 1881, NA, RG 10, vol. 6654, file 106A-3-1 (ICC Documents, p. 232).

> arrangements before that if any of the Band did not like to stop on the Reserve, we would let them go where they thought the[y] would do better.
>
> To the Chief did we not say that. –
>
> Answer yes we did say so. –
>
> I [the Gambler] then asked the Agent if we could not get another Reserve.
>
> I have not got the answer from the Agent yet, if we will be granted what we are asking for; and I do not like to be refused by the Band what I think will be allowed by the Government, so if it will suit the Chief, and the members of the Band in Council, we will give up to the Government Thirty-two (32) square miles of the south end of our Reserve. For my part I am willing.[79]

At this council, consistent with the Gambler's request and McDonald's instructions from the Minister of the Interior, the proposal was to surrender 32 square miles, and the discussion about which part of the Bird Tail Creek reserve to surrender went well into the night. Dewdney's proposal to cut off the entire south part of the reserve "would have deprived the Band of nearly all their prairie lands"[80] and was rejected in a vote, by "a majority of one." McDonald in turn rejected the Band's counterproposal that the land be taken in a strip along the entire west side of the reserve, ostensibly because "it would destroy their Reserve" but perhaps because it would not have included the land claimed by the Sharman family. In the end, McDonald reported that the Band agreed to a compromise which included all the land east of Bird Tail Creek in the southern portion and the remainder from both the northern and southern boundaries of the reserve, for a total area of 32 square miles:

> On the vote being taken there was a majority of one, against giving up the south end.
>
> The Chief proposed giving up three (3) miles on the west side from north to south, which I told them I could not allow, as it would destroy their Reserve.
>
> I told the Band I regretted very much that they were unable to come to a settlement. If they would allow me, I would propose what portion of the Reserve I thought would be the best for them to surrender, but they must understand it rested with them altogether, viz. That portion of the Reserve east of Bird Tail Creek from the south boundary to within a mile or so of the Agency Farm making the Creek the

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[79] A. McDonald, Indian Agent, Treaty 4, "Proceedings of a Council of Way-way-see-cappo's Band convened by the Chief and held in the Reserve, Bird Tail Creek," February 24, 1881 (ICC Documents, pp. 254-55).

[80] A. McDonald, Indian Agent, Treaty 4, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, February 28, 1881, NA, RG 10, vol. 6654, file 106A-3-1 (ICC Documents, p. 257).

> eastern boundary of the Reserve south of the agency farm, what ever more is required to make up the 32 square miles is to be taken from the north end of the Reserve but not farther south than the northern boundary of the agency Farm and should [there be] more required, then from the south end.
>
> As it was passed [sic] midnight and it would take more time to consider over my suggestion, I hoped they would give me an answer the next morning.
>
> After some talk amongst themselves, the Chief rose and said, the whole thing was settled. He said all the Band would surrender what I had proposed and that he and his Head men would sign the papers whenever required to do so.
>
> I certify that this is a correct report of the process.[81]

Surrender No. 183 was signed at Fort Ellice by Wa-wa-se-capow (Waywayseecappo), Oo-ta-ka-wenin (the Gambler), and Sauvage on March 7, 1881. This document stated that the boundaries of the Bird Tail Creek reserve "on the north and east sides" should be altered so as to surrender a total of "30 square miles":

> Whereas, in fulfilment of the provisions of "certain articles of a Treaty" made and concluded at Qu'Appelle, in the said Territories, bearing date the fifteenth day of September, in the year 1874, known as the Qu'Appelle Treaty No. 4, to which treaty the said Wa-wa-se-capow's Band became parties by an instrument in writing, dated and executed at Fort Ellice, in the said Territories, on the twenty-first day of September aforesaid, certain lands in the said Territories, of which the lands hereinafter described form part, have been duly assigned as a reserve for the said band of Indians.
>
> And whereas, since the assignment thereof as aforesaid it has been found more convenient and for the interests of the said Band of Indians that the boundaries of the said reserve on the north and east sides thereof should be altered, and in lieu of the lands (hereinafter described) by such alterations of boundaries excluded, other lands of equal extent assigned to the said Band.
>
> And whereas, at a meeting or council of the said Band, summoned for the purpose, according to their rules, and held on the twenty-fourth day of February, in the year 1881, at the said reserve, in the presence of Allan Macdonald [sic], Esquire, duly authorized to attend such council or meeting by the Superintendent-General of Indian Affairs, pursuant to the requirements of section 37 of the *Indian Act*, 1880, the assent of the majority of the male members of the said Band of the full age of twenty-one years, for the surrender to Her Majesty of the lands hereinafter described, has been given.

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[81] A. McDonald, Indian Agent, Treaty 4, "Proceedings of a Council of Way-way-see-cappo's Band convened by the Chief and held in the Reserve, Bird Tail Creek," February 24, 1881 (ICC Documents, pp. 255-56).

> NOW KNOW YE, that we, the said Wa-wa-se-capow, Oo-ta-ka-wenin, and Sauvage, as Chief and Headmen as aforesaid, representing the said Band of Indians, and for and in the name of the said Band, for the object and purpose above set forth, do hereby release, surrender and yield up to Her Majesty, all that portion of the said reserve, as it now exists and is defined, lying to the eastward of the Bird Tail Creek, extending from its southern boundary, northwards to a point from which a line drawn east and west will intersect the southern boundary of school section eleven of township twenty, ranged twenty-five, west of the principal Meridian, and also so much of the northerly part of the said reserve, across the same, as, with the portion thereof hereinbefore described, will when surveyed and measured, contain in all thirty square miles.
>
> To hold the same to Her Majesty, Her heirs and assigns forever.[82]

The required affidavit, attesting that "the surrender hereto annexed has been assented to by the Band in the said surrender named at the council or meeting of the said Band, as set forth in the said surrender," was sworn by McDonald and Waywayseecappo at Fort Ellice before Hugh Richardson, a stipendiary magistrate for the North-West Territories.[83] The surrender was approved by Order in Council PC 654 dated April 27, 1881, which stated that the surrender covered "thirty sections of their Reserve on Bird Tail Creek, in consideration of another Reserve of equal area being assigned them at a more suitable point."[84]

SURVEY OF LIZARD POINT AND SILVER CREEK RESERVES

When surveyor John C. Nelson passed through Fort Ellice in April 1882, the Gambler met him and urged him to go and mark out the boundaries of the reserve to be set apart for the Gambler and his followers. Nelson agreed to do so, if it was possible, but by the time horses were brought down to transport him to the site, the ice on the river was unsafe and Nelson did not go.[85]

The first survey of the surrendered portion of Waywayseecappo's reserve was performed by P.H. Dumais, Dominion Land Surveyor, in the summer or fall of 1882 under the direction of the

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82 Surrender No. 183, March 7, 1881 (ICC Documents, pp. 260, 264-66).

83 Surrender No. 183, March 7, 1881 (ICC Documents, pp. 258, 260-61).

84 Order in Council PC 654, April 27, 1881, NA, RG 2, series 1, vol. 209, pt. 2 (ICC Documents, p. 262).

85 John C. Nelson, Dominion Land Surveyor, to Superintendent General of Indian Affairs, December 29, 1882, Canada, Parliament, *Sessional Papers*, 1883, No. 5, "Report of the Department of Indian Affairs for the Year Ended 31st December, 1882," p. 214.

Department of the Interior rather than the Department of Indian Affairs. Dumais reported that the part of the reserve east of Bird Tail Creek contained only 4 ⅜ square miles and, if he had taken the balance of the 30 square miles entirely from the northerly part of the reserve "as per surrender," Indian houses and improvements would have been included. Because of this, the Chief had asked him to leave before the survey was completed and Dumais had complied.[86]

Dumais proposed to take land from both the north and south portions of the reserve so that the entire 30 square miles could be cut off without disturbing the Indian settlement. The Department of Indian Affairs initially objected to Dumais's proposal because it was not "in accordance with the deed of surrender."[87] Instead, the Department elected to conduct its own survey and, in April 1883, A.W. Ponton, Dominion Land Surveyor, was instructed to go to Fort Ellice to mark off, among other projects within Treaty 4 territory, the land surrendered by Waywayseecappo and the reserve to be set apart for the Gambler. For those two particular surveys, Ponton was to be "guided by the advice and instructions of Mr. Agent Herchmer."[88]

Ponton provided two reports of events related to the survey of the reserves at Bird Tail Creek and Silver Creek in the summer of 1883, one immediately after the survey and the other in his annual report. According to these reports, Ponton and Herchmer both went to the Bird Tail Creek reserve and met members of the Band. In the first report, Ponton described them as "the greater portion of the male population of the Reserve,"[89] whereas in the second report, he says that they "interviewed the Chief, his head men, and several others of the Band."[90] The Chief and his followers believed that

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[86] A. Russell, for the Surveyor General, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, December 14, 1882, NA, RG 10, vol. 6654, file 106A-3 (ICC Documents, p. 338); John R. Hall, Secretary, Department of the Interior to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, February 13, 1883, NA, RG 10, vol. 6654, file 106A-3 (ICC Documents, pp. 312-15).

[87] John R. Hall, Secretary, Department of the Interior, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, February 13, 1883, NA, RG 10, vol. 6654, file 106A-3 (ICC Documents, p. 313); Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, Ottawa, February 24, 1883, NA, RG 10, vol. 6654, file 106A-3 (ICC Documents, pp. 343-45).

[88] John C. Nelson, Dominion Land Surveyor, to A.W. Ponton, Dominion Land Surveyor, April 1, 1883 (ICC Documents, p. 348).

[89] A.W. Ponton, Dominion Land Surveyor, to Edgar Dewdney, Indian Commissioner, July 13, 1883, NA, RG 10, vol. 7770, file 27117-3, mfm reel C-12056 (ICC Documents, p. 357).

[90] A.W. Ponton, Dominion Land Surveyor, to John C. Nelson, Dominion Land Surveyor, February 25, 1884 (ICC Documents, p. 369).

they had surrendered more land east of the Bird Tail Creek than was calculated in Dumais's survey. After hearing the Band's concerns, Ponton spent a difficult week resurveying the "tortuous" creek, impeded by high water and thick willows, "with no better result than further disclosing the intractable mood of the Band, and reproducing the oft reiterated, and indefinite statement 'there is not all the land left we are entitled to.'"[91] Following this first week of work, Ponton reported:

> The Indians then met me to decide what sections they would surrender, but they were dissatisfied, claiming that the Reserve should have originally been twelve miles long and six miles wide and contain seventy two square miles, that thirty square miles then being deducted for the Gamblers band they would have forty two square miles left. The Reserve however being only eleven and one half miles long they were left only thirty-nine square miles. . . .[92]

Because the Indians at this point refused to identify the lands to be cut off their reserve until this matter could be settled, Ponton sent part of his crew under his assistant, Mr Haslet, to begin the survey of the Gambler's reserve, while Ponton and his remaining men went to the Oak River Sioux Reserve to settle a boundary dispute. Haslet established the south and east boundaries of the Gambler's reserve, but was forced to await Ponton's return on June 10 to verify the north boundary, since Herchmer had not provided any instructions on this matter. After going to Birtle to obtain a list of sections from the Dominion Lands Office, Ponton returned and completed the survey of the Gambler's reserve.[93] According to Order in Council PC 1151 dated May 17, 1889, which confirmed a large number of reserves in Manitoba and the North-West Territories, Ponton surveyed IR 63, containing 30 square miles on the east side of the Assiniboine River at Silver Creek about nine miles north of Fort Ellice, in June 1883 for 44 families under the Gambler.[94]

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[91] A.W. Ponton, Dominion Land Surveyor, to John C. Nelson, Dominion Land Surveyor, February 25, 1884, NA, RG 10, vol. 3680, file 12249, mfm reel C-10119 (ICC Documents, p. 369).

[92] A.W. Ponton, Dominion Land Surveyor, to Edgar Dewdney, Indian Commissioner, July 13, 1883, NA, RG 10, vol. 7770, file 27117-3, mfm reel C-12056 (ICC Documents, p. 358).

[93] A.W. Ponton, Dominion Land Surveyor, to John C. Nelson, Dominion Land Surveyor, February 25, 1884, NA, RG 10, vol. 3680, file 12249, mfm reel C-10119 (ICC Documents, pp. 369-70).

[94] Order in Council PC 1151, May 17, 1889, NA, RG 2, series 1 (ICC Exhibit 12, vol. 3, tab 26, pp. 12-13).

Upon Ponton's completion of the Gambler's survey, Herchmer told him that the Waywayseecappo Band "had decided to give up the southern portion of their reserve."[95] Ponton completed the survey at Waywayseecappo in July 1883, taking the land east of Bird Tail Creek and 18 sections from the north part of the reserve, as specified in the 1881 surrender, and the remainder of the land to total 30 square miles from the southern portion of the reserve.[96] According to Order in Council PC 1151, the reserve, renamed Lizard Point IR 62, contained 39 square miles on Bird Tail Creek about 15 miles northeast of Birtle, and was surveyed for 26 families under Waywayseecappo.[97] Ponton described the revised reserve in these terms:

> The soil throughout the reserve is generally a black loam, of first-class quality. In the southern and western portions there are numerous ponds, lakes and hay meadows. There is a sufficiency of firewood everywhere in this reserve. Timber fit for building purposes occurs in small quantities throughout, and in larger quantities in the neighborhood of its northern boundary. There is a large lake with partially wooded shores near the centre of the reserve. Its area is about two square miles, and it is said to contain fish. Wild ducks abound.[98]

Hayter Reed, at that time the Acting Assistant Indian Commissioner, observed that

> the part cut off by him [Ponton] differs slightly in shape from that cut off by M. Dumais, & I am of the opinion that Mr. Ponton's survey is the more desirable of the two as he followed the Section lines & legal subdivision boundaries, unless indeed the White Settlers have been permitted to enter the south parts of Sections 16, 17, & 18, T[ownshi]p 19, R[ange] 25 from which it appears by the sketch that M. Dumais cut a narrow strip.[99]

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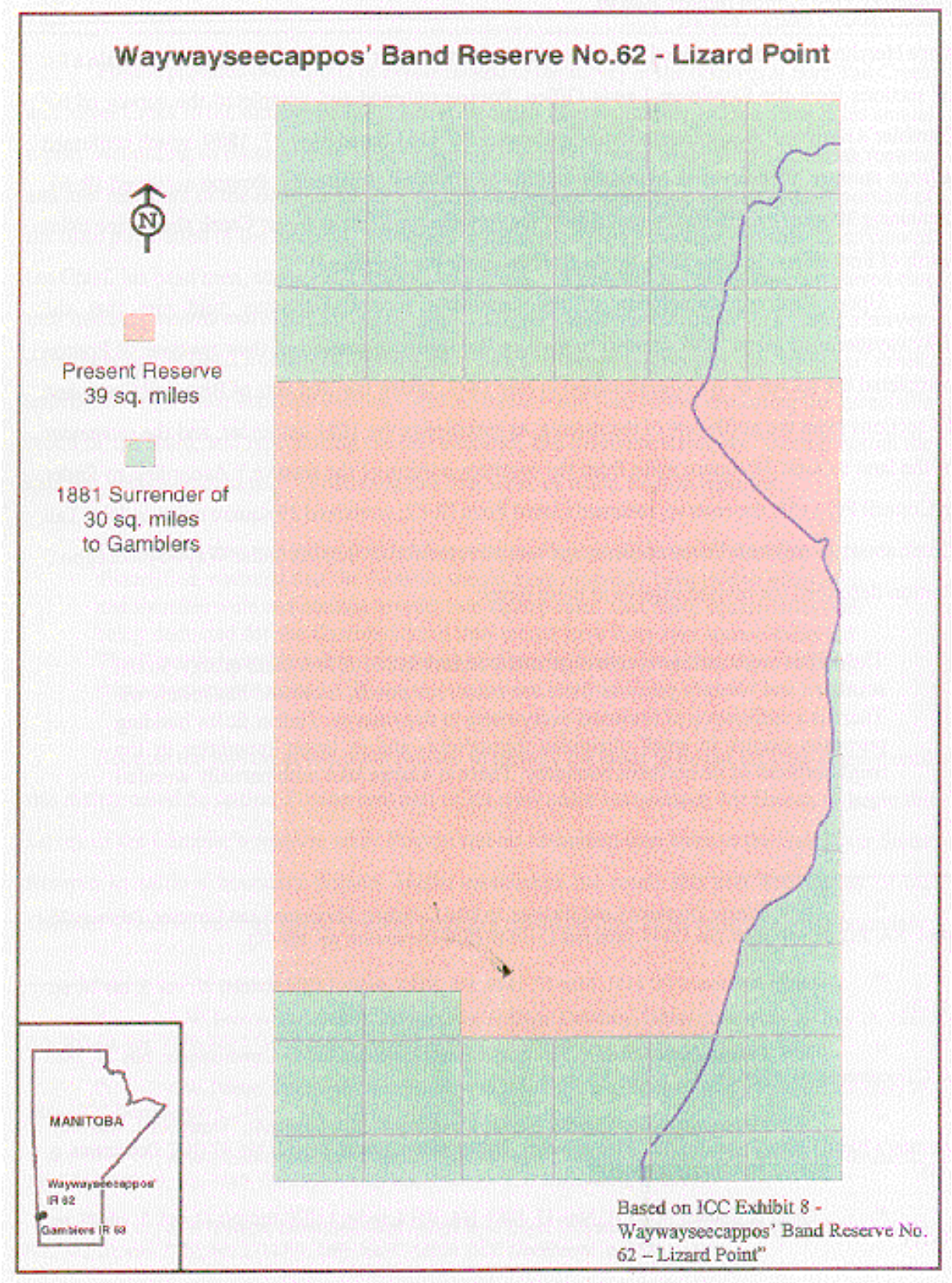
[95] A.W. Ponton, Dominion Land Surveyor, to Edgar Dewdney, Indian Commissioner, July 13, 1883 (ICC Documents, pp. 358-59).

[96] "Waywayseecappo's Band Reserve No. 62 – Lizard Point" (ICC Exhibit 8); "Treaty No. 2, Way-way-see-capo's Band, Lizard Point, No. 62," Plan of Survey, Indian Affairs Survey Records No. 47 (ICC Documents, p. 373).

[97] Order in Council PC 1151, May 17, 1889, NA, RG 2, series 1 (ICC Exhibit 12, vol. 3, tab 26, pp. 10-11).

[98] A.W. Ponton, Dominion Land Surveyor, "Indian Reserve No. 62," NA, RG 2, series 1, vol. 419/DIAND file 501/30-1-33-1, vol. 1 (ICC Documents, pp. 352-53).

[99] Hayter Reed, Acting Assistant Indian Commissioner, to Superintendent General of Indian Affairs, April 14, 1884, NA, RG 10, vol. 6654, file 106A-3 (ICC Documents, p. 377).


Waywayseecappos' Band Reserve No.62 - Lizard Point
N
Present Reserve
39 sq. miles
1881 Surrender of
30 sq. miles
to Gamblers
MANITOBA
Waywayseecappos' IR 62
Gamblers IR 63
Based on ICC Exhibit 8 -
Waywayseecappos' Band Reserve No.
62 – Lizard Point"

THE GAMBLER'S DISCONTENT WITH THE SILVER CREEK RESERVE

Neither of Ponton's two reports referring to the survey of the reserve at Silver Creek mentions any consultation with the Gambler or band members about the specific location of the reserve or the presence of any band members during the actual survey. His final report does give his opinion of the advantages in the site:

> 'The Gambler's Reserve.' Its alluvial soil of very best quality, its rolling and open aspect, the facilities for continuous ploughing in all directions, *the quantity and quality of its timber in the valley of the Silver Creek* which almost evenly intersects the Reserve, and possesses good water power, gives it advantages over any other reserve visited by me. The men are part of 'Way-way-see-capas', and in their characteristics very similar to the men of that Band. At the time of my visit, only a small portion of the Reserve was under cultivation, but land was under [process]of breaking up, and I doubt not that ere long good accounts will be rendered of this Reserve.[100]

It should be noted that, in relation to the availability of timber on the reserve, Ponton's report is inconsistent with the official description of the reserve filed with the plan for IR 63:

> The reserve generally is high-rolling prairie, interspersed with poplar bluffs of small sized timber from two to four inches in diameter. The soil is a black loam with gravelly ridges, and, with the exception of the valley of Silver Creek, can be almost all cultivated. It is much cut up by the valley of the Silver Creek and lateral coulées running into it. The best land is found on the northern part a short distance from the Manitoba and North-Western Railway. *Some useful poplar timber is still found in the valley of Silver Creek, but most of it has been killed by fires*. On the slope to the Assiniboine scattered scrub oak was observed, useful in the manufacture of small implements. *The timber supply is hardly sufficient for the Indians*.[101]

In his September 1884 report, T.P. Wadsworth, the agency and farm inspector for the Department of Indian Affairs, described in some detail the well-furnished houses and the 60 acres of cleared and cropped land of two members of the band, O-gah-mah and Thomas Tanner. He stated

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[100] A.W. Ponton, Dominion Land Surveyor, to J.C. Nelson, Dominion Land Surveyor, February 25, 1884, NA, RG 10, vol. 3679, file 12249 (reproduced in part at ICC Documents, p. 371). Emphasis added.

[101] A.W. Ponton, Dominion Land Surveyor, "Indian Reserve No. 63," NA, RG 2, series 1, vol. 419/DIAND file 501/30-1-33-1, vol. 1 (ICC Documents, p. 355). Emphasis added.

that six band members were actively planting crops and raising livestock and were doing very well at both, while other Indians had earned "a good deal of money" working on the railway. From Wadsworth's perspective, "this part of Waywayseecappo's Band, which was allowed to break away from the band and settle here in 1880, has done exceedingly well, and is living in comfort."[102]

However, Wadsworth also indicated that the band was not entirely happy with the reserve. It complained "that the present area is not sufficient nor in compliance with the terms of the treaty" and, despite Ponton's favourable estimation of the quantity and quality of timber on the reserve, that there was not enough wood on the reserve as surveyed.[103] The band asked for the reserve to be extended to the west side of the Assiniboine River where there was "plenty of timber" and "as yet . . . no settlers upon the land asked for."[104] Similarly, in 1886, Acting Indian Agent J.A. Markle reported complaints that the reserve was deficient in both wood and hay land, and he considered various solutions including surrendering land for exchange, granting the band a woodlot, or uniting Waywayseecappo, the Gambler, and South Quill on one reserve:

> I informed them that [it] was my opinion the Department would object to enlarge the Reserve, but if they would agree to surrender an equal quantity of land for hay and wood land, that the Department would grant their request if possible. This they agreed to do, and Gambler, who claims to be the Chief, was to advise me of the sections that would suit them.
>
> He called at my office some time after, and stated that sections 15 and 22, T[ownshi]p 18 R[ange] 29 W[est] of the Assiniboine River suited them. I remember charging Gambler, at the time, to be positive, as the Department might have considerable trouble in acquiring this land, and if they did, that no more changes would be expected. His reply was to this effect. If we get this, we have wood, hay, farm, and pasture land, and will ask no more.
>
> In reply to your inquiry as to the advisability of granting them a wood lot up the River, I beg to offer a few suggestions, which, in my opinion, will bear consideration before further trouble and expense is incurred in acquiring more land

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[102] T.P. Wadsworth, Inspector, Indian Agencies and Farms, to Superintendent General of Indian Affairs, September 17, 1884, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year ended 31st December, 1884," 91-92 (ICC Documents, pp. 384-85).

[103] T.P. Wadsworth, Inspector, Indian Agencies and Farms, to Superintendent General of Indian Affairs, September 17, 1884, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year ended 31st December, 1884," 91-92 (ICC Documents, p. 385).

[104] T.P. Wadsworth, Inspector, Indian Agencies and Farms, to Superintendent General of Indian Affairs, September 17, 1884, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year ended 31st December, 1884," 91-92 (ICC Documents, p. 385).

> for them. An attempt should be made to get a union of Gambler's, Way-way-see-cappo's and South Quill bands, and which I believe can be . . . accomplished. The cost to the Department, in my opinion, of maintaining these three bands on separate Reserves, is too great, and from which they are not deriving the same benefit as they would if a union could be consummated. Education is claimed to be the key to Indian civilization, yet neither [sic] of these three bands have a school. The cost of maintaining three schools, when one would be of more benefit, as it would, in all probability, receive encouragement, and good attendance, will, in time, be considerable expense, and, if to be judged by the one we started at Gambler's, something over a year ago, will be very little encouragement to the Department. More direct supervision could also be given them, and many other advantages, which at present they cannot get without an enormous expenditure of money.[105]

It is perhaps an indication of Markle's inexperience and unfamiliarity with the recent split between the Gambler and Waywayseecappo that his recommendation regarding reuniting the bands was rejected out of hand in a marginal note as "impracticable," although merging Waywayseecappo and South Quill was considered a possibility.[106]

There is no response on file to the first complaint. By the summer of 1887, Markle reported that the Gambler and many of his followers had moved back to the reserve at Bird Tail Creek:

> Gambler, the nominal chief, has now removed to Way-way-see-Cappo's Reserve at Lizard Point, stating, as his reason for the change, that wood and hay are more easily obtained there, and that he will be much nearer to the hunting ground on the Riding Mountain.
>
> Long Claws and his relations have also followed Gambler to the Lizard Point Reserve, and I would not be surprised if other members of this band would eventually return to the old reserve for the reasons given by Gambler.[107]

By the time the Gambler's reserve at Silver Creek was confirmed by Order in Council in 1889, most of its residents with the exception of the Tanner family had rejoined Waywayseecappo. The situation

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[105] J.A. Markle, Acting Indian Agent, to Indian Commissioner, February 6, 1886, NA, RG 10, vol. 6654, file 106A-3 (ICC Documents, pp. 392-94).

[106] Marginal note in J.A. Markle, Acting Indian Agent, to Indian Commissioner, February 6, 1886, NA, RG 10, vol. 6654, file 106A-3 (ICC Documents, p. 393).

[107] J.A. Markle, Indian Agent, Birtle, Manitoba, to Superintendent General of Indian Affairs, Ottawa, July 12, 1887, Canada, Parliament, *Sessional Papers*, 1888, No. 15, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1887," 75-77 (ICC Exhibit 12, vol. 4, tab 53).

created problems, not only at Lizard Point which had been reoccupied by former residents who had renounced it, but also for followers of Rattlesnake at Valley River who had no desire to move to Silver Creek but had no reserve land to call their own. Hayter Reed, by then the Indian Commissioner, wrote:

> I have the honor to refer to Department's letter of 21 March 1888 and other correspondence relative to the reserve set apart at Silver Creek to enable the Gambler and his band to separate from that of Way-way-see-cappo at Lizard Point.
>
> As the Department is aware, subsequently to the making of such arrangements, Gambler and Long Claws, with their immediate respective followers, returned to Lizard Point.
>
> Out of the number of souls thus left interested in the Silver Creek reserve, viz., 128, there is a considerable proportion who although allowed for when that reserve was surveyed, were at the time residing at Valley River, in what I understand is now blocked out as T[ownshi]p 25, R[ange] 23, W1, and had been settled there continuously for some thirty years previously.
>
> The scarcity of wood and hay, which drove Gambler and Long Claws back to Lizard Point, caused a number of those who remained at Silver Creek to abandon it and join those who, as already stated, were settled at Valley River.
>
> The consequence is, that there are now only some 50 souls remaining at Silver Creek, composed almost entirely of members of the Tanner brothers' families, who have made themselves so comfortable, that they would not care to move, and naturally, rather than see the reserve curtailed, would like to force the others to return. The Valley River Indians would strongly oppose any attempt to compel them to remove to Silver Creek, nor would it be wise to make it, since their present surroundings, including comparatively good hunting, enable them to live, without assistance from the Government, and undoubtedly, were a meeting of the whole band held, the majority would decide against Silver Creek.
>
> They express a strong desire to have a reserve set apart for them at Valley River, and are quite willing to resign their interest in the Silver Creek reserve, in exchange.
>
> The land which could thus be cut off the Silver Creek reserve, although not so well adapted for the Indians, as that at Valley River, is none the less pleasing to the eye, well adapted for white settlers, and could consequently be readily disposed of by the Department of the Interior. Everything considered, I feel disposed to strongly recommend that the Indians settled at Valley River have a reserve given them there, on the terms of an exchange, and that provision be made for the possibility of a few more eventually desiring to join them there.[108]

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[108] Hayter Reed, Indian Commissioner, to Deputy Superintendent General of Indian Affairs, December 11, 1889, NA, RG 10, vol. 6654, file 106A-3-1-1 (ICC Exhibit 12, vol. 2, tab 10).

As we have already noted, within five years Rattlesnake's reserve had been created, with 15 square miles of the reserve at Silver Creek being surrendered in exchange for an equal area at Valley River.[109] Similarly, difficulties in setting apart a reserve for South Quill at Rolling River had been overcome and that reserve, too, was created. In 1898, most of the remaining half of the Gambler's reserve at Silver Creek was surrendered for sale, with the exception of small portions of it being used by the Indians remaining in the vicinity.[110] Today, the reserve comprises just 1037 acres in five separate holdings.[111]

Elder James Tanner provided the following testimony in relation to the surrender of 15 square miles to establish a reserve at Valley River:

> Since the time our land – since that time our land has disappeared acre by acre. And at one shot, 15 sections went to Valley River. That 15 sections of land went to Valley River people and got the land, and only Valley River people voted.
>
> . . .
>
> So with 15 sections gone to Valley River, the 15 sections were sold, was sold to farmers and to homesteaders, and all years, and all the years that passed, nobody ever told – talked to us about how our land went from 30 sections to what we have today. In the remaining few acres, that was always missing; we did not know, because nobody ever brought this in front of us to know.[112]

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[109] According to one source, the area set apart at Valley River in 1896 was 11,544.46 acres, or just in excess of 18 square miles, to replace the 15 square miles of the Gambler's reserve surrendered in 1893: Foy Poulin, Memorandum to File, "History – Gambler Reserve No. 63," May 11, 1966 (ICC Documents, p. 417).

[110] Memorandum, [author unknown], "In Charge of Records," Department of Indian Affairs, January 26, 1924, NA, RG 10, vol. 3754, file 30848/DIAND file 501/30-33 (ICC Documents, p. 406); see also "Gamblers [sic] Indian Reserve No. 63" (ICC Exhibit 9). The areas not surrendered for sale in 1898 are variously described as totalling 700 acres (Foy Poulin, Memorandum to File, "History – Gambler Reserve No. 63," May 11, 1966 (ICC Documents, p. 409)); 860 acres (Author unknown, [Office of Native Claims], Memorandum to File, "Waywayseecappo Band," February 14, 1979 (ICC Documents, p. 497)); and 1037 acres ("Gamblers [sic] Indian Reserve No. 63" (ICC Exhibit 9)). With regard to the area of 1037 acres represented in Exhibit 9 as being the current size of IR 63, there are two parcels, which would appear to comprise roughly 160 acres, that apparently were not sold following surrender and were returned to the Band in 1963. Deducting 160 acres from 1037 acres would leave an unsurrendered area of approximately 877 acres as of 1898.

[111] "Gamblers Indian Reserve No. 63" (ICC Exhibit 9).

[112] ICC Transcript, November 5 1996, p. 27 (James Tanner).

Mr Patrick Tanner made similar statements to the Commission raising questions about the propriety of this surrender and others involving Gamblers reserve land.[113] Although these are important allegations that warrant close examination to determine if the Crown discharged its lawful obligations towards the Gamblers First Nation in relation to the manner in which these surrenders were taken, our inquiry is limited to considering whether the First Nation has an outstanding treaty land entitlement. Therefore, it should be repeated that the Commission makes no conclusions regarding the validity of the various land surrenders involving the Silver Creek Reserve.

[113] For example, Mr Patrick Tanner stated that "[a]ll the other Bands that were part of the Fort Ellice amalgamation, there was Wayway, South Quill, Sakimay, Rattlesnake and Gambler, all the other reserves received good sized reserves. They have all – they have all reaped most of the benefit; Gambler lost most of it. Like we have, today, is only maybe one-twentieth of what the reserve was. . . . I guess the one that sticks out the most in my mind was Valley River. They surrendered 15 square miles of Gambler's for their reserve at Valley River. That's the Rattlesnake's. And when they surrendered, I don't know why they were the ones to surrender, but they surrendered part of our reserve, 15 square miles, for their reserve. And at this time when it was surrendered, there was not one person from Gambler who signed the surrender. It seems like whoever asked first got a piece of the pie first, and by the time it came to Gambler's turn, the pie was finished" (ICC Transcript, November 5, 1966, pp. 12-13 [Patrick Tanner]).

PART III

ISSUES

As discussed above, legal counsel for the Gamblers First Nation and Canada agreed at the Planning Conference of June 14, 1996, that the Commission should focus on the following three issues:

1 **Was Canada's obligation to provide treaty lands to the claimant in respect of the adherence to Treaty 4 on September 21, 1874, satisfied in 1877 with the selection and survey of the lands at Bird Tail Creek for the "Fort Ellice Band"?**

2 **To what extent, if at all, did the "surrender for exchange" in 1881 affect the treaty land entitlement of the claimant?**

3 **What is the quantum of the claimant's outstanding treaty land entitlement, if any?**

At the same planning conference, Canada and the First Nation agreed that the apparent discrepancy of some two square miles between the 1881 surrender and the Order in Council accepting that surrender would not be an issue in this inquiry.

Because the First Nation's confirming research on the treaty paylist analysis and determination of the land quantum was not completed, the parties subsequently agreed that the Commission's findings and recommendations in this inquiry should be restricted to identifying the proper date of first survey for the Gamblers First Nation and determining what impact, if any, the 1881 "surrender for exchange" has on the calculation of the First Nation's treaty land entitlement. Part IV of this report sets out our analysis and findings with regard to these two modified issues as agreed to by the parties:

1 **Is the proper date of first survey for the Gamblers First Nation 1877 or 1883?**

2 **To what extent, if at all, did the "surrender for exchange" in 1881 affect the treaty land entitlement of the claimants?**

PART IV

ANALYSIS

ISSUE 1 DATE OF FIRST SURVEY

Is the proper date of first survey for the Gamblers First Nation 1877 or 1883?

Canada and the Gamblers First Nation agree that, in addressing the issue of whether Canada's obligation to provide treaty lands to the First Nation has been satisfied, the date of first survey should be used for the purpose of calculating the First Nation's treaty land entitlement. The source of the dispute in this claim is whether the date of first survey was 1877, when William Wagner surveyed the original reserve at Bird Tail Creek for the Fort Ellice Band, or 1883, when a separate reserve was surveyed for the Gambler and his followers at Silver Creek. Selecting one date over the other will have significant consequences in relation to the First Nation's claim. As the case has been framed by the parties, the question of which date is the proper date of first survey for the purposes of treaty land entitlement turns on whether the 1877 survey was performed validly and in accordance with the terms of Treaty 4, since neither party has challenged the legitimacy of the 1881 surrender and the subsequent 1883 survey of reserve land for the Gambler.

The relevant provision of Treaty 4 in this context is the "reserve clause," which provides:

> And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, *such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians*, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families; provided, however, that it be understood that, if at the time of the selection of any reserves, as aforesaid, there are any settlers within the bounds of the lands reserved for any band, Her Majesty retains 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. . . .[114]

In determining the proper date of first survey, we must consider the meaning of the words "after conference with each band of the Indians" and the respective rights and obligations of Canada and the Band in relation to the selection and survey of the Band's reserve lands under Treaty 4. Another area of dispute that arises in the context of this issue is whether the representatives of either Canada

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[114] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 6. Emphasis added.

or the Band were properly authorized to select the reserve at Bird Tail Creek in 1877. In addressing these questions, we will first set out the main principles of treaty interpretation that have been developed by the courts and applied by the Commission in earlier inquiries, and we will then apply those principles to the facts and treaty provisions in this case.

Principles of Treaty Interpretation

In previous inquiries into claims involving alleged outstanding treaty land entitlements, the Commission has found that, although there is limited case authority dealing with treaty land entitlement, a convenient starting point is the six well-established principles of treaty interpretation that have arisen in the jurisprudence. These principles were concisely restated in the *Report and Recommendations on Treaty Land Entitlement* published by Saskatchewan's Office of the Treaty Commissioner:

- The treaty should be given a fair, large and liberal construction in favour of the Indians.
- Treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians.
- As the honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned.
- Any ambiguity in wording should be interpreted as against the drafters and should not be interpreted to the prejudice of the Indians if another construction is reasonably possible.
- Evidence by conduct or otherwise as to how the parties understood the treaty is of assistance in giving it content.
- The treaty was made with Indians, not bands, and an examination of the treaty as a whole indicates that most terms are intended to treat individual Indians equally, and bands in proportion to their populations.[115]

As we stated in our reports into the claims of the Kahkewistahaw and Lucky Man Cree Nations, we take the view that these principles of interpretation, applied in the context of treaty land entitlement, lead to the conclusion that the Commission will normally apply the date of first survey approach to

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[115] Cliff Wright, Office of the Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatachewan, May 1990), 24.

calculate treaty land entitlement unless there are unusual circumstances which would otherwise result in manifest unfairness.[116] We have already noted that this conclusion is not in issue in the present inquiry because the parties, although differing on what constitutes the date of first survey, do not disagree with the date of first survey approach as the basis for calculating the band's entitlement.

Nevertheless, certain of the Commission's earlier conclusions regarding treaty land entitlement bear repeating. As we stated in our report on the treaty land entitlement claim of the Fort McKay First Nation:

> The treaty conferred upon every Indian an entitlement to land exercisable either as a member of a band or individually by taking land in severalty. In the case of Indians who were members of a band, *that entitlement crystallized at the time of the first survey of the reserve*. The quantum of land to which the band was entitled in that first survey is a question of fact, determined on the basis of the actual band membership – including band members who were absent on the date of first survey.[117]

In its report on the Lac La Ronge inquiry, the Commission summarized its findings on the nature and extent of the Crown's obligations by setting out six principles, which provide a useful framework for dealing with treaty land entitlement claims:

1 The purpose and intention of the treaty is that each band is entitled to 128 acres of land for each member of the band, and every treaty Indian is entitled to be counted in an entitlement calculation as a member of a band.

2 For a band without reserves, the quantum of land entitlement crystallizes no later than the date of the first survey and shall be based on the actual band membership, including band members who were absent at the time of the survey.

3 If the band received its full land entitlement at date of first survey, Canada's treaty obligations are satisfied, subject to the principle that "late additions" are entitled to be counted for entitlement purposes.

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[116] ICC, *Inquiry into the Treaty Land Entitlement Claim of the Kahkewistahaw First Nation* (Ottawa, November 1996), reported (1998) 6 ICCP 21 at 77-78; ICC, *Inquiry into the Treaty Land Entitlement Claim of the Lucky Man Cree Nation* (Ottawa, March 1997), reported (1998) 6 ICCP 109 at 155.

[117] ICC, *Inquiry into the Treaty Land Entitlement Claim of the Fort McKay First Nation* (Ottawa, December 1995), reported (1996) 5 ICCP 3 at 53. Emphasis added. It should be noted that, unlike Treaties 8 and 10, Treaty 4 does not allow for land to be provided in severalty. However, in our view, the general principle providing for the quantum of land to be determined at the time of the first survey is identical under each treaty.

4 If a band did not receive its full entitlement at the date of first survey, or if a new or additional shortfall arose as a result of "late additions" joining the band after first survey, the band has an outstanding treaty entitlement to the shortfall acreage, and Canada must provide at least this amount of land in order to discharge its obligation to provide reserve lands under treaty.

5 Canada's failure to provide the full land entitlement at date of first survey, or subsequently to provide sufficient additional land to fulfil any new treaty land entitlement arising by virtue of "late additions" joining the band after first survey, constitutes a breach of the treaty and a corresponding breach of fiduciary obligation. A breach of treaty or fiduciary obligation can give rise to an equitable obligation to provide restitution to the band.

6 Natural increases or decreases in the band's population after the date of first survey have no bearing on the amount of land owed to the band under the terms of treaty.[118]

In its subsequent report on the Kahkewistahaw First Nation's treaty land entitlement claim, the Commission offered the following views on the date of first survey, based on its comments arising out of the treaty land entitlement inquiry for the Lac La Ronge Indian Band:

> In the Lac La Ronge inquiry, the Commission interpreted the reserve clause in Treaty 6 and considered a number of possible dates and approaches for calculating treaty land entitlement, including the date of treaty, the date of selection, the date of first survey, and the current date. Although the wording of the reserve clause in Treaty 6 (signed in 1876) is not identical to that contained in Treaty 4, the two are substantially similar. Treaty 6 provides that "the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each Band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them."[119] After considering the various options for calculating entitlement, the Commission made the following conclusions about the interpretation of the reserve clause:
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> > In our view, the wording of the treaty and the surrounding historical context suggest that the parties intended to carry out the selection and survey of reserves within a short time following treaty to avoid conflicts with settlers over land selections. Despite the

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[118] ICC, *Lac La Ronge Indian Band Report on Treaty Land Entitlement* (Ottawa, March 1996), reported (1996) 5 ICCP 235 at 318-19.

[119] For comparative purposes, the wording of the reserve clause in Treaty No. 4 is set out on pages 16 and 51 of this report.

absence of clear wording in the treaty or definitive policy guidelines on treaty land entitlement, the general practice of Indian Affairs was to calculate the amount of land to be set aside by counting the number of band members on the most recent treaty annuity paylist available to the field surveyor at the time of the survey. If the parties had intended to use the populations of Indian bands at the time of the treaty to determine land entitlement, this could have been easily accomplished by attaching a schedule to the treaty listing the respective population figures for each band that signed treaty. The fact that Indian Affairs lacked reliable information on band population figures at the time of treaty suggests that such an interpretation was not intended by the parties. . . .

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

In general, we agree with the statement in the 1983 [Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims] that, "although the treaties do not clearly identify the date for which a band's population base is to be determined for the land quantum calculations the most reasonable date is not later than the date of first survey of land." Depending on the facts of any given case, it may be necessary to consider many questions in selecting the date on which a band's population should be assessed, including the specific terms of treaty, the circumstances surrounding the selection of land by the band, delays in the survey of treaty land, and the reasons for those delays.[120]

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[120] ICC, *Inquiry into the Treaty Land Entitlement Claim of the Kahkewistahaw First Nation* (Ottawa, November 1996), reported (1998) 6 ICCP 21 at 76-77. The passage referred to from the Commission's report into the treaty land entitlement claim of the Lac La Ronge can be found at ICC, *Inquiry into the Treaty Land Entitlement Claim of the Lac La Ronge Indian Band* (Ottawa, March 1996), reported (1996) 5 ICCP at 235 at 316-17.

As we noted previously, the date of first survey approach is not in issue in these proceedings, but the foregoing passages are useful to establish the context of our analysis.

It is also helpful in this inquiry to refer to the Department of Indian Affairs and Northern Development's "Criteria Used in Determining Bands with Outstanding Entitlements in Saskatchewan" as it relates to cases involving band splits. Although the criteria were developed by Indian Affairs in 1977 expressly in relation to Saskatchewan bands, this document is instructive in identifying how Canada generally dealt with band splits and the calculation of land entitlement under the numbered treaties. The criteria state that once a band has split or divided to form two or more new bands, different methods of calculating treaty land entitlement will be used depending on whether the split occurred before or after the date of first survey. Generally, if the band received treaty land before the split occurred, the band's treaty land entitlement would be calculated based on the population of the original band as a whole as of the date of first survey rather than on the populations of the new bands. Conversely, if treaty land was allocated but not to the original band before the split occurred, then entitlements would be calculated separately for the new bands after the split based on their respective dates of first survey.[121]

In the case at issue, the First Nation challenges Canada's contention that the first survey occurred before the Gambler and his followers split from Waywayseecappo. Counsel submits that, although Canada sought to amalgamate on one reserve the followers of as many Chiefs as possible, this policy of amalgamation failed at an early stage because of the nomadic nature of the Indians of that area at that time:

> The phrase "Band" is often used in terms of the notes by Lieutenant Governor Morris at that time. Tents, tribes, those kind of phrases are tossed about. There are, in the materials provided to the Commissioners, several socio-economic historical reports, and they all seem to suggest that particularly in the Fort Ellice region, the Saulteaux, and the Qu'Appelle region, the Crees, at that time were very migratory. The concept of a Chief was something that was basically an indication that the majority had supported somebody, or for the time being support somebody, and that person carried the mantle of chieftainship at that time. It could change almost any time.[122]

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[121] Department of Indian Affairs and Northern Development, "Criteria Used in Determining Bands with Outstanding Entitlements in Saskatchewan," August 1977.

[122] ICC Transcript, November 6, 1996, p. 93 (Paul B. Forsyth).

Canada submits that, unlike Sakimay, who received a separate reserve as early as 1876, the Gambler did not ask to be treated separately; he remained a headman under Waywayseecappo until the surrender in 1881 and should be treated as one of the people represented by Waywayseecappo.[123] For its part, the First Nation contends that, when the Gambler objected to Wagner's survey in 1877, he did so on behalf of his own followers as well as Waywayseecappo and his people, for whom the Gambler had been appointed spokesman.[124] However, the First Nation did not go so far as to suggest that the Gambler and his people comprised a separate band in 1877. It also did not suggest that, if Wagner had amended his survey to suit the Gambler at that time, the land so set apart would not have formed the reserve for Waywayseecappo, the Gambler, and their combined followers, or that the survey would not have been their "first survey."

In its inquiry into the claim of the Young Chipeewayan Band regarding Stoney Knoll IR 107, the Commission was called upon to determine whether the claimants constituted a "band." We noted the definition of a "band" in the 1876 *Indian Act* as "any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common of which the legal title is vested in the Crown, or who share alike in the distribution of any annuities or interest moneys for which the Government of Canada is responsible."[125] We found that, "[i]n common parlance the words 'band,' 'tribe,' and 'body' all imply a group living as a community, a communal group"[126] and that "a 'band,' as that term is used in common law, is a body of individuals who exist as a collective, cohesive, and identifiable community."[127] The evidence before the Commission in that case led us to conclude that

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123 ICC Transcript, November 6, 1996, pp. 206-07 (François Daigle).

124 ICC Transcript, November 6, 1996, p. 208 (Paul B. Forsyth).

125 *Indian Act*, SC 1876, c. 18, s. 3(1).

126 ICC, *The Young Chipeewayan Inquiry into the Claim regarding Stoney Knoll Indian Reserve No. 107* (Ottawa, December 1994), reported (1995) 3 ICCP 175 at 198.

127 ICC, *The Young Chipeewayan Inquiry into the Claim regarding Stoney Knoll Indian Reserve No. 107* (Ottawa, December 1994), reported (1995) 3 ICCP 175 at 202.

the claimants were "an identifiable community living today, or indeed at any time previous, as a collectivity."[128]

In the present case, if we were required to decide whether Waywayseecappo, the Gambler and their followers constituted a band in 1877, we would be inclined to conclude that, following the survey by Wagner, they were indeed a body of Indians living together as a collective community on the reserve set aside for them. At the 1881 surrender meeting, the Gambler sought Waywayseecappo's consent to surrender land in exchange for land that Gambler and his followers would receive at Silver Creek – a consent that presumably would not have been required had the Gambler and his people previously constituted a separate band. In the Gambler's own surrender speech, he confirmed that he had gathered members to join the band of which Waywayseecappo was to be "our Chief."

However, we do not find it necessary to determine whether Waywayseecappo, the Gambler, and their followers comprised a single band because it has not been raised as an issue. The First Nation is merely challenging the validity of the 1877 survey; it is not claiming that the Gambler led a separate band. That being the case, since the First Nation merely contends that the 1877 survey by Wagner *prior* to the band split in 1881 was invalid, it follows, in the First Nation's submission, that the true first surveys were performed by Ponton *after* the band split and that entitlements should be calculated accordingly. Canada takes the opposite position.

We will now consider the validity of the 1877 survey.

"Conference with Each Band of the Indians"

The validity of the 1877 survey by William Wagner must be measured with reference to the requirements of Treaty 4 regarding the establishment of reserves for the Indian peoples of that territory. For ease of reference, it will be recalled that the reserve clause states:

> And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, *such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after*

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[128] ICC, *The Young Chipeewayan Inquiry into the Claim regarding Stoney Knoll Indian Reserve No. 107* (Ottawa, December 1994), reported (1995) 3 ICCP 175 at 202.

> *conference with each band of the Indians*, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families; provided, however, that it be understood that, if at the time of the selection of any reserves, as aforesaid, there are any settlers within the bounds of the lands reserved for any band, Her Majesty retains 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; and provided, further, that the aforesaid reserves of land, or any part thereof, or any interest or right therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained, but in no wise shall the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves.[129]

We will consider first the meaning and application of the conference requirement in this clause before turning to the question of who constituted the authorized representatives for both Canada and the Band in the land selection process.

The Meaning of "Conference"

Canada and the Gamblers First Nation agree that, under the terms of Treaty 4, the Crown's representatives were required to confer with a particular band of Indians before setting apart a reserve for that band. Where they differ is on the content of the conference requirement and which party – Canada or the band, or either of them – has the final say in determining the location of the band's reserve.

Canada urges the Commission to find that the word "conference" within the overall context of the reserve clause means that, after conferring with a band regarding the desired location for its reserve, Canada's officers were to select reserve land for the band. Counsel contends that this definition is true regardless of whether the Commission relies simply on the "clear terms" of the treaty or, should it find those terms ambiguous, on additional extraneous evidence. Similarly, it would be contrary to the terms of treaty to suggest that a band has the exclusive right to *determine* the location of its reserve or the right to at least *consent* to the location before the reserve is set

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[129] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 6. Emphasis added.

apart.[130] Canada argues that, if the treaty makers had intended that the Indians should have to consent or agree to the locations of their reserves, the treaty makers would have used the word "consent" just as they did in the proviso of the reserve clause that allows the government to dispose of reserve lands "with the consent of the Indians entitled thereto first had and obtained":

> If you go to the word "consent" or "agreement," it implies a decision; it implies "yes" or "no"; it implies a free exercise of will.
>
> "Conference" and "consent" are different words. They mean different things and they mean different things in their ordinary meaning, . . . the ordinary meaning of both parties to the Treaty, I submit.[131]

In any event, Canada argues that the source of the power to set aside reserves is not the treaty but rather the royal prerogative of the Crown:

> The assumption here is that the power to set aside reserves derives from the Treaty. The power to set aside reserves does not derive from the Treaty, we submit; it's an exercise of the Royal prerogative of the Crown. There is an obligation on the Crown to set aside reserves, but the actual setting aside is done through the Royal prerogative of the Crown.[132]

Counsel submits that the selection of reserves by Canada's representatives is subject to certain matters that Canada must consider in making the selection, including:

- the wishes of the band;[133]
- the rights of settlers already resident on the land selected;[134]

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130 Submissions on Behalf of the Government of Canada, October 29, 1996, p. 12.

131 ICC Transcript, November 6, 1996, p. 169 (François Daigle).

132 ICC Transcript, November 6, 1996, p. 171 (François Daigle).

133 ICC Transcript, November 6, 1996, p. 185 (François Daigle).

134 ICC Transcript, November 6, 1996, p. 173 (François Daigle); Submissions on Behalf of the Government of Canada, October 29, 1996, p. 13.

- existing township surveys and further requirements of the *Dominion Lands Act* regarding lands for schools and the Hudson's Bay Company;[135] and
- other factors such as the shape of the reserve, water frontage, soil quality, access to timber, existing and future settlements, railway use, and suitability for uses such as farming and hunting.[136]

According to Canada, "[t]he fact that the Crown's discretion is limited in the selection of reserves also supports the view . . . that the discretion was the Crown's; it wasn't the First Nation's." Therefore, in counsel's submission, Canada rather than the band has the final say in determining where the band's reserve should be located.[137]

The Gamblers First Nation responds that Canada's interpretation of the word "conference" is too narrow. Rather than mere consultation, "conference" in a legal setting implies meeting and consulting to resolve differences, to harmonize conflicting views and ultimately to arrange a compromise acceptable to both parties.[138] The First Nation agreed that "consent" means something different than "conference," but it expressed the difference in this way:

> "Consent" as used in the second paragraph of the Treaty is basically, Canada comes and says, we're going to dispose of this, we're going to use this, we're going to expropriate this, we need your consent, will you do it. It's a much different concept than I suggest is covered with the words "after conference," which talk about negotiation and compromise and agreement.[139]

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135 ICC Transcript, November 6, 1996, pp. 173, 181 (François Daigle); Submissions on Behalf of the Government of Canada, October 29, 1996, p. 13.

136 ICC Transcript, November 6, 1996, pp. 179-80 (François Daigle); Submissions on Behalf of the Government of Canada, October 29, 1996, p. 13.

137 ICC Transcript, November 6, 1996, p. 172 (François Daigle).

138 ICC Transcript, November 6, 1996, pp. 137-38 (Paul B. Forsyth).

139 ICC Transcript, November 6, 1996, p. 210 (Paul B. Forsyth).

Counsel pointed to a number of indicators that the treaty requires at least agreement between a band and the Crown in the selection of reserve lands, and suggested that these might even go so far as to show that, in the final analysis, a band's wishes should be paramount:

- At the 1874 treaty negotiations, the Gambler is reported by Morris to have said that "we have not looked around us yet, and chosen our land, *which I understand you tell us to choose*."[140]
- Commissioners Christie and Dickieson were instructed "*to select the Reserves where they shall be deemed most convenient and advantageous for the Indians*, each Reserve to be selected as provided by the Treaty after conference with the Indians interested therein and subject to the other conditions set forth in the Treaty."[141]
- In his memorandum regarding the selection of reserves, Surveyor General J.S. Dennis stated that, "as soon as possible *after the location of the reserves in question may be decided upon between the Commissioner and the Indians*, the outlines thereof, in each case, should be laid out and marked upon the ground."[142]
- Following the Commissioners' meetings with the Indians in 1875, Christie wrote that "*[t]he Chiefs at [Fort] Ellice were not all decided as to the locality of their Reserves*."[143]
- In his report of those same meetings with the Fort Ellice Band, Wagner commented, first, that "*the Reserve for this tribe was choosen* [sic] *by them* at the head of Bird Tail Creek" and, second, that "[*t*]*he Fort Ellice Indians* numbering 65 families *will probably choose the midst of the woods* and occupy nearly 2 townships of 41600 acres."[144]
- Finally, in response to a request for his legal opinion regarding the requirements for setting apart a reserve upon a claim by a trespasser that a reserve had not been properly created, Z.A. Lash of the Department of Justice stated that, "the survey and setting out of the reserve having been done with the express consent & approval of the Indians & having since been acquiesced in by them, no Order in Council is necessary; but in as much as an Order in Council is a more formal record of the proceedings the undersigned recommends, for the

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[140] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 21; Morris, *Treaties of Canada*, 84-85 (ICC Documents, p. 31).

[141] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 21; Order in Council, July 9, 1875, NA, RG 10, vol. 3622, file 5007 (ICC Documents, p. 46). Emphasis added.

[142] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 23; J.S. Dennis, Surveyor General, Memorandum, July 13, 1875, NA, RG 10, vol. 3622, file 5007 (ICC Documents, pp. 48-49).

[143] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 24; W.J. Christie, Indian Commissioner, to E.A. Meredith, Deputy Minister, Department of the Interior, September 9, 1875, PAM, MG 12, B1, Alexander Morris, Lieutenant Governor's Collection, No. 1094 (ICC Documents, p. 69).

[144] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 24; William Wagner, Dominion Land Surveyor, to Minister of the Interior, January 2, 1876, NA, RG 88, vol. 300, file 0644 (ICC Documents, pp. 105-06).

> avoidance of doubts, that one be passed approving of & confirming the reserve as already set apart."[145]

In conclusion, the First Nation submits that a liberal interpretation of Treaty 4 means that the Indians would have understood the word "conference" to mean that they were entitled to select their own reserve or that they must at least agree with Canada as to the land to be set apart.[146] Counsel did express one caveat, however:

> It's not our submission that the wishes of the Bands are absolute and paramount and without reasonable restriction.
>
> There are restrictions that are reasonable. If settlers are settled in an area, or a city or town exists, it would not be reasonable, even if the Band said they wanted that land, to uproot all of those settlers. That's considered in the words of the Treaty.
>
> By the same token, things like railways, telegraphs, I mean I think those are reasonable limitations. Some of the things that are referred to in the *Dominion Lands Act* would probably be reasonable limitations.
>
> But subject to reasonable limitations, the wishes of the Bands, the Indians, were to be paramount at that time. And unless there was a reasonable, an objective reason to disallow what the Indians had chosen, particularly at the meeting with Christie, then their wishes should not have been ignored.[147]

The Commission has already had the opportunity in two previous inquiries to consider the requirements for creating a reserve. In the first, which like the present case dealt with a claim under Treaty 4, the Commission was asked by the Kahkewistahaw First Nation to determine whether a band's treaty land entitlement should be calculated when the band requested land in a particular location or when the first survey had been completed. We stated:

> It is clear that a band's *entitlement* to reserve land arises upon the band signing or adhering to treaty. However, the *quantification* and *location* of the band's entitlement

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[145] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 24; Z.A. Lash, Department of Justice, to Department of the Interior, August 12, 1876, NA, RG 10, vol. 3637, file 6853 (ICC Documents, p. 129). Canada responded that, having regard to the context in which it was given, Lash's opinion is merely relevant to the question of whether a reserve exists vis-à-vis a trespasser, not as between Canada and a band, and in the trespass context an Order in Council is not required to signify the existence of a reserve. However, in Canada's view, Lash's opinion does not stand for the proposition that the consent of a band is necessary to establish a reserve.

[146] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 20.

[147] ICC Transcript, November 6, 1996, pp. 210-11 (Paul B. Forsyth).

are not triggered until certain procedures described in the treaty are carried out. Under Treaty 4, "*such reserves [are] to be selected* by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, *after conference with each band of the Indians*." In our view, the purpose of the "conference" with the band was to ensure that the land to be set aside as reserve met with the approval of the chief and headmen and that it was suitable for its intended purpose (which was typically agriculture in the case of bands in southern Saskatchewan). However, it does not necessarily follow that the band's population on the date of selection should determine the size of the reserve.

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

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

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

concluded that a reserve has been set aside, the population must be assessed on this date to determine whether Canada has satisfied the band's treaty land entitlement.

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

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

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

> Determining a Band's treaty land entitlement involves five basic steps:
>
> 1) Identification of the band and the applicable Treaty.
> 2) Determination of the relevant survey date.
> 3) Determination of the total lands received by the band.
> 4) Determination of the population base.
> 5) Overall entitlement calculations.
>
> . . .
>
> B Date for Entitlement Calculation
>
> The date to be used in the land quantum calculations is seldom clearly spelled out in any of the treaties. Some of the treaties refer to the laying aside or assignment of a reserve, others mention the selection of land. Legal advice from the Department of Justice suggests that, although the treaties do not clearly identify the date for which a band's population base is to be determined for the land quantum calculations, *the most reasonable date is not later than the date of first survey of land. It is Canada's general view that this is the date to be used to determine whether it has met its obligation under the*

> *treaties, to provide a quantum of land to an Indian Band based on the population of that Band at date of first survey.*
>
> *Generally the date to be used is taken from the plan of survey of the first reserve set aside for the use and benefit of an Indian Band. This is the date which is noted by the surveyor as the date which he carried out the survey. Other indicators that ought to be noted include the date on which the surveyor signed the plan and the date noted in the surveyor's field book.*
>
> *In some cases, the date which is chosen for entitlement purposes is not the date of the first actual survey for a band's reserve. A reserve may have been surveyed for the band, but it was never administered as a reserve. Furthermore, if the band rejects the survey and abandons the reserve after the survey, another reserve may be surveyed elsewhere at a later date and confirmed by Order-in-Council. Depending on the facts in each case, this could be considered as the date of first survey. The later survey could be used as date of first survey because this is when the first reserve, officially recognized by Order-in-Council, was set aside for the band.*[148]

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

- determining whether the reserve was surveyed or located in conformance with the terms of the treaty – in this case, following consultation between Canada's officers and the band as required by Treaty 4;
- determining whether the survey or allotment was acceptable to the band; and
- determining whether the survey or allotment was accepted by Canada.[149]

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

Therefore, we find the most reasonable conclusion to be derived from the interpretation of Treaty 4 is that the date of first survey is the appropriate date for

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[148] Department of Indian Affairs and Northern Development, "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims," May 1983. Emphasis added.

[149] Office of the Treaty Commissioner, "Research Methodology for Treaty Land Entitlement (TLE)," 1994.

> calculating treaty land entitlement. We interpret the Crown's obligation under Treaty 4 to be the allocation of 128 acres of land for each band member at the time that land was *set apart* as a reserve for the use and benefit of the band. It was only when land was *surveyed* by Canada in accordance with the treaty, and *accepted* by the band, that it could be said that the land was properly set apart. Therefore, subject to exceptions being made in unusual circumstances which would otherwise result in manifest unfairness, the general rule is that the population on the date of first survey shall be used to calculate a band's treaty land entitlement.[150]

To summarize, the Commission considers the "conference" requirement of Treaty 4 to be more than a formality. It is included to ensure that the land meets with the approval of band leaders and that it will be suitable for its intended purpose. Once Canada agrees to the band's selection and completes the survey, the band can expressly approve or disapprove of the land set apart; alternatively, it can signal its approval by continuing to reside on and use the reserve for the collective benefit of its members, or its disapproval by refusing to live on and use the reserve as surveyed. In cases involving multiple surveys, it becomes necessary to identify the "true" date of first survey by determining whether a particular reserve was surveyed in accordance with the treaty and was acceptable to both Canada and the band. Obviously, it is a question of fact in each case whether a particular survey should amount to a band's first survey. Indeed, in Kahkewistahaw's case, both Canada and the First Nation agreed that, although first in time, the survey by William Wagner in 1876 was not the true first survey because the band never settled on the land marked out.

After issuing its report in the Kahkewistahaw inquiry, the Commission was called upon to consider similar questions in the treaty land entitlement claim of the Lucky Man Cree Nation. In that case, the First Nation argued that Canada's obligation to set aside a reserve, and to calculate a band's treaty land entitlement, should arise immediately upon the initial consultation taking place. The Commission disagreed, finding that the facts in that case did not establish the necessary consensus at such an early date. After quoting much of the foregoing passage from its Kahkewistahaw report, the Commission considered whether that analysis should apply with equal force in the context of the distinctive terms of Treaty 6. We concluded that it should. Treaty 6 states:

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[150] ICC, *Inquiry into the Treaty Land Entitlement Claim of the Kahkewistahaw First Nation* (Ottawa, November 1996), reported (1998) 6 ICCP 21 at 79-83.

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, *after consulting with the Indians thereof as to the locality which may be found to be most suitable for them*.[151]

The Commission stated:

> The contentious words of the reserve clause are contained in the phrase "after consulting with the Indians thereof as to the locality which may be found to be most suitable for them." In our view, the word "consulting" contemplates the initial discussions in which an Indian band informs Canada's agents of its preferred location for a reserve. We agree with Canada's point, however, that other clauses in the treaty give fuller expression to the parties' intention that a band's reserve shall be "*agreed upon* and surveyed." It is just this sort of consensus or meeting of the minds that the Commission referred to in its report dealing with the Kahkewistahaw Band of Treaty 4, and we believe that this conclusion is equally applicable to bands under Treaty 6.
>
> The Lucky Man Cree Nation argued that the obligation to set aside a reserve arose as soon as "consultation" took place. In fact, we consider that the obligation to set aside a reserve arose even earlier – upon a band's adhesion to treaty. As we stated in the Kahkewistahaw report, however, the *quantification* and *location* of a band's entitlement were not triggered until the consensus contemplated by the treaty was achieved. As a general rule, the consensus to which we refer would normally occur upon *completion* of the survey – that is, at the date of first survey. It is true that there had to be a preliminary understanding of some sort between Canada and a band with respect to a specific location before a survey would even be undertaken. In our view, this preliminary understanding was not sufficient to constitute the consensus that we contemplate. It was only *following* the survey, when the band indicated its acceptance of the surveyed area as its reserve – either expressly (by saying so) or implicitly (by living on or using the reserve for its benefit) – that a true consensus could have been said to exist. It is for these reasons that the Commission attaches such significance to the date of first survey.[152]

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[151] *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions* (Ottawa: Queen's Printer, 1964), 3.

[152] ICC, *Inquiry into the Treaty Land Entitlement Claim of the Lucky Man Cree Nation* (Ottawa, March 1997), reported (1998) 6 ICCP 109 at 162-63.

As in this case, Canada argued in the Lucky Man inquiry that the Crown has the final say in determining the location of a band's reserve. The Commission concluded that such a position is inconsistent with the concept of selecting reserves by consensus:

> the Commission does not accept Canada's contention that setting aside reserve land is simply a matter of royal prerogative, and that Canada, rather than a band, is "the decision maker as to both when and where the reserve would be located." Canada was required to "consult" with the Indians by the express terms of Treaty 6. For a true meeting of the minds to take place, both parties must have input into the process, and both must agree on the reserve selected and surveyed.
>
> Arguably, the logical extension of this requirement for consensus is that, just as it would have been open to a band to reject for its own reasons a reserve site selected by Canada, it would have been equally open to Canada to reject sites requested by the band if there were valid reasons for doing so. Canada's discretion in this regard would presumably have to have been exercised reasonably, however. One of the most important – and difficult – roles of government, then and now, is to weigh and reconcile competing interests, and in doing so Canada must have particular regard for treaty rights and the fiduciary nature of its relationship with the Indians. We do not consider this to mean that Canada was immutably bound to prefer the position of the Indians in all cases in which competing policy or other interests arose. What it *does* mean, in our view, is that, if, in the context of setting apart reserves, Canada chose a competing interest over the interests of a particular band, it must have had reasons for doing so that were valid and not coloured by improper considerations.[153]

Neither party in this case has persuaded the Commission that it should take a different approach from the one it took in the Kahkewistahaw and Lucky Man inquiries. We still believe that the treaty makers intended the process of reserve selection to proceed by way of consensus and that, as a result, neither Canada nor the Band could unilaterally determine the location of the reserve. *Both* parties were subject to the reasonable limitations identified in Canada's submissions and conceded by counsel for the First Nation.

We turn now to the question of whether such consensus existed in relation to the 1877 survey.

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[153] ICC, *Inquiry into the Treaty Land Entitlement Claim of the Lucky Man Cree Nation* (Ottawa, March 1997), reported (1998) 6 ICCP 109 at 164-65.

Was There Consensus?

The submissions by the Gamblers First Nation on this issue are directed towards two main themes. The first is that, in the meeting on August 28, 1875, at which the Gambler was the "chief Orator," Commissioners Christie and Dickieson reached an agreement with the Fort Ellice Band that its reserve should be located "at the head of the Bird Tail Creek," and instructed Wagner to survey the reserve there. Counsel argued:

> Although the specific boundaries are not detailed in the letter it seems apparent that the government representatives knew of the configuration they requested because they knew it fell within the limits of Treaty 2 land.[154]

According to the First Nation, the "only impediment" to surveying the reserve in this location at that time was that the land lay within the geographical limits of Treaty 2 and the Commissioners were unsure whether land could be set apart for a Treaty 4 band there.[155] Presumably, therefore, none of the other "reasonable limitations" on reserve selection identified by counsel for Canada (and conceded by counsel for the First Nation) were relevant factors in this case. Accordingly, the First Nation submits that Canada, and specifically Wagner, knew or ought to have known the Band's wishes before the 1877 survey was undertaken.[156]

The second point of the First Nation's argument is that, once agreement had been reached between the duly authorized representatives of Canada and the Band in 1875 as to the location of the reserve, the government was not permitted to impose a new location unilaterally on the Band. Nevertheless, in a report dated May 9, 1877, Laird commented that, although Band members preferred their reserve on both sides of Bird Tail Creek, they would likely "be content to have it all on the West side." The First Nation views this comment as evidence of Laird's intent to "wrongly and unilaterally depart from the clearly expressed wishes of the Band . . ." and vary without any sound basis the terms of the agreement reached at the 1875 conference. Therefore, the First Nation submits that Laird's conduct amounted to a "flagrant example of a representative of Canada acting

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154 Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 10.

155 Submissions on Behalf of the Gamblers First Nation, October 24, 1996, pp. 10, 17-18.

156 Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 2.

'without honour' in his dealings with those Indians who were looking to Canada to fulfill the spirit and letter of the Treaty."[157]

Similarly, when Wagner eventually surveyed the reserve in 1877, he did so with the assistance of a man he knew was not the Gambler. He also did so in accordance with that man's instructions and with Laird's recommendation that the reserve be set apart on the west side of Bird Tail Creek – both of which were contrary to the 1875 agreement.[158] The First Nation further submits that, following the survey, the Gambler "immediately" voiced his objection, but Wagner, whether through prejudice,[159] spite,[160] or arrogance,[161] refused to relocate the reserve. In December 1877, Waywayseecappo and his headmen objected once again to no avail, this time to McDonald. According to the First Nation, Wagner's refusal coupled with McDonald's inaction amount to further evidence of Canada's unilateral variation of the selection made in 1875.[162] Counsel argued that the majority of the Band followed the Gambler to his new reserve at Silver Creek and this underscores the level of the Band's disenchantment with Wagner's survey.[163] The logical conclusion of the First Nation's position, submits Canada, is that, if a "conference" requires Canada and a band to reach a consensus, either a consensus was reached in 1875 and then breached by Canada, or no consensus was reached at all.[164] To this argument, the First Nation counters that even Canada did not approve of the 1877 survey:

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157 Submissions on Behalf of the Gamblers First Nation, October 24, 1996, pp. 12-13.

158 Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 19.

159 Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 11.

160 Counsel for the First Nation noted that one of the reasons given by Wagner for refusing to change the reserve location in response to the Gambler's objection was that Wagner considered the Gambler to be "troublesome": Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 13.

161 Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 14.

162 ICC Transcript, November 6, 1996, p. 213 (Paul B. Forsyth).

163 Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 25.

164 ICC Transcript, November 6, 1996, p. 165 (François Daigle).

> To this end, it is significant that the survey of 1877 was never formally approved by the appropriate govemment authorities, nor was it made the subject of approval by Order-in-Council. On the other hand, the surveys performed in 1883 were approved by Chief Surveyor Nelson in January 1889, and on May 17, 1889 confirmed by Order-in-Council.[165]

In response, Canada contends that, if "conference" has the meaning proposed by the First Nation, Canada has satisfied the conference requirement of Treaty 4 in any event, and therefore the survey of 1877 fixed the date when the First Nation's population should be counted for treaty land entitlement purposes.[166] Canada points to at least five occasions when its representatives met with the Chief and others to discuss reserve selection:

- the initial conference in late August 1875 between Commissioners Christie and Dickieson for Canada and representatives of the Band, including the Gambler as "chief Orator";
- the meeting on August 3, 1876, involving Dickieson, Wagner, and Indian Agent Angus McKay, of which McKay reported that Waywayseecappo was not yet prepared to select his reserve because one of his headmen was absent;
- the meeting between the Chief and Wagner in December 1876 as the latter passed through on his way to Fort Pelly;
- Laird's interview or interviews with Waywayseecappo as reported in Laird's letter of May 9, 1877; and
- ultimately, the meeting between Wagner and Waywayseecappo in July 1877 during which the Chief instructed his son-in-law to point out the reserve to Wagner.[167]

Canada submits that it considered and complied with the wishes of the Band to have the reserve surveyed at the head of Bird Tail Creek.[168] As to the First Nation's complaint that the location of the reserve was moved and imposed unilaterally without any reasonable basis from the location agreed to by Christie and Dickieson in 1875, Canada counters that Wagner's concern about excluding "all

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165 Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 32.

166 ICC Transcript, November 6, 1996, p. 190 (François Daigle).

167 ICC Transcript, November 6, 1996, pp. 188-89 (François Daigle).

168 ICC Transcript, November 6, 1996, p. 185 (François Daigle).

the improvements made by the Chief and his families" amounted to a "valid explanation for not making the changes requested."[169]

In response to the First Nation's argument that objections were expressed by the Gambler and Waywayseecappo immediately following the 1877 survey, Canada submits that the entire Band nevertheless continued to reside on the reserve for at least three years until the surrender meeting in early 1881.[170] Even following the surrender, Waywayseecappo and his followers remained at Bird Tail Creek, and it was not many more years before the Gambler and most of his followers abandoned the reserve at Silver Creek and returned to Waywayseecappo's reserve at Bird Tail Creek (resurveyed as Lizard Point IR 62).[171]

Moreover, the only reason for the meeting in 1881 and the resurveys in 1883 was to implement the surrender. They did not occur because there was no reserve or the initial survey had not been properly done. According to Canada, if a reserve had not been properly set apart for the Band in the first place, there would have been no need for a surrender at all; the very fact of the surrender proposal "shows that all accepted that the survey had set aside the reserve."[172]

In the Commission's view, the evidence does not support the conclusion that Canada and the Fort Ellice Band reached any sort of binding agreement in 1875 because there was no consensus on the specific location of the reserve. Christie and Dickieson obviously believed that they were not in a position to commit the government because they were unsure whether Wagner could be instructed to survey a reserve for the Band within the limits of Treaty 2. We believe that the naming of the head of Bird Tail Creek as the preferred location in 1875 constituted no more than "the initial discussions in which an Indian band informs Canada's agents of its preferred location for a reserve," to use the language of the Lucky Man report. The specifics of the location, including the survey and the consensus between Canada and the Band that the lands so set apart would constitute the reserve, were still to come. Even if it might be considered that a conditional agreement had been reached

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169 Supplementary Submissions on Behalf of the Government of Canada, May 9, 1997, p. 6.

170 ICC Transcript, November 6, 1996, p. 191 (François Daigle).

171 ICC Transcript, November 6, 1996, pp. 199-200 (François Daigle).

172 ICC Transcript, November 6, 1996, p. 191 (François Daigle).

subject to Canada obtaining approval of the reserve's location, there is other evidence which demonstrates that Band members had still not made up their own minds.

In his year-end report for 1875, Wagner indicated that the Fort Ellice Indians would likely choose their reserve in "the midst of the woods" where there would be plenty of timber,[173] the implication from this statement being that they had not yet chosen. Following the meeting on August 3, 1876, both Wagner and McKay reported that Waywayseecappo was not yet ready to decide on a reserve; McKay's comment that "they did not wish their reserves surveyed for the present as one of their head men was absent" is just as consistent with divisions within the Band over where the reserve should be located as with the Chief's deference to the Gambler on that issue. Still, we can infer from McKay's words that the location of the reserve had not yet been fully settled among band members. More explicit evidence of this can be found in Laird's letter of May 9, 1877, in which it will be recalled that he wrote:

> *The delay in locating the Reserves of these Bands has been caused by disagreement among their members in making a selection. They appear to have settled their disputes* and expressed to me that they wish their Reserves to be located as follows:
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> 1. 'Wawasecappo's, or the Fort Ellice Band.' Their selection is pretty much as mentioned in Messrs. Christie and Dickieson's report [of October 7, 1875]. They desire a Reserve to be surveyed for them at the head of Bird Tail Creek, on the road leading from Swan Lake via Shell River, used by the North West Mounted Police in travelling to Swan River Barracks. The site is about 24 miles from Shoal Lake, and about 36 miles from the mouth of the Shell River. They would prefer to have the Reserve on both sides of the Bird Tail Creek, but will, I trust, be content to have it all on the West side.[174]

This letter demonstrates that the Band had not finalized its own position regarding reserve selection until early 1877, and suggests that the final negotiations to arrive at a consensus with the Band were still forthcoming.

The Commission recognizes the concerns expressed by the First Nation regarding Laird's comment that, although Waywayseecappo's people wanted their reserve on both sides of Bird Tail

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[173] William Wagner, Dominion Land Surveyor, to Minister of the Interior, January 2, 1876, NA, RG 88, vol. 300, file 0644 (ICC Documents, pp. 105-06).

[174] David Laird, Lieutenant Governor and Indian Superintendent of the North-West Territories, to Minister of the Interior, May 9, 1877, NA, RG 10, vol. 3649, file 8187 (ICC Documents, pp. 141-44).

Creek, they "will, I trust, be content to have it *all* on the West side."[175] Yet we cannot fail to notice that, although admittedly the lion's share of the reserve originally surveyed by Wagner was in fact situated to the west of Bird Tail Creek, the reserve nonetheless included land on the east side of the creek for fully 11 miles of its overall length of 11½ miles. In our view, Laird's statement represented little more than his own personal views as to the location of the reserve, and it appears that the position recommended by him was not fully implemented in any event.

Moreover, while it might have appeared, based on the evidence available to the First Nation when it prepared its submissions, that Wagner had coldly refused to consider the Gambler's request to change the location of the reserve, the additional documents tendered with Canada's supplementary written submission disclose that Wagner in fact had good reason to leave the reserve where he had originally surveyed it since the location proposed by the Gambler "would have excluded all the improvements made by the Chief and his families."[176] We must conclude that consideration of these improvements was just the sort of "reasonable limitation" discussed by counsel for Canada and admitted by counsel for the First Nation in their respective submissions. The additional documents further reveal that Wagner had apparently already resurveyed part of the reserve because he "found out that the place wished for was not in it."[177] After meeting with the Gambler, Wagner offered to move the reserve, but the Gambler refused this overture because he was dissatisfied with the *shape* of the reserve proposed by Wagner.[178] By the time the Gambler got back to Wagner to confirm that a reserve 12 miles by six miles would be acceptable, Wagner had already finished the job and submitted his plans and field notes, and was apparently unable to make further changes without express authorization from Ottawa.

What we see in this exchange is the sort of give and take that was surely an integral part of many reserve surveys. Canada and the bands made proposals and counterproposals, even as the

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[175] David Laird, Lieutenant Governor and Indian Superintendent of the North-West Territories, to Minister of the Interior, May 9, 1877, NA, RG 10, vol. 3649, file 8187 (ICC Documents, pp. 141-44). Emphasis added.

[176] William Wagner, Dominion Land Surveyor, to J.S. Dennis, Surveyor General, March 26, 1878, NA, RG 88, vol. 300, file 0644 (ICC Exhibit 12, vol. 4, tab 31, pp. 2-3).

[177] William Wagner, Dominion Land Surveyor, "Diary of Surveys of Indian Treaty No. 4 from 19 February 1877 to 26 February 1878," January 26, 1878 (ICC Exhibit 12, vol. 1, tab 3).

[178] William Wagner, Dominion Land Surveyor, to J.S. Dennis, Surveyor General, March 26, 1878, NA, RG 88, vol. 300, file 0644 (ICC Exhibit 12, vol. 4, tab 31, pp. 2-3).

reserves were being surveyed, before arriving at a compromise acceptable to both parties while at the same time perhaps not being all that either party might have desired. We consider Wagner's report on the survey of Sakimay's reserve, where he similarly refused to provide a reserve 40 miles long but eventually worked out a solution, as further evidence of this sort of compromise. It does not indicate that Wagner sought to dominate the Indians with whom he dealt or that he failed to survey in accordance with his instructions, but rather that he was firm in insisting on reasonable limitations in the configurations of the reserves he was called upon to survey. In this respect, we find the following comments of McKay to be significant:

> I found that the Indians were very much satisfied with Mr. Wagner and that he managed to impress them with confidence. I would respectfully recommend that he be given the survey of the Reserves for Indians on the Saskatchewan as I am convinced that he will give the greatest satisfaction to the Indians.[179]

In the final analysis, it appears to the Commission that Canada gave the Band precisely what it asked for: a reserve at the head and on both sides of Bird Tail Creek. Although the First Nation argues that Waywayseecappo and the man appointed by him had no authority to advise Wagner on land selection – an issue to which we will turn momentarily – the First Nation also admits that Wagner surveyed in accordance with the instructions given to him by these two Indians.[180] The Gambler raised concerns that Wagner sought to address, and in his later objection Waywayseecappo requested a reserve 40 miles long that, in our view, Wagner quite reasonably refused.

As counsel for the First Nation noted, after Waywayseecappo's objection there were no further documents on file for three years until the idea of a surrender surfaced with the arrival of the Sharman family on the south end of the reserve in November 1880. In our view, this lack of activity suggests that, notwithstanding the objections voiced by the Gambler and others, band members, at least initially, decided to reside on the reserve and use it for their collective benefit. There appears to have been a significant faction led by the Gambler that grew increasingly dissatisfied with the reserve, and, for that group, the arrival of the Sharmans presented Canada with a convenient

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[179] Angus McKay to Superintendent General of Indian Affairs, October 14, 1876, NA, RG 10, vol. 3642, file 7581 (ICC Exhibit 12, vol. 2, tab 25, pp. 26-27).

[180] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 19.

opportunity to free up part of the reserve for settlers while providing the land at Silver Creek in exchange for the Gambler and his followers. We make no comment on the validity of the surrender or Canada's motives in securing it. What we do take from it, however, is the express recognition by the Gambler that Waywayseecappo was his Chief and that the reserve had been set apart for the entire Band. This recognition was, if anything, reinforced by the decision of the Gambler and many of his followers to return to Bird Tail Creek in 1887 and later to be restored to Waywayseecappo's band list.

Finally, with respect to the First Nation's argument that Canada never approved the 1877 survey by Order in Council but did approve the 1883 surveys, we caution against placing too much significance on this fact. It will be recalled that, in 1876, Z.A. Lash on behalf of the Deputy Minister of Justice expressed the opinion that "the survey and setting out of the reserve having been done with the express consent & approval of the Indians & having since been acquiesced in by them, no Order in Council is necessary; *but in as much as an Order in Council is a more formal record of the proceedings the undersigned recommends, for the avoidance of doubts, that one be passed approving of & confirming the reserve as already set apart*."[181] We have seen in earlier inquiries that the later practice of confirming reserves by Order in Council was not always the approach followed by the government. In fact, the 1889 Order in Council by which the 1883 surveys were confirmed also confirmed the reserves set apart for many other bands over the preceding two decades. For this reason, the Order in Council must be looked upon as more a matter of the government catching up on its housecleaning than anything of special significance to Waywayseecappo, the Gambler, and their followers. The reason that the 1877 survey was not referred to in the Order in Council was that, by 1889, it had already been replaced and superseded by the surveys in 1883 that divided the reserve at Bird Tail Creek into IR 63 for the Gambler at Silver Creek and Lizard Point IR 62 for Waywayseecappo and the others who elected to remain.

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[181] Z.A. Lash, Department of Justice, to Department of the Interior, August 12, 1876, NA, RG 10, vol. 3637, file 6853 (ICC Documents, p. 129). Emphasis added.

Authority of Laird and Wagner to Select Reserves

A further basis on which the Gamblers First Nation attacks the 1877 survey by William Wagner is that neither Wagner nor Laird was authorized to confer with the Indians and select reserves:

> The provisions of Treaty 4 were very specific and required the Government to appoint two officers who would act on behalf of the Government with respect to the selection of the reserves. As a result, only the two persons appointed in accordance with the Treaty would have the power to act as agent for the Government and bind them [sic] in that regard. Due to the certainty of the Treaty provisions, it is clear that only the commissioners specifically appointed for the purpose of selecting the Reserve had the power to do so and thus, no other person, regardless of their position in the Government, relationship with the Indians, or apparent authority, was authorized to act as agent of the Government in the selection of the Reserve. Due to the fact that Commissioners Christie and Dickieson were appointed under the Treaty as agents for the Crown for this purpose, they were the only two men permitted to do so. In other words, neither David Laird nor Mr. Wagner had been given the authority to act as the agent for the Government and therefore any agreements or actions by these two men, in relation to the selection of the Reserve, are not consistent with the Treaty.[182]

Canada's response is that, based on the decision of the Supreme Court of Canada in *J.E. Verrault & Fils Ltee v. Attorney General for Quebec,*[183] "a contract made by an agent of the Crown acting within the scope of his ostensible (apparent) authority is a valid contract by the Crown" and therefore binding on the Crown as principal.[184] As Lieutenant Governor and Indian Superintendent, Laird was "charged with the administration of the Treaty No. 4 area which included the lands in and about Birdtail [sic] Creek"[185] and thus presumably had at least apparent, if not express, authority to meet with the Indians to select reserves. With regard to Wagner, Canada submits that he acted within the limits of his authority and indeed recognized those limits by refusing to incur the additional

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182 Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 28.

183 *J.E. Verrault & Fils Ltee v. Attorney General for Quebec* (1975), 57 DLR (3d) 403 (SCC).

184 Submissions on Behalf of the Government of Canada, October 29, 1996, p. 19.

185 Supplementary Submissions on Behalf of the Government of Canada, May 9, 1997, pp. 6-7.

expense of revising the survey as requested by the Gambler without first seeking the authorization of the Surveyor General.[186]

Treaty 4 states that "Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for the said Indians, such reserves to be selected *by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose*, after conference with each band of the Indians."[187] Although it is true that Christie and later Dickieson were appointed by Order in Council to select reserves, we see nothing in the words of the treaty to suggest that *only* Christie and Dickieson could perform, or could be authorized to perform, that function. Contrary to the position taken by the First Nation, the treaty does not refer to "*two* officers" but merely to "officers." Surely it was open to Canada to appoint as many "officers" as it might see fit to complete the task. Nor, in our view, was it necessary for such an "officer" to be given the title of "commissioner." Presumably a lieutenant governor or a surveyor could be considered an "officer" for the purposes of the treaty if part of their duties entailed selecting reserves on behalf of Indian bands. Similarly, Treaty 4 does not stipulate that the only appropriate officers would be those appointed by Order in Council and we suspect that less formal means of appointment would suffice.

In short, while there is no evidence before us to establish that Laird or Wagner were appointed by Order in Council to select reserves for those bands desiring them, we view them as having acted within the scope of their actual or implied authority[188] and thus having had the power

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186 Supplementary Submissions on Behalf of the Government of Canada, May 9, 1997, p. 6.

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

188 G.H.L. Fridman in *Fridman's Law of Agency*, 7th ed. (Toronto: Butterworths Canada, 1996), 122-23, differentiates between implied and apparent authority in these terms:

> The apparent authority must be carefully distinguished from the *implied* authority, in particular that variety of implied authority which has been called *usual* authority, which some agents may possess over and above the express authority granted them by the principal. *Implied* (including in this context *usual*) authority is the authority which in fact the agent possesses as a result of the construction of his contract of agency in the light of business efficacy, or of the normal practices and methods of the trade, business, market, place, or profession, in which the agent is employed. *Apparent* authority, on the other hand, is the authority which, as a result of the operation of the legal doctrine of estoppel, the agent is considered as possessing, in view of the way a reasonable third party would understand the conduct or statements of the principal and the agent. Sometimes this is described as implied authority, on the ground that it is what a third party would expect an agent in such a position to possess in the ordinary course of events. Such use of the terms implied authority and usual authority, it is suggested,

to bind the Crown. Moreover, we see nothing in the subsequent actions of the Crown to suggest that the steps taken by Laird and Wagner were repudiated in any way, and indeed, even if they acted without actual or implied authority, their work appears to have been accepted and ratified by the Government of Canada. When the "surrender for exchange" proposal arose in 1880, Canada's representatives clearly operated under the assumption that the land set apart in 1877 constituted a valid and subsisting reserve.

Ratification is distinguished by G.H.L. Fridman in *Fridman's Law of Agency* from the usual agency relationship where the agent's authority to act is granted *before* the exercise of that authority:

> With "ratification" the position is reversed. What the "agent" does on behalf of the "principal" is done at a time when the relation of principal and agent does not exist. . . . The agent, in fact, has no authority to do what he does at the time he does it. Subsequently, however, the principal, on whose behalf, though without whose authority, the agent has acted, accepts the agent's act, and adopts it, just as if there had been a prior authorisation by the principal to do exactly what the agent has done. . . . [R]atification by the principal does not merely give validity to the agent's unauthorised act as from the date of the ratification: it is antedated so as to take effect from the time of the agent's act. Hence the agent is treated as having been authorised from the outset to act as he did. Ratification is "equivalent to an antecedent authority".[189]

We note that the principle of ratification was applied in the context of a Crown agency relationship in *R. v. Howard*, where the Supreme Court of Canada held that, to the extent that the Treaty Commissioners in that case went beyond their original instructions in negotiating a treaty, the Government of Canada by its subsequent conduct demonstrated that it had been made aware of this fact and ratified the treaty as drafted in any event. The court held that there was no legal or constitutional requirement of an Order in Council to ratify the treaty in question.[190] We find that Canada at least implicitly ratified the reserve at Bird Tail Creek and therefore the First Nation's objection to the 1877 survey on this ground must fail.

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is a source of confusion.

189 G.H.L. Fridman, *Fridman's Law of Agency*, 7th ed. (Toronto: Butterworths Canada, 1996), 84.

190 *R. v. Howard*, [1994] 2 SCR 299 at 300, [1994] 3 CNLR 146.

Waywayseecappo's Authority to Select Reserves

The next major thrust of the First Nation's challenge to the validity of the 1877 survey is that the lands were chosen by an unauthorized representative of the Band, resulting in a selection that is not binding on the First Nation.

First, the First Nation argues that there is uncontradicted evidence that the Gambler was expressly designated by both the Chief and the Band as the member who would select the reserve and advise the surveyor in marking out the reserve boundaries on behalf of the Fort Ellice Band.[191]

Second, the First Nation maintains that Waywayseecappo did not speak for the Fort Ellice Band on the matter of reserve selection; rather, at the meeting in 1875 the Gambler clearly expressed the Band's wishes regarding the location of the reserve. The Commissioners and Wagner all attended this meeting, at which the Gambler was acknowledged to be the "chief Orator" for the Indians, and, according to the First Nation, they must be considered to have known the Gambler and his role in reserve selection.[192] The First Nation submits that this role was confirmed, at least implicitly, by Waywayseecappo's reluctance to select reserve lands until 1877 and the Gambler's objection to the survey performed without his "approval." Later, the Gambler's role was also explicitly confirmed by the Gambler and Waywayseecappo in their remarks at the surrender meeting in 1881. As with its objections to the actions of Laird and Wagner, the First Nation submits that the survey of 1877 was not based on the agreement the First Nation claimed had been made between the authorized agents of the government and the Indians in 1875, but rather on the subsequent actions of individuals who had no authority to bind the principals in question.[193] Therefore, in the First Nation's submission, the survey of 1877 once again did not meet selection requirements of Treaty 4 and should not be considered binding.[194]

Canada takes the position that the evidence does not establish the Gambler's "appointment" to act for the Band in the selection of the reserve, nor does it establish the existence of an agreement

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191 Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 28.

192 Submissions on Behalf of the Gamblers First Nation, October 24, 1996, pp. 8-11.

193 Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 29.

194 Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 29.

between the Gambler and Commissioners Christie and Dickieson on the location of the reserve.[195] Counsel argued that, other than the Gambler's own speech at the surrender meeting in February 1881, there is no other reference to the Gambler being expressly chosen to act on behalf of the Band for the purpose of reserve selection and no evidence to establish that the Crown was aware of such an appointment.[196] The Gambler's speech was "after the fact" since it occurred four years after the reserve was selected and six years after the consultations at Fort Ellice began.[197] According to Canada, Wagner remained unaware of the Gambler's role even following the latter's objection in 1877 to the survey being done without his approval because, in Wagner's report of March 26, 1878, he figured that the reason for the Gambler's resistance was "probably to show me his influence."[198] Although the Gambler was a leading spokesman at the Treaty 4 negotiations, he was not, according to Canada, a Chief or headman and did not sign the treaty.[199] Instead, "Waywayseecappo was the one that [sic] was introduced as Chief . . . [a]nd this is important because this first meeting is really what sets the relationship between the two parties to the Treaty . . . and the continuing of the relationship."[200]

Canada argues that Wagner was turned away by Waywayseecappo on at least three occasions without any indication from the Chief that the Gambler was the person to consult regarding reserve selection.[201] Although the First Nation suggests that it was consistent with Waywayseecappo's status as Chief to delay the survey rather than admit that only the Gambler had the authority to select the land,[202] the proper inference, according to Canada, is that the Chief deferred not because the Gambler had been appointed to select the reserve but because the Band had not yet decided where its reserve

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195 Submissions on Behalf of the Government of Canada, October 29, 1996, p. 15.

196 Submissions on Behalf of the Government of Canada, October 29, 1996, p. 15

197 ICC Transcript, November 6, 1996, p. 192 (François Daigle).

198 Submissions on Behalf of the Government of Canada, October 29, 1996, p. 5.

199 Submissions on Behalf of the Government of Canada, October 29, 1996, p. 3.

200 ICC Transcript, November 6, 1996, pp. 186-87 (François Daigle).

201 ICC Transcript, November 6, 1996, p. 197 (François Daigle).

202 ICC Transcript, November 6, 1996, p. 217 (Paul B. Forsyth).

should be.[203] Because Waywayseecappo as Chief had the "apparent" – if not the actual – authority to express the wishes of the Band regarding reserve selection, Canada submits that his choice of land should be binding on that basis alone. However, any doubt was dispelled, in Canada's view, when the Band ratified the selection, first, by allowing Waywayseecappo to remain as Chief and, second, by voting to retain the remainder of the original reserve at Bird Tail Creek following the surrender for exchange.[204]

In general, the authority of an agent is derived from an agreement between the principal and the agent such that "one, called the *agent*, is considered in law to represent the other, called the *principal*, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property."[205] The Gambler, according to his surrender speech in 1881, as documented by McDonald, was chosen by Waywayseecappo and the Fort Ellice Band to select the Band's reserve, thereby making the Gambler the agent on behalf of the Chief and Band as principals. The absence of further documentary evidence demonstrating the existence of this relationship of principal and agent does not mean that the relationship did not exist. The Gambler's own speech, with which the Chief concurred, established this relationship, and that speech is entitled to weight in and of itself.

Therefore, the mere fact that the Gambler may not have been referred to in other documents as "agent for the Band" does not mean that he was not so appointed. Indeed we find that he was so appointed, at least initially.[206] However, a relationship of principal and agent created by an agreement between the parties may also be terminated either by both parties agreeing to its termination, or by one party unilaterally withdrawing from the original agreement. As G.H.L. Fridman states in *Fridman's Law of Agency*:

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203 ICC Transcript, November 6, 1996, p. 193 (François Daigle).

204 Submissions on Behalf of the Government of Canada, October 29, 1996, p. 16.

205 G.H.L. Fridman, *Fridman's Law of Agency,* 7th ed. (Toronto: Butterworths Canada, 1996), 11.

206 Canada recognizes this, by arguing in the alternative that, if Gambler was appointed agent, he was in fact consulted by the Crown: Submissions of the Government of Canada, October 30, 1996, p. 16.

> A. Agency created by act of parties . . .
>
> **Agreement, revocation and renunciation.** Since the relationship of principal and agent has been created by agreement between them, it follows that the relationship may be determined by both parties agreeing to the discharge of that relationship. It will also be determined if either party withdraws his original agreement. This will occur where the principal gives the agent notice of revocation of the agency or the agent gives the principal notice of renunciation. Any such notice may be given in any form: a deed or document in writing is unnecessary, even if the original authority was contained in a deed.[207]

Even assuming that these common law principles relating to the express or implied authority of agents applied to the internal affairs and governance of an Indian band in 1877 – and we make no finding in this regard – we see nothing in the circumstances of this case that would give rise to an irrevocable agency relationship between Waywayseecappo and the Gambler. That being the case, there is no reason why Waywayseecappo could not have revoked any authorization granted to the Gambler to select the reserve.

Therefore, we find that, by the time he protested to Wagner, the Gambler's authority to select land for the Fort Ellice Band had apparently ceased. Although there apparently was an initial agreement between Waywayseecappo and the Gambler that the latter would select the reserve, Waywayseecappo appeared to have revoked the Gambler's authority to act by directing another member of the Band to accompany Wagner and by allowing the survey to proceed without the Gambler's involvement. The initial acceptance by the Band of the reserve as surveyed in 1877 negates any reasonable argument that the Gambler objected to the location on behalf of the collective Band.

As to the effect of Waywayseecappo's revocation on Canada, we note the importance attached by Fridman to notice of such revocation being given by a principal to a third party:

> Unilateral revocation by the principal will not affect the third party as long as the agent is acting in an authorised or apparently authorised manner, unless and until the third party has notice of the fact that the agent's authority has been terminated. In other words, as long as the principal continues to "hold out" the agent as having authority to act on his behalf, he will be bound by transactions between the agent and

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[207] G.H.L. Fridman, *Fridman's Law of Agency*, 7th ed. (Toronto: Butterworths Canada, 1996), 389.

> third parties and the principal will continue to "hold out" the agent in this way, until the third party has notice that the agency has ended.[208]

We find this reasoning compelling in this case in that Canada, although aware of the Gambler's stature as a spokesman for the Band, was not informed of his role in selecting the reserve and apparently did not learn of it until he spoke at the surrender meeting on February 24, 1881. The proposition that Waywayseecappo was reluctant, for reasons of stature or otherwise, to divulge his lack of authority to select the reserve is pure speculation, and, even if true, should not be allowed to prejudice Canada's position. Canada clearly relied upon the reasonable impression conveyed by Waywayseecappo that he had the authority to bind his people. We conclude that Waywayseecappo had the apparent authority to commit the Band when he advised Wagner regarding land selection in 1877, and Canada's representatives were entitled to rely on the choices made by Waywayseecappo in the exercise of that authority.

Although the First Nation argues that the Gambler immediately objected to the location of the reserve on behalf of the whole Band, we must concur with Canada that, despite the Gambler's complaint, the Band originally accepted the reserve as surveyed. Subsequently, only the Gambler and his followers relocated while a substantial number of the Fort Ellice Band remained at Bird Tail Creek. Although there is evidence that Waywayseecappo and the Gambler made arrangements in 1877 so that those members of the Band who found the reserve unsuitable could go where they thought they could do better,[209] a substantial portion of the "Fort Ellice Band" under Chief Waywayseecappo's leadership apparently accepted the location of the reserve at Bird Tail Creek. And many of those who initially moved to the Silver Creek Reserve, including the Gambler himself, later returned to Bird Tail Creek.

In our view, the facts demonstrate that, even if Waywayseecappo was not authorized to select reserve land or could not revoke the Gambler's authority to do so, the Band, including the Gambler and his followers, ratified Waywayseecappo's selection by residing on the land at Bird Tail Creek following the 1877 survey. The remaining members of the Band further ratified the selection by

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[208] G.H.L. Fridman, *Fridman's Law of Agency*, 7th ed. (Toronto: Butterworths Canada, 1996), 404.

[209] A. MacDonald, Indian Agent, Shone Lake, NWT, to Government of Canada, Dept. of Indian Affairs, Ottawa, Ontario, February 24, 1881 (ICC Documents, pp. 253-54).

electing to stay on the land following the departure of the Gambler and his followers in the wake of the 1881 surrender.

We also regard one other aspect of the surrender meeting to be telling. At no time did the Gambler or any other members of the Band suggest that the land to be given up was not part of their reserve. Indeed, the Gambler's request to give up part of the reserve in exchange for the new reserve at Silver Creek is more an affirmation of the reserve as surveyed by Wagner than a challenge to its validity. We note that "reserve" was defined in the 1876 *Indian Act* as "any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered, and includes all the trees, wood, timber, soil, stone, minerals, metals, or other valuables thereon or therein."[210] The actions of the representatives of both Canada and the Band indicate that, following the survey in 1877, all of them regarded the land at Bird Tail Creek as having been set apart for the use and benefit of the Fort Ellice Band, notwithstanding the objections of the Gambler and his followers. The only reason a surrender became necessary was that, even if some members of the Band were dissatisfied with the configuration of the reserve, all nevertheless believed, as did Canada, that the land had been set apart on their behalf and constituted their reserve.

In conclusion, we find that there was consensus between Canada and the Band on the selection of the reserve at Bird Tail Creek. However, this consensus was only achieved in 1877 following the survey by Wagner, at which time the Band signalled its acceptance of the reserve as surveyed by residing on and using the land for its collective benefit. No consensus had yet been established in 1875 at the time of the Band's preliminary designation of the general location in which it wanted its land. In our view, the 1877 survey was conducted in accordance with the requirements of Treaty 4 and was accepted by both Canada and the Band. Finally, there is no evidence before us that the selection and survey at Bird Tail Creek resulted in some manifest unfairness to the Gambler's Nation. We therefore conclude that the date of first survey for entitlement calculation purposes should be 1877 and not 1883.

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[210] *Indian Act*, SC 1876, c. 18, s. 3(6).

ISSUE 2 IMPACT OF THE 1881 SURRENDER FOR EXCHANGE

To what extent, if at all, did the "surrender for exchange" in 1881 affect the treaty land entitlement of the claimants?

It will be recalled that the surrender for exchange in 1881 arose as a result of the dissatisfaction of the Gambler and his followers with the reserve at Bird Tail Creek and the manner in which it was surveyed. In 1881, Indian Commissioner Edgar Dewdney and the Deputy Superintendent General of Indian Affairs approved the surrender of 32 square miles of the Bird Tail Creek Reserve by the Fort Ellice Band, in exchange for an equivalent area for the Gambler Band at Silver Creek. Although counsel for the First Nation stated that the surrender for exchange had "no effect" on the First Nation's treaty land entitlement,[211] it is nevertheless the First Nation's position that the circumstances surrounding the surrender and the resulting surveys in 1883 support the contention that neither Canada nor the Band took the view that the survey of 1877 had fulfilled the treaty land entitlement of the Gambler and his followers.

The First Nation contends that these circumstances demonstrate that Canada did not meet the selection requirements of Treaty 4 in performing the 1877 survey. First, the Order in Council of May 30, 1879, appointing Edgar Dewdney as the Indian Commissioner for Treaties 4, 6, and 7 acknowledged Canada's failure to fulfill its treaty obligations and created Dewdney's position for the purpose of carrying out "in good faith and to the letter all Treaty Covenants."[212] Second, following the surrender for exchange, A.W. Ponton was instructed in April 1883 to resurvey Waywayseecappo's reserve and to survey a number of other reserves for Treaty 4 bands, including the new reserve for the Gambler. His instructions read in part:

> I have the honor by direction of the Honourable the Indian Commissioner to instruct you to proceed with as little delay as possible to Fort Ellice and there to report yourself to Mr. Indian Agent Herchmer for the purposes of laying out Reserves for Indians under Treaty No. 4. . . .
>
> The extent of the several Reserves which you may have to lay out will be governed by the number of souls in the Band in the manner fixed by the Treaty that

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211 ICC Transcript, November 6, 1996, p. 150 (Paul B. Forsyth).

212 Order in Council, May 30, 1879 (ICC Documents, pp. 166-67).

> is to say being one square mile for each family of five souls in each Band, or in that proportion.[213]

The First Nation argues that these instructions are important as they directed Ponton to fulfill the terms of Treaty 4 in his surveys for bands in that area. "Clearly," argues counsel, "the inference is that Canada itself in 1883 did not regard the earlier surveys as having laid out Reserves for Indians pursuant to the requirements of Treaty 4 in the Fort Ellice area"[214] and desired that the new survey work should do so.

By contrast, as we have already seen, it is Canada's position that the proper inference to be drawn from the 1881 surrender is that both Canada and the Band considered that the survey of 1877 had laid out a reserve for the Band, failing which there would have been no requirement for a surrender. Canada further argues that the 1883 resurvey of Lizard Point IR 62 merely identified the remaining land left after the 1881 surrender.[215] It is therefore Canada's position that the 1881 "surrender for exchange" does not affect the proposition that treaty land entitlement should be based on the 1877 survey of Bird Tail Creek.[216]

With respect to counsel for the First Nation, it is our view that the excerpts from Ponton's instructions have been taken out of context, or, more properly, have been given a meaning that is not warranted when all the surrounding circumstances are taken into account. It was clearly contemplated that Ponton would be surveying "several" reserves in the Treaty 4 area – including reserves for bands that had not yet received treaty land – and the general instructions given by Nelson to survey in accordance with the treaty formula of one square mile per family of five would obviously apply in such circumstances. However, Nelson also provided Ponton with the following instructions specific to the reserves for Waywayseecappo and the Gambler:

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213 John C. Nelson, Dominion Land Surveyor, to A.W. Ponton, Dominion Land Surveyor, April 1, 1883, NA, RG 10, vol. 7770, file 27117-3, reel C-12056 (ICC Documents, pp. 346-47).

214 Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 31.

215 Submissions on Behalf of the Government of Canada, October 29, 1996, p. 20.

216 Submissions on Behalf of the Government of Canada, October 29, 1996, p. 20.

> You will confer specially with Mr. Agent Herchmer and receive instructions in respect to marking out the lines between the surrendered and the unsurrendered portions of the Reserve for the Band of the Way-way-see-cap.
>
> After the completion of the survey of the Way-way-see-cap reserve you will proceed to the reserve projected for the Gamblers Band and define its Boundaries . . .[217]

There is no indication in these instructions that Ponton was to calculate the treaty land entitlement for Waywayseecappo and the Gambler or to do anything other than identify the areas to be allocated to each in accordance with the terms of the surrender for exchange in 1881. Moreover, there is other evidence which demonstrates that, for all purposes, Canada believed that it had established a reserve for the Fort Ellice Band in 1877. As submitted by Canada, the very fact that a surrender was taken in 1881 for the exchange evidences a belief on the part of the government that the reserve already existed.

It is our view that in 1881 the parties did not intend to survey a new reserve but simply decided to surrender a specific portion of the existing reserve and to provide in exchange new land in the same proportion at Silver Creek to satisfy the Gambler and his people. The fact of the surrender for exchange does not give rise to the implication that there had always been two separate bands, or that the Gambler and his followers were seeking to have their new reserve set aside in accordance with the treaty formula. Rather, it is our conclusion that the surrender for exchange of 1881 was simply the result of a Band split and a decision to divide the existing land entitlement between the two factions. As the Gambler stated in his speech at the surrender meeting:

> If we will be granted what we are asking for; *and I do not like to be refused by the Band* what I think will be allowed by the Government, *so if it will suit the Chief and the members of the Band in Council*, we will give up to the Government thirty-two (32) square miles of the south end of *our reserve.*[218]

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[217] John C. Nelson, Dominion Land Surveyor, to A.W. Ponton, Dominion Land Surveyor, April 1, 1883, NA, RG 10, vol. 7770, file 27117-3, reel C-12056 (ICC Documents, p. 348).

[218] A. McDonald, Indian Agent, Treaty 4, "Proceedings of a Council of Way-way-see-cappo's Band convened by the Chief and held in the Reserve, Bird Tail Creek," February 24, 1881 (ICC Documents, p. 255). Emphasis added.

It can be seen that the Gambler himself recognized that only one band existed at the time, and that the land at Bird Tail Creek constituted the Band's reserve. It is important to observe that both the First Nation and Canada intended to use the amount of land surrendered at Bird Tail Creek as the basis for determining the area of the reserve at Silver Creek; the evidence simply does not support the contention that the parties intended to use the treaty formula as the basis for the survey of these respective reserves. We therefore conclude that the surrender for exchange in 1881 did not in any way affect the basis upon which the treaty land entitlement of the Gamblers First Nation should be calculated. Accordingly, the appropriate date of first survey for the Gambler and his followers remains 1877 when they were part of the collective membership of the Fort Ellice Band under Chief Waywayseecappo.

On a final note, however, we wish to emphasize that our findings regarding the First Nation's date of first survey should not be taken as necessarily suggesting that we believe the First Nation has an adequate land base for its current needs. The oral evidence presented to us on November 5, 1996, made it abundantly clear that the First Nation is struggling to deal with a limited and inadequate land base, without even sufficient room for gardens or an adequate playground area for children. However, we understand that there are at present claims being advanced by the First Nation with respect to the discrepancy in the number of sections of land – 30 or 32 – to be surrendered for exchange in 1881, and with respect to the validity of later surrenders of reserve land by the First Nation. Although we are not prepared to rule on the merits of these other claims, we recognize that the First Nation, if it can successfully establish its position in those claims, might alleviate to some degree its current difficulty. Our sympathy for the First Nation's current situation must be tempered by the requirement that, with respect to the treaty land entitlement claim at present before us, we must adhere to existing principles involved in determining whether Canada owes the First Nation an outstanding lawful obligation.

PART V

RECOMMENDATION

Having concluded that the Gamblers First Nation has failed to establish that its date of first survey was 1883, and that the 1881 surrender for exchange had no impact on the basis for calculating the First Nation's treaty land entitlement, the Commission recommends:

> **That the Gamblers First Nation's outstanding treaty land entitlement, if any, should be calculated based on an 1877 date of first survey.**

FOR THE INDIAN CLAIMS COMMISSION

Daniel J. Bellegarde Commission Co-Chair	Roger J. Augustine Commissioner	Carole T. Corcoran Commissioner

October 22, 1998

APPENDIX A

GAMBLERS FIRST NATION TREATY LAND ENTITLEMENT INQUIRY

1 Planning conference — Ottawa, June 14, 1996

2 Community session — Binscarth, Manitoba, November 5, 1996

The Commission conducted a community session at the Binscarth Community Club at which the following members of the Gamblers First Nation testified: Chief Louis Tanner, Patrick Tanner, James Tanner, George Tanner, and Donna Tanner.

3 Legal argument — Binscarth, Manitoba, November 6, 1996

4 Content of formal record

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

- the documentary record (3 volumes of documents and annotated index, which were cumulatively marked as Exhibit 1)
- 11 other exhibits tendered during the inquiry, marked as Exhibits 2 to 12
- combined transcript of community session and oral submissions (1 volume)
- written submission of counsel for the Gamblers First Nation, dated October 24, 1996
- written submission and supplementary submission of counsel for Canada, dated October 29, 1996, and May 9, 1997, respectively

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