

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *West Moberly First Nations v. British Columbia*,
2017 BCSC 1700

Date: 20170925
Docket: 05-3802
Registry: Victoria

Between:

**West Moberly First Nations, Halfway River First Nation, Salteau First Nations,
Prophet River First Nation, and Doig River First Nation**

Plaintiffs

And:

**Her Majesty the Queen in Right of British Columbia, the Attorney General of
Canada, the Kaska Dena Council and the McLeod Lake Indian Band**

Defendants

And:

**Tahltan Central Government, Takla Lake First Nation, and
Tsay Keh Dene First Nation**

Intervenors

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

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First Nation; Prophet River First Nation;
Salteau First Nations; West Moberly
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Place and Date of Trial:

Victoria, B.C.
October 14-16, 20-21, 2014;
October 26-29, 2015;
November 2-6, 9-10, 16-18, 2015;
November 23-26 and 30, 2015;
December 1-2, 8-10, 14-16, 2015;
January 4-6, 11-14, 18-21, 2016;
January 25-28; 2016;
February 1-4, 2016;
November 14-18, 21-25, 2016

Place and Date of Judgment:

Victoria, B.C.
September 25, 2017

[1] The issue in this action is the location of the western boundary of Treaty 8.

[2] In 1899 Canada signed Treaty 8 at Lesser Slave Lake with a group of aboriginal people (as referred to in the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, to refer to Indian or Métis people involved in the treaty process). In these reasons, I will use the phrase “aboriginal people” and its variants except where context requires otherwise. From time to time, less palatable labels will unavoidably arise from historical documents. Where I refer to “Indian bands,” they are as defined in the *Indian Act*, R.S.C. 1985, c. I-5. The treaty was one of what would become eleven “numbered treaties” made between Canada and various aboriginal groups from 1871 to 1921. Representing Canada were three treaty commissioners: David Laird, J.A.J. McKenna and J.H. Ross. In addition to the signatories of 1899, various other aboriginal groups joined Treaty 8 by adhesion over the years, including the West Moberly First Nations plaintiffs’ ancestors in 1914 (*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at para. 20).

[3] From time to time, starting in late 1909, some have questioned the location of the western boundary of the area included in Treaty 8. Such questions were not seriously pursued until the McLeod Lake Indian Band sought to adhere to Treaty 8 in the mid-1980s and brought an action to enforce its claimed right to do so. McLeod Lake Indian Band, Canada and British Columbia settled that action by agreement in 2000 (exhibit 282, document 2688). Settlement of the action brought about McLeod Lake Indian Band’s adhesion without resolving the location of the western boundary of Treaty 8.

[4] For the reasons that follow, I declare that the western boundary of Treaty 8 is the height of land along the continental divide between the Arctic and Pacific watersheds (the Arctic-Pacific divide).

[5] The plaintiffs are Indian bands whose antecedents adhered to Treaty 8. They assert that the western boundary of the treaty is the height of land dividing the waters that flow to the Arctic Ocean from the waters that flow to the Pacific Ocean.

The plaintiffs find support from the defendants Canada and the McLeod Lake Indian Band, which adhered to Treaty 8 as a result of the settlement referred to above. These parties, led by the plaintiffs, take the position that the western boundary (at least north of 54° N) coincides with the Arctic-Pacific divide, and follows that divide or height of land to where it crosses British Columbia's northern boundary – 60° N at approximately 131° W, according to Dr. Robert Galois, an expert witness qualified to give opinion on the geography and cartographic history of the cordillera of the Rocky Mountains and adjacent lands (November 2, 2015, at 37, ll. 37-44).

[6] The remaining defendants -- British Columbia and the Kaska Dena Council -- take the position that the boundary is some distance to the east of the Arctic-Pacific divide, and that it runs instead along what we now call the Rocky Mountains. These defendants are supported by the intervenors: Tsay Keh Dene First Nation, Takla Lake First Nation, and Tahltan Central Government. Neither the defendant Kaska Dena Council nor the intervenors are Treaty 8 nations.

[7] A goal of treaty interpretation is to search for the understanding and common intention of both parties to a treaty: *R. v. Marshall*, [1990] 3 S.C.R. 456 at para. 78. In a case such as this, where documents run into the thousands of pages, a court must guard against being overwhelmed by the evidence of that intention from only one side of the bargain.

[8] This case is unusual within the body of decisions on treaty interpretation: here, federal Crown (a signatory to the treaty), a defendant, agrees with the aboriginal adherents who are the plaintiffs in this trial as to the location of the western boundary of Treaty 8. Therefore the contracting parties, as both "sides" of the bargain, at least as represented here, agree on the treaty's interpretation.

[9] But as noted above, Crown in its provincial aspect takes a different view. The Crown in its provincial aspect was not a signatory to the treaty but as one aspect of the Crown is nonetheless a party to the treaty.

[10] The parties' post-treaty conduct is a factor relevant to analysis of the treaty's historical background (*R. v. Sioui*, [1990] 1 S.C.R. 1025 at para. 46); conduct closer in time to the inception of the treaty is likely most indicative of intent (*Sioui* at para. 88). Where there is consistent conduct including that of successors, the court may consider the entire course of post-treaty conduct for intention (*Lac La Ronge Indian Band v. Canada*, 1999 SKQB 218 at para. 51, 54, upheld at 2001 SKCA 109 at 35, 103).

[11] Pursuant to this court's order of August 31, 2007, all signatories and adherents to Treaty 8 have been given notice of this action. None has appeared to take issue with the position shared by the plaintiffs, Canada and the McLeod Lake Indian Band as to the location of the disputed boundary.

[12] This case is decidedly not about aboriginal rights, title, or interests that existed before the treaty. It is not about what aboriginal signatories or adherents surrendered or gave up by entering treaty. It is not about what obligations the Crown assumed when it entered the treaty, nor does it have an impact on or purport to interpret treaty provisions other than those setting out the treaty boundary.

[13] To clear up any possible uncertainty, I accept as admissible the documents contained in exhibit 282. The parties agreed on the documents' admissibility; the documents' provenance was not in question; indeed, the document agreement confirms this (ex. 1).

[14] The metes and bounds description set out in Treaty 8 giving rise to the issue to be decided in this action reads (underlining added):

AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say:

Commencing at the source of the main branch of the Red Deer River in Alberta, thence due west to the central range of the Rocky Mountains, thence northwesterly along the said range to the point where it intersects the 60th parallel of north latitude, thence east along said parallel to the point where it intersects Hay River, thence northeasterly down said river to the south shore of Great Slave Lake, thence along the said shore northeasterly (and including such rights to the islands in said lakes as the Indians mentioned in the treaty may possess), and thence easterly and northeasterly along the south shores of Christie's Bay and McLeod's Bay to old Fort Reliance near the mouth of Lockhart's River, thence southeasterly in a straight line to and including Black Lake, thence southwesterly up the stream from Cree Lake, thence including said lake southwesterly along the height of land between the Athabasca and Churchill Rivers to where it intersects the northern boundary of Treaty Six, and along the said boundary easterly, northerly and southwesterly, to the place of commencement.

(ex. 282, doc. 1193 at 3-4)

[15] A continental divide stretches up the western length of North America. Within Canada, its southern portion starts at the Canada-United States boundary, or at the 49° N parallel. There the continental divide separates water flowing ultimately to Hudson Bay to the northeast from water flowing ultimately west to the Pacific Ocean. This southern portion of the continental divide in Canada is located in the Rocky Mountains. Somewhere between 52° N and 53° N, the water on the east side of the divide begins to flow to the Arctic Ocean rather than to Hudson Bay. At Mt. Barton (54° 30' N), this continental divide separates from the Rocky Mountains and begins a more westerly and ultimately northwesterly track, whereas the Rocky Mountains continue northwesterly. As will be seen, the southern Canadian portion of the continental divide is also the boundary between British Columbia and Alberta. At Intersection Mountain (53° 47' N), the boundary separating British Columbia and Alberta stops following the Rocky Mountains and instead strikes due north along 120° W.

[16] After separating from the continental divide, the Rocky Mountains continue in their own northwesterly course to the Peace River, then beyond the Peace River to the Liard Plateau, south of the Liard River. There the Rocky Mountains effectively come to an end some kilometres short of the northern boundary of British Columbia at the 60° N parallel. That is the current state of geographical knowledge. What is

important to the resolution of the issue presented in this case is the state of geographical understanding in the late nineteenth century, as it may have influenced those who drafted the metes and bounds description of the western boundary of Treaty 8.

[17] Both knowledge and nomenclature developed over the years. Along the way, there have been some inconsistent understandings of what constituted the Rocky Mountains, where they were located, and their northerly extent. The feature we now call the Rocky Mountains was not always called so even by settlers, and the name has at times been applied to other mountainous features in British Columbia. These inconsistencies have added to the difficulty in interpreting Treaty 8 and have lent support to various arguments in this action.

[18] The Rocky Mountains began to assume importance as a boundary after the war of 1812 between the United Kingdom and the United States ended with the Treaty of Ghent. The Convention between the two countries extended the northern boundary of the United States along 49° N from “the Lake of the Woods to the Stony Mountains” (Galois report, ex. 15 at 8). West of the mountains, an area called the “Oregon Country” was by agreement to be open equally to both the United Kingdom and the United States for ten years, a time period which was later extended. There was a competing claim to the northern Pacific coast advanced by Russia. By treaty between the United Kingdom and Russia in 1825, Russia’s territory extended no further south than 54° 40’ N (Galois report, ex. 15 at 8). The Oregon Treaty of 1846 extended the United States boundary between the United States and the United Kingdom from the mountains further west to the Pacific coast, with Vancouver Island agreed to be British territory: *Oregon Boundary Treaty, 1846*, 34 B.S.P. 14.

[19] In 1858, imperial statute created the colony of British Columbia: *An Act to Provide for the Government of British Columbia, 1858* (U.K.), 21 & 22 Vict., c. 99. The statute stated the boundaries of the new colony to be “to the East by the Main Chain of the *Rocky Mountains*,” s. 1 (italics in original) (ex. 282, doc. 0091).

[20] John Arrowsmith was accepted by expert witnesses in this trial as a reputable nineteenth-century English mapmaker. Arrowsmith published his map “The Provinces of British Columbia & Vancouver Island” in 1859 (ex. 35). This map showed the eastern boundary of British Columbia following the Rocky Mountains past the point where the Arctic-Pacific divide splits off to the west, at about 54° 40’ N latitude and 120° W longitude, with the boundary continuing to the Peace River, then following the Peace River west to the Finlay River, then following the Finlay River around the north of the Peak Mountains. British Columbia’s eastern boundary was described in contemporary legislation as “by the Main Chain of the *Rocky Mountains*.” The map in exhibit 35 shows notations for “Lands Height” in four locations (circled in red by Dr. Galois) after leaving the Rocky Mountains. The “Lands Height” is shown running south of what the map shows as the “Peace R.” (now known as the Parsnip River as a tributary), south of “McLeod Ft. & Lake,” and then running between the source of the Finlay River and Bear River, that fed into a river labelled “Simpson or Babine R.” This 1859 Arrowsmith map gives a reliable picture of the extent of settler knowledge of the Arctic-Pacific divide in the territory in question here around 1858.

[21] In 1866, imperial statute merged the colonies of British Columbia and Vancouver Island. This statute dropped the “Main Chain” modifier and described the newly merged colony’s territory as “bounded ... to the East from the Boundary of the United States Northwards by the Rocky Mountains”: *British Columbia Act (An Act for the Union of the Colony of Vancouver Island with the Colony of British Columbia, 1866* (U.K.), 29 & 30 Vict., c. 67, s. 7.

[22] In March 1867, Parliament united the provinces of Canada, Nova Scotia and New Brunswick under the name Canada by *The Constitution Act, 1867* (U.K.), 30 & 31 Vict. c. 3, reprinted in R.S.C. 1985, App. II, No. 5. That imperial statute contemplated Canadian expansion. Its recitals provided that it was “expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America.” Section 146 contemplated that Rupert’s Land and the North-western Territory, or either of them, might be admitted to Canada (“the Union”) by Order in

Council of the United Kingdom. The northern and western boundaries of the newly-created Canada did not at first go beyond a relatively narrow band around the top of Lake Superior, land drained by rivers flowing into the Great Lakes and eventually the St. Lawrence River. The land drained by rivers flowing into Hudson Bay had been under the control of the Hudson's Bay Company by virtue of the Company's 1670 Royal Charter. This granted the "Company of Adventurers" exclusive rights to "Trade and Traffick" over land that drained into Hudson Bay. It also granted the company "power and command" over land where its forts were located in the territory. The charter named the area granted to the Hudson's Bay Company Rupert's Land.

[23] The Hudson's Bay Company surrendered Rupert's Land to the imperial Crown by the *Rupert's Land Act, 1868* (U.K.), 31 & 32 Vict., c. 105. In 1870 Canada in turn acquired Rupert's Land and the North-Western Territory by the *Rupert's Land and North-Western Territory Order (Order of Her Majesty in Council Admitting Rupert's Land and the North-Western Territory into the Union)* June 23, 1870. By acquiring the North-Western Territory, Canada gained land northwest of Rupert's Land -- land drained by rivers flowing to the Arctic Ocean. A rough approximation of the divide between Rupert's Land and the North-Western Territory in present-day Alberta would lie somewhere between the North Saskatchewan and Athabasca Rivers. By that imperial order of June 23, 1870, Canada moved its boundary significantly northward from the watershed of the Great Lakes and westward toward the eastern boundary of British Columbia.

[24] British Columbia's eastern boundary would itself become a subject of controversy in the 1880s, to be decided by the opinion of Lieutenant-Colonel D.R. Cameron.

[25] Canada's new territory was populated by aboriginal people, a few European trappers and settlers, and people descended from both aboriginal and European occupants. Canada's approach to dealing with aboriginal inhabitants and those descended from mixed parentage in its newly-acquired territory derived from the British approach. This approach followed the Royal Proclamation issued by King

George III in 1763 (*Royal Proclamation, 1763*, R.S.C., 1985, App. II, No. 1). I agree with this summary set out in the report of Gwynneth Jones, an expert witness qualified to give opinion on the historical interpretation of historical documents:

This Proclamation “reserved” the land beyond the narrow boundaries of the organized British colonies “for the use of the...Indians” and forbade the survey or patent of those lands prior to a cession or sale from Indian people to the Crown.

(Jones report, ex. 3 at 27)

[26] The Royal Proclamation had several effects. One effect was that the extensive area ceded by France to Britain at the Treaty of Paris -- an area much greater in size than the Thirteen Colonies and stretching beyond them to the north and west -- was reserved to the aboriginal people who inhabited those lands. Settlers could only apply to gain interest in those lands if the aboriginal inhabitants in possession first surrendered or ceded their interest through treaty with the imperial Crown.

[27] In the wake of the Royal Proclamation, the Crown developed a pattern of treating with aboriginal people in order to obtain surrender of their rights over, and interests in, their land. Upon Confederation, Canada continued with this pattern through eleven numbered treaties with various aboriginal groups in northwestern Ontario and across the prairies.

[28] In 1871, again as contemplated by the *Constitution Act*, s. 146, an imperial order now known as the Terms of Union joined together British Columbia and Canada: *British Columbia Terms of Union*, R.S.C. 1985, App. II, No. 10.

[29] While Canada’s treaties with aboriginal peoples derive from the precepts of the Royal Proclamation, the genesis of British Columbia’s approach to dealing with aboriginal people is not so clear. Ms. Jones suggests that British Columbia’s approach developed through James Douglas, Chief Factor for the Hudson’s Bay Company and Governor first of the Colony of Vancouver Island and later of the two Colonies of Vancouver Island and British Columbia (Jones report, ex. 3 at 27-28). The Terms of Union, article 13, suggests that British Columbia and Canada

recognized a difference between their respective approaches to dealing with aboriginal peoples and land:

13. The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.

[30] Between Ontario and the Rocky Mountains, Canada controlled a great deal of arable land. Canada could promise reserves from this land to aboriginal people with whom it entered into treaty. Treaty 6 took in much of what is now central Saskatchewan and Alberta. To the south, Treaty 7 covered southwestern Alberta. Both treaties provided for reserves of one square mile for each family of five, with adjustments up or down for larger or smaller families. Both treaties also required Canada to pay differing amounts to chiefs, subordinates (Treaty 6) or minor chiefs (Treaty 7) and band members annually, and to provide farm equipment and livestock to those aboriginal signatories who took up or continued farming.

[31] Canada was alert to the cost of treating with its aboriginal people, and would defer taking on financial obligations through treaties until it saw an immediate need for territory inhabited by aboriginal people, whether for settlement or economic exploitation. I rely here on the opinion of Ms. Jones as well as that of Robin Brownlie, an expert witness qualified to opine on history including the history of aboriginal peoples and their relationship with governments in Canada (Jones report, ex. 3 at 41; Brownlie report, ex. 89 at 23).

[32] The other numbered treaty that is material to this action is Treaty 11, made in 1921 and explicitly contiguous with the northern boundary of Treaty 8.

[33] Canada encountered a jurisdictional dispute when Ontario challenged Canada's interest in lands ceded in Treaty 3 in northwestern Ontario. The Privy Council decision held that Crown in its provincial aspect took benefit of the surrender of lands within provincial boundaries: *St. Catherine's Milling and Lumber Company v. The Queen*, [1888] UKPC 70 at 12-13.

[34] In the late 1880s and into 1890 Canada contemplated treating with Indians inhabiting territory north of Treaty 6 and Treaty 7. The contemplated area included territory north of 60° N. This parallel marked British Columbia's northern boundary.

[35] While the prospect of this further treaty was still under consideration, William Austin, who was the Clerk in Charge of the Technical Branch of the Department of Indian Affairs, suggested that the treaty take in an area extending north from what is now Saskatchewan and Alberta and into what is now the Northwest Territories, to 63° N, and westerly along the parallel at 63° N "to the summit of a Northern spur of the Rocky Mountains which divides the waters of the MacKenzie River from those of the Yukon River" (ex. 282, doc. 0374 at 1). The proposed boundary would follow that spur south to 60° N. There it would turn east along that parallel to the meridian at 120° W, and there turn south to follow the boundary between British Columbia and Alberta.

[36] This language ("summit of a Northern Spur of the Rocky Mountains which divides ...") was used again in 1891 by Hayter Reed, then Indian Commissioner for the Northwest Territories (ex. 282, doc. 0387 at 1). These descriptions by both Mr. Austin and Mr. Reed indicate how at least some federal officials in the early 1890s understood topography in and beyond northern British Columbia. Their descriptions also demonstrate reliance on a major watershed or divide for a proposed treaty boundary.

[37] Other contemporary correspondence about the proposed treaty shows reluctance to extend the treaty into British Columbia's provincial territory. In 1890, Mr. Vankoughnet (federal Deputy Superintendent of Indian Affairs) corresponded with Mr. Dewdney (Minister of Indian Affairs) concerning the contemplated treaty. Mr. Dewdney asked Mr. Vankoughnet what extent of country he thought should be included. Mr. Vankoughnet reminded Mr. Dewdney that "British Columbia's northern limit is also the 60th degree of Latitude and its eastern limit the 120th degree of Longitude. We shall, of course have to exclude this from the Treaty" (ex. 282, doc. 0367). This indicates some reluctance on the part of Dominion officials to

extend treaty areas into provincial territory. Mr. Vankoughnet recommended that the proposed treaty area extend northward as far as 65° N. However, Dominion officials did not see a need at that time to obtain aboriginal surrender of interests as white settlers were not imminently moving into that territory. Canada abandoned the idea of further treaty covering northern and western territory for several years.

[38] Contemplation of treaties with resident aboriginal people resumed with the discovery of gold in the Klondike in 1896. By 1897 a large number of miners were trying to reach the Klondike. The more established routes to the Klondike crossed American territory by the Alaska panhandle. Alternately, some chose to travel overland to the Klondike through what was then Athabasca and the Northwest Territories, a region that took in much of current northern Alberta and Saskatchewan. Of those, many crossed into northern British Columbia while looking for a route to the Klondike gold fields. Canadian merchants vied for the opportunity to sell equipment and provisions to the gold-seekers. That in turn lent impetus to a campaign to develop one or more “all-Canadian routes” to the gold fields as opposed to alternative routes which involved crossing American territory by the Alaska panhandle.

[39] The Member of Parliament for Edmonton insisted on an all-Canadian route to the Klondike and found the attention of Canadian officials. They instructed Inspector Moodie of the Northwest Mounted Police to explore and map an overland route from Edmonton to Pelly River in the Yukon.

[40] The rush for gold had the effect of focusing attention on northern British Columbia as well as northern territory under Dominion jurisdiction. The Commissioner of the North West Mounted Police, L.W. Herchmer, received reports from various sources about potential difficulties between aboriginal people and increasing numbers of white trappers, fur traders and transient gold seekers. In late 1897 Commissioner Herchmer wrote to Fred White, Comptroller of the North West Mounted Police in Ottawa:

I have the honour to draw your attention to the advisability of the Government taking some immediate steps towards arranging with the Indians not under

Treaty, occupying the proposed line of route from Edmonton to Pelly River. These Indians although few in number, are said to be very turbulent, and are liable to give very serious trouble when isolated parties of miners and travellers interfere with what they consider their vested rights.

At the present time the Half-breeds of Lesser Slave Lake are dissatisfied with the presence of the Police in that District, and the numerous parties of Americans and others between that point and Peace River will not improve the situation. The Beaver Indians of Peace River and the Nelson are said to be inclined to be troublesome at all times, and so also are the Sicamies and Nahamies, and the Half-breeds are sure to influence them.

(ex. 282, doc. 0667)

[41] Mr. White forwarded Commissioner Herchmer's information to Deputy Superintendent General for Indian Affairs Clifford Sifton. Mr. White's letter is typed but bears handwritten interlineation (shown here by added underlining):

I transmit, herewith, for the consideration of the Hon. the Superintendent General of Indian Affairs, copy of a letter from the Commissioner of the Mounted Police, dated 2nd instant, respecting Indians not now under Treaty. who occupy the country westward from Edmonton to Pelly River.

(ex. 282, doc. 0673)

[42] Mr. Sifton was also Minister of the Interior. By mid-December 1897, Minister Sifton directed that inquiries be made of Amédée Forget, Indian Commissioner of the Northwest Territories. On January 12, 1898, Mr. Forget sent back recommendations. He prefaced his report by saying he had some difficulty arriving at a satisfactory conclusion as to the territory that should be included in a treaty, and as to the nature of terms that should be offered.

[43] After mentioning tracts that were already partially occupied by white people, either as miners or traders, Mr. Forget stated:

With regard to the attitude of the Indians of the Lower Peace and Nelson Rivers and the Nahanni and Sicanie tribes, referred to by Commissioner Herchmer, I have no information and am therefore not in position to speak, but as their territory is already the scene of considerable activity in mining matters and as Commissioner Herchmer has through recent Police patrol throughout the district occupied by these Indians, doubtless obtained accounts and reliable information, I can only conclude that the same necessity for extinguishment of the native title exists there as at Lesser Slave Lake and vicinity. Beyond these points however I do not consider that the Government would be justified in undertaking the negotiation of treaties which would involve very heavy outlay for comparatively inadequate returns in-so-

far as the value of territory to be ceded, or the rights of the Indian owners, are concerned.

(ex. 214 at 2)

[44] Mr. Forget then recommended that Canada negotiate treaty for an area “confined to the Provisional District of Athabasca and North Western British Columbia, marked ‘A’ and ‘B’ on the accompanying map.” Ms. Jones considers the reference to North Western British Columbia to be an error, and that Mr. Forget meant to refer to North Eastern British Columbia instead. If it were an error, it is repeated on the fourth page of the letter as “N.W. B.C.” and in Mr. Forget’s later list of probable population, included with his letter of January 26, 1898, where he shows Fort Nelson and Fort Halkett in what he continues to call North West British Columbia (ex. 282, doc. 0748 at 8-9). Given that Mr. Forget became the Lieutenant Governor of the North-West Territories in 1899, it is difficult to accept that he made, and repeated, the mistake Ms. Jones attributes to him. Moreover, to his January 12, 1898, report, Mr. Forget attached a map which showed Fort Halkett just west of 126° W and Fort Nelson at approximately 123° W (ex. 216).

[45] Mr. Forget’s map shows the northern limit of Treaty 6. His map suggests an eastern limit of the proposed treaty area (which he has marked “A”) that would follow the Athabasca River to Athabasca Lake, then the Slave River north to just short of 60° N. Mr. Forget has marked with a “B” an area of northeastern British Columbia that is bordered on the east by 120° W and on the north by British Columbia’s northern boundary along 60° N -- but he placed no markings on his map to suggest a western boundary of the proposed treaty. His map does show, squarely in the area where he has placed his “B,” what appear to be the main tributaries of the Peace River, and north of that the Liard and Dease Rivers, these details suggesting at least a consideration of a treaty area west of the Rocky Mountains. This is that map (ex. 216):



[46] In April 1898, Mr. Forget reported to the Department of Indian Affairs:

... I have been enabled to compile a more accurate estimate of the number of Indians in the territory to be ceded within the Provisional District of Athabasca and what is now termed the North West Territory, including a small number residing in Northern British Columbia in the neighbourhood of Ft. Halkett and the district about the abandoned Ft. Nelson

(ex. 282, doc. 0797 at 2)

[47] In April 1898, Minister Sifton also requested a map which he wished to use in the House of Commons to show: ceded territory; proposed territory to be treated for; and territory to be left unceded (ex. 282, doc. 0800 at 1). This conclusion is based

on my own reading of the source document, including a handwritten note across the face of the first page, and my agreement with Ms. Jones' transcription of the notations on that first page (Jones report, ex. 3 at 83).

[48] In early May 1898, a surveyor with the Lands and Timber Branch named Samuel Bray prepared a brief document estimating the approximate area of the territory proposed to be ceded as 284,100 square miles. This included 52,300 square miles in the North West Territories and 100,000 square miles in the British Columbia Peace River District. The Athabasca District was listed separately at 99,200 square miles and Lesser Slave Lake District at 32,600 square miles. Mr. Bray noted that the British Columbia territory "includes a large tract watered by the River Aux Liards" (ex. 282, doc. 0813).

[49] Minister Sifton incorporated some of what Commissioner Herchmer had reported, as well as portions of two of Mr. Forget's letters, into a report to the Privy Council recommending negotiation of Treaty 8.

[50] Minister Sifton's report was adopted by the Privy Council on June 27, 1898, as Order-in-Council (OIC) 1703 (ex. 282, doc. 0839). Minister Sifton's report thereby became the basis on which to issue notice of intent to enter into negotiations leading to Treaty 8 and subsequently to enter into those negotiations.

[51] OIC 1703 incorporated two recommendations made by Minister Sifton that treaty commissioners be given discretion. The commissioners' first discretionary power was "both as to the annuities to be paid to and the reservations of land to be set apart for the Indians" (4). The second discretionary power related to territory:

The Minister also considers that, as to the territory to be ceded, the Commissioners will likewise have to be given discretionary power, for its extent will depend upon the conditions which are found to exist as a consequence of the inroads of white population: but he is of opinion that the territory to be treated for may in a general way be restricted to the Provisional District of Athabasca and such of the country adjacent thereto as the Commissioners may deem it expedient to include within the treaty.

[52] In the summer of 1898, Minister Sifton in his dual capacity as Minister of the Interior and Superintendent General of Indian Affairs sent out printed notices stating (ex. 193):

All Indians and Half-breeds resident within the said Provisional District and territory, except those Half-breeds whose claim to land have already been extinguished in Manitoba or the Territories and who are now resident within the territory proposed to be treated for, are therefore invited to attend the Sessions of the Commission at such of the above mentioned points as may be nearest to their respective places of residence.

[53] The phrase “said Provisional District and territory” referred back to “the Provisional District of Athabasca and of such territory immediately adjacent thereto as may be deemed advisable to include within the said Treaty.”

[54] The map of Canada in the mid-to-late 1890s was much different from today’s. British Columbia’s boundaries were as they are now, but present-day Alberta and Saskatchewan did not become provinces until 1905. In the late 1890s, what is now Alberta was divided between the district of Alberta in the south and Athabasca to the north. Their dividing line appears to have run just north along the parallel at 55° N. Athabasca’s eastern boundary appeared to run along the Athabasca River and the west shore of Lake Athabasca, before following the Slave River to the 60° N parallel. At the time, the former province of Manitoba was a small square at the south-east corner of our current Manitoba. The former Manitoba’s western boundary ran along the eastern boundary of the district of Assiniboia in what is now southern Saskatchewan. The District of Saskatchewan occupied a band to the north of Assiniboia that extended as far east as Lake Winnipeg. To the north of all lay the North-West Territories, appearing on the map above the 60° N parallel, north of Athabasca and much of British Columbia and taking in part of what is now northern Saskatchewan.

[55] Minister Sifton’s printed notice proposed meetings for the purpose of treaty negotiation at 12 listed locations on dates between June 8, 1899, and August 23, 1899. The westernmost location listed was Fort St. John. Although the notice listed those 12 proposed meeting places, evidence is silent as to where the copies of the

notice were in fact circulated. Robert Irwin, an expert witness qualified to give opinion on the history of western Canada and aboriginal peoples, conceded on cross-examination that the historical record shows that the notices were prepared and circulated but it does not show which areas the notices in fact reached (January 26, 2016, at 28, ll. 24-31).

[56] On November 30, 1898, Minister Sifton prepared a memorandum for the Privy Council (ex. 199). Minister Sifton's report was adopted by the Privy Council on December 6, 1898, as OIC 2749 which begins:

On a Report dated 30th November 1898, from the Superintendent General of Indian Affairs, stating with reference to his report of the 18 June 1898, upon which was based the Minute of Council approved on the 27th of the same month, authorizing the appointing of Commissioners to negotiate a treaty with the Indians occupying territory to the North of that already ceded and shown in pink on the attached map ...

(ex. 282, doc. 0945 at 1)

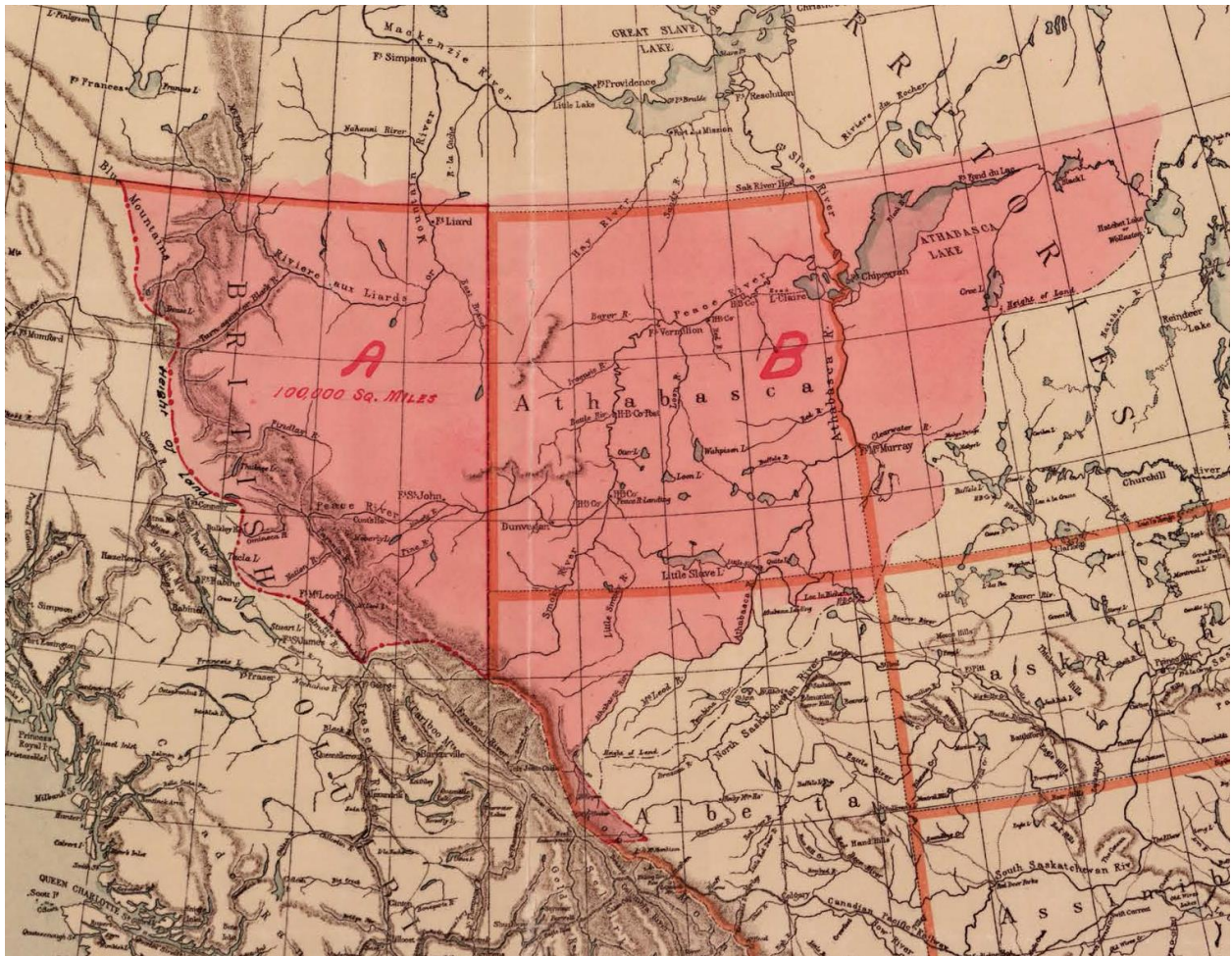
This OIC was also a form of notice, this time from federal to provincial Crown, of Canada's intention to enter treaty. The text of OIC 2749 ends:

The Minister further recommends that a certified copy of this Minute, if approved, and of the map attached hereto, be transmitted to the Lieutenant Governor of the Province of British Columbia for the information of his Government.

(5)

The map referred to is the map found at the end of exhibit 282, document 0945 at 12, and also found with the copy of OIC 2749 delivered to the British Columbia Lieutenant-Governor (ex. 22 and ex. 201).

[57] A portion of the map (from the Privy Council file copy found at ex. 203) is reproduced here:



[58] As noted by Dr. Galois in his evidence in chief, Mr. Bray's May 1898 description referred to earlier (ex. 282, doc. 0813) conforms generally to the area within British Columbia proposed for treaty consideration as shown on the above map attached to OIC 2749 (November 2, 2015, at 32, ll. 15-20). Joseph Desloges was an expert witness qualified to opine on physical geography including hydrology and geomorphology in relation to the Rocky Mountains in British Columbia and adjacent lands. Dr. Desloges has attempted to measure the area shown inside British Columbia on this map and estimates it at 103,000 square miles, not far off the "100,000 SQ. MILES" shown within British Columbia on this map (Desloges report, ex. 73 at 56-57).

[59] The phrase "Height of Land" appears handwritten along the dotted and dashed line representing the western edge of the coloured area, and was added to

the base map. Iain Taylor gave opinion as an expert witness qualified on historical geography and cartography including historical mapping of the Rocky Mountains. According to Dr. Taylor, there is no way to know in which order these features were added to the base map: pink shading; letters “A” and “B”; notation “100,000 SQ. MILES” under the “A”; and the handwritten “Height of Land” (January 4, 2016, at 18). Dr. Taylor felt that the words “Pacific Arctic Watershed” further south, in smaller lettering directly along the same dotted and dashed line, were likely part of the base map.

[60] The body of OIC 2749 paraphrased Commissioner Herchmer’s information as conveyed by Minister Sifton’s memorandum:

... that in that report it was set forth that the Commissioner of the NorthWest Mounted Police had pointed out the desirability of steps being taken for the making of a treaty with the Indians occupying the proposed line of route from Edmonton to Pelly River; that he had intimated that these Indians as well as the Beaver Indians of the Peace and Nelson Rivers, and the Sicamas and Nihamas Indians were inclined to be turbulent and were liable to give trouble to isolated parties of miners or traders who might be regarded by the Indians as interfering with what they considered their vested rights; ...

(1-2)

OIC 2749 then turned to consider the problem that might arise from the fact that part of the proposed treaty area was inside British Columbia’s provincial boundary:

The Minister, in this connection, draws attention to the fact that part of the territory marked “A” on the plans attached is within the boundaries of the Province of British Columbia, and that in the past no treaties such as have been made with Indians of the North West have been made with any of the Indians whose habitat is west of the Mountains. An arrangement was come to in 1876 under which the British Columbia Government agreed to the setting aside by a Commission subject to the approval of that Government, of land which might be considered necessary for Indian reserves in different parts of the Province, and later on the agreement was varied so as to provide that the setting apart should be made by a Commissioner appointed by the Dominion Government whose allotment would be subject to the approval of the Commissioner of Lands and Works of the Province.

As the Indians to the west of the Mountains are quite distinct from those whose habitat is on the eastern side thereof, no difficulty ever arose in consequence of the different methods of dealing with the Indians on either side of the Mountains. But there can be no doubt that had the division line between the Indians been artificial instead of natural, such difference in treatment would have been fraught with grave danger and have been the

fruitful source of much trouble to both the Dominion and the Provincial Governments.

It will neither be politic nor practicable to exclude from the treaty Indians whose habitat is in the territory lying between the height of land and the eastern boundary of British Columbia, as they know nothing of the artificial boundary, and, being allied to the Indians of Athabasca, will look for the same treatment as is given to the Indians whose habitat is in that district.

(3-6)

[61] Canada was sensitive to the fact that the aboriginal people it hoped to treat with would expect to be treated no less generously than those who had entered treaties before them. Federal Crown officials from Ottawa who contemplated treaty were not entirely certain that the aboriginal people they hoped to treat with would want or expect to have reserves set aside for them (ex. 199 at 3; Jones report, ex. 3 at 13). Nonetheless, Canada felt bound at least to make the offer. Thus, Treaty 8 promised those aboriginal peoples who entered into treaty up to one square mile per family of five as reserve land, or, at the aboriginal signatory's option, land in severalty of 160 acres for each person, such land to be inalienable without consent of the Governor-General in Council of Canada.

[62] On March 2, 1899, OIC 303 amended OIC 2749 by substituting David Laird for Mr. Forget as commissioner. (Mr. Forget had been appointed Lieutenant Governor of the North West Territories.) It also added Mr. Ross as the third treaty commissioner. The commissioners for Treaty 8 were now Mr. Laird, Mr. McKenna and Mr. Ross.

[63] The public notice set June 8, 1899, for the first treaty negotiations at Lesser Slave Lake. The treaty commissioners, however, were delayed in their travels. Supplies arrived too slowly at Edmonton; rains fell; expected boats and crew were trapped in late ice upriver.

[64] A record of travel and proceedings appears from Charles Mair, who, in his capacity of English Secretary to the unfortunately named Half-breed Scrip Commission, travelled with the treaty commission party, recorded the events of the journey and treaty negotiation in his diary, and published his observations in 1908 in

Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899 (Toronto: William Briggs, 1908). Mr. Mair acted as a witness to signatures on the treaty (ex. 282, doc. 1193). His narrative has been accepted as authoritative by the Supreme Court of Canada in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69. Exhibit 123 in this trial is a hard copy first edition of *Through the Mackenzie Basin*. A digital copy of part of this edition exists at exhibit 282, document 1538. I accept Mr. Mair's description but not without some hesitation in view of his hyperbolic claim to be able to see distant mountains from the shore of Lesser Slave Lake (ex. 123 at 54), a proposition debunked by Dr. Desloges (November 24, 2015, at 31).

[65] The treaty commissioners explained the terms and import of the proposed treaty to the assembled aboriginal people on June 20, 1899. On June 21, 1899, the treaty was signed by the treaty commissioners and "the Cree Chief and Headmen of Lesser Slave Lake and the adjacent territory," including Keenooshayo, a chief (ex. 215 at 13). Mr. Mair reports some of what was said by the treaty commissioners, by some who traveled with them, and, more importantly, by some of the aboriginal people assembled there. Mr. Mair described his account as "necessarily much abridged" (ex. 123 at 64; ex. 282, doc. 1538 at 17). Even abridged, his is the best account available of what the aboriginal speakers hoped to achieve through the treaty, and their intent in entering into it.

[66] I infer from Mr. Mair's account that the aboriginal people depended heavily on the explanation of the treaty terms put forward by the commissioners, particularly Mr. Laird on June 20, 1899, and that they depended heavily on Mr. Laird's reading of the treaty terms to the assemblage on June 21, 1899. From Mr. Mair's report of what was said by the aboriginal participants, it seems clear that the aboriginal signatories wanted to continue to make their own living, to avoid conflict with white people coming into their territory, and to increase their learning or knowledge through education. It is also fair to say that Mr. Mair does not report any discussion at Lesser Slave Lake concerning the western geographic extent of the treaty.

[67] In exhibit 123 at 63 (ex. 282, doc. 1538 at 16), Mr. Mair describes Mr. Laird saying on the afternoon of July 20, 1899:

“I understand you all agree to the terms of the Treaty. Am I right? If so, I will have the Treaty drawn up, and to-morrow we will sign it. Speak, all those who do not agree!”

Mr. Mair reports that the aboriginal people present signified their assent. On p. 64, he continues his narrative: “At three p.m. on Wednesday, the 21st, the discussion was resumed by Mr. Laird, who after a few preliminary remarks, read the Treaty, which had been drafted by the Commissioners the previous evening.” Treaty 8 was then signed by the commissioners and on behalf of the aboriginal peoples present, and witnessed.

[68] The treaty commission had set itself an ambitious schedule for the summer of 1899. The commissioners’ delay in reaching their own first session at Lesser Slave Lake made it impossible for them to fulfill the original schedule. The commissioners decided to obtain adhesions from aboriginal groups in other locations, rather than draft fresh treaties with each group.

[69] To achieve as much as possible, the commissioners split up. For the narrative of 1899 adhesions by the three treaty commissioners, I rely on exhibit 215, described by Canada’s counsel as documents relating to Treaty 8 (January 26, 2016, at 78, l. 47 - 79, l. 1).

[70] Chairman Mr. Laird travelled to Peace River Landing on July 1, 1899, where he treated with people identified simply as Indians; to Vermilion on July 8, 1899, where he treated with people identified as Beaver, Crees, and other Indians; and to Fond du Lac (Lake Athabasca) on July 25 and 27, 1899, where he treated with people identified as Chipewyan Indians.

[71] Meanwhile, commissioners Ross and McKenna travelled to Dunvegan on July 6, 1899, where they obtained the signatures of people identified as Beaver Indians; to Fort Chipewyan, where they obtained signatures from Chipewyan Indians of Athabasca River, Birch River, Peace River, Slave River and Gull River, and from

Cree Indians of Gull River and Deep Lake on July 13, 1899; and to Smith's Landing to obtain agreement from Chipewyan Indians of Slave River on July 17, 1899.

[72] Commissioners McKenna and Ross then went their separate ways in turn. Commissioner McKenna went to Fort McMurray to obtain agreement of Chipewyan and Cree Indians on August 4, 1899; and commissioner Ross went to Wapiscow Lake to obtain the agreement of the "Indians of Wapiscow" on August 14, 1899.

[73] None of the locations where aboriginal people agreed to the treaty terms in 1899 was west of what we now call the Rocky Mountains.

[74] On September 22, 1899, the treaty commissioners prepared a report to Minister Sifton. Their report begins:

Sir, -- We have the honour to transmit herewith the treaty which, under the Commission issued to us on the 5th day of April last, we have made with the Indians of the provisional district of Athabasca and parts of the country adjacent thereto, as described in the treaty and shown on the map attached.

(ex. 282, doc. 1250 at 3)

[75] No discrete version of this original report, with map attached, is in evidence. This is unfortunate as the original treaty commissioners apparently felt it advisable to supplement their treaty language with a visual representation.

[76] Minister Sifton forwarded the report of the treaty commissioners to the Privy Council. It approved the report and ratified Treaty 8 on February 20, 1900, by OIC 363 (ex. 282, doc. 1305). Minister Sifton did not attach a map to his report, which recites that the named commissioners were appointed to negotiate the treaty with "the Cree, Beaver, Chipewyan and other Indians inhabiting the territory – as fully defined in the Treaty – lying within and adjacent to the Provisional District of Athabasca."

[77] As noted, the treaty commissioners had been unable to meet and treat with all of the aboriginal people at all of the places referred to in the public notice made in the summer of 1898. To continue the treaty process, OIC 460, on March 2, 1900,

appointed James Macrae both treaty and scrip commissioner in order to carry on the work of both commissions. The order provided as follows:

The Minister states that as the Treaty Commissioners were unable last year to meet the Indians at Fort St. John and Fort Resolution, it will be necessary to appoint Mr. Macrae a Commissioner for the purpose of taking their adhesions; and he recommends that Mr. Macrae be appointed accordingly.

(ex. 282, doc. 1314 at 1-2)

[78] Mr. Macrae understood his instructions to be limited. This can be seen in his report to Minister Sifton, dated December 11, 1900, where he wrote:

My commission to take adhesions to Treaty 8 was designed to enable me to treat with the Indians of Fort St. John in the Upper Peace River and the various bands on Great Slave Lake that trade at Fort Resolution

(ex. 282, doc. 1375 at 5)

Mr. Macrae's understanding of his limited authority is also seen in his explanation, which follows immediately, for having taken two additional groups "with whom I was not empowered to deal" into treaty, explaining that they were "undoubted inhabitants of the tract covered by Treaty No. 8" (ex. 282, doc. 1375 at 6).

[79] Mr. Macrae reported that he had taken adhesions of all of the aboriginal people at Fort Resolution, but only "of certain of the Indians of Fort St. John."

[80] None of the locations where Mr. Macrae obtained adhesions to Treaty 8 from aboriginal people was west of the Rocky Mountains.

[81] In his report, Mr. Macrae also referred to attachments, the sixth of which was described as "Map showing the distribution of Indians in the territory covered by Treaty No. 8 and the extent of that territory" that Mr. Macrae intended to be attached to his report (ex. 282, doc. 1375 at 9). In the margin next to this, someone has written, "This last has been sent to the printers," under which there appears to be a name. Ms. Jones states that it was Mr. Macrae's note (Jones report, ex. 3. at 144). According to Ms. Jones, Minister Sifton in turn endorsed a report to the Privy Council, including Mr. Macrae's report but not the map, and Minister Sifton's report became OIC 2793 when it was approved on January 7, 1901 (Jones report, ex. 3

at 145; ex. 282, doc. 1375). Ms. Jones also states in her reply to Dr. Irwin that while she concurs that the Macrae map was not attached to the copy forwarded to the Governor General in Council for its consideration, yet Minister Sifton “had reviewed and apparently approved the complete report, including the map, prior to its submission to Council” (Jones reply, ex. 4 at 16).

[82] I conclude that the map that Mr. Macrae intended to attach to his December 11, 1900, report to Minister Sifton is the map published later as the final document in exhibit 215, titled “Treaty No. 8 (made June 21, 1899) and adhesions, reports, etc.” This consolidation of documents includes in addition to the Macrae map:

1. OIC 2749;
2. the September 22, 1899, report of treaty commissioners Laird, Ross and McKenna;
3. the December 11, 1900, adhesion report of treaty commissioner Macrae; and
4. the Orders in Council ratifying the treaty and 1900 adhesions respectively.

[83] I conclude that this was the map that Mr. Macrae intended to attach to his December 11, 1900, report after taking into consideration Mr. Macrae’s roughly contemporaneous letter (January 2, 1901) to astronomer acquaintance Dr. Otto Klotz, reprinted in *The Ottawa Naturalist*, March 1901 (ex. 282, doc. 1378). In his letter Mr. Macrae included many naturalist observations from his adhesion journey in the spring and summer of 1900. Mr. Macrae ended his letter by referring to a map to be published along with his report in the “blue book of the Department of Indian Affairs” (the upcoming Department’s *Sessional Papers* of 1901):

With my report in the blue book of the Department of Indian Affairs will be published a map that may interest you showing roughly the habitat of various Indian tribes. Please note the incursion of the Crees, who are of Algonquin

stock, into the country of the Tinnie or Dhinnie family. Of the existence of the Iroquois about Jasper House you will have been long aware.

(ex. 282, doc. 1378 at 4)

Dr. Taylor conceded in cross-examination that this map is likely the one that accompanied Mr. Macrae's report in the *Sessional Papers* of 1901 and that has become identified as the "Macrae map" (January 5, 2016, at 20, ll. 36-47; and at 22, l. 47-23, l. 43).

[84] I find that this map was likely the same or at least very similar to the missing map referred to by the treaty commissioners in their report of September 22, 1899, found in exhibit 282, document 1250 at 1.

[85] I also note that Mr. Mair's book (ex. 123) refers on the title page to "a Map of the County Ceded" and that the Macrae map is part of the prefatory pages of the book, unfolds immediately before the Introduction, and is the sole map in the volume. This is that map:



BC1388359/1

[86] The expansion of the treaty area in the northeast can be seen by comparing this map to the one attached to OIC 2749. While the respective western boundaries might look like they differ between the two maps, both versions appear to follow the “Height of Land” in the northwest portion and both show the treaty boundary to the west of the label “Rocky Mountains.”

[87] That Mr. Macrae was alive to the accuracy of maps generally may be seen from a letter he wrote on November 14, 1900, to the Department of the Interior, in which he reported on errors he had found in “one of the latest Dominion maps of the North West Territories prepared by your Department which I took into the North with me last summer,” which he says he had taken with him on his travels as treaty commissioner (ex. 282, doc. 1344).

[88] In 1905 David Laird was president of the Historical and Scientific Society of Manitoba. He published a document titled “Our Indian Treaties,” in which he said (underlining added):

Treaty No. 8 was made and concluded at the several dates mentioned therein in 1899, the first being at Lesser Slave Lake on the 21st of June, between Commissioners D. Laird, James A.J. McKenna, now Assistant Indian Commissioner, and Hon. James H. Ross, and the Cree, Beaver, Chipewyan and other Indians inhabiting the country watered by the Athabasca and Peace Rivers, in the District of Athabasca, also that portion of British Columbia east of the Rocky Mountains, and of the McKenzie District south of Great Slave Lake.

(ex. 282, doc. 1466)

Mr. Laird was referring above to the aboriginal peoples who had entered treaty, and not purporting to give the extent of the treaty area.

[89] In 1909, Mr. Macrae was still an Inspector of Indian agencies and reserves for the Department of Indian Affairs in Ottawa. On December 30, 1909, he sent a briefing paper to Deputy Superintendent of Indian Affairs Pedley in which Mr. Macrae questioned the map attached to his report of 1900 in these words (ex. 206 at 1-2):

The undersigned begs to refer to a report made by him under date of December 11, 1900 on Adhesions taken to Indian Treaty No. 8, which report was submitted accompanied by documents.

Document No. 6 was a “map showing the distribution of Indians in a territory covered by Treaty No. 8 and the extent of that territory.”

It is now noticed that the south western boundary of the territory intended to be indicated on that map has come to be regarded to a greater or less extent as authoritative, and there seems cause to believe that it possibly should not be so regarded because in laying down such south western boundary a certain water-shed or height of land seems to have been followed which may not coincide with the discriptions [sic] of the words contained in the Treaty.

...

The undersigned being of record as responsible for that map now begs to direct your attention thereto as if it contained an erroneous delineation it may be very necessary to correct it.

[90] Mr. Macrae then outlined what he says were “strongly held differences of opinion not only as to what is the ‘Central Range of the Rocky Mountains’ but even

as to what mountain range or ranges constituted the Rocky Mountains referred to in the Treaty” (2).

[91] Mr. Macrae did not explain what had prompted his communication to the Deputy Superintendent, nor did he identify the strong holders of the different opinions he mentioned.

[92] Mr. Macrae concluded his brief by saying -- “[w]ithout expressing any opinion on that subject” -- that the subject was “of great importance” (3).

[93] The historian Dr. Irwin testified that the question arose as a result of a communication to the Department of Indian Affairs in the fall of 1909 from Father Coccola, a missionary at Fort St. James, indicating that aboriginal people at Fort McLeod and Fort Grahame were in need of a reserve and were destitute (January 25, 2016, at 43). This led Department of Indian Affairs staff to consider whether Fort McLeod and Fort Grahame were in territory covered by Treaty 8. This was less than a year before “Slaves and Sicannees Indians” signed adhesion to Treaty 8 at Fort Nelson in 1910 (ex. 205).

[94] Dr. Irwin was not entirely correct: departmental activity appears to have been precipitated by the first of the two fall 1909 letters from Father Coccola. He wrote to the Department of Indian Affairs on September 28, 1909, to suggest that Canada set aside land “between the Ingenika and Findlay Rivers” for aboriginal people near Bear’s Lake (near Fort McLeod) and Fort Grahame because white miners and others were staking land in the area (ex. 282, doc. 1571). In a second letter of October 12, 1909, Father Coccola reported on “the state of affairs at McLeod and Graham,” stating that “the Indians there are on the verge of starvation” and “literally starving” (ex. 282, doc. 1573). At this time J.K. McLean was a surveyor within the Department of Indian Affairs. (I use his initials to differentiate him from a J.D. McLean who was also active within the department during this controversy.) Mr. J.K. McLean communicated Father Coccola’s late September letter in a memorandum of November 3, 1909, to Deputy Minister Pedley (ex. 282, doc. 1578), in which Mr. J.K. McLean said:

He also calls attention to a band of 200, Indians at Graham. He states that there is a block of about 4000 acres of good land between the ingenika [sic] and Findlay River where a reserve could be surveyed. He says white men are beginning to stake land and there is no time to lose. This latter block of land is in [illegible] Treaty 8, and in that portion of B.C. East of the summit of the mountains which belongs to the Dominion Lands.

[95] J.D. McLean, Secretary of the Department of Indian Affairs, in turn responded to Father Cocola's September 28, 1909, letter. He asked in a letter of November 3, 1909, for more detail about the location of the lands desired by the people at Bear Lake (near what was then Fort McLeod) and Fort Grahame and enclosed "a small map" -- now missing -- "showing Bear Lake and Fort Graham" on which Father Cocola could show "the land desired by the Indians" (ex. 222).

[96] On November 6, 1909, Mr. J.D. McLean also wrote to the Department of the Interior to say that there had been an application for a reserve to be set apart for "Indians resident at Fort Graham B.C." (ex. 282, doc. 1582). The Ingenika River is a tributary of the Finlay River, and both are west of the Rocky Mountains, east of the Cassiar Mountains and east of the Arctic-Pacific divide. The letter described the area as "at the junction of the Findlay and Ingenica Rivers" and as being:

... in that portion of B.C. East of the Mountains transferred to the Dominion Government as part of the Railway Belt and ... also in Treaty No. 8 which was made in 1899.

(ex. 282, doc. 1585)

[97] The Assistant Secretary of the Department of the Interior set Mr. J.D. McLean right in a letter on December 3, 1909, but only to inform him that the lands were not within the Railway Belt or the Peace River Block "and consequently are not under the administration of this Department" (ex. 223). The Assistant Secretary did not comment on Mr. J.D. McLean's assertion that the area was within Treaty 8.

[98] On December 10, 1909, Mr. J.K. McLean (the surveyor) wrote another memorandum to Deputy Minister Pedley (ex. 225; for a clearer copy see ex. 282, doc. 1602). This memorandum pointed out that the contemplated new reserve between the Ingenika and Finlay Rivers would be within British Columbia and therefore outside of territory controlled by Canada. He suggested that it would be

necessary to obtain the adhesion of the aboriginal people concerned but if they succeeded in obtaining adhesion to the treaty, it would not be possible for Canada to provide the proposed reserve. Mr. J.K. McLean did not question whether the area in which it was proposed to create a new reserve was within Treaty 8; it does not appear to have been a question for him. It also appears that Canada was prepared to contemplate treaty over land in British Columbia and worry later about whether it could deliver reserves promised in the treaty.

[99] According to Dr. Irwin in direct examination, the Department of Indian Affairs then asked Mr. Macrae about the map attached to his report of 1900 showing the treaty extending west of the Rocky Mountains (January 25, 2016 at 43, ll. 26-35). I have not been able to locate a document in which this question was put to Mr. Macrae, and I therefore conclude that this is an inference drawn by Dr. Irwin. I am not prepared to infer that Mr. Macrae was asked directly about the Macrae map. Rather than do so, I think it more likely that Mr. Macrae was aware of recent questions within the Department of Indian Affairs as to the potential to bring aboriginal people around Fort Grahame and Fort McLeod into treaty, and he was aware of the uncertainty surrounding the creation of reserves so far from the Peace River Block.

[100] Mr. Macrae's memorandum to the Deputy Superintendent was circulated.

[101] On January 11, 1910, Mr. Laird, the original chief treaty commissioner, responded: "The printed map of the territory embraced in the Treaty, which accompanies the pamphlet report of the same, appears to me to be approximately correct" (ex. 207 at 1; ex. 282, doc. 1627 at 1). This is not inconsistent with Mr. Laird's remarks in 1905: on the earlier occasion he was dealing with the aboriginal peoples treated with, but on the occasion in 1910 he was dealing with the treaty area.

[102] On January 19, 1910, Duncan Campbell Scott, chief accountant of the Department of Indian Affairs, wrote another view of the matter:

... a map of the kind in question does not carry with it any authority as fixing the limits of the Treaty and it therefore has no real importance. In using the height of land as a boundary, Mr. Macrae was probably not far astray, but this map would never be referred to in fixing the boundaries of any Treaty that might be made with the Indians of the Western portion of British Columbia, as the territory ceded by treaty No. 8 is described in the Treaty itself and must be interpreted according to the language of the Treaty.

...

The Province is not bound by any land provisions in a Treaty negotiated by the Dominion Government without their concurrence and we must sooner or later face the difficulties which our own action has created. Upon the whole I do not anticipate any trouble over this matter. The only adhesion to the Treaty so far given by British Columbia Indians is that at Fort St. John taken by Mr. Macrae when he was Commissioner on the 30th of May 1900.

...

The other two chief points at which the British Columbia Indians living within the boundaries of Treaty No. 8 trade are Fort Graham and Fort Nelson.

(ex. 208 at 1 - 3)

[103] Mr. Scott therefore appears to have agreed with Mr. J.D. McLean that Fort Grahame, on the Finlay River and west of the Rocky Mountains, was within the territory covered by Treaty 8.

[104] On January 20, 1910, Mr. J.K. McLean, the Department of Indian Affairs' surveyor, gave a third opinion. After writing that "very little" could be added to the commentary from Mr. Laird and Mr. Scott, Mr. J.K. McLean next supported the view that the treaty commissioners -- in stating that the boundary followed the central range of the Rocky Mountains or the east boundary of British Columbia -- must have followed the same range "to the sixtieth parallel which must mean along the height of land" (ex. 282, doc. 1641).

[105] Mr. Macrae's question in his memorandum and the various answers it elicited appear to have been dropped. Mr. Scott's conviction that the map would never be used to fix boundaries of any treaties with aboriginal peoples in western British Columbia apparently held little sway when it came to fixing the boundaries of Treaty 11, for its southwestern corner is fixed at the northwestern corner of Treaty 8 as generally shown on the Macrae map.

[106] In late 1912, ongoing disagreements between Canada and British Columbia over land reserved for aboriginal people in British Columbia led to an agreement to establish a Royal Commission on Indian Affairs for the Province of British Columbia. This is commonly known as the McKenna-McBride Commission: the federal commissioner was Mr. McKenna (one of the treaty commissioners who negotiated Treaty 8 at Lesser Slave Lake), and the provincial commissioner was Premier Sir Richard McBride.

[107] On February 1, 1916, the Commission issued Interim Report 91. It reported that on January 31, 1916, Mr. McKenna moved and the Commission unanimously adopted a resolution that began:

WHEREAS a Treaty, known as Number 8, was made in the year 1899, between the Crown and certain Indians of northwestern Canada;

AND WHEREAS the territory covered by such Treaty extended into that part of the Province of British Columbia which lies between the Rocky Mountains and the 60th Parallel of North Latitude and the 120th degree of Longitude; ...

(ex. 234 at 25)

[108] British Columbia takes some comfort from this description of Treaty 8's area inside the province not extending past the Rocky Mountains, as stated by J.A.J. McKenna, one of the treaty's own original commissioners (albeit in his later role on the joint commission). British Columbia says that this shows the understanding of one of the principal negotiators of Treaty 8 as to the extent of its incursion into British Columbia and provides evidence of Canada's intention as to the territorial extent of the treaty from one of its signatories. It also acts as a counterbalance to David Laird's statement four years earlier that the boundary shown on the Macrae map was "approximately correct."

[109] In 1921, Canada signed Treaty 11 at Fort Liard. Treaty 11 covers a large portion of the current Northwest Territories north of 60° N and along the Mackenzie River to the Arctic Ocean. Authorizing OIC 686 describes Treaty 11's territory this way:

Commencing at the North West corner of the territory ceded under the provisions of Treaty Number 8; thence northeasterly along the height-of-land

to the point where it intersects the boundary between the Yukon Territory and the Northwest Territories; (ex. 195 at 5)

[110] There has been no argument or evidence before me that Treaty 11's metes and bounds language is in dispute. Therefore I presume that the Treaty 11 map follows its own metes and bounds language at the detail above: "Commencing at the northwesterly corner of the territory ceded under the provisions of Treaty Number 8"

[111] The Treaty 11 map published by the Department of Indian Affairs and dated 1921 shows the southwestern corner of Treaty 11, where it meets the 60° N parallel, as being just west of 130° W (ex. 262). The Treaty 11 map published by King's Printer in 1926 shows the same (ex. 195 at 9).

[112] I note that this point is also where both the map attached to OIC 2749 and the Macrae map show the western boundary of Treaty 8 meeting the 60° N parallel (ex. 195).

[113] British Columbia takes great comfort from yet another map, this one by James White, originally published in 1912, titled "Indian Treaties 1850-1912" (ex. 27). The "White map" shows the western boundary of Treaty 8 following the Rocky Mountains to the 60° N parallel. This presumably was Mr. White's interpretation of the metes and bounds language in Treaty 8, and was included within the *Handbook of Indians of Canada* initially published as an appendix to the Geographic Board of Canada's Tenth Annual Report (Galois report, ex. 15 at 90, fn 239). J.G.H. Bergeron was secretary to the McKenna-McBride Commission. In that capacity he requested copies of the *Handbook* from Mr. White (ex. 282, doc. 1791) and received at least five copies of it in July 1912 (ex. 282, doc. 1793 and ex. 282, doc. 1794).

[114] British Columbia thinks it is very important that Canada sent this publication which contained as an appendix the White map. It is unclear what importance can be placed on a request for a publication or on Canada's response to that request when it does not appear that the request was specifically for a map found within the

volume. The White map was one of over six hundred pages in the *Handbook*: this takes some force from British Columbia's suggestion that Canada's post-treaty conduct in sending the *Handbook* shows that Canada accepted Mr. White's placement of the boundary. This is reinforced by a January 1914 letter to Mr. Bergeron from Deputy Superintendent General Duncan Campbell Scott, to which Mr. Scott attached the Macrae map (ex. 282, doc. 1823 at 3). Mr. Scott's letter appears to have been in response to a communication from Mr. McKenna (at 1):

The Department has been in communication with Mr. Commissioner McKenna with regard to a portion of Treaty No. 8 territory which lies within the boundaries of British Columbia. Mr. McKenna requested that the Commission be advised as to what tracts, if any, are to be set aside therein as reserves, and the location thereof. In this connection I am sending herewith a small map extracted from the annual report, which shows the limits of Treaty No. 8.

[115] The map attached to OIC 2749, sent by way of notice to British Columbia not long before Treaty 8 was negotiated and first signed, and the Macrae map, generated following the 1900 adhesions to Treaty 8, both show the western boundary of the treaty following the Arctic-Pacific divide (allowing for a small deviation in the OIC 2749 map at the very northern limit). Again, the question is whether the treaty language -- "to the central range of the Rocky Mountains, thence northwesterly along the said range to the point where it intersects the 60th parallel of north latitude" -- has a meaning different from what is shown in the map representations. Was the intent of the treaty commissioners that the treaty's western boundary remain in the Rocky Mountains after the Arctic-Pacific divide separates from the Rocky Mountains and leaves the Rocky Mountains a secondary watershed?

[116] OIC 1703 gave the treaty commissioners wide discretion "as to the territory to be ceded ... for its extent will depend upon the conditions which are found to exist as a consequence of the inroads of white population" (ex. 282, doc. 0839 at 4). British Columbia and Kaska Dena Council argue that OIC 2749 in no way reduced the ambit of this discretion conferred by OIC 1703. They argue that the treaty commissioners exercised their discretion by reducing the area within British

Columbia to be covered by the treaty by retracting the western boundary from the Arctic-Pacific divide to the Rocky Mountains in the metes and bounds description of its western boundary. This is all in aid of British Columbia's and Kaska Dena Council's assertion that the "central range of the Rocky Mountains" must lie within the Rocky Mountains and not perambulate far to the west along the northern British Columbia portion of the Arctic-Pacific divide. British Columbia and Kaska Dena Council argue that the treaty commissioners were prepared to exercise this discretion. They point to the fact that the same treaty commissioners extended Treaty 8's area further north and east, to the south shore of Great Slave Lake, beyond the area proposed in the map attached to OIC 2749.

[117] This argument favours a Rocky-Mountain-centered interpretation of the treaty, but does not advance the issue much. The treaty commissioners had discretion as to the territory to be ceded, but that does not mean that the commissioners in fact reduced the area in the western region of the treaty from the area proposed in the map accompanying OIC 2749.

[118] Another approach to that question is to look at contemporary uses of the phrase "central range of the Rocky Mountains" and its constituent parts. This approach was taken by Dr. Iain Taylor, an expert in historical cartography. He examined a large number of maps, as well as other documents, from which he had extracted a list of ways in which "the mountainous eastern boundary of BC" has been described (Taylor report, ex. 110 at 31-32). Of the 26 examples Dr. Taylor presented, two use the phrase "central range of the Rocky Mountains": one of those is from Treaty 8, the other from Treaty 7. Earlier in his report, at 20, Dr. Taylor had referred to the use of the phrase in the Summary Report of the Geological Survey Department for the year 1892, where a Mr. McConnell used the phrase describing the area around Glacier Lake and the Great Saskatchewan Glacier from which the Saskatchewan River emanates as "a line of cliffs out of which the ice from the great river of the central range of the Rockies precipitates itself in ice cascades and avalanches" (ex. 282, doc. 0452 at 9).

[119] Arthur Roberts, an expert witness qualified to give opinion on the exploration, mapping and nomenclature of the mountains of British Columbia, has said:

There is not today, nor was there in 1899, an official or accepted definition of the “central range” of the Rocky Mountains. In addition, no unambiguous interpretation of the central range can be made either today or from an 1899 perspective.

(Roberts report, ex. 97 at 5)

[120] But that might overstate the matter, as Treaty 7 defines part of its boundary as running “to the central range of the Rocky Mountains or to the boundary of the Province of British Columbia” (ex. 282, doc. 0232 at 2). That language is unambiguous in equating – and defining – the “central range” with and as the eastern boundary of British Columbia in 1877. It must be remembered that the British Columbia boundary referred to was defined by statute as the “Main Chain” of the Rocky Mountains in 1858, and as “by the Rocky Mountains” in the statutes of 1863 and 1866. Moreover, Lieutenant-Colonel Cameron gave an opinion that these phrases were meant to convey that the boundary was the watershed line in the mountains -- an opinion accepted by the United Kingdom Secretary of State for the Colonies in resolving a boundary dispute between British Columbia and Canada in 1884.

[121] It bears repeating that David Laird was a treaty commissioner for both Treaty 7 and Treaty 8. It is fair to assume that in 1899 Mr. Laird would have been aware that the eastern boundary of British Columbia, in the southern portion due west of the source of the Red Deer River, was the watershed previously referred to in statute as the “main-chain” or “by the Rocky Mountains.”

[122] In 1873, Sanford Fleming was engineer-in-chief of the Canadian Pacific Railway. He reported on the progress of exploratory surveys made for the railway up to the end of 1873. In doing so, he described the “main chain of the Rocky Mountain Zone,” referred to a “Rocky Mountain Chain,” and put the relationship among the Rocky Mountains, the Peace River and the continental watershed in these terms (ex. 282, doc. 0149 at 17):

The main chain of the Rocky Mountain Zone observes a general parallelism with the Pacific Coast, and, in British Columbia, is from 300 to 400 miles distant from it. These mountains rise like a colossal wall above the continental plain on its eastern side. Their flanks are, however, deeply gashed, and great counterfort-like spurs jut out, between which the rivers of the plains take their rise.

Immediately on the western flank of the main Rocky Mountain Chain, are found high mountain masses in independent groups, and known by local names, such as "Cariboo," "Selkirk," and "Gold" ranges. They are only separated by deep chasms or narrow valleys from each other and from the main chain; indeed, they may be considered as part of it. Including these subsidiary mountain groups, the breadth of the main chain, which varies greatly, will probably average from a hundred to two hundred miles. Much of this great mountain barrier rises over 8,000 feet above sea level. The loftiest central peaks enter the region of perpetual snow, and some of them have been estimated to reach an elevation of 15,000 feet above the ocean.

There are several openings or "passes" through the Rocky Mountain Chain; some of these passes are from 6,000 to 7,000 feet above sea level. The lowest is less than 2,000 feet.

The Rocky Mountain Chain undoubtedly determines the water shed of the Continent. While the water shed is for the most part coincident with the central crest of the main range, its continuity is occasionally interrupted by transverse openings, affording, as will hereafter be seen, comparatively easy passages from one side of the mountains to the other. The most remarkable of these interruptions presents itself in about latitude 56°, where the Peace River finds a passage from the Western to the Eastern side of the main Rocky Mountain Chain and this throws the water shed of the Continent, in this latitude, westerly across British Columbia towards the Cascade Mountains.

[123] In 1875, Alfred Selwyn was director of the Geological Survey of Canada. He used the phrase "main chain" when he reported passing through "the main chain of the Rocky Mountains" on the Peace River (ex. 282, doc. 3610 at 80). He also reported that the Arctic-Pacific divide was between Swamp River and Carp Lake, its axis running south-easterly to Giscome Portage Road, and then described the half circumference of a circle with a radius of 100 miles to the Leather or Yellow-head pass in the main chain of the Rocky Mountains (ex. 282, doc. 3610 at 67-68). This recognition of a difference between the Arctic-Pacific divide and what Mr. Selwyn believed to be the main chain of the Rocky Mountains at the Peace River might support the British Columbia and Kaska Dena Council argument, although perhaps at the expense of Lieutenant-Colonel Cameron's resolution of the British Columbia eastern boundary dispute, discussed below.

[124] In 1876 Canada entered into Treaty 6, which described its western boundary as:

... west to the Athabasca River; thence up the said river, against the stream, to the Jasper House, in the Rocky Mountains; thence on a course south-easterly, following the easterly range of the mountains, to the source of the main branch of the Red Deer River; ...

(ex. 282, doc. 3375 at 3)

[125] At minimum, this language (“following the easterly range of the mountains”) suggests that the drafters of Treaty 6 believed there to be more than one range of the Rocky Mountains in the vicinity of the source of the Red Deer River, a geographical feature that also appears in both Treaty 7 and Treaty 8. Logically, if there were an easterly range of the Rocky Mountains in that area, there must also be a westerly range; what is not known is whether the drafters of Treaty 6 believed there were any Rocky Mountain ranges in between and, if so, how many.

[126] The concept of a “central” range of the Rocky Mountains emerged when, in 1877, Canada entered into Treaty 7. This would treat for area directly south of Treaty 6. The metes and bounds description for Treaty 7 described its southern and then western boundary this way:

... commencing at a point on the International Boundary due south of the western extremity of the Cypress Hills, thence west along the said Boundary to the Central Range of the Rocky Mountains or to the boundary of British Columbia, thence northwesterly along the said Boundary to a point due west of the source of the main branch of the Red Deer River.

(ex. 282, doc. 0232 at 2)

This caused the western boundary of Treaty 7 (set at the “Central Range of the Rocky Mountains”) to be some distance further west than the western boundary of Treaty 6 to the north (set at the “easterly range” of the Rocky Mountains). There is nothing in Treaty 7’s metes and bounds description above by which to identify the named “Central Range” other than the phrase in apposition: the boundary of British Columbia (here, specifically the eastern boundary of British Columbia). Presumably the drafters of Treaty 7 believed the provincial boundary to be sufficiently beyond question that no more was needed.

[127] Dr. Desloges has stated that the phrase “central range” emerged as a descriptor in about 1877, when it appeared in Land Registry and Department of the Interior documents and in Privy Council minutes relating to Treaty 6 and Treaty 7. He goes on to say, however, that by 1896, “central range” appears to have fallen out of the lexicon, and “main chain” had re-emerged (Desloges report, ex. 73 at 28).

[128] British Columbia was not as convinced that its eastern boundary was so clearly delineated. In the early 1880s British Columbia Premier Smithe took the position that British Columbia’s eastern boundary was along the eastern edge of the Rocky Mountains. That boundary had been described in various ways in the statutes creating and reorganizing the colony, and then province, of British Columbia. The *Act to Provide for the Government of British Columbia, 1858* (U.K.), 21 & 22 Vict., c. 99, s. 1, described the eastern boundary as “to the East by the main Chain of the *Rocky Mountains*.” This description in statute differed from the bill that had been introduced. The bill as introduced had named the new colony New Caledonia (with one unpopular proposal for the name “Pacifica”) and described the colony’s eastern boundary as “the watershed between the streams which flow into the Pacific and the Atlantic and Icy Oceans” (ex. 282, doc. 0085 at 16). The amendment substituting “Main Chain” for “the watershed, etc.” was put forward and accepted in committee in the British House of Commons. The mover of the bill himself did not object, which suggests that he as well as other Members took the “Main Chain” to be the watershed “between the streams which flow into the Pacific and the Atlantic and Icy Oceans.”

[129] The *Act to define the Boundaries of the Colony of British Columbia, and to continue an Act to provide for the governance of the said Colony, 1863* (U.K.), 26 & 27 Vict., c. 83, s. 3, described the eastern boundary of British Columbia as “by the *Rocky Mountains*” and the meridian at 120° W, and implicitly extending “to the north by the Sixtieth Parallel of North Latitude.”

[130] The description “by the Rocky Mountains” -- at least in its application to the southern portion of the province’s eastern boundary -- carried over into the statute

merging the colonies of Vancouver Island and British Columbia: *An Act for the Union of the Colony of Vancouver Island with the Colony of British Columbia*, 1866, 29 & 30 Vict. c. 67, s. 7.

[131] It was this somewhat general language describing the eastern boundary of the province that Premier Smithe seized upon to argue that the province extended to the eastern flank of the Rocky Mountains, at least in the southern portion from the United States boundary to the mountains' intersection with the meridian at 120° W.

[132] Lieutenant-Colonel Cameron was commissioned to report to the Earl of Derby, the Secretary of State for the Colonies. Lieutenant-Colonel Cameron's opinion was based on a thorough review of the debates in the British Parliament (Letter, October 29, 1884, from *Correspondence relating to the Eastern Boundary of the Province*: ex. 282, doc. 0286). He concluded that "by the main-chain of the Rocky Mountains" in the 1858 Act is part of the same line as "by the Rocky Mountains" in the Acts of 1863 and 1866, and he reasoned (at 2):

... one essential characteristic of the expressions -- in their application to the definition of a boundary -- is that they must have been intended to indicate some presumably ascertainable and practical line. The only line of the kind which can be generally predicated as characteristic of mountain ranges is their line of water-shed.

[133] Lieutenant-Colonel Cameron next went on to state: "The words 'by the main chain of the Rocky Mountains' occurring in the Act of 1858, has special reference to a water-shed line, for it is this line which determines the main-chain."

[134] Canada was a party to this dispute, so must be taken to have known, as of 1884, that "main chain" was to be taken to refer to a watershed line, at least for the purpose of settling a provincial boundary. This would be entirely consistent with the description of the western boundary of Treaty 7, which Canada had negotiated seven years earlier, and which equated the eastern boundary of British Columbia with the "central range of the Rocky Mountains." As Dr. Roberts said in cross-examination, those responsible for drafting Treaty 7:

at some level ... assumed that “the central range of the Rocky Mountains” was an adequate description for where they wanted to place the boundary, and it -- all indications are they wanted to place the boundary on the watershed.

(December 2, 2015, at 62, ll. 1-4)

The first part of that statement is relatively uncontroversial; the second portion cannot be so easily accepted. The exchange that led to this statement centered on the White map, which showed the western boundary of Treaty 7 to be contiguous with the eastern boundary of British Columbia, and the eastern boundary corresponding to the divide. Dr. Roberts accepted the correspondence of these lines “unless there’s an error on the map” (December 2, 2015, at 59, ll. 40-41).

Dr. Roberts understood that the intention was that the boundary should be the watershed in these words:

But it is my understanding that the intention was that the boundary should be the watershed. In fact, I know the boundary is the watershed. And so if the watershed line accurately represents the boundary for British Columbia and Alberta, then the boundary of Treaty 7 is adjacent to the watershed line.

[135] The Geological Survey of Canada published a “Map of Part of British Columbia and the North West Territory from the Pacific Ocean to Fort Edmonton” to illustrate the report of George M. Dawson of 1879-80 (ex. 116). On the second of its three sheets this map shows the Peace River with a notation “High Rugged Mountains” to the south, “High wooded Mountains” to the north, and “Mountains 4000 feet high on both sides of the River” just to the north side of the Peace River. The map shows the junction of the Parsnip River and the Finlay River, then shows the Parsnip River in fair detail south to McLeod Lake. From McLeod Lake the map again shows good detail of the course of the Crooked River, through Kerry’s Lake and beyond to Summit Lake. Between Summit Lake and the Fraser River, also labeled and shown in good detail on this map, is a notation “Giscome Portage.” West and north of that the label “Pacific-Arctic Watershed 2820’ s.” appears, next to a notation “wide gently undulating Sandy terrace flats.” The map shows a label “THE ROCKY MOUNTAINS” some distance east of McLeod Lake, with the label starting a bit above the south end of the lake and continuing south-southeast on the map. The

Finlay River is not represented in nearly the level of detail devoted to the Parsnip and Peace Rivers, and there are notations “Unexplored Region” in more than one area west of the Parsnip River, indicating an absence of detailed information about part of the region, at least in settler understanding.

[136] The Geological Survey of Canada publication establishes that by 1880 it was understood that the Arctic-Pacific divide was west of the junction of the Parsnip and Finlay Rivers, and west of where the Peace River cuts through the Rocky Mountains.

[137] In 1896, the Geological Survey of Canada published *Report of an Exploration of the Finlay and Omenica Rivers* by R.G. McConnell (ex. 282, doc. 0493 at 29). In narrating observations from his 1893 field-work, Mr. McConnell used the phrase “central part of the Rocky Mountain ranges.” A marginal printed note next to that point in Mr. McConnell’s text states “Rocks in central ranges.” Mr. McConnell’s own text, narrated from the area around Fort Grahame, reads:

Westward, range after range of nameless mountains, running nearly parallel to the valley of the Finlay, extended to the horizon, while eastward the view was soon obstructed by the higher peaks of the central ranges of the Rockies.

Reference to “central ranges” in the plural suggests there was, at least in Mr. McConnell’s mind, more than one central range of the Rocky Mountains when viewed from the Finlay River in the vicinity of Fort Grahame.

[138] During final argument, counsel for the intervenor Tahltan Central Government tendered document for identification 45, which contained a definition of the word “central” from the *New English Dictionary on Historical Principles*, vol. 2 (Oxford: Clarendon Press, 1893) at 222. He was met by objections from the plaintiffs, Canada and the McLeod Lake Indian Band.

[139] The objections were:

1. the dictionary definition was from an 1893 edition of the Oxford English Dictionary (or its precursor);

2. none of the experts was confronted with or offered an opportunity to comment on this definition;
3. as an historical document, it required some sort of historical expertise to establish its provenance; and,
4. it was not the sort of document of which the court could take judicial notice.

[140] In my view, the dictionary definition does not require to be received in evidence in order that the court consider it. Counsel cited the decision in *Chingee v. Canada (Attorney General)*, 2005 BCCA 446, where Southin J.A., speaking for the court, said at paras. 17-19:

17. Mindful though I am of the seventh of the principles of treaty interpretation, I think it appropriate to begin by asking what the words "in severalty" meant in that treaty, at least to the commissioners who drafted it.
18. Many different definitions of the term taken from various authors were put before the learned judge and were put before us.
19. But I have turned to The Oxford English Dictionary, the relevant passages of which were prepared between 1908 and 1914 (see the historical introduction to The Oxford English Dictionary finally published by The Oxford University Press in its full range in 1933 and reprinted in 1961 and 1970). I see no difference between the text relating to the phrase "in severalty" in that edition and that in the second edition, which was published by the Clarendon Press at Oxford in 1989.

[141] Dealing with the objections, I conclude:

1. the age of the dictionary might affect its weight, although Southin J.A. did not appear to worry too much about an edition of the *Oxford English Dictionary* almost as old as the one in question while considering the meaning of a different portion of Treaty 8;
2. the Tahltan Central Government, as an intervenor, was prohibited from cross-examining witnesses (or leading evidence, for that matter);

3. old dictionaries, from recognized publishers, at least, do not require proof through historians, archivists, or the like, any more than ancient judgments published hundreds of years ago, require proof; and,
4. despite the statement at para. 22 of *R. v. Krymowski*, [2005] 1 S.C.R. 101, I view this dictionary entry as authority more than evidence, and so judicial notice should not arise.

[142] I will therefore consider the dictionary entry in document for identification 45 without entering it into evidence.

[143] The intervenor Tahltan Central Government relies on the second meaning given in this dictionary entry:

2. *fig.* Belonging to the centre as the chief and most significant point or part, which lies at the heart, or dominates the rest; *hence*, chief, principal, leading, dominant.

But I note that the primary meaning in this entry is:

1. Of or pertaining to the centre or middle; situated in, proceeding from, containing or constituting the centre.

[144] If anything, this entry supports the plaintiffs' position somewhat more than the defendants' position.

[145] The question might be simply put: did the commissioners charged with drafting Treaty 8 intend its western boundary to follow the same watershed, where it diverged from the Rocky Mountains at about 54° 30' N, or did they intend the boundary to follow the Rocky Mountains along a lesser watershed north of that point?

[146] Dr. Taylor testified, regarding use of the phrase "central range," that:

... if you pick it apart it would seem to imply there are a series of ranges, at least three perhaps, one of which has some centrality to it and the others of lesser centrality.

(December 8, 2015, at 57, ll. 29-32)

In his report, Dr. Taylor lists 12 passes through the Rocky Mountains, from south to north, and states the number of mountain ranges in the vicinity of each pass (Taylor report, ex. 110 at 34). By his count, there is an even number of ranges at or near six of the passes south of where water east of the mountains starts to flow to the Arctic Ocean rather than Hudson Bay, and one with an odd number of ranges. North of that, three passes have an even number of ranges nearby, two have an odd number of ranges. I think the implication of a series of ranges is more than the semblance Dr. Taylor allows. In my view, for there to be a “central” range, there must be more than one range, and, for one of several to be “central,” it is logical that the number of ranges be an odd number.

[147] I disagree further with Dr. Taylor in his somewhat speculative addition of importance of height or elevation to the meaning of “central range” in this passage that follows immediately:

It could be that in terms of my conclusion it also had elements of the importance from the point of view of the altitude – general altitude of the range, that that would be the line of the highest mountains, the mountains that were the most difficult in terms of their height and perhaps in terms of glaciers and snowfields and things like that to cross so that there is kind of a marker that would have denoted the most difficult section of the Rocky Mountain Range.

(December 8, 2015, at 57, ll. 32-42)

[148] Height is more readily understood, as it can be measured. Importance is too subjective to be a reliable and ascertainable boundary. The difficulty even with height or altitude is captured in the quote above. That is, if “general altitude of the range” is adopted, it suggests some averaging. And if “the line of the highest mountains” is adopted, Dr. Taylor’s explanation goes on to weaken the objectivity of that criterion by suggesting that difficulty -- including “glaciers and snowfields and things like that to cross” -- would make boundary identification more difficult.

[149] For a central range in the Rocky Mountains to be the treaty boundary, it would have to extend to 60° N, although perhaps not as part of a series of three or more ranges but as one. Yet the evidence seems quite clear that there is not one such range.

[150] If on the other hand “central range” was meant to refer to the watershed or divide due west of the source of the Red Deer River, then it was meant to refer to the continental divide. From 54° 30’ N, the continental divide carries on as the Arctic-Pacific watershed and continues, ultimately crossing the parallel at 60° N.

[151] I conclude that the “said range” in the metes and bounds description of Treaty 8 refers to the Arctic-Pacific divide or watershed, and not to a range or lesser watershed within what we now call the Rocky Mountains. In doing so, I accept Dr. Galois’ opinion that the phrase “central range” as applied to boundaries means a line of watershed. Due west of the source of the Red Deer River, the line of watershed is the Hudson Bay-Pacific divide which, as part of the continental divide, is the highest order of watershed. North of that point, water west of the divide continues to flow to the Pacific Ocean while water to the east begins to flow to the Arctic Ocean rather than to Hudson Bay. This occurs well south of what Dr. Taylor has called “the split” at approximately 54° 30’ N (ex. 110 at 18).

[152] Brian Menounos was an expert witness qualified to opine on aspects of physical geography including surface processes and landforms, the origin, movement and collection of water in mountain regions, the physical geography of mountain environments and quaternary geology. Robert Gowan was a witness for British Columbia. He described his job as being to provide maps and analysis of digital geographic data to the “natural resource sector” in the province.

[153] Dr. Menounos, Dr. Desloges and Mr. Gowan have stated that the Rocky Mountains end south of 60° N (January 27, 2016, at 82, ll. 27-38). Dr. Menounos states in his expert report that the Rocky Mountains end abruptly south of Liard River and that they have a clear northern boundary south of the Liard River (Menounos report, ex. 43 at 12, 36). Dr. Desloges gives two latitudes for the northernmost point of the Rocky Mountains: approximately 59° 38’ N and 59° 37.45’ N (Desloges report, ex. 73 at 24, 26). Mr. Gowan struggled to find a connection between the northern end of the Rocky Mountains and the 60° N parallel (January 27, 2016, at 82, l. 39-83, l. 46; January 28, 2016, 72, ll. 31-39).

[154] It follows that Mr. White's map, as representing his graphic interpretation of the metes and bounds description in Treaty 8, was wrong.

[155] The parties led evidence on the ethnographic and linguistic reasons to prefer one or another interpretation of the treaty's western boundary.

[156] OIC 2749 refers twice to the map showing the proposed treaty extending to the Arctic-Pacific divide. After reciting background information, some of which is reflected from OIC 1703, OIC 2749 points out that no treaties had been made to that time with aboriginal peoples living west of the mountains. I take that reference to be to the Rocky Mountains.

[157] OIC 2749 goes on to state that up to then, there had been no difficulties arising out of differences in treatment of Indians living on either side of the mountains because they were "quite distinct," and then states the obvious: that in the northern reaches of the proposed treaty area, the British Columbia boundary, as the 120° W meridian, can be considered quite artificial, in the sense that the aboriginal inhabitants would have no reason to be aware of it or its significance in their daily lives.

[158] OIC 2749 recognizes that the main purpose of the proposed treaty -- to obtain peace with aboriginal peoples occupying the territory being invaded by whites seeking a route to the Klondike, or seeking gold or other resources in Athabasca District and northern British Columbia, or deciding to settle in this territory for their own reasons -- would not be significantly achieved if the treaty stopped at the British Columbia boundary.

[159] A later portion of OIC 2749 reads:

The Minister submits that it will neither be politic nor practicable to exclude from the treaty Indians whose habitat is in the territory lying between the height of land and the eastern boundary of British Columbia, as they know nothing of the artificial boundary, and, being allied to the Indians of Athabasca, will look for the same treatment as is given to the Indians whose habitat is in that district.

I conclude that the use of the word “mountains” in the early portions of OIC 2749 can be contrasted with the phrase “height of land” in the portion above, and that this use was deliberate and meant to reaffirm that the intent was to seek treaty with aboriginal peoples occupying territory up to the Arctic-Pacific divide.

[160] British Columbia has seized on the word “allied” in the last sentence cited above (“being allied to the Indians of Athabasca”). British Columbia does so in order to argue that in the late 1890s Canada, particularly as evidenced by annual reports of the Department of Indian Affairs, perceived a relationship between the Sekani and the Carrier peoples but not between the Sekani and the Beaver. Canada dealt with the Carrier and Sekani peoples under the aegis of the Babine and Upper Skeena Indian Agency, which had the Rocky Mountains as its eastern boundary. The annual reports in question tended to describe the Carrier peoples as more settled, and the Sekani (two bands of Sikanees and two bands of Nihanees) as more nomadic (ex. 282, doc. 0540 at 7).

[161] In argument, British Columbia points to these words from OIC 2749 (underlining added):

As the Indians to the west of the Mountains are quite distinct from those whose habitat is on the eastern side thereof, no difficulty ever arose in consequence of the different methods of dealing with the Indians on either side of the Mountains. But there can be no doubt that had the division line between the Indians been artificial instead of natural, such differences in treatment would have been fraught with grave dangers and have been the fruitful source of much trouble to both the Dominion and the Provincial Governments.

The Minister submits that it will neither be politic nor practicable to exclude from the treaty Indians whose habitat is in the territory lying between the height of land and the eastern boundary of British Columbia, as they know nothing of the artificial boundary, and being allied to the Indians of Athabasca, will look for the same treatment as is given to the Indians whose habitat is in that district.

British Columbia asserts that these words raise the question of an alliance between the aboriginal peoples of Athabasca and those in British Columbia, and it argues that there is no evidence that the Dominion Government or the treaty commissioners perceived there to be an alliance between the Beaver east of the mountains and the

Sekani west of the mountains, or between the Sekani and other aboriginal groups in Athabasca District.

[162] In its written argument, British Columbia states at para. 946:

While expert opinion based upon a retrospective consideration of anthropological, linguistic, ethnographic and historical research may be interesting, it is unlikely to reflect the understanding in 1899 of these Aboriginal groups.

I agree. Ethnography was not an organized field of academic or scientific endeavour in the late nineteenth century; indeed, anthropology, of which ethnography is an offshoot, was in its infancy. Knowledge of the inhabitants of northern British Columbia came from the observations of explorers such as Alexander MacKenzie and Simon Fraser. Perhaps the most detailed and voluminous account of the inhabitants of the Rocky Mountain Trench and the land on either side of it is found in the writings of Father A.G. Morice, who spent nineteen years, from 1885 to 1904, ministering in Carrier and Sekani territory from his mission at Stuart Lake. In so doing, he travelled extensively in the area of the northern Rocky Mountain Trench, including McLeod Lake and Fort Graham. He described the Sekani as highly nomadic, with leadership determined by capability rather than hierarchy or heredity. How much of Father Morice's observations would have been available to the treaty commissioners in 1899 is not entirely clear. For that reason, the opinions of the ethnography and linguistics experts tendered at trial are of limited assistance in determining the extent of the knowledge of the treaty commissioners or those instructing them, or in divining their intent.

[163] On the other hand, the evidence of members of the various aboriginal groups who testified is of some importance. It is not necessary to determine whether one or another group of aboriginal peoples exercised exclusive rights or occupation to any particular area: for the purposes of the question before the court, it is sufficient to consider whether aboriginal peoples living in the Rocky Mountain Trench might have a basis on which to object to European incursion into the area, and whether there

might be sufficient ground to believe that those people might learn of the terms on which aboriginal peoples to the east had entered into treaty with the Crown.

[164] Roslyn Notseta is a member and former chief of the Halfway River First Nation, which she described as a reserve of different families from different areas. Her mother was from Prophet River. After allowing for the frailties of those portions of her evidence dependent on hearsay passed on by elders and others, I am persuaded by Ms. Notseta that there was relatively free movement by aboriginal peoples back and forth across the Rocky Mountains in the nineteenth century (November 17, 2015).

[165] Mary McKanachaa, a member of the Prophet River First Nation, described traveling from the Prophet River Reserve, south of Fort Nelson, south and then west, through the mountains, then further west past the Arctic-Pacific divide. She said if she marked all of the trails known to and used by her people on a map, it would look like a spider web. When it was pointed out to her that the route she had marked crossed the red line delineating the claimed western boundary of Treaty 8, being the Arctic-Pacific divide, she answered that there was no red line on the ground over which she travelled (ex. 65; November 18, 2015, at 25).

[166] Clarence Willson, a member and councillor of the West Moberly First Nation, has described a complex family history of relationships and movement back and forth across the Rocky Mountains, and from Prince George north beyond the end of Williston Lake and Ingenika to the area around Fort Ware (November 18, 2015, at 48-65).

[167] Vera Poole is an elder of the Tsay Keh Dene First Nation, which has in the past been known as the Fort Grahame Band, the Ingenika Band, and Kwadacha. Her people have been displaced more than once as a result of construction that led to the creation of the Williston Reservoir and the destruction of their homes. Ms. Poole is clear that her people are Sekani, and not Beaver, and although marriages occur between her people and Beaver, the Rocky Mountains act as a natural barrier separating the two peoples (January 11, 2016, at 24, l. 41 - 25, l. 3).

[168] John French, chief of the Takla Lake First Nation, testified that his peoples' territory is to the west, at and sometimes over the Arctic-Pacific divide. He testified that the divide is sometimes distinguishable only by the species of fish caught in the rivers and streams, Arctic grayling on one side, salmon on the western side (January 19, 2016, at 7, l. 34 - 8, l. 32). His people have little contact with people of Beaver ancestry, presumably because of the greater distance separating them (January 11, 2016, at 9, l. 11 - 10, l. 9).

[169] I do not accept that in 1899 there existed either a notional or a real boundary between the Beaver and Sekani as represented by the Rocky Mountains. Instead, I find that the territorial limits of the Beaver to the east and Sekani to the west were fluid, or flexible, with individuals and family groups travelling back and forth across the mountains at will, to hunt and trade.

[170] I find that the Sekani were (in the words of Commissioner Herchmer) "inclined to be turbulent," and that they were, and were known to be, sufficiently in occupation of the land west of the Rocky Mountains to object to European incursion; and at the same time they were, and were known to be, in sufficiently frequent contact with the Beaver living east of the Rocky Mountains that the Sekani would soon learn if the Beaver entered into treaty, and on what terms.

[171] I accept the evidence of Sharon Hargus, an expert witness qualified to give opinion in linguistics, in particular the Sekani and Beaver languages. Dr. Hargus states that the Beaver, Sekani and Carrier languages have a common root in the Athabaskan language family, and that Sekani is more similar to Beaver than it is to Carrier (Hargus report, ex. 107 at 23-24). This is supported by a report in 1810 from Daniel Harmon, the Northwest Company factor at Stuart Lake, as quoted by Robin Ridington, an expert witness qualified to give opinion in anthropology, including ethnohistory and ethnography (Ridington report, ex. 93 at 23).

[172] While Dr. Ridington and John Yerbury (an expert witness qualified to give opinion on anthropology, specifically ethnohistory) seem to agree that the Sekani had been displaced from east of the Rocky Mountains into the Rocky Mountain

Trench area by the Beaver, I accept Dr. Ridington's opinion (Ridington report, ex. 93 at 5):

Contact between the Beaver and Sekani has been continuous from the earliest recorded history to the present (R. Ridington and J. Ridington, 2013, Chapter 4). Marriages took place between the two groups throughout the nineteenth and twentieth centuries and continue into the present (Amber Ridington, 2013: 74-92). This flow of people back and forth undoubtedly contributes to the maintenance of Beaver/Sekani as a single speech community.

Dr. Ridington concludes (Ridington report, ex. 93 at 25) that:

... the Beaver and the Sekani were closely related but sometimes antagonistic within the context of competition for fur trade relations. They gambled with one another and established relationships through marriage.

[173] I declare that the western boundary of Treaty 8 is the height of land along the continental divide between the Arctic and Pacific watersheds (the Arctic-Pacific divide).

[174] The parties may speak to costs, although written submissions should be exchanged and submitted before any date is set for an application.

"R.T.C. Johnston, J."

The Honourable Mr. Justice Johnston