THE 1923 CANADA-ONTARIO AGREEMENT AND THE WILLIAMS TREATIES

Daniel E. Shaule, MA
Specialization in Great Lakes Treaty-Making
Trent University
Peterborough, ON
d_shaule@hotmail.com

Abstract

This paper examines the joint agreement between Canada and Ontario that authorized the negotiations of a treaty with the Mississauga and Chippewa in 1923, known as the Williams Treaties. This agreement envisioned surrender to an area of land not covered by any other treaty, described as 10,719 square miles above the 45th parallel. This paper draws from government archives to show the development of the claim and the process that led to the joint agreement. The agreement also described the land as bounded by existing treaties. The land described in the treaty totals 20,100 square miles along with a clause including lands, "… they ever had, now have, or now claim to have ...,." The Supreme Court of Canada indirectly interpreted this clause to include former surrenders.

Résumé

Cet article examine l'entente réciproque entre le Canada et l'Ontario autorisant les négociations d'un traité avec les Mississauga et les Chippewas en 1923, les « Traités Williams ». Cet accord envisageait que soit abandonnée plus de territoire que tout autre traité, de 10,719 miles carrés. Cet article montre (au moyen d'archives gouvernementales) l'évolution de la revendication et le processus qui a mené à l'entente réciproque. L'accord décrit aussi ce territoire comme étant lié par les traités qui existaient déjà. On le décrit dans le traité comme couvrant 20,100 miles carrés; une clause y rattache les terres « …qu'ils ont déjà eues, ont maintenant, ou disent avoir déjà eues …». La Cour Suprême du Canada a indirectement interprété cette clause comme comprenant des territoires cédés autrefois.

Introduction

In 1994, the Supreme Court agreed the 1923 Treaties were illegitimate and valid at the same time. The 1923 Indian Treaties, known as the Williams Treaties after Chairman Angus Seymour Williams, the treaty commissioner, addressed the claims of two distinct Indigenous nations, the Mississaugas and the Chippewas, to the same territory. The Mississaugas and Chippewas are two distinct dialects within the "Anishinabe" language group and held a shared hunting territory in the eastern Great Lakes region. In effect, the two Treaties each consist of two documents: an agreement between the Government of Canada and the Province of Ontario that empowered a government commission to obtain a treaty to 10,719 square miles located north of the 45th parallel and south of the Ottawa River, and the treaty itself. The Williams Treaties purported to surrender hunting, fishing, and trapping rights, and were the only treaties in Canada to include such rights for forfeiture. In the 1980s, a fishing rights issue in Canadian courts revealed that the terms of the 1923 Treaties described more than double the amount of land set out in the agreement portion of the documents.

In 1985, George Henry Howard, a Mississauga man from Hiawatha, a First Nation south of Peterborough, Ontario, was charged with fishing out of season in a region covered by Treaty 20, an area south of the lands covered by the 1923 agreement, which, in contrast, had affirmed fishing rights. As Howard would come to learn, the Williams Treaties actually described 20,100, not 10,719, square miles, and contained a clause covering any lands the Mississaugas and Chippewas "ever had, now have, or now claim to have," which has been referred to as a "basket clause."[1] The Crown argued that the Williams Treaties' "basket clause" meant that its provisions covered earlier treaty areas, such as the 1818 Treaty 20 territory where Howard had been fishing. The court upheld the Crown's proposition that the Williams Treaties included Treaty 20 lands via the basket clause as a claim the Mississaugas or Chippewas "ever had," and therefore Howard was found guilty of fishing out of season.[2]

The court's interpretation, coming seventy years after the treaties were signed, ran counter to what was understood in the 1920s. For example, in November 1923, Toronto's *Daily Globe* announced that a treaty commission had entered into a treaty with the Mississaugas and Chippewas for lands in south-central Ontario above the 45th parallel, east of Georgian Bay, and south and west of the Ottawa River, and thus understood the land cession as finite, that is, not comprehensive.[3] In another example from March 1924, the Indian Department's *Annual Reports* confirmed the treaties, albeit referring to lands described as north of Lake Simcoe and south of the Ottawa River, as reflected in the agreement. Then, once again, the arrangement was reconfirmed in July 1924 in the House of Commons as a cession of Indian Title to 10,719 square miles.[4]

The court's interpretation of the events in the 1920s contradicts the historical record. The treaties' boundaries might remain unquestioned today if the Howard case had not exposed inconsistencies in the boundary terms.

Howard appealed the case all the way to the Supreme Court of Canada. Where he ultimately lost is when the Court ruled that the terms of the Williams Treaties were valid and surrendered all hunting, fishing, and trapping rights of the signatories.[5] The case put to the test Section 35 of the 1982 Constitution Act, which states, "Existing aboriginal (*sic*) and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." The court based its decision on testimony from another Hiawatha Mississauga man, Ralph Loucks, who claimed, from childhood recollections, that in 1923 the Hiawatha Mississaugas knew they were surrendering their hunting, fishing, and trapping rights.[6] Therefore, the court concluded that the Williams Treaties included all lands these nations had ever claimed, will ever claim, and now claimed. Therefore, the Mississaugas in 1985 had no *existing* Aboriginal or treaty right to fish because it had been extinguished in 1923.

Scholarship on, litigation over, and community knowledge of the Williams Treaties is minimal because, once signed, the documents were filed away in the Indian Department and labelled confidential: no one could view them without the permission of the Minister of Indian Affairs.[7] In 1973, a copy in the national archives became available for public review. That is when historian Leo Johnson examined it while writing his *History of the County of Ontario, 1615-1875*, in which he included a chapter on the Treaties.[8] In 1986, Robert Surtees wrote a report simply titled *The Williams Treaties* for the Department of Indian Affairs Historical Research and Treaties branch.[9] Two decades later, in 2001, Joan Lovisek published "The Ojibway vs. The Gerrymander: The Evolution of the Robinson, Huron and Williams Treaties Boundaries," which focused on treaty boundaries prior to Confederation in 1867.[10] In 1850 the British signed a treaty with the Ojibway to lands north of Lake Huron, whereas, seventy-three years later, the Mississaugas and Chippewas would be approached to cede lands to the east of this area, creating an overlap of surrendered lands.[11] In 2004, Peggy Blair published *A Lament for a First Nation: The Williams Treaties of Southern Ontario*, focusing on hunting, fishing, and trapping rights and the Howard decision.[12] In this paper, I examine the development of the joint agreement between Canada and Ontario that authorized the negotiation of the Williams Treaties, drawing from government archives, to show that, throughout the process, the Mississaugas and Chippewas, along with both the federal and provincial governments, only envisioned a surrender of 10,719 square miles above the 45th parallel, in an area not covered by any other treaty. The historical record confirms that the final 1923 Williams Treaties transgressed the agreement by including more land than was authorized, and thus are

fundamentally flawed. The Supreme Court, in a ruling that ignores the historical record, confirmed that lands beyond the 10,719 square miles are a valid part of the Williams Treaties, and ultimately found Howard guilty of fishing, contrary to provincial laws in 1985.[13]

Treaties were required due to the 1763 Royal Proclamation that stipulated British subjects could not reside on Indian Lands until the lands were surrendered by a treaty between the affected First Nation and the Crown. The claim that led to the agreement and the Williams Treaties dated back to 1869, when the Mississaugas and Chippewas forwarded a petition to the Indian Department claiming compensation for their loss of the use of an area north of the 45th parallel, west of Georgian Bay, and south and east by the Ottawa River. The federal Indian Department's initial concern centred on who was responsible for treaty annuities, when the province received the benefits of the lands.[14] Therefore, the Indian Department planned to propose to the Province of Ontario that a capital contribution of $125,000 be provided, of which the interest was to be used to pay annuities. Ontario chose not to respond to the Indian Department, and when pressed for an answer over the next five decades, asked that the claim be placed in abeyance until they researched the matter.[15]

Claim Renewal

In 1914, the Indian Department asked the Department of Justice to look into the Mississaugas' and Chippewas' claim to lands north of the 45th parallel—an area that had been quantified as 10,719 square miles since 1884.[16] The department accepted the invitation and appointed lawyer Robert V. Sinclair to conduct the investigation. In his opinion, the claim was valid, but only to a smaller portion of the claimed area, as some of the lands previously surveyed overlapped with the 1850 Robinson Huron Treaty. Sinclair simply subtracted these lands from the 10,719 square miles originally claimed, leaving 9,759 square miles.[17] Sinclair described the value of this territory as "incalculable," and acknowledged that there has been a "delay in settling the matter due to a dispute between the Government of Canada and the Province of Ontario."[18] The federal government needed an agreement with the province to make a treaty, as a result of provisions of the 1867 Constitution. Section 91.24 of the British North America Act, 1867, gave the Government of Canada responsibility for Indians, Indian lands, and treaty-making; however, section 109 stipulated that "All Lands, Mines, Minerals, and Royalties belong[ed] to the several Provinces of Canada."[19] It would appear, then, that all Indian land once surrendered became part of a province's land holdings. This interpretation was confirmed in *The Attorney General of Ontario v. St. Catherine's Milling Company*, which went to the highest

court in Canada—at the time the Judicial Committee of the Privy Council—in 1888, a case noteworthy for its characterization of Indian title: "The Crown [Province] has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden."[20] The case confirmed that all lands, once surrendered by treaty, belonged to the province in which they were situated.[21] Therefore, the Indian Department, from this point forward, required an agreement with the province in question to use some of the lands to create a reserve in the event of a treaty. In this case, however, the Indian Department was more interested in having the province accept financial responsibility since it acquired all beneficial interest in land once it was surrendered. Sinclair's recommendation was to "obtain an agreement from the Province to assume the monetary obligation" for annuities.[22]

R. V. Sinclair completed his investigation in November 1916.[23] The Justice Department planned to give a copy of the report to the Indian Department at a meeting, to go over Sinclair's recommendations. The meeting never took place, and with the demands of the first World War and other pressing issues, the claim remained in abeyance for another four years. Two years after the war ended, W. Stewart Edwards, Assistant Deputy Minister of Justice, wrote to the Indian Department deputy superintendent about the Sinclair report on the Mississaugas' and Chippewas' land claim.[24] Edwards pointed out that the document confirmed the Mississaugas' and Chippewas' claim in all aspects, and advised the Indian Department to seek an agreement with Ontario to accept responsibility for annuities.[25] There was no immediate response.

Meanwhile, the trajectory of the Mississaugas' and Chippewas' historic land claim changed when the Judicial Committee of the Privy Council released the *Star Chrome* case decision in 1921. *Star Chrome* was a "dust-up" between Rosalie Thompson and the Star Chrome Mining Company over the validity of a Dominion of Canada land patent Thompson had sold to Star Chrome. In February 1907, the company took proceedings against Thompson, claiming cancellation of the sale and demanding repayment of the purchase money, with damages, on the grounds that the Dominion of Canada title Thompson held was invalid. Star Chrome successfully argued, the lands were under the proprietorship of the Province of Quebec, and therefore only it could issue a proper title.[26] The *Star Chrome* case endorsed the outcome of a case involving the St. Catherine Milling Company case of 1888 that confirmed that all lands surrendered after Confederation belonged to the province in which they were located. The case took this conclusion one step further, however, addressing the question of who held proprietary rights to lands surrendered *before* 1867. The court also confirmed that lands surrendered before Confederation belonged to the province in which they were situated post-Confederation.[27] Prior to this case, the Government of Canada was of the opinion that it held title to lands surrendered be-

fore the implementation of the British North America Act. Accordingly, it had continued to lease and sell lands, issue timber licenses, and hold monies for First Nations residing on lands surrendered before 1867. The *Star Chrome* decision was a watershed moment in that it exposed how the Government of Canada and the Province of Ontario were violating the provisions of the Royal Proclamation of 1763.[28] The proclamation stipulated that British subjects could not reside on Indian lands until those lands had been surrendered by treaty. Canada had been leasing and selling pre-Confederation treaty lands that belonged to the province, and the provinces had been using lands without a proper surrender. The *Star Chrome* decision effectively led to the passing of the 1924 Indian Lands Act, in Ottawa, to address the ownership of land prior to Confederation and Indian lands in general. One of those areas Ontario was using illegally was in the Ottawa Valley, where it had been building roads and surveying and extracting resources for decades without compensating the Mississaugas and Chippewas. If Ontario were to have taken legal action against Canada for selling and leasing pre-Confederation lands, the province would have had to answer questions about its use of lands not covered by a treaty, in violation of the proclamation. The *Star Chrome* decision gave Canada and Ontario the needed legal and political push to negotiate an agreement on how to approach the Mississaugas and Chippewas to persuade them to surrender their historic claim to the 10,719 square miles.[29]

In particular, the case offered Ottawa a solution to the unresolved issue of how to get Ontario to accept responsibly for annuities and to provide reserve lands for the Mississaugas and Chippewas following a treaty. However, after fifty years, officials in the Indian Department were operating under an established set of attitudes and seemed to feel that they held no leverage to get Ontario to agree to provide a capital account, to pay annuities, or provide land for reserves. The department believed it needed a strategy to get Ontario to agree to these responsibilities, but failed to realize that the province had become more agreeable than ever to having the lands surrendered.[30]

At the same time, the Indian Department was also dealing with other unclaimed and unceded lands of the Mississaugas and Chippewas. The department was aware that the 1787–1788 treaty that covered the north shore of Lake Ontario was invalid: officials in the 1780s had had the Chiefs sign a blank treaty, contrary to provisions of the proclamation and later instructions for proper treaty signing.[31] The Mississaugas and Chippewas either were unaware of the invalid treaty or had failed to officially claim the area. Either way, the Indian Department was primarily concerned about the restitution expectations of the Indigenous groups involved, as more land meant these groups would be due more money from Ontario. A plan to address both issues was required.

The Indian Department would take the next year and a half to for-

mulate a reply to the Department of Justice in support of the Mississaugas' and Chippewas' claim. On July 4, 1921, Assistant Deputy Superintendent of the Indian Department J. D. McLean recommended that the province be approached, not to address annuities and reserve lands, but, rather, to determine whether the Province was interested in jointly determining the "extent and validity" of the claim itself.[32] Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs, formulated the multifaceted plan.[33] If the province accepted the invitation, then it would be easier to demonstrate that Ontario was getting beneficial interest in the land. The plan, in theory, made it easier to ask for a capital account, the interest of which would pay for annuities and the setting aside of some lands for reserves. The strategy also ingeniously addressed outstanding unclaimed lands of the Mississaugas' and Chippewas'. The investigation of "extent and validity" resulted in a process whereby the Indian Department could discover what the Mississaugas and Chippewas knew about other lands not covered by a treaty. For example, if the Mississaugas and Chippewas mentioned lands in the supposed 1787–88 treaty, the plan appears to have been to include these lands as "claimed" lands and simply add them to the treaty. The Government of Canada, then, could approach the Mississaugas and Chippewas to surrender the land in order to comply with the Royal Proclamation.[34]

To be clear, then, the proposed investigation of "extent and validity" was a ruse, as the validity of the claim was not the issue at that moment.[35] Neither the Indian Department nor the Province of Ontario ever disputed the original claim to 10,719 square miles. The extent and validity of the claim had been resolved years earlier and had been confirmed again by Sinclair, despite his determination that the extent of the claim was a smaller area of 9,759 square miles. The plan was a gambit to get Ontario involved in the process, something the Indian Department had been trying to do for over five decades.

The Agreement

As stated earlier, section 91.24 of the British North America Act gave the federal government responsibility for Indians while clause 109 gave *all lands* to the province. The effect of these clauses meant the Indian Department had to get the province to agree to lend them some lands to create reserves in the event of a treaty, an anomaly of treaty-making after 1867. McLean requested that the Department of Justice handle the negotiations with Ontario, but it declined.[36] Therefore, the Indian Department decided to contact Ontario directly to create an agreement. Duncan Campbell Scott wrote to W. E. Raney, Attorney General of Ontario.[37] Within two weeks, the Deputy Attorney General for the province agreed to join the Government of Canada in determining the extent and

validity of the claim.[38] Ontario—knowing that the area in question was a large and important one—felt that it was "advisable" to get involved, as the matter could be delayed no longer.[39] After *Star Chrome*, the province was finally interested—or, rather, self-interested—in resolving long-standing claims to lands not covered by a treaty.

At this point, the Indian Department's solicitor, Angus Williams, wrote to the Justice Department again requesting their assistance in drafting an agreement. Williams suggested that R. V. Sinclair, due to his prior experience, should lead the process to determine the extent and validity of the claim.[40] Angus Williams's memo requesting assistance and recommending Sinclair was forwarded to the Deputy Minister of Justice, E. L. Newcombe.[41] The justice minister reversed his earlier decision to remove his department from the Mississaugas' and Chippewas' claim, and decided to stay involved.[42] After all, the Justice Department had recently validated the claim for the Indian Department in a report written by Robert Sinclair, who now was being recommended to investigate the "extent and validity" of the claim. The Department of Justice, however, instead of hiring Sinclair, appointed lawyer Oliver Mowat Biggar (O. M. Biggar) to draft an agreement with Ontario and instructed the Indian Department to have its solicitor, Angus Williams, assist him.[43] Biggar thus simultaneously negotiated the agreement for the Mississaugas' and Chippewas' lands and the 1924 Indian Lands Agreement with the Ontario Government, in response to the *Star Chrome* case.[44]

Biggar immediately started drafting a memorandum of agreement (MOA), and by June the initial terms had been discussed with provincial officials.[45] It proposed a commission to determine whether the claim was "well founded" and decide what should be done in the event the claim was justified.[46] Biggar reviewed all the evidence at his disposal and concluded that the Mississaugas and Chippewas had a *prima facie* claim to 10,719 square miles above the 45th parallel.[47] It is noteworthy that Biggar described the claim as bounded by an 1818 treaty, which would later be included in the Williams Treaties in *R. v. Howard,* the court case that exposed the contradiction between the treaty and the MOA.[48] All this is to say that the Crown defined the lands in question as finite and specific, in 1869, 1884, 1895, 1916, and 1921, and as 10,719 square miles, not covered by a treaty and claimed by the Mississaugas and Chippewas as their hunting lands.

In early January 1923, discussions took place between the Ontario Minister of Lands and Forests, Beniah Bowman, and his deputy minister over the draft MOA.[49] The Minister approved the general ideas contained in the draft agreement.[50] Ontario already had informally agreed to limit compensation to half a million dollars, based on the original petition, and had issued a $400,000 cheque to the Indian Department while the commission was still investigating the validity of the claim.[51] In the absence of any complications or impediments, the final draft agreement

would be presented to the federal and provincial cabinets for approval.[52] Before this could happen, however, an extraordinary obstacle appeared.

In February 1923, an archivist in the Indian Department, G. M. Matheson, sent a memorandum to Oliver Biggar and Angus Williams informing them that in 1798 Lieutenant Governor Robert Prescott (1796-1799) had rejected a "plan" by Peter Russell to obtain a treaty to a small portion of the north shore of Lake Ontario, but to describe a much larger area of land in the written treaty because the Indians could not read and would not know they were being duped.[53] The "plan" was rejected by Prescott, and the north shore of Lake Ontario was never formally surrendered—right up to the day George Howard was caught fishing. Matheson's memo demonstrates that the commissioners in 1923 knew that the north shore was not covered by a valid treaty and remained the hunting grounds of the Mississaugas and Chippewas even if those lands had not been officially "claimed" in a written petition by the Mississaugas and Chippewas.[54] If the Indian Department or the commissioners were to bring the unclaimed area to the attention of the Mississaugas and the Chippewas, they knew it was likely that the First Nations would change the territory described in the agreement and raise the price of surrender. The Indian Department had a moral and legal obligation to share this information with the Mississaugas and Chippewas, and the fact that they knowingly and intentionally failed to do so taints the honour of the Crown. However, more compensation might result in Ontario backing out of an agreement that took fifty years to make. We may infer that this was the reason that what should have been a notable and serious obstacle to the MOA simply was ignored.[55]

On March 9, 1923, Biggar reported to Duncan Campbell Scott that before finalizing the agreement, the Province of Ontario wanted to include a clause to deal with reserve lands when the Indians became "extinct."[56] This "extinction clause" outlined that the reserve lands held in trust by the Government of Canada were to be returned to the province once the Mississaugas and Chippewas became extinct.[57] Remarkably, the Indian Department was quick to offer a more extensive extinction clause, which repeats almost word for word Section 1 of the 1924 Indian Lands Act, also drafted by Biggar.[58] Ontario accepted Canada's amendment of the clause in full, and a draft MOA was finalized in April 1923.[59]

The first clause in the memorandum is a "whereas" clause that states the Chippewas' and Mississauga's claim to be entitled to lands in the Province of Ontario not covered by a treaty.[60] The area is described as 10,719 square miles, just as it was in the 1869 claim, and the agreement allows for an enquiry at the Department of Indian Affairs into the "probable validity" of the claim.[61] A commission was to be created in order to determine the "validity of the claim," and, if the claim was found to be valid, the parties could enter then into a treaty for "just and fair terms."[62]

Thus, the first three clauses of the memorandum provided the pre-

text for an "enquiry" to determine the validity of the Mississaugas' and Chippewas' claim, and spelled out how many people would make up the commission, who would appoint the commissioners, how the commission was to establish validity, and the commission's next role as treaty commission, if it were to decide in favour of the claim.[63] Clauses 4 and 5 dealt with the respective roles and responsibilities of the governments involved. The Province of Ontario agreed to provide compensation for annuities and set aside reserve lands, which were to be held in trust by the Government of Canada.[64] Canada agreed to be responsible for the salaries and expenses of the commissioners. The final clause, clause 7, the "extinction clause," outlined that in the event the bands became "extinct," the land held in trust by Canada was to be returned to Ontario, along with any money held by the bands.[65]

The province received cabinet approval of the MOA almost immediately.[66] On June 23, 1923, the Governor General approved it on behalf of the federal government by an order-in-council.[67] The Governor General then was asked to approve the appointment of commissioners.[68] The province recommended R. V. Sinclair, K. C., of Ottawa, and Uriah McFadden, K. C., of Sault St. Marie.[69] Sinclair, of course, was being asked to investigate the "extent and validity" of a claim he had previously determined to be valid. His selection for the task once again implies that neither the province nor the federal government had any serious questions about the claim. The cabinet met the following week to consider the superintendent of Indian Affairs' recommendations for the agreement and commissioners.[70] A report to the cabinet outlined the extent of the commission's authority to investigate and arrange the surrender of an area of 10,719 square miles. This report once again stipulated that the land not covered by any treaty was bounded on the south-east by Treaty Number 20 of 1818.[71] On August 31, 1923, the cabinet ratified the MOA and Williams, Sinclair, and McFadden were approved to represent the federal government.[72]

The MOA was sanctioned by the federal and provincial cabinets before being sent to the Governor General for approval.[73] Obtaining the approval of the Governor General is a long-standing tradition relating to treaties dating back to the Royal Proclamation of 1763, Canada's first constitutional document. With his approval, the first task of the commission was to investigate the validity of the long-standing claim to 10,719 square miles above the 45th parallel, the same area that had been pursued for over fifty years. Charles Stewart, Superintendent General, Indian Affairs (1921– 1926), subordinate J. D. McLean, Assistant Deputy Minister of Indian Affairs, wrote to the Indian agents connected to the Mississaugas and Chippewas asking for their cooperation in the commissioners' work.[74]

By now the Mississaugas and Chippewas had heard rumours that the government was sending someone to investigate their long-stand-

ing claim. Some communities, however, were not aware of the nature of the commission, and other people thought the commissioners were there to investigate the 1850 Robinson Treaty, which overlapped their claim to land. As a precaution, they formally requested, through their lawyer, that independent legal counsel attend meetings with the government representatives.[75] The Mississaugas' and Chippewas' lawyer, I. E. Weldon, wrote to the Indian Department on the matter but received no response.[76] A month later the Department of Indian Affairs informed Weldon that "it is not the policy of the Government to hear counsel in support of the Indian claim."[77] Outside legal counsel was not considered necessary or welcome, in other words, because the commission had been authorized by the MOA to be "fair and just." As we shall see, this did not turn out to be a sufficient guarantee.[78]

Investigation of Validity

The investigation of validity began on September 14, 1923, at Georgina Island, a Chippewa Nation situated at the southern end of Lake Simcoe, north of Toronto. The investigation now would be entirely opaque, to us today, if not for the 284 pages of minutes generated during the investigation. Minutes were taken at each community; however, those from Georgina Island were the only set that recorded the introduction presented by the commissioners. Those minutes, after we read them with clarity, prove to encapsulate the half-truths, misdirection, feigning, and calculated betrayal of their Indigenous audience by the commissioners—and all lawyers—working for the Indian Department. A ten-foot-square map was hung on the wall in each community the commission visited in with the claimed area outlined in red.[79] The Georgina Island introduction demonstrated that the commissioners' deceitful behaviour started with their first words, when, referring to the map, they stated that they were there to investigate "this territory" and "if the claims are established, to negotiate a treaty." At Georgina Island the word "claim" was used eight times—seven in the singular and once in the plural.[80] Using the word in the singular implied that the claim was to one area of land, as indicated on the map, whereas the plural suggested separate and distinct parcels of land, which the Crown did not overtly admit to investigating.

The commissioners used the word "claim" and "claims" in the same sentence when explaining the agreement to the Chippewas: "Under this Agreement, these Commissioners are authorized to investigate the **claim** of the Indians in regard to this territory, and if the claims [emphasis added] are established, to negotiate a Treaty of Surrender and arrange for such compensation as seems to be reasonable and proper."[81]

This word choice seems to suggest that the commissioners knew the

Mississaugas and Chippewas had more than one claim. The commissioners knew about the supposed 1787 treaty for the north shore of Lake Ontario and the plan to defraud the Mississaugas and Chippewas by taking a small surrender and filling in a larger area. It is my theory that at some point during the investigation the commissioners essentially adopted the 1798 plan and used the investigation of validity to obfuscate their intentions. If the commissioners were not following the 1798 plan, the scheme they formulated in 1923 certainly looks similar to it. Either way, at Georgina Island, Chippewa informants described hunting, fishing and trapping south of the Holland River: for example, one person reported, "My grandfather was Joseph Snake, he had hunting ground on the south side of Lake Simcoe at Holland Landing and Schomberg." The Holland River is well south of the southern boundary of the 1869 claim. Statements like this established the territory as belonging to the Chippewas, and implicitly laid claim to the land by acknowledging it as their hunting grounds.[82] I should mention that for the majority of these interviewees, their first language was Anishinaabemowin.

The bands informed the commissioner that the 1787 treaty was not valid, given the commissioners' focus on obfuscation; the commissioners must have been taken aback. The Mississaugas' and Chippewas' territories not covered by a treaty were more extensive than the commissioners even realized. The Mississaugas' and Chippewas' bands also informed the commission of seven townships below Lake Simcoe that were also not covered by a treaty. To make matters worse, the commission learned that the 45th parallel, which they thought passed just north of Lake Simcoe, in fact lay a hundred miles further north, creating one thousand square miles of land not covered by a treaty and outside of the commissioners' mandate. Johnson Paudash, from Hiawatha, noted; "Now there is line 45 on that map, but you don't find Simcoe up there, do you? See, there is that line 45 right along from Bracebridge to Moose Deer Point."[83]

The feigning began in the field. When the Mississaugas and Chippewas testified about their hunting lands not being covered by a treaty, the commission's reaction was one of professed astonishment.[84] In fact, a curious thing happened. At each community the commissioners visited, they would hear about these "other lands," and each time they collectively acted as if they were hearing this information for the first time. In fairness, while the commissioners were aware that the lands along the north shore of Lake Ontario had not been ceded properly, they were probably surprised by claims to lands north and south of Lake Simcoe. Johnson Paudash, a respected member of the Hiawatha band, listed all of the unsurrendered areas mentioned above. The commission pretended they were hearing this information for the first time, even though Hiawatha was their last stop, as noted at Hiawatha.

Q. You say the Mississauga surrendered from the Bay of—
A. You must know that one Treaty (*sic*) was defective, and that Treaty (*sic*) was made at the "Carrying Place" by Sir John Johnson, but it was defective, and in ~~the~~ 1805 they made a confirmatory surrender and it gives a full description of the land intended to be surrendered in 1787. In 1784 they surrendered for the Bay of Quinte along the lake to Scarboro. That was the Gunshot Treaty, and in 1788, four years later, they surrendered that confirmatory surrender Scarboro up to Lake la Clie [Simcoe], but it was supposed to cover the lands surrendered in 1784. They added in that additional piece tho', that piece runs to the southern point of Lake La Clie which is now Simcoe. They went 14 miles at the right angle, then 14 miles south to the northern boundary of Pickering, thence east to those two townships (indicating on map) leaving this piece unsurrendered south of Lake Simcoe.
Q. How many townships in this unsurrendered piece?
A. Seven townships—Reach, Brock, Thora, North Gwillimbury, Georgina, Scott, Uxbridge, and a part of Scugog township. Those were unsurrendered.
Q. You coloured this map?
A. Not all, the Indian Department did most of it in May 1901.
Q. Then you got this on May 23rd, 1901?
A. Yes.
Q. Did you assist in the colouring of this map?
A. Yes, I was down there and they showed me the map, but they did not colour the townships I spoke of above. I coloured that myself.
Q. You coloured this map?
A. Not all, the ...
Q. Who did the blue?
A. The Indian Department
Q. The Yellow?
A. They marked them down with a pencil to show the unsurrendered lands and showed it to me, and the surrender parts too, and I put the colours on.
Q. Now let me understand: they marked out in pencil at the Department the boundaries of those lands, and they coloured the Surrender of 1818 in blue?
A. Yes sir.
Q. You did the rest?
A. Yes, the late Mr. Orr did the pencil marks.[85]

The information Paudash presented was already on file at the Indian Department. In fact, the commissioners had also heard, in five previous communities, that there were seven townships below Lake Simcoe that

were not covered by a treaty, and yet were surveyed and sold to settlers anyway.

The commissioners later conducted an investigation to confirm what the Mississaugas and Chippewas had told them. They were aware of the 1787–1788 treaty, which was supposed to have covered the north shore of Lake Ontario, hence the subterfuge of an investigation of "extent and validity." However, their investigation revealed lands above and below Lake Simcoe not covered by a treaty, just as they had been told. Their research confirmed what they had learned. The fact was, the commission held no power or authority to change the joint agreement that created the commission and its mandate. The commissioners could have, and should have, reported that the Mississaugas and Chippewas had claims outside of the commission's mandate and recommended that the Indian Department obtain approval from the federal and provincial cabinets to expand their mandate; but they did not do so. Initially taken aback, the commissioners appear to have stuck to their initial plan and mandate and added those lands to the impending treaty. Thus, they were reinforcing the suspicion that they were following the deceptive strategy of 1798 or one very similar to it.

Treaty Negotiations

In October and November 1923 the commissioners returned to the communities they had visited earlier, but this time as a treaty commission to "negotiate" a treaty as authorized by the MOA.[86] What took place during the treaty signing is difficult to determine. Despite 284 pages of minutes from the investigation of validity, and despite the presence of a secretary, no record of the treaty negotiations has been found in the national archives or Indian Department, to this day. All that is known at present is that the commission brought a pre-drafted treaty with them.[87] There is no evidence of Indigenous contributions to negotiations, if indeed there were any, which makes the whole process suspect.[88]

The Williams Treaties in their final form acknowledge the MOA: "And It Is Further Understood that this treaty is subject to an agreement dated the _____ day of April, A.D. 1923, made between the Dominion of Canada and the Province of Ontario, a copy of which is hereto attached."[89] This clause binds the treaty to the agreement. The lands described in the agreement reflected the original 1869 claim to unceded hunting lands of the Mississaugas and Chippewas. What became apparent was that there were more lands in the Mississaugas' and Chippewas' territory being used by the province and not covered by a treaty. The so-called "basket clause" allowed for "other lands," and was more than likely included to account for territory not covered by another treaty—some the Indian Department had knowledge of, and some the Missis-

saugas and Chippewas revealed during the investigation of validity.[90]

Thus, the pre-drafted Williams Treaties and the ratified agreement contradict each other. The first land clause of the treaties describes 17,600 square miles instead of 10,719, almost doubling the area the commission held authority to investigate and negotiate according to the memorandum. The second land clause described another 2,500 square miles. The third land clause (commonly known as the "basket clause") includes all lands the Mississaugas and the Chippewas "ever had, now have, or now claim to have."[91] The commissioners, by concluding a treaty that included lands far in excess of 10,719 square miles, transgressed their mandate. For this reason, lands beyond the 10,719 square miles are not a valid portion of the Williams Treaties. The commissioners never possessed a mandate to receive the surrender of these lands, and the First Nations never intended to surrender the lands at that time. The commission also never intended to include lands already covered by another treaty. Moreover, at that time, the Crown had an obligation to inform the Mississaugas and Chippewas of these other lands but did not do so.

There is also the question of whether a treaty can re-surrender an area of land that had already been surrendered. Surely the Mississaugas and Chippewas should have been informed clearly that this was the Crown's intention, yet the opposite appears to have been the case. In fact, the agreement describes the lands not covered by a treaty to be adjacent to the treaty lands set out in 1812, 1815,1818 and 1822, and the commissioners informed the Chippewas of this during the investigation of validity. Again, the duplicity of the commission's interpretation of treaty agreements from 1812, 1815, 1818 and 1822 as re-surrendered should not constitute a valid portion of the treaty.[92] In addition, there is no evidence the communities ever were given a copy of the agreement during the investigation of validity or treaty negotiations. Even if they were, the treaty would not have been legitimately made, as most Mississaugas and Chippewas could not speak, read, or write English, nor were they educated enough in the western systems to fully analyze the implications. Furthermore, denied independent legal counsel, they could not have had it interpreted. If the Mississaugas and Chippewas had been provided a copy, and if they had been allowed independent representation, the clauses in the treaty that purport to include surrendered land might have been caught, and the final form of the treaty probably would have been much different.

It is unclear from the historical record if the Mississaugas and Chippewas received copies of the treaty after negotiations concluded. What is known is that, in 1932, the Indian agent for the Mississaugas of Rice Lake and Curve Lake, V. M. Eastwood, received six copies of the treaty with instructions to give them to the bands.[93] It is uncertain whether the agent ever forwarded these copies of the Williams Treaties to the Mississauga councils or whether the agreement was even attached.

Seventy years after the Williams Treaties were signed; the Supreme Court of Canada ignored what it called "extrinsic" historic evidence, and relied on procedural law to make a determination against George Henry Howard. In *R v. Howard,* the court validated the land clauses in the Williams Treaties that included land outside of the 10,719 square miles mandated in the agreement, even though the agreement specifically stated the area to be investigated and ceded lay adjacent to the 1818 Treaty 20, where George Henry Howard was fishing. Instead, the Supreme Court determined that since the commissioners had knowingly transgressed their mandate and the government had ratified the treaty anyway, the treaty was valid.

> To the extent that the commissioners negotiated a treaty which went beyond the northern lands, it is abundantly clear, and on this point we agree with the Court of Appeal, that the Government of Canada was made aware of this fact and ratified the Treaty as drafted by its subsequent conduct.[94]

There is one report that exists confirming that the commission did indeed inform the superintendent of the Indian Department that they included more lands in the surrender than authorized. The report makes no mention of including former treaties other than the (supposed) 1787 treaty lands.[95] However, from this point forward, the superintendent of the Indian Department, in all official correspondence, described the treaties as a surrender of 10,719 square miles; for example, the Indian Department's *Annual Reports* confirmed that the treaties applied to lands north of Lake Simcoe and south of the Ottawa River, and the designation was reconfirmed in July 1924 in the House of Commons when the agreement was described as a "cession of Indian Title to 10,719 square miles."[96]

Should the lands outside the agreement mandate be morally, ethically, and legally included in the Treaties? Neither the treaty commission nor the superintendent of the Indian Department held authority to alter the agreement mandate. The agreement was the result of joint negotiations and ratified by the federal and provincial cabinets, and approved by the Governor General. If and only if those steps were repeated, then the answer could be yes; however, the duplicity of the commission in including other lands in the Treaties should render their part of the Treaties invalid. It is hardly just and fair that the courts would accept the Treaties as valid based on the proposition the government was aware the commissioners had transgressed their authority. The historical record demonstrates validity should apply only to the boundaries of the long-standing hunting land claim area quantified as 10,719 square miles, and, therefore, the Supreme Court decision against George Henry Howard should be overturned, and the Crown should renegotiate a treaty.

Epilogue

In 2012, the Alderville Mississauga First Nation, on behalf of the other Mississauga and Chippewa Nations in the Williams Treaties, took Canada and Ontario to court over equity issues related to the Williams Treaties. After three years in court, all parties agreed to negotiate a settlement. In 2018, The Mississauga and Chippewa Nations and Ontario and Canada ratified an agreement to settle their issues related to the Williams Treaties. The settlement included a monumental 1.2 billion dollars and recognition of their right to fish, hunt and trap in most of their former treaty areas.

Acknowledgements

I want to thank Laura Murray, Carl Benn and the many others for their input into this paper. I want to acknowledge Janet Armstrong who encouraged me to pursue this research project.

Notes

1. See Indian and Northern Affairs Canada, Copy of The Treaty Made November 15, 1923 Between His Majesty the King And the Mississauga Indians of Rice Lake, Mud Lake, Scugog Lake and Alderville, or Memorandum of Agreement between Dominion of Canada and Province of Ontario, April 1923, LAC, RG 10, volume 2329, file 67,071-2.

2. See Indian and Northern Affairs Canada, Copy of The Treaty Made November 15, 1923; R. v. Howard [1994] 2 SCR 299, 1994 CanLII 86 (SCC), http://canlii.ca/t/1frtf, accessed January 25, 2018 referring to Provincial Court Judges Bates decision

3. *The Globe,* "Ontario Will Give Half Million Cash to Oldest Families," Nov. 24, 1923.

4. See 1923 Treaties Report to Parliament. Sessional Papers, No. 14, Vol LXI, 1925, 15, Geo V.; Sessional Papers, July 18, 1924, p. 4857. Debates of the House of Commons. v. 164 1924.

5. R. v. Howard [1994] 2 SCR 299, 1994 CanLII 86 (SCC), http://canlii.ca/t/1frtf, accessed January 25, 2018.

6. See testimony of Ralph Joseph Loucks in the Peterborough, Provincial Court, before His Honour R. B. Batten J., October 1, 1985. Mr. Loucks was born May 12, 1913.

7. In 1930, F. E. Titus, a solicitor for the Ontario Department of Lands and Forests, noted to Mr. Cain, Deputy Minister of the Lands Branch, that the second part of the treaty had been suppressed in 1924. See Titus to Cain, August 29, 1930, in Ministry of Natural Resources of Ontario, Williams Treaty, File 2. Also in a personal communication, historian Leo Johnson explained to me that in 1972 when he requested a copy of the Williams Treaties from Information Canada he was told that they could not give him a copy without ministerial permission. By February 1973, the copyright on the National Archives of Canada copy, by then more than 50 years old, had expired making the document available to the public.

8. Leo Johnson, *History of the County of Ontario, 1615-1875* (Whitby, ON: Corporation of the County of Ontario, 1973). Although, Cummings, Peter, Neil H. Mickenburg, et al. Native Rights in Canada. Toronto: General Publishing Company Limited, 1972, did make a reference to the treaty as one the abrogated hunting rights. Later, Richard Daniels in A History of Native Claims Processes in Canada 1867-1979, prepared for the Research Branch, Department of Indian and Northern Affairs, February, 1980. Daniels infers the claim was baseless and "settlement was proceeded with in the face of knowledge that the claim might well have been defeated in a court of law on technical grounds" (p. 71) but does provide evidence or knowledge for this assertion.

9. Robert Surtees, *The Williams Treaties*: *Treaty and Historical Research Report* (Ottawa: Department of Indian Affairs, 1986).

10. Joan Lovisek, "The Ojibway vs. The Gerrymander: The Evolution of the Robinson, Huron and Williams Treaties Boundaries," *Actes de 32e Congr*és des Algonquinistes 32 (2001): 278–303.

11. The term Ojibway and Chippewa are synonyms both referring to the Anishinabe.

12. Peggy Blair, *Lament for a First Nation: The Williams Treaties of Southern Ontario* (Vancouver: UBC Press, 2008).

13. *R. v. Howard*, [1994] 2 SCR 299, 1994 86; A final note of scholarship, one recent publication provides brief analysis of the Williams Treaties and Howard case, see, Gaetano Pentassuglia. Minority Groups and Judicial Discourse in International Law: A Comparative Perspective. Leiden: Martinus Nijhoff, 2009. pp. 144

14. Report by William Spragge, May 19, 1870, LAC, RG 10, vol. 2329, no. 67071-1B.

15. Mr. Smith to Deputy Minister of Indian Affairs, September 30, 1884, RG 10, Vol. 2329, File 67, 071, Reel, C-11,202.

16. Surveyor Sam Bray to Deputy Minister of Justice, October 21, 1884, LAC, RG 10, Reel c-11,202, Vol. 2329, File 67,071 pt. 1B. In 1884 someone interchanged compensate to surrender which prompted a survey of the land to determine the extent and value in the event of surrender.

17. Report of R. V. Sinclair re the claim of the Chippewa of Lakes Huron and Simcoe, and the Mississauga's of Rice Mud and Scugog Lakes for Compensation for unsurrendered lands.

18. Report of R. V. Sinclair.

19. Constitutional Act, 1867, section 109, In this instance, the Province of Ontario.

20. St. Catherine's Milling and Lumber Company v. The Queen [1888], 14 A.C. 46. To read more on the St. Catherine Milling Co. see Sidney Harring. *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: Osgoode Society for Canadian Legal History/University of Toronto Press, 1998), 125–147; Leonard Rotman. *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996), 223–243.

21. Constitution Act, 1867, 30-31 Vict., c. 3 (U.K.) 91. (24). Indians and Lands reserved for the Indians.

22. R. V. Sinclair to E. L. Newcombe, Deputy Minister of Justice, Nov. 23, 1916, LAC, RG 10, vol. 2330, File 67,071-3 pt 2. Annuities are money paid yearly for the surrender of land.

23. R. V. Sinclair to E. L. Newcombe, Deputy Minister of Justice, Nov. 23, 1916, LAC, RG 10, vol. 2330, File 67,071-3 pt 2.

24. W. Stuart Edward, Assistant Deputy Minister of Justice, letter to Deputy Superintendent of Indian Department, February 9, 1920, LAC, RG 10, Reel c-11,202, Vol. 2330, File 67,071-3 pt. 2.

25. W. Stuart Edward, to Deputy Superintendent of Indian Department, February 9, 1920.

26. The land was originally part of the Abenakis of Becancour surrender of 1882, which was accepted by an order of the Governor General of Canada in Council on April 3, 1882. The Dominion Government sold the land to Cyrice Tetu of Montreal who left the land in her will

to Caroline Tetu. The lands were subsequently seized by the sheriff then sold to Joseph Lamarche, and over time the title was acquired by Rosalie Thompson who sold it to the Star Chrome Mining Co., Ltd.

27. See Rhonda Telford, "The Sound of The Rustling of the Gold is Under My Feet Where I Stand, We Have a Rich Country: A History of Aboriginal Mineral Resources in Ontario" (PhD diss., University of Toronto, 1996).

28. William Henderson, "Canada's Indian Reserves: The Usufruct In Our Constitution." Ottawa Law Review 12, no.167 (1980): 167–194. A.G. Quebec v. A. G. Canada, Judgement of the Lords of the Judicial Committee of the Privy Council, Delivered November 23, 1920.

29. LAC, Department of Indian Affairs – Effect of judgment of P.C. (Privy Council) in the *Star Chrome* case. 1921/02-1921/05, volume/box number: 1948, file number: 1921-242.

30. E. Bayly, Deputy Attorney General for the Province of Ontario, to D. C. Scott, Deputy Superintendent General of Indian Affairs, December, 22, 1921, LAC, RG 10, Vol. 2330, File 67,071, R - 11202.

31. Dorchester to Simcoe, January 27, 1794. Cruickshank, ed. The Simcoe Papers, Vol II, p. 61; Also in R. J. Surtees, 1984: 43; See Smith and Rogers. 1994: 107.

32. J. D. McLean, Assistant Deputy Minister to Deputy Minister of Justice, July 4, 1921, LAC, RG 10, Reel 11,202, Vol. 2330, File 67,071-3.

33. For a background on Duncan Campbell Scott see Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canad*a (Vancouver: UBC Press, 1986); and Mark Abley, *Conversations with a Dead Man: The Legacy of Duncan Campbell Scott* (Vancouver: Douglas & McIntyre, 2013).

34. See the 1923 Indian Treaties.

35. Except for a time in the 1890s when the Board of Arbitration incorrectly assumed the claim was invalid and characterized the claim as not worth pursuing.

36. McLean to Deputy Minister of Justice, July 4, 1921. *Supra* Note 32.

37. Suspiciously, on the same day, the historical record shows McLean, the Assistant Deputy of Indian Affairs, also wrote to Raney hinting that negotiations with the province should be conducted through

the Department of Justice.

38. E. Bayly, Deputy Attorney General for the Province of Ontario to D. C. Scott, Deputy Superintendent General of Indian Affairs, December, 22, 1921. RG 10, Vol. 2330, File 67,071, C-11202.

39. Bayly to Scott, December, 22, 1921

40. A. S. Williams, Solicitor for the Department of Indian Affairs, memo for D. C. Scott, March 16, 1922, LAC, RG 10, Reel 11,202, Vol. 2330, File 67,071-3.

41. D. C. Scott to Deputy Minister of Justice, E. L. Newcombe, March 21, 1922, LAC, RG 10, Reel 11,202, Vol. 2330, File 67,071-3.

42. Scott to Newcombe, March 21, 1922. "I beg to enclose herewith a copy of a memorandum made by the Departmental Solicitor, and beg to call your attention to the last paragraph, in which it is suggested that an agreement should be prepared and submitted to the Province for approval, and that the assistance of Mr. Sinclair be obtained in preparing this agreement."

43. E. L. Newcombe, Deputy Minister of Justice, to D. C. Scott, May 18, 1922, LAC, RG 10 Vol. 2033, 67,071, pt. 2.

44. See Clause 1, The Indian Lands Act, 1924, S. O. 1924, c. 15. The wording of Clause 1, The Indian Lands Act, 1924, is identical to clause 7 in the April 1923 Memorandum of Agreement.

45. O. M. Biggar was the grandson of Sir Oliver Mowat, the third Premier of Ontario, a former Minister of Justice and Attorney General of Canada, and the eighth Lieutenant-Governor of Ontario. O. M. Biggar was a retired army Colonel and a lawyer and civil servant. In 1920 he was appointed chief electoral officer when the Dominion Elections Act established the position. See http://en.wikipedia.org/wiki/Oliver_Mowat_Biggar

46. Note: The Indian Department knew that the Mississauga and Chippewa had other lands that had not been surrendered, but they had not actually 'claimed' the land, so the Indian Department had to get them to claim it and, at the same time, not let them know they claimed it or the Province would owe more money.

47. O. M. Biggar, Memorandum, December 16, 1922, MNR, Williams Treaty Blue Books, Vol. 1, File 19388.

48. O. M. Biggar, Memorandum, December 16, 1922. The case in ques-

tion is R. v. Howard.

49. O. M. Biggar to Deputy Superintendent of Indian Affairs, January 31, 1923, LAC, RG 10, Reel c-11,202, Vol. 2330, File 67,071-3 pt 2.

50. Ibid.

51. Department of Indian Affairs, November 14, 1923, LAC, RG10, Volume 2330, File 67,071-3, Pt. 1. Also see Minister of Lands and Forests to C. Stewart, Superintendent of Indian Affairs, November 6, 1923, LAC, RG 10, Reel, c-11,202, Vol. 2330, File 67,071 pt. 1.

52. Biggar to Deputy Superintendent of Indian Affairs, January 31, 1923. *Supra* Note 49.

53. Memorandum, G. M. Matheson to Indian Department, February 28, 1923, LAC, RG 10, Reel 11,202, Vol. 2330, File 67,071-3 Pt. 2. Matheson was employed in the Records Branch of the Department of Indian Affairs from 1888 until his retirement as head registrar in 1936. See LAC, RG 10, reel C-13,491, Vol. 768a, Indian Department – Historic Sketches on Indian Affairs, p. 43.

54. For more on Matheson see, Michael Gourlie. "An Administrative History for Indian Affairs in Ontario." Archivaria 34 (Summer 1992): 279–283.

55. Memorandum, Matheson to Indian Department, February 28, 1923. "The letter of October 21, 1797 signed Robt. Prescott refers to the surrender in the year 1787 of land claimed by the Indians to be unceded, and to the two deeds of purchase, both dated 1787. The one made at Toronto was in blank, omitting the description of lands and conditions of sale, but a new deed was obtained in 1805. The other deed (of 1787) was made at Matchidash and is supposed to cover lands now claimed by the Indians as unceded. In the provision surrender of the 8th of June 1811, a copy of which was also sent to Mr. Biggar on the 21st ultimo, the description of the land then surrendered refers to the "purchase made from the Indians in the year 1787."

56. Biggar to Deputy Superintendent of Indian Affairs, March 9, 1923, LAC, RG 10 vol. 2330, file 67,071 -3, pl. 2

57. Biggar to Deputy Superintendent of Indian Affairs, March 9, 1923.

58. Biggar to Deputy Superintendent of Indian Affairs, March 9, 1923.

59. Biggar to Deputy Superintendent of Indian Affairs, March 9, 1923,

except for the last sentence that reads "accumulated unexpended simple interest," which was changed to, "accrued, unexpended simple interest."

60. Memorandum of Agreement between Dominion of Canada and Province of Ontario, April 1923, LAC, RG 10, Vol. 2329, File 67,071-2.

61. Memorandum of Agreement, April 1923.

62. Memorandum of Agreement, April 1923.

63. Memorandum of Agreement, April 1923.

64. Memorandum of Agreement, April 1923.

65. Memorandum of Agreement, April 1923. "any balance of the proceeds of the sale or other disposition ... be paid to the Province of Ontario, together with accrued unexpended simple interest thereon."

66. Ontario Order-In-Council, May 22, 1923. LAC, RG 10, Reel c-11,202, Vol. 2330, File 67071-3 pt 2.

67. Privy Council Order-In-Council, June 23, 1923, LAC, RG 10, Reel c-11,202, Vol. 2330, File 67,071-3 pt. 2.

68. Charles Stewart, Superintendent General of Indian Affairs Report to Governor General in Council, August 22, 1923, LAC, RG 10, vol. 2330, file 67,071 ·3, pt. 2.

69. Minister of Lands and Forests to D. C. Scott, Deputy Minister of Indian Affairs, August 16, 1923. LAC, RG 10 vol. 2330, file 67,071-3, pt. 2.

70. Governor General in Council approval of the 1923 investigation of validity Commission. Privy Council Order-in-Council, August 31, 1923, to approve the terms of the Memorandum of Agreement, LAC, RG 10, Reel c-11,202, Vol. 2330, File 67,071-3 pt. 1.

71. Privy Council, Order-in-Council, August 31, 1923. The SCC in 1994 would conclude the1818 treaty was re-surrendered by the Williams Treaties in *R v. Howard*. Map of Treaty 20 see http://www.williamstreatiesfirstnations.ca/about/#prettyPhoto/2/ [21-2-2018]

72. Governor General in Council approval of the 1923 investigation of validity Commission. Order-in-Council, August 31, 1923.

73. See Privy Council Order-in-Council 1923-1750, by Lord Byng of

Vimy, Governor General of Canada.

74. J. D. McLean to various Indian Agents, August 27, 1923. LAC, RG 10, vol. 2330, file 67,071 3, pt .2

75. I. E. Weldon to W. P. Nichols, Attorney General of Ontario, September 8, 1923, LAC, RG 10, Reel c-11,202, Vol. 2330, File 67,071-3 pt. 1

76. Weldon to Nichols, September 8, 1923.

77. Commissioners to I. E. Weldon, October 11, 1923, LAC, RG 10, Reel c-11,202, Vol. 2330, File 67,071-3 pt. 1.

78. Draft Memorandum of Agreement. April [blank], 1923, LAC, RG 10, Vol. 2330, file 67,071-3, pt 2.

79. Testimony given to the Commission of Inquiry into the Validity of the Claim of the Mississauga and Chippewa to unsurrendered lands in Ontario, September 14 to 27, 1923. It is outside the scope of this paper to include all the events in the MOA. My aim is to determine if the commission had authority to determine the validity to 10,719 square miles in the investigation of validity. For map see LAC, RG 10, Vol. 2330, File 67,071 pt 1, Reel c-11,202

80. Testimony given to the Commission of Inquiry, September 14 to 27, 1923.

81. Testimony given to the Commission of Inquiry, September 14 to 27, 1923. LAC, RG 10, Vol. 2330, File 67,071 pt 1, Reel c-11,202.

82. Testimony of ex-chief Charles Big Canoe.

83. Testimony of Johnson Paudash to the Commission of Inquiry into the Validity of the Claim of the Mississauga and Chippewa to unsurrendered lands in Ontario, September 14 to 27, 1923.

84. Testimony of Investigation of Validity, September, October, 1923, LAC, RG 10, Reels c-11,202 and c-11,203, Vol. 2332, File 67,071-4c.

85. Testimony given to the Commission of Inquiry into the Validity of the Claim of the Mississauga and Chippewa to unsurrendered lands in Ontario, September 14 to 27, 1923, C-11203, pp. 236

86. The Treaty Commission: Chippewa Nations of Georgina Island, October 31, 1923; Christian Island, November 3, 1923; Rama, November 7, 1923. Mississauga Nations of Curve Lake, November 15, 1923; Hiawatha, November 16, 1923; Alderville, November 19, 1923; Scugog, November 21, 1923.

87. It is uncertain who drafted the treaty. While the historical record demonstrates how the Memorandum of Agreement was developed, there is no paper trail for the creation of the 1923 Williams Treaties with the Mississauga and Chippewa. The author of the treaty was likely an individual from the Indian Department, the Justice Department, O. M. Biggar, or the commissioners.

88. A recent study has also determined that the Williams Treaties on file in Library and Archives Canada is a forgery. The archive copy has sections overlaid with a type of white-out and financial information that was only known months after the treaty was signed, See Janet Armstrong, *Supplemental Report, Re:* Alderville et al. v. Her Majesty the Queen in Right of Canada et al. May 2013.

89. Indian and Northern Affairs Canada, Copy Of The Treaty Made November 15, 1923.

90. See Indian and Northern Affairs Canada, Copy Of The Treaty Made November 15, 1923. It is also speculated the clause was added years later.

91. See Indian and Northern Affairs Canada, Copy Of The Treaty Made November 15, 1923.

92. I don't believe the treaty commissioners ever intended to re-surrender 1812, 1815, and 1822 treaty lands. They were interested in including lands outside of the 10,719 square miles not covered by a treaty.

93. A. F. Mackenzie, Secretary, Department of Indian Affairs, to V. M. Eastwood, Peterborough, Ontario, June 25, 1932, DIAND, file 1/1-11-15 vol. 1.

94. R. v. Howard, [1994] 2 SCR 299, 1994 86 (SCC). Accessible on Canlii http://canlii.ca/t/1frtf. It is worth repeating here that in May 2013 Historian Janet Armstrong determined the Williams Treaties on file in Library and Archives Canada is a forgery. What the Supreme Court of Canada means by "subsequent conduct" is we issued you treaty annuities and you accepted therefore you accepted the written terms of the treaty.

95. A. S. Williams, R. V. Sinclair, Uriah McFadden to Superintendent of Indian Affairs, December 1, 1923, LAC, RG 10, vol. 2330, file 67,071-3. Pt. 1

96. See 1923 Treaties Report to Parliament. Sessional Papers, No. 14, Vol LXI, 1925, 15, Geo V.; Sessional Papers, July 18, 1924, p. 4857.

Debates of the House of Commons. v. 164 1924. The information to refute the proposition that the government was aware the commissioners had transgressed their authority and therefore made it valid was uncovered after the trial. I located after the trial while researching my Master's Thesis, circa 1999.

References

Archival Sources

British North America Act, 1867, 30-31 Vict., c. 3 (U.K.)

Department of Indian Affairs and Northern Development, file 1/1-11-15 vol. 1. Library and Archives Canada (LAC) RG 10, Reel C-11202, C-11203.

Secondary Sources

Abley, Mark. *Conversations with a Dead Man: The Legacy of Duncan Campbell Scott*. Douglas & McIntyre, 2013.

Armstrong, Janet. *Historical Report: The Making of the Williams Treaties of 1923*. Expert Report prepared for *Alderville et al. v. Her Majesty the Queen in Right of Canada et al*. 2004. Unpublished.

Armstrong, Janet. *Supplemental Report*. Expert Report prepared for *Alderville et al. v. Her Majesty the Queen in Right of Canada et al*. May 2013. Unpublished.

Daniels, Richard. *A History of Native Claims Processes in Canada 1867–1979.* Prepared for the Research Branch, Department of Indian and Northern Affairs, February, 1980.

Cummings, Peter, et al. *Native Rights in Canada*. General Publishing Company Limited, 1972.

Gourlie, Michael. "An Administrative History for Indian Affairs in Ontario." *Archivaria*, vol. 34, 1992, pp. 279–283.

Harring, Sidney L. *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence*. Osgoode Society for Canadian Legal History/University of Toronto Press, 1998.

Henderson, William. "Canada's Indian Reserves: The Usufruct in Our Constitution." *Ottawa Law Review*, vol. 12, no.167, 1980, pp. 167–194.

Johnson, Leo. *History of the County of Ontario, 1615–1875*. Whitby: The Corporation of the County of Ontario, 1973.

Lovisek, Joan. "The Ojibway vs. the Gerrymander: The Evolution of the Robinson Huron and Williams Treaties Boundaries." *Actes de 32e Congrés des Algonquinistes*, vol. 32, 2001, pp. 278–303.

"Ontario Will Give Half Million Cash to Oldest Families." *Globe*, 24 Nov. 1923.

Pentassuglia, Gaetano. *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective.* Martinus Nijhoff, 2009.

Rotman, Leonard Ian. *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*. University of Toronto Press, 1996.

Surtees, Robert. *The Williams Treaties*. Treaty and Historical Research Report. Department of Indian Affairs, 1986.

Titley, Brian. *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada*. UBC Press, 1986.

Telford, Rhonda. "'The Sound of the Rustling of the Gold Is under My Feet Where I Stand; We Have a Rich Country': A History of Aboriginal Mineral Resources in Ontario." 1996, University of Toronto, PhD dissertation.