

## TREATY 8:

### *An Anomaly Revisited*<sup>1</sup>

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ROBERT IRWIN

Negotiators from British Columbia, Canada, and the McLeod Lake Sekani initialled an agreement securing the adhesion of the McLeod Lake Sekani to Treaty 8 on 30 September 1999.<sup>2</sup> This agreement, subject to ratification, brought to an end nearly thirteen years of litigation and, although overshadowed by the Nisga'a treaty, is another important step in settling British Columbia's Aboriginal claims. In order to understand this agreement and place it in its appropriate context, Canadians must understand the historical context for the making of Treaty 8 in British Columbia. Treaty 8, negotiated at Lesser Slave Lake in 1899, is often lost in the important debates regarding comprehensive claims and the nature of Aboriginal title in British Columbia, and when it is discussed it receives cursory coverage.<sup>3</sup> In the Autumn 1999 issue of *BC Studies* Arthur J. Ray called attention to the important place of Treaty 8 in British Columbia's history.<sup>4</sup> After reading Professor Ray's article, however, readers may be left with the impression that the Canadian government intended to include the McLeod Lake Sekani in Treaty 8 in 1899 but failed to secure their adhesion for a century because the BC government blocked the Department of Indian Affairs (DIA).<sup>5</sup> According to this

<sup>1</sup> I would like to thank those colleagues who spared me a moment of their valuable time to read and comment on drafts of this paper. The opinion expressed here and any errors or omissions are the responsibility of the author.

<sup>2</sup> A copy of the agreement can be found at <http://www.aaf.gov.bc.ca/aaf/treaty/mlfinaldraft.htm>

<sup>3</sup> An example would be Paul Tennant's, *Aboriginal People and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: UBC Press, 1990).

<sup>4</sup> Arthur J. Ray, "Treaty Eight: A British Columbia Anomaly," *BC Studies* 123 (Autumn 1999): 5-58. All parenthetical references in the text are to this article.

<sup>5</sup> Professor Cole Harris also recognized this aspect of Ray's article in his editorial comment. See *BC Studies* 123 (Autumn 1999): 3. Professor Ray leaves this impression by ending his

interpretation, the agreement corrects an outstanding historical wrong perpetrated by the BC government.

Professor Ray, however, omits important evidence that people need in order to understand fully Treaty 8 in British Columbia. He quotes from documents selectively – at times citing the statement of claim made by the McLeod Lake Sekani rather than the documents that are at the centre of the claim – and he makes errors in his presentation of evidence.<sup>6</sup> If British Columbians are going to understand the McLeod Lake agreement, then they need a more complete understanding of the process of making Treaty 8 in British Columbia than that provided by Professor Ray. The documentary evidence demonstrates that Treaty 8 did not include the territory of the McLeod Lake Sekani prior to the agreement initialled on 30 September 1999. The inclusion of this group in Treaty 8, therefore, is not the correction of a historical wrong but, rather, a new adhesion to the treaty. Further, the adhesion of McLeod Lake to Treaty 8 is another step in the process of solving British Columbia's Aboriginal claims and should be examined in this light.

#### THE RATIONALE FOR EXTENDING THE BOUNDARY

Professor Ray asserts that there were compelling reasons to extend Treaty 8 into British Columbia. He notes three in particular. First, in the years immediately preceding the making of Treaty 8, the government became aware of the significant mineral potential in north-eastern British Columbia and the increased activities of miners in the Cassiar and Omineca Districts. Professor Ray points out that the movement of Klondike-bound prospectors through the Peace River and Liard River Districts, many of whom intended to mine in

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article with references from the McLeod Lake statement of claim and British Columbia's opposition to the McLeod Lake's demands.

<sup>6</sup> McLeod Lake's adhesion to Treaty 8 was the subject of lengthy legal wrangling. Several experts were called upon by the parties involved to conduct scholarly analysis of the issues involved, including both Professor Ray and myself. Dr. Edward Rogers has written that historians "have certain skills that are beneficial to the proper development of a lawsuit." Their role is primarily one of assisting the participants – the judge, the legal counsels, and the litigants – "to understand the facts and their cause and effect relationships." In order to fulfil this role and assist the court to understand the issues presented, the historian must read the documents carefully and "present historical argument backed by a balanced historical analysis and fair presentation of the facts." See Edward S. Rogers, "The Role of the Historian in the Litigation Process," *Canadian Historical Review* 67, 2 (1986): 196-7, 200. Given this important role for the historian in the litigation process, I find the errors Professor Ray makes in presenting evidence troubling.

the Cassiar, further complicated the issue. Second, he points out that the Canadian government was aware of the hostility the entry of miners into these districts generated in the Sekani and Dene-za. The federal government feared this hostility would result in violence, and Ray surmises, without any direct evidence, that Canada believed that British Columbia would hold the federal authorities responsible for stabilizing the situation as it had in the Kootenay and Skeena Districts in 1887. Third, Professor Ray suggests that Canada understood that the treaty would have to respect the Aboriginal cultural landscape created by kinship and that the British Columbia-Alberta border along the 120th meridian (an anomaly born of the Cariboo gold rush) did not reflect the cultural landscape of the Aboriginal communities.

I do not disagree that the Canadian government had concerns regarding the problems engendered by the entry of Klondike-bound prospectors and the trans-boundary nature of the Aboriginal cultural landscape. The DIA's consideration of these issues explains why the Fort St. John and Fort Nelson areas were eventually included in the treaty and why the government sought adhesions from the people living in these districts. It does not, however, equate to the impression left by Ray's article that the DIA included the territory of the McLeod Lake Sekani in Treaty 8 but that the intransigence of the BC government has blocked their adhesion for a century. Each concern the DIA had regarding the extension of the treaty into British Columbia has limitations that Professor Ray ignores. The prospects of mineral developments, for example, did not cause the DIA to recommend making a treaty in Yukon.<sup>7</sup> Similarly, Treaty 8 commissioner David Laird noted that the cultural landscape was not a significant enough reason to extend the eastern boundary of the treaty into the Isle a la Crosse and Portage la Loche Districts.<sup>8</sup> Just as important, the Klondike gold rush from Edmonton ended in the fall of 1898, and by the time the treaty commissioners embarked on their journey to make Treaty 8, the Hudson's Bay Company (HBC), according to Ray the most important source of information for the DIA, had concluded the rush was no longer a significant problem.<sup>9</sup> The federal government's concern

<sup>7</sup> Ken Coates, "Best Left as Indians: The Federal Government and the Indians of Yukon, 1894-1950," *Canadian Journal of Native Studies* 4, 2 (1984): 179-204.

<sup>8</sup> David Laird to Secretary, 29 April 1904, RG 10, vol. 4006, file 241, #209-1.

<sup>9</sup> The exodus of miners from the district began in September and October 1898, as recorded in the HBC journal at Dunvegan by George Harvey. Cited in David Leonard, *Delayed Frontier: The Peace River Country to 1909* (Edmonton: Detselig, 1995), 157-61. As early as 5 September 1898, the HBC officer at Lesser Slave Lake reported that "the Klondyke Rush to this section, I believe, is about over and the bolstering up of the overland route by interested

about the situation at Fort St. John in 1898, nevertheless, had led it to announce that it would meet the Aboriginal people at that location to make a treaty with them in 1899.<sup>10</sup> No such notice, however, had been sent to the Fort Grahame or McLeod Lake Sekani, and Ray explains neither how concerns about violence at Fort Grahame could be resolved by making a treaty at Fort St. John nor how *not notifying* the Sekani that a treaty would be made quelled the threat of violence at those locations.

Professor Ray also fails to adequately address the compelling reasons Canada had for limiting the expansion of the Treaty 8 boundary into British Columbia without the province's agreement. Readers, consequently, cannot determine whether the three concerns Professor Ray identifies are sufficient for Canada to include the Omineca, Finlay, Parsnip, and Dease River drainage systems in the treaty without the approval of the province. Making a treaty within the boundaries of a province was not something the DIA considered lightly in 1898, but British Columbia responded to Canada's overtures by ignoring them (35). Professor Ray limits his discussion of the problem caused by British Columbia's silence to the difference between the size of reserves granted in British Columbia and those offered in the numbered treaties (41-2). He also notes that Canada tried to "downplay" the issue by suggesting that reserves may not be necessary and that, if they were, the "commissioners themselves" would decide on the scope of reserve lands under the provisions of the 1875-6 agreement with British Columbia (43).<sup>11</sup> Professor Ray's discussion, however, does not effectively illustrate

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parties cannot be much longer continued in the face of so many failures." Macdonald to Chipman, 5 September 1898, PAMHBCA, D.20/69/7. The HBC informed William Fox at Fort Graham in August 1898 that they did not believe "there will be such excitement in your locality next year as there has been this, but it is as well to be prepared." The officer at Fort St. James was even more clear in May 1899, noting: "I do not think there will be any more miners go into your country this year, the excitement on the outside has now subsided." See M.E. Camsell to Fox, 28 August 1898; A.C. McNab to Fox, 8 May 1899, PAMHBCA, B.249/c/1. The HBC also noted that Fort Graham had accumulated a surplus of supplies in 1898 "taken from Miners, who came from Edmonton and Kamloops, en route for the Yukon, and who abandoned their journey, some from disgust and many from destitution." See "Inspection Report on Bear Lake Outpost (Fort Graham), Sept. 1900," PAMHBCA, B.249/c/2. David Laird was well aware that the rush had ended. He noted that, while travelling into the country, "I met several of parties of these returning gold hunters, among whom were some ill of scurvy and a few, I was informed, in destitute circumstances." See Laird to Smart, 29 September 1899, RG 15, vol. 2006, file 517361, pt. 1.

<sup>10</sup> Notice of treaty in RG 10, vol. 3848, file 75236-1.

<sup>11</sup> The commissioners' decision at Lesser Slave Lake "that it would be best to make one treaty covering the whole of the territory ceded, and to take adhesions thereto from the Indians to be met at the other points rather than make several separate treaties" removed their ability to make discretionary reserve allotments to Aboriginal peoples from British

either the problem of making treaty within the boundary of a province or Canada's previous experience with this issue. In fact, the issue of providing for reserve lands within the boundary of a province was a central concern of the DIA in the years immediately preceding the making of Treaty 8.

Problems with the North-West Angle Treaty (Treaty 3) had inadvertently brought the realities of Canadian federalism to the attention of the DIA. Canada negotiated Treaty 3 in 1873 and provided reserves of 640 acres per family of five. Ontario challenged Canada's jurisdiction in the area covered by the treaty, and, following a series of court decisions against the federal government, Canada entered into an agreement with Ontario that was enacted in statute in 1894. Clause 6 of this agreement states: "That any future treaties with the Indians in respect of territory in Ontario to which they have not before the passing of said statutes surrendered their claim aforesaid shall be deemed to require the concurrence of the government of Ontario."<sup>12</sup> This pattern would be followed in the making of Treaty 9, beginning in 1902. After three years of discussions between the Canadian and Ontario governments, a treaty was presented to the Aboriginal peoples in 1905. Negotiations regarding Ontario's confirmation of those reserves granted in Treaty 3, meanwhile, were a continuous source of concern in the DIA in 1897 and 1898, as the planning for Treaty 8 was under way. After a thorough examination of the issue in March 1899, just three months before he embarked on the Treaty 8 commission, J.A.J. McKenna informed Sifton that the matter remained unresolved.<sup>13</sup> The difficulties that followed the making of a treaty within the boundaries of a province without the concurrent approval of that province were thus clearly apparent to the DIA and one member of the treaty commission.

In the case of British Columbia, the issue was not limited to reserve lands. Canadian "Indian" policy in British Columbia was limited by Term 13 of the "Terms of Union." According to Term 13, the federal government assumed authority for Aboriginal peoples and Aboriginal lands but was to follow "a policy as liberal as that hitherto pursued

Columbia taking Treaty 8. This discretionary allotment was the scenario envisioned in P.C. 2749, 6 December 1898. See Report of the Commissioners for Treaty No. 8, *Annual Report of the Department of Indian Affairs, 1899* (Ottawa, 1900), xxxvi; and P.C. 2749, 6 December 1898, RG 10, vol. 3848, file 75236-1.

<sup>12</sup> *Statutes of Canada*, 54-55 Vic. c. 5, s. 6.; James Morrison, *Treaty Research Report: Treaty Nine* (Ottawa: DIAND, 1986), 21-32.

<sup>13</sup> J.A.J. McKenna and Reginald Rimmer to Sifton, March 1899, RG 10, vol. 2545, file 111834, pt. 1.

by the British Columbia Government.”<sup>14</sup> British Columbia rejected the notion of Aboriginal title within the province. While McKenna was aware of the problems that could follow the making of a treaty within a province, Laird was fully aware of the difficulties of dealing with Aboriginal issues with the government of British Columbia. As minister of the interior and superintendent general of Indian affairs in 1874-5, Laird had responsibility for trying to reach an agreement with British Columbia regarding the size of reserves and the designing of an Aboriginal policy. At one point, a frustrated Laird, having had his proposal that reserves in British Columbia be twenty acres per household rejected, remarked that the framers of Term 13 of the Terms of Union “could hardly have been aware of the marked contrast between the Indian policies which had, up to that time, prevailed in Canada and British Columbia, respectfully.”<sup>15</sup> Laird, therefore, understood first hand that dealing with British Columbia on the issue of Indian affairs was problematic. He also would have been aware of the 1875-6 agreement, which was arrived at after years of difficult negotiations.

The agreement of 1875-6 provided for three commissioners (later reduced to a single individual) to visit each First Nation in British Columbia, enquire about its land needs, and fix and determine the extent and location of reserves to be allotted.<sup>16</sup> It conflicted with the fixed acreage model for determining reserves, which was used in the numbered treaties. The parties agreed “that in determining the extent of the reserves to be granted, no basis of acreage be fixed, but that each nation of Indians be dealt with separately,” and that the commissioners, in fixing the reserves, were to be guided by the spirit of the Terms of Union, which contemplated a “liberal policy.”<sup>17</sup> Within the agreement there is no mention of Aboriginal title or the disposition of the title to the reserve lands after allotment. This system of reserve creation was extended into the Parsnip River region when Peter O'Reilly surveyed a 286-acre reserve for the McLeod Lake Sekani in 1892, confirmed by British Columbia in 1898 (42).

<sup>14</sup> British Columbia, *British North America Act, 1867: Terms of Union with Canada and Orders of the Legislative Assembly* (Victoria: Wolfenrauff, 1881), 66. For a discussion of this issue, see Robin Fisher, *Contact and Conflict* (Vancouver: UBC Press, 1977), 176-8.

<sup>15</sup> Laird, Memorandum, 1 March 1874; Laird, Memorandum, 2 November 1874. Reprinted in *Papers Connected with the Indian Land Question in British Columbia* (Victoria: Wolfenden, 1875), 130-1, 152.

<sup>16</sup> For an examination of how the system worked, see Kenneth Brealey, “Travels from Point Ellice: Peter O'Reilly and the Indian Reserve System in British Columbia,” *BC Studies* 115/116 (Autumn/Winter, 1997-8): 181-236.

<sup>17</sup> Order in Council 1138, 6 January 1876, in *Papers Connected with the Indian Land Question*, 169.

The decision to extend the boundaries of Treaty 8 into British Columbia was, therefore, complex and legalistic. As Professor Ray notes, the DIA was aware that in the Peace River country, near the Alberta border, it had agreement to take control of a 3.5-million-acre block of land that could be used to provide a land base to Aboriginal peoples living near those districts at Fort St. John.<sup>18</sup> The government also had some understanding of the cultural landscape of the area, as Ray asserts, and would know that Aboriginal people from Fort Nelson were also active around Fort St. John. Further west, however, Canada did not have access to any land base. Would the Canadian government extend Treaty 8 into British Columbia without the explicit consent of the BC government and then hope to reach an agreement with the province at a later date? Professor Ray never addresses this question effectively; instead, he concludes that the western boundary of Treaty 8, described as "the central range of the Rocky Mountains," was the Arctic-Pacific continental divide. Professor Ray's effort to explain Canada's failure to secure the adhesion of the McLeod Lake Sekani emerges from this perspective.

#### PROFESSOR RAY'S BOUNDARY

Professor Ray's conclusion that the Canadian government extended Treaty 8 as far west as the Arctic-Pacific divide is based on only two pieces of evidence: Privy Council Order 2749, dated 6 December 1898, and Macrae's map printed in the annual report of the DIA, 1900. In interpreting these two pieces of evidence, Professor Ray has cited documents inaccurately, made errors in the presentation of evidence, and relied too heavily on the DIA pamphlet *Treaty No. 8* published in 1966. This pamphlet identifies PC 2749, 6 December 1898, as the "Order in Council Setting Up Commission for Treaty 8."<sup>19</sup> Professor Ray uses that phrase with regard to PC 2749 (30). Following the logic of the DIA pamphlet, Professor Ray does not inform the reader that

<sup>18</sup> Professor Ray's note in this instance is quite unusual. In the text of his article, he notes that "there are two likely reasons for Dominion officials not to have taken these lands into account." He states that "the Dominion officials briefly considered the possibility of using Peace River lands for reserves." The evidence is "a badly faded and torn memo," as though the quality of the paper diminishes its significance. Moreover, he remarks that it is "within a file of correspondence for the period 1891-9." Professor Ray cites RG 10, vol. 3848, file 75231-1. No such file record exists in the National Archives of Canada search system. I assume it is a typing error and that the file number is 75236-1. The title of that file, which Professor Ray never discloses, is "Treaty Eight: Treaty Negotiations between Indian Affairs and Native Peoples," RG 10, vol. 3848, file 75236-1.

<sup>19</sup> Canada, *Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc.* (Ottawa: DIAND 1966).

there were three Orders in Council passed by the federal government with regard to Treaty 8 – not just PC 2749.<sup>20</sup> First, PC 1703, dated 27 June 1898, established a treaty commission composed of A.E. Forget, J.A.J. McKenna, and a third member to be named later. On the issue of the boundary, PC 1703 makes no mention of BC territory, stating:

as to the territory to be ceded, the Commissioners will likewise 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 the opinion that the territory to be treated for may in a general way be restricted to the Provisional district of Athabasca, and such territory adjacent thereto as the Commissioners may deem it expedient to include within the treaty.

Second, PC 2749, dated 6 December 1898, “apprised” British Columbia of Canada’s intentions, explained that the national government considered it impolitic and impractical to exclude Aboriginal peoples living “west of the Mountains” to the “height of land” because they were “allied” to the people in the Athabasca District. And it asked British Columbia to formally “acquiesce in the action taken.” The map accompanying this Order in Council includes territory in British Columbia between the Arctic-Pacific height of land and the Alberta border. Third, PC 330, dated 2 March 1899, amended PC 1703 by replacing Forget with David Laird and naming James Ross the third member of the commission. The government did not amend the discretionary power granted to the commissioners regarding the boundary.

The transformation of PC 2749 from notice to British Columbia to instructions to the commissioners removes all discretionary authority

<sup>20</sup> Although all three of these Orders in Council are located in RG 10, vol. 3848, file 75236-1, which Professor Ray has examined and cited in his paper, he appears to be either unaware that there are two different Orders in Council or confused about the difference between them. For whatever reason he integrates PC 1703 and PC 2749 into a single statement. There is not a single reference to PC 1703 in the entire report. For example, at page 30-1 Ray provides a single reference to *PC 2749, 27 June 1898*, as printed in the 1966 DIA pamphlet (fn. 50), yet the three quotes, which Ray informs us are all from the same Order in Council, do not come from the same document. The first two quotes come from PC 1703, 27 June 1898. The third is from PC 2749, 6 December 1898. Even more troubling is that *PC 1703 is not in the DIA pamphlet*, and PC 2749, which *is* in the pamphlet, does not have a date attached in that version. At page 28, Ray notes that Sifton asked permission for a treaty and that “the clerk of the Privy Council informed the DIA of its support for a treaty.” He cites Clerk of the Privy Council to Superintendent General, 27 June 1898, rather than giving the title of the document, PC 1703. At page 43-4 he cites a memorandum to the Province of British Columbia and references BCARS, but he does not inform the reader that he is quoting from PC 2749. In another instance, on page 49, he quotes PC 1703, 27 June 1898, but cites a memorandum of the Privy Council, 6 December 1898. For the references in question see p. 28 fn. 47; p. 30, fn. 50; p. 44, fn. 80; and p. 49, fn. 90.



granted to the commissioners under PC 1703 with regard to the boundary. When explaining the boundary, however, Chief Treaty Commissioner David Laird noted that he followed the instructions from "the order of His Excellency the Governor in Council, dated 27 June 1898"; namely, PC 1703.<sup>21</sup> The commissioners, consequently, understood that their instructions provided discretionary authority regarding the boundary. Professor Ray, furthermore, is aware that PC 2749 was directed towards British Columbia. He refers to a "memorandum to the province," dated 6 December 1898, but provides the reader with no indication that this "memorandum" was PC 2749 (42). It was the common practice for the federal government and British Columbia to communicate with each other through Order in Council, as anyone reading the collection *Papers Connected with the Indian Land Question in British Columbia* would quickly recognize. Interestingly, Professor Ray chooses to provide a footnote to the pamphlet when describing PC 2749 as "setting up the Commission" and a footnote to the BC archives when referring to it as "a memorandum to British Columbia."<sup>22</sup> Even worse from the perspective of the reader, although Professor Ray has read both documents, he appears unable to keep them separate. Professor Ray quotes from PC 1703 and PC 2749 randomly, attributing all of the quotations to a single document. He thus merges the two Privy Council orders into a single set of instructions. Separating the two Orders in Council, however, is essential because one describes a policy intention to another level of government while the other instructs the commissioners regarding their responsibilities.

Once the reader understands that the DIA considered extending the treaty to the Arctic-Pacific height of land but provided the commissioners with discretionary authority regarding the boundary, the second piece of evidence, Macrae's map, becomes even more important to the conclusion reached by Professor Ray. Ray notes that the map was not part of the treaty or the reports approved by the government by Order in Council. But he maintains that "it has been published repeatedly ever since and has become the official Treaty 8 map" (53).

<sup>21</sup> Laird, "Memorandum for the Deputy Minister," 11 Jan 1910, RG 10, vol. 8595, file 1/1-11-5-1. It is interesting that while Ray paraphrases this memorandum in his article (52-3), he never provides a reference to it preferring to cite secondary sources.

<sup>22</sup> A letter from J. A. J. McKenna to Laird, 5 December 1898, noting that the appropriate steps had been taken to transmit a dispatch to British Columbia asking it to acquiesce in the treaty process and take the steps necessary to provide reserves is in the treaty file. RG 10, vol. 3848, file 75236-1. Professor Ray should therefore know that PC 2749 was a dispatch to British Columbia.

As evidence that it has been published repeatedly ever since and has become the official map, he cites the *Annual Report of the Department of Indian Affairs*, 1900. Undoubtedly, Macrae's map has taken on a life of its own but not because it has been published repeatedly ever since or was the only map ever produced. For example, in 1912 the map accompanying the *Handbook of Indians of Canada* (published by Canada under the direction of James White, FRGS, the senior cartographer in the Department of the Interior) used the watershed of the Rocky Mountains, a certain height of land, as the western boundary rather than the Arctic-Pacific height of land.<sup>23</sup> Indeed, any claim to official status for Macrae's map must not only be associated with its inclusion in the 1900 *Annual Report*, but also with the problematic 1966 pamphlet.

Professor Ray suggests that the difference between the wording of the treaty, "the central range of the Rocky Mountains," and the use of the Arctic-Pacific height of land in defining the boundary on the map can be easily addressed. The commissioners, he notes, intended the boundary to be the Arctic-Pacific height of land but were "apparently unaware that north of the 54th parallel the crest line of the Rocky Mountains is no longer congruent with the Continental Divide" (52). Ray's discussion of Dominion knowledge of the Rocky Mountains is limited to a brief description of the fact that, in many maps, legends often covered northeastern British Columbia, and a 1913 report that suggested the Liard River drained the "eastern watershed of the Rocky Mountains."<sup>24</sup> Rather than examine what evidence the Dominion may have possessed regarding the physical geography of northeastern British Columbia, Ray provides a single paragraph explaining that the position of the Canadian government has been that the phrase "central range of the Rocky Mountains" was intended to mean "height of land."

Here Professor Ray relies on a memorandum from David Laird, which, given its importance to his position on the western boundary,

<sup>23</sup> *Handbook of Indians of Canada: Published as an Appendix to the Tenth Report of the Geographic Board of Canada*. (Ottawa, 1913). This book and the associated map was forwarded to the McKenna-McBride Commission as a reference tool. J. G. H. Bergeron to White, 11 July 1913 and H. Johnston to Bergeron, 12 July 1913. RG 10, vol. 11022, file 590.

<sup>24</sup> This evidence is not located on page 52, but rather in a discussion on page 49. The statement in the 1913 report is not evidence that the government did not understand the geography of northeastern British Columbia. The Liard does drain part of the eastern watershed of the Rocky Mountains. It also drains the western watershed of the Rocky Mountains, the eastern watershed of the Cassiars, and at Dease Lake, reaches as far as the western watershed of the Cassiar Mountains. Ray, 49, fn. 88.

he should have quoted rather than paraphrased. Curiously, Ray never cites the actual memorandum, citing an unpublished secondary source and, on one occasion, a pamphlet published five years prior to the memorandum.<sup>25</sup> The DIA had four memoranda prepared in December 1909 and January 1910, following a request for the survey of a reserve at Fort Grahame for the Sekani people. J.A. Macrae noted that, in drawing the map, “a *certain* water-shed or height of land seems to have been followed which may not coincide with the description of the words contained in the Treaty.” According to Professor Ray:

Laird replied that, by using the words “central range of the Rocky Mountains” in 1899, the commissioners had intended to use the “height of land” to the 60th parallel as the border. Thus as far as Laird was concerned, Macrae’s map was in fact, compatible with the commissioners’ original intentions. (53)

What Laird actually wrote 11 January 1910 is as follows:

The printed map of the territory embraced in the Treaty appears to me to be *approximately* correct. The Northwesterly boundary of Treaty No. 7 is given as the central range of the Rocky Mountains, or the boundary of British Columbia ... If therefore the height of land between British Columbia and Alberta is held to be “the central range of the Rocky Mountains,” then, I take it, these words in Treaty 8 mean the same height of land continued northwesterly to the 60th parallel of north latitude.

<sup>25</sup> Professor Ray primarily cites an unpublished paper by Douglas Cole for his information. On one occasion, Ray footnotes a pamphlet from 1905 as the source of a paraphrase he attributes to 1909. See p. 53 fn. 102. In that pamphlet Laird actually wrote that Treaty 8 was made with the Aboriginal peoples in “that portion of British Columbia east of the Rocky Mountains.” See David Laird, *Our Indian Treaties* (Winnipeg: Manitoba Free Press, 1905), 6. The document to which Ray refers is a memorandum requested after inquiries from Fort Grahame regarding the creation of reserves for the Sekani. J.D. McLean informed the deputy minister that Fort Grahame was east of the mountains in the Treaty 8 territory and asked the Department of the Interior to set aside land from the Peace River Block. When the Department of the Interior responded that Fort Grahame was not east of the mountains, McLean requested an explanation of Macrae’s map. It is interesting to note that the Department of the Interior sent McLean a map to clarify the location of Fort Grahame, but the map in the file is Macrae’s map. See McLean, Memorandum for Deputy Minister, 3 November 1909; McLean to P.G. Keyes (Interior), 8 November 1909; Asst. Secretary Interior to McLean, December 1909; McLean, Memorandum to Deputy Minister, 10 December 1909, RG 10, vol. 3750, file 29858-10. Four memoranda on the boundary appeared: J.A. Macrae, 30 December 1909; Laird, 11 January 1910; Scott, 19 January 1910; and J.K. McLean (surveyor), 20 January 1910. All four of the preceding memoranda are in RG 10, vol. 8595, file 1/1-11-5-1.

Laird's memorandum was followed by Duncan Campbell Scott, who stated that "in using the height of land as a boundary, Mr. Macrae was probably *not far astray*." A further memorandum by surveyor J.K. McLean noted:

The Commissioners in describing Treaty 8, commenced at the southwest corner of Treaty 6 and ran west to the North-west corner of Treaty No. 7 which had been fixed as being on the central range of the Rocky Mountains or the East boundary of British Columbia. They then followed this same range to the sixtieth parallel which must mean along the height of land.

If the Arctic-Pacific height of land is the height of land, or "central range of the Rocky Mountains," referred to in these memoranda, then Macrae's map is neither "approximately correct" nor "far astray": it is accurate. But the issue is not as simple as Professor Ray suggests.

Both Laird and McLean defined the notion of the height of land associated with the "central range of the Rocky Mountains" as it relates to the eastern boundary of British Columbia. The eastern boundary of British Columbia, "the main chain of the Rocky Mountains," had been held to be the "line of the watershed of the Rocky Mountains" by the British boundary commission in 1884, and a similar reference was made by the Canadian government in 1896 in resolution of the boundary issues related to the purchase of Rupert's Land.<sup>26</sup> South of the intersection of the Rocky Mountains with the 120th meridian of longitude, moreover, the Rocky Mountain watershed, or height of land, is associated with two different continental divides – the Hudson Bay-Pacific height of land and the Arctic-Pacific height of land.

Given Professor Ray's analysis it is also confusing, from my standpoint, that he only casually mentions the recommendation in

<sup>26</sup> The resolution of the boundary between British Columbia and the Northwest Territories was a vexing problem after 1871. A British boundary commission considered the issue and reported that the boundary should be taken as the "line of the watershed of the Rocky Mountains." See Cameron to Secretary of State for the Colonies, 29 October 1884, in *Correspondence Relating to the Eastern Boundary of the Province*. See also Report on the Eastern Boundary of British Columbia, NAC, MG 11, C.D. 42, vol. 779. Similarly, Canada needed to define the boundary for the purposes of Term 6 of the Deed of Surrender with the HBC. P.C. 1667, 7 May 1896, stated: "The Minister observed that the view taken by all the Chief Officers of the Department of the Interior, including not only the Deputy Minister, but the Surveyor General, the Geographer and the Chief Astronomer, is that the watershed of the Rocky Mountains should be taken as the boundary." The government, therefore, accepted the watershed of the Rocky Mountains as the western boundary of the fertile belt. See RG 15, D-11-1, vol. 728, file 404185.

David Laird's memorandum that the DIA consider securing an adhesion to Treaty 8 from the Fort Grahame Sekani (53). The Royal North-West Mounted Police had been active in the Fort Grahame District in 1906 brushing out trails, and they reported on the destitution of the Sekani people.<sup>27</sup> In his 1910 memoranda, Laird noted that "it will also probably be necessary before long to get the adhesion of the Indians in the vicinity of Fort Grahame."<sup>28</sup> At first glance, this information appears essential to Professor Ray's contention that the boundary of the treaty included the area between the Rocky Mountains and the Continental Divide. It certainly lends credence to Professor Ray's assertion that ambiguities surrounding the boundary continue. Laird's recommendation to secure an adhesion from Fort Grahame, however, does not necessarily mean that the territory was inside the boundaries of the original treaty. In the period 1907 and 1909, for example, Laird, as Indian commissioner, was involved in the extension of Treaty 5 throughout the area of present-day northern Manitoba. Adhesions to the treaty were taken from numerous groups in this area whose territory was not included in the original treaty.<sup>29</sup> Similarly, the DIA, just four years after Laird's memorandum, decided that a formal adhesion of the people at Moberly Lake was unnecessary, "as the territory in which they dwell is included within the limits of Treaty No. 8."<sup>30</sup> The DIA, consequently, simply provided them with annuities and reserves and placed them on band lists. In any event, despite Laird's comments, the DIA made no efforts to secure an adhesion at Fort Grahame.

The memoranda not only commented on the boundary, but also cast doubt on the utility of using Macrae's map as a definitive source for the location of the boundary. Duncan Campbell Scott remarked that a map "does not carry with it any authority as fixing the boundaries of any Treaty ... 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."<sup>31</sup> According to the treaty, the western boundary is the "central range of the Rocky Mountains." Rather than attempting to discover what information was available to the treaty

<sup>27</sup> Macleod to Officer Commanding "N" Division, 8 January 1906, RG 10, vol. 4027, file 299110.

<sup>28</sup> Laird, Memorandum, 11 January 1910, RG 10, vol. 8595, file 1/1-11-5-1.

<sup>29</sup> Frank Tough, *As Their Natural Resources Fail: Native Peoples and the Economic History of Northern Manitoba, 1870-1930* (Vancouver: UBC Press, 1996), 99-113.

<sup>30</sup> Memorandum to Scott, 21 February 1914, RG 10, vol. 7777, file 27131-1.

<sup>31</sup> Duncan Campbell Scott, "Memorandum to Deputy Superintendent General," 19 January 1910, RG 10, vol. 8595, file 1/1-11-5-1.

commissioners about the location of the Rocky Mountains, Professor Ray accepts the map as definitive. The DIA, however, had significant information available regarding the Rocky Mountains in 1899. Even more important, the primary sources of that information were the same as those regarding the cultural landscape and mining activity that Professor Ray suggests influenced the DIA's decision to extend the boundary to the Arctic-Pacific height of land. Professor Ray never informs the reader how the DIA could have such a good understanding about the cultural landscape yet be completely unaware of the location of the mountains.

#### CANADIAN KNOWLEDGE ABOUT THE ROCKY MOUNTAINS

Beginning in 1872-3, the Geological Survey of Canada sent numerous expeditions into the area west of the Rocky Mountains. Many of these expeditions were in support of the Canadian Pacific Railway, and their reports were widely circulated. Other expeditions were sent for the purposes of accumulating knowledge about the resources of northern British Columbia and to survey the connections between this district and the Yukon River District. Popular literature (such as Captain Butler's account) was also available, and, in the winter of 1898, when the government was considering the boundary of the treaty, a Senate investigation into possible railway routes between Edmonton and the Yukon was gathering all of the information available about the topography of northern British Columbia. One common element emerges from these reports. According to the wisdom of the Canadian government expeditions, McLeod Lake and Fort Grahame were west of the Rocky Mountains.

A few references should suffice, although dozens could be presented. John Macoun, testifying before the Select Senate Committee on the Mackenzie River Basin, noted that in 1875 he "went with Professor Selwyn to the Pacific coast and crossed into the interior by the Fraser by way of Fort St. James until we came to a place called Fort McLeod. *That is west of the Rocky Mountains* and latitude 55°."<sup>32</sup> George M. Dawson, later to be head of the Geological Survey of Canada, made a similar reference to McLeod Lake in 1879, noting that it marked the "junction of the interior plateau ... with the *western foot hills of the Rocky Mountain Range*."<sup>33</sup> In his report on the Finlay and Omineca,

<sup>32</sup> *The Great Mackenzie Basin* (Ottawa: Queen's Printer, 1888), 68. (emphasis added)

R.G. McConnell of the geological survey placed the Rocky Mountains to the east of Fort Grahame. He noted that "the eastern branches of the Finlay drain the western slopes of the Rocky Mountains proper." He went on to specifically identify the geographic structure mentioned in Treaty 8, noting that from Fort Grahame the "eastward view was soon obstructed by the *central ranges of the Rockies*."<sup>34</sup>

There was also a recognition in these reports that the watershed of the Rocky Mountains and its central ranges were not associated with the Arctic-Pacific height of land. Sandford Fleming, in his 1874 report to the Liberal government, of which David Laird was a minister, disassociated the mountain range from the continental divide:

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 chain of the Rocky Mountain Chain and thus throws the water shed of the Continent, in this latitude, westerly across British Columbia towards the Cascade Mountains.<sup>35</sup>

George Mercer Dawson also discovered a watershed in the Rocky Mountains. In 1879, he travelled from McLeod Lake to Fort St. John via the Pine Pass through the Rocky Mountains. At the summit he noted a swampy area filled with beaver ponds and tangled spruce between the two river valleys that "form[s] the actual watershed."<sup>36</sup> The map that accompanied this report has a clearly marked line called "Summit of the Rocky Mountains" cutting across both the Liard and Peace Rivers. Similarly, R.G. McConnell noted that the Rocky Mountains constituted a watershed, although they were breached by the Liard River. The district, he remarked,

<sup>33</sup> George M. Dawson, "Report on an Exploration from Fort Simpson on the Pacific Coast, to Edmonton on the Saskatchewan, 1879," in *GSC: Reports of Progress for 1879-80* (Ottawa: Dawson Bros., 1881), 33B (emphasis added). This report was forwarded to McKenna in April 1899. See Dawson to McKenna, 12 April 1899, MG 27, Sifton Papers, file Dawson to Deville, reel C-485.

<sup>34</sup> McConnell, "Report on Finlay and Omineca, 1893," *Geological Survey of Canada: Annual Report*, vol. 7, 1894 (Ottawa: S.E. Dawson, 1896), 6C and 16C. Ray cites only an excerpt of this report from Gordon Bowes's *Peace River Chronicles* (at p. 30, fn. 20) as evidence available to the government regarding mineral prospects in the district.

<sup>35</sup> Sandford Fleming, *Report of Progress on the Explorations and Surveys up to January 1874* (Ottawa: MacLean, Roger and Company, 1874), 4.

<sup>36</sup> Dawson, "Report on an exploration, 1879," 37B.

is traversed, in a direction a little north of west, throughout its whole length by the Rocky Mountain chain, *which constitutes the main water parting of the district.*

The Rocky Mountains enter the district on the south between long. 120° W and 126° 30' W., as an assemblage of nearly parallel limestone ridges, striking in a north-westerly direction, and rising to altitudes of 3,000 to 4,000 feet, but diminish rapidly in both height and width before reaching the Liard, in lat. 59° 30' N., and appear to die away in this latitude shortly after crossing this stream.<sup>37</sup>

The Rocky Mountains, regarded as forming the eastern mountain system of the Cordillera, are consequently interrupted in this part of their length [by the Liard River]. The Range of which the northern extremity is here found has a length of over 1000 miles. It extends uninterruptedly southward to the International Boundary, and is still further continued into Montana to about 46°. The width of this persistent mountain chain probably averages throughout fifty miles; and its main physical and geological features are almost identical.<sup>38</sup>

He also notes in his report that the Liard River "originates west of the Rocky Mountains."<sup>39</sup> These few examples demonstrate that the DIA had available a body of literature that clearly indicated that the Peace and Liard River systems breached the Rocky Mountains and that both rivers originated to the west of this mountain chain.<sup>40</sup> All of this information was under discussion in the Senate in 1898 as debate ensued over possible railway routes to the Yukon. Foremost in the discussion in the Senate was the impracticability of Moodie's route through the Rocky Mountain Trench.<sup>41</sup> The commissioners,

<sup>37</sup> R.G. McConnell, "Report on Yukon and Mackenzie Basin, 1887-88," in *GSC: Annual Report*, vol. 4, 1888-89, 8D (emphasis added).

<sup>38</sup> McConnell, "Report on Yukon and Mackenzie Basin, 1887-88," 44D.

<sup>39</sup> *Ibid.*, 10D

<sup>40</sup> Earlier Geological Survey of Canada reports include Charles Horetzky, "Report, 1872," in Sandford Fleming, *CPR: Report of Progress*, 1874, Appendix B; John Macoun, "Report on Peace River," in Sandford Fleming, *CPR: Report of Progress*, 1874, Appendix C; A.R.C. Selwyn, "Report on Exploration in British Columbia," *GSC, Report of Progress*, 1875-6, part 4; and John Macoun, "Report on Exploration in British Columbia," *ibid.*, part 5. There are also numerous railway survey reports on the district. See, for example, the material contained in Canadian Pacific Railway, *Description of the Country Between Lake Superior and the Pacific Ocean* (Ottawa: Dawson Bros., 1876). Popular accounts include W.F. Butler, *The Great Lone Land* (London: Low and Searle, 1872); Charles Horetzky, *Canada on the Pacific* (Montreal: Dawson, 1874); and Malcom McLeod, ed., *Peace River: A Canoe Voyage from Hudson's Bay [sic] to the Pacific by the late Sir George Simpson*, (Ottawa: Drurie, 1872). All contain similar references to the location of the Rocky Mountains and McLeod Lake.

<sup>41</sup> *Journals of the Senate of Canada*, 1898, Appendix 5, Special Committee upon Opening Up Direct Communications between the Railway System of Canada and the Yukon.



furthermore, carried at least one of these reports – George Mercer Dawson's 1879 report and accompanying maps – with them on the treaty-making expedition.<sup>42</sup> It is intriguing that I can find no evidence that the commissioners requested copies of McConnell's reports on the Finlay and Omineca Districts.

#### THE DIA AND THE BOUNDARY

Professor Ray's assertion that the DIA lacked sufficient information about the location of the Rocky Mountains is thus not substantiated by the evidence. The readers should also be aware that, in the DIA files related to the planning for the making of Treaty 8, all evidence except Macrae's map and PC 2749 suggests that the government did not intend to make a treaty with any groups living west of the Rocky Mountains in 1899. The notices regarding the time and date of the treaty commission include only Fort St. John as a BC location. The notice of locations was an important criterion, according to David Laird. He explained that, among other reasons, Portage La Loche had not been included in Treaty 8 because "no notices had been given or supplies sent for a meeting."<sup>43</sup> The DIA collected population survey data from the NWMP for all sites of the treaty commission, including Fort St. John and Hudson's Hope, but never included data from its own records regarding the number of people living at Fort Grahame or McLeod Lake.<sup>44</sup> The DIA consulted with Bishop Grouard of the Vicariate Apostolique de Athabasca-Mackenzie and the HBC, both of which treated the Rocky Mountains as an administrative boundary for their operations.<sup>45</sup> All of these preparations point to the understanding that the Rocky Mountains would be an appropriate geographic boundary for Treaty 8.

Nor did Canada take advantage of opportunities to secure an adhesion of the McLeod Lake Sekani after the original treaty had been made. The issue of reserve lands for Fort Grahame was dropped

<sup>42</sup> Dawson to McKenna, 12 April 1899, MG 27, Sifton Papers, file Dawson-Deville, reel C-485. Dawson noted that the maps were fragile and should be placed on a linen base for travel in the Interior. This map, it may be recalled, had a clearly marked line denoting the "summit of the Rocky Mountains" cutting across the Liard and Peace Rivers.

<sup>43</sup> Laird to Secretary, 29 April 1904, RG 10, vol. 4006, file 241,209-1.

<sup>44</sup> RG 18, vol. 1435, file 76 pt. 2. It should be noted that the Sekani at McLeod Lake and Fort Grahame were listed in the Babine Agency reports in every annual report of the DIA after 1892, yet no inquiry was ever addressed to the Indian agent.

<sup>45</sup> Robert Choquette, *The Oblate Assault on the Canadian Northwest* (Ottawa: University of Ottawa Press, 1995), 86-102. Claude Champagne, *Les Débuts de la Mission dans le Nord-Ouest Canadien* (Ottawa: University of Ottawa Press, 1983), 53-59.

following the exchange of memoranda in 1910 regarding the boundary, despite Laird's suggestion that the DIA consider taking an adhesion at Fort Grahame. During the McKenna-McBride Commission a second opportunity presented itself, and once again the DIA failed to address the issue. As Professor Ray noted, the commissioners sought to secure British Columbia's cooperation with regard to providing reserves to those people within the boundaries of Treaty 8 "for whom Reserves have not already been constituted or allotted."<sup>46</sup> Interim Report 91, however, did not use the language of the treaty, the central range of the Rocky Mountains; instead noting that "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 Longitude." The commissioners resolved that British Columbia be required to set out land for reserves according to Treaty 8 "within that part of British Columbia covered by Treaty No. 8, as hereinbefore set out." In the detailed report on Treaty 8 lands that accompanied the report, Fort Nelson and the nomads "roaming along the N. W. boundary" of Treaty 8 are listed.<sup>47</sup>

Two commissioners, meanwhile, had entered the area west of the Rocky Mountains and, after meeting with members of the bands there, established new reserves for the Fort Grahame and McLeod Lake Sekani.<sup>48</sup> After these decisions were communicated to the DIA, Scott identified the nomads still unaccounted for as being different from these bands. The DIA was fully aware that reserves much smaller than those called for in Treaty 8 had been created at Fort Grahame and McLeod Lake, yet it never protested that these people should have been treated according to the terms of the treaty.<sup>49</sup> The superintendent of Indian affairs for British Columbia, W.E. Ditchburn, later noted that several small reserves had been approved in the area

<sup>46</sup> Ray quotes I.R. 91 selectively, but references the McLeod Lake statement of claim rather than the document. For a copy of I.R. 91 see *Report of the Royal Commission on Indian Affairs for the Province of British Columbia* (1916), 126-7. McKenna requested that the DIA forward any information regarding people within the Treaty 8 territory. See McKenna to Scott, 18 December 1913, RG 10, vol. 8595, f. 1/1-11-5-1. McKenna was given information regarding the DIA's opinion that 300 nomads currently trading at Fort Grahame were from Treaty 8.

<sup>47</sup> *Report of Commission, Detailed Reports*, 847.

<sup>48</sup> Carmichael and Shaw to White, 22 October 1914, RG 10, vol. 11022, f. 565C. These reserves included two of 320 acres each for Fort McLeod, two small fishing stations of 5 to 10 acres for Fort McLeod, one of 160 acres at Fort Grahame, and another undetermined reserve of 640 acres for the Fort Grahame Band at Police Meadows.

<sup>49</sup> Scott to Bergeron, 5 January 1914; Gibbons to Scott, 6 August 1915; Scott to Gibbons, 24 August 1915, RG 10, vol. 8595, f. 1/1-11-5-1

included as part of Treaty 8 by Macrae's map. "It is quite evident, therefore, that this map is in error as Mr. McKenna, who was one of the Treaty Commissioners and also a member of the Royal Commission, would not have had the small reserves set aside were these Indians properly included in Treaty 8." Duncan Campbell Scott replied, intriguingly, "I would say that the Treaty itself places the boundary at the central range of the Rocky Mountains, – that is in effect the height of land."<sup>50</sup> He then went on to cite PC 2749 but did not deal with the contradiction raised in Ditchburn's letter.

## CONCLUSIONS

It is important that readers have a full understanding of the issue of the western boundary of Treaty 8 if they are to ask appropriate questions about the McLeod Lake settlement. The boundary issue is more complex than Professor Ray would suggest. After a thorough review of the documentary record, his analysis cannot be supported. The documents suggest that Treaty 8 did not include the territory of the McLeod Lake Sekani and that the federal government never pursued their adhesion to the treaty. If the assumption that the territory of the McLeod Lake Sekani is within Treaty 8 is put aside, then Professor Ray's implied conclusion that the settlement effectively corrects a historic wrong perpetrated by the BC government is not substantiated by the evidence. Readers needed to be apprised of this problem if they are to fully understand the current agreement. McLeod Lake is not another Lubicon Cree situation but something quite different. McLeod Lake's adhesion to Treaty 8 deserves to be recognized and scrutinized, along with the Nisga'a treaty, as a settlement of Aboriginal claims in British Columbia. In my opinion, it is a testament to the vitality of Treaty 8 and the numbered treaties that McLeod Lake chose to adhere to a century-old treaty rather than to pursue a new comprehensive agreement. British Columbia, the federal government, and the McLeod Lake Sekani should be congratulated on the successful adhesion of McLeod Lake to Treaty 8.

<sup>50</sup> Ditchburn to Scott, 19 November 1920; Scott to Ditchburn, 4 December 1920, RG 10, vol. 4042, f. 336877