

TREATY 8 AND EXPERT WITNESSES:

A Reply to Robert Irwin

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Over the past twenty years I have been involved, as an expert witness, in numerous Aboriginal and treaty rights cases. The tone and content of Dr. Robert Irwin's critique of my article is what I have come to expect from cross-examining counsel in the adversarial theatre of the courtroom, where attacks on the personal credibility of expert witnesses and charges of misusing¹ and making biased selections of the evidence are not uncommon. I believe that Irwin's approach is best left in the courtroom, so I will not subject the reader to a line-by-line rebuttal of his charges. There are, however, a few issues that Dr. Irwin raises that I would like to address so that the reader has the perspective to consider the relative merits of the contrasting interpretations of Treaty 8 history we offer.

ADVOCACY AND BIAS

Dr. Irwin correctly notes in his Footnote 5 that both of us had been retained as historical experts by the parties involved in the McLeod Lake Sekani's legal dispute, which was settled out of court in 1999.² It is of importance, however, that he fails to note that three parties were involved in the proceedings: the McLeod Lake Sekani and the Governments of Canada and British Columbia. He leaves the reader with the wrong impression that I was an advocate for the McLeod Lake Sekani. In fact, I was hired by the litigation support section of the Department of Indian Affairs (DIA) to prepare a brief for the attorney general of Canada. However, although Canada supported the Sekani's petition, the federal government did not ask me to address

¹ Irwin, for example, states: "Professor Ray, furthermore, is aware that PC 2749 [announcing to British Columbia the federal intention to negotiate Treaty 8] was directed to 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." In fact, what I wrote was: "Canada made its first move to obtain provincial support on 12 December 1898, when the Acting Under Secretary of State for the provinces forwarded to the Lieutenant-Governor of British Columbia extracts of Privy Council Order 2749." Irwin also misquotes me in saying that the memorandum to British Columbia was dated 6 December 1898. In fact, as I noted, the letter to British Columbia was dated 12 December 1898 and included portions of PC 2749.

² Irwin, footnote 5

the boundary question or whether the McLeod Lake Sekani had the right to be included in the treaty; instead, the Crown asked me to consider how British Columbia benefited from Treaty 8. This was because the province and the federal government also disputed who would have to bear the expense if the Sekani were successful in their suit.

BRITISH COLUMBIA AND THE MCLEOD LAKE SEKANI

Dr. Irwin repeatedly and wrongly asserts that I imply that British Columbia sought to block the adhesion of the McLeod Lake Sekani to Treaty 8 for over a century. To the best of my knowledge, the issue is not a century old; rather, it arose in the 1980s when these people petitioned for the right to join Treaty 8. What I did point out, rightly, was that the province opposed their petition at this time, whereas the federal government supported it. One of the major points of my article, which Dr. Irwin seems to have missed entirely, is that in 1899 the two levels of government avoided clashing over the First Nations issues, which Treaty 8 raised, by not addressing contentious subjects head on. British Columbia, for instance, did not openly agree to the extension of the treaty into its territory – nor did it oppose it. This meant, of course, that the western boundary of Treaty 8 did not become a subject of inter-provincial legal dispute until much later. The McLeod Lake Sekani raised it by asserting their right to join Treaty 8 after they had become disillusioned with the ongoing comprehensive claims and the modern treaty negotiation processes.

THE RATIONALE FOR EXTENDING THE TREATY INTO BRITISH COLUMBIA

Dr. Irwin's discussion of the topic of the federal government's rationale for including and excluding various First Nations territories within Treaty 8 is, I believe, confusing and contradictory. He suggests that the presence or absence of mineral deposits (or the potential of discovering them) and Native threats to violently oppose intruders in their territories were separate considerations. In fact, the federal government had to take both of these concerns into account. There is no question that, in 1899, it was the Dene-za, Sekani, and "Nahanni" who seemed the most threatening.

Dr. Irwin argues, as did Doug Cole in a brief he prepared for British Columbia before his death, that the problems that the Klondike gold

rush had created in the area had subsided by 1898, and, therefore, a treaty was no longer needed.³ In support for this position, he cites the internal correspondence of the Hudson's Bay Company (HBC) for Lesser Slave Lake and Fort Graham for late 1898 and 1899 (the year the treaty was signed) and 1900, which states that prospecting fever was subsiding.⁴ He offers no evidence, however, that this information reached HBC headquarters in Winnipeg and/or that it had been forwarded to government decision makers before the treaty was concluded. Furthermore, Dr. Irwin ignores the evidence that I discussed with respect to Fort McLeod, where prospecting continued until the signing of the treaty.

GEOGRAPHIC KNOWLEDGE AND THE TREATY 8 BOUNDARY: THE PHYSICAL LANDSCAPE

Dr. Irwin asserts that there is no doubt that the western boundary of Treaty 8 was supposed to be the "central ranges of the Rocky Mountains" and that the treaty commissioners clearly never intended to include Sekani territory. In taking this position, he does not point out that his conclusion is at variance with the work of other previous researchers who have pointed out that the boundary is ambiguous.⁵ It also presumes that government officials, including treaty commissioners, had precise knowledge of the boundaries of Sekani territory on the eve of the treaty.

Although I had not been asked to address the boundary question as an expert in the McLeod Lake Sekani's litigation, it piqued my interest. As a historical geographer, I was puzzled by the fact that a

³ Douglas Cole, "McLeod Lake and Treaty 8," Report Prepared for Michael Frey, Barrister and Solicitor, Legal Services Branch, Ministry of the Attorney General of British Columbia, 31 June 1997, 32-4. In fairness to Cole it should be pointed out that he prefaced his discussion of the collapse of the Klondike gold rush as a factor in treaty-making plans with this substantial qualification: "The demise of the viability of a Canadian overland route to the Yukon *probably* [emphasis added] explains the virtual disappearance, after December 1898, of further mention of the "proposed route" ... in Treaty-related documents....". See Cole, "McLeod Lake," 32.

⁴ Irwin, Footnote 8.

⁵ In 1986 Denis Madill wrote that "the boundary question has been addressed by the Department of Indian Affairs on several occasions and it has been concluded that the more westerly range of mountains [rather than the Rocky Mountains] was the intended boundary of Treaty Eight." See Denis Madill, *Treaty Research Report: Treaty 8* (Ottawa: Treaty and Historical Research Centre: Indian and Northern Affairs Canada, 1986), 25. See also, J. Bruce Melville, *Indian Reserves and Indian treaty Problems in Northeastern, BC* (Vancouver: BC Hydro, 1981) 2.13-2.22.

map drawn in 1900, which is attributed to J.A. Macrae (who was a treaty commissioner in 1900), has gained general acceptance as the “official” treaty map even though it portrays a western boundary that is at considerable variance with the one described in the 1899 treaty text.⁶

Dr. Irwin rejects my suggestion that some of the confusion may have arisen from the fact that DIA officials, particularly the treaty commissioners, had a poor understanding of the geography of the area in 1899-1900.⁷ He argues that they had access to detailed information contained in geologic survey reports, especially those of the legendary geologist, George M. Dawson, and accounts provided by other visitors.⁸ If this is correct, and DIA officials understood what they read, then how was it possible for David Laird, who was one of the commissioners who drafted the treaty in 1899, to say ten years later that the Macrae map was “approximately correct”; or for Duncan Campbell Scott to state that it was “not far astray” when, in fact, a substantial territory lies between the “central ranges of the Rocky Mountains” (as defined by Dr. Irwin) and the drainage divide separating the western Arctic and Pacific watersheds?⁹ In places, this area is more than 100 miles wide, and it includes most of Sekani territory.

I believe that other remarks that Laird made about the Macrae map in 1909 provide additional evidence that he remained confused about major features of the physical geography of the region long after he had helped negotiate the treaty. Dr. Irwin notes, for example, that the treaty commissioner stated that “*if therefore the height of land between British Columbia and Alberta is held to be the ‘central range of the Rocky Mountains’* [emphasis added], then, I take it, these words in Treaty 8 mean the same height of land continued northwesterly to the 60th parallel of north latitude.”¹⁰ Clearly, Laird is uncertain about the relationship between the height of land and the Rocky Mountains.

⁶ Irwin notes that the 1912 *Handbook of the Indians of Canada* used a boundary that accords with the one that is described in the text of the treaty. This fact is largely beside the point. The Macrae map is the one that is used today, as it has been, with very few exceptions, since 1900.

⁷ Although Dr. Irwin takes issue with the way I cited the three privy council orders concerning Treaty 8 (1703, 2749 and 330), we agree on two crucial points. (1) The map that accompanied Canada’s notice to British Columbia of its treaty-making intentions of 6 December 1898 used the watershed, not the Rocky Mountains, as the proposed western boundary, and (2) it simultaneously gave treaty commissioners discretionary authority to define that boundary. Significantly, the Macrae map reverted to the one used on 6 December 1898.

⁸ Irwin, 13-4.

⁹ Quoted by Irwin, 11.

¹⁰ Irwin, 11.

Furthermore, as J. Bruce Melville noted when he researched the boundary issue in 1981, topographical maps customarily do not extend the "central ranges of the Rocky Mountains" to the 60th parallel;¹¹ rather, he suggests that the Liard River is generally considered to be their northern limit. Since Irwin raised the issue of the McLeod Lake Sekani's litigation, it should be pointed out that one of the McLeod Lake Sekani's expert witnesses, Simon Fraser University geographer Dr. Arthur Roberts, reached a somewhat different conclusion on this important point.

In his 1981 study, Melville suggested that the imprecise and inconsistent use of geographic terminology added to the confusion.¹² His idea was explored fully by Roberts, who reached a number of major conclusions that throw doubt on Dr. Irwin's thesis: (1) prior to the end of the 19th century, cartographers commonly depicted the Rocky Mountains "as a continuous line or wall of mountains along the western edge of the prairies/plains" and employed "little else to represent the entire Cordillera";¹³ (2) in his 1886 preliminary report on the Rocky Mountains between latitudes 49 degrees and 51 degrees and 30 minutes, G. M. Dawson made no reference to a "central range" of the Rocky Mountains, and he inconsistently used various topographic terms in reference to sections of these cordillera;¹⁴ (3) the Rocky Mountains had not been officially named in 1899, and there "could have been many different perceptions as to what mountainous area actually constituted the 'Rocky Mountains';"¹⁵ and (4) "there was (and is) no officially defined or discernable (sic) central range."¹⁶ Roberts noted that the text of Treaty 11 (1921) suggested that a more westerly boundary was intended, as Macrae's map indicated. The Treaty 11 boundary description states, in part: "commencing at the northwesterly corner of the territory ceded under to provisions of Treaty Number Eight; thence northeasterly along the height-of-land to the point where it intersects the boundary between the Yukon Territory and the Northwest Territories."¹⁷

¹¹ Melville, 2.20-2.21. He also noted that the map of the proposed treaty area, which the federal government sent to the province in 1898, used a topographic map that "is grossly incorrect." *Ibid.*, 2.17

¹² *Ibid.*, 2.20-2.21.

¹³ Arthur Roberts, "Mountain Nomenclature: The Western Boundary of Treaty 8," n.d., 13. The maps of Arrowsmith cartographic firm, which had privileged access to HBC data, are an excellent nineteenth-century example.

¹⁴ Roberts, "Mountain Nomenclature," 22-4.

¹⁵ *Ibid.*, 26.

¹⁶ *Ibid.*, 26.

¹⁷ *Ibid.*, 26. See also Melville, who makes the same point. Melville, 2.23-2.25.

GEOGRAPHIC KNOWLEDGE
AND THE TREATY 8 BOUNDARY:
THE CULTURAL LANDSCAPE

In his critique of my article, Dr. Irwin does not address in any significant way the cultural geography issues that I raised, particularly those relating to tribal territories; rather, he contends that there is no doubt that the intended western boundary of Treaty 8 was “the central range” of the Rocky Mountains. McLeod Lake lies to the west and, therefore, Dr. Irwin contends that the government never intended to include the Sekani. Unfortunately, it is not that simple. Suppose, for the sake of argument, Dr. Irwin is correct about the intended boundary. It is arguable that the McLeod Lake Sekani still would have been entitled to inclusion, given that it is generally accepted that their territories extended into the Rocky Mountains, probably as far eastward as the eastern foothills.

Thus far, the debate has focused on how best to interpret evidence that exists concerning where the federal government intended to draw the boundary for Treaty 8. A more interesting question has yet to be considered, however. What justification did the government have for using either the boundary as described in the treaty text of 1899 or the Macrae map of 1900? None of the treaty commissioners ventured as far west as the Rocky Mountains. There is no question that government officials’ knowledge about the cultural geography of the region, particularly as it related to the exact boundaries of First Nations territories, was even sketchier than was their understanding of the physical geography. I am not aware, for instance, of any late nineteenth-century maps that display the boundaries of local First Nations territories. All they knew for certain was that the eastern boundary of British Columbia was not suitable. Normally only their approximate locations are indicated, as is the case with the Macrae Map. Likewise, verbal descriptions of them are very general. In view of this fact, I believe that a strong case could be made that the boundaries that the commissioners used were the ones the government intended (about which the commissioners were confused) rather than the ones that circumscribed the lands they understood the First Nations to have actually “surrendered” to them in 1899 or 1900.