March 31, 2015

THE ROUGE RIVER VALLEY TRACT

UNSURRENDERED TRADITIONAL LANDS

MISSISSAUGAS OF THE NEW CREDIT FIRST NATION

(Formerly Known As Mississaugas of the New Credit Indian Band)

STATEMENT OF CLAIM

Submitted to

The Government of Canada

and to

The Government of Ontario

WITHOUT PREJUDICE

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EXECUTIVE SUMMARY

1. The following comprises the Statement of Claim of the Mississaugas of the New Credit First Nation (MNCFN) with respect to the Rouge River Valley Tract (RRVT). This Statement of Claim must be read in conjunction with the four Historical Reports, prepared by Joan Holmes and Associates, Inc. (JHA):

    1) **TRADITIONAL LANDS CLAIM OF THE MISSISSAUGAS OF THE NEW CREDIT FIRST NATION** dated January 2011 (Report 1)

    2) **MISSISSAUGAS OF THE NEW CREDIT FIRST NATION GUNSHOT TREATY AND WILLIAMS TREATIES JOINT RESEARCH PROJECT** dated March 2013 (Report 2)

    3) **MISSISSAUGAS OF THE NEW CREDIT FIVE ADDITIONAL RESEARCH ISSUES** dated March 2014 (Report 3)

    4) **1701 NANFAN DEED** dated November 2014 (Report 4).

    The first and fourth Reports were prepared for the Mississaugas of New Credit. The second and third Reports were prepared for the Mississaugas of New Credit and the Assessment and Historical Research Directorate, Aboriginal Affairs and Northern Development Canada, jointly. All references in this Statement of Claim are to page numbers from the four Reports, or to Documents referenced in the three Reports. The Historical Reports, Document Indexes and the Documents themselves are all attached and form an integral part of this Claim.

2. This claim is based on the fact that the Rouge River Valley Tract forms part of the territory of the direct ancestors of MNCFN, the Mississaugas of the Credit, and the fact the that the Rouge River Valley Tract has never been lawfully surrendered by MNCFN or its ancestors. ***As a result MNCFN hereby asserts that it maintains unextinguished aboriginal tile to the Rouge River Valley Tract.***

3. The Mississaugas of the New Credit First Nation are the decedents of the "River Credit" Mississaugas. At all times from the conquest of the French in 1760, from the first Treaty with the Mississaugas in 1764 at Niagara, through to the land surrenders of the 19th century, the British Crown recognized the Mississaugas as the Indians with title to what is now most of southern Ontario.

4. Based on descriptions from the Rev. Peter Jones (a River Credit member and Chief) from 1848 and 1855, and from the "Paper Talk" sent to the Governor General by Chiefs Joseph Sawyer and John Jones in 1844, the River Credit

territory extends from the Rouge River Valley in the east, across to the headwaters of the Thames River, down to Long Point on Lake Erie and back along the shores of Lake Erie, the Niagara River and Lake Ontario back to the Rouge River Valley (See Map on page 3 of Report 1 and Map of MNCFN traditional lands attached as Schedule A).

5. All of that land was recognized by the British Crown as belonging to the direct ancestors of MNCFN and, as part of the Toronto Purchase Claim, Canada has recognized MNCFN as the proper beneficiaries of those lands.

6. The Reports demonstrate that the RRVT was part of the MNCFN territory as clearly described by the Reverend Peter Jones and other MNCFN leaders.

7. The RRVT was included, although perhaps only partially, in the "Gunshot Treaty" in 1788. The Gunshot Treaty is invalid and was considered as such by successive governments in what is now Ontario.

8. The RRVT lies to the east of the Toronto Purchase Treaty and it does not form part of any other valid Treaty or land surrender entered into by MNCFN or its predecessors.

9. MNCFN leaders consistently complained that they had never surrendered their lands east of Toronto Purchase and further that they had never been paid for those lands.

10. The RRVT does fall within the boundaries of the 1923 Williams Treaty, but MNCFN is not a signatory to that Treaty for reasons well documented in Reports 2 and 3.

11. MNCFN may have difficulty meeting the test set out the Supreme Court of Canada to establish unextinguished aboriginal title for reasons that we argue ought not to rule out the claim. MNCFN acquired ownership of its territory in the same way that the British did, by conquest. The fact that the conquest took place subsequent to the assertion of sovereignty by the French does not mean that they did not own the land. The British Crown recognized MNCFN's ownership of its territory and took many surrenders from them from the late 1700s to the mid 1800s.

12. In the alternative, should it be the case that MNCFN can not currently make out a claim to unextinguished aboriginal title to the RRVT, then we would assert that it has sufficient aboriginal interest in the lands to require Canada and Ontario to enter into Treaty with MNCFN regarding the RRVT, as was done with the other Mississauga Nations in the 1923 Williams Treaty.

13. It is also the submission of New Credit that both principles of equity from fiduciary law and the honour of the Crown require restitution, that is that Canada return the land improperly taken and not paid for. Canada and Ontario still own land in the claim area, in particular lands destined for the Rouge River National Park. Those lands should be returned to MNCFN.

14. As against Canada this claim is submitted to the Assessment and Historical Research Directorate as a so-called "claim of a third kind". As against Ontario, this claim is submitted to the provincial government through the land claims process administered by the Ontario Ministry of Aboriginal Affairs.

15. MNCFN is the claimant. It is an Indian Band under the terms of the *Indian Act* RSC 1985, c. I-5 (as amended). MNCFN was formerly known as the Mississaugas of the New Credit Indian Band. Generally in this Statement of Claim the term "MNCFN" is utilized to denote the claimant, except where "River Credit" or "Mississaugas of the Credit" is used to preserve historical meaning.

16. The Toronto Purchase Specific Claim, the Crawford Purchase Specific Claim and Gunshot Treaty Specific Claim, were originally submitted to Canada in 1986 by the Mississauga Tribal Claims Council (MTCC). The MTCC comprised all five southern Ontario Mississauga First Nations (MNCFN, Alderville, Curved Lake, Hiawatha and Scugog). All three claims were rejected by Canada in 1993. The MTCC then requested that the Indian Claims Commission (ICC) conduct an Inquiry into the rejection of the claim in 1993, but the ICC file was closed subsequently, due to inaction (The MTCC ceased to function around 1994).

17. In 1998 MNCFN requested on its own that the ICC conduct an Inquiry into Canada's rejection of all three claims. The first Planning Conference was held in Ottawa July 16, 1998 where Canada agreed to review the basis of the original rejections. At the 2nd Planning Conference, held on October 1, 1998, in Toronto, New Credit requested that the Crawford Purchase and Gunshot Treaty Specific Claims be held in abeyance, until the 1923 Williams Treaty is finally addressed with New Credit.

18. This claim addresses the 1923 Williams Treaty and the Gunshot Treaty.

19. The Toronto Purchase Specific Claim was settled with Canada in 2010.

THE FACTS

20. The facts in support of this claim are clearly set out in four Historical Reports, prepared by Joan Holmes and Associates, Inc. (JHA):

    1) **TRADITIONAL LANDS CLAIM OF THE MISSISSAUGAS OF THE NEW CREDIT FIRST NATION** dated January 2011 (Report 1)

    2) **MISSISSAUGAS OF THE NEW CREDIT FIRST NATION GUNSHOT TREATY AND WILLIAMS TREATIES JOINT RESEARCH PROJECT** dated March 2013 (Report 2)

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21. Some Facts will be set out in detail in this opinion to support particular arguments, but that does not negate the need to review all four Reports in their entirety.

Occupation of the Land and Contact with the British

22. Report 1 has the following aim:

> The aim of this report is to analytically review and document the facts relating to whether or not the antecedents of the Mississaugas of the New Credit surrendered some 63,000 acres of traditional land immediately east of the eastern boundary of the 1805 Toronto Purchase.[1]

23. The history of the Mississauga Indians and how they came into possession of most of what is now southern Ontario is well documented in Report 1:

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[1] Report 1, page 4.

> The Mississauga Indians were members of the Council of the Three Fires, a longstanding alliance of Ojibwa, Pottawatomi, and Ottawa Indians. Within the historical records, Mississauga Indians were often described as Ojibwa or Chippewa Indians. In the late 1600s the Mississaugas moved into what is now eastern and southern Ontario. They established villages along the north shore of Lake Ontario and adjacent waterways, some of which were formerly occupied by elements of the Iroquois Confederacy. These Mississauga village sites included Ganneous and Quinte on the Bay of Quinte, Quintio at Rice Lake, Ganaraska on Lake Ontario close to present-day Port Hope, and ***Teiaiagon and Ganestiquiaigon (on the Rouge River)*** on Lake Ontario in the present-day Toronto area. There were also a number of Mississauga villages on the west end of the lake. [emphasis added] [2]

24. The manner in which the Mississauga Indians split into two groups with the River Credit Indians forming the westerly branch (the easterly branch today comprises the Mississauga First Nations: Alderville, Curved Lake, Hiawatha and Scugog) and the fact that the River Credit Indians are the direct ancestors of MNCFN is set out in Report 1:

> One large group of Mississaugas occupied lands in the Trent River Valley and eastward along Lake Ontario and the St. Lawrence River. A second group established themselves in the area between present-day Toronto and Lake Erie. These Indians considered the Credit River as a favourite area of their ancestors and the Mississaugas who settled on the Credit River and "at the western end of the lake became known collectively as the Credit River Indians." This latter group of Mississaugas "are the direct ancestors of the present Mississaugas of the New Credit First Nation." [3]

25. The Rouge River Valley was of great importance to the Mississauga Indians as it was one of two routes from Lake Ontario to Lake Huron via Lake Simcoe (the other being the route up the Humber River known as the "Toronto Carrying Place" the subject of the Toronto Purchase Specific Claim):

> However, Robinson noted a lack of contemporary maps clearly delineating the eastern trail as compared to the excellent maps of the west, or "Toronto Carrying Place," trail. Henry Scadding in Toronto of Old mentioned the importance of the Rouge Valley to the Mississauga Indians, "The Mississaga Indians attacted [sic] great importance to the Rouge and its valley as a link in one of their ancient trails between Huron and Ontario; and they seem to have imparted to the first white men their own notions on the subject." [4]

26. The British campaign to conquer Canada began in 1758, starting with the capture of the port of Louisbourg, which was followed by the 1759 victory at

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[2] Report 1, pages 11-12.

[3] Report 1, page 12.

[4] Report 1, page 14.

Quebec in the Battle of the Plains of Abraham. The campaign was completed with the surrender of Montreal in 1760. The possession of the lands taken by the British by conquest were secured during the Treaty of Paris in 1763 at the conclusion of the Seven Years' War. Under the Treaty, Canada was ceded to the British by the French in exchange for the return of Guadeloupe and the right to retain the islands of St. Pierre and Miquelon off the coast of Newfoundland.

27. The British had taken the important posts around Lake Ontario in 1759 including Fort Niagra:

> In July 1759 Fort Niagara fell to the British in a 19-day siege called the Battle of Fort Niagara. The Iroquois, despite the Onandangao and Oneida's original intent to remain neutral, first watched from the sidelines then helped the British overcome the French and their allies. In April of 1759, at a conference of various Indian nations, Sir William Johnson learned that a number of Indian nations including the Illinois, Miamis, Shawnees, Ojibway (Sauteurs), and the Mississaugas sent a belt of wampum to the Six Nations. [5]

28. At all times from the conquest of the French in 1760, from the first Treaty with the Mississaugas in 1764 at Niagara, through to the land surrenders of the 19th century, the British Crown recognized the Mississaugas as the Indians with title to what is now most of southern Ontario. The Mississauga Indians were in possession of those lands by conquest of the Iroquois who had previously taken possession of the lands from the Huron and related groups:

> Historical evidence clearly indicates that it was only from the 1650s to about 1690 that the Iroquois Confederacy maintained use and occupation over hunting regions north and west of Lake Ontario. Toward the end of this time period, northern Iroquois villages were being abandoned. One factor leading to the abandonment related to Iroquois defeat of Indian nations to the south of their homeland below the eastern Great Lakes, resulting in a lesser dependence on northern hunting grounds. Praxis Research Associates argues that another important factor contributing to the abandonment of Iroquois settlements north of Lake Ontario was "effected by their defeat in the war against the Ojibwa and their allies." [6]

29. The Mississauga Indians had many village sites along the north shore of Lake Ontario, including one at the mouth of the Rouge River:

> Helen Tanner notes that in the late 1600s the Mississaugas moved into what is now eastern and southern Ontario. They established villages along the north shore of Lake Ontario and adjacent waterways, some of which were formerly occupied by elements of the Iroquois Confederacy.20 Tanner also identifies these Mississauga village sites as Ganneous and Quinte on the Bay of Quinte, Quintio at Rice Lake, Ganaraska on

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[5] Report 1, page 26.

[6] Report 4, page 8.

> Lake Ontario close to present-day Port Hope, and Teiaiagon and Ganestiquiaigon (on the Rouge River) on Lake Ontario in the present-day Toronto area. There were an additional number of Mississauga villages established on the west end of the lake.[7]

30. After the successful taking of Fort Niagra the British moved to take Toronto, but found it burnt and there they met a River Credit Chief:

> Following the capture of Niagara, Sir William Johnson sent a small force to destroy the French fort at Toronto, but found it burned and abandoned. At Toronto, however, they encountered a "Chippewa" Indian who subsequent documents indicate was Chief Tequakareigh of the Mississaugas. [8]

31. The British then sought to make peace with the Mississaugas of the north shore of Lake Ontario:

> Two days later, in an August 2 meeting between Sir William Johnson and Toronto Mississauga Chief Tequakareigh, the latter pledged loyalty to the British. Johnson explained that he provided Chief Tequakareigh with a belt of black wampum to make peace with his and surrounding nations. Johnson provided a second belt of wampum to Tequakareigh and the chief agreed to meet with the Mississaugas along Lake Ontario to offer peace on behalf of the British. [9]

32. Sir William Johnson enlisted Chief Tequakareigh to assist the British in making peace and friendship with the Mississaugas and allied Indians. Report 1 suggests that the next major village of Mississaugas to the east of the Credit River village was at the mouth of the Rouge River:

> It is possible that when Johnson asked Chief Tequakareigh to travel to "the next town of Mississagas" he meant the Mississauga village closest to the Credit River village. The closest village would have been the one in the Rouge River Valley called Kanatiochtiage (Ganatsekwyagon). [10]

33. In 1763 Pontiac led a rebellion against the British largely in the Great Lakes region. Some Mississaugas appeared to have participated. The Rebellion led to two matters of importance: 1) the Treaty of Niagra in 1764 whereby the British made peace with the many of the Indians; and 2) the *Royal Proclamation of 1763*, meant to protect the Indians from unauthorized takings of their land, aspects of which still are found in the *Indian Act* today.

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7 Report 4, pages 10-11.

8 Report 1, page 26.

9 Report 1, pages 26-27.

10 Report 1, page 27.

34. In 1776 Joseph Brant sand other Six Nation Indians supported the British in the American Revolution. By the Treaty of Paris (1783) the British gave control of their territory in upstate New York to the United States. When Six Nation members wanted to relocate to British territory following the American Revolution the British purchased land from the Mississaugas to accomplish this end. Land surrenders were taken from the Mississaugas to secure territory for Joseph Brant at the Grand River and other Six Nations Indians at the Bay of Quinte (Mohawks of Tyandenaga). [11]

35. The land surrender for the Grand River location was signed by three River Credit Chiefs.[12] The British clearly recognized the River Credit Chiefs as having title to these lands.

MNCFN Traditional Territory

36. Chapter 2 of Report 2 deals extensively with the traditional territory of MNCFN.

37. Perhaps the best description comes from Mississaugas of the Credit Band Council minutes dating between 1834 and 1848:

> The boundaries of the original Territory of the River Credit Indians were as follows: Commencing at the mouth of the River Rouge. Thence north to the source of the said river. Thence westerly along the dividing ridges which Separate the waters of Lakes Ontario and Simcoe & Huron. Thence to the source of the Grand River or Ouse. Thence southerly along the dividing ridges between waters of the Grand River and River Thames to Long Point on Lake Erie. Then easterly along Lake Erie, Niagara River, and Lake Ontario to the place of beginning. [13]

38. This description is made when the Reverend Peter Jones was still alive. It is almost identical to the statement contained in a letter dated December 5, 1844, in which Chiefs Joseph Sawyer and Reverend Peter Jones wrote to the Governor General as follows:

> The two Chiefs described their traditional lands from time immemorial as "extended as far down as the river Rouge thence up the said river Rouge to its source thence Westerly along the dividing ridge between Lakes Huron and Ontario to the head

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[11] Report 1, Pages 56-57.

[12] See Report 2 Appendix A: Chiefs of the Mississauga Indians (1750- 1850) organized by location, pages 76 ff.

[13] Report 2, Page 41.

> waters of the river Thames thence southerly to Long point on Lake Erie, thence down Lake Erie, Niagara river and Lake Ontario to the place of beginning." [14]

39. JHA could find no Crown response to this letter and certainly no contradiction.

40. Again in 1855 Chief Reverend Peter Jones wrote to the Indian Department and once again consistently described the traditional territory of the River Credit Mississaugas as follows:

> The said Indians were the original owners of the said territory embraced in the following description, namely commencing at Long Point on Lake Erie, thence eastward along the shore of the lake to Niagara River. Then down the river to Lake Ontario, then northward along the shore of the lake to the River Rouge east of Toronto, then up that river to the dividing ridges between lakes [sic] Ontario and Simcoe, then along the dividing ridges to the head waters of the River Thames, then southward to Long Point, the place of beginning. This vast tract of land now forms the garden of Canada West. [15]

41. Again, JHA could find no Crown response to this letter and certainly no contradiction.

42. We assert that the reference to "as far down as the river Rouge thence up the said river Rouge to its source" does not mean the mid-point of the river Rouge, but rather includes the watershed lands on either side of the River.

43. There are several instances where the River Credit Indians claimed unsurrendered lands at the ***mouth*** of the Rouge River, including a Statement dated June 8, 1847, from Chiefs Joseph Sawyer and Peter Jones.[16] The reference to the mouth of the river would by necessity include both sides.

44. The complaints of the River Credit Indians regarding unsurrendered lands to the east of the Toronto Purchase will be examined in more detail later.

The Nanfan Deed

45. MNCFN submits that the Reports all clearly demonstrate that their direct ancestors were in possession of the lands from the Rouge River Valley west to about the middle of Lake Erie at the time of the British conquest of the French.

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[14] Report 2, Page 42.

[15] Report 2, Page 43.

[16] Report 2, Pages 46-47.

46. Some other aboriginal groups also suggest that they have an interest in MNCFN traditional lands. In particular Six Nations and the Iroquois assert that they have rights or title to these same lands. MNCFN commissioned the fourth Report to put these notions to rest.

47. In the Nanfan Deed the then five nations "deeded" a large tract of land (see map attached as Schedule B) to the British Crown in exchange for hunting rights in perpetuity over the tract surrendered and protection from the French and their First Nation allies (including New Credit).

48. There are numerous problems with the Nanfan Deed, not the least of which is that by 1701 the Iroquois or Five Nations as they were then were no longer in possession of lands north of Lake Erie or Lake Ontario as the ancestors of New Credit had defeated the Five Nations and driven them out of what is now southern Ontario in the "Beaver Wars". For that reason the Nanfan Treaty has been described as a "hoax of history" and as "a joke".

49. Chapter 3 of Report 4 notes that the Nanfan Deed would also appear to be in direct conflict with the "Great Peace of Montreal" also signed in 1701. It was signed by all major aboriginal groups in the Great Lakes area, including the Five Nations. The Great Peace recognizes that the lands north of lakes Ontario and Erie are ***NOT*** Five Nations land, but rather belong to the First Nation Allies of the French, including the Mississaugas (see map attached as Schedule C). So it would appear that the Five Nations signed at least two treaties in 1701, one deeding all of their land including southern Ontario to the English and another recognising that very same land was not theirs to deed.

50. JHA summarises the Nanfan Deed as follows in Report 4:

> 1701 Nanfan Deed
>
> It is evident that by 1700, the Iroquois Confederacy struggled to maintain their population levels. From 1699 to 1701 Iroquois ambassadors travelled between their homeland and the Euro-American colonies to negotiate what became known as "The Grand Settlement of 1701". French colonial officials organized a great peace conference for the summer of 1701. At almost the same time, Lieutenant Governor John Nanfan, Colony of New York, asked for a July meeting with the Iroquois Confederacy in Albany. The Iroquois responded by sending delegations to both Montreal and Albany, although the larger and more distinguished group went north to Montreal.
>
> The Iroquois representatives who journeyed to Montreal participated in a peace conference whereas the Iroquois who went to Albany primarily wished to obstruct French efforts to build forts adjacent to Confederacy lands. Iroquois concern focussed in large part on the construction of a fort in the Detroit region that threatened Iroquois trade prospects in the west. On July 19, 1701, Lieutenant

Governor Nanfan and 20 Iroquois headmen signed a document at Albany known as the "Deed from the Five Nations to the King of their Beaver Hunting Ground". In accordance with the deed, the Iroquois placed the area north and west of Lake Ontario under the protection of the English.

The 1701 Nanfan Deed excluded Iroquois homelands in New York and only covered territory previously controlled and occupied by the Huron and other conquered Indian Nations. Neither Lieutenant Governor Nanfan nor the Iroquois representatives at Albany gave any consideration to the fact that the land identified in the Nanfan Deed was now controlled and occupied by Ojibwa and Mississauga people. Many commentators question what rights to the land were conveyed as the Iroquois had been militarily defeated and forced to abandon the area some ten years prior to 1701.

A number of historians view the Nanfan Deed as a false construct developed by the Iroquois Confederacy to force their English allies to protect Iroquois hunting activities north and west of Lake Ontario. Francis Jennings describes the Nanfan Deed as a worthless piece of paper that purported to convey asserted Iroquois rights over lands that the Iroquois had been defeated in and driven out of.
Jennings states that Iroquois' rights only lasted as long as they held on to the conquered territories and pointedly declares that the Iroquois had in fact been chased out of the Beaver Hunting Grounds territory north and west of Lake Ontario during the Iroquois-French/allied Indian wars of the late 17th century.

Various historians speak against the validity of the deed and some suggest that the English fabricated the Nanfan Deed, in support of English policy to claim a form of control over the lands identified in the deed. It was described as a deception that provided an extremely distorted view of the balance of power within the lands described in the deed. An important question arises: How could the English guarantee to the Iroquois the possession of territories that no longer belonged to them?

Some historians have noted that the Nanfan Deed proved to be an insignificant event when assessing 17th century European-Indian relations. Robert Surtees in particular comments that the land subject to the Nanfan Deed was not occupied exclusively by any European or Aboriginal group. He states that the Ojibwa and their allies were the dominant group at this time after they defeated and expelled
the Iroquois from north of Lake Ontario. The result was that neither the English nor the Iroquois could confidently maintain a presence in the territory on the north side of the lower Great Lakes.

Much to their disappointment the Iroquois discovered in 1702 that the Nanfan Deed had never been sent to England, and 24 years later, in 1726, the then serving Governor of New York found that the deed was still in New York. These facts appear to clearly highlight the lack of significance that English officials attached to the Nanfan Deed. It appears that deed remained largely unknown for almost three centuries. ***It would seem that the deed proved to be a ploy used by the Iroquois Confederacy, the English, or both, to claim rights to lands that had been lost to the Ojibwa and Mississaugas by right of conquest.*** [emphasis added][17]

[17] Report 4, pages 36-37.

51. We are aware that the hunting rights contained in the Nanfan Deed have been upheld in two court decisions, R. v Ireland (1990)[18] and in R. v Barberstock (2003)[19], both Ontario Court of Justice decisions (lower court).

52. The two court cases were both lower court criminal proceedings based on hunting charges. For whatever reasons the judges did not accept or give full weight to the evidence regarding the fact that the Mississaugas were in possession of most of the lands in question at the time of the Nanfan Deed. We submit that in light of the findings in Report 4 both cases are wrongly decided.

53. When it came time for the British to secure title to what is now southern Ontario they did not rely on the Nanfan Deed; they took surrenders from the Mississaugas, including the land for the Six Nations Indians that relocated following the American Revolution (see paragraph 30 above).

54. In any event we would note that the RRVT falls to the east of the geographic boundaries of the Nanfan Deed (see map attached as Schedule B).

Mississauga Surrenders

55. The great majority of southern Ontario is unlike the rest of Ontario and western Canada in that the Mississaugas did not enter into one treaty with the British Crown that dealt with all of their territory. Rather the Mississaugas entered into many different land cessions or treaties with the British Crown from 1781 to 1830. They are documented in Report 1 in the section entitled “Land Cessions, 1781-1830" commencing at page 55.

56. Then the Williams Treaty was taken by Canada and Ontario in 1923 to “clear up” some outstanding issues with the eastern Mississaugas and the Chippewas. Note again that MNCFN is not a party to the 1923 Williams Treaty. More on that point later.

57. River Credit Chiefs are involved in all of the pre-confederation land cessions that fall within the traditional territory of MNCFN.[20] Those include, but are not limited to:

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[18] R. v Ireland Ontario, Court of Justice (General Division), [1991] 2 C.N.L.R. 120.

[19] R. v Barberstock, Ontario Court of Justice (General Division), Collins J., Judgment April 9, 2003, Docket Campbellford 538/99, 09/99, 20/99, 39/99.

[20] See Report 2 Appendix A: Chiefs of the Mississauga Indians (1750- 1850) organized by location, pages 76 ff.

1) 1781 Purchase of Mississauga land opposite Fort Niagra;[21]

2) 1784 "Between the Lakes" Purchase to facilitate the relocation of Joseph Brant and followers to the Haldimand Tract on the Gand River;[22]

3) 1787 Toronto Purchase, confirmed in 1805, and subject of a settled Specific Claim with Canada;[23]

4) 1788 Gunshot Treaty covering lands to east of the Toronto Purchase to the 1783 Crawford Purchase.[24]

58. If the RRVT was ceded by the River Credit then it must have bee through one of the above transactions, for as we know the MNCFN is not a party to the 1923 Williams Treaty. The "so-called" Gunshot Treaty is the most likely candidate. The Gunshot Treaty is closely associated with the 1787 Toronto Purchase, similar in both time and fatal defects.

The 1787 Toronto Purchase and 1788 Gunshot Treaty

59. We know a great deal surrounding the circumstances of the "sale" of Toronto in 1787, which took place in the Bay of Quinte with Sir John Johnson present, but we know very little about exactly what was sold, if anything. We know that the Indians were given rum; that the deed was blank with the marks of three Chiefs from the Toronto area on separate scraps of paper wafered onto the blank deed; that the "Distribution of Arms, Ammunition & Tobacco", made on the same day at the same place, lists five different Chiefs as having received presents that day; that the Mississaugas received approximately 1,700 in cash and goods, and that 1,017 members were assembled at three locations that day to receive "presents", (presumably for their loyalty during the American Revolution).[25]

60. Along with the acquisition of land to settle Loyalists following the American Revolution, the major purpose of the 1787 purchase was to secure a

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[21] Report 1, pages 55-56.

[22] Report 1, pages 57-58.

[23] Report 1, pages 58-60.

[24] Report 1, page 57.

[25] Report 2, pages 15-21.

communication and military route from Toronto to Lake Huron (that did not have to pass the American guns at Detroit).[26] Sir John Johnson, who was present at the meeting and presumably led the negotiations with the Mississaugas, in a letter to James Green dated March 26, 1798, recollected that the description of the 1787 sale must have been according to the purchase:

> …. - The Description must have been according to the purchase, ten miles square at Toronto, and two or four Miles, I do not recollect which, on each side of the intended road or Carrying Place leading to Lake le Clai, then ten miles square at the Lake and the same square at the end of the water communication emptying into Lake Huron - this Deed was left with Mr. Collins, whose Clerk drew it up to have the courses inserted when the Survey of these Tracts were completed and was never returned to my Office. [27]

61. This explains why the 1787 deed was blank. Note that Johnson is quite certain that the Toronto purchase was "ten miles square" (not the fourteen miles from the end of Ashbridges bay to the Etobicoke River that was surveyed in 1788). He was not certain about the width of the strip up to Lake Simcoe ,but he was clear it was either two or four miles on either side of the carrying place (not the fourteen miles in width and twenty eight miles in depth that was surveyed in 1788).[28]

62. The above quote from Johnson also explains the reaction of the Mississaugas when the Crown attempted to survey out the Toronto purchase in 1788 [29] because the Crown wanted, and took, much more than it had agreed to take. This was the basis of the settlement with Canada for the Toronto Purchase Specific Claim.

63. Note that in 1794 Lord Dorchester described the 1787 Toronto Purchase as having no validity:

> Lord Dorchester subsequently described the 1787 Toronto Purchase cession document as "a blank deed, with the names or devices of three Chiefs of the Mississaga Nation, on separate pieces of paper annexed thereto, and witnessed by Mr. Collins, Mr. Kotte, a Surveyor, since dead, and Mr. Lines, Indian Interpreter," as having no validity or value.[30]

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[26] Report 2, page 15.

[27] Report 2, page 35.

[28] Report 2, pages 15-21.

[29] Report 2, page 22.

[30] Report 2, Pages 20-21.

64. Sir John Johnson along with Colonel Butler met with the Mississaugas in Toronto in the summer of 1788. Payments were made at that time, presumably for the 1787 Purchase. Apparently a new land cession was discussed at this meeting dealing with the Mississauga lands to the east of the Toronto Purchase. This was the so-called "Gunshot Treaty".[31]

65. At least with the 1787 Purchase there was a deed, albeit blank with the signatures of the three Chiefs wafered on, but for the 1788 Gunshot Treaty no written documentation whatsoever has been located:

> No purchase deed for the 1788 Gunshot Treaty lands has been located. Historical documentation of any kind about the 1788 Treaty is extremely sparse.[32]

66. JHA did find references in the 1900s to the Gunshot Treaty suggesting that perhaps such a deed did exist in the "Ironside Papers". This lead to Research Question # 5 in Report 3:

> 5) On pages 59-60 of the March 25, 2013 joint research report; 1904 correspondence from Johnson Paudash is cited wherein he informs Indian Affairs that he had written the British Colonial Secretary regarding the 1788 Gunshot Treaty. The Colonial Secretary had replied that the treaty was in the Colonial Public Record Office and that a copy be obtained. Paudash also informed that he had previously discovered in looking through the Ironside Papers that there had been such a Treaty. In the footnote (189) JHA advised that George Ironside's Indian Department correspondence is located at the Detroit Public Library in the Burton History Collection and a research trip to examine the papers may be useful. This research needs to be undertaken. [33]

67. The research was done and no evidence of a written copy of the Gunshot Treaty could be found:

> No copy of the 1788 Gunshot Treaty was found in the Ironside Papers. In fact, there were only two documents found which related to the Mississaugas or activity around Lake Ontario. Instead, the collection largely consists of personal correspondence, the provision of Indian presents, and administrative issues with the Huron Reserve, Lake of the Woods, and Manitoulin Lake. This was not unexpected given the careers of both Ironside Sr. and Ironside Jr. were focused in Amherstburg and the Western District or in Manitowaning and the Northern District. [34]

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[31] Report 2, page 22.

[32] Report 2. Page 22.

[33] Report 3, Page 39.

[34] Report 3, Page 41.

68. We have two extracts form letters written by Colonel Butler in August of 1788. He describes a purchase of lands that would extend from the eastern boundary of the Toronto Purchase to about Rice Lake:

> In two letter extracts dated August 26, 1788, Lieut. Colonel John Butler claims to have purchased the Gunshot Treaty lands, which he described as running along the north shore of Lake Ontario from the eastern boundary of the 1787 Toronto Purchase to the Bay of Quinte and as far back as "Lake La Clay and the Rice lake". [35]

69. In the first extract Colonel Butler gives a rough outline of the lands and states that the Chiefs agreed to surrender the lands, not that they ***did*** surrender the lands, but that they ***agreed*** to:

> I called them to council and made a Proposal to purchase all the Lands to the Bay of Quinty, and as far back as Lake La Clay and the Rice Lake, which, after two or three meetings, they agreed to, I then proposed to them to run a Strait [sic] Line from the Place of Beginning above Toronto 15 or 16 miles Back as that being supposed to be the Breadth from the Clay bank to the said Place of Beginning.[36]

70. In the second extract (both are dated August 26, 1788) Colonel Butler adds some background and detail to the first extract and adds the mystery of the "straight line":

> The day after you left me the Chiefs proposed going home, but as the Indians from Lake La Clay and Pawortink were not yet arrived I desired the Chiefs to Stay and send their young Men & Women home which they did, two days after they arrived, I then Called them to Council and made a proposal to Purchase all the Lands to the Bay of Quinte, and as far back as Lake La Clay and the Rice Lake, which after two or three meetings, they agreed to, I then proposed to them to run a Strait [sic] line* from the Places of Beginning above Toronto 15 or 16 Miles Back as that being Supposed to be the Breadth, from the Clay Bank to the Said Place of beginning [sic]. Mr. Wapacanine and Poquan Demand twenty five Guineas for allowing the straight line.[37]

71. Much time and effort has been expended to solve the mystery of the straight line. The first Section of Report 3 goes into his issue in great detail. Although some commentators have believed that it refers to the northen boundary of the Gunshot Treaty, in Report 3 JHA concluded that it was most likely a reference to what became Yonge Street and that it has nothing to do with the boundaries of the Gunshot Treaty:

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[35] Report 2, Pages 22-23

[36] Report 2, page 23.

[37] Report 2, Page 23.

> The "Strait line" referred to in Butler's correspondence from August 26, 1788, appears to have been a postulation for a future road which would travel north-south from Lake Ontario to Lake Simcoe and intersect Chippewa and Mississauga territory north of the Toronto Purchase. Historical documents inform us that proposals and discussions within the government to build a north-south communication route between York and Lake Huron took place in the same year, if not earlier, of Butler's 1788 Gunshot Treaty meetings with the Mississaugas. Yonge Street, which stretched 33 miles from the Toronto harbour front to Holland Landing, seems to be a plausible contender for Butler's August 1788 reference to payment of 25 guineas for a survey of the "Strait line".[38]

72. Two days later on August 28, 1788, an unnamed government official makes reference to a discussion with Eastern Mississauga Chiefs, at what is now Port Hope, to what sounds like the Gunshot Treaty proposal, but with different boundaries to what Colonel Butler had described:

> Shawanuapaiway with two other chiefs of the Rice Lake in council assembled says that they have not forgot what was told them at Toronto but have been thinking of it ever since, and now they are all met at the great fire. Mr Lines was so good as to make for that purpose to nourish them with a little of their Great Father's milk; they have considered amongst themselves and have agreed to let their Great father have the lands according to his own proposals which they understand is from the purchase made by Capt Crawford to that made by their Great Father of Toronto - they likewise understand that the lands are not to run further back from the shore of Lake Ontario than ten miles. [39]

73. Note that these Chiefs state that the proposal was to sell no more than ten miles back from Lake Ontario. This is more in keeping with the Gunshot Treaty's name as the Mississaugas reportedly had agreed to sell the lands as far back as a man could hear the sound of a gun (although from my experience with shotguns one would be hard-pressed to hear a rifle discharge from a distance of ten miles).

74. The difference between the British description and the Mississauga description of the Gunshot Treaty are significant:

> While the eastern and western boundaries suggested by the two descriptions are generally similar, the depth of the purchase is clearly different. Note that Rice Lake and Lake Simcoe, located about 13 miles and 48 miles north of Lake Ontario, respectively, were not mentioned as landmarks in the Aboriginal description of the lands to be ceded.77 Additionally, the August 28th description provided by the

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[38] Report 3, Page 13.

[39] Report 2, page 24.

> Chiefs of Rice Lake indicate a maximum depth of ten miles, versus an average of 15-16 miles in Colonel Butler's description.[40]

75. In September of 1788 Colonel Butler wrote to Sir John Johnson and states that the proposed Gunshot Treaty purchase had not yet been fully concluded:

> A September 23, 1788 extract of a letter from Colonel Butler to John Johnson referred to the arrival in Toronto of about one hundred Indians who claimed to have "not been cloathed [sic] and were not there when the Goods were distributed for the Lands". Presumably Butler referred to payment made to the Mississaugas the previous month for the 1787 Toronto Purchase. Butler suggested to Johnson the establishment of a place and time the following spring for payment to this newly arrived large group of Indians, and at the same time obtain a deed of "the Lands they have sold". Butler referring to obtaining a deed of the "Lands they have sold" might be a reference to the Gunshot Treaty purchase and, if so, would be further evidence that at this point in time Crown officials had not yet obtained a deed for the 1788 Gunshot Treaty:[41]

76. In October of 1789 a government official of the name of Langley met with Mississauga Indians assembled at the Bay of Quinte. Apparently part of his purpose was to make payment for the Gunshot Treaty. Unfortunately we do not know what Chiefs were present, nor does he clarify the boundaries of the cession:

> On October 18, 1789, Patrick Langan met with Mississaugas gathered at the head of the Bay of Quinte for the purpose of completing payment to the Indians for land ceded "on the North side of Lake Ontario". The payments made by Langan in 1789 were, in accordance with his instructions, for both the Indians who had not been paid for the 1787 Toronto Purchase as well as payment for the 1788 Gunshot Treaty. Unfortunately, the reference to the "Missesagey Nation of Indians" is unclear as to what groups may have been in attendance and received payment.[42]

77. None of the Reports documents a payment to the River Credit Indians for the Gunshot Treaty.

78. Although the British were aware of problems with both the Toronto Purchase and the Gunshot Treaty they went ahead and surveyed out the lands:

> The continuing uncertainty about lack of documentation (such as deeds with boundary descriptions) related to certain Upper Canada land purchases in the late 18th century led Lord Dorchester to conclude that the 1787 Toronto Purchase deed

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40 Report 2, Page 29.

41 Report 2, Page 25.

42 Report 2, Page 26.

was "invalid" in 1794. It is unknown if Dorchester held the same view in respect to the validity of the Gunshot Treaty.

Nevertheless, in 1790 Lord Dorchester referred to the Land Committee a number of proposed surveys, which included township surveys of the Gunshot Treaty lands recently purchased by Sir John Johnson:

> 9th To survey and lay out in Townships the Land lately purchased by Sir John Johnson from the Missesaga [sic] Nation of the North Side Lake Ontario in the District of Nassau from the head of the Bay of Quinté to Toronto.

Within a few short years of the 1788 Gunshot Treaty, and despite the lack of a deed describing the bounds of the purchase, Crown officials authorized a series of townships approximately 11 miles in depth to be laid out along the lakeshore from Toronto to the Trent River in this period.[43]

79. In Report 2 JHA makes the following conclusion about the likely boundaries of the Gunshot Treaty:

> Based on the foregoing evidence, and a lack of documents relating to the negotiation and conclusion of the Gunshot Treaty, that could shed further light upon the bounds of the 1788 land purchase, it would appear that the "Gunshot Treaty" extended from the Trent River in the east to the eastern boundary of the 1787 Toronto Purchase (Scarborough Beaches) in the west, to a depth of approximately 11 miles.[44]

80. Also see "Map of 1787-1788 Toronto and Gunshot Treaty and 1805 Toronto Purchase" prepared by JHA found at page 28 of Report 2.

81. Research Issue # 2 researched by JHA in Report 3 was as follow:

> 2) Investigate how the southern boundary for Surrender No. 20 (1818) was determined as it likely would have involved a determination or assumption concerning the location of the northern boundary of the Gunshot Treaty. Also, when Surrender 20 was undertaken, what were the assumptions/knowledge about the status of the lands below this surrender area?

82. Report 3 finds that by 1818 the Crown was apparently uninterested in the boundaries of the Gunshot Treaty, in particular in the northern boundary, and ***took for granted*** that the lands had been validly surrendered:

> On November 2, 1818, Ridout requested Col. Claus, Deputy Superintendent General of Indian Affairs, to mark on his plan the

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[43] Report 2, Page 30.

[44] Report 2, Page 30.

southern boundary of the soon to be purchased lands south west of the Rice Lake:

> ***Taking it for Granted*** that the tract of lands South West of the Rice Lake marked A by you on the Plan, has been already purchased, I did not send you a description of it - but if you will be so good as to mark on the Plan or inform me by what Townships the tract is to be bounded Southerly - that is - if by Georgina, Breach [Reach?], Cartwright, Manvers, and Cavan - or what of the boundary the Description shall without delay be sent you - I return you your plan and the description herewith of the others.[emphasis added] [45]

83. In November of 1818 the Crown took Surrender No. 20 from the Eastern Mississaugas. The description of the land cession sets out neither the southern boundary of Surrender No. 20 nor the northen boundary of the Gunshot Treaty:

> The surrender agreement for Treaty/Surrender No. 20 was ratified on November 5, 1818. The Mississaugas of Alnwick conveyed an area of approximately 1,951,000 acres extending from Rice Lake, northward approximately 33 miles and westward to Lake Simcoe. In the description, the northern boundary of the purchase was described as "the line forty-five," placing the boundary line fully 27 miles beyond the 33 miles already described. There is no reference to the southern boundary of Treaty No. 20 or the Gunshot Treaty. [46]

Problems with Early Land Cessions and Attempts to Rectify

84. By the early 1790s the British colonial government began to search for documentation to support early land sessions. They encountered many issues. By 1794 Lord Dorchester was of the opinion that at least the Toronto Purchase was invalid:

> On January 27, [1794] Lord Dorchester corresponded with Simcoe and advised that, "in all negotiations of consequence with Indians, the Superintendent General of Indian Affairs, if possible should be present".89 Dorchester also mentioned an enquiry related to a land purchase at Matchedash Bay. He explained that a plan had been discovered in the Surveyor General's Office, "to which is attached a blank deed, with the names or devices of three Chiefs of the Mississaga [sic] Nation, on separate pieces of paper annexed thereto". As the plan document was blank, Dorchester opined that it "not being filled up, is of no validity, or may be applied to all the Land they [the Mississauga] possess."90 He considered that it was "an omission which will set aside the whole transaction and throw us on the good faith of the Indians for just as much Land as they are willing to allow, and what may be further necessary must

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[45] Report 3, Page 16.

[46] Report 3, Pages 16-17.

> be purchased anew."91 It seems evident that Governor General Dorchester considered a properly executed deed was required for each cession of territory. Neither the 1787 Toronto Purchase nor the 1788 Gunshot Treaty had properly executed deeds.[47]

85. In 1798 Sir John Johnson gave his recollection of some of the land cessions that he and others had been involved with. He gave a recollection of the 1787 Toronto Purchase that was vastly different from what the Crown had surveyed and admitted that Colonel Butler had not obtained a deed for the Gunshot Treaty nor could he locate one:

> Johnson also informed James Green, Military Secretary, that according to a 1790 letter, Colonel Butler had not obtained a deed for the purchase of the lands covered by the 1788 Gunshot Treaty "from Toronto to Pemetinchootiong, or the Rice Lake Landing on Lake Ontario, nor can I find anything of a later date relative to it." Three days later, the Indian Department issued a deed form to be used at all times when obtaining and describing land cessions.[48]

86. Note that in a clear case of closing the barn door long after the cow had gone instructions were immediately given to obtain a deed and a deed form was issued!

87. The problems were not merely academic; disputes had arisen between settlers and the Indians:

> In September of 1797, Peter Russell, Administrator of the Government of Upper Canada, explained to Robert Prescott, Governor General of Canada, that he could not locate records about all of the land purchases made from Indians. He remarked about disputes between settlers and "the Messissagues [sic] & the Rice Lake Indians in consequence," in a number of townships on the north side of Lake Ontario. Russell requested either the originals or copies of the following land purchase deeds:
>
> > The Deed of Cession from the Indians to the Crown for a Purchase made in 1787, for a Tract at Toronto and another at Matchidash on Lake Huron.
> >
> > The Deed for the Cession of the Country on the No. side of Lake Ontario from the head of the Bay of Quinté to York (purchased perhaps by Capt. Crawford in 1787).[49]

88. As stated by JHA in Report 2 clearly Peter Russell was looking for deeds for the Toronto Purchase and the Gunshot Treaty.

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47 Report 2, Page 32.

48 Report 2, Page 36.

49 Report 2, Page 33.

89. In 1798 Peter Russell proposed a solution to the problem that would have amounted to sharp practice:

> In January of 1798, Peter Russell, Administrator of the Government of Upper Canada, suggested a strategy to solve the problem of unclear boundaries of Indian land purchases. He recommended including a written description of the boundaries of lands that were supposedly ceded in the 1787 Toronto Purchase, as well as purchases undertaken in 1784 and 1788, in the preamble to a proposed surrender of land on the northern limit of the Toronto Purchase about to be taken from the Mississaugas. Russell argued that the lands purchased in 1784, 1787, and 1788 had already been paid for so he did not deem it fraudulent to adopt and accept the boundaries as described in assorted government documents. [50]

90. To his credit, Governor General Robert Prescott rejected Russell's scheme:

> In an April 9, 1798 dispatch (number 34), Robert Prescott, Governor General, rejected Russell's suggestion to write the descriptions of the 1784, 1787 and 1788 land purchases in the preamble of a subsequent land purchase from the Mississaugas. Instead, Prescott proposed that a new deed for the 1787 Toronto Purchase must be completed with the Mississaugas, considering it would be "preferable to renew the Purchase altogether" than to deceive or deal underhandedly with the situation:
>
> > The mode you propose of rendering the purchase of sufficient validity to all parties concerned, by "purchasing a small Tract to the Eastward of the Northern Limit of the Toronto purchase, in order that a Recapitulation explanatory of the Courses and Boundaries of the Purchases in 1784, 1787, and 1788, may be introduced in the Preamble of the Deed, which, if properly drawn up may be perhaps as binding a Record of their respective Limits, as if the original Deeds of Purchase had not been lost, or they had been actually expressed in the Blank Deed," is a measure I cannot agree to, on account of its tendency to mislead the Indians, and would be productive of the most dangerous consequences to the King's Interest, as soon as they should discover, that they had not been openly dealt with. Management of that kind should never be attempted with Indians: the present juncture besides, is, of all others, the most inauspicious for such purposes. - It would in my opinion, be preferable to renew the Purchase altogether, than to risk the consequences that would inevitably follow, if your Plan was put in practice. I should conceive, therefore, that to remedy the existing difficulty, and place the "many respectable Persons who have risked nearly their whole property within the limits of this Purchase, in peaceable possession of their Lands," it is absolutely necessary that a New Deed of the Purchase in question should be executed with the Messissagua [sic] Indians. [51]

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[50] Report 2, Page 34.

[51] Report 2, Page 36.

91. Governor General Robert Prescott clearly perceived both the inequity and the danger of misleading the Mississaugas. Prescott, somewhat mysteriously, believed that Governor General Robert Prescott's dispatch "provided satisfaction to the Executive Council and "happily removed" uncertainty they were in concerning the boundaries of lands purchased in 1784, 1787 and 1788".[52]

92. The Crown would go on to attempt to "rectify" the Toronto Purchase in 1805, but for whatever reason there was no attempt made to rectify the Gunshot Treaty, or the Crawford Purchase for that matter, until the 1923 Williams Treaty:

> While Crown officials discussed problems with three 1780s land purchases, with a focus on the 1787 Toronto Purchase and its associated problems (lack of deed, unclear knowledge about boundaries), there appeared to be no impetus to renew either the 1784 Crawford or the 1788 Gunshot Treaty purchases. Despite extensive research, no documents have been located that indicate Crown officials considered renewing the Gunshot Treaty. A mere two years after the "problematic" purchase, Lord Dorchester referred the proposed township surveys of the Gunshot Treaty lands to the Lands Committee,112 demonstrating that in the 1790s, the Crown treated Gunshot Treaty lands as though they had been validly ceded. [53]

93. In July of 1805, Deputy Superintendent General of Indian Affairs William Claus met with the Mississaugas of the Credit Nation to discuss the Toronto Purchase along with a new proposed surrender to the west of the Toronto Purchase (Cession No. 13a, 2 August 1805). Clarity for the western boundary of the Toronto Purchase was necessary to fix the eastern boundary of Cession No. 13a.

94. By 1805 all of the Chiefs present at the meeting with Sir John Johnson at the Bay of Quinte in 1787 were dead. The assembled Mississaugas of the Credit Chiefs were asked to "confirm" boundaries of the Toronto Purchase:

> The 1805 deed described about 250,880 acres in the Toronto area and included a special provision protecting Mississauga fishing rights on the Etobicoke River. The ceded tract was shown on an attached plan.117 William Claus, Deputy Superintendent General of Indian Affairs, called on the memories of the Mississaugas to assist in determining the boundaries. The Mississaugas commented, "We cannot absolutely tell what our old people did before us, except by what we see on the plan now produced & what we remember ourselves and have been told." They requested a copy of the 1805 deed and plan to prevent future misunderstandings. [54]

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[52] Report 2, Page 37.

[53] Report 2, Page 39.

[54] Report 2, Page 40.

95. The River Credit Chiefs were paid 10 shillings for entering into the 1805 deed.

96. There were many irregularities associated with the 1805 transaction and in 2010 The Toronto Purchase Specific Claim was settled with Canada.

97. JHA states quite clearly that:

> There is no evidence in the documents that the views of Dorchester and Prescott were shared with the Mississaugas of the Credit or other Mississauga groups on the north shore of Lake Ontario in regard to the Gunshot Treaty. While the Toronto Purchase was renewed in 1805, the lands surrendered improperly in the 1788 Gunshot Treaty were not dealt with again until 1923. [55]

98. The reference to 1923 in the above quotation is to the 1923 Williams Treaty and, as we know and will explain in its own section, the MNCFN was not a party to the 1923 Williams Treaty.

Complaints Regarding Unsurrendered Lands

99. In 1847 the Mississaugas of the Credit relocated from their village site on the Credit River (current location of the Mississauga Golf and Country Club) to their reserve near present-day Hagersville. The move was precipitated by the Crown's refusal to give them title to the village site.

100. Thereafter the Mississaugas of the Credit began to take issue with the Crown regarding their traditional lands and the various land cessions taken by the Crown. They were clearly upset about the forced relocation and looking for an accounting.

101. In June of 1847 Mississaugas of the Credit Chiefs Joseph Sawyer and Peter Jones sent a statement to the Crown "claiming certain Tracts of land which to the best of their knowledge and belief have never been surrendered to the Crown; and therefore remain their property." [56]

102. The statement contained a list of unsurrendered lands including a claim for land at the mouth of the Rouge River:

> 1st The well known Reserve at the River Credit
> 2nd The Reserve at the 16 Mile Creek now called Oakville
> 3rd The Reserve at the 12 Mile Creek now called Bronte

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[55] Report 2, Page 41.

[56] Report 2, Page 46.

> 4th The Burlington Bay Beach through which the Canal to the Bay passes and is about five miles in length.
> 5th The Burlington Heights near to Sir Allan MacNabs House containing about 200 acres of land.
> 6th A small Reserve near the Town of Niagara called Mississaga Point.
> **7th The Tract of land at the Mouth of the River Rouge**.[57]

103. The complaints about the land at the mouth of the Rouge River, at least initially, seem to be about land reserved from land cessions as opposed to lands never treated with. Over time that changes to include clear statements about lands to the east of the Toronto Purchase not having been ceded or at least not paid for.

104. The eastern Mississaugas and the Chippewas were also making complaints regarding unsurrendered lands. See Report 2 pages 48 ff.

105. The complaints about unsurrendered lands begin again in the 1890s. MNCFN sent a delegation to Ottawa in 1894 to press their claims:

> On April 16, 1894 a delegation from the Mississaugas of the Credit Band met with government officials in Ottawa. A memorandum of the meeting summarized the discussion which included matters related to lands and reserves. At one point the delegation requested information about the total amount of land surrendered and payment received. Additionally, the delegates raised the issue of payment for the Band's "unsurrendered lands," which included land east of the "Toronto purchase," which is a reference to the Gunshot Treaty lands.[58]

106. Canada's response is breathtaking in its audacity:

> On June 15, 1894, a departmental official sent a letter to Daniel McDougall, Chief and Councillor, and John Chechock, Agent for Claims, Mississaugas of the Credit, which responded to each claim raised on April 16. In regard to the claims for payment for unsurrendered lands, including lands "East of the 'Toronto Purchase'," the official noted that a search of the Department's papers failed to find a record of a surrender, "but as this territory has always formed part of the Provincial domain, ***it must be assumed*** that the Indian title was extinguished."[59]

107. MNCFN to its credit did not take that response well and apparently they had been receiving legal advice:

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[57] Report 2, Pages 46-47.

[58] Report 2, Page 53.

[59] Report 2, Page 54.

> One week later, Chief McDougall and John Chechock wrote to Hayter Reed, Deputy Superintendent General of Indian Affairs, and replied in detail to each point discussed in the June 15 letter. In regard to the claim for lands unsurrendered east of the Toronto Purchase the two men claimed the land had never been paid for nor surrendered:
>
> > We will continue to insist that the territory east of the "Toronto Purchase" must be paid for. It was never surrendered as your letter admits, and we do not understand that occupancy as part of the Provincial domain could destroy our title. We trust that the Government does not intend to plead the Statute of Limitations against us.[60]

108. Note that MNCFN was insisting on being paid for the lands east of the Toronto Purchase. That is essentially the same claim that we are advancing herein, one hundred and twenty one years later.

109. Canada conducted a search for documentation to support their claim that Indian title had been extinguished, first in their own records then in England, but without success.[61]

110. In 1896 and 1897 MNCFN engaged in a running battle with Canada regarding their desire to retain a lawyer to press their claims, including repeated requests for payment for the lands east of the Toronto Purchase.[62]

111. In 1897 MNCFN submitted a petition to Canada and request an independent commission of inquiry to look into their claims:

> In April 1897 the Mississaugas of the Credit submitted a petition to the Superintendent General of Indian Affairs. The petition outlined the Band's claims to various unsurrendered lands in the Province of Ontario, and petitioned for appointment of an independent Commission to investigate their claims. The petition listed several tracts of land formerly possessed by the Band, which the petitioners claimed were never surrendered to the Crown. Included on the list of unsurrendered lands were lands at the entrance of the Rouge and Grand Rivers, and Twenty Mile Creek. The petitioners also claimed unsurrendered lands lying east of the Toronto Purchase.[63]

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[60] Report 2, Pages 54-55.

[61] Report 2, Page 55.

[62] Report 2, Pages 55-57.

[63] Report 2, Page 57.

112. Clifford Sifton, Superintendent General of Indian Affairs, wrote back to MNCFN refusing to appoint a commission and flatly denying any responsibility on the part of the federal Crown with respect to pre-confederation transactions:

> Without expressing an opinion as to whether or not the Mississauga Indians may have any claim to compensation on account of the matters referred to in the petition, I may say that there is no possible ground upon which the Dominion Government could be held to be in any way liable. The lands on account of which the claims are made are not, nor were they ever, in the possession of that Government. By the British North America Act the Reserves held by the Indians prior to confederation were transferred to the Dominion Government to be held in trust for the Indians, and that Government cannot, either directly or indirectly, assume any responsibility for claims arising out of transactions respecting lands which took place previous to the transfer.[64]

113. MNCFN continued to press their case while Canada refused to either appoint a commission or pay for a lawyer for MNCFN:

> Correspondence over the next several months reveals that the Mississaugas of the Credit continued to insist on presenting evidence to a Commission that would investigate issues associated with surrendered and sold lands, as well as Mississauga lands that allegedly were unsurrendered, including lands to the east of the Toronto Purchase. The Department of Indian Affairs continued to refuse to allow the establishment of a Commission or expenditure of Band funds on legal representation to pursue the claims. [65]

114. A lawyer acting for MNCFN did eventually get to meet with Clifford Sifton and other department officials, and apparently Canada agreed that their money (annuities) claims, but he could get no "satisfactory answer" with respect to their land claims:

> Finally, in June of 1898, Chisholm met with Indian Affairs officials in Ottawa on behalf of the Mississaugas of the Credit. Chisholm subsequently informed the Mississaugas that he discovered that their money claims were to be dealt with by the Department of Justice. Chisholm noted he had received no satisfactory answer regarding the Band's earlier petition to Clifford Sifton requesting investigation of their land claims. He reported that Sifton appeared willing to consider evidence the Band might forward in support of various claims, but refused to cover the costs incurred. He concluded that although Sifton did not address the merits of the land

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[64] Report 2, Pages 57-58.

[65] Report 2, Page 58.

> claims during their meeting he would probably consent "to the Band having them presented in proper shape, should you press him to do so". [66]

115. This is where matters ended for the MNCFN land issues, for about one hundred years:

> The matter appears to have been dropped in 1898 when the Mississaugas of the Credit [legal] counsel advised that the Superintendent General was unwilling to cover the legal costs that would be incurred to properly investigate the Band's various land claims. [67]

116. It is worth noting that at no time was the Crown able to demonstrate how MNCFN's interest in the Gunshot Treaty lands was extinguished.

The 1923 Williams Treaty

117. MNCFN is not a signatory to the 1923 Williams Treaty. If they were this claim would be without merit. The real question is ***why*** were they not a party to the 1923 Williams Treaty?

118. At the commencement of the Treaty process Canada and Ontario were concerned with unsurrendered land that belonged to the eastern Mississaugas and the Chippewas far to the north of the Gunshot Treaty and therefore the involvement of MNCFN was not required. Then, after meeting with the First Nations in the Fall of 1923, the Treaty Commissioners became aware of the problems with several early land cessions, including the Gunshot Treaty, and determined to include those lands in the 1923 Williams Treaty at the last minute.

119. The Treaty Commissioners failed to involve MNCFN, by a combination of oversight and negligence regarding confusion between the Toronto Purchase and the Gunshot Treaty.

120. As demonstrated above, MNCFN clearly has an interest in the William Treaty lands to the east of the Toronto Purchase to the Rouge River Valley.

121. It was in 1920 that Canada and Ontario finally decided to properly investigate the claims of the eastern Mississaugas and the Chippewas:

> Beginning in 1920, high level officials in the Governments of Canada and Ontario came to realize the necessity of dealing with the unsurrendered land claims of the

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[66] Report 2, Page 58.

[67] Report 3, Page 22.

> Mississaugas of Alnwick, Rice and Mud Lakes, and Scugog, and the Chippewas of Lakes Huron and Simcoe. [68]

122. The issues were primarily with what was referred to as the "northern hunting grounds" lying north of the 45th parallel[69] of the various First Nations. In 1923 Ontario and Canada entered into a Memorandum of Agreement to deal with the unsurrendered lands:

> In April 1923, the Governments of Canada and Ontario signed a Memorandum of Agreement to deal with unsurrendered land claims of certain "Indians of the Chippewa and Mississauga Tribes". Charles Stewart, Superintendent General of Indian Affairs, signed on behalf of Canada, and Beniah Bowman, Minister of Lands and Forests, signed on behalf of Ontario. The land in question was described as:
>
> > … parts of the counties of Renfrew, Hastings, Haliburton, Muskoka, Parry Sound and Nipissing, and being bounded on the south and east by the lands included in the surrender of the Indian title made on the 18th of November, 1815, the 5th of November 1818, and November, 1822; on the north by the Ottawa and Mattawa Rivers and Lake Nipissing, and on the west by the lands included in the surrender of the Indian title made in 1850, known as the Robinson-Huron surrender, and by the Georgian Bay, the area in question including about 10,719 square miles [70]

123. Note that the lands described do not include the lands in the Gunshot Treaty area:

> It is important to note that in the 1923 Memorandum of Agreement there is no mention of the lands along the Lake Ontario shore between Toronto and the Bay of Quinte, and extending north for some 10 miles, allegedly surrendered by the Mississaugas of the Credit and other Mississauga groups in the 1788 Gunshot Treaty. [71]

124. Canada and Ontario then both passed Orders In Council approving the negotiation of what we now know as the Williams Treaty:

> The Province of Ontario passed an Order in Council on May 22, 1923, approving the April 1923 Memorandum of Agreement, and Canada followed suit on June 23, 1923.203 Three Treaty Commissioners were selected to negotiate a treaty with the seven claimant Chippewa and Mississauga First Nations. On August 31, the Privy Council appointed Treaty Commissioners A.S. Williams, R.V. Sinclair, and Uriah

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68 Report 2, Page 61.

69 Report 2, Page 63.

70 Report 2, Page 62.

71 Report 2, Page 63.

> McFadden to investigate claims to unextinguished Indian title to certain lands which included about 10,719 square miles in the Counties of Renfrew, Hastings, Haliburton, Muskoka, Parry Sound, and Nipissing. [72]

125. Note that the "seven claimant Chippewa and Mississauga First Nations" do ***not*** include MNCFN as they had not pressed a claim to the "northern hunting grounds". The claimant First Nations were the four eastern Mississauga First Nations (today Alderville, Curved Lake, Hiawatha and Scugog) and the three Chippewa First Nations (today Beausoleil, Georgina Island and Rama).

126. In September of 1923 the Treaty Commissioners met with the First Nations and discovered that there were issues outstanding with respect to unsurrendered ands on the north shore of Lake Ontario:

> On October 10, 1923, the Williams Treaty Commissioners provided a report to James Lyons, Minister of Lands and Forests, Ontario. The Commissioners suggested that in addition to the unsurrendered land north of the 45th parallel, they had discovered during the course of their inquiries that lands supposedly covered by the 1788 Gunshot Treaty, "are not described in any treaty". [73]

127. That October 10 report included a strategy remarkably similar to the one put forward by Peter Russell in 1798, and rejected by Governor General Robert Prescott as underhanded and dangerous (referred to in paragraphs 87 & 88 above), which was to simply include the Gunshot Treaty lands in the Williams Treaty:

> The joint commission appointed by the Government of Canada and the Province of Ontario to inquire into the claims preferred by the Chippewa Indians of Lakes Huron and Simcoe, and the Mississauga Indians of Rice Lake, Mud Lake and Lake Scugog for compensation in respect to an area of land extending from the forty-fifth parallel of latitude north of Lake Nipissing and from the Georgian Bay east to the Ottawa River, alleged by the claimants to be the ancient hunting grounds of their ancestors, visited the reserves of the Chippewa Indians at Georgina Island on Lake Simcoe, at Christian Island on the Georgian Bay, and at Rama, and the reserves of the Missessauga Indians at Rice Lake, Mud Lake, Lake Scugog and Alderville, between the 12th and 26th days of September, for the purpose of taking such evidence as the claimants might desire to present in support of their respective claims.
> …
>
> It is the opinion of the commission that the claimants have submitted ample and satisfactory proof of the occupation by them of the land referred to as the ancient hunting ground of the ancestors of the claimants. These hunting grounds cover an

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[72] Report 2, Page 63.

[73] Report 2, Page 64.

> area of over 10,000 square miles of territory, the value of which is almost incalculable.
> …
>
> … ***It was further discovered that the lands lying between the Bay of Quinte and the County of York, and extending north a day's journey from the shore of the Lake, commonly supposed to have been surrendered by what is known as the Gun-shot Treaty are not described in any treaty***.
>
> The Gun-shot Treaty, which was made on the 23d day of September 1787 [sic], and which was intended to cover the area in question, unfortunately does not contain any description whatever of the land covered by it. It is suggested by the Commission in the event of a surrender from the claimants of the large tract of hunting grounds above described to include in the surrender the lands intended to be covered by the Gun Shot Treaty….[emphasis added] [74]

128. And that is what Canada and Ontario did: the Gunshot Treaty lands were included in the Williams Treaty. There is no evidence in the Report to indicate that this inclusion was discussed with the seven claimant First Nations. There is conclusive evidence that it was ***not*** discussed with MNCFN and that they were not a party to the Williams Treaty, even though they had been involved in the original Gunshot Treaty in 1788:

> The Mississaugas of the New Credit First Nation, whose ancestors the Mississaugas of the Credit had been parties to the 1788 Gunshot Treaty, were not signatories to the 1923 Williams Treaty. [75]

129. The Williams Treaty Commissioners' rationale for including the Gunshot Treaty lands in the Williams Treaty was both bizarre and wrong:

> On December 1, 1923, the Commissioners who negotiated the Williams Treaties sent their treaty report to the Superintendent General of Indian Affairs and the Minister of Lands and Forests. The Commissioners explained why they included the Gunshot Treaty lands within the terms of the Williams Treaties. In their reasoning the Commissioners erred greatly when they claimed the Gunshot Treaty lands had been part of the 1787 Toronto Purchase and by "omission" had simply been left out of the 1805 Toronto Purchase land description. [76]

130. In fact, the Treaty Commissioners appear to be confusing and conflating the 1787 Toronto Purchase and the 1788 Gunshot Treaty. Here is the actual quote from the Treaty Commissioner' treaty report:

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[74] Report 2, Page 64.

[75] Report 2, Page 65.

[76] Report 2, Page 67.

> On the 13th of September, 1787, a Treaty, commonly called "The Gunshot Treaty" was made by the Honourable Sir John Johnson, Baronet, on behalf of the King, with the Principal Chiefs and War Chiefs of the Mississauga Nation. This Treaty was intended to cover the land bordering on the north shore of Lake Ontario, and extending back therefrom as far as a gunshot could be heard, and covering the land lying between the Bay of Quinté and the Tobicoke River. The Commission, in the course of its researches, discovered that this Treaty was signed without a particular description of the lands intended to be surrendered having been included therein, the intention being, as appeared from the files, that the surveyor was to write into the Treaty a proper description of the lands intended to be covered thereby. It is quite clear that the surveyor failed to complete the Treaty in this regard, and the Gunshot Treaty as printed in the Volume of Indian Treaties and Surrenders published in 1905, contains no description of the lands, the title to which was intended to be surrendered. A few years after the signing of this treaty the omission in question was discovered, and a subsequent confirmatory Treaty was signed on August 1st, 1805, but by error only a portion of the land intended to be included in the Gunshot Treaty was included in the confirmatory surrender. This portion is now commonly known as the "Toronto Purchase," and included only the townships of Tobicoke, York and Vaughan, and parts of the townships of King, Whitechurch and Markham in the county of York.
>
> In view of the foregoing, the Commissioners determined to include in the new treaty that portion of the lands originally intended to be covered by the Gunshot Treaty, but which had not been included in the confirmatory surrender of August 1st, 1805. The Commission having therefore obtained from the Surveys Branch a proper description of the lands south of Lake Simcoe, already referred to, and of the lands intended to have been included in the Gunshot Treaty, prepared two Treaties, one to be signed by the three Bands of Chippewas, and the other to be signed by the four Bands of Mississaugas, each of which Treaties covered all the ancient hunting grounds of both nations, the townships south of Lake Simcoe, and the Gunshot Treaty lands,…. [77]

131. The Commissioners statement that "*this Treaty was signed without a particular description of the lands intended to be surrendered having been included therein, the intention being, as appeared from the files, that the surveyor was to write into the Treaty a proper description of the lands intended to be covered thereby*" is actually a reference to the 1787 Toronto Purchase ***not*** the 1788 Gunshot Treaty (see paragraph 82 above and Report 2 Chapter One).

132. The next portion of the treaty report (quoted above but reproduced here again for clarity) is breathtakingly inaccurate:

> It is quite clear that the surveyor failed to complete the Treaty in this regard, and the Gunshot Treaty as printed in the Volume of Indian Treaties and Surrenders published in 1905, contains no description of the lands, the title to which was intended to be

[77] Report 2, Page 68.

> surrendered. A few years after the signing of this treaty the omission in question was discovered, and a subsequent confirmatory Treaty was signed on August 1st, 1805, but by error only a portion of the land intended to be included in the Gunshot Treaty was included in the confirmatory surrender. This portion is now commonly known as the "Toronto Purchase," [78]

133. The 1787 Toronto Purchase and the 1788 Gunshot Treaty were two different treaties with different parties and the 1805 Treaty 13, the "confirmation" of the Toronto Purchase was entered into with the Mississaugas of the Credit ***only***. (See paragraph 92 above and Report 2 Chapter One.)

134. In their December 1923 treaty report the Williams Treaty Commissioners then gave their rationale for the inclusion on the Gunshot Treaty lands in the Williams Treaty (quoted above but reproduced here again for clarity) which was based entirely on their erroneous assumptions about the 1878 Toronto Purchase, the 1788 Gunshot Treaty and the 1805 confirmation of the Toronto Purchase:

> In view of the foregoing, the Commissioners determined to include in the new treaty that portion of the lands originally intended to be covered by the Gunshot Treaty, but which had not been included in the confirmatory surrender of August 1st, 1805. The Commission having therefore obtained from the Surveys Branch a proper description of the lands south of Lake Simcoe, already referred to, and of the lands intended to have been included in the Gunshot Treaty, prepared two Treaties, one to be signed by the three Bands of Chippewas, and the other to be signed by the four Bands of Mississaugas, each of which Treaties covered all the ancient hunting grounds of both nations, the townships south of Lake Simcoe, and the Gunshot Treaty lands,…. [79]

135. So in other words, the Williams Treaty Commissioners decided to rectify the 1805 Toronto Purchase confirmation, which was between the Crown and the Mississaugas of the Credit ***only***, by including the Gunshot Treaty lands in a Treaty with the eastern Mississaugas and the Chippewas ***only***. This is on top of the problem that they got the history of the 1787 Toronto Purchase, the 1788 Gunshot Treaty and the 1805 Treaty 13, the "confirmation" of the Toronto Purchase spectacularly wrong.

136. This confusion on the part of the Williams Treaty Commissioners was so egregious that it caused MNCFN and the Assessment and Historical Research Directorate, Aboriginal Affairs and Northern Development Canada to pose Research Issue # 4 in Report 3:

> 4) It appears that the Commissioners for the Williams Treaties made certain erroneous assumptions regarding the Toronto Purchase and Gunshot Treaty, ie. they

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[78] Report 2, Page 68.

[79] Report 2, Page 68

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> believed they were the same surrender and that the Gunshot Treaty lands had been mistakenly omitted from the 1805 re-surrender. On page 68, footnote 220, JHA has advised that it may be useful to research what documentation the Commissioners reviewed prior to making these determinations. This research needs to be undertaken.
>
> It may also be useful to determine if the Commissioners, when considering the Toronto Purchase, were aware of or interested in determining what present day community or communities might be the descendants of the signatories of the Toronto Purchase? (Given that Praxis, in their 1999 report, noted they did not find references to MNC in their research surrounding the Williams Treaties, research on the latter question may not be fruitful). [80]

137. In Report 3 JHA could find no explanation for the errors made by the Williams Treaty Commissioners. Their conclusion is as follow:

> This report from the Williams Treaty Commissioners made no reference to what type of evidence convinced them that there existed unsurrendered land south of the 45th parallel reputedly covered by the 1788 Gunshot Treaty.
>
> On November 6, James Lyons, Minister, Department of Lands and Forests, Ontario, wrote to Charles Stewart, Superintendent General of Indian Affairs, and enclosed a cheque in the amount of $400,000 as compensation for the land claim of the Chippewa and Mississauga Indians, "in the parts of the Counties of Renfrew, Hastings, Haliburton and the Districts of Muskoka, Parry Sound and Nipissing, comprising approximately 11,000 square miles." Lyons stated that the final settlement could not exceed approximately half a million dollars. Lyons made no reference to the inclusion of the Gunshot Treaty lands in the new treaty.
>
> The Williams Treaty with the Mississauga Indians of Rice Lake, Mud Lake, Scugog Lake, and Alderville was drawn up on November 15, 1923. The treaty covered specified lands north of the 45th parallel, as well as the Gunshot Treaty lands and seven townships immediately south of Lake Simcoe. These four Mississauga nations received a total of $250,000 for signing the treaty. The Mississaugas of the New Credit First Nation, whose ancestors the Mississaugas of the Credit had been parties to the 1788 Gunshot Treaty, were not signatories to the 1923 Williams Treaty. [81]

138. JHA could find no evidence that MNCFN was aware of the inclusion of the Gunshot Treaty lands in the Williams Treaty:

> Researchers found no evidence from the period immediately following the Williams Treaties in the 1920s to indicate awareness on the part of the Mississaugas of the

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[80] Report 3, Page 24.

[81] Report 3, Page 38.

> New Credit that the Gunshot Treaty lands had been included in the Williams Treaties. [82]

139. JHA did find evidence that MNCFN did make complaints to Ontario and Canada once they became aware of the inclusion and stated that they ought to have been a party to the 1923 Williams Treaty:

> On July 7, 1931, the Deputy Minister of Lands and Forests, Ontario, notified the Deputy Superintendent General of Indian Affairs that he had received a deputation led by Johnson Paudash, representing the Mississaugas of New Credit. He explained that the deputation claimed "a portion of the area covered by the surrender of 1923, lying immediately North of the confirmed surrender of 1805 to the Holland River, a triangular tract of land lying immediately West of the Township of Gwillimonry [sic] in North York, comprising in the opinion of Johnson Paudash, some 20,000 acres more or less." ***The Deputy Minister reported that the Mississaugas of New Credit argued they should have been parties to the Agreement of 1923 (Williams Treaties)***. The Mississaugas of the New Credit now requested compensation and informed the Ontario Deputy Minister that they planned to travel to Ottawa to press their claim.[emphasis added] [83]

140. Both Ontario and Canada have been explicitly aware since 1931 that MNCFN lands were included in the 1923 Williams Treaty. The Crown has been aware of problems with the Gunshot Treaty since at least 1794. No action has been taken by either Ontario or Canada to correct this matter to date regarding the MNCFN interests in the Gunshot Treaty lands, hence this claim.

141. The Toronto Purchase Specific Claim, the Crawford Purchase Specific Claim and Gunshot Treaty Specific Claim, were originally submitted to Canada in 1986 by the Mississauga Tribal Claims Council (MTCC). The MTCC comprised all five southern Ontario Mississauga First Nations (MNCFN, Alderville, Curved Lake, Hiawatha and Scugog). All three claims were rejected by Canada in 1993. The MTCC then requested that the Indian Claims Commission (ICC) conduct an Inquiry into the rejection of the claim in 1993, but the ICC file was closed subsequently, due to inaction (The MTCC ceased to function around 1994).

142. In 1998 MNCFN requested on its own that the ICC conduct an Inquiry into Canada's rejection of all three claims. The first Planning Conference was held in Ottawa July 16, 1998 where Canada agreed to review the basis of the original rejections. At the 2nd Planning Conference, held on October 1, 1998, in Toronto, New Credit requested that the Crawford Purchase and Gunshot Treaty

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[82] Report 2, Page 71.

[83] Report 2, Page 72.

Specific Claims be held in abeyance, until the 1923 Williams Treaty is finally addressed with New Credit.

143. This claim addresses both the 1923 Williams Treaty and the Gunshot Treaty.

THE LAW

144. Although it is clear from the Reports that MNCFN has never validly surrendered the RRVT the convoluted facts of this claim make the application of current law with respect to unextinguished aboriginal title problematic, for a number of reasons.

145. First is that the Mississaugas of the Credit came into ownership of the RRVT by way of conquest over the Iroquois subsequent to the assertion of European Sovereignty.

146. Second is that the Crown, even when faced with compelling evidence that the lands in question had never been properly surrendered or ceded, proceeded to act as though they had been by surveying out townships and allowing setters to occupy the land making it impossible for MNCFN to use the lands in such a way as to preserve exclusive use.

147. MNCFN asserts that it does retain unextinguished aboriginal title to the RRVT for the simple reason that they never validly ceded this land to the Crown, nor were they paid for it.

148. Let us start at the beginning, with the Gunshot Treaty.

The Validity of the Gunshot Treaty

149. We submit that the Reports and the argument above clearly demonstrate that the Gunshot Treaty is invalid.

150. Paragraphs 64 to 75 above detail the problems associated with the validity of the Gunshot Treaty.

151. The first point of law to be considered is: *can MNCFN go behind the terms of the Treaty and utilize extrinsic evidence to assist in interpreting the Treaty?* On a number of occasions the Supreme Court of Canada has answered this

question in the affirmative. A example from 1999 is found in *R. v. Marshall*[84]; where Binnie J. spoke for the majority:

> The Court of Appeal took a strict approach to the use of extrinsic evidence when interpreting the Treaties of 1760-61. Roscoe and Bateman JJ.A. stated at p. 194: "While treaties must be interpreted in their historical context, extrinsic evidence cannot be used as an aid to interpretation, in the absence of ambiguity". I think this approach should be rejected for at least three reasons.
>
> Firstly, even in a modern commercial context, extrinsic evidence is available to show that a written document does not include all of the terms of an agreement. Rules of interpretation in contract law are in general more strict than those applicable to treaties, yet Professor Waddams states in *The Law of Contracts* (3rd ed. 1993), at para. 316:
>
> > The parol evidence rule does not purport to exclude evidence designed to show whether or not the agreement has been "reduced to writing", or whether it was, or was not, the intention of the parties that it should be the exclusive record of their agreement. Proof of this question is a pre-condition to the operation of the rule, and all relevant evidence is admissible on it. This is the view taken by Corbin and other writers, and followed in the Second Restatement.
>
> See also *International Casualty Co. v. Thomson* (1913), 48 S.C.R. 167, *per* Idington J., at p. 191, and G. H. Treitel, *The Law of Contract* (9th ed. 1995), at p. 177. For an example of a treaty only partly reduced to writing, see *R. v. Taylor and Williams* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.) (leave to appeal dismissed, [1981] 2 S.C.R. xi).
>
> Secondly, even in the context of a treaty document that purports to contain all of the terms, this Court has made clear in recent cases that extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty. MacKinnon A.C.J.O. laid down the principle in *Taylor and Williams*, *supra*, at p. 236:
>
> > . . . if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms.
>
> The proposition is cited with approval in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 87, and *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1045.
>
> Thirdly, where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms, *per* Dickson J. (as

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[84] *R. v. Marshall* [1999] 4 C.N.L.R. 161 (SCC)

> he then was) in *Guerin v. The Queen*, [1984] 2 S.C.R. 335. Dickson J. stated for the majority, at p. 388:
>
> Nonetheless, the Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the Band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms.
>
> The *Guerin* case is a strong authority in this respect because the surrender there could only be accepted by the Governor in Council, who was not made aware of any oral terms. The surrender could *not* have been accepted by the departmental officials who were present when the Musqueam made known their conditions. Nevertheless, the Governor in Council was held bound by the oral terms which "the Band understood would be embodied in the lease". In this case, unlike *Guerin*, the Governor did have authority to bind the Crown and was present when the aboriginal leaders made known their terms.
>
> The narrow approach applied by the Court of Appeal to the use of extrinsic evidence apparently derives from the comments of Estey J. in *R. v. Horse*, [1988] 1 S.C.R. 187, where, at p. 201, he expressed some reservations about the use of extrinsic materials, such as the transcript of negotiations surrounding the signing of Treaty No. 6, except in the case of ambiguity. (Estey J. went on to consider the extrinsic evidence anyway, at p. 203.) Lamer J., as he then was, mentioned this aspect of *Horse* in *Sioui*, *supra*, at p. 1049, but advocated a more flexible approach when determining the existence of treaties. Lamer J. stated, at p. 1068, that "[t]he historical context, which has been used to demonstrate the existence of the treaty, may equally assist us in interpreting the extent of the rights contained in it".[85]

152. *Marshall* then stands for the proposition that the use of extrinsic evidence is quite permissible, even where there is no ambiguity on the face of the Treaty, to show that the written document does not include all of the terms of the agreement, and the historical and cultural context of the Treaty, because it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms.

153. In the present case, where it would appear that the Gunshot Treaty was never written down and quite possibly never concluded, it is difficult to argue that its terms are clear or unambiguous.

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[85] *R. v. Marshall* [1999] 4 C.N.L.R. 161, at 171-173 (SCC)

154. The four Reports are therefore available to assist us in determining the question of the validity of the Gunshot Treaty.

155. The Reports demonstrate that the Gunshot treaty was, at best: vague in its geographic description; never written down; uncertain as to parties; quite likely never concluded or finalized; and has been the subject of substantial consternation on the part of both the Crown and the Mississaugas.

156. The online Oxford dictionary defines a treaty as: "A formally concluded and ratified agreement between states".[86] The Gunshot Treaty fails on both counts: it would appear that it was never formally concluded and that it was not formally ratified.

157. We would submit that at the very least a valid treaty or land cession must be in writing. An "unwritten" treaty or land cession should be considered invalid for reasons of uncertainty or vagueness. Even in *R v. Sioui* the treaty in question was in writing.[87]

158. The quote from *R. v. Marshall* [88] in paragraph 143 above discusses in length ***oral*** promises given in the context of a ***written*** treaty, but note that the treaties themselves are in writing.

159. The Crown has stated on several occasions that it believed undocumented treaties to be invalid or the subject lands not to have been validly ceded:

> The continuing uncertainty about lack of documentation (such as deeds with boundary descriptions) related to certain Upper Canada land purchases in the late 18th century led Lord Dorchester to conclude that the 1787 Toronto Purchase deed was "invalid" in 1794. It is unknown if Dorchester held the same view in respect to the validity of the Gunshot Treaty.[89]

160. There was considerably more documentation available for the 1787 Toronto Purchase that there is for the 1788 Gunshot Treaty, so if he was consistent Lord Dorchester certainly ought to have believed that the Gunshot Treaty was invalid as well.

161. In 1923 the Williams Treaty Commissioners report contained the following:

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86 http://www.oxforddictionaries.com/definition/english/treaty

87 R. v. Sioui, [1990] 1 S.C.R. 1025

88 *R. v. Marshall* [1999] 4 C.N.L.R. 161 (SCC)

89 Report 2, Page 30.

> … It was further discovered that the lands lying between the Bay of Quinte and the County of York, and extending north a day's journey from the shore of the Lake, commonly supposed to have been surrendered by what is known as the Gun-shot Treaty ***are not described in any treaty***. [emphasis added] [90]

162. With respect to MNCFN that statement is as true today as it was in 1923.

163. As amply demonstrated above and in the Reports the Mississaugas of the Credit also repeatedly made claims to unsurrendered lands to the east of the Toronto Purchase and to lands at the Rouge River. They also repeatedly stated that they had never been paid for those lands.

ABORIGINAL TITLE

164. The most up to date statement of how to prove aboriginal title comes from the 2014 Supreme Court of Canada decision in *Tsilhqot'in Nation v. British Columbia*:

> [50] The claimant group bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. In asking whether Aboriginal title is established, the general requirements are: (1) "sufficient occupation" of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation. In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty. [91]

165. The Supreme Court has established a three part test:

1) "sufficient occupation" of the land claimed to establish title at the time of assertion of ***European*** sovereignty; [emphasis added]

2) continuity of occupation where present occupation is relied on; and

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[90] Report 2, Page 4.

[91] Tsilhqot'in Nation v. British Columbia, 2014 SCC 44.

3) exclusive historic occupation.

166. MNCFN is not relying on present occupation for obvious reasons addressed above and the evidence in the Reports would support that the Mississaugas of the Credit exercised exclusive historic occupation, but MNCFN cannot possibly prove "sufficient occupation" of the land claimed to establish title at the time of assertion of ***European*** sovereignty, as the RRVT was occupied by the Hurons and related tribes at the time the French asserted sovereignty.

167. MNCFN can prove "sufficient occupation" of the land claimed to establish title at the time of assertion of ***British*** sovereignty in 1760.

168. The test in *Tsilhqot'in* makes it impossible for MNCFN to make out aboriginal title. This seems unfair as MNCFN can into ownership of their traditional lands in exactly the same way that the British did: by conquest.

169. The application of the *Tsilhqot'in* test is at least doubly unfair in that the British were clearly of the opinion that the Mississaugas of the Credit owned their traditional lands. Indeed the British did not rely on their conquest of the French to give them ownership of the land, instead they proceeded to negotiate treaties and land cessions from the aboriginal occupants of those lands, including the Mississaugas of the Credit.

170. If MNCFN did not have title to the lands how did the British Crown obtain title to the lands? If the British Crown did not obtain title to the lands then how did Canada and Ontario obtain title to the lands?

171. We would submit that it would be most perverse for Canada and Ontario to rely on treaties and land cessions with the Mississaugas of the Credit to demonstrate title to most of southern Ontario and in the same breath deny that the MNCFN retains aboriginal title to the RRVT today.

172. In the alternative we would suggest that Canada and Ontario have at least a ***duty*** to negotiate a treaty or agreement with MNCFN regarding the RRVT and to pay MNCFN for their lands, as they have been requesting since 1847, some one hundred and sixty eight years now.

THE NATURE OF THE DUTY

173. We submit that Canada and Ontario (the Crown) have a ***fiduciary duty*** to negotiate a treaty or agreement with MNCFN regarding the RRVT and to pay MNCFN for their lands. We will trace the origin of that duty.

THE ROYAL PROCLAMATION OF 1763

174. As noted by the Supreme Court of Canada in *Guerin,*[92] the origins of the Crown's fiduciary obligation to Indians can be found in the *Royal Proclamation of 1763*, which states:

> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, ***if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name,*** at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie. . . . [emphasis added]

175. The Court held that because Indians are constrained to only alienate their land to the Crown, therefore the Crown owes a fiduciary duty to the Indians who dispose of their lands through the Crown:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, Native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.
>
> An Indian band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the band's behalf. The Crown first

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[92] *Guerin* v. *The Queen*, [1984] 2 SCR 335, 55 NR 161, 13 DLR (4th) 321, [1985] 1 CNLR 120.

> took this responsibility upon itself in the Royal Proclamation of 1763 [see RSC 1970, App. I]. It is still recognized in the surrender provisions of the *Indian Act*. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.[93]

176. There have been issues raised regarding the application of *The Royal Proclamation of 1763*, but as the Ontario Court of Appeal found in *Chippewas of Sarnia Band v. Canada*:

> [201] On the other hand, the evidence shows that while the Royal Proclamation was a unilateral declaration of the imperial Crown, historically, it had become a formal part of the treaty relationship with the Indian nations. In reviewing the evidence, we have already alluded to the fact that the Crown took extraordinary steps to make the First Nations aware that the policy set out in the Royal Proclamation would govern Crown-First Nations relations and the importance attached to the Royal Proclamation by First Nations as their Charter. There can be little doubt that from the aboriginal perspective, the Royal Proclamation was perceived as an authoritative and enduring statement of the principles governing their relationship with the Crown. We also note in the record evidence that government officials considered that the Indian land provisions in the Royal Proclamation were still in effect even after the passage of the Quebec Act. Moreover, the Royal Proclamation is expressly referred to in the Canadian Charter of Rights and Freedoms, s. 25, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11 and it has been consistently cited in the case law from the earliest times as the defining source of the principles governing the Crown in its dealings with the aboriginal people of Canada.[94]

177. We submit that it is good law that the Mississaugas of the Credit were constrained from alienating their lands to no one but the Crown, regardless of whether that be as the result of the *Royal Proclamation of 1763*, the Quebec Act of 1774, the instructions of Lord Dorchester in 1794, or some other statute or proclamation, then there was a *Guerin*-type fiduciary duty on the Crown.

DOES THE SAME DUTY EXIST UPON SURRENDER OF ABORIGINAL TITLE?

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[93] *Guerin* v. *The Queen*, [1984] 2 SCR 335, 55 NR 161, 13 DLR (4th) 321, [1985] 1 CNLR 120 at 131-32, Dickson J

[94] Chippewas of Sarnia Band v. Canada (Attorney General) (2000), 195 D.L.R. (4th) 135 (Ont C.A.)

178. In *Guerin*[95], the Musqueam Band surrendered 162 acres of ***reserve*** land to the Crown in 1957 for a lease. In the present claim we are dealing with the surrender of ***aboriginal title*** to the Crown. The issue then becomes: does the same *Guerin*-type duty exist upon surrender of aboriginal title? This issue has not yet been resolved by the courts and we must examine the reasoning of the Court in Guerin to determine if the principles contained therein are transferable to aboriginal title (Native Title, Indian Title) situations.

179. The Court held that the *Indian Act* surrender provisions placed the Crown between Indians and settlers with respect to the alienation of Indian lands:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, Native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. ***The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.***
>
> An Indian band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763 [see RSC 1970, App. I]. It is still recognized in the surrender provisions of the *Indian Act*. ***The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.***[96] [emphasis added]

180. This analysis does not turn upon the fact that the lands were reserve lands, it turns simply upon: "the Indian interest in the land is inalienable except upon surrender to the Crown." This fact is as true in aboriginal title surrenders as it is in surrenders of reserve land. Therefore the same fiduciary duty must exist in both situations, and the duty is this:

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[95] *Guerin* v. *The Queen*, [1984] 2 SCR 335, 55 NR 161, 13 DLR (4th) 321, [1985] 1 CNLR 120.

[96] *Guerin* v. *The Queen*, [1984] 2 SCR 335, 55 NR 161, 13 DLR (4th) 321, [1985] 1 CNLR 120 at 131-32, Dickson J

> ... the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, ***to deal with the land for the benefit of the Indians***.[97] [emphasis added]

181. One could argue that the duty upon the Crown is to protect the Indians from unscrupulous third parties that would exploit the Indians if the Crown did not intercede and prohibit direct dealings, and that this duty would not apply to situations where the Crown itself is the purchaser. But it does not sit well in the mouth of the Crown to say that it can lawfully do what it has prohibited others from doing – namely exploiting Indians.

182. Indeed, it should be the case that the duty applies doubly so when the Crown is the purchaser, so as to prevent unjust enrichment from self-dealing. We submit that the Crown has never paid MNCFN for the RRVT. That is a textbook example of unjust enrichment.

THE SCOPE OF THE DUTY

183. All eight members of the Court found in *Guerin* that Canada had breached its fiduciary duty to the Band. On the nature of the Crown's fiduciary relationship, Dickson J. stated for the majority of the Court:

> Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.
>
> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest J. Weinrib maintains in his article "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1, at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion". Earlier, at p. 4, he puts the point in the following way:
>
> > [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The

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[97] *Guerin* v. *The Queen*, [1984] 2 SCR 335, 55 NR 161, 13 DLR (4th) 321, [1985] 1 CNLR 120 at 131, Dickson J

> fiduciary obligation is the law's blunt tool for the control of this discretion.
>
> I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct. . . .[98]

184. The Crown then stood in a fiduciary relationship with New Credit regarding the continuing debacle of the surrender of the Gunshot Treaty lands. At the very least the Crown had two major duties:

1) to ensure that the Indians were fully informed as to their rights and the facts regarding any particular transaction; and

2) to ensure that the Crown paid a reasonable price for surrendered land.

In the present case the Crown has failed, and continues to fail, miserably in its exercise of both duties.

FAILURE TO INFORM AND ADVISE THE BAND

185. In *Apsassin* the Supreme Court of Canada split 4-3 on the question of whether mineral interests were included in the 1945 surrender for sale or lease , but the Court was unanimous that the Crown owed a post-surrender fiduciary obligation to dispose of the surrendered land in the best interests of the Band. The Court also found that the Crown had breached this obligation by "inadvertently" selling the mineral rights in the reserve lands. McLachlin J. wrote the minority judgment on the effect of the 1945 surrender on the earlier surrender of the mineral rights, but the entire Court supported her analysis of the Crown's fiduciary obligations in the pre-surrender context.[99] Justice Gonthier's majority decision, in which he concluded that the Beaver Indian Band had clearly intended to surrender its reserve, made reference to a "tainted dealings" approach. In addressing how the Beaver Indian Band's surrender for sale or lease

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[98] *Guerin* v. *The Queen*, [1984] 2 SCR 335, 55 NR 161, 13 DLR (4th) 321, [1985] 1 CNLR 120 at 136-37 and 140, Dickson J.

[99] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 28-29 (SCC).

of both the mineral and the surface rights in 1945 had subsumed the earlier 1940 surrender of the mineral rights alone, Gonthier J stated:

> I should also add that ***I would be reluctant to give effect to this surrender variation if I thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention***. However, neither of these situations arises here. As the trial judge found, the consequences of the 1945 surrender were fully explained to the Indians by the local agent of the DIA during the negotiations. There was also substantial compliance with the technical surrender requirements embodied in s. 51 of the 1927 *Indian Act*, and as McLachlin J. concludes, the evidence amply demonstrates the valid assent of the Band members to the 1945 agreement. Moreover, by the terms of the surrender instrument, the DIA was required to act in the best interests of the Band in dealing with the mineral rights. In fact, the DIA was under a fiduciary duty to put the Band's interests first. I therefore see nothing during the negotiations prior to the 1945 surrender, or in the terms of the surrender instrument, which would make it inappropriate to give effect to the Band's intention to surrender all their rights in I.R. 172 to the Crown in trust "to sell or lease."[100] [emphasis added]

186. How could the Band's understanding of the terms of the Gunshot Treaty lands have possibly been "adequate" given the facts of this claim? The Crown has never communicated to MNCFN that the 1788 "purchase" was invalid and of no force and effect. The Gunshot Treary was in much need of confirmation as was the Toronto Purchase. The Crown did not attempt to fulfil its fiduciary duty to ensure the informed consent of the Indians.

187. In addition, the Crown's withholding of this information is precisely the sort of conduct that Gonthier, J. said would "taint" the dealings and therefore make it: "unsafe to rely on the Band's understanding and intention." There is also another legal term used to describe this type of action: "sharp dealing." The *Taylor and Williams* decision of the Ontario Court of Appeal has long stood for the proposition: "Since the honour of the Crown is involved, no appearance of "sharp dealing" should be sanctioned."[101]

THE FAILURE TO PROVIDE ADEQUATE COMPENSATION

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100 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 34 (SCC).

101 *R v. Taylor and Williams*, [1981] 3 CNLR 114 (Ont. CA) at 123. This case was cited with approval by the Supreme Court of Canada in *R. v. Sparrow*, [1990] 3 CNLR 160 at 179-80.

188. In the present claim there is no good evidence to support the proposition that the Crown has provided MNCFN ***any*** compensation with respect to the Gunshot Treaty and the RRVT, let alone adequate compensation.

189. In Guerin, Dickson J. sets out the test for a fiduciary:

> Professor Ernest Weinrib maintains in his article "The Fiduciary Obligation," 25 U.T.L.J. 1 (1975), at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." Earlier, at p. 4, he puts the point in the following way:
>
> [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.
>
> I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.[102]

190. The concept from Professor Ernest J. Weinrib, quoted by Dickson, J. with approval in *Guerin*, that: "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion" has been explored and expanded upon by the Supreme Court of Canada in a series of decisions regarding when and where the courts will use Equity's "blunt instrument" to supervise and regulate conduct with the finding of a fiduciary duty or obligation.

191. A landmark decision in the law of fiduciary in Canada is that of Madam Justice Wilson in *Frame v. Smith*.[103] She sets out the following three-part analysis for the identification of relationships which presumptively give rise to fiduciary obligations:

> ... there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

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[102] *Guerin v. R.* (1984), 13 DLR (4th) 321 at 340-41 (SCC).

[103] *Frame v. Smith* (1987), 42 DLR (4th) 81 (SCC).

> (1) The fiduciary has scope for the exercise of some discretion or power.
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[104]

192. All three of the required elements from *Frame v. Smith* are present in this matter: 1) the Crown had absolute discretion regarding the compensation for the Gunshot Treaty; 2) the Crown could, and did, unilaterally exercise that discretion so as to affect the Mississaugas' interests; and 3) the Mississaugas from 1788 through to the mid 1900s were "peculiarly vulnerable" in particular as the Crown consistently refused MNCFN's request for funds to retain legal counsel.

193. Although Madam Justice Wilson was writing in dissent, her reasons have since been adopted by the majority of the Court in several cases, including the current leading case on surrenders – *Apsassin*. It is evident from the reasons of Madam Justice McLachlin in *Apsassin* that the principles established in *Frame v. Smith* are still good law and continue to apply to the relationship between the Crown and First Nations:

> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 S.C.R. 99; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.[105]

194. Again, the facts of the Gunshot Treaty and the RRVT fit perfectly the type of scenario that Madam Justice McLachlin describes as giving rise to a fiduciary obligation.

195. As McLachlin J stated in *Apsassin*:

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[104] *Frame v. Smith* (1987), 42 DLR (4th) 81 at 98-99 (SCC).

[105] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at para 38 (SCC).

> The trial judge was correct in finding that a fiduciary involved in self-dealing, i.e. in a conflict of interest, bears the onus of demonstrating that its personal interest did not benefit from its fiduciary powers: J.C. Shepherd, *The Law of Fiduciaries* (1981), at pp. 157-59; and *A.H. Oosterhoff: Text, Cases and Commentary on the Law of Trusts* (4th ed. 1992). The Crown, facing conflicting political pressures in favour of preserving the land for the Band on the one hand, and making it available for distribution to veterans on the other, may be argued to have been in a position of conflict of interest.[106]

196. The fact then that the Crown was involved in self-dealing in the Gunshot Treaty and the RRVT , means that ***the Crown*** bears the onus of proving that its personal interest did not benefit from its actions.

PRE - SURRENDER DUTIES VS. POST - SURRENDER DUTIES

197. Although much has been made of this distinction from time to time, it would not appear to have much bearing on the claim at hand. *Guerin* stands for the proposition that, post-surrender, the Crown has a duty to ensure that the Indians receive fair value for their land. *Apsassin* stands for the proposition that, pre-surrender, the Crown has a duty to ensure the Indians know what they are doing, to give effect to the Indians intentions (unless the decision was abnegated), and to refuse surrenders where the transaction was foolish, improvident, and exploitative.

198. With respect to the Gunshot Treaty and the RRVT the Crown breached all of its fiduciary duties as defined by the Supreme Court, both pre-surrender and post-surrender. In short, the Crown breached its fiduciary obligations by subordinating the interests of the Mississaugas to the Crown's own political and financial interests.

THE HONOUR OF THE CROWN

199. In the *Mikisew Cree* decision the Supreme Court of Canada shied away from the concept of fiduciary duty and placed a new reliance on the concept of the "honour of the Crown". The judgement of the Court was delivered by Binnie J. At paragraph 33 he states:

> 33 Both the historical context and the inevitable tensions underlying implementation of Treaty 8 demand a *process* by which lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not). The content of the process is dictated by the

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106 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 45 (SCC).

> duty of the Crown to act honourably. Although *Haida Nation* was not a treaty case, McLachlin C.J. pointed out, at paras. 19 and 35:
>
> The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (Badger, at para. 41). Thus in Marshall, supra, at para. 4, the majority of this Court supported its interpretation of a treaty by stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship".[107]

200. Thus the Crown must avoid even the appearance of "sharp dealing". The facts of the Gunshot Treaty and the RRVT are a textbook example of sharp dealing.

201. Binnie J. Goes on, in a section entitled "Honour of the Crown" to give the concept more flesh in context of the Crown's duty to consult in taking up Treaty land:

> 51 The duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court *as a treaty obligation* as far back as 1895, four years before Treaty 8 was concluded: *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at pp. 511-12 *per* Gwynne J. (dissenting). While he was in the minority in his view that the treaty obligation to pay Indian annuities imposed a trust on provincial lands, nothing was said by the majority in that case to doubt that the honour of the Crown was pledged to the fulfilment of its obligations to the Indians. This had been the Crown's policy as far back as the *Royal Proclamation* of 1763, and is manifest in the promises recorded in the report of the Commissioners. The honour of the Crown exists as a source of obligation independently of treaties as well, of course. In *Sparrow*, *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, *Haida Nation* and *Taku River*, the "honour of the Crown" was invoked as a central principle in resolving aboriginal claims to consultation despite the absence of any treaty.
>
> 52 It is not as though the Treaty 8 First Nations did not pay dearly for their entitlement to honourable conduct on the part of the Crown; surrender of the aboriginal interest in an area larger than France is a hefty purchase price. [108]

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[107] Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, 2005 SCC 69

[108] Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, 2005 SCC 69

202. MNCFN also surrendered huge tracts of land to the Crown, including some of the most valuable piece of real estate in Canada today, which also happens to be the lands subject to this Claim.

203. MNCFN is entitled to honourable conduct on the part of the Crown today just as the Mississaugas of the Credit were entitled to honourable conduct on the part of the Crown in 1788, 1794 and 1923.

204. It is our submission that the *Mikisew Cree* decision is applicable to this claim, but also that it does not alter the nature of the Crown's obligation to the First Nation and the fact that equitable remedies from fiduciary law are applicable to compensation for this Claim.

COMPENSATION

205. As the damages in this claim flow from a breach of Treaty or fiduciary duty then it is necessary to look at how equity compensates in this type of situation. Robert Mainville, in his book "An Overview of Aboriginal and Treaty Rights and Compensation for their Breach"[109] points out:

> In fiduciary cases, the courts go beyond the narrow confines of the common law and "look to the harm suffered from the breach of the given duty, and apply the appropriate remedy."[110] As L. I. Rotman noted:
>
> The nature of the wrong and the nature of the loss, not the nature of the cause of action, will dictate the scope of the remedy.
>
> Potential remedies which may be invoked upon a finding of a breach of fiduciary obligation include restitutionary, personal, proprietary, and deterrent remedies. These may include equitable remedies – such as constructive trust, injunctions, declarations, prohibitions, rescission, accounting for profits, repayment of improperly used moneys (plus interest), equitable liens, equitable damages, and in rem restitution – and/or liability based on negligence, fraud, coercion, undue influence, profiteering, economic duress, negligent misrepresentation, or third party liability. ***A court may also grant interest on financial proceeds awarded to remedy a breach of***

[109] Robert Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for their Breach* (Saskatoon: Houghton Boston Printers, 2001) at 108.

[110] *Hodgkinson v. Simms* at 444.

> ***fiduciary duty which is payable from the date of the breach. Interest awarded may be ordinary or compounded.*** [emphasis added][111]

206. Mainville goes on to note:

> Fiduciary remedies attempt to fully compensate the aggrieved party by providing ***full restitution in kind***, thus ensuring that the remedy compensates *for both the past breach and for the future consequences of the breach.* In other words, ***the remedy must ensure that the aggrieved party is restored to the situation the party would have been in had the breach of fiduciary duty never occurred***. In consequence, restitution in kind is favoured over equivalent monetary compensation where such restitution is possible. ... ***Where such restitution is not possible, the full monetary value of the property must be provided as compensation, including any increases in value that occurred between the breach and the date on which the compensation was actually made***. In addition, in both cases where restitution in kind is achieved or the monetary equivalent is provided, additional compensation must also be supplied to achieve the objective of full restitution, including, in appropriate cases, disgorgement of benefits and compensation for lost opportunities, for injurious affection, and for all consequential damages [emphasis added].[112]

207. It is the submission of New Credit that both principles of equity from fiduciary law and the honour of the Crown require restitution, that is that Canada return the land improperly taken and not paid for. Canada and Ontario still own land in the claim area, in particular lands destined for the Rouge River National Park. Those lands should be returned to MNCFN.

208. With respect to the lands that cannot be returned, as Mainville notes above: "Where such restitution is not possible, the full monetary value of the property must be provided as compensation, including any increases in value that occurred between the breach and the date on which the compensation was actually made." That means that New Credit is owed today the unimproved fair market value of the lands improperly included in the 1805 Treaty that cannot be returned. New Credit is also owed "lost opportunity" or "loss of use" with respect to those lands as well.

209. We must also look at Equities "blunt instrument" which is accounting and disgorgement of profits. If a fiduciary steals from a beneficiary and makes a profit thereby, Equity will force that fiduciary to account for and disgorge any profits.

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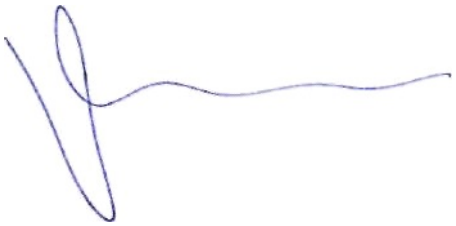
[111] L. I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) at 196.

[112] Robert Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for their Breach* (Saskatoon: Houghton Boston Printers, 2001) at 111.

210. The honour of the Crown was badly tarnished by its conduct surrounding this claim. There must be a fair and just settlement to restore that honour.

Dated at Oakville, this 31st day of March, 2015.

Kim Alexander Fullerton
Barrister & Solicitor
Professional Corporation



Per: Kim Alexander Fullerton