FILE NO.: SCT-5001-13
CITATION: 2019 SCTC 3
DATE: 20190730

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
KAWACATOOSE FIRST NATION, PASQUA FIRST NATION, PIAPOT FIRST NATION, MUSCOWPETUNG FIRST NATION, GEORGE GORDON FIRST NATION, MUSKOWEKWAN FIRST NATION AND DAY STAR FIRST NATION Claimants	David Knoll, for the Claimants
– and –	
STAR BLANKET FIRST NATION Claimant	Aaron B. Starr, Galen Richardson and Dusty Ernewein, for the Claimant
– and –	
LITTLE BLACK BEAR FIRST NATION Claimant	Ryan Lake, Aron Taylor and Aaron Christoff, for the Claimant
– and –	
STANDING BUFFALO DAKOTA FIRST NATION Claimant	Mervin C. Phillips and Leane Phillips, for the Claimant
– and –	
PEEPEEKISIS FIRST NATION	Michelle Brass and Tom Waller, for the Claimant

Claimant **– and –** HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent	Lauri M. Miller and Donna Harris, for the Respondent **HEARD:** June 20-23, 2016, July 24-25, 2017, October 10-12, 2018

REASONS FOR DECISION

Honourable W. L. Whalen

NOTE: This document is subject to editorial revision before its reproduction in final form.

Cases Cited:

Ross River Dena Council Band v Canada, 2002 SCC 54, 2002 CarswellYukon 58 (WL Can); *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, 417 DLR (4th) 239; *Lac La Ronge Indian Band v Canada*, 2001 SKCA 109, 2001 CarswellSask 662 (WL Can); *Canada (AG) v Anishnabe of Wauzhushk Onigum Band*, [2004] 1 CNLR 35 (Ont CA), 2003 CarswellOnt 4835 (WL Can); *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, 2001 CarswellBC 2703 (WL Can); *Rizzo & Rizzo Shoes Ltd, (Re)* [1998] 1 SCR 27, 1998 CarswellOnt 1 (WL Can); *Nowegijick v R*, [1983] 1 SCR 29 at 36, 1983 CarswellNat 123 (WL Can); *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 143, 1990 CarswellMan 209 (WL Can); *R v Badger*, [1996] 1 SCR 771, 1996 CarswellAlta 587 (WL Can); *R v Marshall*, [1999] 3 SCR 456, 1999 CarswellNS 262 (WL Can); *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14, 2013 CarswellMan 61 (WL Can); *R v Taylor*, [1981] 3 CNLR 114 (ONCA), 1981 CaswellOnt 641 (WL Can); *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 CarswellBC 235; *Mitchell v MNR*, 2001 SCC 33, 2001 CarswellNat 873 (WL Can); *Kwicksutaineuk/Ah-Kwa-Mish First Nation v British Columbia (Minister of Agriculture & Lands)*, 2010 BCSC 1699, 2010 CarswellBC 3315 (WL Can); *Kitselas First Nation v Her Majesty the Queen Right of Canada*, 2013 SCTC 1; *Canada (AG) v Anishnabe of Wauzhushk Onigum Band*, [2003] 1 CNLR 6 (Ont Sup Ct J), 2002 CarswellOnt 3212 (WL Can), aff'd [2004] 1 CNLR 35 (Ont CA); *Madawaska Maliseet First Nation v Her Majesty the Queen in Right of Canada*, 2017 SCTC 5; *R v Sundown*, [1999] 1 SCR 393, 1999 CarswellSask 94 (WL Can).

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, ss 14, 22

Indian Act, RSC 1906, c 81, s 49

Indian Act, SC 1884, c 27

Indian Act, RSC 1886, c 43

Headnote:

Aboriginal law – Specific claims – Reserve creation – Crown intention – Indigenous perspectives – Oral history

This Claim arises out of the 1918 surrender of Last Mountain Indian Reserve 80A (IR 80A or Last Mountain Reserve). It was originally surveyed by John C. Nelson and later confirmed by Order in Council PC 1151 (PC 1151) on May 17, 1889, as "a Fishing Station for the use of the Touchwood Hills and Qu'Appelle Valley Indians." In 1918, IR 80A was ostensibly surrendered by the George Gordon, Poorman (known today as Kawacatoose), Day Star, Muskowekwan, Muscowpetung, Pasqua, and Piapot Bands (present-day First Nations called the Kawacatoose Group). The Declaration of Claim alleges that Canada did not administer the 1918 surrender of Last Mountain Reserve in accordance with its legal obligations.

Four other First Nations asserted that they were also beneficiaries of IR 80A under PC 1151: Little Black Bear, Star Blanket, Peepeekisis (collectively File Hills Bands) and Standing Buffalo Dakota First Nations. All were added as Claimants (the Added Claimants) to facilitate the efficient determination of which First Nations were meant to benefit from the creation of the Last Mountain Reserve under PC 1151 in 1889. These Reasons for Decision address only that issue.

In this sub-phase of the validity stage, the proper interpretation of "Touchwood Hills and Qu'Appelle Valley Indians" was the focal point. The interpretation requires a thorough analysis of the historical context. Oral history and Indigenous perspectives about that context are essential to inform the Tribunal about the historical context and ultimately, for the proper analysis of PC 1151. However, the legal test to be applied still remains focused on the intentions of the Crown as it created the Reserve. The question is whether the Crown contemplated the perspectives of the Added Claimants.

The File Hills Bands submitted that the Crown's intention could not be determined from the ordinary meaning of the words "Touchwood Hills and Qu'Appelle Valley Indians" alone. They argued that the documentary evidence revealed that the Government was uncertain about its own intention, including confusing the geographic Qu'Appelle Valley with the administrative Qu'Appelle Agency. The Crown's uncertainty made the historical context and Indigenous perspectives all the more important and determinative in resolving intent. From their perspective, the Indigenous people of the area identified themselves with the Qu'Appelle Valley. This was part of their world view and its organization. The Cree/Saulteaux Bands were all closely related, sharing the same traditions, spiritual beliefs and nomadic existence. IR 80A (Kinookimaw) was a common traditional stopping place used by all for purposes that are discussed. By use they accepted the Reserve as such. When the principles of interpretation are applied liberally, in the Bands' best interests and least restrictively of their rights, the Tribunal should find that the File Hills Bands were "Qu'Appelle Valley Indians." They also argued that the Crown had not properly documented its intent.

For Standing Buffalo Dakota First Nation (Standing Buffalo), IR 80A was the Government's fulfillment of an obligation arising from an "allyship" relationship. The Government's post-surrender discrimination against Standing Buffalo on the basis of the perception of Standing Buffalo as American Sioux was a breach of the honour of the Crown. Standing Buffalo had always been a part of the Qu'Appelle Valley group of Bands that Canada had recognized as beneficiaries, and its status should be reinstated now. Its Reserve neighboured those of three of the Bands of the Kawacatoose Group that were admittedly Qu'Appelle Valley Indians.

The Kawacatoose Group cited 100 years of treatment of IR 80A as theirs by the Crown as their primary argument, relying mostly on the documentary record. They submitted that the File Hills Bands were not geographically located in the Qu'Appelle Valley and questioned the other Claimants' belief that they had been deprived of certain rights at Kinookimaw, which the Kawacatoose Group said had not been identified.

The oral history evidence was central in providing the Tribunal with insight into Indigenous perspectives, both before and after the creation of IR 80A. It was important to

understand those perspectives to determine how they related to the Crown's intentions in creating the reserves.

Oral history was the source of linkage to Treaty No. 4. From all the evidence, it was clear that, in a general way, reserve creation was part of treaty implementation for the adhering First Nations. It is also clear on the face of PC 1151 that as of 1889, the Governor General in Council perceived that Order in Council to be addressing reserves within the Treaty No. 4 area. However, this evidence as presented was not sufficiently developed to support a finding that a promise of fishing station reserves was made at the time of Treaty adherence, either as part of the Treaty or in some related way.

The witnesses also gave oral history evidence about their ancestors' perspectives on how they became beneficiaries of IR 80A as a reserve, distinct from pre-existing connections to that land. However, when considered as a whole, the oral history evidence is problematic on the question of the origins of entitlement. The history of the witnesses conflicted from one First Nation to another as well as internally among witnesses from the same First Nation.

The oral history testimony clearly established the strong emotional and spiritual attachment that all of the First Nations had to IR 80A through traditional use and related cultural perspective. It was founded on their communities' traditional use of IR 80A and all that that entailed over the decades and centuries. However, that traditionally-based sense of entitlement does not afford direct assistance in the interpretation of the Crown's intentions behind the expression "Touchwood Hills and Qu'Appelle Valley Indians" unless it can be shown that the Crown was aware of it and was motivated to act upon it. It does provide a rich understanding of certain aspects of Indigenous perspectives and context at various times, all of which must be kept in mind when considering the extensive documentary evidence adduced in this case.

The documentary record reveals Mr. Nelson's extensive involvement in the Qu'Appelle Valley and Touchwood Hills in the period leading up to the creation of IR 80A. By the time he described IR 80A on January 1, 1883, he was fully aware of the bands and reserves located in the Touchwood Hills and Qu'Appelle Valley. He also appeared to have accommodated the requests of First Nations in relation to the reserves he was laying out for them. He knew those geographic locations were separate and distinct from the File Hills, where he had not yet worked. He did not

specify or qualify which bands were to benefit from the fishing station because the surveying of reserves in the area was not yet complete and it was not certain which bands might ultimately be located in the Touchwood Hills or the Qu'Appelle Valley.

Mr. Nelson was responsible for all aspects of the survey of IR 80A. His intention in creating the survey and describing it must surely govern in the sense that his work was the basis for PC 1151. The intended beneficiaries of IR 80A were as Mr. Nelson planned and expected them to be. His intention was that IR 80A would be for the shared benefit of the bands residing in the geographic area known as the Touchwood Hills, and also along the shores of the Qu'Appelle River or Lakes which he referred to as the location of the "Qu'Appelle Valley Indians." That would not include the bands in the File Hills.

Standing Buffalo had given significant military support to the British and their successors. There is no doubt that the Band had been recognized and honoured for its loyalty and support. Standing Buffalo credited its good standing with the British through the relationship referred to as "allyship." It is not necessary in this proceeding to determine the fact, nature or effect of "allyship." Standing Buffalo was one of the bands occupying a reserve on the Qu'Appelle Valley lakes and river and neighbouring the bands admitted to be "Qu'Appelle Valley Indians." There is no reason why Mr. Nelson would not also have intended Standing Buffalo to benefit from IR 80A, or why that Band would be disqualified or excepted, especially since he had fully accommodated the Chief's chosen location otherwise.

Mr. Nelson's perspective was unquestionably different than the Indigenous perspectives in the region, including the bands' self-identification as Indians of the Qu'Appelle region. There is no evidence of a nexus between the two perspectives. Mr. Nelson's perspective is the source of the Crown's intent in this case. Unfortunately, the two perspectives did not seem to speak to one another except the limited consultations about reserve locations he was responsible for surveying. There is no evidence that Mr. Nelson took a more inclusive view of "Qu'Appelle Valley Indians" than has been discussed. The Indigenous and Government of Canada perspectives apparently developed and thrived separately from each other, without connection or adoption by one culture or the other.

The File Hills Bands felt entitled by their traditional use of IR 80A over the decades and centuries. There is no doubt that the fishing station was a very familiar, long used and even sacred stopping point. These facts plus the Added Claimants' continued traditional use did not confer beneficiary status under PC 1151 and the *Indian Act*, or under any other applicable law.

In retrospect, and from the perspective of the File Hills Bands, it is not fair that the File Hills Bands were not allotted a fishing station. However, there is no evidence that Mr. Nelson was aware of their need for a fishing station, either at the time he conceived of it, or when he surveyed it and supervised its confirmation by law. None of the principles of interpretation, applied liberally and to the best advantage of the File Hills Bands, can expand Mr. Nelson's intent, which he exercised as Canada's authorized agent.

Held: The Claims of the Star Blanket First Nation, the Little Black Bear First Nation and the Peepeekisis First Nation are hereby dismissed. The Standing Buffalo Dakota First Nation is confirmed as a Claimant in the future conduct of this proceeding.

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I. INTRODUCTION

[1] This Claim alleges breaches of legal obligations relating to the 1918 surrender of Last Mountain Indian Reserve No. 80A (IR 80A or Last Mountain Reserve). The disputed land is located in Treaty No. 4 (Treaty 4) territory and is on the south side of Last Mountain Lake, where the Little Arm River flows into that lake in the Qu'Appelle Valley, Saskatchewan. The Claimants are Cree and Saulteaux people who adhere to Treaty 4, with one exception. Standing Buffalo Dakota First Nation is Dakota/Sioux and did not adhere to Treaty 4. Standing Buffalo Dakota First Nation asserted that the area was within its traditional territory.

[2] The Last Mountain Reserve consisted of 1,408 acres (about 2.2 square miles) before the allegedly improper surrender of 1918. It was originally surveyed by John C. Nelson and confirmed by Order in Council PC 1151 (PC 1151) on May 17, 1889, as "a Fishing Station for the use of the Touchwood Hills and Qu'Appelle Valley Indians" (Common Book of Documents Standing Sub-Phase (CBD), Vol 1, Docs 23–24; CBD, Vol 3, Doc 239 at 57). The Order in Council did not specify which bands were included in the terms "Touchwood Hills and Qu'Appelle Valley Indians." In 1918, IR 80A was ostensibly surrendered by the George Gordon, Poorman (known today as Kawacatoose), Day Star, Muskowekwan[1], Muscowpetung, Pasqua, and Piapot Bands. The proceeds flowing from the surrender were shared among these seven Bands.

[3] The same seven Bands initiated this Claim with the Specific Claims Tribunal (Tribunal). They are now known as: Kawacatoose First Nation (Kawacatoose), Pasqua First Nation (Pasqua), Piapot First Nation (Piapot), Muscowpetung First Nation (Muscowpetung), George Gordon First Nation (George Gordon), Muskowekwan First Nation (Muskowekwan) and Day Star First Nation (Day Star) (collectively, the Kawacatoose Group). The Kawacatoose Group alleges that Canada did not administer the 1918 surrender of the Last Mountain Reserve in accordance with its legal obligations. They say that the surrender was not carried out: (1) in compliance with the *Indian Act*, RSC 1906, c 81, section 49; (2) in compliance with Treaty 4,

[1] A note on terminology: The spelling of certain First Nation names, such as Muskowekwan, Muscowpetung, Kahkewistahaw, etc., varies in the documentary record. When referenced in a quoted passage from the documentary record, historical spelling has been kept; otherwise, the spelling in paragraph 2 has been used throughout these Reasons for Decision.

which they assert requires the consent of the "Indians entitled thereto" before the disputed land could be "sold, leased or otherwise disposed of" (CBD, Vol 1, Doc 11); and, (3) in the best interests of those who had an interest in the Last Mountain Reserve. The Kawacatoose Group further alleges that while administering the Last Mountain Reserve, Canada breached fiduciary obligations owed to the Kawacatoose Group when Canada: (4) entered into lease arrangements with third parties contrary to the terms of the March 23, 1918 surrender, which specified it was "in trust to sell" (CBD, Vol 1, Doc 75); (5) permitted a road to be built across and water to be taken from the Last Mountain Reserve without lawful authority and without securing compensation; (6) permitted squatters to trespass; (7) failed to prevent damage by campers and to obtain compensation from them; (8) entered into inadequate and inappropriate lease agreements without the consultation and approval of the interested First Nations; and, (9), failed to prevent the removal of gravel without compensation, consultation or consent. Their Claim relies on paragraphs 14(1)(b), (c), (d), and (e) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*].

[4] After the Kawacatoose Group filed their Claim, four other First Nations asserted that they were also beneficiaries of IR 80A under PC 1151: the Standing Buffalo Dakota First Nation (Standing Buffalo), the Little Black Bear First Nation (Little Black Bear), the Star Blanket First Nation (Star Blanket) and the Peepeekisis First Nation (Peepeekisis). Little Black Bear, Star Blanket, and Peepeekisis are Treaty 4 nations whose reserves are located in the File Hills area. They will at times be referred to in these Reasons for Decision as the "File Hills Bands." Standing Buffalo did not adhere to Treaty 4. Standing Buffalo described a special relationship it had with the British Crown, and through which it said it was allotted a reserve in the Qu'Appelle Valley. These four First Nations were accorded Claimant status in order to make submissions with respect to their standing in this Claim, and will be referred to collectively as the "Added Claimants."

[5] In addition to asserting that they were beneficiaries under PC 1151, the Added Claimants also alleged various breaches of legal obligations owed to them and relating to the purported surrender of the Last Mountain Reserve in 1918, if they were allowed to proceed beyond this sub-phase (see paragraph 10 below for details regarding the phases of the Claim).

[6] The File Hills Bands and Standing Buffalo were added as Claimants in the course of the

Tribunal's case management to facilitate the efficient determination of which First Nations were meant to benefit from the creation of the Last Mountain Reserve under PC 1151 in 1889. These Reasons for Decision address only that issue. The validity of the Claim will be addressed at a later date, as necessary.

II. PROCEDURAL HISTORY

[7] On June 7, 2008, the Kawacatoose Group plus Little Black Bear and Star Blanket filed claims with the Specific Claims Branch, where negotiations must take place before any possible claim can be made to the Tribunal. On June 20, 2013, the Kawacatoose Group filed its Claim with the Tribunal (Amended Declaration of Claim filed January 28, 2014).

[8] On October 28, 2013, Star Blanket applied to intervene. On November 22, 2013, Little Black Bear applied for intervenor or party status. By consent, these two Applicants were added as Claimants on February 27, 2014.

[9] The Tribunal sent Notices pursuant to section 22 of the *SCTA*, to Peepeekisis on June 17, 2014 and Standing Buffalo on August 19, 2014. Standing Buffalo applied for party status on September 25, 2014. Peepeekisis also indicated its interest in becoming a party. On consent of all Parties, except Little Black Bear, the Tribunal added Standing Buffalo and Peepeekisis as Claimants on September 29, 2014, subject to Little Black Bear's consent, which followed on October 8, 2014. The Tribunal also sent a section 22 Notice to Okanese First Nation, but received no indication of interest in joining the proceedings.

[10] At the request of the Parties, the Tribunal bifurcated the Claim into validity and compensation stages. It further divided the validity stage into a standing sub-phase and a validity sub-phase. These Reasons for Decision address the standing sub-phase.

[11] The Kawacatoose Group applied on April 21, 2015, for the Tribunal to consider whether it "has a mandate under s.16 of the *Specific Claims Tribunal Act* to determine questions of validity concerning allegations raised in claims or parts of claim submissions, filed with the Minister under the Specific Claims Policy, that have been accepted for negotiation" (Notice of Application at para 1). The Respondent asserted settlement privilege in response. The Application has been placed in abeyance until the standing sub-phase has concluded.

[12] On August 31, 2015, Standing Buffalo applied to admit documents over which the Respondent asserted settlement privilege, and to admit transcripts of testimony before the National Energy Board that had been given by Elders who are now deceased. The Tribunal dismissed the Application (*Kawacatoose First Nation et al and Star Blanket and Little Black Bear First Nation and Standing Buffalo Dakota First Nation and Peepeekisis First Nation v Her majesty the Queen in Right of Canada*, 2016 SCTC 1).

[13] On June 20–23, 2016, the Tribunal held an oral history evidence hearing at the Treaty 4 Governance Centre in Fort Qu'Appelle, Saskatchewan.

[14] On June 22, 2017, Little Black Bear applied to examine the Respondent for discovery regarding Canada's policy and rationale for setting aside fishing stations. The Tribunal granted the Application, concluding that the examination would proceed on the basis of written questions that were modified by the Tribunal in its decision (*Kawacatoose First Nation et al and Star Blanket and Little Black Bear First Nation and Standing Buffalo Dakota First Nation and Peepeekisis First Nation v Her majesty the Queen in Right of Canada*, 2018 SCTC 3).

[15] On July 24–25, 2017, the Tribunal held a further oral history and expert evidence hearing at the Treaty 4 Governance Centre in Fort Qu'Appelle, Saskatchewan.

[16] The hearing of oral submissions on the standing sub-phase occurred on October 10–12, 2018, in Regina, Saskatchewan.

III. AGREED ISSUES

[17] The Parties agreed that the Last Mountain Reserve "was set apart and confirmed by Order in Council (OIC) PC 1151 dated May 17, 1889 as a Fishing Station for the use of the Touchwood Hills and Qu'Appelle Valley Indians" (Statement of Issues for Standing Sub-Phase of Validity Phase at para 1), but disagreed on the how "Touchwood Hills and Qu'Appelle Valley Indians" should be interpreted. The Parties agreed that the following issues were to be determined in this standing sub-phase:

i. For the benefit of which Claimants was the Last Mountain Reserve set apart and confirmed by PC 1151?

ii. Which of the Claimants made use of the Last Mountain Reserve?

IV. FACTS

A. Introduction

[18] The historical background to this Claim is of fundamental importance because the principal task is to determine intention through the examination of a vast array of documents and oral history relating to events and perspectives (both Indigenous and non-Indigenous) over more than a century. It is also important to canvass the facts so that readers may have some understanding of the complexity of the case, and so that there is transparency with respect to the Tribunal's appreciation of those matters.

B. Documentary Record

1. Pre-Reserve and Reserve Creation

[19] Historically, the Claimants are peoples of Cree, Saulteaux and Dakota/Sioux origin who, for centuries before the formation of Canada, occupied the central plains of the continent. They were nomadic peoples in what is now the southern part of Saskatchewan, and followed a migratory route through the Qu'Appelle Valley region. They sustained themselves by hunting and fishing, camping along the way, gathering berries and medicines, as well as trading with other Indigenous people they encountered as they made their way.

[20] In 1874, all but one of the Claimants and Canada entered into Treaty 4. Standing Buffalo has never signed a treaty although a reserve was set aside for it under the *Indian Act*. The written Treaty promised that bands would be consulted in the provision of reserves of one square mile for each family of five, but did not specifically define the nature, scope or details of the process for selecting those reserves. Its only promise of fishing rights was as follows:

> And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families…
>
> …

> And further, Her Majesty agrees that Her said Indians shall have right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining or other purposes, under grant or other right given by Her Majesty's said Government. [CBD, Vol 1, Doc 11]

[21] Policy in respect of the location and characteristics of reserves seemed to be made largely "on the ground" as the task of laying them out moved forward. In a Memorandum dated July 13, 1875, Surveyor General J. S. Dennis gave direction for the survey of Treaty 4 reserves. He suggested that William Wagner, D.L.S., be employed to do surveys of reserves in the "vicinity" of "Qu'Appelle" at locations determined by the Commissioner at Qu'Appelle, and that he then proceed to "the Touchwood Hills" to survey reserves there too (CBD, Vol 1, Doc 12, at 2–3). He also proposed that the reserves be located so as not to interfere with future settlement or railway construction, yet meet the needs of the Indians through reserves with water frontage and land for both farming and hunting:

> …the Reserves should be selected in such manner as not to interfere with the probable requirements of future [illegible] settlement, or of land for railway purposes…
>
> …
>
> If the Minister approve, it might be suggested to the Commissioner that in setting apart any Reserves, the interests of the Indians should be considered so far as to give them all the necessary frontage upon a river or lake, to include an abundance of land for farming purposes for the Bands at the same time, the tract should be made to run back and include a fair share also of land which may not be so desirable for farming, but would be valuable for the purposes connected with the Band, such as hunting, etc. [CBD, Vol 1, Doc 12, at 4–6]

[22] The Common Book of Documents included excerpts from the Department of Indian Affairs' (Department) Annual Reports, each of which described its activities and progress in dealing with First Nations over the preceding year. Only one page of the Annual Report for 1880 was produced (CBD, Vol 1, Doc 7). It presented a table detailing the reserves created up to then, together with their locations and the names of the benefiting bands:

> Number of Indians in the North-West Territories and their Whereabouts in 1880

No. of Reserve.	Name of Band.	Location of Reserve.	Tribe.
…	…	…	…
	File Hills		
81	Peepeekisis	File Hills	Cree
82	Okanesse	do	do
83	Star Blanket	do	do
84	Little Black Bear	do	do
	Touchwood Hills		
85	Muscawecum	Touchwood Hills	Cree
86	George Gordon	do	do
87	Day Star	do	do
88	Poor Man	do	do
…	…	…	…
	Muscowpetungs		
76	Piapot	Qu'Appelle Valley	Cree
79	Pasqua	do Lake	do
80	Muscowpetung	do Valley	do

[23] The notes of the various surveyors of reserves in the area were not included in the CBD. One of the few contemporaneous surveyors' records produced was John C. Nelson's lengthy hand-written Memorandum dated January 10, 1882, reporting on the work he had done over the spring, summer and fall of the previous year. The Memorandum commenced with a summary of the geographic locations he had surveyed:

> The seasons work comprised the allotment of reserves in the following localities, viz -
>
> Moose Mountain,
>
> Crooked and Round Lakes,
>
> Nut Lake,
>
> Fishing Lake,
>
> Touchwood Hills,
>
> The Qu'Appelles.
>
> [CBD, Vol 3, Doc 234 at 1]

[24] He then chronicled his arduous journey, starting in Ottawa on May 25, 1881, through to Winnipeg, arriving on June 18, 1881, at Fort Ellis, in what is now the Province of Saskatchewan. (CBD, Vol 3, Doc 234, at 1–3). There, the Indian Agent instructed him to proceed to Moose Mountain, where he noted his interaction with the Chief of the White Bear Band. At the Chief's request, he planted metal posts at the corners of the reserve, which had already been surveyed in 1877 by William Wagner. He noted the importance of sustenance fishing to the Indigenous community:

> There is a lake near the north west-corner, called by the Indians the lake where the fish is, abounding in pike and pickerel. White Bear informed me that he wished very much to have this lake within the boundaries of his reserve as his people depend in a great measure for their support from the fish caught there. [emphasis in original; CBD, Vol 3, Doc 234, at 5–6]

[25] Mr. Nelson tried to reconnoiter the lake, but was unable because flooding of the surrounding forests made access impossible, so he moved on.

[26] He finished surveying reserves in the Moose Mountain area by July 21, 1881, and proceeded to Crooked Lake (CBD, Vol 3, Doc 234, at 7–8). Reserves had already been surveyed for bands located there, but at their request, Mr. Nelson conducted new surveys relocating the bands from the south side of the Valley to the north side. He had also been instructed to reduce the bands' frontages on the Qu'Appelle River, which he did.

[27] While completing this work, Mr. Nelson became aware that the water bordering the Kahkewistahaw Reserve was not suitable for fishing. Accordingly, he reserved a 96-acre piece of land on the north east end of Crooked Lake, referring to it as a "fishing station." He completed the survey of the main Kahkewistahaw Reserve (Indian Reserve No. 72) in August 1881 and of the fishing station in February 1884 (CBD, Vol 3, Doc 239, at 33–36: the survey appears at CBD, Vol 3, Doc 239, at 36). Mr. Nelson wrote about it in his January 1882 Memorandum:

> It will be seen by referring to the map, sketch B, the Band of Ka Kee wistahaw have no fishing ground in front of their reserve like the others at Crooked and Round Lakes. I therefore thought it desirable to reserve for them a small bit of ground on the north side of Crooked Lake for a fishing station. [CBD, Vol 3, Doc 234, at 10]

[28] A Memorandum dated January 21, 1897, from the Deputy Superintendent General of Indian Affairs Hayter Reed to the responsible Minister gave insight into how fishing stations had

come about, and their rationale. Mr. Reed had been involved in the administration of First Nations in the Qu'Appelle Valley area during the 1880s, and was referred to in Mr. Nelson's notes, as will be seen. It appears that the Department had originally identified entire lakes for the exclusive use of bands for fishing. However, in 1881, it changed the practice and developed the device of the fishing station, which set aside a specified tract of reserve land for the exclusive use of one or more designated bands along the edge of a body of water. From the fishing station, the bands could access the water to fish. In the result, bands would no longer have exclusive use of an entire body of water that was not wholly contained within their reserves, but would share the water with other bands or settlers. First Nations would therefore have access to fishing grounds without having to trespass on settled land, and more shoreline would be also available for settlement. This reduced the likelihood of conflict between settlers and bands. It was also in the Department's financial interest that bands be able to continue to sustain themselves by fishing, and although Mr. Reed did not mention it, the right to fish was a term of the Treaty: This account of fishing stations was described as follows:

> …the idea of reserving waters in which the Indians should have the exclusive right to fish appears to have emanated from the department which in 1881 urged upon the Indian Commissioner for Manitoba and the North West Territories the necessity, in view of the fast advancing settlement of the country by whites, of reporting what Lakes & c., should be secured, and Pigeon Lake was one of those recommended.
>
> Eventually the Department of Marine and Fisheries refused to reserve exclusive privileges for the Indians and the policy they adopted was to secure fishing stations to insure the Indians access to the waters, and prevent possibility of question of trespass and other disputes with settlers arising. [CBD, Vol 3, Doc 240]

[29] When he had finished at Crooked Lake, Mr. Nelson proceeded on August 26, 1881, to Nut Lake: "…we left the same day for Nut Lake, going by Touchwood Hills and Fishing Lake. From Touchwood Hills to Fishing Lake most of the trail was rendered almost impossible…" (CBD, Vol 3, Doc 234, at 11). He surveyed a reserve for the Yellow Quill Band along the east shore of Nut Lake, about which he noted (CBD, Vol 3, Doc 234, at 15): "…the lake abounds with fish and fowl." He then surveyed another reserve for the Yellow Quill Band at Fishing Lake (eventually becoming the Fishing Lake Reserve, Indian Reserve No. 89: ref. Exhibit 1, map), about which he noted (CBD, Vol 3, Doc 234, at 16): "…[w]ild fowl abound on Fishing Lake where the Indians have fisheries."

[30] Having completed the survey at Fishing Lake on September 29, 1881, he returned to the Touchwood Hills, where on October 28, 1881, he completed alterations to Day Star's Reserve requested by the Chief. He then visited the George Gordon Reserve to add a piece of farmland to the existing reserve, again at the Band's request.

[31] Shortly after November 2, 1881, Mr. Nelson surveyed a reserve for Standing Buffalo. As he reported, he had visited the location earlier in the summer with the Indian Agent and Chief Standing Buffalo. He observed that the location had "a remarkably beautiful situation" with "clay loam of first class quality" and "an abundance of poplar timber" (CBD, Vol 3, Doc 239, at 51). However, because hay was scarce, he decided to reserve a small meadow further up the river. This would eventually be confirmed in 1889 as Indian Reserve No. 80B (IR 80B), described as "'Hay Grounds' for the use of the Indians of the bands of Chief 'Muscowpeetung' and others" (CBD, Vol 3, Doc 239, at 59). This was the second special purpose station laid out by Mr. Nelson outside of a principal reserve.

[32] Mr. Nelson's final survey in 1881 was for the "Muskowpeetung's Band" (CBD, Vol 3, Doc 234, at 22). He commenced that survey in November 1881, but did not complete it until May 1882 (CBD, Vol 3, Doc 239, at 55–56).

[33] On January 1, 1883, Mr. Nelson handwrote a list of yet unsurveyed reserves:

> List of some unsurveyed Indian Reserves in the North West Territories
>
> Qu'Appelle District
> Little Touchwood Hills
> Muskow-equahn's Band
>
> File Hills
> Little Black
> Bear
> Star Blanket
> Okanesse
> Peepeekis — Partly surveyed by Mr. Patrick
>
> …
>
> Long or Last Mountain Lake
> A fishing station of 320 acres for Qu'Appelle & Touchwood Indians
>
> Little Touchwood Hills
> Some changes to be made in George Gordon's Reserve [CBD, Vol 3,

Doc 235]

[34] Of particular interest in this list are the geographic identifiers and the proposed fishing station at Long or Last Mountain Lake "for Qu'Appelle and Touchwood Indians."

[35] Mr. Nelson completed the survey of the Muscowpetung Reserve in May 1882. Otherwise, there was no documentary evidence of what else he may have done that year.

[36] Only one page of the Department's Annual Report for 1883 was included in the CBD. That page did not present a table like the one reproduced above from the 1880 Report. However, the bands were grouped in the same way:

> "Pasqua", "Muscoweepeetung" and "Standing Buffalo" near Fort Qu'Appelle, have raised fair crops and have broken a good deal of land this fall.
>
> The File Hills Indians under Little Black Bear, Star Blanket, Okaness and Pee-pee-kee-sis are doing fairly well.
>
> The Touchwood Indians, under Kah-wah-kah-toos, Gordon, Day Star and Muscow-e-quan, are also improving, but not as much as they should considering the assistance they have received and the fine reserve they occupy. The Indians of both the File and Touchwood Hills have opportunities to hunt; a few take advantage of it but the majority are too lazy. Our Agents place no obstacle in the way of their hunting, and are only too glad to see them making a little money by the hunt, with which to purchase clothing.
>
> …
>
> Pi-a-pot has only just settled, and it is difficult to say how his band will prosper… In accordance with my recommendation, the Agency of this Treaty has been moved from Fort Qu'Appelle to Indian Head… [CBD, Vol 1, Doc 16]

[37] The Parties agreed that an archivist-prepared *Guide to Indian Bands and Agencies in Western Canada, 1871-1959* was accurate in respect of the organization of area Indian Agencies during the period in question (CBD, Vol 2, Doc 154, at 105). For example, the *Guide* provided the names of the Agencies that administered Little Black Bear between 1874 and 1959 as follows:

> **AGENCIES:** 1874-1884 Qu'Appelle
>
> 1885-1899 File Hills
>
> 1900-1914 Qu'Appelle
>
> 1915-1948 File Hills
>
> 1949-1959 File Hills-Qu'Appelle [emphasis in original]

[38] In 1883 and 1884, Chief Piapot and his Band became a major concern for area officials. Chief Piapot was very discontented with the terms of the Treaty, the location of a reserve for his people, the amount of land his people were to receive, and the nature and quality of food being provided to the Band while it adjusted to agricultural life on a reserve. He claimed that government-provided food was killing his people (CBD, Vol 1, Doc 15). By letter dated May 27, 1884, Indian Commissioner A. J. Irvine reported leading a detachment of 50 men and one gun to prevent alarm spreading amongst settlers as a result of Chief Piapot and his armed followers moving about the area. Although the Chief attempted to elude police, he was eventually located and persuaded to meet with Assistant Indian Commissioner Hayter Reed the next day in Qu'Appelle. Chief Piapot complained that Mr. Reed had not delivered on promises of better food for sick Band members, new clothing and other matters. Mr. Reed ultimately persuaded the Chief to return to his Reserve. Mr. Irvine also reported Chief Piapot's discontent with his allotted Reserve, and his desire for another location:

> Pie-a-pot begged me to use my influence towards procuring him a reserve at a place called the "Last Mountain Lake" near the Qu'Appelle Lakes, saying at the time that, that was the place he had wanted for his reserve, at the time he took the Treaty. [CBD, Vol 1, Doc 18; CBD, Vol 3, Doc 236]

[39] On June 5, 1884, Surveyor Nelson reported that he had visited Long or Last Mountain Lake to set aside a fishing station "for the Touchwood Hills and Qu'Appelle Valley Indians" (CBD, Vol 1, Docs 19–20). This was the intended fishing station he had described as yet to be surveyed in his Memorandum of January 1, 1883 (see paragraph 33 above). Mr. Nelson identified the location he intended for the fishing station, but did not survey it at that time. He observed that it was a place where the Indians habitually camped to fish, and there were even a few winter fishing houses:

> I have the honor to report that I visited Long or Last Mountain Lake for the purpose of setting aside certain fishing stations for the Touchwood Hills and Qu'Appelle Valley Indians.
>
> After a careful examination of the various places along the shore of the lake where the Indians have been in the habit of camping during the fishing season I am of the opinion that these fishing stations should be reserved at the mouth of the Little Arm River - a bay or arm of the Lake above mentioned.
>
> Here they have erected several small houses to live in during the winter. [CBD, Vol 1, Doc 19]

[40] On June 11, 1884, Mr. Nelson reported meeting with Chief Piapot, who was now asking

for a reserve right next to Muscowpetung, on the west side. The location would also border on the Qu'Appelle River. Mr. Nelson explained the difficulties in accommodating the request and did not offer great hope, although in his letter to the Department, he agreed it was a good location, and he recommended finding a way to do it. As an alternative, together with Indian Agent McDonald, Mr. Nelson proposed a reserve on the east side of Last Mountain Lake. This was the area in which the Chief had first expressed an interest. They accompanied the Chief to the area, but as Nelson reported, Chief Piapot did not consider it a good location because it lacked timber, running water and good fishing:

> Colonel McDonald suggested to Piapot that he might accept the reserve on the east side of Long or Last Mountain Lake, but the latter did not consider it a suitable place owing to the scarcity of timber and the lack of running water, as well as fishing.
>
> Chief Piapot subsequently said that he was desirous of securing a reserve in which there was a river, plenty of fish, and a good supply of timber, and that if the land adjoining the reserve of Chief Muscowpetung's Band, already spoken of, was not available, he would be satisfied to take a reserve on the South Saskatchewan River… [CBD, Vol 3, Doc 237]

[41] The Department's Annual Report for 1885 (CBD, Vol 1, Doc 28, at 2–3) described the organization of its Agencies in the District of Assiniboia and Western Manitoba. Assiniboia was administered by the Birtle Agency. Western Manitoba was administered by the Indian Head Agency, which included the Bands involved in this Claim plus ten other First Nations, with a combined population of around 3,940. From other correspondence of the same year, the Parties agreed that this Agency organization remained in place until at least mid-August 1885. The Report stated:

> The Indian bands and reserves in these parts of the Territories were, until quite recently, under the supervision of two agents, being distributed in the following manner: -
>
> *Indian Head Agency*.

			Souls
Day Star's band, Touchwood Hills			113
Mus-cow-e-quahn'a band, Touchwood Hills			283
Tah-we-ke-ei-qua-pe (formerly Ka-wa-ka-too's) band, Touchwood Hills			170
George Gordon's	band	do do	202
…	…	…	…
Little Black Bear's	do	File Hills	117
Star Blanket's	do	do	89

Pa-pee-kee-sis’	do	do	124
Okanese’s	do	do	83
…	…	…	…
Pi-a-pot’s	do	Qu’Appelle	394
Mus-cow-pe-tung’s	do	do	212
Pasquah’s	do	do	257
Standing Buffalo’s	do	do	250

[42] There was only one Indian Agent to administer the needs of over 20 First Nations with a population of 3,938. As observed in other correspondence, Department resources were thin in these early years and man power in the region was not enough to handle everything.

[43] Surveyor Nelson’s Report of December 5, 1885 appeared in the Department’s 1885 Annual Report (CBD, Vol 1, Doc 28, pages 8–9). He described the work he had done that spring and summer, beginning with consulting with the Chief of the Jack Band (now the Assiniboine First Nation, near Wolseley, Saskatchewan: ref. Exhibit 1, map) about the boundaries of his proposed reserve. As it turned out, the Chief wanted the Reserve that had been set aside for and abandoned by the Piapot Band. Mr. Nelson complied, surveying what would eventually become Indian Reserve No. 76 (CBD, Vol 3, Doc 239, at 49–50).

[44] On June 20, 1885, he moved on to the Qu’Appelle Valley, where he surveyed Piapot’s requested reserve next to Muscowpetung and bordering on the Qu’Appelle River. The Indian Commissioner had accepted Mr. Nelson’s recommendation in that regard. He then proceeded to Long or Last Mountain Lake, where he surveyed “a fishing station for the Touchwood Hills and Qu’Appelle Valley Indians”, completing the survey on June 27, 1885 (CBD, Vol 1, Doc 28, at 8–9).

[45] The Department’s 1885 Annual Report stated that “the Indians are beginning to regard their reserves as their homes, and to keep on them more continuously.” It was also reported that schools had been built “on Little Black Bear’s reserve in the File Hills”, on “Chief Gordon’s reserve”, and on other reserves in the area, including Pasqua. There was also an industrial school “at Qu’Appelle, established in 1884 in the interests of the Indian youth of the territory covered by Treaty No. 4” (CBD, Vol 1, Doc 28, at 5).

[46] The Riel Rebellion took place and was quelled in 1885. The Department’s 1885 Annual

Report addressed the effects in Treaty 4 territory (CBD, Vol 1, Doc 28, at 4). The Government was clearly concerned about the loyalty of the First Nations and their activities in relation to the uprising. The bands were unsettled, and some individual members had participated in violence and were imprisoned as a result. Some were imprisoned unjustly. Government officials took action to assert control and maintain the peace, and sought declarations of loyalty from the chiefs.

[47] The anxieties and distrust raised by the Riel Rebellion translated into further hardship for Indigenous communities. In a letter dated August 16, 1885, Assistant Indian Commissioner Hayter Reed admitted the adoption of what became known as the "pass system", which he admitted he had instituted without statutory justification:

> I am adopting the system of keeping the Indians on their respective Reserves & not allowing any leave them without passes- I know this is hardly supportable by any legal enactment but one must do many things which can only be supported by common sense and by what may be for the general good-I get the Police to send out daily and send any Indians without passes back to their Reserves… [CBD, Vol 3, Doc 210]

[48] Mr. Reed's introduction of the pass system was further explained and directed in a transcribed letter from Acting Deputy Superintendent General R. Sinclair dated June 23, 1892. The content and tone of this communication gives insight into the Government's attitude and the operation of the system:

> With respect to the subject of the letter address[ed] to the Deputy Supt General by the Comptroller of the N.W.M. Police on the 17th instant, enclosing copy of a letter from the Commissioner of the Mounted Police respecting the escorting back of Indians who leave their Reservations without passes, a [Illegible] which has now become an almost daily occurrence, the undersigned has the honor to report that the granting of passes to Indians in the North West permitting them, for certain approved reasons to leave their Reservations, commenced in 1885 when the Department was advised, by letter from the then Indian Commissioner for Manitoba and the N.W. Territories, that at his request the Assistant Commissioner Mr. Hayter Reed had put into writing a number of suggestions with regard to future management of the Indians in the Territories xxxx
>
> Amongst these suggestions which were reduced to writing by the Assistant Indian Commissioner was the following marked No.7:-
>
> > "No rebel Indians should be allowed off the Reserves without a pass signed by an I.D. official. The danger of complications with white men will thus be lessened, and by preserving a knowledge of individual

> movements any inclination to petty depredations may be checked by the facility of apprehending those who commit the first of such offences."
>
> [Marginalia]
>
> "This should be done and insisted upon as far as practicable. It might be thought well another year to legislate in that direction." (sgd) E.D.
>
> In a letter addressed to the Indian Commissioner by the Department on the 28th Oct. of that year, with reference to the granting of passes, the Indian Commissioner was informed that the Supt General was of opinion that if the pass system could be generally introduced with [safety?] it would be in the highest degree desirable, and that with respect to disloyal Bands the system should be strictly carried out as a consequence of their disloyalty, and that it should be introduced as far as practicable amongst the loyal Bands, but no punishment could be inflicted in the case of members of such Bands for [breaking?] bounds, and that should resistance be offered on the [Illegible] of Treaty rights the [obtaining?] of a pass before leaving the Reserve would not be insisted upon as regards loyal Indians.
>
> The form of pass which it was proposed to use was submitted to the Supt General in May 1886 and was approved in the following June, and a number of books of passes were accordingly prepared. [CBD, Vol 3, Doc 214]

[49] An amendment to the *Indian Act*, SC 1880, c 43, also came into force in April 1884 (*Indian Act*, SC 1884, c 27) making it an offence to incite "three or more Indians, non-treaty Indians, or half-breeds apparently acting in concert…[t]o make any request or demand of any agent or servant of the Government in a riotous, routous, disorderly or threatening manner, or in a manner calculated to cause a breach of the peace;…or [to] do an act calculated to cause a breach of the peace" (section 1). Breach could result in imprisonment of up to two years, with or without hard labour. It also made "the sale, gift or other disposal, to any Indian…in the North West Territories...of any fixed ammunition or ball cartridge" an offence (section 2). The amendment further made it an offence for Indians to engage in or assist in the celebration of a "Potlach" or the dance known as "Tamanawas" (section 3).

[50] Counsel for Little Black Bear advised the Tribunal that the Band had not been permitted to have a chief for 60 years following the Riel Rebellion. Although no documentation was offered in support of this statement, no other Party took issue.

[51] The 1887 Department of Indian Affairs Annual Report described the bands and their reserves according to administrative agency and location (CBD, Vol 1, Doc 29, at 3–4):

No. of Reserve.	Name of Band.	Location of Reserve.	Tribe.
…	…	…	…
	File Hills Agency.		
81	Pee-pee-kisis	File Hills	Cree
82	Okanesse	do	do
83	Star Blanket	do	do
84	Little Black Bear	do	do
	Touchwood Hills Agency.		
85	Mus-cow-equahn	Touchwood Hills	Cree
86	Geo. Gordon	do	do
87	Day Star	do	do
88	Kah wah-kan-toose	do	do
89	Yellow Quill	Fishing Lake	do
90	Do	Nut Lake	do
	Mus-cow-pe-tungs Agency.		
75	Pia-pot	Qu'Appelle Valley	Cree
79	Pas-quah	do Lake	do
80	Mus-cow-pe-tungs	do Valley	do

[52] It was not until May 17, 1889, that the reserves were formally approved and allotted by PC 1151 (CBD, Vol 3, Doc 239). Eighty-four reserves, two fishing stations, one hay ground and two timber limits were thus approved in omnibus fashion. The introductory wording to PC 1151 stated (at page 3):

> …[the]plans of the various Reserves of Land, as well as descriptions of the same, which have from time to time been allotted to, and have been set apart for, the benefit of the hereinafter mentioned Bands of Indians who were interested in those portions of... the North-West Territories covered by Treaties 4…, the boundaries of said Reserves having been defined by survey, as shown…, and recommending that the Reserves thus defined and described hereafter under the names of the Chiefs of the various Bands or otherwise be confirmed… [emphasis added]

[53] The Parties agree that IR 80A was a properly constituted "reserve" under the *Indian Act*. PC 1151 approved the reserves of all of the Claimants to this sub-phase, including IR 80A (CBD, Vol 3, Doc 239, at 57–58).

[54] A Memorandum appeared at page 7 of PC 1151 under the name of John C. Nelson, who was described as "[i]n charge of Indian Reserve Surveys" (CBD, Vol 3, Doc 239, at 7). Copies of the plans of survey for all of the approved reserves were reproduced in PC 1151. The name of the surveyor of each reserve appeared in the lower right-hand corner of each plan of survey. Mr. Nelson's name and signature also appeared in the lower left-hand corner of each survey, indicating that he had checked and approved it.

[55] An overview of the survey details for the Claimants' Reserves appear in table form below:

The Claimants' Reserves (not including IR 80A)

a. Claimants Undisputed as "Touchwood Hills"

Band	**Year of Survey and Surveyor**	**IR No.**	**Page No. of CBD, Vol 3, Doc 239**
Day Star	1876 (Wagner) 1881 (Nelson) 1888 (Nelson)	IR 87	73–75
George Gordon	1883 (Ponton)	IR 86	71–72
Muskowekwan	1884 (Nelson)	IR 85	69–70
Kawacatoose (Poorman)	1876 (Wagner) 1889 (Nelson)	IR 88	76–77

b. Claimants Undisputed as "Qu'Appelle Valley Indians"

Band	**Year of Survey and Surveyor**	**IR No.**	**Page No. of CBD, Vol 3, Doc 239**
Pasqua	1876 (Wagner)	IR 79	53–54
Muscowpetung	1881 (Nelson) 1882 (Nelson)	IR 80	55–56
Muscowpetung	1881 (Nelson)	IR 80B	59–60

Piapot	1885 (Nelson)	IR 75	47–48

c. Claimants Disputed as "Touchwood Hills" or "Qu'Appelle Valley Indians" (i.e. File Hills Bands and Standing Buffalo)

Band	**Year of Survey and Surveyor**	**IR No.**	**Page No. of CBD, Vol 3, Doc 239**
Star Blanket	1880 (Patrick)	IR 83	65–66
Little Black Bear	1880 (Patrick) 1884 (Nelson)	IR 84	67–68
Standing Buffalo	1881 (Nelson)	IR 78	51–52
Standing Buffalo	1881 (Nelson)	IR 80B	59–60
Peepeekisis	1880 (Patrick) 1887 (Nelson)	IR 81	61–62

[56] PC 1151 dealt with the approved reserves in numerical order. The page preceding each plan of survey contained a written description of its reserve, including survey details, size, a metes and bounds description and a short narrative of physical characteristics.

[57] With respect to the reserves of Bands not disputed as being Qu'Appelle Indians, all of those reserves bordered on the Qu'Appelle River or Qu'Appelle Lake (also known as Fishing Lake), and this was duly noted in the survey descriptions. However, there was no mention of water quality or fishing except in the case of the Pasqua Reserve where it was noted: "[f]ish and wild-fowl abound in the lake…" (CBD, Vol 3, Doc 239, at 53).

[58] The File Hills Bands' survey descriptions also talked about water. The description of the Star Blanket Reserve noted (CBD, Vol 3, Doc 239, at 65): "Lakes and hay swamps are numerous." The description of the Little Black Bear Reserve stated (CBD, Vol 3, Doc 239, at 67): "Swamps, ponds and lakes are numerous." The description of the Peepeekisis Reserve observed (CBD, Vol 3, Doc 239, at 61): "There are numerous lakes and small creeks."

[59] Standing Buffalo's Reserve was noted as being "on the north side of the Qu'Appelle or Fishing Lakes on the east side of Jumping Creek" (CBD, Vol 3, Doc 239, at 51).

2. Post-Creation to Surrender of IR 80A

[60] While the Parties agree that IR 80A was a properly constituted "reserve" within the meaning of the *Indian Act*, it has been suggested that that was not so clear to the Department when it started to consider disposing of the Reserve in the early 1900s. Because PC 1151 had described it as a "fishing station" rather than a "reserve", and because it had not been named after a specific chief or band, the Department was concerned about the process of disposing of it.

[61] In a letter to the Minister dated November 20, 1906, the Department's Acting Deputy Superintendent General reported that a legal opinion from the Land & Timber Branch (based on PC 1151's introductory wording; see paragraph 52 above) indicated the Government's intention had been to dedicate IR 80A as a reserve to bring it under the operation of the *Indian Act*. That being so, "before any portion of this reserve could be sold or leased it would have to be surrendered by the Indians in accordance with the provisions of the Indian Act" (CBD, Vol 1, Doc 41). The Acting Deputy Superintendent General also reported that he had enquired of Inspector of Indian Reserves W. M. Graham, who had reported that three families lived and fished there all the time, and that members of the Piapot and Muscowpetung Bands fished there occasionally (CBD, Vol 1, Doc 41, at 2; CBD, Vol 1, Doc 40). The Index to the CBD reveals that Mr. Graham had also been an Indian Agent in the area during the early 1900s. The Land & Timber Branch's legal opinion was confirmed by the Deputy Minister of Justice in January 1907 (CBD, Vol 1, Doc 42). The Minister of Interior of Canada accepted the opinion although he did not think it "equitable" (CBD, Vol 1, Doc 43).

[62] Now the question turned to which "Indians" should participate in a surrender process as PC 1151 did not specifically name the bands entitled to IR 80A.

[63] In a letter dated May 4, 1907, Inspector of Indian Agencies W. M. Graham wrote to the Secretary of the Department of Indian Affairs acknowledging the instruction to seek surrender of IR 80A. Mr. Graham's question was whether it would be necessary to take surrenders from the Piapot, Muscowpetung, Pasqua, Sioux (i.e. Standing Buffalo), Gordon, Muskowekwan, Day Star and Poor Man (i.e. Kawacatoose) Bands—which he opined would be "qui[t]e a task" (CBD, Vol 1, Docs 45–46). Alternatively, he could seek surrender from the actual residents on IR 80A, which would be "an easy matter." Mr. Graham noted that none of the Bands just mentioned

made use of the Reserve as a fishing station, except for four or five members of the Muscowpetung Band, who had resided there continuously for the last seven or eight years and considered themselves the sole owners. He concluded: "I do not think [the] Touchwood and Qu'Appelle Indians lay claim to it."

[64] On September 2, 1913, Indian Agents W. Murison and H. Nichol wrote to the Secretary that "the four bands belonging to the Touchwood Agency and the three bands belonging to the Qu'Appelle Agency who comprise the Indians interested in this reserve…have all been met in Council and they have signified their consent to a surrender of the whole of this reserve" (emphasis added; CBD, Vol 1, Doc 61). The Secretary's response asked for clarification of which bands were interested as there were five bands in the Touchwood Hills Agency (not four) and four in the Qu'Appelle Agency (not three) (CBD, Vol 1, Doc 63). In this exchange of correspondence, the bands were identified by which Agency administered them.

[65] Touchwood Hills Agency Indian Agent Murison responded that the Muskowekwan, Gordon, Day Star and Poorman Bands claimed an interest. He said, however, that the "old Indians" of those Bands took the position that the Piapot Band had no claim as its reserve was not in the Touchwood Hills at the time of taking treaty. Also, the Pasqua and Muscowpetung Bands had fishing privileges at Qu'Appelle Lake and River, the implication being that they should not be entitled either. Finally, while the Peepeekisis Band was originally a Touchwood Hills Band that was to have had a reserve there, it ultimately took a reserve in the File Hills and therefore should have no interest either. The Indian Agent suggested that departmental records could clarify the matter (CBD, Vol 1, Docs 64–65). The CBD did not produce any departmental reply.

[66] On May 15, 1914, Inspector of Indian Agencies W. M. Graham weighed in again with an opinion that the Indians of the Touchwood Hills Agency and Qu'Appelle Valley included "all the Indians of the Qu'Appelle, File Hills and Crooked Lake Agencies" (CBD, Vol 1, Doc 68). Mr. Graham spoke in terms of Agencies rather than geographic locations. Up to this point, there was no specific mention of Standing Buffalo being entitled. At the time, Standing Buffalo was administered by the Qu'Appelle Agency.

[67] Ultimately, surrenders for the sale of IR 80A were taken, confirmed and approved on July

20, 1918 by PC 1815 (CBD, Vol 1, Doc 74). That Order in Council specified that the surrenders were from the Muscowpetung, Pasqua and Piapot Bands of Indians of the Qu'Appelle *Agency*, and by the Poorman, Day Star, George Gordon and Muskowekwan Bands of the Touchwood Hills *Agency*. The underlying surrender documents were purportedly signed by the chiefs of the seven Bands, together with supporting affidavits of the Indian Agent (CBD, Vol 1, Docs 70, 75–77). The surrender documents did not list the individual bands but framed the surrender as being from "[t]he Touchwood Hills and Qu'Appelle Valley Indians interested in Indian Reserve No. 80 A."

[68] The Department offered the land for sale. The question then turned to entitlement to share in the proceeds.

[69] With no reason being stated in any document of record, Standing Buffalo was not included as an entitled band. A note simply dated "1914" presented a calculation of the amounts each of the seven Bands would receive from the sale of 1,480 acres worth $74,000. Standing Buffalo's name had been included in the list as an eighth benefiting band, but the accompanying calculation had been stroked out without explanation (CBD, Vol 1, Doc 66).

3. Subsequent to Surrender of IR 80A

[70] With the surrender complete, IR 80A was subdivided into lots, a number of which were sold. Attention turned to finalization of distribution of proceeds. On March 12, 1924, W. M. Graham (now Indian Commissioner) wrote to the Department's Deputy Secretary reporting his calculation of the proper distribution among the seven Bands and requesting a cheque. He did not question the propriety of the surrender in terms of which Bands were entitled (CBD, Vol 1, Doc 80). However, a few months later, in a June 30, 1924, letter to the Deputy Superintendent General, Mr. Graham returned to the position he had advanced in May 1914 (CBD, Vol 1, Doc 96; CBD, Vol 3, Doc 241). He reported that the File Hill Indians, as well as "the old Indians" at Touchwood Hills, claimed that the File Hills Bands had an interest in IR 80A, and that the Qu'Appelle Valley Bands, whose reserves bordered on water, did not:

> The old Indians at Touchwood claimed that when the Fishing Station was set aside, it was for those bands who had no fishing lakes in close proximity to their reserves, and they name Poorman's, Day Star's, Muscowequan's, Gordon's, File Hills Bands and Muscowpetungs, as the bands for whom the station at Last

> Mountain Lake was set aside. They claim that Pasqua's were not entitled to participate, inasmuch as they had a fishing lake which forms a part of the line of the north boundary of their reserve, and the Piapot Band did not settle on their reserve until a later period. This is a question which I think should be gone into very carefully, as the File Hills Indians feel that they are being deprived of monies to which they are justly entitled, and it would appear reasonable to me that they should be included as Qu'Appelle Valley Indians.
>
> No doubt the Department will have a record of the original agreement… [CBD, Vol 1, Doc 96; CBD, Vol 3, Doc 241]

[71] This seemed to touch off a debate within the Department. Deputy Superintendent General D. C. Scott responded on July 19, 1924, opining that while "the File Hills Indians would geographically be included under the term, Qu'Appelle Valley Indians", so could the Assiniboine and Crooked Lake Bands (CBD, Vol 1, Docs 82, 85). Therefore, the term must have been a "misnomer." He noted that at the time IR 80A was selected, Department files referred to the reserves of the Star Blanket, Little Black Bear, Okanese and Peepeekisis Bands as the File Hills Reserves, and the Day Star, Kawacatoose, Muskowekwan and George Gordon Bands as the Touchwood Hills Reserves. The reserves near Fort Qu'Appelle were known as the Qu'Appelle Reserves (excepting Standing Buffalo's Indian Reserve No. 78, about which Mr. Scott said "the Indians of which are American Sioux"). Mr. Scott reasoned that had it been the Department's intent to benefit the File Hills Bands, it would have been specified. While the Pasqua Band may not have been intended to benefit at the time, departmental correspondence did not give that indication so he did not now feel justified excluding it:

> At the time of selection of Indian reserve No.80-A, Indian reserves Nos.81,82,83 and 84, were as definitely known and referred to by the Department as the File Hills reserves, as reserves Nos.85,86,87 and 88 were known and referred to as Touchwood Hills reserves. It is apparent, therefore, that if the Indians of the File Hills reserves were intended to be included, they would have been as specifically mentioned as were those of Touchwood Hills.
>
> The reserves near Fort Qu'Appelle were known and referred to by the Department as the Qu'Appelle reserves and these, with the exception of No.78, the Indians of which are American Sioux, are entitled to share with the Touchwood Hills Indians in the proceeds from sale of Indian reserve No.80-A. It is just possible that it was not intended to provide fishing reserve at 80-A for the Pasqua Indians but as the correspondence at the time does not show that the Indians of that reserve were not included, I do not feel justified in ruling that they should not share in the proceeds.

[72] In a letter dated July 12, 1924, Chief Surveyor D. Robertson agreed with Mr. Scott's analysis (CBD, Vol 1, Doc 84), adding that the File Hills Bands should probably have been

provided with a fishing station, although at Fishing Lake:

> From their location it would certainly appear that the Indians of the File Hills reserve should have been provided with a fishing station but if this were being done the obvious site would appear to be on Fishing Lake. The most easterly group of reserves in the Qu'Appelle Valley I think may quite safely be eliminated on account of the fact that three of them border on Crooked and Round Lakes and the Indians of the fourth, namely Kakewistahaw, were given a special reserve on Crooked Lake. The Assi[ni]boine reserve would in my opinion be just as much entitled to share as the reserves in the File Hills.
>
> One argument against the claim of the File Hills Indians is that those reserves in the File Hills were designated as File Hills reserves in the reports of the Department and those in the Touchwood Hills were designated as Touchwood Hills reserves, and it seems probable that if the official who selected the location of the fishing reserve at Last Mountain Lake intended to include the File Hills reserves, he would have specifically mentioned them as well as Touchwood Hills. Personally I am inclined to think that the Indians intended to be covered by the term Qu'Appelle or Qu'Appelle Valley Indians were the Indians of those reserves which were known in the Department's reports and correspondence of that date as Qu'Appelle reserves, namely: Piapot, Muscowpetung, Pasqua and Standing Buffalo and it is just possible that it was even intended not to include the Pasqua and Standing Buffalo as they bordered on the Fishing Lakes.

[73] Standing Buffalo's exclusion as a member of the "Qu'Appelle Valley Indians" appears to have come from the belief that its members were "American Sioux." This was stated repeatedly in field reports to the Superintendent General or Deputy Superintendent of Indian Affairs. Such reports were probably made annually, although only portions were produced over the years. For example, they stated:

i. According to W. M. Graham, Indian Agent, on August 28, 1901 (CBD, Vol 1, Doc 33, at 4): "These Indians are known as the Sioux, or Dakotahs, and were formerly resident in Minnesota, in the United States."

ii. According to W. M. Graham, Indian Agent, on August 14, 1902 (CBD, Vol 1, Doc 34, at 4; identical comment as above (CBD, Vol 1, Doc 34 at page 4).

iii. According to W. M. Graham, Inspector of Indian Agencies, on August 1, 1905 (CBD, Vol 1, Doc 38, at 4): "It is very difficult to get an exact census, as many of these Indians are going backwards and forwards between the United States and Canada and are practically residents of both countries."

iv. According to W. M. Gordon, Indian Agent, on July 23, 1906 (CBD, Vol 1, Doc 39, at 2): "The Indians of this reserve are Sioux or Dakotas, and formerly resided in the United States, in fact many of them go backwards and forwards between this reserve and the United States."

v. According to W. M. Gordon, Indian Agent, on April 30, 1908 (CBD, Vol 1, Doc 49, at 2): "These Indians are Sioux or Dakotas, and formerly resided in the United States and do not draw treaty here."

[74] By contrast, in all of the Department's Annual Reports during the period in question, Standing Buffalo drew praise as an industrious, productive people, working their own small farms as well as labouring for nearby settlers who appreciated their work. They were described as healthy and clean. They took good care of their homes, animals and implements. They were practicing Roman Catholics and their children went to school.

[75] The question of entitlement to IR 80A continued. By letter dated May 19, 1931, the Touchwood Hills Indian Agent asked the Department Secretary which bands "owned" IR 80A because his bands "are continually talking about who owns it" and "they all have different ideas" (CBD, Vol 1, Doc 92). On May 28, 1931, the Secretary replied with a brief history identifying the seven Bands of the Kawacatoose Group as the "Indians of the Touchwood Hills and the Qu'Appelle or Qu'Appelle Valley" who were thus entitled to IR 80A and therefore also proper participants to the surrender (CBD, Vol 1, Doc 93).

[76] On August 15, 1932, the Touchwood Hills Indian Agent wrote again that the Muskowekwan Band claimed the entire Reserve as its own, and suggested that the "Qu'Appelle Valley Indians" wished any money they had received to be refunded to the Muskowekwan Band (CBD, Vol 1, Doc 94).

[77] Regional Supervisor of Indian Agencies, J. P. B. Ostrander raised the question again in a letter to the Department dated March 14, 1949. The Muskowekwan and Kawacatoose Bands of the Touchwood Hills Agency were claiming that at the time of Treaty 4, their respective Chiefs were told that the fishing station had been allotted to them. They also claimed that the bands bordering the Qu'Appelle Lake or River were not entitled because they were on fishing water.

Assuming that the Reserve had been set aside for certain bands, Mr. Ostrander asked the Department to review its records and inform him so that he could clear up any confusion (CBD, Vol 1, Doc 111). On April 2, 1949, Superintendent D. J. Allan responded that a search of the Department's files showed that IR 80A had been set aside for the use of the seven Bands that had actually surrendered it, and that no band had been allotted a particular parcel on the Reserve (CBD, Vol 1, Doc 112).

[78] Questions about entitlement continued to come from the First Nations. The following are documented examples:

i. March 9, 1925 (CBD, Vol 1, Doc 91): In a handwritten report entitled "Buffalo Bow's Statement" there was a meeting of chiefs in relation to Long Lake where it was stated that "as long as the sun shines – this piece of land will belong to the Indians that were represented by their chiefs" and that "as long as the earth lasts – there would be a road for them to go to Fishing Lake." The report indicated only that "[t]he four Chiefs – Peepeekisis, Okanesse, S.B. & Little Black Bear were present."

ii. August 29, 1938 (CBD, Vol 1, Doc 103): The George Gordon, Poorman, Day Star and Muskowekwan Bands claimed that "the Hon. Mr. Laird" had promised them a fishing station, which they thought to be IR 80A. They also claimed that no other bands had an interest in it, particularly the Qu'Appelle Indians who were located on a lake. Some Poorman Band members claimed they were present to hear the promise. The Bands also claimed that the Qu'Appelle Valley Bands had publicly admitted to having no interest in IR 80A. They asked the Department to find a copy of the agreement giving them the interest. If there was a response, it was not produced.

iii. February 20, 1953 (CBD, Vol 1, Doc 121): The Muskowekwan Band refused to pass a resolution permitting the Department to negotiate a lease of unsold IR 80A land, claiming that the Band had been solely entitled, to the exclusion of all other bands. The Band asked how other bands became interested. The Poorman Band also refused to consider a resolution giving the Department permission to

negotiate because the 1918 surrender should have been sufficient. If there was a response, it was not produced.

iv. July 15, 1953 (CBD, Vol 1, Docs 122, 124): The Peepeekisis Band asked for information about its interest in IR 80A, which it asserted on the basis that it had been part of the Qu'Appelle Agency when the fishing reserve had been set aside, and it was only later that the File Hills Agency had been created. The Department responded that the seven Bands that had surrendered IR 80A were the only ones interested.

v. February 9, 1954 (CBD, Vol 1, Doc 126): The Piapot Band leadership complained to the Minister, alleging irregularities in the surrender of IR 80A and asking for a "thorough investigation" into it. The Band asserted that it had requested a fishing station for itself and 6 other bands, resulting in Indian Commissioner Hayter Reed allotting IR 80A to them. It also stated that the Pasqua Band had no interest because it was situated on a lake. The Minister responded on March 15, 1954 (CBD, Vol 1, Doc 133), advising that all of the surrender documents had not yet been located but that IR 80A had been set aside for bands located in the Qu'Appelle and Touchwood Hills areas, which did not include File Hills Bands because they were not situated at those named locations. However, the Pasqua Band was situated at the Qu'Appelle location. The Band wrote again (letter dated May 21, 1954; CBD, Vol 1, Doc 129), stating that portions of IR 80A had been set aside for each of the Touchwood Hills Bands, the locations of which were then described. Allegations of irregularity in the surrender were repeated, as well as the Pasqua Band's having no interest. The Band stated that it would not accept surrender documents as final.

vi. May 2, 1965 (departmental date stamp; CBD, Vol 1, Doc 6): Chief Day Star asked whether the Touchwood Hills Bands alone owned IR 80A, or whether other bands had a share. He also wanted to know if the land had been sold or leased.

C. Oral History

1. Introduction

[79] The Tribunal received oral evidence from fourteen witnesses over a period of five days. All were highly respected Elders (or "life speakers", as Noel Starblanket preferred to be called; Hearing Transcript, July 24, 2017, at 72) in their respective communities. Most had served as chiefs, councillors or spiritual leaders. Many had been active in Indigenous political organizations at regional, provincial or national levels. Because of their lineage and leadership roles, all were steeped in the history, culture and society of their respective communities. They were also individually rich in life experience. A number had pursued post-secondary educations leading to modern career paths, or had achieved significant positions of employment, in spite of very difficult beginnings.

[80] The names, First Nation membership, ages at the time of testifying and appearance dates of the witnesses are as follows:

Mervin Frank Cyr	George Gordon	77 years	June 20, 2016
Michael McNab	George Gordon	79 years	June 20, 2016
Lindsay Cyr	Pasqua	63 years	June 20, 2016
Robert Bellegarde	Little Black Bear	61 years	June 21, 2016
Vernon Bellegarde	Little Black Bear	75 years	June 21, 2016
John Bellegarde	Little Black Bear	60 years	June 21, 2016
Margaret Starblanket	Star Blanket	75 years	June 21, 2016
Michael Thomas Pinay	Peepeekisis	69 years	June 22, 2016
Elwood John Pinay	Peepeekisis	70 years	June 22, 2016
Douglas Grant Starr	Star Blanket	69 years	June 22, 2016
Irvin Buffalo	Day Star	80 years	June 22, 2016
Vincent Ryder	Standing Buffalo	85 years	June 23, 2016
Wayne Goodwill	Standing Buffalo	75 years	June 23, 2016

Noel Starblanket	Star Blanket	69 years	July 24, 2017

[81] All of the witnesses explained the sources of their oral history, which had clearly been a significant cultural feature of their upbringing. None of the oral history was challenged as to admissibility, and the Tribunal was also satisfied in that regard.

[82] A brief passage of testimony from life speaker Noel Starblanket offered some insight into the serious nature and place of oral history in the cultures of these First Nations:

> Wapii-Moostoosis was a very spiritual and powerfully political articulate man. He thought about us at -- on this very land in 1874. My great-grandfather, Ahchuchwahauhatohapit, was also a very spiritual man, but he was more political than my great-great-grandfather. And my grandfather, Day Hawk, Kîsikâw-Kêhkêhk (ph) was his name, Allan Starblanket. He was all spiritual, totally spiritual, and that's -- he was non-political and that's where I learned. And my father was the other way. He was totally political, less spiritual, so I learned from him too. So I have all the gatherings -- teachings of all those old people, which have been handed down over the years and I hope that I've collected them enough -- well enough in my memory that I can speak about them now to a tribunal like this and that you will know that these come from respected venerable old people who -- who spoke those truths in order that they might be heard even at this day… [Hearing Transcript, July 24, 2017, at 34–35; Note: Wapii-Moostoosis was a Chief Signatory to Treaty 4]

2. Indigenous Perspectives

[83] Oral history was the most important source of Indigenous perspectives in this case. The witnesses from the four File Hills Bands and Standing Buffalo provided most of the oral history because it was central to their establishing the traditional role and importance of IR 80A in their history. These perspectives were also important components of the Bands' views of their relationships and understandings with the Canadian government. Kawacatoose Group Elders did not focus greatly on IR 80A's place in their traditions because their Bands' entitlement to the fishing station was not in question. However, their traditions and cultures were clearly very similar and Elder witnesses from the other bands referred to them in that context. In the case of Standing Buffalo, there were some distinct differences of perspective, as will be discussed.

[84] The Cree/Saulteaux Bands made clear that they did not traditionally distinguish themselves by boundaries or as separate communities. As Robert Bellegarde testified, "Cree" was not part of the vocabulary. The File Hills people saw themselves as related to each other and without geographic boundaries or divisions such as were established once reserves and separate

First Nation identifications were instituted by the Government. As Elder Bellegarde stated, they saw themselves as "Nēhiyaw"; and, everything they did was "Nēhiyaw"; and, the territory was "Nēhiyaw." The people grew up knowing their culture, language and ceremonies, all of which was Nēhiyaw (Robert Bellegarde—Hearing Transcript, June 21, 2016, at 20–24; Noel Starblanket—Hearing Transcript, July 24, 2017, at 29, 82, and 99.

[85] The Claimants had been nomadic hunters and gatherers, who had moved about the central plains of North America for hundreds of years or longer. The Cree/Saulteaux Claimants followed a traditional migratory path reaching from southern Montana and southwestern Saskatchewan (in the area of the Cypress Hills), up to Lake Diefenbaker in central Saskatchewan (approximately 250 kilometers northwest of Last Mountain or Long Lake (Noel Starblanket—Hearing Transcript, July 24, 2017, at 22–23)). In the case of the Standing Buffalo Dakota/Sioux people, their migratory range was somewhat broader, extending from around Niagara Falls, Sault Ste. Marie and Sioux Lookout in the east, to the Canadian Rockies in the west, and Montana and the Black Hills of South Dakota and Wyoming in the south (Wayne Goodwill—Hearing Transcript, June 23, 2016, at 65). In order to sustain themselves, these nomadic peoples hunted buffalo and other large game when the buffalo went into decline. They would camp along the way, hunting, fishing, and picking berries and medicines. They traveled in small groups that would traditionally meet at certain locations to participate in ceremony, socialize and trade.

[86] The "Creator" and creation stories were engrained, unquestioned and formative of a world view very different from that of the European newcomers (Robert Bellegarde—Hearing Transcript, June 21, 2016, at 22). Ceremony was very important, and every ceremony began with an acknowledgement of thanks to the "Creator." This reinforced a world view of treating the land and nature with respect. As Noel Starblanket testified, Indigenous people of the area shared the land and waters. They fished, hunted and gathered to sustain themselves, and they self-regulated their use of the land. They did not have or need permits or regulations as found in British or Canadian law, but relied on what he described as "God-given -- God-driven regulation" (Hearing Transcript, July 24, 2017, at 38–39).

[87] Long Lake had been a natural stopping point along the migratory routes of the various Indigenous groups, going both north and south (Vernon Bellegarde—Hearing Transcript, June

21, 2016, at 69). Kinookimaw (the Indigenous name for IR 80A) was one of those spots, and had been used to rest and feed the horses, to camp for a day or a few weeks, to fish, hunt, trap, gather, meet with other migratory groups and to socialize and trade. Elder Lindsay Cyr observed that Indigenous people had probably once lived on or near Kinookimaw, as borne out by the presence of a number of teepee rings in the area (Hearing Transcript, June 20, 2016, at 67–68, 72–73, 84). He had not become aware, however, that it had been a likely stopping point for "a lot of [bands]" until recent railway environmental studies had reported the discovery of artifacts near (but not on) Kinookimaw (Hearing Transcript, June 20, 2016, at 86–87).

3. Standing Buffalo's Perspective

[88] Standing Buffalo's perspective was different in a number of ways. It had not signed Treaty 4, or any treaty, and of course it was not part of the Cree/Saulteaux Nation that formed the bulk of the Indigenous population in the area at the time (Wayne Goodwill—Hearing Transcript, June 23, 2016, at 100–01). Standing Buffalo's ties were with the Dakota, Nakota and Lakota Sioux of the American plains. This First Nation was part of a 400-year old spiritual and governance body known as the Seven Council Fires, which was broken into sections based on regions. In that association, Standing Buffalo had become known as the "Fish People" or "Fish Eating People" (Wayne Goodwill—Hearing Transcript, June 23, 2016, at 81).

[89] Importantly, as the Bands' witnesses explained in some detail, Standing Buffalo's attachments were Canadian, by virtue of the long-standing alliance with the British Crown, reaching back to the days before the American Revolution. The alliance had begun when the Band's forefathers encountered British ships that they referred to as "floating teepees." By offering gifts, the British communicated that they had come in peace. Soon they were trading, and out of this trade grew a relationship of trust and good faith with obligations and responsibilities on each side. Standing Buffalo referred to the relationship as an "allyship", which became military as well. Standing Buffalo's Elders explained how their people had fought with the British and their Canadian successors in virtually every war since the American Revolution. As proof, they displayed a number of medals, medallions, citations and momentos given to them by the British and Canadian governments. One of the medals had been awarded for Standing Buffalo's support of the British in the American Revolutionary War. The Band had also fought with the British in the War of 1812, receiving a Union Jack in recognition of their

role. In this particular conflict, Standing Buffalo had fought against its own American Sioux relatives. Members of the First Nation had also fought in the two Great Wars and had been recognized with individual medals of service. To commemorate the 200th anniversary of the War of 1812, Standing Buffalo's leaders had been invited to Ottawa, where they had received another medal recognizing their First Nation's service (Vincent Ryder—Hearing Transcript, June 23, 2016, at 34; Wayne Goodwill—Hearing Transcript, June 23, 2016, at 64–74). Post-Confederation, the Band had maintained contact with its American Sioux relatives, including Sitting Bull, but had always remained centred and resident in Canada.

[90] Although it did not sign Treaty 4, Standing Buffalo was nevertheless allotted a reserve in the Qu'Appelle Valley. The witnesses suggested that allyship had played an important role in this. The Band's Chief at the time had traveled to Fort Garry in Manitoba to inspect potential reserve land being offered there. However, he had decided it was unsuitable because it lacked sufficient game to support his people and because it was situated on a flood-plane. He then went to the Qu'Appelle Valley and scouted that area. He had been attracted to the region because it had lakes, woods, game and good agricultural land. He identified and asked for a particular piece of land, and he was accommodated. The Chief believed this land would sustain his people because there was fresh water, nearby pastures for grazing, game, fish and good farm land. The fact that Chief Standing Buffalo had been allowed choices and was able to obtain a prime piece of land was viewed as a measure of the Band's respect on the basis of allyship (Wayne Goodwill—Hearing Transcript, June 23, 2016, at 86–88).

4. Perspectives on Signing of Treaty

[91] The oral history testimony also addressed Indigenous perspectives on the signing of the Treaty, its consequences and subsequent events. Peepeekisis Elder Michael Thomas Pinay stated that in negotiating Treaty 4, Alexander Morris promised (Hearing Transcript, June 22, 2016, at 38–39): "The animals and the plants that are here are yours." Elder Pinay explained that his people took this to mean all living creatures, including animals, birds and fish, and all vegetation needed for food, medicine, transportation, accommodation and warmth: in other words, what the people needed to sustain themselves and to survive according to their accustomed way of life (Hearing Transcript, June 22, 2016, at 38–39, 42–44).

[92] Life speaker Noel Starblanket vividly described his community's perspective of the Treaty and its consequences:

> Any Christian person who believes in their Christianity, regardless of their denomination, will tell you that blessed are the meek for they shall inherit the earth, and that too is part and parcel of the belief system of our people, our Cree people, and specifically the Star Blanket Cree Nation, so that's why I -- I tell you these things because you have to know that we shared this land through treaty with -- as I said this morning, with our white brothers. We didn't give you the land. We didn't sell it to you. We shared it with you because that is our nature, that is our kindness, and that is our generosity, and yet through your own legal systems you took -- took this upon yourselves to wrest the title of this land from us and put it in your own titles… [Hearing Transcript, July 24, 2017, at 18]

[93] Elder Michael Thomas Pinay expressed his disappointment that the promise of police to protect the people became Indian Agents and police controlling them; and, promised schools and teachers became residential schools (Hearing Transcript, June 22, 2016, at 39).

[94] Life speaker Noel Starblanket addressed the modern consequences of the clash of world views, and disappointments flowing from the Treaty and perceived broken promises:

> In the old days when you went to residential school, it was the Christian way or no way, so that's why we were beaten and so today I'm very adamant about these things because I had to come away from that. I had to come out of that because I despised French people. I despised Christians. I despised Catholics. I despised white people. I hated them. I wanted to hurt them back. That's what happened to me in residential school. I had to learn about that. I went to seminars. I read books. I went to ceremonies and all of which culminated in forgiveness. You have to forgive the people that have hurt you and so I have chosen to do that, but I do not forget and that's why I'm here because, yes, I've forgiven non-Indigenous people, but I don' forget. [Hearing Transcript, July 24, 2017, at 35–36]

5. Post-Treaty Use of IR 80A

[95] All of the oral history witnesses testified that the traditional uses and activities relating to Kinookimaw continued after Treaty 4 was signed, and after IR 80A formally became a reserve. This was especially so during the days of transportation by horse and buggy. Witnesses indicated that members of their communities would visit Kinookimaw to camp, rest their horses, fish, hunt, and pick berries, roots and medicines. They would also gather there to participate in ceremonies. As children, many of the witnesses had themselves visited Kinookimaw with grandparents or parents. They spoke of camping in tents for a few days or a few weeks. All of the witnesses were at least 60 years of age, and some considerably older when they testified, so their early

experiences at Kinookimaw took place mostly in the 1920s and 1930s. After the Treaty was signed and the Bands had settled on reserves, their people still made occasional trips to the traditional migratory locations to pursue the usual sustaining activities. The Touchwood Hills and File Hills Bands turned regularly to Kinookimaw for fishing because their reserves were landlocked. Kinookimaw was the closest good fishing lake. There was a general consensus that Long Lake contained an abundance of whitefish, northern pike, pickerel, perch, and even fish eggs during the spawning season.

[96] Elder Michael McNab (of George Gordon) spoke of how they had fished at Kinookimaw, mostly in the fall, so that they could keep fish for the winter. Elder Robert Bellegarde (of Little Black Bear) testified that his family had fished there mostly in the winter, for sustenance. Elder Vernon Bellegarde (of Little Black Bear) described Kinookimaw as a traditional stopping point on the way to or from hunting grounds in the Cypress Hills. He also spoke of sustenance fishing in winter. Elder Michael Thomas Pinay (of Peepeekisis) testified that his people had moved between Long Lake (where IR 80A was located) and the Cypress Hills. He knew the location of his grandfather's summer and winter camps, so there was still activity going on at the traditional locations after IR 80A came into being. It seems that the communities had fished, hunted, etc., at various locations around Long Lake. However, once IR 80A came into being, that was where Elder Pinay's people would stop to hunt, fish, swim and pick berries. They would also visit and trade with other communities that stopped there, including, for example, the Peepeekisis, Cote, Day Star and Nekannet First Nations. Elder Elwood John Pinay (of Peepeekisis) described how his grandparents stayed at Kinookimaw, practicing their traditional activities from April to October. Elder Douglas Grant Starr (of Star Blanket) indicated that his people had also fished at Kinookimaw, staying there a few days or weeks to catch fish, dry them, then pound them into pemmican. He confirmed that he had also camped with his parents at Kinookimaw to participate in pow-wows and ceremonies. Elder Vincent Ryder (of Standing Buffalo) testified that his grandparents had fished at Long Lake all year round, but particularly in the early spring and winter, to catch fish they then shared with their community or sold to farmers if there was enough. He observed that he had not been permitted to fish there as a child because it was considered dangerous for young people, especially as paranormal phenomena were thought to occur there. He said it had become a routine for his people to stop at Kinookimaw because of the days when they traveled regularly to their hunting grounds in the Cypress Hills. Life speaker

Noel Starblanket (of Star Blanket) explained how his people fished, hunted, trapped, gathered, traded and practiced ceremony at Kinookimaw because it was located on their traditional migratory route. While the people had also fished at other lakes, they were particularly attracted to Kinookimaw because it was a gathering place for many other First Nations (Mervin Frank Cyr—Hearing Transcript, June 20, 2016, at 32; Michael McNab—Hearing Transcript, June 20, 2016, at 43–47, 50–51; Robert Bellegarde—Hearing Transcript, June 21, 2016, at 28–30, 36–37; Vernon Bellegarde—Hearing Transcript, June 21, 2016, at 68–72, 84; Margaret Starblanket—Hearing Transcript, June 21, 2016, at 126–28; Michael Thomas Pinay—Hearing Transcript, June 22, 2016, at 49, 51–57; Elwood John Pinay—Hearing Transcript, June 22, 2016, at 95–98; Douglas Grant Starr—Hearing Transcript, June 22, 2016, at 157–58, 173; Vincent Ryder—Hearing Transcript, June 23, 2016, at 24–29, 31, 41–43; Noel Starblanket—Hearing Transcript, July 24, 2017, at 22–23).

[97] Kinookimaw was also considered a sacred place for these First Nations. Pasqua Elder, Lindsay Cyr, also testified that his people had ceremonial sites at IR 80A. While he allowed that other First Nations had ceremonial sites in the area, he did not think they had any at Kinookimaw. He indicated that people from Pasqua and other First Nations were buried at Kinookimaw. He had seen the grave sites (Hearing Transcript, June 20, 2016, at 75, 84).

[98] Elder John Bellegarde testified that Chiefs Little Black Bear and Peepeekisis had both died and been buried at Kinookimaw. He believed that others from those Bands were also buried there (Hearing Transcript, June 21, 2016, at 109–10, 116–17).

[99] Elder Michael Thomas Pinay confirmed that Chief Peepeekisis was buried at Kinookimaw, which he described as a sacred place with a medicine wheel (Hearing Transcript, June 22, 2016, at 76). Elder Elwood John Pinay testified that in 1889 both Chief Peepeekisis and his son, Chief Sparrow Hawk, had died at Kinookimaw and been buried there. He described "Last Mountain Hill" as a very important sacred place to a number of First Nations (Hearing Transcript, June 22, 2016, at 94, 101–10). Elder Irvin Buffalo was not aware that Chief Peepeekisis had died and been buried at Kinookimaw (Hearing Transcript, June 22, 2016, at 225).

[100] Elder Vincent Ryder of Standing Buffalo testified that north of Kinookimaw there had

been a huge rock in the shape of a woman praying. His people would visit the site to perform ceremonies. Unfortunately, the rock had mysteriously disappeared. According to Elder Ryder's oral history, ceremonial mounds and burial sites were also located in the hills around Long Lake (Hearing Transcript, June 23, 2016, at 26, 31). Elder Wayne Goodwill confirmed that the rock in the shape of a praying woman was sacred to the Dakota people, who would pray at it whenever they could. He also testified that many medicine wheels belonging to the Dakota people were located around Long Lake (Hearing Transcript, June 23, 2016, at 82, 90, 108).

6. Entitlement to IR 80A

[101] George Gordon Elder Michael McNab testified that his father and grandfather had taught him that IR 80A had been aside for the seven Bands of the Touchwood Hills and Qu'Appelle Valley Agencies. By his observation, it had been used mostly by those First Nations. He thought the Peepeekisis First Nation had a fishing station at Katepwa (Hearing Transcript, June 20, 2016, at 43, 46–47).

[102] Elder Lindsay Cyr of Pasqua understood from his oral history sources that Kinookimaw had been allotted to his people alone. He testified that a number of bands visited and used the area, but not so much Kinookimaw, although he eventually allowed that some people from other bands might have used it. According to the stories passed down to him, lands for hunting, fishing and timber had been discussed as part of the Treaty, and fishing stations had been promised as a part of those negotiations (Hearing Transcript, June 20, 2016, at 66–67, 85–86).

[103] According to Elder Robert Bellegarde, Kinookimaw had been allotted to the Little Black Bear First Nation alone. Although the community had also fished at Katepwa, which was much closer than Kinookimaw, the Band had felt uneasy about going there and knew that Kinookimaw was where it belonged. He stated that there had never been any talk of sharing Kinookimaw with other First Nations, or of other First Nations having fishing rights at Kinookimaw. Later in his testimony, however, he said that an uncle had told him that Pasqua and Muscowpetung shared IR 80A with Little Black Bear. He also believed that Peepeekisis had a fishing station at Katepwa (Hearing Transcript, June 21, 2016, at 28–31, 38). Elder John Bellegarde, also of the Little Black Bear First Nation, testified that according to his Elders, Kinookimaw belonged to Little Black Bear alone because its reserve was landlocked. An uncle had been adamant about it

and said that the fishing station had been promised to the Band at the signing of the Treaty. His uncle had also told him that the Peepeekisis First Nation had a fishing station at Katepwa. The Elder testified that he had visited Kinookimaw with his father when he was 9 years old, and that he had observed a family from each of the Pasqua and Peepeekisis Bands camping there. He said his father told him that they had fishing rights there too (Hearing Transcript, June 21, 2016, at 68–73, 92–93). He also believed that Peepeekisis had a fishing station at Katepwa (Hearing Transcript, June 21, 2016, at 101–03, 106).

[104] Elder Margaret Starblanket testified that her father had told her that a lot of people had the right to the Kinookimaw fishing grounds, including Little Black Bear, George Gordon, Muscowpetung and Peepeekisis (Hearing Transcript, June 21, 2016, at 127–28). Life speaker Noel Starblanket testified that the Treaty had promised a fishing station. He said that Star Blanket's original fishing station had been located near a reserve given to his people close to the present Sakimay Reservation at Crooked Lake. However, when the Band had not accepted that reserve, the land was sold, and the fishing rights were lost. Because Star Blanket's ultimate reserve in the File Hills was landlocked, he argued it was a logical inference that the Band would exercise fishing rights at Kinookimaw because it was a traditional fishing ground. He regarded the existence of mounds associated with Star Blanket at Kinookimaw as supporting this conclusion. Life speaker Starblanket did not deny that other bands had an interest in Kinookimaw or that they used it too. In any event, Star Blanket was entitled under the circumstances (Hearing Transcript, July 24, 2017, at 22–23, 108, 131–32).

[105] Elder Michael Thomas Pinay's understanding was that at the time of the Treaty a promise had been made to allot fishing stations to each community depending on its location. According to his understanding, this was why IR 80A had been allotted to Peepeekisis alone (Hearing Transcript, June 22, 2016, at 40–41). Later in his testimony, however, he stated that a few First Nations had had an interest in IR 80A. He could not remember all of them, but they included Little Black Bear, Star Blanket and Pasqua (Hearing Transcript, June 22, 2016, at 57). He observed that while the Bands should have been able to fish throughout the territory, it was the Government's wish that each community have a fishing station. After the Riel Rebellion, and with the further pressure of increased settlement, the Government took Treaty land away and allocated fishing stations to each community. There had been important fishing places all around

Long Lake. However, the Government wanted Indigenous people restricted to IR 80A. Before then, First Nations had fished wherever they wanted. He stated that a government official (probably Mr. Graham) would have told the Peepeekisis people that their fishing station was IR 80A (Hearing Transcript, June 22, 2016, at 72–74, 82–83). On the other hand, Peepeekisis Elder Elwood John Pinay testified that there had been no understanding arising from Treaty negotiations that IR 80A belonged to the Band. As he put it (Hearing Transcript, June 22, 2016, at 96): "We just used it and when we finished, we left it."

[106] Elder Douglas Grant Starr of the Star Blanket First Nation testified that his people had had access to IR 80A because they were landlocked (Hearing Transcript, June 22, 2016, at 163).

[107] Day Star Elder Irvin Buffalo told the story of how Chief Kawacatoose had sent his brother to Winnipeg to ask the Department for a fishing station for the Kawacatoose, Day Star, George Gordon, and Muskowekwan Bands. However, because surveying was complete for the year, the brother was told that his request was too late. He was told to come back the next year, when a decision would be made. In the meantime, Mr. Graham was appointed Indian Commissioner, and suddenly the fishing station at Kinookimaw was created for the four Touchwood Hills Bands plus Pasqua, Piapot, and Muscowpetung. The fact that the Qu'Appelle Valley Bands had a river and lakes running by their reserves aroused considerable hard feeling in the Touchwood Hills. Elder Buffalo also thought the other three Bands had acquired interests in IR 80A because their chiefs were friends with Indian Commissioner Graham. Although people from other reserves in the area used IR 80A, Mr. Buffalo thought it was used mostly by the Touchwood Hills First Nations. He had never heard of the File Hills or Peepeekisis Bands fishing there (Hearing Transcript, June 22, 2016, at 207–17, 221–22, 225).

[108] Elder Wayne Goodwill testified that according to Standing Buffalo Elders, IR 80A had been given to his people, who had in fact used it. Although the main Standing Buffalo Reserve was located on water, it turned out that the lakes in the Valley were very shallow and marshy. He said that the largest, Pasqua Lake, was so shallow that one could walk or drive a wagon across it, and the water was murky and muddy. In other words, water by the Reserve did not support fishing. For this reason, the community, often referred to as the "Fish People" or "Fishing Eating People", turned to Kinookimaw, a traditional fishing and gathering spot. Elder Goodwill testified

that his grandfather had participated in negotiations for access to Kinookimaw. He acknowledged that other First Nations also used the Reserve, especially as the need for fishing grounds grew with the pressure of expanding settlement. Elder Goodwill's people fished at IR 80A, and participated there in ceremonies (Hearing Transcript, June 23, 2016, at 79–80, 89, 93–96, 107–08). Elder Goodwill also testified that Chief Standing Buffalo had been invited to a meeting of chiefs at Kinookimaw 46 years before. At that meeting, the Chief had been given a letter confirming that his Band was included in the group entitled to the fishing station. Elder Vincent Ryder testified that no Indian Agent had told them that IR 80A was not for their use or forbade them to use it, although other bands told them they had no right. Rather, an Indian Agent had said that all the bands of the area could fish there (Hearing Transcript, June 23, 2016, at 29, 44–45). Pasqua Elder, Lindsay Cyr, also testified that Pasqua Lake was like a marsh before the dam was built (Hearing Transcript, June 20, 2016, at 81). None of the Parties challenged the position that the Valley lakes were shallow or marshy.

7. Limitations on the Use of IR 80A

[109] The First Nations visited and used IR 80A less and less for a variety of reasons. That was not to say that they did not go there at all, but they did so less frequently, although when they did, it was for the same purposes already discussed.

[110] Elder Margaret Starblanket, who had been born and raised on the Little Black Bear Reserve, testified that the people stopped going to IR 80A once they had been allotted reserves, settled down, and built houses. In other words, the Bands put their nomadic lifestyles aside. Once settled on reserves, they adopted an agricultural lifestyle (Hearing Transcript, June 21, 2016, at 141–42).

[111] Access to Kinookimaw also became considerably more difficult once the Government instituted the pass system. At least, that was so for some bands. Pasqua Elder Lindsay Cyr did not think his people needed a pass to go to IR 80A. He testified that none of the "old people" talked about that and he said that there had been a lot of activity back and forth (Hearing Transcript, June 20, 2016, at 89–90). Elder Vernon Bellegarde testified that the Little Black Bear people had not needed a pass to go to Cypress Hills or Kinookimaw. He recalled his father having to produce treaty identification to a conservation officer to be able to fish at Katepwa, but

that had not been a problem (Hearing Transcript, June 21, 2016, at 83–84).

[112] On the other hand, Peepeekisis Elder Michael Thomas Pinay testified that the pass system had been a result of the Riel Rebellion, and that it had been severe and strictly enforced. He described how a band member required a pass to leave the reserve, go to town or even to visit relatives on a different reserve. He described how his grandparents, who had been successful farmers, had to have a pass to sell their own grain, and how once sold, the proceeds were paid to the Indian Agent. They then had to seek the Indian Agent's permission to use their own funds to purchase things for the farm. He also provided a gripping description of a farmer who had run out of meat for his family because of a large and isolating snowstorm. To feed the family, he had slaughtered one of his own cattle. The Indian Agent came along later and noticed one cow was missing. He arrested the farmer for not having permission to slaughter the cow, even though the circumstances had been explained, and he jailed the man for 30 days. Elder Pinay testified that they had had the "most notorious" Indian Agent, William Graham, who was very strict and ruled with an iron hand. He declared that obtaining a pass to visit, hunt or fish was a matter of luck. He also thought that the number of passes had been limited in order to prevent people from gathering at IR 80A. The pass system eventually ended when First Nations men returned from World War II and questioned its legality. It turned out that the system had only been based on a memo to Indian Agents. It had not been authorized by any statute or regulation. Although the system's end began in 1951, Elder Pinay said that it continued to apply to his people until 1960 (Hearing Transcript, June 22, 2016, at 30–31, 38–39, 62–64, 74).

[113] Elder Elwood John Pinay confirmed the restrictiveness of the pass system to the Peepeekisis people and observed that Mr. Graham, who had a farm just south and west of the File Hills, had been active as Indian Agent, then Indian Commissioner, until 1930 (Hearing Transcript, June 22, 2016, at 104–05).

[114] Elder Irvin Buffalo made no mention of the pass system or its application to the Day Star First Nation.

[115] However, the pass system had had a very controlling effect on the members of the Star Blanket First Nation. Life speaker Noel Starblanket forcefully described how it had worked. He testified that the system had come in immediately after the signing of the Treaty in 1874. It had

given Indian Agents the powers of a magistrate. The system had been very arbitrary and controlling. For example, to go fishing at Kinookimaw, one had to explain where he or she wanted to go, the purpose, how long the travel would take each way and the time that would be spent fishing. If the person did not return by the specified date, he or she would go to jail. If a person wanted to sell grain, or any other produce, it was also necessary to have permission. The Indian Agent would use the granting of a pass to control the movements and activities of band members by rewarding individuals or families that he liked, or who were very compliant. He would use it to punish those he did not like. For example, a person might ask for permission to sell 300 bushels of grain, but would only be allowed to sell 25 bushels. If an Indian Agent did not approve of a Sun Dance celebration off the reserve, he would not give permission to attend. Life speaker Starblanket spoke of how his own grandfather had been imprisoned for slaughtering one of his cows when there was no other meat to be found by hunting. The pass system significantly diminished movement outside the reserves, including travel to IR 80A (Hearing Transcript, July 24, 2017, at 52–57, 71–76, 82–83, 118–20).

[116] Standing Buffalo's oral history witnesses did not indicate that the pass system had affected their people, or that it had restricted their movements or activities.

[117] A final factor that reduced the use of Kinookimaw was the creation or improvement of Lake Katepwa by the damming of water in the Qu'Appelle Valley. This took place around 1943 and resulted in an alternative fishing location. Because Katepwa was closer to the reserves than Kinookimaw and was abundant in the same kinds of fish, many of the First Nations eventually seemed to prefer to fish there. It was not that they did not continue to go to IR 80A or use it as they always had. Katepwa was simply closer and more convenient. The dam that made Katepwa a good place to fish also raised and improved the waters of the other lakes in the Valley. As observed, some of the Claimants thought that Peepeekisis had been allotted a fishing station at Katepwa (Robert Bellegarde—Hearing Transcript, June 22, 2016, at 30–31, 46–47, 54; Vernon Bellegarde—Hearing Transcript, June 21, 2016, at 72, 103; Noel Starblanket—Hearing Transcript, July 24, 2017, at 49, 115–16).

D. Expert Evidence

[118] Standing Buffalo presented expert evidence in the form of a written report (Exhibit 4A)

and testimony by Geoffrey Ian Brace (on July 25, 2017, Exhibit 4B), who was qualified as an expert in archaeology and anthropology for the purpose of assessment of whether Siouan occupation and use occurred in the area of IR 80A and Last Mountain Lake.

[119] Mr. Brace provided a brief anthropological history of the area. He described petroglyphs, paintings, boulder monuments and archaeological artifacts and bones that revealed the presence of the Sioux and their use of the area around Last Mountain Lake as long as 500 to 900 years before. His testimony was not contradicted or seriously challenged, so it is not necessary to state more than his general conclusions.

V. OVERVIEW OF THE LAW

A. The *Specific Claims Tribunal Act* and Grounds

[120] This Claim challenges the validity and administration of the purported 1918 surrender of 1408 acres from IR 80A. Subsection 14(1) of the *SCTA* enumerates the grounds upon which the Tribunal may find a claim valid. The Claimants have pleaded paragraphs 14(1), (b), (c), (d), and (e) of the *SCTA*, dealing with statutory obligations, administration of reserves, illegal dispositions, and inadequate compensation for land taken under legal authority.

[121] The *Indian Act*, RSC 1906, c 81, section 49, sets out the surrender mechanism. That mechanism applied to land that met the definition of "reserve" in subsection 2(i): "…any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, and which remains so set apart and has not been surrendered to the Crown…." In *Ross River Dena Council Band v Canada*, 2002 SCC 54, 2002 CarswellYukon 58 (WL Can) [*Ross River*], the Supreme Court of Canada noted that the definition "exists primarily to identify what lands are subject to the terms of the Act" (para 49).

[122] Paragraph 14(1)(c) of the *SCTA* provides for claims that deal with both the process leading up to the formalization in law of reserves and the administration of reserves under the *Indian Act* after they have been created. The full text of paragraph 14(1)(c) provides:

> **14 (1)** Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:
>
> …

> **(c)** a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation; [emphasis added]

[123] The underlined portions of paragraph 14(1)(c) are divided by "or". In referring to that paragraph, the Added Claimants all excluded the words "provision or non-provision of reserve lands" from their written pleadings. They all paraphrased paragraph 14(1)(c) as follows:

> …a breach of a legal obligation in its administration of reserve lands, or other assets of the First Nations, including unilateral undertakings that give rise to a fiduciary obligation in law [emphasis added; Declaration of Claim filed by Little Black Bear at para 16; Declaration of Claim filed by Standing Buffalo at para 16; Declaration of Claim filed by Star Blanket at para 16; Declaration of Claim filed by Peepeekisis at para 15]

[124] At the hearing, the Added Claimants were asked to clarify, and they all affirmed in oral submissions that they intended to exclude reference to the provision or non-provision of reserve land as a basis for their Claims, and therefore, also, as an issue in this standing sub-phase. The alleged breaches of fiduciary duty relate to the administration of the 1918 surrender, not the creation of the reserve:

i. Little Black Bear confirmed orally that the only issues were "for the benefit of which First Nations was IR 80A set apart and confirmed by OICPC 1151" and "which of the Claimant First Nations made use of IR 80A" (Hearing Audio Recording, October 10, 2018, at approximately 3:16 P.M.).

ii. Peepeekisis confirmed orally that "on the first issue, for which First Nations was IR[80]A set apart and confirmed by order in council PC 1151, there is no dispute that IR80A was effectively set apart and confirmed by OICPC 1151", and furthermore, that it's position was that Peepeekisis was part of the "Qu'Appelle Valley Indians" mentioned in PC 1151 (Hearing Audio Recording, October 11, 2018, at approximately 10:17 A.M.). Peepeekisis also confirmed orally that from its perspective the case was about the administration of reserve lands (Hearing Audio Recording, October 11, 2018, at approximately 1:01 P.M.).

iii. Star Blanket orally re-confirmed paragraph 25 of its written submissions, which asserted: "The Claim does not present any issue with respect to whether or not

there was an intention to create a reserve, as IR 80A was approved through the Order in Council. The issue however is what was the intention of the Crown in creating IR 80A, and if it included the First Nation as a beneficiary." Star Blanket also said: "In order to make said determination the following issues must be addressed: considerations the Tribunal must contemplate in determining whether Star Blanket has a beneficiary in IR 80A; the intention of the Crown and Star Blanket in creating IR 80A; the intention includes Star Blanket within the meaning of 'Touchwood Hills and Qu'Appelle Valley Indians'; and, Star Blanket's acceptance and utilization of IR 80A….A complete analysis…requires the Tribunal to turn its mind to the intentions of the Parties…" (Hearing Audio Recording, October 11, 2018, at approximately 2:23 P.M.).

iv. Standing Buffalo confirmed orally that IR 80A "was assigned [by PC 1151] and that [the] administration of the reserve lands and the unlawful disposition of those reserve lands is the issue for us" (Hearing Audio Recording, October 11, 2018, at approximately 4:53 P.M.). The "essence" of the submission in the sub-phase was that on a proper interpretation, IR 80A was set aside for Standing Buffalo; and, to carry out a proper interpretation, PC 1151 must be interpreted in light of earlier events, including the allotment of IR 78 and IR 80B, and the history of allyship (October 12, 2018, at approximately 10:25 A.M.): "The essence of the submission…[is that] there was a reserve that was provided and that reserve that was provided links to the earlier events…80A directly links to the [inaudible] provision of the Standing Buffalo Reserve No. 78 and the provision of 80B and subsequently 80A. That all three of them have to be taken together…" (Hearing Audio Recording, October 11, 2018, at approximately 4:56 P.M.).

[125] The Added Claimants' pleadings and submissions did not allege "non-provision of reserve lands" when they invoked paragraph 14(1)(c) of the *SCTA*. Instead, they submitted that on a proper interpretation of the facts, they were beneficiaries of IR 80A. Consistent with this, none of the Parties disputed that IR 80A was validly created in law by PC 1151 for the "Touchwood Hills and Qu'Appelle Valley Indians."

[126] The Claims therefore call for careful consideration of the rights and interests that are, and are not, in issue. Deeply held attachments to land and fundamental relationships between the Claimants and the Crown were described during the oral submissions hearing. While types of interests other than an *Indian Act* reserve interest may be possible in respect of the disputed land, such other possible interests were not asserted to ground an allegation of non-provision of reserve land pursuant to paragraph 14(1)(c) of the *SCTA*.

[127] Supreme Court of Canada decisions dealing with historical processes and events that led up to the formalization of reserves in law distinguish between the inquiry into whether a reserve was created under the *Indian Act*, and whether the Indigenous collectivity had a pre-existing or "cognizable interest" during the period when the Crown was considering whether to finalize the creation of the reserve under the *Indian Act* (*Wewaykum Indian Band v Canada*, 2002 SCC 79 at paras 51, 85, 89, 93, 98, [2002] 4 SCR 245; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at paras 54, 64–65, 417 DLR (4th) 239).

[128] Court precedents dealing with treaty land entitlements distinguish between promises of land that are part of the treaty and reserve finalization (*Lac La Ronge Indian Band v Canada*, 2001 SKCA 109, 2001 CarswellSask 662 (WL Can), leave to appeal dismissed). In the Treaty No. 3 case, *Canada (AG) v Anishnabe of Wauzhushk Onigum Band*, [2004] 1 CNLR 35 (Ont CA), 2003 CarswellOnt 4835 (WL Can), the Ontario Court of Appeal stated at paragraph 10: "Treaty 3 did not set apart reserves, but did create a process for doing so."

[129] Similarly, Treaty 4 established entitlements to reserve lands according to the terms of the Treaty, but did not specify the particular parcels that would be "reserves" as defined in the *Indian Act*. No breach of a legal obligation relating to the process of reserve creation or finalization is in issue at this stage of the Claim.

[130] The question requiring clarification in this sub-phase is limited to a determination of the membership of the beneficiary group described in PC 1151. Other property interests are not directly in issue. Nevertheless, as the Claimants elaborated in their submissions, their relationships with the Crown, Treaty 4, and the reserve creation history remain highly relevant for the interpretation of PC 1151, and some witnesses also testified that relevant promises were made at the time of adherence to Treaty 4.

B. Interpreting PC 1151: Guiding Principles from the Reserve Creation Precedents

[131] The Claimants referred the Tribunal to *Ross River* as the leading precedent on *Indian Act* "reserve" creation. *Ross River* was a tax case in a non-treaty setting, focusing on whether the disputed land was a "reserve" within the meaning of the *Indian Act*. Although in the present Claim, no dispute exists about whether the Reserve was created or which document or oral representation created it, *Ross River* provides guidance about the approach to take in interpreting PC 1151.

[132] The Supreme Court of Canada stated expressly that: (i) the decision in *Ross River* was not a definitive statement on *Indian Act* reserve creation; (ii) a definitive statement would be "premature and detrimental to the proper development of the law"; and, (iii) reserves were established in various ways across Canada (*Ross River* at paras 41–43). Nevertheless, at paragraph 67, the Court summed up the following general principles:

> Thus, in the Yukon Territory as well as elsewhere in Canada, there appears to be no single procedure for creating reserves, although an Order-in-Council has been the most common and undoubtedly best and clearest procedure used to create reserves. (See: *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654 (S.C.C.), at pp. 674-75; Woodward, *supra*, at pp. 233-37.) Whatever method is employed, the Crown must have had an intention to create a reserve. This intention must be possessed by Crown agents holding sufficient authority to bind the Crown. For example, this intention may be evidenced either by an exercise of executive authority such as an Order in Council, or on the basis of specific statutory provisions creating a particular reserve. Steps must be taken in order to set apart land. The setting apart must occur for the benefit of Indians. And, finally, the band concerned must have accepted the setting apart and must have started to make use of the lands so set apart. Hence, the process remains fact-sensitive. The evaluation of its legal effect turns on a very contextual and fact-driven analysis. Thus, this analysis must be performed on the basis of the record. [emphasis added]

[133] *Ross River* held further that where an order in council exists creating a reserve, it is likely to be definitive:

> Under the *Indian Act*, the setting apart of a tract of land as a reserve implies both an action and an intention. In other words, the Crown must do certain things to set apart the land, but it must also have an intention in doing those acts to accomplish the end of creating a reserve. It may be that, in some cases, certain political or legal acts performed by the Crown are so definitive or conclusive that it is unnecessary to prove a subjective intent on the part of the Crown to effect a setting apart to create a reserve. For example, the signing of a treaty or the

> issuing of an Order-in-Council are of such an authoritative nature that the mental requirement or intention would be implicit or presumptive. [para 50]

[134] In *Lac La Ronge Indian Band v Canada*, 2001 SKCA 109, 2001 CarswellSask 662 (WL Can), the Saskatchewan Court of Appeal considered reserve creation in a treaty setting. The Saskatchewan Court of Appeal upheld the trial judge's approach to reserve creation at paragraph 207, which bore similarities to the *Ross River* test:

> The trial judge found that there was no specific procedure or single process which alone can create a reserve. There are four essential elements for the creation of a reserve:
>
> 1. the Crown must make a deliberate decision to create a reserve;
> 2. consultation with the Band;
> 3. there must be a clear demarcation of the land; and
> 4. there must be some manifestation by the Crown that the lands will constitute a reserve.

[135] These precedents indicate that courts have placed great emphasis on the intentions of the Crown when they have evaluated the Crown's actions to resolve the question of when exactly an *Indian Act* reserve comes into existence in law.

C. Principles of Statutory Interpretation Applicable to PC 1151

1. Statutory Context

[136] PC 1151 provided:

> On a Memorandum dated 15th May, 1889, from the Superintendent General of Indian Affairs, submitting herewith lithographed plans of the various Reserves of Land, as well as descriptions of the same, which have from time to time been allotted to, and have been set apart for, the benefit of the hereinafter mentioned Bands of Indians who were interested in those portions of Manitoba and the North-West Territories covered by Treaties 4, 6 and 7, and part of Treaty 2, the boundaries of the said Reserves having been defined by survey, as shown on the said lithographed plans, and recommending that the Reserves thus defined and described hereafter under the names of the Chiefs of the various Bands or otherwise be confirmed by Your Excellency in Council. [emphasis added; CBD Vol 3, Doc 239, at 3]

[137] PC 1151 was an omnibus with each reserve being described briefly in words and by a plan of survey. The description for IR 80A within PC 1151 provided: "…set aside as a Fishing Station for the use of the Touchwood Hills and Qu'Appelle Valley Indians…" (CBD, Vol 3, Doc 239, at 57).

[138] In 1889, the *Indian Act*, RSC 1886, c 43, was in force. Subsection 2(k) provided that a "'reserve' means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians" (emphasis added).

2. Interpretive principles

[139] Principles of statutory interpretation apply to orders in council (*Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, 2001 CarswellBC 2703 (WL Can). The general rule from *Rizzo & Rizzo Shoes Ltd, (Re)* [1998] 1 SCR 27, 1998 CarswellOnt 1 (WL Can), is that statutes must be interpreted in light of their purpose and context:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [para 21; citing Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87]

[140] Also, an ambiguous statutory provision "relating to Indians" must be interpreted generously. Discussing the *Indian Act* in *Nowegijick v R*, [1983] 1 SCR 29 at 36, 1983 CarswellNat 123 (WL Can) at para 25, the Supreme Court of Canada concluded:

> It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption.

[141] In *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 143, 1990 CarswellMan 209 (WL Can) at para 118 [*Mitchell*], the Supreme Court of Canada observed further: "…it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them." In *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, 2001 CarswellBC 2703 (WL Can), the Supreme Court of Canada again affirmed this approach:

> …if two approaches to the interpretation and application of an enactment are reasonably sustainable as a matter of law, then the interpretation or application that impairs the Indian interests as little as possible should be preferred, so long as the ambiguity is a genuine one, and the construction that is favourable to the Indian interests is one that the enactment will reasonably bear, having regard to the legislative purposes of the enactment: see *Nowegijick*, *supra*; *Mitchell*, *supra*;

> *Semiahmoo Indian Band* Isaac C.J., at p. 28; and *Sparrow*, *supra*, at p. 1119, *per* Dickson C.J. [para 68]

3. Interpretation in the Context of a Treaty and the Honour of the Crown

[142] The File Hills Bands emphasized the significance of the historical context when interpreting PC 1151, and in particular, the significance of Treaty 4. For Standing Buffalo, the allyship relationship with the Crown was very significant.

[143] The written terms of Treaty 4 include the following:

> And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of Indians, and to be of sufficient area to allow one square mile for each family of five…
>
> …
>
> And further, Her Majesty agrees that Her said Indians shall have right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining or other purposes, under grant or other right given by Her Majesty's said Government. [CBD, Vol 1, Doc 11]

[144] The Supreme Court of Canada has affirmed that treaties may also include oral terms (*R v Badger*, [1996] 1 SCR 771 at para 52, 1996 CarswellAlta 587 (WL Can) [*Badger*]; *R v Marshall*, [1999] 3 SCR 456 at para 12, 1999 CarswellNS 262 (WL Can) [*Marshall*]).

[145] The Supreme Court of Canada has further affirmed that the honour of the Crown applies to all of the Crown's dealings, including the "resolution of claims and the implementation of treaties" (*Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14 at para 70, 2013 CarswellMan 61 (WL Can) [*Manitoba Métis*] citing *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 17, [2004] 3 SCR 511; *Manitoba Métis* at para 66 citing *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24, [2004] 3 SCR 550; *Manitoba Métis* at para 68 citing *Badger* at para 41). While not all interactions engage specific obligations, the Court laid out principles in *Badger*:

> First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement

> whose nature is sacred. …Second, the honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. …Third, any ambiguities or doubtful expressions in the working of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. [para 41]

[146] In *R v Taylor*, [1981] 3 CNLR 114 (ONCA) at para 8, 1981 CaswellOnt 641 (WL Can), (leave to appeal refused), the Ontario Court of Appeal also gave direction on the significance of context, history and oral tradition when evaluating a treaty's effect: "Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect."

[147] The Supreme Court of Canada made a further finding in *Manitoba Métis* with respect to the honour of the Crown: "The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples…" (para 73(4)). The Court continued that the "honour of the Crown demands that constitutional obligations to Aboriginal peoples be given a broad, purposive interpretation", and the "honour of the Crown requires it to act diligently in pursuit of its solemn obligations and the honourable reconciliation of Crown and Aboriginal interests" (paras 77–78).

[148] Given the Parties' framing of the issues (see paragraphs 124 to 130 above), the Claimants' references to these principles of treaty interpretation and the honour of the Crown were understood to be aimed at the task of interpreting PC 1151, as opposed to submissions about any possible breach of duty at the time of reserve creation. However, these principles have less useful application where, as here, the Indigenous beneficiaries of a Crown promise have conflicting perspectives and interests in the subject of the promise.

D. Precedents on Oral History and Indigenous Perspectives

[149] In the course of hearing specific claims, the Tribunal often receives oral history evidence from First Nations' witnesses who have received that evidence through their oral traditions. The witnesses may also give direct evidence received first hand. The testimony of a particular witness may include information acquired in both ways. The Parties sometimes employed the

term “Indigenous perspectives” to refer to the information contained in both kinds of evidence. Such evidence was received in the hearing of this sub-phase.

[150] In a series of cases addressing Aboriginal rights and title, the Supreme Court of Canada has elaborated an approach for oral history evidence based upon principles of necessity, reliability, relevance, and reconciliation. In *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 CarswellBC 2358 [*Delgamuukw*], the Supreme Court of Canada explained:

> As I said in *VanderPeet*, at para. 68:
>
> > In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties of proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in for example, a private law torts case.
>
> The justification for this special approach can be found in the nature of aboriginal rights themselves. I explained in *Vanderpeet* that those rights are aimed at the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory. They attempt to achieve that reconciliation by “their bridging of aboriginal and non-aboriginal cultures” (at para. 42). Accordingly, “a court must take into account the perspective of the aboriginal people claiming the right….while at the same time taking into account the perspective of the common law” such that “[t]rue reconciliation will, equally, place weight on each” (at paras. 49 and 50).
>
> In other words, although the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does not strain “the Canadian legal and constitutional structure” (at para. 49). Both the principles laid down in *Vanderpeet* — first, that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and second, that trial courts must interpret that evidence in the same spirit — must be understood against this background.
>
> …
>
> This appeal requires us to…adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past.
>
> …

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. …This process must be undertaken on a case-by-case basis. [paras 80–82, 84, 87]

[151] In *Mitchell v MNR*, 2001 SCC 33, 2001 CarswellNat 873 (WL Can) [*Mitchell*], the Supreme Court of Canada described the practical mechanism to apply, using a principled approach to evidence and exceptions to the hearsay rule:

> The flexible adaptation of traditional rules of evidence to the challenge of doing justice in aboriginal claims is but an application of the time-honoured principle that the rules of evidence are not "cast in stone, nor are they enacted in a vacuum" (*R. v. Levogiannis*, [1993] 4 S.C.R. 475 (S.C.C.), at p. 487). Rather, they are animated by broad, flexible principles, applied purposively to promote truth-finding and fairness. The rules of evidence should facilitate justice, not stand in its way. Underlying the diverse rules on the admissibility of evidence are three simple ideas. First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. Second, the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it. Third, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.
>
> In *Delgamuukw*, mindful of these principles, the majority of this Court held that the rules of evidence must be adapted to accommodate oral histories, but did not mandate the blanket admissibility of such evidence or the weight it should be accorded by the trier of fact; rather, it emphasized that admissibility must be determined on a case-by-case basis (para. 87). Oral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge.
>
> Aboriginal oral histories may meet the test of usefulness on two grounds. First, they may offer evidence of ancestral practices and their significance that would not otherwise be available. No other means of obtaining the same evidence may exist, given the absence of contemporaneous records. Second, oral histories may provide the aboriginal perspective on the right claimed. Without such evidence, it might be impossible to gain a true picture of the aboriginal practice relied on or its significance to the society in question. Determining what practices existed, and distinguishing central, defining features of a culture from traits that are marginal or peripheral, is no easy task at a remove of 400 years. Cultural identity is a subjective matter and not easily discerned… [paras 30–32]

[152] In *Mitchell*, the Supreme Court of Canada reflected further on the need to actively resist inappropriate assumptions. It also rejected "complete abandonment of the rules of evidence":

> In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions. Oral histories reflect the distinctive perspectives

> and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective. Thus, *Delgamuukw* cautions against facilely rejecting oral histories simply because they do not convey "historical" truth, contain elements that may be classified as mythology, lack precise detail, embody material tangential to the judicial process, or are confined to the community whose history is being recounted.
>
> …
>
> There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, "[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse" (*Marshall v. Canada*, [1999] 3 S.C.R. 456 (S.C.C.), at para. 14). In particular, the *Van der Peet* approach does not operate to amplify the cogency of evidence adduced in support of an aboriginal claim. Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. Placing "due weight" on the aboriginal perspective, or ensuring its supporting evidence an "equal footing" with more familiar forms of evidence, means precisely what these phrases suggest: *equal* and *due* treatment. While the evidence presented by aboriginal claimants should not be undervalued "simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case" (*Van der Peet*, *supra*, at para. 68), neither should it be artificially strained to carry more weight than it can reasonably support. [emphasis in original; paras 34, 39]

[153] Although the judicial precedents discussed arose in the context of Indigenous rights and title litigation, no such limitation or distinction was raised by any Party, and the principles of necessity, reliability, relevance, and reconciliation are not logically restricted to that setting.

[154] The Added Claimants spoke at length about the significance of Indigenous perspectives on the issues in this sub-phase. As the courts have observed, the concept of "Indigenous perspectives" may include oral history and oral tradition, as well as other perspectives of Indigenous witnesses and claimants. Some considerations for courts when considering both kinds of evidence are described in the Federal Courts' *Practice Guidelines for Aboriginal Law Proceedings*, which refer to "Elder Testimony and Oral History", not only "Oral History" (online: <www.fct-cf.gc.ca/Content/assets/pdf/base/AboriginalLawPracticeGuidelinesApril-2016(En).pdf>).

[155] A requirement of impartiality is that each party will be heard on an equal footing. The relevant law is then applied. Where oral history encounters the common law tradition, the

Supreme Court of Canada has provided guidance in the cases just discussed on how to proceed, and has flagged some of the challenges.

[156] In this sub-phase, the proper interpretation of PC 1151 was the focal point. Following the directions of the Supreme Court of Canada, all the evidence must be considered for its value in assisting the Tribunal to evaluate PC 1151 in light of the historical context and the applicable presumptions of statutory interpretation, including evidence relating to what the Crown's likely motivations and considerations were in 1889.

[157] Some legal principles invoked in submissions addressing how certain Indigenous perspectives should be relied upon in this sub-phase were distinguishable and are reviewed here to further clarify the approach taken to the evidence in these Reasons for Decision. Little Black Bear cited *Kwicksutaineuk/Ah-Kwa-Mish First Nation v British Columbia (Minister of Agriculture & Lands)*, 2010 BCSC 1699, 2010 CarswellBC 3315 (WL Can) [*Kwicksutaineuk*], to further the proposition that the meaning of "Qu'Appelle Valley Indians" in PC 1151 should be taken from pre-contact times. *Kwicksutaineuk* involved the certification of a class in an action involving aboriginal fishing rights. Regarding who the rights holders were, Slade J. concluded:

> If the commonly used descriptor "First Nations" is to have any meaning in the context of a discussion of aboriginal rights, it must, in my opinion, refer to an aboriginal collective that can fairly assert itself as having an ancestral connection to an identifiable collective which, historically, engaged in practices that found the basis for the asserted right.
>
> It does not assist this determination that the proposed class is comprised of Bands. The *Indian Act* was not on the radar before contact, and band membership may not necessarily establish an ancestral connection with the members of the same indigenous aboriginal collective for which fishing was an integral aspect of a distinctive culture at contact. [paras 19–20]

[158] This Claim differs from cases in which an Aboriginal right must be defined based on evidence of "an integral aspect of a distinctive culture at contact." In this Claim, the Tribunal has been tasked with interpreting an order in council created by the Crown in furtherance of relationships established jointly between the Crown and the Claimants. The interpretation of that order in council requires, as described above, a thorough analysis of the historical context, including Treaty 4 and Standing Buffalo's distinctive relationship with the Crown. Oral history and Indigenous perspectives about that context are essential to inform the Tribunal about the historical context and ultimately, for the proper analysis of PC 1151. However, the legal test to

be applied still remains focused on the intentions of the Crown. The invocation of *Kwicksutaineuk* in the manner proposed by Little Black Bear misses the mark, unless it can be established that such pre-contact history was in the Crown's mind, or that the Crown's intent was somehow linked to that context.

[159] Peepeekisis emphasized that "[b]oth the Crown and Aboriginal perspectives must be considered" when evaluating reserve creation (Peepeekisis' Written Submissions filed September 18, 2018, at para 43). More specifically, the Indigenous perspectives on the intention behind the creation of IR 80A "must be respectfully balanced" with the evidence of the Crown's perspectives, "including how this relates back to the intentions behind Treaty No. 4 and its implementation" (Peepeekisis' Written Reply Submissions filed October 5, 2018, at para 9).

[160] The Tribunal understands that a respectful balancing of the evidence in this sub-phase requires a thorough analysis of the historical context, both as presented by the witnesses for the First Nations, as well as that reflected in the documentary evidence; and, it must also do so by taking into account the presumptions of statutory interpretation reviewed above.

[161] Again though, the task remains the interpretation of a Crown action, PC 1151, not an evaluation of what the Crown ought to have done based on the Claimants' ancestors' intentions, or potential bases of Crown liability that are rooted in other types of interest in land. *Kitselas First Nation v Her Majesty the Queen Right of Canada*, 2013 SCTC 1 [*Kitselas*], also referred to by Peepeekisis in written submissions, was a claim about land that ought to have been set aside as reserve land but was not, and is distinguishable in this sense.

[162] Peepeekisis referred to paragraph 83 of *Kitselas* in discussing the application of oral history evidence and Indigenous perspectives to the issues in this sub-phase. In *Kitselas*, the Tribunal considered the oral history relating to: the meaning of place names; knowledge about the significance of places and the identity of the Kitselas people; and, the Elders' understanding of the disputed place that they described as not having been abandoned. In reaching its decision, the Tribunal applied the legal test for the existence of a cognizable interest and described the cognizable interest as a pre-existing interest that was not created by the Indian Reserve Commissioner. The Kitselas First Nation's oral history about the land was essential to identifying the cognizable interest and thus also to the analysis of fiduciary obligations.

Cognizable interests that may exist prior to reserve creation, as distinct from reserve interests pursuant to PC 1151, are not an issue in this sub-phase. Here, the Added Claimants seek to establish that they were in fact included in the instrument prepared by the Crown, in light of all the circumstances of the day, yet within the Crown's own administrative regime, and with its own motivation and intent.

[163] Peepeekisis also relied on *Ross River* at paragraph 64, which provided another example of the use of oral history evidence: "one must look both at the Crown and Aboriginal perspectives to determine on the facts of a given case whether the party alleged to have exercised the power to create a reserve could reasonably have been seen to have the authority to bind the Crown to act to appropriate or set apart the lands and then to designate them as a reserve" (Hearing Audio Recording, October 11, 2018, at approximately 11:15 A.M.). In this excerpt, however, the Supreme Court of Canada was speaking of how to identify the moment of reserve creation when the *existence* of the reserve is in dispute:

> The question arises in both cases as to whether the powers of the Governor in Council must be exercised personally or if those powers may be delegated to a government official. As the intervener Coalition of B.C. First Nations submits, one must look both at the Crown and Aboriginal perspectives to determine on the facts of a given case whether the party alleged to have exercised the power to create a reserve could reasonably have been seen to have the authority to bind the Crown to act to appropriate or set apart the lands and then to designate them as a reserve.

[164] In this sub-phase, all Parties agree that PC 1151 created the Reserve. Whether a binding representation that differs from PC 1151 may have been made at another time is not in issue. To be clear, oral history relating to the intentions and motivations of the Crown is highly relevant. However, the task before the Tribunal is to not to evaluate whether reserve creation in fact occurred via a means other than PC 1151.

[165] Lastly, Peepeekisis submitted that the "Aboriginal perspective includes Indigenous legal traditions and courts must take the Aboriginal perspectives into account alongside the perspective of the common law, including with respect to how Aboriginal peoples identify, organize and govern themselves" (Peepeekisis' Written Submissions filed September 18, 2018, at para 44 citing *Spookw v Gitxsan Treaty Society*, 2017 BCCA 16 at paras 50–54). Peepeekisis submitted that it self-identified with the Qu'Appelle Valley Bands (Peepeekisis' Written

Submissions filed September 18, 2018, at para 49–50). It stressed that Indigenous perspectives in this Claim should not be marginalized in favour of the "shifting perspectives" of Crown agents in the documentary record (Peepeekisis' Written Reply Submissions filed October 5, 2018, at para 9). In other words, Peepeekisis submitted that the First Nation had been consistent in its self-identification as part of the "Qu'Appelle Valley Indians" while Crown agents were confused and inconsistent with the result that Peepeekisis should enjoy the benefit of an interpretation that accommodates its perspective and does not have a limiting effect.

[166] The Claimants' perspectives were part of the historical context and are part of the evidentiary matrix that is relevant to the interpretation of PC 1151. However, it cannot be forgotten that the legal task is the proper interpretation of the Order in Council, which in light of the law reviewed above, turns on the *Crown's* intentions. It is possible that the evidence might reveal that the Crown's intentions were informed by the Indigenous organization and collectivities of the time, as well as the treaty and allyship contexts. It is also possible that this evidence, when combined with the application of a liberal interpretation most favourable to the Indigenous collectivities, could lead to the conclusion that the Crown's intention was to include all the Added Claimants. If, however, the Crown's intent was found on the facts to include some but not all of the Claimants in PC 1151, then a Claimant's sense of itself as belonging to, or having belonged to, the "Qu'Appelle Valley Indians" would not change that intention. Nor can the law relating to treaty interpretation, honour of the Crown and fiduciary obligations retroactively revise an order in council that the evidence clearly established had a more limited focus.

[167] As presented, this sub-phase proceeded on the basis that PC 1151 created the Reserve, and the issue was who, on a proper interpretation, were the beneficiaries under that Order in Council as it applied to IR 80A.

E. Anishnabe of Wauzhushk Onigum

[168] Little Black Bear referred to *Canada (AG) v Anishnabe of Wauzhushk Onigum Band*, [2003] 1 CNLR 6 (Ont Sup Ct J), 2002 CarswellOnt 3212 (WL Can) [*Anishnabe of Wauzhushk Onigum*], aff'd [2004] 1 CNLR 35 (Ont CA), in which a Treaty 3 reserve had been set aside "not to be for any particular Chief or Band, but for the Saulteaux Tribe, generally, and for the purpose

of maintaining thereon an Indian agency and the necessary grounds and buildings" (para 17). The Rainy Lake and Rainy River Bands both claimed an interest, although in 1908, Canada accepted a surrender from the Rainy Lake Bands only. The issue at trial was: did the Rainy River Bands share the same entitlement to the reserve as the Rainy Lake Bands? The analysis focused on determining the Crown's intention in creating the reserve.

[169] The trial judge looked broadly at the historical context to determine the intentions of the Crown, including consideration of: the wording and language of the Order in Council creating the reserve for the "Saulteaux Tribe generally"; the historical context before and immediately after the Order in Council; and, the actions of the parties at the time of the 1908 surrender and following. A distinguishing feature of the case was that the 1875 Order in Council creating the reserve was provisional because a survey remained outstanding. The Ontario Superior Court of Justice held that: the 1875 Order in Council created the reserve notwithstanding its provisional nature; the wording and language in the Order in Council did not clarify which Indians or bands were entitled to the benefit of the reserve; the evidence of events as a whole from 1875 to 1908 was "inconclusive, frequently vague and often conflicting" in respect of the Crown's intention as to entitlement; the 1908 surrender was "a distinct unequivocal act" indicating the Crown's intention that the Rainy Lake Bands were the only beneficial owners of the reserve, and subsequent to 1908, the Crown's intention remained clear and there was no evidence of any interest or claim by the Rainy River Bands prior to the institution of the claim (*Anishnabe of Wauzhushk Onigum* at para 83). The Court therefore concluded that the reserve had been set aside only for the Rainy Lake Bands.

[170] Little Black Bear relied in part on the contextual approach used in *Anishnabe of Wauzhushk Onigum*. It submitted that the Tribunal must examine the broad historical context at the time the Reserve was set aside. Little Black Bear submitted that Indigenous perspectives and circumstances at the time IR 80A was conceived of and set aside, plus the Band's consistent use of the Reserve, its post-surrender assertions of interest, as well as the Crown's internal debate with respect to entitlement around the time of the surrender and in the years following, supported a conclusion that the Band was entitled, especially when the applicable principles of statutory interpretation were liberally applied.

F. *Madawaska Maliseet*

[171] Little Black Bear also suggested that the Crown had failed an obligation of diligence to keep adequate records regarding which of the Bands were entitled to IR 80A. Such being the case, the honour of the Crown required that any ambiguities be resolved in favour of the Indigenous Claimants, as held in *Madawaska Maliseet First Nation v Her Majesty the Queen in Right of Canada*, 2017 SCTC 5:

> I find that the Honour of the Crown in this instance, where the record is incomplete and important key documents which could shed further light on this question are missing as a result of Crown mismanagement of these important documents, requires that any ambiguity on this question, should it exist, must be resolved in favour of the Maliseet Madawaska. [para 368]

[172] The Parties who sought to rely on *Madawaska Maliseet First Nation v Her Majesty the Queen in Right of Canada*, 2017 SCTC 5, did not introduce evidence directly in support of this position, so it will be assessed on the basis of the evidentiary record in full.

VI. POSITIONS OF THE PARTIES

A. The Crown

[173] The Crown made no submissions as to which of the Claimants were entitled to be included as "Touchwood Hills and Qu'Appelle Valley Indians" in respect of IR 80A under PC 1151. That being so, it did not concede the reasonableness of its determination of which First Nations should benefit.

[174] The Crown also submitted that there was no need to define an "allyship relationship" to make a finding on whether Standing Buffalo should benefit.

[175] Finally, Canada took the position that it was not necessary to determine whether there was a Treaty 4 oral promise to provide fishing stations to signatory First Nations. It submitted that this question was not within the parameters of the issues before the Tribunal in this sub-phase stage (Respondent's Written Submissions filed September 28, 2018, at paras 2–5).

B. The Claimants

1. Overall Approach and Legal Tests

[176] All of the File Hills Bands relied on *Ross River* for guidance where there is vagueness in

the description of beneficiaries. Little Black Bear also relied on *Anishnabe of Wauzhushk Onigum*. They submitted that in determining the Crown's intention, the Tribunal must consider the language of PC 1151, the historical context when it was set aside, and the subsequent conduct and actions of the Parties. With respect to the language of PC 1151, its ordinary meaning must be considered, as well as its underlying purpose (i.e. a "purposive interpretation"). The principles of interpretation discussed should be applied in considering ordinary meaning and purposive intent. Indigenous perspectives carry significant and equal weight in the interpretation of PC 1151 and must also be taken into account as the law has directed.

[177] The File Hills Bands took the position that the Crown's intention could not be determined from the ordinary meaning of the words "Touchwood Hills and Qu'Appelle Valley Indians" alone. When surrender was proposed and, in the years following surrender, the documentary evidence revealed the Government's internal debate about its own intentions, including confusing the geographic Qu'Appelle Valley with the administrative Qu'Appelle Agency. The Crown's uncertainty made the historical context and Indigenous perspectives all the more important and determinative in resolving intent.

[178] All of the Claimants were administered by the Qu'Appelle Agency until sometime in August 1885. IR 80A had been both conceived and surveyed during the Qu'Appelle Agency's administration, when Government resources were too few for the job that had to be done. In August 1885, the File Hills Bands came under the administration of the new File Hills Agency, then in 1901, returned to the administration of the Qu'Appelle Agency. The suggestion was that the Crown's uncertainty and confusion were the result of the Crown's attempts to understand which bands were intended beneficiaries through the lens of changing administrative structures, which were subsequent to Mr. Nelson's early 1880s work and again made Indigenous perspectives all the more important as a tool of interpretation.

[179] From the perspectives of the File Hills Bands, the Nēhiyaw of the area identified themselves with the Qu'Appelle Valley. This was part of their world view and its organization. The Cree/Saulteaux Bands were all closely related, sharing the same traditions, spiritual beliefs and nomadic existence. IR 80A (Kinookimaw) was a common traditional stopping place used by all for the purposes that have been discussed.

[180] It was not disputed that Canada's underlying motive in creating IR 80A was to separate the Indigenous community from the settlers, who wanted to live on the shore of the lake. By creating the fishing station, the Government facilitated settlement, maintained the peace and met its obligations under Treaty 4. Landlocked bands, including the File Hills Bands, would be assured of fishing grounds and access to them.

[181] The File Hills Group also agreed that the collective's ethnographic and geographic self-identification with the Qu'Appelle Valley, it's use of Kinookimaw before and after the Treaty, and the Government's uncertainty with respect to the meaning of "Qu'Appelle" in terms of geography or administration when IR 80A was being conceived and surveyed, should result in the File Hills Group being included as "Qu'Appelle Valley Indians." When the principles of interpretation were applied liberally, in the Bands' best interests and least restrictively of their rights, the Tribunal should find that the File Hills Group were "Qu'Appelle Valley Indians." They urged that the Government's lack of clarity in determining whether "Qu'Appelle" was a geographic or administrative descriptor of intent should be resolved in favour of the File Hills Group. They also argued that the Crown had not properly documented its intent. When, at the time of the surrender and after, front line officials asked the Department to clarify its intent by reviewing its records, there was no response. This suggested that records had not been kept or that they did not exist.

[182] The File Hills Group submitted that the requirements of *Ross River* were complete when they used IR 80A. By use they accepted the Reserve as such.

[183] For Standing Buffalo, IR 80A was the Government's fulfillment of an obligation arising from the allyship relationship. The Government's post-surrender discrimination against Standing Buffalo on the basis of nationality (i.e. the perception of Standing Buffalo as American Sioux) was a breach of the honour of the Crown. Standing Buffalo had always been a part of the Qu'Appelle Valley group of Bands that Canada had recognized as beneficiaries, and its status should be reinstated now.

[184] The Kawacatoose Group cited 100 years of treatment of IR 80A as theirs by the Crown as their primary argument, relying mostly on the documentary record. They submitted that the File Hills Group was not geographically located in the Qu'Appelle Valley and questioned the Added

Claimants' belief that they had been deprived of certain rights at Kinookimaw, which the Kawacatoose Group said had not been identified. The Kawacatoose Group suggested that the Added Claimants might be able to make a claim based on pre-reserve creation principles of "cognizable interest", although it had not been pleaded and the Kawacatoose Group took no position on it.

2. The Proper Role and Weight of Oral History Evidence

[185] As summarized, the Added Claimants all relied on oral history evidence provided through the testimony of Elders. They emphasized legal precedents that established oral history as an accepted type of evidence, which they pointed out must be accepted on an equal footing with all other types of evidence, including the documentary evidence in this case. They also submitted that oral history evidence does not require documentary corroboration in order to be accepted. Where it conflicts with documentary evidence, it may also be accepted over the documentary evidence, especially where that evidence is itself conflicted and cannot resolve the issue, as it was suggested to be in this case. The oral history evidence must be weighed like all other forms of evidence, and it must be weighed respectfully and in a balanced way.

[186] The oral history evidence in this case was central in providing the Tribunal with insight into Indigenous perspectives, both before and after the creation of IR 80A. It was the source of these Claimants' history of the Reserve's importance and use before the Treaty, after the Reserve's creation, up to the surrender and after. It was also the basis of: the Added Claimants' self-identification with the Qu'Appelle communities; their position on how IR 80A came to be allotted to the Added Claimants; and, its linkage to the Crown's obligations under Treaty 4. Through the oral history, the Tribunal learned how the Indigenous community organized and governed itself, including how bands related to each other. While there was no documentary evidence establishing that the Crown had advised the bands that IR 80A had been created, or for whom, the Added Claimants submitted that it could be inferred from the Elders' evidence that at least some of the Added Claimants had been advised and were thus intended to benefit.

[187] Standing Buffalo relied on oral history testimony to support its view of the allyship relationship it described enjoying with the Crown, and that was the basis of its entitlement to IR 80A.

3. Was PC 1151 Ambiguous?

[188] The Claimants largely agreed that PC 1151 was ambiguous with respect to the identification of beneficiaries of IR 80A, although this was an alternative argument for Little Black Bear. The problem, of course, was the meaning of "Qu'Appelle Valley Indians." The Kawacatoose Group took the position that the ambiguity could not be resolved on the basis of the language in PC 1151, or from the other documentary record at the time IR 80A was set aside. The Kawacatoose Group submitted that Canada had definitively clarified its intent by the structure of the surrender itself, as well as subsequent correspondence through the years confirming the seven Bands' entitlement and culminating in the 1960s when entitlement was reconfirmed upon the formation of the Kinookimaw Beach Association.

[189] On the other hand, Little Black Bear argued that Canada's intention was not ambiguous when viewed geographically to reflect the Indigenous collectives in place at the time Treaty 4 was negotiated. Ambiguity only crept into the picture later when the Government became interested in a surrender of IR 80A, as evidenced by the confusion and internal debate disclosed by the documentary record. Ambiguity should be resolved by the interpretation most favourable to Little Black Bear, namely, the geographically based view reflecting the Indigenous collectives in place at the time of the Treaty, and consistent with the Indigenous perspective that it self-identified as part of the Qu'Appelle community. The organization of the first Agency in the area reflected this geographic orientation, and was accordingly called "the Qu'Appelle Agency."

[190] Little Black Bear argued that its interpretation was strengthened by Canada's admission that there were no historical documents clearly stating which of the Bands IR 80A had been set aside for. Canada had also admitted it had no documentary record setting out criteria for when a fishing station reserve would be set aside (Little Black Bear's Written Submissions filed September 18, 2018, at para 130).

4. The Role of Treaty 4

[191] Little Black Bear submitted that a "purposive understanding of Treaty 4's historical context and the principles of treaty interpretation" were the key to resolving the central issue (Little Black Bear's Written Submissions filed September 18, 2018, at para 76). Context, Indigenous perspectives, history and oral tradition were also critical to any decision involving

"Indian or aboriginal rights" and when "determining [a] treaty's effect" (Little Black Bear's Written Submissions filed September 18, 2018, at para 83 citing *R v Taylor*, [1981] 3 CNLR 114 (ONCA), 1981 CaswellOnt 641 (WL Can)).

[192] A number of the Added Claimants took the position that IR 80A was linked to Treaty 4 beyond the promise of reserves thereunder. Through the evidence of its Elders, Little Black Bear submitted that fishing rights included in Treaty 4 went beyond the written promise and included an oral promise of fishing stations (Elders John Bellegarde, Robert Bellegarde and Vernon Bellegarde). These promises served the Government's purpose of maintaining treaty fishing rights, particularly for landlocked bands, while at the same time facilitating increased settlement and avoiding conflict between settlers and First Nations. The principles of interpretation discussed above require an interpretation that would interfere minimally with fishing rights under the Treaty. Exclusion of Little Black Bear from the benefits of IR 80A, would undermine the Band's fishing rights under the Treaty, given that it was landlocked, and would ignore the reason why fishing stations were created, namely to facilitate settlement, minimize conflict between settlers while assuring the Indigenous right to fish promised by the Treaty. Little Black Bear also urged that "the honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants" (Little Black Bear's Written Submissions filed September 18, 2018, at para 89 citing *Manitoba Métis* at para 73).

[193] Peepeekisis argued that Treaty 4 contemplated that reserves would be created to support fishing. Although not specifically written into the Treaty, fishing reserves were part of the Treaty's spirit and intent. Peepeekisis relied on oral history testimony for "evidence of intentions surrounding the negotiation of Treaty No. 4 to provide critical context to understanding the intentions that guided the creation of IR 80A, which was part of the fulfillment of Treaty No. 4's promises" (Peepeekisis' Written Reply Submissions filed October 5, 2018, at para 3). Like Little Black Bear, Peepeekisis urged a generous, liberal interpretation that would not restrict the Band's fishing rights, at the same time upholding the honour of the Crown in assuring those rights.

[194] Star Blanket's approach was very similar to that of Little Black Bear and Peepeekisis. It particularly emphasized the direction of the Supreme Court of Canada in cases involving First

Nations where interpretation was a question. Star Blanket reminded the Tribunal of Cory J.'s statement at paragraph 9 in *Badger* that "any ambiguity in the treaty will be resolved in favour of the Indians", and his expansion of the same principle in *R v Sundown*, [1999] 1 SCR 393 at para 24, 1999 CarswellSask 94 (WL Can) citing *Badger* at para 41, that "any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed...." Given the Band's perspective at the time of the Treaty, the Treaty's promises, the oral history in that regard, and the Band's traditional use of Kinookimaw before and after the Treaty, Star Blanket submitted that acknowledging it as a beneficiary would honour the Treaty and assure its promise of Indigenous fishing rights in the least restrictive way.

[195] Relying on *Madawaska*, Little Black Bear and Day Star submitted that the honour of the Crown required the resolution of ambiguities in favour of the Indigenous claimant when the Crown's records are poor. Little Black Bear argued that Canada had failed in making or keeping records because Indian Agents who had asked the Department to review its records in order to clarify questions about entitlement to IR 80A had received no response. The inference drawn was that there were no records, either because they did not exist or were badly kept. Little Black Bear also relied on the Crown's admissions that it had no other documents explaining intention or underlying policy for the creation of fishing stations. The Crown responded that, unlike in *Madawaska*, there was no evidence of missing documents, and no one had alleged Crown mismanagement of same. The documentary record was complete, albeit unclear.

5. Standing Buffalo and Allyship

[196] Standing Buffalo relied heavily on its Elders' oral history testimony to explain the relationship that had developed between it and the Crown. It submitted that the obligations embodied in the relationship included promises relating to a way of life in which fishing and other attachments to the land were elements. It characterized the setting aside of its primary reserve and the hay grounds as manifestations of the allyship. The Crown's awarding of medals, a flag and citations in recognition of military assistance was further proof. The Band submitted that the relationship created obligations arising from the honour of the Crown, and with the underlying facts also giving rise to a constitutional commitment (Standing Buffalo's Written Submissions filed September 18, 2018, at para 3).

[197] Standing Buffalo relied on principles stated in *Marshall* and *Badger* that: (i) the honour of the Crown requires it to act in a way that accomplishes the intended purposes of treaty and statutory grants to Indigenous peoples; and, (ii) it is always assumed that the Crown intends to fulfill its promises and to do so with no appearance of "sharp dealing" (*Marshall* at para 49 citing *Badger* at para 41). Standing Buffalo's Reserve was located in the Qu'Appelle Valley in the same area and close to three of the benefitting Bands. It was known to rely on fish for sustenance. Even though it had not signed the Treaty, it had been allotted a prime reserve based on its special relationship with the Crown. In addition, its need for hay had been recognized by the allotment of a special purpose reserve (IR 80B). IR 80A was on land traditionally used by the Band, both before and after it was created. In summary, Standing Buffalo urged that the honour of the Crown, a constitutional commitment arising from the allyship relationship, and the principles of interpretation required the Band's recognition as a beneficiary of IR 80A.

6. The Crown's Intention

[198] The Kawacatoose Group took the position that there was no departmental policy for the creation of fishing stations in the 1880s. It pointed out that Mr. Nelson had identified "Touchwood Hills" in the descriptor for IR 80A because the Touchwood Hills were not located in the Qu'Appelle Valley. Neither were the File Hills. Mr. Nelson was distinguishing geographic locations. The Kawacatoose Group reasoned that if Mr. Nelson had intended to include the File Hills Bands, he would have done so, because like the Touchwood Hills, they had a separate and distinct geographic location. The bands located further downstream in the Qu'Appelle Valley were not included because they already had fishing waters at Crooked and Round Lakes.

[199] According to Little Black Bear, Crown officials did not turn their minds to the creation of fishing stations until 1881, and they did so to address settlement pressures and possible conflict, as discussed in Mr. Hayter Reed's January 21, 1897 Memorandum (see paragraph 28 above). By the time Mr. Nelson first contemplated IR 80A, he was familiar with the geography of the Qu'Appelle Valley region, the collective situated there and the meaning of the terms "Touchwood Hills and Qu'Appelle Valley Indians." When he first contemplated IR 80A in his January 1, 1883 list of unsurveyed reserves, those reserves were listed under the heading "Qu'Appelle District" (see paragraph 33 above). Both IR 80A and an intended reserve for Little Black Bear were listed under that heading. Little Black Bear suggested that the "Qu'Appelle

District" was a general geographic area and that "Qu'Appelle Valley Indians" referred to First Nations living in that District.

[200] Mr. Nelson surveyed reserves for bands located in the Qu'Appelle District. He contemplated IR 80A would answer the Indigenous community's requirements for fishing. For Little Black Bear, the timing of Mr. Nelson's conception of IR 80A and his survey work to create primary reserves for the bands in the District, including for Little Black Bear, suggested that he was creating IR 80A for the "Indians" of the Qu'Appelle District. This was also consistent with the First Nation's self-identification as part of the Qu'Appelle, its perspective of Treaty 4, and its traditional use of Kinookimaw. The ordinary meaning of "Qu'Appelle Valley Indians" at the time was intended to encompass all bands situated along the Qu'Appelle Valley, including the landlocked Little Black Bear First Nation. The Band also pointed out that IR 80A was considerably larger than most fishing stations created for single bands, suggesting it was intended for a number of bands. Little Black Bear's inclusion as a beneficiary of IR 80A would also be consistent with placing the least constraint on the Band's fishing rights under the Treaty.

[201] Peepeekisis saw IR 80A as a manifestation of the written and oral promises arising from Treaty 4 to assure First Nation fishing rights in the region. Crown officials were aware that Peepeekisis was historically one of the Indigenous groups in the Qu'Appelle Valley and used its waterway. Mr. Nelson was aware of Department policy under which fishing stations were to be created for bands that did not have fishing grounds near their reserves, and he had followed this policy in creating a fishing station for Kahkewistahaw (Peepeekisis' Written Submissions filed filed September 18, 2018, at paras 49, 51–54). Mr. Nelson commented on Day Star's housekeeping and the otherwise "repulsive" nature of Indigenous peoples (CBD, Vol 3, Doc 234, at 18); Peepeekisis submitted that this indicated that he did not have much experience or awareness about the people themselves or their needs. Otherwise he would have been more specific in his description of which bands IR 80A was meant for. However, Mr. Nelson did not have authority to overrule the Treaty and its related promises. His vagueness should not be held against Peepeekisis, which otherwise fitted the policy of addressing the needs of landlocked bands that were part of the Qu'Appelle Valley collective through the creation of a fishing station. Later descriptions of Agency organization and geographic descriptions could not diminish or constrain Peepeekisis' fishing rights as a beneficiary of IR 80A.

[202] Star Blanket took the position that "Qu'Appelle Valley Indians" included all of the bands whose reserves were located in the "Qu'Appelle District." Mr. Nelson had identified the Qu'Appelle District in his January 1, 1883 list of yet unsurveyed reserves, which included IR 80A and reserves in the Touchwood Hills and File Hills. Star Blanket observed that in creating IR 80B for Muscowpetung and Standing Buffalo, Mr. Nelson had shown his awareness of the practice of identifying specific bands as beneficiaries of special purpose reserves. When he did not follow that practice in creating IR 80A, he evidenced his intention that all bands in the Qu'Appelle District should benefit. This broad intention was also consistent with the Indigenous perspective and history of use of IR 80A. Oral evidence also disclosed that at the time Mr. Nelson was surveying in the area, Canada thought of the Indigenous community collectively rather than as bands. Based on oral history testimony, Star Blanket also submitted that the Department had invited all bands collectively within the Qu'Appelle District to fish at IR 80A. Star Blanket was an established member of the Qu'Appelle Valley collective. It had been known as "the Calling River People" because it had used and travelled the Qu'Appelle Valley waterways as part of its migratory tradition (Noel Starblanket—Hearing Transcript, July 24, 2017, at 37, 91).

[203] Standing Buffalo submitted that it's entitlement to IR 80A was drawn from its allyship relationship with the Crown. In the 1870s and 1880s, Canada was attempting to meet the needs of the Indigenous community in the area. It was not necessary for a band to sign Treaty 4 in order to merit the Crown's attention. Standing Buffalo had been allotted a prime reserve selected by its Chief. This was consistent with the collegial relationship and mutual respect between the Band and the Crown through allyship. Canada knew that Standing Buffalo relied on fish for sustenance. The Band had been known as the "Fish People" or "Fish Eating People." In allocating Standing Buffalo's reserve, Canada had been sensitive to the Band's needs when it also set aside IR 80B as a "Hay Grounds" reserve to be shared with Muscowpetung. IR 80A had been created contemporaneously to fulfill Standing Buffalo's need for fishing grounds. The water by the Band's primary reserve was too shallow to support the type and quantity of fish needed to sustain the Band. IR 80A had been well-known to Standing Buffalo as a traditional gathering place for fishing, gathering, and participating in ceremony. Kinookimaw had also been a sacred place for Standing Buffalo's people. Throughout the 1880s and later, Standing Buffalo's location had been described in departmental reports as "Qu'Appelle", or "Qu'Appelle Lake(s)",

along with its neighbours, Pasqua, Muscowpetung and Piapot, who were acknowledged beneficiaries of IR 80A. Being in the same geographic locale as these three Bands, Standing Buffalo was part of the "Qu'Appelle Valley Indians."

7. Interpretation Post-PC 1151

[204] The Kawacatoose Group argued that events after IR 80A's confirmation by PC 1151 established that the seven Bands were the ones entitled to the Reserve. The Crown's intention was confirmed by the 1918 surrender, which called upon the participation of the seven Bands. Subsequent correspondence raising questions about entitlement consistently resulted in senior departmental officials corroborating the seven Bands' entitlement, including by Assistant Deputy and Secretary McLean in 1922, Deputy Superintendent General Scott in 1924, Directors of Indian Affairs in 1936 and 1938, Regional supervisor Ostrander in 1949, Minister Harris in 1954 and Assistant Deputy Minister Battle in 1965. In the 1960s, the Department sought a surrender for purposes of leasing some remaining part of IR 80A. Again, it sought surrender from the seven Bands. This resulted in the formation of the Kinookimaw Beach Association. When senior departmental officials confirmed the entitlement of the seven Bands, it also rejected the entitlement of the File Hills Bands that were claiming entitlement. The Department had consistently regarded the seven Bands as entitled for 100 years.

[205] The Kawacatoose Group submitted that Standing Buffalo had been excluded from entitlement to IR 80A because the Department considered it to be "American Sioux." Also, Standing Buffalo did not assert an interest until this Claim was made. Peepeekisis was in the same situation, and Little Black Bear had not asserted an interest until the Chief and Council of Piapot raised it in 1954. These Bands' own actions spoke to their lack of entitlement.

[206] Little Black Bear argued that the Department got confused after IR 80A was formally set aside. Before then, when the Reserve was conceived and sited, the Department viewed the Indigenous community as one collective. Later, however, it viewed it through a band-based lens. Also, the Department lacked resources in the early years, so it had difficulty keeping track of the bands, their characteristics and their needs. This might explain the confusion and lack of records clearly expressing the Government's intention. Little Black Bear submitted that Canada's intention in creating IR 80A was formed in the non-band-based context, to benefit all bands in

the Qu'Appelle District. IR 80A was a practical, inexpensive solution that assured the bands' needs were met in terms of fishing, while at the same time supporting the development of settlement in a peaceful manner. Little Black Bear pointed to the views of front-line officials expressed in correspondence supporting the File Hills Bands' entitlement to IR 80A.

[207] Maintaining its earlier stated position, Peepeekisis also submitted that the Crown's calling upon the seven Bands in the 1918 surrender was an administrative convenience, and subsequent confirmations simply compounded that administrative convenience. That would not, however, change Canada's original intent, which included the File Hills Bands. Also, the names of the Agencies administering the bands were of no consequence, particularly as those names changed over time. This added to the confusion but, again, did not alter Canada's original intent and could not extinguish Peepeekisis' entitlement. Peepeekisis insisted that it was historically part of the Qu'Appelle Valley District, irrespective of how Agencies were organized or what they were called. Peepeekisis submitted that Mr. Graham's 1924 written support of the File Hills Bands being beneficiaries should be given weight because he had lived and worked with the Bands for many years. Similarly, weight should be given to Indian Agent Deason's 1925 opinion that all bands taking treaty payments at Fort Qu'Appelle should be considered "Qu'Appelle Valley Indians." He had a relatively clear understanding of the Indigenous perspectives and the people of the region. The File Hills Bands received their treaty payments at Fort Qu'Appelle at the time.

[208] Star Blanket considered that the post-PC 1151 documentary record evidenced its right to share in IR 80A, and demonstrated the Department's uncertainty or confusion about entitlement.

[209] Standing Buffalo noted that its name had appeared in a list of bands that were to benefit from the surrender, but it had been stroked off the list without a reason being given. It pointed out that Chief Surveyor Robertson (letter of July 12, 1924; CBD, Vol 1, Doc 84) and the Director of Indian Affairs (letter of September 10, 1938; CBD, Vol 1, Docs 104–05) indicated that Standing Buffalo should be entitled. The suggestion that it was excluded because it was "American Sioux" was incorrect and discriminatory, as the oral history and expert evidence had established.

8. Use of IR 80A

[210] The Kawacatoose Group acknowledged that most of the evidence of use of IR 80A by the Added Claimants came from oral history testimony. The Kawacatoose Group did not dispute that testimony but submitted that the use had been occasional and infrequent given the history and context at the time the Treaty was signed and during the years that followed. That use did not rise to the degree that would have required Canada to consider including those First Nations when setting the fishing station aside.

[211] The Kawacatoose Group also acknowledged that it had not denied the other bands access to IR 80A. However, the fact that they had access did not mean the Reserve had been set aside for them, or gave rise to an entitlement.

[212] Little Black Bear and Peepeekisis submitted that their traditional use of IR 80A was a significant component of the Indigenous perspective and their theory of entitlement. The fact that they used IR 80A after it was set aside satisfied the principle in *Ross River* that the band must accept the reserve through use. Peepeekisis pointed out that the imposition of farming, residential schools and the pass system reduced the Bands' frequency of use of IR 80A, but that should not be held against the Bands or adversely affect their entitlement. All of the File Hills Bands used IR 80A because they were landlocked, did not have their own fishing grounds, and Kinookimaw was the closest good fishing water to their reserves.

[213] For Standing Buffalo, use was not of great importance to its theory of entitlement. However, it did observe that its use of IR 80A had been all encompassing and not limited. It also observed that the Reserve had been used by many First Nations, not just one or a few.

VII. ANALYSIS

A. This Historical Context of IR 80A as Described in the Oral History

[214] The most appropriate starting point is with the substantial oral history evidence that has been received. This is because according to the Indigenous history, the "story" leading to the problem before the Tribunal started long before the creation of IR 80A. Resolving the interpretation question at hand is impossible without knowing and recognizing the underlying Indigenous perspective and historical context. I fully accept the legal principles discussed in this

regard. This point of departure also segues conveniently into the character and effect of oral history as evidence, and how it fits into the puzzle at hand.

[215] Oral history is the only way the Claimants can bring their history, perspective and the context of the times into the arena. At the time that Treaty 4 was signed and the reserves were formed, including IR 80A, Indigenous cultures and technologies did not include paper records. However, that did not mean that the Claimants' ancestors did not keep track of their history, world view and laws. They did so by passing it down orally from one generation to another. It was a conscious and organized feature of the way they lived and managed to maintain a collective awareness of their roots. Canadian law has accepted oral history as a full and equal partner in the kinds of evidence that courts may receive. To be accepted, the oral history evidence must be necessary, reliable and relevant. Once that threshold is satisfied, it may be admitted and used like any other piece of evidence, but with an awareness of cultural differences. It must also be given "*equal* and *due* treatment" (emphasis in original; *Mitchell* at para 39; see paragraph 152 above). The court must weigh oral history evidence according to the principles applicable to all evidence.

[216] I accept the legal importance of attempting to understand the perspectives and underlying histories of the Claimants. Through such understanding, they will have a fair opportunity to establish a nexus between their perspectives and the Crown's intention in creating IR 80A. It may then be easier to apply the rules of interpretation in a generous manner that honours the purpose behind the creation of IR 80A, while maintaining these Parties' rights and guarding against an approach that diminishes or limits those rights. The principles discussed in paragraphs 136 to 148 above were not disputed or challenged in any way. The Tribunal takes instruction from them.

[217] No Party objected to any of the oral history evidence presented in this sub-phase hearing, although they urged the Tribunal to give different weights to various aspects. While there was no contest to the admissibility of the oral history testimony, some comment is appropriate.

[218] Firstly, I was convinced that all of the witnesses were doing their best to tell the truth as they had learned and experienced it, and that they were attempting to assist the process of resolution, although they were aware of the dynamics of the dispute among the participating First

Nations and with the Crown. The Elders testified in utter solemnity. Each day's testimony was preceded with significant and often elaborate ceremony in which the obligation to speak one's heart and mind openly, and in truth, was accentuated again and again. The Tribunal was invited to observe and participate in those ceremonies. Each day of hearing exuded the solemnity of the day's business, and with a view to finding fair resolution in a spirit of reconciliation, not just between First Nations and Crown, but also among First Nations.

[219] The Elders all explained their origins and sources of learning, which involved them in constant teachings of history and culture by close family members and Elders, many of whom had been leaders in their own time and who had learned from previous leaders. As a whole, these witnesses painted a picture of shared history and perspective. At times the testimony was gripping in details of how, over the decades, the people had been mistreated, oppressed and marginalized. Most Canadians would be shocked by these dark and convincing revelations. Of course, there were also many informative details about a nomadic society on a prairie without boundaries, once rich in sustaining resources, and where today's legal and political boundaries did not exist. When viewed through the lens of the First Nation Claimants, IR 80A is a piece of a bigger picture, state of being and events that occurred over the decades before and after contact.

[220] The Claimants all agreed that the issues in this sub-phase cannot be resolved without an appreciation of the Indigenous historical and cultural perspectives. Their ancestors were nomadic peoples who followed traditional paths through the territories in question, hunting, fishing and gathering. The nomadic way of life inspired their view of the land, and how they related to it and to each other. They were not organized into bands, as they eventually were, once they fell under the administration of the *Indian Act*. The divisions and geographic boundaries that were the norm in the Canadian system of land management and the common law were unknown to them, and totally foreign to how they organized themselves. They were led by Chiefs as they moved about their traditional territories, sometimes travelling together with the followers of other Chiefs, and often meeting with other groups at recognized resting places that were traditional stopping points. IR 80A, known to the First Nations as "Kinookimaw", was one of those traditional meeting places.

[221] The Cree/Saulteaux people identified themselves and everything about and around them

was “Nēhiyaw.” Standing Buffalo’s Siouan world view was similar under their centuries-old Seven Council Fires. These Plains people had their own laws of behaviour and belief, which as one Elder explained, were “God-given.” The laws that governed them were not only practical, but also of spiritual force.

[222] As described by the witnesses, the land sustained their ancestors. It provided food, medicines, shelter, and water—and was deeply spiritual in nature. Their way of life produced a shared view of how they related to the land and the larger world around them, including each other. The result was a belief system based on sharing. Thus, when Treaty 4 came under negotiation and Alexander Morris promised: “[t]he animals and the plants that are here are yours”, it was taken as a solemn affirmation that the people would continue to be able to maintain themselves on the land as they always had, and in a sharing way. The fundamental importance of Cree/Saulteaux and Dakota/Sioux relationships with the land was communicated forcefully in the testimony of a number of the Elders, when they referred to “Mother Earth” (Peepeekisis Elder Thomas Michael Pinay—Hearing Transcript, June 22, 2016, at 39, 72; Pasqua Elder Lindsay Cyr—Hearing Transcript, June 20, 2016, at 59; Little Black Bear Elder Robert Bellegarde—Hearing Transcript, June 21, 2016, at 12; Day Star Elder Irvin Buffalo—Hearing Transcript, June 22, 2016, at 202; Standing Buffalo Elder Wayne Goodwill—Hearing Transcript, June 23, 2016, at 90; and, Star Blanket life speaker Noel Starblanket, Hearing Transcript, July 24, 2017, at 51, 92). The land was and continued to be a “Mother.” It is a powerful image.

[223] These descriptions of world views and historical context were grounded in centuries of life experience. The land composing IR 80A was viewed in this context by the ancestors of the Claimants prior to the creation of the Reserve, as well as after. Indeed, the perspectives presented by the oral history witnesses expressed culture and beliefs much broader than the institutional legal focus of this proceeding. From the perspectives of many witnesses, Canadian law was a frustrating interference with their view of justice and how the world worked.

[224] Based on this evidence, it is a small but important step to recognize that Kinookimaw was an important place for the Indigenous people of the area before, at, and after the signing of Treaty 4. Virtually all of the Elders attested to its importance as a stopping point along the migratory path to and from the Cypress Hills in what is now southwestern Saskatchewan. There

was a strong consensus that it had been a traditional place to rest and feed horses, gather berries, herbs and medicines, pursue local game and to fish. As such, it was also an important meeting place where the people would visit, engage in trade and share ceremony. Because Long Lake was abundant with a wide variety of fish, it was also an important source of sustenance. Fish would be caught in large numbers, dried and made into pemmican to carry the bands over the winter and their travels. Kinookimaw also had a sacred quality, with rock formations of a spiritual nature that became important monuments to those who gathered there. For the Sioux, it also had paranormal qualities, so that children were closely guarded for their safety. Prior to the signing of the Treaty, the Claimants' ancestors also rested at other places near or on the shores of the lake, and they had other important traditional stopping points along the migratory path. However, they were attracted to Kinookimaw because it was a traditional gathering place for so many bands.

[225] Those were the views of the Claimants' predecessors who signed Treaty 4, and this continued after the Treaty was signed. Many of the witnesses recounted how their ancestors continued to use Kinookimaw, much in the same way after the signing of the Treaty as they had before. They also spoke of their own visits to Kinookimaw as youngsters, with grandparents, parents or other family members. They would travel by horse and buggy, staying for a few days or weeks to pursue the traditional uses of the land and the lake. Kinookimaw's importance grew when a number of First Nations people, including several powerful chiefs, died from disease introduced by settlers, and were buried there.

B. The Connection Between Treaty 4 and IR 80A

[226] The text of Treaty 4 was brief and general in its reference to the Indigenous signatories' right to fish, hunt, and trap. It said only that the "Indians shall have right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered." This general statement was qualified and did not apply to lands "required or taken up from time to time for settlement, mining or other purposes" approved by the Government. At the time of the Treaty, of course, the area open for hunting, trapping and fishing was most of the territory—a vast area. The Treaty made no mention of specific purpose "stations", such as for fishing, hunting, haying or timber. However, as the courts have held, written treaties may also include oral terms (*Badger*; *Marshall*).

[227] The Claimants justified their entitlement to IR 80A under PC 1151 by linking the Reserve to the Treaty or Treaty-related promises made at the time, or in Standing Buffalo's case, by linking it to allyship and the geographic location of its primary reserve. For the File Hills Bands, they also identified themselves as geographically and culturally ("Nēhiyaw") associated with the Qu'Appelle region at the time of the Treaty, rather than where their reserves were eventually located. Oral history was the source of linkage to the Treaty, as well as geographic and cultural identification. Arguments of actual geographic location were advanced mainly through the submissions of Counsel in reference to all of the evidence, both oral and documentary.

C. Accounts of How Claimants Came to be Beneficiaries of IR 80A

[228] The witnesses also gave oral history evidence about their ancestors' perspectives on how they became beneficiaries of IR 80A as a reserve, distinct from pre-existing connections to that land. The Elders' accounts and explanations of entitlement to IR 80A were varied. The best account was from Day Star Elder Irvin Buffalo. According to his oral tradition, an ailing Chief Kawacatoose sent his brother to ask the Department of Indian Affairs for a fishing station on behalf of the Kawacatoose, Day Star, George Gordon and Muskowekwan Bands. Those Bands were landlocked in the Touchwood Hills and needed a place to fish. The brother travelled to "near Winnipeg" (Hearing Transcript, June 22, 2016, at 207–08) and made the request on behalf of the four Bands. He was told, however, that surveying for the year was complete and that he should return the next year when the request would be considered and a decision made. Elder Buffalo recounted that "all of a sudden" seven Bands became entitled to Kinookimaw—the four just mentioned plus Pasqua, Piapot and Muscowpetung. Day Star's belief was that the three Bands had been added as a favour to their chiefs by W. M. Graham, who was Indian Agent or Commissioner, and a friend of those chiefs.

[229] Elder Buffalo testified that his people had fished at Regina Beach on Long Lake, both on the south and north shores. However, the surveyor crossed to the north side and surveyed the station there. Members of Day Star had subsequently but unsuccessfully searched for survey posts on both the north and south sides of the lake. The Elder explained that there had been considerable ill-feeling on the part of the Touchwood Hills Bands toward the added three, because those three were located on the Qu'Appelle Valley river/lake system and already had fishing grounds. Elder Buffalo allowed that a number of people from other local bands had also

used IR 80A because they knew it was a reserve, although he said it had been used mostly by the Touchwood Hills First Nations.

[230] George Gordon Elder Mervin Frank Cyr spoke mostly about his knowledge of IR 80A's surrender. Without elaboration, he testified that his Band had fishing rights at IR 80A, and that they had used them. He also described that Chief Kawacatoose had drawn a diamond shaped map of the fishing station, indicating where each of the Touchwood Hills Bands had a share of the land for their own use. According to George Gordon Elder Michael McNab's oral history, IR 80A had been set aside for the seven Bands of the Kawacatoose Group, which he described as Bands of the Touchwood Hills and Qu'Appelle Valley *Agencies*, and it had been used mostly by those Bands. Without further elaboration, he stated that it had been set aside for bands that did not have fishing grounds of their own.

[231] Elder Lindsay Cyr of Pasqua testified that IR 80A had been set aside for his people alone. Later in his testimony he allowed that it might also have been used by other bands, although mostly from nearby areas. He stated that lands for hunting, fishing and timber had been discussed as part of Treaty negotiations, and he maintained that fishing stations had been promised as part of the Treaty.

[232] Elders Irvin Buffalo, Mervin Frank Cyr, Lindsay Cyr and Michael McNab provided all of the oral history evidence received on behalf of the Kawacatoose Group, which was eventually called upon to surrender IR 80A. It was not disputed that those First Nations were valid beneficiaries of IR 80A.

[233] Star Blanket Elder Douglas Grant Starr testified generally about how and where his people had fished. He said they had had access to the Qu'Appelle lakes as well as the reserve at Kinookimaw Beach, although his own fishing had been at Katepwa. He stated very briefly, and without detail, that his Elders had taught him that Star Blanket had access to Kinookimaw for fishing.

[234] Life speaker Noel Starblanket testified that a fishing station had been promised to his people as part of the Treaty. Originally, the Band's fishing rights had been located near Crooked Lake, where it had originally been allotted a reserve. However, when the Band refused to take up

that reserve, the related fishing rights were lost. When a new landlocked reserve was eventually allotted, the Band's fishing rights were situated at Kinookimaw, Star Blanket's traditional stopping place to rest, fish and gather. He credited this history to "old Pat Cappo" (a chief in his father's time), who had said they shared Kinookimaw with other people. The life speaker's father had also been a chief. Life speaker Starblanket was convinced of this history: "…when I talk about these things, I'm not just drawing stuff out of a hat. This is not storytelling. These are the facts as we -- we remember them in Elder testimony…" (Hearing Transcript, July 24, 2017, at 41). Later in his evidence, he testified that Chief Cappo maintained that while Star Blanket should have had fishing rights and a share of the land at Kinookimaw, the Government had given them to the Touchwood Hills Bands, which he thought was "all right" because they were not situated on a body of water. However, the Government had also given rights to Pasqua, Muscowpetung and Piapot, whose Reserves already had bodies of water to fish in. This was not right or fair. Life speaker Starblanket also acknowledged that his people fished at Katepwa when it became available, because it was closest lake to their Reserve.

[235] Star Blanket Elder Margaret Starblanket had been born and grown up on the Little Black Bear Reserve, although she had married a Star Blanket Chief and had lived thereafter on the Star Blanket Reserve. She testified that IR 80A was a reserve for a lot of the people who needed a place to hunt, fish, and trap, including Little Black Bear, George Gordon, Muscowpetung and Peepeekisis. She understood that IR 80A had been a part of Little Black Bear's lands, although she said that she had lost track of it after Little Black Bear got its reserve.

[236] Little Black Bear Elder Robert Bellegarde also testified that IR 80A had been set aside for his Band alone. He maintained that it had not been shared with any other bands, although later in his testimony he indicated it had been shared with Pasqua and Muscowpetung. He said that according to an uncle, the fishing station had been promised at Treaty time. Although Band members knew they belonged at Kinookimaw, Elder Robert Bellegarde stated that they eventually fished mostly at Katepwa because it was closer to the reserve.

[237] Elder Vernon Bellegarde of Little Black Bear also testified that the fishing station had been given to his Band alone. His grandfather had told him "this is our land", and an uncle who was a former chief had been adamant that IR 80A belonged to Little Black Bear alone (Hearing

Transcript, June 21, 2016, at 69, 72–73, 92). The uncle insisted that the Band had been promised a fishing station at the signing of the Treaty. On the other hand, Elder Vernon Bellegarde related how, when he was about nine years of age, he had visited Kinookimaw with his father, and they had encountered a family from each of Pasqua and Muscowpetung. According to his father, those Bands also had fishing rights at Kinookimaw, so it was not a problem that the families were there. Later in his testimony, Elder Vernon Bellegarde expanded that his father had told him that members of other reserves, including Pasqua and Muscowpetung camped there. The Elder thought the fishing station had been allotted to Little Black Bear because it had been a traditional stopping point for the Band at the time of the Treaty.

[238] Little Black Bear Elder John Bellegarde also testified that Kinookimaw had been set aside for his Band alone. This was because Little Black Bear was landlocked and without fishing grounds of its own. He said many Elders had confirmed this to him, and it was the only place identified as Little Black Bear's fishing grounds. However, when Katepwa became available, the Band fished there mostly because it was much closer. Still, the Band always regarded Kinookimaw as its own. He allowed that an uncle maintained that Kinookimaw was shared with Pasqua and Muscowpetung.

[239] Elder Michael Thomas Pinay of Peepeekisis testified that fishing stations had been promised to each community, depending on its location. He said the Government wanted every community to have a fishing station. Initially, he claimed that IR 80A had been allotted to Peepeekisis alone. However, he later said that a few First Nations had an interest in it. He could not recall which bands, but they included Little Black Bear, Star Blanket and Pasqua. He thought a government official (probably Mr. Graham) had told Peepeekisis it had access to IR 80A because its reserve was landlocked. On the other hand, Peepeekisis Elder Elwood John Pinay testified that IR 80A was a place for his people to fish, but that it had not been given to the Band in relation to signing the Treaty: "We just used it and when we finished, we left it."

[240] Standing Buffalo Elder Wayne Goodwill testified that IR 80A had been given to his people, who had also been known as the "Fish People" or "Fish Eating People", because the water bordering their Reserve was too shallow to support significant fishing. The Band had come to rely greatly on fish as a source of food once the buffalo went into decline. Later in his

testimony, he said that his grandfather had participated in negotiations for access to Kinookimaw, and he acknowledged that many other bands had also used the Reserve for sustenance fishing and ceremony. Elder Goodwill said Elders had seen a letter acknowledging Standing Buffalo's entitlement to IR 80A. He himself had accompanied Chief Standing Buffalo to a meeting about 46 years before. The purpose of the meeting was to discuss settlement of the allotment of IR 80A to beneficiary First Nations, and Standing Buffalo had been included in the list of bands entitled. Standing Buffalo Elder Vincent Ryder testified that no Indian Agent had forbidden the Band to use IR 80A. One or more of the Indian Agents had said all of the bands, collectively, could fish there. However, other bands had told Standing Buffalo it was not entitled to use IR 80A. He also said that, in addition to IR 80A, his people had fished at various lakes in the area, including Echo and Pasqua.

[241] Standing Buffalo Elder Vincent Ryder did not address the question of entitlement, focusing mostly on Kinookimaw's traditional significance and how it had been used before and after the Treaty. He agreed, however, that people from other tribes would use it, although rarely, and he did not know who they were.

D. Use of IR 80A After its Creation

[242] It is clear that access to Kinookimaw diminished significantly once the First Nations were settled on their allotted Reserves. They did not move about nearly as much then, as their time was taken learning agriculture, and building farms and homes. Having to send children to school also kept them close to home, especially during the school year.

[243] Of great significance, the Riel Rebellion and Government suspicion of Indigenous loyalties, led to the institution of the pass system. The controlling aspects of this system have already been discussed. It was a way the Government could closely supervise and control almost every aspect of Indigenous life, quite apart from the already controlling features of the *Indian Act*. By meting out passes in a coordinated fashion, Indian Agents could limit the opportunities of area bands to meet with each other, and thereby also limit the possibility of insurrection.

[244] From my understanding of the evidence, the pass system was much more controlling than that. As the Elders have testified, it became a mechanism to reward and punish every aspect of an individual's or family's daily life. As a result, the Bands' abilities to travel to IR 80A, and to

engage there in traditional uses, was significantly restricted. It appears that not all of the Bands were subject to the same degree of control. Elders testifying on behalf of Pasqua and Little Black Bear did not think the pass system had applied to their people. Still, the overall effect was that Bands would not encounter each other as frequently or at all, which may have reinforced the impression that other bands did not use the Reserve. This may also have affected viewpoints of entitlement, especially since IR 80A was not formally set aside until after the Riel Rebellion had been suppressed, the pass system implemented, and most area First Nations had settled on their Reserves. Once Katepwa was available, IR 80A was used even less by the First Nation Claimants. The perception of some witnesses and their forebears that other Bands did not seem to use Kinookimaw could also have supported one's belief that IR 80A was theirs alone.

E. Conclusions on the Oral History Evidence Relating to Entitlement

[245] When considered as a whole, the oral history evidence is problematic on the question of entitlement. The history of the witnesses conflicted from one First Nation to another as well as internally among witnesses from the same First Nation. One Star Blanket Elder testified simply that his Band had had access to IR 80A and the right to fish there. Another said that when original fishing rights had been lost with a reserve, the Band refused to settle on, the rights shifted to Kinookimaw although he did not explain how. Later he said that while Star Blanket should have had fishing rights there and a share, the Government gave it to the Touchwood Hills Bands (which was okay because they were landlocked) and to Pasqua, Muscowpetung and Piapot (which was not appropriate as they bordered water). The third Star Blanket Elder said it was a place for people who needed a place to fish, including members of Little Black Bear, George Gordon, Muscowpetung, and Peepeekisis, although she understood it to have been part of Little Black Bear's lands.

[246] Similarly, the Little Black Bear Elders demonstrated inconsistencies on entitlement. They all started out by saying that IR 80A had been Little Black Bear's alone. However, later in their testimonies they conceded that it might have been shared with other bands, in particular Pasqua and Muscowpetung.

[247] One Peepeekisis Elder said IR 80A was initially allotted to his Band alone, but later allowed that it had been shared with other bands. He could not remember which other bands had

shared, except Little Black Bear, Star Blanket and Pasqua. Another Peepeekisis Elder testified that IR 80A was simply a place for his people to fish and when they were done with it, they left it.

[248] As for Standing Buffalo, one Elder indicated IR 80A had been given to his Band because it had inadequate fishing grounds. Although not clear, the inference might have been that Standing Buffalo alone was entitled. Later in his testimony, however, he indicated that IR 80A had also been used by many other bands for fishing and ceremony. He said Standing Buffalo had appeared in a letter or on a list indicating its entitlement, although other bands had said it was not entitled. The second Standing Buffalo Elder did not address the question of entitlement, but acknowledged he had seen members of other bands there, although he could not say who they were.

[249] I have summarized the oral history testimony on entitlement to demonstrate the variety of understandings that existed within and among the First Nation Elders who testified. Some Elders understood that IR 80A had been set aside for their First Nation alone although a number eventually allowed that other First Nations used it or shared it. Some Elders understood that their community only had access but no other entitlement. These differences, variations and inconsistencies in the oral history evidence make it difficult to determine with any confidence that the Added Claimants were entitled to IR 80A.

[250] When I make this observation, I do not in any way question the sincerity of the witnesses, or the genuineness of their testimony. I am quite certain they accurately recounted the information passed down to them as a matter of their forbears' understanding and perspective.

[251] However, the inconsistencies undermined their evidence, both on an individual and overall basis. Regarding the statements by some witnesses that a First Nation was the only beneficiary, I conclude it was impossible for IR 80A to have been allotted to a single First Nation because it is contrary to the Parties' own consensus that the seven-member Kawacatoose Group was validly entitled. A band's sole entitlement was also inconsistent with the designation of "Touchwood Hills and Qu'Appelle Valley Indians." There was a general consensus that these were two distinct geographic areas. The Department associated bands with reserves after the imposition of the *Indian Act*, and by departmental logic, a single band would not be described as

"Touchwood Hills and Qu'Appelle Valley Indians." One band could not be located in or be a member of both geographic areas. Multiple bands were also located by the Department in each of the two geographic areas. As I understand it, the thrust of the Added Claimants' submissions was that "Qu'Appelle Valley Indians" should be interpreted to include them. A conclusion that only one band was a beneficiary under PC 1151 is impossible where a number of bands from distinct geographic areas are already acknowledged beneficiaries. For the same reasons, the Added Claimants' argument that they identified with the larger Qu'Appelle region and were part of a larger Indigenous collective that should be considered when interpreting "Qu'Appelle Valley Indians" does not work in circumstances where individual bands claim sole entitlement. None of the principles of interpretation can unscramble and accommodate these positions.

[252] A number of the Elders also understood IR 80A to have been related to an oral promise that was part of Treaty 4, or related in some other way to the Treaty. From all the evidence, it is clear that, in a general way, reserve creation was part of treaty implementation for the adhering First Nations. It is also clear on the face of PC 1151 that as of 1889 the Governor General in Council perceived that Order in Council to be addressing reserves within the Treaty 4 area. However, the testimony about an oral promise of fishing stations came with little elaboration or underlying factual basis for support of the position. Without more, I am skeptical. This evidence as presented was not sufficiently developed to support a finding that a promise of fishing station reserves was made at the time of Treaty adherence, either as part of the Treaty or in some related way. If fishing stations had been promised as part of the Treaty, I would have expected it to have been a strong, consistent and common theme in the oral history, but it was not. I would also have expected some awareness and documentary reference by the Crown if it had made promises in addition to the written Treaty that it must keep track of, execute and honour. I could find nothing in that regard. I found no nexus between the Crown and indigenous perspectives on this point.

[253] My understanding of why Little Black Bear and some of the other Added Claimants asserted the oral promise was to strengthen the interpretation of PC 1151 as proposed by those Claimants. The way they framed the issues for this sub-phase puts great emphasis on the Treaty context for the task of interpreting PC 1151, but they did not allege breach of treaty resting on a specific promise, oral or written. I make this observation because treaty interpretation is not a focal purpose of this sub-phase and care must be taken to limit the conclusions drawn here to

what is necessary for this sub-phase.

[254] Although the evidence was insufficient to support the specific assertion made by Little Black Bear, there is no doubt that IR 80A was identified, surveyed, and confirmed with an awareness of the Treaty setting. Both from the oral history and written record it is evident that access to fishing was a concern at the time of Treaty negotiation, and was a concern of both Indigenous participants and the Crown officials involved in the reserve creation process that followed the inception of the Treaty. The evidence as a whole supports that this was part of the Crown's overall outlook and motivation during the surveys and passage of PC 1151. The evidence was clear that Surveyor Nelson, and his superiors, would have been aware of Treaty 4. PC 1151 specifically refers to Treaty 4 and Mr. Nelson was in charge of the surveys approved by PC 1151.

[255] It is clear from the written record that the Treaty provided that the Government, through Commissioners, would "assign" reserves of a specified size selected by its officials in consultation with the bands. The Treaty also stated that the "Indians shall have right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered" subject to Government regulation, and excepting lands taken up or required from time to time for settlement, mining or other purposes.

[256] The Indigenous population had surrendered its entire traditional territory. When the Treaty was signed no reserves were yet in existence and settlement was in its infancy. The Indigenous people did not know where their reserves would be, or the characteristics of those reserves. However, they could fish anywhere in this vast territory, except as limited by the Treaty.

[257] In the ensuing years, fishing stations were a way that bands in need of fishing grounds could continue to have access to fisheries and the Crown could moderate conflict between Indigenous people and settlers. Fishing stations were a mechanism through which both the Crown and Indigenous treaty adherents' concerns about fishing access could be addressed.

[258] It should be noted that in none of the oral history testimony was there any mention or suggestion that the Claimants were ever without a place to fish. None suggested that they were

unable to meet their needs in fish for purposes of sustenance. Nor was it suggested or pleaded that this term of the Treaty had been breached.

[259] In 1874, when Treaty 4 was negotiated, there was no need to think of fishing stations, even if the concept of fishing stations existed then, which I do not accept. I do not see why fishing stations would be discussed or even come up in the negotiations when the bands could fish anywhere not settled or otherwise developed, which was most of the territory. This was especially so because no reserves had yet been set aside and the adhering Indigenous groups did not know precisely where they would be settled or the characteristics of their reserves.

[260] Because of the pass system, many of the bands had great difficulty accessing *any* off-reserve location, including IR 80A. It was not that they could *not* access IR 80A to fish or hunt. The access was controlled, which certainly caused inconvenience and a sense of oppression. The First Nations' change in lifestyle from nomadic hunting and gathering to agriculture also limited their movement. The pressures of daily life on a farm, maintaining a home, sending children to school, and for some, engaging in employment, kept the people close to their reserves. But none of these factors limited sufficient access to fishing waters or the availability of fish as the Claimants' way of life and economy changed. Indeed, when a dam was built in the Qu'Appelle Valley to create Katepwa, most of the bands fished there because it was closer and more convenient. Katepwa was blessed with the same abundance and variety of fish. The Elders also indicated that their people fished at other locations. The issue in this case was not a lack fish or places to fish.

[261] Regarding the testimony about how certain bands came to be beneficiaries of IR 80A, the testimony of Elder Irvin Buffalo about the ailing Chief Kawacatoose sending his brother to Winnipeg to ask for a fishing station is interesting because it provides details that may be measured against the documentary evidence. It is not simply a conclusory statement.

[262] The Elder testimony clearly established the strong attachment that all of the First Nations had to IR 80A through traditional use and related cultural perspective. I accept that that attachment was deep, emotional and spiritual. In my view, this was the primary basis of the Added Claimants' sense of entitlement. It was founded on their communities' traditional use of IR 80A and all that that entailed over the decades and centuries. However, that traditionally-

based sense of entitlement does not afford direct assistance in the interpretation of the Crown's intentions behind the expression "Touchwood Hills and Qu'Appelle Valley Indians" unless it can be shown that the Crown was aware of it and was motivated to act upon it. It does provide a rich understanding of certain aspects of Indigenous perspectives and context at various times, all of which must be kept in mind when considering the extensive documentary evidence adduced in this case.

F. Analysis of the Documentary Record

[263] I turn now to consideration of what the documentary record offers for the task of interpreting the expression "Touchwood Hills and Qu'Appelle Valley Indians" as used in PC 1151 and earlier documents. It was an expression devised and used governmentally to create what all agrees was a valid reservation within the meaning of the *Indian Act*. It remains important to note that colonial officials also operated with their own sense of social context of the times, which may not have been well-informed with respect to the Indigenous perspectives.

[264] What does the documentary record reveal about the Government's intention in using and approving that wording? Who did the Government intend to benefit, and why? More particularly, what was the Crown's intent, given the Indigenous collectives' perspectives at the time, and in the context of having adhered to Treaty 4 not many years before?

[265] The first reserves in the Qu'Appelle Valley area were surveyed by William Wagner two years after Treaty 4 was signed. In September 1876, he surveyed the Day Star Reserve (Indian Reserve No. 87) and Kawacatoose Reserve (Indian Reserve No. 88), both of which J. C. Nelson subsequently surveyed boundary alterations for in 1881, 1888 and 1889. Both reserves were located in the Touchwood Hills. Mr. Wagner also surveyed Pasqua Reserve (Indian Reserve No. 79) in October 1876. The Pasqua Reserve was located in the Qu'Appelle Valley itself, not far from Fort Qu'Appelle.

[266] Surveyor General J. S. Dennis' Memorandum of July 13, 1875 proposed that Mr. Wagner be employed to follow the Commissioner and survey tracts for reserves identified by the Commissioner at Qu'Appelle, the Touchwood Hills and wherever else the Commissioner might go that season. This was the first documented reference to the Touchwood Hills and Qu'Appelle as distinct geographic locations. There was no precise indication of what Mr. Dennis meant by

"Qu'Appelle"—i.e. the Qu'Appelle Valley, Fort Qu'Appelle or the town of Qu'Appelle (see Exhibit 1, map). Mr. Dennis' Memorandum gave the impression that the policy and process of reserve creation in the region was being made on the ground as they went forward in these early days after the Treaty. It also addressed balancing the needs of the Indigenous community with non-Indigenous settlement and development. Mr. Dennis suggested that reserves should be suitable for farming and that they have frontage on a river or lake. They should also include land that was suitable for other purposes such as hunting. It appeared that Mr. Dennis was aware of Canada's obligation to accommodate First Nations' rights to hunt and fish. It was also evident that the Government intended to force the bands into agriculture. One can only imagine how unsettling and difficult these early years must have been for the Indigenous community.

[267] The Department's 1880 Annual Report listed the bands, their reserves and their "[w]hereabouts" (see paragraph 22 above). Under the heading "Location of Reserve" the reserves were grouped under the subheadings of "File Hills", "Touchwood Hills" and "Qu'Appelle Valley" or "Qu'Appelle Lake." As they were all "locations", they must have been separate and distinct geographic places, or else it would not have been necessary to identify them separately. "Qu'Appelle Valley/Lake" reserves included the reserves of Piapot, Pasqua and Muscowpetung. Standing Buffalo's Reserve had not yet been sited, so it was not on the list. The "Touchwood Hills" reserves included the reserves of Muskowekwan, George Gordon, Day Star and Poor Man (i.e. Kawacatoose). The "File Hills" reserves included the reserves of Peepeekisis, Okanese, Star Blanket and Little Black Bear. Piapot's Reserve had not yet been sited, so it was not on the list yet either. Therefore, even in 1880, the bands that were eventually called upon to surrender IR 80A had been assigned reserves in the Qu'Appelle Valley (or Qu'Appelle Lake) and the Touchwood Hills. The list made no reference to Agencies, although from 1874 until sometime in August 1885, the bands with reserves in all of these locations were under the administration of the Qu'Appelle Agency. Had the distinction been in terms of agency administration rather than geography, there would have been no need to distinguish File Hills and Touchwood Hills from one another, or those two from the Qu'Appelle Valley/Lake locations.

[268] IR 80A was conceived of and surveyed by J. C. Nelson. It was through his lengthy hand-written chronicle of work done during the spring, summer and fall of 1882 that one could discern

much about what he thought, how he worked, and his relationship with the Indigenous communities of the area. To begin with, there is no escaping the fact that Mr. Nelson held the typical colonial view of the day about First Nations people. At one point in his account he described a visit to Chief Day Star's home, where he was "much surprised to see what a comfortable and tidy place he possessed" (CBD, Vol 3, Doc 234, at 18). He observed that the Chief had a very large family of daughters "who appear to be quite skillful in housekeeping and the dairy business." He then commented: "They are much less repulsive than their kindred."

[269] At the beginning of his Report, he summarized where "the past season" had taken him, including "Touchwood Hills" and "The Qu'Appelles." These were obviously geographic locations, along with Moose Mountain, Crooked and Round Lakes, Nut Lake, and Fishing Lake, which rounded out the list. They were also separate and distinct locations. The survey work Mr. Nelson did in 1881 at Touchwood Hills was an alteration of the Day Star Reserve boundary. His survey work at "The Qu'Appelles" was to lay out Reserves for Standing Buffalo and Muscowpetung, including a small shared Reserve of "Hay Grounds" up the river, because their Reserves did not have sufficient meadow land for hay (see paragraphs 31 and 52 above). Mr. Nelson's observation that Standing Buffalo's chosen Reserve was "a remarkably beautiful situation" with "clay loam of the first class quality" and "an abundance of poplar timber" confirms the oral history account of how carefully Chief Standing Buffalo had searched out a location of top quality. It also confirms that Standing Buffalo's wishes carried weight and were respected, given that the Band had not adhered to the Treaty. Mr. Nelson did not question Standing Buffalo's entitlement to its chosen spot. Creating the hay grounds also demonstrated the surveyor's awareness of the needs of both Muscowpetung and Standing Buffalo in terms of meadow land. I doubt very much this awareness and his acting upon it were spontaneous and of his own accord. More likely, it had been pointed out and requested by the Chiefs of the two Bands, especially Standing Buffalo, who was very particular about his Band's needs. In any event, Mr. Nelson was quite accommodating. It is clear that he had the discretion to create the hay ground as a separate reserve to be shared by two or more area bands.

[270] On other occasions that year, Mr. Nelson demonstrated similar awareness and willingness to accommodate First Nations' requests. At Moose Mountain, he drove iron bars at the corners of a reserve that had already been surveyed by Mr. Wagner. This was at the specific request of the

Band so that their lands might be marked by iron posts "like the white men" (CBD, Vol 3, Doc 234, at 5; see paragraph 24 above). He was also made aware of the importance of sustenance fishing for Chief White Bear's Band. The Chief wanted a nearby lake included within his Reserve because his people depended on the plentiful fish in the lake for food. Mr. Nelson appeared willing and attempted to reconnoiter the lake, but was unable because flooding had made it inaccessible. After surveying several other reserves in the area, he continued on to Crooked Lake in the Qu'Appelle Valley, which the excerpt from the Department's 1880 Annual Report indicated was where the Ochapowace, Kahkewistahaw, Cowessess and Sakimay Bands were located (CBD, Vol 1, Doc 7).

[271] There, at the request of bands whose reserves had already been surveyed, Mr. Nelson conducted new surveys moving the bands from the south side of the Valley to the north side. He also surveyed new reserves, including for Kahkewistahaw (Indian Reserve No. 72), which he observed, unlike its neighbours, had no fishing grounds bordering it. Accordingly, he exercised his discretion to lay out a "fishing ground" of 96 acres (Indian Reserve No. 72A) on the north east end of Crooked Lake. This was a fishing station, just like IR 80A, except it was for Kahkewistahaw alone. In fact, Mr. Nelson surveyed Indian Reserve No. 72A in 1884, the same year he surveyed IR 80A. So again, Mr. Nelson demonstrated an awareness of the importance of fishing to a First Nation, and a willingness to accommodate the need. In doing so, he exercised discretion to set aside a small reserve for a specific purpose. He must have had authority to exercise discretion because it was never questioned and was approved in PC 1151.

[272] Mr. Nelson finished at Crooked Lake in late August 1881, and then proceeded to Nut Lake. In his January 1882 Memorandum, he described his travel through the Touchwood Hills, commenting on the poor quality of the trail. There can be little doubt that he knew the Touchwood Hills as a geographical location. He surveyed two reserves for Yellow Quill, one on the shore of Nut Lake and the other on the shore of Fishing Lake. In each case, he noted the abundance of fish and the presence of fisheries, the point again being his awareness of the importance of fishing to their way of life.

[273] When he had finished surveying Yellow Quill's Reserves, he returned to the Touchwood Hills. This was the third or fourth time he had travelled to or through that geographic location.

He had to have known it well by then. His destination was the Day Star Reserve. Once there, he consulted with the Chief and his Headmen about alterations they wanted to their Reserve (Indian Reserve No. 87), originally surveyed in 1876 by William Wagner. Mr. Nelson made the desired changes, including expanding the Reserve's boundary because a number of Band members' houses and farms lay outside the Reserve. So again, Mr. Nelson demonstrated a willingness to accommodate a Band's wishes. He would return in 1888 to make further alterations to the Reserve (CBD, Vol 3, Doc 234, at 73–74).

[274] He then moved on to meet with the George Gordon Band about its desire to alter its boundary by removing a strip of timberland and adding an equal piece of farmland. Mr. Nelson's Memorandum spoke of investigating the request and the changes he thought would best meet the Band's needs. It also appeared, that like Day Star, a number of George Gordon Band houses and farmland were outside the Reserve's boundary, which he adjusted accordingly. Although Mr. Nelson's January 1882 written account spoke as though the George Gordon Band's Reserve had already been surveyed, PC 1151 indicated that it was surveyed by A. W. Ponton in 1883 (CBD, Vol 3, Doc 239, at 71–72). There was no explanation. Perhaps an original survey was scrapped and a new one made in 1883. The George Gordon Reserve is in the Touchwood Hills.

[275] Next, Mr. Nelson met with the Chief of the Muskowekwan Band to determine whether the Band had decided where it wanted to situate its Reserve. The Chief's brother-in-law was present and apparently took over the meeting. Mr. Nelson described him as such a difficult and disagreeable person that he decided not to do the survey at that time. However, he prepared a sketch showing where the Band wanted its land. So again, he was accommodating. The meeting and proposed site was in the Touchwood Hills. He would return to survey Indian Reserve No. 85 in 1884.

[276] He then went up the Qu'Appelle Valley to a spot about 20 miles above Fort Qu'Appelle, where the Muscowpetung Band had settled. The Chief informed him that he wanted his reserve located on the south side of the Qu'Appelle River and adjoining the Pasqua Reserve on the west. Mr. Nelson accommodated the request and established the west boundary of the Muscowpetung Reserve, but had to leave it until the next spring because winter had set in.

[277] In summary, Mr. Nelson's work in 1881 had involved him with three of the four Bands in

the Qu'Appelle Valley that were later called upon to surrender IR 80A, and in 1889, he would survey alterations to the fourth Band's Reserve. These were the Bands identified by the Crown as "Qu'Appelle Indians." He had also worked on two of the Touchwood Hills Reserves (Standing Buffalo and Muscowpetung). The Kawacatoose Reserve had already been surveyed in 1876. Chief Piapot would not have his Reserve (Indian Reserve No. 75) until 1885. Mr. Nelson had to have been very familiar with the geography in these two areas.

[278] None of Mr. Nelson's work over the spring, summer and fall of 1881 had been done in the File Hills. However, by 1881, Reserves had been surveyed by Mr. A. P. Patrick for the File Hills Bands: Star Blanket, Little Black Bear and Peepeekisis. Mr. Nelson would survey alterations to the Little Black Bear and Peepeekisis Reserves in 1884 and 1887 respectively. The File Hills Reserves were reported as they existed in the Department's 1880 Annual Report. It is difficult to believe that Mr. Nelson would not have been aware of the existence and geographic location of the File Hills when he was doing his work in 1881. He would likely also have been familiar with the Annual Reports, because his work would be summarized in them, probably on the basis of his year end reports to the Department. He would have also known the other surveyors active in the area. He would not do any survey work himself in the File Hills until 1884.

[279] A year after the January 10, 1882 Memorandum, in a note dated January 1, 1883, Mr. Nelson prepared a handwritten "List of some unsurveyed Indian Reserves in the North West Territories." The relevant part of the list has been reproduced at paragraph 33 above. The overall heading of the list was "Qu'Appelle District", which was double underlined. Then followed subheadings, with one or more band names being under each subheading. It is evident that the subheadings were all geographic locations within the "Qu'Appelle District." Although only the "unsurveyed Indian Reserves" in the Little Touchwood Hills, File Hills and Long or Last Mountain Lake were reproduced, the list found at Common Book of Documents, Volume 3, Document 235 included approximately 19 other geographic areas. That document appears to have been the surveyor's "to-do" list. It was about work to be done sometime in the future, but not necessarily the next year. There was no indication when the surveying would be done, or in what order.

[280] It was on this list that Mr. Nelson penned under the subheading "Long or Last Mountain Lake"—"[a] fishing station of 320 acres for Qu'Appelle & Touchwood Indians." The list also contained reference to two other fishing stations, although it is not disclosed whether they were ever set aside.

[281] It seems obvious, and I conclude that "Qu'Appelle District" was a general geographic location, and that the subheadings "Little Touchwood Hills", "File Hills", "Fort Ellice", etc. were separate geographic locations within that larger District. The listing of bands under a geographic subheading indicated both that Mr. Nelson's awareness of bands and their location within the subheaded geographic locations. This was Mr. Nelson's working perspective, which reflected the process of defining where reserves would be located for certain bands. It was the practical perspective of a surveyor with an "on the ground" focus. It was also the perspective presented in the Department's Annual Reports.

[282] The Department's 1883 Annual Report described the Pasqua, Muscowpetung and Standing Buffalo Bands as being "near Fort Qu'Appelle." Little Black Bear, Star Blanket, Okanese and Peepeekisis were referred to as "File Hills Indians", while Kawacatoose, George Gordon, Day Star and Muskowekwan were referred to as "The Touchwood Indians." It is significant that the same three distinct geographic categorizations were maintained from one Annual Report to the next. Fort Qu'Appelle, File Hills and Touchwood Hills were still three separate and distinct geographic locations (see paragraphs 22 and 36 above).

[283] In 1883 and 1884, Chief Piapot and his Band presented a major challenge to the Department. The Chief was unhappy with the Treaty and the Reserve that had been surveyed for him. His people were sick and hungry. Chief Piapot thought the Government was trying to kill them with food it was providing. Canada deployed a force to deal with the Chief when he started moving about the Valley with armed men. He was eventually persuaded to settle down, and urged to choose a reserve site. At first he wanted a tract near Last Mountain Lake, indicating this was the spot he had wanted when he signed the Treaty. In 1884, Mr. Nelson returned to the area, in part to deal with laying out a Reserve for Chief Piapot. Now, however, the Chief wanted to be next to Muscowpetung on the Qu'Appelle River. Mr. Nelson explained that there would be difficulties in meeting the request, and together with the Indian Agent, proposed a location near

the Last Mountain Lake location the Chief had been interested in the year before. However, Chief Piapot rejected the suggestion because he thought it lacked timber and running water. Curiously, he also thought it did not offer good fishing. He was insistent on the Qu'Appelle River location. Mr. Nelson did not hold out hope to the Chief, but he personally thought it a good site and went to bat for the Chief to make it happen. So again, Mr. Nelson showed an ability to consult and communicate with a band, to understand its needs and to accommodate. In June 1885, Mr. Nelson surveyed the Piapot Reserve in the location requested by the Chief (see paragraphs 40 and 44 above).

[284] Eleven days before meeting with Chief Piapot, Mr. Nelson had travelled to Last Mountain Lake to identify the location of the fishing station referred to as unsurveyed in his January 1, 1883 list. In his June 5, 1884 Report to the Commissioner of Indian Affairs, he explained that the proposed fishing station was to be for the "Touchwood Hills and Qu'Appelle Valley Indians." He chose a spot where he learned the bands had camped, and where there were already a couple of small winter houses (see paragraph 39 above). He observed that it was suitable for camping and hunting water fowl. It also had timber. He wanted to keep the reserve away from settlers. As the south east side of the lake was "thickly settled", he chose the north side (CBD, Vol 1, Doc 19). He was also aware of the fishing qualities of the lake, observing that bands were selling fish to the settlers and complaining that settlers had "killed immense quantities of white fish in the spawning season." It is also significant to note that Mr. Nelson surveyed alterations to Little Black Bear's Reserve in March of 1884, several months before identifying where IR 80A would be. Little Black Bear was one of the File Hills Bands. It could therefore not be said that Mr. Nelson was unaware of or unfamiliar with the File Hills when he chose the location of the fishing station for "the Touchwood Hills and Qu'Appelle Valley Indians." He had just worked in the File Hills, yet did not include the File Hills in the beneficiary descriptor of the fishing station.

[285] Mr. Nelson's December 5, 1885 Report set out his surveying work that year and was reported in the Department's 1885 Annual Report (see paragraphs 43 and 44 above). In June 1885, he consulted the Chief of the Jack Band about where he wanted to locate his reserve. The Chief requested the reserve previously abandoned by Chief Piapot. Mr. Nelson complied, surveying Indian Reserve No. 76. He then proceeded to Last Mountain Lake where he completed

the survey of IR 80A on June 27, 1885, describing it in his Report and on the survey as a "[f]ishing [s]tation for the Touchwood Hills and Qu'Appelle Valley Indians."

[286] The Department's 1885 Annual Report again reviewed the locations of the bands and reserves, grouping them under Touchwood Hills, File Hills and Qu'Appelle, as before. There was no change in geographic descriptors. It was also stated that "until quite recently" the reserves had been under the supervision of two agents in one Agency known as the "Indian Head Agency" (see paragraphs 41 and 42 above).

[287] The small dedicated purpose reserve was not new to Mr. Nelson when he conceived of IR 80A. He had already surveyed a fishing station for the use of the Kahkewistahaw Band alone. The hay grounds set aside for the shared use of Muscowpetung and Standing Buffalo were the same device, only for growing hay. From Mr. Nelson's January 10, 1882 Memorandum, he seemed comfortable in having and exercising the discretion to create these special purpose reserves. Precisely when the special purpose reserve came into use is unknown. However, why it was done was discussed in Deputy Superintendent General of Indian Affairs Hayter Reed's January 21, 1897 Memorandum to the Minister of the day (see paragraph 28 above). It had apparently been the practice to reserve entire lakes for the exclusive use of First Nations for fishing. This was probably to assure the preservation of Indigenous fishing rights in the face of pressure from rapidly growing white settlement. However, at some point, the Department of Marine and Fisheries refused to follow the practice, and adopted the fishing station as a way to make sure First Nations had access to fishing grounds, while at the same time avoiding potential conflict with settlers through trespass to their properties. This was a practical solution to a potentially explosive situation. In my view, it was a policy, and one that was developed on the ground as settlements and reserves were laid out. It also made sense to leave the creation of fishing stations within the discretion of the surveyors who were laying out reserves for bands and would therefore also be familiar with band needs and the land itself. Mr. Reed's description of the policy is consistent with Mr. Nelson's exercise of discretion in creating the hay station and the two fishing stations discussed.

[288] In 1887, Mr. Nelson completed Mr. A. P. Patrick's 1880 survey of the File Hills Peepeekisis Reserve (Indian Reserve No. 81). This was Mr. Nelson's other surveying experience

in the File Hills. All of the Qu'Appelle, Touchwood Hills and File Hills Reserves were confirmed in the May 17, 1889 omnibus PC 1151. In that document, the Governor in Council set aside IR 80A as "a Fishing Station for the use of the Touchwood Hills and Qu'Appelle Valley Indians." That description and purpose remained the same from its conception in 1884 until its formal approval in 1889. The Parties agreed that IR 80A was a "reserve" within the meaning of the *Indian Act* (see paragraph 60 above).

[289] It is worth noting that each survey under PC 1151 showed Mr. Nelson as being "[i]n charge of Indian Reserve Surveys", and each plan of survey indicated that he had "[a]pproved" it. Obviously, this included the surveys of the File Hills Reserves. He signed each plan of survey included in PC 1151, indicating he had checked it. The description and purpose of IR 80A had not changed between 1882 and 1889. In reviewing and checking each survey, Mr. Nelson would have understood their locations and characteristics, including the intended purpose and beneficiaries of the IR 80A fishing station he had himself created. He did not expand or change the wording in any way. Had it been his intention to include the File Hills Bands he would surely have indicated it. He certainly understood the geography and the identity of the bands in the region. There is no indication he changed his original intention in setting IR 80A aside.

[290] Why was IR 80A stated to be for the benefit of First Nations in geographic areas rather than under the names of chiefs? Why did Mr. Nelson conclude that a fishing station was required for bands in those geographic areas?

[291] There is no written explanation in any of the documents produced. However, the reason is easily inferred. When he conceived of IR 80A and eventually surveyed it, the overall survey process in the area was well underway, but not complete. It was a delicate process of trying to settle previously nomadic bands onto reserves, learning their preferences, understanding their needs and trying to satisfy them. Then there were the bands that would not settle, such as Piapot and Day Star. When he surveyed the Touchwood Hills and Qu'Appelle Valley, Mr. Nelson could not know what bands would ultimately be allotted reserves in each of those areas. If he realized (on his own or by complaint from the bands) that the Touchwood Hills were landlocked and without fishing grounds, he could not know what bands might yet settle there in the future, or who would do the surveys for possible future reserves. Similarly, he could not have known what

other bands might be located in the Qu'Appelle Valley itself. He was not the only surveyor working in the area. The problem could be solved relatively easily by creating a fishing station for whatever bands might ultimately be located in the Touchwood Hills or the Qu'Appelle Valley. Again, it was a practical solution for unknown eventualities.

[292] I do not think there was any vagueness in the descriptor "Touchwood Hills." The Touchwood Hills was a distinct geographical area on the plain bordering the Qu'Appelle Valley. The File Hills was also a distinct geographic area, also on the prairie above but bordering on or some part falling into the Qu'Appelle Valley. Bands situated in the Touchwood Hills could not also be located in the File Hills or vice-versa. Similarly, bands situated in the Touchwood Hills and/or File Hills could not also be located in the Qu'Appelle Valley. They were distinct locations in Mr. Nelson's eyes.

[293] I am satisfied that the File Hills was a separate and distinct geographic location, in which Little Black Bear, Star Blanket and Peepeekisis were eventually located. Indeed, reserves had been surveyed for all three of those bands by the fall of 1881—i.e. before Mr. Nelson conceived of the fishing station, sited it and surveyed it. Mr. Nelson clearly knew of the File Hills—probably while he was working in the area in 1881, and most certainly by the time he had surveyed IR 80A and the enactment of PC 1151 as just discussed. The Touchwood Hills and File Hills were both on the prairie, while the Pasqua, Muscowpetung, Piapot and Standing Buffalo Bands were in the Valley itself, bordering on the Qu'Appelle Valley River and lake system. The Touchwood Hills, File Hills and Qu'Appelle Lake/Valley were distinct geographic locations and that was how Mr. Nelson and the Department regarded them.

[294] As for how the need for the fishing station came to Mr. Nelson's attention, again there is no direct answer in the documentary record. If he had other notes, particularly for the years 1882 through 1884, they were not produced, and there was no indication why. However, as I have observed numerous times, Mr. Nelson appears to have consulted closely with the chiefs whose reserves he was surveying, and when they asked for something he was generally responsive and accommodating. Certainly the amount of land in issue for an additional couple of hundred acres here or there was not great given the vastness of the unsettled territory that remained, and that the Indigenous community had ceded by treaty.

G. The Request for IR 80A

[295] Only one concrete and reasonably likely explanation appeared in the whole body of evidence as to how IR 80A came to be, and that was in the oral history testimony of Day Star Elder Irvin Buffalo, who testified that Chief Kawacatoose sent his brother to Winnipeg to ask the Department for the fishing station. That evidence is summarized at paragraph 107 above. The details of the trip and request were fairly extensive, including why the Chief sent his brother, the destination of Winnipeg, the fact that the surveying season was over, the request to return the next year, the sudden (i.e. unexpected) allotment of the reserve to the four Bands, plus Pasqua, Piapot and Muscowpetung, the hard feelings it produced and the perception that those Bands had no need because while the Touchwood Hills Bands were landlocked and without fishing grounds, the three Qu'Appelle Valley Bands bordered on or were close to a river and lakes. The details of the resentment and suspicion that the three Qu'Appelle Valley Bands had been included because their chiefs were friendly with Mr. Graham lend weight and credence. Complaints are easy to remember. The complaint about the inclusion of the four Bands situated on the Qu'Appelle Valley River system was subsequently brought up a number of times, although not by Kawacatoose.

[296] Elder Buffalo's evidence was not challenged by any of the other Parties. He gave his account in a straight forward manner, without embellishment or indecision. I can see no reason why he should not be believed. Considering all of the documentary evidence, when a chief made a request to Mr. Nelson with respect to the configuration of his reserve, Mr. Nelson seemed consistently to listen, understand and attempt to accommodate. If he received a request directly or through the Department to create a fishing station for four or seven of the bands he had worked with, why would he not act? He was certainly familiar with the areas in which the seven Bands' Reserves were located. He would have known that the Touchwood Hills were landlocked. He likely also knew or was made aware that the Qu'Appelle River system and associated lakes, including Pasqua Lake, were very shallow and poorly suited to fishing as the oral history evidence suggested several times unchallenged. He had spent enough time in the area to observe water levels. By the time Mr. Nelson noted the fishing station on his list of unsurveyed reserves, the Kawacatoose and Day Star Bands had been on their surveyed reserves for approximately six years. This was plenty of time for them to experience any difficulties of

fishing in the waters that bordered them. By the time Mr. Nelson surveyed IR 80A, the Muskowekwan and George Gordon Reserves would also have been surveyed, and he would have been that much more familiar with the Touchwood Hills.

[297] The suggestion that Mr. W. M. Graham added the three Qu'Appelle Valley Bands as a favour to his friends is a bit curious. However, it is not impossible that he may have been working in the area in the late fall of 1882. The CBD credits Mr. Graham as Indian Agent with a Report dated August 31, 1900 (CBD, Vol 1, Index re Doc 32). Although I think it doubtful, it is possible that he was there when the need for the fishing station came to Mr. Nelson's attention. It really does not matter. Somehow it came to Mr. Nelson's attention, whether directly or indirectly through the efforts of Chief Kawacatoose's brother, requests by one of the bands situated on the Qu'Appelle River system or by some other official.

H. The Changes in Agency Administration and Later Administrative Confusion

[298] For more than ten years after the signing of the Treaty, all of the First Nation Claimants were administered by the same Agency, which was known as the "Indian Head" or "Qu'Appelle" Agency. By sometime in August 1885, there was a reorganization, resulting in the File Hills Bands being administered by the new File Hills Agency. In 1900, there was another reorganization, resulting in these Bands being administered until 1914 by the Qu'Appelle Agency, then back again to the File Hills Agency from 1915 to 1948. If identified by Agency, these Bands would therefore have gone from "Qu'Appelle" to "File Hills", and back and forth again. Their Agency identification would have been different when IR 80A was surveyed, confirmed by PC 1151 and surrendered. The Touchwood Hills Bands and those located in the Valley experienced similar changes in Agency identification.

[299] I can see how this might have been confusing to bands and officials alike, and how it could have caused misunderstanding. The bands' contact with the Department was virtually entirely through the Agencies and their associated officials. The officials' perspective was also from an Agency point of view. However, the governing perspective here was that of Mr. Nelson, a surveyor, whose bearings were geographic, not administrative. There was scant reference to Agencies, if any at all, in Mr. Nelson's memos, notes and correspondence. If he spoke of an Agency, it was as a place that he met some official or group, and even then it was in the context

of a geographic location. For example, he spoke of meeting at Fort Qu'Appelle or Qu'Appelle, where the agency was located, but the context was locale.

[300] Mr. Nelson was responsible for all aspects of the survey of IR 80A. His intention in creating the survey and describing it must surely govern in the sense that his work was the basis for PC 1151, which was in turn the stamp of approval of the content he had generated. Once the Reserve was created, departmental officials could not change the beneficiaries unilaterally for their own purposes or by whim. Another order in council would have been required to make such a change. I am quite satisfied, and conclude that the intended beneficiaries of IR 80A were as Mr. Nelson planned and expected them to be, keeping in mind that he could not know at the time of his surveys, how many bands might ultimately be situated in each geographic location. His intention was that IR 80A would be for the shared benefit of the bands residing in the geographic area known as the Touchwood Hills, and also in the Qu'Appelle Valley itself along the shores of the Qu'Appelle River or Lakes. That would not include the bands around Crooked or Nut Lakes, which he had identified and provided for separately, including a fishing station for the Kahkewistahaw (see paragraph 27 above).

[301] Mr. Nelson's perspective was a function of his annual survey work. It was unquestionably different than the Indigenous perspectives that have been discussed, including the bands' self-identification as Indians of the Qu'Appelle region. There is no evidence of a nexus between the two perspectives. Without it, I can only conclude that they differed, but not that they actively conflicted in a sense that would call the principles of interpretation into play as suggested by Little Black Bear in paragraph 189 above. Mr. Nelson's perspective and underlying intent were informed by geography and a professional surveyor's mandate in relation to situating bands on particular land within a particular time frame. The Indigenous perspectives were informed by the broad sweep of their histories and traditions. Mr. Nelson's perspective is the source of the Crown's intent in this case. Unfortunately, the two perspectives did not seem to speak to one another very much except the limited consultations about reserve locations reviewed above. There is no evidence that Mr. Nelson took a more inclusive view of "Qu'Appelle Valley Indians" than has been discussed. The Indigenous and non-Indigenous perspectives apparently developed and thrived separately from each other, without connection or adoption by one culture or the other.

[302] When the Department started considering the disposition of IR 80A, questions arose about the status of the fishing station and the process that had to be followed to sell it. Because no individual band names appeared in IR 80A's descriptor, and it was not a residential reserve, these questions were fair enough. It was reasonable to seek legal opinions, and for those opinions to conclude that IR 80A was a reserve within the meaning of the *Indian Act*, given its approval under PC 1151. I suspect the opinions were reached by much the same approach as reasoned in this decision. That done, a surrender process was necessary, and of course that raised the question of who in the Indigenous community should approve the surrender. It is interesting that Mr. Graham, by now Indian Inspector, seemed to have no initial difficulty identifying Piapot, Muscowpetung, Pasqua, Standing Buffalo, George Gordon, Muskowekwan, Kawacatoose and Day Star as the likely bands to participate if it was necessary to obtain the approval of bands, rather than of the individuals who lived on IR 80A at the time (see paragraph 63 above). This was obviously Mr. Graham's interpretation on May 7, 1907, of who the "Touchwood Hills and Qu'Appelle Valley Indians" were. He said as much in stating: "I do not think the Touchwood [Hills] and Qu'Appelle [Valley] Indians lay claim to it" (emphasis added).

[303] In the fall of 1913, the Indian Agent for the Touchwood Hills Agency reported that the four bands of the Touchwood Hills *Agency* and the three of the Qu'Appelle *Agency* had met in council and approved the surrender. This caused head office to express concern because it thought there were five bands in the Touchwood Hills *Agency* and four in the *Qu'Appelle*. Framing the surrender by Agency caused confusion. Also, Standing Buffalo was not included because, as it later became clear, it was disqualified because it was thought to be American Sioux. Peepeekisis had apparently originally been allocated a reserve in the Touchwood Hills, but had relocated to a new reserve in the File Hills, so it did not qualify. The Touchwood Hills Indian Agent also reported that the Touchwood Hills Bands objected to the participation of Pasqua, Muscowpetung and Piapot because they were located on the Qu'Appelle River or lake system. This complaint was repeated in later years subsequent to the surrender. It is of interest because it coincides with oral history evidence that expressed the same point of view. In May of 1914, Inspector of Indian Agencies Graham stated that the Touchwood Hills and Qu'Appelle Valley Bands included "all the Indians of the Qu'Appelle, File Hills and Crooked Lake Agencies." This was not consistent with the views of the Touchwood Hills Bands just discussed, and may have been based on the Department's administrative organization at the time. The

Crooked Lake Bands included the Sakimay, Cowessess, Kahkewistahaw and Ochapowace, which were administered by the Qu'Appelle Agency until sometime in 1885 (CBD, Vol 2, Doc 154).

[304] In March 1924, Mr. Graham calculated the apportionment of funds from the sale of IR 80A among the seven Bands. He did not suggest that any of those Bands ought not to benefit, or that there should be more benefitting bands. However, in June of the same year he reported that the Touchwood Hills Bands claimed that the File Hills Bands were interested in IR 80A and he repeated the objection to the participation of the Qu'Appelle Valley Bands. The File Hills Bands of course agreed with his proposition, and Mr. Graham thought it a reasonable one, and suggested that it be carefully investigated. The conversation or debate that followed has been discussed earlier in this decision (see paragraphs 70 to 78). It is apparent that there was sympathy among some front line officials for the File Hills Bands. Those sympathies were founded on the arguments of Band members, who raised it often. However, senior Department officials and surveyors consistently maintained that IR 80A had been intended for the benefit of the seven Bands. At no time did the Department change its original position in this regard. The fact that questions were directed by the Bands from time to time, and communicated or even supported by front line officials, did not amount to confusion on the part of the Department itself. The Department listened to the questions, and considered them, but did not alter its position. In my view, the Department's conclusion was the correct one, except with respect to Standing Buffalo. It is also consistent with Mr. Nelson's intent. We do not know how the Department reached that conclusion, although it was probably by an analysis of Mr. Nelson's records or even by consulting with him directly.

I. Recap of Mr. Nelson's Intentions and Inclusion of Standing Buffalo

[305] Mr. Nelson visited the Reserve location chosen by Chief Standing Buffalo during the summer of 1881 and surveyed it (Indian Reserve No. 78) in early November. Mr. Nelson remarked on the high quality of the site. It is apparent that the Chief knew what he was looking for. I accept the oral history adduced on behalf of the Band describing Chief Standing Buffalo's search for a reserve, his criteria, his investigative visit to Fort Garry and his refusal of land in Manitoba for the reasons explained. He continued his search into the Qu'Appelle Valley, where he identified the land he wanted. Standing Buffalo had not adhered to a treaty, yet he was

allotted his preferred location for a reserve without hesitation or complaint. Not only that, but he was also allotted a small "Hay Grounds" Reserve (IR 80B) to share with Muscowpetung at a separate but nearby location. IR 80B was also surveyed in November 1881. Both Indian Reserve No. 78 and IR 80B were located near the Pasqua and Muscowpetung Reserves, along the Qu'Appelle River and lake system. The Piapot Reserve would not be surveyed for another four years.

[306] Mr. Nelson wrote his list of unsurveyed reserves on January 1, 1883. For the reasons I have discussed, he was fully aware by then of the bands and reserves located in the Touchwood Hills and Qu'Appelle Valley. He knew those geographic locations were separate and distinct from the File Hills, where he had not yet worked. When he surveyed IR 80A, he did not specify or qualify which "Indians" in the Touchwood Hills and Qu'Appelle Valley were to benefit from the fishing station. I conclude that he meant *all* Indians in those geographic locations would benefit. He did not exclude any of the six reserves established at the time. I can see no reason why he would not also have intended Standing Buffalo to benefit from IR 80A, or why that Band would be disqualified or excepted, especially since he had fully accommodated the Chief's chosen location and allotted a hay ground for it to share with Muscowpetung. Whatever the needs he identified to justify the creation of IR 80A for the Qu'Appelle Valley Indians, those needs were for all of the bands located there, including Standing Buffalo.

[307] The Crown excluded Standing Buffalo from the surrender process and related monetary benefits for a number of reasons, including that it was American Sioux or Dakota, it had lived in Minnesota, its members moved back and forth between Canada and the United States, and they did "not draw treaty" in Canada. Of course the Band had not signed the Treaty, so it did not receive the annual payments under it. While it is true that members of Standing Buffalo visited the United States, where they had family, they were clearly resident in Canada. Department Reports consistently praised the Band's industrious nature, farming ability, good care of animals and implements, cleanliness and good health. The Band members were also devout Roman Catholics and sent their children to school. All this could not have been achieved if Band members were spending most of their time, or even a significant amount of time in the United States. Standing Buffalo was in fact a fiercely loyal and hardworking band. By measure of the Department's goals for the Indigenous communities of the area, Standing Buffalo was a "poster

band." It did not deserve, and there was no just reason, to discriminate against it, or to disqualify it from the IR 80A group.

[308] I accept that Standing Buffalo had given significant military support to the British and their successors. There is no doubt that the Band had been recognized and honoured for its loyalty and support, at least until the Canadian government became distrustful of Indigenous communities on the prairies as a result of the Riel Rebellion, and also perhaps because of fear of Chief Sitting Bull and his war-like tendencies.

[309] Standing Buffalo credited its good standing with the British through the relationship referred to as "allyship." It is not necessary in this proceeding to determine the fact, nature or effect of "allyship." In my view, Standing Buffalo was one of the bands occupying a reserve in the Qu'Appelle Valley, along with Pasqua, Muscowpetung and eventually Piapot. As such, its members were "Qu'Appelle Valley Indians" within the meaning of those words. On that basis, Standing Buffalo was as entitled to use and benefit from IR 80A as did its neighbouring Bands, Kawacatoose, Muscowpetung, Pasqua and Piapot. The Crown's reasons for discriminating against Standing Buffalo were unfounded and irrelevant to the framing of IR 80A. That discrimination did not uphold the honour of the Crown. Standing Buffalo was every bit as Canadian as its neighbours. I conclude that Standing Buffalo was included in "Qu'Appelle Valley Indians" with respect to IR 80A in PC 1151.

J. The Significance of Use of IR 80A and the Pass System

[310] Given that all Parties agreed that IR 80A was a properly constituted reserve under PC 1151 and within the meaning of the *Indian Act*, IR 80A must have satisfied the principles of reserve creation stated in *Ross River*. Mr. Nelson was authorized by Canada to define reserves in the area in question. Canada demonstrated a sufficient and binding intention to create IR 80A by enacting PC 1151, in which Mr. Nelson was also the approving surveyor. The Crown took the necessary acts to define the Reserve by survey and PC 1151. The Reserve was set aside for the benefit of "Indians", albeit they were identified by geographic locale rather than by chief or band name. The Crown's intent was subsequently corroborated by the surrender process where the benefitting bands were called upon to approve the surrender. On the basis of the oral history evidence, all of the First Nation Claimants used IR 80A, including the seven Bands the Crown

intended to benefit.

[311] The fact that bands other than the seven also used IR 80A after it was surveyed and formally set aside, does not in and of itself qualify those bands to be beneficiaries pursuant to PC 1151. The oral history suggested that around the time reserves were allotted to the Claimants, the Bands did not pay great attention to boundaries and they often moved about each other's reserves. Traveling to and using a reserve allotted to another band would not diminish the entitlement of the band to whom the reserve had been allotted, nor would it create an entitlement for the visitor pursuant to PC 1151. The use in *Ross River* must be by the First Nations the Crown intended to benefit. Use *per se* did not bestow entitlement, except on a band that was intended to benefit under the Order in Council.

[312] I accept that the Added Claimants all felt entitled by their traditional use of IR 80A over the decades and centuries. There is no doubt that the fishing station was a very familiar, long used and even sacred stopping point. This fact plus continued traditional use did not confer beneficiary status under PC 1151 and the *Indian Act*, or under any other applicable law. The oral history described how bands not of the Touchwood Hills or Qu'Appelle Valley enjoyed the continued practical benefit of being able to use IR 80A for traditional purposes. The fact that the entitled bands and the Crown did not attempt to exclude other bands from the Reserve did not confer legal benefit under PC 1151.

[313] I fully accept the evidence the post-Treaty limitations imposed on the Bands' use of IR 80A as related in the oral history testimony, especially the terrible impact of the pass system, which was designed to restrain their movement and to control many aspects of their lives. It was a brutal and illegal policy that will be a lasting blot on Canadian history. As shocking and unfair as the pass system was, it had no effect on entitlement to benefit from IR 80A. No doubt the pass system substantially reduced the free use of the Reserve, as and when the bands wanted. Use of IR 80A was also diminished by the massive uprooting changes to the traditional Indigenous prairie way of life introduced by colonization and the Treaty. Indigenous people were forced to transition from nomadic hunting and gathering to a completely unfamiliar, stationary and overly controlled agrarian existence.

[314] I have arrived at my conclusions of intention based on how reserves were identified on

the ground by a Crown authorized surveyor, who travelled the region, learning its geographic features characteristics and demographics, with the main focus being on the Indigenous community, but also with an awareness of non-Indigenous settlement and related development both at the time and into the near future. It was a time of massive change for all living beings on the prairie.

K. Concluding Comments

[315] Mr. Nelson was the authorized surveyor. He was attentive to the nature and character of the land he surveyed. He consulted with the leadership of the bands he was surveying reserves for. While he carried stereotypical Euro-colonial views, he tried to understand the needs of the communities he was serving and he was consistently accommodating in this region. The entire system by which land was divided and subdivided by the Crown was of Anglo-legal origin, and completely foreign to the Indigenous community. That was the unhappy fact and result for this community. Mr. Nelson's actions and motivations were central to the application of the new parliamentary common law legal system, its operation in the Qu'Appelle Valley region and its application.

[316] Why were the File Hills Bands not allotted a fishing station? Why were they not included in the way IR 80A was defined? Is it fair? In retrospect, and from the perspective of the File Hills Bands, it is not fair. In retrospect, it is easy to understand and accept their point of view. However, based on the preceding analysis, I conclude that Mr. Nelson was not aware of their need for a fishing station, either at the time he conceived of it, or when he surveyed it and supervised its confirmation by law. While I am certain he was aware of the File Hills and where they were when he was creating IR 80A, there is no evidence that he was aware of their need for a fishing station. Had he been, or had he been asked for a fishing station or inclusion in IR 80A, I think it probable that he would have tried to accommodate.

[317] While one might think the need was obvious, because the File Hills Reserves were landlocked, that may not be so. All of the original surveys of these reserves had been conducted by Surveyor A. P. Patrick. The Peepeekisis survey description noted that "[t]here are numerous lakes and small creeks." The Little Black Bear survey stated that "[s]wamps, ponds and lakes are numerous." The Okanese Reserve (Indian Reserve No. 82) was also located in the File Hills,

although it has never taken an interest in this Claim or sought to participate. The survey for Indian Reserve No. 82 described the land as having an undulating surface "broken by ponds, lakes and hay swamps" (CBD, Vol 3, Doc 239, at 63). The Tribunal received no evidence to suggest that the File Hills Bands requested better fishing waters, a fishing station or inclusion in a defined fishing reserve, including IR 80A. There was no evidence that the File Hills Bands experienced difficulty obtaining fish, other than the interference created by the pass system and imposed on all bands in the District.

[318] While I acknowledge the perspective of the File Hills communities, which I have tried to describe in some detail, that does not change the reasons why Mr. Nelson conceived of and surveyed IR 80A, and his underlying motivation and intent, as I have discussed. None of the principles of interpretation, applied liberally and to the best advantage of the File Hills Bands, can expand Mr. Nelson's intent, which he exercised as Canada's authorized agent. I cannot import or expand an intent that Mr. Nelson did not have when the evidence indicates otherwise. There is no basis for doing so in the rules of evidence, nor jurisdiction under the *Tribunal*. Similarly, there is no basis for changing the fact that in the context in which he was working, Mr. Nelson would have understood the Touchwood Hills, File Hills and Qu'Appelle Valley as three separate and distinct geographic locations.

[319] While there is evidence of Mr. Nelson's understanding of the terms "Qu'Appelle Valley" and "File Hills", his approach to reserve creation, and of the Treaty and the overall context in which he worked, there is no evidence to suggest that Mr. Nelson had any awareness of the now expressed needs of the File Hills Bands during the period he was active in reserve creation in the region. While Canada could have broadened its intent to include the File Hills Bands as IR 80A beneficiaries, there is no evidence that it did so, although some front line officials later raised the question and even promoted it. However, Canada treated the benefits of IR 80A as Mr. Nelson had intended them, and it was consistent in doing so.

[320] Although very general, Treaty 4's promise of access to unsettled, undeveloped land for fishing was reasonably clear. None of the Parties alleged otherwise. Some oral history witnesses stated that fishing stations were part of the Treaty by inference or underlying oral promises made at the time. However, I have difficulty accepting that there were oral promises about fishing

stations because of the limited and conflicting evidence I have discussed. There was nothing to indicate that the device of fishing stations had been conceived at the time of the signing of the Treaty. The evidence demonstrated more persuasively that the fishing station came about in a particular way after 1874 to resolve problems being encountered by the Crown and Indigenous people as settlement advanced and access to fishing waters became more difficult. Also, as I have already observed, if there had been oral promises of fishing stations or reserves allotted not primarily for residence but to support fishing or some other purpose, I would have expected it to be a more prominent, common and consistently expressed feature of the oral testimony as a whole. That was not the case.

[321] Neither the oral history nor documentary evidence disclosed a difficulty on the part of the Indigenous community to access fishing grounds or to catch adequate amounts of fish. The pass system controlled access but did not eliminate it. IR 80A was a Crown constituted device to assure Indigenous access to fishing grounds while minimizing conflict with settlers. Also, all of the First Nations in this proceeding used IR 80A and were not excluded by the Crown or IR 80A's intended beneficiaries. How the Crown ultimately (paragraphs 157 and 158 above) administered IR 80A with respect to the purported surrender that is said to have taken place is beyond the scope of this sub-phase.

[322] With respect to the *Kwicksutaineuk* principles discussed in, the pre-contact perspective of the Indigenous community was important in understanding its way of life, traditions and world view in order to understand why Kinookimaw was important to the Bands' post-contact perspective, their use of the Reserve, the place of fishing in their lives and the upheaval they experienced after adhering to Treaty 4. It was also helpful in understanding the work involved in establishing reserves post-contact. However, while the Treaty 4 framework was joint between the Crown and Indigenous adherents, reserves were entities devised by the Crown according to Anglophone common law legal structures. The task at hand was understanding the process by which reserves came into being in the Qu'Appelle Valley region, and ultimately evaluating what the Crown intended by "Touchwood Hills and Qu'Appelle Valley Indians" in PC 1151. While historical context is very important in understanding that process, the interpretation of the meaning of PC 1151 and the wording used in IR 80A is not directly assisted by *Kwicksutaineuk.*

[323] As discussed in paragraphs 171 and 195 above, several Claimants relied on the principle in *Madawaska,* that ambiguities should be resolved in favour of an Indigenous claimant where the Crown's records were poor. With respect, I do not accept that precedent has application here. There was no evidence that Crown records were missing, unavailable, or mismanaged. In any event, I am satisfied that the subject ambiguity was capable of clarification on the basis of the evidence adduced.

[324] For all these reasons, I conclude and adjudge that all of the Claimants to this sub-phase have status and are entitled to continue with the balance of this Claim except for the Star Blanket First Nation, the Little Black Bear First Nation and the Peepeekisis First Nation, whose Claims are hereby dismissed. The Parties continuing with the Claim shall be at liberty to amend their pleadings to accommodate the result of these Reasons for Decision, the timing and order of such amendments to be determined by a Tribunal Member assigned by the Chairperson. For the same reason, the question of costs shall also be determined at the direction of the Tribunal Chairperson.

W. L. WHALEN

Honourable W. L. Whalen

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20190730

File No.: SCT-5001-13

OTTAWA, ONTARIO July 30, 2019

PRESENT: Honourable W. L. Whalen

BETWEEN:

KAWACATOOSE FIRST NATION, PASQUA FIRST NATION, PIAPOT FIRST NATION, MUSCOWPETUNG FIRST NATION, GEORGE GORDON FIRST NATION, MUSKOWEKWAN FIRST NATION AND DAY STAR FIRST NATION

Claimants

and

STAR BLANKET FIRST NATION

Claimant

and

LITTLE BLACK BEAR FIRST NATION

Claimant

and

STANDING BUFFALO DAKOTA FIRST NATION

Claimant

and

PEEPEEKISIS FIRST NATION

Claimant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Indian Affairs and Northern Development

Respondent

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