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Development on Indigenous Homelands and the Need to Get Back to Basics with Scoping: Is There Still "Unceded" Land in Northern Ontario, Canada, with Respect to Treaty No. 9 and its Adhesions?

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Development on Indigenous Homelands and the Need to Get Back to Basics with Scoping: Is There Still "Unceded" Land in Northern Ontario, Canada, with Respect to Treaty No. 9 and its Adhesions?

Abstract

Scoping includes the establishment of unambiguous spatial boundaries for a proposed development initiative (e.g., a treaty) and is especially important with respect to development on Indigenous homelands. Improper scoping leads to a flawed product, such as a flawed treaty or environmental impact assessment, by excluding stakeholders from the process. A comprehensive literature search was conducted to gather (and collate) printed and online material in relation to Treaty No. 9 and its Adhesions, as well as the Line-AB. We searched academic databases as well as the Library and Archives Canada. The examination of Treaty No. 9 and its Adhesions revealed that there is unceded land in each of four separate scenarios, which are related to the Line-AB and/or emergent land in Northern Ontario, Canada. Lastly, we present lessons learned from our case study. However, since each development initiative and each Indigenous Nation is unique, these suggestions should be taken as a bare minimum or starting point for the scoping process in relation to development projects on Indigenous homelands.

Keywords

Indigenous homelands, development, scoping, environmental assessment, Treaty No. 9, Treaty No. 9 Adhesions, Northern Ontario, Canada, Line-AB, unceded land

Acknowledgments

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Development on Indigenous Homelands and the Need to Get Back to Basics with Scoping: Is There Still "Unceded" Land in Northern Ontario, Canada, With Respect to Treaty No. 9 and its Adhesions?

Development projects are increasingly affecting Indigenous homelands in northern Canada and around the world (Tsuji et al., 2011). Kirchhoff et al. (2013) explained that in development projects:

> Environmental challenges occur frequently. Approaches to mitigate damage, to halt developments and undertakings that are likely to cause serious problems and, in some cases, to compare alternatives and identify the most desirable options have been developed. One of the main ways of doing this is through environmental [impact] assessment (EA) processes of various types. The most entrenched form of environmental assessment is project-level environmental assessment, which is now common in virtually every part of the world. (p. 2)

Proper scoping is an essential part of the environmental assessment process (Whitelaw et al., 2009). Similarly, proper scoping should have been historically—and should be at present—an essential part of the treaty-making (or negotiated agreement-making) process. Although a universally held definition for the term scoping does not exist (Mulvill & Baker, 2001), a common element of the scoping process is "the establishment of unambiguous spatial boundaries for the proposed project" (Tsuji et al., 2011, p. 37). Scoping is a term generally used in environmental assessment literature with respect to development projects and should become more common in the treaty-making literature because both processes often have development on Indigenous homelands as the end goal. As stated by Tsuji et al. (2011):

> Proper scoping is essential for any environmental assessment (EA) process. This is particularly true with respect to resource development in the intercultural setting of First Nation homelands of northern Canada. (p. 37)

Improper scoping in either the environmental assessment process or treaty-making process leads to a flawed product—that is, a flawed environmental assessment or treaty—by excluding Indigenous people who should be included in the process and/or including people who should not be included. For example, the Victor Diamond Mine environmental assessment process in Northern Ontario, Canada, excluded Indigenous groups through the establishment of erroneous spatial boundaries for the project (Tsuji et al., 2011; Whitelaw et al., 2009, 2012). Unrest in the communities and winter-road blockades followed (Whitelaw et al., 2009). The diamond mine's scoping process was:

> Based on two erroneous assumptions: that the registered trapline system [of the Government of Ontario] was the accepted system of land use/occupation in northern Ontario, and that land use/occupancy was based on the treaty-imposed reserve system (not the family-based traditional lands system). (Tsuji et al., 2011, p. 37)

Similarly, Long (2010) noted, in treaty-making "Indigenous territories seldom conform to the boundaries of the state" (p. 64). This is true in Canada and worldwide where there are treaties with Indigenous people. For example, in the United States of America (US), the American Indians in Northern California were never properly enumerated, and their Traditional Lands never properly demarcated before the signing of the treaties—and for political reasons, the Californian Indian Treaties

were never ratified—thus, successive US governments were left to deal with treaty issues not of their own making (Miller, 2013). In another case, the "redrawing" of treaty boundaries in the Fort Laramie Treaty of 1868 has led to an ongoing legal battle between the US and the Sioux Nation (Cutlip, 2018). Thus, treaty boundaries—like development project boundaries—must be properly scoped and validated, or there will be unforeseen consequences.

Our case-based development-and-scoping study centres on Treaty No. 9 and its Adhesions:

> Unfortunately, there is simply no consensus about what Treaty Nine represents. Simple facts like the admissions of Indians north of the Albany River in 1905 and the arbitrary line, designated AB [hereafter referred to as the line-AB] . . . have been ignored by historians. (Long, 1989, p. 41)

In 1867, when Ontario, Quebec, New Brunswick, and Nova Scotia were amalgamated to form the Dominion of Canada, this confederation of provinces (Figure 1) did not resemble what we today consider the country of Canada[1] (Figure 2). The provinces of Ontario and Quebec were only a portion of their current size; most of present-day Canada's land mass was embodied in Rupert's Land and the North-Western Territory. In 1870, an Order of Her Majesty (Queen of England) in Council admitted Rupert's Land and the North-Western Territory into the Dominion of Canada (Rupert's Land and North-Western Territory—Enactment No. 3, 1870). Together, Rupert's Land and the North-Western Territory were renamed the Northwest Territories (Figure 3). The lands of the Northwest Territories would be partitioned to become the provinces and territories of the country of Canada (Figure 2). However, in the Rupert's Land and North-Western Territory—Enactment No. 3 (1870), it was stated in the terms and conditions:

> Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial [British] Government; and the [Hudson's Bay] Company shall be relieved of all responsibility in respect of them. (Part 1, Section 14)

[1] A federated system of government exists in Canada; whereby, there are two levels of government: the central or federal government (originally known as the Dominion of Canada, now referred to as the Government of Canada), and the provincial (e.g., Government of Ontario) and territorial (e.g., Government of Nunavut) governments. Areas of legislative power were first specified for the different levels of government in the British North American Act (1867; now known as the Constitution Act, 1867) and then later in the repatriated Constitution Act (1982). According to the British North American Act (1867), the Government of Canada has legislative authority over "Indians, and Lands reserved for the Indians" (VI. Distribution of Legislative Powers, Section 91, Item 24).

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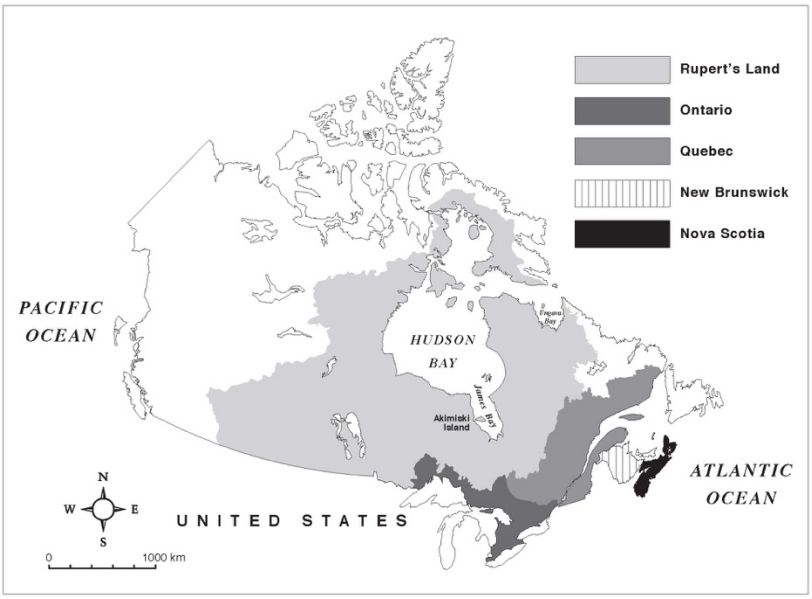
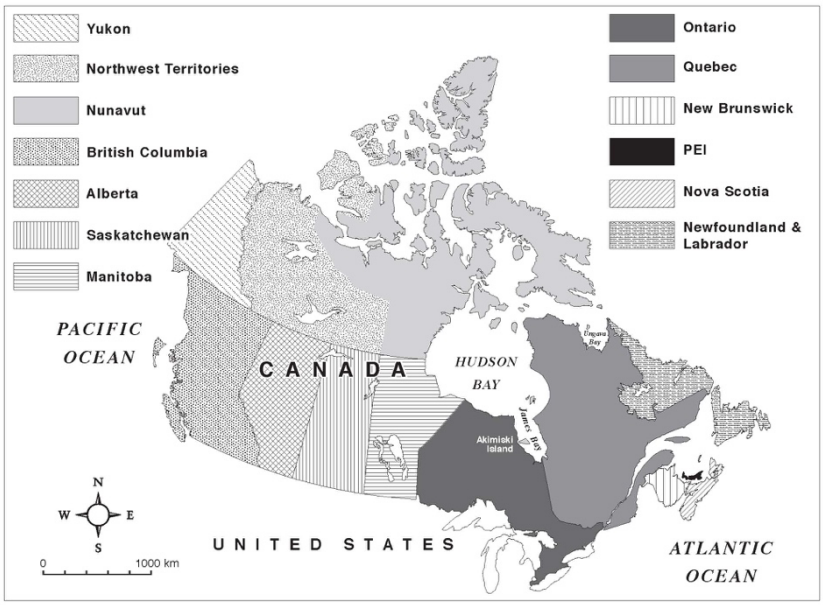
Figure 1. Canada in 1867



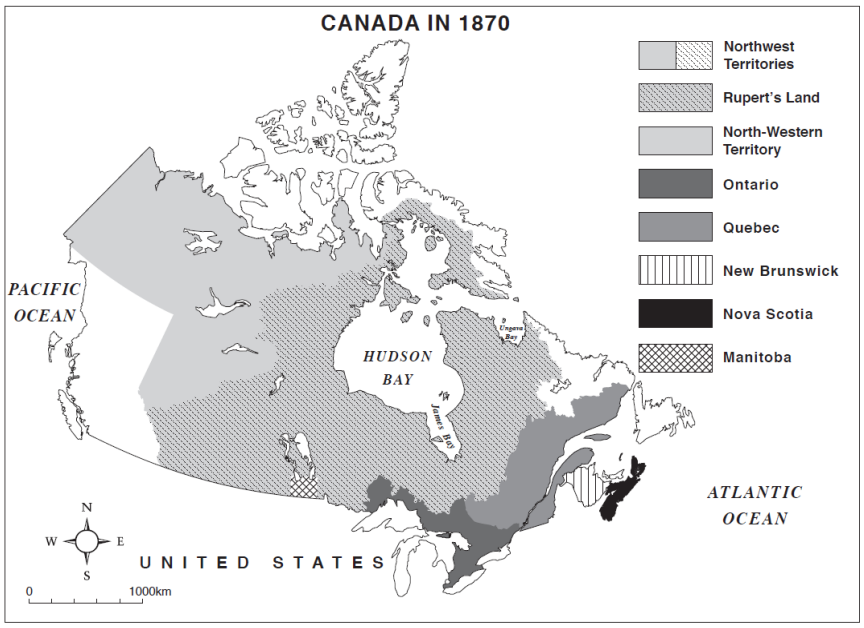
Note. Adapted from "Post-Glacial Isostatic Adjustment and Global Warming in Subarctic Canada: Implications for Islands of the James Bay Region," by L.J.S. Tsuji, N. Gomez, J.X. Mitrovica, and R. Kendall, 2009, *Arctic, 62*(4), p. 460 (https://doi.org/10.14430/arctic176). Copyright 2009 by Arctic Institute of North America.

Figure 2. Canada in 1997



Note. Adapted from "Akimiski Island, Nunavut, Canada: A Test of Inuit Title," by C. Pritchard, B. Sistili, Z. General, G.S. Whitelaw, D.D. McCarthy, and L.J.S. Tsuji, 2010, *Canadian Journal of Native Studies, 31*(2), p. 411 (http://www3.brandonu.ca/cjns/30.2/09tsuji.pdf). Copyright 2010 by the University of Brandon.

Figure 3. Canada in 1870



Note. Adapted from "Territorial Evolution," by Natural Resources Canada, n.d. (https://www.nrcan.gc.ca/earth-sciences/geography/atlas-canada/selected-thematic-maps/16884). Copyright n.d. by Natural Resources Canada.

Schedule A of the Order-in-Council[2] offers further elaboration of this point:

> Upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines. (Cauchon & Cockburn, 1867, para. 11)

In other words, *Indian*[3] lands could only be acquired by consent (ceded or purchased) as the British Crown believed that Indigenous people held rights to land in North America (Henry, 2006; The Royal Proclamation of 1763). Thus, the period from1870 to1930 was characterized by the signing of 11 treaties (and their adhesions) between the Government of Canada and various First Nations that

[2] "A federal Order-in-Council is a legal instrument made by the Governor in Council pursuant to a statutory authority or, less frequently, the royal prerogative. All orders in council are made on the recommendation of the responsible Minister of the Crown and take legal effect only when signed by the Governor General [of Canada]. Orders-in-Council address a wide range of administrative and legislative matters . . . [for example] the disposition of Indigenous lands" (Library and Archives Canada, 2020, About Orders-in-Council section, para. 2). Similarly, for the Government of Ontario, "An Order in Council is a legal order made by the Lieutenant Governor, on the advice of the Premier [of the Province of Ontario] or a Minister [of the Government of Ontario]" (Government of Ontario, 2020, para. 1).

[3] The term "Indian" was erroneously used to describe Indigenous people in North America because European explorers thought they had landed in India. We use the term "Indian" throughout this article when referencing historical documents. Otherwise, we use the term First Nations. Further, although the Canadian Constitution Act (1982) states, "In this Act, '*aboriginal peoples* of Canada' [emphasis added] includes the Indian, Inuit and Métis peoples of Canada" (Section 35(2)). We use *Indigenous Peoples* in keeping with recent developments in Canada.

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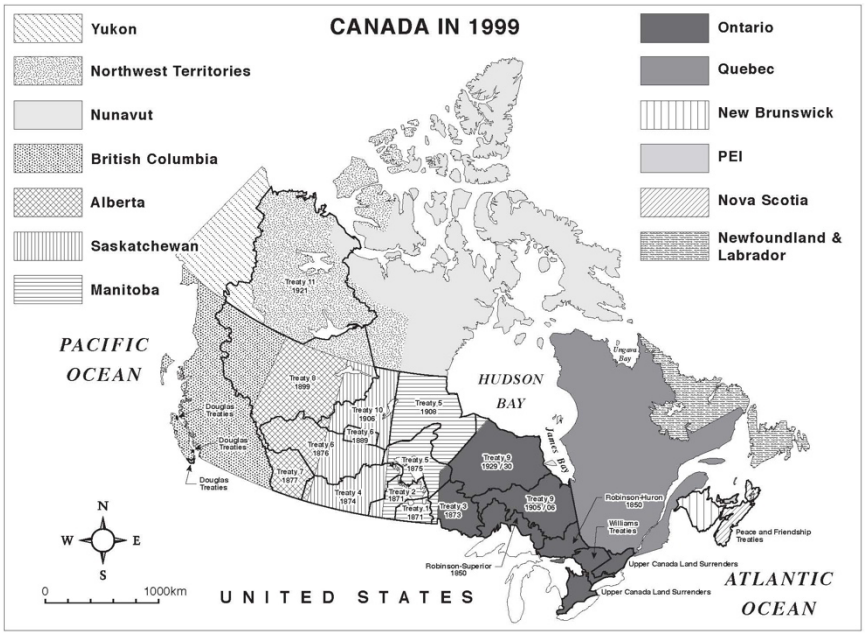
became known as the Numbered Treaties (Indigenous and Northern Affairs Canada, 2016; Figure 4). These treaties were necessary to allow for relatively unfettered development on Indigenous Lands. Unique among the Numbered Treaties was Treaty No. 9 with the Cree, Ojibwe, and Oji-Cree peoples, as it was the first and only Numbered Treaty where one member of the Treaty Commission was nominated by and represented a province (Ontario), along with the usual Canadian government representatives[4] (Scott et al., 1905). Perhaps this is the reason why so much controversy and confusion has been associated with Treaty No. 9 and its Adhesions, and, as we will illustrate, why areas of Northern Ontario were not included in Treaty No. 9 and its Adhesion.

Figure 4. Numbered Treaties



Note. Adapted from the "Historical Treaties of Canada" map, by Indian and Northern Affairs Canada, n.d.c. (https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/htoc_1100100032308_eng.pdf). Copyright n.d. by Indian and Northern Affairs Canada.

The present article will be the first to examine specifically the question of whether there is still unceded land in Northern Ontario related to Treaty No. 9, its Adhesions, and the Line-AB, in the context of proper scoping. The article begins with a very brief background section about Treaty No. 9 to set the stage of the present study. A description of the methods employed will then be presented. This section is followed by results, discussion based on secondary data analyses relevant to the research question, and the conclusions of the study including lessons learned with respect to scoping.

[4] Note that in Treaty No. 8, the Province of British Columbia participated, but had a very limited role in the treaty-making process (Long, 2010).

Background

The Treaty-Making Process in Northern Ontario

In 1905, a Treaty No. 9 field team was assembled with commissioners appointed by both the Government of Ontario (Daniel G. MacMartin) and the Government of Canada (Duncan C. Scott and Samuel Stewart); this Treaty No. 9 Commission was entrusted with the task of travelling down the Albany River and stopping at Hudson's Bay Company fur-trading posts to enter into treaty with First Nations living in the area south of the Albany River (Scott et al., 1905). The Albany River was the northern boundary of Ontario as defined by law at that time.[5] As emphasized by the Treaty No. 9 commissioners in their report:

> Under the provisions of clause 6 [the Statute of Canada, 54-55 Vic., chapter V] . . . *the terms of the treaty [No. 9] were fixed by the governments of the Dominion and Ontario* [emphasis added]; the commissioners were empowered to offer certain conditions, but were not allowed to alter or add to them in the event of their not being acceptable to the Indians. (Scott et al., 1905, p. 2)

This is why many Treaty No. 9 researchers have suggested that there were no negotiations with First Nations, as the commissioners could not change the terms of the treaty (e.g., Dragland, 1994; Long, 1989, 2010; Morrison, 1986, 1988). Thus, when the commissioners' train departed Ottawa for Dinorwic, a small Canadian Pacific Railway station in Ontario[6] (Dragland, 1994; Long, 2006; Scott, 1947), on June 30, 1905, to start their Treaty No. 9 field expedition, the commissioners were not authorized to change the specific terms of Treaty No. 9 (Scott et al., 1905). However, the commissioners in their Treaty No. 9 report also stated:

> As the cession of the Indian title in that portion of the Northwest Territories which lies to the north of the Albany river would have to be consummated at no very distant date, it was thought advisable to make the negotiations with Indians whose hunting grounds were in Ontario serve as the occasion for dealing upon the same terms with all the Indians trading at Albany river posts, and to add to the community of interest which for trade purposes exists amongst these Indians a like responsibility for treaty obligations. We were, therefore*, given power by Order of His Excellency in Council of July 6, 1905, to admit to treaty any Indian whose hunting grounds cover portions of the Northwest Territories lying between the Albany river, the district of Keewatin and Hudson Bay* [emphasis added], and to set aside reserves in that territory. (Scott et al., 1905, p. 1)

The timing of the Order-in-Council (Government of Canada) is important, as the authority to admit First Nations whose land was north of the Albany River to Treaty No. 9 was provided after the Treaty No. 9 commissioners were in the field.

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[5] In 1889, "the federal government awarded the Kenora area to Ontario in 1889. At the same time, the Albany River became the province's northern boundary" (Ontario Ministry of Government and Consumer Services, n.d., Ontario Boundaries 1889 section, para. 1).

[6] Dinorwic also served at a Hudson's Bay trading post located near Dryden and Sioux Lookout, Ontario, and 200 miles east of Winnipeg, Manitoba (Dragland, 1994; Long, 2006; Scott, 1947).

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Moreover, the Treaty No. 9 official text makes no mention of the land north of the Albany River:

> The said Indians [Cree, Ojibwe, and Oji-Cree peoples] *do hereby cede, release, surrender and yield up* [emphasis added] to the government of the Dominion of Canada, for His Majesty the King and His successors forever, all their rights titles and privileges whatsoever, to the lands included within the following limits, that is to say: *That portion or tract of land lying and being in the province of Ontario* [emphasis added], bounded on the south by the Height of Land and the northern boundaries of the territory ceded by the Robinson-Superior Treaty of 1850, and the Robinson-Huron Treaty of 1850, and *bounded on the East and North by the boundaries of the said Province of Ontario as defined by law* [emphasis added], and on the West by a part of the eastern boundary of the territory ceded by the Northwest Angle Treaty No. 3; *the said land containing an area of ninety thousand square miles, more or less* [emphasis added]. (Treaty No. 9, 1905, p. 1)

Further, according to maps found on the Government of Canada website for treaties (Crown–Indigenous Relations and Northern Affairs Canada, 2020), it is clear that the northern boundary of Treaty No. 9—as per the written text of the Treaty—was the Albany River, which at the time was the northern boundary of Ontario (see Figure 4 & Figure 5) as defined by law (Indian and Northern Affairs Canada, n.d.b).

Thus, it is difficult to comprehend how the Treaty No. 9 commissioners can state the following in their official Treaty No. 9 report:

> Cession was taken of the tract described in the treaty, comprising about 90,000 square miles, and, *in addition, by the adhesion of certain Indians whose hunting grounds lie in a northerly direction from the Albany river, which may be roughly described as territory lying between that river and a line drawn from the northeast angle of Treaty No. 3, along the height of land separating the waters which flow into Hudson bay by the Severn and Winisk from those which flow into James bay by the Albany and Attawapiskat* [emphasis added; this northern boundary will be later referred to as the Line-AB by the Treaty No. 9 Adhesion Commissioners, Cain & Awrey (1929); Figure 6], *comprising about 40,000 square miles* [emphasis added]. (Scott et al., 1905, p. 8)

Since, there is no mention of the Line-AB in the text of Treaty No. 9—even though the Treaty No. 9 commissioners retrospectively asserted that the Line-AB was the northern boundary of Treaty No. 9—that is, the Albany River (Treaty No. 9, 1905). Historically, it should be noted that the Government of Canada held the position that only the written text in any treaty was binding:

> The Government cannot admit their claim to any thing which is not set forth in the treaty [with specific reference to Treaties 1 and 2] . . . which treaty is binding alike upon the Government and upon the Indians, yet, as there seems to have been some misunderstanding between the Indian Commissioner and the Indians in the matter of Treaties Nos. 1 and 2, the Government, out of good feeling to the Indians and as a matter of benevolence, is willing to raise the annual payment to each Indian under Treaties Nos. 1 and 2 . . . on the express understanding, however, that each Chief or other Indian who shall receive such increased annuity or annual payment shall be held to abandon all claim whatever against the Government in connection with the so-called

"outside promises," other than those contained in the memorandum attached to the treaty. (Committee of the Honourable Privy Council, 1875, p. 1)

Figure 5. Treaty No. 9 and Adhesions

Note. The small triangular area delineated in the northeast corner of Manitoba and the northwestern corner of Ontario is a cartographic error based on the original Treaty No. 9 Adhesion map (see Figure 9); this triangular area is now part of the Province of Manitoba. Adapted from "Historical Treaties of Canada" map, by Indian and Northern Affairs Canada, n.d.c. (https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/htoc_1100100032308_eng.pdf) and the "Canada in 1905" map, by Indian and Northern Affairs Canada, n.d.a. (https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-TAG/STAGING/texte-text/hc1905trty_1100100028856_eng.pdf). Copyright n.d. by Indian and Northern Affairs Canada.

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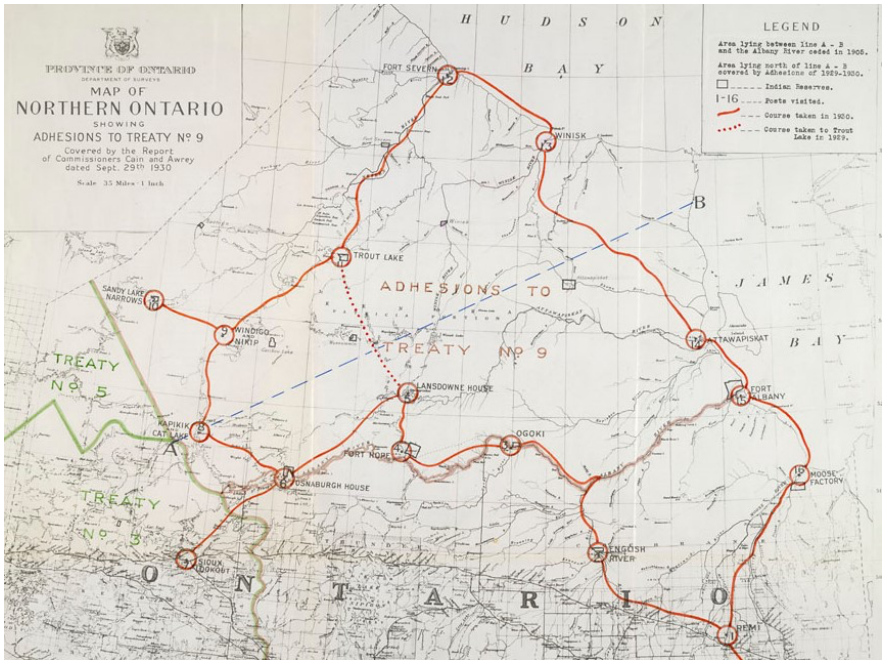
Figure 6. Map Showing Line-AB



Note. From *Report of Commissioners re Adhesion to Treaty No. 9, for the year 1930*, by W.C. Cain and H.N. Awrey, 1930. In the public domain.

However, since the Constitution of Canada was repatriated in 1982:[7]

> Canadian courts have ruled that treaties must be interpreted in accordance with the common intention of treaty partners and that oral promises made during treaty negotiations cannot be ignored when interpreting treaty texts. (Coyle & Borrows, 2017, p. 8)

An Indigenous Perspective on Land in Northern Ontario

The Government of Ontario and many in Southern Ontario view the province's Far North as an untouched hinterland containing vast swaths of natural resources (Gardner et al., 2012). Although it is true that there are vast resources in the Far North of Ontario, it is far from untouched. This region of the province appears untouched because the First Nations people of Northern Ontario have treated the land

[7] With repatriation of the Constitution of Canada in 1982, the British Crown no longer held legal power to amend the Constitution of Canada. Moreover, the repatriated Constitution entrenched Indigenous Treaty Rights:

> Section 35(1) [Canadian Constitution Act, 1982] recognizes and affirms the treaty rights 'of the Aboriginal peoples,' not the treaty rights of the Crown. In other words, treaty rights of the Aboriginal peoples are constitutionalized, while the treaty rights of the Crown are not. The Sparrow decision held that because Aboriginal rights are constitutional, they take priority over other rights which are not constitutional. (Macklem 1997, p. 131)

For other examples, see *Regina v. Badger* (1996) and *Regina v. Sundown* (1999). Adding further, "The [Canadian] Court has signaled that there is more to a treaty than its written text" (Macklem, 1997, p. 100).

respectfully and used it sustainably over millennia. As Chief Jonathon Solomon (2009) of Kashechewan First Nation stated:

> We live in the north. The land up north is our home. It's our lifeline, it's our bloodline of who we are. The land up north is not an untouched land. Our people, my ancestors, travelled that land. All over the area of my land, you can see sacred burial grounds, where my people died, where they lost their loved ones during the winter months. So it's not an untouched land; it's not a land that has been discovered. We've been there for thousands and thousands of years. We were very nomadic people. We are still closely tied to the land. Like I said, that is our bloodline, our lifeline. Without land, we will [not] be Cree people of James Bay . . . Where there are footprints all over the place in my territory, that signifies that my people were out in the land. (p. 954)

Similarly, Band Councillor Sam McKay (2009) of Kitchenuhmaykoosib Inninuwug, also known as Big Trout Lake First Nation, said:

> Our concepts of preserving Mother Nature . . . We are one with the land, we depend on it to feed our families, and we have thousands of years of intergenerational experience with how to live in harmony with the land and preserve it, not destroy it in a few years. (p. 912)

Chief George Hunter (2009) of Weenusk First Nation asserted:

> The protection of our homelands . . . The Far North is First Nations land . . . the land looks after us. We have an abundance of fish, wildlife, waterfowl and stuff, and as a result, the land is our social welfare system, and we would like to keep it that way. We've got good, clean water and we can dip our cups into any of our river and creek systems without worrying . . . We have not contaminated and harmed our land. (p. 956)

In addition, First Nation leaders of Northern Ontario stress that they did not own the land, but were stewards of the land:

> Man does not own land. (Elder Janet Nakogee of Attawapiskat First Nation recorded in 1987, cited in Long, 1993, p. 57)

> I always believed that the Creator included me in his creation. Therefore, I belonged to the land. The same goes for everybody. The Natives did not have any problems as [long as] they pursued their traditional life. (Elder John Matinas of Attawapiskat First Nation recorded in 1987, cited in Long, 1993, p. 22)

> When we're talking about the land, the people are connected to the land. First Nations people are stewards of the land; it's part of us. (Chief Keeter Corston of Chapleau Cree First Nation; Corston, 2009, p. 955).

Thus, it is understandable in the context of the First Nations worldview that if one does not own the land, one cannot give up the land by treaty, but one can share the land with others. According to Grand Chief of Mushkegowuk Council Stan Louttit (2011):

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> The [Treaty No. 9] Commissioner's Diaries record many Oral Promises that were made to the First Nations at Treaty [No. 9] time, which were not recorded in the official written document [Treaty No. 9]. The Diaries support the Elder's story that they never gave up their land. (Slide 13)

From a First Nations' perspective, stewardship of the land is an inherent right bestowed upon them. Grand Chief Stan Beardy (2009) of Nishnawbe Aski Nation stated:

> The north is our homeland and we govern and protect it through our inherent right, given to us by the Creator. Since time immemorial, our people have exercised our inherent right and protected the lands. That is why they are still in pristine condition. And we will continue to protect our lands for future generations. (p. 828)

Chief Andrew Solomon of Fort Albany First Nation (2009) said:

> When you talk about jurisdiction, that there are only two ways you can have jurisdiction: You can inherit it—one way—or you get delegated it. The province [of Ontario] and the feds [Government of Canada] got delegated by the Queen of England. First Nations here, we inherited it from our Creator. (p. 954)

Indeed, the Government of Canada is starting to acknowledge Indigenous Inherent Rights beyond what is contained in the Canadian Constitution Act (1982).

> The new policy will recognize Indigenous lawmaking power; their inherent rights to land; and, in many instances, title within their traditional territories. In all, the legislation and policy will support the implementation of the new United Nations Declaration on the Rights of Indigenous Peoples Act. (Crown–Indigenous Relations and Northern Affairs Canada, 2018, para. 4)

Nonetheless, there are some concerns with this emerging Indigenous rights process (for a critical review, see King & Pasternak, 2018). In addition, the related issues of Aboriginal Title and private property are complex, which will require the abandoning of absolutes with respect to common law, constitutional law, and Indigenous law in order to find resolution (Borrows, 2015).

Methods

A comprehensive literature search was conducted to gather (and collate) printed and online material in relation to Treaty No. 9 and its Adhesions, as well as the Line-AB. Starting in 2007, we searched academic databases as well as the Library and Archives Canada; online sources were last accessed August 27, 2019. Data sources used in the present study included Treaty No. 9 and its Adhesions, maps, photographs, reports, correspondence, drafts, memorandums, Order-in-Councils, books, articles, diaries, published Indigenous oral history, PowerPoint presentations, and the film *Trick or Treaty* based on Treaty No. 9 (also known as the James Bay Treaty; Obosawin, 2014). Data were analysed qualitatively by manual coding, using deductive thematic analysis. We used an organizational template to guide deductive coding in order to determine if Treaty No. 9 was properly scoped with unambiguous spatial boundaries (Tsuji et al., 2011). In addition, data were analyzed and categories were created using

inductive thematic analysis—that is, categories emerged from the data itself (Fereday & Muir-Cochrane, 2006)—and the data analysis was iterative.

Results and Discussion

The Ontario Boundary Extension (1889), Unceded Land, and the Need for a Treaty

In 1884, the northern boundary of Ontario was extended west and north (to the Albany River) by the Judicial Committee of the Imperial Privy Council; this extension was enacted through the Canada (Ontario Boundary) Act, 1889 (Figure 7). With increasing development activity (e.g., settlement, prospecting, railway construction) in this newly acquired northern area of Ontario, Indian Title needed to be extinguished (i.e., ceded), and non-Treaty First Nations wanted their rights protected (Macrae, 1901). In a memorandum to the Superintendent General of Indian Affairs from J. Macrae of the Office of the Inspector of Indian Agencies and Reserves, Macrae (1901) outlined the unceded territory as:

> Lying to the north and north-east of the country surrendered by the Indians under the Robinson Treaties lies the tract indicated on the annexed map. (p. 1)

Figure 8 shows the Macrae (1901) map of unceded land with Treaty No. 3 defining the southwestern border, and the Robinson–Superior Treaty and Robinson–Huron Treaty lands forming the southern border. The northern border is the Albany River, and the shoreline of James Bay is the northeastern border. However, the southeastern border of the unceded territory on the map also extends into the Province of Quebec below James Bay. The Macrae (1901) map would become the starting point for the scoping (i.e., demarcation) of the land to be included in Treaty No. 9.

In addition, Macrae (1901) pointed out:

> The number of Indians inhabiting the tract referred to is not reliably known nor is their present deposition understood, and it is submitted that it might be *wise to collect trust-worthy information in respect to both* [emphasis added]. (p. 3)

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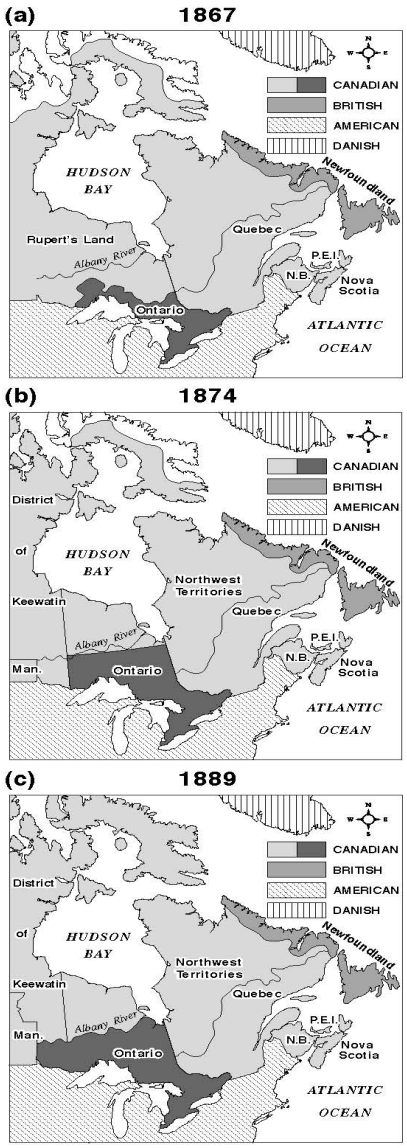
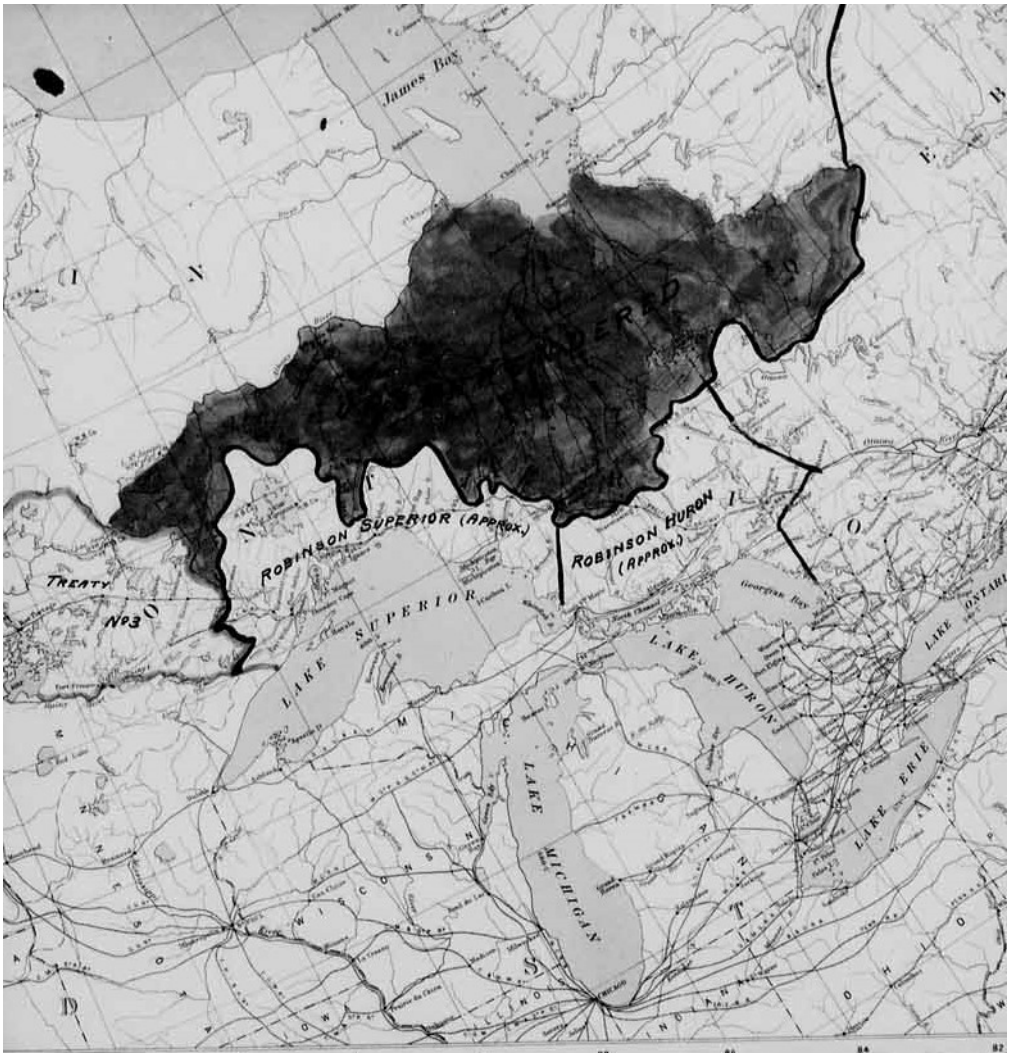
Figure 7. The Province of Ontario Boundaries (a) in 1867 at Confederation, (b) in 1874, and (c) in 1889 After the Boundary Extension



Note. Adapted from "Sea Level Change in the Western James Bay Region of Subarctic Ontario: Emergent Land and Implications for Treaty No. 9" by L.J.S. Tsuji, D. Daradich, N. Gomez, C. Hay, and J.X. Mitrovica, 2016, *Arctic, 69*(1), p. 101. (https://doi.org/10.14430/arctic4542). Copyright 2016 by the Arctic Institute of North America. Reprinted with permission.

Figure 8. Macrae's (1901) Map.



Note. Unceded land is shaded. For orientation, James Bay is to the north. From Memorandum for the Superintendent General of Indian Affairs, by J. Macrae, 1901. In the public domain.

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Subsequently, J. McLean (1901), secretary of Indian Affairs, sent a memorandum to R. Rimmer, a law clerk at Indian Affairs, for an opinion on whether the provinces of Ontario and Quebec should be included in the surrender of the tract of land, described by Macrae (1901), if the federal government chose to surrender it. R. Rimmer's (1901) report stated that, in light of the St. Catherines Milling and Lumber Company court case in which the Government of Canada lost to the Province of Ontario[8]:

> I think the consent of each Province should certainly be obtained . . . [with a] view to seeking the *concurrence* [emphasis added] of the provincial governments [Ontario and Quebec]. (p. 3)

Thus, right from the beginning of the Treaty No. 9 process in 1901, legal counsel advised that concurrences should be obtained from both Ontario and Quebec. What form the concurrences should take was not specified.

Petitions for Treaty, and the District of Keewatin Issue

The topic of petitions related to the request for a treaty has been extensively covered by other researchers (e.g., Long 1978a, 1978b, 2010; Macklem, 1997; Morrison, 1986), so we will not belabour the point that there was real and relatively widespread interest by most non-Treaty First Nations to enter into treaty for a number of reasons (e.g., the protection from settlement and development pressures on the Indigenous ways of life, and associated health and wellbeing benefits; Long, 2010). However, there is one petition that is particularly relevant to our examination of the boundaries of Treaty No. 9 and its Adhesions because of the District of Keewatin issues it raises: the treaty-extension request letter dated December 12, 1901, from J. Williams (1901), clerk at the Hudson's Bay [fur trading] Company, to the Superintendent General of Indian Affairs. The District of Keewatin is north of the 1889 Ontario boundary extension (Figure 7). In Secretary of the Department of Indian Affairs J. McLean's (1902a) reply letter, he acknowledged:

> The receipt of your letter of the 12th. . . . inclosing [*sic*] a petition from the Indians residing in the Province of Ontario and in the District of Keewatin, asking to be allowed to enter into treaty with the Government [of Canada] . . . the petition will receive consideration. (p. 1)

By February 22, 1902, J. McKenna (1902), assistant Indian commissioner of the Department of Indian Affairs, had prepared a report and sent it to C. Sifton, minister of the Interior and superintendent of Indian Affairs:

> Respecting the suggested extinguishment of the Indian title in the territory lying north and north-east of the territory of Ontario covered by the Robinson Huron Treaty. (p. 1)

[8] Briefly, as explained by Drake (2018):

> In 1883, the St. Catherine's Milling and Lumber Company (the Company) cut approximately 2,000,000 feet of timber around Wabigoon Lake in northwestern Ontario pursuant to a licence granted by the Dominion government. The Ontario government took issue with the licence, arguing that the land where the timber was cut belonged to Ontario, not the Dominion government, and thus only Ontario had authority to issue such a licence. The trial judge, Chancellor Boyd, held in favour of Ontario. Each of the Company's appeals—to the Ontario Court of Appeal, to the Supreme Court of Canada, and to the Privy Council—was dismissed. … [Since this time,] almost none of the legal principles enshrined within the Privy Council's decision are still [considered] good law. (pp. 6-7, 11).

Further, McKenna (1902) noted:

> The communication from the Indians describes the territory as being in Ontario and Keewatin, while the maps submitted show the territory as being in Ontario and Quebec, the main portion being in the former Province. I mention this because in extinguishing the aboriginal title in the territory covered by Treaty Three there has been an apparent inconsistency. The territory is partly in Ontario and partly in Keewatin and a portion extends into Manitoba . . . the Department of the Interior recognized the Halfbreeds of the ceded portion of Keewatin as North West Halfbreeds . . . The consequence is that Halfbreeds living on the Keewatin side of the English River are recognized as having territorial rights and got scrip, scrip which they may locate in Manitoba or any part of the North West Territories; while the Halfbreed on the Ontario side who naturally come and make claim has to be told that he has no territorial rights. We must take care to avoid the perpetuation of this . . . until the settlement of Halfbreed claims is completed, so that we may start with a clean slate in that respect. Then to avoid as far as possible the appearance of inconsistency, *I would suggest that the extinguishment be confined to Ontario and Quebec* [emphasis added] and be made in the form of an adhesion to the Robinson Huron Treaty . . . The *suggested cession will cover the whole of the unceded portion of Ontario* [emphasis added]. (pp. 1-3)

Thus, it is clear that the "halfbreed" and scrip issue[9] was the reason why the District of Keewatin was excluded from subsequent Treaty No. 9 boundaries discussions.

Lastly, McKenna (1902) proposed:

> The officers who pay the Robinson Huron annuities this year be informed . . . and instructed to ascertain . . . *the number of Indians in the [unceded] territory and their habitat, described by natural boundaries* [emphasis added]. (p. 4)

This was the start of the enumeration process of First Nations inhabiting the unceded tract of land, referred to in Macrae's map (Figure 8), and the attempt to document the Traditional Lands.[10]

Estimating the Total Number of Non-Treaty First Nations People to be Included in Treaty No. 9, and the Finalization of the Boundaries of the Land to be Surrendered Under Treaty No. 9

On April 8, 1902, J. McLean (1902b), secretary of Indian Affairs, sent out a letter to Indian agents in Ontario advising them:

[9] During this time period, the derogatory term "halfbreed" (or "half-breed") was used in Canada, typically in reference to a person of mixed Indigenous and European heritage (Library and Archives Canada, 2019; for a more extensive discussion of the "halfbreed" question with respect to Treaty No. 9, see Long, 1978c). Scrip refers to a document that could be redeemed for land or money.

[10] Prior to European first contact, land use and settlement patterns of First Nations in northern Ontario were non-random and typically were clustered along major waterways (Tsuji et al., 2011; Woodland Heritage Services, 2004). During the fur trading years, prior to Treaty No. 9 (1905), river-basin areas were used by First Nations families and extended families, but there was movement between these river-basin groups (Lytwyn, 2002). J.M. Cooper began mapping these family-based Traditional Lands and Traditional Territories in the 1920s in northern Ontario. He collected oral history in order to construct territorial maps based on settlement patterns in the 1880s (Flannery & Chambers, 1986).

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> [Non-Treaty] Indians inhabiting the district lieing [*sic*] north and north east of the land surrendered under the Robinson [Treaties] . . . inform any enquirers that the Government [of Canada] has the request for a treaty under consideration, and that they will be advised later on of a decision. (p. 1)

To gather data on the number of non-Treaty First Nations people that may be involved in the treaty-making process in the future, and the boundaries of their Traditional Territories (also referred to as hunting grounds), Indian agents in Ontario began to make inquiries about these topics to missionaries and Hudson's Bay Company personnel (involved in the fur trade). For example, in a letter dated July 14, 1902, the Archdeacon T. Vincent (1902; Stonewall, Manitoba) made an inquiry to the Superintendent General Indian Affairs:

> A few days ago I received a letter from the Indian Agent at Port Arthur [J. Hodder], requesting information regarding a certain portion of un-surrendered territory, bounded on the South by the height of land, on the West by the Albany River [in Ontario], on the North by James Bay, and on the East by the Nottaway River [in Quebec, see Figure 8] . . . What is really required? (p. 1)

J. McLean (1902c), secretary of Indian Affairs, replied to Archdeacon T. Vincent:

> The Department [Indian Affairs] will be glad if you can see your way to comply with Mr. Hodder's request and furnish him the information [about the number of "Indians" and their Traditional Territories] that he asked for, by letter. (p. 1)

Estimates of non-Treaty First Nations people trading at the Hudson's Bay Company posts in the unceded land began to arrive at the Indian Affairs office. By December 6, 1902, it was reported by J. Hodder (1902), Indian agent, Port Arthur, Ontario, in a letter to J. McLean, secretary Indian Affairs:

> A list of the Hudson's Bay Co Posts and the approximate number living in their vicinity and trading at them is given below, *it was not possible to obtain boundaries of their hunting grounds from any person I came in contact with . . . Total 2140* [emphasis added] . . . While the above estimate can be considered fairly correct, some of the Posts may not be included in the list [and some in Quebec such as Waswanaby] and *quite a number of Indians wander around and are not attached to any particular [Hudson's Bay] Post* [emphasis added], it is estimated that the full number would *come under 3000* [emphasis added]. I am indebted to Mr. Alex Matheson of the Hudson's Bay Co, and Archdeacon Thomas Vincent late of Moose Factory for the most of the above information. (pp. 1-2)

To gather additional data, J. McLean (1903) sent out letters to other Indian agents in Ontario early the next year, instructing his personnel to collect:

> Any information as to the number of Indians inhabiting the district lying North and East of the line surrendered under the Robinson–Huron and Robinson–Superior Treaties. (p. 1)

This was not a very fruitful exercise, because no information could be gathered from several of the Indian agents (Hagan, 1903; Sims, 1903); however, W. MacLean (1903), Indian agent, Parry Sound, Ontario, reported:

> [With] reference to certain Indians residing in the territory lying North & East of the land surrendered under the Robinson Huron & Robinson Superior Treaty . . . [there are an estimated 400 Temogammque Indians, but everybody contacted was] *unable to give me any information as to the natural boundaries of the territory occupied by the Abbittibi Indians* [emphasis added]. (pp. 1-2)

All of the above collected data were used to draft a report entitled, *Synopsis Proposed Treaty with Indians of District North of Robinson Superior and Huron Treaties (1850)*, whereby it was specified that Ontario and Quebec would be part of the proposed treaty, the District of Keewatin would be left out because of the "halfbreed" issue and:

> The full number [of non-Treaty First Nations people] would come under 3000 and that some of these places may not be included in the district the title of which it is proposed to extinguish. (Anonymous, 1903, p. 3)

In a memorandum from F. Pedley (final version dated August 17, 1903), deputy superintendent general of Indian Affairs, to C. Sifton, minister of the Interior and superintendent general of Indian Affairs, details were described:

> So far as the Indians of Quebec are concerned, it is suggested that *no treaty should be made with them* [Quebec non-Treaty Indians] *or that any Quebec Indians living temporarily in Ontario should be included in the Ontario treaty* [emphasis added], but we should endeavor to obtain an understanding from the Province of Quebec . . . The new treaty might be called *Treaty No. 9*, or the *James Bay Treaty* . . . the best time to make the treaty is in the autumn, in the month of September . . . 1904 . . . In the estimate for the fiscal year 1904-5 we should include an amount sufficient to meet the cost of making the treaties, and *the first payment of annuities, and, if necessary, gratuities* [emphasis added]. These items may be as follows:
>
> > Cost of making the treaty, which will depend largely upon the size of the party and its composition, say . . . *$15,000.00* [emphasis added]
> >
> > 1st payment. 3,000 Indians (estimated population) at *$4.00 [annuity] per capita . . . [$]12,000.00* [emphasis added]
> >
> > *Gratuity*. 3,000 Indians (estimated population) at *$4.00 per capita . . . [$]12,000.00* [emphasis added]
> >
> > Total [estimated number of Indians] . . . *2,365* [emphasis added]. (Pedley, 1903, pp. 5-7)

This memorandum is important because it presents an estimate of the number of First Nations people to be admitted to treaty, and concomitantly the area of the land to be covered by the treaty, and the budget

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to be put forward forthwith. In a letter dated March 25, 1904, from D.C. Scott (1904), accountant at Indian Affairs, to F. Pedley, deputy superintendent general of Indian Affairs, he advised:

> Upon the last page of your memorandum, *an estimate is given of what the probable cost may be. I do not think these figures can be altered* [emphasis added]. (p. 1)

Having these figures solidified was important because on April 30, 1904, F. Pedley (1904a), deputy superintendent general of Indian Affairs, sent a letter to E. Davis, commissioner of Crown Lands for the Government of Ontario that stated:

> This Department proposes at as early a date as possible to negotiate a treaty with the Indians whose habitat lies North of the height of land between the boundaries of the tract surrendered by the Robinson Treaties of 1850, and the Northern and Eastern boundaries of the Province of Ontario . . . [with a total population estimate of] *2,365. Accurate enumeration may have the result of increasing or diminishing this number, but it is thought to be approximately correct* [emphasis added]. (pp. 1-2)

A similar letter was sent by F. Pedley to C. Chipman, commissioner of the Hudson's Bay Company. C. Chipman's (1904) reply on May 11, 1904, reads:

> *I gather from the numbers on your list it is only intended to deal with Indians borne* [*sic*] *within the boundaries of Ontario* [emphasis added]. In that case would it be necessary for the Commissioner to go into the Province of Quebec, to the posts at Abitibi, Ruperts House, and Waswanaby? (p. 2)

In this letter, C. Chipman also petitions to include First Nations that inhabit the land north of the Albany River (i.e., in the District of Keewatin) in the treaty. In the return correspondence, dated May 18, 1904, F. Pedley (1904b) specified that the District of Keewatin and Province of Quebec were not to be included in Treaty No. 9:

> The arrangements to be made for negotiating a new treaty with the *Indians of Ontario* [emphasis added], North of the height of land. It is only proposed to take a cession of that portion of the Province of Ontario not covered by the Robinson Treaty or other treaties or surrenders. (p. 1)

Thus, Treaty No. 9. was to include only non-Treaty First Nations people of Ontario, and the actual budget[11] of $30,000 in small notes (Scott, 1947) fiscally fixed the number of non-Treaty First Nations people that could be monetarily included in Treaty No. 9 during the proposed 1904-field expedition. This 1904 trip did not occur because of issues with the Government of Ontario in gaining concurrence (which will be addressed in a forthcoming section).

[11] Compare that to the estimated total budget of $39,000, as calculated by Pedley (1903).

It would be approximately a year before F. Pedley (1905b) issued a memorandum on April 27, 1905, entitled, *In Re James Bay Treaty*, to Sir Wilfred Laurier, acting superintendent general of Indian Affairs[12] and attached a draft Order-in-Council. In follow-up on May 2, 1905, F. Pedley (1905c) submitted a letter and enclosure (*Draft James Bay Treaty Order-in-Council*) to E. Newcombe, deputy minister of Justice, Government of Canada, for his input. In his response dated May 5, 1905, E. Newcombe (1905) wrote:

> It appears to me that all that is needed from the Government of Ontario is its concurrence and consent to the conclusion of a treaty upon the proposed terms . . . I enclose a fair copy of the draft report as revised. (p. 1)

> The land which is to be ceded shall be described as follows: That portion or tract of land lying and being in the Province of Ontario, bounded on the south by the Height of land and the northern boundaries of the territory ceded by the Robinson–Superior Treaty of 1850, and the Robinson–Huron Treaty of 1850, and *bounded on the East and North by the boundaries of the said province of Ontario as defined by law* [emphasis added], and on the West by a part of the Eastern boundary *of the territory ceded* [italicized and underlined section was handwritten into the Pedley typed draft] by the North West Angle Treaty No. 3; the said land containing an *area of ninety thousand square miles, more or less* [emphasis added]. (p. 2)

The passage detailing the boundaries of Treaty No. 9, as revised by E. Newcombe, remains unchanged in appearance in the approved Government of Canada Order-in-Council (1905a) of the terms of Treaty No. 9, which had Government of Ontario input to gain concurrence (McGee, 1905). Lastly, S. Stewart (1905), assistant secretary of Indian Affairs, sent a letter dated June 26, 1905, to the Undersecretary of State, Government of Canada, which stated:

> I beg to enclose herewith [a paper] copy of Treaty No. 9. Would you kindly cause this to be engrossed on parchment at as early a date as possible? You will observe *that there are certain omissions* [such as, the actual date the agreement between the Government of Ontario and the Government of Canada was signed] *for which blanks should be left to be afterwards filled in* [emphasis added]. (p. 1)

From the time that the text of Treaty No. 9 was engrossed on parchment (or in this case vellum), the written terms of the treaty were fixed. Two vellum copies would be made and carried into the field by the Treaty No. 9 Commission to be signed by the Treaty No. 9 commissioners, leaders of the non-Treaty First Nations people, and witnesses: one copy for the Government of Ontario (Archives of Ontario, 2019), and one copy for the Government of Canada (Treaty No. 9, 1905). The only way to add to the Treaty No. 9 "official document" would be to add another same-sized piece of vellum, as was done for the agreement between the Government of Ontario and the Government of Canada (McLean, 1905; Scott, 1905) after the commissioners returned from the Treaty No. 9 expedition.

[12] C. Sifton resigns on February 27, 1905, as minister of the Interior and superintendent general of Indian Affairs; thus, W. Laurier takes on the responsibility of the acting superintendent general of Indian Affairs (Dominion of Canada, 1905; Parliament of Canada, 2020). On April 8, 1905, F. Oliver was appointed as minister of the Interior and the superintendent general of Indian Affairs (Parliament of Canada, 2020).

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Admitting First Nations People North of the Albany River in the District of Keewatin to Treaty No. 9

It is surprising that the Treaty No. 9 commissioners reported that some non-Treaty First Nations from the District of Keewatin were included in Treaty No. 9 (Scott et al., 1905) because we have shown: (a) the District of Keewatin was excluded from the beginning of the Treaty No. 9 planning process (Macrae, 1901), in light of the "halfbreed" issue (McKenna, 1902), and (b) the boundaries fixed on vellum in the Treaty No. 9 text did not include the District of Keewatin (Treaty No. 9, 1905). Long (2006) suggested:

> Upon the urging of the Hudson's Bay Company, the federal government had decided at the last minute [through an Order-in-Council on July 6, 1905]—and after the commissioners had left Ottawa [on June 30, 1905]—to admit Indians who traded along the Albany River but hunted in the North West Territories [District of Keewatin], north as far as the imaginary line AB. (p. 24)

We have found no evidence in Library and Archives Canada that supports Long's (2006) contention about the influence of the Hudson's Bay Company on the District of Keewatin issue, except the May 11, 1904, letter from C. Chipman (1904) to F. Pedley that we previously mentioned. We suspect that it was a change in leadership at Indian Affairs that led to these last-minute changes to the commissioner's treaty-making parameters through Government of Canada Order-in-Councils. For example, Minster of the Interior and Superintendent General Indian Affairs Clifford Sifton, who as the elected member of government was ultimately responsible for Treaty No. 9, resigned in the winter of 1905 (Dominion of Canada, 1905; Parliament of Canada, 2020). Prime Minister Wilfred Laurier assumed responsibilities as acting superintendent general of Indian Affairs (Pedley, 1905b), until Frank Oliver took over this portfolio on April 8, 1905 (Parliament of Canada, 2020). On June 20, 1905, an Order-in-Council was introduced from the Superintendent General of Indian Affairs, but there is no signature on the typed copy. We assume it to be F. Oliver, but we do not know for sure who put this Order-in-Council forward (Superintendent General Indian Affairs, 1905). This Order-in-Council (1905b) was approved on June 29, 1905, confirming the appointment of D.C. Scott and S. Stewart from Indian Affairs as the two Government of Canada commissioners to negotiate Treaty No. 9. The Government of Ontario commissioner had yet to be named. Further, this Order-in-Council stipulated that at Hudson's Bay Company posts:

> Situated close to the boundary between the Province of Ontario and the District of Keewatin, *the said Commissioners representing the Dominion of Canada shall use their discretion in allotting reserves within the District of Keewatin and in admitting to treaty any Indians whose hunting grounds may cover portions of the District of Keewatin* [emphasis added]. (pp. 1-2)

Thus, D.C. Scott and S. Stewart, Government of Canada commissioners, were given authority on June 29, 1905, to allow the District of Keewatin First Nations into Treaty No. 9, prior to their Ottawa, Ontario, Treaty No. 9 expedition departure date of June 30, 1905 (Scott et al., 1905). However, it is evident that the commissioners were not aware of this Order-in-Council (1905b) because, in their retrospective Treaty No. 9 report, they stated that they were:

> *Given power by Order of His Excellency in Council of July 6, 1905, to admit to treaty any Indian whose hunting grounds cover portions of the Northwest Territories lying between the Albany*

> *river, the district of Keewatin and Hudson bay* [emphasis added], and to set aside reserves in that territory. (Scott et al., 1905, p. 1)

The Government of Canada Order-in-Council that Scott, Stewart, and MacMartin (1905) are retrospectively referring to is the Order-in-Council (1905c) submitted on July 3, 1905. This Government of Canada Order-in-Council was to bring the Government of Ontario Order-in-Council appointing D.G. MacMartin as the Government of Ontario Treaty No. 9 commissioner into force federally. The Government of Canada Order-in-Council (1905c) was brought into effect on July 6, 1905, and reads:

> The Minister therefore recommends that Mr. MacMartin be appointed as a Commissioner to negotiate the said treaty . . . *The Minister further recommends that the authority given to the Dominion Commissioners to set aside reserves be extended to that part of the North West Territories lying between the Albany River, the District of Keewatin and Hudson Bay, and to admit to Treaty any Indians whose hunting grounds cover portions of that District* [emphasis added]. (pp. 1-2)

We have been using the word "retrospectively" when referring to the Scott et al. (1905) report because it was written after the Treaty No. 9 commission team returned from the field, so D.C. Scott (the principal author of the report) would have known about the July 6, 1905, Order-in-Council (1905c) being passed, and revised events in this light. As we have mentioned previously, Long (2010) noted that the Treaty No. 9 commissioners left Ottawa on June 30, 1905, for Dinorwic (Scott et al.,1905), while the Order-in-Council was passed July 6, 1905. Long (2010) does not pursue this line of inquiry further, but we will here.

The commissioners arrived by train in Dinorwic on July 2, 1905 (Scott et al., 1905), and left on their northward journey into the wilderness by canoe on July 3, 1905 (Scott et al., 1905). We are highly incredulous that, once the Treaty No. 9 commission field team left for the wilderness by canoe to visit the Hudson's Bay fur trading outposts to conduct treaty activities, they received any correspondence regarding Order-in-Council (1905c) because we see no proof in the written record that suggests that the commissioners' party received said message. Moreover, there was no form of rapid communication at the time to get the message to them once the commission was in the field: Postal service would have been too slow to reach the commission in time due to the remote locations they were travelling to; telegraphs would have offered a rapid means of communication, but were associated with railways, and there were no railway lines where the commissioners' team headed; and long-distance telephone connection did not exist in 1905 in the region that the commission was entering (Babe, 1993; NorthernTel, 2019). The "moccasin telegraph," which refers to the network used by Indigenous people to transmit messages by foot and canoe (Long, 2010), could have been used, but there is no written evidence that it was. Unless other material becomes available, there is no evidence that suggests that the Treaty No. 9 commissioners received news about Order-in-Council No. 1905-1275 while in transit in the wilderness; thus, the commissioners did not know they had the authority to treaty First Nations people from the District of Keewatin. The legality of carrying out an activity without the knowledge that authority has been granted until after the activity is completed is beyond the scope of the present article.

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It should be stressed that Treaty No. 9 Commissioner D.C. Scott was also the senior accountant at Indian Affairs and knew the intricacies of the Treaty No. 9 budget, including the estimated number of non-Treaty First Nations people and the boundaries of the region to be ceded (Scott, 1904). He knew or should have known that, from a monetary standpoint, the District of Keewatin First Nations people should not be included because the $30,000 budget he took to the field could not cover their inclusion. Further, F. Pedley (1905b) had planned with C. Chipman, commissioner Hudson's Bay Company, to provide transportation, accommodations, etc. for the Treaty No. 9 Commission to visit only the Hudson's Bay trading posts in the northern portion of Ontario; there is no mention of travelling to Hudson's Bay posts in the District of Keewatin. These arrangements were finalized at the last minute (Chipman, 1905) so there was no time to change travel arrangements for the Treaty No. 9 Commission to include travel to the District of Keewatin Hudson's Bay Company posts and, more importantly, to inform the non-Treaty First Nations people of the District of Keewatin the change in plans. Thus, the admittance of District of Keewatin First Nations people to Treaty No. 9 in 1905 would be a limited and a haphazard process at best.

Further to the above issue, it is important to note that when the Governments of Canada and Ontario (Order-in-Council, 1906) ratified Treaty No. 9, there was no change in the boundaries as described in the Treaty No. 9 text. However, the Canadian Order-in-Council also referenced (as did Treaty No. 9) a "blanket" land clause:

> And also [cede] the said Indian rights, titles and privileges whatsoever to *all other lands* [emphasis added] wherever situated in Ontario, Quebec, Manitoba, the District of Keewatin, or in any other portion of the Dominion of Canada. (Treaty No. 9, 1905, p. 1)

Although the written text of Treaty No. 9 only referred to land south of the Albany River specifically, the Ontario and Canadian governments could argue that the blanket land clause in Treaty No. 9 would account for land north of the Albany River up to Line-AB, as Long (2010) speculated. We disagree. This type of blanket land clause was standard in many of the previous Numbered Treaties (see Treaty No. 4, 1874; Treaty No. 5, 1875; Treaty No. 6, 1876; Treaty No. 7, 1877; Treaty No. 8, 1899). One would surmise that its purpose would be to account for small areas of land not mentioned in a particular treaty's text. If not, boundaries would not have been specified in all the Numbered Treaties; instead, the blanket land clause would have been all that was needed for every treaty. Further, if the Government of Ontario and the Government of Canada evoke this blanket land clause with respect to Line-AB, there is a disjunct; the power of the land clause is in its ambiguity—no boundaries are specified—thus any land can be covered by this clause. However, once boundaries, such as those set by the Treaty No. 9 commissioners along the northern Line-AB, there is specificity and the demarcated land boundaries should have been included in the text of Treaty No. 9. Nevertheless, this is a legal issue that must be resolved in court.

Further, the commissioners stated that, upon entering into Treaty No. 9, the "Indians" ceded a further 40,000 square miles in addition to the 90,000 square miles written in Treaty No. 9 (1905) text, which raises the issue of what was actually explained to the First Nations people who signed Treaty No. 9. The commissioners' own written words on the northern boundary of Treaty No. 9 directly contradict the text of Treaty No. 9. Indigenous-language translators were used to explain the content of the treaty

because First Nation leaders were not able to read the English text of Treaty No. 9 (1905).[13] If First Nations people were told orally that the northern boundary of the treaty was the Line-AB, when in fact Treaty No. 9's northern boundary was designated as the Albany River, the treaty's text was not properly translated, which would have been a serious breach of treaty protocol at the very least. In the Treaty No. 9 commissioners' report, it was stated the treaty was signed after "the terms of the treaty having been fully explained" to the First Nations people (Scott et al., 1905, p. 5). Further, the reverse situation, in which Treaty No. 9's northern boundary was explained as the Albany River as per the Treaty No. 9 text while the boundary was the Line-AB, would also be problematic.

The Treaty No. 9 translation issue has been covered extensively by other researchers (e.g., Long, 2010, 2011), so we turn our attention to Treaty No. 9 as a flawed document. It has been suggested by Long (2010) that Treaty No. 9 might have been the first of the Numbered Treaties that lacked oversight by the Colonial Office in Great Britain and the Governor General of Canada. The last-minute negotiations and the need for the concurrence agreement[14] between the Government of Canada and the Government of Ontario compounded the problem. For example, Treaty No. 9 (1905) stated:

> And it is further understood that this Treaty is made and entered into subject to an agreement dated the third day of July between the Dominion of Canada and Province of Ontario, which is hereto attached. (p. 3)

[13] There are inconsistencies in the Treaty No. 9 record, including the commissioners' diaries, regarding who actually translated Treaty No. 9 at one or more of the Hudson's Bay Company trading posts (Long, 2006; Morrison, 1986). Moreover, "The commissioners' own records indicate that [at] treaty signing . . . the written treaty [specifics] were not explained to the Ojibway and Cree, who gave their consent only to the commissioners' oral explanations" (Long, 2006, p. 4). Indeed, "Angus Weenusk [New Post] replied that they 'accepted the terms as stated'" (Louttit, 2010, Slide 13). Lastly, conversational Cree (or Ojibwe or Oji-Cree) is relatively simplistic compared to "high" Cree (or "high" Ojibwe or "high" Oji-Cree); the treaty concepts could not have been properly explained by the translators who were likely missionaries or Hudson's Bay Company post employees, as they would have at best been fluent in the conversational Indigenous language.

[14] The Agreement Between the Dominion of Canada and the Province of Ontario (1905) reads as follows:

> And whereas, by the agreement made the 16th day of April, 1894, entered into between the Government of the Dominion of Canada . . . and the Government of the Province of Ontario . . . in pursuance of the statute[s] of Canada . . . Ontario [both] passed [in 1891] . . . [similarly entitled] 'An Act for the settlement of certain questions between the governments of Canada and Ontario respecting Indian lands,' and by the sixth clause of the said agreement [of 1894] it is provided, "That any future treaties with the Indians in respect of Territory in Ontario to which they have not before the passing of the said Statutes surrendered their claim aforesaid, shall be deemed to require the concurrence of the Government of Ontario." (p. 2)

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The agreement was never attached to Treaty No. 9 because it was never fully executed until December 1, 1905, and backdated to July 3, 1905,[15] in order to "make the date of the agreement some day previous to the date in the Treaty [No. 9]" (Matheson, 1905, p. 1). The lack of oversight by the drafters of Treaty No. 9 has also been documented in the Ontario Court.[16] Clearly, the issues with Treaty No. 9 extend beyond translation issues.

The Adhesions to Treaty No. 9

The 1908 Adhesion to Treaty No. 9, which was signed by the Abitibi Algonquins in Quebec (Stewart, 1908), will not be covered because it has no bearing on the Treaty No. 9 and Line-AB issue (Long, 2010). However, this is not true for the Treaty No. 9 Adhesion of 1929 to 1930.

On April 1, 1912, the boundaries of Ontario were expanded westward to the Manitoba border and northward to the northwestern shores of James Bay and Hudson Bay; that is, to the present-day boundaries of said province (Ontario Boundaries Extension Act, 1912).[17] The following year, a map was circulated at Indian Affairs that demarcated the unceded territory in Ontario, formerly part of the District of Keewatin (Inspector Treaty No. 5, 1913); the Line-AB was not indicated on the map (Figure 9). With development activities pushing northward into the more northerly regions of Ontario (Long, 1978a), D.C. Scott (1923), former Treaty No. 9 commissioner, and now deputy superintendent general of Indian Affairs, crafted a letter dated November 27, 1923, to G. Ferguson, premier of Ontario, informing him:

> I wish to draw your attention to the fact that the Indian title to a large portion of the Province of Ontario, north of the Albany River has not yet been ceded, and I am enclosing herewith a map [see Figure 9] showing in red the unceded district. Certain Indians in this district who trade at posts on the Albany River are already annuitants under Treaty 9 [referring to the mythical Line-AB], but the remaining population of approximately 1500 have not yet relinquished their aboriginal rights to this territory. (p. 1)

[15] "The copy of the agreement . . . was duly received. The date has been filled in as of the 3rd of July [1905] and the official seal has been affixed to Hon. Mr. Oliver's signature" (Pedley, 1905d, p. 1).

[16] As stated in *Regina v. Batisse* (1978):

> The term 'the government' obviously refers to only one body. Had the words used been 'a government' then the meaning would have been different. Furthermore, I have not been directed to any authority, historical or otherwise, where any Province after Confederation was referred to as a 'country.' In 1905 the only Government of the country was the federal Government and this distinction between federal and provincial authorities was well known to all (including the Indians). Indeed, the very fact that the federal Government was referred to in two other non-identical terms confirms my view that the drafters of the treaty were not very careful with the technical terms used throughout the document. If the makers of the treaty intended to delegate authority to regulate the Indian hunting and fishing rights to the Government of the Province of Ontario, they would have specifically said so. I note, for example, that in the Agreement between the provincial and federal Government (to which the treaty specifically referred), there was no hesitation in using the term 'the government of the province of Ontario' when referring to that body. (para. 44)

[17] "Ontario's boundaries were pushed north to Hudson Bay in 1912, completing the province's expansion to its current borders" (Ontario Ministry of Government and Consumer Services, 2020, Ontario Boundaries 1912 section, para. 1).

Figure 9. Map of Unceded Land in the Province of Ontario (B) and the Province of Manitoba (A) in 1913

Note. From Inspector Treaty No. 5 Letter, 1913. In the public domain.

By June 1, 1926, a description of the boundaries for the Adhesion to Treaty No. 9 had been prepared by Indian Affairs personnel (Anonymous, 1926; two initials appear on the document, but are not decipherable):

> All that tract of land and land covered by water in the Province of Ontario, comprising part of the District of Patricia, containing one hundred and twenty-eight thousand three hundred and twenty square miles, more or less, *being bounded on the South by the northerly limit of Treaty Nine* [emphasis added, because of the ambiguity on whether it is the Albany River or the Line-AB]; on the West by the easterly limits of Treaties Three and Five and the boundary between the Province of Ontario and Manitoba; on the North by the waters of Hudson Bay, and on the East by the waters of James Bay and *including all islands, islets and rocks, waters and land covered by water within the said limits* [emphasis added, because this type of phrase had been used in previous Numbered Treaties, but not in Treaty No. 9][18] *and also all islands, islets and*

[18] The importance of leaving out the "land covered by water" clause in Treaty No. 9 has been discussed by Tsuji et al. (2016), in the context of sea-level change and unceded land in James Bay (Tsuji et al., 2009).

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> *rocks in Hudson and James Bay which comprise part of the Province of Ontario* [emphasis added, because this phrase is removed in the final Treaty No. 9 Adhesion description]. (p. 1)[19]

The final version is presented below, with the changes mentioned above:

> All that tract of land, and land covered by water in the Province of Ontario, comprising part of the District of Kenora (Patricia Portion) containing one hundred and twenty-eight thousand three hundred and twenty square miles, more or less, being *bounded on the South by the Northerly limit of Treaty Number Nine* [emphasis added]; on the West by Easterly limits of Treaties Numbers Three and Five, and the boundary between the Provinces of Ontario and Manitoba; on the North by the waters of Hudson Bay, and on the East by the waters of James Bay and including all islands, islets and rocks, waters and land covered by water within the said limits, and also all the said Indian rights, titles and privileges whatsoever to all other lands and lands covered by water, wherever situated in the Dominion of Canada. (Adhesions to Treaty Number Nine, 1929, p. 29)

Note that there is still ambiguity in the southern boundary of the Adhesion, because of the Line-AB issue. That is, the northerly limit of Treaty No. 9 should be the Albany River as written in the text of Treaty No. 9, but the northerly limit of Treaty No. 9, according to the commissioners who negotiated it, is the Line-AB. Moreover, D.C. Scott was a Treaty No. 9 commissioner and the architect of the Line-AB and—as the deputy superintendent general of Indian Affairs (i.e., the head civil servant and non-elected member of government for his department) during the Treaty No. 9 Adhesion time period—he had the opportunity to clarify matters but did not.

Nonetheless, as with Treaty No. 9, the number of non-Treaty First Nations people had to be estimated. Thus, the fur trading companies were queried (Brabant, 1926), as well as Indian Affairs personnel (Department of Indian Affairs, 1927). Enumeration met with several issues, such as "the frequent duplications of names of Indians" (Department of Indian Affairs, 1927, p. 1) and "it is difficult to ascertain the exact number of Indians that would be affected as there is no regular census of these non-treaty Indians" (Scott, 1927, p. 1). We did not uncover any evidence of an attempt to collect hunting ground information for the adhesion process, in contrast to Treaty No. 9, where an unsuccessful attempt was made. Perhaps this type of information was deemed irrelevant because the land to be ceded included all of Northern Ontario.

The region visited by the two Treaty No. 9 Adhesion commissioners—W. Cain representing the Government of Ontario, and H. Awrey representing the Government of Canada—was vast, with air travel being the main mode of transportation they used (Cain & Awrey, 1929). Three main points of contact were selected to engage the non-Treaty First Nations people: Trout Lake, part of the Severn River system, was visited in 1929, and the mouths of the Severn River and Winisk River, where they empty into Hudson Bay, were visited in 1930 (Cain & Awrey, 1929, 1930).

[19] Islands in Hudson Bay and James Bay have never been part of Ontario; they historically belonged to the Northwest Territories, so should not have been included in the Treaty No. 9 Adhesions' text (Tsuji et al., 2009).

Cain and Awrey (1929) asserted in their report:

> *Under Treaty No. 9* [emphasis added] not only did the Indians within the said area south of the Albany cede, release and surrender their rights but those resident in the area lying north of the river to a straight *line AB* [emphasis added] roughly drawn from the Northeast Angle of Treaty No. 3 in a north-easterly direction to a point on James bay approximately midway between the mouth of the Attawapiskat river on James bay and that of Winisk river on Hudson bay, did likewise. (p. 20)

Adding further, they stated:

> That the surrender made in the year 1905 [with Treaty No. 9] by the Indians of that portion lying South of the line AB, then in the Northwest Territories but included in the extended boundaries of Ontario in 1912 [north of the Albany River], be hereby approved and confirmed. (Cain & Awrey, 1929, p. 32)

Similar to Long (2010), we can find no evidence indicating how Cain and Awrey (1929, 1930) confirmed the cession of the land between the Albany River and Line-AB with the Ojibwe, Oji-Cree, or Cree. The extinguishment process of Indian Title was regimented, as will be discussed in the forthcoming section. Evidently, the two Treaty No. 9 Adhesion commissioners assumed that the northern boundary of Treaty No. 9 was the Line-AB mentioned by Scott et al. (1905) in their Treaty No. 9 report, even though there was no mention of the Line-AB in Treaty No. 9 text in which the Albany River was the northern boundary specified. We speculate that D.C. Scott, as the former Treaty No. 9 commissioner who created the whole Line-AB issue, and who as the deputy superintendent general of Indian Affairs drafted the Treaty No. 9 Adhesion document, unduly influenced his Indian Affairs Paymaster H. Awrey on the existence of the Line-AB. Indeed, it appears that H. Awrey and perhaps W. Cain used the map described in their report to explain the location of the Line-AB to the First Nations people at Trout Lake:

> Every important point in the treaty proposals from the area involved, which was indicated to the Indians on a *roll map* [emphasis added] hanging upon the north wall of the rude structure was carefully considered to the minutest detail. (Cain & Awrey, 1929, p. 23)

We have found no evidence that maps were used during Treaty No. 9 explanations. We assume this is because the northern boundary was the Albany River and this physical boundary would have been easy to convey to First Nations people. The Line-AB as the southern boundary of the Treaty No. 9 Adhesion would be much more difficult or impossible to explain without a map and, even with a map, the explanation would have been difficult to comprehend. The existence of the map showing Line-AB from the Cain and Awrey (1929; Figure 6) report (or a similar map on which it was based) is highly suggestive of what we have inferred.

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The Attawapiskat Cree of the District of Keewatin

The Numbered Treaties (Nos. 3-11)[20] follow the same format when it comes to the extinguishment of First Nations land: The treaty is first interpreted and explained to the First Nations people; First Nations leaders then sign or place their mark on the treaty on behalf of the people they represent; a gratuity is given to all who have ceded their land in recognition of the extinguishment of all claims; and an annuity is given in subsequent years. For Treaty No. 9 (1905), the gratuity passage reads as follows:

> And with a view to show the satisfaction of His Majesty with the behaviour and good conduct of His Indians, and in extinguishment of all their past claims, He hereby, through His commissioners, agrees to make each Indian a present of *eight dollars in cash* [emphasis added]. (p. 2)

The annuity passage appeared as such:

> His Majesty also agrees that next year, and annually afterwards forever, He will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, *four dollars* [emphasis added], the same unless there be some exceptional reason, to be paid only to the heads of families for those belonging thereto. (Treaty No. 9, 1905, p. 2)

The commissioners of Treaty No. 9 were very aware that until the gratuity ($8) had been paid, the First Nation person had not extinguished their claim to the Government of Canada. This is clearly shown in the following two passages, one from the commissioners' 1905 report and one from their 1906 report (the commissioners had to complete Treaty No. 9 signings in 1906, as they did not have enough time to complete all Treaty No. 9 business in 1905):

> They [English River First Nation people] were informed that by the acceptance of the gratuity [$8] they would be held to have entered treaty, a statement which they fully realized. (Scott et al., 1905, p. 5)

> It was not necessary to make treaty with the Indians of Chapleau, as they belong to bands residing at Moose Factory, English River, and other points where treaty had already been made. They were, however, recognized as members of the bands to which they belong, and were paid the gratuity [$8] due them, after being informed as to what the acceptance of the money by them involved. (Scott et al., 1906, p. 13)

Thus, it is clear from Treaty No. 9 (1905) text and the reports by the commissioners (Scott et al. 1905, 1906) that the First Nations people who received the $8 gratuity extinguished their claims to land and resources. In other words, if a First Nations person did not receive the $8 payment in one instance, as a gratuity, they did not extinguish their claim to land and resources.

At the Fort Albany Treaty No. 9 signing in 1905, only 1 of the 10 Cree signatories was from the Attawapiskat region, "Jacob Tahtail" ([*sic*], on the Treaty No. 9 document]), according to Cree Oral

[20] Treaty No. 3 (1873); Treaty No. 4 (1874); Treaty No. 5 (1875); Treaty No. 6 (1876); Treaty No. 7 (1877); Treaty No. 8 (1899); Treaty No. 9 (1905); Treaty No. 10 (1906); Treaty No. 11 (1921).

Tradition (Long, 1993). Thus, that some Attawapiskat First Nation people of the District of Keewatin were at the Treaty No. 9 signing is not in dispute because Cree Oral Traditions confirm that some were present at Fort Albany (the Cree Elder James Wesley cited in Long, 1993). What comes into question is how many Attawapiskat Cree were included in Treaty No. 9 at Fort Albany in 1905. In the Cain and Awrey (1930) Adhesions to Treaty No. 9 report, they use the population figure of 583 for Attawapiskat Cree and 688 for Albany Cree for the year 1930; thus, if population numbers were proportional in 1905 and if all the Fort Albany and Attawapiskat Cree were present at the Fort Albany Treaty No. 9 signing, the number of signatories representing each region should have been proportional, which it was not. Even the Treaty No. 9 commissioners report:

> *Some of the Indians were away* [emphasis added] at their hunting grounds at Attawapiskat river, and it was thought advisable to postpone the election of chiefs until next year. (Scott et al., 1905, p. 5)

Thus, there is convergence between Cree Oral History and the governments' written record that some Attawapiskat First Nation people—most likely a large portion, noting that the Attawapiskat Cree were only represented by 1 person out of 10 signatories—were not present at the Treaty No. 9 signing at Fort Albany. Moreover, the District of Keewatin First Nations people had been told repeatedly that they would not be allowed to enter into treaty (Long, 1978a, 2010), so there was no reason for them to be at the Hudson's Bay trading posts. It should be noted that when Treaty No. 9 was signed in 1905, most Cree did not live year-round in permanent residences, meaning that the coastal Cree might spend a few months at Hudson's Bay Company posts like Fort Albany, while inland Cree would only spend a few weeks there (Hookimaw-Witt, 1997; Long, 1993). Thus, the Attawapiskat Cree would have had to disrupt their schedule to make a long journey to Fort Albany and would have needed sufficient notification to make the trip. Also, as described in Hudson's Bay Company records, at least five prominent Cree leaders were associated with the river basins in the Attawapiskat region of the western part of James Bay (Lytwyn, 2002). It follows that there is a contingent of Attawapiskat Cree that did not extinguish their claim to land and resources through Treaty No. 9, as they were not present at Treaty No. 9 and represented by a "headman[21]"; therefore, most of the Attawapiskat Cree did not receive the $8 gratuity, the symbol of extinguishment of claims.

As we discussed earlier, it is questionable whether the Treaty No. 9 commissioners knew that they had the authority to treaty District of Keewatin First Nations people. Nonetheless, some Attawapiskat Cree were part of Treaty No. 9, which explains why Cain and Awrey reported (1929):

> The province of Ontario since 1912 has recognized the extinguishment of the rights of the Indians who were attached to the bands making cession in 1905 of the territory lying South of the line AB and north of the Albany *to the extent of annually paying the federal Government the $4 per capita treaty money* [emphasis added]. (p. 20)

The commissioners also reported that *annuities* were paid to Attawapiskat Cree in 1929 (Cain & Awrey, 1929). As explained previously, it is the acceptance of the $8 *gratuity* that extinguishes a First Nation person's claim, as detailed in the text of Treaty No. 9 and emphasized by the Treaty No. 9

[21] Headmen were recognized leaders of the First Nation.

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commissioners (Scott et al., 1905); the payment of annuities does not serve as approval and confirmation of extinguishment of claim.

The Attawapiskat Cree have orally passed this understanding of the conditions under which their claim to lands can be extinguished. When Shano Fireman, an Elder who lived in the bush year-round in the Attawapiskat area, was asked, "Did the treaty [No. 9] mean that you gave up your land" (cited in Hookimaw-Witt, 1997, p. 132)? He answered:

> No. There were two bundles of money. One contained $4 per person, and the other $8 per person. Our people chose to take only the $4 bundle because the bigger amount would have meant that we give up our land. The smaller amount meant that we would get assistance. (cited in Hookimaw-Witt, 1997, p 132)

Thus, it is clear that the Attawapiskat-area Cree understood that if they did not accept the $8 gratuity, they did not extinguish their claim to land in accordance with Treaty No. 9 text and the explanation given to them by the Treaty No. 9 translators. This would explain why Long (1995) reported that, prior to 1930, many Attawapiskat area Cree were receiving annuities with the Fort Albany Cree.

An "Accidental Gift": Unceded Land in Northern Ontario

Long (2011) suggested, "[D.C.] Scott actually negotiated an oral treaty of peace and friendship, and that his spoken gift [promising continued hunting, fishing, and the continuation of their cultural lifestyle] was accepted" (p. 190). We will show how another "gift"— unceded land in Treaty No. 9 and its Adhesions territory—was inadvertently bestowed upon First Nations people through improper scoping for Treaty No. 9 and its Adhesions in the following scenarios. Until recently, the way forward would consist of a comprehensive land claim;[22] however, the Government of Canada has initiated a new process:

> It will consist of a new distinctions-based Policy on the Recognition and Implementation of Indigenous Rights to replace the Comprehensive Land Claims and Inherent Right Policies . . . The policy will facilitate the implementation and exercise of Indigenous rights, which includes building upon and strengthening Canada's approach to *implementing existing and new treaties and agreements* [emphasis added] . . . We have heard that Canada's current policy framework to support the recognition and implementation of Indigenous rights is flawed, and that past insistence on "cede, release and surrender" provisions in treaties and agreements is inappropriate and outdated. We need to address issues created by the Comprehensive Land Claims and Inherent Right Policies, such as the imposition of strict federal mandates that do not take the distinctions between Indigenous groups into account, and inappropriately rigid approaches to certainty that impede the renewal of relationships . . . [We need to] entrench co-development as the basic standard for federal engagement with Indigenous peoples to advance

[22] According to the Government of Canada (2020):

> Comprehensive land claims deal with the unfinished business of treaty-making in Canada. These claims generally arise in areas of Canada where Aboriginal land rights have not been dealt with by treaty or through other legal means. In these areas, forward-looking agreements (also called "modern treaties") are negotiated between the Aboriginal group, Canada and the province or territory. (para. 1)

> the implementation of their rights. (Crown–Indigenous Relations and Northern Affairs Canada, 2018, Background section, para. 3, New Policy on the Recognition and Implementation of Indigenous Rights: What We Have Learned section, para. 1, New Policy on the Recognition and Implementation of Indigenous Rights: Potential Approaches section, para. 2)

At present, the Government of Canada is working with over 80 Recognition of Indigenous Rights and Self-Determination Discussion Tables representing more than 390 Indigenous communities and a total population of approximately 760,000 people (Crown–Indigenous Relations and Northern Affairs Canada, 2019). With respect to the present study of Treaty No. 9, the difference between 1905 and the present is that the Ojibwe, Oji-Cree, and Cree now read, write, speak, and understand English, and they will have legal counsel to negotiate an agreement with the Government of Canada. Thus, as it stands, what we are left with are four scenarios for the First Nations people who signed Treaty No. 9 and its Adhesions:

Scenario #1

First Nations people ceded their land south of the Albany River as specified in Treaty No. 9, as well as other small areas in Canada that were not specified in the treaty, taking into account the blanket land clause. This scenario does not consider what the commissioners claim to have done in their report, only the text of Treaty No. 9 and its Adhesions. This is the Government of Canada's (Natural Resources Canada, n.d.) and Government of Ontario's (Government of Ontario, 2019) version of events, as illustrated by the maps on their official websites (see also Figure 4 for a representation). Note that the maps of Treaty No. 9 and Adhesions on the Government of Canada and Government of Ontario websites do not include the additional 40,000 square miles (Figure 10) north of the Albany River up to the Line-AB in Treaty No. 9 land, as claimed by the Treaty No. 9 Commissioners in 1905. The land covered by Treaty No. 9 is the 90,000 square miles generally described in Treaty No. 9 text (Treaty No. 9, 1905).

In Scenario #1, since Treaty No. 9 did not include "land covered by water" as in the Treaty No. 9 Adhesion of 1929 to 1930, this issue becomes:

> Significant because the western James Bay region has, and will continue to be, subject to sea-level changes associated with ongoing adjustments due the last ice age and modern global warming signals . . . The rate of land emergence since 1905 in the area south of the Albany River is estimated as ~3.0 km^2/yr [i.e., 331 ± 12 km^2 of unceded land that has emerged]. Over the next century, land will continue to emerge in this region. (Tsuji et al., 2016, p. 99; see Figure 11)

This emergent land, being unceded, should be considered under an Aboriginal Title claim.

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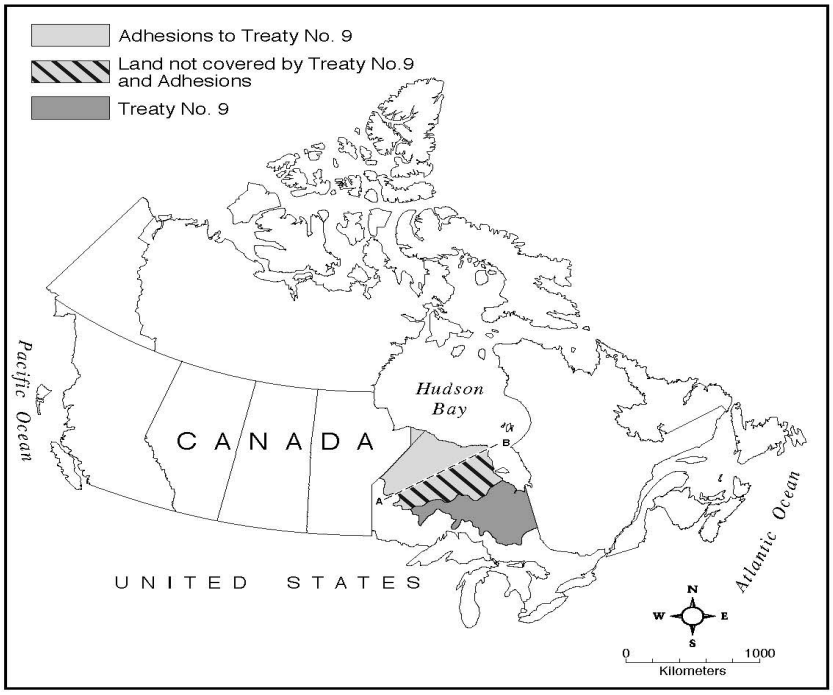
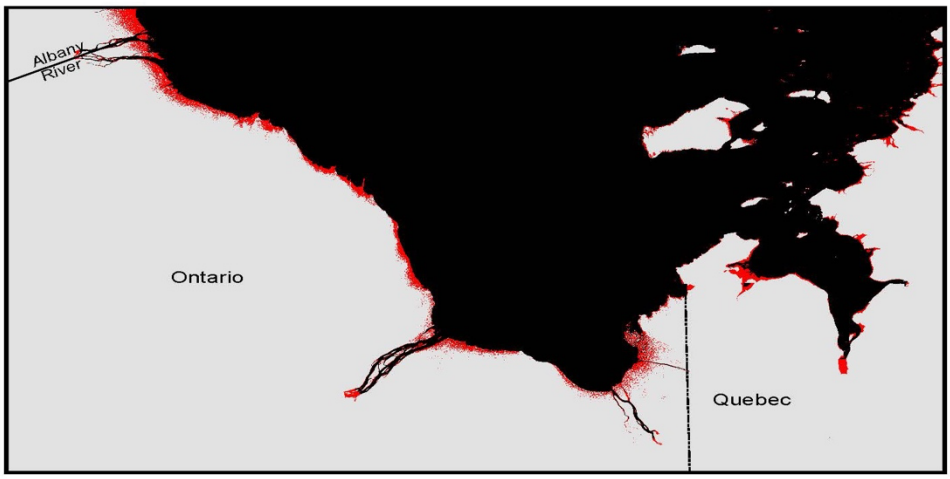
Figure 10. Land Not Covered by Treaty No. 9 and Adhesions



Note. The hatched area depicted is the 40,000 square miles described in Scenario #1, and the unceded land described in Scenario #2. In the public domain.

Figure 11. Emergent Land Since 1905 in the James Bay Region South of the Albany River to the Quebec Border



Note. Emergent land is marked in red and combines the glacial isostatic adjustment signal with an estimate of the regional sea-level rise. From "Sea Level Change in the Western James Bay Region of Subarctic Ontario: Emergent Land and Implication for Treaty No. 9," by L.J.S. Tsuji, D. Daradich, N. Gomez, C. Hay, and J.X. Mitrovica, 2016, *Arctic, 69*(1), p. 105 (https://doi.org/10.14430/arctic4542). Copyright 2016 by the Arctic Institute of North America. Reprinted with permission.

Scenario #2

As specified in Treaty No. 9, First Nations people ceded their land south of the Albany River—as well as other small areas of land not specified, taking into account the blanket land clause—but did not cede land north of the Albany River to the Line-AB, as asserted in the Treaty No. 9 commissioners' report. This scenario accounts for the fact that the Treaty No. 9 commissioners could not have known they were granted the authority, after they had begun their treaty travels, to bring the District of Keewatin First Nations people into Treaty No. 9, which contradicts their Treaty No. 9 retrospective report (Scott et al., 1905). Thus, the northern boundary of Treaty No. 9 in this scenario is the Albany River, the same as in Scenario #1. What is different in Scenario #2 is that the Treaty No. 9 Adhesion commissioners negotiated the Adhesions to Treaty No. 9 assuming that the Line-AB was the northern boundary of Treaty No. 9—contrary to the text of Treaty No. 9— whereby the Albany River was the northern boundary. This appears to be what was negotiated, based on what was written in the Adhesion commissioners' report (Cain & Awrey, 1929, 1930), as well as the accompanying map (see Figure 6). In Scenario #2, there is approximately 40,000 square miles of unceded land between the Albany River and the Line-AB (see Figure 10). Further, in mapping the fur trading posts where the Treaty No. 9 commissioners "negotiated" with First Nations people in 1905 and 1906, it is clear that the commissioners were travelling along the Albany River basin and the Moose River basin. Important to note is that the Treaty No. 9 commissioners did not travel any of the river basins north of the Albany River because the official northern boundary of Treaty No. 9 was the Albany River (Treaty No. 9, 1905). Similarly, in 1929 and 1930, the Treaty No. 9 Adhesion commissioners did not travel along any of the river basins (Figure 12) in the area delineated to the south by the Albany River and on the north by Line-AB (see Figure 10) to conduct treaty negotiations. Although the Treaty No. 9 Adhesion commissioners did visit Attawapiskat to set up a reserve and pay annuities (Cain & Awrey, 1929, 1930), any record of the Attawapiskat Cree being paid gratuities to extinguish their Land Title is lacking. The Treaty No. 9 Adhesion commissioners erroneously assumed that Indigenous Title to the area delineated on the south by the Albany River and on the north by Line-AB (Figure 10) had been extinguished under Treaty No. 9.

The land north of the Albany River and south of the Line-AB should be considered unceded until the Government of Ontario and the Government of Canada can produce a Treaty No. 9 Adhesion document with the signatures of Attawapiskat-area Cree that verifies they extinguished their claims to land at Fort Albany in 1905 and Winisk in 1930 by accepting the $8 gratuity—a requirement of surrender as stated in the text of Treaty No. 9 and reinforced by the Treaty No. 9 commissioners. Indeed, the Attawapiskat Cree have always asserted that they have never relinquished Aboriginal Title by signing Treaty No. 9. According to Chief Theresa Hall of Attawapiskat First Nation (2009):

> The majority of our members are living in poverty. Our community is cramped and on a little over two square miles of land and we have a significant housing crisis. Our school is contaminated and we can't drink water from our tap. Further, we are routinely evacuated from our community during break up, yet despite all this I believe we are one of the wealthiest First Nations in Canada. We still have our language, our culture and we are still able to go out on our land and to engage in our traditional aboriginal practices. We still have aboriginal title and this includes the land, the water and the minerals because we never signed on to Treaty 9. (p. 981).

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The above-described area (Figure 10) should be the subject of an Aboriginal Title claim.

Scenario #3

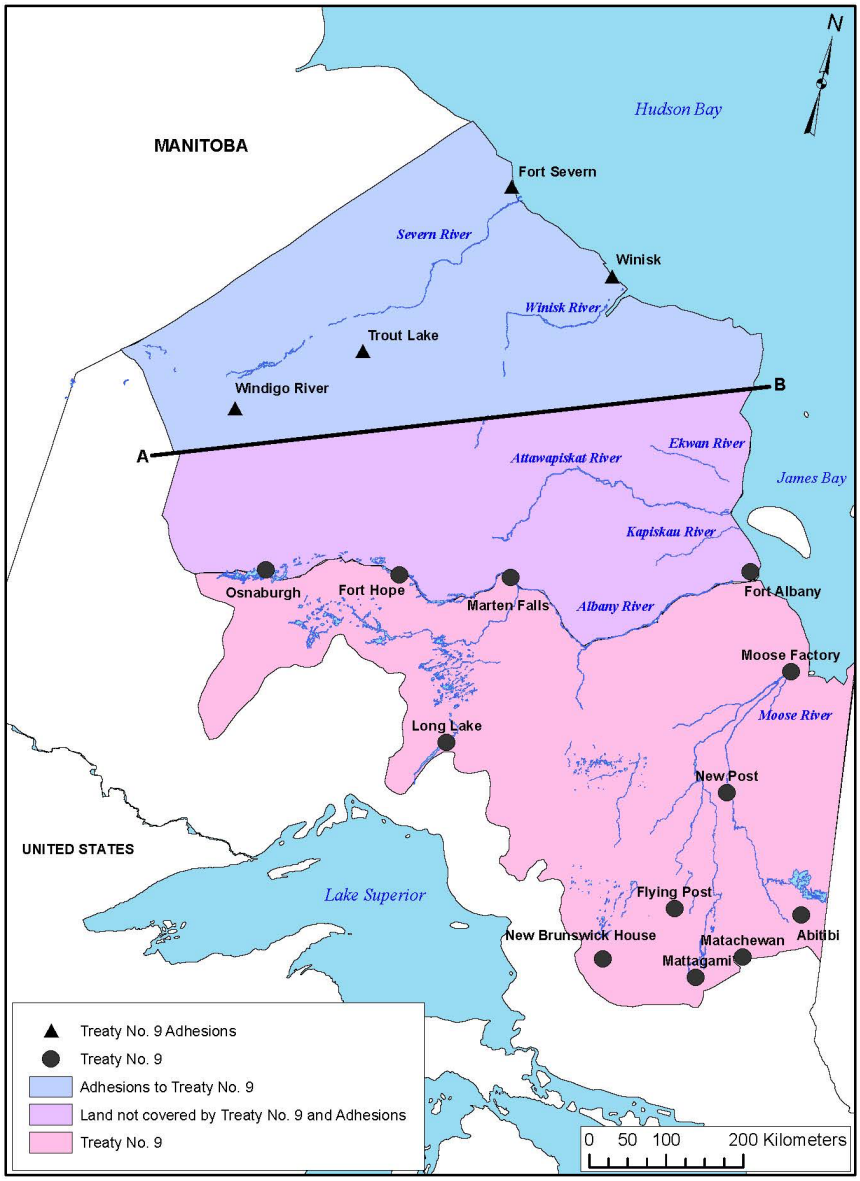
In this scenario, the First Nations people ceded their land south of the Albany River, as specified in Treaty No. 9, as well as other small areas of land not specified, but they also ceded the land north of the Albany River to the Line-AB as asserted in the Treaty No. 9 commissioner's report. This scenario assumes that the commissioners had the authority to include all of the District of Keewatin First Nations people inhabiting the land north of the Albany River and south of the Line-AB into Treaty No. 9. Taking into account the Treaty No. 9 Adhesion commissioners' report (Cain & Awrey, 1929, 1930) and the map contained therein, it appears that the Treaty No. 9 Adhesion commissioners used the Line-AB as the southern boundary of the Adhesion.

In light of the issues that we discussed previously, Scenario #3 is highly unlikely. Nonetheless, under Scenario #3 there would also be unceded land, accounting for the land covered by water and emergent land issue described in Scenario #1 (Figure 11). However, assuming the northern boundary of Treaty No. 9 is the Line-AB increases the amount of unceded land (i.e., 331 km^2 of land that has emerged since 1905, plus the land that has emerged north of the Albany River to Line-AB since 1905).

Scenario #4

The First Nations people ceded their land south of the Albany River as specified in Treaty No. 9, as well as other small areas of land not specified, and also north of the Albany River to the Line-AB. This scenario assumes that the commissioners had the legal authority to do so, contrary to the text of Treaty No. 9. In Scenario #4, the Treaty No. 9 Adhesion commissioners used the Line-AB as the southern boundary of the Adhesion. The outcome of Scenario #4 is the same as Scenario #2 (Figure 10) because the Treaty No. 9 commissioners in 1905 only brought into treaty a limited number of the District of Keewatin First Nations people, as explained previously. Further, as mentioned for Scenario #2, the Treaty No. 9 Adhesion commissioners did not travel in the area delineated to the south by the Albany River and to the north by Line-AB to bring the remaining District of Keewatin First Nations people into Treaty No. 9 through the Adhesion in 1929 and 1930.

Figure 12. Hudson's Bay Company Trading Posts Visited by the Treaty Commissioners with Respect to the Signing of Treaty No. 9 in 1905 and 1906



Note. Adapted from "How the Commissioners Explained Treaty Number Nine to the Ojibway and Cree in 1905," by J.S. Long, 2006, *Ontario History, XCVIII*(1), p. 7. Copyright 2006 by the Ontario Historical Society (the location of Treaty No. 9 signatories), and *Report of Commissioners re Adhesion to Treaty No. 9, for the year 1930*, by W.C. Cain and H. N. Awrey, 1930. In the public domain (the signing of Treaty No. 9 Adhesions in 1929-1930).

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Conclusions

The extinguishment of First Nations' claims to land in Northern Ontario was not a trivial matter. The ad hoc nature of the treaty process highlights this point, especially the decision to allow into Treaty No. 9 First Nations people residing north of the Albany River in the District of Keewatin after the commissioners were already in the field and unable to change the specific terms of the treaty (i.e., boundaries). If the routes of the two commissions, Treaty No. 9 and the Treaty No. 9 Adhesions, are plotted on a map (Figure 12), it is clear that a large area of land that includes rivers, such as the Kapiskau River, Attawapiskat River, and Ekwan River systems was not visited for the purpose of treaty making. The treaty signing procedure was one of convenience, where the commissions visited Hudson's Bay trading posts in existence at the time, grouped First Nations people into "bands" based on where the people traded even though these so-called "bands" had no familial or territorial relevance except to the commissioners. Indigenous Peoples' own traditionally recognized groupings, such as familial groups based in river basins, should have been the unit of interaction—this is especially important in an area as large as the western James Bay region (Hookimaw-Witt, 1997). Perhaps if this approach had been used and the Treaty No. 9 text had been written more carefully, there would not be the question of unceded land in Northern Ontario, as highlighted by the four scenarios presented above.

Lessons Learned

It is clear from the case study that spatial boundaries for a treaty must be unambiguously established during the scoping process. Similarly, Indigenous Nations' territorial boundaries must be identified, with Traditional Territories subsequently described. Following this process allows for the accurate recording of areas of overlap between treaty boundaries and Traditional Territories. Identifying these areas of overlap allows for the consultation with the appropriate Indigenous people and/or group. From this point in the process onward, the number of people to be consulted and included in the treaty-making process can be accurately established. This process should be iterative. The fly-in and fly-out, very-short-visit approach is convenient for government officials but is not an approach that yields positive results with respect to the community being visited. Multiple and longer community visits should be the norm for the consultative process, not the exception. The above-described process is important not only for land-title initiatives in Canada, but also has relevance for Indigenous people worldwide, such as in the case of Native Title in Australia.[23] Indeed, when an Indigenous group in Australia submits their Native Title application to the Federal Court of Australia, they must include a comprehensive history of the Indigenous group, as well as a detailed description of the boundaries that are covered in the application (Native Title Act 1993, 2019). Thus, since each land-title initiative (e.g., treaty, Native Title application) and Indigenous group are unique, our suggestions should be considered a minimum or starting point for the scoping process with respect to land-title initiatives on Indigenous homelands worldwide, not the endpoint.

[23] Although historically there are no treaties between the Australian Government and Indigenous Peoples in Australia—since the *Mabo v. Queensland* (1992, No. 2) court case—the Australian Government (2020) has acknowledged, "native title arises as a result of the recognition, under Australian common law, of pre-existing Indigenous rights and interests according to traditional laws and customs. Native title is not a grant or right created by governments" (Native Title and Land Rights section, para. 2).

Likewise, meaningful Indigenous input needs to occur throughout any development initiative process, not just at the scoping stage, to ensure more sustainable development on Indigenous homelands. If not, the results can be catastrophic. As Chief David Babin (2009) of Wahgoshig First Nation described:

> We protect our lands. They've been protected for thousands of years. European people have come here, and look what they've developed; they've developed a land of disaster. They take all the revenues and whatever and leave, and leave us with nothing. Then we have to do the cleanup, and we have to live with that for 100 years. Our people are getting sick from all these industries that are coming around our territory.
>
> In the far north, we're just starting to face that. I'm in the Timmins area [near north of Ontario, Treaty No. 9], where development is very, very high. We've got the mining industry and the forest industry, where they leave a lot of pollutants behind. We worry about our water. We have some of the cleanest water in Canada, and we still have to worry about it because of the development that's happening around us. Yet you [Government of Ontario] give these permits out to them [developers] like it was nothing . . . You're [Government of Ontario] only thinking about what's happening today. We've got to think about tomorrow. We've got to think about our kids, our children who are coming. What are we going to leave them? Are they going to live on nothing?
>
> I was talking about development with the hydro dams and the damage they've done. They washed away our graveyards into the lakes, and yet development still happens . . . You took us off our land. You took us away from our home so you can develop industry . . . The point is what? Destroying the lands, our rivers, our waters? What kind of water are we drinking today? It all has to be treated. (p. 955)

Similarly, Chief Keeter Corston (2009) of Chapleau Cree First Nation noted:

> When you [Government of Ontario] make the decisions . . . you polluted everything; you polluted all south of 50 [parallel]. You cut every tree; you've ruined it. Species are at risk, the moose population is going down, the marten population is crumbling, and still you want more. You want to go north of 50 now; you want to go north there because you've ruined it here . . . I've warned the northern chiefs [of Ontario]. I live south of the 50th parallel, and I've seen the behaviour. The behaviour [of the Government of Ontario] hasn't changed one bit. These people [Chiefs of the Far North of Ontario] are here to protect their homelands that belong to them. It doesn't belong to Ontario. The land was never surrendered. (pp. 955-956).

Lastly, Attawapiskat First Nation Elder Gregory Koostachin (2009) spoke on behalf of the Nishnawbe Aski Nation Elders and gave advice to the Far North Chiefs:

> I just wanted to say that the [E]lders here, the Nishnawbe Aski, some of them are there behind me, and the many other [E]lders—our job is to give advice to our chiefs, to remember not to give their land anymore to anyone, to try to keep their land, what is left out there, for us people.
>
> The provincial government is issuing permits without any consultation with us. And this is why we give advice to our chiefs that enough is enough. We will hold what is left out there and then

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we will fight for it. I just want to come to the point that our land is not for sale. It is not for sale. We want to keep that. (p. 958)

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