Adhesion to Canadian Indian Treaties and the Lubicon Lake Dispute

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Abstract — Research shows that adhesions to the numbered treaties were of two types: “internal” and “external.” In an internal adhesion, a band living within the previously ceded area agreed to the terms of the treaty, and no new transfer of land was involved. In an external adhesion, a band living outside the previously ceded area agreed to the terms of the treaty, thus adding a previously unceded piece of territory to the treaty area.

This distinction is essential to understanding the long-running Lubicon Lake dispute. From the federal government’s point of view, all of northern Alberta was ceded in Treaty Eight; so the Lubicons, who live within this area, are entitled to make only an internal adhesion. In contrast, the Lubicons claim to live on unceded land and thus demand to make an external adhesion. Their claim to possess unextinguished aboriginal title to a specific tract of land is used to justify demands for compensation that would not be paid in the case of an internal adhesion.

Résumé — Des recherches démontrent qu'il existait deux types d’adhésions aux traités numérotés: les adhésions «internes» et les adhésions «externes». Dans le cas d'une adhésion interne, une bande habitant à l'intérieur d'un territoire précédemment cédé adhérait aux termes du traité et aucun nouveau transfert de terres n'était impliqué. Dans le cas d'une adhésion externe, une bande habitant à l'extérieur du terrain précédemment cédé adhérait aux termes du traité, ajoutant ainsi une parcelle de territoire non cédée préalablement au territoire couvert par le traité.

Cette distinction est essentielle à la compréhension de l'interminable dispute du lac Lubicon. Selon le gouvernement fédéral, tout le nord de l'Alberta a été cédé par le Traité Huit; par conséquent, les Lubicons, qui vivent à l'intérieur de ce territoire, ne sont en droit de demander qu'une adhésion interne. Au contraire, les Lubicons prétendent vivre sur des terres non cédées et exigent donc une adhésion externe. Prétendant posséder des titres aboriginaux non éteints à l'égard d'une bande de terre spécifique, les Lubicons exigent une compensation qui n’aurait pas à être payée s’il s'agissait d'une adhésion interne.
This article has two purposes. First, it analyzes the adhesions to the eleven Numbered Treaties signed in western and northern Canada between 1871 and 1921. As far as I know, this paper is the first to address this topic. I have not found any works in the historical and legal literature on treaties that make more than passing reference to the concept of adhesion.\(^1\)

The second aim of the article is to suggest that the long-running Lubicon Lake conflict in northern Alberta is a disagreement over the concept of adhesion. Although the dispute has not been publicly conducted in these terms, the essence of the matter is that Canada and Alberta rely upon the federal government's traditional theory and practice manifest in the eighty-one recorded adhesions to the Numbered Treaties, whereas the Lubicons take a different view of adhesion. This difference of interpretation is not the cause of the Lubicon Lake stalemate (ideas in themselves rarely cause conflicts), but it is the jurisprudential expression of the conflict of interest between the parties.

Adhesion

The Numbered Treaties purported to extinguish the Indian title in all of Manitoba, Saskatchewan, and Alberta, much of Ontario and the Northwest Territories, and smaller parts of the Yukon and British Columbia. Although there were minor differences among the treaty agreements, the similarities are more important in this context. In each case, the government of Canada, by order in council, established a commission to negotiate the treaty, which was afterwards also approved by order in council. The Indians received a cash gratuity and other presents for signing, annual payments in perpetuity, the promise of educational and agricultural assistance, the right to hunt and fish on Crown land until required for other purposes, and land reserves to be owned by the Crown in trust for the Indians.\(^2\)

Each treaty contained an explicit statement about the extinguishment of Indian title. Treaty One read:

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ents—Right Treaty, Wrong Adhesion: John Semmens and the Split Lake Indians," (1983–84) 17 Archivaria 261, shows insight into the nature of adhesions but does not develop the general significance of the topic.

2. A convenient synopsis is the chart "Treaty Agreements between the Indian Peoples and the Sovereign in Right of Canada" published by DIAND, Treaties and Historical Research Research Centre, revised May 1979.
The Chippewa and Swampy Cree Tribes of Indians and all other Indians inhabiting
the district hereinafter described and defined do hereby cede, release, surrender
and yield up to Her Majesty the Queen and successors forever all the lands
included within the following limits, that is to say:3

Then followed a detailed geographical description of the area to be surrendered.
All the other Numbered Treaties followed this model with only slight changes in
wording.

In contrast to the earlier land-surrender treaties in Upper Canada, which had
been negotiated with single bands or small groups of related bands, the Numbered
Treaties covered large expanses of territory on which lived many bands of
Indians, often of unrelated tribes. Because of the huge distances of the prairie and
the boreal forest, it was impossible to assemble all the bands and tribes at one
place and time to carry out negotiations. Thus arose the new concept of “adhesion,”
which had not been used in pre-Confederation treaties.4 Adhesion allowed a band
that had not participated in the negotiations to join or adhere afterwards to a
treaty. They would join as a group, with the chief and headmen signing the treaty,
just as if they had been present at the first signing, except that the terms were now
fixed and not subject to further negotiation. It was a “take it or leave it” proposition.

Below is a list of all separate signings of the eleven Numbered Treaties. The
first signing of each treaty is marked with an asterisk; all signings not so marked
are considered adhesions.5 Each adhesion is also allocated to one of three types,
according to a scheme explained further on.

There were no adhesions to the Manitoba Treaties One and Two, which resembled
the Upper Canada treaties in dealing with relatively small areas of land and
numbers of Indians. Every subsequent treaty, however, had at least one adhesion,
with the average number of adhesions per treaty being 9.0 (excluding Treaties
One and Two from the divisor) or 7.4 (including them). The total number of
adhesions is eighty-one, although another researcher might reach a slightly different
total by treating a couple of anomalous cases differently from what has been done
here. For example, in signing Treaty Five, there was a preliminary adhesion at

3. Treaty One, printed in W. E. Daugherty, Treaty Research Report: Treaty One and
Treaty Two (Ottawa: Indian and Northern Affairs Canada, Treaties and Historical
Research Centre, 1983) at 27.
5. The enumeration is made from the Treaty Research Report series published by the
Treaties and Historical Research Centre of Indian Affairs, the volumes of which contain
the texts of treaties and adhesions as appendices. The information has been checked
against A. Morris, The Treaties of Canada with the Indians (Toronto: Coles, 1979;
reprint of 1880 ed.), and against Canada, Department of Indian Affairs, Indian Treaties
and Surrenders (Toronto: Coles, 1971; 3 vols; reprint of vols 1 & 2 published by the
Queen's Printer, 1891, and of vol. 3, published by the Queen's Printer, 1912).
Table 1
List of Signings of Numbered Treaties

<table>
<thead>
<tr>
<th>Treaty</th>
<th>Place of Signing</th>
<th>Date of Signing</th>
<th>Type</th>
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Wapang (Dog Head Point) on 28 September 1875, followed by a definitive adhesion on 26 July 1876; yet only the latter has been counted in this list.\(^6\) However, minor quibbles about such cases would not affect the overall picture.

The eighty-one adhesions fall into three categories. First were twenty-seven adhesions obtained by the original treaty commission as part of its mandate to deal with the various bands and tribes; these were largely a matter of convenience. The commissioners would go from place to place as part of one tour. Full negotiations would take place only at the first meeting; at subsequent meetings, the negotiated treaty would be explained to the assembled Indians, whose chiefs would then sign if the group accepted the terms. Treaty Four, for example, was first signed at Qu'Appelle on 15 September 1874, after which the commissioners travelled to Fort Ellice, where on 21 September they took the adhesion of a band of Saulteaux.\(^7\) A similar procedure was used in making Treaty Eight in 1899. The commissioners negotiated the terms at Lesser Slave Lake, then obtained signatures from eight other groups as they travelled along the Peace and Athabasca Rivers. In the case of Treaty Eight, the treaty commission split into separate subgroups to meet as many bands as possible in a limited time, a procedure also followed in some other treaties.

The second type of adhesion, embracing forty-one cases, occurred when signatures were obtained in a subsequent year, usually by different commissioners with a new appointment but sometimes by the original commissioners finishing their task. In the case of Treaty Four, three adhesions were obtained by new commissioners in 1875, and one each in 1876 and 1877. Similarly in Treaty Eight, another commissioner was appointed and obtained four adhesions in 1900, and still another was signed in 1910.

In most cases, adhesions in this category were necessitated by the logistical difficulty of meeting all the relevant Indians in one season. Sometimes, however, they arose from the refusal of bands to accept the terms originally proffered. Thus Big Bear's band of Cree refused to accept Treaty Six as long as they could maintain themselves by hunting buffalo in Montana and only adhered with reluctance on 8 December 1882. Other bands of Cree and Saulteaux rejected Treaty Six for decades, wandering in the foothills of the Rocky Mountains until adhesions were finally obtained in 1944, 1950, 1954, and 1956.\(^8\)


No single written formula was used for adhesions of the first two categories. Sometimes there was just a list of signatures with a barebones explanation, as in the first adhesion to Treaty Six:

Signed by the Chiefs and Headmen of the Willow Indians near Fort Carlton, this 28th day of August, A. D. 1876, the same having been first read and explained by the Hon. Jas. McKay and by Peter Erasmus, in the presence of the undersigned witnesses . . . 9

Sometimes there was a more extended document stating that the Indians had not been present at the original negotiations but, after having heard the treaty explained, now surrendered their rights to land in return for the benefits of the treaty. The wording varied from case to case, but Big Bear's adhesion was typical:

NOW THIS INSTRUMENT WITNESSETH, that the said "Big Bear," for himself and on behalf of the Band which he represents, does transfer, surrender and relinquish to Her Majesty the Queen, Her heirs and successors, to and for the use of Her Government of the Dominion of Canada, all his right, title and interest whatsoever, which he has held or enjoyed, of, in and to the territory described and fully set out in the said treaty; also all his right, title and interest whatsoever to all other lands wherever situated, whether within the limits of any other treaty heretofore made or hereafter to be made with Indians, or elsewhere in Her Majesty's territories. To have and to hold the same unto and for the use of Her Majesty the Queen.10

Such wording raises an interesting legal question: what exactly did Big Bear surrender? According to the adhesion document, he did not cede a specific tract of land but rather his interest in the whole tract described in Treaty Six. The government must have considered Big Bear and his band as still possessing some form of property right; otherwise, there would have been no reason to place this form of adhesion before them. Yet, ever since obtaining the first signatures to Treaty Six in 1876, the government had acted as if it had extinguished the Indian title to the entire tract of land described in the treaty. That is, the government had begun to survey it; had offered homesteads to settlers and land grants to colonization companies, had made plans, including land grants, for building railways, and had acted in all respects as a landlord with a clear title.

No documentary evidence or litigation has been found to show exactly how such situations were perceived by the politicians and civil servants responsible for making Indian policy. Reasoning from the evidence of actions and from the wording of the adhesions, it seems there must have been a rationale like the following:

9. Ibid. at 65.
10. Ibid. at 74.
The nomadic Indians of the prairies and boreal forest did not live on small, well-defined tracts of land in the manner of agricultural peoples. Rather, they hunted over large areas in more or less harmonious co-ordination with friendly bands and in conflict with hostile bands. To purchase the Indian title, therefore, the sovereign did not ask each band to sell a particular tract of land but rather asked a group of bands to sell their interest in a large area corresponding approximately to the collective hunting grounds. The sovereign could not rely on being able to get the agreement of each of the large number of bands involved; indeed, one could not even count on being able to meet all of them for negotiations since some bands, or fractions of them, might be off hunting or trading. In order to extinguish the Indian title, it was sufficient to get the adhesion of most of the Indians living in a treaty area. Others could adhere later and receive the same benefits, but a few dissenters could not hold up the treaty process.

Confirmation of this hypothetical rationale comes from the existence of the third category of adhesions, numbering thirteen cases, in which Indian bands were asked to surrender title to a specific tract of land. These thirteen adhesions can be reduced to three historical episodes: the extensions of Treaty Six in 1889, Treaty Five in 1908–10, and Treaty Nine in 1929–30. In each case, the Indian bands who adhered to the treaty lived outside the limits of the land described in the original version of the treaty. In other words, the Indians were asked to surrender title to a specifically described piece of territory if and only if the treaty area was to be expanded.

This procedure was first used at Montreal Lake on 11 February 1889, where a group of Cree surrendered their title to a tract of land immediately north of the Treaty Six boundary:

... in consideration of the promises of the said treaty being extended to us and the Bands which we represent, [we] transfer, surrender, and relinquish to Her Majesty the Queen, Her heirs and successors, to and for the use of the Government of the Dominion of Canada, all our right, title and interest whatsoever which we and the said Bands which we represent hold and enjoy, or have held and enjoyed, of, in and to the territory included within the following limits: ...

Also, all our right, title and interest whatsoever to all other lands wherever situated, whether within the limits of any other treaty heretofore made, or hereafter to be made with Indians, and whether the said lands are situated in the North-West Territories or elsewhere in Her Majesty’s Dominion, to have and to hold the same unto and for the use of Her Majesty the Queen, Her heirs and successors forever.11

An amusing episode that took place in 1908 illustrates the difference between adhesions of the first and second categories on the one hand, and the third category on the other. The government gave Inspector John Semmens two separate

11. Ibid. at 75.
forms to use when it commissioned him to take adhesions to Treaty Five in northern Manitoba. The first, for use at Split Lake and Nelson House, extended the limits of Treaty Five and therefore called upon the Indians to cede a newly described tract of land. The second, for use at Norway House, Cross Lake, and Fisher River, was designed to take Indians into treaty within the existing boundaries of Treaty Five and therefore called upon the signatories to surrender not a specific piece of land but “all our right, title, and privileges whatsoever, which we have or enjoy in the territory described in the said treaty.”

The instructions were clear; but when he made the trip, Semmens became confused and gave the Indian chiefs the wrong piece of paper to sign, although he claimed that he had verbally explained the correct adhesion to each band. Discovery of the error gave rise to an acerbic correspondence the following year, showing the significant difference between the two forms of adhesion.

Hereafter, I will refer to adhesions of the first and second types as “internal” and adhesions of the third type as “external,” distinguishing them on the basis of whether or not they enlarged the amount of ceded territory. This distinction between internal and external adhesions is not just an academic distinction without a difference; it turns out to be crucial to understanding the Lubicon Lake conflict.

**Treaty Eight and Lubicon Lake**

The Minister of the Interior and of Indian Affairs in Wilfrid Laurier’s first government was Clifford Sifton. Toward the end of 1897, he began to receive advice that it was imperative to negotiate a northern treaty. The discovery of

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12. The two adhesions are printed in Coates & Morrison, Treaty Research Report: Treaty Five, supra, note 6 at 86–89.


15. A. E. Forget to Secretary, Department of Indian Affairs, 12 January 1898. National Archives of Canada (hereafter NAC), RG 10, vol. 3848, file 75,236-1.
gold in the Yukon meant that large numbers of whites were travelling north from Edmonton, and the Indians were disturbed at this influx into their traditional lands. Sifton hoped to put a treaty commission in the field in the summer of 1898, but the missionary bishop Émile Grouard advised that it would not be feasible to notify and assemble the native people so quickly.  

The Department continued to prepare for the treaty, leading to an order in council of 27 June 1898, authorizing negotiations. As important as the legal preparations were the logistical plans which the Department began to make at this time. The result was a “Public Notice” of June 1898, distributed in the north a full year ahead of the treaty commission’s visit. It invited the Indians and Métis to attend negotiations for “the extinguishment of their title.” It also laid out a precise itinerary; the commission would meet the natives at twelve different places between the dates of 8 June and 23 August 1899.

The importance of logistics is obvious from a glance at the map of the treaty area, comprising 324,900 square miles in British Columbia, Alberta, Saskatchewan, and the Northwest Territories. With the exception of some natural prairies in the Peace River country, this vast land consisted of forest, rivers and lakes. The native people lived by hunting, fishing and trapping, and there was hardly any agricultural settlement except around Lesser Slave Lake. White settlement consisted almost entirely of Hudson’s Bay Company trading posts and mission churches.

A couple of rough roads had been cut in recent years, but long-distance transportation for large groups of people had to be over the major rivers (Peace, Athabasca, Slave) and lakes. And a large group would definitely be involved; for there would be the Indian treaty commission, the half-breed scrip commission, accountants to handle the money, interpreters to deal in several Indian languages, missionary advisers, porters, cooks, etc. The travel season, moreover, would be short, since the waterways of the north do not thaw until late May and winter may return in September.

The Indians were spread across this immense area in small family groups. The difficulty of transport for a large group of white men and their bulky supplies meant that the Indians would have to assemble at various points to meet them. There was no other practical way to complete the negotiations in a finite period of time.

Lubicon Lake is far from any of the major waterways on which the commission planned to travel. However, the commission had announced that it would make stops all around the perimeter of the area containing Lubicon Lake: Lesser Slave Lake, Peace River Landing, Fort Vermilion, Red River Post, Fort McMurray, and

16. A. E. Forget to Secretary, Department of Indian Affairs, 25 April 1898, ibid.
17. P. C. 1703, 27 June 1898, ibid.
Wapiscaw Lake. There were Hudson’s Bay Company forts at all these locations, and any Indians living around Lubicon Lake would probably have been in the habit of trading at one or more of these locations.

On 2 March 1899, an order in council named the members of the treaty commission: David Laird, Indian Commissioner, as chairman; J. A. J. McKenna, an Indian Affairs official who was also a personal confidant of the Minister; and J. H. Ross, a member of the Legislative Assembly of the Northwest Territories.\(^{21}\)

Apprehending some difficulty in the negotiations, Sifton also got the cabinet to appoint Father Albert Lacombe, the famous Oblate missionary, to go along.\(^{22}\)

The government also appointed a commission to distribute scrip to the half-breed population.\(^{23}\) The half-breed commission travelled and worked together with the treaty commission. The government was operating on the theory that had gradually developed since passage of the Manitoba Act, that the half-breeds had inherited a share of Indian title that also had to be extinguished.\(^{24}\)

The plan was for the treaty party to assemble in Edmonton, travel overland to Athabasca Landing, and then go by boat to the west end of Lesser Slave Lake, where they were expected to arrive on 8 June. But the Hudson’s Bay Company failed to have trackers ready to meet the treaty party at Athabasca Landing, and the Mounties had to haul two scows and a York boat upstream in terrible weather. Although the main party did not reach its destination until 19 June, J. H. Ross, travelling separately, arrived there 6 June, explained the delay to the Indians, and asked them to elect a chief and headmen.\(^{25}\)

Negotiations began on 20 June at Lesser Slave Lake, and the commissioners drew up the treaty that evening in accordance with the day’s discussions. After more debate, the treaty was signed on 21 June, and treaty money was paid on 22 June.\(^{26}\)

As in the other Numbered Treaties, the Indians agreed to “cede, release, surrender and yield up . . . all their rights, title and privileges whatsoever” to all the lands described in the treaty.\(^{27}\) They retained the right to hunt, fish, and trap on

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22. C. Sifton to Council, 29 April 1899, *ibid*.
the ceded lands subject to government regulation and until the land was required for settlement or other purposes. They received the right to claim reserves of one square mile per family of five, or land in severalty of 160 acres per person; these reserves or individual grants would be made at an unspecified later time after consultation with the Indians. The commissioners reported that the Indians “were generally averse to being placed on reserves,” and that “it would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves.”

There was an initial gratuity of $7 and an annuity of $5 to each Indian, more to chiefs and headmen.

Since they were a good ten days behind schedule, the Indian commissioners now decided to split their party in an attempt to visit all destinations that summer. Ross and McKenna left for the west on 22 June, intending to go up the Peace River to Dunvegan and Fort St. John. They sent a messenger ahead, who found, when he got to Fort St. John, that the Indians had already dispersed and could not be reassembled that summer. Ross and McKenna, therefore, did not travel as far as Fort St. John, but they took the adhesion of a group of Beaver Indians at Dunvegan on 6 July.

This adhesion illustrates the procedure that was uniformly followed after the negotiations at Lesser Slave Lake. At subsequent meeting points, the Indians were asked to adhere to a treaty whose terms were already settled; they were not given the opportunity to impose new conditions. In taking these adhesions, Ross and McKenna used a different formula of words from David Laird, but there was no difference in substance. These were clearly instances of the first type of internal adhesion described in the preceding section. Although there were several different meetings and signings, it was all one process carried on by the members of one treaty commission during one summer.

While Ross and McKenna went upstream on the Peace River, Laird went downstream so that he could reach the distant destination of Fond du Lac at the east end of Lake Athabasca. On the way, he took adhesions at Peace River Landing and Fort Vermilion. Ross and McKenna, following behind after dealing with the Beavers at Dunvegan, went down the Slave River to Fort Smith. Other destinations were picked up by one or another of the commissioners on the return trip up the Athabasca River to Athabasca Landing. In spite of the initial delay, the commissioners managed to make the circuit envisaged in the “Public Notice” of June 1898, with the exception of Fort St. John. They took 2,217 Indians into Treaty Eight.


30. The adhesions of 1899 are all reprinted in ibid. at 130–34.

31. Commissioners’ report, 22 September 1899, in ibid. at 125.
The work, however, was not yet complete. The British Columbia Indians still had to be met at Fort St. John, and the aboriginal title on the south shore of Great Slave Lake was still to be acquired. An order in council of 2 March 1900 named J. A. Macrae commissioner to secure these adhesions in the coming summer. In the event, Macrae took not only these adhesions but those of two other bands that approached him to enter treaty: Crees from Sturgeon Lake, southwest of Lesser Slave Lake, and Slaves from the Upper Hay River. Macrae's work exemplifies the second type of internal adhesion, namely those taken in a subsequent year to complete the signing process.

In total, Macrae received 1,219 Indians in four adhesions. He noted in his report, however, that some Indians still had not been reached:

There yet remains a number of persons leading an Indian life in the country north of Lesser Slave lake, who have not accepted treaty as Indians, or scrip as half-breeds, but this is not so much through indisposition to do so as because they live at points distant from those visited, and are not pressed by want. The Indians of all parts of the territory who have not yet been paid annuity probably number about 500 exclusive of those in the extreme northwestern portion, but as most, if not all, of this number belong to bands that have already joined in the treaty, the Indian title to the tract it covers may be fairly regarded as being extinguished.

This is an important expression of the official view that the Indian title to the treaty area could be considered extinguished even though every one knew that some Indians had not yet signed the treaty.

Macrae was also given concurrent power to receive applications for half-breed scrip. He took 383 applications, probably many more than the government had expected. The files were given for analysis to J. A. J. McKenna, who recommended 229 of these cases for approval and the remainder for disallowance on numerous grounds. Of particular interest is a group of thirteen claims that Macrae had recommended against, on grounds that they were Whitefish Lake Indians. They are important in this context because of the close association between the inhabitants of Whitefish and Lubicon Lakes. Macrae wrote:

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33. The adhesions are printed in *ibid.* at 138–40. I have corrected the arithmetic in the statistical summary of Macrae's report at 141.
34. J. A. Macrae to C. Sifton, 11 December 1900.
I have reserved these last especially for your decision because the claimants are part of a considerable number of persons at, and north of Whitefish Lake who have not yet taken scrip as Halfbreeds or entered into treaty as Indians, and they (the claimants) were disposed to take treaty, but being prevented from doing so by the unwillingness of their band to give in its adhesion they did the next best thing, as it appeared to them, and applied for scrip.

It has to be decided whether they shall be conceded the same rights as others of electing whether they will rank as Halfbreeds or Indians in view of the fact that the community of which they form a part has not yet been treated with; that when treated with its members are likely to be dealt with as Indians; and that then these scrip applicants will naturally desire the same treatment. My opinion is that the claims might be left in abeyance until the Indians of Whitefish Lake and therabouts are treated with.

McKenna accepted the recommendation not to grant scrip at the present time, but he rejected Macrae’s view that these applicants belonged to a band that would have to sign a group adhesion. “They belong,” he wrote,

to a group who did not come in to take treaty in 1899 and they were not taken into treaty last year because it appears their Chief and band as a whole did not come to make a formal adhesion. No more formal adhesions are necessary. These Indians and any others who have not already been put on the treaty lists should be taken in the ordinary way and paid arrears.37

Apparently, there was no hard and fast criterion as to whether Indians not yet taken into treaty should be dealt with as groups making a formal adhesion, or as individuals simply adding their names to treaty pay lists. It was a matter of practical judgment, about which officials could differ.

Another group adhesion to Treaty Eight took place at Fort Nelson, British Columbia, on 15 August 1910 that illustrates the consistency of government policy. The commissioners of 1899 and 1900 had not visited this remote part of British Columbia, so the Indians of that region had not yet had a chance to adhere to treaty. The official view seems to have been that Indians had to be offered a reasonable opportunity to make a group adhesion to treaty, after which they could enter as individuals. Thus, each year when the Inspector for Treaty Eight made a trip throughout the vast region to pay treaty annuities, he added to the pay lists the names of Indians who had not been present at the adhesions of 1899–1900.

A Whitefish Lake band was constituted in this manner in 1901. Treaty Eight Inspector H. A. Conroy took into treaty the thirteen applicants who had been refused scrip by Macrae and McKenna, plus others to a total of fifty-four. Numbers grew gradually as Conroy told the headman he would promote him to

37. J. A. J. McKenna, 16 March 1901.
Adhesion to Canadian Indian Treaties / Flanagan

chief if he could increase his band membership to 100. There were eighty-seven names on the pay list when reserves totalling 11,993.6 acres were surveyed for the Whitefish Lake band in 1908. Even then, Conroy wrote, "I have been told that there are about seventy or eighty half breeds living in and around that country who have not received scrip and will not enter treaty."38

Over the years, many Indians added their names to the band list at Whitefish Lake, about forty miles southeast of Lubicon Lake. In 1933, fourteen of these men petitioned the government to create a separate reserve for their families at Lubicon Lake, pleading that Whitefish Lake was too far away and they did not wish to live there. In 1940, the Indian Affairs Branch gave the Lublicons permission to elect their own chief, but it was too late for them to obtain a reserve directly from the federal government. The Alberta Natural Resources Act of 1930 had transferred public lands from the Crown federal to the Crown provincial, so the federal government would have to request a land quantum from Alberta after validating the claim.39

An Indian Agent visited Lubicon Lake in 1940 with a federal surveyor and selected an approximate location for the reserve at the west end of the Lake.40 The Surveyor General could not afford to do the survey in 1941 because World War II had reduced his budget,41 but in 1942 the Indian Affairs Branch requested the Province of Alberta to designate twenty-five square miles west of Lubicon Lake as a probable Indian reserve.42 After the War ended, the Surveyor General turned to the task of surveying the proposed reserves in northern Alberta. Lubicon Lake was last on a list to be done in the summer of 1946, but the surveyor, who went first to Hay Lake in the far north, did not get to Lubicon Lake.43 For reasons unknown, the survey at Lubicon Lake was not carried out the following year and was apparently "forgotten."44

Goddard argues that the "real reason" the survey was never completed was the membership inquiry conducted by the Indian Affairs accountant Malcolm McCrimmon, which removed many names from band lists in northern Alberta,

39. Memorandum of agreement, 14 December 1929, s. 10, enacted by the Alberta Natural Resources Act, S. C., 1930, c. 3.
40. N.-P. L'Heureux to Secretary, Indian Affairs Branch, 1 October 1940. This and following correspondence is found in Exhibit B attached to Affidavit 2 of Chief Bernard Ominayak, filed 23 September 1982, in Ominayak v. Norcen, contained in the papers of Judge N. D. McDermid, Glenbow-Alberta Institute, 6992, appeal book 3.
41. T. R. L. MacInness to N.-P. L'Heureux, 9 September 1941, ibid.
42. H. W. McGill to N. E. Tanner, 17 February 1942, ibid.
43. C. D. Brown to R. A. Hoey, 29 October 1946, ibid.
including the Lubicon Lake band. In Goddard’s view, officials deliberately reduced the size of the Lubicon band so that it would no longer seem to merit its own reserve and ignored their earlier commitment to provide one. The thesis may be correct, but Goddard’s presentation of the evidence is undocumented, tendentious, and not fully persuasive. He seems to assume that events that happen more or less simultaneously are causally connected, but such connections have not been proven with documentary evidence.

In 1950, the Lubicon Indians again asked for their reserve, touching off several confusing years. Indian Affairs officials were uncertain whether a reserve had been definitely promised or whether Lubicon Lake was the best place for it. Local officials were instructed to ask the Lubicons if they really wanted a reserve at Lubicon Lake or if they might prefer some other location. These consultations proved unsatisfactory because the Lubicons were still actively trapping and hunting. Only a handful might show up for any particular meeting, so opinions about the location of the reserve varied, depending on who was present.

The Province of Alberta, which had been carrying a provisional reserve on its books, now began to exert pressure for a final decision and issued an ultimatum on 22 October 1953: if the federal government did not commit itself within thirty days, the province would take the reserve off its books and open the area to oil exploration. Indian Affairs, being advised by its local officials that Lubicon Lake was an unsuitable location and that some other solution could eventually be found, made no effort to block Alberta’s action, and the hypothetical Lubicon reserve disappeared.

The Lubicons continued to live for another two decades as they always had, hunting, fishing, and trapping on land which was not otherwise used, until the province began an all-weather road from Grande Prairie to Little Buffalo in 1971. Rising oil prices pointed to the development of northern Alberta’s oil sands, and Premier Lougheed officially announced on 18 September 1973 that the Syncrude project would go ahead.

On 27 October 1975, the Indian Association of Alberta borrowed strategy from the Dene of the NWT and tried to register a caveat to about 25,000 square miles
lying north of Lesser Slave Lake between the Peace and Athabasca Rivers. This was on behalf of the "isolated communities"—Lubicon Lake and half a dozen other groups of Indians in the area—who claimed to be entitled to reserves under Treaty Eight. By attempting to register a caveat, the isolated communities were asserting an unextinguished aboriginal title to a large part of northern Alberta. Like the Dene, they were asserting the novel legal doctrine that Treaty Eight had not extinguished aboriginal title even though the text purported to do so. As a matter of political strategy, they were trying to block Syncrude and other northern oil projects and thereby wring concessions from the provincial government.53

When the Supreme Court of Canada rejected the Dene caveat in 1976, it noted that one could probably register a similar caveat in Alberta because of the wording of the province's Land Titles Act.54 Fearing that it might lose the impending court battle, the government of Alberta had the legislature revise the act.55 The province declared that there were no unextinguished aboriginal rights in Alberta, only "unfulfilled land entitlements,"56 and the Attorney General challenged Indian groups to go to court if they thought they could prove the existence of unextinguished aboriginal title.57

The isolated communities coalition fell apart, and the Lubicon band emerged as a political actor in its own right. After Bernard Ominayak was elected chief in 1978,58 he entrusted the Lubicons' legal strategy to Montreal lawyer James O'Reilly, who had been instrumental in bringing about the James Bay Agreement. In early 1980 Billy Diamond, Chief of the James Bay Cree, flew in to meet Ominayak. Offering to guarantee a bank loan of $400,000 for the Lubicons plus another $300,000 if necessary, he told Ominayak to hire O'Reilly.59

The political-legal strategy that had worked for the James Bay Cree in the 1970s—claiming unextinguished aboriginal title, seeking an injunction to hold up natural-resource development, entering into negotiations to achieve a settlement—seemed like a model for the Lubicon Cree in the 1980s.60 But there was a key

55. The Land Titles Amendment Act (Bill 29) S. A. 1977, c. 27, s. 10, amending s. 141 of the Land Titles Act. Royal Assent was granted on 18 May 1977.
56. B. Bogle, Alberta Hansard (17 March 1978) at 262.
57. J. Foster, Alberta Hansard, (6 April 1977) at 672–73.
58. Goddard, "Forked Tongues" supra, note 14 at 43.
difference between the two situations. Before 1975, there had been no land surrenders in northern Quebec, so the native claim to possess unextinguished aboriginal title had *prima facie* validity. By contrast Treaty Eight purported to extinguish the Indian title to all of northern Alberta, so the Lubicons would have to make out the more difficult proposition that the absence of an adhesion by what may or may not have been a Lubicon band in 1899-1900 had created an unceded region in the middle of the treaty area, like a hole in the middle of a doughnut.

O'Reilly filed a statement of claim with the Alberta Court of Queen’s Bench on 19 February 1982, requesting an injunction against resource development. He asked for complete cessation of activity in a “reserve area” of 900 square miles around Lubicon Lake, and a reduced level of activity in a surrounding area of 8,500 square miles called the “hunting and trapping territory.” The theory behind the claim was that unrestricted resource development posed imminent danger to the Lubicons’ land rights, which were said to be of three types: (1) aboriginal title that still existed because the Lubicons had never formally adhered to Treaty Eight; (2) the reserve that had been granted but never implemented by government officials; (3) the Indians’ right to hunt, fish, and trap on unoccupied Crown land protected by the Alberta Natural Resources Act, 1930. The claim to possess continuing aboriginal title is of special interest here. In the words of the appellants’ factum:

In the first place, [the Lubicons] claim aboriginal rights over the entire Hunting/Trapping Territory. Appellants allege and argue that:

a) These aboriginal rights are existing aboriginal rights within the meaning of Section 35 of the *Constitution Act, 1982*.

b) These aboriginal rights entail the exclusive use and enjoyment of all the lands in the Hunting/Trapping Territory as well as the natural resources thereof including the minerals and the wildlife.

c) These aboriginal rights can be invoked by all of Appellants or any one of Appellants indivisibly but they are collective rights.

d) Aboriginal rights include aboriginal or Indian land title, which title can have a number of different sources, such as historical occupancy (from time immemorial, or occupancy at the time of assumption of British sovereignty or even occupancy at the time of treaty), the *Royal Proclamation, 1763*, and recognition by the Crown.

e) Aboriginal rights also *include*, as an element thereof, hunting and trapping rights.
f) Moreover, in the present proceedings, Appellants allege and argue that Treaty No. 8 did not extinguish their aboriginal rights since, *inter alia*, neither they nor their ancestors were ever a party to it or adhered to it, nor were their aboriginal rights or those of their ancestors otherwise surrendered or extinguished.\(^6\)

The crucial statement in this chain of reasoning is the last one, that since neither the Lubicons nor their ancestors ever adhered to Treaty Eight, they still possess unextinguished aboriginal title. “Adhere” in this context must mean a formal group adhesion with signatures by chief and headmen, for it is common knowledge that many, perhaps most, of the Lubicons’ ancestors joined Treaty Eight as individuals, and thus the Lubicons have been receiving annuities and other treaty benefits, except those that require a land reserve.

At the first level, the Lubicon theory is a challenge to McKenna’s decision in 1901 not to seek further group adhesions. It maintains in effect that he made a factual mistake, that there was an existing group, the Lubicon band, that should have been dealt with as a group. To evaluate such a claim would require historical evidence about whether there was a Lubicon band in 1901, or whether there were only individuals who later cohered into a band. The government might wish to contest such a claim, but the stakes would not be very high; for if the claim should prove successful, it would only entitle the Lubicons to make an internal adhesion to Treaty Eight, as the band at Fort Nelson did in 1910. In itself, the claim to have been overlooked does not generate an assertion of aboriginal title unless one takes the next step of challenging the distinction between internal and external adhesions, which, though never fully articulated, has guided government policy in the past.

The Lubicon theory is important because it takes that step. The Lubicons maintain that, because they have never made a group adhesion, they still possess aboriginal title to a *definable piece of land within the treaty area*. The government resists this aspect of the Lubicon theory because it contradicts the premise upon which the Numbered Treaties were negotiated, namely, that the multiple bands of Indians that signed each treaty surrendered, not unique homelands within the treaty area, but their right to use the entire area. The Lubicon theory is a piece-by-piece understanding of treaty, according to which bands surrender aboriginal title one piece at a time until the Crown acquires the entire mosaic of territory. But Canada has always proceeded, and the treaties are worded, as if the Crown was dealing with multiple claimants, each possessing an overlapping claim to use the same broad area. This is not a mosaic but a holistic approach. The Crown acquires the title to the whole area once it has dealt with a sufficient number of claimants. The aboriginal title to the whole is either extinguished or it is not; it is not subdivided into pieces to be acquired one at a time.

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Justice Forsyth declined to grant the injunction. On 17 November 1983, he held that "damages would be an adequate remedy to the applicants in the event they were ultimately successful in establishing any of their positions advanced." The Lubicons would first have to prove that their aboriginal title still existed, then seek damages if they could show they had suffered loss. Justice Forsyth did not believe that interference with "their traditional way of life" threatened them with immediate "irreparable injury." On 11 January 1985, the Alberta Court of Appeal upheld the lower court's decision, saying that there was ample time to try the claim and assess damages, if any. In March 1985, the Supreme Court of Canada refused leave to appeal. Two weeks later, after the British Columbia Court of Appeal granted an injunction against logging on Meares Island in circumstances that bore some similarity to the Lubicon case, O'Reilly again sought leave to appeal but was refused a second time.

Throughout the litigation, the Lubicon theory of adhesion was never tested on its merits. The judicial decisions hinged solely on the question of whether an interlocutory injunction was justifiable to prevent irreparable harm. Since losing their request for an injunction, the Lubicons have kept their theory of aboriginal rights out of court, using it instead as a weapon in their political battles with Alberta and Canada.

In 1988, when the federal government tried to sue Alberta as a way of bringing the conflict to a close, Chief Bernard Ominayak began to say openly that the Lubicons were ready to "assert jurisdiction," i.e., to assume governmental control over their traditional territory in validation of their claim that they had never relinquished their aboriginal title. On 21 September, Ominayak announced that his band would assert jurisdiction on 15 October if an agreement was not reached; this would mean a blockade of roads onto oil-producing lands. On 6 October, O'Reilly read a statement in court that the Lubicons were asserting jurisdiction and would not participate in any further judicial proceedings.

Events now moved quickly in elaborate choreography. Although the province declared that it would enforce the law, the Lubicons set up their blockade on 15 October. The province secured an injunction against it on 19 October; and early on the morning of 20 October, heavily armed RCMP officers took down the blockade and arrested twenty-seven people. Premier Getty and Chief Ominayak then met on 22 October in the little town of Grimshaw. The same day, Getty

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63. Ibid., 157–158.
64. Richardson, supra, note 14 at 246; [1985] 1 S. C. R. xi.
65. Windspeaker (3 June 1988) at 3.
66. Richardson, ibid. at 258.
67. Windspeaker (7 October 1988) at 1.
68. Richardson, supra, note 14 at 260; Windspeaker, 21 October 1988 at 1.
agreed to sell the federal government seventy-nine square miles with mineral rights, and another sixteen square miles without mineral rights, for a reserve. The total of ninety-five square miles conformed to the Lubicons’ own count of their membership.

But no settlement was possible without the agreement of the federal government. Negotiations began well when Ottawa accepted the ninety-five-square-mile reserve but broke down on 24 January 1989, over the issue of compensation. Maintaining they had a “comprehensive” claim based on aboriginal rights, the Lubicons demanded compensation from the federal government for failure to extinguish their aboriginal title in 1899. The amount owed—$167 million according to one calculation—would compensate the Lubicons for various federal benefits that they had not received since 1899 because they had no reserve. The Lubicons were willing to negotiate the amount of compensation but not the principle that something had to be paid. The federal government, on the other hand, viewed this as only a “specific” claim based on treaty entitlement. It recognized the Lubicons’ right to a reserve, and it was willing to pay to set up the reserve—$45 million, according to its calculations. But it refused to pay a general amount for extinguishment of aboriginal title, because in its view aboriginal title had been extinguished all over northern Alberta with the signing of Treaty Eight. The federal government could not accede to the Lubicons’ claim for compensation without undercutting the validity of its holistic approach to the treaties. If it deviated from this principle in the Lubicon case, it might be forced to regard many other current and potential claims across Canada as “comprehensive” (aboriginal title) rather than “specific” (treaty entitlement) claims. Thus the difference in understanding of adhesion and extinguishment continues to be a major factor in preventing an agreement.

69. Windspeaker (26 October 1988); Richardson, ibid. at 261.
Commentary on “Adhesion to Canadian Indian Treaties and the Lubicon Lake Dispute”

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Thomas Flanagan’s article on adhesion to Indian treaties in this issue of the Canadian Journal of Law and Society is a bold foray into a virtually unexplored area of aboriginal rights. Although adhesions to most of the eleven Numbered Treaties in northern and western Canada were common, as Flanagan points out, not much attention has been paid to them. The matter is nonetheless of major importance for many aboriginal peoples, as was demonstrated by the decision of the Supreme Court of Canada last year that the Teme-Augama Anishnabai had surrendered their aboriginal title by adhesion to the 1850 Robinson-Huron Treaty. There can be little doubt that the issue is going to arise more frequently as other aboriginal peoples challenge the application of treaties to their ancestral lands.

Flanagan’s article deals with two matters. First, it examines adhesions to the Numbered Treaties generally, and presents a classification for them based on the federal government’s treaty-making practice. Secondly, it looks at the Lubicon land claim in northern Alberta in light of this classification, and suggests that failure to resolve the claim is due largely to “a disagreement over the concept of adhesion.” I find Flanagan’s characterization of the nature of the Lubicon dispute to be helpful, as it clarifies a fundamental issue in Indian treaty law. The issue is this: In a situation where an aboriginal group whose ancestral lands are within a treaty area did not sign the treaty, do they have existing aboriginal land rights, or simply a claim to receive the same treaty benefits as the aboriginal groups who did sign the treaty? Or, to put it another way, assuming the treaty validly extinguished the land rights of the aboriginal signatories, would it have had the same impact on

* I would like to thank Brian Slattery for his very helpful comments on a draft of this paper.


2. I use the general term “group” instead of nation, tribe, band or other designation in this context to avoid problems of definition which might otherwise occur, and because I do not want to limit the application of my discussion of land claims to a particular kind of collectivity. My use of this term is not an implicit denial of the legitimate claims of aboriginal peoples to nationhood.

3. A “clear and plain” intention to extinguish would have to be proven (Sparrow v. The Queen, [1990] 1 S.C.R. 1075 at 1099), taking into consideration the historical context,
the rights of the group who did not sign? The significance of an adhesion to the
treaty by this group depends on how this initial issue is resolved.

Flanagan suggests that a clear distinction exists between what he calls “internal”
and “external” adhesions. Internal adhesions involve aboriginal groups whose
ancestral lands are within the area described by the treaty but who were not
present at the original treaty negotiations or who did not accept the terms at that
time. They signed later, either in the same year at another meeting-place on the
treaty commissioners’ initial circuit, or in a subsequent year. External adhesions
involve aboriginal groups whose land claims lie outside the treaty’s original
limits, requiring a territorial extension of the treaty.

Flanagan’s research has revealed that the federal government seems to regard
internal and external adhesions as legally distinct. An external adhesion involves
the surrender by the adherents of their aboriginal rights to specific lands which
they claim as a distinct aboriginal group. Those lands then become part of the
treaty area as extended by the adhesion. According to Flanagan, internal adhesions
are different because the government apparently thinks that all the lands within
the original treaty area form a whole, aboriginal title to which is extinguished
when “a sufficient number” of claimant groups within the area sign the treaty. The
Lubicon claim contradicts the government’s understanding because the Lubicons
allege that they have unextinguished aboriginal title to their ancestral lands within
the original limits of Treaty Eight on the grounds that they have never signed the
treaty.

While Flanagan presents both sides in this debate, he devotes much more space
to the government’s position, support for which he finds in both Crown practice
and the treaties’ terms. The treaties, however, are at best equivocal in this respect.
Treaty Eight provides:

... the said Indians [Cree, Beaver, Chipewyan and other Indians, inhabiting the
district hereinafter defined and described] do hereby cede, release, surrender and
yield up to the Government of the Dominion of Canada ... all their rights, titles
and privileges whatsoever, to the lands included within the following limits ... [a]nd also the said Indian rights, titles and privileges whatsoever to all other lands
wherever situated in the Northwest Territories, British Columbia, or in any other
portion of the Dominion of Canada.4

the record of negotiations, and the aboriginal understanding of the agreement (A.-G. of
appears to suggest, rely simply on the surrender clause in the treaty itself: see Re
of Accepting Benefits from the Crown: A Comment on the Temagami Indian Land

4. Treaty No. 8 Made June 21, 1899, and Adhesions, Reports, Etc. (Ottawa: Queen’s
Printer, 1966) at 12.
This may imply, as Flanagan suggests, that the Cree, Beaver, Chipewyan and other Indian parties were regarded by the government as having one common claim to the whole treaty area. But it could also mean that they each had a claim to distinct lands within the treaty area (and possibly elsewhere) which would all be covered by this general surrender provision, thereby avoiding the unnecessary and potentially contentious task of delineating each group's claim separately. As the Supreme Court of Canada has repeatedly said that ambiguities in treaties are to be resolved in the Indians' favour, this interpretation is to be preferred over that suggested by Flanagan. Moreover, it corresponds with the reality of aboriginal life as, making allowance for some overlap, each group did have a definite territory for hunting, fishing and other resource use. Certainly the treaty commissioners were not so ill-informed as to believe that the Cree, Beaver and Chipewyan Indians living within the treaty area all claimed the same lands.

Canadian case law confirms that distinct aboriginal groups have land rights to specific areas. In Baker Lake v. Minister of Indian Affairs Mahoney J. said that a claim to aboriginal title requires proof that the claimants and their ancestors formed an organized society and that they "occupied the specific territory over which they assert the aboriginal title . . . to the exclusion of other organized societies." With some modifications, this test for proof of aboriginal title has been applied in other cases.

The view that a treaty extinguishes aboriginal title throughout the designated area when enough aboriginal signatures are obtained encounters other obstacles as well. For one thing, just how many signatures are required? If aboriginal leaders representing over 50 percent of the aboriginal population in the treaty area sign on, is that sufficient? What if all the Beaver and Chipewyan but none of the Cree leaders had signed Treaty Eight—would the Cree's title have been extinguished by the acceptance of the treaty by those other tribes? The very idea that extinguishment could occur in

7. The reports of the treaty commissioners and the record of signatures reveal that the commissioners dealt with different aboriginal groups at different places within the treaty's territorial limits: e.g., see Report of Commissioner for Treaty No. 8 in Treaty No. 8, supra, note 4, at 20, where J.A. Macrae reported taking "adhesions of certain of the Indians of Fort St. John and the whole of those of Fort Resolution on Great Slave lake, whose hunting grounds lie within treaty limits" (my emphasis).
such a way is all the more suspect when one considers that the territorial extent of Treaty Eight appears to have been determined in advance by the government. Extinguishment of the aboriginal title of a group who did not sign would therefore depend arbitrarily on whether their ancestral lands happened to lie inside or outside the treaty's boundaries. Moreover, the government would be able to extinguish the title of recalcitrant groups simply by manipulating the boundaries.

So the suggestion that the land rights of all aboriginal groups within a treaty area would be extinguished when the representatives of some unspecified number of groups signed does not stand up to scrutiny. Regardless of the practice and views of the Canadian government, as a matter of general constitutional principle, the Crown (i.e., the executive branch of government) cannot make law. In entering into Indian treaties as in other dealings with vested rights, the Crown must follow the legal rules established by legislation and judicial decisions.

The legal rules respecting Indian treaties were laid down in the Royal Proclamation of 1763, the Indian provisions of which are still in force. Among other things, the proclamation provides that, if any of the nations or tribes of Indians connected with and living under the protection of the Crown wish to dispose of their unsurrendered lands, the lands can be purchased only by the Crown at a public assembly of those Indians held for that specific purpose. This


12. R.S.C. 1985, App. II, No. 1. Ironically, the Royal Proclamation is Crown legislation, issued under authority of the rule of British colonial law that the Crown can legislate in conquered and ceded colonies until a representative assembly is promised or created: see Campbell v. Hall (1774) Lofft 655 (K.B.). It was made possible by the cession of New France to Britain in 1763. See generally Brian Slattery, Land Rights of Indigenous Canadian Peoples (Saskatoon: University of Saskatchewan Native Law Centre, 1979).


14. R.S.C. 1985, App. II, No. 1 at 6. Although there is uncertainty over the proclamation's territorial extent, the Supreme Court of Canada appears to regard its surrender provisions, at least, as being generally applicable: see Guerin v. The Queen, [1984] 2 S.C.R. 335 at 376-82.
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provision, which is as applicable to purchases of Indian lands by adhesion as by original treaty, obliges the Crown to obtain a formal surrender from each group holding aboriginal title within a designated area for the Crown to have a clear title to all the lands located there.\textsuperscript{15}

The protection accorded to aboriginal land rights by the Royal Proclamation is supported by general principles of Anglo-Canadian law. Since at least the seventeenth century, the common law has been vigilant in shielding vested rights—especially property rights—from violation by the Crown.\textsuperscript{16} Although the Supreme Court of Canada has successfully avoided any clear definition of aboriginal land rights by saying they are \textit{sui generis},\textsuperscript{17} the Court’s unanimous decision in \textit{Canadian Pacific Limited v. Paul}\textsuperscript{18} indicates that these rights are proprietary in nature. As such they are entitled to as much common law protection as other vested property rights.\textsuperscript{19} One consequence of this is that the Crown cannot extinguish the title of one aboriginal group by signing a treaty with other groups, any more than it can extinguish the title of one homeowner by purchasing the houses of other homeowners on the same city block.\textsuperscript{20}

Returning to the Lubicon claim, if the Lubicons were a distinct aboriginal group with land rights within the Treaty Eight area, those rights could not as a matter of law have been extinguished by the treaty if they did not sign it. The Lubicons’ lands would therefore have to be excluded from the lands purportedly surrendered by the treaty. Currently, one option for the Lubicons would be to adhere to the treaty, and accept the benefits provided by it. One can call this an internal adhesion if one likes, but the legal effect would be precisely the same as in the case of an external adhesion. Another option would be for the Lubicons to negotiate their own “treaty” with the federal government, which would probably be more beneficial, given the kind of settlements other aboriginal groups have obtained in modern land claims agreements.\textsuperscript{21} However, given that the government is unlikely to accept negotiations on that basis, the Lubicons would probably be

\begin{itemize}
\item \textsuperscript{15} For detailed discussion, see McNeil, \textit{supra}, note 3, esp. 55–61.
\item \textsuperscript{16} See H. Broom, \textit{Constitutional Law}, 2nd ed. by G. L. Denman (London: Maxwell & Son, 1885), at 225–33.
\item \textsuperscript{17} See \textit{Guerin v. The Queen}, [1984] 2 S.C.R. 335, esp. 382; \textit{Sparrow v. The Queen}, [1990] 1 S.C.R. 1075 at 1108.
\item \textsuperscript{18} [1988] 2 S.C.R. 654 at 677.
\item \textsuperscript{19} Contrast \textit{Mabo v. Queensland}, (1993) 175 C.L.R.1 (H.C. Aust.).
\item \textsuperscript{21} \textit{E.g.}, see \textit{The Western Arctic Claim: The Inuvialuit Final Agreement} (Ottawa: Indian and Northern Affairs Canada, 1984).
\end{itemize}
obliged either to pursue their claim in court, or to continue asserting their land rights directly by resisting trespass by oil companies and others who have been invading their lands.\textsuperscript{22} In my view, the latter approach has certain procedural advantages, as the Lubicons would then be able to rely on their possession in any legal action involving trespass.\textsuperscript{23} But whatever the form of action, the suggestion that Treaty Eight extinguished their land rights even if they did not become parties to it is a legal fantasy which no court in Canada should accept.

\textsuperscript{22} See generally J. Goddard, \textit{Last Stand of the Lubicon Cree} (Vancouver: Douglas & McIntyre, 1991).

\textsuperscript{23} For discussion of this approach in another context, see K. McNeil, “A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginals?” (1990) 16 Monash L. Rev. 91 esp. at 107–10.