

INDIAN CLAIMS COMMISSION PROCEEDINGS



(1998) 8 ICCP

Reports

Kahkewistahaw First Nation
1907 Reserve Land Surrender Inquiry

Moosomin First Nation
1909 Reserve Land Surrender Inquiry

Chippewas of Kettle and Stony Point First Nation
1927 Surrender Inquiry

Sumas Indian Band
1919 Surrender of Sumas Indian Reserve No. 7 Inquiry

Responses

Responses of the Minister of Indian Affairs and Northern Development
to: Lucky Man Cree Nation Treaty Land Entitlement Inquiry,
Kahkewistahaw 1907 Reserve Land Surrender Inquiry,
Moosomin 1909 Reserve Land Surrender Inquiry,
Homalco Indian Band Inquiry,
Sumas Indian Band 1919 Surrender of Indian Reserve 7 Inquiry

INDIAN CLAIMS COMMISSION PROCEEDINGS

A PUBLICATION OF

THE INDIAN CLAIMS COMMISSION



(1998) 8 ICCP

CO-CHAIRS

Daniel J. Bellegarde
P.E. James Prentice, QC

COMMISSIONERS

Roger J. Augustine
Carole T. Corcoran
Aurélien Gill

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Available in Canada through

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or by mail from

Canada Communication Group — Publishing

Ottawa, Canada K1A 0S9

Catalogue No. RC12-1-1998-8E

ISSN 1195-3586

ISBN 0-662-26927-6

The Indian Claims Commission Proceedings is a continuing series of official reports, background documents, articles, and comment published by the Indian Claims Commission (Canada).

For information about subscriptions and extra copies or to request the French edition, *Actes de la Commission des Revendications des Indiens*, please contact

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CONTENTS

Letter from the Co-Chairs

v

Abbreviations

vii

REPORTS

Kahkewistahaw First Nation
1907 Reserve Land Surrender Inquiry

3

Moosomin First Nation
1909 Reserve Land Surrender Inquiry

101

Chippewas of Kettle and Stony Point First Nation
1927 Surrender Inquiry

209

Sumas Indian Band
1919 Surrender of Sumas Indian Reserve No. 7 Inquiry

281

RESPONSES

Re: Lucky Man Cree Nation Treaty Land Entitlement Inquiry
Ronald A. Irwin, Minister of Indian Affairs and Northern
Development, to P.E. James Prentice and Carole T. Corcoran,
Indian Claims Commission, May 22, 1997

369

Re: Kahkewistahaw 1907 Reserve Land Surrender Inquiry
Jane Stewart, Minister of Indian Affairs and Northern
Development, to James Prentice and Roger J. Augustine,
Indian Claims Commission, December 18, 1997

371

Re: Moosomin 1909 Reserve Land Surrender Inquiry
Jane Stewart, Minister of Indian Affairs and Northern
Development, to James Prentice, Carole T. Corcoran, Aurélien Gill,
Indian Claims Commission, December 18, 1997
372

Re: Homalco Indian Band Inquiry
Jane Stewart, Minister of Indian Affairs and Northern
Development, to Daniel J. Bellegarde and James Prentice,
Indian Claims Commission, December 18, 1997
373

Re: Sumas Indian Band 1919 Surrender of IR 7 Inquiry
Jane Stewart, Minister of Indian Affairs and Northern
Development to Daniel J. Bellegarde and Carole T. Corcoran,
Indian Claims Commission, January 21, 1998
375

THE COMMISSIONERS

377

FROM THE CO-CHAIRS

On behalf of the Commissioners and staff of the Indian Claims Commission, we are pleased to present volume eight of the *Indian Claims Commission Proceedings*. This volume of the *Proceedings* includes four reports of inquiry, all related to the surrender of Indian reserve land. Also included are letters from the Minister of Indian Affairs and Northern Development responding to the recommendations set out in five reports released by the Commission.

The first report published in this volume deals with the 1907 reserve land surrender claim of the Kahkewistahaw First Nation. In this inquiry, the Commissioners examined whether the Crown was in breach of its statutory and fiduciary obligations to the First Nation when it obtained a surrender in 1907 of approximately three-quarters of the Kahkewistahaw Indian Reserve located adjacent to the banks of the Qu'Appelle River in southern Saskatchewan.

The report into the 1909 reserve land surrender claim of the Moosomin First Nation in central Saskatchewan addressed whether the Crown breached its statutory and fiduciary obligations as a result of the surrender of 23 square miles of rich agricultural land and the subsequent relocation of the Moosomin Band to a more remote and northern location.

The third report addressed alleged improprieties in relation to the 1927 surrender of Indian reserve land set aside for the Chippewas of Kettle and Stony Point First Nation in southwestern Ontario. This claim, which was also the subject of litigation before the courts, raises fundamental issues about whether the involvement of Crown officials and third parties in the surrender process invalidated the sale of the land or otherwise resulted in a breach of fiduciary obligation on the part of the federal government.

The final report in this volume of the *Proceedings* deals with the Sumas Indian Band Inquiry into the 1919 surrender of Sumas Indian Reserve (IR) No. 7. The claim relates to an alleged wrongful surrender of 153.46 acres of the Sumas IR 7 for sale to the Soldier Settlement Board.

In the section entitled Responses, the Commission has reproduced five letters from the Minister of Indian Affairs and Northern Development responding to the findings and recommendations made by the Indian Claims Commission into five separate claims. The letters respond to reports of inquiry into the following claims: (1) the Treaty Land Entitlement of the Lucky Man Cree Nation; (2) the Kahkewistahaw First Nation 1907 Reserve Land Surrender; (3) the Moosomin First Nation 1909 Reserve Land Surrender.

der; (4) the Homalco First Nation claim relating to Aupe Indian Reserve No. 6 and No. 6A; and (5) the Sumas Indian Band 1919 Surrender of Indian Reserve No. 7.

Daniel J. Bellegarde
Co-Chair

P.E. James Prentice, QC
Co-Chair

ABBREVIATIONS

BCCA	British Columbia Court of Appeal
BCR	Band Council Resolution
BCSC	British Columbia Supreme Court
CA	Court of Appeal
CNLR	Canadian Native Law Reporter
CPR	Canadian Patent Reporter
DIAND	Department of Indian Affairs and Northern Development
DLR	Dominion Law Reports
DLS	Dominion Land Surveyor
DSGIA	Deputy Superintendent General of Indian Affairs
DVLA	Director, Veterans' Land Act
FC	Canada Federal Court Reports
FCA	Federal Court Appeal Division
FCTD	Federal Court Trial Division
FTR	Federal Trial Reports
IAB	Indian Affairs Branch
ICC	Indian Claims Commission
ICCP	Indian Claims Commission Proceedings
IR	Indian Reserve
NA	National Archives of Canada
NR	National Reporter
ONC	Office of Native Claims
OR	Ontario Reports
RSBC	Revised Statutes of British Columbia
RSC	Revised Statutes of Canada
RSUC	Revised Statutes of Upper Canada

SC	Statutes of Canada
SCC	Supreme Court of Canada
SCR	Canada Supreme Court Reports
SGIA	Superintendent General of Indian Affairs
SSB	Soldier Settlement Board
TD	Trial Division
WWR	Western Weekly Reports

REPORTS



Kahkewistahaw First Nation
1907 Reserve Land Surrender Inquiry
3

Moosomin First Nation
1909 Reserve Land Surrender Inquiry
101

Chippewas of Kettle and Stony Point First Nation
1927 Surrender Inquiry
209

Sumas Indian Band
1919 Surrender of Sumas Indian Reserve No. 7 Inquiry
281

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE 1907 RESERVE LAND SURRENDER CLAIM OF THE KAHKEWISTAHAW FIRST NATION

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Commission Co-Chair P.E. James Prentice, QC
Commissioner Roger J. Augustine

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Stephen Pillipow et al.

For the Government of Canada
Bruce Becker / Kim Kobayashi

To the Indian Claims Commission
Ron S. Maurice / Kim Fullerton / Kathleen Lickers

FEBRUARY 1997

CONTENTS

PART I INTRODUCTION 9

- Mandate of the Indian Claims Commission 11
- Claim Area Map 13

PART II THE INQUIRY 14

- Historical Background 14
 - Canadian Indian Policy 14
 - Treaty 4 (1874) 17
 - The Kahkewistahaw Reserve 20
 - Map of Kahkewistahaw IR 72 21
 - Farming on the Kahkewistahaw Reserve 23
 - The Changing Relationship between the Crown and the Band 28
 - Local Pressure to Surrender Crooked Lake Reserves 33
 - The Surrender Request of 1885 34
 - The Request of 1886 34
 - The 1891 Petition 35
 - The 1899 Request 36
 - The 1902 Proposal and Petition 37
 - The 1904 Request 39
 - Prelude to the Surrender: A New Attitude in the Department 40
 - The 1907 Surrender Meetings 44
 - After the Surrender 50
 - Impact of the Surrender on IR 72 55

PART III ISSUES 59

PART IV ANALYSIS 61

- Issue 1: Validity of the 1907 Surrender 61
 - Surrender Provisions of the 1906 *Indian Act* 61
 - Compliance with Technical Surrender Requirements 64
 - Mandatory versus Directory Surrender Requirements 67
 - Effect of Valid Surrender 70
- Issue 2: Canada's Pre-surrender Fiduciary Obligations 73
 - The *Guerin* Case 74
 - The *Apsassin* Case 76
 - Pre-surrender Fiduciary Duties of the Crown 79

Where a Band's Understanding Is Inadequate or the
Dealings Are Tainted 79
Where a Band Has Ceded or Abnegated Its Power to Decide 84
Duty of the Crown to Prevent the Surrender 91

PART V CONCLUSIONS AND RECOMMENDATION 97
Recommendation 98

APPENDIX

A Kahkewistahaw First Nation 1907 Surrender Inquiry 100

... although I am most anxious that the views of the people of Broadview should be met, still from my position as Indian Agent I am bound in the interests of the Indians to point out the difficulties in the way, which are tersely these. If these lands are surrendered by the Indians, no reasonable money value can recompense them, as their Hay lands would be completely gone, and this would necessitate no further increase of stock, which would of course be fatal to their further quick advancement, and would be deplorable. . . .

– Indian Agent Alan McDonald, March 10, 1891

PART I

INTRODUCTION

On August 20, 1881, the Government of Canada completed the survey of Indian Reserves 72 and 72A for the Kahkewistahaw Band¹ under the terms of Treaty 4. As originally drawn, these reserves were located some 130 kilometres east of Regina on the southern escarpment of the Qu'Appelle Valley and the adjoining uplands. The two reserves consisted of 46,816 acres, or sufficient land for 365 people under the terms of the treaty.

Twenty-two years later, on January 28, 1907, the Government of Canada procured a surrender of 33,281 acres from those reserves, effectively depriving the Kahkewistahaw Band of close to three-quarters of the land that it had accepted in 1881.² That surrender resulted in the disposition of most of Kahkewistahaw's arable land, with the remaining land being almost completely unsuited for cultivation. In effect, the Kahkewistahaw First Nation was left to survive on the steep escarpment and lower benches of the Qu'Appelle Valley.

In 1908 and 1910, the surrendered lands were sold at public auction to the non-Indian farmers who had long coveted them, and the few remaining unsold parcels were later distributed as part of the soldier settlement scheme following the First World War. It is unclear, although doubtful, whether the full amount of the proceeds from these sales was ever paid to the First Nation.³

At issue in this inquiry is the propriety of that 1907 surrender. By necessity, this claim has taken our Commission back to the overzealous implementation of the federal government's surrender policy of that time. The application of that policy in this case was intended to pry from the Kahkewis-

1 Alternatively referred to as "Kahkewistahaw," the "First Nation," or the "Band," depending on the historical context.

2 Surrender No. 548, Kahkewistahaw Indian Reserve (IR) No. 72, January 28, 1907, National Archives of Canada [hereinafter NA], RG 2, Series 1, March 4, 1907 (ICC Documents, pp. 269-73).

3 It should be noted that the administration of the sale proceeds is not at issue in these proceedings.

tahaw people the valuable farming lands accepted by them under the terms of Treaty 4, and in our view it surely marked the moral low ebb in the relationship between aboriginal and non-aboriginal Canadians on the western prairies. For all Canadians, there can be only shame in those events and in the application of that policy to the Kahkewistahaw First Nation. This Commission's report provides the Canadian government with an opportunity to accept responsibility for these events and, it is hoped, to bring a just and fair resolution to this historical grievance of the Kahkewistahaw people.

On March 2, 1989, the Kahkewistahaw First Nation submitted a claim under the federal Specific Claims Policy seeking "recognition of [its] claims and compensation for the losses and damage sustained" as a result of the 1907 surrender.⁴ In response to this submission, the Specific Claims Branch of Indian Affairs undertook a review of the claim, which was completed in January 1992.⁵ That research was presented to Kahkewistahaw in a meeting on April 14, 1992, following which the First Nation submitted an update to its position.⁶

Two years later, on receiving advice that Canada's preliminary position was that the 1907 surrender did not give rise to a lawful obligation to Kahkewistahaw, the First Nation formally requested that the Commission conduct an inquiry into this claim. Although Kahkewistahaw provided Canada with a further supplemental submission in response to the preliminary rejection of the claim,⁷ Canada reiterated that it had breached no duties to the First Nation.⁸ Ultimately, on August 31, 1994, the Commission decided to conduct this inquiry.⁹

4 William J. Pillipow, Barrister & Solicitor, to P. Cadieux, Minister, Department of Indian Affairs, March 2, 1989 (ICC Documents, p. 465).

5 Department of Indian Affairs, "Specific Claims Branch Review of Kahkewistahaw Band's Claim Concerning the 1907 Surrender," January 1992 (ICC Documents, pp. 649-752).

6 William J. Pillipow, Pillipow & Company, to Jeannie Jeffers, Specific Claims Branch West, April 28, 1992, enclosing "Summary of Legal Position of Band," undated (ICC Documents, pp. 754-72).

7 Stephen Pillipow, Pillipow & Company, to Jack Hughes, Specific Claims West, June 30, 1994, enclosing Pillipow & Company, "Supplemental Submission to the Minister of Indian Affairs and Northern Development, Kahkewistahaw First Nation Specific Claim - Land Surrender of 1907," June 1994 (ICC Documents, pp. 776-801).

8 Jack Hughes, Senior Claims Advisor, Specific Claims West, to Chief Louis Taypotat and Council, Kahkewistahaw First Nation, August 10, 1994 (ICC Documents, pp. 858-59); Stephen Pillipow, Pillipow & Company, to Jack Hughes, Senior Claims Advisor, Specific Claims West, August 11, 1994 (ICC Documents, p. 860); Jack Hughes, Senior Claims Advisor, Specific Claims West, to Stephen Pillipow, Pillipow & Company, August 25, 1995 (ICC Documents, p. 861). The date on this last document would appear to be in error, with August 25, 1994, being more likely.

9 Dan Bellegarde and James Prentice, Co-Chairs, Indian Claims Commission, to Chief and Council, Kahkewistahaw First Nation, September 2, 1994; Dan Bellegarde and James Prentice, Co-Chairs, Indian Claims Commission, to Ron Irwin, Minister of Indian and Northern Affairs, and Allan Rock, Minister of Justice and Attorney General, September 2, 1994.

Kahkewistahaw has alleged that the surrender obtained by Canada in 1907 was not valid because of the presence of duress, undue influence, and negligent misrepresentation, and because the surrender bargain was unconscionable. The First Nation has also alleged that the surrender was invalid because Canada failed to comply strictly with the requirements of the *Indian Act*, breached its fiduciary obligation to the First Nation by the manner in which it obtained the surrender, and violated a requirement of Treaty 4 by failing to obtain the consent of all Kahkewistahaw members interested in the reserve.

In reply, Canada has denied that the legal doctrines of duress, undue influence, unconscionable bargain, or negligent misrepresentation are applicable to *Indian Act* surrenders. Alternatively, even if those doctrines are generally applicable in the surrender context, Canada has denied that the necessary facts exist to support a finding that duress, undue influence, unconscionability, or negligent misrepresentation occurred in this case. Canada has further asserted that the *Indian Act* surrender requirements were essentially complied with; there was no pre-surrender fiduciary obligation under the circumstances of this surrender; even if such a fiduciary obligation existed, it was complied with in any event; and the *Indian Act* surrender requirements were a reasonable expression of the Treaty 4 provision concerning band consent to disposition of reserve lands.

For the reasons that follow, we agree with the Kahkewistahaw First Nation that the Government of Canada breached fiduciary obligations owed to these aboriginal people. The government not only failed in its obligation to protect the Kahkewistahaw Band but served in fact as a cunning intermediary in procuring a surrender that can only be described as unconscionable and tainted in its concept, passage, and implementation.

MANDATE OF THE INDIAN CLAIMS COMMISSION

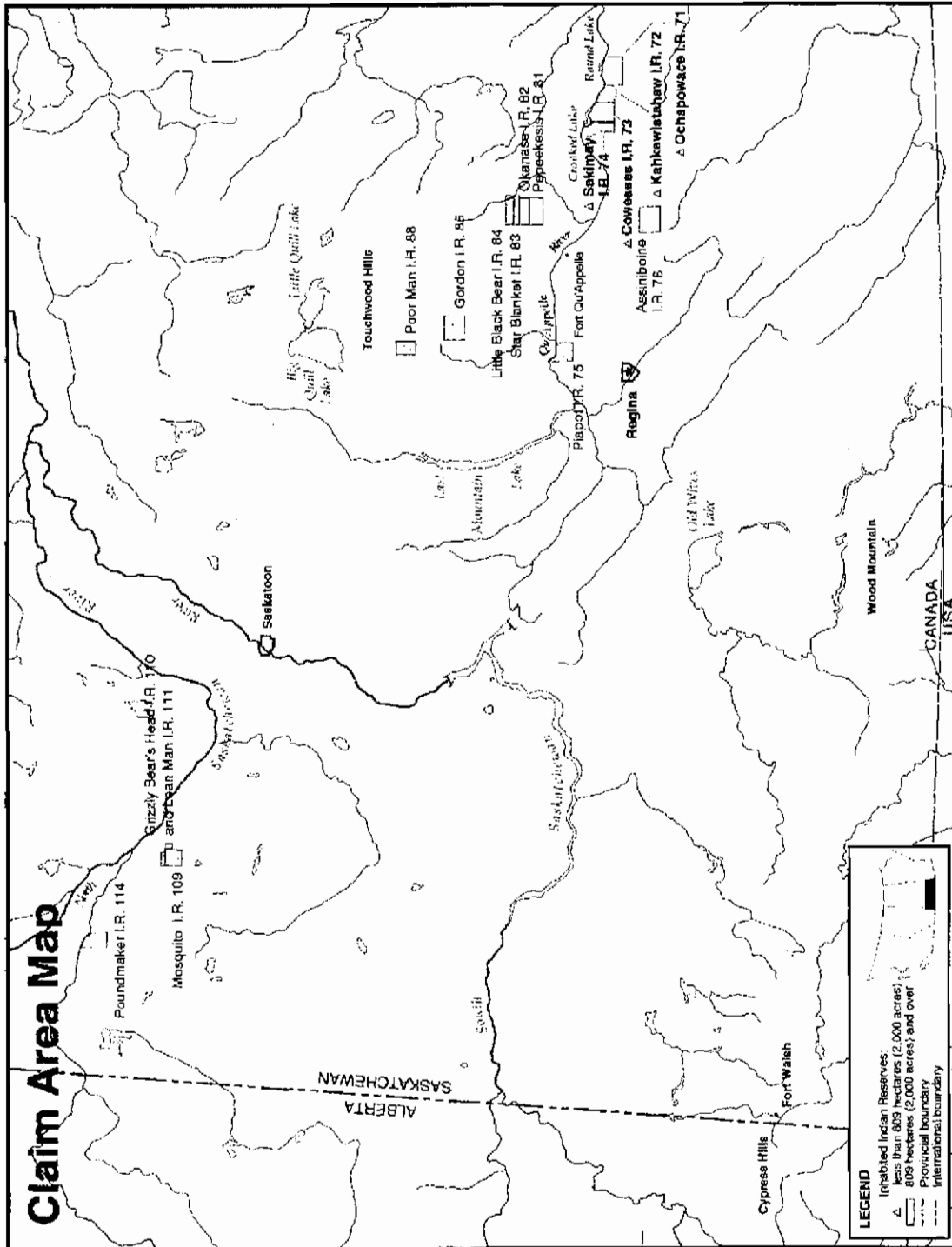
The mandate of this Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where that claim has already been rejected by the Minister. . . ." ¹⁰ The role of the Commission in this inquiry is to determine whether the claim of the Kahkewistahaw First Nation should be accepted by Canada for negotiation under the Specific

¹⁰ Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

Claims Policy. This policy, outlined in the 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding “lawful obligation” on the part of the federal government. A “lawful obligation” specifically includes claims based on “[a] breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.”¹¹

Our task in the present inquiry is to assess the validity of Kahkewistahaw’s claim in light of the Specific Claims Policy. In short, the issue is to determine whether Canada owes an outstanding lawful obligation to the First Nation arising out of the circumstances of the 1907 surrender. We have concluded that it does.

¹¹ Department of Indian Affairs and Northern Development [hereinafter DIAND], *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in [1994] 1 ICCP 171-85 [hereinafter *Outstanding Business*].



PART II

THE INQUIRY

We begin with an examination of the historical evidence relevant to Kahkewistahaw's claim, including the documentary record and the testimony of the Crooked Lake elders during the community session conducted on May 3, 1995, on the Kahkewistahaw reserve. At that session, the Commission received evidence from seven members of the First Nation, including Mervin Bob, Joseph Crowe, Steven Wasacase, George Wasacase, Charles Buffalocalf Sr, Margaret Bear, and Ernest Bob. The Commission also heard from David Hoffman, a professional agrologist, appraiser, and land management consultant, who presented a report comparing the soil quality of the surrendered lands with that of the lands retained by the First Nation.¹²

The parties each submitted written arguments to the Commission on January 26, 1996, before making oral submissions at the final session in Saskatoon on February 1, 1996. The written submissions, documentary evidence, transcripts, and the balance of the record of this inquiry are referenced in Appendix A of this report.

HISTORICAL BACKGROUND

Canadian Indian Policy

The surrender of 33,281 acres of reserve land by the Kahkewistahaw Band in 1907 did not occur in an historical vacuum. Kahkewistahaw and Canada had already established a relationship through a treaty signed 33 years before the specific events of concern in this inquiry.

Prior to the establishment of formal treaty relations between the Crown and Kahkewistahaw in 1874, Canada had already adopted clear Indian policies that were applied to the Indians of the West as they had been to their

¹² Hoffman & Associates Ltd, "Comparison of Soils between Surrendered and Non-Surrendered Areas of Kahkewistahaw," undated (ICC Documents, pp. 802-57).

counterparts in eastern Canada, notwithstanding that special policies had been proposed to deal with the unique conditions on the prairies.¹³ The immediate goal of the government was to place Indians under federal protection and influence in order to “civilize” them through education, Christian instruction, and agricultural training. The longer-term goal was to assimilate them into the general population once they no longer needed the shelter and guidance of the dominion government. This policy of the “Bible and the plough” was explicitly modelled on the approach taken in Upper and Lower Canada in the years before Confederation, and was based on the creation of federally protected reserves of sufficient size and adequate quality for economically viable agricultural production.¹⁴

As white settlement encroached on traditional Indian lands and buffalo became scarce, it became apparent that the traditional hunting way of life of the Plains Indians could not long survive. Treaties initiated by Canada and consummated with the Plains Indians required the Indians to cede their aboriginal rights over huge tracts of land in exchange for, among other things, promises of reserve lands, agricultural implements, and farming instruction. The goal of these treaty promises by Canada was to provide Indians with an alternative economic base and to situate them in areas where they might sell their agricultural produce to nearby non-Indian communities. At the same time, it was decided that, until the Indians had become more sophisticated in matters of commerce, they should be protected by implementing safeguards for the disposal of their reserve lands.

To this end, the *Indian Act* was introduced to continue statutorily the policy of the *Royal Proclamation* of 1763 that no Indian reserve land could be sold or leased to third parties until it had first been surrendered by the band to the federal Crown. Treaty Commissioner Alexander Morris (who was also the Lieutenant Governor of Manitoba, the North-West Territories, and Keewatin) reflected this view as follows:

-
- 13 Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 52-54, describes those policies as calling for the introduction of cattle before attempting to teach agricultural techniques; credit at stores where Indians could obtain necessities; larger reserves located farther from non-Indian settlements; greater annuities; preferential hiring policies for Indians in the police and military; a border patrol, among other things, to protect the remaining buffalo herds; and the creation of a special fund for Indian welfare from the sale of dominion lands. In hindsight, these policy proposals seem eminently sensible, especially in light of what actually transpired on the prairies.
- 14 See John L. Tobias, “Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy,” and John S. Milloy, “The Early Indian Acts: Developmental Strategy and Constitutional Change,” in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 127, 145, and 323. See also John Leslie and Ron Maguire, eds., *The Historical Development of the Indian Act*, 2d ed. (Ottawa: DIAND, Treaties and Historical Research Branch, 1978).

I regard the system as of great value. It at once secures to the Indian tribes tracts of land, which cannot be interfered with, by the rush of immigration, and affords the means of inducing them to establish homes and learn the arts of agriculture. I regard the Canadian system of allotting reserves to one or more bands together, in the localities in which they have had the habit of living, as far preferable to the American system of placing whole tribes, in large reserves, which eventually become the object of cupidity to the whites, and the breaking up of which, has so often led to Indian wars and great discontent even if warfare did not result. The Indians have a strong attachment to the localities in which they and their fathers have been accustomed to dwell, and it is desirable to cultivate this home feeling of attachment to the soil. . . . Besides, the fact of the reserves being scattered throughout the territories, will enable the Indians to obtain markets among the white settlers, for any surplus produce they may eventually have to dispose of. . . . Any premature enfranchisement of the Indians, or power given to them to part with their lands, would inevitably lead to the speedy breaking up of the reserves and the return of the Indians to their wandering mode of life, and thereby to the re-creation of a difficulty which the assignment of reserves was calculated to obviate. There is no parallel between the condition of the North-Western Indians and that of the Indians who have so long been under the fostering care of the Government in the older Provinces of Ontario and Quebec.¹⁵

The notion of Crown protection of Indian reserve land, as referred to in the comments of Commissioner Morris, was not new: it had been a central feature of imperial and later colonial policy and had been explicitly adopted by the new dominion government.¹⁶ Thus, at Confederation, the Secretary of State of the new Dominion of Canada became the Superintendent General of Indian Affairs and almost immediately took legal and administrative control of Indian lands through Canada's first national Indian land legislation.¹⁷ Additional legislation in 1868 reflected the civilization and assimilation policy mentioned above, the goal of which was to facilitate the enfranchisement of individual male Indians who from the degree of "civilization" they had attained were worthy of this privilege of being released from Indian status in exchange for full citizenship and voting rights. With enfranchisement, a portion of the reserve lands could be freed from government protection, and

15 Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based* (Toronto: Belfords, Clarke and Co., 1880; facsimile reprint, Saskatoon: Fifth House Publishers, 1991), 287-88.

16 See the following legislation: *An Act for the Protection of the Lands of the Crown in This Province from Trespass and Injury*, RSUC 1792-1840 (1839, c. 15); *An Act for the Better Protection of the Lands and Property of the Indians of Lower Canada*, Province of Canada, Statutes 1850, c. 42; *An Act for the Protection of the Indians in Upper Canada from Imposition, and the Property Occupied or Enjoyed by Them from Trespass and Injury*, Province of Canada, Statutes 1850, c. 74; *An Act respecting the Management of Indian Lands and Property*, SC 1860, c. 151.

17 *An Act Providing for the Organization of the Department of the Secretary of State of Canada and for the Management of Indian and Ordnance Lands*, SC 1868, c. 42.

could eventually become fee simple land.¹⁸ In 1868, a separate department responsible for Indian Affairs (the Department) was established, first as a branch under the Secretary of State and later under the Minister of the Interior before becoming a full-fledged department in its own right in 1880. Local Indian agents, vested with many of the new powers of the Superintendent General, were appointed to ensure the uniform and effective application of Canadian Indian policy.¹⁹

Treaty 4 (1874)

The historical context for the signing of Treaty 4 has been dealt with by the Commission in its March 1996 report into the treaty land entitlement claim of the Kawacatoose First Nation and in the more recent report into Kähköwistahaw's treaty land entitlement claim.²⁰ The context for the negotiations and excerpts from the actual discussions are set out as follows in the Kawacatoose report:

The early 1870s represent a period of great transition among the Indian nations that resided within the 75,000 square mile area of Treaty 4. The disappearance of the buffalo had been foreseen, white settlers were moving into the area, and some bands were taking steps to convert from the life of "plains buffalo hunters to reserve agriculturalists." Other bands were becoming more nomadic, moving freely back and forth across the U.S. border in pursuit of buffalo – a staple of the aboriginal diet and way of life. However, the increasing scarcity of buffalo led to periods of hardship and starvation, as well as greater competition and, ultimately, intertribal warfare over the remaining animals. As noted in the report prepared for this inquiry by the OTC [Office of the Treaty Commissioner]:

Conflict between Assiniboine, Blackfoot, Gros Ventre, Crow and Sioux was common in the nineteenth century as well as conflict between Indians and non-Indians. The white settlers were not sympathetic to the plight of the Indians and often ignored their rights. The Indian practice of horse stealing, which was common between tribes, angered whites. The illicit whisky trade in which traders sold whisky to the Indians in exchange for buffalo robes or other commodities further exacerbated the violence. The Cypress Hills massacre was an example of the type of violence that occurred in this period.

18 *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act 31st Victoria, chapter 42*, SC 1869, c. 6, ss. 13-16.

19 SC 1880, c. 28, ss. 4-9.

20 See Indian Claims Commission, *Kawacatoose First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996), now reported at (1996) 5 ICCP 73; Indian Claims Commission, *Kähköwistahaw First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, November 1996).

Moreover, the survey operations of the Boundary Commission and the steps associated with erecting a proposed telegraph line west of Fort Garry were starting to affect this territory, "all which proceedings are calculated to further unsettle and excite the Indian mind, already in a disturbed condition. . . ."

Alexander Morris was Lieutenant Governor of the area which then comprised Manitoba and the North-West Territories, including present-day Saskatchewan. Together with David Laird, the federal Minister of the Interior, and W.J. Christie, a retired factor with the Hudson's Bay Company, Morris was commissioned by the Government of Canada to make treaties with Indian nations in the southern "Fertile Belt."

At Lake Qu'Appelle in September 1874, the three Commissioners negotiated with the assembled Chiefs for six days to encourage the initially reluctant Indian leaders to accept the benefits of treaty in exchange for ceding Indian rights in the lands encompassed by Treaty 4. Morris reported the concerns expressed by the Chiefs at these meetings, particularly over what was perceived by the Indians to be the unfairly advantageous position of the Hudson's Bay Company at that time, but also over the rights of present and future generations of the aboriginal peoples. On September 11, 1874, the third day of the conference, Morris gave the Chiefs the following assurances:

The Queen cares for you and for your children, and she cares for the children that are yet to be born. She would like to take you by the hand and do as I did for her at the Lake of the Woods last year. We promised them and we are ready to promise now to give five dollars to every man, woman and child, as long as the sun shines and water flows. We are ready to promise to give \$1,000 every year, for twenty years, to buy powder and shot and twine, by the end of which time I hope you will have your little farms. If you will settle down we would lay off land for you, a square mile for every family of five. . . .

The next day Morris stated:

[. . . The Queen thinks of the children yet unborn. I know there are some red men as well as white men who only think of to-day and never of to-morrow.] The Queen has to think of what will come long after to-day. Therefore, the promises we have to make to you are not for to-day only but for to-morrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the oceans. When you are ready to plant seed the Queen's men will lay off Reserves so as to give a square mile to every family of five persons . . . [, and on commencing to farm the Queen will give to every family cultivating the soil two hoes, one spade, one scythe for cutting the grain, one axe and plough, enough seed wheat, barley, oats and potatoes to plant the land they get ready. The Queen wishes her red children to learn the cunning of the white man and when they are ready for it she will send schoolmasters on every Reserve and pay them. We have come through the country for many days and we have seen hills and but little wood and in many places little water, and it may be a long time before there are many white men settled upon

this land, and you will have the right of hunting and fishing just as you have until now until the land is actually taken up. . . . I think I have told you all that the Queen is willing to do for you.]²¹

On September 15, 1874, the final day of the conferences, Morris convinced Chief Kahkewistahaw, or “He Who Flies Around,” and 12 other chiefs and headmen of Cree and Saulteaux bands in the area to sign Treaty 4.

The “reserve clause” in Treaty 4 set forth Canada’s obligation to provide reserve land to Indian bands:

And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty’s Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families. . . .²²

With respect to the alienability of reserve land, Treaty 4 continued:

. . . provided, however, that it be understood that, if at the time of the selection of any reserves, as aforesaid, there are any settlers within the bounds of the lands reserved for any band, Her Majesty retains the right to deal with such settlers as She shall deem just, so as not to diminish the extent of land allotted to the Indians; and provided, further, that the aforesaid reserves of land, or any part thereof, or any interest or right therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained, but in no wise shall the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves.²³

Treaty 4 also provided that members of signatory bands would be entitled to receive cash annuities, material aid in the form of farm implements and livestock, and agricultural instruction, among other things. As the Commission noted in the Kawacatoose report, “[t]he farm implements and livestock, together with a band’s allocation of reserve land, were important to enable the band to develop a new economy based on agriculture.”²⁴

21 See ICC, *Kawacatoose First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996), 5 ICCP 73 at 96-99. Footnote references omitted.

22 *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu’Appelle and Fort Ellice* (Ottawa: Queen’s Printer, 1966), 6 (ICC Documents, p. 2).

23 *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu’Appelle and Fort Ellice* (Ottawa: Queen’s Printer, 1966), 6 (ICC Documents, p. 2).

24 ICC, *Kawacatoose First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996), 5 ICCP 73 at 100.

That the Indians in this area of Saskatchewan were serious about farming is shown clearly by the fact that, one year following the signing, some of the bands from the Qu'Appelle area sent a message to Lieutenant Governor Morris in Winnipeg requesting the agricultural implements promised in the treaty.²⁵ For several years thereafter, usually at the time of the annual treaty annuity payments, the Treaty 4 bands continued their original demands, even to the point of collectively voicing their concerns to the Governor General, the Marquis of Lorne, on the occasion of his 1881 visit to the North-West Territories. At that time they complained about the hardship they were experiencing as a result of hunger and privation, assured him of their commitment to farming, and implored him to arrange for more work oxen, tools, and equipment to be provided to them under their treaty.²⁶

Twenty-six years after signing Treaty 4 at Lake Qu'Appelle, Chief Kahkewistahaw would have occasion, when approached by Indian Commissioner David Laird in 1902 about the possibility of the Band surrendering part of its reserve, to remind the Crown of its treaty promises. Kahkewistahaw admonished Commissioner Laird: "We were told to take this land and we are going to keep it."²⁷

The Kahkewistahaw Reserve

At the time of signing Treaty 4, the nomadic existence of the Kahkewistahaw Band was centred in southwestern Saskatchewan near the Cypress Hills. The Band's members apparently had no experience whatsoever with agriculture. Made up primarily of Plains Cree with some Saulteaux members, the Band depended more on the buffalo than did the other bands that settled on reserves at Crooked Lake.

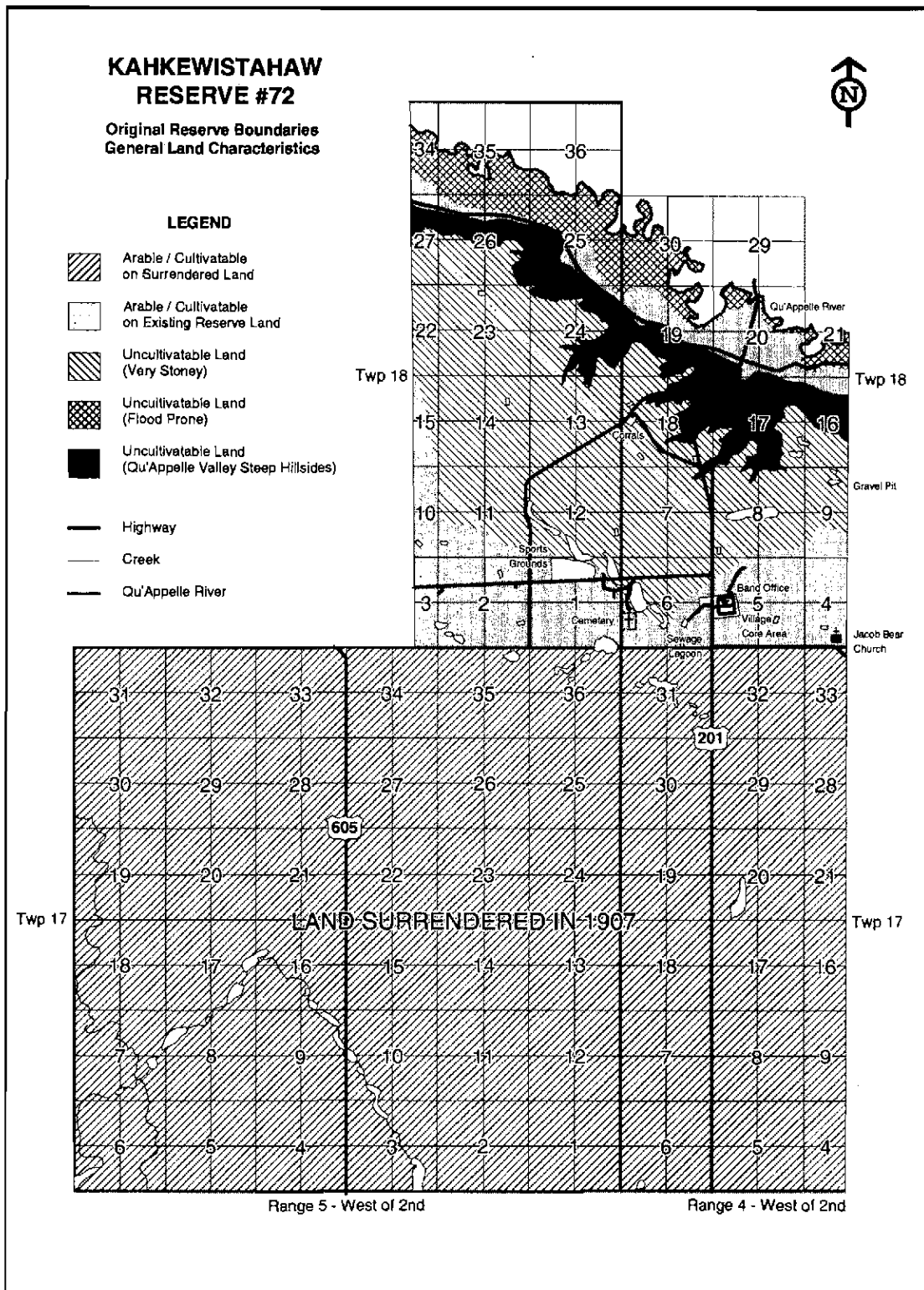
Chief Kahkewistahaw was from a prominent and well-respected family. His father, Le Sonnant, had signed the Selkirk Treaty of 1817 in Manitoba, and his brother, The Fox, was a well-known Cree leader in his own right.²⁸ As the years passed, the esteem with which Chief Kahkewistahaw's own people

25 Telegram of July 10, 1875, from Lieutenant Governor Alexander Morris to Superintendent General David Laird, and reply of July 12, 1875, from Laird to Morris, NA RG 10, vol. 3622, file 5007. The story of Canada's response to these early requests for assistance is told by Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 63-65.

26 Address of the Qu'Appelle Chiefs to the Governor General, NA, RG 10, vol. 3768, file 33,642.

27 David Laird, Indian Commissioner, to J.D. McLean, Secretary, Department of Indian Affairs, May 6, 1902, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 175-77).

28 The Kahkewistahaw Band is described in Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 47.



regarded him was repeatedly demonstrated, and Department officials also viewed him as being of particularly sound judgment. Kahkewistahaw healed the early divisions in the Band over the government's reserve policy and persuaded his people to stay out of the 1885 Riel Rebellion, even to the point of leaving the reserve to retrieve a number of young warriors who had joined rebellious Chiefs. In recognition of his leadership role, Kahkewistahaw was invited to Ottawa after the conclusion of hostilities and was well received there.²⁹

Between 1874 and 1880, the Kahkewistahaw Band returned to the Qu'Appelle Valley each year to receive treaty annuity payments. William Wagner surveyed an area of 41,414 acres for Kahkewistahaw in 1876, but the evidence shows that the Band never lived on or used this land, and thus never accepted it as a reserve. Instead, Kahkewistahaw and his people chose to pursue what was left of their traditional buffalo hunting economy in the Cypress Hills.

Subsequently, Allan Poyntz Patrick and his assistant, William Johnson, were commissioned in 1880 to survey the reserves of those bands desiring them, and Kahkewistahaw was one such band. In our recent report dealing with Kahkewistahaw's treaty land entitlement claim, we concluded that Patrick and Johnson started, but likely did not complete, the survey of Kahkewistahaw's reserve in 1880. The following year, in 1881, John C. Nelson surveyed Kahkewistahaw Indian Reserve (IR) 72 and provided the Band with a fishing station, which was later replaced with the 96-acre IR 72A in 1884. These two reserves were eventually confirmed by Order in Council on May 17, 1889. In total, Kahkewistahaw received 46,816 acres of land, sufficient for 365 people under the Treaty 4 formula of 128 acres per person. In the ensuing years, reports by the Indian agents confirmed the overall quality of the Band's lands, noting in particular the timber stands in the gulches and the relatively high calibre of the hay fields on the southern portion of the reserve which was later surrendered.³⁰

29 The story of Kahkewistahaw's role in the Riel Rebellion is related in Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, pp. 17-20 (ICC Exhibit 18).

30 For instance, in the 1899 *Annual Report* the agent described the Kahkewistahaw reserve as "undulating prairie of fair quality interspersed with ponds and hay sloughs, dotted here and there with bluffs of poplar. There are some very good hay lands on the prairie in the southern part": Canada, Parliament, *Sessional Papers*, 1899, No. 14, p. 140.

Farming on the Kahkewistahaw Reserve

Following the survey of IR 72 in 1881, Kahkewistahaw's economy slowly evolved from almost complete dependence on government rations and assistance to a relatively self-sustaining mixed farming operation. This evolution occurred notwithstanding several hurdles – some natural, others man-made – that obstructed the Band.

Hayter Reed, in his role as Indian Commissioner and then as Deputy Superintendent General, was one of the primary architects and administrators of prairie Indian policy during the period under review in this report.³¹ Reed's farm policies are of particular interest in this inquiry.

Although not as well known for farming as their neighbours on the Cowessess reserve, members of the Kahkewistahaw Band were generally willing to embrace agriculture as the means by which they would make the necessary adjustment to the new conditions of life confronting them. Thus, when faced in 1883 with the pending closure of the Department's home farm instruction program that had begun only a few years before, Band members specifically asked the visiting Inspector of Indian Agencies for a teacher for their children, as well as a resident farm instructor, who would be designated solely for their instruction.³² As a result of this and similar requests from other bands across the prairies, the farm instruction program was renewed in 1885 and more and better equipment was supplied by the Department. Eventually, a farming instructor was assigned to the four reserves making up the Crooked Lake Agency – Kahkewistahaw, Cowessess, Ochapawace, and Sakimay.

Although it appears from the early reports that some of Kahkewistahaw's members were slow to abandon their buffalo-hunting traditions and to embrace farming, later reports indicate that, in relatively short order, farming became the main economic activity at Kahkewistahaw, as on the other Crooked Lake reserves.³³ Departmental statistics indicate that, as early as

31 Reed began his career as an Indian agent in the Battleford area in 1881, rising to Assistant Commissioner in 1884 and to Indian Commissioner in 1888. He later replaced Lawrence Vankoughnet as Deputy Superintendent General in 1893. The office of Indian Commissioner is succinctly described in Brian Tidle, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 11: "The Commissioner of Indian Affairs was the principal official of the Indian Branch (later, the Department of Indian Affairs) on the Prairies. Under his guidance the provisions of the treaties were administered. He organized the surveying of reserves and the settlement of Indians on them. A complex bureaucracy of Indian agents and agency inspectors was created to carry out his instructions in the far-flung corners of his domains. The Commissioner, in turn, reported to headquarters of the Indian branch in Ottawa."

32 Report to the Superintendent General of Indian Affairs, July 6, 1883, in Canada, Parliament, *Sessional Papers*, no. 4, "Annual Report of the Department of Indian Affairs," 1883, 117-18.

33 See, for example, the agricultural acreage graphs compiled by Sarah Carter in "Two Acres and a Cow: 'Peasant' Farming for the Indians of the Northwest, 1889-1897," in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 371-72.

1884, for instance, 12 of the 49 families on the Kahkewistahaw reserve were farming a total of 55 acres.³⁴ Nor were Band members lacking ambition when it came to learning how to farm. Indian Agent Alan McDonald reported in 1889, for example – after almost the entire wheat crop had been destroyed by drought – that Band members, although discouraged, were not ready to give up and were already turning the soil over in anticipation of a better season the following year.³⁵ In 1901 Indian Agent Magnus Begg made similar comments, reporting that Kahkewistahaw's members were neither lazy nor unwilling to learn and apply agricultural techniques.³⁶

Despite the effort Kahkewistahaw's people may have brought to this new enterprise, farming on the prairies was a difficult undertaking. This was as true for the settlers as it was for the apprentice Indian farmers. Unlike the lands in eastern Canada, those in the West were extremely dry and, because of the harsh climate, the growing season was relatively short. In addition, as Sarah Carter describes, there were other problems that were unique to the fledgling Indian farmers:

Some of these problems were those experienced by all early settlers – drought, frost, hail, and prairie fire, an absence of markets, and uncertainties about what to sow, when to sow, and how to sow. There were other problems that were not unique to the Indians but were likely magnified in their case. For example, reserve land often proved to be unsuitable for agriculture. Indian farmers also had limited numbers of oxen, implements, and seed: the treaty provisions for these items were immediately found to be inadequate. Indians were greatly hampered in their work because they lacked apparel, particularly footwear. They were undernourished, resulting in poor physical stamina and vulnerability to infectious diseases.³⁷

Until the introduction of Marquis wheat, with its shorter maturation period, in 1911, the longer growing season required by Red River Settlement wheat and Red Fife wheat meant that wheat crops were susceptible to the severe and unpredictable weather conditions. Drought, frost, and hail, for

34 This acreage compares favourably with the Cowessess Reserve, where 16 of 70 families farmed a total of 86 acres, and with Ochapawace, where 18 of 69 families farmed 74 acres of reserve land: Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), Appendix 2; Canada, Parliament, *Sessional Papers*, 1884, vol. 18, no. 3, "Annual Report of the Department of Indian Affairs," 1884, 192-205.

35 Report from Alan McDonald to Indian Commissioner, July 27, 1889, NA, RG 10, vol. 3761, file 32182.

36 Report from Magnus Begg to Superintendent General, July 31, 1901, in Department of Indian Affairs, *Annual Report*, 1901, 141-45.

37 Sarah Carter, "Two Acres and a Cow: 'Peasant' Farming for the Indians of the Northwest, 1889-1897," in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 354.

instance, damaged crops at the Crooked Lake Agency regularly throughout the 1880s and 1890s and into the 20th century. So difficult were the conditions that many farmers, including non-Indians, gave up during this time and abandoned farming completely.³⁸

Despite the recurrent problems, wheat became and remained Kawkewistahaw's staple crop throughout the period leading up to the surrender in 1907, accounting for half the recorded acreage under cultivation on the reserve. From 12 acres of wheat in 1882, the cultivated area grew to 90 acres by 1887 and to 100 acres in 1891, remaining at nearly that level until 1895. Exceptionally, in 1892, more than 150 acres of wheat were seeded, while in 1899 the figure was approximately 115 acres.³⁹ Other crops were also planted, including oats, barley, and rye, as well as garden vegetables, such as potatoes and turnips.⁴⁰ Although their farms were usually small, "[t]he great majority of the men on the Kawkewistahaw Reserve engaged in some form of farming; in the typical year between 1886 and 1895, two-thirds of the adult males had a farm of some sort, and this was a significantly greater proportion than on the more successful Cowessess Reserve."⁴¹ For reasons that will be set out below, the acreage under cultivation on the Kawkewistahaw reserve, as on others, began to decline in the late 1890s and never recovered to former levels.

It must be recalled that, because of the effects of disease (primarily tuberculosis), band populations in the West at that time were in decline. Between 1883 and 1886, the Kawkewistahaw population fell from 274 to 183 (and continued to fall thereafter, albeit less dramatically), something departmental officials attributed primarily to disease.⁴² In 1886, Kawkewistahaw had 20 men farming, and in 1895 there were 23.⁴³ By 1906, however, Indian Agent Matthew Millar reported that only five members of the Band could be called grain farmers. By the same token, however, he also observed that other

38 On the basis of his review of departmental *Annual Reports* and *Sessional Papers*, Ken Tyler concluded that "on the Crooked Lakes Agency, crops were damaged by drought in 1886, 1887, 1889, 1891, 1894, 1897, 1898, and 1900. In 1884, 1890, 1891, 1895, 1898, 1899, and 1904, they suffered from frost. And in 1888 and 1900, there was damage due to hail": Ken Tyler, "The Government of Canada and Kawkewistahaw Band," undated, p. 30 (ICC Exhibit 18).

39 Ken Tyler, "The Government of Canada and Kawkewistahaw Band," undated, pp. 33-34 (ICC Exhibit 18).

40 Ken Tyler, "The Government of Canada and Kawkewistahaw Band," undated, p. 34 (ICC Exhibit 18).

41 Ken Tyler, "The Government of Canada and Kawkewistahaw Band," undated, p. 34 (ICC Exhibit 18).

42 Ken Tyler, "The Government of Canada and Kawkewistahaw Band," undated, p. 26 (ICC Exhibit 18). With respect to the ravages of disease, see Sarah Carter, "Two Acres and a Cow: 'Peasant' farming for the Indians of the Northwest, 1889-1897," in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 354.

43 Ken Tyler, "The Government of Canada and Kawkewistahaw Band," undated, p. 34 (ICC Exhibit 18).

members kept cattle and that “[m]ost of these Indians put up a good supply of hay.”⁴⁴

These were not the only obstacles facing prairie Indian farmers. At the beginning of the home farm instruction program in the late 1870s, the farm instructors themselves, recruited primarily from eastern Canada, were largely ignorant of the conditions on the prairies.⁴⁵ Local settlers also opposed the instruction program because they thought it gave Indian farmers false expectations and an unfair commercial advantage over their non-Indian competitors. For instance, in his annual report in 1888, Indian Commissioner Reed noted that “serious complaint has been made by some settlers of the effect of this competition upon them.”⁴⁶ At that time, prairie newspapers often carried stories condemning the government for unfairly assisting Indians to the detriment of white farmers.⁴⁷ This was particularly unwelcome publicity in the years immediately after the Riel Rebellion and at a time when the government was attempting to attract more settlers to populate the prairies.

In light of the actual conditions, the perception that Indian farmers were in competition with the settlers hardly seems sustainable. At the outset, the Indians were not only unskilled, but received instruction and implements that were often substandard. The Canadian-manufactured ploughs provided in the late 1870s and early 1880s, for example, were clearly inferior to models produced in the United States, and they tended to break easily in the tough prairie soil. Nonetheless, the Department refused to request tenders on superior American-made ploughs until after 1882.⁴⁸ Similarly, the oxen provided for ploughing and related purposes were often unsuitable, being either freight animals that had never been used for ploughing or completely unbroken animals. The Department simply did not provide enough farming equipment or animals for practical farming operations. Commissioner Edgar Dewdney admitted as much in 1884, noting that “the want of more teams and implements is found from one end of the territory to another” and that the Treaty 4 area was particularly deficient in this respect.⁴⁹

44 Report of June 30, 1906, from Indian Agent M. Millar to Superintendent General, in Department of Indian Affairs, *Annual Report*, 1906, 125-26.

45 Inspector Wadsworth to Superintendent General, December 9, 1882, in Canada, Parliament, *Sessional Papers*, 1883, No. 5, Department of Indian Affairs, *Annual Report*, 1882, 190.

46 Reed to Superintendent General, October 31, 1888, in Canada, Parliament, *Sessional Papers*, 1889, No. 16, Department of Indian Affairs, *Annual Report*, 1888, 127.

47 See the examples given by Sarah Carter in *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 187-88.

48 Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 95.

49 Dewdney to Superintendent General, January 1, 1882, in Department of Indian Affairs, *Annual Report*, 1881, 41.

Although many of these problems were reduced or overcome through improvements in the farm instruction program and advances in farming techniques, there were others that required considerable local effort and ingenuity. For example, a major hindrance to Kahkewistahaw's success was the absence of a natural market for wheat and other farm produce of the Crooked Lake Agency – something Reed readily admitted.⁵⁰ Crooked Lake farmers, in addition, had difficulty getting their wheat ground into flour, so any wheat harvested was almost useless to them for food or commercial purposes until they could get it ground. At the beginning of Kahkewistahaw's farming efforts in the 1880s, all grain had to be shipped to a mill 80 miles away. Owing to the efforts of Indian Agent McDonald, a grist mill was finally constructed in 1891 and located on the Cowessess reserve. Department funds were used to buy the equipment and materials required, with Indian labour accounting for a considerable portion of the actual construction. Grinding began in 1892 and, within a short period of time, the Crooked Lake Bands were able not only to cut their own grinding costs in half but to offer milling services to nearby non-Indian farmers.⁵¹

Beginning in the late 1880s, the farmers on the Kahkewistahaw reserve were sufficiently confident in their enterprise that they began purchasing equipment out of the proceeds of their own grain sales. In 1888, the Band bought a binder. Over the years, the Crooked Lake Bands purchased additional equipment of all sorts from their own funds, assisted by McDonald, who had obtained a concession from the Massey-Ferguson farm equipment company and scrupulously applied the profits exclusively for the benefit of the agency's farming operations. Between 1889 and 1896, the Kahkewistahaw Band alone bought a binder, four mowers, three rakes, and seven wagons, as well as smaller equipment and tools.⁵²

Raising livestock was another vocation that Kahkewistahaw's members undertook with enthusiasm shortly after the Band moved onto its Crooked Lake reserve. The oxen called for in Treaty 4 began arriving in the early 1880s, and soon both dairy and beef cattle herds became a prominent aspect of the Band's overall agricultural efforts. By 1896, the Band had a herd of 157 animals, more than half of them beef cattle and the rest either work oxen or dairy cows. Unlike grain, beef found a ready market in nearby Broadview, and the Department also purchased beef for rations. The Crooked

⁵⁰ Hayter Reed to Superintendent General, February 27, 1884, NA, RG 10, vol. 3666, file 10181.

⁵¹ Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, p. 37 (ICC Exhibit 18).

⁵² The purchases of the Kahkewistahaw Band are described in Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, pp. 39, 40, and 43 (ICC Exhibit 18).

Lake Bands made serious efforts at that time both to increase their production of beef cattle and to improve the stock. To this end, the agency acquired pedigreed bulls in 1890 and in 1893, and Kahkewistahaw obtained another bull for its own use in 1902.⁵³ Official reports from the time show that Band members were interested in cattle production and were motivated to keep their animals in good shape.⁵⁴

Raising livestock required good hay lands, something that Kahkewistahaw had in abundance on the southern part of its reserve – the part surrendered in 1907. The sloughs at the south end of the reserve were not only sufficient for the Band's hay needs but yielded even in dry years an excess that could be sold on the Broadview market for a small profit. Such enterprise, however, prompted Indian Agent Begg to deny the Band a permit to sell its hay and wood, because he and other officials were determined to satisfy their own needs at prices they could set. The amount of hay cut by the Band rose steadily over the years – from 85 tons in 1882 to 350 tons by 1895 – providing a welcome source of income to Band members who still relied, to some extent at least, on rations and other forms of government assistance.⁵⁵

The Changing Relationship between the Crown and the Band

To ensure that Indians were not without civilized guidance, Indian agents were appointed in every treaty area on the prairies. Their broad administrative and quasi-judicial powers made them figures of considerable local power and influence and highlighted the waning autonomy of First Nations under Canadian Indian policy. Helen Buckley describes the agency system as follows:

A network of agents had charge at the local level, each responsible for one or more reserves, and they were powerful figures in their own right, given the primitive communications of the day. These were the men who saw the farm programs implemented, enforced school attendance, allocated housing, and dealt with domestic disputes and a great many other matters. They wrote full reports to Ottawa on both the progress and the problems of their charges. Some agents were dedicated men who did the best they could within the limits of the system; some were political appointees,

⁵³ Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, pp. 47-48 (ICC Exhibit 18).

⁵⁴ See Department of Indian Affairs, *Annual Report*, 1888, 67; 1889, 64; 1892, 158-59; 1898, 134-35; 1901, 142; 1902, 139; 1903, 158; 1905, 123; and 1907, 123.

⁵⁵ Fifteen per cent of the Band membership were regularly in receipt of rations in 1896, with others falling back on department support as the need arose. A few years later, the aged and sick were reported by agent Wright to be the only ones drawing regular rations. Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, pp. 49 and 57 (ICC Exhibit 18).

poorly educated and unsuited for the job; a few were rogues, intent on profiting from their position.⁵⁶

In their testimony before this Commission, elders from the Crooked Lake area recalled the power and influence of the Indian agents over a wide spectrum of band life well into the 20th century: “. . . the Indian agent was a policeman, sometimes a doctor, he was a guardian, and he was – he was everything.”⁵⁷

After the 1885 Riel Rebellion, the Department decided that stricter supervision needed to be exercised over prairie Indians, particularly the Cree of Saskatchewan. The territories for which individual agents were responsible were reduced in size – the two Indian agencies in Saskatchewan were increased to 10 – and an Indian agent was designated specifically to the Crooked Lake reserves, with his agency office located at Cowessess.⁵⁸ The first Crooked Lake Indian Agent was Alan McDonald, a former soldier who had been present at the signing of Treaty 4 and who served as Indian agent until his retirement from the Department. He was succeeded in 1896 by J.P. Wright, who served a few years until being replaced by Magnus Begg. Begg's death in 1904 led to the appointment of Matthew Millar, who was the Indian Agent at the time of the 1907 surrender at issue in this inquiry.

Departmental regulations required Indians in the Prairie Provinces to obtain permits from the Indian Agent to sell their own agricultural produce,⁵⁹ an authority sometimes exploited by the agents for reasons unconnected to the official rationale of protecting unsophisticated Indians from unscrupulous buyers. For instance, in 1903, Begg refused to give a permit to the neighbouring Cowessess Band; in so doing, he forced its members to sell hay and timber to agency officials at relatively low prices, rather than selling on the open market where better prices could have been obtained.⁶⁰

Since the Crooked Lake Bands were still dependent on rations and other forms of assistance from Canada for their survival, rations soon became another means of enforcing compliance with departmental wishes. As Deputy

56 Helen Buckley, *From Wooden Ploughs to Welfare: Why Indian Policy Failed in the Prairie Provinces* (Montreal and Kingston: McGill-Queen's University Press, 1992), 43. See also H.B. Hawthorn, C.S. Belshaw, and S.M. Jamieson, *The Indians of British Columbia: A Study of Contemporary Social Adjustment* (Toronto: University of Toronto Press, 1958), 486.

57 IOC Transcript, May 3, 1995, p. 71 (Margaret Bear).

58 Indian Commissioner E. Dewdney to Superintendent General, June 4 or July 17, 1885, NA, RG 10, vol. 3671, file 68970, pts. 1 and 2. The first agent designated for the entire Treaty 4 area had been W.J. Christie. He was succeeded in 1876 by Angus McKay, who was himself followed by McDonald in 1877.

59 SC 1881, c. 17, ss. 1, 2.

60 Magnus Begg to Deputy Superintendent General, July 14, 1903; Deputy Superintendent General to Indian Agent Magnus Begg, July 23, 1903. Both documents are in NA, RG 10, vol. 8052, file 673/20-7-2-73.

Superintendent General Hayter Reed observed: "To compel obedience when moral suasion failed, the only means of coercion was to stop their rations. . . ."61 There was much suffering from hunger and exposure during the early period, and protests over rations erupted at Cowessess, Sakimay, and Kahkewistahaw. A departmental inspection of the Crooked Lake reserves in 1886 confirmed the problems, noting that "[a]t that time one could scarcely stir without being besieged by Indians asking for help in the way of food."62 According to the elders, the Crooked Lake Bands were never free of the need for rations.⁶³

Similarly, the prairie pass system was implemented to control the movement of prairie Indians and to prevent them from leaving their reserves without permission. It was also used to discourage parents from visiting their children in off-reserve residential schools and to prevent attendance at traditional ceremonies or dances off the reserves.⁶⁴ The recollections of the elders confirm this control,⁶⁵ as do the reports of agents like McDonald, who noted in 1894 that "[t]he practice of visiting other reserves I have firmly repressed. . . ."66

Under a departmental cattle loan program, Indian farmers could borrow a cow or an ox on condition that the animal or its offspring be returned to the Department. Although the farmer could retain either the borrowed animal or its offspring, he could neither sell nor slaughter it without official permission. Moreover, although many Indian farmers also owned cattle privately outside the cattle loan program, the agents also insisted on controlling the Indians' privately owned cattle by having the animals marked with the departmental brand and by levying fines on anyone who sold or slaughtered his own animals without official permission.⁶⁷

Contemporary observers were often shocked at the restrictions and coercive measures applied by the agents to prairie Indians:

61 McGill University, McCord Museum, Hayter Reed Papers, "Address on the Aims of the Government in Its Dealings with the Indians," n.d., p. 25.

62 Alexander McKibbin, "Report to the Superintendent-General of Indian Affairs," in Canada, Parliament, *Sessional Papers*, 1897, No. 14, "Annual Report of the Department of Indian Affairs," 1897, 214.

63 ICC Transcript, May 3, 1995, pp. 18-19 (Mervin Bob).

64 See F.L. Barron, "The Indian Pass System in the Canadian West, 1882-1935," *Prairie Forum* (spring 1988): 21; J.R. Miller, "Owen Glendower, Hotspur, and Canadian Indian Policy," in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto University Press, 1991), 325-27.

65 ICC Transcript, May 3, 1995, p. 98 (Margaret Bear), and p. 100 (Mervin Bob).

66 McDonald to Superintendent General, July 31, 1893, in Department of Indian Affairs, *Annual Report*, 1893, 63; McDonald to Superintendent General, July 20, 1894, in Department of Indian Affairs, *Annual Report*, 1894, 65.

67 Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 169-70.

He cannot go visit a friend on a neighbouring reserve without a permit. He cannot go to the nearest market town unless provided with a permit. In what was his own country and on his own land he cannot travel in peace. He cannot buy and sell without a permit. He may raise cattle but he cannot sell them unless the government official allows. He may cultivate the soil but he is not the owner of his own produce. He cannot sell firewood or hay from the land that is his by Divine and citizen right, and thus reap the result of his own industry unless subject to the caprice or whim of one who often becomes an autocrat. Said an Indian to me a few days since "I raise cattle, they are not mine, my wood I cannot sell – my own hay I cannot do what I would with – I cannot even do as I like with the fish I may catch. How can I become a man?"⁶⁸

Despite these difficulties, Indian farmers made slow but steady progress until the introduction of two new policies – severalty and peasant farming – beginning in 1889. These policies, when coupled with strict supervision by the Indian agents, contributed significantly to the decline in farming activity among Indian farmers on the Crooked Lake reserves.

Indian Commissioner Edgar Dewdney noted that the severalty policy of subdividing reserves into small plots of land to be allocated to individual Indians "has been recognized as the only true one for the development of a sense of individual responsibility, as opposed to the system of communism among the Indians. . . ."⁶⁹ Hayter Reed agreed and, on his appointment as Indian Commissioner, he moved to implement the subdivision of reserves. In his 1888 Annual Report he announced that severalty would hasten individualism among Indians, break down the tribal system, and ultimately make Indian farmers self-sufficient and free of the need for government assistance.⁷⁰

Under the severalty policy, reserves were to be surveyed and subdivided into 40-acre plots for distribution to individual band members, on the rationale that this would allow the best lands to be divided more equitably. By the same token, however, it also led to large tracts of "unused" reserve lands that could then be sold, a goal which local settlers and newspapers

68 John McDougall, "The Future of the Indians," n.d., pp. 6-7, Glenbow-Alberta Institute, McDougall Family Papers, file 11.

69 Dewdney to Deputy Superintendent General Vankoughnet, February 9, 1887, NA, RG 10, vol. 3774, file 37060.

70 Reed to Superintendent General, October 31, 1888, in Department of Indian Affairs, *Annual Report*, 1887, 128.

endorsed⁷¹ and which Reed envisaged as the logical outcome of the policy.⁷² The Crooked Lake reserves were among the earliest to be subdivided, with Kahkewistahaw going first, followed by Cowessess and Sakimay. Ochapawace refused. However, not all reserves in the Treaty 4 area were subject to the severalty policy, nor did Indian farmers necessarily get the best land on those reserves that were subdivided:

In the Treaty Four District, subdivision proceeded only on those reserves that were close to the railway and were attractive for agricultural purposes. The forty acre lots were located on the northern half of these reserves, near the river, on land that was cut by deep ravines in places and was regarded by few as the best for agriculture. . . . In most places, the southern portion that remained undivided had the superior farmland and hay grounds.⁷³

The related peasant farming policy reflected the notion that an Indian farming family should possess only the amount of land it could cultivate using the most primitive of hand tools, most of which were to be manufactured by the family itself. The official goal was to free Indians from “communistic” tribal culture by converting them into European peasant-style subsistence farmers. The thinking was that an Indian farming family ought to need no more than an acre or less of wheat, another acre or so of root crops and vegetables, and a couple of cows. Instead of groups of farmers working cooperatively to purchase, share, and maintain farming machinery to be used in common fields, individual peasant farmers would plant and harvest smaller subsistence crops using simple implements. Their wives and children would assist them in the fields, thereby ensuring that there would be no place for idleness in Indian communities. Although there is evidence that Hayter Reed, the primary architect of this policy, had strong beliefs that social evolution could proceed only in defined stages,⁷⁴ an incident involving settlers

71 See Sarah Carter, “Two Acres and Cow: ‘Peasant’ Farming for the Indians of the Northwest, 1889-1897,” in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 356-57, for a review of the favourable political and public opinion.

72 In response to objections from the Inspector of Surveys in the Department of the Interior, Reed asserted that the subdivision according to the Dominion Lands Survey was being done in anticipation “of the time when, as is now being done with the Pass-pass-chase Reserve [which was surrendered under questionable circumstances], some lands will be disposed of, or exchanged”: Reed to Deputy Superintendent General, July 30, 1891, NA, RG 10, vol. 3811, file 55152-1.

73 Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen’s University Press, 1990), 205.

74 “The fact is often overlooked, that these Indians who, a few years ago, were roaming savages, have been suddenly brought into contact with a civilization which has been the growth of centuries. An ambition has thus been created to emulate in a day what white men have become fitted for through the slow progress of generations”: Reed to Superintendent General, October 31, 1889, Department of Indian Affairs, *Annual Report*, 1889, 162.

around Battleford in 1888 also lent credence to the view that Reed wished to prevent Indian farmers from being able to compete with the local settlers.⁷⁵

To enforce the policy, Indian agents were ordered to cancel any pending purchases of farm equipment or machinery and not to order any more. At Kahkewistahaw, where Indian farmers had already purchased tools and machinery themselves using their own money, they were to be denied permission to use them. Reserves across the prairies were filled with anger, disappointment, and confusion, and official reports from this period often contain accounts of Indian farmers who, demoralized by the struggle or exhausted by the extra labour involved in bringing in their crops, simply gave up on farming.⁷⁶

The severalty and peasant farming policies were in effect from 1889 to 1896. These policies curtailed and reversed the development of prairie Indian economies until Reed and his policies were ousted following the election of the Laurier government in 1896. By that point, however, the subdivisions that had been accomplished were useful to departmental officials, who were able to restrict Indians to the divided portions where agents could concentrate them in smaller settlements and more effectively monitor reserve activities. In addition, Indians could also be prevented from using undivided reserve land in ways that the agents did not like.⁷⁷

Local Pressure to Surrender Crooked Lake Reserves

The 1896 election saw Clifford Sifton appointed as Minister of the Interior and Superintendent General of Indian Affairs, the latter position equivalent to the current Minister of Indian Affairs. The Departments of the Interior and Indian Affairs were temporarily placed under a single deputy, and prairie Indian agencies were reorganized and downsized.⁷⁸ Central control was increased and, because of Sifton's lack of background in Indian Affairs and his "perspective that Indian assimilation in 'white' society took second place

75 Settler opposition to Indian farming reached such a pitch around Battleford that a petition was delivered to the local Member of Parliament in 1888. Hayter Reed is reported to have promised that the Department "would do whatever it reasonably could to prevent the Indians from entering into competition with the settlers during the present hard time": *Saskatchewan Herald*, October 13, 1888.

76 See the summary provided by Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 220-22.

77 In 1904, for example, an individual Band member opposed to the prospective surrender of the southernmost reserve lands at Cowessess was refused permission to locate himself there because the land had not been subdivided and, therefore, no location ticket giving him a lawful right to reside there could be issued. See J.A. Sutherland to Assistant Indian Commissioner J. McKenna, June 14, 1904, NA, RG 10, vol. 3651, file 82, pt. 4.

78 D.J. Hall, "Clifford Sifton and Canadian Indian Administration, 1896-1905," in I.A. Getty and A.S. Lussier, eds., *As Long as the Sun Shines and the Water Flows* (Vancouver: Nakoda Institute and UBC Press, 1979), 122.

to rapid economic development,"⁷⁹ the primary focus of the combined department was to attract new settlers and to develop western Canada economically.

As a result of Sifton's policies, so many immigrants flocked to western Canada that, in the 10 years from 1896 to 1905, the population grew by nearly one million.

The Surrender Request of 1885

Local pressure to open up the Cowessess, Kahkewistahaw, and Ochapawace reserves for settlement began as early as 1885, just a few years after these Bands had moved onto their lands on or near Crooked Lake. In a letter to Prime Minister Wilfrid Laurier and the Minister of the Interior, Thomas Evans, the local Justice of the Peace in nearby Broadview complained that "the Indian Reserve ought to be removed as soon and as speedily as the government can affect [sic] it . . . and so open up a large and fine tract of country for settlement, that is all, presently, worse than useless."⁸⁰ Indian Commissioner Edgar Dewdney was asked to report on the matter, but no immediate action was taken.

The Request of 1886

Following a visit of the Minister of the Interior to the area in early 1886, the Deputy Minister of Interior wrote to the Deputy Superintendent General of Indian Affairs, Lawrence Vankoughnet, on March 4, 1886, stating that

the settlers in the neighborhood of Moosomin brought to the Minister's attention the fact that the Indian Reserve in question lies immediately alongside of the Canadian Pacific Railway; that it would be desirable in the public interest and in the interest of the Indians themselves that they should be moved back six miles from the railway; that this object can be accomplished by giving to the Indians a greater frontage along the river, and that out of available land in that vicinity, which could be given them in a block, they could have this readjustment of their reserve made so as to give to each member of the band an area not less than 160 acres. To this proposition, it was represented to the Minister, the Indians would be perfectly willing to agree, and as he is confident that the public interest and the advantage of the Indians would be equally [unreadable] by some such arrangement.

79 John Leslie and Ron Maguire, eds., *The Historical Development of the Indian Act*, 2d ed. (Ottawa: DIAND, Treaties and Historical Research Branch, 1978), 104.

80 Thos. Evans, Justice of the Peace, to Sir David L. MacPherson, Minister of the Interior, and the Prime Minister, May 26, 1885, NA, RG 10, vol. 7542, file 29108-1 (ICC Documents, pp. 62-66).

I am to ask whether you do not agree with him in thinking it expedient to open negotiations with the Indians for the purpose of ascertaining their views.⁸¹

In his reply, Indian Agent McDonald did not favour the proposal for an exchange and stressed the importance of the southern portion of the Crooked Lake reserves for haying purposes. Even if the Bands were given alternative lands farther north along the Qu'Appelle River to obtain their hay, "the Indians will be giving up far more valuable lands than they will be receiving."⁸² Following a round of internal correspondence between Indian Affairs and Department of the Interior officials, Evans's proposal was ultimately rejected.⁸³

When the surrender proposal fell through, local residents sought road allowances through the reserves to provide access to the rapidly increasing settlements to the north. On August 13, 1889, the residents of Broadview and Whitewood signed a "Memorandum of acceptance of a conditional surrender of lands for road purposes by the Crooked Lake Indians," which apparently reflected an informal agreement between the local residents and the Indians for the construction of four roads through the reserves.⁸⁴ In 1890, the Crooked Lake Bands, including Kahkewistahaw, surrendered the road allowances described in the Memorandum of Acceptance. The roads were ultimately transferred to the province, but it is not clear whether any compensation was paid for the surrendered lands.⁸⁵

The 1891 Petition

Despite these surrenders of reserve lands to allow for the construction of roads, local interests were not appeased. In 1891, G. Thorburn and a local committee presented a petition to the visiting Minister of the Interior on behalf of the residents of Broadview, Whitewood, and the surrounding area. The committee asked that the whole of Township 17 (in which the larger part of the Crooked Lake Agency was located) be opened up "in the interest

81 A.M. Burgess, Deputy Minister, Department of the Interior, to Edgar Dewdney, Commissioner, Department of Indian Affairs, March 15, 1886, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 76-78).

82 A. McDonald, Indian Agent Treaty No. 4, to Indian Commissioner, March 22, 1886, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 83-85).

83 A.M. Burgess, Deputy Minister, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, April 15, 1886, NA, RG 10, vol. 3732, file 26,623 (ICC Documents, pp. 88-90 and 91-95).

84 Memorandum, August 13, 1889, NA, RG 10, vol. 3556, file 25, pt. 4B (ICC Documents, pp. 104-05).

85 The surrender for road allowances was accepted by an Order in Council dated March 7, 1893. In 1902, when it became apparent that local residents could not fulfil the terms of the Memorandum of Acceptance, the Department sought to obtain a new surrender allowing the roads to be transferred to the territorial government. Kahkewistahaw provided a second surrender of the road allowances on October 29, 1902. NA, RG 10, vol. 3556, file 25, pt. 4B (ICC Documents, pp. 181-85).

of the Town, of the Canadian Pacific Railway, the settlement of the country and its general interest."⁸⁶ Again called upon to respond, McDonald repeated his earlier concern that the southern lands were needed for hay by the Indian farmers of Cowessess, Kahkewistahaw, and Ochapawace:

The same objection to the relinquishment of part of Township 17 still applies, viz. that the chief and best part of the Hay lands belonging to Bands Nos. 71, 72 & 73 are in the land referred to, and *although I am most anxious that the views of the people of Broadview should be met, still from my position as Indian Agent I am bound in the interests of the Indians to point out the difficulties in the way, which are tersely these. If these lands are surrendered by the Indians, no reasonable money value can recompense them, as their Hay lands would be completely gone, and this would necessitate no further increase of stock, which would of course be fatal to their further quick advancement, and would be deplorable, and the only alternative that I can see is to give them Hay lands of equal quantity and value immediately adjacent to the Reserves interested, which I do not think is possible now. . . .*

If it was contemplated by the Committee that waited upon you on the 26th ultimo to have the whole of Township 17 in Ranges 3, 4, 5 & part of 6 surrendered, I would beg to point out that very little of the whole Reserve remains.⁸⁷

Once again, McDonald's views prevailed and the resolution was rejected by the Department.⁸⁸

The 1899 Request

It was not long, however, before yet another effort was made by the local settlers to have the Crooked Lake reserves reduced in size for the benefit of the adjacent non-Indian communities. R.S. Lake, a member of the North-West Territories Legislative Assembly, made a direct appeal to Clifford Sifton in 1899 on the grounds that Kahkewistahaw and the other Crooked Lake Bands had a large surplus of land according to the treaty formula of 1 square mile per family of five.⁸⁹ Sifton agreed to have the Department look into it so long

86 Resolution presented by the Residents of Broadview to the Minister of the Interior, February 2, 1891, NA, RG 10, vol. 3732, file 26623 (ICC Exhibit 14).

87 A. McDonald, Indian Agent, to Superintendent General of Indian Affairs, March 10, 1891, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 118-20). Emphasis added.

88 [unknown] Ottawa, to G. Thorburn, Broadview, April 16, 1891, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 122-25).

89 In a handwritten memorandum, R.S. Lake stated that Kahkewistahaw was entitled to 26 square miles, based on the Band's population. After the surrender of a proposed 25½ square mile strip, he reasoned that the Band would still be left with 47½ square miles. If that land were sold for \$2.50 per acre, he calculated that it could provide about \$10.00 annually for each member of the Band, based on 3 per cent interest: NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 140).

as Lake understood "that it depended altogether on the consent of the Indians."⁹⁰

A.W. Ponton, a departmental surveyor, prepared a memorandum in response in which he recommended that the Indian Agent be instructed to try to obtain a surrender:

Referring to Mr. Lake's memorandum, re: the excess of land held by the Indians of reserves in the Crooked Lake agency . . . I would say that Mr. Lake's figures are correct according to the census of 1898 and the excesses explained by the decrease in the numbers of the Indians of these reserves since the allotment was first made. When Agent A. McDonald reported (Annual Report 1882) "The area of each reserve has been allotted to each band in proportion to the pay sheets of 1879, the year in which the largest number of Indians were paid their annuity."

I would strongly advocate the adoption of Mr. Lake's suggestion, for the reason that the Indians are not benefited by the land, and while it remains tied up, settlement of the large agricultural district lying South of the Railway is prevented owing to the lack of market towns between Whitewood and Grenfell. . .⁹¹

However, the new Crooked Lake Indian Agent, J.P. Wright, saw things in much the same way as his predecessor. He is reported to have disagreed strongly with Ponton's suggestion because the lands in question were still being productively used as hay grounds by the Cowessess, Kawkewistahaw, and Ochapawace Bands. He cautioned that "it would be unwise to ask them to make a surrender at this time."⁹² Sifton concurred and forwarded these views to Lake, who did not press the matter.

The 1902 Proposal and Petition

Nonetheless, just three years later, in the winter of 1902, the new Indian agent, Magnus Begg, apparently did not share Wright's views and proposed that a much smaller portion of the reserves be removed, with the proceeds applied to debts incurred by the Indian farmers for machinery and equipment. Judging from what transpired later, it would appear that Begg had been discussing this matter with local settlers. His suggestion that a 3-mile strip along the southern boundary of the agency be surrendered was rejected by Indian Commissioner Laird, however, who reminded Begg that these were

90 Clifford Sifton, Superintendent General of Indian Affairs, to J.A.J. McKenna, Department of Indian Affairs, January 19, 1899, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 133).

91 A.W. Ponton, Surveyor, to J.A.J. McKenna, Department of Indian Affairs, February 17, 1899, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 136-38).

92 David Laird, Indian Commissioner, to Clifford Sifton, Superintendent General of Indian Affairs, April 2, 1899, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 142-43).

good hay lands and that “[w]here there are so many cattle (and the number ought to be increased) it would never do to have the Indians short of hay.”⁹³

Shortly afterwards, in the spring of that same year, the residents of Broadview, Whitewood, and the surrounding district forwarded yet another petition to Clifford Sifton seeking the surrender of the same 3-mile strip to which Begg had referred. The petition contained a large number of signatures – more than 180 – from a broad spectrum of the community, including members of the Legislative Assembly, ministers, doctors, tradespeople, merchants, railway employees, teachers, postmasters, and several farmers. Given this political pressure, Sifton requested that the matter be looked into and that the petitioners be assured “that the Department will do its best to procure the consent of the Indians; and that an officer will be detailed for that purpose.”⁹⁴

Indian Commissioner Laird met with the Cowessess and Kahkewistahaw Bands on April 16 that year to discuss the matter with them. His subsequent report to headquarters noted that he “found the Indians strongly opposed to surrendering any portion of their reserves” and contained a verbatim extract of the speeches of some of the chiefs and headmen. Chief Kahkewistahaw himself, aging, blind, and in poor health, spoke in opposition to the proposed surrender, reminding Laird (who had signed Treaty 4 on behalf of the Crown) of the original treaty promises:

I will tell you what I think. I was glad when I heard that you were coming to see us. *When we made the treaty at Qu'Appelle you told me to choose out land for myself and now you come to speak to me here. We were told to take this land and we are going to keep it. Did I not tell you a long time ago that you would come some time, that you would come and ask me to sell you this land back again, but I told you at that time, No.*⁹⁵

Laird's subsequent report to J.D. McLean, Secretary of the Department, acknowledged the force of the arguments advanced by the Indian speakers. Laird noted that “the best of their land is the part asked to be surrendered”

⁹³ David Laird, Indian Commissioner, to Indian Agent, Crooked Lake Agency, January 22, 1902, NA, RG 10, vol. 3561, file 82/4 (ICC Documents, pp. 163-64).

⁹⁴ A.P. Collier, Department of the Interior, to J.D. McLean, Secretary, Department of Indian Affairs, March 31, 1902, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 173); J.D. McLean, Secretary, Department of Indian Affairs, to David Laird, Indian Commissioner, April 2, 1902, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 174).

⁹⁵ David Laird, Indian Commissioner, to J.D. McLean, Secretary, Department of Indian Affairs, May 6, 1902, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 175-77). Chief Kahkewistahaw's headman, Wahsacase, made a similar appeal to Laird, stating, “I find that my reserve is small enough.” Emphasis added.

and that the land farther north nearest the river "is gravelly and not well adapted for farming."⁹⁶ Following this report, the question of a surrender was dropped.

The 1904 Request

The respite was a brief one, however. Many residents of the area, apparently undeterred, individually wrote to Sifton to have the Crooked Lake reserves opened up for purchase by settlers. Finally, in early 1904, Sifton responded by directing Assistant Indian Commissioner J.A. McKenna to look into the matter, but from the vantage point of "*whether it would be desirable from an Indian standpoint* and whether the Indians are likely to agree to it."⁹⁷ McKenna subsequently reported that such a surrender would not be in the Indians' best interests, and he reiterated the points made both in 1902 and in previous years:

I would point out that the Commissioner in his report of the 6th of May 1902 stated that there was a good deal of force in the remarks of some of the Indians; that the best of the land in Reserves 71 & 72 was contained in the part asked to be surrendered; and that the best wood was also on the South of the Reserves. This being so it would not be advisable from an Indian standpoint, to dispose of the land.⁹⁸

Noting that Commissioner Laird had relatively recently convened the Cowessess and Kahkewistahaw Bands for the purpose of discussing the proposed surrender, McKenna also advised against calling them together once more for this purpose, "for it might create the impression that the Department is acting for the settlers in the matter." He counselled caution and suggested that the local agent instead "inquire quietly as to the mind of the Indians and report."⁹⁹

Mandated to make such an inquiry, Indian Agent Begg died before being able to carry it out. At the treaty annuity payments that year, the departmental officer in charge of the payments, Mr Lash, is reported to have explained to the assembled members of the Crooked Lake Bands "the benefit they would derive by surrendering a strip of the reserve and a portion of the proceeds

96 David Laird, Indian Commissioner, to J.D. McLean, Secretary, Department of Indian Affairs, May 6, 1902, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 175-77).

97 Clifford Sifton, Superintendent General of Indian Affairs, to Frank Pedley, Deputy Superintendent General of Indian Affairs, March 8, 1904, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 197). Emphasis added.

98 J.A. McKenna, Assistant Indian Commissioner, to Secretary, Department of Indian Affairs, March 19, 1904, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 200).

99 J.A. McKenna, Assistant Indian Commissioner, to J.D. McLean, Secretary, Department of Indian Affairs, March 19, 1904, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 199-201).

received from the sale being used to fence the reserve.” According to Commissioner Laird, “[t]he Indians appeared to appreciate the suggestion, but wanted time to think it over.” Laird also suggested that, once Begg’s replacement had been appointed, it might be opportune to make another approach to the Crooked Lake Bands armed with the authority to promise them “say 10% of the proceeds of sale to be expended for their benefit in farming outfits and in a per capita payment in cash or for liquidation of debts.” In the meantime, Laird advised that “it would not be well to push the matter too hastily, as it is one that requires very careful handling.”¹⁰⁰

Prelude to the Surrender: A New Attitude in the Department

Nothing further was done that year or the next to follow up on Laird’s suggestion. By 1906, William Graham¹⁰¹ had been promoted to Inspector of Indian Agencies in southern Saskatchewan, and Clifford Sifton had been replaced as Minister of the Interior and Superintendent General of Indian Affairs by Frank Oliver, a former editorial writer for the Edmonton *Bulletin* who had long campaigned to free up reserve land for settlement.

Oliver’s appointment in 1905 brought wholesale changes in the official attitude of the Department towards the reserve land question. In response to an inquiry in the House of Commons by R.S. Lake¹⁰² about the proposed Crooked Lake surrenders, Oliver replied that “[t]he case of the Broadview reserve is only one of many in the west, and it is no doubt a hardship to the surrounding country and to large business enterprises.” He noted that “*of course the interests of the people must come first and if it becomes a question between the Indians and the whites, the interests of the whites will have to be provided for.*”¹⁰³

100 David Laird, Indian Commissioner, to J.D. McLean, Secretary, Department of Indian Affairs, March 19, 1904, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 207-08).

101 During Sifton’s administration, William Graham enjoyed some prominence in the Department as a result of his unstinting efforts to “civilize” prairie Indians and the apparent success of his File Hills Colony of Indian farmers. File Hills was an Indian farming settlement directly supervised by Graham and populated by hand-picked Indian candidates. Forbidden to maintain contact with Indian traditionalists, the young colonists were installed on individual tracts of land and married off to each other. Because they “had internalized the white man’s religion and culture and . . . were self-sufficient farmers,” it was hoped they would set the example for a whole new generation of prairie Indians. Impressed by the progress of this experiment, Sifton promoted Graham’s career and mentioned his accomplishments in Parliament on a number of occasions: Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 19, nn. 64 and 65.

102 The same member who had approached Sifton directly in 1899.

103 Canada, House of Commons, *Debates* (March 30, 1906), 947-50. Emphasis added.

This attitude quickly pervaded the Department. In his annual report to the Minister for 1908, Deputy Superintendent General Frank Pedley conveyed a similar philosophy:

The large influx of settlement of recent years into the younger provinces has dictated a certain modification of the department's policy with relation to the sale of Indians' lands.

So long as no particular harm nor inconvenience accrued from the Indians' holding vacant lands out of proportion to their requirements, and no profitable disposition thereof was possible, the department firmly opposed any attempt to induce them to divest themselves of any part of their reserves.

Conditions, however, have changed and it is now recognized that where Indians are holding tracts of farming or timber lands beyond their possible requirements and by so doing seriously impeding the growth of settlement, and there is such demand as to ensure profitable sale, the product of which can be invested for the benefit of the Indians and relieve *pro tanto* the country of the burden of their maintenance, it is in the best interests of all concerned to encourage such sales.¹⁰⁴

In keeping with these sentiments, one year after his appointment Oliver sponsored an amendment to the *Indian Act* allowing up to 50 per cent of the proceeds of a surrender and sale to be distributed immediately to band members.¹⁰⁵ Previously, the *Indian Act* had limited such cash distributions to 10 per cent of the sale price, with the rest to be held in trust in a capital account for the band in question. Oliver was quite candid in explaining to the House of Commons his motivations for seeking the amendment:

This [10 per cent cash distribution] we find in practice, is very little inducement to them to deal for their lands and we find that there is very considerable difficulty in securing their assent to any surrender. Some weeks ago, when the House was considering the estimates of the Indian Department, it was brought to the attention of the House by several members, especially from the Northwest, that there was a great and pressing need of effort being made to secure the utilization of the large areas of land held by Indians in their reserves without these reserves being of any value to the

¹⁰⁴ Canada, Parliament, *Sessional Papers*, 1908, no. 27, "Annual Report of Deputy Superintendent General to Superintendent General, September 1, 1908," xxxv.

¹⁰⁵ SC 1906, c. 20, s. 1 (amending s. 70 of the Act). Royal Assent was given on July 13, 1906. This was not the only *Indian Act* amendment promoted by Oliver to reduce in size or eliminate Indian reserves. In 1911, two others were passed, together referred to by Indians as the "Oliver Act." The first allowed public authorities to expropriate reserve land without the need of a surrender. Any company, municipality, or other authority with statutory expropriation power was enabled to expropriate reserve lands without Governor in Council authorization so long as it was for the purpose of public works. The second allowed a judge to make a court order that a reserve within or adjoining a municipality of a certain size be moved if it was "expedient" to do so. There was no need for band consent or surrender before the entire reserve could be moved. SC 1911, c. 14, ss. 1 and 2, respectively.

Indians and being a detriment to the settlers and to the prosperity and progress of the surrounding country.¹⁰⁶

The new provision proved its usefulness almost immediately, for the next year the Department was able to dispose of the longstanding and troublesome issues associated with the St Peter's reserve in Manitoba. A series of doubtful land transactions involving settlers at St Peters since the 1870s culminated in several investigations and inquiries between 1878 and 1900, none of which resolved the competing claims to lands within the reserve boundaries. Finally, in September 1907, Deputy Superintendent General Pedley came to the reserve in person, reportedly carrying a briefcase containing \$5000 in cash, and managed to get the desired surrender.¹⁰⁷ The surrender document called for disbursement to the Band of 50 per cent of the proceeds of sale one year following the surrender.¹⁰⁸ Indian discontent surfaced later, however, and ultimately the surrender was attacked in Parliament on the basis that "the methods employed by the government agent had been anything but creditable to the government."¹⁰⁹

Inspector Graham seems to have been imbued with much the same spirit as Oliver, for he made it his business to follow up on Laird's earlier suggestion that the possibility of a surrender at Crooked Lake be quietly investigated. In June 1906, he wrote directly to the Minister reporting on his recent visit to the agency, indicating the possibility of obtaining the desired surrenders:

I am satisfied that if this matter were handled promptly and on about the same lines as the Pasquah's surrender was obtained, these Indians would consent to sell. In fact, I feel sure that if I had the papers and money with me when I was there I could have obtained the surrender. . . .

. . . *The trouble in the past has been due to the fact that too many people have been dabbling in the matter.* The people in the adjacent towns are keen for the surrender, and as a result, the Town Council, the Board of Trade and individuals have been talking to the leading Indians, and they now have all kinds of ideas of their needs. In my opinion, *the matter should be handled by our own people, without the knowledge of the outside public, as was done at Pasquah's. . . .*

106 Frank Oliver, House of Commons, *Debates* (June 15, 1906), 5422.

107 Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 22.

108 For a review of the St Peter's claim, see "The St. Peter's Reserve Claims," in R. Daniel, *A History of Native Claims Processes in Canada, 1867-1979* (Ottawa: DIAND, Research Branch, February 1980), 104-21.

109 It was attacked by the member for Selkirk, G.H. Bradbury. House of Commons, *Debates* (March 22, 1911), cols. 5837 ff.

... As this is a large deal it would be necessary to have the matter thoroughly decided upon before the proposition is put to the Indians, because it would have a bad effect if the Department had to go back to them with a second proposition. *Outsiders would interfere in the interval as in the past.* If a little latitude were given to the Officer taking the surrender, he could perhaps meet any small request, that would come from the Indians at the meeting.¹¹⁰

Moreover, Graham thought it could be done with an inducement of one-tenth of the proceeds of sale.

In response, Oliver ordered the Deputy Superintendent General to have "a proper basis for the surrender" prepared,¹¹¹ and Secretary McLean asked Graham how much land ought to be surrendered.¹¹² Graham proposed a total of 90,240 acres – including 32,640 acres from Kahkewistahaw, 36,480 acres from Cowessess, and 21,120 acres from Ochapowace – and recommended the following course of action:

The Department are [sic] aware that several futile attempts have been made to get this surrender. I am of the opinion however, that it can be obtained if handled judiciously. The money for the first payment should be on hand the day the meeting asking for the surrender is held, and the whole matter should be handled with dispatch.¹¹³

The necessary authority was then provided to Graham and the surrender forms and a cheque for the required cash were forwarded to him in early October 1906.¹¹⁴ According to the surrender documents, Graham was to seek a surrender of 33,281 acres of Kahkewistahaw's reserve. This amount was apparently calculated to leave the Band with almost exactly 160 acres per person for each of its 84 members.¹¹⁵ Disease, deprivation, and starvation had contributed to reducing the size of the Band from the population of approximately 365 for which 128 acres per person had been surveyed at the time the reserves were created. Graham advised that he would proceed to

110 W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Frank Oliver, Superintendent General of Indian Affairs, June 19, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 231-33). Note that the *Indian Act* had not yet been amended to allow the 50 per cent cash distribution mentioned above. Emphasis added.

111 [Name unreadable], Department of the Interior, to Frank Pedley, Deputy Superintendent General of Indian Affairs, June 28, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 234).

112 J.D. McLean, Secretary, Department of Indian Affairs, to W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, July 6, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 239).

113 W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, September 24, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 247-48).

114 J.D. McLean, Acting Deputy Superintendent General of Indian Affairs, to W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, October 3, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 252).

115 Submissions on Behalf of the Government of Canada, January 26, 1996, p. 12.

Crooked Lake as soon as he had dealt with the remaining obligations related to the surrender at the Pasqua reserve. “[I]n the meantime,” he added, “I do not consider that a delay will have any prejudicial effect on the proposition, in fact, I think it will have a contrary effect.”¹¹⁶

As later events demonstrated, Graham’s assessment was an accurate one. He did not visit the Crooked Lake Agency until January 1907, in the middle of the winter when illness and the need for rations would be intensified among the Crooked Lake Bands. The testimony of many of the elders from Crooked Lake seemed to bear this assessment out.¹¹⁷

Graham’s mission was no doubt materially assisted as well by the deaths of Chief Kahkewistahaw and headmen Wasacase and Louison before the annuity payments in 1906. It was not uncommon in the years following the Riel Rebellion in 1885 for Canada to remove “unprogressive” Indian leaders or to fail to replace deceased Chiefs, so that Cree bands would be kept leaderless and incapable of hostile action against Canada. This policy was maintained for some time to ensure that only candidates acceptable to the Department became leaders, and thereby to assure the smooth implementation of government policies. Although Kahkewistahaw’s support of Canada during the rebellion was considered exemplary, he and his headmen were also an impediment to obtaining a surrender of the reserve. Despite requests by Band members, Kahkewistahaw and his headmen were not replaced until 1911. As a result, the Band faced the prospect of a surrender vote without the Chief who had so forcefully refused to surrender any part of IR 72 in previous years and without the benefit of a new Chief to succeed him. It is worth noting that, subsequent to the 1907 surrender, Joe Louison (one of the men who opposed the surrender) was elected Chief of the Kahkewistahaw Band.

The 1907 Surrender Meetings

The law governing reserve land surrenders at that time was set out in the 1906 version of the *Indian Act*, which stated that no surrender was valid unless “assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council therefor summoned for that purpose.” In addition, any surrender assented to in this manner had to be placed before a judge to be “certified on oath by the Superintendent General,

¹¹⁶ W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, October 3, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 253-54).

¹¹⁷ ICC Transcript, May 3, 1995, pp. 34, 36-37, and 58 (Joseph Crowe); ICC Transcript, May 3, 1995, p. 76 (Ernest Bob), regarding the suffering of the people due to illness and hunger.

or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote.”¹¹⁸

In early December 1906 before going to the Crooked Lake Agency, Graham took the precaution of writing to headquarters to ensure that the second payment called for in the Pasqua surrender agreement would be paid out to the Band members. His reasoning was that the Crooked Lake Bands might be more willing to make the surrenders requested if they knew that their neighbours on the Pasqua reserve had received the full 10 per cent of the proceeds of sale promised to them.¹¹⁹

On January 21, 1907, Graham set out to obtain surrenders from the three Crooked Lake Bands. Before going to the Kahkewistahaw reserve, Graham visited Cowessess to discuss a surrender proposal. The next day, he travelled to Ochapawace, where he tried to obtain a surrender on the spot, but he was rebuffed by a vote of 16 against and only 4 in favour.¹²⁰ From Ochapawace he went on to Kahkewistahaw, arriving on January 23, 1907.

Departmental statistics prepared in anticipation of the Kahkewistahaw surrender meeting indicated that the Band had a population of 84 persons, only 19 of whom were men over 21 years of age.¹²¹ An analysis of the payroll information from 1906 and 1907, however, suggests that there were as many as 25 to 28 members of the Band who were eligible to vote.¹²² As it turned out, 19 eligible male voters assembled for the January 23 surrender meeting at McKay’s Mission Church on the reserve. Six other persons were present, including Graham, Indian Agent Matthew Millar, interpreter Peter Hourie, and three others – Mr Sworder, Mr Nichols, and Mr Sutherland.

There is no written record of the meeting other than the Minutes drawn up by Millar. They state that “Mr. Inspector Graham . . . very fully and at length explained the terms of the proposed surrender pointing out its meaning to the Indians asking them as intelligent men to very carefully consider the proposal and to act by their vote according to the decision which each one may come to.”¹²³ The vote was then taken, and the proposed surrender was rejected by a vote of 14 to 5.

118 *Indian Act*, RSC 1906, c. 81, s. 49.

119 W.M. Graham to Secretary, Department of Indian Affairs, December 7, 1906, NA, RG 10, vol. 2389, file 79921.

120 W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 277-80).

121 W.A. Orr, In Charge, Lands & Timber Branch, Department of Indian Affairs, to Secretary, Department of Indian Affairs, July 3, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 237-38).

122 Submissions on Behalf of the Kahkewistahaw First Nation, January 26, 1996, pp. 32-33.

123 Matthew Millar, Indian Agent, Crooked Lake Agency, Minutes of Surrender Meeting, January 23, 1907 (ICC Documents, pp. 265-66).

What happened next is not entirely clear. In a reporting letter to headquarters written several weeks later, Graham stated that “[a]s soon as this meeting was over, the Indians held meetings among themselves and a deputation came to see me asking for another regular meeting.”¹²⁴ Millar’s version was similar, noting that “some of them had not fully understood the conditions and now wished to reverse their vote.”¹²⁵

There is no other documentary evidence indicating why the voting members of the Kahkewistahaw Band suddenly indicated a willingness to reverse their position after an already lengthy meeting at which the surrender had been discussed for at least two hours and following several years of petitions during which talk of a proposed surrender had been in the air. The accounts offered by Graham and Millar are evidently incomplete. Moreover, Millar’s report one week later that the assembled members did not “fully understand the conditions,” realizing this only after the actual vote had been taken, contradicts his earlier account in the Minutes of January 23 that Graham had “very fully and at length explained the terms of the proposed surrender.”

The elders interviewed during the course of our inquiry related what they had heard from their parents and others who knew of those events. In keeping with the more general history outlined earlier in this report, they spoke of the Band’s total lack of leadership,¹²⁶ with the result that “they had total control over us at all times,”¹²⁷ to such an extent that departmental officials “made our people surrender”¹²⁸ and “forced us to sell our land.”¹²⁹ They described the view at the time that the Band had little real choice because of the privation and suffering being experienced due to disease and hunger.¹³⁰ Regarding the actual surrender meeting, Mervin Bob recounted that “they were told if they disagreed with anything that they would get no more help, so this is what my dad used to tell me.”¹³¹

124 W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 277-80).

125 Matthew Millar, Indian Agent, Crooked Lake Agency, Minutes of Surrender Meeting, January 28, 1907 (ICC Documents, pp. 267-68).

126 ICC Transcript, May 3, 1996, p. 95, for instance, referred to the fact that “there was no chief at that time” (Joseph Crowe).

127 ICC Transcript, May 3, 1995, p. 64 (George Wasacase).

128 ICC Transcript, May 3, 1995, p. 23 (Mervin Bob).

129 ICC Transcript, May 3, 1995, p. 34 (Joseph Crowe).

130 Joseph Crowe referred in his testimony to sickness and epidemics that had ravaged the population and to “the resources at that time for them to live on was pretty scarce, very scarce, so, therefore, the result was starvation like or starvation conditions”: ICC Transcript, May 3, 1995, p. 58. Ernest Bob added simply that “at that time there was hard times, eh, and then how the government came, the Indian agent, and told the Indians that, okay, these Indians were having a hard time to make a living, eh. . .”: ICC Transcript, May 3, 1995, p. 76.

131 ICC Transcript, May 3, 1995, p. 21 (Mervin Bob).

A second vote was held the following week on January 28 at the same location. This time, 17 voting members of the Band were present along with Graham, Millar, and most of the other witnesses who had been present the week earlier.¹³² In the only Minutes on record of this second meeting, Millar stated that the meeting was “in response to a letter signed by a number of the voting members of the Band and addressed to Mr. Inspector Graham asking him to hold another meeting.”¹³³ The letter to which Millar referred has never been found. Millar also recorded that “Mr. Inspector Graham again fully explained the terms of the proposed surrender after which they replied that they were ready to vote.”¹³⁴

This time Graham prevailed: the surrender proposal was accepted by a vote of 11 to 6.¹³⁵ Millar’s Minutes do not indicate how long Graham spoke or whether the meeting was a lengthy one, but they give the general impression that the 17 Band members arrived with their minds more or less made up. Graham’s later report paints a different picture, however, noting that it was only “after a great deal of talk [that] they finally agreed to surrender.”¹³⁶

The surrender document was in the standard form for the period, stating that the moneys were to be paid in the usual way “after deducting the usual proportion for expenses and management.” Further stipulations provided that payment of one-twentieth of the estimated purchase price was to be made immediately, with a further one-twentieth to be paid upon sale; the owners of improvements and buildings were to be compensated for them; the shares of minors between 12 and 18 were to be protected; and the land was to be sold at public auction. All 17 of the voters in attendance or affixed their marks to the surrender document.¹³⁷

Following these formalities, Graham remained for several hours distributing the promised one-twentieth of the estimated purchase price – \$94.00 per person, a considerable sum of money at that time. The next day, January 29, Graham returned to Cowessess, where he obtained a surrender on terms

132 A comparison of the voters from the two meetings shows that two of those who had originally voted in favour of the first surrender did not attend the second meeting. Peter Hourie, the original translator, was absent, replaced by Harry Cameron.

133 Matthew Millar, Indian Agent, Crooked Lake Agency, Minutes of Surrender Meeting, January 28, 1907 (ICC Documents, pp. 267-68).

134 Matthew Millar, Indian Agent, Crooked Lake Agency, Minutes of Surrender Meeting, January 28, 1907 (ICC Documents, pp. 267-68).

135 Matthew Millar, Indian Agent, Crooked Lake Agency, Minutes of Surrender Meeting, January 28, 1907 (ICC Documents, pp. 267-68).

136 W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 277-80).

137 Surrender of the Kawkewistahaw Band to the Crown, January 28, 1907, Order in Council PC No. 410, March 4, 1907 (ICC Documents, pp. 270-72).

similar to those offered at Kahkewistahaw (except that the initial payout was one-tenth of the estimated purchase price, or twice the rate paid at Kahkewistahaw).¹³⁸ The surrender vote at Cowessess was close – 15 for and 14 against – although Graham managed to get 22 to sign or attach their marks to the actual surrender document. As at Kahkewistahaw, Graham distributed the promised cash before leaving.¹³⁹

After concluding this part of his business at Crooked Lake, Graham went on to Moosomin on February 2, 1907, accompanied by representatives of the two surrendering bands for the purpose of swearing the certificates required under the *Indian Act*. Cowessess Chief Joe LeRat refused for some reason to attend, so Graham brought Alex Gaddie, the Band member who had acted as interpreter during the Cowessess surrender meeting.¹⁴⁰ Since Kahkewistahaw was without the “chiefs or principal men” required by the *Indian Act* to swear an affidavit certifying the surrender, Graham brought an ordinary Band member, Kahkanowenapew, one of those who had voted for the surrender. The certificate in the form of an affidavit was sworn before Mr Justice E.L. Wetmore of the Supreme Court of the North-West Territories. However, since Kahkanowenapew was neither a Chief nor a principal man, it was necessary to cross out the pre-printed word “Chief” in two places on the standard form affidavit and write in its place the word “Indian.” Alex Gaddie translated the affidavit for Kahkanowenapew.¹⁴¹

Graham then returned to Ochapawace, where he once again attempted to obtain a surrender, this time offering “inducements . . . nearly three times as great as those offered Cowessess Band.”¹⁴² Nevertheless, Ochapawace rejected the proposal by a vote of 19 to 5. Undaunted, Graham revised the proposal, seeking a lesser amount of land but offering a larger cash payout on surrender. This time the rejection was unanimous.¹⁴³ At this point, Graham finally gave up and left. Despite these setbacks, he was confident that once Ochapawace was able to assess what Cowessess and Kahkewistahaw

138 The surrender meeting is described in Ken Tyler, “A History of the Cowessess Band,” research paper prepared for the Federation of Saskatchewan Indians, 1975, pp. 108-15. Tyler’s conclusion is that this surrender was questionable owing to a number of irregularities.

139 W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 277-80).

140 Ken Tyler, “A History of the Cowessess Band,” research paper prepared for the Federation of Saskatchewan Indians, 1975, p. 116.

141 Affidavit of Kahkanowenapew, February 2, 1907, Order in Council PC No. 410, March 4, 1907 (ICC Documents, p. 273).

142 W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 277-80).

143 The surrender meetings are described in John L. Tobias, “The Ochapawace Band,” research paper prepared for the Federation of Saskatchewan Indians, 1974, pp. 22-23.

were able to do with their money, "they will fall into line."¹⁴⁴ Graham returned to Ochapawace in June 1919 when the Band had no leadership and managed to obtain the long-sought surrender in exchange for a cash payment of \$110 to each Band member, in accordance with Oliver's 1906 *Indian Act* amendment.¹⁴⁵

The two 1907 surrenders made a total of 53,985 acres of land available for sale.¹⁴⁶ From nearly 50,000 acres of reserve land, Cowessess was left with fewer than 30,000 acres. With the surrender of 33,281 acres of land, the 46,720 acres possessed by Kahkewistahaw in IR 72 fell to little more than 13,000 acres. Years later, after the Ochapawace surrender in 1919, its overall holdings fell from over 50,000 to fewer than 35,000 acres. In terms of percentages, Ochapawace lost nearly 35 per cent and Cowessess lost almost 42 per cent of their respective original reserve acreages. Kahkewistahaw's proportionate loss was much higher – more than 70 per cent.¹⁴⁷ In all three cases, it was the southern portions of the reserves, with their more valuable hay lands and woodlots, that were lost.

Once all the details of the Cowessess and Kahkewistahaw surrenders had been dealt with, Graham wrote a long reporting letter to Secretary McLean, enclosing the surrender documents with the expressed hope "that you will be pleased with what has been done." There is no indication in any of the official correspondence that any attempt was made to ascertain whether, as Sifton had earlier put it, "it would be desirable from an Indian standpoint" to make a surrender. The focus seemed to be entirely on the advantages to the settlers in the area:

I may add in conclusion that the people of Broadview, Grenfel [sic] and adjacent country are delighted with the prospect of having this country thrown on the market. As you are aware this land lying idle has been a great drawback to these towns and they have been trying for years to bring about a surrender.¹⁴⁸

144 W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 277-80).

145 John L. Tobias, "The Ochapawace Band," research paper prepared for the Federation of Saskatchewan Indians, 1974, p. 25.

146 W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 277-80).

147 These calculations are based on the original and 1928 acreage figures provided in Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 263.

148 W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 277-80).

After the Surrender

One week after Graham's reporting letter to Secretary McLean, the President and the Secretary of the Broadview Board of Trade wrote directly to Minister Oliver to convey their appreciation for what "has been accomplished by the unceasing efforts of the Indian Department under your able direction," and to praise Indian Agent Millar and Inspector Graham for their services in bringing about the surrenders.¹⁴⁹ The surrender was submitted to the Governor in Council on February 26 that year and approved on March 4.¹⁵⁰ Just over a year later Oliver recommended to the Governor in Council that Graham receive a substantial raise in pay because, aside from managing his inspectorate, he "so satisfactorily furthered the wishes of the Department in connection with land matters" by obtaining these (and other) surrenders.¹⁵¹

The Crooked Lake lands were sold in two stages. The first sale occurred on November 25, 1908, under Graham's direction. The conditions of sale required that one-tenth of the amount bid and accepted be paid in cash at the time, with the rest to be paid in nine equal annual instalments, and interest on any outstanding balance to be payable at the rate of 5 per cent interest. Out of 322 parcels of land offered, 199 were sold at an average price of \$7.15 per acre. Kahkewistahaw land accounted for \$120,039.37 of the overall amount of \$229,177.20 bid. Both Millar and Harry Cameron, the translator at the January 28 surrender meeting, purchased land. From these proceeds, a second payment of \$94.00 was made to each member of the Kahkewistahaw Band in February 1909, and Millar was encouraged to induce Band members "to pay their debts with this money."¹⁵²

The second sale took place nearly two years later on June 15, 1910, and all but three quarter sections offered were sold. This time the land sold for an average price of \$9.93 per acre. The few parcels that remained unsold or on which the purchasers defaulted were disposed of following the end of the First World War through the Soldier Settlement Board.¹⁵³ No evidence was brought before the Commission to suggest that any further payments on account of principal were made to members of the Band beyond the two

149 Broadview Board of Trade to Frank Oliver, Minister of the Interior, February 19, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 281).

150 Order in Council PC No. 410, March 4, 1907 (ICC Documents, p. 286).

151 Submission to the Governor in Council by Frank Oliver, Superintendent General of Indian Affairs, April 8, 1908, NA, RG 10, vol. 1127, file 639 (ICC Documents, pp. 327-28).

152 Secretary, Department of Indian Affairs, to M. Millar, Indian Agent, February 19, 1909, NA, RG 10, vol. 3732, file 26623-1 (ICC Documents, p. 388).

153 The sales are described in Ken Tyler, "Government of Canada and Kahkewistahaw Band," undated, pp. 89-91 (ICC Exhibit 18).

one-twentieth instalments of \$94.00 per person. However, it does appear that the balance was initially invested on behalf of the Band and that interest payments were made to the Band for at least those few years following the surrender for which the reports of the Indian Agent are before us. In 1910, the interest payment was forwarded to Millar with these instructions:

Enclosed also is a cheque no. 5449 for \$1176.00 for distribution to Kawkewistahaw's Band on account of Interest Funds at their credit. Care should be taken that the Indians spend this money judiciously in paying their debts and in purchasing necessary supplies, seed, etc. Where there are old people dependent on the Dept. their money should be retained by you and expended monthly as required in supplies such as food, clothing, comforts, etc. This is not the full amount of interest at the credit of this Band but it is a substantial payment on account thereof and all that it is considered in the interests of the Indians to pay them at present. The balance will remain at their credit & be available to meet other requirements of the Band.¹⁵⁴

In the Annual Reports submitted by Indian Agent Millar from 1909 to 1913, the apparent benefits of these annual distributions of interest were described in glowing terms. In 1910, Millar stated:

The conditions under which this band live in regard to dwellings, food and clothing, have steadily improved. In my opinion this is largely the result of the use made of their income from interest accruing from surrendered land. Especially useful is this income to old people who have no means of making their own living. . . .

In March payment of interest money from land fund was made to Cowessess and Kawkewistahaw bands. These payments came most opportunely at a season of the year when most needed; these payments enable the Indians to settle their debts and provide many useful supplies; they are especially useful in assisting the old people.¹⁵⁵

The following year, Millar reported:

The interest accruing from surrendered land provides for the old people many luxuries that they could not otherwise obtain. . . .

Three out of the four bands in this agency have a land fund from which interest payments were made in March. These payments came very useful after so severe a winter, enabling the Indians to provide much of the necessary supplies for spring work. While some of this money is foolishly expended, still on the whole it does much

¹⁵⁴ Secretary, Department of Indian Affairs, to M. Millar, Indian Agent, February 10, 1910, NA, RG 10, vol. 3732, file 26623-1 (ICC Documents, p. 406).

¹⁵⁵ Matthew Millar, Indian Agent, to Frank Pedley, Deputy Superintendent General of Indian Affairs, May 18, 1910, Canada, Parliament, *Sessional Papers*, 1911, "Annual Report of the Department of Indian Affairs," 1910, 127 (ICC Documents, p. 410).

good, especially for the old and helpless people, and the system of holding the capital intact and distributing the interest is a good one.¹⁵⁶

The reports from the following two years were in much the same vein.¹⁵⁷

In his report entitled "The Government of Canada and Kahkewistahaw Band," Ken Tyler balanced Millar's comments with some of the drawbacks of the surrender:

Indian Agent Matthew Millar repeatedly stressed the benefits of these interest payments, recounting how they helped the Band members pay off their debts in the spring, or how they helped the old people purchase a few necessities, or even luxuries, now and again. He did not pay the same attention to the hardships which the surrender [had] brought about. Early [in] 1908, he did acknowledge that, "most of the Indians who farm on this reserve (Kahkewistahaw's) were required to establish new places this year, their old holdings being within the surrendered area." Two years later he made passing reference to another hardship which the surrender had imposed upon the Kahkewistahaw Band, when he noted that because of the scarcity of hay, the cattle herds had had to be reduced.¹⁵⁸

By 1914, the new Indian Agent for the Crooked Lake Agency, E. Taylor, reported that many of the Indians within the agency appeared to have lost their interest and ambition:

Cattle. — . . . Very few of the Indians have any desire to increase their small herds of cattle, and this is most regrettable, as cattle-raising would be far more profitable and satisfactory with many of them than grain-growing.

Characteristics and Progress. — Owing to tribal customs, the progress in this agency is slow. The younger generation of the Kahkewistahaw band are disappointing and appear to rely to a great extent on interest money from surrendered land as a chief support, and they dislike to take advice.¹⁵⁹

Within the same time frame, Indian discontent surfaced in the form of a treaty revival movement, which culminated in the creation of treaty discussion

156 M. Millar, Indian Agent, to Frank Pedley, Deputy Superintendent General of Indian Affairs, May 18, 1911, Canada, Parliament, *Sessional Papers*, 1912, "Annual Report of the Department of Indian Affairs," 1911, 137 (ICC Documents, p. 423).

157 W. [sic] Millar, Indian Agent, to Frank Pedley, Deputy Superintendent General of Indian Affairs, May 26, 1912, Canada, Parliament, *Sessional Papers*, 1913, "Annual Report of the Department of Indian Affairs," 1912, 141 (ICC Documents, p. 428); M. Millar, Indian Agent, to Frank Pedley, Deputy Superintendent General of Indian Affairs, June 3, 1913, Canada, Parliament, *Sessional Papers*, 1914, "Annual Report of the Department of Indian Affairs," 1913, 137 (ICC Documents, p. 423).

158 Ken Tyler, "Government of Canada and Kahkewistahaw Band," undated, p. 92 (ICC Exhibit 18).

159 E. Taylor, Indian Agent, undated, Canada, Parliament, *Sessional Papers*, 1915, "Annual Report of the Department of Indian Affairs," 1914, 58 (ICC Documents, p. 437).

groups among the Crooked Lake Bands. This movement, which originated at a meeting in June 1910 on the Cowessess reserve, had the twin goals of restoring Crooked Lake treaty rights and rectifying the various problems that had arisen over the years, including those associated with the surrenders. Louis O'Soup, formerly a prominent farmer on the Cowessess reserve, had by then returned from Manitoba and soon became one of the movement's most influential leaders. Isaac and Kahkanowenapew were the initial Kahkewistahaw representatives. The meetings continued into the winter and spring of 1911, and only the older men who could remember the treaty promises were allowed to take part. By then, Alec and Mesahcamapeness (and possibly others) had also become active participants on behalf of the Kahkewistahaw Band. Before long, the participating members of the Crooked Lake Bands were joined by representatives of other reserves in the region.

Ultimately, messengers were sent to the Moose Mountain, Pelly, Qu'Appelle, and Touchwood agencies to invite further representation, with the goal of sending a delegation to Ottawa. Money was donated by Band members, with those who could not afford to make the trip composing letters to be taken by those who could. Kahkanowenapew was chosen to represent the Kahkewistahaw Band.

Early in 1911, nine men representing seven different bands journeyed to Ottawa, where they had a number of meetings with department officials, including Frank Oliver, between January 24 and 28. One of Kahkanowenapew's primary demands on behalf of Kahkewistahaw was that the Band be permitted to conduct elections for a chief and councillors. Another was that the Indian Agent no longer be allowed to withhold moneys due to the Band and to apply them to whatever debts may have been owed by members to creditors. Kahkanowenapew also raised the promises, which had been made by Graham at the time of taking the surrender in 1907, that the Kahkewistahaw Band would be able to make a living from the proceeds of the sale. Although it is unclear whether he challenged the surrender or reproved Graham or the Department for taking it, Kahkanowenapew did stress that life was still very hard for Band members, and urged that all the interest moneys due to them from the sale of their lands be paid as soon as possible. At the end of this round of meetings, Oliver promised that Kahkewistahaw would be allowed a chief and one councillor, that the annual interest payments due to Band members would be doubled, and that the

Agent would not in future be permitted to withhold their money and apply it to their debts.¹⁶⁰

Nevertheless, the federal government's policy of seeking surrenders continued. During the First World War, Indian lands remained targeted, although less for new settlement than for increased production to sustain the war effort. Following the war, the "greater production" program was retained and made even more comprehensive, with former Inspector William Graham elevated to the position of Indian Commissioner to oversee its implementation. Graham was evidently enthusiastic in his approach, and, in 1920, Saskatchewan Bishop J.A. Newnham complained to D.C. Scott, the Deputy Superintendent General of Indian Affairs:

You will remember that I am in correspondence with you, & with the Sask. Prov. Government about a scheme for the Sioux Band on the Round Lake Reserve. Now they have come to me in distress as they say that your Commissioner at Regina, Wm. Graham, who has "greater production" on the brain, is intending & hoping to transfer them to some Sioux Reserve near Dundurn & hand their Reserve over to Soldier Settlement, or some such thing. I beg to endorse their protest most heartily, & to urge that nothing of the sort be done. They are, though left alone by us & still pagans, a very respectable band: steady and industrious. They have been on that Reserve, or in that district for about 50 years, most of them, perhaps, have been born there, & they love their home. The I.D. [Indian Department] is supposed to be anxious to have the Indians take greater interest in farming, & to complain that they do not farm more. Surely to seize all the best of the farming land in one reserve after another is not the way to encourage them to be farmers? But this seems to be Mr. Graham's method lately; & I fear he has somehow gained the ear & the favour of the I.D. at Ottawa. He would not be in such high favour if you could hear how the Indians & the best Indian Agents speak of him. It is easy to make a reputation for success in one particular line of work, if you determine to sacrifice all other lines for that one. Mr. Graham may get the praise for "greater production", but it is the poor Indians who make the sacrifice. Greater production is good & to be sought – in a just & honest way – but it is not the whole of statesmanship. Nearly all our Indian work is suffering here because he seems to have eyes & ears & enthusiasm only for greater production. I trust you will be able to comfort these Sioux, & allay their fears, & also to see that Mr. Graham realises that his first job is that of "Indian Commissioner."¹⁶¹

In later years, at least one of Canada's own officials came to question the wisdom of the Crown's earlier surrender policy. J.C. Caldwell, Chief of the

¹⁶⁰ The discussions in Ottawa are described in "Notes of Representations Made by a Delegation of Indians from the West," January 24, 1911, NA, RG 10, vol. 4053, file 379203-2.

¹⁶¹ J.A. Newnham, Bishop of Saskatchewan, to D.C. Scott, Deputy Superintendent General of Indian Affairs, February 10, 1920 (ICC Documents, pp. 445-46).

Reserves Division, commented in 1939 that “[i]n the past I believe we have rather unwisely given consent to the surrender of Indian lands, when as a matter of fact, having in mind future development and requirements, such lands should have been retained for Indian use.”¹⁶²

The record before the Commission in this inquiry is virtually bare for almost 70 years from the end of the First World War until the First Nation’s claim was submitted to Canada in 1989. We have no indication whether the annual payments of accrued interest on the proceeds from the surrendered land continued after 1914, or whether some or all of the principal amount was eventually paid out or remained invested for the First Nation’s benefit. We understand, based on the submissions of counsel for the First Nation, that some of these questions may be researched further if it is determined that Canada owes a lawful obligation to Kahkewistahaw as a result of the circumstances surrounding the surrender.

We will turn to the question of Canada’s lawful obligation, after we review briefly the effects of the surrender on Kahkewistahaw’s land base in IR 72.

Impact of the Surrender on IR 72

The difference in the quantity and quality of the land base of the Kahkewistahaw First Nation before and after the 1907 surrender can only be described as shocking. That discrepancy is a material consideration in our finding that the surrender transaction was tainted. Following the survey by John Nelson in 1881, Kahkewistahaw’s IR 72 comprised an area of 46,720 acres on the south shore of the Qu’Appelle River between Round Lake and Crooked Lake. The 1907 surrender resulted in the Band’s interest in 33,281 acres of this land being disposed of to the Crown for sale, leaving the Band with a residual land base of only 13,439 acres.

The differences between the surrendered lands and the residual lands formed the subject matter of a report and oral testimony by David Hoffman of Hoffman & Associates Ltd. Mr Hoffman is a fully accredited appraiser with the Appraisal Institute of Canada, in addition to being a professional agrologist and a farmer in his own right. Before he established his consulting business, he was employed by the Department for almost eight years as Head of Land Administration and Superintendent of Lands, Revenues and Trusts, during which time he was actively engaged in managing Indian lands and training Indian farmers.

¹⁶² J.C. Caldwell, Chief, Reserves Division, to H.W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, April 6, 1939 (ICC Documents, pp. 452-53).

Mr Hoffman's report, entitled "Comparison of Soils between Surrendered and Non-Surrendered Areas of Kahkewistahaw,"¹⁶³ was commissioned by the First Nation to compare, first, the quantitative differences between the surrendered lands and the residual reserve lands in terms of the percentages of arable and non-arable land that each area contains, and, second, the qualitative differences in the arable land contained in each of the two areas. Other than inconsequential differences in approach required by the absence of standardized road allowances on the reserve and the non-categorization of off-reserve grazing lands into soil types, the report applied the Saskatchewan Assessment Management Agency's usual methods of assessing farmland to the assessment of reserve lands within IR 72, being lands that are not normally subject to municipal assessment. The report also used rounded figures for the areas of IR 72 before the surrender (47,000 acres), the surrendered lands (33,000 acres), and the residual reserve lands (14,000 acres).

According to Mr Hoffman, arable land means soils which are fit for cultivation and which can be used for crop production, forage production, or grazing land, and includes both cultivatable arable land (currently cultivated or easily converted to cultivation) and unimproved arable land (currently best used as pasture, but including "bush arable soils" that should eventually be improved into cultivatable land). Non-arable soils are limited to haying or grazing purposes because of severe negative characteristics – such as extreme topography, salinity, stones, or sand – that make cultivation impossible.

The quantitative differences identified in the Hoffman report between the surrendered lands and the residual reserve lands are striking, particularly when considered in light of the map prepared by Hoffman & Associates Ltd which has been included at page 21 of this report. These differences are set forth in Table 1, which has been derived from the table entitled "Summary of Salient Facts" and from other data in the report. It can be seen from Table 1 and from the map that almost 90 per cent of the surrendered lands are arable, as compared with only 26 per cent of the residual reserve lands. Conversely, while 70 per cent of the reserve lands are non-arable, only 10 per cent of the surrendered lands fall into this category. When the combined acreages of the surrendered lands and the residual reserve lands are considered, the surrender left Kahkewistahaw with only 11 per cent of the

¹⁶³ Hoffman & Associates Ltd, "Comparison of Soils between Surrendered and Non-Surrendered Areas of Kahkewistahaw," undated (ICC Documents, pp. 802-57).

TABLE 1
Kahkewistahaw Soil Analysis

Arable v. Non-arable soils		Original Reserve (acres)	Surrendered Area (acres)	Residual Reserve Area (acres)
<i>Arable or Cultivable Soils</i>	Field crop production	22,700	21,800	900
	Other cultivatable land	675		675
	Cultivated grass	700	700	
	Improved hayland	250		250
	Unimproved hayland	100	100	
	Grazing land and bush arable land	8,125	6,300	1,825
	Subtotals (rounded)	32,450 (69%)	28,800 (88%)	3,650 (26%)
<i>Non-arable or Non- cultivable Soils</i>	Qu'Appelle Valley hillsides	1,900		1,900
	Soils with numerous surface stones	6,500		6,500
	Soils subject to flooding and salinity problems	1,050		1,050
	Waste slough (low-lying areas)	3,700	3,200	500
	Subtotals (rounded)	13,150 (28%)	3,200 (10%)	9,950 (70%)
<i>Residential Sites and Road Allowances</i>		1,300 (3%)	750 (2%)	550 (4%)
TOTALS (rounded)		47,000 (100%)	33,000 (100%)	14,000 (100%)

arable land, but 75 per cent of the non-arable land, originally set apart for the Band in 1881.

The second phase of Mr Hoffman's analysis was to compare the quality of the arable areas in the surrendered lands with that in the residue of IR 72. Mr Hoffman noted that, since only 26 per cent of the residual reserve land is arable, better-quality soils make up only 18 per cent of the reserve's total acreage. By way of comparison, the surrendered lands have a higher average soil quality than the residual reserve lands. Perhaps more significant is the fact that better-quality lands make up roughly 82 per cent of the arable land in the surrendered area and 72 per cent of the overall surrendered land base.

In summary, it is clear, in Mr Hoffman's view, that the residual reserve lands are significantly inferior to the lands which were surrendered by the

Kahkewistahaw Band in 1907, in terms of both the *percentage* and the *quality* of arable land that each contains. It should also be noted, however, that these differences are not apparent simply as a result of the advantages of modern technical soils analysis. In the course of the community session, the Commission had the opportunity to view the reserve and was immediately struck by the remarkable and obvious differences between the residual reserve lands and the surrendered lands. As Mr Hoffman testified:

- Q. So given these features, the steep valley sides, the poorly drained soils and the rocks, would a person require any special training of any sort in soil analysis or whatever to have known that most of the existing reserve was of poor quality in 1907?
- A. I don't believe so. I guess the thing that comes to my mind, being I'm a farmer as well and I was raised on a farm, that people in the turn of the century, one of the things they looked for was something that was readily able to be tilled, and generally that is with horse and plough, and the one thing is — the one thing they for sure stayed away from was anything that had any stone in it because that was virtually impossible with that type of technology, and so I think that in my opinion at that time it would be just as noticeable as it is today if not more so.
- Q. More important?
- A. Well I wouldn't want to go in there with a horse and plough, that's all I know. . . .
- Q. So then in your opinion would the fact that most of the surrendered land is good farming land, the fact that very little of the existing reserve is of good quality land, good quality farming land and the fact that most of the existing reserve is of poor quality land have been apparent to the Indian agents and the department representatives in 1907?
- A. Well certainly the stones and the hillwash. I can't see how it couldn't be apparent. It covers such a large amount of the reserve I would have to say yes. You'd think they would notice it at that time as well.
- Q. So then in your opinion was the surrender of this 33,000 acres in 1907 from the reserve a detriment to the agricultural development of the members of the First Nation?
- A. I would say yes.
- Q. Then in your opinion was the surrender of the 33,000 acres from the reserve in the best interest of the members of the First Nation?
- A. I don't believe so.¹⁶⁴

This last question is properly a matter for decision by the Commission. However, before considering this and the other aspects of legal and factual analysis required in this inquiry, we will briefly address the issues before us.

¹⁶⁴ ICC Transcript, May 3, 1995, pp. 137-39 (David Hoffman).

PART III

ISSUES

The broad question before the Commission is whether Canada owes an outstanding lawful obligation to the Kahkewistahaw First Nation as a result of events arising out of the surrender of IR 72 in 1907. To assist in determining whether Kahkewistahaw has a valid claim against Canada, counsel for the parties agreed to the following issues:

- I Was there a valid surrender on January 28, 1907, of some 33,281 acres of the Kahkewistahaw Reserve No. 72?
 1. Did the Crown obtain the surrender:
 - a) as a result of duress;
 - b) as a result of undue influence;
 - c) as a result of an unconscionable agreement; or
 - d) as a result of negligent misrepresentation?
 2. Did the Crown when obtaining the surrender comply with the surrender procedures under the *Indian Act*?
 3. Did the Crown have any trust or fiduciary obligations in relation to the surrender of 1907 to the First Nation, and, if so, did the Crown fulfil those trust or fiduciary obligations when it obtained the surrender?
 4. Did the provisions of Treaty 4 require the Crown to obtain the consent of the Indians entitled to the Kahkewistahaw reserve prior to disposing of some 33,281 acres of the reserve, and, if so, was that consent obtained?

- II Assuming that the 1907 surrender was valid and that the road allowances were included, was the First Nation adequately compensated for those road allowances, and, if not, did the Crown breach any trust or fiduciary

obligations owed to the First Nation by failing to adequately compensate the First Nation for those road allowances?

III If the evidence is inconclusive on any of the previous issues, which party has the onus of proof?

In the course of this inquiry, an extensive body of historical documentation has been placed in evidence, the testimony of elders from the Kahkewistahaw First Nation has been heard and recorded, and lengthy submissions of fact and law have been presented by legal counsel. There is, in short, a wealth of information to assist us in our deliberations, and in Part IV of this report we propose to address the issues in two main components.

In the first part of our analysis, we will identify the technical requirements of the 1906 *Indian Act* for surrendering reserve land, and we will determine whether those requirements were met to implement the surrender validly.

Second, having regard for our mandate to determine whether an outstanding lawful obligation is owing to the First Nation, we will consider whether the Government of Canada breached any fiduciary obligations that have been superimposed by the Supreme Court of Canada on the statutory surrender regime.

PART IV

ANALYSIS

ISSUE 1 VALIDITY OF THE 1907 SURRENDER

Surrender Provisions of the 1906 *Indian Act*

In any case in which the validity of a surrender of reserve land by an Indian band is in issue, the first line of inquiry is to consider the technical provisions of the *Indian Act* relating to surrenders. In this case, the relevant provisions are set out in the 1906 version of the *Indian Act*.¹⁶⁵ Sections 48, 49, and 50 of the 1906 *Indian Act* prohibit the direct sale of reserve lands to third parties and set out the procedural requirements for a valid surrender. Those provisions read as follows:

48. Except as in this Part otherwise provided, no reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Part; Provided that the Superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage, in the interests of the Indians, of wild grass and dead or fallen timber.

49. Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.

2. No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.

¹⁶⁵ RSC 1906, c. 81, as amended [hereinafter 1906 *Indian Act*].

3. The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before some judge of a superior, county or district court, stipendiary magistrate or justice of the peace, or, in the case of reserves in the province of Manitoba, Saskatchewan or Alberta, or the Territories, before the Indian commissioner, and in the case of reserves in British Columbia, or, in either case, before some other person or officer specially thereunto authorized by the Governor in Council.

4. When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.

50. Nothing in this Part shall confirm any release or surrender which, but for this Part, would have been invalid; and no release or surrender of any reserve, or portion of a reserve, to any person other than His Majesty, shall be valid.

These statutory provisions found their philosophical origin in the *Royal Proclamation* of 1763, which stated:

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

The parallel surrender provisions of the 1906 and 1927 versions of the *Indian Act* have been interpreted by the Supreme Court of Canada in *Cardinal v. R.*¹⁶⁶ and in *Blueberry River Band v. Canada*¹⁶⁷ (the latter referred to hereafter as the *Apsassin* case), and by the Ontario Court (General Division) and the Ontario Court of Appeal in *Chippewas of Kettle and Stony Point v.*

¹⁶⁶ *Cardinal v. R.*, [1982] 1 SCR 508, 13 DLR (4th) 321, [1982] 3 CNLR 3.

¹⁶⁷ *Blueberry River Indian Band v. Canada* (Department of Indian Affairs and Northern Development), [1996] 2 CNLR 25 (SCC).

Canada (Attorney General).¹⁶⁸ In *Cardinal*, Estey J provided the following summary of the 1906 *Indian Act* surrender provisions:

It has also been argued that the interpretation which is now being considered is one which exposes the membership of the band to a risk of loss of property and other rights, contrary to the general pattern and spirit of the *Indian Act*. It is perhaps well to observe in this connection that there are precautions built into the procedures of Pt. I of the Act, dealing with surrender. Firstly, the meeting must be called to consider the question of surrender explicitly. It may not be attended to at a regular meeting or one in respect of which express notice has not been given to the band. Secondly, the meeting must be called in accordance with the rules of the band. Thirdly, the chief or principal men must certify on oath the vote, and that the meeting was properly constituted. Fourthly, only residents of the reserve can vote, by reason of the exclusionary provisions of subs. (2) of s. 49. Fifthly, the meeting must be held in the presence of an officer of the Crown. And sixthly, even if the vote is in the affirmative, the surrender may be accepted or refused by the Governor in Council. *It is against this background of precautionary measures that one must examine the manner in which the assent of eligible members of the band is to be ascertained under s. 49.*¹⁶⁹

Accordingly, the procedural requirements for a surrender meeting under section 49 of the *Indian Act* can be summarized as follows:

- 1 a meeting must be summoned for the express purpose of considering whether to surrender the land – that is, a proposal for surrender cannot be raised at a regular meeting of the band or at a meeting where no express notice of the proposed surrender has been provided;
- 2 the meeting must be called in accordance with the rules of the band;
- 3 the meeting must be held in the presence of the Superintendent General or an authorized officer;
- 4 a majority of the male members of the band of the full age of twenty-one years must attend the meeting, and a majority of those attending must in turn assent to the surrender;
- 5 under subsection (2), only those men ordinarily resident on the reserve are eligible to vote;

¹⁶⁸ *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, unreported, [1996] OJ No. 4188 (December 2, 1996) (Ont. CA), Laskin JA, confirming *Chippewas of Kettle and Stony Point v. Attorney General of Canada* (1995), 24 OR (3d) 654 (Ont. Ct (Gen. Div.)), Killeen J.

¹⁶⁹ *Cardinal v. R.*, [1982] 1 SCR 508, [1982] 3 CNLR 3, 13 DLR (4th) 321 at 10.

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- 6 under subsection (3), the band's assent to the surrender must be certified on oath by the Crown and the band; and
 - 7 under subsection (4), the surrender must be submitted to the Governor in Council for acceptance or refusal.

The first six of these criteria deal with a band's consent to the surrender of all or a portion of its reserve. Once the band has consented to the surrender, the consent of the Governor in Council must then be obtained before it can be said that the surrender is valid. We will now consider each of these criteria in the context of the present case.

Compliance with Technical Surrender Requirements

First, was the assent given at a meeting or council called for that purpose? There is evidence to suggest that a meeting was called on January 28, 1907, but the adequacy of the notice for this meeting is the subject of some dispute. The evidence before the Commission suggests that adequate notice of the meetings was provided. The First Nation asserted that it may have had as many as 25 to 28 members over the age of 21 years based on the treaty annuity paylists for 1906 and 1907, but the departmental statistics compiled for the purposes of the surrender vote suggest that there were only 19 eligible voters. In our view, the departmental records compiled at the time of the surrender provide reliable evidence of the number of members of the Band who were eligible to vote at the time of the meeting. Even if there were 25 to 28 adult male members of the Band, this discrepancy could be attributed to some men being absent or otherwise ineligible to vote because they were not ordinarily living on the reserve at the time of the surrender.

Assuming that there were 19 eligible voters at the time of the surrender, it would appear that there was adequate notice for the first meeting on January 23, 1907, because all 19 attended. With respect to the second meeting on January 28, 17 out of 19 eligible voters attended, which again suggests that adequate notice was provided. Furthermore, the records prepared by Inspector Graham and Indian Agent Millar assert that the members themselves asked for the second meeting, and there is no evidence to the contrary. The most reasonable inference to draw from these facts is that adequate notice had been given to the Band as to the time, place, and purpose of the January 28 surrender meeting.

Second, was the meeting called in accordance with the rules of the Band? Canada dismissed the argument that the Crown did not comply with the

Band's rules, since "there is no evidence to establish what the band rules were." Although we have serious reservations about many of the circumstances surrounding the surrender, we note that there was a substantial turnout at the surrender meeting on January 28, 1907, as will be addressed further below. Moreover, the preprinted standard form certification affidavit sworn by Kahkanowenapew confirmed that the meeting was called "according to the rules of the Band," and we can find no specific evidence to contradict this statement.

Third, was the surrender meeting held in the presence of the Superintendent General or an officer authorized to attend on his behalf? The First Nation argued that Inspector Graham was not authorized by the Governor in Council or the Superintendent General to attend the meeting. Rather, he was given instructions to attend the surrender meeting by Secretary McLean, who was the *Acting* Deputy Superintendent General of Indian Affairs during the summer and fall of 1906.¹⁷⁰ Canada submitted that Graham was authorized to attend the meeting by the Superintendent General, the equivalent of a Minister in the Indian Affairs Branch, because a memorandum outlining Graham's proposal for a surrender contains a handwritten marginal note dated September 29, 1906, which states, "approved, Go right ahead," accompanied by the letters "BOM" (an acronym for "By Order of Minister"). Canada relied on the following statement from the trial level in *Apsassin* in submitting that McLean had the authority to delegate this task to Graham:

There is nothing in s. 51 of the *Indian Act* [s. 49 of the 1906 Act] to indicate that the Superintendent General rather than his Deputy was to *personally authorize* any individual to attend the surrender meeting. Section 31(1) of the *Interpretation Act* would therefore apply.¹⁷¹

Sections 31(f) and (m) of the *Interpretation Act*, RSC 1906, chapter 1, lend support to this interpretation:

31. In every Act, unless the contrary intention appears, . . .
- (f) if a power is conferred or a duty imposed on the holder of any office, as such, the power may be exercised and the duty shall be performed by the holder for the time being of the office; . . .

¹⁷⁰ Frank Pedley was the Deputy Superintendent General of Indian Affairs at the time. Submissions on Behalf of the Kahkewistahaw First Nation, January 26, 1996, p. 116.

¹⁷¹ An abridged version of the decision at trial is reported as *Apsassin v. Canada (Department of Indian Affairs and Northern Development)*, [1988] 3 FC 20 (TD). The complete text is reported as *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1988] 14 FTR 161, 1 CNLR 73 (FCTD). Emphasis in original.

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- (m) words directing or empowering any other public officer or functionary to do any act or thing, or otherwise applying to him by his name of office, include his successors in office, and his or their lawful deputy.

On this point, we concur with Canada that McLean, as the Acting Deputy Superintendent General, was "a holder for the time being of the office" of the Deputy Superintendent General and was empowered to exercise the powers that came with that office. Therefore, McLean was empowered to and did authorize Inspector Graham to attend the surrender meeting with the Kahkewistahaw Band.

Fourth, was the surrender assented to by a majority of the eligible voters? In our view, it was. During the surrender meeting on January 28, 1907, 11 of the 17 eligible voters present at the meeting voted in favour of the surrender. Since there were only 19 eligible voters in the Band, this constituted an absolute majority of all eligible voters, whether or not they attended the surrender meeting. Alternatively, even if we were to accept that there were as many as 28 eligible voters at the time of the surrender vote, the requisite majorities were obtained, since 17 of 28 eligible voters attended the meeting and 11 of those 17 voted in favour of the surrender. In *Cardinal*, Estey J rejected the argument that an absolute majority is required under the 1906 *Indian Act*. Since quorum was achieved with a majority of all eligible voters attending the surrender meeting, the *Indian Act* required only that a majority of those present at the meeting vote in favour of the surrender.

Fifth, were all the voters habitually resident on, and interested in, the reserve? There is no evidence to suggest that any of the 17 voters on January 28, 1907, were ineligible by reason of non-residency.

Sixth, was the surrender duly certified? Section 49(3) of the 1906 *Indian Act* required that the surrender vote be certified on oath by the Superintendent General, or his duly authorized officer, and by "some of the chiefs or principal men present" at the surrender meeting. Was this requirement met? As described earlier, on the certificate of surrender, the preprinted word "Chief" was crossed out and the word "Indian" substituted so that Kahkewistahaw, an ordinary member of the Band, could certify the surrender on oath.

At first glance, these circumstances appear to be similar to those in *Apsassin*, where the Chiefs did not personally certify the surrender. Instead, they simply told the Commissioner for Oaths that they wished to surrender and he then swore the certificate. However, the difference in the case of the Kahkewistahaw surrender was that no Chief or principal man was present at

either the surrender or the swearing of the certificate. As we will discuss below in the context of Canada's fiduciary obligations to First Nations, the deaths of Kahkewistahaw, Wasacase, and Louison left the Band with a leadership void that had not been resolved by the time of the surrender. Instead, an ordinary member of the Band who had been present at the surrender swore the certificate. In our view, there was clearly a failure to comply with subsection 49(3) because there was no Chief or headman to attest to the propriety of the surrender process.

Finally, was the surrender accepted by the Governor in Council as stipulated by subsection 49(4)? We have already noted that the surrender was submitted to the Governor in Council on February 26, 1907, and approved on March 4 of that year. In a purely technical sense, the requirements of subsection 49(4) were met because the Band's assent was submitted to the Governor in Council and accepted. However, in light of the reasons of McLachlin J in *Apsassin*, fiduciary obligations may also be superimposed on the Crown, in addition to the technical requirements of subsection 49(4). We will return to the question of the Crown's fiduciary duties later in our report.

Mandatory versus Directory Surrender Requirements

Given our findings that the 1907 surrender failed to comply with the certification provisions in subsection 49(3) of the 1906 *Indian Act*, it is necessary to consider whether such non-compliance renders the 1907 surrender invalid. Obviously, if the provisions of section 49 of the *Indian Act* are mandatory rather than merely directory, any surrender that does not comply with one or more of them may be invalid for that reason alone. For guidance on how these provisions are to be interpreted, it is necessary to consider the relevant case authorities on point.

In the *Chippewas of Kettle and Stony Point* case, Killeen J concluded that failure to comply with section 49 would be fatal to the surrender in some cases but not in others. He stated:

What, then, is the effect of s. 49(1)-(3)?

Section 49(1) lays down, in my view, in explicit terms, a true condition precedent to the validity of any surrender and sale of Indian reserve lands. It makes this abundantly clear by saying that no such surrender "shall be valid or binding" unless its directions are followed.

Bearing in mind the prophylactic principle at stake in the *Royal Proclamation*, as reinforced by ss. 48-50, it is simply impossible to argue that s. 49(1) does not lay down a mandatory precondition for the validity of any surrender. If the surrender in question has not followed the s. 49(1) procedure, it must be void *ab initio*. To

suggest otherwise is to re-write history and the commands of the *Royal Proclamation* and the Indian Act.¹⁷²

The four essential criteria in subsection 49(1) are assent by the majority of male members over the age of 21 years; the assent given at a meeting or council called for the purpose of considering the surrender; the meeting called "according to the rules of the Band"; and the meeting conducted in the presence of the Superintendent General of Indian Affairs or his agent. We have already concluded that all of these criteria were satisfied.

With regard to the residency requirement in subsection 49(2), Killeen J stated:

I may also say, here, that I am not persuaded that s. 49(2) contains a mandatory procedural requirement of the kind specified in s. 49(1). There is nothing in s. 49(2) itself to suggest that failure to comply with its directive would render the surrender invalid. In any event, I am entirely satisfied that s. 49(2) was complied with and that no one who voted at the meeting violated its prescription.¹⁷³

As noted previously, the Commission reached the same conclusion on the facts of this case.

In relation to the certification provision, which we have found was not met in this case, Killeen J stated:

I cannot agree with Mr. Vogel's contention that s. 49(3) contains a mandatory precondition to the validity of the surrender.

It is true that s. 49(3) uses the phrase "shall be certified" but, considered in context, I believe this language to be directory and not mandatory.

In order to get at the meaning and scope of this phrase, one must consider the object and purpose of s. 49(3). As it seems to me, its purpose is clearly differentiated from the purpose of s. 49(1) or (2). These latter provisions establish the exact procedures to be followed in effectuating a valid surrender on the part of a given Indian band. On the other hand, s. 49(3) achieves what I would call an after-the-fact evidentiary purpose, namely, to provide sworn documentary proof that the requirements of s. 49(1) and (2) have been complied with in all respects.

I cannot believe that an evidentiary or proof proviso aimed at providing future proof in sworn form that appropriate procedures for an assent to surrender have been followed can somehow have a nullifying effect on an assent to surrender that would otherwise be valid. Section 49(3) itself does not use the same language as

¹⁷² *Chippewas of Kettle and Stony Point v. Attorney General of Canada* (1995), 24 OR (3d) 654 at 685 (Ont. Ct (Gen. Div.)).

¹⁷³ *Chippewas of Kettle and Stony Point v. Attorney General of Canada* (1995), 24 OR (3d) 654 at 690 (Ont. Ct (Gen. Div.)).

s. 49(1) does – “no release or surrender of a reserve . . . shall be valid or binding, unless” – and, absent such language, the context and purpose of s. 49(3) dictates that it be given a directory rather than mandatory effect.¹⁷⁴

Subsequently, McLachlin J in *Apsassin* considered whether subsections 51(3) and (4) of the 1927 *Indian Act*, which are equivalent to subsections 49(3) and (4) of the 1906 *Indian Act*, are mandatory or merely directory:

This raises the question of whether the ss. 51(3) and 51(4) are mandatory or merely directory. Addy J. and Stone J.A. below held that despite the use of the word “shall”, the provisions were directory rather than mandatory, relying on *Montreal Street Railway Co. v. Normandin*, [1917] A.C. 170 (P.C.), which summarized the factors relevant to determining whether a statutory direction is mandatory or directory as follows (at p. 175):

When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only. . . .

Addy J. concluded that to read the provisions in a mandatory way would not promote the main object of the legislation, which is to ensure that the sale of the reserve is made pursuant to the wishes of the Band. Stone J.A. agreed. This Court has since held that the object of the statute, and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory: *British Columbia (Attorney General) v. Canada*, [1994] 2 S.C.R. 41.

The true object of ss. 51(3) and 51(4) of the *Indian Act* was to ensure that the surrender was validly assented to by the Band. The evidence, including the voter’s list, in the possession of the DIA amply established valid assent. Moreover, to read the provisions as mandatory would work serious inconvenience, not only where the surrender is later challenged, but in any case where the provision was not fulfilled, as the Band would have to go through the process again of holding a meeting, assenting to the surrender, and certifying the assent. I therefore agree with the courts below that the “shall” in the provisions should not be considered mandatory. Failure to comply with s. 51 of the *Indian Act* therefore does not defeat the surrender.¹⁷⁵

174 *Chippewas of Kettle and Stony Point v. Attorney General of Canada* (1995), 24 OR (3d) 654 at 691-92 (Ont. Ct. (Gen. Div.)).

175 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 42-43 (SCC), McLachlin J.

We conclude, on applying the foregoing reasoning to the facts of this case, that the failure to comply with section 49 of the 1906 *Indian Act* similarly does not “defeat the surrender” in this case. Although the certification affidavit was sworn by Kahkanowenapew and not by “some of the chiefs or principal men,” it is apparent that the assent of the majority had already been given. The purpose of subsection 49(3) is merely to confirm satisfaction of the requirements of subsection 49(1) and (2), and in particular that majority assent of the Band members was given at an open meeting called for the purpose of discussing the surrender. We agree that invalidating the surrender on the basis of the failure to certify properly the majority assent already given would work a serious inconvenience and would not promote the object of ensuring that the surrender was validly assented to by the Band. We also conclude that this failure in fulfilling the technical surrender requirements of the *Indian Act* does not, in and of itself, give rise to an outstanding lawful obligation owed by Canada to the First Nation.¹⁷⁶

Effect of Valid Surrender

What, then, is the effect of the surrender, in the words of McLachlin J, not being “defeated”? The answer to this question has been considered more fully in the reasons of the Ontario Court of Appeal in *Chippewas of Kettle and Stony Point*. In that case, the Band surrendered land for sale to a purchaser named MacKenzie Crawford at a price of \$85 per acre, plus a \$15 “bonus” to be paid in two instalments to each eligible voter: \$5 upon voting at the surrender meeting, and a further \$10 in the event that the surrender

¹⁷⁶ The parties have also raised the issue of whether there are any technical requirements within Treaty 4 itself which would have required the Crown to obtain the consent of the Kahkewistahaw Band before securing the 1907 surrender. To the extent that the surrender requirements of the treaty may be inconsistent with sections 48 to 50 of the 1906 *Indian Act*, it is our view that the terms of the statute will prevail. As Cory J stated in *R. v. Horseman*, [1990] 3 CNLR 95 at 105 (SCC):

In addition, although it might well be politically and morally unacceptable in today’s climate to take such a step as that set out in the 1930 Agreement without consultation with and concurrence of the Native peoples affected, *nonetheless the power of the Federal Government to unilaterally make such a modification is unquestioned* and has not been challenged in this case.

We agree with Canada that, when the 1906 *Indian Act* was proclaimed, federal legislation could substantively affect or regulate treaty rights to the extent that the legislation evinced a clear intention to modify a treaty right. At the time of the surrender, there was no constitutional restraint to preclude Canada from enacting such legislation since s. 35 of the *Constitution Act, 1982*, which recognizes and affirms existing aboriginal and treaty rights, did not yet exist. However, we also concur with Canada’s position that it is not necessary to find that there is any inconsistency between the 1906 *Indian Act* and Treaty 4 on the question of surrender requirements. The treaty does not establish a required level of consent or a means of expressing such consent. Accordingly, the statutory surrender requirements represented a reasonable expression of the consent required under the treaty and, to the extent that those statutory requirements were satisfied, it can be said that the treaty requirements were likewise met.

received the Band's consent. Laskin JA described the rationale for the "bonus" in these terms:

Crawford first submitted an offer to the Department of Indian Affairs to purchase the land for \$85.00 per acre, cash. He then offered to pay an additional \$15 cash "bonus" to each member of the Band eligible to vote on the surrender because, in his words, the Indians "all said they had to have some money right away" and "I am quite satisfied they needed a little money." At the meeting, Crawford and the Band discussed the sale price and the amount of money to be paid up front. The Indian agent was concerned about the propriety of paying a bonus. Crawford apparently offered to pay \$100 per acre instead of \$85 per acre plus the \$15 bonus, but after discussion at the meeting, Crawford and the Band decided on the bonus arrangement. It is easy to see why. Under the statutory scheme, the maximum sum that could be distributed to the Band would be 50% of the sale proceeds after closing and even that 50% distribution would be reduced by the Band's debts. The voting members would, on the other hand, receive the entire direct payment. At the meeting, Crawford paid \$5 to each voting member. About two and one-half months later he went to the reserve and paid the rest of the bonus.¹⁷⁷

After closing the sale some 28 months following the surrender, Crawford "flipped" the land for nearly three times the purchase price.

Contending that the "bonus" was no more than a bribe, the Band argued that payment of the "bonus" and indeed Crawford's attendance at the surrender meeting were both prohibited by the *Royal Proclamation* of 1763 and the *Indian Act*. The Band's third ground for challenging the validity of the surrender was the 28-month delay in closing the transaction. On Canada's preliminary application for summary judgment dismissing the Band's claim for declaratory relief, all three grounds were rejected by Killeen J of the Ontario Court's General Division on the basis that they did not represent genuine issues for trial.

The Court of Appeal upheld the decision of Killeen J and dismissed the appeal. Laskin JA acknowledged that the underlying philosophy of both the *Royal Proclamation* and the surrender provisions of the *Indian Act* was to prevent aboriginal peoples from being exploited by third-party purchasers by inserting the Crown in a "protective and fiduciary role" as a buffer or intermediary between the parties. The statute also provided for public surrender meetings since, according to Laskin JA, "with dealings conducted in the

¹⁷⁷ *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, unreported, [1996] OJ No. 4188 (December 2, 1996) at 12-13 (Ont. CA).

open, frauds, abuses and misunderstandings were less likely to occur.”¹⁷⁸ Nevertheless, the Court of Appeal unanimously held that neither Crawford’s attendance at the surrender meeting, nor his offer to pay “bonus” money on the spot, violated the language or the rationale of the *Royal Proclamation* or the *Indian Act*. Laskin JA found that the Band not only intended to surrender its land but had pressed on several occasions for Crawford to move more quickly to close the sale. The Court concluded that the surrender, being unqualified and absolute, “extinguished the aboriginal interest in the surrendered land”¹⁷⁹ and was not subject to the oral understanding or condition that the sale would be completed reasonably quickly after the surrender vote, as the Band had claimed.

Extinguishing the aboriginal interest in the surrendered land means that it is not open to the Kahkewistahaw Band to challenge the titles of the current registered owners of the surrendered lands, most, if not all, of whom by this late date must be *bona fide* third-party purchasers for value. It must be kept in mind, however, that the appeal in *Chippewas of Kettle and Stony Point* arose from a motion by the Crown seeking summary judgment dismissing the Band’s claim for a declaration that the 1927 surrender and the 1929 Crown patent in that case were void. Although the decision confirmed the surrender as well as the titles of those defendants who now own land surrendered by the Band in 1927, Killeen J also recognized that certain issues could not be disposed of summarily and remained to be decided at trial:

Any finding of unconscionable conduct under the facts of this case *cannot affect the validity of the Order in Council* [approving the surrender]; *rather, such finding or findings must surely go to the Band’s other claim for breach of fiduciary duty.*¹⁸⁰

Similarly, the Court of Appeal concluded:

what then of the cash payments, which, in the words of the motions judge, had “an odour of moral failure about them”? In my view, there is no evidence to suggest that these cash payments, in the words of McLachlin J., vitiated the “true intent” or the “free and informed consent” of the Band or, in the words of Gonthier J., “made it unsafe to rely on the Band’s understanding and intention.” In keeping with Apsassin,

¹⁷⁸ *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, unreported, [1996] OJ No. 4188 (December 2, 1996) at 9-10 (Ont. CA).

¹⁷⁹ *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, unreported, [1996] OJ No. 4188 (December 2, 1996) at 29 (Ont. CA).

¹⁸⁰ *Chippewas of Kettle and Stony Point v. Attorney General of Canada* (1995), 24 OR (3d) 654 at 698 (Ont. Ct (Gen. Div.)).

the decision of the Band to sell should be honoured. Therefore, like Killeen J., I am satisfied that there is no genuine issue for trial on whether the cash payments invalidated the surrender. I would dismiss the Band's second ground of appeal.

I add, however, that the cash payments or alleged "bribe" and consequent exploitation or "tainted dealings" may afford grounds for the Band to make out a case of breach of fiduciary duty against the Crown. As the parties have recognized, this is an issue for trial. The same may be said of the Band's contention that the sale to Crawford was improvident, he having immediately "flipped" the land for nearly three times the purchase price. In discussing whether the Crown had a fiduciary duty to prevent the surrender in *Apsassin*, McLachlin J. wrote at p. 371:

It follows that under the Indian Act, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident – a decision that constituted exploitation – the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.

This, too, is an issue for trial.¹⁸¹

Our mandate under the Specific Claims Policy is to determine whether an outstanding lawful obligation is owed by Canada to the Kahkewistahaw First Nation. Although we have concluded that the surrender was technically valid, an outstanding lawful obligation may nevertheless be grounded in Canada's breach of its fiduciary duties to the First Nation. We now turn to our analysis of the fiduciary duties, if any, owed by Canada to Kahkewistahaw on the facts of this case.

ISSUE 2 CANADA'S PRE-SURRENDER FIDUCIARY OBLIGATIONS

The Supreme Court of Canada has, in recent years, addressed in a number of cases the categories of relationships that may be considered "fiduciary" in nature, and the content of the duties that arise given a particular fiduciary relationship and the facts of the case in question. In this portion of our report, we will review the leading cases – most notably *Apsassin* and the consideration of that case by the Ontario courts in *Chippewas of Kettle and Stony Point* – dealing with the fiduciary obligations of the Crown in the context of the surrender of all or a portion of a band's reserve. We will also

¹⁸¹ *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, unreported, [1996] OJ No. 4188 (December 2, 1996) at 24-25 (Ont. CA). Emphasis added. The references to "improvidence" in this passage relate to the issue of the Crown's fiduciary obligations arising out of the Governor in Council's acceptance of a surrender under subsection 49(4). This issue will be dealt with later in this report.

review the approaches which have been used by the courts for identifying whether a fiduciary obligation exists in given circumstances – in particular, where the band's understanding of the terms of the surrender are inadequate, where the conduct of the Crown has tainted the dealings in a manner that makes it unsafe to rely on the band's understanding and intention, where the band has abnegated its decision-making authority in favour of the Crown in relation to the surrender, or where the surrender is so foolish or improvident as to be considered exploitative. In applying the jurisprudence to the facts of this case, we will also consider whether the Crown owed and failed to satisfy any fiduciary duties to the Kahkewistahaw Band and, if so, whether Canada may be said to owe the First Nation an outstanding lawful obligation.

The *Guerin* Case

We have already alluded to certain fiduciary obligations that the Supreme Court of Canada has determined are owing by Canada to First Nations and are superimposed on the statutory surrender regime. In considering these obligations, we will focus primarily on the recent decision of the Supreme Court of Canada in *Apsassin* as the leading authority on the Crown's fiduciary duties to a band *prior to* a surrender of Indian reserve lands. Before embarking on our analysis of *Apsassin*, however, it is appropriate to review briefly the landmark 1984 decision of the Supreme Court of Canada in *Guerin v. The Queen*.¹⁸² Although the *Guerin* case dealt with the fiduciary obligations of the Crown with respect to the sale or lease of Indian reserve lands *after* a band has surrendered its land, the case nevertheless provides a useful starting point because it is the first decision in which the Supreme Court of Canada acknowledged that the Crown stands in a fiduciary relationship with aboriginal peoples.

In *Guerin*, the Musqueam Band surrendered 162 acres of reserve land to the Crown in 1957 for lease to a golf club on the understanding that the lease would contain the terms and conditions that were presented to and agreed upon by the Band Council. The surrender document that was subsequently executed gave the land to the Crown "in trust to lease the same" on such terms as it deemed most conducive to the welfare of the Band. The Band later discovered that the terms of the lease obtained by the Crown were significantly different from what the Band had agreed to and were less favourable.

¹⁸² *Guerin v. The Queen*, [1984] 2 SCR 335, [1985] 1 CNLR 120, [1984] 6 WWR 481, 13 DLR (4th) 321.

All eight members of the Court found that Canada had breached its duty to the Band. On the nature of the Crown's fiduciary relationship, Dickson J (as he then was) for the majority of the Court stated:

Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.

This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest J. Weinrib maintains in his article "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1, at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion". Earlier, at p. 4, he puts the point in the following way:

[Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.

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

. . . When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the band to explain what had occurred and seek the band's counsel on how to proceed. The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. *Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.*¹⁸³

Justice Dickson held that the *Indian Act* surrender provisions interposed the Crown between Indians and settlers with respect to the alienation of reserve lands. He described the source of the fiduciary relationship in these terms:

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

In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.

The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, Native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.

An Indian band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763 [see RSC 1970, App. I]. It is still recognized in the surrender provisions of the *Indian Act*. *The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.*¹⁸⁴

The *Guerin* case is instructive for two reasons: first, it determined that the relationship between the Crown and First Nations is fiduciary in nature; second, it clearly established the principle that an enforceable fiduciary obligation will arise in relation to the sale or lease of reserve land by the Crown on behalf of, and for the benefit of, a band to a third party *following* the surrender of reserve land to the Crown in trust. However, the Supreme Court of Canada was not called upon in *Guerin* to address the question whether the Crown owed any fiduciary duties to the band *prior to* the surrender. That issue was not specifically addressed until *Apsassin* appeared on the Court's docket.

The *Apsassin* Case

In *Apsassin*, the Beaver Indian Band¹⁸⁵ entered into a treaty with the Crown in 1916. Under the terms of Treaty 8, Canada set aside 28 square miles of land as Indian Reserve 172 for the Band in the Peace River District of British Columbia. The reserve contained good agricultural land, but the Band did not use it for farming. It was used only as a summer campground, since the

¹⁸⁴ *Guerin v. The Queen*, [1984] 2 SCR 335, 55 NR 161, 13 DLR (4th) 321, [1985] 1 CNLR 120 at 131-32, Dickson J. Emphasis added.

¹⁸⁵ The Beaver Indian Band was eventually split into two bands, which became known as the Blueberry River Band and the Doig River Band.

Band made a living from trapping and hunting further north during the winter. In 1940, the Band surrendered the mineral rights in its reserve to the Crown, in trust, to lease for the Band's benefit. The Band was approached again in 1945, following the Second World War, to explore surrender of the reserve so that the land could be made available for returning veterans interested in taking up agriculture. After a period of negotiation between the Department of Indian Affairs and the Director, *Veteran's Land Act* (DVLA), the entire reserve was surrendered in 1945 for \$70,000. In 1950, some of the money from the sale was used by the Department to purchase other reserve lands closer to the Band's traplines further north. Between 1948 and 1956, all the surrendered lands, including the mineral rights, were sold to veterans. Following disposition, the lands were discovered to contain oil and gas deposits that have generated an estimated \$300 million in revenues. The mineral rights were considered to have been "inadvertently" conveyed to the veterans instead of being retained for the benefit of the Band, and, although the Department had powers under section 64 of the *Indian Act* to cancel the transfer and reacquire the mineral rights, it did not do so. On discovering these facts, the Band sued for breach of fiduciary duty, claiming damages from the Crown for allowing the Band to make an improvident surrender of the reserve and for disposing of the land below value.

At trial,¹⁸⁶ Addy J dismissed all but one of the Band's claims. He found that no fiduciary duty existed prior to or concerning the surrender, and that the Crown had not breached its post-surrender fiduciary obligation with respect to the mineral rights, since those rights were not known to be valuable at the time of disposition. He also found, however, that the Department had breached a post-surrender fiduciary duty by not seeking a higher price for the surface rights.

The Federal Court of Appeal¹⁸⁷ dismissed the Band's appeal and the Crown's cross-appeal. However, the majority rejected the trial judge's conclusion that no fiduciary duty arose prior to the surrender. Rather, the Federal Court of Appeal held that the combination of the particular facts of the case and the *Indian Act* imposed a fiduciary obligation on the Crown. The specific nature of the obligation was not to prevent the surrender or to substitute the Crown's own decision for that of the Band, but rather to ensure that the Band was properly advised of the circumstances concerning the sur-

¹⁸⁶ *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1988] 14 FTR 161, 1 CNLR 73 (TD).

¹⁸⁷ *Apsassin v. Canada*, [1993] 3 FC 28, 100 DLR (4th) 504, 151 NR 241, [1993] 2 CNLR 20 (FCA).

render and of the options open to it, since the Crown itself had sought the surrender of the lands to make them available to returning soldiers.

Although the majority concluded that the Crown owed a pre-surrender fiduciary duty to the Band, Stone JA (Marceau JA concurring) agreed with Justice Addy's disposition of the case. Stone JA held that the Crown had discharged its duty, since the Band had been fully informed of "the consequences of a surrender," was fully aware that it was forever giving up all rights to the reserve, and gave its "full and informed consent to the surrender."¹⁸⁸ Stone JA also found that the Crown did not breach a post-surrender fiduciary obligation with respect to the disposition of the mineral rights since they were considered to be of minimal value at the time of the surrender. Once the rights had been conveyed to the DVLA, any post-surrender fiduciary obligation of the Department of Indian Affairs was terminated and the Crown had no further obligation to deal with the land for the benefit of the Band.

At the Supreme Court of Canada,¹⁸⁹ the Court was divided 4-3 on the question whether the mineral interests were included in the 1945 surrender for sale or lease. Nevertheless, the Court unanimously held that the Crown owed a post-surrender fiduciary obligation to dispose of the surrendered land in the best interests of the Band. The Court further found that the Crown had breached this obligation by "inadvertently" selling the mineral rights in the reserve lands to the DVLA and by failing to use the Crown's power to cancel the "inadvertent" sale once it had been discovered. Although McLachlin J wrote the minority judgment on the effect of the 1945 surrender on the earlier surrender of the mineral rights, the entire Court supported her analysis of the Crown's fiduciary obligations in the pre-surrender context.¹⁹⁰ However, even Justice Gonthier's majority decision, in which he concluded that the Beaver Indian Band had clearly intended to surrender its reserve, spoke of the department's fiduciary duty "to put the Band's interests first."¹⁹¹ In his reasons, Gonthier J alluded to a "tainted dealings" approach under which the conduct of the Crown must be reviewed to determine whether there has been a breach of fiduciary obligation.

¹⁸⁸ *Apsassin v. Canada*, [1993] 3 FC 28, 100 DLR (4th) 504, 151 NR 241, [1993] 2 CNLR 20 at 46 (FCA).

¹⁸⁹ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 (SCC).

¹⁹⁰ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 28-29 (SCC).

¹⁹¹ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 34 (SCC).

Pre-surrender Fiduciary Duties of the Crown

Where a Band's Understanding Is Inadequate or the Dealings Are Tainted

In addressing how the Beaver Indian Band's surrender for sale or lease of both mineral and surface rights in 1945 had expanded upon and subsumed the earlier 1940 surrender of mineral rights for lease only, Gonthier J stated:

I should also add that *I would be reluctant to give effect to this surrender variation if I thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention.* However, neither of these situations arises here. As the trial judge found, the consequences of the 1945 surrender were fully explained to the Indians by the local agent of the DIA [Department of Indian Affairs] during the negotiations. There was also substantial compliance with the technical surrender requirements embodied in s. 51 of the 1927 *Indian Act*, and as McLachlin J. concludes, the evidence amply demonstrates the valid assent of the Band members to the 1945 agreement. Moreover, by the terms of the surrender instrument, the DIA was required to act in the best interests of the Band in dealing with the mineral rights. *In fact, the DIA was under a fiduciary duty to put the Band's interests first.* I therefore see nothing during the negotiations prior to the 1945 surrender, or in the terms of the surrender instrument, which would make it inappropriate to give effect to the Band's intention to surrender all their rights in I.R. 172 to the Crown in trust "to sell or lease." In fact, the guiding principle that the decisions of Aboriginal peoples should be honoured and respected leads me to the opposite conclusion.¹⁹²

In short, Justice Gonthier would have been reluctant to permit the variation of the 1940 surrender in two situations: first, if the Band's understanding of the terms of the surrender had been inadequate, and, second, "if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention."

With regard to the first of these concerns, we note the conclusion of Addy J at trial in *Apsassin* that, "although [the members of the Beaver Indian Band] would not have understood and probably would have been incapable of understanding the precise nature of the legal interest they were surrendering, they did in fact understand that by the surrender they were giving up

¹⁹² *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 34 (SCC). Emphasis added.

forever all rights to I.R. 172.”¹⁹³ We believe that the same inference can likely be made in the present case. However, the long-standing nature of this grievance points to the conclusion that, although the Band members may have known from the outset that their rights had been absolutely alienated, they were not happy with that result and sought to change it.

Even if the Kahkewistahaw people *understood* that they were giving up all of their rights in the surrendered lands and *intended* to do so, a larger problem for Canada is whether the conduct of the Crown leading up to the surrender somehow tainted the dealings in a manner that made it unsafe to rely on the Band’s understanding and intention. The view that “tainted dealings” might form a separate basis for a claim that the Crown has breached its fiduciary obligations to a band has recently been reiterated by the decision of the Ontario Court of Appeal in the *Chippewas of Kettle and Stony Point* case. There, after agreeing with Killeen J that certain cash payments in that case would not operate to invalidate the surrender, Laskin JA continued:

I add, however, that the cash payments or alleged “bribe” and consequent exploitation or “tainted dealings” may afford grounds for the Band to make out a case of breach of fiduciary duty against the Crown. As the parties have recognized, this is an issue for trial.¹⁹⁴

In *Apsassin*, while discussing the technical surrender provisions of the *Indian Act*, Gonthier J highlighted the importance of identifying a band’s true intention:

An intention-based approach offers a significant advantage, in my view. As McLachlin J. observes, the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured. . . . In my view, when determining the legal effect of dealings between Aboriginal peoples and the Crown relating to reserve lands, the sui generis nature of Aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings.¹⁹⁵

¹⁹³ *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1988] 14 FTR 161, 1 CNLR 73 at 129-30 (TD).

¹⁹⁴ *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, unreported, [1996] OJ No. 4188 (December 2, 1996) at 24-25 (Ont. CA).

¹⁹⁵ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 31 (SCC).

In our view, the crux of Justice Gonthier's analysis is that the autonomy of Indian bands is to be respected and honoured. In this respect he is in full agreement with McLachlin J. If, however, a band's decision-making power has been undermined or "tainted" in a manner that makes it "unsafe to rely on the Band's understanding and intention," then the band's autonomy has likewise been compromised. Although Gonthier J did not define what he meant by "tainted dealings," it is clear that, like McLachlin J, he placed considerable reliance on the following findings of Addy J at trial:

1. That the plaintiffs had known for some considerable time that an absolute surrender of I.R. 172 was being contemplated;
2. That they had discussed the matter previously on at least three formal meetings [sic] where representatives of the Department were present;
3. That, contrary to what has been claimed by the plaintiffs, it would be nothing short of ludicrous to conclude that the Indians would not also have discussed it between themselves on many occasions in an informal manner, in their various family and hunting groups;
4. That, at the surrender meeting itself, the matter was fully discussed both between the Indians and with the departmental representatives previous to the signing of the actual surrender;
5. That [Crown representatives had not] attempted to influence the plaintiffs either previously or during the surrender meeting but that, on the contrary, the matter seems to have been dealt with most conscientiously by the departmental representatives concerned;
6. That Mr. Grew [the local Indian Agent] fully explained to the Indians the consequences of a surrender;
7. That, although they would not have understood and probably would have been incapable of understanding the precise nature of the legal interest they were surrendering, they did in fact understand that by the surrender they were giving up forever all rights to I.R. 172, in return for the money which would be deposited to their credit once the reserve was sold and with their being furnished with alternate sites near their trapping lines to be purchased with the proceeds;
8. That the said alternate sites had already been chosen by them, after mature consideration.¹⁹⁶

In particular, Gonthier J found that Crown officials had fully explained the consequences of the surrender, had not attempted to influence the Band's decision, and had acted conscientiously and in the best interests of the Band throughout the entire process.

¹⁹⁶ *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1988] 14 FTR 161, 1 CNLR 73 at 129-30 (TD).

In Kahkewistahaw's case, it is our view that, unlike Indian Agent Grew in *Apsassin*, Graham did *not* act conscientiously and that he clearly intended to influence the outcome of the surrender vote. Rather than assisting the Crooked Lake Bands in choosing courses of action best suited to their needs, Graham expressed the goal of securing surrenders to "free up" land for settlement and appease the growing pressure from adjoining communities. He expressly stated that bringing cash inducements would assist him greatly in achieving his goal, and he arrived in the middle of the harsh prairie winter with cash in hand. At that time, the Kahkewistahaw Band was particularly vulnerable because its members were poor, starving, illiterate, and, as will be discussed at greater length below, without effective leadership. The surrender meeting in fact took place in the context of a promise that each member of the Band would immediately receive \$94, or one-twentieth of the estimated sale price of the land. Graham made it clear that he intended to see that the Band members did not receive independent legal or other expert advice, and there is evidence that he threatened that they would not receive further government assistance unless they agreed to the surrender. During the Commission's community session at Kahkewistahaw, elder Mervin Bob stated that the Band was very much influenced by the offer of instant cash and the threat of future assistance being withheld:

The Indian agent, farm instructor would put money on the table and say it's – and say that if you guys don't sign this paper you're going to get no more help. Just like putting a bunch of candies in front of a child. Just like putting a bunch of candies in front of a kid saying if you don't do this, if you don't do that, you're not going to get this. That's the way we were treated and this is the what I was asking to tell, to tell you's.¹⁹⁷

Unlike the situation in *Apsassin*, there is no evidence in the present case that any alternative sites or arrangements in lieu of the surrendered lands were considered or even available. To the contrary, the evidence that we do have indicates that it was not the Crown's intention to act conscientiously on the Band's behalf, and that the Crown failed to satisfy its fiduciary obligation to the Band when faced with conflicting interests. We recognize that the Crown was and is constantly faced with conflicting interests since it has the dual and concurrent responsibilities of representing the interests of both the general public and Indians. However, the *fact* that the Crown has conflicting

¹⁹⁷ ICC Transcript, May 3, 1995, p. 102 (Mervin Bob).

duties in a given case does not necessarily mean that the Crown has breached its fiduciary obligations to the First Nation involved. Rather it is the manner in which the Crown *manages* that conflict that determines whether the Crown has fulfilled its fiduciary obligations. As McLachlin J stated in *Apsassin*:

The trial judge was correct in finding that a fiduciary involved in self-dealing, i.e. in a conflict of interest, bears the onus of demonstrating that its personal interest did not benefit from its fiduciary powers: J.C. Shepherd, *The Law of Fiduciaries* (1981), at pp. 157-59; and A.H. Oosterhoff: *Text, Cases and Commentary on the Law of Trusts* (4th ed. 1992). The Crown, facing conflicting political pressures in favour of preserving the land for the Band on the one hand, and making it available for distribution to veterans on the other, may be argued to have been in a position of conflict of interest.¹⁹⁸

We find that the Crown faced identical conflicting political pressures in its dealings with Kawkewistahaw, but has failed in the present case to demonstrate that it did not benefit – at least politically, if not financially – from inducing the 1907 surrender.

It is, in our view, nonsense to suggest that the Kawkewistahaw Band acted autonomously with respect to this surrender or that the decision represented its true intention. The vote that took place on January 28, 1907, was timed and staged to obtain a technical approval, and it represented the culmination of attempts by the surrounding non-aboriginal interests, aided and abetted by the Government of Canada, to procure a surrender. Those attempts began in 1885 and were brought to fruition in 1907, some 22 years later, following a continual barrage of local and departmental pressure involving virtually every figure of authority in the local community and, ultimately, those in positions of departmental authority and responsibility. During that entire 22-year period, the lone voices speaking on behalf of protecting the Kawkewistahaw people were Indian Agent McDonald, Commissioner Laird, and Assistant Indian Commissioner McKenna. By 1907, it appears that, through retirement

¹⁹⁸ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 45 (SCC). This excerpt from the *Apsassin* case raises the question of which party bears the burden of proof in the event that the evidence is inconclusive on any of the issues before the Commission. The general principle with respect to the burden of proof and onus is that the First Nation, as the claimant, bears the burden of proving that the Crown has breached its lawful obligations. In our view, the facts in this case are so clear that the result does not turn on the question of which party bears the burden of proof. Even if the onus does rest with the First Nation, we are satisfied that, on a balance of probabilities, that burden has been met. The First Nation having made out its case on a *prima facie* basis, Canada has not refuted the claim by tendering cogent evidence to the contrary. This is particularly so in those instances in which we have noted that Canada, as a fiduciary in a position of self-dealing or conflict of interest, must demonstrate that it did not benefit from its beneficiary powers.

or for other reasons, all three of those voices had become silent. It is remarkable that the Kahkewistahaw Band maintained its position in the face of such pressure over those 22 years. It is to be remembered that the Band rejected Graham's surrender proposal by a vote of 14 to 5 at the meeting of January 23, and that it was only as a result of the developments in the following days that the Band reversed its position. To suggest that the Band would, after 22 years of adamant opposition, reverse itself and adopt a position so clearly detrimental to its best interests over the course of five days, between January 23 and January 28, 1907, in the absence of "tainted dealings" by the Government of Canada, is absurd.

This is not a case where a band had no interest in putting reserve land to the use for which it was best suited, as was the situation in *Apsassin*. Rather, this is a situation where the Band's efforts at developing agricultural self-sufficiency, although impeded by various policies and circumstances, had gained a foothold and the Band was becoming increasingly able to put the land to good use. The record discloses that, although only a few of the Crown's agents had considered whether this surrender would be in the best interests of the Band, they invariably concluded that it would not. In spite of this advice, the surrender was obtained. Arguably, the First Nation has demonstrated that the Crown was in a conflict of interest, but, for its part, the Crown has failed to establish that the surrender was intended to benefit anyone other than settlers and the Crown itself. This conclusion is to be contrasted with the circumstances in *Apsassin*, in which the Court found that, in spite of the Crown's potential conflict, the sale of the land to the DVLA was also in the Beaver Indian Band's best interests. In this sense, the sale of the land to the Crown was of mutual benefit to the Band and to local interests, so the Crown was not in breach of its fiduciary duty. In the present case, the evidence indicates not only that Canada failed in its duty to protect the Band from sharp and predatory practices in dealing with its reserve lands but that Canada itself initiated the "tainted dealings."

Where a Band Has Ceded or Abnegated Its Power to Decide

We have already mentioned that McLachlin J wrote the minority judgment in *Apsassin*, but that the entire Court nevertheless supported her analysis regarding the Crown's fiduciary obligations in the pre-surrender context. In considering whether the Crown owes a fiduciary obligation to a band in the pre-surrender context, and, if so, the content of that obligation, McLachlin J

drew on several Supreme Court decisions dealing with the law of fiduciaries in the private law context:

Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second “peculiarly vulnerable” person: see *Frame v. Smith*, [1987] 2 SCR 99 [[1988] 1 CNLR 152 (abridged version)]; *Norberg v. Wynrib*, [1992] 2 SCR 226; and *Hodgkinson v. Simms*, [1994] 3 SCR 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (*or more often finds himself in the situation where someone else has ceded for him*) his power over a matter to another person. The person who has ceded power *trusts* the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.¹⁹⁹

On the facts in *Apsassin*, McLachlin J found that “the evidence supports the view that *the Band trusted the Crown to provide it with information as to its options and their foreseeable consequences, in relation to the surrender of the Fort St. John reserve and the acquisition of new reserves which would better suit its life of trapping and hunting. It does not support the contention that the band abnegated or entrusted its power of decision over the surrender of the reserve to the Crown.*”²⁰⁰ Because the Band had not abnegated or entrusted its decision-making power over the surrender to the Crown, McLachlin J held that “the evidence [did] not support the existence of a fiduciary duty on the Crown prior to the surrender of the reserve by the Band.”²⁰¹

Justice McLachlin’s analysis on what constitutes a cession or abnegation of decision-making power is very brief, no doubt because the facts before her demonstrated that the Beaver Indian Band had made a fully informed decision to surrender its reserve lands and that, at the time, the decision appeared eminently reasonable. In our view, it is not clear from her reasons whether she merely reached an evidentiary conclusion when she found that the Band had not ceded or abnegated its decision-making power to or in favour of the Crown, or whether she intended to state that, as a principle of law, a fiduciary obligation arises only when a band actually takes no part in

199 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 40-41 (SCC). Emphasis added.

200 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 41 (SCC). Emphasis added.

201 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 41 (SCC).

the decision-making process at all. She had more to say on the issue in the *Norberg* case, in which she concluded in a minority judgment that an abnegation of decision-making power had occurred in the context of a doctor-patient relationship:

As we have seen, an imbalance of power is not enough to establish a fiduciary relationship. It is a necessary but not sufficient condition. There must also be the potential for interference with a legal interest or a non-legal interest of "vital and substantial 'practical' interest." And I would add this. Inherent in the notion of fiduciary duty, inherent in the judgments of this court in *Guerin* and *Canson* [*Enterprises Ltd. v. Boughton & Co.*, [1991] 3 SCR 534], *supra*, is the requirement that the fiduciary have assumed or undertaken to "look after" the interest of the beneficiary. As I put it in *Canson* at p. 543 [SCR], quoting from this court's decision in *Canadian Aero Service Ltd. v. O'Malley*, [[1974] SCR 592,] *supra*, at p. 606 [SCR], "the freedom of the fiduciary is diminished by the nature of the obligation he or she has undertaken – an obligation which 'betokens loyalty, good faith and avoidance of a conflict of duty and self-interest'." It is not easy to bring relationships within this rubric. Generally people are deemed by the law to be motivated in their relationships by mutual self-interest. The duties of trust are special, confined to the exceptional case where one person assumes the power which would normally reside with the other and undertakes to exercise that power solely for the other's benefit. It is as though the fiduciary has taken the power which rightfully belongs to the beneficiary on the condition that the fiduciary exercise the power entrusted exclusively for the good of the beneficiary. Thus the trustee of an estate takes the financial power that would normally reside with the beneficiaries and must exercise those powers in their stead and for their exclusive benefit. Similarly, a physician takes the power which a patient normally has over her body, and which she cedes to him for purposes of treatment. The physician is pledged by the nature of his calling to use the power the patient cedes to him exclusively for her benefit. If he breaks that pledge, he is liable.²⁰²

The question of what is required to cede or abnegate decision-making power to or in favour of a fiduciary has also been considered by the Supreme Court of Canada in *Hodgkinson*. In that case, the Court dealt with an action by an unsophisticated investor against his accountant, who had recommended certain tax shelters in which, unknown to the investor, the accountant had a personal interest. La Forest J stated:

It is important . . . to add further precision about the nature of reliance, particularly as it applies in the advisory context. Reliance in this context does not require a wholesale substitution of decision-making power from the investor to the advisor. This is

202 *Norberg v. Wynrib*, [1992] 4 WWR 577 at 622-23 (SCC), McLachlin J.

simply too restrictive. It completely ignores the peculiar potential for overriding influence in the professional advisor and the strong policy reasons, to which I have previously referred, favouring the law's intervention by means of its jurisdiction over fiduciary duties to foster the fair and proper functioning of the investment market, an important social and economic activity that cannot really be regulated in other ways. As I see it, the reality of the situation must be looked at to see if the decision is effectively that of the advisor, an exercise that involves a close examination of the facts.²⁰³

Both *Norberg* and *Hodgkinson* suggest that decision-making authority may be ceded or abnegated even where, in a strictly technical sense, the beneficiary makes the decision. Neither case deals with the fiduciary relationship between the federal government and an Indian band, however, and therefore *Apsassin* must be considered the leading authority on the question of the Crown's pre-surrender fiduciary obligations. In reviewing that case, we cannot imagine that McLachlin J intended to say that the mere fact that a vote has been conducted in accordance with the surrender provisions of the *Indian Act* precludes a finding that a band has ceded or abnegated its decision-making power. If that is the test, it is difficult to conceive of any circumstances in which a cession or abnegation might be found to exist.

We conclude that, when considering the Crown's fiduciary obligations to a band, it is necessary to go behind the surrender decision to determine whether decision-making power has been ceded to or abnegated in favour of the Crown. In our view, a surrender decision which, on its face, has been made by a band may nevertheless be said to have been ceded or abnegated. The mere fact that the band has technically "ratified" what was, in effect, the Crown's decision by voting in favour of it at a properly constituted surrender meeting should not change the conclusion that the decision was, in reality, made by the Crown. Unless the upshot of Justice McLachlin's analysis is that the power to make a decision is ceded or abnegated *only* when a band has completely relinquished that power in *form* as well as in *substance*, we do not consider the fact of a band's majority vote in favour of a surrender as being determinative of whether a cession or abnegation has occurred. Moreover, if the test is anything *less* than complete relinquishment in form and substance, it is our view that the test has been met on the facts of this case — the Band's decision-making power with regard to the surrender was, in effect, ceded to or abnegated in favour of the Crown.

²⁰³ *Hodgkinson v. Simms*, [1994] 9 WWR 609 at 645 (SCC), La Forest J. Emphasis added.

In light of the role undertaken by the Crown to “look after” the interests of bands like Kahkewistahaw, and based on the relationship that had developed between Canada and Kahkewistahaw in the 33 years between the signing of Treaty 4 and the 1907 surrender, we believe it would have been reasonable for the members of the Band to expect that the Crown would deal with them on the basis of the “loyalty, good faith and avoidance of a conflict of duty and self-interest” referred to by McLachlin J. In addressing the issue of “tainted dealings,” we have already reviewed at considerable length the facts which have led us to conclude that, in Kahkewistahaw’s case, the Crown’s motives and methods in securing the surrender were deserving of reproach. We find those same facts equally applicable in our conclusion that the Crown did not meet the standard required of it in deciding the issue ceded to or abnegated in favour of it (or *by* it).

In determining whether the Band’s decision-making power was ceded to or abnegated in favour of the Crown, it is particularly important to consider the state of the Band’s leadership at the time and to examine the First Nation’s contention that a leadership vacuum contributed significantly to that cession or abnegation. In particular, the First Nation noted the absence of leadership following the death of Chief Kahkewistahaw and his two headmen, Wasacase and Louison, shortly before the surrender was obtained. The First Nation also relied on a report entitled “Report on Governance – Kahkewistahaw,” in which Professor J.R. Miller emphasized the important role of the Chief in the traditional decision-making process of the Band:

A chief relied upon a council of adult males for advice on matters on which he had to decide a position, and within that council the more aged a councillor was the greater weight his advice would carry. Decision-making was conducted by a process that emphasized consultation and consensus, not mechanical head-counting or a requirement that “fifty percent plus one” person support a particular option. When the chief had explained the issue on which he sought advice to his council, they would offer their views, beginning with the youngest and ending with the eldest. Councillors probably would have discussed the matter with other members of the community, including female relatives, who were not members of the chief’s council. Most adult people in the community would be consulted in one fashion or another, but everyone’s opinion did not have the same weight. The views of those with the experience that age brought were accorded more weight than others. *After his councillors had voiced their considered views, the chief would decide the course of action to be followed.*²⁰⁴

204 J.R. Miller, “Report on Governance – Kahkewistahaw,” May 12, 1995 (ICC Exhibit 7, p. 2). Emphasis added.

Professor Miller also notes that, at the time of the surrender and for some time afterwards, “the Kakhewistahaw people maintained their traditional, largely hereditary, political leadership.”²⁰⁵

We are obliged to acknowledge the enduring and powerful influence that Chief Kakhewistahaw exercised over the affairs of the Band that now bears his name. It was Chief Kakhewistahaw who led his people into a treaty relationship with Canada and kept them out of the Riel Rebellion in 1885. It was also Chief Kakhewistahaw who convinced his people to settle on the reserve that is now the subject of this inquiry and to take up agriculture to adapt to the new economic and social realities they faced. More to the point, we cannot forget the force of his convictions when he reminded the Crown of its treaty promises and spoke out against the proposed surrender of his reserve in 1902. Clearly, Chief Kakhewistahaw was a prominent leader with the ability to galvanize his people against the relinquishment of the land they were promised under the terms of Treaty 4.

Since the surrender was taken at a time when the Band had no recognized Chief or headmen and its members were not allowed to elect new representatives or to seek independent advice, serious questions arise whether the Crown took unfair advantage of the Band at a time when a leadership void existed. Joe Louison was not elected as the new Chief until 1911, but it is important to note that he voted against the surrender on January 28, 1907. Since a Chief played a persuasive role among his people when it was necessary to make decisions of such importance, the vote might have had a different outcome if Joe Louison had been elected Chief before the surrender. In our view, had the Crown been interested in a fair and unbiased decision-making process, it would have waited until the Band had a Chief and headmen before placing a decision of such importance before the voting members.

In short, as long as Chief Kakhewistahaw was alive, the surrender had been repeatedly rejected. The evidence does not support a finding that the Band’s circumstances had changed significantly since before Kakhewistahaw’s death, nor is there evidence that a new leader had emerged whose different vision of the Band’s future led to the surrender being considered in a new light. The fact that it was necessary to call upon Kahkanowenapew to swear the certification affidavit refutes any such contention. We are driven to

205 J.R. Miller, “Report on Governance – Kakhewistahaw,” May 12, 1995 (ICG Exhibit 7, p. 9).

the conclusion that Graham knew the Band to be vulnerable and without leadership, and expressly chose to press his advantage.

We find the similar circumstances at Ochapowace to be telling. While that Band had its own leaders, it was able to resist Graham's tactics and to refuse the surrender he so ardently pursued. Later, when Ochapowace too was without leadership, the long-sought surrender was obtained by Graham, as he knew it would be. To say that this was mere coincidence would, in light of what we now know of departmental policy and practice and of Graham's own views, strain credibility. In conclusion, we have no hesitation in finding, on the facts of this case, that the Band ceded its decision-making power to the Crown, and that the Crown failed to meet its fiduciary duty to exercise that power conscientiously and without influencing the outcome of the surrender vote.

In closing on this issue, we note that, from the reasons of the Federal Court of Appeal in *Apsassin*, it might appear that, if Kahkewistahaw did not abnegate its decision-making power in favour of the Crown, the Crown nevertheless had a positive but lesser duty to provide the Band with "information as to its options and their foreseeable consequences." In the opinion of the Federal Court of Appeal in *Apsassin*, a duty to inform and advise exists and was fulfilled in relation to the Beaver Indian Band. On the further appeal, McLachlin J held that "the evidence supports the view that the Band trusted the Crown to provide it with information as to its options and their foreseeable consequences, in relation to the surrender of the Fort St. John reserve and the acquisition of new reserves which would better suit its life of trapping and hunting."²⁰⁶ Nevertheless, she concluded on the facts of that case that no pre-surrender fiduciary obligation existed. It is not clear from Justice McLachlin's reasons whether she meant that the Crown was duty-bound to inform and advise the Beaver Indian Band prior to the surrender, or whether she merely intended to acknowledge that such information and advice had in fact been provided to that Band. In the end, she was not required to decide that issue. Similarly, in the present case, we believe that it is unnecessary for us to decide whether such a duty exists, for we are prepared to conclude that the Kahkewistahaw Band effectively ceded its decision-making power regarding the 1907 surrender to the Crown and that the Crown procured the surrender through its own "tainted dealings."

²⁰⁶ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 41 (SCC), McLachlin J.

Duty of the Crown to Prevent the Surrender

The next question that the Commission must address is whether, on the facts of this case, the fiduciary obligation grafted by the Supreme Court of Canada onto subsection 49(4) of the 1906 *Indian Act* required the Crown to prevent the surrender of the reserve.

In *Apsassin*, the Beaver Indian Band had argued that the paternalistic scheme of the *Indian Act* – which vests title in the Crown on behalf of a band – imposed a duty on the Crown to protect Indians from making foolish decisions with respect to the alienation of their land. In essence, the argument was that the Crown should not have allowed the Beaver Indian Band to surrender its reserve, because this was not in the Band's long-term best interests. Conversely, the Crown asserted that bands should be treated as independent agents with respect to their lands. McLachlin J dealt with the issue in these terms:

The first real issue is whether the *Indian Act* imposed a duty on the Crown to refuse the Band's surrender of its reserve. The answer to this is found in *Guerin v. The Queen*, . . . where the majority of this Court, *per* Dickson J. (as he then was), held that the duty on the Crown with respect to surrender of Indian lands was founded on preventing exploitative bargains. . . .

My view is that the Indian Act's provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection. The band's consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. *The purpose of the requirement of Crown consent was not to substitute the Crown's decision for that of the band, but to prevent exploitation.* As Dickson J. characterized it in *Guerin* [p. 136 CNLR]:

The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.

It follows that under the Indian Act, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident – a decision that constituted exploitation – the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains. . . .

The measure of control which the Act permitted the Band to exercise over the surrender of the reserve negates the contention that *absent exploitation*, the Act

imposed a fiduciary obligation on the Crown with respect to the surrender of the reserve.²⁰⁷

Gonthier J concurred that “the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured.”²⁰⁸

On the facts in *Apsassin*, Addy J had found that the decision to surrender the reserve made good sense when viewed from the perspective of the Beaver Indian Band at the time of the surrender. McLachlin J therefore concluded that the Governor in Council was not obliged to withhold consent, because the evidence did not establish that the surrender was “foolish, improvident or amounted to exploitation.”

The question now before the Commission is whether the 1907 surrender by the Kahkewistahaw Band was so foolish, improvident, and exploitative as to give rise to a duty on Canada’s part under section 49(4) of the 1906 *Indian Act* to withhold its own consent to the surrender. We conclude that the Governor in Council in fact ought to have withheld consent.

The views expressed by various Indian Affairs officials on the wisdom of surrendering the Band’s land represent a good starting point for determining whether the Governor in Council ought to have consented to the surrender. It will be recalled that, as early as 1886, in response to a proposal that would have seen the Crooked Lake Bands give up the southern portions of their reserves in exchange for greater river frontage, Indian Agent Alan McDonald commented:

Loud Voice and Kah-ke-wis-ta-haw bands would also be giving up the best of their hay, but not to the same extent as “Little Childs”.

These bands should in a few years possess large number of cattle requiring several thousand tons of Hay each, and we should in every way possible protect it for them. . . .

We should not overlook the fact that *should the proposition be carried out, the Indians will be giving up far more valuable lands than they will be receiving.*²⁰⁹

In 1891, when local residents presented a petition to the Minister of Interior calling for the surrender of the southern hay lands in the three Crooked Lake

207 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 39-40 (SCC), McLachlin J. Emphasis added.

208 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 31 (SCC), Gonthier J.

209 A. McDonald, Indian Agent, to Indian Commissioner, March 22, 1886, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 84-85). Emphasis added.

reserves, McDonald was both prophetic and alert to his fiduciary responsibilities in his response on the merits of the proposed surrender:

although I am most anxious that the views of the people of Broadview should be met, still from my position as Indian Agent I am bound in the interests of the Indians to point out the difficulties in the way, which are tersely these. *If these lands are surrendered by the Indians, no reasonable money value can recompense them, as their Hay lands would be completely gone, and this would necessitate no further increase of stock, which would of course be fatal to their further quick advancement, and would be deplorable, and the only alternative that I can see is to give them Hay lands of equal quantity and value immediately adjacent to the Reserves interested, which I do not think is possible now. . . .*

If it was contemplated by the Committee that waited upon you on the 26th ultimo to have the whole of Township 17 in Ranges 3, 4, 5 & part of 6 surrendered, *I would beg to point out that very little of the whole Reserve remains.*²¹⁰

In 1902, Commissioner Laird cautioned that, given the rising importance of cattle operations among Kawkewistahaw's people and the need for the southern hay lands for this purpose, "it would never do to have the Indians short of hay."²¹¹ Two years later, Assistant Indian Commissioner McKenna could not have made himself more clear when, referring to an earlier report by Laird, he stated:

I would point out that the Commissioner in his report of the 6th of May 1902 stated that there was a good deal of force in the remarks of some of the Indians; that the best of the land in Reserves 71 & 72 was contained in the part asked to be surrendered; and that the best wood was also on the South of the Reserves. This being so it would not be advisable, from an Indian standpoint, to dispose of the land.²¹²

These comments were echoed 90 years later in the report and testimony of David Hoffman, who stated that the Band not only surrendered the majority of its reserve land base but was asked to give up the very best land on the reserve – the southern lands which had been favourably mentioned in official reports and which had been coveted for so long by the neighbouring settlements. As we have already remarked, the superiority of the surrendered lands would have been just as obvious – if not more so – to an observer at

210 A. McDonald, Indian Agent, to Superintendent General of Indian Affairs, March 10, 1891, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 118-20). Emphasis added.

211 David Laird, Indian Commissioner, to Magnus Begg, Indian Agent, January 22, 1902, NA, RG 10, vol. 3561, file 82, part 4 (ICC Documents, pp. 163-64).

212 J.A. McKenna, Assistant Indian Commissioner, to Secretary, Department of Indian Affairs, March 19, 1904, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 200).

the time of the surrender as it is today. Moreover, unlike the situation in *Apsassin*, where reserve lands were sold for the express purpose of replacing them with other lands more suited to the Band's requirements, in Kahkewistahaw's case there were no alternative lands of similar quantity and quality available for the Band to purchase with the sale proceeds from the surrendered lands.

By allowing the Kahkewistahaw Band to surrender its best hay lands, Canada deprived the Band of an opportunity to become self-sufficient through agriculture and cattle ranching. The surrender occurred at a time when the Band had engaged in cattle ranching as a burgeoning commercial venture, when the introduction of new strains of faster-maturing wheat and new farming technologies were beginning to transform the western Canadian economy, and when the Kahkewistahaw Band was reportedly becoming less dependent on rations and other forms of government assistance. In fact, it was the high quality of the surrendered lands and the prosperity that could be gained from them which ironically provided the driving force for the surrender. The problem is that it was not the Kahkewistahaw Band that was allowed to reap these profits.

Canada's rejoinder is that the surrender was not foolish, improvident, or exploitative at the time of the surrender in 1907 because the dramatic decline in the population of the Band from the time of treaty would have left the Band with approximately 160 acres of reserve land per person after the surrender (an area in excess of the treaty requirement of 128 acres per person). Furthermore, counsel for Canada submitted that the surrender and sale of 70 per cent of the reserve was reasonable since the Band could no longer sustain its farming operations in any event:

The evidence indicates that at least several years prior to the surrender, the Band had incurred debts for wagons, harnesses and machinery. Without the necessary machinery and equipment, the Band could not obtain the necessary feed for the cattle which prevented them from increasing their herds and having surplus cattle to provide clothing, lumber and necessary provisions. Further, it appears that the reserve was in need of fencing to prevent stray animals from grazing on the Reserve Lands. In short, the Band lacked the resources to improve or further its development.²¹³

213 Submissions on Behalf of the Government of Canada, January 26, 1996, p. 43.

Canada asserted that the money received from the sale of the surrendered lands, and the periodic distributions of interest accruals, benefited the entire Band, particularly the elderly who had no other source of income.²¹⁴

At first blush, the factors identified by Canada might appear to provide valid justification for the impugned surrender. However, we find Canada's first argument – that the transaction was not improvident in light of the Band's reduced population – to be completely without merit for two reasons.

First, this argument imports principles of treaty land entitlement to justify the surrender and ignores the fact that a band's treaty land entitlement is normally established based on its population at date of first survey. In the Commission's recent report dealing with Kahkewistahaw's treaty land entitlement claim, we found that the First Nation's date-of-first-survey population was at least 256, including an 1881 base paylist population of 186, together with 70 absentees and arrears. This figure does not include possible new adherents to treaty and transfers from landless bands, who, in accordance with the principles developed by the Commission in the Fort McKay, Kawatoose, Lac La Ronge, and Kahkewistahaw treaty land entitlement inquiries, would also be entitled to be counted for the purposes of establishing the First Nation's treaty land entitlement. After the 1907 surrender, Kahkewistahaw's reserves were reduced by 33,281 acres – from 46,816 to 13,535 acres – which left the First Nation with sufficient land for just 105 people. Although the evidence shows that, owing to starvation and disease, Kahkewistahaw's population had declined to fewer than 105 in 1907, the suggestion that the reduced reserve satisfied the reduced population in 1907 runs afoul of one of the Commission's conclusions in the Fort McKay report:

*5 After the date of first survey, natural increases or decreases in the population of the band do not affect treaty land entitlement. Thereafter it is only late adherents or landless transfers in respect of whom treaty land has never been allocated that will affect treaty land entitlement.*²¹⁵

In our view, Canada's argument is a red herring and is entirely inconsistent with the proper interpretation of the reserve clause in Treaty 4. Moreover, we find it offensive that Canada in 1907 sought to take advantage of the fact that so many of the Band's members had perished. We refuse to make a finding that, because the Band's population had been decimated by starvation and

²¹⁴ Submissions on Behalf of the Government of Canada, January 26, 1996, pp. 43-44.

²¹⁵ Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reprinted (1996) 5 ICCP 3 at 53. Emphasis added.

disease, the government was legally or morally justified in participating in a process that stripped Band members of most of the lands selected by their forefathers in accordance with the treaty.

Second, this argument by Canada is even more inconsistent with the treaty when considered on qualitative grounds. In the 1907 surrender, Kahkewistahaw not only gave up more than 70 per cent of its reserve lands but also surrendered almost 90 per cent of the arable land on the reserve. This fact is readily apparent from a review of the map of the surrendered lands which accompanies this report and from the report and evidence of David Hoffman.²¹⁶ Even if there *was* sufficient land for the 1907 population of 84, the acreage of *quality* land was surely far below the treaty formula of 128 acres per person. This surrender was unfair in every sense of the word and we do not require the benefit of hindsight in reaching this conclusion. The unfairness must have been just as evident in 1907 as it was when the Commission recently viewed the area. Moreover, the fact that the lands were to be sold at public auction is beside the point. There was no reason for the Band to give up these lands and no justifiable reason for inducing it to do so.

With regard to Canada's second submission – that the surrender was reasonable rather than foolish or improvident, since the Kahkewistahaw Band was unable to sustain or improve upon its previous levels of economic activity in any event – we are not satisfied that such a conclusion would have justified selling off the Band's primary capital asset and only source of income. Moreover, we do not believe that we have the necessary economic evidence before us to be able to assess this point. Nevertheless, even if the Band received fair market value for the surrendered lands, which likewise has not been demonstrated conclusively one way or the other on the limited evidence before us, the adequacy of the consideration received by the Band is not the central issue. The essence of the matter is that it should have been obvious to the Crown that the surrender of the Band's best agricultural land made little or no sense when viewed from the perspective of the Band's best interests.

In conclusion, we find that this surrender transaction was foolish, improvident, and exploitative, and that the consent of the Governor in Council under subsection 49(4) should properly have been withheld.

²¹⁶ Hoffman & Associates Ltd, "Comparison of Soils between Surrendered and Non-Surrendered Areas of Kahkewistahaw," undated, p. i (Summary of Salient Facts).

PART V

CONCLUSIONS AND RECOMMENDATION

We have been asked to inquire into and report on whether the Government of Canada properly rejected the specific claim submitted by the Kahkewistahaw First Nation, or, alternatively, whether it owes an outstanding lawful obligation to the First Nation. We have concluded that the surrender of a portion of IR 72 by the Kahkewistahaw Band in 1907 was valid and unconditional, which means that the First Nation's aboriginal interest in the surrendered land has been extinguished.

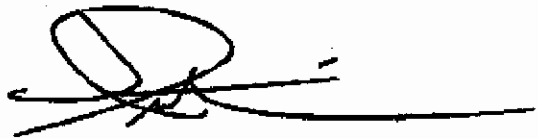
We also find, however, that Canada owed pre-surrender fiduciary obligations to the Kahkewistahaw First Nation and that it breached those obligations. In procuring the surrender, Canada's agents engaged in "tainted dealings" by taking advantage of the Band's weakness and lack of leadership to induce its members to consent to a surrender that, for a period of 22 years, they had steadfastly refused. Moreover, the Band effectively ceded or abnegated its decision-making power to or in favour of Canada with respect to the surrender, but Canada failed to exercise that power conscientiously and without influencing the outcome of the surrender vote. Finally, when offered the opportunity under subsection 49(4) of the 1906 *Indian Act* to reject a surrender that was clearly foolish and improvident and constituted exploitation, the Governor in Council failed to do so. In short, Canada breached its fiduciary obligations by subordinating the interests of the Band to the interests of the surrounding communities as well as Canada's own political interests.

RECOMMENDATION

We find that this claim discloses a breach of Canada's fiduciary obligation to the Kahkewistahaw First Nation. We therefore recommend to the parties:

That the claim of the Kahkewistahaw First Nation be accepted for negotiation under the Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION



P.E. James Prentice, QC
Commission Co-Chair

February 1997



Roger J. Augustine
Commissioner

When we made the treaty at Qu'Appelle you told me to choose out land for myself and now you come to speak to me here. We were told to take this land and we are going to keep it. Did I not tell you a long time ago that you would come some time, that you would come and ask me to sell you this land back again, but I told you at that time, No.

– Chief Kahkewistahaw, May 6, 1902

APPENDIX A

KAHKEWISTAHAW FIRST NATION 1907 SURRENDER INQUIRY

- | | | |
|---|--------------------------------------|-------------------|
| 1 | Decision to conduct inquiry | August 31, 1994 |
| 2 | Notices sent to parties | September 2, 1994 |
| 3 | Planning conference | February 1, 1995 |
| 4 | Community and expert sessions | May 3, 1995 |

The Commission heard from the following witnesses: elders Mervin Bob, Joseph Crowe, Steven Wasacase, George Wasacase, Charles Buffalocalf Sr, Margaret Bear, and Ernest Bob, and expert witness David Hoffman. The session was held at the Education/Sports Complex, Kahkewistahaw Reserve, Broadview, Saskatchewan

- | | | |
|---|---------------------------------|------------------|
| 5 | Legal argument | February 1, 1996 |
| 6 | Content of formal record | |

The formal record for the Kahkewistahaw First Nation Inquiry consists of the following materials:

- 18 exhibits tendered during the Inquiry, including the documentary record (4 volumes of documents with annotated index)
- written submissions of counsel for Canada and the claimants
- transcripts of the community session and legal argument (2 volumes)
- correspondence among the parties and the Commission

The report of the Commission and letters of transmittal to the parties will complete the formal record of this Inquiry.

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE 1909 RESERVE LAND SURRENDER CLAIM OF THE MOOSOMIN FIRST NATION

PANEL

Commission Co-Chair P.E. James Prentice, QC
Commissioner Carole T. Corcoran
Commissioner Aurélien Gill

COUNSEL

For the Moosomin First Nation
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For the Government of Canada
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To the Indian Claims Commission
Ron S. Maurice / Kathleen Lickers

MARCH 1997

CONTENTS

PART I	<i>INTRODUCTION</i>	107
PART II	<i>THE INQUIRY</i>	110
	Background to This Inquiry	110
	Historical Background	112
	Treaty 6	112
	Moosomin Indian Reserves 112 and 112A	115
	Map 1: Claim Area Map	117
	The Changing Relationship between the Crown and the Band	118
	Map 2: Indian Reserve 112	119
	Map 3: Indian Reserve 112A	120
	Agriculture on the Moosomin Reserves	128
	Pressure to Surrender the Moosomin Reserves	132
	Early Conflict over Indian Farming and Hay Lands	132
	Request for Surrender in 1902	135
	Requests for Surrender in 1906 and 1907	137
	Indian Affairs Postpones Plan to Seek Surrender	143
	A New Surrender Proposal Is Offered	145
	Proposals for Surrender in 1908	148
	Surrender Meetings with Thunderchild and Moosomin in August 1908	151
	Letter of Petition from Members of the Moosomin Band in 1909	154
	The Surrender Meeting of May 7, 1909	160
	Events following the Surrender	165
	Management and Disposition of IR 112	166
	Relocation to IR 112B	169
PART III	<i>ISSUES</i>	174
PART IV	<i>ANALYSIS</i>	175
	Issue 1: Compliance with the 1906 <i>Indian Act</i>	175
	Issue 2: Canada's Pre-surrender Fiduciary Obligations	179
	The <i>Guerin</i> Case	179
	The <i>Apsassin</i> Case	181
	Pre-Surrender Fiduciary Duties of the Crown	183

Where a Band's Understanding Is Inadequate or the Dealings Are Tainted	183
Where a Band Has Ceded or Abnegated Its Power to Decide	194
Duty of the Crown to Prevent an Improvident or Exploitative Surrender	198
Issue 3: Standard and Onus of Proof	202
PART V CONCLUSIONS AND RECOMMENDATION	205
Recommendation	206
APPENDIX	208
A Moosomin First Nation 1909 Surrender Inquiry	208

You may rest assured that when you go to your reserves you will be followed by the watchful eye and sympathetic hand of the Queen's Councillors.

– Hon. Alexander Morris, Lieutenant Governor of the North-West Territories, Treaty 6 negotiations, Fort Carlton, August 22, 1876

PART I

INTRODUCTION

This report deals with the inquiry of the Indian Claims Commission into the 1909 surrender of Moosomin Indian Reserves (IR) 112 and 112A. The question before us is straightforward:

Does the Government of Canada owe an outstanding lawful obligation to the Moosomin First Nation of Saskatchewan as a result of the 1909 surrender of the First Nation's reserve lands and its subsequent relocation?

In 1876, Canada and the Plains and Wood Cree of central Saskatchewan and Alberta entered into Treaty 6. In exchange for the surrender of aboriginal title to 121,000 square miles of fertile agricultural land on the prairies, Canada promised to set aside reserves for the Indians to assist them in making a transition from a subsistence livelihood to an agricultural-based economy. In the spring of 1881, 23 square miles, or 14,720 acres, of rich agricultural land was set aside as IR 112 for the Moosomin Indian Band¹ on the south side of the North Saskatchewan River near Battleford, Saskatchewan. In 1887, an additional 2 square miles, or 1280 acres, of excellent hay land was set aside as IR 112A for the joint use and benefit of the Moosomin and Thunderchild Bands. Despite government policies between 1889 and 1896 that impeded the progress of many Indian farmers, the Moosomin Band made significant progress in farming and raising cattle. These achievements were recorded by the Indian Agent on several occasions.

In part because of the Band's success in farming, local settlers and politicians began to lobby Indian Affairs officials in 1902 to move the Moosomin and Thunderchild Bands so that their reserve lands could be made available for the settlers flooding into the west. The initial response of Indian Affairs officials to this request was that it might be beneficial to the Band if the

¹ Alternatively referred to as "Moosomin," "the Band," or the "First Nation," depending on the historical context.

Moosomin reserve were exchanged for lands of similar quality closer to its hay reserve. No further action was taken regarding this proposal.

Around the same time, Chief Moosomin passed away and the Band remained without a Chief recognized by Indian Affairs until shortly after the surrender in 1909. In the years that followed Chief Moosomin's death, rumours spread of a possible surrender. This prompted Chief Moosomin's son, Josie Moosomin, to write a letter in November 1906 to Canada stating that his people "never want to sell this reserve." Despite his statement that the Band wished to retain the reserve, local politicians from the Battleford area pressed Indian Affairs to seek a surrender of the reserves set aside for the Moosomin and Thunderchild Bands. In August 1907, Indian Agent Day presented a proposal for surrender to the Moosomin Band which was flatly refused.

The following year, another proposal for surrender was presented to the Thunderchild and Moosomin Bands. The events of this well-documented meeting disclose that the Thunderchild Band narrowly approved the surrender, while the Moosomin Band was overwhelmingly against it. Rather than respecting the Band's wishes, senior officials in Ottawa reprimanded Agent Day for failing to obtain the surrender of Moosomin's reserve as instructed. In any event, Day had already taken steps to counteract the "baleful interference" of outsiders who were advising the Band not to surrender, and he expressed confidence that the Band would soon be "clamouring for the same privileges accorded to the Thunderchild Band."

In January 1909, a letter of petition, purporting to represent the views of 22 members of the Moosomin Band, proposed the surrender of IR 112 on certain terms. Curiously, not a single member of the Band actually signed or affixed his mark to the document as an expression of their intention to surrender the reserve. This letter prompted local clergymen and Indian Affairs officials to renew their efforts to secure a surrender of both of the Band's reserves on less favourable terms. Agent Day returned to the Moosomin Reserve on May 7, 1909, with \$20,000 in cash to be distributed to the Band if it agreed to surrender.

In this third and largely undocumented attempt by Canada to obtain the surrender, descendants of Chief Moosomin purported to surrender 15,360 acres of the best agricultural land in Saskatchewan in exchange for a reserve that the Department itself later described as hilly, stony, and practically useless. Even though the Department's records are replete with information on virtually every other subject involving the Band, there is a complete absence

of any details from Agent Day on whether a surrender meeting was held with the Band, where it was held, what was discussed, how many eligible voters attended, and how many voted in favour or against the surrender. In the absence of a reliable documentary record, a fair-minded observer would have to question whether a meeting and a vote were even held that day and, if such a meeting and vote were held, what amount of coercion, bribery, or duress might have been required to convince the Band to reverse its position.

In the final analysis, the most that can be said of the events of May 7, 1909, is that the Band was simply overwhelmed by the constant pressure exerted by settlers, politicians, clergymen, and officials from every level of Indian Affairs to surrender these reserves. Following the surrender, the Band was moved north to its present reserve bordering Murray Lake near Cochin, Saskatchewan, but the new reserve had very limited agricultural potential. IR 112 was subdivided and sold at public auction commencing in 1909. One half of the 2-square-mile hay reserve was later restored to the Band for its use and benefit.

On July 15, 1986, the Moosomin First Nation submitted a claim, pursuant to Canada's Specific Claims Policy, asserting that the 1909 surrender was invalid because Canada had not met the legal requirements for a valid surrender. On March 29, 1995, the Specific Claims Branch of Indian Affairs informed Chief Ernest Kahpeaysewat that, in Canada's view, "the evidence and submissions are insufficient to establish that the surrender of Indian Reserve No. 112 was invalid or that a fiduciary obligation was breached by Canada in obtaining the surrender."² On July 17, 1995, the Moosomin First Nation requested that the Indian Claims Commission (the Commission) conduct an inquiry into this claim.

After a thorough consideration of the relevant facts and law in relation to this claim, we have come to the conclusion that the Crown owes an outstanding lawful obligation to the Moosomin First Nation arising out of the 1909 surrender of its reserves. We express our hope that the Canadian government will act on our recommendation and enter into negotiations with the Moosomin First Nation to bring a fair and just resolution to this long-standing grievance.

² Allan Tallman, Specific Claims West, to Chief Ernest Kahpeaysewat, March 29, 1995, Department of Indian Affairs and Northern Development (DIAND), file BW8260-SK374-C1 (ICC Documents, pp. 1434-39).

PART II

THE INQUIRY

BACKGROUND TO THIS INQUIRY

The mandate of this Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries and issue reports on “whether a claimant has a valid claim for negotiations under the [Specific Claims] Policy where that claim has already been rejected by the Minister.”³ The Specific Claims Policy states that Canada will accept claims for negotiation where such claims disclose an outstanding “lawful obligation” on the part of the federal government.⁴ Our role in this inquiry is to determine whether Canada owes an outstanding lawful obligation to the Moosomin First Nation as a result of the 1909 surrender of Indian Reserves 112 and 112A.

The inquiry commenced with a planning conference held on October 19, 1995. Following this conference, a community session was conducted at the Moosomin Reserve near Cochin, Saskatchewan, on February 21, 1996. At that time, the Commission outlined its expectations for the submission of written argument by both parties. The First Nation’s written submissions were received on June 18, 1996. With the First Nation’s agreement, Canada was granted an extension to further consider its position on the claim, and the oral submissions, which were to proceed in July 1996, were rescheduled to September 24, 1996, to accommodate Canada’s request.⁵ When the Commis-

3 Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

4 DIAND, *Outstanding Business, A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in [1994] 1 ICCP 171-85 [hereinafter *Outstanding Business*]. The policy states that a “lawful obligation” or “obligation derived from the law on the part of the federal government” may arise out of any of the following circumstances: (i) “The non-fulfillment of a treaty or agreement between Indians and the Crown”; (ii) “A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder”; (iii) “A breach of an obligation arising out of government administration of Indian funds or other assets”; (iv) “An illegal disposition of Indian land.”

5 Daniel J. Maddigan, Counsel for the First Nation, to Kim Kobayashi, Specific Claims West, June 27, 1996.

sion convened a session to hear oral submissions on September 24, 1996, Canada advised that it had not formulated any position in the inquiry and, therefore, would not be providing written or oral submissions to the Commission. The Commission expressed concerns about not having Canada's position on the issues and decided to grant counsel from the Department of Justice a further extension until October 28, 1996. This new deadline passed without a response, and the Commission remains without any written or oral submissions from Canada on the merits of this claim.

The Commissioners are angered and concerned by Canada's failure to file any written submissions in this matter. Certainly every reasonable opportunity was afforded to Canada to meet its obligation to assist this Commission fully in its deliberations. The First Nation has waited long enough for a resolution of this historical grievance, and this Commission has a duty to report which it intends to discharge. Accordingly, on November 12, 1996, we advised the parties that we would proceed to write and issue our report on the claim.⁶

The essence of the First Nation's argument is that: (1) the Band's consent to the surrender of May 7, 1909, did not comply with the requirements of the *Indian Act*; (2) the Crown did not fulfil its fiduciary obligations in relation to that surrender; and (3) the Crown should properly have withheld its consent to the surrender. As noted above, Canada has taken no position on the claim.

Based on a thorough consideration of the facts and the relevant case law, we have concluded that the Government of Canada breached fiduciary obligations owed to the Moosomin First Nation in relation to the 1909 surrender of Indian Reserves 112 and 112A. Therefore, it was not necessary for the Commission to make any findings on whether the surrender complied with the procedural surrender requirements of the 1906 *Indian Act*. In our view, Canada's conduct in the context of this surrender constituted a serious departure from the standard demanded of a fiduciary. In fact, Canada improperly influenced and pressured the Band into surrendering its land. Finally, Canada procured and consented to a surrender which was obviously foolish, improvident, and exploitative and which resulted in great detriment to the Band. The Commission's findings and recommendations are set out in this report.

⁶ Ron S. Maurice, Commission Counsel, Indian Claims Commission, to Michel Roy, Director General, Specific Claims Branch, November 12, 1996.

HISTORICAL BACKGROUND

In the course of this inquiry, the Commission examined the documentary record consisting of more than 2000 pages of material submitted by the Government and the First Nation. The record also consists of the information received at the community session on February 21, 1996, during which the Commission heard from Peter Bigears, Norman Blackstar, Sidney Ironbow, Jimmy Myo, Isidore Osecap, and Adam Swiftwolfe, all elders of the Moosomin First Nation, and from Edward Okanee, an elder of the Thunderchild First Nation.

Written submissions were received from the First Nation on June 18, 1996, and the First Nation made oral submissions to the Commission in the presence of counsel for Canada on September 24, 1996. The written submissions, documentary evidence, transcripts, and the balance of the record of this inquiry are referred to in Appendix A to this report.

Treaty 6

Treaty 6 was concluded between Canada and the Plains and Wood Cree of central Saskatchewan on August 23 and 28, 1876, near Fort Carlton and on September 9, 1876, near Fort Pitt. North-West Territories Lieutenant Governor Alexander Morris, together with fellow Treaty Commissioners James McKay and W.J. Christie, negotiated the treaty on Canada's behalf over the course of several meetings with the bands of that area.⁷ The Secretary to the Treaty Commission, Dr A.G. Jackes, took detailed notes at those meetings and specifically recorded the commentary and speeches of the various parties. Commissioner Morris included this record with the treaty document when he transmitted it to the Department of Indian Affairs and noted that "it will be of great value to those who will be called on to administer the treaty, showing as it does what was said by the negotiators and by the Indians, and preventing misrepresentations in the future."⁸

Dr Jackes's notes, along with Morris's own report of the negotiations, make it clear that all parties were concerned that farming be facilitated by the treaty, given the dramatic depletion in the buffalo herds which had, to that point, provided for the economic livelihood of the Plains Indian people.

7 *Treaty No. 6, between Her Majesty the Queen and the Plain and Wood Cree Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions* (Ottawa: Queen's Printer, 1966) (ICC Documents, pp. A1-A11).

8 Alexander Morris, Lieutenant Governor, to the Superintendent General of Indian Affairs, December 4, 1876, Department of Indian Affairs, *Annual Report, 1876*, Special Appendix F (ICC Documents, p. A7); notes of Dr A.G. Jackes, December 31, 1876 (ICC Documents, pp. 1492-1541).

Morris wrote, "I . . . fully explained to them the proposals I had to make, that we did not wish to interfere with their present mode of living, but would assign them Reserves and assist them as was being done elsewhere, in commencing to farm, and that what was done would hold good for those that were away."⁹ In response to what he viewed as excessive requests for assistance, Morris emphasized agriculture as the way that the Indians could support themselves, saying that "we cannot support or feed the Indians every day, further than to help them to find the means of doing it for themselves by cultivating the soil."¹⁰ He also wrote that he was encouraged by the Indians' interest in taking up agriculture, that it was important for Canada to comply with the terms of treaty promptly to further this interest, and that "advantage should be taken of this disposition to teach them to become self-supporting, which can best be accomplished [with] the aid of a few practical farmers and carpenters to instruct them in farming and house building."¹¹

This encouragement to engage in agriculture is reflected in the terms of the treaty itself. The relevant provisions of Treaty 6 read as follows:

Her Majesty the Queen hereby agrees and undertakes to lay aside Reserves for farming lands . . . and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, provided all such Reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families. . . .

It is further agreed between Her Majesty and the said Indians, that *the following articles shall be supplied to any Band of the said Indians who are now cultivating the soil, or who shall hereafter commence to cultivate the land*, that is to say: – Four hoes for every family actually cultivating, also two spades per family as aforesaid; one plough for every three families as aforesaid, one harrow for every three families as aforesaid; two scythes, and one whetstone and two hayforks and two reaping hooks for every family as aforesaid; and also two axes, and also one cross-cut saw, one hand-saw, one pit-saw, the necessary files, one grindstone and one auger for each Band; and also for each Chief, for the use of his Band, one chest of ordinary carpenter's tools; also for each Band, enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation by such Band; also for each Band, four oxen, one bull and six cows, also one boar and two sows, and one handmill when any Band

9 Alexander Morris, Lieutenant Governor, to the Superintendent General of Indian Affairs, December 4, 1876, Department of Indian Affairs, *Annual Report*, 1876, Special Appendix F (ICC Documents, p. A2).

10 Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based* (Toronto: Belfords, Clarke and Co., 1880) (ICC Documents, p. 1524).

11 Alexander Morris, Lieutenant Governor, to the Superintendent General of Indian Affairs, December 4, 1876, Department of Indian Affairs, *Annual Report*, 1876, Special Appendix F (ICC Documents, p. A6).

shall raise sufficient grain therefor. *All the aforesaid articles to be given once for all for the encouragement of the practice of agriculture among the Indians. . . .*

That in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by Her Indian Agent or Agents, will grant to the Indians assistance of such character and to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them.

That during the next three years, after two or more of the Reserves hereby agreed to be set apart to the Indians, shall have been agreed upon and surveyed, there shall be granted to the Indians included under the Chiefs adhering to the treaty at Carlton, each spring, the sum of one thousand dollars to be expended for them by Her Majesty's Indian Agents, in the purchase of *provisions for the use of such of the Band as are actually settled on the Reserves and are engaged in cultivating the soil, to assist them in such cultivation. . . .*

That with regard to the Indians included under the Chiefs adhering to the treaty at Fort Pitt, and to those under Chiefs within the treaty limits who may hereafter give their adhesion thereto (exclusively, however, of the Indians of the Carlton region), there shall, during three years, after two or more Reserves shall have been agreed upon and surveyed, *be distributed each spring among the Bands cultivating the soil on such Reserves, by Her Majesty's Chief Indian Agent for this treaty in his discretion, a sum not exceeding one thousand dollars, in the purchase of provisions for the use of such members of the Band as are actually settled on the Reserves and engaged in the cultivation of the soil, to assist and encourage them in such cultivation.*¹²

While negotiating the treaty, to encourage prompt adherence and selection of lands, Morris alluded to the danger of settlers interfering with Indian settlement, but he assured the Indians that, once land had been reserved for them, it could not be taken away without their consent. He stated :

[U]nless the places where you would like to live are secured soon there might be difficulty. The white man might come and settle on the very place where you would like to be. . . . [W]e wish to give each band who will accept of it a place where they may live; we wish to give you as much or more land than you need; we wish to send a man that surveys the land to mark it off, so you will know it is your own, and no one will interfere with you. . . . [U]nderstand me, once the reserve is set aside, it could

¹² Alexander Morris, Lieutenant Governor, to the Superintendent General of Indian Affairs, December 4, 1876, Department of Indian Affairs, *Annual Report*, 1876, Special Appendix F (ICC Documents, p. A8). Emphasis added.

*not be sold unless with the consent of the Queen and the Indians; as long as the Indians wish, it will stand there for their good; no one can take their homes.*¹³

Morris also assured the Indians that “when you go to your reserves you will be followed by the watchful eye and sympathetic hand of the Queen’s Councillors.”¹⁴

Dr Jackes noted that Yellow Sky, the Chief of the band that included members of what was to become known as the Moosomin Band, was not present for the negotiations, but was “favourably disposed” to the treaty.¹⁵ Nevertheless, when Indian Agent M.G. Dickieson met with Yellow Sky’s people in August 1877, they declined to sign an adhesion to the treaty, preferring to remain independent and “to not come under the law.”¹⁶ It appears, however, that Moosomin, who was a headman of Yellow Sky’s band, and a number of others settled in the Battleford area some time in the summer of 1880¹⁷ and later adhered to the terms of Treaty 6. From 1881 until 1884, Yellow Sky continued to be recognized by Indian Affairs as the Chief of Moosomin’s Band, but this changed when Indian Commissioner Edgar Dewdney appointed Moosomin as Chief.¹⁸

Moosomin Indian Reserves 112 and 112A

In the spring of 1881, Indian Affairs surveyor George Simpson surveyed 23 square miles, or 14,720 acres, of land as Indian Reserve 112 for the Moosomin Band.¹⁹ IR 112 consisted of good agricultural land along the south bank of the North Saskatchewan River near Battleford, Saskatchewan. Simpson described the land in his 1882 report to Indian Commissioner Dewdney:

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- 13 Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based* (Toronto: Belfords, Clarke and Co., 1880) (ICC Documents, pp. 1501-02). Emphasis added.
- 14 Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based* (Toronto: Belfords, Clarke and Co., 1880) (ICC Documents, p. 1509).
- 15 Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based* (Toronto: Belfords, Clarke and Co., 1880) (ICC Documents, p. 1526).
- 16 M.G. Dickieson, Indian Agent, to Lieutenant Governor of the North-West Territories, September 14, 1877, National Archives of Canada [hereinafter NA], RG 10, vol. 3656, file 9092 (ICC Documents, pp. 3-4).
- 17 T.P. Wadsworth, Inspector of Indian Agencies, Winnipeg, to [Superintendent General], December 1, 1881, Department of Indian Affairs, *Annual Report*, 1881, p. 119 (ICC Documents, p. 27). E. Dewdney, Indian Commissioner, to Superintendent General, December 31, 1880, Department of Indian Affairs, *Annual Report*, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14 (ICC Documents, p. 14).
- 18 Department of Indian Affairs, Paylists, October 16, 1884, NA, RG 10, vol. 7417 (1884) (ICC Documents, pp. 74-77).
- 19 George Simpson, Surveyor, to E. Dewdney, Indian Commissioner, January 3, [1882], Department of Indian Affairs, *Annual Report*, 1881 (ICC Documents, pp. 20-25).

The banks of the river are as well timbered and the soil excellent . . . The east boundary passes over a rolling country, good soil, timber, poplar in groves, one small lake on this line; plenty of water in the valleys, but in a dry season water would be scarce. The soil on the south boundary is a light sandy loam.²⁰

For the Thunderchild Band, Simpson surveyed a reserve of similar size and quality, IR 115, which adjoined Moosomin IR 112 to the west.²¹ The Indian Commissioner, however, thought it preferable to settle Thunderchild and Napahas on the Moosomin reserve as well. This arrangement proved to be satisfactory to no one, and Thunderchild's people eventually moved to the reserve that had been set aside for them.²²

In 1887, R.C. Laurie, Dominion Lands Surveyor, surveyed an additional 2 square miles, or 1280 acres, of excellent hay lands as Indian Reserve 112A for the joint use and benefit of the Moosomin and Thunderchild Bands.²³ Reserves 112 and 112A were both confirmed by Order in Council PC 1151 on May 17, 1889.²⁴

The 1902 Annual Report prepared by J.P.G. Day, the Indian Agent for the Battleford Agency, stated that the Moosomin and Thunderchild reserves "are extremely well suited for mixed farming and are also well supplied with small timber."²⁵ In 1903, the value of the reserves was further enhanced by the construction of the main line of the Canadian Northern Railway (which ran directly through the reserves) and the building of a railway station on Moosomin IR 112 at Highgate. W.J. Chisholm, the Inspector of Indian Agencies, provided this report on the subject to the Superintendent General on September 14, 1903:

20 George Simpson, Surveyor, to E. Dewdney, Indian Commissioner, January 3, [1882], Department of Indian Affairs, *Annual Report*, 1881 (ICC Documents, p. 20).

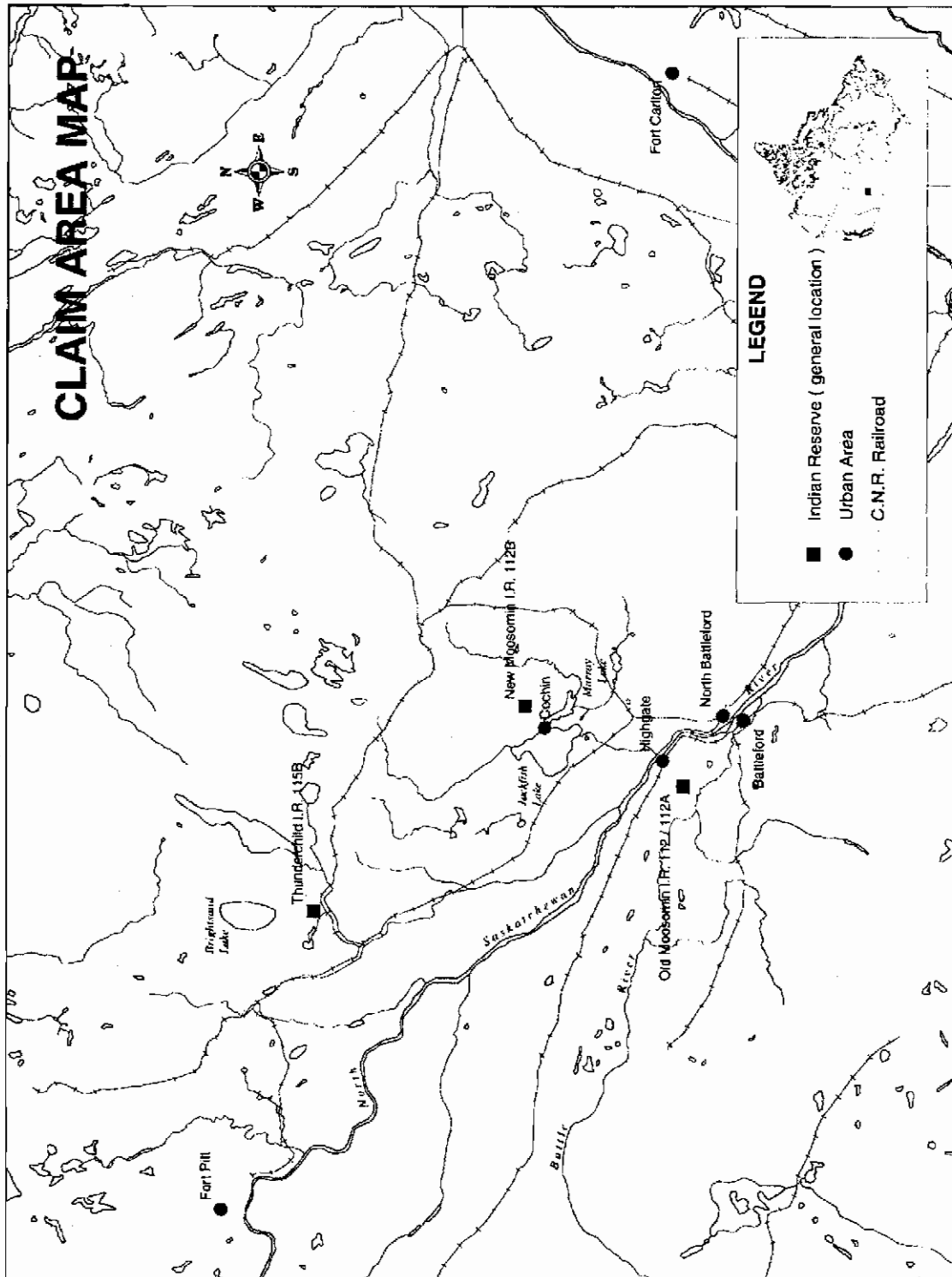
21 George Simpson, Surveyor, to E. Dewdney, Indian Commissioner, January 3, [1882], Department of Indian Affairs, *Annual Report*, 1881 (ICC Documents, pp. 20-25). Reserve 115A, covering approximately 8½ square miles on the north bank of the North Saskatchewan River, was surveyed for the Thunderchild Band in 1884. Report, W.A. Orr to J.D. McLean, April 29, 1902, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 186).

22 L. Vankoughnet, Deputy Superintendent General, wrote in 1883 that he understood that Chief Thunderchild had moved off the Moosomin reserve to "his own Reserve." L. Vankoughnet to Sir John A. Macdonald, Superintendent General, November 15, 1883 (ICC Documents, p. 40). Hayter Reed wrote in 1884 that he had "placed Thunderchild and Na-pa-hese on the reserve of the former adjoining that of Moosomin." Reed to Indian Commissioner, December 28, 1883, NA, RG 10, vol. 3668, file 10644 (ICC Documents, pp. 57-58).

23 Order in Council PC 1151, May 17, 1889, NA, RG 2, series 1, vol. 419 (ICC Document, p. 86 at 110). Laurie's survey of IR 112A was later approved by John Nelson, in charge of Indian Reserve Surveys, Ottawa, on January 23, 1889.

24 Order in Council PC 1151, May 17, 1889, NA, RG 2, series 1, vol. 419 (ICC Documents, p. 95).

25 J.P.G. Day to Superintendent General, Department of Indian Affairs, August 20, 1902, Department of Indian Affairs, *Annual Report*, 1902 (ICC Documents, p. 200).



The route of the Canadian Northern railway as now located west of Battleford crosses these reserves, (Moosomin and Thunderchild) and with the inrush of settlement the Indians are awakening to a very lively appreciation of the value of their inheritance.²⁶

Agent Day's Annual Report for 1905 provided a similar description of Moosomin IR 112:

Moosomin reserve is twelve miles west of Battleford; it contains 14,720 acres. This land lies between the Battle and Saskatchewan rivers; the country is rolling and partially wooded with bluffs of poplar; the soil is a sandy loam and is well adapted for both agricultural purposes and stock-raising. Water is plentifully distributed all over the reserve. . . .

The building of the Canadian Northern railroad through this reserve has been a great help to these Indians by providing work and a near market for all their produce.²⁷

It is evident from the historical record that IR 112 was considered excellent for mixed farming, and the Band used it for that purpose.²⁸ Norman Blackstar related his mother's description of the reserve as "the fertile most prime land that was ever – that humans could possibly possess."²⁹ When one takes into account the soil quality on IR 112, the availability of water and timber on the land, its proximity to the town of Battleford, and its accessibility by rail, it is not surprising that the Moosomin Band thrived on these lands. These same qualities attracted the interest of local settlers and politicians, who sought to acquire the land from the Band for their own purposes.

The Changing Relationship between the Crown and the Band

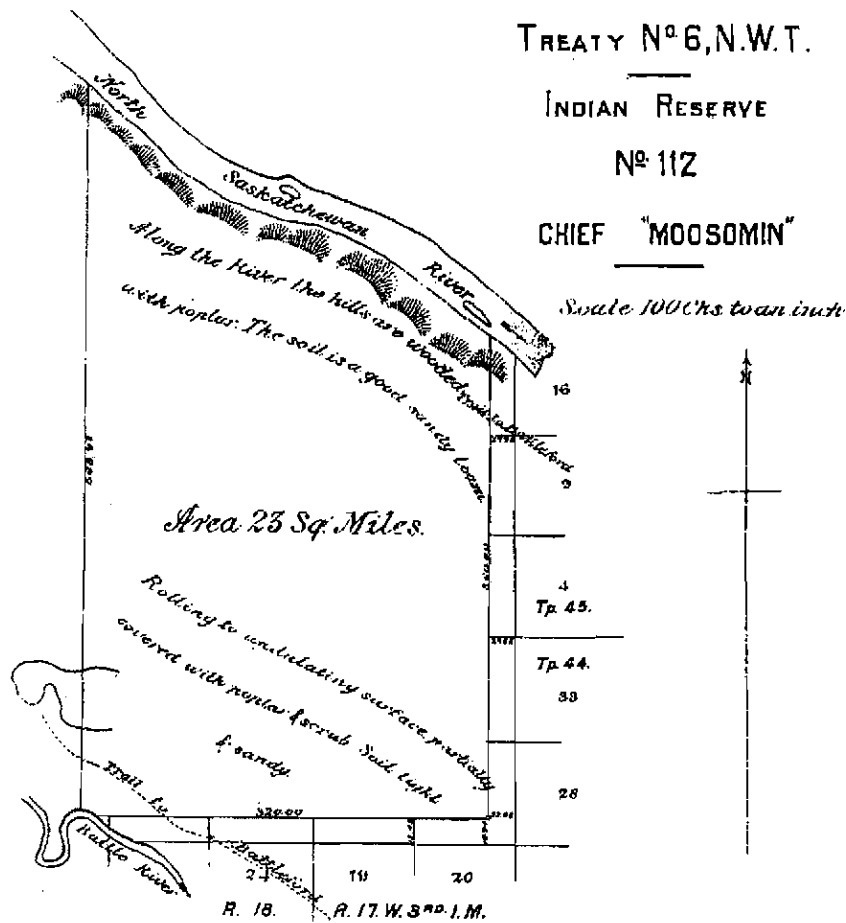
Although the numbered treaties were entered into on the express representations that the bands would be given assistance and instruction to encourage them to take up agriculture on the reserves, in the years that followed, the Canadian government actively pursued policies that effectively undermined the bands' efforts in making this transition. These policies were based on the assumption that Indians required "civilized guidance" and, therefore, that it was necessary to appoint Indian agents to work closely with the prairie Indian bands. Indian agents soon began to control virtually every aspect of

26 W.J. Chisholm to Superintendent General, Department of Indian Affairs, September 14, 1903, Department of Indian Affairs, *Annual Report*, 1903 (ICC Documents, p. 205).

27 Canada, Parliament, *Sessional Papers*, 1906, No. 27, 105 (ICC Documents, p. 1632).

28 B. Prince, MLA, to T.O. Davis, MP, April 16, 1902 (ICC Documents, p. 178). In his letter to Davis, Prince referred to it as three miles of "the best possible land."

29 ICC Transcript, February 21, 1996, p. 21 (Norman Blackstar).



Approved
Edw. Nelson
 In charge Indian Reserve Surveys
 Ottawa 23rd Jan 1881

Surveyed by
 Geo. A. Simpson D. L.S.
 April & May 1881.

TREATY N^o 6, N.W.T.

INDIAN RESERVE

N^o 112 A

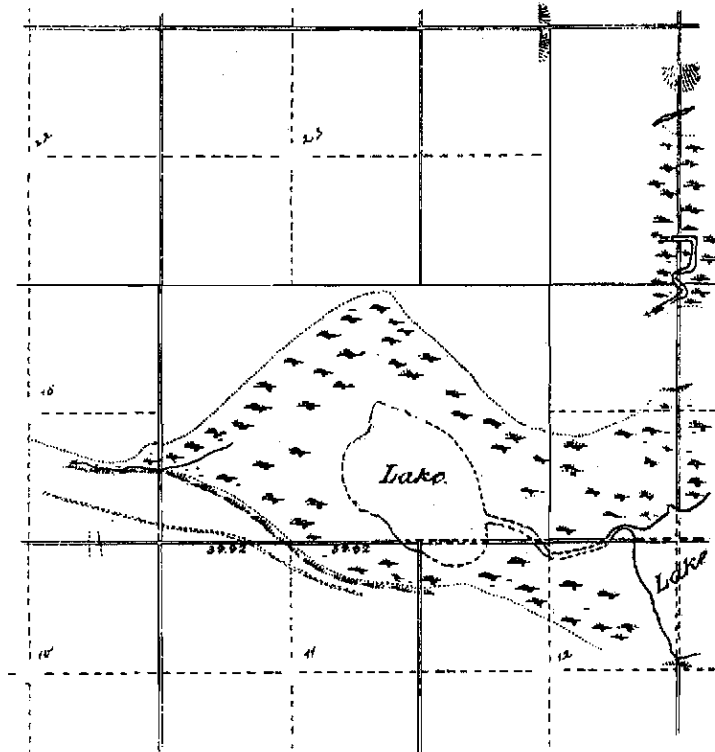
At Crooked Hill Creek

Tray-Lands for the Hounds of Chiefs

"MOOSOMIN" and "THUNDERCHILD"

In T^y. N^o 10 R^ge. 16 W of 3rd T. M.

Scale 40 Chs. to an inch



Area 2.57 Miles.

Approved

Wm. B. Nelson

In charge Indian Reserve Surveys

Given 23rd Jan 1889

Surveyed by

R. C. Laurie D.L.S.

1887

Indian life on the reserve. Historian Helen Buckley described the role of Indian agents as follows:

A network of agents had charge at the local level, each responsible for one or more reserves, and they were powerful figures in their own right, given the primitive communications of the day. These were the men who saw the farm programs implemented, enforced school attendance, allocated housing, and dealt with domestic disputes and a great many other matters. They wrote full reports to Ottawa on both the progress and the problems of their charges. Some agents were dedicated men who did the best they could within the limits of the system; some were political appointees, poorly educated and unsuited for the job; a few were rogues, intent on profiting from their position.³⁰

Given the broad powers and authority of the Indian agents, the introduction of the agency system resulted in the Indians losing much of their autonomy. Indian agents imposed control over many aspects of band life. One policy that was characteristic of this time was the pass system, which was introduced in the years following the Rebellion of 1885 to ensure stricter supervision of the Plains Indians. The pass system required any Indian who sought to leave the reserve to obtain first the written authorization of the Indian agent. Although the system did not prove to be very effective, since all involved “knew there was no legal basis for interfering with the Indians” in this manner, Indian Commissioner Hayter Reed instructed the agents to issue the passes anyway to preserve an appearance of control and to gain knowledge of the Indians’ movements.³¹

Reed, who served as the Indian Commissioner from 1888 until his dismissal in 1897 by Wilfrid Laurier’s newly elected Liberal government, introduced a number of policies that were designed to protect, assimilate, or control the activities of Indians. These policies made it very clear to the Indians that the Indian Affairs Branch wielded a great deal of power when it came to their future well-being. These policies hampered the ability of Indian farmers to develop and cultivate their reserve lands. In the face of ever expanding settlement on the prairies, these lands became increasingly desirable to covetous settlers and increasingly vulnerable to opportunistic politicians who articulated the settlers’ aspirations.

30 Helen Buckley, *From Wooden Ploughs to Welfare: Why Indian Policy Failed in the Prairie Provinces* (Montreal and Kingston: McGill-Queen’s University Press, 1992), 43. See also H.B. Hawthorn, C.S. Belshaw, and S.M. Jamieson, *The Indians of British Columbia: A Study of Contemporary Social Adjustment* (Toronto: University of Toronto Press, 1958), 486.

31 J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1989), 192-93.

In 1881, Canada introduced the permit system that required Indian farmers to obtain permission from the Indian agent to sell their own stock and produce.³² Buckley noted that this system was another instrument of control imposed on Indians: “[I]f an agent did not like an individual or was displeased for some reason, he could refuse or delay his permit indefinitely.”³³ Furthermore, Indians were not permitted to engage in cash transactions; all commerce had to be carried out with “chits” which could be exchanged at the store. Even white settlers expressed the view that this restriction was unreasonable and made it impossible to carry out a successful farm operation, but the policy was nonetheless followed until at least the 1960s.³⁴

In 1889, the introduction of the peasant farming and severalty policies further impeded the progress of Indians in agriculture. The peasant farming policy required Indian farmers to tend small parcels of land on which they could farm only enough grain, vegetables, and stock to sustain themselves and their families. According to Buckley, this “daft” policy was grounded in Commissioner Reed’s misguided sense of social evolution: in his view, allowing Indian farmers to use modern technology would result in their “skipping” a prescribed stage of development on their route to civilization.³⁵ Accordingly, use of the modern machinery available to non-Indian farmers was forbidden, meaning not only that Indians were not permitted to obtain new implements but that they had to cease using some of the machinery they already owned. In spite of the Indians’ protests, and those of some of the agents who were forced to implement it, the policy was established and “fatally chang[ed] the course of reserve agriculture.”³⁶ Thus, while non-Indian settlers had the freedom to develop their agricultural operations profitably and logically, Indian farmers were required “to step aside and function

32 *An Act to Amend “The Indian Act, 1880,”* SC 1881, c. 17, ss. 1, 2.

33 Helen Buckley, *From Wooden Ploughs to Welfare: Why Indian Policy Failed in the Prairie Provinces* (Montreal and Kingston: McGill-Queen’s University Press, 1992), 53.

34 Helen Buckley, *From Wooden Ploughs to Welfare: Why Indian Policy Failed in the Prairie Provinces* (Montreal and Kingston: McGill-Queen’s University Press, 1992), 54. This practice was still carried on with respect to the sale and purchase of goods by the Cold Lake and Canoe Lake First Nations into the 1960s: see Indian Claims Commission, *Inquiry into the Primrose Lake Air Weapons Range* (Ottawa, August 1993), [1994] 1 ICPP 3.

35 Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston, McGill-Queen’s University Press, 1990), 212-13. Reed commented that “the fact is often overlooked, that these Indians who, a few years ago, were roaming savages, have been suddenly brought into contact with a civilization which has been the growth of centuries. An ambition has thus been created to emulate in a day what white men have become fitted for through the slow progress of generations.” Reed to Superintendent General, October 31, 1889, Department of Indian Affairs, *Annual Report*, 1889, 162.

36 Helen Buckley, *From Wooden Ploughs to Welfare: Why Indian Policy Failed in the Prairie Provinces* (Montreal and Kingston: McGill-Queen’s University Press, 1992), 53.

in isolation from the rest of western Canadian society.”³⁷ The result for the Moosomin and Thunderchild Bands was described at the community session by Ed Okanee:

They didn't buy any machinery, you know, to improve the quality of farming, and they just natural – they naturally use – they cut them with scythes, and they tied it up themselves by hand, and they know. You know, they had used the old thrashing methods, the earliest thrashing methods. They used the canvas, and then they threw it in the air, and the chaff flew off. And the agents never did anything to improve the quality of farming. It was the agents and the priest that were behind all of this that just did their extreme – used the extreme methods of discouraging people, and once they became destitute, it was easy for them to move away.³⁸

Commissioner Reed's severalty policy promoted the subdivision of reserves into smaller plots for individual farmers, rather than having the entire reserve cultivated by the band as a whole. In his view, this was an important step towards the individualism he felt would be necessary to assimilate Indians into non-Indian society; the “communistic” ties that bound the tribal system together had to be broken. In addition to promoting individualism, the policy of severalty also created large blocks of “surplus” reserve land that could be sold off, since land would be allotted to each farmer and the balance would be available for surrender. Severalty, therefore, enhanced more than one goal of the Canadian government: it not only sought to recast Indian farmers into an individualistic mould (thus supposedly improving their capacity to farm), but it also reduced the amount of land that the band could put to effective use.³⁹

Commissioner Reed also sought to undermine the traditional systems of leadership and organization of the prairie Indian bands, since he considered these systems to be “communistic” in nature. Historian Sarah Carter noted that the “chiefs of bands perceived to be disloyal in 1885 were deposed, and Reed hoped that as the other chiefs and headmen died off, these offices might be allowed to lapse.”⁴⁰ Where the leaders of a band did not fully

37 Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston, McGill-Queen's University Press, 1990), 216. See also “Two Acres and a Cow: ‘Peasant’ Farming for the Indians of the Northwest, 1889-1897,” in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 353-77.

38 ICC Transcript, February 21, 1996, pp. 53-54 (Ed Okanee).

39 Sarah Carter, “Two Acres and a Cow: ‘Peasant’ Farming for the Indians of the Northwest, 1889-1897,” in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 353-57.

40 Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston, McGill-Queen's University Press, 1990), 149.

endorse departmental policy, they were not recognized by government officials as speaking for the band.

It is unfortunate, to say the least, that the laudable goal of the treaty signatories – to see Indians become self-sufficient through agriculture – was hampered by the imposition of Reed's wrong-headed farming policies. The effect of these policies curtailed and reversed the development of Indian agricultural economies; in addition, the perception that Indians had "surplus lands" that were not being put to productive use made vast tracts of reserve land vulnerable to encroachment by settlers, railway companies, speculators, and politicians alike.

The election of Laurier's Liberal government in 1896 marked a fundamental shift in national policy as the government focused its attention on immigration, expansion, and western development to be fuelled largely by agriculture. The new Minister of the Interior and Superintendent General of Indian Affairs, Clifford Sifton, began a campaign of "efficiency" by increasing central control of Indian Affairs; by temporarily placing both Indian Affairs and the Department of the Interior under a single Deputy; and by "slashing budgets, dismissing personnel and reducing salaries."⁴¹ On a policy level, "Sifton's lack of background in Indian Affairs and his 'perspective that Indian assimilation in "white" society took second place to rapid economic development,'⁴² [meant that] the primary focus of the combined department was to attract new settlers and to develop western Canada economically."⁴³ Sifton's policies were quite successful in encouraging western expansion, and the population of western Canada increased by nearly one million during the 10 years of his administration from 1896 to 1905.⁴⁴

With pressure on the government to make prime agricultural land on Indian reserves available to settlers, Canada introduced legislative changes that made it easier for reserve land to be surrendered or otherwise taken without a band's consent. This process began in 1894 with an amendment to the *Indian Act* that permitted the Superintendent General of Indian Affairs to lease, without first obtaining a surrender, lands belonging to Indians who

41 Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 237-38.

42 John Leslie and Ron Maguire, eds., *The Historical Development of the Indian Act*, 2d ed. (Ottawa: DIAND, Treaties and Historical Research Branch, 1978), 104.

43 Indian Claims Commission (ICC), *Kabkewistabaw First Nation Report on the 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), 36.

44 ICC, *Kabkewistabaw First Nation Report on the 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), 37.

could not work it themselves because of illness or disability.⁴⁵ Much more ambitious measures were implemented under Frank Oliver, who succeeded Sifton as Minister of the Interior and Superintendent General of Indian Affairs in 1905.

Oliver, a former editorial writer for the Edmonton *Bulletin*, had long campaigned in private life to free up reserve land for settlement. He aggressively pursued changes to the *Indian Act* in response to the growing perception, fuelled in large measure by Oliver himself and by other political figures, that Indian reserve holdings were excessive in relation to the Indians' needs and that reserves should be opened up for settlement. The following excerpts from the Commission's inquiry into the 1907 Kahkewistahaw surrender⁴⁶ provide an ample illustration of Mr Oliver's views and the extent to which they were embraced by his officials and entrenched in legislation:

Oliver's appointment in 1905 brought wholesale changes in the official attitude of the Department towards the reserve land question. In response to an inquiry in the House of Commons by R.S. Lake about the proposed Crooked Lake surrenders [including the Kahkewistahaw Reserve], Oliver replied that "[t]he case of the Broadview reserve is only one of many in the west, and it is no doubt a hardship to the surrounding country and to large business enterprises." He noted that "*of course the interests of the people must come first and if it becomes a question between the Indians and the whites, the interests of the whites will have to be provided for.*"⁴⁷

This attitude quickly pervaded the Department. In his annual report to the Minister for 1908, Deputy Superintendent General Frank Pedley conveyed a similar philosophy:

The large influx of settlement of recent years into the younger provinces has dictated a certain modification of the department's policy with relation to the sale of Indians' lands.

So long as no particular harm nor inconvenience accrued from the Indians' holding vacant lands out of proportion to their requirements, and no profitable disposition thereof was possible, the department firmly opposed any attempt to induce them to divest themselves of any part of their reserves.

Conditions, however, have changed and it is now recognized that where Indians are holding tracts of farming or timber lands beyond their possible requirements and by so doing seriously impeding the growth of settlement, and there is such demand as to ensure profitable sale, the product of which can be invested for the

45 Brian Titley has called this amendment "the thin edge of the wedge of confiscation," since it was Canada's first arrogation of the power to obtain Indian reserve land without the consent of the band. See *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 16.

46 ICC, *Kahkewistahaw First Nation Report on the 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), 47-49. Some of the footnote references in the excerpted passages have been retained but renumbered to follow the sequence here.

47 Canada, House of Commons, *Debates* (March 30, 1906), 947-50. Emphasis added.

benefit of the Indians and relieve *pro tanto* the country of the burden of their maintenance, it is in the best interests of all concerned to encourage such sales.⁴⁸

In keeping with these sentiments, one year after his appointment Oliver sponsored an amendment to the *Indian Act* allowing up to 50 per cent of the proceeds of a surrender and sale to be distributed immediately to band members.⁴⁹ Previously, the *Indian Act* had limited such cash distributions to 10 per cent of the sale price, with the rest to be held in trust in a capital account for the band in question. Oliver was quite candid in explaining to the House of Commons his motivations for seeking the amendment:

This [10 per cent cash distribution] we find in practice, is very little inducement to them to deal for their lands and we find that there is very considerable difficulty in securing their assent to any surrender. Some weeks ago, when the House was considering the estimates of the Indian Department, it was brought to the attention of the House by several members, especially from the Northwest, that there was a great and pressing need of effort being made to secure the utilization of the large areas of land held by Indians in their reserves without these reserves being of any value to the Indians and being a detriment to the settlers and to the prosperity and progress of the surrounding country.⁵⁰

The new provision proved its usefulness almost immediately, for the next year the Department was able to dispose of the longstanding and troublesome issues associated with the St Peter's reserve in Manitoba. A series of doubtful land transactions involving settlers at St Peter's since the 1870s culminated in several investigations and inquiries between 1878 and 1900, none of which resolved the competing claims to lands within the reserve boundaries. Finally, in September 1907, Deputy Superintendent General Pedley came to the reserve in person, reportedly carrying a briefcase containing \$5000 in cash, and managed to get the desired surrender.⁵¹ The surrender document called for disbursement to the Band of 50 per cent of the proceeds of sale one year following the surrender.⁵² Indian discontent surfaced later, however, and ultimately the surrender was attacked in Parliament on the basis that "the methods

48 Canada, Parliament, *Sessional Papers*, 1908, No. 27, "Annual Report of the Deputy Superintendent General to Superintendent General, September 1, 1908," xxxv.

49 SC 1906, c. 20, s. 1 (amending s. 70 of the Act). Royal Assent was given on July 13, 1906. This was not the only *Indian Act* amendment promoted by Oliver to reduce in size or eliminate Indian reserves. In 1911, two others were passed, together referred to by Indians as the "Oliver Act." The first allowed public authorities to expropriate reserve land without the need of a surrender. Any company, municipality, or other authority with statutory expropriation power was enabled to expropriate reserve lands without Governor in Council authorization so long as it was for the purpose of public works. The second allowed a judge to make a court order that a reserve within or adjoining a municipality of a certain size be moved if it was "expedient" to do so. There was no need for band consent or surrender before the entire reserve could be moved. SC 1911, c. 14, ss. 1 and 2, respectively.

50 Frank Oliver in Canada, House of Commons, *Debates* (June 15, 1906), 5422.

51 Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 22.

52 For a review of the St Peter's claim, see "The St. Peter's Reserve Claims," in R. Daniel, *A History of Native Claims Processes in Canada, 1867-1979* (Ottawa: DIAND, Research Branch, February 1980), 104-21.

employed by the government agent had been anything but creditable to the government."⁵³

Carter summarizes the federal government's policies during this period and the effect they had on Indians and their lands as follows:

[T]he major preoccupation of Indian Affairs administrators was to induce Indians to surrender substantial portions of their reserves, a policy which ran counter to efforts to create a stable agricultural economy on reserves . . . Not all departmental officials were in favour of an unrestrained, comprehensive program of reserve land surrender. . . . Sifton himself was reluctant at least publicly to give in to pressure to surrender Indian land and insisted the government's role was to act as trustee for the Indians. His attitude did not prevent his civil servants, such as Smart and Pedley, from speculating in Indian lands, even while acting as the supposed representative of the Indians.

Others in Indian administration, such as Frank Oliver, appointed superintendent general of Indian Affairs in 1905, favoured the wholesale alienation of reserve land. Oliver even originally hoped reserve land could be thrown open for settlement without the consent of the Indians. During his term of office, bands across the North-West were pressured to surrender, and hundreds of thousands of acres were alienated. It was Oliver who introduced the 1906 amendment to the *Indian Act* that permitted the distribution of 50 per cent of the purchase price, a measure he predicted would accelerate the surrender process. . . . The Edmonton Bulletin, Oliver's newspaper, campaigned from the 1880's for the removal of Indians from areas of settlement. . . .

These sentiments received widespread support from farmers, townspeople, merchants, railroad executives, newspapermen, and speculators. All those with a stake in the expansion of agriculture were interested in reducing the size of Indian landholdings.⁵⁴

Thus, even though one of the purposes of Treaty 6 was to facilitate a move from a subsistence economy to one rooted in agriculture, Canada pursued policies and legislative amendments which, by both design and effect, worked to undermine the recently established Indian farmers. Combined with the significant pressure exerted by prospective settlers to obtain "surplus" Indian land, these policies and laws demonstrated the challenges faced by Indian farmers to work – and keep – their treaty land.

It is also important to mention that the conflicting policy objectives of government in dealing with Indian lands, and the corrupt practices of certain

53 It was attacked by the member for Selkirk, G.H. Bradbury. Canada, House of Commons, *Debates* (March 22, 1911), cols. 5837 ff.

54 Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 244-45.

government officials, were later made the subject of a special investigation by the Ferguson Royal Commission.⁵⁵ Frank Pedley, for example, served as Deputy Superintendent General of Indian Affairs from 1902 to 1913 under both Clifford Sifton and Frank Oliver until he was forced to resign as a result of his involvement in land speculation. When the Ferguson Commission's findings were raised in the House of Commons in 1915, future Prime Minister R.B. Bennett had this to say about the surrender policies at the turn of the century:

During the fifteen years from 1896 to 1911 everything that could be done to alienate the public resources of Canada by conspiracy on the part of the hon. gentlemen who then were administering the country and their friends, was done . . . I live in the province of Alberta, and I saw men with nothing, grow suddenly rich at the expense of the public. I saw the land of this country being alienated – graft is the proper word to describe the situation – by men whose corrupt ideas degenerated and degraded the public life of the country . . . [O]ne would think that it would be sufficient that all these things should have happened, but it was not. *Lo, the poor Indians they must suffer! The wards of the nation! The aborigines of Canada! The men whose rights they were sworn to protect were the victims of the conspiracy of a Turriff, a Pedley and a White. If anything has ever in the annals of Parliament been placed upon the table of this House calculated to bring the blush of shame to the face of any Canadian, it is the revelation contained in the evidence that is here tonight.*⁵⁶

It was this “shameful” conduct and attitude that provided the backdrop for the events leading up to the surrender of the Moosomin reserve in 1909, to which we now turn.

Agriculture on the Moosomin Reserves

In 1880, shortly after Moosomin settled near Battleford but prior to these lands being surveyed and set apart as IR 112, Indian Commissioner Dewdney reported:

⁵⁵ See Canada, House of Commons, *Debates* (April 14, 1915) (ICC Documents, pp. 1873-1904); Brian Tidle, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 17-22; Pierre Berton, *The Promised Land* (Toronto: McClelland and Stewart, 1984), 245-48.

⁵⁶ Canada, House of Commons, *Debates* (April 14, 1915) (ICC Documents, p. 1900). Emphasis added. Turriff, Pedley, and White were Indian Affairs officials during the relevant time period studied by the Ferguson Royal Commission. Unfortunately, the Commission's report, released in the spring of 1915, was destroyed in a parliamentary fire during the same period. It was, however, the subject of some comment in the House of Commons *Debates* (ICC Documents, pp. 1873-1904).

There are about thirty acres broken by contract, and [Moosomin's] Indians are a splendid lot of workers. Although they have been there about a couple of months, they have built five excellent houses for new beginners, and are taking out rails to fence the ploughed land.⁵⁷

In 1883, Hayter Reed, then the Acting Assistant Commissioner, wrote that "Moosomins' Band has done well, and were the benefits of a Mill to be had they might be relieved from Government aid. . . ."⁵⁸

The later reports of the Indian agents on the Band's progress in cultivating the reserve indicate that Band members were able to make a good living through a combination of farming, stock-raising, freighting, and selling timber, among other activities. It is significant that these successes were achieved in spite of the significant challenges faced by the new farmers, including a poor climate, competition for the lands, and detrimental government policy.⁵⁹

In his 1889 Annual Report, P.J. Williams, the Indian Agent for the Battleford Agency at the time, provided the following comments on the progress of the Moosomin and Thunderchild Bands:

Since my last report, the Indians of this agency have reaped and benefited by a bountiful harvest. Moosomin and Thunderchild's Bands fed themselves with their own flour for eight months; and some of the Indians, after feeding their old and helpless relatives, have several sacks of flour in their houses yet. . . . The Indians were delighted with the idea of handling and using their own crop; so much so, that every Indian this spring commenced work with renewed energy, and the result was that over six hundred acres were sown with wheat; oats and barley, in less quantities, as the sale for these grains was limited; potatoes, turnips, and garden seeds were planted in great quantities; every available acre of old land was seeded. . . .

The individual earnings of the Indians were spent to good advantage in buying reapers, mowers, self binders, waggons etc. This year the Indians themselves propose giving one dollar each out of their treaty money to purchase a steam thresher, as they experienced great difficulty in getting the threshing done last year. . . .

The cattle are doing remarkably well on all of the reserves. . . .
The sheep have done very well on Moosomin's Reserve. . . .⁶⁰

57 E. Dewdney, Indian Commissioner, to Superintendent General, December 31, 1880, Department of Indian Affairs, *Annual Report*, 1881 (ICC Documents, p. 14).

58 Hayter Reed, Acting Assistant Commissioner, to Indian Commissioner, December 28, 1883, NA, RG 10, vol. 3668, file 10644 (ICC Documents, p. 57).

59 With respect to the climate, Miller has noted that conditions for agriculture at the time were "among the worst climatically in prairie history." J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1989), 199.

60 Canada, Parliament, *Sessional Papers*, 1890, No. 12, "Annual Report of Deputy Superintendent General" (ICC Documents, p. 1560).

It is important to observe that this report covers the 1888-89 agricultural year and precedes the implementation of Hayter Reed's peasant farming policy in 1889.

By 1902, the Moosomin Band had made very real progress in mixed farming despite the imposition of the peasant farming and severalty policies. The 1902 Annual Report from Indian Agent Day for the Battleford Agency states:

In Moosomin's band there are twenty-six men, thirty-one women, twenty-three boys, and twenty-eight girls, making a total of one hundred and eight. . . . Mixed farming is carried on by these Indians (Moosomin and Thunderchild Bands), with a very fair measure of success; they also make a little extra by the sale of hay, firewood, charcoal and lime.

The cattle belonging to these bands (Moosomin and Thunderchild) number four hundred and seventy-four head. They are all in prime condition. . . .

These bands have a sufficient number of farming implements for their present requirements, and they take good care of them. . . .

The men of these bands are good workers, but they need constant supervision to keep them in the right path.

I am confident that with good men here in charge for a few years these bands will become entirely self-supporting.⁶¹

Agent Day's Annual Reports from 1905 to 1909 demonstrate that the Moosomin Band continued to make advancements in agriculture and was on the road to becoming completely self-sufficient. In 1905, Day reported:

Mixed farming is a decided success here; the members of this band not only make a good livelihood at it, but some of them are getting to be very prosperous and would scout the thought of asking for government rations. They are energetic, and if one source of revenue fails, they try another; but they keep moving all the time, and in the right direction.

The building of the Canadian Northern railroad through this reserve has been a great help to these Indians by providing work and a near market for all their produce.

There are 279 head of cattle belonging to this band; they are a fine bunch of animals, and are well attended to. . . .

A very complete equipment of farm implements is owned by this band; they paid for them out of their earnings; they are familiar with their use and take good care of them. . . .

[T]hese Indians are decidedly progressive and industrious.⁶²

61 J.P.G. Day, Indian Agent, to Superintendent General, August 20, 1902, Canada, Parliament, *Sessional Papers*, 1906, No. 27, 105 (ICC Documents, pp. 199-201).

62 J.P.G. Day, Indian Agent, to Superintendent General, September 15, 1905, Canada, Parliament, *Sessional Papers*, 1906, No. 27, 105 (ICC Documents, p. 1632).

In the Annual Report for 1906, Agent Day offered these comments in relation to the Moosomin Band:

The population of this band is 134.

These Indians farm, raise stock, sell hay and fire-wood, work for settlers and railroad companies, and also do a lot of freighting. . . .

The cattle belonging to this band are very good, and are well looked after all the time. . . .

These people are well equipped with all classes of farm implements. They own them, and look after them well. Last year this and Thunderchild band bought a new threshing-separator out of the proceeds of the right of way through their reserves for the Canadian Northern railroad. . . .

These Indians are very thrifty and prosperous. The progress they are making is very creditable, and, judging from appearances, it is permanent.

There is little, if any, intemperance. . . .⁶³

In 1907, Agent Day commented:

Nearly all the Indians on this reserve farm and keep stock; they sell their surplus grain, also fire-wood and hay; altogether they make a very good living. . . .

These Indians are industrious, well behaved, and are making a comfortable living.⁶⁴

The 1908 Annual Report includes these remarks by Agent Day:

These men are all farmers and stock-raisers; they also sell hay and fire-wood; do quite a lot of freighting for the railways, work for settlers; and make a very comfortable livelihood.⁶⁵

In his 1909 Annual Report, it is curious that Day made no mention of the fact that the Band had surrendered its reserve and had been relocated. He did, however, provide these comments on the condition of the Moosomin Band:

There are 137 Indians in this band.

63 J.P.G. Day, Indian Agent, to Superintendent General, July 19, 1906, Canada, Parliament, *Sessional Papers*, 1906, No. 27, 105 (ICC Documents, p. 1636).

64 J.P.G. Day, Indian Agent, to Superintendent General, May 1, 1907, Canada, Parliament, *Sessional Papers*, 1908, No. 27, 105 (ICC Documents, p. 1642).

65 J.P.G. Day, Indian Agent, to Superintendent General, April 29, 1908, Canada, Parliament, *Sessional Papers*, 1909, No. 27, 105 (ICC Documents, p. 1650).

The health of this band is good, and everything in the way of hygiene is done to keep them in a healthy state.

The Indians are successful farmers and stockmen; they also sell a lot of fire-wood, freight and work for settlers.

The buildings on this reserve are all constructed of logs. . . . They are all clean and comfortable inside. . . .

Cattle and horses wintered well and without loss. Much interest is taken in the stock industry by these Indians. . . .

The Indians are becoming better equipped each year with wagons, mowers, binders, rakes, seeders, sleighs, harness, etc, besides all the necessary small implements required in their farming operations. . . .

The Indians of this band are very industrious and progressive. They are keenly alive as to ways and means of earning money, and, as a consequence, are becoming quite prosperous.

No cases of intemperance have come to my notice during the past year by any member of this band. . . .⁶⁶

Such was the state of the Moosomin Band in the very year in which the Band surrendered the land that had provided it with a measure of prosperity and the potential for an independent and successful future.

Pressure to Surrender the Moosomin Reserves

We note in examining the historical record the apparently close link between the surrender of Moosomin Indian Reserves 112 and 112A and the surrender of nearby Thunderchild Indian Reserve 115. Although the circumstances of the Thunderchild surrender are not before the Commission in this claim, the events surrounding that surrender must be touched on in this report because of that link. The Commission takes particular note of the Department's perception, as discussed below, that, after the death of Chief Moosomin in or around 1902, Chief Thunderchild, as the only recognized Chief of the Thunderchild and Moosomin Bands, spoke on behalf of the Moosomin Band in relation to the surrender of Reserves 112 and 112A.

Early Conflict over Indian Farming and Hay Lands

Conflict over the land set aside for Moosomin and Thunderchild began in the late 1880s, even before the reserve was confirmed by Order in Council in 1889. By 1888, settlers from the Battleford area had delivered a petition to the local Member of Parliament complaining about the success of the Indian

⁶⁶ J.P.G. Day, Indian Agent, to Superintendent General, April 19, 1909, Canada, Parliament, *Sessional Papers*, 1910, No. 27, 105 (ICC Documents, p. 1753).

bands in farming. The incident and Commissioner Reed's response, which was reported in the *Saskatchewan Herald* on October 13, 1888, were described by Carter:

Residents of Battleford and district were particularly strident in their objections to Indian competition in the grain, hay, and wood markets. In 1888 they petitioned their Member of Parliament and complained that the "Indians are raising so much grain and farm produce that they are taking away the market from the white settlers." During his visit to Battleford in October of that year, Hayter Reed reported that he was assailed by such complaints. He met with a deputation of farmers and one of townspeople and informed both that his department "would do whatever it reasonably could to prevent the Indians from entering into competition with the settlers during the present hard time." . . . Reed arranged with the Battleford citizens to divide up the limited markets in the district. . . . The Indians were allowed to supply wood to the agency. . . . The sale of grain in the district was left exclusively to the white settlers.⁶⁷

The question of additional lands for hay also caused dissatisfaction among neighbouring settlers. The original reserve (IR 112) was surveyed before departmental officials decided that cattle ranching was the most economically viable economy in this area, and, as a result, the surveyor inadvertently failed to provide adequate hay lands for the Band during the initial survey of its reserve. As early as 1883, however, the local Indian Agent indicated that it would be advisable also to reserve an area on the north side of the North Saskatchewan River that the Indians were already using to supply their hay needs. Thus, in 1887, 2 square miles in that location (i.e., Township 46, Range 16, west of the third Meridian) were surveyed as "Hay Grounds" for the joint use and benefit of the Moosomin and Thunderchild Bands (IR 112A), and this reserve was confirmed by Order in Council in 1889.

According to Indian Affairs officials, however, the hay in IR 112A was not sufficient. In 1889, both Commissioner Reed and Indian Agent P.J. Williams requested additional reservations of hay lands in the same area. Williams insisted that additional hay lands "be procured at once, for the reason that it has come to the notice of the settlers that there are such hay-lands on the north side of the North Saskatchewan River, and nearly every one who has stock are after these lands."⁶⁸ In response, the Dominion Lands Agent reported on the growing dissatisfaction among the local settlers, who felt that

67 Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 188.

68 P.J. Williams, Indian Agent, to Indian Commissioner, Regina, September 24, 1889, NA, RG 10, vol. 3782, file 40316 (ICC Documents, p. 114).

the largest and best areas north of the Saskatchewan were reserved by the Indian Department and that these prime areas were not being fully harvested and were not used exclusively by Indians.⁶⁹

On more than one occasion, Agent Williams strongly refuted these allegations, stating that “[n]ot one foot of our Reserve lands was cut by white settlers, nor was one forkfull cut on shares and every acre that was reserved was cut, that was fit for hay.”⁷⁰ According to Williams, the resentment stemmed from factors other than the reservation of land for the Bands. He noted that, while settlers were reacting to a particularly poor year for hay on their own land, the Moosomin Band had only the hay reserve on which to rely for hay. In fact, Williams specifically requested additional hay reserves so that “our Indians and their cattle will not conflict with the white and half-breed settlers . . . who are ever ready to find fault with the Indians and the Department in their dealings with them.”⁷¹

Commissioner Reed wrote that, in spite of the resentment felt by settlers, it was imperative that additional hay reserves be set aside, since the Department’s intent was for Moosomin to rely on stock-raising. Therefore, adequate hay had to be available for the Band to permit it to earn a livelihood. He observed that “[i]t would be just as great a drawback to the country were the Indians restricted in their advancement owing to their inability to procure hay as it would be were the whites to find themselves short.”⁷² He concluded that, although it was possible that the Indians did not require all the hay lands requested, which and how much land should be provided to the Band ought to be carefully considered. To that end, Agent Williams provided a list

69 E. Brokowski, Dominion Land Agent, Battleford, to Commissioner of Dominion Lands, Winnipeg, October 28, 1889 (ICC Documents, pp. 116-18). There was, in fact, a widespread feeling among settlers that the Indians’ use of hay lands was wasteful. Sarah Carter noted that the settlers “claimed that Indians had adequate hay lands and ‘to tie up more hay land than is really required is to throttle an important agricultural industry in its infancy.’ Settlers who had taken up homesteads at Jackfish and Round Hill Lakes with a view to ranching objected to the reservation of hay lands there for Indians, so that ‘pioneer settlers’ may be allowed to enjoy the benefit of their enterprise and expenditure.” *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen’s University Press, 1990), 186.

70 P.J. Williams, Indian Agent, to Indian Commissioner, Regina, March 3, 1890, NA, RG 10, vol. 3782, file 40316 (ICC Documents, p. 143). Williams added: “I have made a careful investigation of the hay lands reserved for Indians use and I find that every available acre so reserved was cut and not an acre cut on shares as stated by the Agent of Dominion Lands here, and great dissatisfaction is expressed by the settlers as to the way permits on hay lands are granted to favorites by the Land Agent here. I have no desire to interfere with the management of the Department of the Interior but when their Agent makes statements which the facts of the case will not justify, statements many if not all are very far wide of the truth I feel bound to represent matters in their true light.” Williams to Indian Commissioner, March 26, 1890, NA, RG 10, vol. 3782, file 40316 (ICC Documents, pp. 151-52).

71 P.J. Williams, Indian Agent, to Indian Commissioner, Regina, March 24, 1890, NA, RG 10, vol. 3782, file 40316 (ICC Documents, p. 149).

72 Hayter Reed, Indian Commissioner, Regina, March 28, 1890, NA, RG 10, vol. 3782, file 40316 (ICC Documents, pp. 153-54).

of the lands he considered “absolutely necessary,” and added that “if we do not get them it will be absolutely impossible for us to winter the now large and ever increasing stock of Indian cattle.”⁷³ The Department of the Interior agreed to provide all but one quarter section of the lands identified by Williams (the quarter section not allowed had already been let under permit to someone else), but A.M. Burgess, Deputy Minister of the Interior, warned Deputy Superintendent General Vankoughnet that this arrangement was not intended by the government to be permanent:

As soon as the lands are required for the purposes of actual settlement, of which one year’s notice will be given, it will be necessary to remove the reservation. The Minister adds: “The Indians must be instructed to raise their own hay on their reserves. This can be done, as some of the reserves can be easily irrigated.”⁷⁴

The conflict between settlers and the Moosomin Band over the hay lands was an early indicator of the pressure that would come to “open up” reserve land for settlement, given the increasing numbers of settlers on the prairies generally and in the Battleford area in particular.

Request for Surrender in 1902

In 1902, Mr B. Prince, a Member of the Legislative Assembly for the North-West Territories, wrote to Mr T.O. Davis, the local Member of Parliament, concerning surrender of the Thunderchild and Moosomin reserves:

You are aware that about twelve miles from Battleford, we have the Moosomin and Thunder Child Reserves who are in the line of march of settlers, as each of these reserves occupies about six miles square of the best possible land in the centre of settlement and between the two rivers. I have been asked by a good number of our mutual friends of Battleford to try and get these two reserves moved on the other side of the river, to which I think these Indians would have no objection. In having these reserves opened for settlement it would very much benefit Battleford and its surroundings. I therefore ask you to use your influence on the Commissioner of Indian Affairs to obtain from him this favor, which I consider would be in the interest of all concerned.⁷⁵

73 P.J. Williams, Indian Agent, to Indian Commissioner, Regina, April 16, 1890, NA, RG 10, vol. 3782, file 40316 (ICC Documents, pp. 156-57).

74 Lyndwode Beroira, Assistant Secretary, Department of Interior, to L. Vankoughnet, May 30, 1890, and A.M. Burgess to L. Vankoughnet, January 9, 1891, NA, RG 10, vol. 3782, file 40316 (ICC Documents, pp. 162, 167).

75 B. Prince to T.O. Davis, April 16, 1902 (ICC Documents, p. 178).

In response, the Department took the position that the proposal for surrender was probably not feasible. In a letter dated April 25, 1902, the Department emphasized that "full consultation with the Indians themselves" was required prior to obtaining a surrender and expressed doubt that the Bands' agreement could be secured.⁷⁶ Immediately thereafter, the Deputy Superintendent General of Indian Affairs, James A. Smart, asked the Secretary of the Department, J.D. McLean, to "make a full report on these two Reserves, the number of Indians, and any particulars with regard to them."⁷⁷ This task was delegated to Indian Commissioner David Laird,⁷⁸ and then to W.J. Chisholm, the Inspector of Indian Agencies. Chisholm was asked "whether in your opinion the Indians would offer serious objections to the proposed transfer," and also to comment on "the quality of the land across the river."⁷⁹

Inspector Chisholm quickly replied that, in his view, the lands immediately across the river were "equally good [as] those of the reserves and equally well adapted to grain growing." He suggested that relocation to the other side of the river would substantially benefit the Bands in that they would be "nearer to their hay-lands" and the difficulties of crossing the river would be avoided. He added that the "range for grazing is better on the north side; and water for stock more convenient."⁸⁰

As for the wishes of the Moosomin and Thunderchild Bands, Inspector Chisholm did not canvass their views but noted that "[s]ome objection would in all probability be raised by a few, yet this would, I think, be overcome by a careful explanation of the objects and advantages." Finally, he noted that the case might be different if the relocation in question was to be to some point farther north of the North Saskatchewan River, and not to the immediate north bank.⁸¹ Commissioner Laird echoed Chisholm's assessment of the situation, adding that if "they were asked to select a reserve some distance North of the river I doubt very much if they would entertain the proposal."⁸² No

76 Unsigned letter to T.O. Davis, April 25, 1902 (ICC Documents, p. 181). It is not clear who the author of this letter is, but the letter states on behalf of Indian Affairs that "it would be out of the question for the Department to undertake" a surrender at the moment.

77 J.A. Smart, Deputy Superintendent General, to J.D. McLean, April 25, 1902, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 182).

78 J.D. McLean, Secretary, Department of Indian Affairs, to Indian Commissioner, Regina, April 26, 1902 (ICC Documents, p. 183).

79 D. Laird, Indian Commissioner, to W.J. Chisholm, Inspector of Indian Agencies, April 30, 1902 (ICC Documents, p. 193).

80 W.J. Chisholm, Inspector of Indian Agencies, to D. Laird, April 30, 1902 (ICC Documents, pp. 194-96).

81 W.J. Chisholm, Inspector of Indian Agencies, to D. Laird, April 30, 1902 (ICC Documents, pp. 194-96).

82 D. Laird, Indian Commissioner, to Secretary, Department of Indian Affairs, May 7, 1902, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 198).

further action appears to have been taken with respect to the request for surrender at this time.

It is important to observe that, in response to the initial pressures from settlers between 1888 and 1902, departmental officials generally acted in a reasoned and responsible manner and with full regard for the best interests of the Moosomin and Thunderchild Bands. For example, in 1888, when settlers pressed government officials to refrain from setting aside additional hay lands for the Bands, the Department persisted in its view that hay lands were necessary to assist the Band in developing its burgeoning cattle operation. In 1902, although the Department did not dismiss the proposal to surrender Moosomin's IR 112 out of hand, it is apparent that Inspector Chisholm and Commissioner Laird gave the proposal favourable consideration only on the understanding that lands of similar size and quality could be obtained for the Band on the other side of the North Saskatchewan River in a location that was closer to the Band's hay reserve.

Requests for Surrender in 1906 and 1907

Following the request for surrender in 1902, there was very little activity relating to the surrender of Moosomin's reserves until 1906. However, a few notable events that took place during this period warrant special mention.

First, it appears that Chief Moosomin died in or around 1902 since his name appeared on the July 13, 1901, payroll but his death was noted on the treaty payroll of July 14, 1902.⁸³ Apparently, "Old" Chief Moosomin's son, Josie Moosomin, was elected as Chief by the Band on May 3, 1904.

Although Indian Agent Day must have been aware of Chief Moosomin's death and Josie Moosomin's election as Chief, Secretary McLean stated that Ottawa was not advised of these developments until February 18, 1907, when Myeow, a Band member, sent a letter to Indian Affairs asking if the Department intended to recognize Josie Moosomin as Chief.⁸⁴ At that time, McLean expressed some confusion about the letter and asked Day to look into the matter.⁸⁵ There is nothing in the record as to what, if any, action Day took in following up on this request. However, judging from subsequent letters on the subject, it would appear that, contrary to a departmental policy which

83 Treaty Annuity Paylists, Moosomin Band, July 13, 1901 (ICC Documents, p. 1593), and July 14, 1902 (ICC Documents, p. 1596).

84 Myeow, Moosomin Reserve, to Secretary, Department of Indian Affairs, February 18, 1907, NA, RG 10, vol. 3969, file 121698-5 (ICC Documents, p. 1645).

85 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, February 28, 1907, NA RG 10, vol. 3969, file 121698-5 (ICC Documents, p. 1646).

entitled every band with more than 100 members to a Chief, Agent Day refused to recognize Josie Moosomin as the Band's choice as Chief.⁸⁶ Therefore, the Moosomin Band had no recognized Chief throughout the critical period from 1902, when the surrender was first proposed, until shortly after the surrender was obtained in 1909. It strikes us as being more than just a coincidence that Agent Day sought to have Josie Moosomin appointed Chief on June 21, 1909, just days after the surrender was finally secured.⁸⁷

Another significant event at the time was the construction of the Canadian Northern Railway (CNR) in 1903 through the Moosomin and Thunderchild reserves and the building of a railway station at Highgate on Moosomin IR 112. On June 25, 1904, the Superintendent General of Indian Affairs asked the Governor in Council for authority under section 38 of the *Indian Act* to sell the land to the CNR for the right of way and railway station "upon such terms as may be agreed upon." By Order in Council dated July 25, 1904, authority was granted to take a 93.25-acre right of way across the Moosomin and Thunderchild reserves, with an additional 9.24-acre parcel for the Highgate station grounds.⁸⁸ As mentioned earlier, the railway line not only enhanced the value of the Moosomin reserve but it also benefited Band members by "providing work and a nearby market for all their produce."⁸⁹

Although there was very little correspondence relating to Moosomin between 1902 and 1906, it appears that there was considerable "unofficial" activity, causing rumours to spread about possible surrenders of the Moosomin and Thunderchild reserves. At the same time, external forces were beginning to galvanize to achieve this objective. In June 1905, Day wrote to Commissioner Laird:

[F]or some time past there have been rumours current in this district, that the "Moosomin" and "Thunderchild" Bands were to be transferred to other Reserves: this has made the work of handling these Bands very difficult, for of course they have heard the rumour too; They refuse to plow or fence, saying that it is no good making

86 J.P.G. Day, Indian Agent, to Secretary, Department of Indian Affairs, September 14, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 265-66).

87 J.P.G. Day, Indian Agent, to Secretary, Department of Indian Affairs, June 21, 1909, NA, RG 10, vol. 3939, file 121698-5 (ICC Documents, p. 1700). Day was authorized to appoint Josie Moosomin as Chief on July 8, 1909, and on July 26, 1909, Day confirmed that he had done so. J.D. McLean to J.P.G. Day, July 8, 1909, and J.P.G. Day to J.D. McLean, July 26, 1909 (ICC Documents, pp. 1708 and 1712); Josie Moosomin is noted on the 1909 payroll as "Chief," Treaty Annuity Paylist, Moosomin Band, June 26, 1909 (ICC Documents, p. 1702).

88 Order in Council, PC 1298, July 25, 1904. The submission to Council of June 25, 1904, is mentioned in the Order in Council.

89 J.P.G. Day, Indian Agent, to Frank Pedley, Deputy Superintendent General, September 15, 1905, Canada, Parliament, *Sessional Papers*, 1906, No. 27, 105 (ICC Documents, p. 1632).

work or improvements, for someone else, for nothing, they asked me if there is any truth in the report; I told them that I had heard nothing from you on the subject.⁹⁰

Accordingly, in January 1906, Agent Day wrote to Commissioner Laird concerning the possible surrender of Thunderchild's IR 115A on the north side of the North Saskatchewan River. Day noted that the Thunderchild Band did not find this reserve to be of much use and that settlers had expressed interest in the land.⁹¹

It is not clear where rumours of a possible surrender originated, but it is evident that they were widespread: a letter dated October 3, 1906, from Jervais Newnham, Anglican Bishop of Saskatchewan, to Commissioner Laird confirmed the existence of the rumours. Bishop Newnham asked whether there was

any likelihood of the Indians on Thunder Child's, Moosomin's, Sweetgrass &c Reserves being moved soon? The present Reserves constitute a great waste of land, a great waste of work in teaching and overseeing them. The 5 Reserves have only Indians enough for 1 or at most 2. I would humbly suggest that the Protestant Indians be *advised* to settle around Sandy Lake, and the R.C. Indians at Turtle [?] Plains, or Mistawasis, or some R.C. Indian reserve. Some such action would mean great economy and much less friction.⁹²

Commissioner Laird responded promptly, advising that "[i]t would be difficult, I think, to get them all to agree to such a movement," and that while it might be a good idea to separate the Catholic from the Protestant Indians, it would not likely be effective.⁹³

Although there is no record of any meeting between Agent Day and the Moosomin Band, it appears that he did informally discuss the matter with a small group of Band members who favoured a surrender. This discussion prompted Josie Moosomin, who identified himself as Chief of the Moosomin Band, to write a letter on November 23, 1906, to "the Government of Ottawa" to express his concerns and to make it clear that Band members did not want to surrender the reserve:

90 J.P.G. Day, Indian Agent, to Indian Commissioner, June 19, 1905, NA, RG 10, vol. 3563, file 82, pt. 11 (ICC Documents, p. 214).

91 J.P.G. Day, Indian Agent, to Indian Commissioner, January 30, 1906 (ICC Documents, p. 213.)

92 Jervais A. Saskatchewan, Prince Albert, to D. Laird, Indian Commissioner, October 3, 1906, NA, RG 10, vol. 3563, file 82, pt. 11 (ICC Documents, p. 216).

93 D. Laird to Bishop of Saskatchewan, Prince Albert, October 11, 1906, NA, RG 10, vol. 3563, file 82, pt. 11 (ICC Documents, p. 217).

Now my Governor as I am sending this letter I want to tell that we never want to sell this reserve. Now when my Father the Chief was living he told me never to leave this his reserve. So though I am not honorable enough to tell you this. But I'll tell you that I am always trying my very best to help the Agent and the Farm Instructor in the line of work. Off [sic] Course this is what my father always followed. That's the very reason why I am not ashamed to tell you this, as you are honorable.

I am sending you this letter to tell you that there are some men here in the reserve who want to sell this land. Those men are not the most industrious people. . . . Off [sic] course these men have no saying in this reservation. We are too willing to let them leave, if we the undersigned have any rights to let them go. So in your reply please let us know whether we have the right to let them leave.⁹⁴

Josie Moosomin also polled the Band's voters and advised Commissioner Laird that there were "26 Men for the keeping of the reserve. 6 want to sell it."⁹⁵

Commissioner Laird apparently expressed some consternation over Agent Day's discussion with the Band regarding a proposed surrender, especially given that Laird had received "no intimation from the Department that the above reserve was to be disposed of."⁹⁶ Accordingly, Laird forwarded the matter to Day and asked why "Chief Moosomin" thought that the reserve was to be surrendered. In response to Laird's inquiry, Day wrote:

[S]ome seven Indians asked me to have their Reserve changed, providing that it could be done advantageously: before they were through speaking, Josie Moosomin came in; and, I presume that this is his reason for writing to you. I would say that no steps were taken in the matter, nor was it my intention to do anything in the matter, unless approached by a majority of the Band, so that his fears were groundless.⁹⁷

Agent Day went on to state that he did not regard Josie Moosomin as a Chief, and that "these Indians told me that there were a number of other members of the Band who were of the same opinion as themselves." He also offered to make a full report on the matter.⁹⁸ Ultimately, Josie Moosomin's plea to retain the reserve received only a brief reply dated December 11, 1906, in

94 Josie Moosomin, Chief, to Government of Ottawa, November 23, 1906, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 218). Emphasis added.

95 Josie Moosomin, Chief, to Commissioner, received November 27, 1906, NA, RG 10, vol. 3563, file 82, pt. 11 (ICC Documents, p. 219).

96 David Laird, Indian Commissioner, to Indian Agent, Battleford, November 28, 1906, NA, RG 10, vol. 3563, file 82, pt. 11 (ICC Documents, p. 220).

97 J.P.G. Day, Indian Agent, to Indian Commissioner, Winnipeg, December 21, 1906, NA, RG 10, vol. 3563, file 82, pt. 11 (ICC Documents, p. 222).

98 J.P.G. Day, Indian Agent, to Indian Commissioner, Winnipeg, December 21, 1906, NA, RG 10, vol. 3563, file 82, pt. 11 (ICC Documents, p. 222).

which Secretary McLean indicated that the land could not be disposed of without a surrender from the Band in accordance with the *Indian Act*.⁹⁹

Although Commissioner Laird was apparently unaware of any proposed surrender, Ottawa did have plans, at the request of local politicians, to pursue surrenders with the Moosomin and Thunderchild Bands. It is clear from a March 16, 1907, letter from George McCraney, the local Member of Parliament, to Deputy Superintendent General Frank Pedley that a meeting with Pedley took place in Ottawa about two months earlier with respect to the possible surrender of the Moosomin and Thunderchild reserves:

You will recollect that when Mr. Prince and Mr. Champagne, M.L.A. of Battleford, were here a couple of months ago, we discussed the question of the removal of the Indians from Moosomin and Thunder Child Reserves, and you intimated that instructions would be given to Mr. Day, Indian Agent, to open communication with the Indians, with a view to their removal.¹⁰⁰

Although there is no detailed record of the lobbying efforts of Messrs Prince and Champagne, the clear implication from this letter is that the Indians were to be removed from the reserves. Having the Bands *retain* the land does not appear to have been considered as an option by Indian Affairs.

There can be no doubt that this meeting, which must have occurred in or around the middle of January, triggered a flurry of activity, beginning with a memo from Deputy Superintendent General Pedley to W.A. Orr of the Lands and Timber Branch on January 21, 1907, regarding the proposed surrender of Indian Reserves 112, 112A, 115, and 115A. Without first obtaining a report from Agent Day on the matter, Pedley instructed Mr Orr as follows:

A letter to the Inspector with surrender papers for the surrender of the whole of the Moosomin and Thunderchild's Reserves may as well be sent the Agent, so that he may take the matter up with the Band or Bands interested.

Should the Indians be willing to surrender it will be, I presume, upon the basis of a cash payment at the time of surrender and the allotment of a new Reserve. The Agent should be so advised.¹⁰¹

99 J.D. McLean, Secretary, Department of Indian Affairs, to Josie Moosomin, December 11, 1906, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 221).

100 G.E. McCraney, Member of Parliament, to Frank Pedley, Deputy Superintendent General of Indian Affairs, March 16, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 246).

101 Deputy Superintendent General of Indian Affairs to Mr Orr, January 21, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 223).

Just three days later, on January 24, 1907, Deputy Superintendent Pedley asked for surrender forms to be prepared and sent to Agent Day.¹⁰² Pedley also drafted a letter to Inspector Chisholm on the same day advising him that the surrender forms had been sent to Day and asking Chisholm to assist in obtaining the surrender, if such aid was necessary.¹⁰³ Pedley then appears to have reconsidered this hasty approach and chose instead to take up Day's earlier offer to provide a report on the matter. On January 28, 1907, Secretary McLean instructed Day not to take any action until he heard further from the Department.¹⁰⁴

The following day, Mr Orr wrote to Deputy Superintendent Pedley stating that, if the latest population figures were used to determine the reserve land entitlements of the Moosomin and Thunderchild Bands under Treaty 6, Moosomin would be entitled to a larger area, whereas Thunderchild held 9 square miles of "excess" land.¹⁰⁵ Orr's memo also suggested that the proposed surrender "provide for sale of their present Reserve at best prices obtainable and purchase of another Reserve as desired by the Indians and the funding of the balance of the purchase money, after paying percentage as may be agreed, between ten and twenty per cent and the cost of removal of Indians."¹⁰⁶

Deputy Superintendent Pedley accepted Mr Orr's advice. One week later, on February 6, 1907, Pedley sent a memo to Oliver suggesting that the agent open discussions with the Bands regarding the surrender of their reserves in consideration for a cash payment and "a suitable reserve upon the basis of the same acreage they would have received according to their present population if a Treaty were now being made."¹⁰⁷ Oliver appears to have approved this plan of action: on February 18, 1907, Day was finally given instructions by Secretary McLean to meet with the Moosomin and Thunderchild Bands to propose a surrender of Reserves 112, 112A, 115, and 115A in exchange for other lands. The idea of reducing the size of the Thunderchild reserve and increasing the size of the Moosomin reserve was dropped; instead, Day was

102 Deputy Superintendent General of Indian Affairs to J.P.G. Day, Indian Agent, January 24, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 229).

103 Deputy Superintendent General of Indian Affairs to W.J. Chisholm, Inspector of Indian Agencies, January 24, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 229).

104 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, January 28, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 232).

105 W.A. Orr, in Charge Lands & Timber Branch, to Deputy Minister, January 29, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 233-34).

106 W.A. Orr, in Charge Lands & Timber Branch, to Deputy Minister, January 29, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 233-34).

107 Frank Pedley, Deputy Superintendent General, to Frank Oliver, Superintendent General, February 6, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 235).

told to present the idea as a straight exchange of the reserve land for other land to see if there was any interest in this proposal.¹⁰⁸

Indian Affairs Postpones Plan to Seek Surrender

It is clear from this sequence of events that Indian Affairs headquarters was prompted to take action by two members of the Legislative Assembly, Mssrs Prince and Champagne, and the local Member of Parliament, Mr McCraney. They made these overtures on behalf of their constituents who had expressed their discontent on many occasions going back to at least 1888 over the fact that the Moosomin and Thunderchild Bands were occupying prime agricultural lands.

Until February 1907, not one meeting had been called for the specific purpose of discussing a proposed surrender with members of either the Moosomin or the Thunderchild Bands. Nevertheless, the prospect of these surrenders evidently spurred interest in the local community, both on and off the Moosomin and Thunderchild reserves. For example, Secretary McLean received several letters in late February 1907 from prospective homesteaders asking, in response to local newspaper reports, when the reserve lands might be available for settlement.¹⁰⁹ A few weeks after this influx of interest, Agent Day wrote to McLean on March 9, 1907, to advise that he had not yet raised the matter with the Bands because outside influences had intervened:

[T]here have been three or four busybodies at work trying to dissuade the Indians from giving up their present Reserves: I know these people, and that their action is prompted from mercenary motives. Another nasty feature of the case is the fact that for the last few months Articles have appeared, from time to time, in the local Press, discussing the subject of these Reserves being ceded, and in such a tone which made it appear that the whole business was practically prearranged; also the Town Council and Board of Trade have passed resolutions, and talked over the same matter. All these proceedings have been viewed with suspicion by the Indians; and they naturally resented the idea of the Land being disposed of without their consent; so much so was this the case that they wrote to find out if it was true; and the Commissioner's answer that he had no intimation from the Department that the Reserve was to be disposed of, reassured them. In view of the foregoing circumstances, I have

¹⁰⁸ J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, February 18, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 237).

¹⁰⁹ Frederick T. Pick, to Minister of the Interior, February 18, 1907; D. Lamont, Napinka, Saskatchewan, to Department of Indian Lands, February 20, 1907; Philip Donahue to Dominion Lands Branch, February 25, 1907; A.Y. Silverlock, Balana, Manitoba, February 26, 1907; G.J. Blackwell, Churchbridge, Saskatchewan, to Minister of the Interior, February 26, 1907; all in NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 238-42).

*therefore not yet approached, or even mentioned the matter to the Indians, as a whole.*¹¹⁰

Having perceived that the “prearranged” appearance of the surrender was distressing many members of the Band, Agent Day suggested that the whole matter should be carefully handled if the Department hoped to obtain the desired surrenders:

What I would prefer to do, and I think the wisest course to pursue, would be for me to go down and lay the case, with full particulars, before you, and then come back with the Papers of surrender already prepared, call a meeting of the Indians, and have the whole question settled at the one meeting; this is, I think, feasible: if a meeting were called now for the purpose of discussing conditions of surrender, and it were postponed for approval and ratification; these people would get at the Indians, in the meantime, and give them bad advice, so that they might not even agree at a future meeting, to what they might be willing to accept now. I have gone thoroughly into the pros and cons of the case, and feel sure that I could elaborate a plan, and give you all the necessary data; to successfully put through this transaction, in a manner satisfactory to the Department and the Indians.¹¹¹

We note Agent Day’s attitude towards opinions coming from outside the Department and which he described as “bad advice,” “mercenary,” and the product of “busybodies.” Given the atmosphere prevailing in the Battleford Agency at the time, with settlers actively seeking the surrenders for their own benefit, it is difficult to see how opposition to a surrender could have been considered “mercenary.” Day’s attitude towards these “busybodies,” however, seemed to reflect the Department’s view that it would have to isolate the Band from advice and opinions that were contrary to its own. In any event, Day’s letter made it clear that the Department believed its goals would be threatened by any reflection and contemplation by the Band.

Meanwhile, the settlers were getting restless: MP McCraney wrote to Deputy Superintendent Pedley to ask why Agent Day had not yet opened “communication with the Indians, with a view to their removal.”¹¹² In his response of March 21, 1907, Pedley advised McCraney that Day had been

¹¹⁰ J.P.G. Day, Indian Agent, to Secretary, Department of Indian Affairs, March 9, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 244). Emphasis added.

¹¹¹ J.P.G. Day, Indian Agent, to Secretary, Department of Indian Affairs, March 9, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 244-45).

¹¹² G.E. McCraney, Member of Parliament, to Frank Pedley, Deputy Superintendent General of Indian Affairs, March 16, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 246).

confronted with certain difficulties arising from persons up in that neighbourhood endeavouring to dissuade the Indians from giving up the present reserve. . . .

The Department and Agent, however, are trying to arrive at a proposition which will be favourably considered by the Indians, and, while this may take some little time, the Agent hopes that he will be able to carry it through.¹¹³

To quote counsel for the Moosomin First Nation, Pedley's letter and subsequent events only served to demonstrate that Indian Affairs had become

an unabashed advocate and proponent of surrender in respect of both the Moosomin and Thunderchild Reserves. From this point forward, insofar as senior Department officials [were] concerned, it [was] only a matter of debating the how and when but never the why of surrender, relative to these two Bands and their Reserves.¹¹⁴

A New Surrender Proposal Is Offered

In response to a request from Secretary McLean, Agent Day wrote a letter dated April 15, 1907, proposing that the following terms of surrender be submitted to the Moosomin and Thunderchild Bands "as a fair basis for exchange":

- an equal area of unoccupied land north of Battleford near Brightsand Lake in exchange for the present reserves;
- a payment of \$4 per acre to be paid by the government as compensation for improvements and as a premium for the exchange, of which \$1 was to be paid in cash, \$1 was to be paid for provisions and outfitting at the time of surrender, and the balance of \$2 was to be funded with the Department (i.e., placed in the Bands' trust accounts);
- the interest earned from the balance in the trust accounts to be expended semi-annually for the benefit of the Bands and distributed in accordance with Band votes, subject to the Department's approval;
- the government to set aside a timber berth or issue a permit in the vicinity of the new reserves and provide a shingle mill, engine, and planer in time for the Bands to procure building material for their new houses, stables, and barns;

¹¹³ Frank Pedley, Deputy Superintendent General of Indian Affairs, to G.E. McCraney, MP, March 21, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 247).

¹¹⁴ Written Submissions of the Moosomin First Nation, June 18, 1996, p. 64.

- the Indians to have the right to take their wire fencing with them to their new reserves; and
- the Indians to receive free rations for six months.

Agent Day also emphasized that a cash payment would have to be paid at the time of the surrender since the Bands were concerned that, “unless they receive some money at the time of surrender, they will have to wait indefinitely for any benefit to accrue to them from their Reserves.”¹¹⁵ Although Day stated that “the price of C.P.R. Land, in the neighbourhood of these two Reserves is \$12.00 per Acre,” there is no evidence before the Commission regarding the value of the proposed replacement land at Brightsand Lake.

In light of Mr Orr’s view that the Department would require \$153,200 to implement the terms of surrender (if approved by the Band) and that such moneys would require parliamentary approval, Deputy Superintendent Pedley forwarded Day’s proposal and Orr’s cost estimates to Minister Oliver with a request for instructions on whether to carry out this proposed plan.¹¹⁶ Although Day estimated the value of the lands at Highgate to be approximately \$12 per acre, it is interesting to note Pedley’s suggestion that “if these reserves were sold by this Department, it is assumed that we might realise probably \$8 per acre therefor, and this, on the basis of retaining \$4 for the Indians as indicated in paragraph 2 of the Agent’s letter, would leave \$4 for purchase from the Interior Department of land in the vicinity of Bright Sand Lake and a timber berth adjacent thereto, as well as for other incidentals.”¹¹⁷

There is no record of a direct response from Oliver, but it appears from Pedley’s letter to Orr on July 11, 1907, that instructions were received to offer less favourable terms than those suggested by Agent Day. The proposed terms were as follows:

The Department will provide a new reserve of equal area, at Bright Sand Lake, which will have to be purchased from the Department of the Interior at \$3.00 per acre, including the timber land. We will also pay the Indians at the time of surrender \$10,000, and will compensate them for their improvements, ration them for six months after surrender, and will pay whatever is necessary to remove and rehabilitate them on the new reserve, provide a shingle mill, engine and planer, and allow the

¹¹⁵ J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, March 23, 1907, and Day to McLean, April 15, 1907, both in NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 249-51).

¹¹⁶ Frank Pedley, Deputy Superintendent General, to Frank Oliver, Superintendent General, February 6, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 252-54).

¹¹⁷ Frank Pedley, Deputy Superintendent General, to Frank Oliver, Superintendent General, February 6, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 252-54).

Indians to take their wire fences with them. The Indians to appoint delegates who with the Agent will select the land on the new reserve.

After meeting these expenditures the balance of the money realized from the sale of the old reserve to be funded for the benefit of the Indians.¹¹⁸

Important differences emerge when these terms are compared with those originally proposed by Day on April 15, 1907. Instead of proposing an exchange of the old reserves for new reserves plus a timber berth and a fixed premium, the Department now sought to cover the cost of the new reserves, the timber berth and the saw mill, and the expense of moving the Bands and rehabilitating them on the new reserves out of the moneys realized from the sale of the existing reserves after surrender.

On July 25, 1907, Secretary McLean instructed Agent Day to propose the above terms of surrender to the Bands. Day met with the Bands on August 24, 1907, and provided this report of his meeting:

I arranged a meeting with the Indians of these two Bands, which was held on the 24th ultimo. I stated to them the object of the assembly and the very liberal terms offered by the Department, but I met with a flat refusal; they evidently were predetermined not to accept any proposal of this nature; the reason for which I subsequently ascertained, was because of the rumors which they had heard of some months ago, when the Public, Press, Town Council, and Board of Trade were discussing the subject, and as I informed you in my Letter of even number of March 9th last, these Indians had been ill advised; and being naturally of a doubting nature, all this talk had aroused their suspicions, and *judging from the hasty rejection of any and all terms of surrender, it was quite apparent that the subject had been much discussed among themselves, and that they had taken a very prejudiced view of it!*

Old Chief Thunderchild was the spokesman for the two Bands: one of the first questions he asked was why he was the only Chief in the Agency; to which I replied that the Department thought it wiser and better not to appoint others when they died off. . . .¹¹⁹

It is important to recognize that it is not clear how the Moosomin Band, in particular, responded to the proposal because their elected Chief, Josie Moosomin, was apparently not entitled to represent them at this meeting. It will be recalled that, on February 18, 1907, Myeow had asked whether Josie Moosomin would be recognized as Chief, but the Department had provided

¹¹⁸ Frank Pedley, Deputy Superintendent General, to Mr Orr, July 11, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 262-63).

¹¹⁹ J.P.G. Day, Indian Agent, to Secretary, Department of Indian Affairs, September 14, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 265). Emphasis added.

no written response. It is not clear why Agent Day did not follow up on this request.

After the meeting, Day suggested to the Bands that he “thought it wiser for them to have a little time to think the matter over, so that they might fully realize the good chance offered to them.”¹²⁰ He reported that the Bands had discussed the matter among themselves at some length, and had “decided for Chief Thunderchild and two delegates from each Band to go down to Ottawa and negotiate the business; and they ask for myself and Interpreter to go along with them.”¹²¹

It is apparent that the question of these proposed surrenders created a great deal of interest and unrest in the area. In spite of this unsettled situation, the Department did not take up the offer to meet with Chief Thunderchild and his delegation in Ottawa and apparently failed to respond at all. In fact, nothing happened for several months until Minister Oliver raised the matter again in a memorandum to Deputy Superintendent Pedley. It seems likely that this inactivity would have served only to increase the anxiety level among members of the Bands. Just as Agent Day had remarked almost two years earlier, Band members were “disquieted” by rumours of a transfer to other lands, and they did not see the point in working at improving the land if it was only going to be given to someone else.¹²²

Proposals for Surrender in 1908

After a brief lull, the matter resurfaced in March 1908 when Deputy Superintendent Pedley provided a memorandum to Minister Oliver reminding him of the state of affairs in Battleford. Then, on May 6, 1908, Oliver received a surrender proposal signed by 27 members of the Thunderchild Band and witnessed by Father Delmas, a Catholic priest, Reverend Macdonald, an Anglican minister, and A. Suffern, a farmer from the Thunderchild reserve.¹²³ The Thunderchild proposal indicated that Band members were willing to surrender IR 115 on the following terms:

120 J.P.G. Day, Indian Agent, to Secretary, Department of Indian Affairs, September 14, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 265).

121 J.P.G. Day, Indian Agent, to Secretary, Department of Indian Affairs, September 14, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 265).

122 J.P.G. Day, Indian Agent, to David Laird, Indian Commissioner, Department of Indian Affairs, May 6, 1906, NA, RG 10, vol. 3563, file 82-11 (ICC Documents, p. 214).

123 Thunderchild Band Members to Frank Oliver, Superintendent General of Indian Affairs, May 6, 1908, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 1655-59).

That this Reserve be sold at an upset price of not less than six Dollars per acre; that we be given, North of the Saskatchewan River, where we may choose, the same number of acres, as we have in our present Reserve, for which we are willing to pay three dollars per acre. . . . That the difference in value between this amount (\$3.00) and the actual amount realized from the sale of our present Reserve, over and above the six dollars' upset price be given to us in the following manner: That the Department will pay to the Thunderchild Band of Indians at the time of surrender \$15,000 cash, That we receive fishing privileges on some Lake we may choose in the neighbourhood of our new Reserve and that we be given ammunition and twine for nets. . . . That all money, minus fifteen thousand dollars realized from the sale of our present Reserve be funded for our use and benefit and that the money be given to us once in three months. . . . That the Indians shall have a voice in the expenditure of the interest on the funded money.¹²⁴

The balance of the Thunderchild proposal was comparable to the proposal made by the Department to the Bands almost a year earlier, except that Thunderchild requested rations for five years instead of six months. The Band also did not propose land at Brightsand Lake, but merely specified "North of the Saskatchewan River" and that it be entitled to choose where its new reserve would be located. Of the 27 names on this proposal, some appear to be signatures, but most are simply names accompanied by an "X" and the words "by his mark." It is not clear who wrote the letter itself. There is no evidence concerning the initiation of this surrender proposal, or regarding the circumstances of any meetings between these persons and the two clergymen and the farmer who witnessed the document. However, it appears that Father Delmas took particular interest in the surrender.

About one week after the Thunderchild proposal, on May 14, 1908, Father Bérubé wrote to Oliver stating that he understood the Thunderchild Band had decided to surrender its reserve and that Moosomin would follow suit.¹²⁵ Before receiving any word from Indian Affairs about its views on the Thunderchild proposal, Father Delmas wrote to Oliver on May 18 requesting land on the Thunderchild reserve. Apparently assuming that the letter he had secured from the Band was sufficient to effect a surrender, Father Delmas stated:

[T]he Thunderchild Band of Indians have surrendered their Reserve, I hope your Department will accept the terms of the agreement and close the deal as soon as

¹²⁴ Thunderchild Band Members to Frank Oliver, Superintendent General of Indian Affairs, May 6, 1908, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 1655).

¹²⁵ Reverend A.P. Bérubé to Frank Oliver, Minister of the Interior, May 14, 1908, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 269).

possible. It has been a very difficult task to get them to accept the terms. . . . *As I have worked hard to get the Indians to repose confidence in the Government and to surrender their Reserve, I would consider it a great favor if you would allow me to put a Catholic Colony on this Reserve. . . . I sincerely trust, that you will not allow this Reserve be sold to speculators. . . . [I]f you give this letter your favourable consideration . . . you can communicate with the Reverend Father Berubé. . . .*¹²⁶

Father Delmas's remarkable statement that the Thunderchild Band had surrendered its reserve was no doubt considerably motivated by self-interest since, to secure the surrender, he had exerted much effort in seeking to have the Band "repose confidence in the Government." In any event, the Department does not appear to have been at all perturbed by this state of affairs. Rather than calling for an investigation into the matter or seeking information on the circumstances leading to the surrender proposal, Deputy Superintendent Pedley responded by seeking even more favourable terms to the Government. He insisted that the new reserve be at Brightsand Lake, that the timber berth be included in the reserve rather than as an addition to it, and that only six months' rations be provided.¹²⁷ Pedley also asked Agent Day whether he thought the Moosomin reserve could also be obtained, to which Day replied that it might.¹²⁸

Accordingly, Deputy Superintendent Pedley advised Agent Day to hold off on obtaining the surrender from Thunderchild until surrender papers concerning Moosomin's IR 112 and the joint Thunderchild-Moosomin hay reserve (IR 112A) were prepared. On June 17, 1908, Pedley sent the surrender papers to Day with express instructions to seek surrenders from both Bands "in order that new locations may be arranged for them at the same time . . . as it would appear advisable to deal with both bands, instead of making any arrangement as to transfer of only one band."¹²⁹ Day responded that, to secure the surrenders, he would need \$15,000 per band to be paid at the time of the surrender, since this had been "arranged with the Indians

126 Reverend Father H. Delmas to Frank Oliver, Minister of the Interior, May 18, 1908, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 1660). Emphasis added.

127 Frank Pedley, Deputy Superintendent General of Indian Affairs, to W.A. Orr, Officer in Charge, Lands and Timber Branch, June 3, 1908, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 272).

128 Frank Pedley, Deputy Superintendent General of Indian Affairs, to J.P.G. Day, Indian Agent, Telegram, June 13, 1908 (ICC Documents, p. 273). Note: this telegram is hard to read, but it looks as though it has "Moosomin" in it, and Day's next telegram appears to be responding to it; J.P.G. Day, Indian Agent, to Frank Pedley, Deputy Superintendent General of Indian Affairs, June 15, 1908 (ICC Documents, p. 274).

129 Frank Pedley, Deputy Superintendent General of Indian Affairs, to J.P.G. Day, Indian Agent, June 17, 1908 (ICC Documents, p. 276).

during the negotiations [sic].” Day also asked for authority to offer rations for a full year rather than just six months.¹³⁰

The rations were approved, but the Department did not respond concerning the cash payment. Day noted that, “unless they receive, at the time of signing, the money, \$15,000 for each Band, which they say was promised to them . . . *it looks as if they would upon the slightest available pretext, back out of the surrender, and exchange, altogether!*”¹³¹ On the face of the documents, it would appear that the Bands were concerned that, if they did not receive money up front, they would never see any of the proceeds of a surrender.¹³² Whatever the cause for the Bands’ concern, Day was obviously not confident that they would consent to a surrender, and he thought that the \$15,000 cash on hand would be necessary to persuade them to go through with it. It took some effort to obtain this sum in cash, however, since the Department was reluctant to entrust such a large amount to Day alone.¹³³

Surrender Meetings with Thunderchild and Moosomin in August 1908

On August 6, 1908, after receiving a cheque to cover the cash payments, Commissioner Laird, who had been instructed to attend and assist in the surrender meetings, informed Day that he should notify the Bands about the meetings.¹³⁴ Laird provided this detailed report of the surrender meetings with the Thunderchild and Moosomin Bands on August 26 and August 28, respectively:

I wrote Mr. Agent Day on the 6th August to notify the Indians of the meetings of the Bands as required by law in such cases. . . .

On the 19th I received a letter from Mr. Day that the Indians of Thunderchild’s and Moosomin’s Bands were notified to come in for the surrender on the 26th August. . . .

On Wednesday, the 26th ultimo, we proceeded to Thunderchild’s reserve, taking with us half the money and two policemen. We met the Band at 2 o’clock, there being

¹³⁰ J.P.G. Day, Indian Agent, to Secretary, Department of Indian Affairs, June 27, 1908 (ICC Documents, p. 277).

¹³¹ J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, July 20, 1908, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 281). Emphasis added.

¹³² J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, April 15, 1907 (ICC Documents, p. 250).

¹³³ D.C. Scott, Accountant, to Frank Pedley, Deputy Superintendent General of Indian Affairs, July 9, 1908 (ICC Documents, p. 278); J.D. McLean, Secretary, Department of Indian Affairs, to David Laird, Indian Commissioner, Department of Indian Affairs, July 30, 1908, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 285).

¹³⁴ David Laird, Indian Commissioner, Department of Indian Affairs, to J.P.G. Day, Indian Agent, August 6, 1908, NA, RG 10, vol. 3563, file 82-11 (ICC Documents, p. 1665).

a pretty full attendance of all Indians on the reserve having votes. I explained the terms contained in the form of surrender. . . . The Chief, who spoke first, and every Indian that followed, except two or three objected most strongly to accept one year's rations instead of the five asked for in their proposal to the Department. They talked the whole afternoon on this point. . . . [W]e agreed to offer two years' rations. Even with this concession the whole forenoon of the following day was taken up in discussion and two or three attempts at voting which were unsatisfactory. In the afternoon we tried again. The Chief stood aside and would not vote until others voted. This was done by calling over the roll and asking each specifically how he voted. The vote when done stood 15 to 15. I then asked the Chief for the casting vote. He made a long speech, and asked if they might take away or sell their houses. I consulted with the Agent and Rev. McDonald and Father Delmas, who were present. . . . We agreed to this change, and the Chief and Principal men signed the surrender, and the payments were at once begun, but were not finished on the reserve until the 28th. . . . 107 Indians were paid on the reserve \$120.00 each making \$12,840.00. . . .

*We met Moosomin's Band at their reserve at 2 o'clock on the 28th ultimo. I explained the terms conceded to Thunderchild's Band. Nearly all the men spoke and were overwhelmingly against the surrender; only Monday had the vote been near, a tie, or had there been any hope of an immediate change, but as matters stood it seemed useless to prolong the negotiations.*¹³⁵

Moosomin's resolve to oppose the surrender was underscored in Agent Day's report of September 18, 1908, regarding the surrender meetings:

The Moosomin Indians refused to surrender; and to show that this was caused by prejudice, I may add that they handed us a signed refusal dated the day previous to hearing the terms and conditions of the proposed surrender; their only reason advanced was that they did not wish to give up their present holdings. *I have since heard that a number of these Indians were hoodwinked into signing this refusal, by a few of the ones who were influenced by outsiders; I have taken steps to counteract this baleful interference; and feel quite confident that the Moosomin Indians will soon be clamouring for the same privileges accorded to the Thunderchild Band.*¹³⁶

It is interesting to note that, although Commissioner Laird offered no explanation as to why the Moosomin Band refused to accept the surrender, suggesting only that further persuasion would not prove useful, Agent Day again characterized the independent advice of outsiders as harmful and per-

¹³⁵ David Laird, Indian Commissioner, to J.D. McLean, Secretary, Department of Indian Affairs, September 3, 1908, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 290-94). Emphasis added.

¹³⁶ J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, September 12, 1908 (ICC Documents, p. 295). Emphasis added. The "signed refusal" is not found in the historical record: accordingly, we do not know who or how many signed it.

icious, and something to be “counteracted.” To Day, the Band’s aspirations were unsatisfactory. Although the Band was prospering on its existing reserves, Day seemed to turn a blind eye to the fact that Band members had good reasons for wanting to keep the lands they were provided under Treaty 6. Honouring those aspirations – and giving effect to the Band’s intention – was clearly not the paramount consideration of Day and his superiors.

When news arrived at Ottawa headquarters that the Moosomin reserve had not been surrendered, senior officials were upset with Agent Day because he failed to obtain a surrender from the Moosomin Band as instructed. On September 14, 1908, Deputy Superintendent Pedley abruptly reminded Day of his instructions:

I would call your attention to the fact that the instructions given you were to obtain a surrender from both bands of Indians, as it was not considered advisable that a surrender should be taken from one Band. . . . I have to ask you to report at once action taken in the matter, and why a surrender was taken contrary to instructions given from only one Band, notwithstanding instructions that surrender should only be taken if both Bands were willing to grant same.¹³⁷

When Day did not immediately respond to this letter, another letter was sent by Secretary McLean on January 27, 1909, reminding Day of Pedley’s letter and stating that “[y]our failure to explain such action which was in direct neglect of positive instructions, can not be allowed to pass without censure.”¹³⁸

Day’s reply to McLean on February 8, 1909, offered an explanation in defence of his actions. He concluded by stating: “I regret exceedingly that the Department views my action, in this matter, in such a light as to call forth a censure: from my point of view it was not merited, as I certainly did my utmost to carry out faithfully the Department’s instructions; and am always ready and willing to do my best, under any and every circumstance, in my duty to the Department and the Indians.”¹³⁹ McLean’s terse reply to Day on

137 Frank Pedley, Deputy Minister, to J.P.G. Day, Indian Agent, September 14, 1908, NA, RG 10, vol. 3563, file 82-11 (ICC Documents, p. 297). Frank Pedley, Deputy Minister, to David Laird, Indian Commissioner, Department of Indian Affairs, September 1, 1908, stating that his “[i]nstructions were to take surrenders from both Bands Thunderchild and Moosomin, not from one band” and demanding a prompt explanation (ICC Documents, p. 288).

138 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, January 27, 1909, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 304).

139 J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, February 8, 1909, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 306).

February 18, 1909, stated simply that “your explanations are not considered satisfactory.”¹⁴⁰

It would appear from this correspondence that Agent Day’s censure and the unwavering determination of the Department to obtain the surrender of the Moosomin and Thunderchild reserves likely had the effect of inspiring Day to intensify his efforts to secure the Moosomin surrender so that he might restore himself in the eyes of his superiors. As he mentioned in his reporting letter of September 12, 1908, he had already taken steps to counteract the “baleful interference” of outsiders and he felt “quite confident that the Moosomin Indians will soon be clamouring for the same privileges accorded to the Thunderchild Band.”¹⁴¹

Letter of Petition from Members of the Moosomin Band in 1909

Events at Moosomin in 1909 followed a path similar to the events at Thunderchild the previous year. There is, however, a conspicuous absence of detail in departmental records as to precisely what happened in the days and weeks leading up to the surrender of Moosomin’s reserves on May 7, 1909.

On January 8, 1909, a letter of petition surfaced which purported to represent the views of 22 members of the Moosomin Band. The letter was addressed to “The Superintendent General of Indian Affairs of Ottawa” and stated:

We the undersigned of the Indians belonging to the Moosomin’s Band, after due consideration beg to state that we are willing to surrender under the following conditions.

That this reserve be sold for \$12.00. [That] we be given the same number of acres around the Lake called Little Jack Fish Lake, for which we are willing to pay \$3.00 an acre. That we keep our hay land at Round Hill and that this said land belonging to us as a part of our Reserve. That the difference in value that is to say \$9.00 an acre to be given to us cash down. We want a Surveyor, before we get the money. We can put the price up, if this, is not satisfactory. We see, how Thunderchild people some of them no money, for winter, and they don’t know whether Lake is open or not. That’s why we want a Surveyor first then we can go and work if our reserve ready to get in.¹⁴²

¹⁴⁰ J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, February 18, 1909, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 309).

¹⁴¹ J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, September 12, 1908 (ICC Documents, p. 295).

¹⁴² Moosomin Band Members to Frank Oliver, Superintendent General of Indian Affairs, January 8, 1909, NA, RG, vol. 4041, file 335-933 (ICC Documents, p. 300).

Unlike the letter that was prepared for the Thunderchild Band the year before, it is curious that all 22 names on this letter are set out in the same handwriting and that not a single member of the Band signed his name or attached "his mark" to this letter as an expression of his intention to surrender IR 112 on the conditions outlined above. One person on the list, John Applegarth, does not appear to have even been a Band member, and it is not clear who he was or what his interest would have been in signing this document. It is also noteworthy that, although Josie Moosomin's actual signature later appears on the documents of surrender, he does not seem to have signed this letter. When these irregularities are considered in light of the Crown's unwavering desire for the surrender and the information provided by the elders during this Commission's hearings (to be reviewed in the following pages), we have serious reservations about whether this letter provides reliable evidence of the Band's intentions, particularly when none of the Band members signed it. There is simply no evidence regarding who wrote this letter, what prompted it, and whether the Moosomin Band as a whole was consulted about its contents. Under these circumstances, we do not attach much weight to this letter of petition as evidence of the Moosomin Band's intention to surrender its reserves.

In any event, it is clear that the letter of petition prompted the Department to renew its efforts to obtain the surrender of IR 112 and the Round Hill hay lands at IR 112A. On January 26, 1909, Secretary McLean instructed Agent Day to resume his discussions with the Moosomin Band on the issue of surrender.¹⁴³ Mr Orr's response to the proposed terms of surrender, which was set out in a handwritten notation on the bottom of the letter itself, was that the terms "would not appear satisfactory as DIA could not pay all cash as desired."¹⁴⁴ This objection was amplified by McLean in a letter to Day, stating that "the price placed upon the reserve is too high."¹⁴⁵ It is noteworthy that the price requested for Moosomin IR 112 is the same value Day proposed in 1907 when he wrote that "the price of C.P.R. Land, in the neighbourhood of these two Reserves is \$12.00 per Acre."¹⁴⁶

143 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, January 26, 1909 (ICC Documents, p. 303).

144 Moosomin Band Members to Frank Oliver, Superintendent General of Indian Affairs, marginal note by W.A. Orr, Officer in Charge, Lands and Timber Branch, January 8, 1909, NA, RG, vol. 4041, file 335-933 (ICC Documents, p. 300).

145 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, January 26, 1909 (ICC Documents, p. 303).

146 J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, April 15, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 250).

On February 19, 1909, Agent Day reported to Secretary McLean regarding a meeting he had had with the Band. He stated that "in accordance with your wishes I went very thoroughly into the subject with these Indians, and have succeeded in getting them to assent to the attached conditions, upon which they are willing to surrender."¹⁴⁷ Even assuming that the letter was representative of the wishes expressed by at least some members of the Band, it is clear that they had proposed very specific terms on which they were willing to surrender, including the land to which they wished to relocate and payment of an additional \$5000 at the time of surrender. Again, there is some question about the individuals with whom Day met and whether there was broad support among members of the Band for the proposed surrender.

We note the role of the clergy in pursuing these surrenders. In relation to the Thunderchild surrender, Father Delmas told Frank Oliver that he had "worked hard to get the Indians to repose confidence in the Government, and to surrender their Reserve."¹⁴⁸ The evidence confirms that Father Delmas played a critical role in obtaining a surrender of Thunderchild's reserves, so it is likely that he employed a similar approach with respect to Moosomin. On March 29, 1909, Anglican Bishop Newnham wrote to Minister Oliver describing the Battleford surrenders:

I understand that Thunder Child's Indians are about to remove from the Battleford Reserve which they surrendered; but it is not yet fully decided where they will locate. Moosomin's band are nearly persuaded to do the same thing. It will not take much to persuade Sweet Grass, Little Pine and Poundmaker to do the same.¹⁴⁹

Oliver passed this letter on to Deputy Superintendent Pedley, who suggested that "there is no reason why the Indians could not be influenced through their clergymen and by our own officers."¹⁵⁰

The clergy also sought to influence where the Bands would settle. On February 19, 1909, the same day that Agent Day wrote to Secretary McLean concerning the surrender, Reverend Macdonald wrote to Commissioner Laird about the proposed relocation to Little Jackfish Lake and the possibility of ensuring that Thunderchild would also settle there for the convenience of the

147 J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, February 19, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 312).

148 Reverend Father H. Delmas, to Frank Oliver, Minister of the Interior, May 18, 1908, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 1660).

149 J.A. Saskatchewan to Frank Oliver, Minister of the Interior, March 29, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 328).

150 Frank Pedley, Deputy Superintendent General of Indian Affairs, to Frank Oliver, Minister of the Interior, April 18, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 357).

farm instructor and the clergy.¹⁵¹ Laird's terse reply was that "there is not the slightest probability that this condition [of relocation to Little Jackfish Lake] will be acceded to. The two Bands must be near each other for economical management."¹⁵² A different tone was sounded in Ottawa, where, on receipt of Day's terms, McLean set out to determine whether the lands and fishing rights sought by the Band were, in fact, available.¹⁵³ His letters of February 26, 1909, emphasize that "it is very much desired to comply with these conditions as the surrender of their present reserve is required in the interest of advancing settlement."¹⁵⁴

The Department of the Interior, however, "decided that it is not practicable to lay out a satisfactory tract of land as an Indian Reserve" on the land sought by the Band. Secretary McLean then provided Agent Day with the following instructions:

Kindly explain the above to the Indians of the Moosomin Band and show them that it would be to their advantage to select their reserves at some locality north of the north boundary of township 53. Kindly attend to this matter as soon as possible as in the event of the surrender being taken it will be convenient to have the necessary survey made immediately that the survey work for the Thunderchild Band is completed.¹⁵⁵

It is not clear why this request was made, especially given that no response concerning availability of lands appears to have been received until April 19, 1909, and given that the eventual response from Secretary P.G. Keyes was that the lands desired by the Band could be reserved.¹⁵⁶ It is also not at all clear

151 D.A. Macdonald to David Laird, Indian Commissioner, Department of Indian Affairs, February 19, 1909, NA, RG 10, vol. 3563, file 82 pt. 11 (ICC Documents, p. 310). Bishop Newnham wrote a similar request to Minister Oliver in regard to where the Bands should be allowed to move to, noting that some of the locations the Bands had mentioned would be inconvenient for the "economical management" of the Bands. J.A. Saskatchewan, to Frank Oliver, Minister of the Interior, March 29, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 331).

152 David Laird, Indian Commissioner, Department of Indian Affairs, to D.A. Macdonald, February 22, 1909, NA, RG 10, vol. 3563, file 82 pt. 11 (ICC Documents, p. 316).

153 J.D. McLean, Secretary, Department of Indian Affairs, to P.G. Keyes, Secretary, Department of the Interior, February 26, 1909 (ICC Documents, p. 317); J.D. McLean, Secretary, Department of Indian Affairs, to Deputy Minister, Department of Marine & Fisheries, February 26, 1909 (ICC Documents, p. 319). Both found in NA, RG 10, vol. 4041, file 335-933.

154 J.D. McLean, Secretary, Department of Indian Affairs, to P.G. Keyes, Secretary, Department of the Interior, February 26, 1909 (ICC Documents, p. 317); J.D. McLean, Secretary, Department of Indian Affairs, to Deputy Minister, Department of Marine & Fisheries, February 26, 1909 (ICC Documents, p. 319). Both found in NA, RG 10, vol. 4041, file 335-933.

155 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, April 6, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 334).

156 P.G. Keyes, Secretary, Department of the Interior, to J.D. McLean, Secretary, Department of Indian Affairs, April 19, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 359).

how moving Band members still farther north could possibly have been "to their advantage."

Perhaps recognizing the impossibility of attempting to impose further terms on the Band, Secretary McLean wired Agent Day on April 10, 1909, and advised him not to provide the foregoing explanation to the Band.¹⁵⁷ He then forwarded Keyes's letter to Surveyor Lestock Reid, stating that "[i]t is hoped that when the Indians have selected the tract of land they are willing to accept in exchange for the Moosomin Reserve, the Agent will have no trouble obtaining from the Band the necessary surrender."¹⁵⁸

Although the Department accepted most of the terms proposed in the letter of petition, some important changes were made. Even those members of the Band who presumably agreed with the letter of petition did not wish to surrender the hay lands in IR 112A at Round Hill. Nonetheless, McLean indicated the Band would be asked to surrender this reserve as well.¹⁵⁹ Additionally, Duncan Campbell Scott, the Chief Accountant who later became the Deputy Superintendent General of Indian Affairs, suggested deletion of the term which stated that "the money be given to us once in three months."¹⁶⁰

The insistence on securing IR 112A, important as it was, does not appear to have been specifically communicated to Agent Day. On April 23, 1909, Deputy Superintendent Pedley forwarded the surrender forms to Day, but Pedley's covering letter made no mention of the addition of IR 112A, even though he saw fit to point out the "slight difference in the land included in the surrender" since some of the land had already been patented.¹⁶¹ He also instructed Day to submit the proposed surrender to the Moosomin Band and advised him that provision had been made for the payment of \$20,000 at the time of the surrender; Pedley, however, failed to ask Day specifically to seek a surrender of IR 112A.¹⁶² Other than this letter from Pedley, there appears to have been no other correspondence with Day following McLean's telegram of April 10, 1909. There is also no mention in the correspondence of any additional land being set aside for the Moosomin Band as consideration for

157 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, April 10, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 356).

158 J.D. McLean, Secretary, Department of Indian Affairs, to Lestock Reid, Surveyor, Department of Indian Affairs, April 20, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 363).

159 J.D. McLean, Secretary, Department of Indian Affairs, to Lestock Reid, Surveyor, Department of Indian Affairs, April 21, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 364).

160 D.C. Scott, Chief Accountant, to Chief Surveyor, Department of Indian Affairs, April 22, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 366).

161 Frank Pedley, Deputy Superintendent General of Indian Affairs, to J.P.G. Day, Indian Agent, April 23, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 367).

162 Frank Pedley, Deputy Superintendent General of Indian Affairs, to J.P.G. Day, Indian Agent, April 23, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 367).

this additional surrender.¹⁶³ It is remarkable that such an important addition to the terms of surrender – the addition of the land that a previous agent had described as “absolutely necessary” to the Band’s well-being – would be excluded from mention by mere oversight.

On April 30, 1909, Agent Day reported to Secretary McLean that he had discussed the revised terms with the Moosomin Indians, who “expressed themselves as perfectly satisfied with the arrangements and terms and agreed to sign the surrender, just as soon as the money is here.”¹⁶⁴ The report adds, however, that the Band wished to retain its hay lands at IR 112A, since this reserve was close to the Band’s new location. As an aside, it must be noted that Day’s report was lacking particular details about whether the entire Band was summoned for this discussion or whether the revised terms were raised with only a small group of Indians who purported to represent the entire Band. This is an important point in light of two facts: first, that the Department, and Day specifically, did not recognize Josie Moosomin as Chief of the Band and, second, that for all intents and purposes the Band did not have a Chief at the time of the surrender and during the discussions leading up to it.

In response to Agent Day’s report, Secretary McLean wired the blunt reply that the “Indians must surrender all their present reserves including hay land.”¹⁶⁵ He amplified these comments in a subsequent letter, saying that “[a]fter due consideration it has been decided that it is not desirable to allow the said lands to be held by the Indians.”¹⁶⁶

On May 6, 1909, Agent Day wrote to Secretary McLean acknowledging these instructions and stating that they “shall be carefully carried out.” Day also noted that \$20,000 in cash had arrived at the bank the day before and that he intended to “take the surrender” and distribute the cash the following day.¹⁶⁷

163 Frank Pedley, Deputy Superintendent General of Indian Affairs, to J.P.G. Day, Indian Agent, April 23, 1909 (ICC Documents, p. 367); S. Bray, Chief Surveyor, to D.C. Scott, Chief Accountant, April 21, 1909 (ICC Documents, p. 365). Both found in NA, RG 10, vol. 4041, file 335-933.

164 J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, April 30, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 370).

165 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, May 3, 1909 (ICC Documents, p. 372).

166 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, May 4, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 372).

167 J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, May 6, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 373).

The Surrender Meeting of May 7, 1909

Unlike the Department's correspondence relating to the surrender meetings at the Thunderchild and Moosomin reserves in August 1908, Agent Day's report concerning the Moosomin surrender in May 1909 offers very few details. Remarkably, there are no documents that record with any significant particularity the discussion at the surrender meeting of May 7, 1909. Only a handful of documents offer assistance in determining what happened during this critical meeting.

Day was accompanied to the meeting by a Royal North-West Mounted Police (RNWMP) escort to ensure the safekeeping of the \$20,000 in cash to be paid to the Moosomin Band for the surrender.¹⁶⁸ Band members apparently agreed to surrender both IR 112 and IR 112A that same day. A duplicate of the surrender document indicates that the terms agreed to by the Band were not exactly those set out in the January 8 letter of petition, with the most notable difference being that the Band would not be paid \$12 per acre but, rather, that the lands would be sold for not less than an upset price of \$6 per acre. On the last page of the surrender, it appears that 15 members of the Band either signed or affixed their marks with an "X" beside their names on the document.¹⁶⁹

Later that day, Agent Day, Josie Moosomin, and Etowekeesik attended before C.J. Johnson, who was Day's clerk and a Justice of the Peace, in Battleford to provide a sworn certificate of surrender as required by section 49(3) of the *Indian Act*. The standard form certificate states that the surrender was "assented to by a majority of the male members of the said Band of Indians of the Moosomin Reserve of the full age of twenty-one then present," at a "meeting or council of the said Band summoned for that purpose and according to its rules."¹⁷⁰ Since Josie Moosomin was not recognized as the Chief, the certificate was amended so that he and Etowekeesik were referred to as "Chief men" of the Moosomin Band.

Although there is no detailed report of the meeting itself, Day did provide a brief summary of the meeting in a letter to Secretary McLean on May 18, 1909:

¹⁶⁸ RNWMP Superintendent of "C" Division report for the month of May 1909 (ICC Documents, p. 1696).

¹⁶⁹ Surrender Instrument and related documents, May 7, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 389).

¹⁷⁰ Surrender Instrument and related documents, May 7, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 390).

The Moosomin Band have requested me to ask you for two Copies of their Surrender, one for themselves, and the other for *Rev. Father Delmas who did all the talking and interpreting for them.*

As you will observe; I took the surrender of their Hay Swamp at Round Hill, although I had the greatest difficulty in procuring their consent to let this go.¹⁷¹

The record contains no evidence as to what notice was given of the meeting, no minutes of the meeting, no list of eligible voters, and no tally of voters for and against the surrender. That the Band does not appear to have been given much, if any, notice of the surrender meeting is borne out by the fact that Agent Day's letter of May 6, 1909, suggests that he decided to travel to the Moosomin Reserve on May 7 only after he had received the funds required for the \$20,000 cash advance that day. Nor does it appear that the Band was given notice of the proposed terms of the surrender, since Josie Moosomin wrote to say that he was "very surprised" that the Department expected the Band to surrender its hay lands as well as the main reserve, adding that "[w]e did, but against our will."¹⁷² Day's brief letter of May 18, 1909, confirms that he

*had the greatest difficulty in procuring their consent to let this go; their contention being hard to overcome, that this Hay land is close to their new Reserve; and that unless they are able to procure sufficient Hay for their stock, they will be compelled to abandon this industry which is their most important means of making a livelihood. I told them that they might rest assured that the Department would see that they did not suffer loss on this account, and would arrange for Hay Land on the Reserve.*¹⁷³

On the face of this account, it would seem that assuming there was in fact a meeting, whoever attended the surrender meeting on behalf of the Band was convinced to surrender both Reserves 112 and 112A on May 7, 1909, on the basis of oral representations by Agent Day which are reflected nowhere in the terms of surrender. The Band received no advice as to the precariousness of entering into such an arrangement and relied instead on Day's assurances. As is clear from subsequent correspondence detailed below, Day was in no way capable of keeping these promises. The option of holding off on the

171 J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, May 18, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 399). Emphasis added.

172 Chief Josie Moosomin to the Department of Indian Affairs, May 12, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 397).

173 J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, May 18, 1909 (ICC Documents, p. 399). Emphasis added.

surrender until the question of alternative hay lands could be sorted out was not canvassed by Day. This is understandable, given the clear instructions he had received from the Department to secure the surrender and to see that IR 112A would not be retained by the Band.

Since the official record of the surrender is remarkably sparse, it is of particular importance for the Commission to consider carefully the information provided by Moosomin elders at the community session on February 21, 1996, to supplement the documentary evidence. The elders paint a very different picture from that of a Band "clamouring for the benefits" of surrender, as Day had previously predicted. Instead, it shows that many Band members, far from being concerned with the impact of a possible surrender, were unaware that a surrender was even being considered.

Ed Okanee's father was the headman of the Thunderchild Band at the time of these surrenders, and his mother's uncle was former Chief Josie Moosomin. He described what his father and great uncle had told him about the meetings at the Thunderchild and Moosomin reserves in August 1908:

They told us that they had worked on Moosomin for many, many years to let go of this land. Because previous to that, Thunderchild had moved away. Moosomin stood ground. Then Mr. Laird and other agents ganged up on him to surrender. If he did not let go of the surrender, if he didn't go ahead with the surrender, he would lose his title as a chief. . . . [1]t was Mr. Laird that told Jessie if he did not surrender, he would lose his chieftainship. There were 15,000 that was put on the table, and if you don't accept this money, he says, from this day on, you will never see this kind of money again. But even to this day, we are still – we need money for everything, and it dictates our daily life in order that he wasn't speaking the truth when he said that about the 15,000. And there were more. They were misled, you know, towards in giving up this land.¹⁷⁴

With respect to the Moosomin surrender itself, Jimmy Myo, whose father signed the surrender document, commented his father said that

there was no meetings, and there was no vote. They just came and took that land. . . . I watched them as they put my name down that I received the money, and after we were told that we didn't have a chief, even though we had one, but he wasn't recognized as a chief by the white people, and there was a chief at Thunderchild who was recognized as a chief by the government, by the white people, and when they sold their land, we were told that they had a vote to sell the land, so we didn't have to vote;

¹⁷⁴ ICC Transcript, February 21, 1996, pp. 50-52 (Ed Okanee).

they already did that kind of job over there by Thunderchild. That was good enough for us. . . .

[I]n those days, the Indian Affairs, the government had a lot of power. They could have done anything to us. I don't know what would have happened if they didn't – if the Indians didn't leave. My father used to say that; I don't know what would happen to us. Maybe they'd just gather all of us, he said, and go and dump us some place in the bush up north. That's how much power they had. We didn't have. One of the reasons why we didn't have any power, because we didn't understand English. We couldn't talk English, and those are the interpreters. The interpreters that we had at the time, they weren't to be trusted. They interpret things the way they wanted . . . all they wanted was something out of it, whether it's money or land. Father Delmas was after the land, and Day, it was probably money.¹⁷⁵

Jimmy Myo added that “the bottom line is . . . 90 per cent of the Indian people from that reserve didn't know what was going on.”¹⁷⁶ He also confirmed that, whatever informal discussions there may have been, there was no knowledge of a meeting that was held by the adult male members of Moosomin regarding a surrender.¹⁷⁷

On the subject of whether a vote was even held, Peter Bigears stated:

There was no vote. No gathering took place to discuss the issue. No vote took place. They were literally asked to come and sign. They were asked whether they wanted to let go and sell the land, but a fair majority did not agree, so they were asked, and George Day and the priest signed those names. It wasn't their thinking or to decide to sign.¹⁷⁸

Norman Blackstar described what his mother told him about the surrender:

Nothing was asked. No referendum took place. A lot – a lot of the membership did not know what transpired. It was difficult in those days. There was hardly anyone that understood English at the time.¹⁷⁹

Sidney Ironbow described how the surrender was related to him by his late father and another elder named Louis Bigear:

In the old days, they used to sit us on top of the hill when they shared their knowledge. There was a lot of regret in his mind. Expressed regret in his mind, and there

175 ICC Transcript, February 21, 1996, pp. 25-26 (Jimmy Myo); see also pp. 44-45.

176 ICC Transcript, February 21, 1996, p. 45 (Jimmy Myo).

177 ICC Transcript, February 21, 1996, p. 69 (Jimmy Myo).

178 ICC Transcript, February 21, 1996, p. 46 (Peter Bigears).

179 ICC Transcript, February 21, 1996, p. 22 (Norman Blackstar).

was a lot of stress because of what had transpired and now considering where the land that they had they were made to settle on. Where we are sitting, where we are sitting, look at. Look. Look in the far distance. As far as you can see, as far as land you can see, all of this land, he says, was originally ours. Look to the south across the river. There is rich, fertile land that we had when we once had, that we had to leave. *To this day, we don't realize – we don't know what transpired, why we had to leave.* Louis Bigear was his name. I couldn't say anything when he was talking, but I just listened intensely. Facing south. Facing south talking about the land that we were cheated on, he says, that was good land. There was a lot of other people that did not know what transpired. *My late father, my father never said that there was any discussion, any meetings that took place, a referendum or a vote, nothing. My mind is vivid, he said. When we left there, it was a pitiful sight and pitiful to see. People scattered, not knowing what was going on when we had to leave.* When he was telling me the story, he became very emotional and tears started coming out – or tears rolled down his face, he says. This is the kind of land that we have now, he says. I don't know what it's going to be like for your future, your grandchildren, the unborn. You have a lot to consider, to think about how – what kind of living, life they are going to have. Even myself, I was emotional while I was listening to him. *As far as I knew, no transaction took place. No meeting took place to talk about this land.* He says, when we brought here, he says, the Sauteaux – Sauteaux didn't appreciate our arrival. They questioned who made the decision; who told you to come, to come into the land that we had chosen to live on. A lot of questioning took place. And we could never sold the land. We could never take money for land. To this day, it's not known how the transaction took place. There was a ceremony that took place in the old town, and then again the people that went from Moosomin that went to that gathering shared the story, told of their emotional – their emotions, how they felt. Most of them cried when they were telling the story, the loss of the land. I would like to share again that nothing took place. *No transaction took place. No meeting took place.*¹⁸⁰

The elders also described confusion and unrest following the surrender when some of the Band members either refused to leave the land or returned to it after moving to the new reserve. Jimmy Myo testified:

When we finally moved out of there, some went back, still didn't know or didn't believe, some didn't know, some didn't believe that the land was sold, was surrendered. But they were – as he put it, they were chased away from there by the police. And he used to go on and say that land wasn't surrendered or wasn't sold. It was just taken away from us he said, used to say. Maybe some day we will know for sure. We will know for sure what I am talking about he used to say. But he was hurt pretty bad too, my dad, like many others that wanted to make a living, and he said we worked

180 ICC Transcript, February 21, 1996, pp. 28-29 (Sidney Ironbow). Emphasis added.

hard from day until night to make our living, and that was a good land to make a living.¹⁸¹

Peter Bigears summarized what his father said:

This is what happened in 1911. And that's where the policemen, Mounted Policemen arrived, and they chased us away from there. Those that came home this way did not believe that the land was being sold.

...
It was at Thunderchild that first sold that land, and we were in – they just took the impression on the government's side was was [sic] that we had decided to do that also, that the money was disbursed, but I don't know how much was given. Some received wagons and some received horses. *That they came here, and then they went back. Then shortly after that, 1911, they were literally chased out of there. That's when they believed that this transaction had taken place without their full knowledge of what was behind it.*¹⁸²

All of these details point to a surrender that was taken without the specific knowledge or consent of many, if not most, members of the Moosomin Band. At most, even those who had been persuaded to support the surrender were “surprised” that they were asked, contrary to their express wishes, to surrender the hay lands, and even Josie Moosomin stated that they agreed to the surrender, “but against our will.”

Events following the Surrender

With respect to the Band's concern about losing its hay lands, the Department suggested that suitable substitute hay land be found near the new reserve, and that, if such land was not available, an extra square mile could be added to the new reserve.¹⁸³ Secretary McLean supported this idea and instructed the Department's surveyor, Lestock Reid, to see if such substitute hay land could be obtained.¹⁸⁴ On May 26, 1909, however, Reid strongly advised McLean to hold 1 square mile of the hay reserve at IR 112A for the Band, since there were no hay lands available within 20 miles of the new reserve.¹⁸⁵ Chief Surveyor Samuel Bray later advised McLean that the surren-

181 ICC Transcript, February 21, 1996, p. 16 (Jimmy Myo).

182 ICC Transcript, February 21, 1996, pp. 19-20 (Peter Bigears). Emphasis added.

183 Samuel Bray, Chief Surveyor, to Frank Pedley, Deputy Minister, May 19, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 401).

184 J.D. McLean, Secretary, Department of Indian Affairs, to Lestock Reid, Surveyor, Department of Indian Affairs, May 22, 1909 (ICC Documents, p. 402).

185 Order in Council PC 1539, July 6, 1909, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 422-28 at p. 426).

der should exclude Moosomin's share of IR 112A, or that this square mile should be granted back to the Band in the same Order in Council accepting the surrender.¹⁸⁶

On June 10, 1909, the surrender was submitted to the Governor in Council for acceptance or rejection. The submission noted that "at the time the surrender was negotiated it was the intention of the Department to provide these Indians with a square mile of land elsewhere for growing hay," but since land could not be found in that vicinity it was recommended that a square mile of IR 112A should be retained for the Band. The Order in Council accepting the surrender and confirming that the Band was to retain 1 square mile of IR 112A was approved on July 6, 1909.¹⁸⁷

Shortly before the Order in Council was approved, Agent Day wrote to the Department requesting on the Band's behalf that Josie Moosomin be appointed Chief of the Moosomin Band.¹⁸⁸ This request was accepted by Secretary McLean, who noted that Day had never reported the death of old Chief Moosomin. McLean continued:

However, as the Moosomin Band has a population of about 130, the Department is not aware of any reason why a new chief should not be appointed. Although you do not recommend Josie Moosomin, whom the Indians would like to see appointed, it is presumed that you consider him suitable for this office. On that understanding you are hereby authorized to appoint Josie Moosomin as chief.¹⁸⁹

Management and Disposition of IR 112

By August 1909, the town of Battleford was clamouring for information regarding the date and method of sale of the former Moosomin and Thunderchild reserves. The town's Secretary-Treasurer advised the Department that the Town Council was advertising the sale and had received "a great number of applications" and "many enquiries on the subject."¹⁹⁰ Secretary McLean responded that "the mode of disposition of these lands cannot

186 Samuel Bray, Chief Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, June 2, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 412).

187 Order in Council PC 1539, July 6, 1909, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 422).

188 J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, June 21, 1909 (ICC Documents, p. 1700).

189 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, July 5, 1909 (ICC Documents, p. 1708).

190 H.C. Adams, Secretary-Treasurer, Town of Battleford, to P.G. Keyes, Secretary, Department of the Interior, August 3, 1909, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 444, 445).

be determined until after subdivision survey has been made, and then full information in regard to the sale will be given.”¹⁹¹

Surveyor Reid had completed his fieldwork on the survey in mid-July 1909, at which time he submitted his notes regarding subdivision of the reserves, including per acre valuations and descriptions of the land by quarter section.¹⁹² On September 14, Chief Surveyor Bray provided Deputy Superintendent Pedley with this information and the plans of subdivision for Indian Reserves 112, 115, and 115A, noting that, “[a]s far as the plans and valuations are concerned, the sale may now be made at any time.”¹⁹³ In a subsequent letter, Bray recommended that “these valuations should be accepted for guidance at the sale.”¹⁹⁴

Eleven days later, a draft advertisement had been prepared announcing the proposed sale of the lands by public auction on November 3, 1909, in Battleford. The lands were to be “offered for sale in quarter sections, cash, or one-tenth cash and the balance in nine equal annual instalments with interest at 5 per cent on the unpaid purchase money.”¹⁹⁵ The advertisement was run in selected newspapers in Alberta, Saskatchewan, Manitoba, and Ontario over a three-week period commencing October 11, 1909, which, by way of comparison, was only half the exposure for sales of other reserve lands during that period.¹⁹⁶ W.W. Smith, Secretary of the Battleford Board of Trade, objected to the short time-frame:

I have been instructed by the Board of Trade and Council of Battleford to bring to your attention the advisability, in our opinion, of postponing the sale of the Indian lands at this point to a later date, preferably next spring. Our objection to the date set is due to the fact that after having spent considerable time and money advertising the coming sale in Eastern papers we now find that owing to the short notice, we will be unable to get the interested parties on the ground by that date.

I might state that a very large number of inquiries have been received regarding these lands from Eastern farmers, as well as from parties residing in the United States,

191 J.D. McLean, Secretary, Department of Indian Affairs, to H.C Adams, Secretary-Treasurer, Town of Battleford, August 13, 1909, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 449).

192 Lestock Reid, Surveyor, Department of Indian Affairs, to J.D. McLean, Secretary, Department of Indian Affairs, July 15, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, pp. 432-39).

193 Samuel Bray, Chief Surveyor, to Frank Pedley, Deputy Minister, September 14, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 1717); Lestock Reid Survey Plan of Moosomin IR 112, 115, and 155A, approved by Frank Pedley and Samuel Bray, Chief Surveyor, July 1909 (ICC Documents, p. 1705).

194 Samuel Bray, Chief Surveyor, to Frank Pedley, Deputy Minister, September 23, 1909 (ICC Documents, pp. 1717-18).

195 J.D. McLean, Secretary, Department of Indian Affairs, Newspaper Advertisement, September 25, 1909 (ICC Documents, p. 454).

196 *Regina Leader Post*, Saskatchewan. Advertisement of the sale of Reserve Lands (ICC Documents, pp. 1720, 1723, 1724).

and in event of the sale being fixed for a more opportune time, there is every reason to believe that a very large part of these lands will be purchased by farmers and so brought under cultivation at an early date.

If the sale takes place as advertised on November 3rd, there is little doubt that the greater part of the land purchased will go to speculators, and as you know, the easy terms offered make possible for the withholding of this land from settlement for an indefinite time. . . .¹⁹⁷

Secretary McLean replied on October 28, 1909, that, as "the time the sale is advertised to take place, namely, 3rd proximo, is a favourable one to bring the lands into the market," it was considered "in the best interests of the Indians [that] the sale should proceed as advertised."¹⁹⁸

Nevertheless, Mr Smith's prediction proved to be remarkably accurate. Excluding subdivided lots in the Village of Highgate, IR 112 was sold under 115 separate agreements for sale, including 82 in November 1909, 13 in June 1910, five from 1913 to 1918, and 15 after 1920. In each case, the terms included a downpayment of 10 per cent, with interest on the balance outstanding payable at rates ranging from 5 to 7 per cent, depending on the year of sale. Fully one-half of the parcels sold in 1909 were purchased by lawyers F.W. Grant of Midland, Ontario, and James T. Brown of Moosomin, Saskatchewan, both of whom were land speculators. A report prepared for the Federation of Saskatchewan Indians asserts that other purchasers, notably W.J. Aikens and W.A. Kenning, also appear from Grant's personal papers to have been in league with Grant and Brown to purchase a large portion of the reserve under a prearranged understanding not to compete with one another during the bidding. These four men alone purchased 58 of the 82 parcels sold in 1909.¹⁹⁹

Of the 115 agreements for sale, 112 went into default, in most cases on the first anniversary of the sale when the first annual instalments fell due. Half of the agreements were eventually cancelled due to chronic arrears, generally years after initially going into default, with interest for periods of 10 to 15 years being unpaid and lost. The remaining 58 agreements were eventually paid out, but in most cases after extended periods of arrears. Of the 82 sales in 1909, 66 had gone into arrears by 1910 and all were in arrears by

197 W.W. Smith, Secretary, Battleford Board of Trade, to Frank Pedley, Deputy Minister, October 20, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, pp. 458 and 459-60).

198 J.D. McLean, Secretary, Department of Indian Affairs, to W.W. Smith, Secretary, Battleford Board of Trade, October 28, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 465).

199 Don McMahon, Federation of Saskatchewan Indians, Claim Submission, August 1, 1985 (ICC Documents, pp. 828-29); Notes and documents from the personal files of F.W. Grant (ICC Documents, pp. 2108-10)

1914. Fully 39 of the sales were cancelled for chronic arrears, with 35 of those cancellations taking place in 1925 or later.

On February 29, 1916, Mr Smith wrote to Secretary McLean regarding the former Moosomin and Thunderchild reserves:

These lands were purchased largely by speculators, and due to exceptional circumstances which have since held, these buyers have apparently been unable to transfer to actual settlers, and this condition is even more pronounced at the present time owing to war conditions and the consequent lack of immigration. . . . [M]ost of the original buyers appear to have allowed their payments to run in arrears. . . .²⁰⁰

Although neither the parties nor the Commission have had the benefit of seeing a full accounting for these sales, it is evident from the record that the Moosomin Band never received the full benefit from the sale of its reserve lands. This issue, however, is not before the Commission in this inquiry.

Relocation to IR 112B

The historical record does not make it entirely clear when Moosomin's people actually moved to their new reserve, but it appears that they had at least begun moving by August 1909.²⁰¹ In his annual report for 1909, Agent Day apparently did not view the surrender and relocation as worthy of special comment; indeed, his report comments only on the state of the Band prior to the surrender and makes no reference to the relocation.²⁰² The new reserve was surveyed during the process of negotiating the surrender, since it was hoped that having the land selected would help secure the surrender.²⁰³ The evidence taken at the community session shows that there was confusion among the Band members about the relocation. It appears that a few members returned to the original reserve lands at some point and were not aware that the land had been surrendered.²⁰⁴

²⁰⁰ W.W. Smith, Secretary, Battleford Board of Trade, to J.D. McLean, Secretary, Department of Indian Affairs, February 29, 1916, NA, RG 10, vol. 4041, file 335-933-1A (ICC Documents, p. 630).

²⁰¹ At that point, the Secretary-Treasurer of the Town of Battleford was inquiring about the status of the "recently vacated" reserve lands. H.C. Adams, Secretary-Treasurer, Town of Battleford, to Secretary, Department of the Interior, August 3, 1909, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 444).

²⁰² J.P.G. Day, Indian Agent, to Frank Pedley, Deputy Superintendent General of Indian Affairs, Canada, Parliament, *Sessional Papers*, 1910, No. 27, "Report of Indian Agents" for the Year Ended March 31, 1909, 128 (ICC Documents, p. 1753). Day's 1909 report continues to refer to Moosomin's reserve as "12 miles west of Battleford . . . between the Battle and Saskatchewan Rivers," December 31, 1909 (ICC Documents, p. 1753).

²⁰³ J.D. McLean, Secretary, Department of Indian Affairs, to Lestock Reid, Surveyor, Department of Indian Affairs, April 20, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 363).

²⁰⁴ ICC Transcript, February 21, 1996, p. 20 (Peter Bigears); p. 58 (Jimmy Myo); and p. 95 (Adam Swiftwolfe).

Early on, the land was known to be only minimally suited to agriculture. In 1903, Surveyor Reilly had noted the following with regard to Township 48: "The whole Tp. is stony. The soil is a good loam, mostly clay subsoil and supports a good growth of grass, but it is too stony to be used for cultivation purposes and consequently only fit for stock raising."²⁰⁵ Surveyor Wilkins had previously noted in 1889 that "[Township 48] is not adapted to agriculture, except to a very limited extent."²⁰⁶ With respect to Township 47, Wilkins reported that it was "in general a very poor one in an agricultural sense [and with] the exception of sections 2, 3, 4, 5, & 6 there is none of it really first class land."²⁰⁷ He noted that the grazing was excellent throughout the Township. Four years after the surrender, however, the Department noted that "the conditions for stock raising are only moderately good on this reserve," but that "it is thought that by better application to agriculture requirements can be easily met without depending as much as at present upon native hay for the cattle."²⁰⁸

By way of comparison, in relation to the original reserve, Agent Day had been able to report in 1909:

These Indians are successful farmers and stockmen; they also sell a lot of fire-wood, freight and work for settlers. . . . [M]uch interest is taken in the stock industry by these Indians, and I have every hope that by this means they will ultimately become perfectly independent of government aid. . . . The Indians of this band are very industrious and progressive. They are keenly alive as to ways and means of earning money, and, as a consequence, are becoming quite prosperous.²⁰⁹

Neither Day nor the Band's new Indian Agent, J.A. Rowland,²¹⁰ was able to report similar success on the new reserve. Rowland's monthly reports concerning the Battleford Agency rarely made reference to work or agriculture on the Moosomin reserve, although his reports were often generally favour-

²⁰⁵ W.R. Reilly, Surveyor, to Surveyor General, June 12, 1903 (ICC Documents, p. 1611).

²⁰⁶ Field notes of Fred W. Wilkins on the Survey of Township No. 48 Range 16 West of the 3rd Initial Meridian, September 30, 1889 (ICC Documents, p. 1588).

²⁰⁷ Field notes of Fred W. Wilkins on the Survey of Township No. 47 Range 16 West of the 3rd Initial Meridian, September 19, 1889 (ICC Documents, pp. 1571-74). Both of Wilkins's reports make reference to an abundance of hay land in the area. However, when the new reserve was surveyed in 1909, it was found that there was "very little hay": Samuel Bray, Chief Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, June 2, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 412).

²⁰⁸ Acting Deputy Superintendent General to J.A. Rowland, Indian Agent, October 19, 1915 (ICC Documents, p. 1911).

²⁰⁹ J.P.G. Day, Indian Agent, to Frank Pedley, Deputy Superintendent General of Indian Affairs, Canada, Parliament, *Sessional Papers*, 1910, No. 27 "Report of Indian Agents" for the year ended March 31, 1909, 128 (ICC Documents, p. 1753).

²¹⁰ Rowland was appointed Indian Agent by Order in Council on February 18, 1912. J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to A. Rowland, February 17, 1912 (ICC Documents, pp. 1802-08).

able regarding the state of affairs in the Agency as a whole. Any references that Rowland *did* make to Moosomin, however, were generally negative.

Some of the Band's lack of success was attributed by agents to poor weather and other conditions.²¹¹ It is also important, however, to consider the disruption felt by Band members as a result of the relocation. Norman Blackstar described what his grandfather had told his mother:

He said they didn't like what transpired. They were hurt, emotionally hurt, and they cried, he said. Now today, now today, he says, if you were over there, he says, you wouldn't have to suffer this much. He says you would just go on with your work.²¹²

Rowland himself observed that "[t]hey have never raised a good crop on the Moosomin Reserve, and they have met with so many failures that it is hard to get them to take any interest in farming."²¹³

In the Department's view, the Agent was paying insufficient attention to the Band's sense of dislocation. In 1914, Deputy Superintendent General Duncan Campbell Scott admonished Rowland:

Agriculture, on this reserve, appears to be making little or no progress. This may be due in part to the loss of interest caused by their removal four years ago but it is thought that they have now been sufficiently long on this reserve to have become settled and show a more active interest in earning a livelihood.²¹⁴

This letter prompted Rowland to respond that the absence of progress in farming was due to the ineptitude of the farm instructor provided for the Band, and that waiting for interest payments was having a negative effect on the band members.²¹⁵

Later that year, Deputy Superintendent General Scott again criticized Agent Rowland's performance and the results he was obtaining at the reserve. Scott noted that, in view of the fact that "the Indians have not yet become properly

211 See, for example, J.P.G. Day, Indian Agent, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, June 20, 1911 (ICC Documents, pp. 1798-99): "The weather has been ideal for farming purposes; we have had abundant rains on all the Reserves but Moosomin's where they have had practically none worth mentioning"; J.P.G. Day, Indian Agent, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, August 24, 1911 (ICC Documents, pp. 1800-01): "On account of the drought at the beginning of the season, and also the gophers, the instructor at Moosomin Reserve had to plow down his grain."

212 ICC Transcript, February 21, 1996, p. 22 (Norman Blackstar).

213 J.A. Rowland, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, June 7, 1918 (ICC Documents, p. 671).

214 D.C. Scott, Deputy Superintendent General of Indian Affairs, to J.A. Rowland, Indian Agent, April 16, 1914 (ICC Documents, pp. 1836-47).

215 J.A. Rowland, Indian Agent, to D.C. Scott, Deputy Superintendent General of Indian Affairs, June 12, 1914 (ICC Documents, pp. 1848-53).

re-established in their industries since their removal from their old reserves," Rowland should be particularly careful to visit the reserve at least once a month.²¹⁶ Again, Rowland wrote in his own defence, this time observing that because the reserve was not accessible by train, it was difficult to visit it.²¹⁷ Rowland also commented:

When I took charge in this agency, the financial and social condition of the Indians was at a low ebb. The agency had been exploited for political and personal ends and the welfare of the Indians was not taken into consideration. The number of their cattle were steadily declining, the debts were increasing and their farming was only done in a half-hear[t]ed manner.²¹⁸

Although the record does not reveal the full state of affairs on the Moosomin reserve, it is apparent that the social and economic life of the community was in serious decline following the surrender.

Perhaps the most poignant description of the Moosomin Band's life after surrender was given by W.M. Graham in 1930, 20 years after the relocation. Graham was appointed Inspector of Indian Agencies for South Saskatchewan in 1904 and played a key role in the surrender of the Kahkewistahaw Reserve, as is discussed in the Commission's Report on that claim. In 1920, he was appointed to the recently resurrected post of Indian Commissioner, and it was in that capacity that he made a report to Deputy Superintendent Scott concerning the state of affairs on some of the western reserves under his supervision.²¹⁹ In responding to Scott's inquiry into the conditions on the Alexis reserve, in central Alberta, Graham wrote:

Agriculture apparently was the last thing that was in the minds of those who agreed to set aside this particular reserve for Indians. . . . Farming . . . cannot be carried on here, and the next thing to consider is the question of getting the Indians moved to another point. The land on the Alexis reserve is valueless and would not bring anything if offered for sale. There is no hay on it, so that it would not be any good even as a ranch proposition. We have another situation almost equal to that at [Alexis], which will have to be dealt with sooner or later; *I refer to the Indians on the*

216 D.C. Scott, Deputy Superintendent General of Indian Affairs, to J.A. Rowland, Indian Agent, January 26, 1915 (ICC Documents, pp. 1861-64).

217 J.A. Rowland, Indian Agent, to D.C. Scott, Deputy Superintendent General of Indian Affairs, February 19, 1915 (ICC Documents, pp. 1865-70).

218 J.A. Rowland, Indian Agent, to D.C. Scott, Deputy Superintendent General of Indian Affairs, October 3, 1917 (ICC Documents, p. 665).

219 Graham's career in Indian Affairs, and his conflicts with Scott, are described in Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 184-99.

*Moosomin Reserve. You will recall that they surrendered a splendid farming reserve, and were removed to their present location, which is hilly, stony, in a frost belt and practically useless as a farming proposition. This is not the only objectionable feature. One of the inducements which was used to get them to move was that fishing would be accessible in the lake which adjoins the reserve. Unfortunately, commercial fishing has been allowed here also, and I am told that the lake has been practically fished out. In addition to this, extra restrictions have been placed on the Indians regarding fishing, which makes it difficult for them to make a living.*²²⁰

In short, the best description of the land, as Jimmy Myo put it at the community session, is that “the right word to use in that is no good.”²²¹

²²⁰ W.M. Graham, Indian Commissioner, to D.C. Scott, Deputy Superintendent General of Indian Affairs, April 24, 1930, NA, RG 10, vol. 4095, file 600324 (ICC Documents, pp. 740-42). Emphasis added.

²²¹ ICC Transcript, February 21, 1996, p. 18 (Jimmy Myo).

PART III

ISSUES

The fundamental question before the Commission in this inquiry is to determine whether Canada owes an outstanding "lawful obligation" to the Moosomin First Nation concerning the surrender of Indian Reserves 112 and 112A in 1909. To assist in addressing this broad question, the parties agreed on the following statement of issues:

1. Were the provisions of the *Indian Act*, 1906, complied with when the surrender of Reserves 112 and 112A were obtained?
2. Did the Crown owe any pre-surrender fiduciary obligations to the Band and, if so, did it fulfil those obligations?
3. Was the surrender of Reserves 112 and 112A obtained as a result of undue influence or duress?
4. If the evidence is inconclusive in determining any of the above issues, upon whom does the onus of proof rest?
5. As a consequence of the determination of the above issues, were Reserves 112 and 112A lawfully surrendered by the Moosomin First Nation?

We will deal with the substantive issues in two broad categories: (1) compliance with the *Indian Act*; and (2) discharge of the Crown's fiduciary obligations with respect to surrender. Finally, in issue 3 we will offer a few closing comments on the onus of proof.

PART IV

ANALYSIS

ISSUE 1 COMPLIANCE WITH THE 1906 *INDIAN ACT*

Sections 48, 49, and 50 of the *Indian Act*, 1906, set out the formal requirements for a valid surrender of all or part of an Indian reserve:

48. Except as in this Part otherwise provided, no reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Part; provided that the Superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage, in the interests of the Indians, of wild grass and dead or fallen timber.

49. Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.

2. No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.

3. The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before some judge of a superior, county or district court, stipendiary magistrate or justice of the peace, or, in the case of reserves in the province of Manitoba, Saskatchewan or Alberta, or the Territories, before the Indian Commissioner, and in the case of reserves in British Columbia, before the visiting Indian Superintendent for British Columbia, or, in either case, before some other person or officer specially thereunto authorized by the Governor in Council.

4. When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.

50. Nothing in this Part shall confirm any release or surrender which, but for this Part, would have been invalid; and no release or surrender of any reserve, or portion of a reserve, to any person other than His Majesty, shall be valid.²²²

Section 49 is the *sole* statutory protection provided for a band to ensure that its goals and choices with respect to its land are honoured. As McLachlin J stated in *Blueberry River Indian Band v. Canada*²²³ (referred to as the *Apsassin* case throughout this report), “[t]he basic purpose of the surrender provisions of the *Indian Act* is to ensure that the intention of Indian bands with respect to their interest in their reserves be honoured.”²²⁴

In contrast to the evidence before the Court in *Chippewas of Kettle and Stony Point v. Canada*,²²⁵ and before this Commission in our inquiry into the Kahkewistahaw surrender, there is a gaping hole in the official record concerning the surrender of Indian Reserves 112 and 112A by the Moosomin First Nation. In *Chippewas of Kettle and Stony Point*, where the Court of Appeal considered a challenge to the validity of the surrender, there was ample evidence, beyond that contained in the standard form certificate, which provided “overwhelming proof that the Band gave its assent to the surrender with a strong overall majority vote of at least 26 out of 44 eligible voters.”²²⁶ In Kahkewistahaw, the Indian Agent kept minutes of both meetings, including a tally of voters.²²⁷

222 RSC 1906, c. 81, as amended. These protective provisions of the *Indian Act* trace their origin to the *Royal Proclamation* of 1763, which entrenched and formalized the process whereby only the Crown could obtain Indian lands through agreement or purchase from the Indians. The proclamation states:

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

223 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 (SCC).

224 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 at 223 (SCC).

225 *Chippewas of Kettle and Stony Point v. Canada* (1995), 24 OR (3d) 654 (Ont. Ct (Gen. Div.)), affirmed in *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1997), 31 OR (3d) 97 (CA).

226 *Chippewas of Kettle and Stony Point v. Canada* (1995), 24 OR (3d) 654 at 692 (Ont. Ct (Gen. Div.)).

227 ICC, *Kahkewistahaw First Nation Report on the 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), 54-55.

In this case, however, the only contemporaneous evidence before us is the surrender document, the sworn certificate of surrender, and Josie Moosomin's letter of May 12, 1909, stating that the Band had surrendered both IR 112 and 112A, "but [surrendered the hay lands in IR 112A] against our will." Although the Chief's letter is evidence of an intention to surrender (which we will discuss fully below), it cannot be construed as conclusive evidence that the Act's provisions were complied with. The same reasoning applies to the standard form certificate of surrender, which states that the surrender was "assented to by a majority of the male members of the said Band of Indians of the Moosomin Reserve of the full age of twenty-one then present." The surrender document also discloses that 15 members of the Band apparently either signed the surrender or affixed their marks to the document by placing an "X" beside their names. The census report for that year indicates that there were 30 men of the full age of 21 years in the Band at the time.²²⁸ It is in this factual context that we must consider the relevant statutory regime.

In *Cardinal v. R.*,²²⁹ the Supreme Court found that the requirement in section 49 that the surrender be "assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose," was ambiguous. Estey J, writing for the Court, found that there were five possible meanings to this requirement. However, he concluded that the Act should be interpreted to mean that a majority of the eligible voters of the Band had to attend the surrender meeting, and that a majority of those present had to vote in favour of the surrender.²³⁰

Since 15 out of 30 eligible voters apparently signed or affixed their marks to the surrender document, there is some evidence to suggest that the required majority of the majority assented to the surrender. However, without any independent evidence to confirm that the required majority attended the surrender meeting and that all 15 men who signed or affixed their marks to this document also voted in favour of the surrender, the evidence is inconclusive on whether a majority of all eligible voters attended the meeting and a majority of those voted in favour of the surrender. Although there is some evidence to support this proposition, it would not be prudent for the Commission to make such a conclusion without some form of independent evi-

228 "Census Return of Resident and Nomadic Indians," December 31, 1909, Canada, Parliament, *Sessional Papers*, 1910, No. 27, 48-49 (ICC Documents, p. 1755).

229 *Cardinal v. R.*, [1982] 1 SCR 508, 13 DLR (4th) 321, [1982] 3 CNLR 3 (SCC).

230 *Cardinal v. R.*, [1982] 1 SCR 508, 13 DLR (4th) 321, [1982] 3 CNLR 3 at 8-10 (SCC).

dence, given the dubious circumstances surrounding the events of the surrender.

In addition to the ambiguity of the certificate, the absence of any further evidence means that we cannot determine whether a meeting was called according to the Band's rules for the express purpose of considering the surrender proposal. Assuming there was such a meeting, there are no details of any notice of the meeting, when and to whom notice was given, the number of persons present at the meeting, whether an actual vote was taken, and, if such a vote was taken, the tally of votes for and against the surrender. There is also no evidence of the nature of any discussion with the eligible voters and the extent to which the terms of the surrender were explained to members of the Band. We find it astounding that, although Agent Day was vigilant about communicating virtually every detail of his activities to the Department on other subjects prior to the surrender, he kept no records pertaining to this most important of meetings.

The elders' testimony supports the conclusion that some sort of meeting was held and that those present may have signed the surrender document at that time. However, it is not clear whether the 15 men who signed or affixed their marks to the document were aware of what it meant, since there is no evidence of what was discussed at this meeting. Furthermore, the information provided by the elders suggests that, in view of the close relationship between the Thunderchild and Moosomin Bands, along with the fact that Chief Thunderchild was recognized by the Department as spokesman for the two Bands but Josie Moosomin was not recognized as Chief, those members of the Moosomin Band who did attend the meeting may have operated under the misconception that the Thunderchild Band's assent to the 1908 surrender was considered effective with respect to the Moosomin reserves as well. That there may have been some confusion in this regard is reinforced by the elders' statements and by the fact that IR 112A was held by both Bands in common.

In this case, the surrender document and sworn certificate must be considered in light of the oral history and the Department's own records, both of which raise very real doubts about whether the Band fully understood what was going on with respect to the surrender. The First Nation submitted that the surrender document and certificate should be given minimal weight, given the interest of the signatories in obtaining the surrender of these reserves – with Agent Day believing his job hinged on this result and Josie Moosomin likewise believing that his chieftainship was on the line. In our

view, the combination of all these factors makes it at least arguable that section 49 was not complied with when the surrender was taken in 1909.

In the final analysis, however, this Commission is unable to reach a conclusion as to whether section 49(1) of the *Indian Act* was complied with and we doubt, in light of the absence of historical documentation regarding the surrender, that a reliable conclusion can ever be reached on this question. In any event, in view of our findings below concerning the Crown's fiduciary obligations with respect to this surrender, it is not necessary for the Commission to make a finding on whether there was compliance with section 49(1) of the *Indian Act* and we decline to do so.

ISSUE 2 CANADA'S PRE-SURRENDER FIDUCIARY OBLIGATIONS

The more important task before us in this inquiry is to determine whether the Crown owed any fiduciary duties to the Moosomin Band in relation to the surrender of IR 112 and 112A and, if so, whether the facts disclose that the Crown discharged these duties. Accordingly, we shall begin with a review of the Supreme Court of Canada's decisions in *Guerin v. The Queen*²³¹ and *Apsassin* as the leading authorities on this issue.

The *Guerin* Case

In *Guerin*, the Supreme Court of Canada dealt with the Musqueam Band's 1957 surrender of 162 acres of its reserve land to the Crown. This land was surrendered for the purpose of leasing the land to the Shaughnessy Golf Club, on the understanding that the lease would contain the terms and conditions presented to and accepted by the Band Council. The surrender document required the Crown to lease the land on such terms as it deemed most conducive to the welfare of the Band. Subsequently, however, the Band discovered that the lease did not give effect to the understanding reached between the Band Council and the Crown. In fact, the terms were even less favourable to the Band.

All eight members of the Court found that the Crown owed a legal duty to the Band in relation to the surrender and that this duty had been breached. However, three sets of reasons for judgment were rendered, disclosing different conceptions of the nature of this duty. On behalf of the majority of the Court, Dickson J (as he then was) wrote:

²³¹ *Guerin v. The Queen*, [1984] 2 SCR 335, [1985] 1 CNLR 120, [1984] 6 WWR 481, 13 DLR (4th) 321, 53 NR 161 (SCC).

Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the *Act*... [W]here by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct. . . .²³²

Therefore, the *Indian Act*, which codified and confirmed the "historic responsibility" undertaken by the Crown "to act on behalf of the Indians so as to protect their interests in transactions with third parties," recognizes a distinct fiduciary obligation on the Crown which is enforceable in the courts. The protective provisions over Indian lands as set out in the *Indian Act* and the terms of Treaty 6 are simply expressions of the Crown's "historic responsibility."

Dickson J noted that "[t]he discretion which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case . . . The *Indian Act* makes specific provision for such narrowing in ss. 18(1) and 38(2)."²³³ Accordingly, fiduciary principles will always bear on the relationship between the Crown and Indians, but, depending on the context, a fiduciary duty may be narrowed because the Crown's discretion is lesser and a First Nation's scope for making its own free and informed decisions is greater.²³⁴ Section 49(1) of the 1906 *Indian Act* is an example of such narrowing: although reserve land is held by the Crown on behalf of a band (pursuant to section 19 of that *Act*), it may not be surrendered except with the band's consent. It is this "autonomy" to decide how to deal with reserve land that the Supreme Court considered in *Apsassin*, to which we now turn.

²³² *Guerin v. The Queen*, [1984] 2 SCR 335, [1985] 1 CNLR 120, [1984] 6 WWR 481, 13 DLR (4th) 321, 53 NR 161 at 175 (SCC).

²³³ *Guerin v. The Queen*, [1984] 2 SCR 335, [1985] 1 CNLR 120, [1984] 6 WWR 481, 13 DLR (4th) 321, 53 NR 161 at 176-77(SCC).

²³⁴ This view was reaffirmed in *R. v. Sparrow* (1990), 70 DLR (4th) 385, [1990] 3 CNLR 160 (SCC), and most recently by Mr Justice Iacobucci in *Quebec (Attorney-General) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 at 147 (SCC), where he states: "It is now well-settled that there is a fiduciary relationship between the federal Crown and the aboriginal people of Canada: *Guerin v. Canada* . . . None the less, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14, 26 C.P.R. (3d) 97, [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed."

The *Apsassin* Case

In *Apsassin*, the Court considered the surrender of reserve land by the Beaver Indian Band, which later split into two bands now known as the Blueberry River Band and the Doig River Band. The reserve contained good agricultural land, but the Band did not use it for farming. It was used only as a summer campground, since the Band made a living from trapping and hunting farther north during the winter. In 1940, the Band surrendered the mineral rights in its reserve to the Crown, in trust, to lease for the Band's benefit. In 1945, the Band was approached again, to explore the surrender of the reserve to make the land available for returning veterans of the Second World War interested in taking up agriculture.

After a period of negotiations between the Department of Indian Affairs (DIA) and the Director, *Veteran's Land Act* (DVLA), the entire reserve was surrendered in 1945 for \$70,000. In 1950, some of the money from the sale was used by DIA to purchase other reserve lands closer to the Band's traplines farther north. After the land was sold to veterans, it was discovered to contain valuable oil and gas deposits. The mineral rights were considered to have been "inadvertently" conveyed to the veterans, instead of being retained for the benefit of the Band. Although the DIA had powers under section 64 of the *Indian Act* to cancel the transfer and reacquire the mineral rights, it did not do so. On discovery of these events, the Band sued for breach of fiduciary duty, claiming damages from the Crown for allowing the Band to make an improvident surrender of the reserve and for disposing of the land at "undervalue."

At trial,²³⁵ Addy J dismissed all but one of the Band's claims, finding that no fiduciary duty existed prior to or concerning the surrender. He also concluded that the Crown had not breached its post-surrender fiduciary obligation with respect to the mineral rights, since they were not known to be valuable at the time of disposition. He found, however, that the DIA breached a post-surrender fiduciary duty by not seeking a higher price for the surface rights.

The Federal Court of Appeal²³⁶ dismissed the Band's appeal and the Crown's cross-appeal. However, the majority rejected Addy J's conclusion regarding a pre-surrender fiduciary duty: they found that the combination of

²³⁵ An abridged version of the decision is reported as *Apsassin v. Canada (Department of Indian Affairs and Northern Development)*, [1988] 3 FC 20 (TD), and the complete text is reported as *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development) et al.*, [1988] 1 CNLR 73, 14 FTR 161 (TD).

²³⁶ *Apsassin v. Canada*, [1993] 3 FC 28, 100 DLR (4th) 504, 151 NR 241, [1993] 2 CNLR 20 (FCA).

the particular facts in the case and the provisions of the *Indian Act* imposed a fiduciary obligation on the Crown. The content of that obligation was to ensure that the Band was properly advised of the circumstances concerning the surrender and the options open to it, particularly since the Crown itself sought the surrender of the lands to make them available to returning soldiers. On behalf of the majority, Stone JA (with Marceau JA concurring and Isaac CJ dissenting) concluded that the Crown discharged its duty, since the Band had been fully informed of “the consequences of a surrender,” was fully aware that it was forever giving up all rights to the reserve, and gave its “full and informed consent to the surrender.”²³⁷ Stone JA also found that there was no breach of the post-surrender fiduciary obligation concerning the mineral rights, since there was a “strong finding” that the mineral rights were considered to be of minimal value, so it was not unreasonable to have disposed of them. Finally, once the rights had been conveyed to the DVLA, any post-surrender fiduciary obligation on the part of the Department of Indian Affairs was terminated, and the Crown had no further obligation to deal with the land for the benefit of the Band.

The Supreme Court of Canada divided 4-3 on the question of whether the mineral interests were included in the 1945 surrender for sale or lease. Nevertheless, the Court was unanimous in concluding that the Crown had breached its post-surrender fiduciary obligation to dispose of the land in the best interests of the Band, first, when it “inadvertently” sold the mineral rights in the reserve lands to the DVLA, and, second, when it failed to use its statutory power to cancel the sale once the error had been discovered. Justices Gonthier and McLachlin, respectively writing for the majority and the minority, also concluded that, to the extent the Crown owed any pre-surrender fiduciary duties to the band, they were discharged on the facts in that case.

The Court’s comments on the question of pre-surrender fiduciary obligation may be divided into those touching on the *context* of the surrender and those concerning the substantive *result* of the surrender. The former concern whether the context and process involved in obtaining the surrender allowed the Band to consent properly to the surrender under section 49(1) and whether its understanding of the dealings was adequate. In the following analysis, we will first address whether the Crown’s dealings with the Band were “tainted” and, if so, whether the Band’s understanding and consent

²³⁷ *Apsassin v. Canada*, [1993] 3 FC 28, 100 DLR (4th) 504, 151 NR 241, [1993] 2 CNLR 20 at 46 (FCA).

were affected. We will then consider whether the Band effectively ceded or abnegated its autonomy and decision-making power to or in favour of the Crown.

The substantive aspects of the Supreme Court's comments relate to whether, given the facts and results of the surrender itself, the Governor in Council ought to have withheld its consent to the surrender under section 49(4) because the surrender transaction was foolish, improvident, or otherwise exploitative. We will address this question in the final part of our analysis.

Pre-Surrender Fiduciary Duties of the Crown

Where a Band's Understanding Is Inadequate or the Dealings Are Tainted

For the majority of the Court, Gonthier J focused on the context of the surrender, concerning himself with giving "effect to the true purpose of the dealings" between the Band and the Crown.²³⁸ He wrote that he would have been "reluctant to give effect to this surrender variation if [he] thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention."²³⁹

At the heart of Justice Gonthier's reasons is the notion that "the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured."²⁴⁰ In so holding, he emphasized the fact that the Band had considerable autonomy in deciding whether or not to surrender its land, and that, in making its decision, it had been provided with all the information it needed concerning the nature and consequences of the surrender. Accordingly, in Justice Gonthier's view, a band's decision to surrender its land should be allowed to stand unless the band's understanding of the terms was inadequate or there were tainted dealings involving the Crown which make it unsafe to rely on the band's decision as an expression of its true understanding and intention.

²³⁸ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 at 200 (SCC).

²³⁹ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 at 202 (SCC).

²⁴⁰ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 at 200 (SCC).

Where there are “tainted dealings” involving the Crown, caution must be exercised in considering whether or not the band’s apparently autonomous decision to surrender the land should be given effect. In *Chippewas of Kettle and Stony Point*, for example, Laskin JA considered that the alleged bribe provided to the Band members by the prospective purchaser of the reserve lands might constitute “tainted dealings.” Although he recognized that it was a question for trial which could not be dealt with in Canada’s preliminary application for summary judgment, he nevertheless forged the explicit link between “tainted dealings” and fiduciary obligation that Gonthier J was not required to make in the context of *Apsassin*.²⁴¹ In our view, Canada’s failure both to properly manage competing interests (which was stressed by the Federal Court of Appeal in *Apsassin*) and to use its position of authority to apply undue influence on a band to effect a particular result can contribute to a finding of “tainted dealings” involving the Crown. Such a finding may cast doubt on a surrender as the true expression of a band’s intention. Both of these elements are relevant to the question of “tainted dealings,” because they have the potential to undermine the band’s decision-making autonomy with respect to a proposed surrender of reserve land.

Although Gonthier J did not expand on his sense of what would constitute “tainted dealings,” we note that the Court of Appeal concluded that the Crown was in a conflict of interest. McLachlin J also commented that the Crown was arguably in a conflict of interest because of the presence of conflicting pressures “in favour of preserving the land for the Band on the one hand, and making it available for distribution to veterans on the other.”²⁴²

Nevertheless, in *Apsassin*, the Supreme Court was able to find, beneath the technical irregularities and confusion over the nature of the surrender, a genuine intention on the part of the Beaver Indian Band, formulated with the assistance of a conscientious Indian Agent, to dispose of reserve land for which it had no use. Thus, the Court had no difficulty in concluding that there was a neat reconciliation of the Crown’s interests in opening up good agricultural land for returning soldiers and the Band’s interests in selling land it did not use to obtain alternative lands closer to its traplines.

Even if we were to assume that the Moosomin Band provided a technically valid surrender (an issue on which we express no finding), when one looks beyond the question of technical compliance with the *Indian Act*, the weight

²⁴¹ *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1997), 31 OR (3d) 97 at 106 (CA).

²⁴² *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 at 214 (SCC).

of the evidence leads us to conclude that the Crown's officials applied coercion, improper influence, and pressure on the Band to surrender its land. Taken together, these actions constituted tainted dealings on the part of Crown agents who sought to "remove" the Indians from their treaty entitlement so that these lands could be "opened up" for settlers. Rather than making an earnest attempt to reconcile the competing interests of settlers and the Crown with those of the Moosomin Band, Crown officials like Indian Agent Day, Secretary McLean, Deputy Superintendent Pedley, and Minister Oliver deliberately set out to use their positions of authority and influence to completely subordinate the interests of the Moosomin Band to the interests of settlers, clergymen, and local politicians who had long sought the removal of the Indians and the sale of their lands.

When conflicts over reserve land first arose between the Band and prospective settlers in 1889, the Department conscientiously took the position that the long-term interests of the Bands had to be secured rather than giving in to the pressure of settlement. From 1902 on, however, the official record discloses no effort to balance or protect the interests of the Band. Rather, the Crown commenced a concerted campaign to move the Band off the land and to establish the settlers whose political representatives went to great pains to ensure that the Department of Indian Affairs pressed for a surrender. As counsel for the First Nation pointed out, Crown officials were concerned only with the *how* of surrender, rather than the *why* or *whether* of surrender. At the time of this surrender, Indian Affairs was apparently not mindful of the promises made to the Indians in Treaty 6, as officials began to succumb to, and indeed advance, the interests of non-Indians who sought the land for settlement. In keeping with this shift in loyalties, the surrender of Indian Reserves 112 and 112A was motivated solely by the political interest in "removing" Indians in order to "open up" the land for settlement by homesteaders. On the evidence as a whole, no other conclusion is possible.

It is important to observe that there is absolutely no evidence to suggest that the option of *not* surrendering the land was ever presented to the Band, even though the Band repeatedly expressed an intention to retain it. Any "intention to surrender" evidenced by the Band was single-handedly created and pursued by the Crown, and the exercise of "giving effect to the Band's intention" would be contrived, to say the least.

In our review of the documentary record, we have noted that the surrender was considered by all parties (other than the Band) to be a matter of "opening up" the land for settlement. The fact that it would simultaneously

destroy the Band's agricultural economy was never mentioned or considered. This is not a case in which the Band had surplus land in its reserve holdings of which it was not making any use, and which it sought to dispose of in a mutually advantageous exchange. It is also not a case in which the Crown's wish to secure the reserve land for other purposes was coincident with the Band's desire to secure other land for its own purposes, as in *Apsassin*. On the contrary, this is a case in which the Band's interests conflicted directly with those of prospective settlers, since all concerned sought the land for precisely the same purpose – its excellent agricultural potential. The Moosomin Band was asked to surrender the entirety of its reserve lands solely for the benefit of others, and the instigating parties did not much concern themselves with where the Band ended up, so long as it was “removed.”

In all the dealings surrounding this surrender, the question of whether *any* surrender, on *any* terms, was truly desired by the Band, or in its best interests, was never asked or answered by departmental officials. The only apparent inquiry on record came in 1902, when Inspector Chisholm commented that, although the Moosomin and Thunderchild Bands might consent to a move across the North Saskatchewan River (since they might even *benefit* from being closer to their hay lands), a move farther north would no doubt be opposed.²⁴³ To the extent that any inquiries were made by the Crown, the answer was clear that the Band had no intention of surrendering its land. This attitude is amply reflected in Josie Moosomin's letter of November 23, 1906, and the fact that the Band consistently rejected surrender, at least until 1909.

Jimmy Myo emphasized that the Department wielded a great deal of power over the Band, and that Band members at the time of surrender were concerned about what would happen to them if they did not comply with the Department's apparent wishes. At the time, Josie Moosomin also stated his desire to “help the Agent” and to do what the Department wanted. We also know from his letter of November 23, 1906, that he trusted the Department to ensure that the Band would never have to surrender the reserve, because the Government of Canada was “honorable.”²⁴⁴ This letter makes it clear that Josie Moosomin trusted the Crown and believed that the Department would protect his people's interests – a view echoed by Father Delmas, who said he had “worked hard to get the Indians to repose confidence in the Govern-

²⁴³ W.J. Chisholm to Commissioner D. Laird, April 30, 1902, NA, RG 10, vol. 3563, file 82, pt. 11 (IOC Documents, pp. 194-96).

²⁴⁴ Josie Moosomin to the “Government of Ottawa,” November 23, 1906 (IOC Documents, p. 218).

ment.”²⁴⁵ Josie Moosomin wanted the Department to understand that the Band did not want to surrender its land.

Accordingly, at the time the Department began to press for the surrender in 1907, it had before it a statement by Josie Moosomin (identifying himself as Chief, though the Agent did not recognize him in that position) that the Band never wanted to surrender its land. Josie Moosomin also sent an unofficial tally of voters which indicated that 26 men of the Band opposed a surrender, while only six favoured the idea. Although Agent Day stated that the question of surrender had been raised with Band members, he had not gone into it in any detail and had not provided the Department with a full report. The Department’s response was to assure Josie Moosomin that the land could not be disposed of without a surrender. Rather than accepting Josie Moosomin’s letter as an expression of the Band’s intention to retain its land, the Department turned a blind eye to his plea and promptly took steps to arrange for that very surrender.

In our view, the Department’s only interest in IR 112 was its surrender, and its only inquiries into the matter related to the means, terms, and conditions by which that surrender could be obtained. Accordingly, it is our view that the Department gave no consideration to the best interests of the Band, with the exception of Inspector Chisholm’s suggestion in 1902 that a surrender in exchange for land on the other side of the Saskatchewan River and in closer proximity to its hay lands might actually benefit the Band. For the sake of clarity, we do not mean to suggest that it was the Crown’s duty to decide for the Band whether or not to surrender its land; rather, it was required to consider the Band’s best interests and to ensure that its decision was informed and free from duress, undue influence, and other factors that would taint the Crown’s dealings with the Band and undermine the Band’s autonomy to make this decision on its own.

In our view, *Apsassin* does not represent a checklist of the conditions that must prevail in order to make a surrender valid. It is nonetheless instructive to compare the Moosomin surrender with the surrender granted by the Beaver Indian Band. In considering whether the Crown discharged its fiduciary obligation in allowing the surrender of the surface rights to the land, the Court in *Apsassin* placed a great deal of significance on the following factors:

²⁴⁵ Father Delmas to Frank Oliver, Minister of the Interior, May 18, 1908 (ICC Documents, p. 1660).

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- the Department struggled with the question of selling the reserve;
 - the Band's goal was to get different land closer to its trapline, which it could not do without the proceeds of sale;
 - the land was "virtually useless to the Band at the time";
 - when the surrender was given, the Band had already selected alternative sites after "mature consideration";
 - the question of surrender was fully discussed among Band members themselves and with departmental representatives prior to the surrender actually being signed;
 - although Band members "would not have understood and probably would have been incapable of understanding the precise nature of the legal interest they were surrendering, they did in fact understand that by the surrender they were giving up forever all rights to I.R. 172, in return for the money which would be deposited to their credit once the reserve was sold and with their being furnished with alternate sites near their trapping lines to be purchased with the proceeds";²⁴⁶ and
 - perhaps most important of all, Crown officials had fully explained the consequences of a surrender, had not attempted to influence the Band's decision, and had acted conscientiously and in the best interests of the Band throughout the entire process.

These factors are conspicuously absent from the present claim. The stark reality of the situation is that Indian Affairs must have known that the surrender of this rich agricultural land, in exchange for land that was marginal at best, could never have been in the best interests of the Moosomin Band. On the facts before us, it is clear that the Department acted opportunistically and sought the surrender in the face of repeated rejections by the Band and the clear statement by Josie Moosomin that the Band wished to retain its land forever. The Department's consultations with the Band were directed towards the sole objective of persuading it to surrender the land, rather than allowing a free and open consideration of the idea.

The question of "influences," undue and otherwise, is a matter of particular interest. We note the Department's attitude towards the "influences" it

²⁴⁶ *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1988] 14 FTR 161, 1 CNLR 73 at 130 (TD).

thought were motivating the Band to oppose surrender and Agent Day's consistent view that the less information the Band had, and the less exposure it had to outside opinion and advice, the better off it would be. Accordingly, Day actively took steps to insulate the Band from the independent advice of "busybodies" because he was aware that this was a critical obstacle in the way of obtaining the Band's consent to surrender. By insulating the Band from these "baleful" external influences, Day was in a much better position to encourage the Band to place its trust and confidence in him. The Crown in turn used this trust and confidence only to obtain a surrender and not to give effect to the Band's stated intention of keeping its reserves.

According to Agent Day, the Band's lack of interest in surrender was due to the "naturally doubting nature" of the Indians and the bad advice they had received. Day never attributed this reluctance to the fact that the Moosomin and Thunderchild reserves were widely regarded as some of the best farming land in central Saskatchewan, and that the Bands were making a good living from them. Given that the Bands appeared to receive no objective advice whatsoever from Indian Affairs officials, who chose instead to keep them deliberately in the dark, Day's criticism of outside advisers is suspect.

In our view, the evidence amply demonstrates that Indian Affairs simply saw the Band's intention to remain exactly where it was as an obstacle to be "overcome," rather than as a decision that ought to be "respected and honoured."²⁴⁷ In view of the trust and confidence reposed in the Department to respect and give effect to the decisions of the Band, such an approach represents a serious departure from the standard of conduct expected from the Crown. As the Court stated in *Apsassin*, "the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured."²⁴⁸ The *time* for honouring and respecting decisions is not only at the moment of surrender but at all points leading up to it. If the Crown is obliged to truly honour and respect those decisions, surely its officials must refrain from engaging in "tainted dealings" that improperly influence the Band and completely overwhelm its ability to act autonomously and to make a decision after a mature consideration of its options.

²⁴⁷ This attitude is also evident in the clerical interventions in the matter, such as those of Father Delmas and Bishop Newnham: see, for example, Bishop Newnham's letter to Commissioner Laird, October 3, 1906 (ICC Documents, p. 216), and Father Delmas's letter to Frank Oliver, May 18, 1908 (ICC Documents pp. 1660-61).

²⁴⁸ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 at 200 (SCC).

The evidence before the Commission points to a conclusion that the Moosomin Band consistently expressed its opinion on numerous occasions prior to the surrender that it did not want to give up its land. There is no evidence that the Department considered it beneficial for the Band to move to another location; the only evidence is that the Department sought to locate the Band anywhere other than IR 112. Furthermore, there is no evidence that the Department's proposal for surrender was so rich that it amounted to an offer that the Band, in its own best interests, could not refuse. In spite of this, the Band's desire to retain its land was not honoured; rather, it was overcome by the Department's influence and pressure. In the final result, there is evidence that at least some members of the Band agreed to surrender IR 112 and 112A (the latter against their will), but the only plausible reason why the Band changed its position is because it was simply overborne by Agent Day, either on his own or in concert with Father Delmas.

In so concluding, we have also had regard for the information collected from the elders of the Moosomin and Thunderchild Bands at the community session. This session represents one of the few sources of information concerning the surrender meeting itself, and also provides insight into the events leading up to the surrender and the intentions of the Band. Given the overall historical record, the elders' testimony has the ring of truth to it and, in our view, this information is consistent with and corroborates the documentary record which the Commission has carefully reviewed. Jimmy Myo stated:

[T]hey didn't know that the white people were after that reserve, because it was a good farm land, and they try to make deals with the chief and with some of probably the band members, but *they didn't want to surrender at all. They didn't want to sell that land or trade it for something*, because that's where many of them were born, and there was graves on that site. They didn't want to leave those . . . but *the main reason that they didn't want to, they didn't want to part with that part of land is they knew they would make a living out of it.*²⁴⁹

Peter Bigears testified that, although his grandfather and other Band members had signed the surrender or affixed their mark beside their names, most were unable to speak or read English and may not have understood what

249 ICC Transcript, February 21, 1996, p. 14 (Jimmy Myo). Emphasis added.

they were signing.²⁵⁰ He added that the reason they signed was that “they were promised wagons and horses. That’s how they got cheated on.”²⁵¹

Jimmy Myo added that Father Delmas “used to talk Cree, trying to coax the Indian people to sell the land; the other land would be better for us to live, where there was game and fish. Along with the Indian agent, he was the one that really worked hard to try to get us out of there . . . these two guys worked very, very hard to get rid of us out of there.”²⁵²

Adam Swiftwolfe said “they were cheated out of this land deal . . . The agents and the priest were behind this. That’s why they wanted to get rid of the Indians, to occupy this land for themselves. When they were consulted if they wanted to let go of the land, they had refused.”²⁵³

On the facts in this case, we are struck by the fact that each time the Band expressed a desire not to surrender its land, the Department made it clear through its actions and words that it did not find this resolution acceptable. It is clear that, but for the persistence and agenda of the Department, no surrender would have been obtained. It is also clear that a great deal of effort was expended by all the authorities involved in militating for the surrender. Under these circumstances, it is evident that the Band was simply worn down by the persistent efforts of the Department to obtain the surrender. That is not to say that every surrender brought about as a result of influence or pressure from the Department is tainted, since in some instances the Department might take a forceful approach to promote the best interests of the Band. Needless to say, those are not the facts in this case.

Finally, we should briefly address the actions of the Band when it agreed “against its will” to a surrender of IR 112A in addition to IR 112. The inclusion of these hay lands was not simply a matter of the Band surrendering additional land; from the Band’s perspective, it went to the heart of the bargain as a whole. Agent Day had previously resisted this surrender, emphasizing to the Department that the Band wished to retain these lands. Secretary McLean’s terse reply, however, was that “Indians must surrender all their present reserves including hay land,”²⁵⁴ and that “[a]fter due consideration it has been decided that it is not desirable to allow the said lands to be held by

250 ICC Transcript, February 21, 1996, pp. 40 and 94 (Peter Bigears); see also ICC Transcript, February 21, 1996, p. 22 (Norman Blackstar).

251 ICC Transcript, February 21, 1996, p. 47 (Peter Bigears).

252 ICC Transcript, February 21, 1996, pp. 16 and 46 (Jimmy Myo); Norman Blackstar also gave testimony to this effect: ICC Transcript, February 21, 1996, p. 24.

253 ICC Transcript, February 21, 1996, p. 95 (Adam Swiftwolfe).

254 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, May 3, 1909 (ICC Documents, p. 372).

the Indians.”²⁵⁵ The Band was not presented with the option of retaining IR 112A, just as it had not been presented with the option of not surrendering any land at all.²⁵⁶ It is clear that the bargain struck and represented by the terms and conditions of surrender did not represent the true intentions and understanding of the Band because the whole process had been tainted by the improper conduct of the Crown’s officials, who completely abdicated their trustlike responsibilities owed to the Moosomin Band.

The Department was simply not prepared to allow the deal to fall through if the Band was unwilling to surrender Reserve 112A: the Department’s attitude was that the land must be taken regardless of the Band’s intentions and, indeed, this is what occurred. As Agent Day’s reporting letter discloses, he “had the greatest difficulty in procuring their consent” to the surrender of reserve 112A, but it was nonetheless obtained. This is clear evidence of undue influence being exerted against the Band.

In conclusion, it is our view that, for the following reasons, it would be unsafe to rely on the 1909 surrender of Indian Reserves 112 and 112A as a true expression of the Moosomin Band’s understanding and intention:

- 1 the Department of Indian Affairs aggressively sought the surrender not because it would benefit the Moosomin Band, but because it was in the interests of local settlers, clergy, speculators, and politicians;
- 2 the Department did not inform the Band that it was free not to surrender the reserves because the Department did not consider this to be an acceptable option;
- 3 the Department did not concern itself with the eventual location to which the Band was to be moved, and pursued the surrender while showing a complete disregard for the fact that such a move might cause serious harm to the Band’s economic and social conditions;
- 4 the Department applied, and allowed or encouraged others to apply, pressure on the Band to obtain the surrender;

²⁵⁵ J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, May 4, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 373).

²⁵⁶ A memo from Chief Surveyor Bray to Frank Pedley, Deputy Minister, on May 27, 1909, provides evidence that officials were instructed by Minister Oliver himself to obtain a surrender of the reserves from the Moosomin Band and not to be dissuaded by the reluctance of the Band to surrender: “The Indians of the Moosomin Band were extremely desirous to retain their share (or one mile) of this reserve for hay purposes. The Minister decided it should be surrendered. It was accordingly surrendered as above stated.” NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 409).

- 5 the Department sought to insulate the Band from outside influences and independent advice so that the only opinions and views available to the Band were those of Agent Day and the local clergy, who shared a mutual interest in obtaining the surrender;
- 6 the surrender eventually agreed to by the Band was obtained “against its will” and on representations which Agent Day had no ability to guarantee and which he had good reason to believe would be rejected by the Department; and
- 7 the surrender was not in the best interests of the Band.

The situation in this case is markedly different from that prevailing in *Apsassin* where, among other things, “the Department took the view that no pressure should be brought to bear on the Band to promote a sale, rather than a lease, of the land.”²⁵⁷ It is clear that the Department considered only one outcome to be possible and that it made every effort to obtain it. Accordingly, the surrender was obtained in violation of the Crown’s fiduciary obligation to respect the Band’s decision-making autonomy by ensuring that the surrender was obtained in the absence of improper motivation and “tainted dealings” on the part of Crown officials. As we said in the Kahkewistahaw inquiry, “the evidence indicates not only that Canada failed in its duty to protect the Band from sharp and predatory practices in dealing with its reserve lands but that Canada itself initiated the ‘tainted dealings.’”²⁵⁸ Under these circumstances, it would be unsafe to rely on the 1909 surrender as an expression of the Moosomin Band’s true understanding and intention.

In concluding that the Crown’s dealings with the Moosomin Band in relation to the 1909 surrender were “tainted,” it is important to observe that we have not simply judged the conduct of these officials by today’s moral standards. Rather, we have been cautious to apply what the Supreme Court of Canada in *Apsassin* considered to be the appropriate standard of conduct expected of a fiduciary in the context of the times when these events took place. It is our view that the Crown’s conduct was inappropriate regardless of whether the legal and equitable standards against which it is measured are those of 1909 or those of today.

²⁵⁷ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 at 213 (SCC).

²⁵⁸ ICC, *Kahkewistahaw First Nation Report on the 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), 110-11.

Where a Band Has Ceded or Abnegated Its Power to Decide

In the Commission's report dealing with the 1907 surrender by the Kahkewistahaw Band, we addressed in some detail McLachlin J's reasons concerning the Crown's fiduciary obligations in the pre-surrender context. In considering whether the Crown owes a fiduciary obligation to a band in the pre-surrender context, McLachlin J drew on several Supreme Court decisions dealing with the law of fiduciaries in the private law context:

Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 SCR 99 [[1988] 1 CNLR 152 (abridged version)]; *Norberg v. Wynrib*, [1992] 2 SCR 226; and *Hodgkinson v. Simms*, [1994] 3 SCR 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (*or more often finds himself in the situation where someone else has ceded for him*) his power over a matter to another person. The person who has ceded power *trusts* the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.²⁵⁹

In analyzing this passage, the Commission stated the following in the Kahkewistahaw report:

On the facts in *Apsassin*, McLachlin J found that "the evidence supports the view that *the Band trusted the Crown to provide it with information as to its options and their foreseeable consequences, in relation to the surrender of the Fort St. John reserve and the acquisition of new reserves which would better suit its life of trapping and hunting. It does not support the contention that the band abnegated or entrusted its power of decision over the surrender of the reserve to the Crown.*" Because the Band had not abnegated or entrusted its decision-making power over the surrender to the Crown, McLachlin J held that "the evidence [did] not support the existence of a fiduciary duty on the Crown prior to the surrender of the reserve by the Band."

Justice McLachlin's analysis on what constitutes a cession or abnegation of decision-making power is very brief, no doubt because the facts before her demonstrated that the Beaver Indian Band had made a fully informed decision to surrender its reserve lands and that, at the time, the decision appeared eminently reasonable. In our view, it is not clear from her reasons whether she merely reached an evidentiary conclusion when she found that the Band had not ceded or abnegated its decision-making power to or in favour of the Crown, or whether she intended to state that, as a

²⁵⁹ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 at 209 (SCC). Emphasis added.

principle of law, a fiduciary obligation arises only when a band actually takes no part in the decision-making process at all.²⁶⁰

After considering further jurisprudence from the Supreme Court of Canada on the question of what is required to cede or abnegate decision-making power to or in favour of a fiduciary, the Commission continued:

Both *Norberg*²⁶¹ and *Hodgkinson*²⁶² suggest that decision-making authority may be ceded or abnegated even where, in a strictly technical sense, the beneficiary makes the decision. Neither case deals with the fiduciary relationship between the federal government and an Indian band, however, and therefore *Apsassin* must be considered the leading authority on the question of the Crown's pre-surrender fiduciary obligations. In reviewing that case, we cannot imagine that McLachlin J intended to say that the mere fact that a vote has been conducted in accordance with the surrender provisions of the *Indian Act* precludes a finding that a band has ceded or abnegated its decision-making power. If that is the test, it is difficult to conceive of any circumstances in which a cession or abnegation might be found to exist.

We conclude that, when considering the Crown's fiduciary obligations to a band, it is necessary to go behind the surrender decision to determine whether decision-making power has been ceded to or abnegated in favour of the Crown. In our view, a surrender decision which, on its face, has been made by a band may nevertheless be said to have been ceded or abnegated. The mere fact that the band has technically "ratified" what was, in effect, the Crown's decision by voting in favour of it at a properly constituted surrender meeting should not change the conclusion that the decision was, in reality, made by the Crown. Unless the upshot of Justice McLachlin's analysis is that the power to make a decision is ceded or abnegated *only* when a band has completely relinquished that power in *form* as well as in *substance*, we do not consider the fact of a band's majority vote in favour of a surrender as being determinative of whether a cession or abnegation has occurred. Moreover, if the test is anything *less* than complete relinquishment in form and substance, it is our view that the test has been met on the facts of this case – the Band's decision-making power with regard to the surrender was, in effect, ceded to or abnegated in favour of the Crown.²⁶³

We remain of the view that, in light of the historical role undertaken by the Crown to "look after" the interests of bands like Moosomin, and based on the nature of the relationship which developed between Canada and Moosomin from the signing of Treaty 6 in 1876 until the 1909 surrender, it

260 ICC, *Kahkewistahaw First Nation Report on 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), 112. Footnotes deleted.

261 *Norberg v. Wynrib*, [1992] 4 WWR 577 at 622-3 (SCC), McLachlin J.

262 *Hodgkinson v. Simms*, [1994] 9 WWR 609 at 645 (SCC), La Forest J.

263 ICC, *Kahkewistahaw First Nation Report on 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), 114-15.

would have been reasonable for the Band to expect the Crown to deal with them on the basis of the "loyalty, good faith and avoidance of a conflict of duty and self-interest" referred to by McLachlin J in *Apsassin*. In addressing the issue of "tainted dealings," we have already reviewed at considerable length the facts which have led us to conclude that the Crown's motives and methods in procuring the surrender of IR 112 and 112A from the Moosomin Band were deserving of reproach. We find those same facts equally applicable in our conclusion that the Crown did not meet the standard required of it in exercising the decision-making power ceded to or abnegated in favour of it (or *by* it).

Moreover, just as the question of leadership was critical in determining whether the Band's decision-making power was ceded to or abnegated in favour of the Crown in the Kahkewistahaw inquiry, there was a parallel leadership vacuum that contributed significantly to the cession or abnegation of decision-making power by the Moosomin Band when it surrendered Indian Reserves 112 and 112A. In the years prior to the surrender, Agent Day had advised Secretary McLean and Commissioner Laird that the Moosomin Band had no Chief, the reason being that "the Department thought it wiser and better not to appoint others when they died off."²⁶⁴ Day also specifically stated that Josie Moosomin was *not* the Chief. We have also noted that the Department received a letter from Band member Myeow asking whether Josie Moosomin would be recognized as Chief in view of the fact that he had been so elected by members of the Band on May 3, 1904.²⁶⁵ Confused by this letter, Secretary McLean passed it on to Agent Day for a response, but no further correspondence concerning the fate of this request is in evidence before us. Needless to say, however, no steps were taken, since the Band remained without a Chief for the next two years.

The fact that the Department refused to recognize the Band as having a Chief was a significant factor in the circumstances of this surrender. Jimmy Myo testified that, at the time of surrender, it was either implicitly suggested or explicitly stated that, as Chief Thunderchild was the only Chief in the Battleford Agency, his Band's consent to the 1908 surrender provided sufficient consent for the Moosomin Band as well. In light of the testimony that no vote was held and that Band members may have simply signed a surrender form placed before them as a *fait accompli*, there is strong evidence that the

²⁶⁴ Day to McLean, September 14, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 265).

²⁶⁵ Myeow to Secretary McLean, February 18, 1907, NA, RG 10, vol. 3969, file 121698-5 (ICC Documents, p. 1645).

Band's decision-making power with regard to the surrender had been ceded to or abnegated in favour of the Crown, both in *form* as well as in *substance*.

There can be no doubt that the Department was aware that old Chief Moosomin had died and that Josie Moosomin was the Band's choice as its new Chief. Nevertheless, the Department and, in particular, Agent Day refused to formally recognize Josie Moosomin as Chief. When the matter was brought to the attention of departmental headquarters, nothing was done until after the surrender had been obtained. It was only in the weeks after the surrender that Agent Day recommended Josie Moosomin's appointment as Chief. It strikes us that these events point to something more than a mere coincidence, since nothing of any significance happened between 1904 and 1909 to justify this sudden change of position on the part of Day and his superiors. By withholding this recognition, Josie Moosomin was vulnerable to exploitation at the hands of the Department. Likewise, without a recognized chief or leader, the entire Band was vulnerable to the considerable power and influence wielded by Agent Day and other departmental officials when the question of surrender was raised.

It will be also recalled that, when Thunderchild surrendered its reserve in late August 1908 but Moosomin refused, Deputy Superintendent Pedley demanded a prompt explanation, reminding Laird that his instructions were to "take surrenders from both Bands Thunderchild and Moosomin, not from one band."²⁶⁶ It is clear that the Department was not prepared to accept any other result. In particular, with regard to IR 112A, the Department would not have considered allowing the deal to fall through if the Band had been unwilling to surrender those prized hay lands; nor was it willing to allow the Band to retain them. The Department's attitude was that all the Band's land would be taken, regardless of the Band's intentions, wishes, or desires – and, indeed, this is what occurred. As Agent Day's reporting letter disclosed, he "had the greatest difficulty in procuring their consent" to the surrender of IR 112A, but it was nonetheless obtained. In our view, this is not so much evidence of a decision being *made* by the Band as a decision being *forced* upon it.

For these reasons, our conclusions in this case are strikingly similar to our findings in the Kahkewistahaw inquiry. Since the surrender was taken at a time when the Band had no recognized Chief or headmen and its members

²⁶⁶ Telegram from Deputy Superintendent Pedley to Commissioner Laird, September 1, 1908 (ICC Documents, p. 288).

were not allowed to elect new representatives or to seek independent advice, serious questions arise whether the Crown took unfair advantage of the Band at a time when a leadership void existed. In our view, had the Crown been interested in a fair and unbiased decision-making process, it would have waited until the Band had a Chief and headmen before placing a decision of such importance before the members for a vote.

In conclusion, we have no hesitation in finding, on the facts of this case, that the Band ceded its decision-making power to the Crown, or, perhaps more appropriately, that the Band's decision-making autonomy was effectively ceded for it by the overwhelming power and influence exercised by Crown officials seeking to obtain the desired surrenders. Accordingly, we find that the Crown failed to meet its fiduciary duty to exercise its power and discretion in a conscientious manner and without unduly influencing the Band's decision-making autonomy with respect to the proposed surrender of Indian Reserves 112 and 112A.

Duty of the Crown to Prevent an Improvident or Exploitative Surrender

In *Apsassin*, McLachlin J considered whether section 51(4) of the 1927 *Indian Act* – which is equivalent to section 49(4) of the 1906 Act – imposed a fiduciary duty on the Crown in the context of the Governor in Council's discretion to accept or refuse a surrender. Building on the understanding that section 49(1) was designed to give effect to a band's true intention with respect to a surrender, McLachlin J wrote:

My view is that the *Indian Act's* provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection. The band's consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. The purpose of the requirement of Crown consent was not to substitute the Crown's decision for that of the band, but to prevent exploitation. . . . [T]he Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident – a decision that constituted exploitation – the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.²⁶⁷

²⁶⁷ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 at 208 (SCC). On this point, Gonthier J concurred with McLachlin J's view that "the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured" (at 200).

In *Chippewas of Kettle and Stony Point*, Killeen J, whose judgment was upheld by the Ontario Court of Appeal, concluded that “the existence of a fair bargain is not a condition precedent to the exercise of the surrender power under s. 49 of the Act or to the acceptance of a surrender by the Governor in Council thereunder,” and that a bad bargain cannot work to vitiate the consent of either the Band or the Governor in Council.²⁶⁸ In other words, evidence of an unconscionable transaction cannot affect an otherwise valid surrender.

Nevertheless, in the present case, the provisions of the *Indian Act* and the nature of the relationship between Canada and the Indians give rise to a fiduciary duty on the Crown, and more specifically the Governor in Council, to withhold its consent to a surrender under section 49(4) of the Act where the Band’s decision to surrender was, to use the words of McLachlin J, “foolish or improvident – a decision that constituted exploitation.” It is of interest to note that, in *Apsassin*, McLachlin J relied on the trial judge’s findings of fact and concluded that the surrender of the reserve by the Beaver Indian Band made “good sense” when viewed from the Band’s perspective at the time.²⁶⁹

By way of contrast, in the present case we find that the surrender of Indian Reserves 112 and 112A was clearly improvident and exploitative of the Band. Accordingly, the Governor in Council had an obligation to prevent the surrender from taking place by simply withholding its consent. The evidence on this point speaks for itself.

Prior to the surrender, the Band, in common with the Thunderchild Band, held “about six miles square, of the best possible land” for farming in central Saskatchewan.²⁷⁰ Chief Moosomin and his people had settled on this land in keeping with the promise in Treaty 6 that Indian bands would become self-sufficient by establishing agriculture as their primary means of livelihood. Despite the policies of the Canadian government which nominally promoted Indian farming, but effectively undermined this objective at the same time, the Moosomin Band developed a respectable economy based on mixed farming. Agent Day remarked on the success of Band members as farmers and stockmen on their original reserve and said that he had “every hope that by

²⁶⁸ *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1995) 24 OR (3d) 654 at 698 (Ont. Ct (Gen. Div.))

²⁶⁹ The relevant factors included, as noted above, the Band’s interest in acquiring a new reserve closer to its traplines. It will also be recalled that the Band was not using the reserve for farming or any other purpose except as a summer campground.

²⁷⁰ B. Prince to T.O. Davis, April 16, 1902 (ICC Documents, p. 178).

this means they will ultimately become perfectly independent of government aid." He added that "the Indians of this band are very industrious and progressive. They are keenly alive as to ways and means of earning money, and, as a consequence, are becoming quite prosperous."²⁷¹ Despite Day's ready acknowledgments of the Band's success in farming, the Department devastated this prosperity by taking away the Band's high-quality land and replacing it with land that was decidedly inferior.

Indeed, the productive capacity of the land was the evident motivation for the surrender in the first place. Not only was the land actively sought by settlers and politicians acting on their behalf, but the Department laboured under the unfounded perceptions that Indians were competing unfairly with non-Indian farmers, and that the amount of land reserved for Indians was excessive in proportion to their numbers.

In this connection, the Commission adopts the following assessment of the Band's situation prior to the surrender:

The image of the band acquired from official reports was one of steady material and social improvement, which had been won after considerable initial difficulties had been experienced in settling down to life on the land. The record makes it clear that this progress was not made easily, or without effort. It was evident that there had been many interruptions in the band's movement towards well-being, which developed in part from finally becoming familiar with the place in which the band had made its home since 1882. Just as this progress had begun to be discernible, however, a series of external events were to occur which would disrupt the band's development just as it had begun to accelerate.²⁷²

The surrender forced the Band to relocate farther north, far from the rich agricultural lands bordering on the North Saskatchewan River and with no access to the river or to the railway. Whereas the Band had formerly found success in agriculture, the new reserve was inappropriate for mixed farming. Although parts of the reserve were satisfactory for grazing cattle, the land generally was covered in boulders and was rough.²⁷³ Day's successor as Indian agent was eventually forced to report that "[t]hey have never raised a good crop on the Moosomin Reserve, and they have met with so many fail-

271 Canada, Parliament, *Sessional Papers*, 1910, No. 27, "Annual Report for the Department of Indian Affairs for the Year Ended 31st December, 1909," 128-31 (ICC Documents, p. 1753).

272 Don McMahon, "The Surrender and Sale of Moosomin Indian Reserve No. 112," *Federation of Saskatchewan Indians*, August 1, 1985 (ICC Documents, p. 784).

273 Field notes and report of Fred W. Wilkins, September 4, 1889, and September 20, 1889 (ICC Documents, pp. 1561-74, 1575-89); Field notes of W.R. Reilly, May 29, 1903 (ICC Documents, pp. 1599-1610); W.R. Reilly to Surveyor General, June 12, 1903 (ICC Documents, p. 1611).

ures that it is hard to get them to take any interest in farming.”²⁷⁴ The key reasons for these failures may be traced to the surrender – namely, the poor quality of the replacement land and the sense of dislocation suffered by the Band.

The situation that eventually unfolded on the new reserve at Jackfish Lake was well summarized in 1930 by Commissioner Graham, who ironically was the same man who had orchestrated the ruinous surrender of the best part of the Kahkewistahaw reserve in 1907. It will be recalled that Graham equated the situation at Moosomin with the Alexis Reserve in Alberta, where “[a]griculture apparently was the last thing that was in the minds of those who agreed to set aside this particular reserve for Indians.”²⁷⁵ Specifically with respect to the members of the Moosomin Band, Graham commented that “they surrendered a splendid farming reserve, and were removed to their present location, which is hilly, stony, in a frost belt and practically useless as a farming proposition.”²⁷⁶ Graham suggested that moving the Alexis Band was a possible solution, and implied that such action might also be required with respect to the Moosomin Band. Given that the Band had already been moved to this location, supposedly for its greater benefit, it is indeed ironic that the Department’s proposed solution was yet another move.

In the Commission’s view, this was an entirely predictable result. Departmental officials were aware, or ought to have been aware, that this surrender was utterly foolish and improvident when viewed from the Band’s perspective at the time. The Band’s hard-won successes in agriculture were sacrificed to “open up” the reserve to settlers who coveted the high-quality land. The *goal*, and not simply the *effect*, was to convey these opportunities for success into the hands of settlers. The land to which the Band was dispatched was of significantly poorer quality than that which it had surrendered. While the site of former IR 112 is intensively cultivated, the new reserve (IR 112B) has resisted all efforts to turn it into a viable farming operation. As the evidence demonstrates, this was a known and predictable result at the time of the surrender.

The relocation did more than simply set back the farming operations. It also discouraged Band members from taking up “their industries.” More-

274 J.A. Rowland, Indian Agent to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, June 7, 1918 (ICC Documents, p. 671).

275 W.M. Graham, Indian Commissioner, to D.C. Scott, Deputy Superintendent General, April 24, 1930, NA, RG 10, vol. 4095, file 600324 (ICC Documents, p. 740).

276 W.M. Graham, Indian Commissioner, to D.C. Scott, Deputy Superintendent General, April 24, 1930, NA, RG 10, vol. 4095, file 600324 (ICC Documents, p. 741).

over, it evidently confused and distressed many who did not appear to be aware that a surrender had taken place, and it imposed a serious “transition cost” on the Band. The effect of uprooting a community, largely against its will, and attempting to settle it in an unfamiliar and unforgiving location seems to have been wholly disregarded by agents of the Crown. In short, allowing the Band to surrender its reserves amounted to exploitation and a breach of the Crown’s fiduciary duty.

There is one question that the Crown should have asked itself, but apparently never did: Is it in the best interests of the Moosomin Band to surrender its land and relocate to IR 112B? The answer was clearly no. The facts disclose *why* this question was never asked: simply put, the answer would not benefit the Crown and local settlers, whose interests were the paramount consideration throughout. We conclude that, not only did the Crown fail to turn its mind to the question whether the surrender was foolish or improvident when viewed from the perspective of the Moosomin Band at the time, but Indian Affairs officials were not even alert to the fact that such a question might be relevant given the trust and confidence placed in the Crown by the Band.

ISSUE 3 STANDARD AND ONUS OF PROOF

In the parties’ agreed statement of issues, the Commission was asked to address the following question: “If the evidence is inconclusive in determining any of the above issues, upon whom does the onus of proof rest?” The general principle with respect to the burden of proof and onus is that the First Nation, as the claimant, bears the burden of proving that the Crown has breached its lawful obligations. The standard of proof is based on the civil standard described by the British Columbia Court of Appeal in *Rex v. Findley*:

In a civil action, the plaintiff is said to have made out a *prima facie* case when he has adduced evidence which is capable of showing a greater probability of what he alleges is more correct than contrary. . . . In a civil case, one side may win a decision by the narrowest of margins upon reasons which seem preponderating, although they are not in themselves decisive. . . . The court’s decision may rest on the balance of probabilities.²⁷⁷

²⁷⁷ *Rex v. Findley*, [1944] 2 DLR 773 at 776 (BCCA).

That the First Nation bears the burden of proof is also clear from the Specific Claims Policy, which states:

The criteria set out above are general in nature and the actual amount which the claimant is offered will depend on the extent to which the claimant has established a valid claim, *the burden of which rests with the claimant*.²⁷⁸

In the present case, the Moosomin First Nation has satisfied the burden of proof on a balance of probabilities. In fact, the evidence is overwhelming and we have little doubt that the Crown breached its pre-surrender fiduciary duties owed to the Moosomin Band. Since the evidence is conclusive on this issue, it is not necessary to consider whether the onus should shift to the Crown under the circumstances.

Although the evidence is clear on the Crown's breach of fiduciary duty, it will be recalled, however, that we declined to make any findings on whether the surrender provisions of the *Indian Act* had been complied with because, in our view, the evidence was inconclusive. Having said that, we do not intend to resolve this issue by imposing the onus of proof on either the Moosomin Band or Canada because it is simply not necessary to do so in view of our findings on breach of fiduciary obligation.

In declining to address this issue, we note that there is little to be gained from finding that the surrender was invalid or void *ab initio* (i.e., void from the outset) on the grounds that it did not comply with the mandatory provisions of the *Indian Act*. From a practical perspective, the issue of statutory compliance is academic because the Specific Claims Policy clearly states that innocent third parties who subsequently purchase surrendered lands will not be dispossessed of their interest as a result of any settlement reached between Canada and the First Nation.²⁷⁹ Since the evidence before us suggests that the federal government no longer owns the lands which are the subject of this claim, the First Nation would be entitled only to compensation in lieu of having these specific lands returned to reserve status.

Nor does our decision not to address the compliance issue have any impact on the compensation available to the Moosomin First Nation under the Specific Claims Policy. In this regard, we wish to emphasize that the Moosomin Band would not have surrendered its reserves *but for* the Crown's

²⁷⁸ *Outstanding Business*, 31.

²⁷⁹ *Outstanding Business*, 31. Under the heading of "Compensation," item 8 states: "In any settlement of specific native claims the government will take third party interests into account. As a general rule, the government will not accept any settlement which will lead to third parties being dispossessed."

breach of fiduciary obligation in procuring the surrender. Likewise, we are also satisfied that the Band would not have lost its reserves if the Governor in Council had properly exercised its discretion by refusing to consent to the foolish, improvident, and exploitative surrender of these lands. Since the Band lost its land only as a result of Canada's improper conduct, it is our view that the First Nation would be entitled to claim compensation under the Specific Claims Policy for the "current, unimproved value of the lands" plus loss of use because the lands were not "lawfully surrendered."²⁸⁰ This result flows not only from the policy but also from the well-established principle of restitution, which suggests that compensation should attempt to place the First Nation in the same position it would have been in if the Crown had not breached its fiduciary obligations.

²⁸⁰ See item 3 under the heading of "Compensation" in *Outstanding Business*, 31.

PART V

CONCLUSIONS AND RECOMMENDATION

The question before the Commission is whether the Government of Canada owes an outstanding lawful obligation to the Moosomin First Nation. We have concluded that it does.

In view of our conclusions regarding the Crown's fiduciary obligations with respect to this surrender, it is not necessary for the Commission to make a finding on whether there was compliance with section 49(1) of the *Indian Act*.

We conclude, however, that Canada breached its fiduciary obligations in securing the surrender of Indian Reserves 112 and 112A because the Crown failed to respect the Band's decision-making autonomy and, instead, engaged in "tainted dealings" by taking advantage of its position of authority and by unduly influencing the Band to surrender its land. Rather than taking Josie Moosomin's letter of November 1906 as an expression of the Band's intention to retain its land, the Department ignored Josie Moosomin's plea and promptly took steps to arrange for that very surrender. Crown officials deliberately set out to use their positions of authority and influence to completely subordinate the interests of the Moosomin Band to the interests of settlers, clergymen, and local politicians who had long sought the removal of the Indians and the sale of their reserves. The surrender was pursued in the face of consistent statements from the Band that it did not wish to give up its land or relocate. In the final result, the Crown abdicated its trustlike responsibilities and ignored the intentions and wishes of the Band. Under the circumstances, it would be unsafe to rely on the surrender as an expression of the Band's true understanding and intention.

We also have no hesitation in finding, on the facts of this case, that the Band's decision-making autonomy was ceded for it by the overwhelming power and influence exercised by Crown officials seeking to obtain the desired surrenders. Accordingly, we find that the Crown failed to meet its fiduciary duty to exercise its power and discretion in a conscientious manner

and without unduly influencing the Band's decision-making autonomy with respect to the proposed surrender of Indian Reserves 112 and 112A.

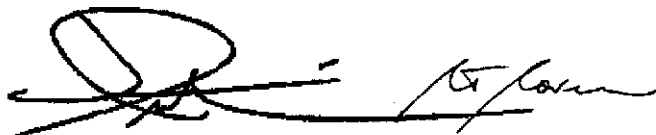
Finally, the evidence is clear that the Governor in Council gave its consent under section 49(4) of the *Indian Act* to a surrender that was foolish, improvident, and exploitative, both in the process and in the end result. The Crown's failure to prevent the surrender under these circumstances amounted to a breach of fiduciary duty.

RECOMMENDATION

Accordingly, we find, for the reasons stated above, that this claim discloses an outstanding lawful obligation owed by Canada to the Moosomin First Nation. We therefore recommend to the parties:

—————
That the claim of the Moosomin First Nation be accepted for negotiation under the Specific Claims Policy.
 —————

FOR THE INDIAN CLAIMS COMMISSION



P.E. James Prentice, QC
 Commission Co-Chair

Carole T. Corcoran
 Commissioner



Aurélien Gill
 Commissioner

Dated this 31st day of March, 1997.

Lo, the poor Indians they must suffer! The wards of the nation! The aborigines of Canada! The men whose rights they were sworn to protect were the victims of the conspiracy of a Turriff, a Pedley and a White. If anything has ever in the annals of Parliament been placed upon the table of this House calculated to bring the blush of shame to the face of any Canadian, it is the revelation contained in the evidence that is here to-night.

— Hon. R.B. Bennett, House of Commons debate on
Report of the Ferguson Royal Commission, April 14, 1915

APPENDIX A

MOOSOMIN FIRST NATION 1909 SURRENDER INQUIRY

- 1 **Request that Commission conduct inquiry** July 17, 1995
- 2 **Planning conference** October 19, 1995
- 3 **Community session** February 21, 1996

The Commission heard from the following witnesses: elders Peter Bigears, Norman Blackstar, Sidney Ironbow, Jimmy Myo, Isidore Osecap, and Adam Swiftwolfe, all of the Moosomin First Nation, and Edward Okanee, an elder of the Thunderchild First Nation. The community session was held at Cochin, Saskatchewan.

- 4 **Legal argument** September 24, 1996
- 5 **Content of formal record**

The formal record for the Moosomin First Nation Inquiry consists of the following materials:

- 4 exhibits tendered during the inquiry, including the documentary record (6 volumes with two annotated indices)
- written submissions of counsel for the First Nation
- transcripts of the community session and legal argument of the First Nation (two volumes)
- written correspondence among the parties and the Commission

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE 1927 SURRENDER CLAIM OF THE CHIPPEWAS OF KETTLE AND STONY POINT FIRST NATION

PANEL

Commissioner Roger J. Augustine
Commission Co-Chair Daniel J. Bellegarde

COUNSEL

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To the Indian Claims Commission
Kim Fullerton / Ron Maurice / Isa Gros-Louis Ahenakew

MARCH 1997

CONTENTS

PART I	<i>INTRODUCTION</i>	213
	Mandate of the Indian Claims Commission	215
PART II	<i>THE INQUIRY</i>	216
	Historical Background	216
	The Band and the Reserve	216
	Map 1: Claim Area Map	217
	Outside Interest in Reserve Land	219
	Initial Stage, 1900-20	219
	Map 2: Kettle Point Reserve	220
	Attempt to Lease Lakefront Lots, 1923	222
	Crawford's Offer, January 1927	224
	Kettle Point Surrender Vote, March 30, 1927	227
	Irregularities and Protests around Vote, 1927	228
	Community Session Evidence, 1995	233
	Post-Vote Events	237
	Indian Affairs Ignores Protests, 1927-29	237
	Crawford Fails to Pay, 1927-28	240
	Band Council Demands Payment, August 1928	241
	Stony Point Surrender, October 1928	242
	Conditional Payment and "Flip," October 1928	243
	Payment Returned, January 1929	245
	Involvement of White, 1928 to January 1929	246
	Crawford Pays Interest, March 1929	247
	Crawford Payment Returned, May 1929	248
	White's Higher Offer, May 1929	249
	Sale to Crawford and White, June 1929	250
	Finalization of Price and Deeds	251
	Distribution to Band, October 1929	252
PART III	<i>ISSUES</i>	255
PART IV	<i>ANALYSIS</i>	256
	Background	256
	Reasons of the Motions Judge	256

Reasons of the Ontario Court of Appeal 261
Issues 1 and 2: Was the Surrender Valid and Unconditional? 264
Issue 3: Breach of Fiduciary Duty 265
 Submissions of the Parties 265
 Did the Crown Breach Its Pre-surrender Fiduciary Duty? 266
 Did the Crown Breach Its Post-surrender Fiduciary Duty? 268
Issue 4: Was the Crown Negligent? 271

PART V FINDINGS AND RECOMMENDATION 272

Issues 1 and 2: Was the Surrender Valid and Unconditional? 272
Issue 3: Breach of Fiduciary Duty 273
Issue 4: Was the Crown Negligent? 273
Recommendation 274

APPENDICES 275

A Chippewas of Kettle and Stony Point First Nation Inquiry 275
B Statement of Issues Suggested by Counsel for Chippewas of Kettle and
Stony Point First Nation and Canada 276

PART I

INTRODUCTION

In 1827, the Indian peoples of the Kettle Point area along Lake Huron entered into Treaty 29, which covered most of what is now southwestern Ontario. Under the terms of this treaty, reserves were established to provide lands for the exclusive use and occupation of the Indians. This claim concerns the surrender of certain of these reserve lands in 1927 by the Chippewas of Kettle and Stony Point, 100 years after the treaty was signed. The land, described by the Indian Agent at the time of surrender as nothing but “white drifting sand, being worthless, for agricultural purposes,” was surrendered for sale to a purchaser who intended to develop a clubhouse and summer cottages. That was the eventual result, and today the land in question is held by a number of owners, none of whom are members of the Chippewas of Kettle and Stony Point First Nation.

In November 1992, the Chippewas of Kettle and Stony Point First Nation initiated an action in the Ontario Court (General Division) regarding the 1927 surrender.¹ The First Nation alleged that the surrender was invalid, that it had been obtained by bribery and fraud, and that the Crown had breached its fiduciary obligations to the First Nation throughout the surrender process. A meeting took place between the First Nation and the Department of Indian Affairs and Northern Development (DIAND) on January 6, 1993, to determine whether the First Nation had a specific claim against Canada. Counsel for the First Nation and for Canada agreed that the litigation could be placed in abeyance if the Specific Claims Branch of DIAND accepted the claim for negotiation.² On March 31, 1993, Canada advised the Chippewas of Kettle and Stony Point that “a lawful obligation does not arise out of this claim and

1 Ontario Court (General Division), Notice of Motion, Certificate of Pending Litigation, Chippewas of Kettle and Stony Point, Claim to an Interest in certain lands, November 6, 1992 (ICC Documents, pp. 704-13).

2 Russell Raikes to Judy Glover, A/Director Specific Claims East, February 11, 1993 (ICC Documents, pp. 761-66).

that there is no basis under the Specific Claims Policy to proceed to negotiations.”³

On August 26, 1993, Chief Thomas Bressette of the Chippewas of Kettle and Stony Point First Nation asked the Indian Claims Commission to review Canada’s rejection of the claim concerning the 1927 surrender.⁴ A Band Council Resolution authorizing the Commission to proceed was received on November 23, 1993.⁵ The Commission advised the Chippewas of Kettle and Stony Point and the Government of Canada on February 2, 1994, that it would conduct an inquiry into this matter.⁶

The Commission convened planning conferences on April 18 and October 17, 1994, to clarify and resolve matters as much as possible at a preliminary stage. The Commission then held a session at the Kettle Point Reserve on March 8, 1995, during which we heard from the community on the claim. On July 17, 1995, there was a Commission session in Toronto where the parties explored the issue of band membership. The Band and Canada made oral legal submissions in Toronto on October 26 and 27, 1995.

During the course of the Commission inquiry, the court action proceeded. Canada made a motion before the Ontario Court (General Division) for summary judgment, which was heard in December 1994. In essence, Canada asked the court to find that there was no issue of fact with respect to the validity of the surrender that would require a trial for resolution, and, further, that on the available facts the surrender was valid. On August 18, 1995, the court granted Canada’s motion and dismissed that portion of the Band’s case seeking a declaration that the land surrender and subsequent Crown patent were void.⁷ This decision was upheld on appeal by the Ontario Court of Appeal on December 2, 1996.⁸

Appendix A outlines the chronology of the inquiry and the content of the formal record. Appendix B sets out the issues before this Commission as identified by the First Nation and Canada.

3 Judy Glover, A/Director, Specific Claims East, to Chief Thomas Bressette, Kettle and Stony Point First Nation, March 31, 1993 (ICC Documents, pp. 861-63).

4 Chief Thomas M. Bressette to Harry LaForme, Chief Commissioner, Indian Claims Commission, August 26, 1993.

5 Chief Thomas M. Bressette to Harry LaForme, Chief Commissioner, Indian Claims Commission, November 23, 1993.

6 Chief Commissioner Harry LaForme, Indian Claims Commission, to Chief and Council, Chippewas of Kettle and Stony Point, and to the Ministers of Justice and Indian Affairs, February 2, 1994.

7 *Chippewas of Kettle and Stony Point v. Canada* (1995), 24 OR (3d) 654 (Ont. Ct. (Gen. Div.)).

8 *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1997), 31 OR (3d) 97 (CA).

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission was established in 1991 to assist First Nations and Canada in the negotiation and fair resolution of specific claims. Order in Council PC 1992-1730 empowers the Commission to inquire into and report on whether or not Canada properly rejected a specific claim:

AND WE DO HEREBY advise that our Commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development (hereinafter "the Minister"), by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:

- a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
- b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.⁹

Under this mandate, the Commission's task is to determine whether the Chipewas of Kettle and Stony Point First Nation have a valid claim for negotiation under the Specific Claims Policy. That Policy requires that a claim disclose an outstanding lawful obligation on the part of the Government of Canada before it may be accepted for negotiation. This report sets out our findings on the issue of lawful obligation and our recommendations to the claimant First Nation and to the government.

⁹ Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 21, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

PART II

THE INQUIRY

Part II of the report examines historical evidence relevant to the claim of the Chippewas of Kettle and Stony Point First Nation. The Commission's inquiry into this claim included the review of four volumes of documents submitted by the parties as well as numerous exhibits. At the information-gathering session in the community on March 8, 1995, the Commission heard directly from a number of the members of the First Nation.

HISTORICAL BACKGROUND

The Band and the Reserve

The Chippewas of Kettle and Stony Point First Nation (formerly known as the Chippewas of Kettle Point and Stony Point Band) consists of 1699 members, of whom 1029 live on Kettle Point Indian Reserve (IR) 44 and 670 live off reserve.¹⁰ Kettle Point IR 44, the First Nation's only reserve,¹¹ is located in southwestern Ontario on Lake Huron, 35 kilometres northeast of Sarnia and 60 kilometres northwest of London.¹²

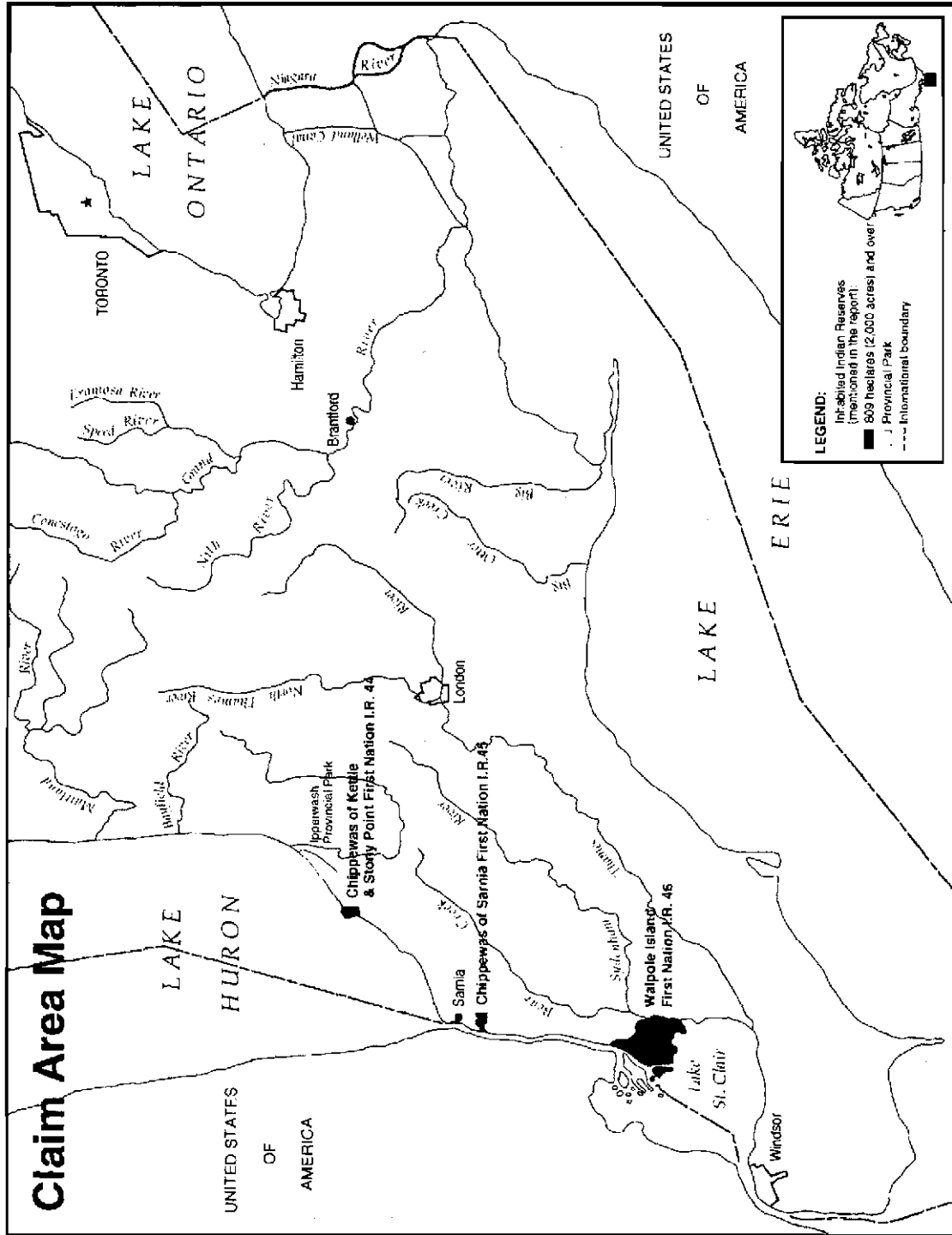
Reserve creation in southwestern Ontario took place after the War of 1812. Around 1818 more than 2 million acres located east of the St Clair River and southern Lake Huron, and known as the "Huron Tract," became the subject of treaty discussions with Chippewa chiefs and other Indian leaders in the area.¹³ They requested reserves at several locations including Kettle

10 Department of Indian Affairs and Northern Development (DIAND), Departmental Statistics, Indian Register, December 31, 1996.

11 Stony Point IR 43, about three kilometres east of Kettle Point, was also the subject of a land surrender and sale of waterfront lands in the late 1920s. In 1942 the Stony Point Reserve was expropriated for military purposes.

12 DIAND, *Schedule of Indian Bands, Reserves and Settlements* (Ottawa: DIAND, December 1992), and Departmental Statistics. The Kettle Point Reserve encompasses 2095 acres, or 848.8 hectares.

13 Map, "The Huron Tract Purchase," Canada, *Indian Treaties and Surrenders* (Toronto: Coles, 1971), 71-75 (IGC Documents, p. 47).



Point and Stony Point.¹⁴ A provisional agreement formalized the discussions in 1825.¹⁵ And, after the necessary surveys,¹⁶ Treaty 29, dated July 10, 1827, finally established reserves at Kettle Point, Stony Point, Sarnia, and Walpole Island for the Chippewas of Sarnia Band.¹⁷

Chippewas had been well established in southern Ontario since the early 18th century, but other nations were also in the area.¹⁸ Especially after the American Revolution, Potawatomi, Ottawa, Chippewa, Shawnee, and other groups moved from south of the Great Lakes into Upper Canada. Many already had family connections across the border with the United States, but additional movement was stimulated by the U.S. policy of relocating Indians west of the Mississippi River, by a scarcity of game, and by an attachment to the Great Lakes environment.¹⁹

Indian allies of the British residing in the United States had been receiving annual presents by crossing into British territory. In 1837 the British Indian Department announced it would no longer give presents to non-resident Indians. This change also encouraged thousands, mostly Potawatomi, to relocate from the United States to Upper Canada during the late 1830s and early 1840s. In the absence of specific treaty provisions for them, the Potawatomi newcomers had little choice but to wander, become squatters, marry into other bands, or assimilate into the settler society.²⁰ Some were taken into the Chippewas of Sarnia Band from which the Chippewas of Walpole Island Band and the Chippewas of Kettle and Stony Point Band were created.²¹

Walpole Island became a separate band in the 1860s,²² but the Chippewas at Kettle Point and Stony Point did not gain independence from the Sarnia Band, 40 kilometres away, until 1919, when they became the Chippewas of

14 R.J. Surtees, "Indian Land Surrenders in Ontario, 1763-1867," paper dated February 1984 (Ottawa: DIAND, 1983 [sic]), 82-85. Stony Point was also known as Aux Sable or Sable River.

15 Provisional Agreement, Treaty 27½, April 26, 1825 (ICC Documents, pp.1-2).

16 M. Burwell, Fieldbook, July 31, 1826 (ICC Documents, pp. 3-46).

17 Treaty 29, July 10, 1827, Canada, *Indian Treaties and Surrenders* (Toronto: Coles, 1971), 71-75 (ICC Documents, pp. 48-50).

18 E.S. Rogers, "Southeastern Ojibwa," in *Northeast*, ed. B.G. Trigger, vol. 15 of *Handbook of North American Indians*, William C. Sturtevant, gen. ed. (Washington: Smithsonian Institution, 1978), 760-64.

19 James A. Clifton, *A Place of Refuge for All Time: Migration of the American Potowatami into Upper Canada, 1830 to 1850* (Ottawa: National Museum of Man, 1975), 100.

20 James A. Clifton, *A Place of Refuge for All Time: Migration of the American Potowatami into Upper Canada, 1830 to 1850* (Ottawa: National Museum of Man, 1975), 32-36, 65-68, 86-87; Helen Hornbeck Tanner, ed., *Atlas of Great Lakes Indian History* (Norman and London: University of Oklahoma Press, 1987), 126.

21 James A. Clifton, *A Place of Refuge for All Time: Migration of the American Potowatami into Upper Canada, 1830 to 1850* (Ottawa: National Museum of Man, 1975), 90-95.

22 Nim.Da.Waab.Jig, *Walpole Island: The Soul of Indian Territory* (Walpole Island & Windsor: Commercial Associates, 1987, repr. 1989), 42-43.

Kettle and Stony Point Band.²³ Even after they became a separate band, Indian Affairs sometimes referred to the Indians with reserves at Kettle Point and Stony Point as the “Chippewas of Chenail Ecarte and St. Clair,” which is a geographically inaccurate name that harkens back to Treaty 29.²⁴

OUTSIDE INTEREST IN RESERVE LAND

Initial Stage, 1900-20

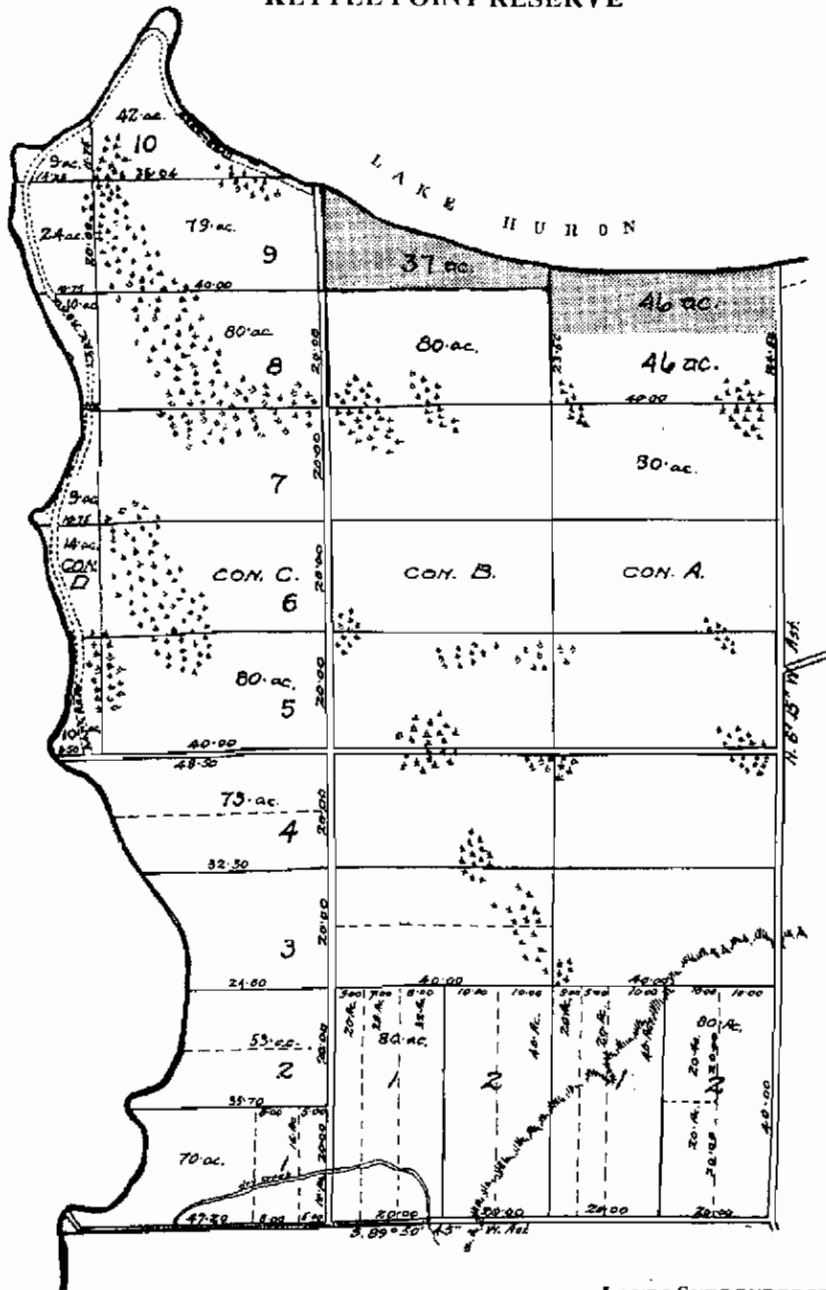
Indian Affairs' eventual sanction of the Kettle Point and Stony Point people's long-standing desire to separate from the Sarnia people coincided with mounting outside interest in lakeshore lands at the Kettle Point and Stony Point Indian Reserves. Earlier, when the Sarnia Band's reserves were being surveyed for subdivision into lots, Indian Affairs had opposed dividing the Band because the Kettle Point and Stony Point residents opposed the survey.²⁵ Thus, in 1900, Indian Affairs took the position that the overall wishes of the Sarnia Band should prevail:

[T]he Stony Point and Kettle Point Reserves are not the property of the Indians residing thereon, but are the common property of the whole Sarnia Band. It is very desirable to have the Reserves surveyed and subdivided into Lots, in order that the Indians residing thereon may be properly located and the surplus land available for location to other deserving Members of the Band.²⁶

Since the survey went ahead, the Kettle Point lots eventually surrendered in 1927 and sold in 1929 were identified by 1900 as Lot 8, concession A, and Lot 9, concession B.²⁷

- 23 Agreement, Chippewas of Sarnia, April 15, 1919, National Archives of Canada [hereinafter NA], RG 10, vol. 2568, file 115678, pt. 2 (ICC Documents, pp. 136-37). When they were separated in 1919, the Sarnia Band had a population of 294 and the Kettle and Stony Point Band had a population of 135. Order in Council PC 915, May 1, 1919, Governor General in Council, NA, RG 10, vol. 2568, file 115678, pt. 2 (ICC Documents, pp. 138-39). Calculation, Indian Affairs, [1 May 1919], NA, RG 10, vol. 2568, file 115678, pt. 2, (ICC Documents, 140).
- 24 Agreement, Chippewas of Sarnia, April 15, 1919, NA, RG 10, vol. 568, file 115678, pt. 2 (ICC Documents, pp. 136-37). “Chenail Ecarte and St. Clair” refer to the stream Chenail Ecarte in the vicinity of Walpole Island or Wallaceburg, Ont., and Lake St Clair and/or the St Clair River.
- 25 Petition from Chief Johnson & 23 others, Ravenswood, Ontario, to C. Sifton, Indian Affairs, April 2, 1900, NA, RG 10, vol. 2763, file 151900 (ICC Documents, p. 78).
- 26 James A. Smart, Indian Affairs, to J. Fraser, MP, April 19, 1900, NA, RG 10, vol. 2763, file 151900 (ICC Documents, pp. 86-87).
- 27 Plan T290 & Plan 419, W.S. Davidson, “Plan of Indian Reserves at Kettle Point and Stony Point, Scale 20 Chains to an Inch,” June 20, 1900 (ICC Documents, p. 125).

KETTLE POINT RESERVE



LANDS SURRENDERED

Adapted from:
 Plan of Indian Reserves at Kettle
 Point and Stony Point
 W.S. Davidson, O.L.S.
 Sarnia, June 20th, 1900

In 1900, the surveyor described soil at both the Kettle Point and Stony Point Reserves as “good clay loam,” which towards the north “becomes poor and sandy until near the lake shore it is drifting sand.”²⁸ He was not blind to the value of the waterfront, however. Indeed, he alerted Indian Affairs headquarters to its recreational potential:

The regular lots on Kettle Point Reserve are 20 chains wide and 40 chains long. The lots in Broken Front Concession D are very small but may be valuable for summer resort purposes as they adjoin the celebrated Kettle Point Bass fishing ground . . .²⁹

Waterfront land at the Stony Point Reserve was so desirable that the Thedford Board of Trade wrote the local Member of Parliament in 1911 suggesting the “handful of People [Indians]” there be moved to permit development.³⁰ After World War I, Thomas Paul was appointed to fill a vacancy at the Sarnia Indian Agency. He oversaw the affairs of what was properly called the “Chippewas of Kettle Point and Stony Point Band” from 1919 to 1930.³¹ One of his first acts was to advise headquarters that tourists were using the lakefront road and beaches between Kettle Point and Stony Point.³²

Several weeks later, W.R. White, another departmental official, suggested to the Deputy Superintendent General of Indian Affairs, Duncan Campbell Scott, that the “beautiful sand beach” at Kettle Point should be leased:

Another benefit which it was thought *should have accrued to this Department* was that the beautiful sand beach on lot 8, Con. A and lot 9, Con. B, could have been leased for summer resort purposes but the Indians refused to surrender it for lease.³³

Shortly after White’s memo to Scott, an agreement to separate under the authority of resolutions by “the Indians of Sarnia” and “the Indians of Kettle

28 Davidson to McLean, June 20, 1900, NA, RG 10, vol. 2763, file 152900 (ICC Documents, pp. 111-12).

29 Davidson to McLean, 20 June 1900, NA, RG 10, vol. 2763, file 151900 (ICC Documents, pp. 111-12).

30 Thedford Board of Trade to J.E. Armstrong, MP, Petrolia, Ont., December 14, 1911, NA, RG 10, vol. 7794, file number illegible (ICC Documents, pp. 127-28).

31 The Sarnia agent’s position had been vacant for months before Paul was appointed in 1919. When he left in 1930, the office was not filled again for two years. Previous Sarnia agents were A. English, c. 1899-1907; William Nisbet, 1908-11; R.C. Palmer, 1912-14; Timothy Maxwell, 1915-18. *The Canadian Almanac and Miscellaneous Directory* (Toronto: Copp Clark Co., 1899-1930).

32 Agent Thomas Paul, Sarnia, to J.D. McLean, Assistant Deputy and Secretary, Indian Affairs, Ottawa, February 12, 1919, NA, RG 10, vol. 7709, file 23029-2A (ICC Documents, pp. 132-33).

33 White to Scott, March 1, 1919, NA, RG 10, vol. 7709, file 23029-2A (ICC Documents, pp. 134-35). Emphasis added. The Commission has no information about W.R. White; it is not known whether or not he was related to John A. White who later purchased the Kettle Point lands.

and Stony Points” appeared.³⁴ The separation was accomplished by May 1, 1919.³⁵ Local pressure for the establishment of a separate agency for Kettle Point and Stony Point followed because some felt the Indians there were “a disgrace to the community.”³⁶ Appointing a farm instructor was also considered. If the Indians were “improvident,” the Department’s assistant accountant thought the farm instructor could make arrangements “to have the lands worked for the benefit of the owners.”³⁷ D.C. Scott brought the matter to the attention of Arthur Meighen, Superintendent of Indian Affairs and the Minister of the Interior.³⁸ To our knowledge no action was taken.

Attempt to Lease Lakefront Lots, 1923

During the summer of 1923, local residents (including A.M. Crawford who later bought the land with John A. White) petitioned for a road through the Kettle Point and Stony Point reserves to gain access to the lakefront.³⁹ On August 29, 1923, W.I. Kemp and associates applied to lease Kettle Point lands to build a hotel and golf course. They hoped to avoid “a large initial outlay on the land itself,” but, if the Indians preferred to sell rather than lease, they wanted “to negotiate with the Indians on a basis satisfactory to all interested parties.”⁴⁰

Indian Affairs headquarters asked Agent Paul to determine if the Indians would be willing to either lease or sell and, if so, on what terms and conditions.⁴¹ In response, Paul echoed the surveyor’s view that “Lot 8, Range A, and Lot 8 and 9, Range B, Kettle Point Indian Reserve are of very little value, from an agricultural standpoint, being white sand.”⁴²

In anticipation of a vote on a surrender for lease, the self-described “Original” members of the Band (descendants of the Chippewas who had signed

34 Agreement, Chippewas of Sarnia, April 15, 1919, NA, RG 10, vol. 2568, file 115678, pt. 2 (ICC Documents, pp. 136-37).

35 Order in Council PC 915, May 1, 1919, Governor General in Council, NA, RG 10, vol. 2568, file 115678, pt. 2 (ICC Documents, pp. 138-39).

36 W.P. Fuller, Ravenswood, Ontario, to Head, Dept. of Indian Affairs, September 22, 1919 (ICC Documents, pp. 142-47); D.C. Scott to W.P. Fuller, October 6, 1919 (ICC Documents, p. 148); McKay to D.C. Scott, October 24, 1919 (ICC Documents, p. 149).

37 McKay to D.C. Scott, October 24, 1919 (ICC Documents, p. 149).

38 D.C. Scott to A. Meighen, Superintendent General of Indian Affairs and Minister of the Interior, November 13, 1919, NA, RG 10, reference illegible (ICC Documents, p. 150). Eight months later Meighen became prime minister.

39 Petition, Ratepayers and residents of town of Thedford and Township of Bosanquet, Port Frank, Ontario, to C. Stewart, SGIA, Indian Affairs, Ottawa, August 10, 1923, NA, RG 10, vol. 7709, file 23029-2B (ICC Documents, pp. 155-57); C. Stewart, SGIA, Indian Affairs, to J.E. Armstrong, Port Frank, Ontario, September 5, 1923, NA, RG 10, vol. 7709, file reference illegible (ICC Documents, p. 161).

40 J.L. Kemp, Barrister, Ottawa, to DSGIA, Indian Affairs, August 29, 1923 (ICC Documents, pp. 158-59).

41 J.D. McLean to Agent Thomas, September 4, 1923 (ICC Documents, p. 160).

42 Paul to McLean, September 6, 1923, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, p. 162).

Treaty 29) contacted Indian Affairs through their lawyer, W.G. Owens. Mr Owens raised questions about the financial return, the composition of the Band, and the appropriateness of the development. His letter of September 19, 1923, is prophetic with respect to the surrender and sale of the same lands a few years later:

[T]he proposition is . . . to lease . . . some 200 acres . . . close to . . . Ipperwash Beach for . . . thirty years at . . . \$2.00 per acre, or \$400 in all. The Lessee evidently proposes to sublet this property in a small lots suitable for summer cottages, and to derive therefrom a very large revenue. . . . On that basis it looks to our clients as though the interest of the band would suffer very considerably for the benefit of a private individual.

We are further instructed that the band at Kettle Point is now practically in the control of certain individuals who have at some time or other been admitted to the band and who are not true Chippewas. Some of them are French half-breeds who many years ago obtained admission to the band through intermarriage, and others are Pottowatomies who came in through Michigan and mingled with the band many years after 1827 when the original treaty was made. These people, French and Pottowatomies, now outnumber the original Chippewas and we are instructed are intent on putting through this proposed deal . . .

. . .

The proposed deal . . . is objectionable . . . also because of the disturbances and bad influence that may result from the installation of this proposed summer resort.⁴³

The actual arrangement was to lease 209 acres at Kettle Point to Mr Kemp for cottages, a boardinghouse, a clubhouse, garages, bathhouses, boathouses, golf links, tennis courts, refreshment stands, et cetera at a rate of \$400, \$500, and \$600, for the first, second, and third years, respectively.⁴⁴ Owens requested a hearing for his clients and a full investigation of the proposal to lease.⁴⁵

Two votes were held; the first rejected the lease proposal,⁴⁶ and a second favoured the proposal but was poorly attended.⁴⁷ Meanwhile, Owens persisted

⁴³ W.G. Owens to Superintendent General, Indian Affairs, September 19, 1923, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, pp. 163-64).

⁴⁴ Executed Articles of Agreement between Canada and Wesley Irving Kemp, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, p. 176). Dollar figures for the fourth and succeeding years are typed over and illegible.

⁴⁵ W.G. Owens to Superintendent General, Indian Affairs, September 19, 1923, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, pp. 163-64).

⁴⁶ Minutes, General Council, William George, Secretary, September 21, 1923 (ICC Documents, p. 165); Agent to J.D. McLean, September 22, 1923 (ICC Documents, p. 166).

⁴⁷ Indian Agent [Paul] to McLean, October 13, 1923, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, pp. 177-78).

in his demand for a special investigation.⁴⁸ Although a 30-year lease agreement was signed by the elected Chief and Council on October 11, 1923,⁴⁹ Mr Paul recommended against it. Paul told headquarters the lease “would divide the Band . . . and cause trouble.”⁵⁰ The protestors claimed the second vote was held without proper notice and that Paul had argued strongly in favour of the lease at the meeting.⁵¹

In the end, Indian Affairs decreed that there would be no further action on the lease because “the Department does not consider the vote taken satisfactory.”⁵² Privately, Paul was reminded to follow proper procedures:

In view . . . of the complaint which has been made [with respect to the administration of the Kettle Point Indian Reserve], it would be well for you to use your best efforts to see that matters are conducted in such manner as to avoid if possible, cause for any future complaint such as has recently been made.⁵³

Crawford's Offer, January 1927

In May 1926 lobbying to have the lakeshore road improved escalated. Pointing out that “it is a matter of interest for the whole country to attract trade and Western Ontario has few if any such assets equalling the shore line round Kettle Point and Ipperwash Beach to Stony Point,” the local community association appealed to Member of Parliament J.E. Armstrong for road work.⁵⁴ Accordingly, the Band was pressured into putting money and work into the road in July and December 1926.⁵⁵

48 Owens to Superintendent General, Indian Affairs, October 1, 1923, NA, RG 10, vol. 8016, file 471/132-8-44-11 (ICC Documents, p. 168); McLean to Owens & Goodwin, October 1, 1923 (ICC Documents, 171); Owens to Secretary, Indian Affairs, October 11, 1923 (ICC Documents, p. 175).

49 Executed Articles of Agreement between Canada and Wesley Irving Kemp, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, p. 176).

50 Indian Agent [Paul] to McLean, October 13, 1923, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, pp. 177-78).

51 Owens to McLean, October 15, 1923, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, pp. 182-84). Caleb Shawkence et al. to Indian Affairs, October 13, 1923, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, pp. 179-81).

52 McLean to Owens & Goodwin, October 19, 1923, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, p. 185); McLean to Paul, October 19, 1923 (ICC Documents, p. 186); McLean to C. Shawkence, October 19, 1923 (ICC Documents, p. 187); McLean to Owens & Goodwin, October 20, 1923 (ICC Documents, p. 188); Owens to McLean, October 23, 1923, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, p. 190).

53 McLean to Paul, November 14, 1923 (ICC Documents, p. 196).

54 D. Rymer, President, Forest Community Association, to J.E. Armstrong, MP, May 29, 1926, NA, RG 10, vol. 7709, file 230029-28 (ICC Documents, p. 235-36).

55 C.L. Hufiman to J.E. Armstrong, May 31, 1926 (ICC Documents, p. 237); Armstrong to Scott, June 7, 1926 (ICC Documents, p. 238); Armstrong to Scott, June 12, 1926 (ICC Documents, p. 244); Armstrong to Scott, June 16, 1926 (ICC Documents, p. 245); R.H. Abraham, Agricultural Representative, Indian Affairs, Chatham, Ont., to Scott, June 19, 1926 (ICC Documents, pp. 246-47); Minutes, Band Council Meetings, July 8, 1926, and December 9, 1926 (ICC Documents, pp. 248-50).

On January 15, 1927, "Crawford and Co." made their request to purchase the desirable lands at Kettle Point:

We would like to purchase, the N. ½, of Lot, No. 8, Range, A, containing 46 acres, more or less, and all of Lot, No. 9, Range, B. containing 37 acres, more or less, on the Kettle Pt. Indian Reserve for the purpose of building a club house, and summer cottages.⁵⁶

Even though no price was mentioned, Mr Paul supported a surrender for sale to Crawford:

As this land is worthless, for agricultural purposes, being white drifting sand, and as the Indians have never received any revenue from the land described, I would recommend that the Department give the application careful and favourable consideration, and if approved by the Department, forward forms for surrender with instructions.⁵⁷

Indian Affairs prepared a "Description for surrender" and sale to Mr Crawford. It identified 44 acres – not 46 acres – in Lot 8 and "all of" or 37 acres in Lot 9. The total amounted to 81 acres, not 83 acres.⁵⁸

Before Crawford had stated any price in writing, Mr Kemp wrote to the Minister of Indian Affairs to offer to purchase 209 acres there (all of Lot 8, range A, and Lots 8 and 9, range B) for \$15,000 or \$71.77 per acre.⁵⁹ The Assistant Deputy and Secretary, J.D. McLean, instructed Paul to submit Kemp's offer to the Band before Crawford's but there is no evidence Paul did so.⁶⁰

At this point, the Member of Parliament for West Lambton, W.J. Goodison, intervened on behalf of Crawford, writing to J.C. Caldwell, who was in charge of the Lands and Timber Branch at Indian Affairs headquarters, to name a price of \$85 per acre. For 83 acres (north half of Lot 8, range A, and all of Lot 9, range B), "[t]his offer is for [\$7,055] cash," wrote Goodison.⁶¹

56 Crawford to Paul, January 15, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 251).

57 Paul to McLean, January 15, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 252).

58 "Description for surrender," January 24, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 254).

59 McLean to Paul, February 21, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 261); Kemp to Minister of Indian Affairs Stewart, February 22, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 262-63).

60 McLean to Paul, March 1, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 264).

61 Goodison to J.C. Caldwell, In Charge, Lands & Timber Branch, Indian Affairs, March 11, 1927, NA, RG 10, reference illegible (ICC Documents, p. 267).

Should the Indians want to sell more land, Goodison indicated Crawford was willing to pay for it at the rate of \$85 per acre.⁶²

Mr Caldwell recommended submitting the Crawford offer to the Band.⁶³ Deputy Superintendent General Scott forwarded the surrender documents and instructions to Paul on March 14, 1927, advising him to take a careful vote:

pay particular attention to the requirement for furnishing a voters' list, showing the number of voting members of the Band present at the meeting called for the purpose of taking surrender, the number voting for the surrender and the number against.⁶⁴

Other instructions were those sent to all Indian agents regarding the procedures for taking a surrender. Issued in 1925 but still in effect in 1927, they stipulated that:

2. An officer duly authorized . . . shall . . . make a voters' list of all the male members of the band of the full age of twenty-one years who habitually reside on or near and are interested in the reserve in question.

3. The meeting or council for consideration of surrender shall be summoned according to the rules of the band, which unless otherwise provided, shall be as follows: – Printed or written notices giving the date and place of the meeting are to be conspicuously posted on the reserve, and one week must elapse between the issue or posting of the notices and the date for meeting or council. The interpreter . . . must deliver, if practicable, written or verbal notice to each Indian on the voters' list, not less than three days before the date of the meeting . . .

4. The terms of the surrender must be interpreted to the Indians . . .

5. The surrender must be assented to by a majority of the Indians whose names appear upon the voters' list, who must be present at a meeting or council summoned for the purpose as hereinbefore provided.

6. The officer duly authorized shall keep a poll-book and shall record the vote of each Indian who was present at the meeting or council and voted.

7. The surrender should be signed by a number of Indians and witnessed by the authorized officer, and the affidavit of execution of the surrender should be made by the duly authorized officer and the chief of the band and a principal man or two principal men before any person having authority to take affidavits and having jurisdiction within the place where the oath is administered.

62 Goodison to J.C. Caldwell, In Charge, Lands & Timber Branch, Indian Affairs, March 11, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 268).

63 Caldwell to DSGIA, March 14, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 270).

64 DSGIA to Paul, March 14, 1927 (ICC Documents, p. 271).

8. The officer taking the surrender should report the number of voting members of the band as recorded in the voters' list, the number present at the meeting, the number voting for and the number against the surrender.⁶⁵

When Paul received the surrender Form No. 65 made out by headquarters for an 81-acre surrender, he changed the acreage to 83 acres by writing over the figures.⁶⁶

KETTLE POINT SURRENDER VOTE, MARCH 30, 1927

At a General Council on March 30, 1927, Robert George and Sam Bressette moved to accept Crawford's \$85 per acre offer. Only Crawford's name was mentioned, and there was no reference to the cash "bonuses" or "bribes" that later became an issue. The motion simply read:

Moved . . . that the sale of the north 1/2 of lot 8, Range A, and all of lot No. 9, Range B, Kettle Point to Mr. A. Mackenzie Crawford of Sarnia, Ontario, containing 83 acres be approved of. The price to be \$85.00 per acre cash and that 50 per cent of the purchase price be distributed among the members of the Band.⁶⁷

The Agent's "Poll Book," dated only "March 1927," indicates by the mark X against 27 of the 39 names listed there which members "Voted For." The "Voting Against" column is blank; however, in the "Remarks" column there is the cryptic note: "P.S. Those members on List were absent, at this meeting, who did not vote."⁶⁸ Paul recorded that 27 voted for the surrender and that the voting strength of the Band was 44.⁶⁹

On March 30, 1927, Chief John Milliken, Robert George, Sam Bressette, John Elijah, Dan Bressette, and James Henry, as "Chief and Principal men of . . . Chippewas of Chenail Ecarte and St. Clair," surrendered 83 acres at Kettle Point "on behalf of the whole people of our said Band in Council assembled" to the Crown "on trust to sell the same at a price of Eighty-five dollars per acres, cash, to such person or persons, and upon such terms as the Government . . . may deem most conducive to our Welfare and that of

65 Instructions for guidance of Indian Agents, D.C. Scott, February 13, 1925 (ICC Documents, p. 229).

66 Surrender of Lot 9, con. B, and Pt. Lot 8, con. A, Kettle Point Reserve, March 30, 1927, Form No. 65 (ICC Documents, pp. 280-82).

67 Minutes, March 30, 1927, General Council, William George, Secretary (ICC Documents, p. 277), and copy of Minutes, March 30, 1927, General Council, Thomas Paul, Agent (ICC Documents, p. 278).

68 "Poll Book, Re: McKenzie [sic] Crawford's Application to Surrender [sic] N 1/2 Lo 8, Rge 'A' & all of Lot 9, Rge 'B', Kettle Pt., March 1927," NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 285-87).

69 "Copy of Poll Book, Kettle Point Surrender, Re: McKenzie [sic] Crawford," March 30, 1927 (ICC Documents, p. 288).

our people.”⁷⁰ Affidavits by Thomas Paul and the Chiefs and councillors confirming that the surrender was correctly assented to were sworn, in an irregular fashion, before Mr Paul himself at Kettle Point on March 30, 1927. The affidavits stated that:

the surrender was assented to by a majority of . . . male members . . . of the full age of twenty-one years entitled to vote, all of whom were present at the meeting or council.

and

no Indian was present or voted at such council or meeting who was not a habitual resident on the reserve of the said band of Indians and interested in the land mentioned in the said release or surrender.⁷¹

By Order in Council PC 842 on May 11, 1927, Canada accepted this surrender for sale of 83 (not 81) acres at Kettle Point IR 44 by the “Chippewas of Chenail Ecarte and St. Clair Band” as having “been duly authorized, executed and attested in the manner required by the 49th Section of the Indian Act.”⁷² This acceptance was in spite of several obvious irregularities: the anachronistic band name on the surrender documents, the minor discrepancy in acreage, and the fact that Agent Paul had sworn his own affidavit.

Irregularities and Protests around Vote, 1927

Other irregularities, not immediately apparent from the surrender papers, surfaced later. On the one hand, not all the voters who “voted for” were present at the meeting. On the other hand, Crawford was present and very directly involved in obtaining the surrender. Also, Crawford paid or expected to pay individual “bonuses,” which were above the \$85 per acre. Anticipating trouble, Crawford assured Goodison that every eligible voter would receive some extra cash. On April 1, 1927, Mr Crawford wrote:

I think I forgot to tell you that all the Indians of the band over twenty-one that have a vote will get their bonus just the same as the ones that did vote.

70 Surrender of Lot 9, con. B, and Pt. Lot 8, con. A, Kettle Point Reserve, March 30, 1927, Form No. 65 (ICC Documents, pp. 280-82).

71 Surrender of Lot 9, Con. B and Pt. Lot 8, Con. A, Kettle Point Reserve, March 30, 1927, Form No. 66 (ICC Documents, p. 283).

72 Order in Council, PC 842, May 11, 1927 (ICC Documents, p. 284).

We tried to buy it that day for \$100.00 per acre, but they all said they had to have some money right away. So we agreed to pay them \$85.00 per acre and \$15.00. There was nothing underhanded everything was disgust (sic) at the meeting.

There was one surrender paper that had been overlooked and I had to go back the next day to have the Chief and councillors sign it. I had to go to their homes, and I am quite satisfied they needed a little money.⁷³

As Crawford was writing to Goodison on April 1, 1927, Mr Paul was writing two different letters to headquarters on the same day. One dealt with the "bonuses" and implied that Paul had little control over the circumstances of the vote:

Mr. Crawford agrees to pay to the Indians, qualified to vote, whether voting for, the surrender or against it, a Bonus, of \$15.00, each, that is the 44 qualified voters, will each receive \$15.00, as a cash bonus, after he receives his deed, from the Department. I might say, that I advised against this procedure, but Mr. Crawford and especially the Indians, seemed determined to have it this way.

Possibly the immediate need of money stimulated this action.

Trusting that this will not create sufficient irregularity, to cancel, this meeting, and sale of land, to Mr. Crawford . . .⁷⁴

The other letter that Mr Paul wrote to headquarters on April 1, 1927, failed to mention the "bonuses." Moreover, it misrepresented the number of voters present at the March 30, 1927, meeting:

There were present, at this meeting, 27 members, who were qualified to vote, on this question, who all voted in favour of the surrender, at a price of \$85.00, per acre, cash, when approved of by the Department. The voting strength of the Band, being 44, and the number voting for the surrender, 27, gives a majority, in favour of the surrender, it is understood, that when the purchase price is paid in full to the Department, that 50%, will be distributed to the Band. I might add, as stated, in previous correspondence, that the property described in this surrender, is white drifting sand, being worthless, for agricultural purposes.⁷⁵

It seems one Maurice George was not present at the General Council even though he is shown in the Agent's poll book as having voted in favour of the surrender.

⁷³ Crawford to Goodison, April 1, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 289-90).

⁷⁴ Paul to Scott, April 1, 1927 (ICC Document, p. 292).

⁷⁵ Paul to Scott, April 1, 1927 (ICC Documents, p. 291).

Maurice George's affidavit states he had intended to vote against the sale even though he believed those voting in favour would receive \$10. He did not make it to the meeting because his car broke down near Forest, Ontario, six miles south of the reserve. About 5:30 p.m. the day of the vote, Mr George was "accosted" on the street in Forest by Agent Paul and prospective purchaser Crawford who asked him how he wished to vote. At Mr George's request, Mr Paul showed him the list of voters indicating 26 had voted for the sale, including Caleb Shawkeence. George was "induced to vote in favour of the sale by reason of the expected payment of money . . . and by reason of seeing Mr. Caleb Shawkeence's name on the list of those who had voted in favour of the sale." When Mr George informed the Agent that he wished to vote in favour, Mr Crawford handed him \$5 – not \$10 or \$15 – for his vote.⁷⁶

The Chief, John Milliken, and Mr Crawford had been most anxious for the vote to be taken without delay.⁷⁷ Two months before the vote, Cornelius Shawanoo, a former Chief of the Band, had written headquarters to protest the imminent General Council being called by Agent Paul. In Mr Shawanoo's opinion, "half breeds and American Potawatomes" should not be allowed to vote for sales or leases unless the "Original members" decided to have the General Council.⁷⁸ Agent Paul felt correspondence such as Mr Shawanoo's "should be ignored," because "it would be impossible, to have [the 'half breeds and American Potawatomes'] removed as members."⁷⁹

Just before the vote was taken, Mr Shawanoo complained to headquarters that Paul had told "one of the Indians if the Indians refuse to sell that the Dept will sell it just the same and the supposed byer promise [sic] to pay \$10.00 each of those who will go to the meeting on the 30th I suppose those in favor of the sale." Acknowledging that the "Original members" were in the minority, Mr Shawanoo concluded, "it is positively no use for us to try & stop the land sale." He implored the department to stop the March 30, 1927, General Council, "called up by our Indian Agent without the Council passing a resolution or without the Original members consent."⁸⁰ Finally, he asked for clarification of the status of those whose ancestors were not party to the treaty that established the Band's reserves:

76 Affidavit of Maurice George, April 14, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 304-06).

77 Paul to McLean, February 2, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 258); J. Milliken to Indian Affairs, February 11, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 260).

78 C. Shawanoo to Indian Affairs, January 26, 1927 (ICC Documents, pp. 255-57).

79 Paul to McLean, February 9, 1927 (ICC Documents, p. 259).

80 Shawanoo to Indian Affairs, March 21, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 272-75).

Who is the Original member on Indian Reserve. Does those decedents of the first Indians that settled on parcel of ground have improvements on already when the Reserve was first set apart or those that came in afterward as Visitors between 50 & 70 year ago. We want a full understanding of this.⁸¹

Mr Caldwell forwarded Mr Shawanoo's correspondence to Agent Paul on March 29, 1927, and ordered him to submit his views to headquarters.⁸²

After the March 30, 1927, vote, Shawanoo's group asked that the sale be stayed.

We would appreciate the Department's ruling as to whether it will be necessary for us to resort to judicial remedies to stay the sale . . . or whether the Department has exclusive jurisdiction in matters of this kind and has power itself to order an enquiry upon proper cause being shown.⁸³

An investigation into allegations of bribery and fraud was being sought by their counsel who produced the affidavit of Maurice George⁸⁴ and put forward other examples of bribery:

That Mr. Crawford paid to each Indian voter in advance of the general Council meeting in question, the sum of \$5.00 for the purpose of inducing them to vote in favour of the sale. He promised them in addition the sum of \$10.00 after they had cast their vote in favour of the sale, and the said \$10.00 was paid by him to the voters who voted in favour of the sale, and the said sum was not paid to those who voted against the sale. In one instance, in the course of the general Council meeting itself, Mr. Caleb Shawkeence was handed a \$5.00 bill by Mr. Crawford to overcome the resistance he was manifesting to the sale, and by reason of the said payment he was induced to and did vote in favour of the sale. Another young man, Mr. Wilfred Shawkeence, was tendered the sum of \$5.00 by Mr. Crawford in advance of the meeting to vote in favour of the sale. He refused the money and did not vote in favour of the sale, and accordingly did not receive any money after the sale.⁸⁵

Counsel charged there had been "an unconscientious use of bargaining power amounting in law to undue influence" which should render the trans-

81 Shawanoo to Indian Affairs, March 21, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 272-75).

82 Caldwell to Paul, March 29, 1927, NA, RG 10, vol. 7794, file 29029-2 [?] (ICC Documents, p. 276).

83 McEvoy & Henderson, Barristers & Solicitors, London, Ont., to Superintendent General, Indian Affairs, April 4, 1927, NA, RG 10, vol. 7794, file 29020-2 (ICC Documents, p. 293).

84 Scott to McEvoy & Henderson, April 7, 1927, NA, RG 10, vol. 7794, file 29020-2 (ICC Documents, p. 294).

85 McEvoy & Henderson to Deputy Superintendent General, Indian Affairs, April 13, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 301-03).

action "legally invalid" given the relative position of "a white land agent bargaining with Indians."⁸⁶

Mr Shawanoo also pointed to the circumstances of Maurice George's vote. He complained about the extra payments too, an immediate consequence of which had been "a big time" resulting in drunkenness, a fight over the vote, arrests, and at least one fine. "We (Shawanoos) number only ten members," he wrote, "and there are about five or six other persons on our side who know no rights are given to us after the changing of (Half-breed) the Chief and Councillors or better known Pottowatomies." Unable to get a reply to his letters, Shawanoo nevertheless reiterated his counsel's request for a list of voters' names.⁸⁷

The Department rejected any suggestion that the circumstances of the vote should invalidate the March 30, 1927, release. On April 26, 1927, J.D. McLean, Acting Deputy Superintendent General of Indian Affairs, advised counsel that the Department had "investigated the whole matter thoroughly" and had found "the surrender was given in a proper and legal manner." Cash payments "were made on the specific request of the Indians themselves, and were entirely independent of the consideration involved in the surrender."⁸⁸

When this response was made, Mr Goodison was assured by Mr Caldwell that consummation of the sale was in process.⁸⁹ But the protesters wanted court action.⁹⁰ Their counsel met with Deputy Superintendent General D.C. Scott on May 7, 1927, to "demand an open court of Enquiry."⁹¹ At that meeting, counsel submitted an affidavit from Isaac Shawnoo, which asserted that cash payments had determined the outcome of the vote:

I was informed about two weeks prior to . . . March 30th, 1927, that I would receive the sum of ten dollars at the said meeting, if I voted in favour of the surrender . . . and that I would receive no money if I voted against the said surrender. . . . the following four Indians, among others, would not have voted in favour of the sale, except for their being paid the sum of five dollars, in order to vote in favour of the said Surrender: Maurice George, John Elijah, Caleb Shawkeence and Wellington

86 McEvoy & Henderson to Deputy Superintendent General, Indian Affairs, April 13, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 301-03).

87 C. Shawanoo to Indian Affairs, April 11, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 295-300).

88 McLean to McEvoy & Henderson, April 26, 1927 (ICC Documents, p. 308).

89 Caldwell, Lands & Timber, Indian Affairs, to Goodison, MP, April 27, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 309).

90 J.R. Stirrett, McEvoy & Henderson, to J.D. McLean, April 30, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 314).

91 J.R. Stirrett to Scott, May 7, 1927 (ICC Documents, p. 318).

Elijah. . . without the aforesaid four votes, there would not have been a sufficient majority in favour of the said Surrender.⁹²

Asserting that the evidence “unquestionably constitute[d] a ‘prima facie’ case of fraud, invalidating the transaction,” counsel pointed out “this is a matter of law and can only be properly passed upon by a competent legal authority.”⁹³

No formal court action or open court of inquiry ever transpired until this Commission inquiry.

Community Session Evidence, 1995

In the course of inquiring into the rejection of a specific claim by Indian Affairs, the Commission’s practice is to hold at least one information-gathering session in the community whenever possible. In this way, individual members of the First Nation are able and are encouraged to provide their recollections and impressions directly to the Commission. The community session on the Kettle Point Surrender Claim was held at the Kettle Point Reserve on March 8, 1995. In this case, since the surrender vote had occurred 68 years earlier, none of the voters was available to recall the event. Those of the Chippewas of Kettle and Stony Point First Nation who did speak volunteered to describe what they had observed or had been told.

Rachel (née Henry) Shawkence, wife of Baxter Shawkence, was born at Stony Point on April 19, 1909. She was almost 18 years old and keeping house for Chief Sam Bressette and his wife (her Aunt Jessie) when the vote was taken. Although she never discussed the vote with the Chief, Rachel described some aspects of reserve life and commented on the vote.⁹⁴

Rachel Shawkence said Lake Huron was “like a lion,” unpredictable and capable of great destruction. When a storm sank five boats in the winter of 1913, her brother, James Henry, picked the dead bodies up off the shore and transported them to Forest. “Nobody can claim that lake front,” she asserted, “it belongs to the lake.” She said the people on the reserve spoke in Indian in 1927; they spoke mostly Ojibway [Chippewa] and Pottowatomie, not English. Women at Kettle Point and Stony Point worked hard in those days. They sold baskets to buy food while their husbands hunted.⁹⁵

92 Affidavit, Isaac Shawnoo, May 7, 1927 (ICC Documents, p. 317).

93 J.R. Stirrett to Scott, May 7, 1927 (ICC Documents, p. 318).

94 ICC Transcript, March 8, 1995, pp. 18, 22 (Rachel Shawkence).

95 ICC Transcript, March 8, 1995, pp. 19, 20, 80 (Rachel Shawkence).

“[B]ecause we didn’t have no money coming in. There were no – no money from the government,” Rachel Shawkence said, the Chief decided to sell the land:

Chief Sam Bressette said we’ll sell that piece of land and we’ll get money and we’ll have some money. And then they had the votes, to see how many wanted to sell the land. They were short of votes, and they made up their mind to buy some votes. They would pay them five dollars, and then after the land was sold, they would pay them the rest of the \$10.00, because some people didn’t want to sell that land. They didn’t want to part (sic) it, because it’s a reserve, and you can’t sell reserve land. It’s very special land. It’s sacred.⁹⁶

The people against selling the land, such as the Shawkences and Greenbirds, were attached to the land partly because it was a beautiful place to go in the summer. Rachel Shawkence thought the five dollars was payment for a Band member’s vote. She mentioned that her father, a well-digger named Gifford Henry who had moved to Kettle Point from Stony Point in 1926, was not member of the Band member when the vote occurred:

He was supposed to be but their – the Council brought in other strange people and they voted against my father. But my father’s mother was a strong member of both Kettle Point and Stony Point. Her name was Elizabeth George.⁹⁷

Rachel Shawkence did not recall hearing about people receiving \$10 payments afterwards, “[b]ut I know they were all dressed up and had new coats on,” she said. Rachel Shawkence attributed the outcome of the vote to actions of the Chief. There was organized opposition to selling the land but “the Chief bought voters and I don’t know who they are,” she said.⁹⁸

Angeline Shawkence was just three years old in 1927, the daughter of Edgar Shahnnoo and the granddaughter of Cornelius Shahnnoo [Shawanoo]. Asked whether she had been told that money influenced the vote, she said:

That’s what they spoke about all the time. They just chuckled about some of those things, how some of them were suckered into doing things, you know. They just went ahead and did those things for the five dollars, and they had no business doing it though. Our Indian agents were, they were not very nice men. They didn’t care for us

96 ICC Transcript, March 8, 1995, pp. 20-21 (Rachel Shawkence).

97 ICC Transcript, March 8, 1995, pp. 26, 22, 25 (Rachel Shawkence).

98 ICC Transcript, March 8, 1995, pp. 27, 28 (Rachel Shawkence).

like, you know, as long as they went and did what was pleasing to them. They didn't listen to us.⁹⁹

Angeline Shawkence had been told that those who disagreed with selling the land did not attend the meeting to vote on the surrender. Her Aunt Laura told her that grandfather Cornelius was so saddened "when that land down the beach there was taken away, sold on them" that he "was just walking around crying how sad he was over what took place." Her aunt was angry about the vote; Laura used to say that all she got was \$5 to buy a broom.¹⁰⁰

In 1927, \$5 was twice the monthly relief allowance. Charles Shawkence, former chief and son of Rachel, elaborated on what \$5 or \$10 represented:

There was no welfare system like we have today. It was called charity. . . . We were given \$2.00 and a half a month. That is what they allowed for charity. Two dollars (\$2.00) and a half a month is no welfare, it was called charity. And you think about the offer that was made, \$5.00 to vote. Like these real estate men or whoever paid the money to get the money to these Indians to vote, that was like two months welfare. And when you put the \$10.00 after they got paid for vote, that's like six months welfare. You have to imagine that. Just, if you were in their shoes, didn't have no money, that's a hell of a pile of money. You're just being enticed into it . . .¹⁰¹

Two or three years before the 1927 vote, Charles's uncle Wilfred, then a teenager, was hunting muskrats with his father, Wesley, in the swamp just south of the land in question. Wilfred and Wesley overheard a conversation between the Indian Agent and Mr Crawford who, according to Wilfred and Charles, were plotting to acquire the land:

Along on the trail from the real estate man, this Mr. Crawford and the Indian agent, I believe his name was Thomas Pull at the time, they were talking. And they didn't see us sitting in the bush, but they were saying: "We have to get this land away from the Indians."¹⁰²

During the course of the the Commission inquiry, no evidence was submitted to suggest that the members of the Band were living in anything but poverty. Those who spoke at the community session had various ways of describing how "tough" times were on the reserve.¹⁰³ For Earl Bressette,

99 ICC Transcript, March 8, 1995, pp. 27, 83 (Angeline Shawkence).

100 ICC Transcript, March 8, 1995, pp. 28, 29, 33 (Angeline Shawkence).

101 ICC Transcript, March 8, 1995, pp. 45-46 (Charles Shawkence).

102 ICC Transcript, March 8, 1995, pp. 51, 52 (Charles Shawkence).

103 ICC Transcript, March 8, 1995, p. 42 (Charles Shawkence).

born in November 1923, recalling his childhood there was to remember many hardships:

We never had shoes to wear, we didn't have blankets to put on our bed and – we had a hardship, we had a hard time. And there's many, many times we had no food to eat. I can recall when we were just growing up my dad used to go down and take his fishing rod and his line and go out and get fish for breakfast. And that's what we had for our breakfast, we had fish for breakfast. Well, comes dinner time he isn't working any place, we got the same kind of food, fish for dinner. It went on for that for, all during the spring, because you couldn't find a job, or if there was any jobs to get, they were so scarce, scarce as hen's teeth. So we managed to survive.

And I recall another time, we had no food to put on our table and my dad had one shell. That was a hard time. And the shell was just a little bit of money but nevertheless you couldn't buy a shell, because things were so hard. It was a hard time to live. So he went back and killed a rabbit, this is the winter time. I didn't finished speaking about the summer time when things were more prosperous.

My dad was a guide, fishing guide, and he would take people to, he'd guide them out in the fishing grounds. And he made, what he made in that summer, that had to keep us until the winter and that wasn't very much. We never had no rubbers to put on, we hardly had any clothes to wear, we had no blanketing to put on our beds. The funniest part of it we would gather all the coats and the sweaters and everything that we could use for a blanket. And we had a big square rug we put on the floor. The last thing we'd do is we'd pick up that rug and throw it on top of the bed and that was our cover. That had all the coats and everything else together. That's the hardships that we had growing up as children.¹⁰⁴

Bonnie Bressette, daughter of Bruce and Hilda George, lived with her grandfather Maurice George when she was growing up. She said he was the one “picked up” in Forest who then accepted money to vote in favour of the surrender. Her information was that her grandfather was picked up along with Caleb Shawkence.¹⁰⁵ At the beach, Bonnie's father used to tell her about how the land was lost and why he thought cottages did not belong there. Bonnie remembered her father saying he had been told that there had been a meeting in which the people had said “no.” Then, “they went back and they paid them to vote.” He told her: “They paid people to vote when people really needed that money, and they were so broke, and they were hungry, and they were having such a hard time.”¹⁰⁶

104 ICC Transcript, March 8, 1995, pp. 99-100, 114 (Earl Bressette).

105 ICC Transcript, March 8, 1995, p. 127 (Bonnie Bressette).

106 ICC Transcript, March 8, 1995, p. 131 (Bonnie Bressette).

Chief Thomas Bressette told the Commission that an elder had told him that he had seen an individual walking around the March 30, 1927, meeting paying people to vote saying, "Here, take \$5.00 to vote."¹⁰⁷ The late elder's point was that "somebody was paying somebody to vote, somebody was in a meeting that didn't belong there, that had no business being in a general Band Council meeting . . ." Chief Bressette said the person was "a real estate agent" named Crawford whose "subsequent correspondence reiterates a fact, we, [the Band] tried to buy the land."¹⁰⁸

Charles Shawkence also characterized Crawford as a real estate agent. He considered it important to draw attention to Crawford's letter of April 1, 1927, to Goodison – the letter in which Crawford not only assured Mr Goodison that *all* band members would "get their bonus just the same as the ones that did vote" and in which Crawford explained that he had gone to the Chief and councillors' homes the next day to get a surrender paper signed.¹⁰⁹ At the March 8, 1995, community session, Mr Shawkence was indignant about these circumstances:

What business does a real estate agent have to go to a member of parliament? He has no business doing a thing like this. It should have been the Indian Agent, taking a piece of surrender paper to take to the Chief. This Crawford interfered with the rules of procedure when he sold that. Here's a, here's a piece of paper where the Indian agent, or the Crawford, the purchaser, went, wrote to Mr. Goodison, a member of parliament. He had no damn business doing it, none whatsoever. That's – I think is, should be taken very – take a hard look at it . . .¹¹⁰

POST-VOTE EVENTS

Indian Affairs Ignores Protests, 1927-29

Indian Affairs did not want any opposition to the Kettle Point surrender to affect the sale of the lands.¹¹¹ After the Privy Council accepted the surrender on May 11, 1927,¹¹² J.D. McLean, acting for the Deputy Superintendent General, wrote a lengthy memorandum to the Minister, Charles Stewart, in which he attempted to dispel the notion that the cash payments had been bribes:

107 ICC Transcript, March 8, 1995, p. 120 (Chief Thomas Bressette).

108 ICC Transcript, March 8, 1995, pp. 122, 124 (Chief Thomas Bressette).

109 Crawford to Goodison, April 1, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 289-300).

110 ICC Transcript, March 8, 1995, p. 67 (Charles Shawkence).

111 McLean to Paul, May 12, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 321).

112 Order in Council 842, May 11, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 319).

Mr. Goodison [the local MP], who is interested in the matter on behalf of Mr. Crawford, had several conversations in the matter with Mr. Caldwell, of our Lands Branch . . . and he confirmed statements since made by both Mr. Crawford and our local Agent Mr. Paul. The original offer made by Mr. Crawford was a price of \$85.00 per acre, cash, for a parcel containing 83 acres. . . . in some preliminary discussion which Mr. Crawford had with members of the Band, prior to the meeting held for the purpose of considering the surrender, a demand was made on him for the payment of an additional cash bonus of \$15.00 per head, payable to each voting member of the Band whether in favour of or against the sale.

Mr. Crawford agreed to pay this amount rather than have the sale held up, and while he has suggested that in this case the figure stated in the surrender should be \$100 per acre, the Indians refused to have the transaction completed in this way, claiming that they needed the extra money for their own personal use. . . .

. . . [Crawford] agreed to make this [\$15.00] payment on the specific demand of the Indians themselves, and on the condition that all voting members of the Band would benefit alike whether in favour of or opposed to the sale. The Indians demanded this payment from Mr. Crawford, apparently very plainly indicating that unless it was made the surrender would be refused.

The payment of a cash bonus to members of a Band upon the occasion of granting a surrender is a common practice with the Department, and very rarely is it possible to secure the release of Indians lands for sale except a considerable cash distribution is made at the time, and such distribution has never before been considered in any way as a bribe or special inducement.

The surrender as granted recently by a majority of the voting members of the Kettle Point Band has been approved by an Order of His Excellency the Governor General in Council dated the 11th instant, and I see no reason why the completion of the sale to Mr. Crawford should not be made . . .

. . . Mr. Stirrett . . . visited your office . . . [and] submitted an affidavit from a young member of the Band. . . . I do not believe that the affidavit is correct. In any case, there is an ulterior motive behind the opposition. This young man is one of two or three members of the opposing party, who have recently applied to the Department to be located for lots which are involved in the present transaction. The land which Mr. Crawford is purchasing is utterly useless for agricultural purposes, being drifting sand, and it is obvious that these young men only desired to secure possession of these lots in order that they might resell for similar purpose for Mr. Crawford intends to use the property. Even had Mr. Crawford's application to purchase not been received, the Department would have certainly refused the applications. The land is exceptionally valuable from a Band standpoint, and any benefits accruing should go to the Band in general, and not to any individual members.¹¹³

McLean informed the Minister that "we consider the transaction bona fide in every respect and fully meeting the provisions of the Indian Act with respect

¹¹³ McLean, Acting Deputy Superintendent General, to Superintendent General, May 19, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 322-24).

to the surrender and sale of Indian lands." On May 19, 1927, McLean recommended "completing the transfer" of this valuable land to Mr Crawford.¹¹⁴

McLean's memorandum was forwarded to Goodison by Minister Stewart with a "Personal" note that read:

The transfer will now go through: I think, however, it would be well for you to make it clear to Mr. Crawford that he must see that the members of the Band receive the \$15 per head promised them, in addition to the \$85 per acre.¹¹⁵

The Minister of Indian Affairs thus advised Goodison on how Crawford should rectify any impression that votes were being bought. Marginalia on a copy of the Minister's note reads: "Mr. Stewart instructed Mr. Caldwell by phone to complete transfer"; and, "\$7055.00."¹¹⁶ Accordingly, Mr Paul was asked to "forward the purchase price to the Department at the earliest possible date."¹¹⁷

The "Original Members" or "Treaty Indians" of the Band, protested the impending sale for two years. They insisted that a majority of the voters had not been entitled to vote because they were not descendants of signatories to the 1827 treaty. Some 17 letters from Cornelius Shawanoo, Mrs Elijah Ashquabe (née Lucy Ann Pewaush), Beattie Greenbird, Steven Shawkence, Mrs Sophia Shaw[a]noo (widow of Amos Shawanoo and mother of Elliott Shawanoo), and Mrs B. Greenbird opposing the surrender were either dismissed or ignored by Indian Affairs.¹¹⁸

114 McLean, Acting Deputy Superintendent General, to Superintendent General, May 19, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 322-24).

115 Minister of Interior to Goodison, MP, May 27, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 325).

116 Minister of Interior to Goodison, MP, May 27, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 325).

117 J.C. Caldwell to Agent Paul, June 4, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 327).

118 Ashquabe to Charles Stewart, Minister, June 14, 1927 (ICC Documents, pp. 328-31); Ashquabe to Charles Stewart, Minister, June 15, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 332-33); McLean to Ashquabe, June 23, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 334); Ashquabe to Charles Stewart, Minister, June 29, 1927 (ICC Documents, pp. 335-38); McLean to Ashquabe, November 2, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 353); Ashquabe to Indian Affairs, October 29, 1927 (ICC Documents, pp. 349-51); Chadwick to Indian Affairs, February 16, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 507); Cornelius Shawnoo to A.C. Chadwick, National Defence, February 11, 1928 (ICC Documents, pp. 356-64); Ashquabe to Corporal Corless, RCMP, Sarnia, July 20, 1929 (ICC Documents, pp. 584-87); Ashquabe to Indian Affairs, April 3, 1929 (ICC Documents, pp. 517-22); Ashquabe to Indian Affairs, April 12, 1929 (ICC Documents, pp. 524-26); Ashquabe to Indian Affairs, May 6, 1929 (ICC Documents, pp. 534-36); Ashquabe to Indian Affairs, May 27, 1929 (ICC Documents, p. 556); Ashquabe to Corporal Corless, August 21, 1929 (ICC Documents, pp. 608-12); Ashquabe to Corporal Corless, RCMP, Sarnia, July 20, 1929 (ICC Documents, pp. 584-87); Stephen Shawkence to Indian Affairs, June 29, 1928 (ICC Documents, pp. 381-86); E.G. Moorhouse to Indian Affairs, December 26, 1928, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 464); Cornelius Shawanoo to Superintendent General, Indian Affairs, ca January 16, 1929 (ICC Documents, pp. 488-97); Mrs. Shawnoo & Mrs. Greenbird, December 29, 1928, NA, RG 10, vol. 3213,

The extent to which the nine non-voting men – Elijah Ashquabe, Elliott Shawanoo, Peter Cloud, Sutton Shawkence, Telford Bressette, Frank George, David Shawnoo, Wesley Shawkence, and Elijah Southwind – supported this prolonged post-vote protest is not apparent from the available documents.¹¹⁹ In 1923, however, Elliot Shaw[a]noo and David Shawnoo had signed a letter deploring the efforts of “Potawatomis and half Breeds” to lease land at Kettle Point.¹²⁰

Crawford Fails to Pay, 1927–28

Mr Crawford did not have \$7,055 to buy the Kettle Point land surrendered for sale specifically to him.¹²¹ His explanation was that someone had reneged on a prior agreement to loan him the money. Seven months after the vote, when Indian Affairs questioned his intentions, Crawford appealed for more time but also acknowledged that the land might have to be returned to the Band.¹²² On November 18, 1927, he wrote Assistant Deputy and Secretary J.D. McLean:

[I]f it can stand for a few months I am quite sure I will be able to pay for it. If not we will have to let it go back to the Indians. But we have not did [sic] the Indians any harm as they have had about \$700.00 out of it. And we are out about twice that amount.

I realize that the Indians have been bothering you a great deal as they have been me, for which I am very sorry for.¹²³

Seven more months passed without payment. Both Crawford and Goodison seemed oblivious to the Band’s concerns. While Crawford apologized to McLean, Goodison felt it necessary to apologize directly to Caldwell:

file 530120 (ICC Documents, pp. 465-75); J.D. McLean to Mrs. Sophia Shawanoo, January 15, 1929 (ICC Documents, p. 486); J.D. McLean to Mrs. Beattie Greenbird, January 15, 1929 (ICC Documents, p. 487); Cornelius Shawanoo to Charles Stewart, Minister of Interior, January 4, 1929 (ICC Documents, pp. 476-83); and J.D. McLean to Cornelius Shawanoo, January 8, 1929 (ICC Documents, p. 485); and Beattie Greenbird to Indian Affairs, May 13, 1929 (ICC Documents, pp. 542-50).

119 Poll Book, March 30, 1927, NA, RG 10, vol. 7794, file 29029-02 (ICC Documents, pp. 285-87).

120 Caleb Shawkence et al. to Indian Affairs, October 13, 1923, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, pp. 179-81).

121 J. D. McLean, Asst. Deputy & Secretary, Indian Affairs, Ottawa, to A. Mackenzie Crawford, Sarnia, November 2, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 352).

122 A.M. Crawford to Indian Affairs, November 18, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 354-55).

123 A. M. Crawford to Indian Affairs, November 18, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 354-55).

I am very sorry indeed that [the Kettle Point sale] did not pan out as we expected. The Indians are ahead, by the money that Mr. Crawford gave each one of them, and he is out himself considerably over \$1,000. He was acting in good faith when he applied but he had a misfortune in regard to a farm he had taken over and it took all his spare cash at that time.¹²⁴

Whatever the original expectations were, by the summer of 1928 there was still no indication that Mr Crawford would be able to complete the transaction.

Band Council Demands Payment, August 1928

Band elections in June 1928 brought in Sam Bressette as Chief and Maurice George and John Elijah as councillors, the first two having been councillors at the time of the surrender vote.¹²⁵ In August 1928 the new Chief and Council wrote directly to Mr Crawford demanding immediate payment. Since a year and a half had passed since the vote, they threatened to cancel the Kettle Point surrender:

You are hereby requested to make the payment on the piece of land we have surrendered to you on March 30th 1926 [sic] within thirty days if you are unable to meet payment by then the agreement will be withdrawn. We have been anxiously waiting for this for a long time, so please consider the matter at once.¹²⁶

Two months passed before there was any documented response. Strategies employed by the purchasers to overcome Crawford's lack of money contributed to confusion and delay to the extent that it was more than another year before payment was credited to the Band's trust fund or distributed to individual members. In the end, the Band's receipt of money for the Kettle Point lands became contingent on the Department's receipt of money for the sale of surrendered Stony Point lands.

¹²⁴ Goodison to Caldwell, June 18, 1928, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 375). If only the 39 individuals in the Agent's March 30, 1927, poll book received \$15 from Crawford, then Crawford would have been "out" just \$585. Paying each of the 44 eligible voters \$15 produces a total of \$660, an amount that was not refunded on January 7, 1929, or on May 4, 1929, when payment was returned to LeSueur and Dawson.

¹²⁵ Paul to McLean, June 22, 1928, NA, RG 10, vol. 7929, file 32-29 (ICC Documents, p. 379). The vote for Chief was 24 for Sam Bressette and 13 for Caleb Shawkence. The vote for two councillors was 24 for Maurice George, 21 for John Elijah, 16 for Joseph Johnson, and 13 for Alfred Greenbird. Judging from the Agent's Poll Book, there was only one Morris or Maurice George of eligible voting age in the Band. "Poll Book, March 1927," NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 285-87), and Copy of Poll Book, March 30, 1927 (ICC Documents, p. 288).

¹²⁶ Chief Sam Bressette, Morris George, and John Elijah to A.M. Crawford, August 9, 1928 (ICC Documents, p. 397).

Stony Point Surrender, October 1928

Lack of success at Kettle Point did not deter Mr Goodison from involving himself in a similar lakefront surrender at Stony Point in 1928. Although the particulars of the October 12, 1928, surrender of Stony Point lands are beyond the scope of this inquiry, the timing of events cannot be ignored. Why was the Band's receipt of money from the sale of the Kettle Point so closely associated with activity related to the sale of Stony Point lands? Was it only for administrative convenience that Indian Affairs found it necessary to close the two transactions simultaneously? Whatever the reasons, documents pertaining to the closure of the Kettle Point sale often include references to the Stony Point purchase being made by a Mr W.J. Scott, Manager, Sarnia Locators, Real Estate and Business Sellers.¹²⁷

The surrenders and sales at Kettle Point and Stony Point invite comparison. To prepare for the Stony Point surrender W.J. Scott approached the Indians directly before the vote.¹²⁸ Agent Paul supported the bids from Mr Crawford and Mr Scott, both of whom were assisted in their dealings with the Department by Member of Parliament Goodison. Goodison's successor as Member of Parliament, Ross Gray, forwarded the money to purchase both the Kettle Point and Stony Point lands to the Department and he also influenced the wording of the patents to Crawford and White and to Scott.¹²⁹ Both Mr Goodison and Mr Gray corresponded extensively with Mr Caldwell of the Lands and Timber Branch, but they wrote few, if any, letters to the Deputy Superintendent General's office.¹³⁰

As in the Kettle Point surrender, the affidavit of execution was improperly completed by the Indian Agent for the Stony Point surrender. The difference was that headquarters returned the Stony Point surrender documents to Mr Paul "with new copies of affidavit attached, which you will be good enough to have signed by yourself and the Chief and Councillors, and sworn to before a Justice of the Peace or other person authorized to take an affidavit."¹³¹

¹²⁷ W.J. Scott to Indian Affairs, June 7, 1928, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 369).

¹²⁸ Goodison to Caldwell, June 18, 1928, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 375).

¹²⁹ Gray to Caldwell, May 7, 1929 (ICC Documents, p. 538); Gray to Caldwell, May 30, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 560-61); Dawson to Gray, MP, June 5, 1929 (ICC Documents, p. 563); LeSueur, LeSueur & Dawson to Gray, MP, June 6, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 565); Gray to Caldwell, July 11, 1929, NA, RG 10, vol. 7794, file 29029-2, and marginalia (ICC Documents, p. 581); and Gray to Caldwell, July 23, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 588).

¹³⁰ On the subjects of the Kettle Point and Stony Point sales, Goodison and Gray each had about a dozen written exchanges with Caldwell between March 11, 1927, and June, 23, 1928, and May 7, 1929, and September 9, 1929, respectively.

¹³¹ J.D. McLean to Thomas Paul, October 16, 1928, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 426).

Conditional Payment and “Flip,” October 1928

The Band’s 30-day deadline had long passed when, on October 13, 1928 – the day after the Stony Point surrender – the firm of LeSueur, LeSueur and Dawson sent a cheque for \$7,055 for the Kettle Point lands to Agent Paul. Conditions attached to cashing this cheque point clearly to the plan to immediately sell or “flip” the lands at a much higher price. The sender explained that the cheque was payable only *after* a Crown grant made out to A. Mackenzie Crawford was delivered directly to the law firm:

The reason for these conditions is that this money is a portion of the purchase price of a part of the lands being acquired by a subsequent purchase from Mr. Crawford, and it is paid on the understanding that the Deed will be obtained and registered in order that the title of the purchasers may be perfected.¹³²

Mr Crawford lacked both the funds to buy the land and, of course, the Crown grant; therefore, “the closing of the purchase [was being] held up pending the obtaining of this document.”¹³³ With the Crown grant, Mr Crawford would be able to raise the \$7,055 or more.

Exactly how much more the initial purchaser(s) of the Kettle Point lands stood to gain is recorded in deeds to Lot 8 lands made out on October 13, 1928, the same day the conditional cheque was sent to Paul. The deeds are for eight transfers of Lot 8 lands from joint owners A. Mackenzie Crawford and John A. White to eight individuals or couples who resided in the United States. How, when, or why John White became involved with Crawford is not explained in the documents that the Commission received but, at the very least, White was involved in the Kettle Point purchase as early as October 13, 1928. John A. White was associated with the John Goodison Thresher Company headed by Goodison, the Member of Parliament.¹³⁴

Lot 8 contained 44 acres, or 53 per cent of the 81 acres surrendered. Crawford and White’s cost to buy Lot 8 therefore amounted to about \$3,800. Together, the American purchasers were paying a total of \$13,200 for the lands, or almost three and a half times what Crawford and White were to pay. Their deeds, dated October 13, 1928, specified that the land they were buy-

132 LeSueur, LeSueur & Dawson to Thomas Paul, October 13, 1928, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 416).

133 LeSueur, LeSueur & Dawson to Thomas Paul, October 13, 1928, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 416).

134 F.P. Dawson to J.C. Caldwell, January 30, 1929 (ICC Documents, pp. 498-99).

ing included "all foreshore rights."¹³⁵ When they formally acquired the land a year later, these deeds were recorded on September 20, 1929.¹³⁶

Whether Indian Affairs headquarters was informed about the conditional aspect of the cheque sent by LeSueur and Dawson is not apparent from the correspondence, but Chief Bressette wrote headquarters just three days later asking if "Mr. Crawford's claim" could be cancelled:

it is some fifteen months or more [17.5 months] since the sale [surrender] was transacted, and we have been waiting on Mr. Crawford to settle up. In an interview with him a short time ago he promised to pay us interest for the time he has kept us waiting for our moneys . . . We would like to know if it would be possible to cancel Mr. Crawford's claim, as he is not fulfilling his promises to us."¹³⁷

Before there was any action to cancel, Agent Paul sent J.D. McLean a receipt from the Bank of Montreal in Sarnia dated October 24, 1928, indicating it had received from Paul \$7,055 "payment on land Kettle Point" which the bank had credited to the Receiver General's account.¹³⁸ There was no explanation of the source of this money other than Paul's statement: "I am inclosing [sic] letter, which speaks for itself, with respect to this surrender submitted by Messrs. LeSueur, LeSueur, and Dawson."¹³⁹ This may have been the firm's October 13 letter.¹⁴⁰

When the Chief learned that money had been sent in, he switched to pressing Indian Affairs headquarters for cash. His note requesting distribution was sent on November 29, 1928:

135 Contracts dated October 13, 1928, with Harry P. Neal, merchant, & wife Goldie G., Smith's Creek, Michigan, \$2,450 for easterly 490' of Lot 8, A (ICC Documents, p. 425); Henry Neal, merchant, Smith's Creek, Michigan, \$2,450 for westerly 490' of easterly 980' of Lot 8, A (ICC Documents, p. 418); Charles F. Lambert, clerk, & wife Lillian, Smith's Creek, Michigan, \$1,000 for westerly 200' of easterly 1,180' of Lot 8, A (ICC Documents, p. 419); James E. Wakefield, machinist, Port Huron, Michigan, \$3,300 for westerly 660' of easterly 1,840' of Lot 8, A (ICC Documents, p. 420); Robert C. Morton, machinist, Detroit, Michigan, \$1,000 for westerly 200' of easterly 2,040' of Lot 8, A (ICC Documents, p. 421); George H. Neal, contractor, & wife Alma, Detroit, Michigan, \$1,000 for westerly 200' of easterly 2,240' of Lot 8, A (ICC Documents, p. 422); James Mackley, real estate dealer, & wife Jane, St Claire, Michigan, \$1,000 for westerly 200' of easterly 2,240' of Lot 8, A (ICC Documents, p. 423); John A. Neal, machinist, & wife Rose, Toledo, Ohio, \$1,000 for westerly 200' of easterly 2,640' of Lot 8, A (ICC Documents, p. 424). The description of the lots was based on "Plan of Indian Reservations at Kettle Point and Stony Point," June 20, 1900.

136 See footnote 179 in section Finalization of Price and Deeds for identification of the deeds registered by the township in 1929.

137 Chief Sam Bressette to Indian Affairs, Ottawa, November 16, 1928, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 440-41).

138 Receipt No. 595, Bank of Montreal, Sarnia, Ont., October 24, 1928 (ICC Documents, p. 433).

139 Thomas Paul to J.D. McLean, October 24, 1928 (ICC Documents, p. 432).

140 LeSueur, LeSueur & Dawson to Thomas Paul, October 13, 1928, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 416).

I have been requested to write you by members of this reserve that they are getting impatient at the delay getting their monies from the Crawford sale of Kettle Point land. . . . There is no work here at present that will enable the Indians to make a living, and a distribution of this money would be of benefit at this time.¹⁴¹

Payment Returned, January 1929

On December 5, 1928, Caldwell wrote a memo to Deputy Superintendent General Scott on the surrendered Kettle Point lands. Therein Caldwell alluded to "some little difficulty in connection with this matter, as at the time Mr. Crawford apparently was not in a position to make payment as agreed upon." Caldwell failed to mention any restrictions on the money from LeSueur, LeSueur and Dawson; rather he informed Scott that Crawford had paid for the surrendered lands by writing: "Recently, however, Mr. Crawford forwarded to the Department through the local Agent, Mr. Paul, the sum of \$7,055.00, being payment in full, and the Department is now, therefore, in a position to issue title to Mr. Crawford."

Goodison had passed away sometime after October 12, 1928. Nevertheless, Caldwell invoked Goodison's name when asking Deputy Superintendent General Scott for the patent:

As the Christmas season is at hand, I would recommend your approval of a distribution [to the Band] of one half of the amount received, and the completion of the transaction by the preparation and issue of a patent to Mr. Crawford. You will recall that the late Mr. W. T. Goodison, M.P., was interested in this matter on behalf of Crawford.¹⁴²

On December 7, 1928, headquarters did supply Paul with \$3,527.50 (half the purchase price of \$7,055.00) to distribute to individual band members. From the \$3,527.50, J.D. McLean directed the Agent to "make as big collection as possible" on amounts Indians owed on loans.¹⁴³

Neither the distribution nor the collection on loans occurred before Christmas 1928 because Chief Sam Bressette found the payment insufficient. His December 18, 1928, telegram to the Minister and Caldwell read: "Please

141 Chief Samuel Bressette to Indian Affairs, November 29, 1928, NA, RG 10, vol. 7704, file 29029-2 (ICC Documents, pp. 443-44).

142 Caldwell to Deputy Superintendent General, December 5, 1928 (ICC Documents, p. 445).

143 J.D. McLean to Thomas Paul, December 7, 1928, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 448).

cancel our surrender of lands to Mackenzie Crawford. He won't pay us any interest and can now sell land for more money."¹⁴⁴

Even though the Chief knew the lands could be sold for more,¹⁴⁵ Deputy Superintendent General Scott considered Crawford's price "satisfactory." Instead of addressing the issue of price, Scott was prepared to cancel the sale for the reason that Crawford had failed to pay within a reasonable period of time:

[I]f it is the wish of the Band that this sale should not be completed we are in a position to refund the amount paid by Mr. Crawford, as the long delay in handing over the purchase price would be sufficient cause for refusing to proceed further with the matter.¹⁴⁶

On January 7, 1929, Indian Affairs sent a departmental cheque for \$7,055 to LeSueur, LeSueur and Dawson with the advice that the matter be dropped:

It is unfortunate that Mr. Crawford delayed so long in making payment of this amount, and his action in this regard has resulted in a very definite change of attitude on the part of the Indian owners of this property, so much so, in fact, that they have definitely advised the Department that they will refuse to accept payment, and request that the transaction be cancelled. You will understand, of course, that the Department considers it would be very unwise to endeavour to proceed further with this matter in the face of such a very decided opposition on the part of the Band . . .¹⁴⁷

This refund did not include the money for "cash bonuses" dispensed by Crawford.

Involvement of White, 1928 to January 1929

Crawford's counsel, F.P. Dawson, travelled to Ottawa in January 1929 to tell Caldwell that non-completion of the purchase was a "serious situation" that would likely produce an action for damages against the elderly Mr Crawford. As Mr Dawson put it, Crawford had "experienced some little difficulty in arranging to finance the purchase. However, he was able to obtain the assistance of some friends." On their instructions and on Goodison's assurance on October 12, 1928, "that the surrender would be completed so far as his

¹⁴⁴ Chief Sam Bressette to Charles Stewart, Superintendent General, Indian Affairs, December 18, 1928 (ICC Documents, p. 452), and Chief Sam Bressette to J.C. Caldwell, Indian Affairs, December 18, 1928 (ICC Documents, p. 451).

¹⁴⁵ McLean to Paul, December 17, 1928 (ICC Documents, p. 450).

¹⁴⁶ Scott, DSGIA, to Mr Pratt, December 19, 1928 (ICC Documents, p. 454).

¹⁴⁷ J.D. McLean to LeSueur, LeSueur & Dawson, January 7, 1929 (ICC Documents, p. 484).

knowledge went, [Dawson] made a binding contract respecting the matter and the money was forwarded to you to complete the purchase.”¹⁴⁸

In this meeting, Caldwell “intimated” to Dawson that he “had had a discussion of the situation with Mr. J.A. White . . . who is associated with the business of which Mr. Goodison was the head [the John Goodison Thresher Company of Sarnia] . . .” Moreover, Caldwell had suggested that “if Mr. White intimated to the Honourable Minister in charge . . . that he had no objection to the completion of the surrender, that it might be carried through . . .” Once he had met with Caldwell, Dawson sought out White in Sarnia.¹⁴⁹

Shortly after Goodison’s death and “acting in the interests of the late Mr. Goodison,” White had indeed met with officials of the Department.¹⁵⁰ White therefore told Dawson that, if the Department “took from anything which he said that there might be an objection to the closing of the surrender that a wrong impression had been obtained. In fact, Mr. White assured [Dawson] that he would do nothing which would prevent the carrying out of the surrender or stand in its way.” White was “prepared to write a letter along the lines suggested by [Caldwell]” but instead opted for a personal visit to Ottawa “to interview both the Minister and [Caldwell] regarding the situation.” Dawson dictated this January 30, 1929, letter asking Caldwell to reconsider returning the money for Crawford’s purchase in the presence of White.¹⁵¹

Crawford Pays Interest, March 1929

In March 1929, Chief Sam Bressette, ex-Chief John J. Milliken, and “witness” Thomas Paul sent a letter to the Minister stating that, if Crawford paid interest covering the period between the surrender and the sale, the “local Indians” would not object to “the completion of the surrender and the granting of the Patent.”¹⁵² By the time Acting Deputy Superintendent General McLean reviewed the situation for the Minister later in March 1929, Crawford already had paid \$846.60 as 6 per cent interest to cover the period of the delay.

McLean opined: “there is no likelihood of the Band receiving any better price for these lands than that offered by Mr. Crawford.” Since Crawford had “already expended quite a sum of money in the negotiations” and “[a]s the surrender was originally given for the purpose of selling the property to

148 F.P. Dawson to J.C. Caldwell, January 30, 1929 (ICC Documents, pp. 498-99).

149 F.P. Dawson to J.C. Caldwell, January 30, 1929 (ICC Documents, pp. 498-99).

150 D.C. Scott to Superintendent General, May 20, 1929 (ICC Documents, pp. 552-53).

151 F.P. Dawson to J.C. Caldwell, January 30, 1929 (ICC Documents, pp. 498-99).

152 Chief Sam Bressette to Minister of Interior, March 11, 1929 (ICC Documents, p. 512).

Mr. Crawford," McLean recommended that "the transaction be completed as originally intended."¹⁵³

Exactly two years after the surrender vote, on March 30, 1929 – shortly before the overall economy was about to slide into the Great Depression – Chief Sam Bressette also indicated to the Minister that, since Crawford was paying interest, "we feel the sale should be completed." Chief Bressette pointed out that the Indians were very short of funds and "the payment will greatly relieve the hardship now being suffered."¹⁵⁴

Crawford Payment Returned, May 1929

The Crawford sale was referred for "approval" to Ross W. Gray, the new local Member of Parliament.¹⁵⁵ This referral introduced further complications, more delay, and, ultimately, it appeared to determine who bought the surrendered land. On learning of the involvement of Gray, Dawson wrote Caldwell to say Crawford's situation was becoming "so serious" that he needed to know Gray's "attitude" in a few days, before the end of April.¹⁵⁶

McLean's curt reply to Dawson of May 4, 1929, was that "the Department now finds it impossible to approve of a sale of this property to Mr. Crawford." The \$7,055.00 was returned to LeSueur, LeSueur and Dawson for a second time along with the \$846.60 interest. Again, the only reason cited was "the difficulty which arose, caused particularly by the delay by Mr. Crawford in making the necessary payment."¹⁵⁷

The firm of Cowan, Cowan and Gray, in which Member of Parliament Gray was a partner, suddenly took the lead in purchasing the surrendered Kettle Point lands.¹⁵⁸ Although White had given Dawson the impression that he would support completion of the sale to Crawford, White manoeuvred to obtain the Kettle Point lands exclusively for himself.¹⁵⁹ The strategy of Messrs White and Gray was to better Mr Crawford's offer.¹⁶⁰

153 McLean to Superintendent General, March 21, 1929 (ICC Documents, pp. 513-15).

154 Bressette to Superintendent General, March 30, 1929 (ICC Documents, p. 516).

155 Dawson to Caldwell, April 23, 1929 (ICC Documents, p. 532).

156 Dawson to Caldwell, April 23, 1929 (ICC Documents, p. 532).

157 McLean to LeSueur, LeSueur & Dawson, May 4, 1929 (ICC Documents, p. 533). The money was first returned to the firm in January 1929.

158 Gray, Cowan & Gray, to Caldwell, July 11, 1929, NA, RG 10, vol. 7794, file 290029-2 (ICC Documents, p. 581).

159 D.C. Scott to Superintendent General, May 20, 1929 (ICC Documents, pp. 552-53).

160 D.C. Scott to Superintendent General, May 20, 1929 (ICC Documents, pp. 552-53).

White's Higher Offer, May 1929

On May 7, 1929, just three days after the \$7,901.60 (\$7,055.00 + 846.60) was returned to LeSueur, LeSueur and Dawson, Gray submitted an offer of \$9,200.00 (\$113.58/acre for 81 acres) from John White to purchase the Kettle Point lands surrendered for sale to Crawford.¹⁶¹ On the same day, Gray also sent Caldwell a conditional \$13,500.00 for land being purchased by W.J. Scott at Stony Point Reserve.¹⁶² Writing to Caldwell about Kettle Point on his House of Commons stationery, Mr Gray asked that White's "very good" offer "be submitted to the Indian Council as soon as possible."¹⁶³

Deputy Superintendent General Scott responded to this turn of events by acknowledging that the lands might be sold to White:

Mr. White desires to secure possession of these lands and offers a price slightly in excess of that which the Indians agreed to accept from Mr. Crawford. It seems somewhat unfair to decline to complete the sale to Mr. Crawford; but I presume no other action is possible, considering the very definite stand which Mr. Gray, the present sitting member, has taken in the matter.¹⁶⁴

Judging by Scott's remarks, we would conclude that Gray had a definite influence on departmental decision making, certainly more influence than that of Crawford, White, or the Band in this instance.

The Deputy Superintendent General believed selling the land to White would involve resubmitting the matter to the Band because the original vote was on Mr. Crawford's application. He therefore told the Minister that "a further surrender will have to be secured in connection with Mr. White's present application."¹⁶⁵ He also observed that there would be a need to return Crawford's cash payments:

[W]hen Mr. Crawford was discussing this matter with the Indians they demanded from him a per capita cash payment of \$15.00, which he paid, totalling \$660.00. If

161 White to Indian Affairs, May 7, 1929 (ICC Documents, p. 537), and Gray, MP, to Caldwell, May 7, 1929 (ICC Documents, p. 541).

162 Gray to Caldwell, May 7, 1929 (ICC Documents, p. 538). The conditions attached to the \$13,500.00 were: "As certain of this money is coming by way of a mortgage Company for whom we act, you will please not disburse any part of these funds until plan has been registered and patent granted to Scott as agreed between yourself and the writer last week." The \$13,500.00 for Stony Point lands amounted to \$35.81 per acre. Indian Affairs, Land Sale Ledger, May 7, 1929 (ICC Documents, p. 540).

163 Gray, MP, to Caldwell, May 7, 1929 (ICC Documents, p. 541); see also White to Indian Affairs, May 7, 1929 (ICC Documents, p.537).

164 D.C. Scott to Superintendent General, May 20, 1929 (ICC Documents, pp. 552-53).

165 D.C. Scott to Superintendent General, May 20, 1929 (ICC Documents, pp. 552-53).

Mr. Crawford's application is to be refused, in all fairness some arrangement should be made to refund to him this \$660.00 at least.¹⁶⁶

Mr White's higher offer was never brought to the attention of the Band.

Sale to Crawford and White, June 1929

Gray managed to circumvent the necessity of taking another surrender by bringing Crawford and White together on a deal that did not require any additional expenditure to obtain the land from the department. Gray accomplished this by sending two letters to Caldwell: one from Crawford instructing the "Indian Lands Department" to issue a deed jointly to Crawford and John White;¹⁶⁷ the other from White withdrawing his offer.¹⁶⁸ Neither of these letters, both dated May 30, 1929, state the purchase price. Gray left for Sarnia that night hoping "to have the money necessary to take up the surrender" on his return.¹⁶⁹ In the meantime, he asked Caldwell to ensure that "to the water's edge" was explicitly stated in the deed. Again writing on House of Commons letterhead, he directed:

as in the case of the other surrender at Stoney Point . . . these deeds should describe the land both in the first parcel and second parcel as extending to the water's edge, then there can be no question about obtaining all of the land required.¹⁷⁰

The \$7,055.00 and \$846.60 interest came back to Indian Affairs, this time through Gray who obtained it from Dawson. Dawson advised Gray that, even though the patent would be to Crawford and White, White must commit to carrying out the previously arranged sales:

My understanding in connection with this matter is that a deed will issue from the Department of Indian Affairs, upon receipt of this sum, in the name of John A. White and A. Mackenzie Crawford, covering the surrendered land. As I previously advised you Mr. Crawford entered into binding agreements for the sale of the land and it is, therefore, necessary under the new arrangement that Mr. White agree, in writing, to carry out the sales so arranged.¹⁷¹

166 D.C. Scott to Superintendent General, May 20, 1929 (ICC Documents, pp. 552-53).

167 Crawford to "The Indian Lands Department," May 21, 1929 (ICC Documents, p. 554).

168 White to Indian Affairs, May 25, 1929 (ICC Documents, p. 555).

169 Gray to Caldwell, May 30, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 560-61). As appears here, there is sometimes an "e" in the spelling of the name of the Stony Point Reserve.

170 Gray to Caldwell, May 30, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 560-61).

171 Dawson to Gray, MP, June 5, 1929 (ICC Documents, p. 563).

When the money was credited to “the proper account” at Indian Affairs, Caldwell noted that “\$7500.00 is . . . the purchase price agreed upon.”¹⁷²

Finalization of Price and Deeds

Indian Affairs headquarters had prepared the surrender documents for an 81-acre surrender. Irrespective of the Order in Council of May 11, 1927, accepting the surrender of 83 rather than 81 acres at Kettle Point, headquarters considered there was an overpayment of \$190.40 (\$170.00 principal and \$20.40 interest) because LeSueur, LeSueur and Dawson paid for 83 not 81 acres. This difference was refunded.¹⁷³ Taking this adjustment into consideration, the total on the Band’s account for selling the Kettle Point lands was \$7,706.20. That is, Indian Affairs’ ledger indicated, at June 10, 1929, that “payment in full, Cash” had been made for 81 acres at Kettle Point at a rate of \$85.00 per acre thus bringing the total amount of the sale to \$6885.00 + 821.20 interest.¹⁷⁴

The other matter left outstanding in finalizing the sale was that neither the patent for 81 acres at Kettle Point to White and Crawford nor the patent for 77 acres at Stony Point to Scott included the words “to the water’s edge” as Gray had requested earlier for both deeds.¹⁷⁵ Gray returned them to Caldwell insisting that “together with the foreshore rights” be added to Crawford and White’s and that “to the water’s edge” be added to Scott’s. Indian Affairs changed both to read: “together with all foreshore rights.”¹⁷⁶ Of course, Gray accepted the Crawford and White patent with this change but he was not happy with the Scott patent. It was not until September 18, 1929 – after Indian Affairs found it necessary to threaten to cancel the Stony Point sale – that Gray finally accepted the wording on the Scott patent.¹⁷⁷

172 LeSueur, LeSueur & Dawson to Gray, MP, June 6, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 565); Caldwell to Accounts Branch, June 7, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 566).

173 Caldwell to Accountant, June 27, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 577-78); LeSueur, LeSueur & Dawson to Secretary, Indian Affairs, July 10, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 580).

174 Indian Affairs, Ledger Sheet for Kettle & Stony Point, June 10, 1929 (ICC Documents, p. 568).

175 Description for Patent, Indian Affairs, June 25, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 574); Description for Patent, Indian Affairs, June 25, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 575).

176 Gray to Caldwell, July 11, 1929, NA, RG 10, vol. 7794, file 29029-2, and marginalia (ICC Documents, p. 581); Caldwell to Cowan, Cowan & Gray, July 18, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 582).

177 Gray to Caldwell, August 6, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 598); Robertson, Chief Surveyor, Indian Affairs, to Lands Branch, Indian Affairs, August 12, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 601); Gray to D.C. Scott, DSGIA, August 29, 1929 (ICC Documents, pp. 615-16); McLean to Gray, September 9, 1929 (ICC Documents, pp. 626-27); Gray to McLean, September 18, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 629).

Except for the Crown's "free use, passage and enjoyment of, in, over and upon all navigable waters," the 81 acres at Kettle Point, being "part and parcel of those set apart for the use of the Chippewas of Chenail Ecart's [sic] and St. Clair Band of Indians," were conveyed to John A. White, Salesman, and A. Mackenzie Crawford, Weigh Master, by the patent that Indian Affairs registered on June 27, 1929, and deposited in the Land Registry Office on August 13, 1929.¹⁷⁸

The eight Lot 8 deeds, made out to the American buyers on October 13, 1928, and signed by Crawford and White in the presence of Dawson, were recorded by the Township on Bosanquet on September 20, 1929.¹⁷⁹ The 44 acres in Lot 8 at Kettle Point sold for an average price of \$300 per acre, which is a profit of 253 per cent or \$215 acre.¹⁸⁰ It appears the instant proceeds to Crawford and White from the Lot 8 sales were \$13,200. The 37 acres in Lot 9 remained in their possession for future sales or development.

Distribution to Band, October 1929

Even though Indian Affairs had received full payment for the Kettle Point lands in June 1929, distribution to individual band members did not occur until late October after Member of Parliament Gray accepted the wording on the Stony Point patent and those lands were paid for.

In August 1929 Chief Sam Bressette, Maurice George, and John Elijah made yet another plea for distribution:

With regards to the distribution of the half of the two pieces of land sold off Kettle & Stoney Point, I beg to say that the members of the said bands are getting impatient about it. There are several who have some house preparing to do before the cold weather sets in and there are some aged people who cannot help themselves they are

178 Crown Grant (Deed No. 15794, Township of Bosanquet) to White and Crawford, June 27, 1929 (ICC Documents, pp. 602-06).

179 Deeds signed by A.M. Crawford and John A. White and their respective wives in the presence of F.P. Dawson, dated October 13, 1928, and recorded September 20, 1929; Deed No. 15810, Harry P. Neal, merchant, & wife Goldie G., Smith's Creek, Michigan, \$2,450 for easterly 490' of Lot 8, A (ICC Documents, pp. 630-33); Deed No. 15811, Henry Neal, merchant, Smith's Creek, Michigan, \$2,450 for westerly 490' of easterly 980' of Lot 8, A (ICC Documents, pp. 634-36); Deed No. 15812, Charles F. Lambert, clerk, & wife Lillian, Smith's Creek, Michigan, \$1,000 for westerly 200' of easterly 1,180' of Lot 8, A (ICC Documents, pp. 637-39); Deed No. 15813, James E. Wakefield, machinist, Port Huron, Michigan, \$3,300 for westerly 660' of easterly 1,840 of Lot 8, A (ICC Documents, pp. 640-43); Deed No. 15814, Robert C. Morton, machinist, Detroit, Michigan, \$1,000 for westerly 200' of easterly 2,040' of Lot 8, A (ICC Documents, pp. 644-47); Deed No. 15815, George H. Neal, contractor, & wife Alma, Detroit, Michigan, \$1,000 for westerly 200' of easterly 2,240' of Lot 8, A (ICC Documents, pp. 648-52); Deed No. 15816, James Mackley, real estate dealer, & wife Jane, St. Claire, Michigan, \$1,000 for westerly 200' of easterly 2,240' of Lot 8, A (ICC Documents, pp. 653-57); Deed No. 15817, John A. Neal, machinist, & wife Rose, Toledo, Ohio, \$1,000 for westerly 200' of easterly 2,640' of Lot 8, A (ICC Documents, pp. 658-60).

180 Appraisal Report, D.W. Lambert, August 5, 1993 (ICC Documents, pp. 864-919).

anxious to get their share for to help them along for to make preparations for the winter. So please rush this matter through as the people are anxiously waiting for this distribution of the money.¹⁸¹

Unfortunately for the Band, about a week before, Agent Paul had recommended that the distribution “for the 50% of the recent surrenders, at Kettle and Stony Pt. Reserves” be delayed until the end of September because the Sarnia Indian Agency had scheduled annual leave from August 26 to September 28, 1929.¹⁸² Under these circumstances, Indian Affairs headquarters found it convenient in mid-September to refer to the problems associated with the wording on the patent to Scott as a reason for the delay. The mid-September letter to the Chief from the department was so vague that it did not state which company or property was holding up the distribution:

I have to inform you that the Company that was negotiating for the property is not satisfied with the Patent as issued by the Department. At the present time, it is not known if the deal will be closed, consequently, the Department is not in the position to make a cash distribution to your members, but I trust the matter will be adjusted at an early date when a distribution can be made.¹⁸³

A telegram from the exasperated Chief to the Superintendent General on October 18, 1929, focused on the sale to Scott:

What is holding money up for land we sold to W.J. Scott Sarnia Indians of Stonepoint and Kettlepoint want their money as soon as possible rush answer collect.¹⁸⁴

Sometime in October 1929, Scott's payment for the Stony Point lands was recorded in the trust fund ledger under “Chippewas of Kettle and Stony Point.” The day of the entry was not recorded.¹⁸⁵ Finally, in mid-October 1929, headquarters mailed a cheque for \$10,190 to Agent Paul, which represented 50 per cent of the amount received from “the sales of lands on the Kettle and Stony Point Reserve . . . to Mr. Crawford and Mr. Scott.”¹⁸⁶

181 Sam Bressette et al. to Indian Affairs, August 31, 1929, NA, RG 10, vol. 7794, file 20-20-2 (ICC Documents, pp. 617-19).

182 Paul to McLean, August 21, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 614).

183 A.F. Mackenzie, Acting Assistant Deputy and Secretary, to Chief Sam Bressette, September 14, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 628).

184 Bressette to Superintendent General, Indian Affairs, October 18, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 664).

185 Trust Fund Account No. 79, Chippewas of Kettle and Stony Point, 1928-1931, NA, RG 10, [illegible] (ICC Documents, pp. 680-99).

186 McLean to Paul, October 18, 1929, NA, RG 10, vol. 7794, file 29020-2 (ICC Documents, pp. 665-67). “Crawford Sale \$6,885.00 + Scott [Sale] 13,500.00 = 20,385.00/2 = \$10, 192.50”

A letter dated October 29, 1929, from Paul to McLean indicates that Paul distributed \$8,877.44 of the \$10,190.00. The difference between what he distributed and what he received for distribution was accounted for as surplus division, the amount due absentees, and as collections on loans, on land sales, and on seed.¹⁸⁷ No money was payable to families on account of members who had died since the surrender.¹⁸⁸

For most Band members, a full two years and seven months elapsed between the date of the Kettle Point surrender vote and when they had a share of the proceeds from the sale in hand.¹⁸⁹ In 1930, Indian Affairs wrote to Ontario Lands Surveyor, W.R. White, to arrange surveys to "establish . . . the limits between the Indian reserves at Kettle and Stony Points and the lands surrendered for sale along the lakeshore."¹⁹⁰

187 Paul to McLean, October 29, 1929 (ICC Documents, p. 668). McLean had instructed Paul to collect on Band loans to 10 individuals (owing between \$26.25 and \$143.94 each) and to collect balances owed on seed supplied in 1920 to five people (ranging from \$4.50 to \$13.75). Describing the occasion as "a splendid opportunity to close old accounts out of the books," he also directed Paul to collect on any other outstanding amounts. McLean to Paul, 18 Oct. 1929, NA, RG 10, vol. 7794, file 29020-2 (ICC Documents, pp. 665-67).

188 McLean to Paul, October 18, 1929, NA, RG 10, vol. 7794, file 29020-2 (ICC Documents, pp. 665-67).

189 The trust fund ledger suggests four members did not receive their portion until November 1929; three others were paid in December 1929, April 1930, and July 1931. Trust Fund Account No. 79, Chippewas of Kettle and Stony Point, 1928-1931, NA, RG 10, [illegible] (ICC Documents, pp. 680-99).

190 A.S. Williams, Indian Affairs, to W.J. Scott, Sarnia Locators, May 22, 1930, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 672); Note initialled "HR," Indian Affairs, to Secretary & Mr. White [Surveyor], Indian Affairs, 22 May 1930, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 673).

PART III

ISSUES

The purpose of this Inquiry is to determine whether Canada has an outstanding lawful obligation, as set out in *Outstanding Business*, to the Band.¹⁹¹ Counsel for the Chippewas of Kettle and Stony Point and Canada have each outlined the issues in their submissions, and their respective lists of issues are attached as Appendix B.¹⁹² In our view, the relevant issues are as follows:

- 1 Was there a valid surrender on March 30, 1927, of 81 acres of Kettle and Stony Point Reserve?
- 2 If the surrender is valid, are there conditions attached to the surrender and were those conditions fulfilled?
- 3 Did the Crown have any fiduciary obligations in relation to this surrender and, if so, did it breach those fiduciary obligations?
- 4 Was the Crown negligent in its conduct before, during, and after the surrender?

¹⁹¹ The concept of lawful obligation is explained in DIAND, *Outstanding Business: A Native Claims Policy, Specific Claims* (Ottawa: DIAND, 1982), 20:

A lawful obligation may arise in any of the following circumstances:

- (ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
- (iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
- (iv) An illegal disposition of Indian land.

¹⁹² Appendix A of Claimant's Submissions and pp. 10-11 of Canada's Submissions. There was no agreement between the parties as to the specific issues to be addressed by the Commission in this inquiry.

PART IV

ANALYSIS

BACKGROUND

As noted above, this matter was simultaneously the subject of an inquiry before this Commission and the subject of a court case. In 1992 the Band filed suit against the Crown, claiming that the surrender was invalid and that the Crown breached its fiduciary duty. The Band was seeking a declaration that the surrender and subsequent Crown patent were void, as well as damages for breach of fiduciary duty. In 1995, the Attorney General of Canada and other defendants brought a motion for summary judgment against the Band on the issue of validity. In other words, the Crown argued that the question of whether the surrender was valid did not amount to a genuine issue for trial, and therefore the Band's claim for declaratory relief should be dismissed. The motions judge agreed with the Crown. He held that the surrender was valid and unconditional, despite the alleged irregularities in the surrender vote and subsequent sale transaction, and he dismissed the Band's claim for recovery of the land.¹⁹³ This decision was recently upheld on appeal.¹⁹⁴

Before examining in detail the reasons of the motions judge and Ontario Court of Appeal, it is important to note that the claim for damages for breach of fiduciary duty was not dismissed and the Band may proceed to trial on that issue. The courts did not rule on the breach of fiduciary duty claim.

Reasons of the Motions Judge

The essence of the Band's case was that the surrender was invalid because the purchaser was present at the surrender meeting and paid Band members to influence them to vote in favour of the surrender, contrary to the *Royal*

¹⁹³ *Chippewas of Kettle and Stony Point v. Canada* (1995), 24 OR (3d) 654 (Ont. Ct (Gen. Div.)).

¹⁹⁴ *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1997), 31 OR (3d) 97 (CA).

Proclamation and Indian Act. More specifically, the Band pointed to the following irregularities:

- 1 the absence of a Band Council Resolution convening the General Council for the surrender vote;
- 2 a lack of Band member status of some of those who voted on the surrender;
- 3 the possible underage status of some of the voters;
- 4 the non-attendance by Band members recorded as voting in favour of the surrender;
- 5 the attendance of a non-Band member (Crawford) at the vote and the offering of cash payments by Crawford to the voters; and
- 6 formal irregularities in the "Proof of Assent to Surrender" documentation.

Along with the lack of compliance with the *Indian Act*, the Band also contended that

- 1 the surrender was conditional and the necessary conditions were not fulfilled;
- 2 the circumstances surrounding the surrender amounted to unconscionable conduct and therefore vitiated the Band's assent to the surrender;
- 3 the Band was misdescribed in the surrender documents, rendering the documents invalid; and
- 4 the ultimate conveyance to Crawford and White jointly rather than just Crawford, as had been agreed upon, rendered the surrender illegal.

Killeen J began by considering the history of the surrender and the enactments in place governing surrenders of Indian lands, namely, the *Royal Proclamation* of 1763 and sections 47 to 51 of the *Indian Act*, RSC 1906, c. 81. The *Royal Proclamation* attempted to address the problem of frauds and abuses occurring in the purchase of Indian lands by prohibiting private purchases of Indian lands and permitting aboriginal land rights to be extin-

guished only through voluntary surrender to the Crown.¹⁹⁵ Three basic principles underlie the *Royal Proclamation's* provisions:

First, First Nations are to be protected in their lands by the Crown. Second, legitimate settlement may take place in areas designated from time to time by the Crown. Third, before an area can be settled, any native land rights must be ceded voluntarily to the Crown.¹⁹⁶

It is through its role as intermediary between the Indians and purchasers that the Crown assumes a protective and fiduciary role. Furthermore, that part of the *Indian Act* dealing with "Surrender and Forfeiture of Lands in Reserve" implements, by way of statute, the general principles outlined in the *Royal Proclamation*. Section 48 prohibits the direct sale of reserve lands and section 49 sets out the procedural requirements for a valid surrender:

48. Except as in this Part otherwise provided, no reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Part: Provided that the Superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage in the interests of the Indians, of wild grass and dead or fallen timber.

49. Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.

¹⁹⁵ The relevant part of the *Royal Proclamation* of 1763 reads as follows:

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

¹⁹⁶ B. Slattery, "First Nations and the Constitution" (1992) 71 *Can. Bar Rev.* 261 at 290. This work was quoted with approval by Killeen J in *Cbippewas of Kettle and Stony Point*.

2. No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.

3. The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before some judge of a superior, county or district court, stipendiary magistrate or justice of the peace, or, in the case of reserves in the province of Manitoba, Saskatchewan or Alberta, or the Territories, before the Indian commissioner, and in the case of reserves in British Columbia, or in either case, before some other person or other specially thereinto authorized by the Governor in Council.

4. When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.

50. Nothing in this Part shall confirm any release or surrender which, but for this Part, would have been invalid; and no release or surrender of any reserve, or portion of a reserve, to any person other than His Majesty, shall be valid.

Killeen J agreed that sections 48 to 50 of the *Indian Act* stipulate mandatory preconditions to the validity of any surrender, but held that all these preconditions were met in this case. The surrender was assented to by a majority of male members at a General Council meeting that was called according to the rules of the Band and conducted in the presence of the Indian Agent. He rejected the Band's argument that, in accordance with the rules of the Band, a Band Council Resolution was required to authorize the meeting. In fact, the calling of the General Council meeting had the support of the Band, and the Chief and councillors. Furthermore, he found that there was no credible evidence to support the argument that some of those who voted in favour of the surrender had no status as Band members.

The Band also argued by implication from section 49(2) of the *Indian Act*, which states "[n]o Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near . . . the reserve," that the prospective purchaser Crawford should not have been at the meeting nor been allowed to make cash payments to the voters. Killeen J disagreed. He held that there was nothing in the *Indian Act* or *Royal Proclamation* to prohibit direct dealing – that is, the attendance of Crawford – at the surrender meeting, or the cash payments. The *Royal Proclamation* does not prohibit direct dealings *per se*; it prohibits direct sales. Moreover, it would have been open to Parliament to prohibit, under the *Indian Act*, all direct dealings and the attendance of outsiders at surrender meetings, but it did not do so.

Although the motions judge was satisfied that there was no express or implied statutory prohibition against Crawford's conduct, he did add the following remarks:¹⁹⁷

There can be little doubt that these cash payments, and the promises which preceded them, have an odour of moral failure about them. It is, perhaps, hard to understand why the Departmental officials could countenance such side offers even in the different world of the 1920s in which they were working. However, as I have said above, I cannot read a statutory prohibition against them within the statutory code of the Act.

Killeen J also rejected the Band's technical argument that the certification on oath of the assent to surrender was not properly done, and that the Band was misdescribed in the surrender documents. None of these minor deficiencies goes to the substantive validity of the surrender, because the provisions that were not strictly complied with are directory rather than mandatory.

The Band further argued that the surrender was actually conditional, and that the conditions failed or were thwarted by Crawford's post-surrender conduct. One of the main conditions of the agreement, according to the Band, was a quick completion of the cash sale, which would have allowed a partial distribution of the proceeds to the Band members within months of the surrender. Since the money was not received until two years later, the Band contended that the condition was not met and a second surrender was required to pass valid title to Crawford.

Killeen J acknowledged that the post-surrender conduct of Crawford, the Department, politicians, and others was "sometimes puzzling, sometimes incomprehensible, and sometimes even boarding on the margins of greed and venality,"¹⁹⁸ and he accepted that "the two-year delay in closing has an arguably excessive and even unconscionable character."¹⁹⁹ However, following *Smith v. R.*,²⁰⁰ he held that the surrender was unconditional and absolute because it contained granting language "cast in the widest possible terms,"²⁰¹ releasing all rights to the Crown.

With respect to the argument that the bargain was unconscionable, Killeen J was of the view that the equitable doctrine of unconscionability applies only to unfair bargains in private transaction and thus has no application to the unique legal regime governing surrenders under the *Royal Proclamation*

197 *Chippewas of Kettle and Stony Point*, at 690.

198 *Chippewas of Kettle and Stony Point*, at 693.

199 *Chippewas of Kettle and Stony Point*, at 694.

200 [1983] 1 SCR 554, 147 DLR (3d) 237.

201 *Chippewas of Kettle and Stony Point*, at 694.

and the *Indian Act*. Moreover, he stated that “a fair bargain is not a condition precedent to the exercise of the surrender power under s. 49 of the Act or to the acceptance of a surrender by the Governor in Council.”²⁰² Accordingly, unconscionability does not go to the validity of the surrender but to the question of fiduciary duty, a question which was not before the court.²⁰³

Finally, the Band asserted that assent to the surrender was induced and coerced by economic duress, as evidenced by the promise of the \$15 payments and possibly the Band’s economic circumstances in 1927. Killeen J rejected that argument as well, reasoning that the Band had to be party to a contract for the doctrine of duress to be applicable, a precondition which did not exist in the case at hand.²⁰⁴ He also questioned again the wisdom of “injecting a narrow contract doctrine in the interstices of the *Indian Act*.”²⁰⁵

Reasons of the Ontario Court of Appeal

The Band appealed Killeen J’s decision to the Ontario Court of Appeal. The court dismissed the appeal, agreeing with Killeen J that the claim for a declaration that the surrender was invalid raised no genuine issue for trial. Although the Band made essentially the same arguments on appeal, it was able to rely on the Supreme Court of Canada’s decision in the *Apsassin* case,²⁰⁶ which was released several months after Killeen J’s decision. That case is important because it sets out an “intention-based approach” to determining the nature and legal effect of dealings between aboriginal people and the Crown with respect to reserve lands, and clarifies the nature of the Crown’s pre-surrender fiduciary duties.

In *Apsassin*, the Supreme Court considered whether a 1945 surrender of a reserve “for sale or lease” included mineral rights. The issue arose because in 1940 the Band had surrendered the mineral rights “for lease.” Some years later, oil and gas deposits were discovered on the surrendered land.

On the issue of the nature and legal effect of the 1945 surrender “for sale or lease,” Gonthier J, writing for the majority on this point,²⁰⁷ rejected techni-

202 *Chippewas of Kettle and Stony Point*, at 698.

203 *Chippewas of Kettle and Stony Point*, at 698.

204 *Chippewas of Kettle and Stony Point*, at 699.

205 *Chippewas of Kettle and Stony Point*, at 699.

206 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344, [1996] 2 CNLR 25 [hereinafter *Apsassin*].

207 The majority/concurring opinion split in *Apsassin* is somewhat complex, but breaks down as follows. The reasons of Gonthier J won the support of the majority of the Court. McLachlin J wrote reasons concurring in the result, but disagreeing with Gonthier J on the issue of whether the 1945 surrender included mineral rights. Gonthier J held that the surrender did include the mineral rights, and he came to that conclusion by adopting an intention-based approach. In addition, although Gonthier J agreed with McLachlin J’s conclusion that the Crown committed a post-surrender breach of fiduciary duty in dealing with the mineral rights, his reasons were

cal statutory interpretation arguments grounded in the definition of “reserve” and “Indian lands” in the *Indian Act*.²⁰⁸ He also rejected arguments that relied on common law property rules, such as the presumption that a general conveyance passes all interests except those specifically reserved in the deed of transfer. Instead, he adopted an intention-based approach, holding that the legal character of the 1945 surrender, and its effect on the earlier surrender, should be determined by reference to the intention of the Band. This approach is to be preferred to a technical one, according to Gonthier J, because

[a]s McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured. . . . In my view, when determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the *sui generis* nature of aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings.²⁰⁹

As noted, Madam Justice McLachlin recognized the importance of autonomy in her discussion of the surrender of surface rights, stating that the provisions in the *Indian Act* for the surrender of reserves strike a balance between autonomy and protection.²¹⁰ The aim is to ensure “that the true intent of an Indian Band is respected by the Crown.”²¹¹

It was clear on the facts in *Apsassin* that the Band understood that by agreeing to the surrender for sale or lease it would be transferring all its rights in the reserve to the Crown in trust. The Band did not intend to hold rights over the reserve once the surrender was completed. Given this clear intention, the 1945 surrender was properly interpreted as a variation of the trust created by the first surrender; it subsumed the earlier agreement and expanded it by including surface rights in the surrender and giving the Crown, as trustee, discretion to sell or lease.

different. Gonthier J agreed with McLachlin J’s analysis of the surrender of the surface rights, including pre- and post-surrender duties and breaches. Thus, the reasons of McLachlin J are instructive on breach of fiduciary duty and the directory rather than mandatory nature of section 51 of the *Indian Act*.

208 One argument was that mineral rights surrendered for lease constituted a “portion of a reserve” and therefore would have the status of “Indian lands” following surrender, which in turn means that the mineral rights were no longer part of the reserve available to be surrendered later for sale or lease.

209 *Apsassin*, at 358-59.

210 *Apsassin*, at 370.

211 *Apsassin*, at 395.

Gonthier J went on to say that, “if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band’s understanding and intention,” he would be reluctant to give effect to the second surrender as a variation of the first.²¹² But there was nothing in the circumstances of the transaction or the surrender instrument in *Apsassin* that would make it inappropriate to give effect to the Band’s intention to surrender all its rights in its reserve. In fact, the Crown representatives took pains to make sure that the Band members fully understood that they were giving up all rights in the reserve, and generally acted in a conscientious manner.²¹³

Following from *Apsassin*, the Chippewas of Kettle and Stony Point argued before the Ontario Court of Appeal that, if there is evidence of “tainted dealings,” one must be careful to find a genuine intention by the Band to surrender. Further, the Band argued that there is ample evidence that the dealings here were tainted. The surrender vote was preceded by a promise from Crawford – the prospective purchaser – of a \$15 payment to the voting members if they voted in favour of the surrender. The Band’s economic circumstances were such that \$15, or even \$5, would have had significant persuasive power at a surrender meeting. And the Indian Agent stood by while the prospective purchaser handed out \$5 to each of the voters at the meeting. The Band submitted that, under these circumstances, it cannot be said that the assent required under the *Indian Act* was obtained.

Laskin JA applied *Apsassin* to the facts at hand and concluded that Killen J was correct in finding that the Band clearly understood in 1927 that it was surrendering 80 acres of its reserve, and that it intended to do so. The evidentiary record before the court clearly supported that finding; throughout the transaction, from surrender up until closing, the Chief consistently expressed an intention to sell the land and pressed for completion of the deal. The objections to the surrender were voiced by a minority only. In addition, the bonus arrangement was agreed to by Crawford and the Band.

Laskin JA then addressed the issue of “tainted dealings”:

Against this record, what then of the cash payments, which, in the words of the motions judge, had “an odor of moral failure about them”? In my view, there is no evidence to suggest that these cash payments, in the words of McLachlin J., vitiated the “true intent” or the “free and informed consent” of the Band or, in the words of

²¹² *Apsassin*, at 362.

²¹³ As per the findings of Addy J at trial, outlined in *Apsassin* at 359-60 (per Gonthier J) and 372-73 (per McLachlin J).

Gonthier J., "made it unsafe to rely on the Band's understanding and intention." In keeping with Apsassin, the decision of the Band to sell should be honoured.²¹⁴

Therefore, the cash payments did not invalidate the surrender, and the validity issue did not present a genuine issue for trial. Laskin JA went on to add the following, however:

the cash payments or alleged "bribe" and consequent exploitation or "tainted dealings" may afford grounds for the Band to make out a case of breach of fiduciary duty against the Crown. As the parties have recognized, this is an issue for trial. The same may be said of the Band's contention that the sale to Crawford was improvident, he having immediately "flipped" the land for nearly three times the purchase price.²¹⁵

Finally, on the issue of delay, the Court of Appeal held that Killeen J was right in concluding that the surrender was unconditional and the delay of no consequence with respect to the validity of the surrender. Again, however, Laskin JA noted that the Crown's conduct in allowing the delay was open to scrutiny under the claim for breach of fiduciary duty.

ISSUES 1 AND 2: WAS THE SURRENDER VALID AND UNCONDITIONAL?

The purpose of this inquiry is to determine whether there is an obligation, derived from the law, owed by Canada to the Band. In this case, we are faced with the Ontario Court of Appeal's decision on two of the very issues before us. The court has carefully considered all the arguments that were addressed to this Commission on these first two issues, and has determined that the surrender was valid and unconditional. Given that the courts have chosen to characterize the \$5 and \$10 payments, made directly to the voting members of the Band by the prospective purchaser, as "bonuses" and not "bribes," we cannot find that the conduct of the Crown in any way resulted in "tainted dealings" that would vitiate or call into question the intention of the Band.

The content and meaning of "lawful obligation" is found in the applicable case law and legislation. Following from the decision of the Court of Appeal, our conclusion is that the surrender is valid and unconditional.

The Court of Appeal made no determination on the issue of breach of fiduciary duty, however. We turn now to that issue.

²¹⁴ *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1997), 31 OR (3d) 97 at 106 (CA).

²¹⁵ *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1997), 31 OR (3d) 97 at 106 (CA).

ISSUE 3: BREACH OF FIDUCIARY DUTY

Submissions of the Parties

The Band submits that, in any case involving a surrender of reserve land, there are three separate phases of the Crown's fiduciary duty to First Nations: pre-surrender, surrender, and post-surrender.²¹⁶ In the pre-surrender phase, the Crown has a duty to prevent exploitative bargains. The Band puts forward the following evidence of the Crown's failure in that regard:

1. members of the Band were in dire financial circumstances;
2. the purchaser was in a superior financial and educational position vis-a-vis the members of the Kettle and Stony Point Band;
3. the purchaser was influential in government circles and the D.I.A. supported the purchase to Crawford from the outset;
4. both the purchaser and the Crown knew of the Band's economic position, yet the purchaser was permitted to pay eligible voting members \$5 at the General Meeting;
5. the Crown permitted the purchaser to attend the General Meeting and pay "bonuses" directly to those voters in attendance;
6. the price of \$85 per acre obtained for the land was below fair market value. The purchaser entered into agreements with third party purchasers for the sale of this land for a price of \$300 per acre in the year following the surrender;
7. the D.I.A. itself received a higher offer from White for the same reserve lands after the contract with Crawford had been repudiated; and
8. there was no effort by the D.I.A. to obtain an appraisal of the lands either before the surrender or after complaints flooded their office immediately after the surrender.²¹⁷

With respect to the issue of market value, the Band argues that the Crown had an obligation to establish whether Crawford's offer was fair. However, no appraisal was done at the time of surrender. Moreover, Crawford was able to flip the land he bought at \$85 per acre for a price of \$300 per acre, which indicates that the price paid to the Indians was well below market value. In addition, an appraisal prepared by the Band's experts estimates the value of the lands in 1927 at between \$145 and \$165 per acre.²¹⁸

²¹⁶ Supplemental Submissions of the Claimant, March 8, 1996, p. 6.

²¹⁷ Supplemental Submissions of the Claimant, March 8, 1996, pp. 6-7.

²¹⁸ Lambert Report (ICC Documents, p. 864).

Moving to the second phase, the Band submits that upon surrender the Crown had a fiduciary duty to act in the Band's best interests because it abnegated its decision-making power to the Crown.²¹⁹ This submission by the Band rests on the following presentation of events:

1. there was no evidence that the Band discussed the matter of surrender at great length;
2. the General Council meeting was convened without a Band Council resolution;
3. only 26 of 44 eligible voters turned out to the meeting;
4. the purchaser was present at the general meeting handing out "bonuses" in an effort to persuade voting members; and
5. the community was financially destitute.

The Band submits that in the post-surrender stage, the Crown had a further obligation to act in the best interests of the Band, exercising the care of a person of ordinary prudence in managing his own affairs.²²⁰ The Band says that the Crown breached this obligation as well: it was aware of White's higher offer, but never relayed that information to the Band. Moreover, the Band submits that the Crown was under a continuing post-surrender fiduciary duty to correct errors.

Canada argues that the Band did receive fair market value for the land, and submits the "Bell report," an appraisal report which shows that the \$85 per acre price was reasonable. Canada further maintains that there is no evidence that the terms of the surrender were foolish, improvident, or exploitative, which, according to *Apsassin*, is the necessary basis for arguing that the Crown had a fiduciary duty to block the surrender. In short, Canada's position is that the Band wanted to surrender its reserve, was able to determine its own course of action, and was not vulnerable to any discretion of the Crown.

Did the Crown Breach Its Pre-surrender Fiduciary Duty?

The most recent case from the Supreme Court of Canada on the issue of the Crown's fiduciary duty in the surrender context is *Apsassin*. As discussed above, that case involved the surrender of a reserve that was later found to contain valuable oil and gas deposits. In *Apsassin*, the Blueberry River Band

²¹⁹ Supplemental Submissions of the Claimant, March 8, 1996, p. 8.

²²⁰ Supplemental Submissions of the Claimant, March 8, 1996, pp. 10-15.

argued that the Crown was under a fiduciary obligation to ensure that the surrender was not improvident, and that the Crown breached its duty because the surrender was not in the Band's long-term best interest. The Crown's rejoinder was that the Band was acting with independent agency when it surrendered its land.

The majority and concurring opinions in *Apsassin* are essentially in agreement with respect to the analysis of fiduciary duties. Madam Justice McLachlin analyzed the fiduciary issue in terms of pre-surrender and post-surrender duties and breaches. She first considered the Blueberry Band's argument that the Crown should have prevented it from surrendering the reserve because it was not in its long-term best interests. The Band argued that the paternalistic scheme of the *Indian Act* imposed a duty on the Crown to protect the Indians from themselves, that is, to block the surrender. McLachlin J disagreed, because the *Act* "strikes a balance between the two extremes of autonomy and protection."²²¹ There is a recognized historical duty on the Crown to prevent exploitative bargains,²²² but that must be weighed against a Band's right to decide whether to surrender its reserve. Thus, it is only where the bargain is *exploitative* that the *Indian Act* imposes on the Crown a fiduciary duty to withhold its consent to the surrender; a Band's surrender decision is to be respected unless it is foolish or improvident. On the facts of *Apsassin*, the surrender was not foolish or improvident; on the contrary, viewed from the perspective of the Band at the time, it made good sense. Therefore, there was no obligation on the Crown, through the Governor in Council, to withhold consent to the surrender.

In this inquiry, Canada argued that, since the sale price of the surrendered land was reasonable, the sale "was not and could not have been foolish, improvident, or exploitative. It is clear from the reasoning in *Apsassin* that the duty of the Crown was to respect the decision of the band."²²³ We disagree. The Band surrendered the land for sale to Crawford at \$85 per acre, and Crawford then "flipped" the land for \$300 per acre. This information, in our view, raises the spectre of exploitation.

The precise details of the flip are interesting. Just over half of the total 81 acres were resold as eight smaller lots at a price of \$300 per acre. The deeds were dated October 13, 1928, which means that the lots were sold 10

²²¹ *Apsassin*, at 370.

²²² *Guerin v. The Queen*, [1984] 2 SCR 335, [1985] 1 CNLR 120.

²²³ Robert Winogron to Isa Gros-Louis Ahenakew, February 14, 1996, p. 8 (ICC file 2105-4-1).

months *before* Crawford and White finally closed the deal and obtained title. And the resale price represented a threefold increase in market value.

We appreciate that, when a large parcel of land is subdivided, it is not unusual for the market price per acre to increase. There must be some compensation for entrepreneurial risk, holding costs, and costs of subdivision in the form of profit. In this case, however, there was virtually no risk in holding this property because the parcels were presold. Nor is it likely that there were major subdivision costs, because the lots were not improved. Therefore, it seems that Crawford and White profited not so much from their entrepreneurial skills as from their having taken advantage of the Indians. They bought the land from the Indians at \$85 per acre and then simply turned around and sold eight parcels at \$300 per acre.

According to *Apsassin*, the Crown has a fiduciary obligation to prevent such exploitative bargains. Thus, the Crown had an obligation to investigate the matter and determine whether the transaction was fair and to the advantage of the Indians. It may be that the Crown should have recognized the potential value of that part of the reserve. It should have inquired into the potential value to satisfy itself that it made good sense for the Band to sell to Crawford for \$85 per acre. The Crown failed to make such inquiries, and by consenting to an exploitative transaction it breached its pre-surrender fiduciary duty.

We note one further point. Even if the huge increase in market value could be attributed almost entirely to the process of subdivision, in that there was a very strong market for smaller lots, it could well be that the Crown had an obligation to recognize the market potential and to subdivide the lots prior to sale to third parties. In fact, the Crown adopted that course of conduct in the Prairie land sales, generally selling surrendered land in quarter-sections at public auction with an upset (minimum) price, in order to give the Indians the benefit of the increase in market value that subdivision can bring. That kind of conduct – taking steps to protect the Indians' interests – is what is required of a fiduciary.

With respect to the Band's second argument, we find that the Band did not abnegate its decision-making power to the Crown. Thus, there is no pre-surrender fiduciary duty arising from that basis.

Did the Crown Breach Its Post-surrender Fiduciary Duty?

It is a well-established principle, based on cases such as *Guerin* and *Apsassin*, that, once land is surrendered to the Crown, the Crown takes on the

obligations of a trustee and must exercise any discretion it has solely to further the best interests of the Indian Band.

Canada acknowledges that it was under an obligation here "to deal with the land in accordance with the surrender document, the views of the First Nation, and in a reasonable manner consistent with the exigencies."²²⁴ The surrender document in this case provides as follows:

TO HAVE AND TO HOLD the same unto His said Majesty The King, his heirs and successors forever, in trust to sell the same at a price of Eighty-five dollars per acre, cash, to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our Welfare and that of our people . . .²²⁵

Canada argues that there was no breach of fiduciary duty because the Crown had a clear mandate under the terms of the surrender document to sell the land for \$85 dollars per acre, and it did just that. Thus, the argument is that Canada did not exercise its discretion improperly, because there was no discretion to begin with.

In our view, the case is not so simple. To reduce the factual context here to a mandate to sell at \$85 and a sale at \$85 is to mischaracterize the reality. There was, in fact, a tortuous chain of events in which the Crawford transaction was resurrected after apparently having been cancelled *twice* and political intermeddling was the order of the day. To recapitulate the facts, three days after the Department wrote to Crawford purporting to cancel the sale for a second time (in May 1929), Member of Parliament Ross Gray made an offer to purchase the property on behalf of Mr White, for \$118 per acre. The Department immediately wrote to Gray informing him that the offer was being considered. But the Band was never apprised of the higher offer. And, shortly after submitting White's offer, MP Gray was able to broker a deal between Crawford and White in which White withdrew his offer and the two became joint purchasers at the original \$85 per acre. As Killeen J described it, Mr Gray "played the role of ringmaster for Crawford and White."²²⁶

These facts show that the Department was in receipt of White's higher offer at a point when it could have cancelled the sale. In December 1928 or early January 1929, the Deputy Superintendent General, apparently on approval from his superiors, *did* cancel the transaction and return the

224 Submission on Behalf of the Government of Canada, October 17, 1995, p. 35.

225 Surrender Form No. 65, March 30, 1927 (ICC Documents, pp. 279-84).

226 *Chippewas of Kettle and Stony Point*, at 678.

purchase moneys in the form of a cheque to Crawford's lawyers.²²⁷ Indeed, the ability and opportunity to withdraw from the Crawford transaction explains why the Department did not simply dismiss the White offer.²²⁸

In our view, these changed circumstances – the opportunity to withdraw from the Crawford transaction, combined with the higher offer – generated an obligation on the Crown to return to the Band to explain what had occurred and to seek the Band's counsel on how to proceed. The Crown, as a fiduciary acting under the terms of the surrender instrument, had a duty to deal with the land in the best interests of the Band. The fact that the surrender document authorized a sale at \$85 per acre does not negate that overriding duty. Moreover, in these particular circumstances, the Crown was no longer bound by the \$85 term. It was left, then, with a general duty to protect and uphold the interests of the Indians in transactions with third parties.

Therefore, in these specific circumstances, the Crown had an obligation to disclose the higher offer to the Band and to obtain direction from the Band on how to proceed. The Crown had complete control of the situation, but, rather than fulfil those obligations, Crown officials instead bowed to political pressure and put the interests of the Band behind third-party economic interests. A fiduciary's duty is that of utmost loyalty to its principal. Measured against that standard, the Crown's conduct amounts to a patently clear breach of fiduciary duty.

That does not end our analysis of the Crown's post-surrender conduct. We are of the view that there was another breach, arising from the two-year delay between the surrender and the closing payment. In the 1925-29 period, the Band members were in difficult economic circumstances and understood that the surrender would bring them much-needed cash. It was not reasonable for them to expect, or agree to, a delayed closing date. Although the Band's expectation of a quick cash sale did not amount to an actual condition of the surrender (because it was not formally assented to by the Band or incorporated into the surrender document), in our opinion it did amount to

²²⁷ In December 1928 the Deputy Superintendent General sent a memorandum to the Superintendent General referring to the complaints of Chief Bressette and stating that it was up to the Minister to decide whether to cancel the sale to Crawford because of the long delay in handing over the purchase price. It appears that the Superintendent General did decide to cancel the transaction, because on January 3, 1929, a memorandum was sent to the Accounts Branch asking for a cheque for \$7,055 payable to Crawford's law firm. This memorandum says that the "transaction has been cancelled at the request of the Band and for other reasons." See *Chippewas of Kettle and Stony Point*, at 674. Authority for the Superintendent General to cancel a surrender may be found in section 64 of the *Indian Act*.

²²⁸ The 1906 *Indian Act* is silent on matters of surrender variation, revocation, and resurrender, so it is not entirely clear whether it was necessary for the Department to obtain a revocation of the surrender and a new surrender or whether it could have simply gotten a variation of the original surrender. But whatever the technical issues are, it remains that it was open to the Crown to cancel the Crawford transaction.

an implied term of the surrender. According to *Guerin*,²²⁹ the Crown is not empowered by a surrender document to ignore oral and implied terms that the Band understood would be the terms of the transaction. As Dickson J (as he then was) stated, such terms “inform and confine the field of discretion within which the Crown was free to act.”²³⁰ The Crown, in this case, acting as a fiduciary, was not permitted simply to ignore the Band’s understanding of the terms of the transaction or its underlying economic needs. Thus, the Crown had no discretion to complete the transaction after the two-year delay, particularly since the delay here can be explained only by bumbling and backroom political dealing.

ISSUE 4: WAS THE CROWN NEGLIGENT?

The Band also argued that Canada was negligent. The factors in support of this argument are similar to those advanced in support of the breach of fiduciary duty issue. Given our conclusion that Canada breached its fiduciary obligation to the Band, we do not find it necessary to address the negligence argument. A fiduciary is required to act with reasonable diligence to protect the interests of its principal.²³¹ In this case, the fiduciary duty encompasses the duty of care.

229 [1984] 2 SCR 335, [1985] 1 CNLR 120 (SCC).

230 *Guerin*, at 388.

231 *Apsassin*, at 366.

PART V

FINDINGS AND RECOMMENDATION

We have been asked to inquire into and report on whether the Government of Canada properly rejected the specific claim submitted by the Chippewas of Kettle and Stony Point First Nation. To determine whether this claim is valid, we considered the following specific legal issues:

- 1 Was there a valid surrender on March 30, 1927, of 81 acres of the Kettle and Stony Point reserve?
- 2 If the surrender is valid, are there conditions that attach to the surrender and were those conditions fulfilled?
- 3 Did the Crown have any fiduciary obligations in relation to this surrender and, if so, did it breach those fiduciary obligations?
- 4 Was the Crown negligent through its conduct before, during, and after the surrender?

Our findings are summarized as follows:

ISSUES 1 AND 2: WAS THE SURRENDER VALID AND UNCONDITIONAL?

Our task in this inquiry is to determine whether there is an obligation, derived from the law, owed by Canada to the Band. In this case, we were faced with the Ontario Court of Appeal's decision on two of the very issues before us. The court has carefully considered all of the arguments that were addressed to this Commission on these first two issues, and has determined that the surrender was valid and unconditional. The content and meaning of "lawful obligation" is found in the applicable case law and legislation. Following from the decision of the Court of Appeal, our conclusion is that the surrender is valid and unconditional.

ISSUE 3: BREACH OF FIDUCIARY DUTY

We find that Canada had pre-surrender and post-surrender fiduciary duties towards the Band and that it breached those duties.

The Crown breached its pre-surrender fiduciary duty by consenting to an exploitative transaction. Crawford bought the land from the Indians for \$85 per acre and immediately turned around and carved out eight lots, which he sold for \$300 per acre. The profit cannot be attributed to improvements or entrepreneurial risk, since the lots were presold and unimproved. According to *Apsassin*, the Crown has a fiduciary obligation to prevent exploitative bargains. Thus, the Crown had an obligation to inquire into the market potential of the land and satisfy itself that it made good sense for the Band to sell to Crawford for \$85 per acre. It failed to do so, and by consenting to an exploitative transaction it breached its pre-surrender fiduciary duty.

The Crown also breached its post-surrender duty to the Band in failing to disclose White's higher offer and failing to seek the Band's counsel on how to proceed. The Department had the discretion to cancel the Crawford transaction when the White offer was made. The Department breached the fiduciary duty attached to this discretion by subordinating the interests of the Band to third-party economic interests. Furthermore, the Crown breached its fiduciary duty by ignoring an implied term of the surrender that the transaction close in a timely manner and allowing the transaction to close two years after the surrender.

ISSUE 4: WAS THE CROWN NEGLIGENT?

In the light of our finding on Issue 3, it is not necessary to consider this issue.

RECOMMENDATION

We find that this claim discloses breaches of Canada's fiduciary obligations to the First Nation. We therefore recommend to the parties:


That the claim of the Chippewas of Kettle and Stony Point First Nation be accepted for negotiation under the Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION



Roger J. Augustine
Commissioner

March 1997



Daniel J. Bellegarde
Commission Co-Chair

APPENDIX A

CHIPPEWAS OF KETTLE AND STONY POINT FIRST NATION INQUIRY

- | | | |
|---|------------------------------------|------------------------------------|
| 1 | Decision to conduct inquiry | February 2, 1994 |
| 2 | Notices sent to parties | February 2, 1994 |
| 3 | Planning conferences | April 18, 1994
October 17, 1994 |
| 4 | Community session | March 8, 1995 |

The Commission heard from the following witnesses: Rachel Shawkence, Angeline Shawkence, Charles Shawkence, Earl Bressette, Chief Thomas Bressette, Bonnie Bressette, Emery Shawanoo, Calvin George.

- | | | |
|---|-------------------------------------|-------------------------|
| 5 | Expert evidence session | July 17, 1995 |
| 6 | Legal argument | October 26 and 27, 1995 |
| 7 | Content of the formal record | |

The formal record for the Chippewas of Kettle and Stony First Nation Inquiry consists of the following materials:

- 11 exhibits tendered during the inquiry, including the documentary record (4 volumes of documents with annotated index)
- written submissions of counsel for Canada and the claimants
- transcripts of the community session, expert session, and oral argument session
- correspondence among the parties and the Commission

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

APPENDIX B

STATEMENT OF ISSUES SUGGESTED BY COUNSEL FOR CHIPPEWAS OF KETTLE AND STONY POINT FIRST NATION AND CANADA

STATEMENT OF ISSUES SUGGESTED BY COUNSEL FOR CHIPPEWAS OF KETTLE AND STONY POINT

The Band through its written "Submission"¹ formulated the issues as follows:

(1) Validity of Surrender

1. Was the payment of \$15.00 by Crawford to eligible voting members of the Band an inducement to vote in favour of the surrender of the lands for sale to Crawford? If so, does such conduct contravene the provisions of the *Indian Act* R.S.C. 1927, c.98, Sections 49-51 or the *Royal Proclamation of 1763*?
2. Was the \$15.00 payment part of the consideration for the purchase of the lands to be surrendered? If so, does such payment contravene the provisions of the *Indian Act*, supra or the *Royal Proclamation of 1763*?
3. Did the surrender vote held March 30, 1927 comply with the requirements of Section 51 of the *Indian Act*?
4. Was Crawford entitled to negotiate directly with the Band and its members for the purchase of the lands at Kettle Point? If not, what is the effect of such conduct on the validity of the surrender?
5. Was Crawford entitled to be present at the General Council meeting held on March 30, 1927 for the purpose of the surrender vote? If not, what is the effect of his presence on the validity of the surrender?

¹ Submission of The Chippewas of Kettle and Stony Point, October 16, 1995, Appendix A.

6. Was the surrender and later sale transaction to Crawford and White unconscionable having regard to the relative bargaining powers of Crawford and the Band, and the purchase price paid for the lands?

(2) Terms of Surrender

7. Did Crawford repudiate the terms or conditions upon which the surrender was given by the First Nation by failing to remit payment of the purchase price until approximately seventeen months after the surrender vote was held?
 - (a) Did Crawford's proposal contemplate an immediate sale of the land, subject to Department of Indian Affairs approval?
 - (b) What were the terms and conditions upon which the lands were surrendered by the Band?
8. What was the effect of Crawford's repudiation on the surrender or on the interest of the First Nation in the lands at Kettle Point?
9. What was the effect of the Department of Indian Affairs' notice to Crawford that his purchase transaction was cancelled and the refund of his purchase monies on two occasions, on the surrender or the interest of the First Nation in the lands at Kettle Point?
10. Was the Department of Indian Affairs entitled to transfer title to the lands at Kettle Point to Crawford and White in the absence of a new surrender vote?
11. In completing the sale of the lands to Crawford and White did the Department of Indian Affairs, in fact, rely upon the advice of Chief Sam Bressette that the Band was willing to complete the transaction if interest was paid by Crawford? Was the Department of Indian Affairs entitled to rely upon that advice in the absence of a new surrender?

(3) Breach of Fiduciary Obligations Etc.

12. Did the Department of Indian Affairs owe fiduciary obligations to the Band and its members with respect to the negotiation of the purchase price and the conduct of the surrender vote, i.e. did fiduciary obligations exist prior to the surrender having regard to the relationship between the Band and the Department of Indian Affairs? If so, what were those obligations?

13. Did the Department of Indian Affairs breach its fiduciary obligations to the Band and its members for the reasons set out in paragraph 57 (i) - (iv), (xiv) - (xxi), (xxiv) - (xxxv) inclusive, of the Amended Statement of Claim?
14. Does the conduct refer [sic] to in question 13 above amount to a breach of trust or negligence by the Department of Indian Affairs?

STATEMENT OF ISSUES SUGGESTED BY COUNSEL FOR CANADA

The Government of Canada through its written "Submission"² formulated the issues as follows:

First Issue: \$15.00 Payments

The claimants argue that \$15.00 payments made directly to voting members of the Band, whether they amount to an inducement to vote or to part of the consideration for the lands surrendered, contravened sections 47 - 49 of the *Indian Act*, 1906, as amended, and/or the *Royal Proclamation*. Accordingly, they argue, the surrender is void.

Second Issue: Section 49 of the Indian Act

The claimants argue that the surrender vote held on March 30, 1927 did not comply with the requirements of sections 47 - 49 of the *Indian Act*.

Third Issue: Unconscionability

The claimants argue that the 1927 surrender and the subsequent sale to Crawford and White were unconscionable, and therefore, void, having regard to the purchase price for the lands, the promise of payment of \$15.00 to eligible voters, and the relative bargaining powers of the purchasers and the Band.

Fourth Issue: Absolute Surrender

The claimants argue that, assuming that the surrender is otherwise valid, certain terms and conditions attach to the 1927 surrender. More particularly, the claimants claim that it was an implied term of the surrender that the sale of the lands would be completed within a certain time frame. According to the claimants, the alleged breach of that term by the Crown and the purchasers makes the 1927 surrender void.

² Submissions on Behalf of the Government of Canada, October 17, 1995, pp. 10 and 11.

Fifth Issue: Fiduciary Obligation

The claimants argue that the Crown, through its conduct before, during and after the 1927 surrender, breached fiduciary obligations it owed to the Band.

Sixth Issue: Breach of Trust and/or Negligence

Finally, the claimants argue that the Crown's conduct before, during and after the surrender of 1927 amounts to breaches of trust and/or negligence.

INDIAN CLAIMS COMMISSION

SUMAS INDIAN BAND INQUIRY 1919 SURRENDER OF INDIAN RESERVE No. 7

PANEL

Commission Co-Chair Daniel J. Bellegarde
Commissioner Carole T. Corcoran

COUNSEL

For the Sumas Indian Band
Clarine Ostrove / E. Ann Gilmour

For the Government of Canada
Bruce Becker / Kim Kobayashi

To the Indian Claims Commission
Ron S. Maurice / Kathleen Lickers

AUGUST 1997

CONTENTS

PART I INTRODUCTION	285
Background to This Inquiry	285
Mandate of the Indian Claims Commission	287
The Specific Claims Policy	287
PART II HISTORICAL BACKGROUND	289
The Sumas Indian Band and Its Reserves	289
Use and Occupancy of Indian Reserves 6 and 7	291
Map 1: Sumas Indian Reserves No. 6 and No. 7	292
Sale of Timber on IR 7	294
The Soldier Settlement Board and Interest in Sumas IR 7	297
Valuation of Sumas IR 7	298
Surrender Negotiations	299
Compensation for Improvements	302
Sale to Soldier Settlement Board and Reduction in Price	303
Sale of IR 7 by Soldier Settlement Board	307
Map 2: Sumas Indian Reserve No. 7	311
PART III ISSUES	313
PART IV ANALYSIS	315
Surrender Provisions of the 1906 <i>Indian Act</i>	315
Effect of Technical Compliance with the <i>Indian Act</i>	318
Issue 1: Fiduciary Obligations of the Crown	320
The <i>Guerin</i> Case	322
The <i>Apsassin</i> Case	325
Pre-surrender Fiduciary Duties of the Crown	329
Where a Band Has Ceded or Abnegated Its Power to Decide	329
Where a Band's Understanding Is Inadequate or the Dealings Are Tainted	333
Where a Band's Decision to Surrender is Foolish or Improvident	335
Where Inadequate Compensation Is Paid for Surrendered Lands	338
Issue 2(a): Undue Influence and Duress	352
Issue 2(b): Advance on the Purchase Price for Distribution to Band Members	354

Issue 3: Advance on the Purchase Price before the Surrender 357
Issue 4: Fiduciary Obligations after the Surrender 358
Issue 5: Onus of Proof 362

PART V CONCLUSIONS AND RECOMMENDATION 363
Recommendation 365

APPENDIX 366
A Sumas Indian Band Inquiry 366

PART I

INTRODUCTION

BACKGROUND TO THIS INQUIRY

On December 1, 1987, the Sumas Indian Band (the Band) filed a claim with the Specific Claims Branch, Department of Indian Affairs and Northern Development (DIAND), for the alleged wrongful surrender in 1919 of 153.46 acres of land within Indian Reserve (IR) 7 for sale to the Soldier Settlement Board. On July 6, 1988, counsel for the Band also brought legal action against the Crown in the Federal Court (Trial Division).

The Band claimed that the Crown owed fiduciary duties to the Band with respect to the management of IR 7 and in relation to the decision to surrender the reserve. The Band asserted that the Crown breached its fiduciary obligations to the Band as follows:

- The Crown knew or ought to have known that the surrender of IR 7 was not in the Band's best interests because the Band was in need of cultivable land.
- The Crown exerted strong pressure on the Band and gave priority to the interests of the Soldier Settlement Board, which requested the land for soldier settlement purposes, over the Band's interests. This resulted in a conflict of interest and a breach of the Crown's fiduciary duty of loyalty to the Band.
- The Crown failed to disclose both its potential conflict of interest and the fact that it intended to transfer the land to the Soldier Settlement Board.¹

The Band also submitted that the Crown induced Band members to surrender the reserve on October 31, 1919, by applying undue influence and

¹ Sumas Indian Band, Statement of Claim, Sumas IR 7, December 1, 1987, ICC Exhibit 2, tab 1, pp. 30-31.

duress and that the Band did not provide an informed consent to the surrender. It therefore submitted that the surrender was an unconscionable transaction and was voidable in equity as a result of the Crown's breach of fiduciary obligation. Alternatively, if the surrender of IR 7 was not voidable, the Band submitted that the Crown breached its fiduciary obligations by acting contrary to the terms of the surrender and the Order in Council accepting the surrender because DIAND agreed in 1923 to forfeit compensation to the Soldier Settlement Board for 13.6 acres of IR 7. Finally, the Band alleged that the Crown breached a fiduciary obligation when it declined to reacquire the surrendered lands from the Soldier Settlement Board once it became known that the land was not suitable for soldier settlement purposes. Based on these alleged breaches of lawful obligation, the Band claimed "damages for past and future loss of use and enjoyment of I.R. #7, and for loss of timber revenue and agricultural revenue arising from the surrender. . . ."²

On December 13, 1990, Al Gross, negotiator for Specific Claims West, DIAND, wrote to the Chief and Council of the Sumas Band to inform them that Canada had rejected the Band's claim that the surrender of IR 7 was invalid, but offered to negotiate with the Band on a narrower basis. In particular, Canada agreed that there may have been a breach of duty to the Band when Indian Affairs agreed to reimburse the Soldier Settlement Board for 9.865 acres taken up by the Sumas River within the surrendered lands. DIAND, however, denied that the Crown exerted undue influence and duress on Sumas Band members to procure their consent to the surrender, and maintained that the Band "was made aware of the information available to the Crown, and that the decision to surrender was made on the basis of informed consent. In addition, our view is that the consideration received by the band was fair. . . ."³ Finally, DIAND stated there was no evidence that the surrendered lands were offered to the Crown for purchase, and, in any event, the Crown was under no fiduciary obligation to reacquire the surrendered lands from the Soldier Settlement Board since the land was no longer a reserve.

On September 23, 1992, the Band's counsel notified Canada that it would be bringing the department's rejection of the claim concerning the wrongful surrender before the Indian Claims Commission (the Commission) for review. At the same time, counsel for the Band submitted further evidence to

² Sumas Indian Band, Statement of Claim, Sumas IR 7, December 1, 1987, ICC Exhibit 2, tab 1, pp. 31-34.

³ Al Gross, Negotiator, Specific Claims Branch, DIAND, to Chief and Council, Sumas Band Administration, December 13, 1990, ICC Exhibit 2, tab 4.

DIAND in an attempt to convince the department to accept the wrongful surrender claim for negotiation. DIAND responded on November 25, 1992, repeating its willingness to negotiate compensation for refunding a portion of the purchase price to the Soldier Settlement Board, but maintaining that the original surrender was valid.

On June 10, 1993, counsel for the Band responded to DIAND's rejection of the claim by putting forward several additional arguments about the alleged invalidity of the surrender. On September 13, 1993, counsel for the Band was informed that the Department of Justice, counsel for DIAND, had rejected the Band's additional arguments.

On March 10, 1995, Chief Lester Ned of the Sumas Indian Band requested that the Indian Claims Commission conduct an inquiry into the alleged wrongful surrender claim. On September 25, 1995, the Government of Canada and the Chief and Council of the Band were advised that the Commission would conduct an inquiry into the government's rejection of this claim.

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission derives its authority to conduct inquiries from Order in Council PC 1992-1730. Inquiries are conducted pursuant to the *Inquiries Act* as set out in the Commission issued to the Commissioners on September 1, 1992. Pursuant to its mandate, the Commission is empowered to inquire into, report on, and issue recommendations pertaining to specific claims that have been rejected by Canada. The Commission is authorized as follows:

AND WE DO HEREBY advise that our Commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development (hereinafter "the Minister") by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:

- a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister . . .⁴

THE SPECIFIC CLAIMS POLICY

As noted above, under the terms of its mandate the Commission is empowered to report on the validity of claims rejected by the Minister of Indian

Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1992, pursuant to Order in Council PC 1991-1329, July 15, 1991.

Affairs “on the basis of Canada’s Specific Claims Policy.” That policy is contained in a 1982 booklet published by DIAND entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.⁵

The main issue between Canada and the Sumas Indian Band concerns whether or not Canada fulfilled its “lawful obligations” to the Band in obtaining the surrender of IR 7. The term “lawful obligation” is set out in *Outstanding Business*:

The government’s policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding “lawful obligation,” i.e., an obligation derived from the law on the part of the federal government.

A lawful obligation may arise in any of the following circumstances:

- i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
- ii) A breach of obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.
- iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
- iv) An illegal disposition of Indian land.

Furthermore, Canada is prepared to consider claims based on the following circumstances:

- i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
- ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.

The Commission has been asked to inquire into and report on whether the Sumas Indian Band has a valid claim for negotiation pursuant to Specific Claims Policy. This report contains our findings and recommendations on the merits of this claim.

⁵ DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted in [1994] 1 ICCP 171-85 [hereinafter *Outstanding Business*].

PART II

HISTORICAL BACKGROUND

Part II of this report provides a detailed examination of the historical background in relation to the surrender of Sumas IR 7 on October 31, 1919. In addition to a careful review of the documentary record, which contained over 500 pages of historical documents, the Commission heard oral testimony from elders Hugh Kelly and Ray Silver at a community session convened on the Sumas Reserve on April 29, 1996. The Commission also considered the written submissions of legal counsel for both the Band and Canada before hearing oral argument on the facts and law on April 29, 1996, at the Sumas Reserve. A chronology of the Commission's inquiry and a summary of the documentary record, exhibits, transcripts, and written submissions are set out in Appendix A.

THE SUMAS INDIAN BAND AND ITS RESERVES

The Sumas Band is part of the Stó:lō Nation, a division of the Coastal Salish language group, whose traditional lands are located in the Fraser Valley in British Columbia. Stó:lō means "the river people"; the literal translation of Sumas is "a big level opening." From the time British Columbia entered Confederation in 1871, the question of Indian lands was a contentious issue between the federal and the provincial governments. In 1875, Canada and British Columbia agreed to the formation of a Joint Reserve Commission to address the matter of allotting Indian reserves in the province. The original Joint Reserve Commission consisted of three members, but it was soon dissolved. In its stead, G.M. Sproat was appointed sole Indian Reserve Commissioner in 1878.⁶

Commissioner Sproat visited the Sumas territory in 1879 and set aside a total of 12 reserves for the "Somass River Indians," who, at the time, com-

6 Robin Fisher, *Contact and Conflict*, 2d ed. (Vancouver: UBC Press, 1992), 188-94.

prised both the Sumas and Lakahahmen Bands.⁷ By an Order in Council dated August 24, 1953, the Sumas and Lakahahmen Bands were formally separated and the reserve lands were divided between the two Bands. Indian Reserves 1 to 5 and 8 to 12 were reserved for the Lakahahmen Band.⁸ Only Indian Reserves 6 and 7 were set aside for the exclusive use and benefit of the Sumas Band.

In a Minute of Decision dated May 15, 1879, Commissioner Sproat described IR 7, the subject of this inquiry, as “a reserve situate in Township 19 as described on the official plans in the Provincial Land Office as the North West Quarter of Section 6, Township 19, New Westminster District.”⁹ W.S. Jemmett surveyed IR 7 in 1881 and noted that it was mostly “heavily timbered, the rest a beaver dam.”¹⁰ His field notes show the Sumas River dissecting the reserve along with at least two roads – a “wagon road” to Nooksackville with “telegram wires along line across boundary” and another unidentified road north of the bend in the river.¹¹ There is no acreage figure indicated on either the field notes or the survey plan, but a list of “Reserves established by G.M. Sproat, Indian Commissioner,” published in 1885, lists the reserve in the “N.W. 1/4 of section 6, Township 19” as being 160 acres.¹²

In 1909, the Band surrendered 6.53 acres from IR 7 for a right of way for the Vancouver Power Company. The surrender, No. 599, was accepted by Order in Council 2177 on October 28, 1909.¹³ This transaction was reflected in the area confirmed as IR 7 by the Royal Commission on Indian Affairs for the Province of British Columbia in 1916. That Commission was established in 1912 to deal with Indian land issues left unresolved after the government of British Columbia withdrew from the previous Reserve Commission in 1908. In September 1912, federal representative J.A.J. McKenna and the Premier of British Columbia, the Honourable Sir Richard McBride, agreed to the establishment of a royal commission “to settle all differences between the Governments of the Dominion and the Province respecting Indian lands and

7 Submissions of the Sumas Indian Band, April 16, 1996, p. 1.

8 Memorandum from the Minister of Citizenship and Immigration to the Governor General in Council, August 24, 1953, DIAND file 987/30-0, vol. 1, and Order in Council PC 1953-1314, December 9, 1953 (ICC Documents, pp. 402-04).

9 G.M. Sproat, Indian Reserve Commissioner, Minutes of Decision, May 15, 1879 (ICC Documents, p. 5).

10 William Jemmett, Surveyor, British Columbia, Field Notes, June 1, 1881 (certified correct, April 13, 1886), Field Book B.C. 1129 (ICC Documents, p. 21).

11 William Jemmett, Surveyor, British Columbia, Field Notes, June 1, 1881 (certified correct, April 13, 1886), Field Book B.C. 1129 (ICC Documents, pp. 17-22).

12 W.M. Smithe, Chief Commissioner of Lands and Works, return to an Order of the House, February 28, 1885 (ICC Documents, p. 27).

13 Surrender No. 599, October 9, 1909, in DIAND, Land Registry, No. X015969 (ICC Documents, pp. 43-45), and Order in Council PC 2177, October 28, 1909 (ICC Documents, p. 46).

Indian Affairs generally in the Province of British Columbia.”¹⁴ Subject to the approval of the two levels of government, the Royal Commission on Indian Affairs for the Province of British Columbia (commonly referred to as the McKenna-McBride Commission) had the power to adjust the acreage of Indian reserves in that province. In its report published in 1916, the acreage stated for Sumas IR 7 is 153.46 acres, which takes into consideration the 1909 sale to the Vancouver Power Company (160 acres as originally described minus the 6.53-acre right of way).¹⁵

USE AND OCCUPANCY OF INDIAN RESERVES 6 AND 7

As previously noted, the Sumas Band was allotted Indian Reserves 6 and 7 as its reserve lands by Commissioner Sproat in 1879. Map 1 on page 292 shows the location of these reserves and other important geographical features of the area. IR 6 consisted of 610 acres at the base of Sumas Mountain, about a mile and a half west of Sumas Lake. This was the location where most members of the Sumas Band chose to establish their homes, orchards, and gardens. Only two band members were reported to have lived on IR 7: Old York, who lived there for a period of time before his death about 1913, when whatever improvements he had made were abandoned by his family;¹⁶ and Gus Commodore, who had a house on IR 6 but moved onto IR 7 in about 1917 to work at a nearby shingle plant.¹⁷

IR 6 had one major drawback with respect to using the land for agricultural purposes because nearly two-thirds of this reserve was flood plain and not suitable or reliable for large-scale cultivation.¹⁸ IR 7, on the other hand, had the potential to provide good agricultural land because its soil was rich and suitable for cultivation¹⁹ and it was rarely subject to flooding. It was, however, heavily timbered and considerable clearing would have been necessary before it could be used for farming. Chief Ned told the McKenna-

14 McKenna-McBride Memorandum of Agreement, September 24, 1912, in preamble of the *Indian Affairs Settlement Act*, SBC 1919, c. 32.

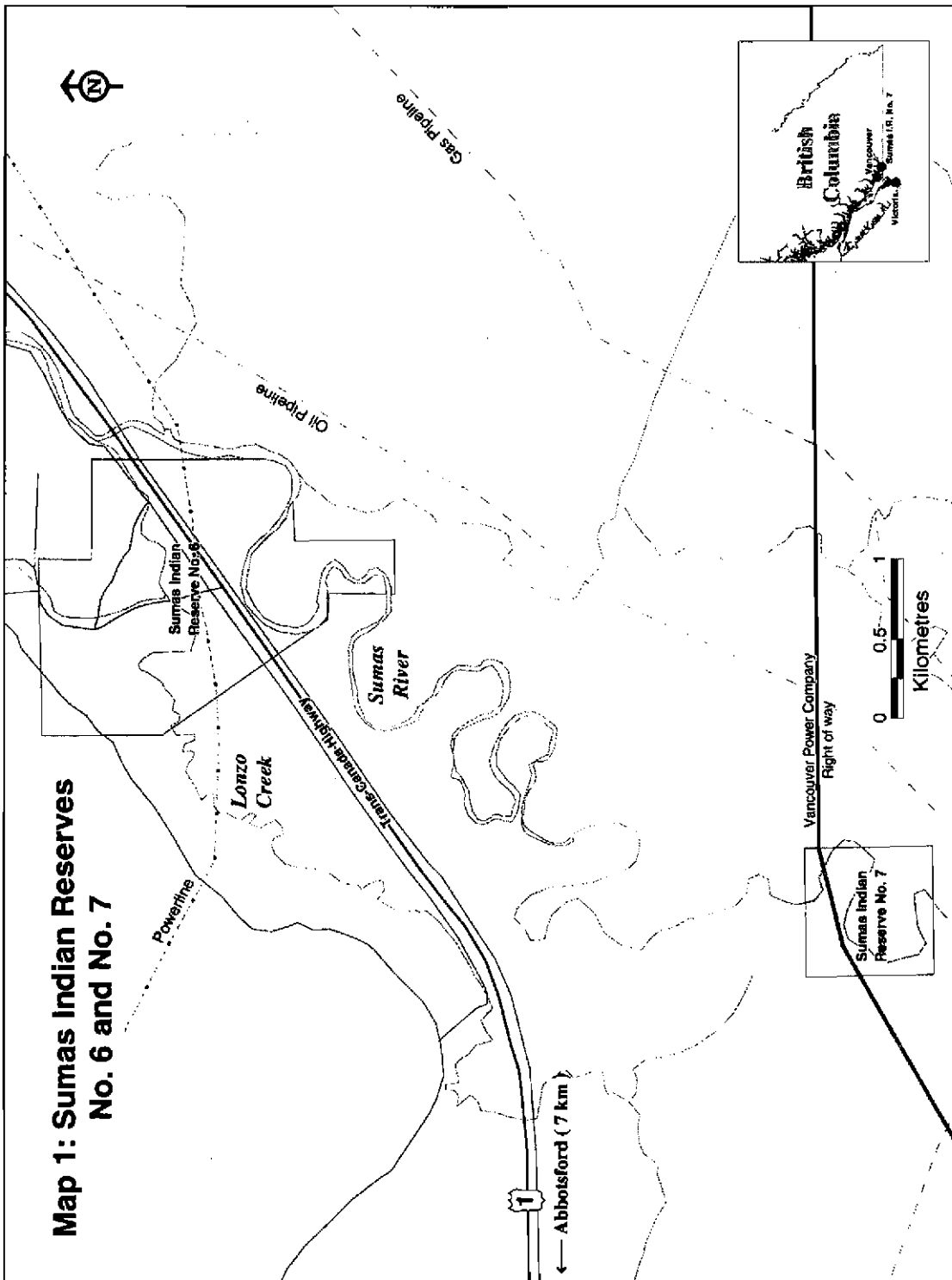
15 Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, June 1, 1916 (ICC Documents, p. 128).

16 Royal Commission on Indian Affairs, Transcript of Chief Ned's testimony, January 12, 1915 (ICC Documents, pp. 61, 71-73).

17 F.B. Stacey, Member of Parliament, Vancouver, to D.C. Scott, Deputy Superintendent General, April 16, 1919, National Archives of Canada (hereinafter NA), RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 206)

18 ICC Transcript, April 29, 1996, pp. 34-35 (Chief Ned). See also Royal Commission on Indian Affairs, Transcript of Agent Byrne's testimony, February 8, 1916 (ICC Documents, p. 103).

19 Royal Commission on Indian Affairs, Transcript of Agent Byrne's testimony, February 8, 1916 (ICC Documents, p. 110).



McBride Commission in 1915 that clearing and cultivating IR 7 was a future consideration, although he still envisioned that all the people would continue to make their homes on IR 6:

- Q. Would the land [at IR 7] be worth clearing?
- A. The land is very good for cropping and it would be worth clearing for a farming proportion [sic] . . .
- Q. And I suppose the first state to the utilization of that land is to dispose of the timber and sell it?
- A. If we get rid of the cedar we will cultivate the land.
- Q. And there are members of the Band who have no land of their own – is that correct?
- A. I would like to clear my land but we have no money to do much land clearing.
- Q. Are there young men in this band now who have no land that they can cultivate?
- A. These people who live on this reserve [IR 6] they have all places: everyone of them, and they would take additional holdings on the other reserve if we could clear it and sell the timber. This would be their home and they would go there and cultivate some of the land over there.²⁰

At the request of the Royal Commission, Peter Byrne, the Indian Agent, approximated the value of IR 7 at \$13,000 in 1916 (\$12,000 for the land and \$1,000 for improvements). This estimate was not made from an on-site inspection of the land but was based primarily on “the value of contiguous properties . . . [and] the best information I could obtain from the Indians.”²¹ He specifically stated that he did not inspect the timber to estimate its value.

The timber on IR 7 is an important factor in estimating the value of the reserve, but there is conflicting and confusing evidence as to the quantity and value of this resource. In 1903, the Band did not consider the retail value of the wood to be high. In response to an Indian Affairs proposal to dispose of the timber on IR 7, the Indian Agent reported that the band members

²⁰ Royal Commission on Indian Affairs, Transcript of Chief Ned's testimony, January 12, 1915 (ICC Documents, pp. 70-71).

²¹ Peter Byrne, Indian Agent, New Westminster, to C.N. Gibbons, Secretary, Royal Commission on Indian Affairs, January 19, 1916 (ICC Documents, pp. 92, 98).

were unanimously opposed to surrendering the timber, claiming that the amount likely to be realized from the sale would be so small as to be of little use to them and that they would prefer to cut and dispose of it themselves, and intended shortly to ask permission from the Department to do so. In this way they think they can earn some money with which to make some necessary repairs to their buildings.²²

Between 1907 and 1914, there were at least four other offers to purchase the marketable timber on the reserve. In 1907, the sum of \$2500 was offered for "the merchantable timber."²³ In 1910, a local shingle manufacturer offered \$4000 for "only the grown and merchantable" timber – an offer deemed fair by the Department of Indian Affairs employee who made a personal inspection of the reserve.²⁴ Neither a request to purchase in 1913 that had no stated price, nor another offer in 1914 to pay a 75¢ per cord stumpage fee for cedar to make shingle bolts and also to "take the cottonwood and spruce" at an unspecified price estimated the quantity of timber that could be harvested.²⁵ In all these cases, the federal government declined to submit a surrender to the Band "owing to the position taken by the British Columbia Government with regard to Reserves in British Columbia," which was essentially that the province would claim a reversionary right in all reserve lands surrendered by Indian bands.²⁶ This was one of the problems that the McKenna-McBride Commission was mandated to resolve.

SALE OF TIMBER ON IR 7

After the completion of the McKenna-McBride Commission's report in 1916, there was renewed interest in the acquisition of the timber from IR 7. In June 1916, P.A. Devoy submitted an offer to Ottawa, both personally and through his Member of Parliament, to purchase the "down and dead" cedar trees on IR 7 to manufacture shingle bolts. He noted that no one was living on IR 7 and that land-clearing activities near the reserve exposed the dry cedar to a

22 R.C. McDonald, Indian Agent, New Westminster, to A.W. Vowell, Superintendent of Indian Affairs, British Columbia, November 25, 1903, NA, RG 10, vol. 7330, file 987/20-7-30-6 (ICC Documents, p. 34).

23 C.E. Moulton, Sumas, Washington, to R.C. McDonald, Indian Agent, New Westminster, June 17, 1907 (ICC Documents, p. 36).

24 John McDougall, Department of Indian Affairs, Ottawa, to Deputy Superintendent General of Indian Affairs, January 17, 1910, NA, RG 10, vol. 7330, file 987/20-7-30-6, pt. 1 (ICC Documents, p. 47).

25 Peter Byrne, Indian Agent, to Secretary, Department of Indian Affairs, January 25, 1913, and J.W. Langs, Langs & Roddis, South Sumas, BC, to J.D. McLean, Secretary, Department of Indian Affairs, May 9, 1914 (ICC Documents, pp. 53, 58).

26 Frank Pedley, Deputy Superintendent General of Indian Affairs, to A.W. Vowell, Superintendent of Indian Affairs for British Columbia, July 9, 1907; J.D. McLean, Assistant Deputy and Secretary of Indian Affairs, to Peter Byrne, Indian Agent, New Westminster, January 31, 1913; McLean to Langs & Roddis, South Sumas, BC, May 19, 1914, all in NA, RG 10, vol. 7330, file 987/20-7-30-6 (ICC Documents, pp. 42, 54, 59).

risk of fire, which would deprive the Band and the government of revenues from which they might otherwise benefit.²⁷ The Department of Indian Affairs asked the Indian Agent to report on the quality of the cedar and whether its sale was advisable. The Indian Agent confirmed that the cedar timber was all dead and most of it down, but because the Indians were away picking hops, he had not had an opportunity to discuss the proposed sale with them.²⁸

In the meantime, other bids for this timber came in from Thomas Christie and Hubert Gilley, both of whom were engaged in the shingle business.²⁹ As well, at least one other prospective buyer was dealing directly with the band members. In December 1916, Agent Byrne was asked for information on a report

that an American citizen, named Whiteside, has been in communication with the Indians of the Sumas Reserve with a view to negotiating with them to obtain cedar on the reserve. It is represented that he has been using money and liquor to obtain their favour. I wish you would be good enough to let me know whether you have any information concerning this or not.³⁰

In the same letter, the Agent was again asked to report on the progress of Mr Devoy's application.

With regard to the Devoy offer, Agent Byrne first responded that it had so far been "impossible" to get the Band to consent to this sale, even though the agent considered Mr Devoy's bid of \$1.05 per cord to be the highest obtainable and the best offer for any similar timber in that locality. According to Agent Byrne, the Indians seemed "suspicious," and even after other offers were received and it became obvious that Mr Devoy's offer was the highest, the Band still refused to consider favourably the sale of this timber.³¹ Three days later the Indian Agent provided information on the Whiteside application and his own discussions with the Band about the sale of this timber:

27 P.A. Devoy, New Westminster, to Deputy Superintendent General of Indian Affairs, June 8, 1916, NA, RG 10, vol. 7330, file 987/28-7-30-6, pt. 1 (ICC Documents, p. 134).

28 Peter Byrne, Indian Agent, New Westminster, to Assistant Deputy and Secretary, Department of Indian Affairs, September 18, 1916, NA, RG 10, vol. 7330, file 987/20-7-30-6, pt. 1 (ICC Documents, p. 137).

29 Thomas W. Christie, Vancouver, to Mr Byrne, Indian Agent, New Westminster, November 16, 1916, and Hubert Gilley, Mgr., Otter Single Company, Otter, BC, to Mr Byrne, Indian Agent, New Westminster (ICC Documents, pp. 139-40).

30 D.C. Scott, Deputy Superintendent General of Indian Affairs, to Peter Byrne, Indian Agent, New Westminster, December 29, 1916 (ICC Documents, p. 142).

31 Peter Byrne, Indian Agent, New Westminster, to Assistant Deputy and Secretary, Department of Indian Affairs, January 2, 1917 (ICC Documents, p. 143).

I might say that previous to this time, Mr. Devoy had made his offer in writing, which was and is yet the highest quoted, but nevertheless the Indians, for some reason unknown to me, seem to be very anxious to negotiate with Mr. Whiteside's representatives at a lower figure . . .

. . . at the last meeting I held with the Sumas Indians at which I again submitted the tenders for the timber and recommended that they agree to the sale of it they refused to consider the proposition. The amount per cord for stumpage seems to be quite satisfactory to them, but they want more than \$1.00 per cord for cutting and delivering the bolts . . .³²

After receiving advice from the Timber Inspector that an outright sale of the timber would necessitate a formal surrender, valuation, and call for tenders, government officials opted instead to authorize the cutting of the timber by the Band under a permit of sale to Mr Devoy.³³ This proposition was laid before the Band, and by resolution dated January 31, 1917, the Sumas Band Council consented to the sale of the timber to Mr Devoy for the price offered, \$1.05 per cord.³⁴ In addition, the agreement provided:

If the Indians cut the bolts they are to get \$1.50 per cord at the stump, and if they cut and haul them, they are to get \$3.00 per cord delivered in the water at a certain point. In addition Mr. Devoy is to pay the usual dues at tariff rates to the Department [75 cents per cord] and 30 cents per cord to the Indians of this band.³⁵

According to the royalty statements and scaling returns submitted by the Indian Agent, a total of 1730.3 cords³⁶ were harvested under this agreement between April 1917 and March 1918.³⁷ A total of \$1298.49 was remitted to the Department of Indian Affairs on account of this timber, made up entirely of the \$0.75 per cord stumpage rate. There is no record of how much money

32 Peter Byrne, Indian Agent, New Westminster, to [Deputy Superintendent General of Indian Affairs], January 5, 1917 (ICC Documents, pp. 144-45).

33 J.D. McLean, Assistant Deputy and Secretary, to Peter Byrne, Indian Agent, New Westminster, January 11, 1917, NA, RG 10, vol. 7330, file 987/20-7-30-6, pt. 1 (ICC Documents, p. 147).

34 Resolution signed by Chief Ned, Gus Commodore, and Peter Sylva, Sumas Band, New Westminster, and by P.A. Devoy, January 31, 1917 (ICC Documents, pp. 148-50).

35 Peter Byrne, Indian Agent, New Westminster, to D.C. Scott, Deputy Superintendent General of Indian Affairs, February 2, 1917, NA, RG 10, vol. 7330, file 987/20-7-30-6, pt. 1 (ICC Documents, p. 151), and Resolution signed by Chief Ned, Gus Commodore, and Peter Sylva, Sumas Band, New Westminster, and by P.A. Devoy, January 31, 1917 (ICC Documents, pp. 148-50).

36 "Cord: any of various units of quantity for wood cut for fuel or pulp; esp: a unit equal to a stack 4 x 4 x 8 foot or 128 cubic feet." *Webslers Third International Dictionary* (1968). However, we have been unable to ascertain exactly how this term was used by the different parties involved in the timber transactions, thereby rendering its use as a unit of measurement unreliable.

37 The figure of "1730.3 cords" is taken from the Band's Specific Claim submission (ICC Exhibit 2, tab 1, p. 7). The copies of the various royalty statements and scaling returns submitted to the Commission are not always legible, so it is difficult to verify this number.

might have been distributed to individual band members for either the \$0.30 per cord fee stipulated in the agreed terms or the extra wages paid for cutting and hauling.³⁸

It is not clear how extensively IR 7 was logged under the permit for sale to Mr Devoy, since the various reports estimating the quantity of timber on the reserve used different units of measurement.³⁹ Without this information, it is impossible to know whether the presence of any marketable timber added to the value of IR 7 when it was later surrendered and sold.

THE SOLDIER SETTLEMENT BOARD AND INTEREST IN SUMAS IR 7

The Soldier Settlement Board was established in accordance with the *Soldier Settlement Act, 1917*,⁴⁰ and the *Soldier Settlement Act, 1919*.⁴¹ It was characterized as “a body corporate, and as such, the agent of the Crown in the right of the Dominion of Canada.”⁴² Its purpose was to provide assistance to soldiers returning from active service in the First World War who wanted to take up farming. Its primary responsibility was to secure farming land for returning soldiers at reasonable cost. To that end, it was empowered to acquire land from various sources, including surrendered Indian reserves:

The Board may acquire from His Majesty by purchase, upon terms not inconsistent with those of the release or surrender, any Indian lands which, under the *Indian Act*, have been validly released or surrendered.⁴³

On April 16, 1919, F.B. Stacey, a Member of Parliament who was temporarily attached to the Vancouver office of the Soldier Settlement Board, informed Duncan Campbell Scott, the Deputy Superintendent General of Indian Affairs, that eight returned soldiers had applied to homestead the “unoccupied” Sumas IR 7. Mr Stacey had inspected the reserve and reported:

38 “Specific Claims Branch Review, Sumas Band Specific Claim, Surrender of Sumas IR 7 in 1919,” p. 16, [no date], in Sumas Indian Band, Statement of Claim, Sumas IR 7, tab 2 (ICC Exhibit 2).

39 J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Peter Byrne, Indian Agent, New Westminster, June 15, 1916; Byrne to Assistant Deputy and Secretary, Department of Indian Affairs, September 18, 1916; and H.J. Bury, Timber Inspector, Lands & Timber Branch, Department of Indian Affairs, to Deputy Superintendent General of Indian Affairs, Ottawa, January 10, 1917, NA, RG 10, vol. 7330, file 987/20-7-30-6 (ICC Documents pp. 136, 137, 146).

40 *An Act to assist Returned Soldiers in settling upon the Land and to increase Agricultural production*, 7-8 George V, 1917, c. 21 (ICC Documents, pp. 152-55).

41 *Soldier Settlement Act*, 9-10 George V, 1919, c. 71 (ICC Documents, pp. 224-41).

42 *Soldier Settlement Act, 1919*, 9-10 George V, 1919, c. 71, s. 4(1) (ICC Documents, p. 226).

43 *Soldier Settlement Act, 1919*, 9-10 George V, 1919, c. 71, s. 10 (ICC Documents, p. 226).

The soil is good, land nearly all wooded but not with heavy stuff and can be cleared at a medium cost. On the Reserve is a half breed squatter, also an Indian by the name of Commodore, with a wife and three children, who has a house and land on another Reserve, but moved over here some two years ago to work in a shingle mill that was in operation. He says that Mr. Byrne told him he could stay there, but of course I do not suppose Mr. Byrne could or would make any official promise to that effect. The Indian (Commodore) is cutting a little wood and selling it, *but there should be no difficulty in removing him and opening up the land to the eight soldiers.*⁴⁴

VALUATION OF SUMAS IR 7

Following Mr Stacey's request to make Sumas IR 7 available to the Soldier Settlement Board, a Department of Indian Affairs official reported to the Deputy Minister that the reserve in question measured 153.46 acres and was valued at \$13,000⁴⁵ (the same value assigned by Agent Byrne for the McKenna-McBride Commission hearings three years previously). This sum translates into a per acre value of \$84.71.

On April 25, 1919, the Department instructed Agent Byrne to "meet Mr. Stacey and agree upon a fair and reasonable valuation for this reserve."⁴⁶ On the same day, Deputy Superintendent General Scott informed the Chairman of the Soldier Settlement Board that those instructions had been sent, and assured him that, "if your Board decides to obtain the land at that valuation I will at once endeavour to secure a surrender from the Indians for the purpose of soldiers' settlement."⁴⁷

Agent Byrne reported that he travelled to the reserve on May 3, "consulted with the Indians in regard to them giving a surrender of this land," and "also went over the ground and carefully examined the nature of the soil, etc."⁴⁸ According to Agent Byrne's report, he met with Mr Stacey two days later and they agreed on a price for the reserve lands: "[W]e decided that Eighty Dollars (\$80.00) per acre was a just and fair value to place on the land in this Reserve, after deducting the right-of-way for the B.C. Electric Railway, and for

44 F.B. Stacey, Soldier Settlement Board (hereinafter SSB), Vancouver, to D.C. Scott, Deputy Superintendent General of Indian Affairs, April 16, 1919, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 206). Emphasis added.

45 Henry Fabien, Department of Indian Affairs, Ottawa, to Deputy Minister, April 24, 1919 (ICC Documents, p. 207).

46 D.C. Scott, Deputy Superintendent General of Indian Affairs, to Peter Byrne, Indian Agent, New Westminster, April 25, 1919, NA, RG 10, vol. 7535, file 26,153-1 (ICC Documents, p. 209).

47 D.C. Scott, Deputy Superintendent General of Indian Affairs, to W.J. Black, Chairman, Soldier Settlement Board, Ottawa, April 25, 1919, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 208).

48 Peter Byrne, Indian Agent, New Westminster, to D.C. Scott, Deputy Superintendent General of Indian Affairs, June 4, 1919, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 219).

the Highways passing through it.”⁴⁹ For his part, Mr Stacey considered that IR 7 was a “good buy” at \$80 per acre: the timber was second growth and small and could be cleared at \$50 per acre, the British Columbia Electric station was “right at the door,” and the soil was especially suited to cultivating vegetables and fruits.⁵⁰ Indeed, the price agreed to was less than he would have offered or what Indian Agent Byrne thought it was worth. As Soldier Settlement Board Commissioner E.J. Ashton noted, Mr Stacey

had been ready to recommend a price of \$85.00 per acre, for this, but he considered \$80.00 per acre a good price for it.

Mr. Byrnes [sic] who valued the land with him considered it worth \$100.00 per acre, which, Mr. Stacey informs me, is the opinion of the settlers in the vicinity of this reserve.⁵¹

On July 3, 1919, the Board accepted the valuation of \$80 per acre and asked the Department of Indian Affairs to negotiate for the surrender of the land (160 acres “less the land held by the British Columbia Electric Railway”) at this price.⁵²

SURRENDER NEGOTIATIONS

When the Soldier Settlement Board first approached Indian Affairs in April 1919 with the request to purchase Sumas IR 7, the Deputy Superintendent General asked the Agent’s “opinion on the feasibility of obtaining a surrender.”⁵³ Agent Byrne did not reply until June, when he reported that he had gone to the Sumas Reserve on May 3, consulted the Indians, and found them “divided in regard to this surrender, some are inclined to favourably consider it, while others strongly object, and it is doubtful if the consent of the majority can be obtained.”⁵⁴

In July, when the Soldier Settlement Board agreed to the price set by Agent Byrne and Mr Stacey, the Agent was officially authorized to submit the surrender to the Band, according to the provisions of the *Indian Act*. He was sent

49 Peter Byrne, Indian Agent, New Westminster, to D.C. Scott, Deputy Superintendent General of Indian Affairs, June 4, 1919, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 219).

50 E.J. Ashton, Commissioner, SSB, to W.J. Black, Chairman, SSB, June 14, 1919 (ICC Documents, p. 221).

51 E.J. Ashton, Commissioner, SSB, to Mr Black, Chairman, SSB, July 3, 1919 (ICC Documents, p. 222).

52 E.J. Ashton, Commissioner, SSB, to D.C. Scott, Deputy Superintendent General of Indian Affairs, July 3, 1919, NA, RG 10, vol. 7535, file 26,153-1 (ICC Documents, p. 223).

53 D.C. Scott, Deputy Superintendent General of Indian Affairs, to Peter Byrne, Indian Agent, New Westminster, April 25, 1919, NA, RG 10, vol. 7535, file 26,153-1 (ICC Documents, p. 209).

54 Peter Byrne, Indian Agent, New Westminster, to D.C. Scott, Deputy Superintendent General of Indian Affairs, June 4, 1919, NA, RG 10, vol. 7535, file 26,153-1 (ICC Documents, p. 219).

the necessary surrender forms along with "a cheque for the sum of \$4500 to be distributed on a per capita basis to the Indians at the rate of \$100 each, provided the surrender is granted by the Indians."⁵⁵ On the same day, the Deputy Superintendent General asked the Board to advance this amount "on account of the purchase price and for distribution after the vote is taken, should the Indians agree to surrender."⁵⁶ The Board forwarded the money immediately.

This per capita distribution was permissible under the *Indian Act*, which allowed for a "sum not exceeding fifty per centum of the proceeds of any land" to be paid to the members of a band at the time of surrender.⁵⁷ The \$4500 advanced by the Soldier Settlement Board was less than 50 per cent of the expected proceeds (153.6 acres sold at \$80 per acre amounts to \$12,288, half of which is \$6144). Four years after the surrender, in May 1923, the Band requested and received the balance of 50 per cent of the proceeds of the sale for distribution on a per capita basis to Sumas Band members.⁵⁸ No evidence was submitted to demonstrate how often, or in what manner, the Department of Indian Affairs made use of this 50 per cent cash advance in negotiating surrenders involving other Indian bands.

In the case of the Sumas IR 7 surrender, the money was sent to the Agent after only one report that the Indians were reluctant to sell the lands. When the Agent acknowledged receipt of the surrender forms and the advance money on July 25, 1919, he indicated that he thought that it was "going to be a very slow job as these Indians are very hard to do business with."⁵⁹ He did not report again until requested to do so in September, at which time he again indicated the Band's reluctance to surrender, but gave no details about their reasons:

I regret to state that, up to the present, I have been unable to obtain a surrender of Reserve No. 7 of the Sumas Band of Indians, although I have approached these people on various occasions.

55 D.C. Scott, Deputy Superintendent General of Indian Affairs, to Peter Byrne, Indian Agent, New Westminster, July 16, 1919, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 243).

56 D.C. Scott to Major E. Ashton, Commissioner, SSB, July 16 and July 18, 1919 (ICC Documents, pp. 246-47).

57 RSC 1906, c. 81, s. 89.

58 A. O'N. Daunt, Indian Agent, New Westminster, to Assistant Deputy and Secretary, Department of Indian Affairs, May 2, 1923, and J.D. McLean to Daunt, May 17, 1923, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, pp. 351-52).

59 Peter Byrne, Indian Agent, to Assistant Deputy and Secretary, Department of Indian Affairs, July 26, 1919, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 249).

Only two days ago I again interviewed the Chief and he told me that he would get his people together to try and have them consent to giving the surrender, as desired by you.⁶⁰

A little more than a month later, Agent Byrne reported on October 31, 1919, that the Band had consented to the surrender. According to Agent Byrne's report, all nine band members on the voters' list attended the meeting and voted in favour of the surrender. The surrender document was executed by eight members of the Band. The surrender stipulated that all of IR 7, comprising 153.5 acres, was surrendered to the King, his Heirs and Successors forever:

in trust to dispose of the same to the Soldier Settlement Board at the rate of Eighty dollars per acre, upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

And upon the further condition that all moneys received from the disposition thereof, less amount to be distributed to the members of the Band, shall be placed to our credit and interest thereon paid to us, in the usual way.⁶¹

With the signed surrender form, the Agent included the voters' list, the payroll showing the distribution of the advance money, and the sworn certification of both the Agent and the Chief and principal men of the Band that the surrender was taken in accordance with the terms stipulated in the *Indian Act*.⁶² This last document includes a declaration that the terms of the surrender were translated to the voting members by an interpreter qualified to interpret from the English language to the language of the Band.⁶³ This is the only evidence we have that an interpreter was present at the surrender meeting. However, it is evident from the testimony of elder Hugh Kelly before the Indian Claims Commission that many Sumas people could read and write English in the relevant time period.⁶⁴

What is absent from these documents is an explanation why members of the Sumas Band suddenly changed their position and agreed to a surrender. There is no evidence of what was discussed at meetings with the Indian Agent or among the Band members themselves. We know only that, in a period of

60 Peter Byrne, Indian Agent, to D.C. Scott, Deputy Superintendent General of Indian Affairs, September 20, 1919, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 251).

61 Surrender, October 31, 1919 (ICC Documents, pp. 253-54).

62 Surrender, October 31, 1919, with affidavit and voters' list; Peter Byrne to D.C. Scott, November 1, 1919 (ICC Documents, pp. 253-58).

63 Affidavit, October 31, 1919 (ICC Documents, p. 255).

64 ICC Transcript, April 29, 1996, pp. 15-16, 19 (Hugh Kelly).

approximately one month, the possibility of the Department of Indian Affairs obtaining a surrender from the Band went from being unlikely to a successful endeavour.

The surrender of Sumas IR 7 was accepted by Order in Council dated November 15, 1919.⁶⁵

COMPENSATION FOR IMPROVEMENTS

Because most members of the Sumas Band chose to make their homes on IR 6, there were few improvements on IR 7 to consider. In 1916, the McKenna-McBride Commission heard evidence that Old York was the only band member who had ever had a house and clearing on Sumas IR 7, but he had died some two years previously and his family had failed to maintain the property. Even so, the Agent had, at that time, placed a value of \$1000 on these improvements.⁶⁶ In April 1919, F.B. Stacey reported that the only occupants of Sumas IR 7 were a "halfbreed squatter, also an Indian by the name of Commodore, with a wife and three children who own a house and land on another Reserve, but moved here some two years ago to work in a shingle mill that was in operation."⁶⁷

When Agent Byrne acknowledged his instructions to put the surrender before the Band in July 1919, he reported that "there are some small patches of clearing on this Reserve, belonging to individual Indians and I will endeavour to make arrangements with them for their improvements."⁶⁸ Afterwards he submitted two claims:

I am submitting herewith, a claim of Chief Ned and also a claim of Gus Commodore for compensation for improvements by them on the Reserve, which the band have surrendered. Each one is asking for the sum of \$200.00 which I think is a fair and just price, for the work done by them. If it is not possible to get this money from the parties, who intend to acquire the Reserve, I would respectfully recommend that it be taken from the band funds, as both of these men have worked hard to assist me in obtaining the surrender.⁶⁹

⁶⁵ Order in Council dated November 15, 1919, NA, RG 10, vol. 7535, file 26,153-1 (ICC Documents, p. 263).

⁶⁶ Peter Byrne, Indian Agent, New Westminster, to C.N. Gibbons, Secretary, Royal Commission on Indian Affairs, January 19, 1916 (ICC Documents, pp. 92, 98).

⁶⁷ F.B. Stacey, SSB, Vancouver, to D.C. Scott, Deputy Superintendent General of Indian Affairs, April 16, 1919, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 206).

⁶⁸ Peter Byrne, Indian Agent, to Assistant Deputy and Secretary, Department of Indian Affairs, July 25, 1919, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 249).

⁶⁹ Peter Byrne, Indian Agent, to D.C. Scott, Deputy Superintendent General of Indian Affairs, November 1, 1919 (ICC Documents, p. 258).

Since the price proposed to the Soldier Settlement Board for Sumas IR 7 did not include any additional amounts for improvements, officials in the Lands and Timber Branch were of the opinion that any such compensation must be paid from the proceeds of the sale. The Agent was therefore instructed to submit vouchers in the usual manner and both Chief Ned and Gus Commodore were paid \$200 from the Band's trust account on November 24, 1919.⁷⁰

SALE TO SOLDIER SETTLEMENT BOARD AND REDUCTION IN PRICE

In its submission to the Governor General in Council on November 24, 1919, the Department of Indian Affairs asked that Sumas IR 7 be transferred to the Soldier Settlement Board "on the understanding that the balance of the purchase price will be paid on transfer of the title."⁷¹ On December 1, 1919, Order in Council PC 2421 transferred 153.5 acres of Sumas IR 7 to the Soldier Settlement Board, which paid the outstanding balance of \$7780 on December 19, 1919 (the balance was calculated on the basis of 153.5 acres at \$80 per acre, which equals \$12,280 less the \$4500 advanced before the surrender).⁷²

The Department of Indian Affairs then proceeded to prepare the Letters Patent to transfer title of these lands to the Soldier Settlement Board. In March 1920, the officials in Ottawa contacted Agent Byrne requesting information about a telegraph line through the reserve, shown on the township plan but not on any survey, as well as any public highways or roads through the reserve.⁷³ Agent Byrne replied that a public road passed through IR 7 "following the line indicated on the original survey of this Reserve, which was then known as the Nooksackville road. There is a telegraph line on this road. This is the only telegraph line on the Reserve, besides that on the B.C. Electric Railway's right of way, which also passes through the reserve."⁷⁴

The Letters Patent that the Soldier Settlement Board received on April 17, 1920, did not include this public road. The actual patent was not submitted

⁷⁰ W.A. Orr, Officer in Charge, Lands and Timber Branch, to Deputy Minister, November 8, 1919 (ICC Documents, p. 261), and Vouchers 443 and 444, November 24, 1919, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, pp. 268-71).

⁷¹ Arthur Meighan, Superintendent General of Indian Affairs, to the Governor General in Council, November 24, 1919 (ICC Documents, pp. 266-67).

⁷² Order in Council PC 2421, December 1, 1919, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, pp. 272-73), and E. Ashton, Commissioner, SSB, to Deputy Superintendent General of Indian Affairs, December 19, 1919, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents p. 279).

⁷³ J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to P. Byrne, Indian Agent, March 1, 1920 (ICC Documents, p. 285).

⁷⁴ Peter Byrne, Indian Agent, to Assistant Deputy and Secretary, Department of Indian Affairs, March 26, 1920 (ICC Documents, p. 286).

as evidence in this inquiry, but a memorandum prepared for the Deputy Minister in June 1920 indicated that the Board received only about 150 acres in their deed since "3.46 acres was taken off for the public road. The area inserted in the Description for Patent was 150 acres more or less . . ."75

Having received the patent, the Soldier Settlement Board issued instructions to its Vancouver office to subdivide the land and set sale prices, bearing in mind that the Board was required to recoup the total purchase price plus surveying and other incidental costs.⁷⁶ The subsequent detailed inspection and survey made Board officials question whether they could, in fact, recover their costs:

There is no question but that the Board has paid altogether too much money for the land. Our records here will show that we seldom pay in excess of forty or fifty dollars per acre for uncleared land anywhere in the Fraser Valley. The cost of clearing, however, varies, but from what you yourself have seen on this Reserve, you will know that while portions may be cleared at \$100. per acre or less, other portions will cost in excess of \$150. per acre.

Considering the Board's policy in regard to placing men on uncleared lands, I do not see how we could attempt to effect a sale of this Reserve unless the price was well within what the land is actually worth in its present state. . . .⁷⁷

According to the Vancouver District Superintendent of the Soldier Settlement Board, the land was not worth more than \$50 an acre.⁷⁸

The subdivision survey also calculated that there were only 135.9 useable acres available for soldier settlement, as opposed to the 153.5 acres purchased. The Board argued that it should not have had to pay for approximately 7 acres taken up by roads through the reserve and the river, which occupied about 10 acres. An internal legal opinion prepared for the Board advised that despite this reduction in the acreage available for settlement purposes, the Board was legally required to pay for all the property enclosed by the reserve.⁷⁹ Despite this legal opinion, the Board decided to "discuss this matter further with the Department of Indian Affairs, with a view to pay-

75 Donald Robertson, Department of Indian Affairs, Ottawa, to Deputy Minister of Indian Affairs, June 29, 1920 (ICC Documents, p. 308).

76 Assistant Secretary, [SSB], to District Superintendent, SSB, Vancouver, April 14, 1920 (ICC Documents, p. 290).

77 District Superintendent, SSB, Vancouver, to Director of Lands and Loans, SSB, Ottawa, May 7, 1920 (ICC Documents, p. 302).

78 District Superintendent, SSB, Vancouver, to Director of Lands and Loans, SSB, Ottawa, May 7, 1920 (ICC Documents, p. 302).

79 Assistant Commissioner, SSB, to W.J. Black, Chairman, SSB, June 25, 1920 (ICC Documents, p. 305).

ing only for the actual acreage as disclosed by the sub-division. . . .”⁸⁰ Chairman Black of the Soldier Settlement Board wrote to the Deputy Superintendent General, stating:

. . . I find the road clearly marked on the Township Plan and also on Plan submitted to me by the Board’s representative at Vancouver, on the latter it being described as Whatcom Road. It therefore appears that the same has either by use or grant become dedicated to the public and as such was not available for transfer to us, and we could not incorporate it into the farm, should we desire to do so.

The area embraced by the Sumas River, practically 10 acres, is considerable and obviously cannot be utilized by us.

In view therefore of the circumstances and the comparatively large sum involved in relation to the total purchase price, may I request that you take the matter into consideration with a view to possible adjustment? . . .⁸¹

On receipt of this request, the Department of Indian Affairs generated a report on Sumas IR 7. The Surveys Branch reported to the Deputy Superintendent General that, “if the Department is disposed to make any refund to the Board,” the area might be reduced to 145 acres:

In the present case the original township plans show the area of the quarter-section to be 160 acres, the river apparently not being considered large enough to be deducted and on the latest township plan issued and confirmed by the Surveyor General, the measurements of the quarter-section are shown such as to make the area 160 acres; the river shown as not having been traversed. The river therefore was not considered in making the description for patent and the basic area of 160 acres was taken. Order in Council dated 25 January, 1913 confirmed this reserve as 160 acres. From this an area of 6.54 acres was deducted for the Right of Way of the Vancouver Power Company and 3.46 acres was taken off for the public road. The area inserted in the Description for Patent was 150 acres more or less, the river not being deducted for reasons as above stated.⁸²

No plan of the public road has been filed with the Department and it is doubtful if a survey of it has ever been made. Its position on our plan of the reserve shows it to occupy about 3.5 acres of the reserve. The agent confirmed this position by stating the road to be approximately as shown on the plan of the reserve. The area of the river as shown on the Township plan would be 5 acres (approximately). Of course there may

80 District Superintendent, SSB, Vancouver, to Director of Lands and Loans, SSB, Ottawa, May 7, 1920 (ICC Documents, p. 305).

81 W.J. Black, Chairman, SSB, to D.C. Scott, Deputy Superintendent General of Indian Affairs, June 25, 1920, NA, RG 10, vol. 7535, file 26,153-1 (ICC Documents, p. 306).

82 Neither the description for patent nor the patent itself was included in the documents submitted to the Commission.

be steep banks receding from the high water mark which would double this amount but this additional amount should not be included in any area allowed for the river.

Allowing 5 acres for the river and amounts as stated for the Right of Way and road, the remaining area would be 145 acres and if the Department is disposed to make any refund to the Board, I consider they should be charged for 145 acres unless they are prepared to supply a plan of survey of the river and the road made by a Dominion Land Surveyor, showing that the amount of land covered by the road and the actual river bed is greater than that allowed above. The area in patent should not be changed as the wording "150 acres more or less" agrees with any information the Registrar may have.⁸³

On July 2, 1920, the Deputy Superintendent General offered to reduce the area to 145 acres and to refund \$680 to the Soldier Settlement Board, but stated that no further reduction would be considered without a detailed survey plan to substantiate the reduced acreage figures.⁸⁴ The Board responded two and a half years later, in January 1923, that it wished to rely on the 135.9 acres shown on a detailed survey plan conducted by Provincial Land Surveyor A.E. Humphrey in April 1920 when the land was originally subdivided. The Board did not think that it should have to undertake the additional work and expense of having another survey conducted. Additionally, the Board pointed to the fact that \$80 an acre had been a very good price because, despite being extensively advertised, only a small portion had been sold.⁸⁵

W.R. White of the Department of Indian Affairs found that the area of the lots on Humphrey's survey were accurate, but he did not agree with the Board's argument about the roads. If the Department felt the area of the river should be excluded, he still recommended that the Board be required to pay for at least 139.9 acres:

[T]he roads along the North and West boundaries containing approximately 4 acres, were laid out by the Soldier's Settlement Board and would not have been required for the purposes of this Department. The river, which occupies an area of 9.865 acres, although not usually excepted when the width is so small as about 50 feet, might be deducted if found expedient. I think that the 4 acres included in the road along the North and West boundaries should in any case be paid for, making a total of 139.9 acres.⁸⁶

83 Donald Robertson, Department of Indian Affairs, Ottawa, to Deputy Minister, June 29, 1920 (ICC Documents, p. 308).

84 D.C. Scott, Deputy Superintendent General of Indian Affairs, to W.J. Black, Chairman, SSB, July 2, 1920, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 309).

85 Secretary, SSB, to D.C. Scott, Deputy Superintendent General of Indian Affairs, January 23, 1923, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, pp. 330-31).

86 W.R. White, Department of Indian Affairs, Ottawa, to Lands Branch, January 27, 1903, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 332).

The Acting Deputy Superintendent General then contacted the Board proposing that 139.9 acres be accepted, with the Department of Indian Affairs agreeing to except the river area, and the Board agreeing to pay for the road allowance.⁸⁷

This proposal was accepted by the Board and, on February 19, 1923, the sum of \$1088 was returned to the Board as an adjustment of the purchase price for Sumas IR 7 (the difference between 153.5 acres and 139.9 acres at \$80 an acre equals \$1088).⁸⁸ Nothing in the evidence presented to the Commission indicates that the Band was ever consulted or was even aware that these negotiations to refund a portion of the purchase price of IR 7 were occurring with the Soldier Settlement Board.

SALE OF IR 7 BY SOLDIER SETTLEMENT BOARD

By August 1920 it was becoming apparent to the Soldier Settlement Board that the land on Sumas IR 7 might not be suitable for soldier settlement. The land needed extensive clearing before it could be cultivated, something that many soldiers, unaccustomed to agriculture, might not be prepared for. The Board began to consider the possibility of selling the land to civilians to dispose of it. On August 13, 1920, Commissioner Ashton of the Board wrote to the Chairman:

I am not at all sure that it is suitable for soldier settlement.

In any event, if sold to soldiers, the men must be picked men, used to this class of clearing, or they would never make good. Furthermore, as some of this land will undoubtedly cost \$150.00 an acre to clear, they cannot be expected to pay about \$90.00 an acre for it. The best way out of this deal will probably be to hold the land for sometime and later sell it to civilians. . . .⁸⁹

In December 1920, Commissioner Ashton wrote to Member of Parliament Stacey complaining that IR 7 was too expensive and was unsuitable for soldier settlement, and asking if civilians would pay the price needed to recoup the Board's expenses:

87 J.D. McLean, Acting Deputy Superintendent General of Indian Affairs, to S. Maber, Secretary, SSB, Ottawa, January 29, 1923, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 333).

88 S. Maber, Secretary, SSB, Ottawa, to J.D. McLean, Acting Deputy Superintendent General of Indian Affairs, February 1, 1923; McLean to Maber, February 19, 1923; SSB, official receipt, February 20, 1923; Maber to Secretary, Department of Indian Affairs, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, pp. 334, 339, 340, 341).

89 Major E.J. Ashton, Commissioner, SSB, Ottawa, to W.J. Black, Chairman, SSB, Ottawa, August 13, 1920 (ICC Documents, p. 311).

this matter has been carefully considered by the Board and a decision has been arrived at that we should endeavour to sell this whole reserve en bloc. . . .

The Board has, on more than one occasion, taken our British Columbia Superintendents severely to task for purchasing land at excessive figures, and informed them very definitely that they are not to purchase land for soldier settlement at anything higher than the inspector's valuation.

On May 5, Messrs. — Schetky and E. Copeland appraised the reserve and put a valuation of \$50.00 per acre on it. Some time ago regulations were passed forbidding the purchase of totally uncleared land for soldier settlement. We cannot take action diametrically opposed to regulations we have been insisting that our Superintendents carry out.

In your letter to me of July 4th, 1919, you stated that there were eight returned soldiers applying for the purchase of this property, and a few days before this, when we met in your office in the Parliament Buildings, you intimated that the adjoining farmers were anxious to secure this reserve for their sons. As in view of our Regulations we are unable to sell this land in the ordinary way to soldier settlers, could you inform us as to the possibility of selling to civilians at the figure we gave for it? . . .⁹⁰

In the following month, however, the Inspector of the Board's Western Offices reviewed the file and, being firmly convinced that no action should be taken to sell the reserve to returned soldiers under the Act and also that it would be "injudicious" on the part of the Board to sell this land to civilians except as a whole, he recommended that no immediate action be taken to dispose of the land whatsoever.⁹¹ Commissioner Ashton accepted this recommendation, with the proviso that any offer to purchase all or part of the land must still be carefully considered.⁹²

Two months after this decision was taken, the Annual Report of the Soldier Settlement Board was released. Under a section entitled "Meaning of Suitable Lands," it stated:

If the first maxim is that the men must be "fit to farm" the second maxim is that the land must be "fit to farm." They are of equal importance. From the commencement of operations the Board laid it down that land was not suitable for soldier settlement which was remote from transportation or which was not ready for cultivation or which was of a price greater than its productive value.⁹³

90 Major E.J. Ashton, Commissioner, SSB, Ottawa, to F.B. Stacey, Member of Parliament, Penticton, BC, December 15, 1920 (ICC Documents, p. 313).

91 L. Boyd, Inspector, Western Offices, SSB, Ottawa, to Major E.J. Ashton, Commissioner, SSB, Ottawa, January 29, 1921 (ICC Documents, p. 314).

92 Major E.J. Ashton, Commissioner, SSB, Ottawa, to L. Boyd, Inspector, Western Offices, SSB, Ottawa, January 31, 1921 (ICC Documents, p. 315).

93 "Soldier Settlement on the Land," Annual Report of the Soldier Settlement Board, March 31, 1921, p. 10 (ICC Documents, p. 321).

Almost two years later, in January 1923, the Soldier Settlement Board advised the Department of Indian Affairs that it was having difficulty selling the surrendered land in former IR 7:

While the lands have been available for sale for the past two years and have been extensively advertised, the Board have only been able to dispose of a small portion. The sale has not been restricted to soldier settlers but has been open to civilians and the price asked has been that which the Board paid your Department.⁹⁴

Aside from the issue of price, buyer reluctance could have been attributed in part to unpaid dyking charges on the land and difficulties encountered by the Board in having its title registered by the province. At this time the *British Columbia Land Registry Act* required the consent of the Lieutenant Governor in Council before title to Indian Reserve land could be registered. When the Soldier Settlement Board applied to have the title registered in September 1922, the province refused to issue the necessary order in council. One of the reasons given related to an ongoing dispute between the province and the Board about the collection of municipal and improvement taxes on Board lands. Since these particular lands were within the Sumas Dyking Area, the province was reluctant to register the title because the dyking charges could not be recovered from the Board. The province also questioned the validity of the grant from the Department of Indian Affairs, claiming that the reversionary fee was in the Crown in right of the Province, and therefore the Board needed a provincial crown grant.

This dispute with the province continued through 1923. At least two potential sales of lots on Sumas IR 7 were lost when the applicants refused to complete the sales because the Board could not deliver title. In February 1924, the Chairman of the Soldier Settlement Board outlined these problems to the Deputy Superintendent General of Indian Affairs and suggested that the lands could be returned to the Department:

As no agreements have been executed by the Board covering the sale of any of the land in the reserve and as we are not committed to any settlers, the Board could return the patent to your department if you are unable to suggest any other procedure which would overcome the present impasse.⁹⁵

94 S. Maber, Secretary, SSB, Ottawa, to D.C. Scott, Deputy Superintendent General of Indian Affairs, January 23, 1923, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 331).

95 John Barnett, Chairman, SSB, to Deputy Superintendent General of Indian Affairs, February 29, 1924, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 367).

Deputy Superintendent General Scott's reply to this proposal was to suggest that the Board "allow the matter to stand for a short while as I hope to be able to report a settlement of the general reserve question in British Columbia which will enable your patent to be registered."⁹⁶ Several months later, the Vancouver District Superintendent of the Soldier Settlement Board wrote to the Superintendent of the Loan Review and Records Branch of the Board in Ottawa that "it would be the best solution of our difficulties if the Department of Indian Affairs could be persuaded to take back this reserve as it will be a difficult piece of property to dispose of as a whole on account of it being uncleared and so badly cut up."⁹⁷ There is, however, nothing in the material reviewed to indicate that the Department was approached again with this proposal. On July 22, 1924, Deputy Superintendent General Scott informed Commissioner Ashton that the order in council confirming the McKenna-McBride Commission Report had passed "and there is no reason now why the patent should not be registered."⁹⁸

Even after this initial hurdle was overcome, the Soldier Settlement Board had a difficult time attracting buyers for the lots on the surrendered Sumas IR 7. This difficulty was attributed in part to both the cost of clearing and the extra expenses of the dyking project. By 1930, however, all the lots were sold. The general location of these lots within the subdivision of IR 7 is shown on Map 2 on page 311.⁹⁹ Table 1, on page 312, shows the purchase price paid for each lot: the average sale price for the 145.08 acres sold amounted to \$81.81 per acre. Only the purchaser of lot 9 is identified as a returned soldier. The purchaser of lot 2 and lots 5 to 8 are stated to be civilians, and the other purchasers are not designated.¹⁰⁰

96 D.C. Scott, Deputy Superintendent General of Indian Affairs, to John Barnett, Chairman, SSB, March 4, 1924 (ICC Documents, p. 368).

97 I.T. Barnet, District Superintendent, SSB, Vancouver, to Superintendent, Loan Review and Records Branch, SSB, Ottawa, July 7, 1924 (ICC Documents, p. 369).

98 D.C. Scott, Deputy Superintendent General of Indian Affairs, to Major E.J. Ashton, Commissioner, SSB, Ottawa, July 22, 1924 (ICC Documents, p. 371).

99 This map has been adapted from Survey Plans - Subdivision of Sumas IR 7, A.E. Humphrey, Surveyor, May 5, 1920 (ICC Documents, pp. 299-301).

100 The information here and in the table is taken from various documents submitted to the Commission. All acreages are from ICC Documents, pp. 299-300; dates, prices, and income from pp. 379-83, 392, 395-96.

Map 2: Sumas Indian Reserve No. 7

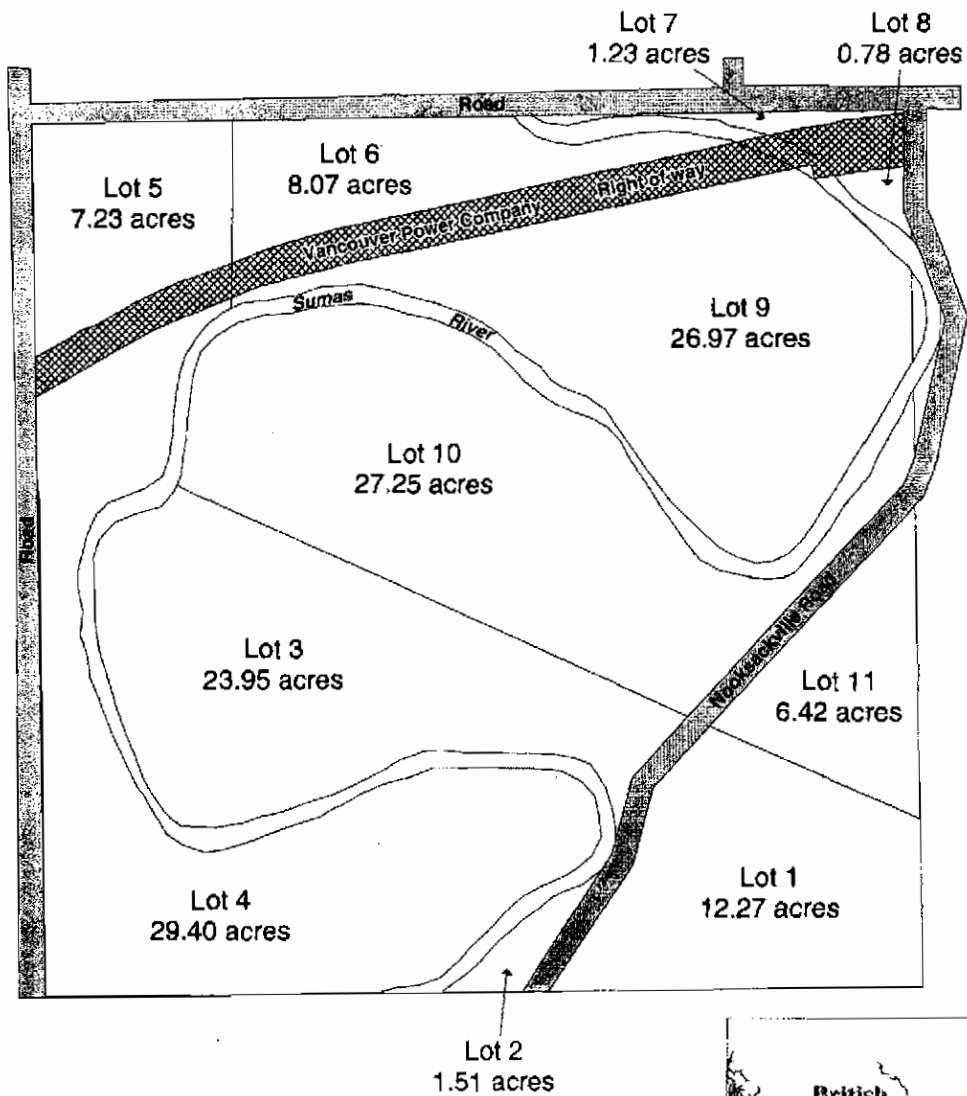


TABLE 1**Purchase Price of Lots in Sumas IR 7**

Lot Number	Acreage	Date	Price/Acre	Income
5, 6, 7, & 8	17.31	February 1927	\$125/acre	\$2,163.75
2	1.51	March 1928	\$139.07/acre	\$210.00
9	26.97	April 1929	\$74.16/acre	\$2,000.00
1 & 11	18.69	June 1930	\$80/acre	\$1,495.20
3, 4, & 10	80.6	July 1930	\$74.44/acre	\$6,000.00
TOTAL	145.08		\$81.81/acre	\$11,868.95

PART III

ISSUES

The purpose of this inquiry is to determine whether the Sumas Indian Band has a valid claim for negotiation under the Government of Canada's 1982 Specific Claims Policy, as outlined in *Outstanding Business*. To reiterate, that Policy states that the government will recognize claims that disclose an outstanding "lawful obligation" on the part of the federal government.

The question whether the surrender of Sumas IR 7 by the Sumas Band was lawful gives rise to a number of different legal issues. The parties agreed to the following joint formulation of issues in this inquiry:

- 1 Did the Crown have any fiduciary or trust obligations to the Band prior to the surrender, and if so, were those fiduciary or trust obligations fulfilled?
- 2 Did the Crown, in obtaining the surrender from the Band, comply with the surrender requirements of the *Indian Act*?
In particular:
 - a) Did the Crown or its agents exercise undue influence/duress over the members of the Band in order to obtain the surrender? and
 - b) Is the Crown's receipt of an advance on the purchase price of reserve land prior to the completion of the surrender contrary to the provisions of the *Indian Act*?
- 3 Is the Crown's receipt of an advance of the purchase price of reserve land prior to the completion of the surrender contrary to the Crown's fiduciary obligations, if any, with regard to the management of reserve or surrendered land?
- 4 If the surrender is valid:
 - a) Did the Crown fulfil their fiduciary obligations to the Band subsequent to the surrender? and/or

- b) Did the subsequent disposition of the lands comprising IR 7 violate the terms of the surrender or the applicable legislation (*Indian Act*; *Soldier Settlement Act*) or constitute a breach of the Crown's fiduciary obligation to the Band?
- 5 If the evidence is inconclusive on any previous issues, which party has the onus of proof?

To assist in our deliberations, the parties have provided us with a wealth of information for our review and consideration. All this information has been carefully considered, and the issues identified by the parties will be addressed in Part IV of this report.

PART IV

ANALYSIS

SURRENDER PROVISIONS OF THE 1906 *INDIAN ACT*

Before considering whether the Crown owed any fiduciary obligations to the Sumas Band in the circumstances of this claim, we will begin with a brief review of the procedural requirements for a surrender under the *Indian Act*.¹⁰¹ The relevant provisions of the 1906 *Indian Act* prohibit the direct sale of reserve lands to non-Indians by requiring that the band consent to the surrender of reserve land to the federal Crown.

The formal requirements for a valid surrender and alienation of Indians lands are set out in sections 48 through 50 of the 1906 *Indian Act*:

48. Except as in this Part otherwise provided, no reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Part; Provided that the Superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage, in the interests of the Indians, of wild grass and dead or fallen timber.

49. Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.

2. No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.

¹⁰¹ RSC 1906, c. 81, as amended.

3. The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before some judge of a superior, county or district court, stipendiary magistrate or justice of the peace, or, in the case of reserves in the province of Manitoba, Saskatchewan or Alberta, or the Territories, before the Indian commissioner, and in the case of reserves in British Columbia, or, in either case, before some other person or officer specially thereunto authorized by the Governor in Council.

4. When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.

50. Nothing in this Part shall confirm any release or surrender which, but for this Part, would have been invalid; and no release or surrender of any reserve, or portion of a reserve, to any person other than His Majesty, shall be valid.¹⁰²

In *Cardinal v. R.*,¹⁰³ Estey J interpreted the surrender provisions of the *Indian Act* and concluded that the following procedural requirements must be complied with for there to be a valid surrender:

It has also been argued that the interpretation which is now being considered is one which exposes the membership of the band to a risk of loss of property and other rights, contrary to the general pattern and spirit of the *Indian Act*. It is perhaps well to observe in this connection that there are precautions built into the procedures of Pt. I of the Act, dealing with surrender. Firstly, the meeting must be called to consider the question of surrender explicitly. It may not be attended to at a regular meeting or one in respect of which express notice has not been given to the band. Secondly, the meeting must be called in accordance with the rules of the band. Thirdly, the chief or principal men must certify on oath the vote, and that the meeting was properly constituted. Fourthly, only residents of the reserve can vote, by reason of the exclusionary provisions of subs. (2) of s. 49. Fifthly, the meeting must be held in the presence of an officer of the Crown. And sixthly, even if the vote is in the affirmative, the surrender

¹⁰² These protective provisions of the 1906 *Indian Act* trace their origin to the *Royal Proclamation* of 1763, which entrenched and formalized the process whereby only the Crown could obtain Indian lands through agreement or purchase from the Indians. The *Proclamation* states:

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

¹⁰³ *Cardinal v. R.*, [1982] 1 SCR 508, [1982] 3 CNLR 3, 13 DLR (4th) 321.

may be accepted or refused by the Governor in Council. *It is against this background of precautionary measures that one must examine the manner in which the assent of eligible members of the band is to be ascertained under s. 49.*¹⁰⁴

Therefore, the procedural requirements for a surrender under section 49 of the 1906 *Indian Act* can be summarized as follows:

- 1 a meeting must be summoned for the express purpose of considering whether to surrender the land – that is, a proposal for surrender cannot be raised at a regular meeting of the band or at a meeting where no express notice of the proposed surrender has been provided;
- 2 the meeting must be called in accordance with the rules of the band;
- 3 the meeting must be held in the presence of the Superintendent General or an authorized officer;
- 4 a majority of the male members of the band of the full age of twenty-one years must attend the meeting, and a majority of those attending must in turn assent to the surrender;
- 5 under subsection (2), only those men ordinarily resident on the reserve are eligible to vote;
- 6 under subsection (3), the band's assent to the surrender must be certified on oath by the Crown and the band; and
- 7 under subsection (4), the surrender must be submitted to the Governor in Council for acceptance or refusal.

As we stated in the Kahkewistahaw inquiry,¹⁰⁵ the first six of these criteria deal with a *band's consent* to the surrender of all or a portion of its reserve. Once the band has consented to the surrender, the *consent of the Governor in Council* is also required before it can be said that the surrender was obtained in compliance with the *Indian Act*.

Aside from the question whether the Governor in Council ought to have withheld consent to the surrender of Sumas IR 7 pursuant to section 49(4) of the 1906 *Indian Act* (which shall be discussed later in this report), legal counsel for the Sumas Band did not formally challenge the validity of the

¹⁰⁴ *Cardinal v. R.*, [1982] 1 SCR 508, [1982] 3 CNLR 3, 13 DLR (4th) 321 at 10.

¹⁰⁵ ICC, *Kahkewistahaw First Nation Report on the 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), 80-81.

surrender. Technical compliance with the procedural requirements of the *Indian Act* is not disputed. The surrender document in this case, witnessed by Indian Agent Byrne, was executed on behalf of the Band by Chief Ned and seven other Band members. Nine individuals were listed on the voters' list as having been present at the surrender meeting, and all nine voted in favour of the surrender. The surrender declaration was sworn by Agent Byrne, Chief Ned, Oscar Ned, and Gus Commodore, attesting to the fulfilment of the formal procedural requirements of the *Indian Act*.

Although the technical validity of the surrender is not in issue, legal counsel for the Sumas Band submitted that any expression of consent by the Band in 1919 was vitiated as a result of the Crown's actions and breach of fiduciary obligations in obtaining the surrender, thereby rendering the surrender wholly void. Thus, before embarking on an in-depth consideration of the existence and extent of the Crown's fiduciary duties, we will examine whether actions of the Crown are capable of rendering an otherwise valid surrender void or voidable.

EFFECT OF TECHNICAL COMPLIANCE WITH THE *INDIAN ACT*

What then, is the effect of a surrender which is valid in a purely technical sense but which raises questions of Crown conduct during the surrender process? For guidance, it is necessary to consider the recent decision in *Chippewas of Kettle and Stony Point v. Canada*,¹⁰⁶ a case which involved an assertion by the claimant First Nation that the surrender was invalid because the purchaser was present at the surrender meeting and paid Band members to influence them to vote in favour of the surrender contrary to the *Royal Proclamation* of 1763 and the *Indian Act*. On a motion for summary judgment, Killeen J held that certain provisions of the *Indian Act* are mandatory while others are simply directory. Nevertheless, "it is simply impossible to argue that s. 49(1) does not lay down a mandatory precondition for the validity of any surrender. If the surrender in question has not followed s. 49(1), it must be void *ab initio* [i.e. void from the outset]. To suggest otherwise is to re-write history and the commands of the *Royal Proclamation* and the *Indian Act*."¹⁰⁷

¹⁰⁶ *Chippewas of Kettle and Stony Point v. Canada* (1995), [1996] 1 CNLR 54, 24 OR (3d) 654 (Ont. Ct (Gen. Div.)); affirmed by the Ontario Court of Appeal in *Chippewas of Kettle and Stony Point v. Canada* (1997), 31 OR (3d) 97 (Ont. CA).

¹⁰⁷ *Chippewas of Kettle and Stony Point v. Canada* (1995), [1996] 1 CNLR 54, 24 OR (3d) 654 at 685 (Ont. Ct (Gen. Div.)).

With respect to the Chippewa First Nation's arguments that the surrender was invalid because it was obtained through duress or because it amounted to an unconscionable transaction, Killeen J stated that equitable and contract doctrines cannot be read into the *Indian Act* and, thus, "cannot affect the validity of the Order in Council [approving the surrender]; rather, such finding or findings must surely go to the Band's other claim for breach of fiduciary duty."¹⁰⁸ At the Ontario Court of Appeal in *Chippewas of Kettle and Stony Point*, Laskin JA had the benefit of considering the recent Supreme Court of Canada decision in *Apsassin*, but nevertheless reached a similar conclusion with regard to alleged improprieties of the Crown in the pre-surrender context:

what then of the cash payments, which, in the words of the motions judge, had "an odour of moral failure about them"? In my view, there is no evidence to suggest that these cash payments, in the words of McLachlin J., vitiated the "true consent" or the "free and informed consent" of the Band or, in the words of Gonthier J., "made it unsafe to rely on the Band's understanding and intention." In keeping with *Apsassin*, the decision of the Band to sell should be honoured. Therefore, like Killeen J., I am satisfied that there is no genuine issue for trial on whether the cash payments invalidated the surrender. I would dismiss the Band's second ground of appeal.

I add, however, that the cash payments or alleged "bribe" and consequent exploitation or "tainted dealings" may afford grounds for the Band to make out a case of breach of fiduciary duty against the Crown. As the parties have recognized, this is an issue for trial. The same may be said of the Band's contention that the sale to Crawford was improvident, he having immediately "flipped" the land for nearly three times the purchase price. . . .¹⁰⁹

Therefore, recent case law suggests that where there has been technical compliance with the procedural requirements of the *Indian Act*, no challenge can be made to the validity of the surrender itself on the grounds that the Crown breached its fiduciary obligations in the process leading up to the surrender. Nevertheless, a valid claim for compensation could be based on the Crown's breach of fiduciary duty, providing there is evidence to establish that such a duty was owed to the Sumas Band in the circumstances of this claim. We now turn our analysis to the facts of this case to determine whether the Crown owed any fiduciary obligations to the Sumas Band and, if so, whether the Crown was in breach of these obligations.

¹⁰⁸ *Chippewas of Kettle and Stony Point v. Canada* (1995), [1996] 1 CNLR 54, 24 OR (3d) 654 at 698 (Ont. Ct (Gen. Div.)). Emphasis added.

¹⁰⁹ *Chippewas of Kettle and Stony Point v. Canada* (1997), 31 OR (3d) 97 at 106 (CA).

ISSUE 1 FIDUCIARY OBLIGATIONS OF THE CROWN

Did the Crown have any fiduciary or trust obligations to the Band prior to the surrender, and if so, were those fiduciary or trust obligations fulfilled?

In arguing that the Crown owed a fiduciary duty to the Sumas Band in relation to the surrender of IR 7, counsel for the Band refers to a number of cases in which the courts recognize that the relationship between the Crown and aboriginal peoples is *per se* fiduciary in nature.¹¹⁰ Even if it were necessary to find a fiduciary relationship anew each time, the Band submits that the relationship between the Crown and the Sumas Band in the context of this surrender transaction has all the hallmarks that give rise to fiduciary duties on the part of the Crown.¹¹¹ The Band argues that as a result of its vulnerability, its relative lack of sophistication, and the power imbalance between the Sumas people and the Crown in 1919, the relevant fiduciary obligations owed to the Band in the context of the surrender are to consider the best interests of the Band; to provide full disclosure of all relevant information concerning the transaction; to disclose to the Band the Crown's own interest in the transaction; and to explain fully all consequences of the transaction. The Band argues that these obligations were not fulfilled and that there is no evidence that the Crown:

- ever turned its mind to whether this transaction was in the interests of the Band;
- revealed to the Band how the proposed details of the transaction had been arrived at and in particular that the Indian Agent believed that the land was worth \$100.00 per acre rather than the \$80.00 per acre which was agreed to between DIA [Department of Indian Affairs] and the SSB [Soldier Settlement Board]; and
- disclosed the nature of the Crown's relationship to the SSB and its interest in promoting the surrender and disposal of the Band's reserve.¹¹²

¹¹⁰ *Guerin v. The Queen*, [1984] 2 SCR 335; *R. v. Sparrow* (1990), 70 DLR (4th) 385, [1990] 3 CNLR 160 (SCC); *Blueberry River Band v. Canada (Department of Indian Affairs and Northern Development)* (subnom. *Apsassin v. Canada*) (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 (SCC); *R. v. Badger*, [1996] 2 CNLR 77 (SCC); *Wewayakum Indian Band v. Canada*, [1989] 1 SCR 322; *Delgamuukw v. British Columbia*, [1993] 5 WWR 97 (BCCA).

¹¹¹ *Frame v. Smith* (1987), 42 DLR (4th) 81 (SCC); *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574; *Quebec (Attorney General) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 (SCC); *Blueberry River Band v. Canada (Department of Indian Affairs and Northern Development)* (subnom. *Apsassin v. Canada*) (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 (SCC); *M.(K.) v. M.(H.)*, [1992] 3 SCR 6; *Norberg v. Wynrib*, [1992] 2 SCR 226; *Hodgkinson v. Simms*, [1994] 9 WWR 609 (SCC); Frankel, "Fiduciary Law" (1983), 71 Calif. L. Rev. 795.

¹¹² Submissions of the Sumas Indian Band, April 16, 1996, pp. 15-16

The Band contends that the non-fulfilment of these obligations resulted in a breach of the Crown's fiduciary duty to the Sumas Band. Finally, the Band further submits that the Crown breached its fiduciary duty by allowing a surrender that left the Band with insufficient reserve land to meet its needs.

In reply, Canada submitted that the relationship between Canada and the Band did not give rise to any trust responsibilities on the part of Canada prior to the surrender, since Mr Justice Dickson (as he then was) stated in *Guerin* that "before surrender, the Crown does not hold land in trust for the Indians."¹¹³ Moreover, Canada argues that, before the surrender, Canada did not stand in a fiduciary relationship with the Band which would give rise to a fiduciary obligation to determine whether the surrender was in the best interests of the Band. To the extent that Canada did have any pre-surrender fiduciary obligation – such as the duty to prevent an exploitative bargain – there was no breach on the part of Canada of any such duty.¹¹⁴

Following the Supreme Court of Canada's landmark decision in *Guerin*, the Canadian courts have struggled to identify a single fiduciary principle in order to define the limits of the doctrine and its application in various fact situations. Outside the established categories where a fiduciary relationship *prima facie* exists (e.g., trustee-beneficiary, doctor-patient, solicitor-client), the courts have sought to identify the requisite elements for imposing a fiduciary obligation on a new relationship. Thus, in *Frame v. Smith*, Wilson J offered the following principles to guide the courts in determining whether a fiduciary obligation should be imposed under the circumstances:

There are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.¹¹⁵

¹¹³ *Guerin v. The Queen*, [1984] 2 SCR 335, [1986] 6 WWR 481, 13 DLR (4th) 321, [1985] CNLR 120 at 138.

¹¹⁴ Government of Canada's Written Submissions, April 23, 1996, pp. 13-14.

¹¹⁵ *Frame v. Smith*, [1987] 2 SCR 99, 42 DLR (4th) 81 at 99.

It is also important to observe that any doubt whether aboriginal people stand in a fiduciary relationship with the Crown has been laid to rest by the Supreme Court of Canada. The *Guerin* decision provided the first instance where the courts recognized the relationship between aboriginal people and the Crown as fiduciary in nature. This decision was reaffirmed in *R. v. Sparrow*,¹¹⁶ and most recently by Mr Justice Iacobucci in *Quebec (Attorney-General) v. Canada (National Energy Board)*:

It is now well-settled that there is a fiduciary relationship between the federal Crown and the aboriginal people of Canada: *Guerin v. Canada* . . . None the less, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14, 26 C.P.R. (3d) 97, [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed.¹¹⁷

Stated in such clear and plain language, it is apparent that the Supreme Court of Canada recognizes that the relationship between the Crown and aboriginal peoples is inherently fiduciary in nature. However, Mr Justice Iacobucci was also clear that not every aspect of the relationship will give rise to a specific fiduciary obligation. Rather, the scope and content of the fiduciary's duties can only be determined through a careful analysis of the nature of the relationship between the parties.

The task before us, then, is to define the scope and content of the Crown's fiduciary duties to the Sumas Band, if any, in view of the particular facts and circumstances of this claim. Before commencing our analysis of the facts and the nature of the relationship that existed between Canada and the Sumas Band in 1919, we shall begin with a review of the *Guerin* and *Apsassin* decisions of the Supreme Court of Canada, since both cases are of particular importance in the present claim.

The *Guerin* Case

The facts in *Guerin* involve the surrender of 162 acres of reserve land by the Musqueam Indian Band to the federal Crown for lease to a golf club on certain terms as agreed to by the Band Council. The surrender document gave the land to the Crown in trust to lease "upon such terms as it deemed most conducive to the welfare of the band." The terms of the lease obtained

¹¹⁶ *R. v. Sparrow* (1990), 70 D.L.R. (4th) 385, [1990] 3 C.N.R. 160 (SCC).

¹¹⁷ *Quebec (A.-G.) v. Canada (National Energy Board)* (1994), 112 D.L.R. (4th) 129 at 147 (SCC).

by the Crown were in fact much less favourable than those originally agreed to by the Band Council. The Band was unable to obtain a copy of the lease until some 12 years later, and subsequently commenced an action for damages against the Crown in 1975. The Supreme Court of Canada held that section 18(1) of the *Indian Act*, which confers discretion on the Crown to decide where the band's best interests lie, transforms the Crown's obligation to deal with the land after surrender on behalf of the band into a fiduciary duty that will be supervised by the courts. Mr Justice Dickson held that while the Crown's obligations to Indians cannot be defined as a trust, the absence of a formal trust relationship does not mean that the Crown owes no enforceable duty to the band in the way in which it deals with Indian land:

In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.

The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.

An Indian band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the band's behalf. The Crown first took this responsibility upon itself in the *Royal Proclamation of 1763* [see R.S.C. 1970, App. I]. It is still recognized in the surrender provisions of the *Indian Act*. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.¹¹⁸

Furthermore, in discussing the discretion of the Crown to sell or lease on terms that were "deemed most conducive to the general welfare of the Band," Mr Justice Dickson stated:

This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest J. Weinrib maintains in his article "The Fiduciary Obligation"

118 *Guerin v. The Queen*, [1984] 2 SCR 335 at 376.

(1975), 25 U.T. L.J. 1, at p. 7, that “the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other’s discretion.” Earlier, at p. 4, he puts the point in the following way:

[Where there is a fiduciary obligation] there is a relation in which the principal’s interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law’s blunt tool for the control of this discretion.

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

It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.¹¹⁹

Applying the facts in *Guerin* to these guiding principles, Mr Justice Dickson found that the Crown had breached its fiduciary obligation towards the Band by accepting less favourable terms than those contained in the surrender without the Band’s approval:

After the Crown’s agents had induced the band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms . . . The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.¹²⁰

Although *Guerin* confirmed the existence of a post-surrender fiduciary obligation, the Court did not expressly state that the Crown may have other types of fiduciary duties outside this specific context. However, Mr Justice Dickson emphasized that it is the *nature of the relationship*, rather than membership in an already established category, that gives rise to fiduciary relations. He further noted that the categories of fiduciaries “should not be

119 *Guerin v. The Queen*, [1984] 2 SCR 335 at 384. Emphasis added.

120 *Guerin v. The Queen*, [1984] 2 SCR 335 at 388-89.

considered closed,” thereby recognizing the evolving nature of the fiduciary principle.

Of particular relevance to this claim is the decision of the Supreme Court of Canada in the *Apsassin* case, which dealt with the issue whether fiduciary obligations on the part of the Crown can arise in a pre-surrender context.

The *Apsassin* Case

At issue in *Apsassin* was the validity of two land surrenders in 1940 and 1945. In 1940 the Beaver Indian Band¹²¹ surrendered the mineral rights in its reserve to the Crown, in trust, “to lease” for its benefit. In 1945 the Band agreed to surrender its entire interest in the reserve to the Crown for “sale or lease.” The Department of Indian Affairs sold the entire reserve to the Director of the *Veterans’ Land Act* (DVLA) in 1948 for \$70,000; through “inadvertence,” however, the Department also transferred the mineral rights. Following the sale, the lands were discovered to contain oil and gas deposits. Once these facts were discovered, the Band commenced an action for damages resulting from the improper transfer of the mineral rights and sought a declaration that the 1945 land surrender was invalid on the ground that the Crown had committed several acts and omissions that constituted negligence and breach of fiduciary obligation owed to the Band.

At trial,¹²² Addy J dismissed all but one of the Band’s claims. He found that no fiduciary duty existed prior to or concerning the surrender, and that the Crown had not breached its post-surrender fiduciary obligation with respect to the mineral rights, since those rights were not known to be valuable at the time of disposition. He also found, however, that the Department had breached a post-surrender fiduciary duty by not seeking a higher price for the surface rights.

The Federal Court of Appeal¹²³ dismissed the Band’s appeal and the Crown’s cross-appeal. However, the majority rejected the trial judge’s conclusion that no fiduciary duty arose prior to the surrender. The Federal Court of Appeal held that the combination of the particular facts of the case and the *Indian Act* imposed a fiduciary obligation on the Crown. The specific nature of the obligation was not to prevent the surrender or to substitute the Crown’s own decision for that of the Band, but rather to ensure that the Band

121 The Beaver Indian Band eventually split into two bands known as the Blueberry River Indian Band and the Doig River Band.

122 *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1988] 14 FTR 161, 1 CNLR 73 (FCTD).

123 *Apsassin v. Canada*, [1993] 3 FC 28, 100 DLR (4th) 504, 151 NR 241, [1993] 2 CNLR 20 (FCA).

was properly advised of the circumstances concerning the surrender and of the options open to it, since the Crown itself had sought the surrender of the lands to make them available to returning soldiers.

Although the majority concluded that the Crown owed a pre-surrender fiduciary duty to the Band, Stone JA (Marceau JA concurring) agreed with Justice Addy's disposition of the case. Stone JA held that the Crown had discharged its duty, since the Band had been fully informed of "the consequences of a surrender," was fully aware that it was forever giving up all rights to the reserve, and gave its "full and informed consent to the surrender."¹²⁴ Stone JA also found that the Crown did not breach a post-surrender fiduciary obligation with respect to the disposition of the mineral rights because they were considered to be of minimal value at the time of the surrender. Once the rights had been conveyed to the DVLA, any post-surrender fiduciary obligation of the Department of Indian Affairs was terminated, and the Crown had no further obligation to deal with the land for the benefit of the Band.

At the Supreme Court of Canada, the Court was divided 4-3 on the question whether the mineral interests were included in the 1945 surrender for sale or lease. The Court, however, was unanimous in concluding that the Crown had breached its post-surrender fiduciary obligation to dispose of the land in the best interests of the band because the Crown had "inadvertently" sold the mineral rights in the reserve lands to the DVLA and then failed to use its statutory power to cancel the sale once the error had been discovered. With respect to the Crown's pre-surrender fiduciary duties, Justice Gonthier, writing for the majority, agreed with Justice McLachlin's minority reasons and concluded that the Crown discharged its duties on the facts in that case.

In disposing of the case on the issue of pre-surrender duties and breaches, McLachlin J conducted her analyses from two perspectives: first, as an inquiry into whether the *Indian Act* imposed a fiduciary obligation on the Crown with respect to the surrender; and, second, as an inquiry into whether the facts and circumstances of the case gave rise to any fiduciary duties.

On the question whether the *Indian Act* imposed a fiduciary duty on the Crown to refuse the Band's surrender of its reserve, McLachlin J struck a middle ground between the polarized positions of the parties:

My view is that the Indian Act's provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection. The

¹²⁴ *Apsassin v. Canada*, [1993] 3 FC 28, 100 DLR (4th) 504, 151 NR 241, [1993] 2 CNLR 20 at 46 (FCA).

band's consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. *The purpose of the requirement of Crown consent was not to substitute the Crown's decision for that of the band, but to prevent exploitation.* As Dickson J. characterized it in *Guerin* [p. 136 CNLR]:

The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.

It follows that under the Indian Act, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident – a decision that constituted exploitation – the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains. . . .

The measure of control which the Act permitted the Band to exercise over the surrender of the reserve negates the contention that *absent exploitation*, the Act imposed a fiduciary obligation on the Crown with respect to the surrender of the reserve.¹²⁵

Therefore, McLachlin J concluded that the Band's decision to surrender reserve land, as the expression of an autonomous actor, is to be respected unless that decision results in exploitation of the Band. The Crown must respect the decision of the Band, and the statutory regime does not impose a fiduciary duty on the Crown to withhold its consent to the surrender unless the band's decision is foolish, improvident, or amounts to an exploitative bargain.

The second branch of Justice McLachlin's analysis considered whether the particular facts of the case resulted in a fiduciary relationship being "super-imposed on the regime for alienation of Indian lands contemplated by the Indian Act" – a question that requires a careful analysis of the facts on a case-by-case basis. In considering this issue, McLachlin J provided a succinct summary of the Supreme Court of Canada's decisions on the law of fiduciaries:

Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 SCR 99 [[1988] 1 CNLR 152 (abridged version)]; *Norberg v. Wynrib*, [1992] 2 SCR 226; and *Hodgkinson v. Simms*, [1994] 3 SCR

¹²⁵ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 39-40 (SCC), McLachlin J. Emphasis added.

377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.¹²⁶

On the facts in *Apsassin*, McLachlin J found that “the Band trusted the Crown to provide it with information as to its options and their foreseeable consequences, in relation to the surrender,” but there was no evidence to suggest that “the Band abnegated or entrusted its power of decision over the surrender of the reserve to the Crown.” In support of this conclusion, McLachlin J relied on the following findings of Addy J at the trial level:

1. That the plaintiffs had known for some considerable time that an absolute surrender of I.R. 172 was being contemplated;
2. That they had discussed the matter previously on at least three formal meetings where representatives of the Department were present;
3. That, contrary to what has been claimed by the plaintiffs, it would be nothing short of ludicrous to conclude that the Indians would not also have discussed it between themselves on many occasions in an informal manner, in their various family and hunting groups;
4. That, at the surrender meeting itself, that matter was fully discussed both between the Indians and with the departmental representatives previous to the signing of the actual surrender;
5. That neither Mr. Grew, Mr. Gallibois nor Mr. Peterson [Crown representatives] appeared to have attempted to influence the plaintiffs either previously or during the surrender meeting but that, on the contrary, the matter appears to have been dealt with most conscientiously by the departmental representatives concerned;
6. That Mr. Grew [the local Indian Agent] fully explained to the Indians the consequences of a surrender;
7. That, although they would not have understood and probably would have been incapable of understanding the precise nature of the legal interest they were surrendering, they did in fact understand that by the surrender they were giving up forever all rights to I.R. 172, in return for the money which would be deposited to

¹²⁶ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 40-41 (SCC).

their credit once the reserve was sold and with their being furnished with alternate sites near their trapping lines to be purchased from the proceeds;

8. That the said alternative sites had already been chosen by them, after mature consideration.¹²⁷

To summarize the foregoing discussion, the recent cases suggest that, where there has been substantial compliance with the *Indian Act* and the band has voted in favour of a surrender, the Indian interest in the land is extinguished by operation of the statute. That, however, does not end the matter because it is also necessary to consider whether the Crown breached its fiduciary duties to the band as a result of the manner in which the surrender was obtained. It is, therefore, necessary to look behind the surrender decision to determine whether the Crown owed a fiduciary duty to the band in the surrender transaction. Where the facts warrant such a conclusion, a breach of the Crown's fiduciary duties could provide a separate basis for a valid claim by the band for compensation.

In the Commission's *Kahkewistahaw First Nation Report on the 1907 Reserve Land Surrender Inquiry*, we set forth our analysis and views in regard to the *Apsassin* decision. On the question whether the Crown owed any fiduciary duties to the Sumas Band which it failed to discharge, our analysis will be based in large measure on what we have already said in the *Kahkewistahaw Report*. In *Kahkewistahaw*, we reviewed the tests established by the courts for identifying whether a fiduciary obligation exists in the specific circumstances of the case, and we intend to adopt a similar approach for the purposes of this inquiry.

Pre-surrender Fiduciary Duties of the Crown

Where a Band Has Ceded or Abnegated Its Power to Decide

In the interests of clarifying what Justice McLachlin meant by her statement in *Apsassin* that there must be a cession or abnegation of decision-making power before a fiduciary duty can arise on the specific facts of a case, it is useful to consider the comments she made in the minority judgment in *Norberg v. Wynrib*, which considered whether an abnegation of decision-making power had occurred in the context of a doctor-patient relationship:

¹²⁷ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 41 (SCC).

As we have seen, an imbalance of power is not enough to establish a fiduciary relationship. It is a necessary but not sufficient condition. There must also be the potential for interference with a legal interest or a non-legal interest of "vital and substantial 'practical' interest." And I would add this. Inherent in the notion of fiduciary duty, inherent in the judgments of this court in *Guerin* and *Canson* [*Enterprises Ltd. v. Boughton & Co.*, [1991] 3 SCR 534], *supra*, is the requirement that the fiduciary have assumed or undertaken to "look after" the interest of the beneficiary. As I put it in *Canson* at p. 543 [SCR], quoting from this court's decision in *Canadian Aero Service Ltd. v. O'Malley*, [[1974] SCR 592,] *supra*, at p. 606 [SCR], "the freedom of the fiduciary is diminished by the nature of the obligation he or she has undertaken – an obligation which 'betokens loyalty, good faith and avoidance of a conflict of duty and self-interest. . . .'"

The duties of trust are special, confined to the exceptional case where one person assumes the power which would normally reside with the other and undertakes to exercise that power solely for the other's benefit. It is as though the fiduciary has taken the power which rightfully belongs to the beneficiary on the condition that the fiduciary exercise the power entrusted exclusively for the good of the beneficiary.¹²⁸

This issue has also been discussed at some length by the Supreme Court of Canada in *Hodgkinson*. In that case, the Court dealt with an action by an unsophisticated investor against his accountant, who had recommended certain tax shelters in which, unknown to the investor, the accountant had a personal interest. La Forest J stated:

It is important . . . to add further precision about the nature of reliance, particularly as it applies in the advisory context. *Reliance in this context does not require a wholesale substitution of decision-making power from the investor to the advisor.* This is simply too restrictive. It completely ignores the peculiar potential for overriding influence in the professional advisor . . . *As I see it, the reality of the situation must be looked at to see if the decision is effectively that of the advisor, an exercise that involves a close examination of the facts.*¹²⁹

Both *Norberg* and *Hodgkinson* suggest that there can be an effective transfer of decision-making authority even where, in a strictly technical sense, the principal has ostensibly made the decision on its own. It stands to reason, therefore, that the mere fact that a vote has been conducted in accordance with the surrender provisions of the *Indian Act* does not necessarily rule out the possibility that a band did, in fact, cede or abnegate its decision-making power to the Crown. To suggest otherwise would be to render

128 *Norberg v. Wynrib*, [1992] 4 WWR 577 at 622-23 (SCC), McLachlin J.

129 *Hodgkinson v. Simms*, [1994] 9 WWR 609 at 645 (SCC), La Forest J. Emphasis added.

McLachlin J's comments in *Apsassin* meaningless, since it would be difficult to imagine a situation in which there could be a cession or abnegation of decision-making control where a surrender has been approved by a band vote. Rather, it is relevant to look behind the ostensible consent of the band to determine whether any unfair advantage has been taken of the band as a result of its relative vulnerability and lack of sophistication *vis-à-vis* the Crown. Where there is evidence that the band has been taken unfair advantage of or has been manipulated into surrendering its land, equity must surely provide a remedy, given the Crown's role to protect aboriginal peoples from exploitative transactions involving their lands.

In written argument, Canada summarized its view of the issue as follows:

the relevant issue for consideration is whether the Band gave its full and informed consent to the surrender rather than whether Canada determined if the surrender was in the best interests of the Band. The notion advanced by the Band that the Crown has a fiduciary obligation to determine the best interests of a band prior to a surrender was in effect rejected by the Supreme Court of Canada in *Apsassin*.¹³⁰

As a general principle, *Apsassin* stands for the proposition that bands are to be treated as autonomous actors whose decisions must be honoured and respected. The measure of control given to the band under the *Indian Act* to decide to surrender its reserve lands negates the contention that the Crown had a duty to act in the best interests of a band *unless* the band ceded or entrusted this power of decision to the Crown. Depending on the facts, it may very well be the case that the Crown does owe a specific fiduciary duty to act solely in the best interests of the band if there has been a cession or abnegation of decision-making power over a matter.

On the facts in this case, the Sumas Band submitted that the Crown unduly pressured it to surrender IR 7. In support of this argument, the Band focused on the conduct of Indian Agent Byrne, who, according to counsel for the Band, repeatedly approached the Band and pressured its members to grant the surrender. The historical record does reveal that Agent Byrne approached the Sumas Band on a number of occasions in an attempt to secure a surrender of IR 7. It would also appear that his repeated attempts to obtain the surrender are indicative of the Sumas Band's initial reluctance to grant a surrender.

¹³⁰ Government of Canada's Written Submissions, April 23, 1996, p. 17.

Acting under specific instructions to provide an opinion on the feasibility of obtaining a surrender of land, Agent Byrne reported on June 4, 1919, of a meeting he had with the Band:

The Indians are divided in regard to this surrender, some are inclined to favourably consider it, while others strongly object, and it is doubtful if the consent of a majority can be obtained.¹³¹

Once in possession of the surrender forms to be submitted to the Sumas Band, Agent Byrne again reported on his meeting with the band and advised the Deputy Superintendent General of Indian Affairs, Duncan Campbell Scott, that "this is going to be a very slow job as these Indians are very hard to do business with."¹³² Later, in his response to a request for an update on the progress regarding the surrender, Agent Byrne reported, ". . . I again interviewed the Chief and he told me that he would get his people together to try and have them consent to giving the surrender, as desired by you."¹³³ On October 31, 1919, Agent Byrne attended a meeting where the Band agreed to the surrender of Sumas IR 7.

We agree with counsel for the Band that Agent Byrne's persistence in seeking the surrender warrants close scrutiny in light of the conflicting interests of Indian Affairs and the Soldier Settlement Board in the reserve lands. However, after a careful examination of all the surrounding facts and circumstances, there is insufficient evidence to confirm that Agent Byrne at any time applied undue pressure on the Indians to consent to the surrender against their will. Nor is there any evidence that the Band ceded or abnegated its power of decision in favour of the Crown, thereby creating a duty on the part of the Crown to exercise that power in the best interests of the Band.

When they were approached in 1919 to surrender all their interest in IR 7, members of the Sumas Band must have considered the proposed surrender on many occasions. The historical record indicates that Agent Byrne met with the band on at least three occasions and, given the importance of such a decision, it is reasonable to assume that members of the Band would have also discussed the matter among themselves in the absence of Agent Byrne. Although the Band was reluctant to surrender the reserve during these

131 Peter Byrne, Indian Agent, to D.C. Scott, Deputy Superintendent General of Indian Affairs, June 4, 1919, NA, RG 10, vol. 7535, file 26153-1, reel C-14808 (ICC Documents, p. 219).

132 Peter Byrne, Indian Agent, to Assistant Deputy Secretary, Department of Indian Affairs, July 28, 1919, NA, RG 10, vol. 7535, file 26153-1, reel C-14808 (ICC Documents, p. 249).

133 Peter Byrne, Indian Agent, to D.C. Scott, Deputy Superintendent General of Indian Affairs, September 20, 1919, NA, RG 10, vol. 7535, file 26153-1, reel C-14808 (ICC Documents, p. 251).

initial meetings, it is clear that Agent Byrne discussed the matter with the Chief, who then raised it again with his Band. In the end result, the Band agreed to surrender the reserve by an unanimous vote of eligible band members present at the meeting. The conduct of the Sumas Band after the surrender also suggests that its members were aware of the consequences of their decision to surrender all its interest in IR 7. Not only did the Band request the compensation agreed to for improvements to the reserve land but it also asked Agent A.O'N. Daunt in 1923 to seek payment of the outstanding balance of the purchase price.

While it is fair to say that Agent Byrne was instructed to approach the Band to determine whether it would be prepared to surrender the reserve for the benefit of the returning soldiers, there is no evidence to suggest that the Band ceded or abnegated its power to decide whether or not to surrender the land for sale. In the end result, the Band voters in attendance at the surrender meeting were unanimously in favour of the surrender and there is no direct evidence to establish that the Sumas Band lost or ceded its full power of decision to surrender its reserve.

In the light of *Apsassin*, we conclude on the basis of the evidence before us that members of the Sumas Band made a full and informed decision to surrender all their interest in IR 7 to the Crown and expressed their intention to do so by voting unanimously in favour of the surrender and, later, by signing or affixing their marks to the surrender document. The Crown had no duty, in the circumstances of this surrender, to substitute its own decision for the Band's, since the Band membership retained control over this aspect of the decision-making process.

Where a Band's Understanding Is Inadequate or the Dealings Are Tainted

In *Apsassin*, Mr Justice Gonthier, writing for the majority, concurred with McLachlin J's reasons with regard to the disposition of the issues dealing with the Crown's fiduciary duties in the surrender context.¹³⁴ However, in considering whether the Beaver Band's surrender for sale or lease of both mineral and surface rights in 1945 had expanded upon and subsumed the earlier 1940 surrender of mineral rights for lease only, Gonthier J adopted an

¹³⁴ Gonthier J explained in his reasons for judgment in *Apsassin*, [1996] 2 CNLR 25 at 28 (SCC): "I have had the benefit of reading the reasons of my colleague, McLachlin J. While I agree with her analyses of the surrender of the surface rights in Indian Reserve 172 ("I.R. 172"), and the application of the British Columbia Limitation Act, R.S.B.C. 1979, c. 236, and with her ultimate disposition of the case, I find that I cannot agree with her conclusion that the 1945 surrender of I.R. 172 to the Crown did not include the mineral rights in the reserve."

“intention-based approach” as the basis for determining the legal effect of dealings between aboriginal peoples and the Crown:

An intention-based approach offers a significant advantage, in my view. As McLachlin J. observes, the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured. . . . In my view, when determining the legal effect of dealings between Aboriginal peoples and the Crown relating to reserve lands, the *sui generis* nature of Aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings.¹³⁵

He later added the following caveat regarding the validity of the surrender variation agreed to by the band:

*I should also add that I would be reluctant to give effect to this surrender variation if I thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention. However, neither of these situations arises here. As the trial judge found, the consequences of the 1945 surrender were fully explained to the Indians by the local agent of the DIA [Department of Indian Affairs] during the negotiations. There was also substantial compliance with the technical surrender requirements embodied in s. 51 of the 1927 Indian Act, and as McLachlin J. concludes, the evidence amply demonstrates the valid assent of the Band members to the 1945 agreement. Moreover, by the terms of the surrender instrument, the DIA was required to act in the best interests of the Band in dealing with the mineral rights. In fact, the DIA was under a fiduciary duty to put the Band's interests first. I therefore see nothing during the negotiations prior to the 1945 surrender, or in the terms of the surrender instrument, which would make it inappropriate to give effect to the Band's intention to surrender all their rights in I.R. 172 to the Crown in trust "to sell or lease." In fact, the guiding principle that the decisions of Aboriginal peoples should be honoured and respected leads me to the opposite conclusion.*¹³⁶

Mr Justice Gonthier's analysis is important because it stands for the principle that the autonomy of Indian bands is to be respected and honoured. On this point, he and Madam Justice McLachlin are in full agreement. If, however, a band's decision-making power has been undermined or “tainted” by

¹³⁵ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 31 (SCC).

¹³⁶ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 34 (SCC). Emphasis added.

the conduct of the Crown, which makes it “unsafe to rely on the Band’s understanding and intention,” then the band’s autonomy has likewise been compromised. Given this emphasis on the band’s autonomy, both Gonthier J and McLachlin J in *Apsassin* placed considerable reliance on the factual findings of the trial judge to conclude that Indian Affairs officials had fully explained the consequences of the surrender, had not attempted to influence the Band’s decision, and had acted conscientiously throughout the entire process.

As the Court said in *Apsassin*, the *Indian Act* was intended to strike a balance between protection and autonomy, and a decision by a band to surrender its reserve land must be respected unless that decision is “exploitative” or “if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band’s understanding and intention.” We can find no evidence in the chronology of events relating to the Sumas Band and the surrender of IR 7 to support the contention that the Crown, in its conduct, unduly influenced or pressured the Band to surrender. Although there is nothing in the historical record to indicate why the Band, after its repeated refusals, changed its position in favour of the surrender, we cannot conclude that this change of mind can be attributed to the conduct of any Crown officials. Without any direct evidence to the contrary, we find that Crown officials did not taint the transaction in such a way that it would be unsafe to rely on the surrender of IR 7 as an expression of the Sumas Band’s true understanding and intention.

Where a Band’s Decision to Surrender Is Foolish or Improvident

The next issue deals with whether the Governor in Council ought to have withheld its consent to the surrender under subsection 49(4) of the 1906 *Indian Act*. Justice McLachlin’s decision in *Apsassin* makes it clear that, where there is evidence of exploitation, the Crown’s protective role, as set out in the *Indian Act*, provides the source of a fiduciary duty on the Crown to consider whether the band’s decision to surrender is foolish, improvident, or amounts to exploitation. Where it is evident that the surrender was foolish or improvident when viewed from the perspective of the band at the time, the Crown, through the Governor in Council specifically, has a duty to override the band’s decision by refusing to accept the surrender.¹³⁷

¹³⁷ This reasoning is consistent with McLachlin J’s statement in *Apsassin*, [1996] 2 CNLR 25 at 40, that the band’s decision to surrender made good sense when “viewed from the perspective of the Band at the time.”

Such a determination cannot be made in a vacuum. A determination of this issue must be made within the context of the circumstances existing at the time of surrender. In this claim, an examination of how the Sumas Band used the land on IR 7 before 1919 provides a useful starting point for determining whether the surrender was foolish or improvident. The historical evidence has established that Sumas IR 7 was valued for its heavy timber and its soil, which was "rich and . . . and suitable for agricultural purposes." Although the land did contain merchantable timber, the Band had done little work in clearing the land because of a lack of money and fears that a fire might run through the land if it did.

Speaking to the McKenna-McBride Commission in January 1915, Chief Ned told the Commissioners that his Band was interested in cultivating IR 7 in the future, and that Band members, all of whom (with only two exceptions) lived on IR 6, would take additional holdings on IR 7 "if we could clear it and sell the timber." An agreement between the Band and Mr Devoy was entered into, however, for the harvesting of the merchantable timber in January 1917. Although the Band apparently had plans to cultivate and settle on IR 7, it did not use the land extensively in the years leading to surrender.

The terms and conditions of the surrender provided that the reserve be disposed of to the Soldier Settlement Board for \$80 per acre on terms most conducive to the welfare of the Band and that all moneys received from the disposition, less the amount distributed to Band members, be placed to the Band's credit, with interest paid in the usual way. An advance of \$4500 was requested and obtained from the Soldier Settlement Board, to which the Band members received an immediate per capita distribution at the time of the surrender. The balance of the purchase price was received within two months of the surrender, with 50 per cent of the proceeds being placed in the Band's trust accounts.

The Band argues that the decision to surrender was exploitative because the Crown failed to disclose that Agent Byrne believed the land to be worth \$100 per acre, yet agreed to the price of \$80 per acre in valuing the land with the Soldier Settlement Board, and also that the Crown must have known that the surrender would leave the Band with insufficient land for its needs. On the other hand, Canada submits that the Band has not established that the surrender was foolish, improvident, or exploitative in view of the terms of the surrender, the value received for the reserve, and the Band's limited use of the land at the time. Although Canada was prepared to acknowledge that there were varying opinions on the value of the lands on a per acre basis,

counsel argued that “subsequent selling prices of the lands suggest that the consideration of \$80.00 per acre paid by the Soldier Settlement Board in 1919 was fair value.”¹³⁸

Based on these facts, can it be said that the Crown breached its fiduciary duty by failing to withhold its consent to the surrender pursuant to section 49(4) of the *Indian Act* on the ground that the surrender transaction was foolish, improvident, or exploitative in the circumstances? In our view, there is insufficient evidence to establish that the surrender was foolish, improvident, or exploitative. In determining whether the Crown had a duty to withhold its own consent to the surrender, it must be borne in mind that the Band “had the right to decide whether to surrender the reserve, and its decision was to be respected.”¹³⁹ Given the balance inherent in the *Indian Act* between the two extremes of autonomy and protection, it is our view that the Crown should not interfere with the Band’s right to decide for itself whether to surrender the land unless it was manifestly obvious that the terms of the surrender transaction were exploitative or that the Band’s decision was foolish or improvident.

Although it is not clear what factors prompted the Band to change its views and agree to surrender its land for \$80 per acre, it is not patently obvious from the evidence before us that this decision was foolish or improvident when viewed from the perspective of the Band at the time. On the one hand, it is clear that the Band did have future plans for the reserve. Yet there is also evidence that the Band was not using the reserve to any significant degree for agricultural or residential purposes at the time it was surrendered in 1919. On balance, it is plausible that the Band may have agreed to surrender the reserve because it was not contiguous to the main reserve, because it was underused, or because the Band would derive an immediate benefit from the sale by virtue of a per capita distribution of half the proceeds, with the remainder to be placed in an interest-bearing account for future use. Thus, when viewed from the perspective of the Band at the time, it may have made good sense to surrender IR 7, since it was not being actively used by the Band and because the proceeds from the sale would have benefited the Band and its members.

Assuming the Band’s decision to surrender was not foolish or improvident, can it be said that the transaction was exploitative because the Crown failed to disclose that the lands might have been worth more than the \$80

¹³⁸ Government of Canada’s Written Submissions, April 23, 1996, p. 19.

¹³⁹ *Apsassin*, [1996] 2 CNLR 25 at 40.

per acre agreed to between Agent Byrne and Mr Stacey? Although it is clear that the Sumas Band knew it was surrendering its interest in IR 7 forever, there is no evidence to indicate that the Band was informed or was aware of the conflicting interests of the Crown when it sought the surrender. Nor does the historical record suggest that the Band was consulted or involved in any sense in the negotiation of the sale price of \$80 per acre.

Although these facts are not really in dispute, it is our view that Canada's failure to disclose the existence of competing interests between Indian Affairs and the Soldier Settlement Board does not have any real bearing on whether the Band intended to surrender its interest in the land and, accordingly, it is not sufficient to vitiate the Band's consent to the surrender. Nor was the purchase price of \$80 per acre for IR 7 so manifestly unreasonable on the face of the transaction that it required the Governor in Council to withhold its consent to surrender.

Having said that, we are not completely satisfied that the Crown acted reasonably in trying to obtain fair compensation for the Band in exchange for the surrender of IR 7. Thus, the alleged non-disclosure could potentially give rise to a valid claim for compensation if the Crown breached a fiduciary duty by allowing the lands to be sold for less than fair market value without the full and informed consent of the Band.

The question whether the Crown breached a fiduciary duty by allowing the lands to be sold for less than fair market value without the full and informed consent of the Band will be addressed in the next section of this report. For now, however, we must conclude that, in the absence of any evidence to the contrary, the terms of the surrender, in and of themselves, cannot be said to be exploitative. Nor is it manifestly obvious from the record that the Band's decision to surrender was foolish or improvident. Thus, the Crown, through the Governor in Council, did not breach its fiduciary duty to the Band by accepting the surrender under section 49(4) of the *Indian Act*.

Where Inadequate Compensation Is Paid for Surrendered Lands

The next issue deals with whether the Sumas Band received fair compensation for the lands surrendered to the Crown for returning veterans of the first World War. The Sumas Band submits that the Department of Indian Affairs breached its fiduciary duty by failing to consider whether the sale of IR 7 was in the best interests of the Band, and by failing to disclose to the Band the proposed details of the transaction that had been arrived at between Indian Agent Byrne and Mr Stacey on behalf of the Soldier Settlement Band. In par-

ticular, the Band was concerned that, even though Agent Byrne believed that the land was worth \$100 per acre, he agreed with Mr Stacey to place a value of \$80 per acre on the land. Finally, the Band states that Indian Affairs failed to disclose the nature of its relationship with the Soldier Settlement Board and its interest in promoting the surrender and disposal of the Band's reserve.¹⁴⁰

Although the Band argued that Agent Byrne's failure to disclose material facts renders the surrender invalid because the Band did not provide a full and informed consent to the surrender, we are convinced for reasons we have already discussed that the Band understood that it was surrendering its interest in IR 7 forever and that it understood the consequences of the surrender. Nor was the Band's decision so foolish or improvident that the Governor in Council ought to have withheld its consent to the surrender. Nevertheless, we have serious reservations about whether the Crown discharged its fiduciary duty towards the Band by failing to obtain fair market value from the Soldier Settlement Board for the surrendered land and by allowing the land to be sold for less than fair market value without the Band's full and informed consent.

Canada submitted that it did not breach any fiduciary duty towards the Band in fulfilling the terms of the surrender because the terms of the surrender instrument simply provided that the reserve be sold to the Soldier Settlement Board for \$80 per acre on such terms as Canada may deem most conducive to the welfare of the Band. The terms of the surrender, Canada argues, were met by the issuance of Letters Patent to the Board and by receipt of an advance payment from the Board of \$4500 and payment of the balance of \$7780 in December 1919.¹⁴¹

In light of the facts in this case, we can not agree with Canada's argument that its fiduciary duty was confined simply to fulfilling the terms of the surrender by obtaining the \$80 per acre purchase price from the Soldier Settlement Board on behalf of the Band. This argument distorts the reality of the situation and attempts to gloss over the fact that Agent Byrne exercised complete control over the negotiation of the purchase price with the Board and that he did not consult with the Sumas Band or inform it that the land might be worth more than the \$80 per acre agreed to by Mr Stacey and him.

In our view, the case law clearly establishes that the Department of Indian Affairs owed a fiduciary duty to the Sumas Band once it undertook to act in

140 Sumas Band's Written Submissions, April 16, 1996, p. 16.

141 Government of Canada's Written Submissions, April 23, 1996, p. 32.

the best interests of the Band in the negotiation of the purchase price with the Soldier Settlement Board. While we are aware of Justice McLachlin's comment in *Apsassin* that the measure of control that Indian bands exercise over the decision to surrender negates the contention that the Crown has a duty to decide for a band where its best interests lie, the same reasoning does not apply to the present situation because there was a unilateral undertaking by Indian Affairs to enter into negotiations with the Board on the purchase price for the reserve for the benefit of the Band. Therefore, while it can be said that the Sumas Band retained control over its decision whether to surrender the reserve, the determination of purchase price and the negotiations with the Board were left solely to the discretion of Agent Byrne, who acted on behalf of the Band.

Support for this conclusion can be found in *Guerin*, where Dickson J described the source of the Crown's fiduciary obligation in these terms:

It is true that the *sui generis* interest that the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true . . . that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. *These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties.*¹⁴²

Likewise, it will be recalled from *Apsassin* that fiduciary obligations can arise on the facts where one party possesses a power or discretion to act solely for the benefit of a party who is peculiarly vulnerable.¹⁴³

Also in *Kruger v. The Queen*,¹⁴⁴ the Federal Court of Appeal considered whether the Crown owed any fiduciary obligations to the Penticton Indian Band in a situation where a portion of the band's reserve was expropriated by the Department of Transport for an airport. The Crown chose to exercise its expropriation authority rather than obtain a surrender from the band because no agreement could be reached over the proper amount of compensation that should be paid to the band for the lands taken. Writing for the

¹⁴² *Guerin*, [1985] 1 CNLR 120 at 131-32 and 136.

¹⁴³ In *Apsassin*, [1996] 2 CNLR 25 at 40, McLachlin J states: "Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second 'peculiarly vulnerable' person. . . . The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party." Also see *Frame v. Smith* (1987), 42 DLR (4th) 81 (SCC).

¹⁴⁴ *Kruger v. The Queen*, [1985] 3 CNLR 15 (FCA).

majority of the Court, Urie J recognized that *Guerin* dealt only with the Crown's obligations in a specific context – namely, the surrender of Indian lands on certain terms that were changed by the Crown without consultation or approval by the Indians – but nevertheless found that the Crown owed a fiduciary duty to the band:

When the Crown expropriated reserve lands, being Parcels A and B, there would appear to have been created the same kind of fiduciary obligation, vis-a-vis the Indians, as would have been created if their lands had been surrendered. *The precise obligation in this case was to ensure that the Indians were properly compensated for the loss of their lands as part of the obligation to deal with the land for the benefit of the Indians*, just as in the *Guerin* case, the obligation was to ensure that the terms of the lease were those agreed to by the Indians as part of the general obligation to them to ensure that the surrendered lands be dealt with for their use and benefit. *How they ensured that lies within the Crown's discretion as a fiduciary and so long as the discretion is exercised honestly, prudently and for the benefit of the Indians there can be no breach of duty.*¹⁴⁵

This decision is significant for at least two reasons. First, it suggests that the Crown has a general fiduciary duty by virtue of its role as intermediary between Indians and third parties to take reasonable steps to ensure that proper compensation is paid for the loss of Indian lands. Second, the Court stated that the proper standard of conduct required of the Crown is not necessarily one of undivided loyalty, but one that requires it to exercise its discretion honestly, prudently, and for the benefit of the Indians. Thus, the *Kruger* and *Apsassin* decisions both suggest that the proper standard of conduct required of a fiduciary under these circumstances is “that of a man of ordinary prudence in managing his own affairs.”¹⁴⁶

When all the circumstances regarding the valuation of IR 7 and the determination of the purchase price are considered, it is apparent that Indian Affairs unilaterally undertook to act on behalf of the Band in discussions with the Soldier Settlement Board and that it had a corresponding duty to the Band to exercise that power or discretion with loyalty and care. It makes no difference in the present case that Indian Affairs determined the purchase price before the surrender of the reserve because the facts confirm that Agent Byrne assumed complete control over discussions with the Board and that he

¹⁴⁵ *Kruger v. The Queen*, [1985] 3 CNLR 15 at 41 (FCA).

¹⁴⁶ In *Apsassin*, [1996] 2 CNLR 25 at 60, Justice McLachlin stated that in the circumstances of that case the “duty on the Crown as fiduciary was ‘that of a man of ordinary prudence in managing his own affairs’: *Fales v. Canada Permanent Trust Co.*, [1977] 2 SCR 302 at 315.”

was instructed to "cooperate with Mr. Stacey in arriving at a fair valuation for this reserve" before discussing the prospect of a surrender with the Band.¹⁴⁷ In this sense, Agent Byrne was in a position to exercise power or discretion in determining the value of the Band's reserve, and the exercise of this power or discretion would, and did, affect the legal and practical interests of the Band. Accordingly, there can be no doubt that the Crown had a fiduciary duty to protect the best interests of the Band by taking reasonable steps to ensure that the Sumas Band received fair value for the lands it was being asked to surrender.

Did the Department of Indian Affairs, then, discharge its fiduciary duty to the Band by acting in a reasonable and prudent manner to ensure that the Sumas Band received fair compensation for the land surrendered in IR 7? Although each case must be judged on its own merits, it is worthwhile to compare the present case with the facts and circumstances in *Apsassin* and *Kruger* to determine whether the Crown discharged its fiduciary duties to the Sumas Band.

In *Apsassin*, the Court considered whether the Crown breached a fiduciary obligation to the Beaver Indian Band for selling the reserve lands for less than market value. The facts were that the band agreed to surrender its reserve to the Crown to allow the valuable agricultural land to be distributed under the *Veterans' Land Act* to returning soldiers. The terms of the surrender gave the Department of Indian Affairs the discretion to sell or lease the lands on such terms as Canada deemed most conducive to the welfare of the band. Negotiations ensued between the Department of Indian Affairs (DIA) and the Director of the *Veterans' Land Act* (DVLA), whose officials agreed that the land would be sold *en bloc* for \$70,000. In the course of these negotiations, DIA obtained an appraisal that valued the land at approximately \$93,160, while appraisals done by the DVLA suggested a lower value. The trial judge held that the Crown breached its fiduciary duty by selling the lands at under value, because it sold the lands for less than the value suggested by DIA's own appraisers. The trial judge stated:

The defendant had a duty to convince the Court that it could not reasonably have expected to obtain a better price. There was no evidence as to what other offers were sought and what efforts were made to obtain a better price elsewhere. Since the onus of establishing that a fair price was in fact obtained in March 1948 has not been

¹⁴⁷ D.C. Scott, Deputy Superintendent General of Indian Affairs, to W.J. Black, Chairman, SSB, April 25, 1919, NA, RG 10, vol. 7535, file 26153-1, reel C-14808 (ICC Documents, p. 208); and W.J. Black to D.C. Scott, April 26, 1919, NA, RG 10, vol. 7535, file 26153-1, reel C-14808 (ICC Documents, p. 213).

discharged by the defendant, I find that the latter was guilty of a breach of its fiduciary duty towards the plaintiffs in that regard.¹⁴⁸

In the appeal before the Supreme Court, McLachlin J concluded that the trial judge erred in finding that the Crown breached its fiduciary duty by selling the land for \$70,000. In light of the similarities between the *Apsassin* case and this inquiry, it is worthwhile to set out Justice McLachlin's analysis in some detail to identify the relevant factors involved in a determination of this issue:

The trial judge was correct in finding that a fiduciary involved in self-dealing, i.e. in a conflict of interest, bears the onus of demonstrating that its personal interest did not benefit from its fiduciary powers: J.C. Shepherd, *The Law of Fiduciaries* (1981), at pp. 157-159; and A.H. Oosterboof: *Text, Cases and Commentary on the Law of Trusts* (4th ed. 1992). The Crown, facing conflicting political pressures in favour of preserving the land for the Band on the one hand, and making it available for distribution to veterans on the other, may be argued to have been in a position of conflict of interest.

More problematic is the trial judge's conclusion that the Crown failed to discharge the onus of showing the price of \$70,000 to be reasonable. While the DIA received a higher appraisal, there were also appraisals giving lower value to the land. In fact, there appears to have been no alternate market for the land at the time, which might be expected to make accurate appraisal difficult. The evidence reveals the price was arrived at after a course of negotiations conducted at arm's length between the DIA and DVIA.

This evidence does not appear to support the trial judge's conclusion that the Crown was in breach of its fiduciary obligation to sell the land at a fair value. In finding a breach despite this evidence, the trial judge misconstrued the effect of the onus on the Crown. The Crown adduced evidence showing that the sale price lay within a range established by the appraisals. This raised a *prima facie* case that the sale was reasonable. The onus then shifted to the Bands to show it was unreasonable. The Bands did not adduce such evidence. On this state of the record, a presumption of breach of the Crown's fiduciary duty to exact a fair price cannot be based on a failure to discharge the onus upon it. I note that the trial judge made no finding as to the true value of the property, nor any finding that it was significantly greater than \$70,000, deferring this to the stage of the assessment of damages.¹⁴⁹

The *Kruger* case also dealt with similar issues with regard to the valuation of Indian lands and negotiations between two federal departments with competing interests. As mentioned earlier, the facts in *Kruger* dealt with the expropriation of two parcels of land within a reserve set aside for the use and

¹⁴⁸ *Apsassin*, [1988] 14 FTR 161, 1 CNLR 73 at 139 (TD).

¹⁴⁹ *Apsassin*, [1996] 2 CNLR 25 at 45-46 (SCC).

benefit of the Penticton Indian Band in 1938. Later that same year, the Municipality of Penticton proposed to lease 72.56 acres of land (Parcel A) at \$6.50 per acre per annum for construction of a municipal airport. When the Department of Transport (Transport) became involved, it increased the area required for the airport to 153.8 acres, but did not approve the lease arrangements, preferring instead to acquire the land outright. Negotiations proceeded between Transport and the Indian Affairs Branch (IAB) which acted on behalf of the Band. In July 1940, the Indian Agent advised that the Indians were prepared to surrender the land for lease at \$10 per acre per annum for a period of 10 years. The Indians requested this amount because most of the band's hay lands and meadows used for agricultural operations would be taken. Although the Indian Commissioner for British Columbia thought that the rent was not "excessive," Transport disagreed and decided to expropriate, offering \$100 per acre as compensation for the lands to be taken.

When this amount was refused by the band, Transport was granted authority by federal Order in Council to expropriate the land on condition that negotiations continue with the band to determine the amount of compensation to be paid for the lands. The payment of \$115 per acre was later authorized by Order in Council, which stated that the Indians agreed to accept the figure of \$17,687. The expropriation became effective on February 4, 1941, and compensation was paid to and received by the band in March and April 1941.

Parcel B involved an additional 120 acres requested by the Department of National Defence for "an emergency landing field for the West Coast defense system." When Transport advised the IAB that the lands were required, the Indian Agent was instructed to discuss the matter with the Penticton Band and to cooperate as fully as possible with Transport, which later commenced work on the reserve before the land had been sold, leased, or expropriated. The band asked how much compensation it would receive, and objected to Transport's taking possession of the lands before payment. Negotiations continued and, by May 1943, Transport had two independent appraisals, which valued the land at \$6,831.10 and \$6,810.60, respectively. An independent appraisal done by the IAB estimated the value at \$16,958.75, but this figure was also not accepted by the band which instead sought approximately \$25,000 in compensation. When Transport stated that this expenditure could not be justified, another Order in Council authorized the expropriation of Parcel B. The expropriation was completed in February 1944.

An offer of interim compensation was refused by the band in May 1944. After protracted negotiations and discussions among members of the band whether they should go to court to determine the issue of compensation, the Indian Agent reported in January 1946 that the band agreed to accept a settlement of \$15,000, to be paid immediately to avoid litigation. The Deputy Minister of Transport advised the IAB that the offer of settlement was accepted. Although the land had already been expropriated, Agent Barber was instructed to meet with the Indians and to obtain their consent to the surrender of Parcel B. The band consented, but expressed concern that it was being asked to surrender the land when the land had already been taken through expropriation. The Order in Council approving the surrender stated that compensation was negotiated and was considered to be "fair and reasonable." The compensation was paid to and accepted by the band in March and April 1946.

On the question whether the lands were sold at under value, Urie JA (Stone JA concurring) found that there was no breach of fiduciary obligation by the Crown based on an alleged conflict between the two Crown departments for the following reasons: first, Department of Indian Affairs officials were articulate spokespersons for the band's interests, and, in fact, their forceful representations influenced the Department of Transport since the latter agreed to increase the compensation offered to and accepted by the band; second, Crown officials were well aware of their obligations to the band and discharged them to the best of their abilities; and, third, the band failed to discharge the onus of establishing, on a *prima facie* basis, that Indian Affairs officials had not disclosed sufficient information to the band.¹⁵⁰ Justice Urie held that, while the payments made to the band were a compromise, the band had independent legal advice; it was aware that it had other options, such as proceeding to Exchequer Court; and the "*payments were for sums which could be substantiated by the independent valuations received by both parties and which were determined after extensive negotiations and forceful representations on the Indians behalf. . . .*"¹⁵¹

In view of the case law, and taking into account the particular facts in this claim, we have serious reservations about whether the Crown fulfilled its fiduciary obligations to the Sumas Band. Specifically, the manner in which the purchase price was determined between Indian Agent Byrne and Mr Stacey raises doubts whether the \$80 per acre agreed to between Indian

¹⁵⁰ *Kruger v. The Queen*, [1985] 3 CNLR 15, at 653.

¹⁵¹ *Kruger v. The Queen*, [1985] 3 CNLR 15 at 654. Emphasis added.

Affairs and the Soldier Settlement Board represents fair market value for IR 7. In our view, the following factors confirm that the Department of Indian Affairs did not exercise its discretion in a reasonable and prudent manner when it agreed to the purchase price of \$80 per acre for IR 7.

First, the Crown was arguably in a conflict of interest because the Department of Indian Affairs was under an obligation to ensure that the Band received fair compensation for its land, whereas the Soldier Settlement Board was interested in obtaining the land for returning soldiers at the lowest price possible. In a House of Commons debate on the *Soldier Settlement Act* on June 23, 1919, Mr Meighen made it clear that the primary concern of the Crown was to promote the settlement of returning soldiers on good agricultural land to be purchased by the Board at reasonable prices:

We first of all took the ground that the principle that should govern us throughout was the welfare of the Soldiers. First, we held that it was no assistance to a soldier to place him upon land upon which he was not likely to succeed, and no assistance to place him on good land at a reasonable price unless he were a man who was likely to succeed at that occupation [agriculture].¹⁵²

In order to carry out the broad objective of the Act, it was in the Board's interests to purchase the land for as low a price as possible. Obviously, the Board's objective runs counter to the competing duty of the Department of Indian Affairs to obtain fair compensation for the reserve on behalf of the Band.

Second, there is absolutely no evidence to suggest that Agent Byrne or any other departmental official acted as "articulate spokespersons" for the Band or attempted in any way to obtain a higher price for the reserve than the \$80 per acre agreed to by Agent Byrne. On the contrary, Agent Byrne was instructed to *cooperate* with the Soldier Settlement Board's representative, Mr Stacey, who was also a Member of Parliament. Undoubtedly, Agent Byrne felt obliged to carry out these instructions, and that is precisely what he did. Even though Agent Byrne knew that local settlers might pay up to \$100 per

¹⁵² Canada, House of Commons, *Debates* (June 23, 1919), 3850. The fact that the Soldier Settlement Board was interested in keeping its costs as low as possible is also obvious when one considers the provisions of the *Soldier Settlement Act, 1919*, 9-10 George V, c. 71 (*Joint Book of Authorities*, tab 16). Section 7 provided that the Board may purchase lands by agreement to fulfil the purposes of the Act at "reasonable" prices, but section 12 was clear that the "valuation of any land purchased or proposed to be purchase by the Board, whether by agreement or compulsorily, shall not be enhanced merely because its value has, by reason or in consequence of settlement or settlement operations . . . become enhanced." Naturally, this provision would have a tendency to lower land values to assist the Board in fulfilling its mandate of settling soldiers on good agricultural land.

acre for the reserve, he agreed to \$80 per acre, and there is no evidence that he made any counter-offers to obtain a higher price that was more consonant with his own estimates of the reserve's value. That there were no real arm's-length negotiations at all is made clear by Mr Stacey's report to the Board, which states that he would have been prepared to offer up to \$85 per acre for the land, but was able to secure Agent Byrne's agreement to \$80 per acre.¹⁵³ Surely, a reasonable and prudent person managing his or her own affairs would have done something more to ensure that a fair price was paid for the land.

Third, it does not appear that Indian Affairs was even alert to its duty to protect the Band's interests in the discussions with the Soldier Settlement Board. This duty arose not only by virtue of the Crown's protective role as intermediary in the surrender process but also as a result of the unilateral undertaking by Indian Affairs to negotiate the purchase price. Under these circumstances, the Sumas Band was peculiarly vulnerable to the Crown's exercise of discretion during the negotiation process. Canada, however, asserted that "members of the Band were independently minded and very capable of making their own decisions and negotiating in favour of their own interests." In support of this assertion, Canada pointed to the Band's involvement in negotiating a deal for the sale of the timber in 1917 on condition that it would receive \$1.50 per cord to cut bolts at the stump and \$3.00 per cord for delivery to a certain point. Although we acknowledge the active involvement of the Band in negotiating this deal, we think Canada has overstated the case for two reasons:

- 1 The fact that Indian Affairs felt obliged to intervene in the same deal and to convince the Band not to sell its timber for the lower of two offers made by Mr. Devoy and Mr. Whiteside¹⁵⁴ serves only to confirm the Band's lack of sophistication and vulnerability in such transactions.
- 2 Although it is reasonable to suggest that members of the Band might have had some understanding of labour markets and the wages to be paid for cutting and hauling timber, it strains credibility to suggest that the Band would have had any real understanding of the real estate market for agricultural land, since it was not actively farming and, indeed, was prohibited

¹⁵³ Major E.J. Ashton, Commissioner, SSB, to W.J. Black, Chairman, SSB, July 3, 1919, no file reference available (ICC Documents, p. 222).

¹⁵⁴ See Peter Byrne, Indian Agent, to D.C. Scott, Deputy Superintendent General of Indian Affairs, January 5, 1917, NA, RG 10, vol. 7330, file 987/20-7-30-6, reel C-13519 (ICC Documents, pp. 144-45).

by the *Indian Act* from selling its land without the Crown's intervention in the transaction. The Band's relative lack of education and sophistication with respect to land matters made it peculiarly vulnerable to the exercise of the Crown's discretion in the circumstances.

Fourth, although Agent Byrne was aware that the land might be worth \$100 per acre, he took no steps to obtain an independent valuation or assessment to confirm what the market value of the land actually was. Nor is there any evidence to suggest that either he or Mr Stacey were qualified to make this valuation on their own. Even if this were the case, we would nevertheless have concerns about the independence of their opinions given the competing considerations of Indian Affairs and the Soldier Settlement Board, both of which operate as agents of the federal Crown. It is important to observe that in both the *Apsassin* and the *Kruger* decisions, the Department of Indian Affairs at least went to the trouble of obtaining independent land valuations to assist it in obtaining fair market value on behalf of the Indians. Such a step would have been eminently reasonable given the apparent conflict of interest that existed. This is not a case where the Crown can assert that the price agreed to fell within a range of values established by independent valuations of the land taken at the time, since no valuations were obtained. The *Apsassin* case can be further distinguished on the basis that there was an alternative market for the land at the time, since local settlers were apparently interested in the land, which was reputed to have good soil.¹⁵⁵

Fifth, there is no evidence to suggest that Agent Byrne ever informed the Band that it might be able to obtain a higher price than \$80 per acre for the reserve. In fact, it is clear from departmental correspondence that Agent Byrne made a deliberate decision to withhold this information from the Band until he and Mr Stacey had come to an agreement on the valuation. In a letter to Duncan Campbell Scott on June 4, 1919, Agent Byrne stated: "At the time of my visit I informed Mr. Stacey that I was endeavouring to obtain the consent of the Indians to the surrender of this land, and we decided not to

¹⁵⁵ With respect to the valuation of IR 7, it is also noteworthy to point out that the *Soldier Settlement Act, 1919*, defines "Agriculture land" as "adaptable for agricultural purposes and the value whereof for any other purpose is not greater than its value for agricultural purposes." This raises questions whether the Soldier Settlement Board valued IR 7 only for its agricultural potential or whether Mr. Stacey took into account other potential uses of the land aside from the dominant purpose for which it was required by the Board. If IR 7 was valued only for agricultural purposes, further research should be conducted to determine whether there was merchantable timber on the land and, if so, whether this timber was factored into the valuation as a potential source of revenue or, alternatively, as a cost of clearing the land.

report on the question of valuation, until the consent of the Indians, was if possible obtained.”¹⁵⁶ In our view, it was quite improper for Agent Byrne to betray the trust and confidence of the Band by deliberately withholding important information about the potential value of the land and the manner in which he and Mr Stacey determined the purchase price. The evidence in this case is that the Band was never informed that \$80 per acre might be less than fair market value, and it can not be said that the Band provided a full and informed consent to this purchase price, since it was deliberately kept in the dark by Mr Byrne. This was a decision that was made by Agent Byrne without consultation from the Band and without its full and informed consent.

Sixth, the Band did not have independent legal or expert advice on the value of the land, and there is no evidence that it was informed of what its options were if it chose not to accept the \$80 per acre offered by the Soldier Settlement Board. Although we do not intend to suggest that independent legal or technical advice is always required for the Crown to discharge its fiduciary duties towards an Indian band, it can be an important factor in determining whether or not the band provided a full and informed consent to a surrender or some transaction entered into with the Crown or a third party.

In summary, then, we must conclude that the Crown was faced with competing interests, but that it failed to reconcile those interests in accordance with the standard required of a fiduciary. The Department of Indian Affairs owed a fiduciary duty to the Sumas Band to ensure that it was properly compensated for the loss of its lands, and the Crown failed to exercise its discretion in this transaction in a reasonable and prudent manner for the benefit of the Band.

Although it is clear that Indian Affairs did not act in a reasonable manner during the negotiation process with the Soldier Settlement Board, this is not sufficient to establish a breach of fiduciary obligation because it has not been proven that the Band suffered any damages; in other words, it remains to be determined whether the land, in fact, was worth more than the \$80 per acre purchase price. If \$80 per acre was the fair market value of the land in 1919, it cannot be said that the Band suffered any damages. If, however, the purchase price of \$80 per acre was lower than the actual fair market value of the land, the discrepancy between these two figures would provide a valid basis for a claim to compensation under the Specific Claims Policy.

¹⁵⁶ Peter Byrne, Indian Agent, to D.C. Scott, Deputy Superintendent General of Indian Affairs, June 4, 1919, NA, RG 10, vol. 7535, file 26153-1, reel C-14808 (ICG Documents, p. 219).

The question, then, is how much was the land worth? Canada submitted that the subsequent selling prices of the lands, which were subdivided and sold to civilians between 1927 and 1930, suggests that the \$80 per acre paid by the Soldier Settlement Board in 1919 represented fair market value for the lands. Canada pointed to evidence to suggest that there were varying opinions before the surrender with regard to the value of the reserve and that most of the land sold for between \$30 and \$75 per acre, with only 17.31 acres of the total being sold for the highest price of \$125 per acre.¹⁵⁷ Table 1 confirms that the average sale price for the 145.08 acres sold amounted to \$81.81 per acre.

We are also cognizant of the fact that there were other valuations of the land before and around the time of surrender which confuse the matter even further. For instance, Agent Byrne assessed the value of the lands at \$13,000 (including \$1000 in improvements) in 1916, a sum that amounts to \$81.25 per acre for 160 acres of land.¹⁵⁸ After the surrender, Commissioner Ashton for the Soldier Settlement Board wrote to Mr Stacey on December 15, 1920, advising that Board inspectors appraised the value of the reserve at \$50 per acre because it was "totally uncleared land."¹⁵⁹

Although Canada is correct that the evidence about the subsequent selling prices of the land is equivocal, we are not completely satisfied that the subsequent sale prices of the land provide reliable evidence of fair market value, since the scheme of the *Soldier Settlement Act* required that the Board sell lands only for the amount that it cost the Board to acquire it. That is, the Board was generally not allowed to sell land at a profit even if it was worth more than the Board had paid for it. Section 16 of the *Soldier Settlement Act* stated that the Board may sell lands acquired by it to settlers on the condition that "the sale price shall be the cost of the parcel to the Board" or, in the case of land that was acquired by the Board as part of a larger parcel, the sale price shall be based on "the same proportion of the cost of the entire parcel or parcels so acquired. . . ."¹⁶⁰ Section 17(2) provided that both the cost of the land and the cost of improvements, if any, shall be considered in determining the sale price. If the Board determined that the land could not or should not be sold at cost, section 21 stated that the Board could report

157 Government of Canada's Written Submissions, April 23, 1996, p. 19.

158 Peter Byrne, Indian Agent, to C.N. Gibbons, Secretary, Royal Commission on Indian Affairs, Victoria, BC, January 19, 1916, no file reference available (ICC Documents, p. 92).

159 Major E.J. Ashton, Commissioner, SSB, to F.B. Stacey, Member of Parliament, December 15, 1920, no file reference available (ICC Documents, p. 313).

160 *Soldier Settlement Act, 1919*, 9-10 George V, c. 71.

to the Minister and obtain approval from the Governor in Council to sell lands it had acquired for soldier settlement at any price other than it had originally paid. Therefore, if the Board paid \$80 per acre to acquire IR 7, the Act required that the Board could not sell it for more than \$80 per acre, whether or not the land was worth much more, unless the Governor in Council authorized the sale on other terms.

Another reason why we are not entirely satisfied that \$80 per acre was fair compensation for the land is because it is unclear from the evidence whether IR 7 had any merchantable timber remaining on the land at the time of its sale to third parties. If valuable timber was transferred to the Soldier Settlement Board with the land, it stands to reason that the timber should have been reflected in the sale price of the land negotiated in 1919. Again, this approach is consistent with the fiduciary duty of Indian Affairs to exercise its discretion "honestly, prudently and for the benefit of the Indians."

The evidence does confirm that there was still some timber on the land in 1919 which would have to be cleared before farming operations could commence, but it is not clear whether all merchantable timber had been harvested and sold to Mr Devoy in the three-year period leading to the surrender. The existence of any merchantable timber on IR 7 is an important factor in determining the value of the reserve. The question is whether the timber on the land in 1919 had any value, or whether it was simply a potential clearing cost to be incurred by the Soldier Settlement Board or the settler who purchased the land. Since no evidence was put before us on whether any merchantable timber remained on the land in 1919 (which the Band could have sold or used if it remained in possession of the reserve), it is questionable whether \$80 per acre represented the true market value of the land, since both the agricultural potential of the land and the value of any merchantable timber should have been taken into account.

Since the Crown did not take any steps in 1919 to obtain independent valuations of the land, as had been done in *Apsassin* and *Kruger* where the courts determined that the appropriate standard of conduct was "that of a man of ordinary prudence in managing his own affairs," we are not satisfied that the Sumas Band necessarily received fair compensation for the surrender of IR 7. As we have stated above, we believe that the Band has established that the Crown owed a fiduciary duty to ensure that the Band was properly compensated for the loss of its lands, and that the Crown failed to exercise its discretion in this transaction in a reasonable and prudent manner for the benefit of the Band.

In the final analysis, the Commission does not have sufficient evidence before it on the value of IR 7 in 1919 to be able to resolve the essential factual question, namely, did the Band suffer any damage? We therefore recommend that Canada and the Sumas Band conduct joint research to determine whether the \$80 per acre paid by the Soldier Settlement Board represented fair market value in 1919 having regard to the various considerations we have identified in this report. If the studies confirm that the fair market value was higher than the \$80 per acre obtained by the Band, it is our view that the Band is entitled to be compensated for any such discrepancy. Any compensation owed to the Band would be a matter of negotiation between the parties.

ISSUE 2(A) UNDUE INFLUENCE AND DURESS

Did the Crown or its agents exercise undue influence/duress over the members of the Band in order to obtain the surrender?

In our review of this claim, we have determined that the common law doctrines of undue influence and duress, which typically arise in dealing with the sufficiency of consent in contractual situations, do not strictly apply when considering whether there has been a valid surrender under the terms of the *Indian Act*. That is not to say, however, that these concepts do not have any relevance to the question whether the Crown has breached its fiduciary obligations towards the Band as a result of the manner in which the surrender was obtained.

This point was made by Killeen J in *Chippewas of Kettle and Stony Point v. Canada*,¹⁶¹ where he refused to apply contract principles to determine the validity of a 1927 surrender of reserve lands. With respect to the doctrine of unconscionability, for example, he noted as follows:

Unconscionability is an equity doctrine which addresses the fairness of a bargain . . . the existence of a fair bargain is not a condition precedent to the exercise of the surrender under s. 49 of the Act or to the acceptance of a surrender by the Governor in Council thereunder. *Any finding of unconscionable conduct under the facts of this case cannot affect the validity of the Order in Council; rather such a finding or findings must surely go to the Band's other claim for breach of fiduciary duty.*

It is dangerous to attempt to inject doctrines of the common law or equity into a situation where the *Royal Proclamation* and the *Indian Act* have created a unique regime for the protection of the Indian peoples. As I have said above, the best that can

¹⁶¹ *Chippewas of Kettle and Stony Point v. Canada* (1995), 24 OR (3d) 654 (Ont. Ct (Gen. Div.)).

be said about the concept of unconscionability, for this case is that it may provide some aid or comfort for the band on the question of fiduciary duty.¹⁶²

Killeen J's remarks concerning the applicability of the doctrine of economic duress were of a similar tenor:

As I have said, economic duress is a contract doctrine which will, in appropriate but carefully circumscribed circumstances, avoid a contract obligation . . . This doctrine cannot apply to this case because there is no contract present to which it may be logically applied. As I have already said, the Band is claiming the benefit of the doctrine but the Band was not a direct party to any contract which would attract the doctrine. There is no warrant for injecting a narrow contract doctrine in the interstices of the *Indian Act*.¹⁶³

At the Court of Appeal, Laskin JA similarly concluded:

. . . what then of the cash payments, which, in the words of the motions judge, had "an odour of moral failure about them"? In my view, there is no evidence to suggest that these cash payments, in the words of McLachlin J., vitiated the "true consent" or the "free and informed consent" of the Band or, in the words of Gonthier J., "made it unsafe to rely on the Band's understanding and intention." In keeping with *Apsassin*, the decision of the Band to sell should be honoured. Therefore, like Killeen J., I am satisfied that there is no genuine issue for trial on whether the cash payments invalidated the surrender. I would dismiss the Band's second ground of appeal.

I add, however, that the cash payments or alleged "bribe" and consequent exploitation or "tainted dealings" may afford grounds for the Band to make out a case of breach of fiduciary duty against the Crown. As the parties have recognized, this is an issue for trial. The same may be said of the Band's contention that the sale to Crawford was improvident, he having immediately "flipped" the land for nearly three times the purchase price. . . .¹⁶⁴

Recent case law therefore suggests that the concepts of undue influence and economic duress cannot be read into the four corners of the *Indian Act* which set out special procedural requirements governing the surrender of Indian reserve lands. Thus, where there has been technical compliance with the surrender provisions of the *Indian Act*, it follows that the Indian interest in the reserve has been extinguished by operation of the statute. It is, nevertheless, relevant to consider whether the Crown procured the surrender in a

¹⁶² *Chippewas of Kettle and Stony Point v. Canada* (1995), 24 OR (3d) 654 at 698 (Ont. Ct (Gen. Div.)). Emphasis added.

¹⁶³ *Chippewas of Kettle and Stony Point v. Canada* (1995), 24 OR (3d) 654 at 699 (Ont. Ct (Gen. Div.)).

¹⁶⁴ *Chippewas of Kettle and Stony Point v. Canada* (1997), 31 OR (3d) 97 at 106 (CA). Emphasis added.

manner that violated its trustlike responsibilities owed to the band, even though the surrender is valid in a technical sense since it complied with the surrender provisions of the *Indian Act*.

The issue of Crown conduct has been explored in the context of determining whether or not the Sumas Band provided its free and informed consent to the surrender of IR 7. Given our conclusion that there was no evidence of tainted dealings on the part of the Crown which makes it unsafe to rely on the surrender as an expression of the Sumas Band's understanding and intention, it is not necessary to review again those same facts in any considerable detail to determine whether the Crown's conduct amounts to undue influence or duress. As we stated above, there was no direct evidence that the Crown applied any undue influence or duress on the Sumas Band in the process leading up to the surrender of IR 7. Although the evidence does indicate that the Crown was unable to secure a surrender the first time it approached the Band and was persistent in its endeavour to alienate the reserve lands from the Band, there is no warrant for concluding that any of this conduct amounted to "undue" influence or pressure on the Band to surrender its land. At the end of the day, the Band was free to make the decision and the case law requires that we respect and honour the decisions of the Band unless there is evidence of tainted dealings with Crown officials which make it unsafe to rely on the Band's decision as a true expression of its understanding and intention.

ISSUE 2(B) ADVANCE ON THE PURCHASE PRICE FOR DISTRIBUTION TO BAND MEMBERS

Is the Crown's receipt of an advance on the purchase price of reserve land prior to the completion of the surrender contrary to the provisions of the *Indian Act*?

This issue involves the interpretation to be placed on section 89(1) of the 1906 *Indian Act*.¹⁶⁵ By amendment to the 1906 *Indian Act*, Parliament authorized payment of up to 50 per cent of the proceeds from the sale of surrendered lands to be distributed to the Indians at the time of surrender. The previous version of the *Indian Act* allowed a maximum per capita distribution of only 10 per cent of the sale proceeds to the band. Section 89(1) states, in part:

¹⁶⁵ As amended by SC 1906, c. 20, s. 1.

With the exception of such sum not exceeding fifty per centum of the proceeds of any land, and not exceeding ten per centum of the proceeds of any timber or other property, as is agreed at the time of surrender to be paid to the members of the band interested therein . . .

Counsel for the Sumas Band submitted that Indian Affairs officials violated section 89(1) when they decided for themselves that an advance on purchase funds would be required to induce the Band into surrendering IR 7. More specifically, it was argued that section 89(1) "does not permit the Department of Indian Affairs to unilaterally decide that an advance on purchase funds should be provided to Band members. The terms of this provision are designed to prevent an advance of funds being used as an inducement to Band members to agree to a surrender."¹⁶⁶ Canada, however, submits that rather than preventing the Crown from using the proceeds of sale as an inducement to Band members to agree to a surrender, this amendment was passed specifically to provide the Crown with this power.¹⁶⁷

When the proposed amendment was debated in the House of Commons on June 15, 1906, Frank Oliver, then Minister of the Interior and Superintendent General of Indian Affairs, was quite candid in explaining the underlying rationale for the amendment:

This Bill contains only one section and has only one object. It is simply to change the amount of the immediate and direct payment that may be made to Indians upon the surrender of their lands. At the present time Indians on surrendering their lands are only entitled to receive ten per cent of the purchase price either in cash or other value. This we find, in practice, is very little inducement to them to deal for their lands and we find that there is a very considerable difficulty in securing their assent to any surrender. Some weeks ago, when the House was considering the estimates of the Indian Department, it was brought to the attention of the House by several members, especially from the Northwest, that there was a great and pressing need of effort being made to secure the utilization of the large areas of land held by Indians in their reserves without these reserves being of any value to the Indians and being a detriment to the settlers and to the prosperity and progress of the surrounding country.

. . .

We do not wish to advance fifty per cent of the purchase price unless we have to do so in order to procure a sale of the land. We recognize that it is very much better that the Indians should have the money in fund and only receive the interest from year to year. But where it is very desirable in the interest of a growing town, for instance, to

¹⁶⁶ Sumas Band's Written Submissions, April 16, 1996, p. 20.

¹⁶⁷ Government of Canada's Written Submissions, April 23, 1996, p. 28.

secure lands for the purpose of cultivation, and to remove the Indians from them, the urgency of the case must to some extent govern the action of the department.¹⁶⁸

There can be no doubt that this provision was intended to have a specific effect, namely, to give Crown officials the authority to offer a greater incentive to bands to surrender their reserve lands.

The fact that Parliament passed an amendment whose primary purpose was to induce Indian bands into surrendering the remaining lands they had as reserves in exchange for a one-time cash payment is morally and ethically objectionable when judged by today's standards. Nevertheless, the authority of the federal government to unilaterally pass such legislation in 1906 is beyond question owing to the doctrine of parliamentary supremacy.¹⁶⁹

Although it is clear that Parliament had the legislative authority to allow 50 per cent of the surrender proceeds to be paid to band members, it is still necessary to scrutinize the circumstances in which a cash payment is used in surrender cases because the abuse of this authority and discretion by over-zealous Crown officials can result in a breach of fiduciary duty towards the band in question. In the *Kabkewistahaw Report*, the Commission stated that it is necessary to consider whether the Crown attempted to reconcile its competing responsibilities:

We recognize that the Crown was and is constantly faced with conflicting interests since it has the dual and concurrent responsibilities of representing the interests of both the general public and Indians. However, the *fact* that the Crown has conflicting duties in a given case does not necessarily mean that the Crown has breached its fiduciary obligations to the First Nation involved. Rather it is the manner in which the Crown *manages* that conflict that determines whether the Crown has fulfilled its fiduciary obligations.¹⁷⁰

¹⁶⁸ Canada, House of Commons, *Debates*, June 15, 1906, 5422 and 5434 (Frank Oliver) (ICC Exhibit 3).

¹⁶⁹ Prior to the enactment of section 35(1) of the *Constitution Act, 1982*, which provided for constitutional recognition and protection of "existing" aboriginal and treaty rights, the federal government had full authority to enact legislation which extinguished or infringed upon aboriginal or treaty rights providing that there was a clear and plain intention to do so: see *R. v. Sparrow*, 1990 1 SCR 1075, [1990] 3 CNLR 160. For example, in *R. v. Horseman*, [1990] 3 CNLR 95 at 105 (SCC), Cory J. held that the federal Crown had the authority to extinguish treaty rights to hunt for commercial purposes when it enacted the *Alberta Natural Resources Transfer Agreement, 1930*:

... although it might well be politically and morally unacceptable in today's climate to take such a step as that set out in the 1930 Agreement without consultation with and concurrence of the Native peoples affected, *none-the-less the power of the Federal Government to unilaterally make such a modification is unquestioned* and has not been challenged in this case.

¹⁷⁰ ICC, *Kabkewistahaw First Nation Report on the 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), 108.

In the case of the 1907 Kahkewistahaw surrender, the Commission concluded that Indian Affairs officials breached their fiduciary obligations to the band by offering cash inducements in the middle of a harsh prairie winter to people who were "particularly vulnerable because [band] members were poor, starving, illiterate, and . . . without effective leadership."¹⁷¹ In that case, the cash inducement was an important factor which contributed to the Commission finding that the Crown did not properly manage its fiduciary responsibilities towards the Kahkewistahaw Band.

In view of the above, the payment of up to 50 per cent of the proceeds immediately following a surrender of land by a band cannot, in and of itself, be said to be unlawful or a breach of the Crown's fiduciary obligations. A per capita distribution payment could, however, amount to a breach of the Crown's fiduciary duty if these payments were used by Crown officials to exploit or apply undue pressure on the band to surrender its land. Thus, the issue of exploitation or tainted dealings is relevant in determining whether or not the Crown fulfilled its fiduciary obligation concerning these payments.

Based on the evidence before us, however, it has not been established that there were any tainted dealings involving the Department of Indian Affairs, nor was any undue influence or duress applied to the Sumas Band in seeking the surrender of IR 7. Since the advance payments were lawful and there is no evidence of tainted dealings on the part of the Crown, we cannot find any breach of the Crown's fiduciary obligation concerning the advance on the purchase price.

ISSUE 3 ADVANCE ON THE PURCHASE PRICE BEFORE THE SURRENDER

Is the Crown's receipt of an advance of the purchase price of reserve land prior to the completion of the surrender contrary to the Crown's fiduciary obligations, if any, with regard to the management of reserve or surrendered land?

The Sumas Band argues that the receipt of \$4500 by the Department of Indian Affairs and payment of the money to the Band immediately on surrender, but prior to the Governor in Council accepting the surrender, fettered the ability of the Governor in Council to render an objective opinion concern-

¹⁷¹ ICC, *Kahkewistahaw First Nation Report on the 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), 107.

ing the acceptability of the surrender under subsection 49(4) of the Act. The question, then, is whether the discretion of the Governor in Council was in fact fettered because of the advance payment on the purchase price.

As we have stated previously in this report and in our report on the 1907 Kahkewistahaw Surrender, after a band has provided its consent to surrender reserve land, the Governor in Council must also accept the surrender pursuant to subsection 49(4) of the *Indian Act* before there can be a valid surrender of reserve land in a purely technical sense. In exercising this discretion, the Crown has a superimposed fiduciary obligation on top of the legislative regime to prevent a foolish, improvident, or exploitative bargain. The assessment whether or not a surrender results in an exploitative bargain when viewed from the perspective of the Band at the time, therefore, takes into account all the circumstances operating at the time the Crown takes the surrender.

Viewed in this light, the Governor in Council must refuse to consent to a surrender where the band's decision was foolish, improvident, or would amount to exploitation. In arriving at this decision, whether or not the Crown received and distributed moneys in advance of accepting the surrender is perhaps one indicia to be considered. The receipt and distribution of moneys, however, cannot provide the sole basis on which to rest a finding that the Crown breached its fiduciary duty to prevent an exploitative transaction.

For reasons we have already discussed above, there is insufficient evidence to establish that the Sumas Band's decision to surrender was foolish, improvident, or otherwise exploitative. Therefore, we must conclude that the Governor in Council did not breach its fiduciary duty by accepting the surrender under section 49(4) of the *Indian Act*.

ISSUE 4 FIDUCIARY OBLIGATIONS AFTER THE SURRENDER

If the surrender is valid:

- (a) Did the Crown fulfil their fiduciary obligations to the Band subsequent to the surrender? and/or
- (b) Did the subsequent disposition of the lands comprising IR 7 violate the terms of the surrender or the applicable legislation or constitute a breach of the Crown's fiduciary obligation to the Band?

The Sumas Band submitted that the Crown breached the terms of the surrender and its fiduciary obligations to the Band in four distinct ways by

- paying compensation for improvements out of the purchase price of the reserve without authorization;
- reducing the purchase price of the reserve and granting the SSB a rebate without authorization;
- failing to obtain a return of the lands for the Band when they were offered by the SSB;
- allowing a disposition of the reserve lands to persons other than returning veterans under the *Soldier Settlement Act* contrary to the terms of the surrender and the *Soldier Settlement Act*.¹⁷²

With respect to the first two allegations, Canada has offered to negotiate compensation under the Specific Claims Policy for the claim relating to the reimbursement of money to the Soldier Settlement Board out of the purchase price and has agreed to reconsider the Band's claim for improvements paid by the Crown out of the purchase price on receipt of the Band's trust accounts confirming such payments.¹⁷³ Therefore, by agreement of the parties, there are really only two post-surrender issues before the Commission for consideration.

The first issue is whether the Crown had a statutory or fiduciary obligation to return the land to the Band when it was offered by the Soldier Settlement Board. The Band submits that the Crown had clear knowledge that the Band had inadequate reserve lands for its needs. Therefore, the Crown ought to have obtained these lands for the benefit of the Band when it became clear that the lands were not required for returning soldiers as originally intended.

In our view, the Crown did not have an obligation to obtain these lands for the Band when they were offered by the Soldier Settlement Board. The surrender document signed by the Chief and principal men of the reserve is clear that an absolute and unqualified surrender was provided to the Board for \$80 per acre. There was no right of reversion in the Band, and a transfer and alienation of title to the reserve was completed when the terms of the surrender were satisfied by payment of the purchase price by the Board, acceptance of the advance and balance of proceeds by the Band, and issuance of the Letters Patent to the Board. In *Apsassin*, Madam Justice McLachlin rejected the argument that the Crown had a continuing fiduciary obligation, on the ground that there was no real transfer of lands from Indian

¹⁷² Sunas Band's Written Submissions, April 16, 1996, p. 21.

¹⁷³ Government of Canada's Written Submissions, April 23, 1996, p. 32.

Affairs to the Director of the *Veterans' Land Act* (DVLA), but merely an administrative allocation within the Crown:

*Although the transfer was from one Crown entity to another, it remained a transfer and an alienation of title. First, the transfer converted the Band's interest from a property interest into a sum of money, suggesting alienation. Second, the continuing fiduciary duty proposed for the DVLA is problematic from a practical point of view. Any duty would have applied, at least in theory, both to the mineral rights and the surface rights. Each sale to a veteran would have required the DVLA to consider not only those matters he was entitled to consider under his Act, but sometimes conflicting matters under the *Indian Act*. This would have made the sale in 1948 pointless from the DVLA's point of view and have rendered it impossible to administer. Moreover, it is not clear that the DVLA had any knowledge of the fiduciary obligations which bound the DIA. In fact, the DVLA and the DIA acted at arms length throughout, as was appropriate given the different interests they represented and the different mandates of their statutes. In summary, the crystallization of the property interest into a monetary sum and the practical considerations negating a duty in the DVLA toward the Band negate the suggestion that the 1948 transfer changed nothing and that the real alienation came later.¹⁷⁴*

Although IR 7 was intended to be surrendered specifically for soldier settlement, by the time it became known that the land would not be used for this purpose the reserve had already been alienated. There is no evidence to suggest that the surrender was conditional upon the sale of the lands to returning soldiers. Once the lands were transferred from the Department of Indian Affairs to the administration and control of the Soldier Settlement Board, the former no longer had any duties with respect to the land unless it had an ongoing fiduciary obligation to seek the return of the land.

In *Apsassin*, Justice McLachlin established that in cases of mistake, error, or fraud on the part of the government in the alienation of reserve lands, the Crown does have a fiduciary obligation to cancel the wrongful alienation pursuant to section 64 of the *Indian Act*. Whether or not the Crown had a fiduciary obligation in this case to return IR 7 to the Sumas Band depends on the interpretation placed on *Apsassin*. It appears from that case that what the Crown is required to "fix" are situations of "inadvertent" conveyance. In this case, the alienation and transfer of Sumas IR 7 cannot be construed as an inadvertent surrender, since the conveyance to the Soldier Settlement Board was intentional. Furthermore, the surrender was absolute and unconditional.

¹⁷⁴ *Apsassin*, [1996] 2 CNLR 25 at 61-62. Emphasis added.

Thus, the Crown did not have a post-surrender fiduciary obligation to return the land to the Band when it was offered by the Soldier Settlement Board.

The final issue is whether the Crown was in breach of any legislation, the terms of the surrender, or its fiduciary duty in acquiescing to the Board's disposal of the land to persons other than returning veterans. With respect to the *Indian Act*, section 51 states that surrendered reserve land "shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of the surrender and the provisions of this Part." The evidence confirms that there was compliance with the terms of the surrender setting the purchase price at \$80 per acre and the Order in Council dated December 1, 1919, providing for the transfer of 153.5 acres to the Soldier Settlement Board on condition that the balance of the purchase price would be paid on transfer of title. Therefore, the reserve lands were disposed of in accordance with section 51 of the *Indian Act*.

The Band also submits that the Crown violated section 10 of the *Soldier Settlement Act*, which states that the Board may acquire Indian lands by purchase "upon terms not inconsistent with those of the release or surrender," because "the surrender stipulated that the Reserve was to be disposed of on the basis of 153.5 acres at a price of \$80.00 per acre."¹⁷⁵ Although the entire purchase price of \$12,280 was initially paid, the Band submits that section 10 was violated when the terms of the surrender were altered as a result of the Board requesting and receiving a refund of \$1088 on the purchase price. Furthermore, the Band submits that the Soldier Settlement Board violated the Act when it sold the land to private individuals, because it had the authority to sell the lands only to "settlers" as defined in section 2(f).

In our view, there was no violation of the *Soldier Settlement Act*. First, we are not convinced that the rebate of \$1088 to the Board amounted to an alteration of the terms of the surrender. Rather, this is more properly characterized as an unauthorized payment of moneys out of the Band's trust accounts for which Canada is accountable. On this point, Canada has already agreed to enter into compensation negotiations with the Sumas Band for the amount reimbursed to the Board in 1923 for the river and road allowance within IR 7. Second, although it is not clear whether the Board obtained the requisite authority from the Governor in Council to sell the lands to private individuals as required by section 21 of the *Soldier Settlement Act*, Indian Affairs did not have any continuing obligation with respect to the land since

¹⁷⁵ Sumas Band's Written Submissions, April 16, 1996, p. 22.

there had already been a complete transfer and alienation of the reserve land to the Board by the time it became known that the lands would not be sold to returning soldiers.

ISSUE 5 ONUS OF PROOF

If the evidence is inconclusive on any previous issues, which party has the onus of proof?

In view of our conclusions above, it is not necessary for the Commission to determine any of the issues in this inquiry based on arguments related to which party bears the onus of proof.

PART V

CONCLUSIONS AND RECOMMENDATION

We have been asked to inquire into and report on whether the Government of Canada owes an outstanding lawful obligation to the Sumas Indian Band. Based on the facts and arguments presented by counsel on behalf of the parties, we have concluded that the surrender of IR 7 by the Sumas Indian Band in 1919 was valid. With respect to the Band's allegations that Canada breached its fiduciary obligations in relation to the surrender, we have concluded that there was no such breach because the Sumas Band made a full and informed decision to surrender the reserve and there were no tainted dealings on the part of the Crown which would make it unsafe to rely upon the surrender as an expression of the Band's understanding and intention. Nor did the Governor in Council have a fiduciary obligation to withhold consent to the surrender under subsection 49(4) of the 1906 *Indian Act* because there was no evidence that the Band's decision to surrender was foolish or improvident, or that the surrender amounted to an exploitative transaction.

The Band also submitted that the Crown breached the terms of the surrender and its post-surrender fiduciary obligations by: (1) paying compensation for improvements out of the purchase price of the reserve without authorization; (2) reducing the purchase price of the reserve and granting the Soldier Settlement Board a rebate without authorization; (3) failing to obtain a return of the lands for the Band when they were offered by the Board; and (4) allowing a disposition of the reserve lands to persons other than returning veterans under the *Soldier Settlement Act*, contrary to the terms of the surrender and the *Soldier Settlement Act*. Since Canada has offered to negotiate compensation under the Specific Claims Policy for the claim relating to the reimbursement of money to the Soldier Settlement Board and has agreed to reconsider the Band's claim for the improvements paid by the Crown out of the purchase price without authorization, there are really only two post-surrender issues before the Commission for consideration. On these

latter two issues, we conclude that the Crown did not have an obligation to reacquire the lands on behalf of the Band when they were offered by the Soldier Settlement Board, and that the terms of surrender and the *Soldier Settlement Act* were not violated when Indian Affairs returned a portion of the purchase price to the Board without the consent of the Band. Although Canada has an obligation, which it has acknowledged, to negotiate compensation for the money refunded to the Soldier Settlement Board without the Band's authority, the Crown's decision to refund a portion of the purchase price cannot invalidate the entire surrender transaction.


In summary, although we have concluded that there was no breach of the Crown's statutory and fiduciary obligations in this case, we are not completely satisfied that the Crown acted reasonably in trying to obtain fair compensation for the Band in exchange for the surrender of IR 7. When all of the surrounding circumstances are considered, it is clear that the Department of Indian Affairs owed a fiduciary duty to the Sumas Band to ensure that it was properly compensated for the loss of its lands and the Crown failed to exercise its discretion in this transaction in a reasonable and prudent manner for the benefit of the Band. Although it is clear that Indian Affairs did not act in a reasonable manner during the negotiation process with the Soldier Settlement Board, this is not sufficient to establish that there has been a breach of fiduciary obligation. At this point, it has not been proven that the Band suffered any damages, because there is insufficient evidence before us to establish that the land was worth more than the \$80 per acre purchase price.

RECOMMENDATION

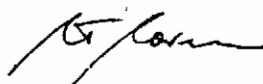
Based on a thorough consideration of the facts and law in relation to this claim, we find that Canada does not owe an outstanding lawful obligation to the Sumas Indian Band. However, we do have reservations about whether the Sumas Band was properly compensated for the loss of IR 7 in 1919. Therefore, we recommend to the parties:

That the Sumas Indian Band and Canada conduct joint research to determine whether fair market value was paid for IR 7 in 1919 having regard to the various considerations we have identified in this report. If the studies confirm that the fair market value was higher than the \$80.00 per acre obtained by the Band, it is our view that the Band is entitled to be compensated for any such discrepancy. Any compensation owed to the Band would be a matter of negotiation between the parties.

FOR THE INDIAN CLAIMS COMMISSION



Daniel J. Bellegarde
Commission Co-Chair



Carole T. Corcoran
Commissioner

Dated this 29th day of August, 1997

APPENDIX A

SUMAS INDIAN BAND INQUIRY

- 1 **Request that Commission conduct inquiry** March 10, 1995
- 2 **Planning conference** June 27, 1995
- 3 **Decision to conduct inquiry** September 22, 1995
- 4 **Notices sent to parties** September 25, 1995
- 5 **Community session and oral submissions**

A community session was combined with the hearing of oral submissions and held on April 29, 1996, on the Sumas Indian Reserve. The Commission heard oral testimony from elders Hugh Kelly and Ray Silver.

The Commission also heard oral submissions from legal counsel from the Sumas Indian Band and Canada.

- 6 **Content of the formal record**

The formal record for the Sumas Indian Band Inquiry into the Surrender of IR 7 consists of the following materials:

- 5 exhibits tendered during the inquiry, including the documentary record (1 volume of documents with annotated index)
- written submissions from counsel for the Sumas Indian Band and counsel for Canada
- joint authorities and supplemental authorities submitted by counsel for Canada with their written submissions
- transcripts from community session and oral submissions (1 volume)

The Report of the Commission and letters of transmittal to the parties will complete the formal record of this Inquiry.

RESPONSES

Re: Lucky Man Cree Nation Treaty Land Entitlement Inquiry
Ronald A. Irwin, Minister of Indian Affairs and Northern
Development, to P.E. James Prentice and Carole T. Corcoran,
Indian Claims Commission, May 22, 1997

369

Re: Kahkewistahaw 1907 Reserve Land Surrender Inquiry
Jane Stewart, Minister of Indian Affairs and Northern
Development, to James Prentice and Roger J. Augustine,
Indian Claims Commission, December 18, 1997

371

Re: Moosomin 1909 Reserve Land Surrender Inquiry
Jane Stewart, Minister of Indian Affairs and Northern
Development, to James Prentice, Carole T. Corcoran, Aurélien Gill,
Indian Claims Commission, December 18, 1997

372

Re: Homalco Indian Band Inquiry
Jane Stewart, Minister of Indian Affairs and Northern
Development, to Daniel J. Bellegarde and James Prentice,
Indian Claims Commission, December 18, 1997

373

Re: Sumas Indian Band 1919 Surrender of IR 7 Inquiry
Jane Stewart, Minister of Indian Affairs and Northern
Development to Daniel J. Bellegarde and Carole T. Corcoran,
Indian Claims Commission, January 21, 1998

375

Minister of Indian Affairs
and Northern Development



Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

RECEIVED MAY 26 1997

MAY 22 1997

P.E. James Prentice, Q.C.
Commission Co-Chair
Ms. Carole T. Corcoran
Commissioner
Indian Claims Commission
P.O. Box 1750, Station B
OTTAWA ON K1P 1A2

Dear Mr. Prentice and Ms. Corcoran:

This is in response to your letter of March 27, 1997 enclosing a copy of the Report of Inquiry into the treaty land entitlement (TLE) claim of the Lucky Man Cree First Nation.

I have been advised of the details of the Indian Claims Commission's findings in this inquiry and note that the Commission has made the finding that the Lucky Man Cree Nation's TLE should be based on the First Nation's population as of its 1887 date of first survey. I accept this finding along with the Commission's recommendation to undertake further research and payroll analysis with a view to determining the First Nation's proper TLE population as of 1887.

I want to take this opportunity to thank the Commission for its work in the conduct of this inquiry, which has culminated in this helpful Report of Inquiry. The Commission has provided a cogent and comprehensive analysis of the relevant facts surrounding this issue, and with this report, adds to the Commission's existing body of work on TLE issues. All these reports will be of tremendous assistance to Canada in the conduct of the TLE review.

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Canada

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Once Canada has completed its further research and payroll analysis based on the 1887 date of first survey, this research will be shared with the First Nation and hopefully a final resolution of this claim will be achieved.

Yours truly,



Ronald A. Irwin, P.C., M.P.

c.c.: The Honourable Allan Rock, P.C., M.P.
Chief Roderick King
Mr. Ron S. Maurice

Minister of Indian Affairs
and Northern Development



Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

DEC 18 1997

Mr. James Prentice,
Mr. Roger J. Augustine
Commissioners of the Indian Claims Commission
P. O. Box 1750, Station B
OTTAWA ON K1P 1A2

Dear Commissioners:

I would like to inform you that Canada has now finalized its position with respect to the Indian Claims Commission (ICC) Inquiry and Report into the 1907 surrender by the Kahkewistahaw First Nation.

As a result of our review, Canada has adopted the ICC's recommendation that Canada accept the Kahkewistahaw First Nation claim for negotiation, under the Specific Claims Policy.

I would like to thank you very much for all of the Commission's fine work during the ICC inquiry process and for your detailed and thoughtful report and recommendations concerning the Kahkewistahaw First Nation 1907 surrender, all of which have permitted Canada to fully reconsider its position and to accept the Kahkewistahaw claim for negotiation under the Specific Claims Policy.

Yours sincerely,

A handwritten signature in cursive script that reads "Jane Stewart".

Jane Stewart, P.C., M.P.

Canada

Minister of Indian Affairs
and Northern Development



Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

DEC 18 1997

Mr. James Prentice
Ms. Carole T. Corcoran
Mr. Aurélien Gill
Commissioners of the Indian Claims Commission
P.O. Box 1750, Station B
OTTAWA ON K1P 1A2

Dear Commissioners:

I would like to inform you that Canada has now finalized its position with respect to the Indian Claims Commission (ICC) inquiry and Report into the 1909 surrender by the Moosomin First Nation.

As you know, Canada has been considering its position on the Moosomin claim since August 1996. I am grateful that Canada has had the benefit of the ICC inquiry process and the thorough analysis and recommendations contained in the ICC Report released May 2, 1997, in arriving at its decision.

As a result of our review, Canada has adopted the ICC's recommendation that Canada accept the Moosomin First Nation claim for negotiation, under the Specific Claims Policy.

I would like to thank you for all of the Commission's fine work during the ICC inquiry process and for your detailed and thoughtful report and recommendations concerning the Moosomin First Nation 1909 surrender, all of which have permitted Canada to fully reconsider its position and to accept the Moosomin claim for negotiation under the Specific Claims Policy.

Yours sincerely,

A handwritten signature in cursive script that reads "Jane Stewart".

Jane Stewart, P.C., M.P.

c.c.: Chief Thomas Mooswa

Canada

Minister of Indian Affairs
and Northern Development



Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

DEC 18 1997

Mr. Daniel J. Bellegarde
Mr. James Prentice
Co-Chairs of the Indian
Claims Commission
P.O. Box 1750, Station B
OTTAWA ON K1P 1A2

Dear Commissioners:

Thank you for providing me with a copy of the Indian Claims Commission's December 1995 report on its inquiry into the Homalco First Nation's Aupe Indian Reserve No. 6 and No. 6A claim. I apologize for the lengthy delay in responding to the Commission's report, however the report raised a number of complex issues for Canada's consideration which required a thorough review.

As you will recall, there were three issues before the Commission in this claim: (1) whether Canada breached a lawful obligation by failing to resolve an acreage discrepancy which occurred during the course of the reserve allotment process; (2) whether Canada had an obligation to acquire additional reserve acreage for the Homalco Band when it was requested by the Band in 1907; and (3) whether Canada had an obligation to protect the Band's settlement lands from a 1910 pre-emption claim by the Band school teacher, William Thompson.

I note that, in effect, the Commission recommended that Canada accept only the third of these issues for negotiation pursuant to the Specific Claims Policy. After careful consideration of the Commission's report, however, I regret to advise that I am unable to accept this recommendation. In Canada's view, the fact that the lands at issue in this claim were alleged to be Indian settlement lands and not reserve land places the Commission's recommendation outside the scope of current Specific Claims Policy dealing with fraud perpetrated by federal employees or agents. Furthermore, with respect to the Commission's findings on the issue of Canada's alleged fiduciary duty to protect Indian

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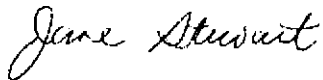
Canada

- 2 -

settlement lands, Canada does not agree that on the facts of this case it had a fiduciary duty to the Homalco Band to protect its traditional lands from the actions of the Band teacher. Canada's position remains that there is no general undertaking to protect lands that may be subject to an Indian interest, nor does Canada recognize a general duty to protect traditional Indian lands (as distinct from reserve lands) from the actions of others.

I regret that my response could not be more positive, however, I wish to thank the Indian Claims Commission for its thoughtful consideration of this claim.

Yours sincerely,



Jane Stewart, P.C., M.P.

c.c.: Chief Richard Harry

Minister of Indian Affairs
and Northern Development



Ministre des Affaires
Indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

'JAN 21 1998

Mr. Daniel J. Bellegarde
Commission Co-Chair
Ms. Carole T. Corcoran
Commissioner
Indian Claims Commission
P.O. Box 1750, Station B
OTTAWA ON K1P 1A2

Dear Mr. Bellegarde and Ms. Corcoran:

Thank you for your co-signed letter of August 29, 1997 to my colleague, the Honourable Anne McLellan, Minister of Justice and Attorney General of Canada, Chief Lester Vernon Ned, Sumas Indian Band, and me enclosing a copy of the Indian Claims Commission's (ICC) final report on its inquiry into the Specific Claim of the Sumas Indian Band - 1919 Surrender of Sumas Indian Reserve No. 7. I regret the delay in responding to your correspondence.

This report deals with the Sumas Indian Band's claim, originally rejected by Canada, alleging that the surrender of 153.46 acres of land for sale to the Soldier Settlement Board in 1919 was invalid, and that Canada failed to fulfill various fiduciary obligations to the Band relative to the surrender.

I appreciate the work which you undertook relative to this inquiry. I note that, in your conclusions, you have affirmed that Canada does not owe an outstanding lawful obligation to the Sumas Indian Band. Moreover, with respect to your recommendation that:

"the Sumas Indian Band and Canada conduct joint research to determine whether fair market value was paid for IR 7 in 1919 having regard to the various considerations we have identified in this report,"

I believe that this recommendation must be assessed within the context of the Commission's own finding that the purchase price of \$80 per acre was not manifestly unreasonable given the evidence presented. In fact, both the arms-length valuation of the reserve by Agent Byrne in 1916 and the subsequent sales of subdivided lots of the reserve land up to 1930 appear to confirm that \$80 per acre was a reasonable estimate of fair market value for the reserve land at the time of surrender.

Canada

.../2

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That being said, the Department of Indian Affairs and Northern Development (DIAND) is prepared to explore the possibility of conducting additional joint research with the Sumas Indian Band on this matter, provided the Band signals its intention to proceed with such exploratory discussions to Mr. John Hall, Senior Advisor, Specific Claims, at the following address:

Department of Indian Affairs
and Northern Development
P.O. Box 11602
2700 - 650 West Georgia Street
VANCOUVER BC V6B 4N9

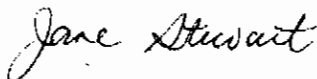
Telephone: (604) 666-5290

Moreover, both the Commission and the Band must clearly understand that a commitment on our part to undertake such discussions or research cannot be interpreted as a conclusion that any claim exists or is thought to exist at this point. Indeed, the reason for undertaking such exploratory discussions would be to determine if evidence for such a claim might, in fact, exist and, if so, how best to assess such evidence in light of the ICC's own findings.

I would also like to note that DIAND remains committed to entering into negotiations with the Sumas Indian Band for compensation for the 9.865 acres of surrendered land taken up by the Sumas River, as indicated in the letter dated December 13, 1990 from Mr. Al Gross to the Chief and Council of the Band.

Again, I wish to thank both of you for your report and for the considerations and recommendations that you have provided.

Yours sincerely,



Jane Stewart, P.C., M.P.

c.c.: The Honourable A. Anne McLellan, P.C., M.P.
Chief Lester Vernon Ned

THE COMMISSIONERS



Roger J. Augustine is a Micmac born at Eel Ground, New Brunswick, where he served as Chief from 1980 to 1996. He was president of the Union of NB-PEI First Nations from 1988 to January 1994. He is president of Black Eagle Management Enterprises and a member of the Management Board of Eagle Forest Products. He has been honoured for his efforts in founding and fostering both the Eel Ground Drug and Alcohol Education Centre and the Native Alcohol and Drug Abuse Rehabilitation Association. In February 1996, Mr Augustine was appointed a director to the National Aboriginal Economic Development Board. In June 1996, he was named Miramichi Achiever of the Year by the Miramichi Regional Development Corporation. He was appointed a Commissioner of the Indian Claims Commission in 1992.



Co-Chair Daniel J. Bellegarde is an Assiniboine/Cree from the Little Black Bear First Nation in Southern Saskatchewan. From 1981 to 1984, Mr Bellegarde worked with the Meadow Lake District Chiefs Joint Venture as a socio-economic planner. He was president of the Saskatchewan Indian Institute of Technologies from 1984 to 1987. In 1988, he was elected first vice-chief of the Federation of Saskatchewan Indian Nations, a position he held until 1997. He is now a management and governance consultant. Mr Bellegarde was appointed Commissioner, then Co-Chair of the Indian Claims Commission on July 27, 1992, and April 19, 1994, respectively.



Carole T. Corcoran is a Dene from the Fort Nelson Indian Band in northern British Columbia. Mrs Corcoran is a lawyer with extensive experience in Aboriginal government and politics at local, regional, and provincial levels. She has served as a Commissioner on the Royal Commission on Canada's Future in 1990/91, and as Commissioner to the British Columbia Treaty Commission from 1993 to 1995. Mrs Corcoran was appointed a Commissioner of the Indian Claims Commission in July 1992.



Aurélien Gill has been a Commissioner of the Indian Claims Commission since December 1994. He is a Montagnais from Mashteuiatsh, Quebec, and served as Chief there for nine years. Throughout his life, Mr Gill has been dedicated to promoting the social and economic development of the First Nations, in particular in helping found many Aboriginal organizations, including the Conseil Attikamekw et Montagnais; the Conseil de la Police amérindienne; the Corporation de développement économique montagnaise; and the National Indian Brotherhood, today the Assembly of First Nations.

Mr Gill served as Quebec Regional Director in the Department of Indian Affairs and Northern Development. As a member of various boards, he has worked to help aboriginal communities take charge of education in their communities, as well as assisting in the economic development of reserves, and helping create a Native Benefit Plan. He is still an active member of the National Aboriginal Economic Development Board, the Conseil en environnement et collectivité d'Hydro-Québec, and the Board of AT & T Canada. Mr Gill is President of Gestion GAMAC P.N., a company devoted to the social and economic development of First Nations communities, in particular those of the Attikamekw and the Montagnais. In 1991, he was named to the Ordre national du Québec.



P.E. James Prentice, QC, Co-Chair, is a lawyer with the Calgary law firm Rooney Prentice. He has an extensive background in native land claims, including work as legal counsel and negotiator for the Province of Alberta in the tripartite negotiations that brought about the Sturgeon Lake Indian Claim Settlement of 1989. Mr Prentice is a member of the Canadian Bar Association, and was appointed Queen's Counsel in 1992. He was appointed Commissioner, then Co-Chair, of the Indian Claims Commission on July 27, 1992 and April 19, 1994, respectively.